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Reflections on Arlington Heights: Fifty Years of Exclusionary Zoning Litigation and Beyond

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REFLECTIONS ON *ARLINGTON HEIGHTS*: FIFTY YEARS OF EXCLUSIONARY ZONING LITIGATION AND BEYOND

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I. INTRODUCTION

Fifty years ago, when I was two years out of law school, I began work on a case—*Metropolitan Housing Development Corp. v. Village of Arlington Heights*—that was destined to take on epic proportions in the housing discrimination field. The case started with a complaint filed in 1972,[1] shortly before I joined the plaintiffs' legal team, and was not finally resolved until 1980,[2] after I'd left that team to become a law professor. During the seven years that I worked on the *Arlington Heights* case, it produced a major Supreme Court decision on standing and the Fourteenth Amendment's Equal Protection Clause[3] and, on remand, an important decision by the Seventh Circuit[4] on the 1968 Fair Housing Act ("FHA").[5] A recent Westlaw search reveals that the Supreme Court's *Arlington Heights* decision has been cited over 20,450 times, more than many of the most iconic civil rights decisions of the past century;[6] and the Seventh Circuit's remand decision is the second-most-cited of all FHA appellate decisions.[7]

Arlington Heights was an exclusionary zoning case, one of many such cases brought in the 1970s challenging local land-use practices that blocked subsidized housing projects of particular value to racial minorities who were underrepresented in the area.[8]

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1. *See infra* note 45 and accompanying text.

2. *See infra* note 395 and accompanying text.

3. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

4. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

5. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619 (2023).

6. *See* Westlaw, *Arlington Heights*, 429 U.S. at 252 [last visited Feb. 12, 2024]. By way of contrast, Westlaw lists about 27,980 citation references for Brown v. Bd. of Ed. of Topeka, Kan., 347 U.S. 483 (1954); about 17,950 for Griggs v. Duke Power Co., 401 U.S. 424 (1971); and about 16,730 for Washington v. Davis, 426 U.S. 229 (1976).

7. *See* Westlaw, *Arlington Heights*, 558 F.2d at 1283 [last visited Feb. 12, 2024] (1485 citing references); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd sub nom.*, 488 U.S. 15 (1988) (1736 citing references). *Huntington*, like *Arlington Heights*, was an exclusionary zoning case, and the Second Circuit's opinion relied heavily on the Seventh Circuit's decision in *Arlington Heights*. *See Huntington*, 844 F.2d at 933, 935–37, 940, 942.

8. In addition to *Arlington Heights*, which is discussed throughout Parts I-III, *see* cases cited *infra* notes 29-30, 33, 91, and 125. This Article uses the term "exclusionary zoning" to encompass all exclusionary land-use actions by municipal authorities that have the purpose or effect of barring low- and moderate-income people from living in that municipality or a portion thereof.

Exclusionary zoning litigation dates back to 1917 when the Supreme Court held in *Buchanan v. Warley*[9] that the Equal Protection Clause barred the City of Louisville, Kentucky, from forbidding Blacks to buy property in predominantly white neighborhoods. *Buchanan* was decided at a time when municipal zoning was in its infancy and before the Court generally endorsed it as a proper exercise of a local government's police power in 1926 in *Euclid v. Ambler Realty Co.*[10] In succeeding decades, exclusionary zoning cases put forth a variety of legal theories to overcome *Euclid*'s presumption of zoning validity.[11]

Passage of the FHA in 1968 gave a new impetus to this type of litigation. Since then, scores of exclusionary zoning cases have been filed, and, as the Supreme Court noted in 2015, they make up the "heartland" of a certain type of FHA claim.[12] *Arlington Heights* is the most important of these cases.

Having now lived with the *Arlington Heights* case for over half a century—first as a lawyer and then as a fair housing scholar—I offer here some new perspectives on exclusionary zoning law, first by providing a detailed critique of the Supreme Court's decision in *Arlington Heights* and then by showing how that decision curbed later race-based challenges to restrictive zoning, which, though sometimes successful, failed to counteract other powerful forces that continued to block affordable housing in high-opportunity communities.[13]

Part II of this Article provides background on the state of exclusionary zoning law in the 1970s, the early phases of the *Arlington Heights* litigation, and the Supreme Court's growing

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Further, although most exclusionary zoning cases, like *Arlington Heights* and *Huntington*, have been brought against suburbs, these cases have occasionally challenged a large city's land-use restrictions. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

9. 245 U.S. 60 (1917).

10. 272 U.S. 365, 388 (1926) (holding, in the course of rejecting a landowner's constitutional challenge to a suburban zoning ordinance that blocked his efforts to develop multi-family housing in an area zoned for single-family homes, that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

11. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 13:9 (2023) (describing various legal theories used to challenge exclusionary zoning in the 1960s and 1970s).

12. Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539–40 (2015).

13. The term "affordable housing" is used here, as it is generally understood in the caselaw, to mean housing that "requires no more than 30% of a household's income for households earning 80% or less" of the area's median income. Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 588 n.1 (2d Cir. 2016). The term "high-opportunity" refers to a community's index of opportunities, which includes school quality, access to jobs, environmental health, and other such factors. *See, e.g.*, Rigel C. Oliveri, *Vouchers and Affordable Housing: The Limits of Choices in the Political Economy of Place*, 54 HARV. C.R.-C.L. L. REV. 795, 795 n.4 (2019).

antagonism toward civil rights cases in this period. Part III deals with the Court's handling of the *Arlington Heights* case, culminating in a critical assessment of Justice Powell's view of the evidence in his majority opinion that led the Court to rule against the plaintiffs' discriminatory-intent claim. Part IV describes the Seventh Circuit's decision on remand, along with the case's final resolution and how the plaintiffs' proposed project, Arlington Heights, and zoning's continuing role in maintaining residential segregation have since evolved. Part V continues with the post-*Arlington Heights* story by showing that exclusionary zoning has remained a powerful force despite many successful FHA-based challenges and concludes by identifying some modern developments that might, at long last, curb zoning's power to restrict opportunities for FHA-protected groups and thus help achieve a fairer, more integrated society.

II. *ARLINGTON HEIGHTS* AND EARLY EXCLUSIONARY ZONING LAW

A. Arlington Heights Begins: The Proposed Project and the Village's Response

In 1970, the Metropolitan Housing Development Corporation ("MHDC") entered into a 99-year lease with the Clerics of St. Viator, a Catholic religious order, to develop a 15-acre parcel of the Clerics' land for a subsidized housing project in the Chicago suburb of Arlington Heights. MHDC was—and still is—a not-for-profit corporation founded in 1968 for the purpose of developing housing in the Chicago metropolitan area for low- and moderate-income minorities, particularly in suburban areas where such housing was not available to them.[14] At the time, Arlington Heights had a population of 64,884 (which included 27 Blacks), the Village having experienced huge growth since 1950 when it had only 8,768 residents (with one Black).[15]

MHDC was created by the Leadership Council for Metropolitan Open Communities ("LCMOC"), which grew out of the 1966 protests by Martin Luther King, Jr. and others about segregated housing in Chicago, and soon became one of the nation's leading multi-service fair housing organizations.[16] In 1970, LCMOC began a litigation

14. For more information on MHDC's history and current activities, see www.mhdcchicago.com [perma.cc/PH4T-YU4E]. MHDC remains active today and continues to supervise the project that was created as a result of the *Arlington Heights* litigation. *Id*.; *see infra* note 396 and accompanying text.

15. *See infra* note 104 and accompanying text.

16. *See* JOHN LUKEHART ET AL., THE SEGREGATION OF OPPORTUNITIES 3 (2005), www.scholarship.law.umn.edu [perma.cc/FPU6-ARP9]. LCMOC remained active for almost forty years, *id*., closing in 2006. *See* PRRAC, *Farewell to the Leadership Council*, (June 1, 2006), www.prrac.org/farewell-to-

program that would eventually bring scores of FHA-cases on behalf of victims of housing discrimination;[17] I joined this program in 1972 and worked with its general counsel, F. Willis (Bill) Caruso, in representing the *Arlington Heights* plaintiffs.[18]

MHDC's 15-acre parcel in Arlington Heights was bounded on two sides by undeveloped St. Viator land and on two sides by single-family neighborhoods and was not then zoned for multi-family housing. MHDC hired a team of designers and planners with experience in developing subsidized housing to create a plan for this site. Their proposal—"Lincoln Green"—called for 190 townhouses designed to harmonize with the nearby single-family homes.[19] Lincoln Green was to be financed using the federal government's Sec. 236 program.[20]

In early 1972, MHDC petitioned Arlington Heights for the necessary zoning change from R-3 (single-family) to R-5 (multi-

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the-leadership-council/ [perma.cc/FVG2-A3AT].

Among its other achievements, LCMOC administered the Gautreaux housing mobility program in the 1980s, helping over 7,000 families move to higher-opportunity areas throughout the Chicago metropolitan area. *See infra* note 449. This program grew out of a class-action suit begun in 1966 by tenants of the Chicago Housing Authority ("CHA") who challenged segregated housing conditions in CHA projects funded by HUD. After the lower courts found constitutional violations by CHA and HUD and the Supreme Court upheld a metropolitan-wide relief order against HUD, *see infra* notes 145-46 and accompanying text, the *Gautreaux* plaintiffs agreed to a plan, administered by LCMOC, under which HUD issued Section 8 housing vouchers to selected plaintiffs for use in private rental units scattered throughout the Chicago metropolitan area. This LCMOC-*Gautreaux* program later became the prototype for HUD mobility plans in various cities throughout the country. *See infra* note 449.

17. Among the reported cases I worked while at LCMOC were Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974); Johnson v. Jerry Pals Real Est., 485 F.2d 528, 529 (7th Cir. 1973).

18. Caruso was the LCMOC's top lawyer for over twenty years and later joined the law faculty at UIC School of Law (then John Marshall School of Law), serving as a clinical professor and co-director of the Fair Housing Legal Support Center until his retirement in 2016.

19. As the Seventh Circuit observed: "Lincoln Green will not be a high-rise development, but merely a cluster of two-story townhouses no higher than the surrounding single family homes." Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975), *rev'd on other grounds*, 429 U.S. 252 (1977).

20.

> "Section 236 Housing" is a low-income housing program designed to increase the flow of such housing by favorable interest assistance payments to the mortgage lender. Unlike the public housing programs now before us, local governmental approval is not required for such housing to be constructed.

Gautreaux v. Romney, 448 F.2d 731, 736 n.9 (7th Cir. 1971).

family). Its design team made a formal presentation to the Village's Plan Commission that including an evaluation of the project's tax and traffic impacts. No word of professional criticism against Lincoln Green was ever made during the nine-month process that ended in September with its rejection by the Village's Board of Trustees. Indeed, neither the Plan Commission nor the Trustees ever asked for or received the Village Planner's views on the proposed development.[21]

Both the Commission and the Trustees were, however, besieged with comments on the "social issue" that much of the Arlington Heights community felt Lincoln Green presented. It was well known that Lincoln Green would be an integrated development whose residents would include many Blacks and other minority families.[22] Racially-explicit letters were published in the local newspaper.[23] Thousands of homeowners filed petitions in opposition to Lincoln Green and an unprecedented number of "civic" groups representing hundreds of residents from throughout the Village spoke against the development.[24]

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21. *See infra* note 259 and accompanying text.

22. MHDC's purpose and marketing methods insured that Lincoln Green would be made particularly available to minority families. *See supra* note 14 and accompanying text. According to MDHC's website, www.mhdcchicago.com [perma.cc/PH4T-YU4E]:

> An important component of MHDC's commitment to fair housing is . . . [a]dvertising for houses and apartments is placed in a manner likely to attract prospective minority applicants who might not otherwise be reached. . . . Thus, for example, at MHDC's multi-family development in Palatine Township [near Arlington Heights], twelve families in the first 40 rentals (30%) were minorities, even though the population of the surrounding area was overwhelmingly white.

Id.

23. *See* Brief for Respondents, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (No. 75-616), 1976 WL 194243, at *17 (1976). For example, a local resident's letter appearing in the *Arlington Heights Herald* one month before the first Plan Commission hearing began: "Concerning your editorial, 'Housing: An Ignored Issue': It isn't ignored, it's unwanted. We do resist low-income housing because it is a ploy to export blacks from Chicago to integrate the suburbs. That came out forcefully in the St. Viator housing proposal." *Id.* at *17–18 (quoting Ps. Ex. 48-1). Another letter complained: "I'm a bit tired of hearing and reading about the Low Income Housing in Arlington Heights for the benefit of our colored and Spanish-American friends in Chicago. One wonders who is running our village, our Mr. Walsh or Mayor Daley." *Id.* at *18 (quoting Ps. Ex. 48-2).

24. One opposing petition contained 3,300 signatures. *Id.* at *17 (referring to Ps. Ex. 38). A letter sent to all members of the Plan Commission and Board of Trustees read in part: "Anyone who has seen Cabrini Green and other of those [Chicago Housing Authority] projects know exactly what Mr. Chandler [MHDC's Board President] is exporting to Arlington Heights." *Id.* at *18 (quoting Ps Ex. 57). For their part, the supporters of Lincoln Green were also a unique combination of religious and church groups, members of human relations committees, the League of Women Voters, and individual citizens. *Id.* at *17 (referring to Ps. Ex. 17, 36).

The public hearings were characterized by emotional, often racial, reactions on the part of the overflow crowds that "terrified" some residents.[25] So emotion-charged were the Plan Commission hearings and so vociferous were the crowds in opposition to those who supported Lincoln Green that the two Commission members who voted in favor of it felt compelled to begin their official statement with the assurance that they had voted for the development not on the "social issue," but because it represented good zoning.[26]

After the Plan Commission's split vote against Lincoln Green, MHDC's petition went to the Board of Trustees, which voted 7-1 against it on September 28, 1971. At the conclusion of the Trustees' meeting, Village President Walsh stated that, while there was a need for low- and moderate- income housing in Arlington Heights, he felt "the objections of the residents is [sic] a mandate to reject this proposal."[27] MHDC filed suit to challenge this decision in 1972.[28]

B. Exclusionary Zoning Law in the Early 1970s

When the *Arlington Heights* complaint was filed, the main precedents in race-based exclusionary-zoning cases were two appellate decisions from 1970: the Tenth Circuit's decision in *Dailey*

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25. *Id.* at *17 (referring to Ps. Ex. 48). At the initial Plan Commission hearing, after a number of people had spoken against Lincoln Green, the following exchange concluded the remarks from the floor:

> Rosemary Splitt, 320 N. Carlisle, Arlington Heights, was placed under oath. She stated that she heard a young girl seated behind her, this young girl being from another country, state that this was unbelievable, she didn't think this could happen in America.
>
> Mr. Zviagzne, 208 E. Oakton, Arlington Heights, was placed under oath. He stated that they have the right to choose their friends, when at a picnic they have the right to choose who they wanted to sit with, he believes in humanity, in all races, but doesn't believe he should be obliged on a moment's notice to change, for somebody to come from Chicago and tell him what he should do, what is right for him. He stated he forgave the young lady, she's too young. When you live longer, you change your opinion.
>
> He explained that in Brazil there is a lot of mixing between colors and he hoped that someday we would live together like that, too, but not by being provoked—no shotgun wedding has lasted very long, and that is what he felt was happening. After more discussion in this regard, he concluded that the people in question don't help you, us, or anybody, they just make things worse. Therefore, he hoped the committee would represent the people who live here, who plan to live, work and die here.

Id. at *18-19 (quoting Ps Ex. 17).

26. *Id.* at *19 (referring to Ps. Ex. 43).

27. *Id.* (quoting to Ps. Ex. 42).

28. *See infra* note 44 and accompanying text.

v. City of Lawton;[29] and the Second Circuit's decision in *Kennedy Park Homes Assn. v. City of Lackawanna*.[30] These cases, which both resulted in plaintiffs' victories, were similar in many ways to *Arlington Heights*.[31]

The Seventh Circuit had not yet decided an exclusionary zoning case, but its 1970 decision in the *Gautreaux* case held unconstitutional municipal action that perpetuated housing segregation.[32] Relying on this decision and on *Kennedy Park* and *Dailey*, a judge in the Northern District of Illinois in 1971 upheld an exclusionary zoning complaint in *Sisters of Providence of St. Mary of Woods v. City of Evanston*,[33] a case that also had many similarities to *Arlington Heights*.[34] Like *Arlington Heights*, the municipality's challenged action in *Sisters of Providence* was a refusal to rezone the relevant land to allow multi-family housing, not the more aggressively-hostile actions taken by the defendants in *Dailey* and *Kennedy Park*. Judge Marovitz in *Sisters of Providence* did not see this "active-passive" distinction as providing Evanston with a "viable defense," at least at the motion to dismiss stage.[35] He, therefore, upheld the plaintiffs' claims under the Fourteenth Amendment, the 1866 Civil Rights Act, and the Fair Housing Act.[36]

The key legal lesson from these pre-*Arlington Heights* cases was that they relied primarily on the Fourteenth Amendment's Equal Protection Clause, with the FHA not being involved at all in *Dailey* and only secondarily in *Kennedy Park* and *Sisters of Providence*.[37] Under the former, the law was understood then—as it

29. 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969).

30. 436 F.2d 108 (2d Cir. 1970), *aff'g* 318 F. Supp. 669 (W.D. N.Y. 1970).

31. Like *Arlington Heights*, *Dailey* and *Kennedy Park* involved land owned by a Catholic religious order that was made available to a non-profit builder whose proposal for a federally subsidized multi-family housing development was blocked by the local municipality in a highly segregated suburban area. *See Dailey*, 425 F.2d at 1038–39; *Kennedy Park*, 318 F. Supp. at 673–78, 682-93.

32. Gautreaux v. Chicago Hous. Auth., 436 F.2d 306 (7th Cir. 1970); *see also* Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971) (endorsing the proposition that "alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools [citing the Second Circuit's decision in *Kennedy Park*]"). For more on the *Gautreaux* case, see *infra* notes 144–45 and accompanying text.

33. 335 F. Supp. 396 (N.D. Ill. 1971).

34. *Sisters of Providence* also involved a parcel of land made available by a Catholic religious order to a non-profit builder for construction of a subsidized multi-family project that would have helped integrate the city's highly segregated housing patterns. *See id*. at 398–99.

35. *Id*. at 403.

36. *Id*. at 405. Judge Marovitz also ruled that the various plaintiffs had standing to sue and that the individual plaintiffs were entitled to pursue a class action. *Id*. at 402.

37. In *Dailey*, the discriminatory events complained of, *see* 425 F.2d at 1038, occurred before the FHA's substantive prohibitions became effective after December 31, 1968. *See* 42 U.S.C. § 3603(a)(2). In *Kennedy Park*, some of the

is now—to prohibit race-based discrimination by public officials unless they could provide a "compelling" justification for their action.[38] In both *Dailey* and *Kennedy Park*, after a bench trial, the district judges concluded that the defendants had engaged in racial discrimination in blocking the proposed developments,[39] findings that the respective appellate courts held were supported by the record and thus could not be set aside as "clearly erroneous" under Fed. R. Civ. P. 52(a).[40] The appellate decisions also upheld the trial courts' determinations that the defendants' attempted justifications for their discriminatory actions were not well founded and thus not compelling.[41] Further, although the trial judge in *Dailey* found that the defendants' discrimination there was racially motivated,[42] both the trial and appellate courts in *Kennedy Park* opined that *either* discriminatory intent or discriminatory effect would violate the Equal Protection Clause absent a compelling governmental justification.[43]

C. Arlington Heights Prior to the Supreme Court

1. Trial Court Proceedings

a. Pre-Trial and Trial

The *Arlington Heights* complaint was filed on June 12,

discriminatory events complained of occurred after the FHA became effective, *see* 436 F.2d at 111, but, because both the trial and appellate courts treated the plaintiffs' FHA claim as involving the same legal standards as their equal protection claim, *see* 318 F. Supp. at 694, 436 F.2d at 112-14, the FHA's availability was not significant in this case.

38. *See Kennedy Park*, 436 F.2d at 114 (noting that, given the racially discriminatory nature of the defendants' action, "the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality"). For a modern statement of this standard, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2162 (2023).

39. *See Dailey*, 425 F.2d at 1038; *Kennedy Park*, 318 F. Supp. at 695. These rulings were based in part on racially explicit statements by local residents. *Id*.

40. *See Dailey*, 425 F.2d at 1039–40; *Kennedy Park*, 436 F.2d at 112-14. For more on Rule 52(a)'s "clearly erroneous" standard, see *infra* notes 100, 253, 270–71 and accompanying text.

41. *See Dailey*, 425 F.2d at 1039–40; *Kennedy Park*, 436 F.2d at 114.

42. *See Dailey*, 425 F.2d at 1040 (noting that "the record sustains the [trial court's] holding of racial motivation . . . in violation of the Fourteenth Amendment").

43. *See Kennedy Park*, 318 F. Supp. at 694 (noting that "a long line of cases in the Supreme Court dealing with equal protection of the laws has held that racial discrimination may be established either by proof of purpose or effect"); 436 F.2d at 114 (noting that, because "[t]he effect of Lackawanna's action was inescapably adverse to the enjoyment of [plaintiffs' right to be free from racial discrimination], the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality").

1972.[44] The plaintiffs were MHDC and three Black individuals (Isaac Greenwood, Arthur Guthrie, and Willie Ramsom) who alleged that they worked in Arlington Heights but could not find housing there.[45] The complaint described the events leading up to the Trustees' rejection of MHDC's rezoning petition, the Village's population growth and racial demographics from 1950 to 1970, and the increase in local jobs during this period.[46] It also alleged that Arlington Heights was zoned primarily for single-family homes and, despite the great need for affordable housing, there was an absence of any subsidized multi-family housing while the Village "often rezoned land for multi-family units designed for the relatively affluent."[47] The plaintiffs asserted that the Lincoln Green proposal was consistent with the Village's zoning policies, including the policy of "buffering" single-family districts from conflicting uses,[48] and that the Village's action in rejecting it was racially discriminatory.[49]

The named defendants were the Village of Arlington Heights and the six members of its Board of Trustees, its Mayor, its Village Manager, and its Director of Building and Zoning.[50] Their alleged violations were divided into two counts, each of which claimed violations of multiple laws. Count I alleged that the Village's refusal to rezone "perpetuated racial segregation in housing" and denied

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44. *See* Complaint, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, (N.D. Ill. June 12, 1972) (No. 72 C 1453) [hereinafter *Complaint*].

45. *Id*. at ¶ 8. The three individual plaintiffs also sought to represent a class of "low and moderate income minority-group members who work or desire to work in Arlington Heights but cannot find decent housing in Arlington Heights at rents they can afford." *Id*. at ¶ 8.c. In addition, a few months after the initial complaint was filed, two more plaintiffs—Eluteria Maldonado (a Latino resident of Arlington Heights) and the Northwest Opportunity Center (a local non-profit organization dedicated to helping Latinos)—intervened. *See* Docket (Item for Oct. 4, 1972), Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974) (No. 72 C 1453) [hereinafter *Docket*].

46. *Complaint*, *supra* note 44, at ¶¶ 14–35.

47. *Id*. at ¶¶ 36–38.

48. *Id*. at ¶¶ 39–45. These parts of the complaint also alleged that the Lincoln Green parcel was similarly situated to others that the Village had rezoned to R-5 for non-subsidized multi-family developments in accord with this buffer policy and that Lincoln Green would not have adversely affected public facilities, schools, tax revenues, or the character or property values of the adjacent single-family neighborhoods. *Id*.

49. *Id*. at ¶ 30. Specifically, the complaint alleged that the Village's rejection of Lincoln Green was:

> racially discriminatory in that it prevents low and moderate income minority group members, who make up a substantial portion of the low and moderate income population of the Chicago area, from moving from areas of minority concentration to a white area, thereby denying them the opportunity to live in a decent integrated environment and perpetuating residential segregation in the Chicago area.

Id.

50. *Id*. at ¶¶ 9–13.

the individual plaintiffs and their class "integrated housing opportunities" compared to those the Village had extended "to wealthier whites who desire to live in Arlington Heights," all said to be in violation the Fourteenth Amendment, the 1866 Civil Rights Act, the 1968 Fair Housing Act, and various Illinois laws.[51] In Count II, MHDC alleged that the refusal to rezone deprived it of the right to use its property in a reasonable manner in violation of the Fourteenth Amendment's Due Process Clause and the Illinois constitution.[52]

The relief requested was purely equitable—a declaratory judgment invalidating the Arlington Heights zoning ordinance as applied to the subject property and an injunction restraining defendants from preventing or interfering with the development of the housing proposed by MHDC.[53] No monetary relief was sought, and there was no jury demand.[54]

In retrospect, a notable feature of the *Arlington Heights* complaint was its lack of specificity regarding the plaintiffs' legal theories, a matter that would prove to be significant later in the litigation. In particular, while the complaint clearly alleged illegal racial discrimination, it did not say *which* of the various federal and state anti-discrimination laws cited were most relied on, simply providing a list of these laws starting with the Fourteenth Amendment.[55] Also, the complaint did not make clear which "comparators"—to use a modern term—were allegedly treated more favorably than Lincoln Green (e.g., nonsubsidized multi-family proposals; single-family-development proposals; white persons generally).

The case was assigned to Judge William J. Lynch, who had been appointed to the federal bench by President Johnson in 1966.[56] The *Arlington Heights* defendants were represented by Jack M. Siegel, a prominent municipal lawyer who by 1972 had been the

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51. *Id*. at ¶ 46. The 1866 Civil Rights Act (42 U.S.C. § 1981 and § 1982) bars racial discrimination in contract and property rights. *See* SCHWEMM, *supra* note 11, chap. 27. This statute did not prove to have any independent significance in the *Arlington Heights* case.

52. *Complaint*, *supra* note 44, at ¶ 47.

53. *Id*. at ¶ 2-3 after "Wherefore" on pp. 22–23.

54. *See id.*; *cf.* Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), aff'd sub nom. Curtis v. Loether, 415 U.S. 189 (1974) (holding that the parties are entitled to a jury trial in FHA cases seeking money damages as well as injunctive relief).

55. *Complaint*, *supra* note 44, at ¶¶ 2, 46–47.

56. *See Biographical Directory of Article III Federal Judges, 1789-present* (2024), FED. JUD. CTR., www.fjc.gov/history/judges/lynch-william-joseph [perma.cc/BQZ8-YK9V] (last visited Feb. 12, 2024) [hereinafter *Federal Judges-Biographies*]. This Article often identifies a judge's appointing president to provide a possible insight into the judge's likely political pedigree and attitude toward civil rights cases. Many judges, of course, do not decide cases as their earlier background might suggest, as this Article regularly demonstrates. *See infra* notes 89, 92, 350, 395 and accompanying text (discussing Nixon-appointees Harry Blackmun, Lewis Powell, and Robert Sprecher).

Village's attorney for over a decade (and would continue in that role for over 50 years).[57] They filed a motion to dismiss, which Judge Lynch denied in a short opinion on October 3, 1972.[58] The defendants then filed their answers, basically denying liability.[59]

On November 10, 1972, the case was reassigned to a new judge, Thomas R. McMillen, who had been appointed to the federal bench a year before by President Nixon.[60] The defendants filed a motion for reconsideration of Judge Lynch's ruling denying their motion to dismiss, but Judge McMillen denied this motion on January 2, 1973.[61]

Discovery progressed during the first half of 1973.[62] A dispute arose when the plaintiffs sought to depose one of the Village's Trustees (Alice Harms) and its Village Manager (L.A. Hanson) in order to inquire about the defendants' motivation in rejecting Lincoln Green.[63] The defendants resisted this effort, the plaintiffs filed a motion to compel, and the parties briefed the matter.[64] On July 10, 1973, Judge McMillen ruled in favor of the defendants in a decision that was later endorsed by the Supreme Court.[65] Other than this dispute, the pre-trial work proceeded with little delay, and the case was ready for trial within a year after the pleadings closed.

In January of 1974, Judge McMillen conducted a week-long bench trial.[66] The plaintiffs' evidence included testimony from MHDC's executive director and three of the individual plaintiffs (Guthrie, Ransom, and Maldonado).[67] The plaintiffs also called, as

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57. Siegel's experience at the time included defending Evanston against an exclusionary zoning claim in the *Sisters of Providence* case. *See supra* notes 33-36 and accompanying text. His long career representing suburbs like Arlington Heights and Evanston would earn Siegel the sobriquet of "dean of municipal law in Illinois." *See* Graydon Megan, *Jack Siegel, municipal attorney, dies at 88*, CHICAGO TRIBUNE (Nov. 19, 2017), www.chicagotribune.com/news/ct-jack-siegel-obituary-met-20140926-story.html [perma.cc/88R6-A9EL]. Throughout the *Arlington Heights* litigation, Siegel appeared entirely alone on behalf of the Village and its co-defendants.

58. *See Docket*, *supra* note 45 (Item for Oct. 3, 1972).

59. *Id*. (Item for Oct. 24, 1972).

60. *See Federal Judges-Biographies*, *supra* note 56, www.fjc.gov/history/judges/mcmillen-thomas-roberts [perma.cc/HH4E-83FK].

61. *Docket*, *supra* note 45 (Item for Jan. 2, 1973).

62. *See id*. (Items for Jan. 15, Feb. 9, Apr. 2, Apr. 25, and May 31, 1973 (noting various discovery requests and responses by the parties)).

63. *See infra* notes 64-65 and accompanying text.

64. *See Docket*, *supra* note 45 (Items for May 24, May 29, June 7, June 14, and June 15, 1973).

65. *See* District Court's "Decision on Plaintiffs' Discovery Motions" (July 10, 1973) in the Court of Appeals Appendix (87-88); *infra* note 306.

66. *See Docket*, *supra* note 45 (Items for Jan. 3, Jan. 4, Jan. 7, Jan. 8, Jan. 9, and Jan. 10, 1974).

67. *See id*. (Items for Jan. 3, Jan. 4, Jan. 7, and Jan. 8, 1974). The plaintiffs' case also included much of the evidence that MHDC had presented at the Village's proceedings on its rezoning application, along with additional demographic evidence, mainly through the testimony of an expert sociologist Pierre DeVries. *See id*. (Items for Jan. 3, Jan. 4, Jan. 7, and Jan. 8, 1974).

an adverse witness, Village Trustee Alice Harms, who remained steadfast in denying any racial motivation in the Trustees' rejection of Lincoln Green.[68] After the plaintiffs rested, the defendants moved for a directed verdict, which was denied,[69] and then put on their evidence.[70] The court then invited the parties to file post-trial briefs, which they did in an exchange that concluded on January 22, 1974.[71]

b. Decision

One month later, Judge McMillen issued a written decision pursuant to Rule 52(a).[72] His opinion declared that he would enter judgment for the defendants, contending that the plaintiffs were seeking "to extend the penumbra of the Fourteenth Amendment considerably beyond its present outer limits" and that none of the Fair Housing Act's provisions "seem applicable to the facts of this case."[73]

The opinion first dealt with the class action and standing issues. Judge McMillen ruled against the plaintiffs' effort to maintain a class action,[74] but he upheld their standing, concluding that MHDC "has sufficient interest in this property to give it standing" and the testimony of one of the individual plaintiffs (Maldonado) "suffices to raise a case or controversy concerning the validity of the defendants' acts."[75]

Turning to the merits, Judge McMillen identified the "crucial fact question [as] whether the result of the defendant trustees' action caused racial discrimination."[76] He then criticized the plaintiffs' proof for focusing on the needs of low-income people as opposed to racial minorities: "Plaintiffs have failed to carry their burden of proving discrimination by defendants against racial minorities as distinguished from the under-privileged generally."[77]

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68. *See id.* (Item for Jan. 8, 1974).

69. *Id.*

70. *See id.* (Items for Jan. 8, Jan. 9, and Jan. 10, 1974).

71. *Id.* (Items for Jan. 4, Jan. 10, Jan. 15, Jan. 21, and Jan. 22, 1974); *see also* 373 F. Supp. at 209 (noting and considering the "post-trial briefs filed by the parties").

72. 373 F. Supp. 208 (N.D. Ill. 1974). Fed. R. Civ. P. 52(a)(1) provides: "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions . . . may appear in an opinion or a memorandum of decision filed by the court."

73. 373 F. Supp. at 209.

74. *Id.* at 209-10.

75. *Id.* Standing would remain an issue that the Supreme Court ultimately resolved in the plaintiffs' favor, albeit based on a somewhat different approach. *See infra* Part III.B.2.

76. 373 F. Supp. at 210.

77. *Id.* at 210.

> They have proved that housing for low-earners is scarce in Arlington

But the plaintiffs *had* shown that the result of the defendant's refusal to allow Lincoln Green would maintain racial segregation in the Village and would also harm racial minorities more than whites. Thus, Judge McMillen seemed to miss the point of the Seventh Circuit's insistence in *Gautreaux* on a result-oriented test for racial discrimination.[78]

Indeed, the remainder of Judge McMillen's opinion focused on matters that seemed to reflect an intent-claim analysis. A year earlier in *McDonnell Douglas Corp. v. Green*,[79] the Supreme Court had established a burden-shifting framework for analyzing intent claims under Title VII, the federal anti-discrimination statute.[80] Judge McMillen's description of the plaintiffs' proof—as depending "on circumstantial evidence" because there was "no direct evidence by which to determine the motives or mental processes of the trustees"[81]—was exactly the situation that *McDonnell Douglas* addressed.[82] Although he did not cite that case, Judge McMillen implied that the plaintiffs had satisfied *McDonnell Douglas*'s first

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> Heights and the surrounding suburban area, but this affects the entire group, not merely blacks or Mexican-Americans. The Fourteenth Amendment and the Civil Rights Act prohibit discrimination against blacks and certain other minorities but does not afford rights to poor people as such. . . . The legal issue on this point, therefore, is whether low-income minorities have a constitutional right to live in an area where they work or desire to seek work. Even more broadly, do low-income workers have a constitutional right to low-rental housing either where they work or elsewhere? We know of no such rule of law.

Id. at 210–11.

78. *See supra* note 32 and accompanying text.

79. 411 U.S. 792 (1973).

80. *See* 42 U.S.C. § 2000e–2(a)(1) (2023). The *McDonnell Douglas* framework dealt with "the order and allocation of proof in a private, non-class action challenging employment discrimination" in Title VII cases where only circumstantial, as opposed to direct, evidence of the defendant's intent was available. *See* 411 U.S. at 800. In such cases, the Court instructed:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [Given that plaintiff] carried his burden of establishing a prima facie case of racial discrimination and [defendant] successfully rebutted that case, . . . [plaintiff now] must be afforded a fair opportunity to demonstrate that [defendant's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, [plaintiff should prevail]. In the absence of such a finding, [defendant's action] must stand.

Id. at 802, 806.

81. 373 F. Supp. at 210.

82. *See supra* note 80; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993) (describing the *McDonnell Douglas* framework as devised "to deal effectively with employment discrimination revealed only through circumstantial evidence").

step of making out a prima facie case of racial discrimination by quickly moving to the second step of that case's analysis, i.e., the defendant's claimed legitimate reasons for blocking Lincoln Green.[83]

Judge McMillen determined that "[t]he weight of the evidence proves that the defendants were motivated with respect to the property in question by a legitimate desire to protect property values and the integrity of the Village's zoning plan."[84] Based on this view, Judge McMillen concluded—correctly, under the *McDonnell Douglas* framework—that the plaintiffs had failed to carry their burden of proving intentional discrimination.[85] This, he ruled, meant that the defendants' rejection of Lincoln Green was not an "act in derogation of the plaintiffs' 14th Amendment rights,"[86] and he thus entered "judgment . . . in favor of the defendants."[87] The plaintiffs filed their notice of appeal on March 22, 1974.[88]

2. Seventh Circuit's Decision

The parties filed their appellate briefs in the summer of 1974

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83. 373 F. Supp. at 211 (identifying "the issue in this case" as whether defendants can be required to rezone the Lincoln Green site "if they have good faith reasons for not doing so").

84. *Id*. According to Judge McMillen:

> The village's zoning plan contemplates the systematic development of land for particular uses with buffer zones or devices between different use zones. In the case at bar, the plaintiffs' project would not constitute a buffer between zones, because no other zone except R-3 exists in the area.
>
> On the other hand, the evidence shows that a multi-family development would seriously damage the value of the surrounding single-family homes and that its presence in the area is strongly opposed by large groups of citizens of the village. Their motive may well be opposition to minority or low-income groups, at least in part, but the circumstantial evidence does not warrant the conclusion that this motivated the defendants. They have zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff—as no doubt are some existing multi-family buildings.

Id.

85. *Id*. at 211-12; *see* Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981) (holding that, under the *McDonnell Douglas* framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

86. 373 F. Supp. at 211. Another "possible deficiency with plaintiffs' case" identified by Judge McMillen was the sequestration of funds under the specific federal program that MHDC sought to use to finance Lincoln Green. *Id*. (noting that "the present Federal funding situation would at least cause this Court to withhold any present relief to the plaintiffs"). This sequestration-of-funds issue was also addressed by the Supreme Court, which held that it did not bar the plaintiffs' claim. *See infra* note 185 and accompanying text.

87. 373 F. Supp. at 212.

88. *See Docket*, *supra* note 45 (Item Mar. 22, 1974).

and presented oral argument in September to a panel made up of Chief Judge Fairchild and Judges Swygert and Sprecher.[89] In December, the Eighth Circuit decided an exclusionary zoning case, *United States v. City of Black Jack, Missouri*,[90] ruling that a St. Louis suburb violated the FHA based on a discriminatory-effect standard.

On June 10, 1975, the Seventh Circuit issued a 2-1 decision in favor the plaintiffs.[91] The majority opinion by Judge Swygert (joined by Judge Sprecher) concluded that "Arlington Heights's rejection of the Lincoln Green proposal violated the Equal Protection Clause of the Fourteenth Amendment," because Lincoln Green "presented the only hope of easing the segregated housing patterns of Arlington Heights" and thus the Village's action "has racially discriminating effects" for which defendants did not show any "compelling justification."[92]

Judge Swygert began by identifying the issue as whether the Village's refusal to rezone the MHDC property "violates plaintiffs' constitutional rights."[93] Although the opinion recognized that the plaintiffs also alleged violations of the 1866 Civil Rights Act and the 1968 Fair Housing Act,[94] Judge Swygert focused only on their equal protection claim.

He analyzed this claim in three parts. The plaintiffs' first contention was that "the Village's zoning policy has been administered in a discriminatory manner," i.e., "that had Lincoln Green been a commercial development the zoning change would have been granted."[95] This was essentially a claim of intentional

89. Thomas E. Fairchild was a judge on the Wisconsin Supreme Court when President Johnson appointed him to the Seventh Circuit in 1966. *See Federal Judges-Biographies*, *supra* note 56, www.fjc.gov/history/judges/fairchild-thomas-edward [perma.cc/A45E-7X63]. Luther M. Swygert was a federal judge in Indiana when President Kennedy appointed him to the Seventh Circuit in 1961. *Id*., www.fjc.gov/history/judges/swygert-luther-merritt [perma.cc/MLM8-3988]. Robert A. Sprecher spent thirty years in private practice in Chicago before President Nixon appointed him to the Seventh Circuit in 1971. *Id.,* www.fjc.gov/history/judges/sprecher-robert-arthur [perma.cc/UD8E-U9Z2].

90. 508 F.2d 1179, 1184–88 (8th Cir. 1974).

91. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

92. *Id*. at 415. In a brief dissent, Chief Judge Fairchild opined that the plaintiffs failed to prove "that it was not reasonably possible to construct the proposed project" on an alternative site in Arlington Heights, *id*. at 416, but he agreed with the majority on the legal principle that "if plaintiffs establish that the Village's enforcement of its zoning scheme makes construction of housing for low and moderate income individuals not reasonably possible, the refusal perpetuates racial segregation and, absent compelling governmental justification, the plaintiffs would be entitled to the relief they seek." *Id*. at 415-16.

93. *Id*. at 410.

94. *Id*. at 411.

95. *Id*. at 412.

discrimination, which the trial court had found not proven.[96] Judge Swygert reviewed the evidence on this point by analyzing the scores of zoning changes granted to commercial developers and concluded that, while some of these violated the Village's "buffer" policy, others did not, and still others were rejected for violating this policy.[97] Thus, he concluded, "Arlington Heights has been applying its buffer zone policy in considering requests for zoning changes though not with absolute consistency."[98] The evidence simply did "not require the conclusion that had Lincoln Green been a proposed commercial development the variance would have been granted despite the fact that the development would not serve as a buffer zone."[99] Applying Rule 52(a)'s deferential standard for reviewing a trial judge's fact-finding on this point,[100] the majority concluded—and the dissent agreed—that "the district court's finding that defendants were concerned with 'the integrity of the Village's zoning plan' is not clearly erroneous."[101]

Having disposed of the plaintiffs' intent claim, Judge Swygert then took up their discriminatory-effect claim. The legal standard here, he noted, was that, "[r]egardless of the Village Board's motivation," if the refusal to rezone MHDC's land "has a racially

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96. *Id.*; *supra* notes 84-85 and accompanying text.

97. According to Judge Swygert's view of this evidence:

> Plaintiffs' own expert agreed that the Village had conformed to its Comprehensive Plan for approximately two-thirds of these sixty zoning changes. . . . Our review indicates that in only four relevant instances were there clear violations of the buffer zone policy and in another two instances a questionable violation. . . . [T]here were two proposed changes rejected at least in part on the basis of the buffer zone policy and another four rejections which might have been on this basis though this was not stated. There were also two proposals that were withdrawn after the Plan Commission had recommended their rejection at least partly on the basis of the apartment policy.

517 F.2d at 412.

98. *Id.*

99. *Id.*

100. *See* Fed. R. Civ. P. 52(a) (providing, at that time, that a trial court's findings of fact in a nonjury trial "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"). Since then, this Rule has been amended in a number of ways, but has always retained its basic "clearly erroneous" standard for appellate review of a trial court's findings of fact, with the current iteration providing, "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). For more on Rule 52(a)'s "clearly erroneous" standard, see *infra* notes 253, 271 and accompanying text.

101. 517 F.2d at 412; *id.* at 415 (Fairchild, C.J., dissenting). A few years later, the Supreme Court would confirm that a trial court's determination concerning a defendant's discriminatory intent in civil rights cases may be overturned on appeal only if it is "clearly erroneous." *See infra* note 271 and accompanying text.

discriminatory effect and perpetuates Arlington Heights' segregated character . . . the decision violated the Equal Protection Clause unless of the Village can justify it by showing a compelling interest."[102]

Judge Swygert recognized that the plaintiffs' theory here could be established in either of two ways—racially discriminatory effect or perpetuation of segregation. As to the former, however, he concluded that the plaintiffs' showing was inadequate.[103]

But the plaintiffs' final theory—segregative effect—was a winner. Judge Swygert noted the demographic evidence showing that Arlington Heights, with a 1970 population of 64,884 and only twenty-seven Black residents, "is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents."[104] Because MHDC was "unable to find an economically feasible and suitable alternative site," Judge Swygert believed that the defendants' rejection of Lincoln Green probably meant that "no section 236 housing will be

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102. 517 F.2d at 412–13.

103. According to Judge Swygert:

> It is true that a greater percentage of blacks than whites are affected by the Village's decision since a greater percentage of blacks than of whites are in the low and middle income categories that are eligible for this proposed section 236 housing development. (Blacks comprise forty percent of the eligible prospective tenants.) But . . . the "class" that is affected by the Village's action is composed of individuals with low and moderate incomes. Racial minorities constitute a higher percentage of this class than they do percentagewise of the population in general within the Chicago metropolitan area. This fact alone, however, does not make decisions that affect those in the lower income bracket more than others racially discriminatory governmental actions. Governmental action having a disproportionate impact on a class composed of an extremely high percentage of racial minorities might be classified as discriminatory in an equal protection sense. But that is not this case.

Id. at 413 (citation omitted).

104. *Id*. at 414 n.1. Judge Swygert added:

> The impact of this statistic can be fully appreciated only in the context of the shift in employment opportunities during that same period [1960-1970]. While the City of Chicago lost 230,000 jobs, the number of jobs in the four-township Arlington Heights area rose from 100,000 to 200,000. Blacks, however, have not been able to take full advantage of these job opportunities. In 1970 only 137 of the 13,000 people who worked in Arlington Heights were black. Part of the explanation for this is that many black workers have been unable to find housing they can afford in Arlington Heights. A study issued by the Cook County Office of Economic Opportunity indicated that based on its survey almost all the black workers in Arlington Heights resided in Chicago. Moreover, the report stated that one of the main problems Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants.

Id. at 414 n.2.

built in Arlington Heights [and thus] a development for which blacks represent forty percent of the eligible applicants will not be built."[105] The MHDC project:

> might well result in increasing Arlington Heights' minority population by over one thousand percent [and] appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of de facto segregated housing. Thus the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.[106]

Thus, Judge Swygert believed that "we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing."[107] He therefore held that "Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects [and thus] could be upheld only if it were shown that a compelling public interest necessitated the decision."[108]

The remainder of the opinion ruled that the defendants' two claimed justifications—"maintaining integrity of the zoning plan (buffer policy) and protecting neighboring property values"—were not compelling.[109] With the Village lacking any legally sufficient

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105. *Id.* at 414.

106. *Id.* This part of the opinion cited four appellate decisions, three from other circuits that involved municipal defendants blocking subsidized housing projects (the Second Circuit in *Kennedy Park*, the Fifth Circuit in *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, Fla.*, 493 F.2d 799 (5th Cir. 1974), and the Eighth Circuit in *Black Jack*) and one from the Seventh Circuit written by Judge Swygert himself that involved private defendants in *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974)). *See* 517 F.2d at 413-15. As a sign of how rapidly the law was evolving, three of these decisions (all except *Kennedy Park*) were handed down after the trial court's ruling in *Arlington Heights*.

All four of these appellate decisions endorsed claims of racial discrimination, but they were based on different laws. As noted above, *Kennedy Park* was a constitutional decision, *see supra* note 37; *United Farmworkers* was based on the Equal Protection Clause, with the Fair Housing Act playing a minor role, *see* 493 F.2d at 802; *Black Jack* was based exclusively on the Fair Housing Act, *see* 508 F.2d at 1188; and *Clark* was based on the 1866 Civil Rights Act's § 1982, *see* 501 F.2d at 327. But Judge Swygert felt they all supported the plaintiffs' equal protection claim that Arlington Heights's segregation was a problem that must be considered in evaluating the racial effect of the Village's decision. "[W]e cannot ignore segregation. This much is evident from *Clark* in terms of section 1982 and the Thirteenth Amendment and we think the principle is applicable to the Fourteenth Amendment in this case." 517 F.2d at 415.

107. 517 F.2d at 415.

108. *Id.*

109. *Id.* As for the buffer policy, Judge Swygert had earlier determined that "the Village has not even been consistent in applying its zoning plan when considering requests for zoning changes to R-5" and that "[t]he planning rationale behind the buffer zone policy has only minimal applicability to [Lincoln Green's] type of low-rise, open-space development." *Id.* As for

justification, the Seventh Circuit held that its refusal to grant MHDC's requested zoning change "is a violation of the Equal Protection Clause of the Fourteenth Amendment."[110] The case was remanded for entry of judgment in the plaintiffs' favor.[111]

The defendants filed a petition for rehearing and rehearing en banc,[112] which was denied on August 13, 1975.[113] After the Seventh Circuit issued its mandate in late October,[114] the defendants filed a petition for certiorari, which the Supreme Court granted on December 15.[115]

D. The Supreme Court in the Early 1970s

1. Changing Attitude Toward Civil Rights

After World War II, the Supreme Court played a leading role in ending *de jure* race discrimination, highlighted by its 1954 decision in *Brown v. Board of Education* holding school segregation unconstitutional.[116] Following this unanimous ruling, the Court also invalidated laws mandating segregation in other public facilities[117] and ruled in a series of school cases that state and local officials could not avoid *Brown*'s integration goal by "race-neutral" student assignment systems that did not result in desegregtion.[118] In the mid-1960s, Congress joined this effort by passing a series of civil rights statutes, culminating in the 1968 FHA, that banned racial discrimination by private as well as public entities in various spheres of American life.[119]

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neighboring property values, the claimed diminution could not be based on the homeowners' reliance on the Village's zoning plan, because "there [have] been other variances in Arlington Heights [and] the neighboring residents certainly could not expect that the zoning plan would always be adhered to even when a racially discriminatory effect would be the result." *Id*.

110. *Id*.

111. *Id*.

112. *See Docket*, *supra* note 45 (Item June 19, 1974).

113. *See id*. (Items June 23, July 3, and Aug. 13, 1975). John Paul Stevens, then a judge on the Seventh Circuit, voted on this petition, a fact that would later lead him to recuse himself when the case reached the Supreme Court and he had become a justice on that Court. *See infra* note 171.

114. *See Docket*, *supra* note 45 (Item Oct. 29, 1975).

115. 423 U.S. 1030 (1975).

116. Brown v. Bd. of Ed. of Topeka, Kan., 347 U.S. 483 (1954). One noteworthy pre-*Brown* case was *Shelley v. Kraemer*, 334 U.S 1 (1948), which held unconstitutional state judicial enforcement of racially restrictive covenants. For more on *Shelley*'s importance in the overall story of housing segregation in the mid-20th century, see RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 73–82 (2018).

117. *See* cases described in *Students for Fair Admissions, Inc v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023).

118. *See* Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430 (1968); Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964).

119. *See* Titles II, Title VI, and Title VII of the 1964 Civil Rights Act, 42

By the time the *Arlington Heights* case was filed in 1972, however, the Supreme Court's enthusiasm for civil rights claims had been curbed by President Nixon's appointment of four new justices—Warren Burger as Chief Justice in 1969; Harry Blackmun in 1970; and in early 1972, Lewis Powell and William Rehnquist—all of whom were chosen with the goal of making the Court more conservative.[120] Thus, as *Arlington Heights* worked its way through the trial and appellate phases, the Court had these four Nixon appointees along with two Eisenhower appointees and three justices appointed by Democratic presidents (one of whom would be replaced by a Republican president by the time *Arlington Heights* was decided).[121]

The effect of this conservative shift was evident in negative decisions in civil rights cases leading up to *Arlington Heights*, which are discussed below.[122] As Professor Chayes observed in a seminal article in 1976, the Burger Court's decisions in public-law cases showed "a lack of sympathy with the substantive results and with the idea of the district courts as a vehicle of social and economic reform."[123] According to Chayes, a prime example of the Court's "distaste for reformist outcomes" was a 1975 exclusionary zoning decision—*Warth v. Seldin* (discussed in the next section)—where a 5-4 majority (made up of the four Nixon appointees and Justice Stewart) denied standing to a variety of plaintiffs based on a restrictive view of pleading and a hostility to the merits of their claim.[124]

U.S.C. §§ 2000a, 2000d, 2000e (2023); 1965 Voting Rights Act, 52 U.S.C. § 10301.

120. *See* ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX 125-26 (2006). In his 1968 presidential campaign, Nixon promised to appoint justices who "would be strict constructionists. They would see themselves as interpreting the law, not making the law. They would [not] see themselves as . . . super-legislators with a free hand to impose their political and social viewpoints upon the American system and the American People." *See Nixon and the Supreme Court - Nixon's Nominations*, RICHARD NIXON PRESIDENTIAL LIBRARY AND MUSEUM, www.nixonlibrary.gov/news/nixon-and-supreme-court [perma.cc/B79G-KHEV] (last visited Feb. 12, 2024). Nixon's four appointments "shifted the Court's ideological composition to the conservative, a position it maintains to this day." *Id*.

121. In addition to the four Nixon appointees, the Court's justices included Stewart and Brennan (appointed by Eisenhower); White (appointed by Kennedy); Marshall (appointed by Johnson); and Douglas (appointed by Roosevelt), who would be replaced in 1975 by Stevens (appointed by Ford). For biographical sketches of these justices that include the identity of their appointing presidents, see *Federal Judges-Biographies*, *supra* note 56.

122. *See infra* Part II.D.2, notes 153-65 and accompanying text, notes 312-13 and accompanying text (discussing, respectively, *Warth v. Seldin*, *Washington v. Davis*, and *Milliken v. Bradley*).

123. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304–05 (1976).

124. *Id*. at 1305.

2. Warth v. Seldin

In mid-1975, the Supreme Court decided an exclusionary zoning case, *Warth v. Seldin*,[125] that it would later describe as "similar in some respects to" *Arlington Heights*.[126] In *Warth*, the Court ruled that a variety of plaintiffs lacked standing to challenge the zoning practices of an upscale Rochester suburb (Penfield) that allegedly had "the purpose and effect of excluding persons of low and moderate income from residing" there.[127] The *Warth* plaintiffs, like those in *Arlington Heights*, included prospective minority residents and builders of such housing, and they asserted claims under the Constitution and the 1866 Civil Rights Act,[128] but not also under the 1968 Fair Housing Act.[129]

Justice Powell's opinion for the Court concluded that neither the minority individuals, the builders, nor any of the other plaintiffs could adequately connect their injury of being excluded from Penfield to the defendants' rejection of any currently viable proposed project, as required for Article III standing.[130] Justice Douglas's dissent accused the Court of reading the complaint "with antagonistic eyes,"[131] and he concluded that the plaintiffs' standing should be co-extensive with those whose right to sue under the FHA had been upheld by the Court in its 1972 *Trafficante* decision.[132] The principal dissent, authored by Justice Brennan and joined by Justices White and Marshall, also asserted that the Court's decision "can be explained only by an indefensible hostility to the claim on the merits" and "tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional."[133]

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125. 422 U.S. 490 (1975).

126. *Arlington Heights*, 429 U.S. at 260.

127. *Warth*, 422 U.S. at 495. In particular, the defendant-officials were accused of allocating "98% of the town's vacant land to single-family detached housing" and taking other steps that made "approval of [low- and moderate-income housing] projects virtually impossible." *Id*. at 495-96. Further, "by precluding low- and moderate-cost housing, the town's zoning practices also had the effect of excluding persons of minority racial and ethnic groups, since most such persons have only low or moderate incomes." *Id*. at 496.

128. *Id*. at 493.

129. *Id*. Thus, the Court in *Warth* "intimate[d] no view as to whether" the facts alleged "would have stated a claim under [the FHA]." *Id*. at 513 n.21.

130. *Id*. at 502–17.

131. *Id*. at 518 (Douglas, J., dissenting).

132. *Id*. at 518-19 (referring to *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)). For the Court's response to this argument, see *infra* note 140.

133. 422 U.S. at 520 (Brennan, J., dissenting). This dissent further opined:

> I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits of this case could involve grave sociological and political

Justice Powell responded that the Court was assuming here that the alleged "intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded."[134] But he rejected the individual plaintiffs' claim that their "inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from [defendants'] alleged constitutional and statutory infractions."[135] The Court here distinguished the lower-court decisions in *Dailey*, *Kennedy Park*, *Black Jack*, and other cases that had recognized "standing in low-income, minority-group plaintiffs to challenged exclusionary zoning practices" on the ground that they:

> challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents. The plaintiffs thus were able to demonstrate that unless relief from assertedly illegal actions was forthcoming, their immediate and personal interests would be harmed.[136]

The Court thus ruled against each of the individual plaintiff's standing, holding that, in order to have standing to challenge a zoning ordinance or practice as racially exclusionary, "usually the initial focus should be on a particular project."[137]

Warth also rejected all of the other plaintiffs' standing. As for the builders who had allegedly lost opportunities and profits by not being able to construct low- and moderate-income housing in Penfield, they could not, with one exception, point to any specific project "that is currently precluded either by the ordinance or by [defendants'] action in enforcing it."[138] The exception was a 1969 proposal that the defendants' had blocked, but the *Warth* plaintiffs

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> ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to.

Id.

134. *Id.* at 502. Justice Powell also acknowledged that, while standing "often turns on the nature and source of the claim asserted[, it] in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 500 (citation omitted).

135. *Id.* at 504. According to Justice Powell, these individuals' "desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing," *id.* at 505, and neither of the two proposed projects that "would have satisfied [the individual plaintiffs'] needs at prices they could afford" was currently viable. *Id.* at 506, 516-17. Further, the plaintiffs' own "description of their individual financial situations and housing needs suggest . . . that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of [defendants'] assertedly illegal acts." *Id.* at 506.

136. *Id.* at 507. In contrast, according to Justice Powell, the *Warth* plaintiffs "assert no like circumstances," relying instead "on little more than the remote possibility . . . that their situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief." *Id.*

137. *Id.* at 508 n.18.

138. *Id.* at 516.

did not allege that this project "remained viable in 1972 when this complaint was filed, or that [defendants'] actions continued to block a then-current construction project."[139] Thus, while this 1969 proposal's rejection by the defendants may have once amounted to an injury-producing claim, there was no basis for inferring that it "remained a live, concrete dispute when this complaint was filed."[140]

In short, *Warth* narrowed the circumstances under which any type of plaintiff could challenge a white suburb's racially exclusionary zoning practices. And even if the *Arlington Heights* plaintiffs could establish standing because their case involved a specific project's rejection and included an FHA claim, the *Warth* opinion represented the views of five justices that seemed to show skepticism, if not outright hostility, to the merits of such a claim.[141]

III. *ARLINGTON HEIGHTS* IN THE SUPREME COURT

A. Pre-Decision: Washington v. Davis and Other New Cases

After the two sides filed their briefs in the early 1976, the Supreme Court decided three cases that prompted a round of supplemental briefs.[142] Two were of particular importance to *Arlington Heights*.[143]

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139. *Id.* at 517.

140. *Id.* at 516. *Warth* also found wanting claims by Rochester taxpayers and Penfield residents. *Id.* at 508-14. The former alleged injuries from their city having to accept more than its fair share of tax-losing low- and moderate-income housing, but the Court saw this as an attempt to assert the rights of the low-income minorities excluded from Penfield and thus was barred by the prudential standing rule against asserting others' rights. *Id.* at 508-10. The Penfield residents alleged that the defendants' "exclusion of persons of low and moderate income" deprived them "of the benefits of living in a racially and ethnically integrated community," *id.* at 512, a claim similar to the one approved by the Court in its 1972 FHA decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). But "*Trafficante* is not controlling here," Justice Powell decided, because the *Warth* plaintiffs did not assert "any right of action under the [FHA]." 422 U.S. at 513. According to Justice Powell, *Trafficante* was based on the Court's recognition that Congress could—and the FHA did—"create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.* at 514. The *Warth* plaintiffs, however, had not made an FHA claim, and thus "[n]o such statute is applicable here." *Id.*

141. *See supra* notes 124, 131–33 and accompanying text.

142. *See infra* notes 168–70.

143. The one that did not prove important to *Arlington Heights* was *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), which rejected a due process challenge by a commercial developer to a city's refusal to allow construction of its proposed high-rise apartment building. The developer's application for the zoning change needed for this project was first approved by the city's planning commission and council, but then was defeated in a popular

The first was *Hills v. Gautreaux*,[144] which reviewed a Seventh Circuit decision calling for metropolitan-wide relief in this long-running litigation over Chicago's segregated public housing system. In a unanimous decision, the Court ruled that HUD, which had earlier been held liable for unconstitutional racial discrimination along with the Chicago Housing Authority, could be subjected to a metropolitan-wide relief order.[145] Although the remedial issues in *Hills* were not relevant to *Arlington Heights*, Justice Stewart's majority opinion made some points that were. He recognized that the Chicago housing market covered the entire metropolitan area and accepted the lower courts' finding that this market was heavily segregated.[146] He also cited a provision of the Fair Housing Act that directs HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the FHA's policies[147] and saw this as supporting a metropolitan-wide remedy that would order "HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market."[148]

The *Hills* opinion described how the federal government's method of supporting low-income housing had greatly changed in recent years, moving from direct subsidy programs like the one for which Lincoln Green had originally qualified to the new Section 8 program, "which has largely replaced the older federal low-income

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referendum that city law required for all zoning changes. The developer argued that the referendum requirement violated the Fourteenth Amendment's Due Process Clause, but the Supreme Court disagreed. Chief Justice Burger's opinion noted that the developer was not claiming that the city's zoning classification violated *Euclid*'s due process standards. *Id.* at 676-77 (referring to Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (described in *supra* note 10)). Rather, the plaintiff's claim was that the standardless process inherent in a referendum violated due process, but the Court held that the standard-requiring doctrine did not apply to referendums. *Id.* at 672-73, 675. The Court did recognize that municipal action produced by a referendum could be overturned if it was based on racial discrimination or some other constitutional infirmity, *id.* at 676 (citing Hunter v. Erickson, 393 U.S. 385 (1969)), but no such claim was made here, and the *Eastlake* opinion therefore concluded that the local voters' decision to block rezoning of the plaintiff's property was not unconstitutional. *Id.* at 676-79.

144. 425 U.S. 284 (1976).

145. *Id.* at 289. The vote in *Hills* was 8-0, with Justice Stewart writing for a five-justice majority, Justice Marshall concurring in an opinion joined by Justices Brennan and White, and Justice Stevens not participating. *Id.* at 286, 306. For more on the Seventh Circuit's 1971 ruling against HUD on liability, see *supra* note 32. For more on the *Gautreaux* case in the Supreme Court, see POLIKOFF, *supra* note 120, at 141-51.

146. *Hills*, 425 U.S. at 298 & n.15.

147. *Id.* at 302 (citing 42 U.S.C. § 3608(d)(5) [now § 3608(e)(5)]). This FHA provision, which is now often called the "affirmatively furthering" mandate, was little used for decades, but has in recent times become a possible source for curbing segregated suburbs' opposition to affordable housing projects. *See infra* notes 450–57 and accompanying text.

148. *Hills*, 425 U.S. at 301.

housing programs."[149] Justice Stewart noted that Section 8-funded projects did not require local-government approval,[150] but he made clear that local governments could still insist that these projects comply with their zoning restrictions.[151] The Court concluded that the metropolitan-wide relief it was authorizing "would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws."[152]

The second new decision important for *Arlington Heights* was *Washington v. Davis*,[153] which held that proof of discriminatory racial purpose is necessary to make out an equal protection violation. This was an employment discrimination case that challenged a qualifying test ("Text 21") used by the District of Columbia for applicants to its police force. The plaintiffs alleged that Test 21 was racially discriminatory because it disproportionately excluded Black candidates. Their claim could not be brought under Title VII of the 1964 Civil Rights Act[154]—and the Court's 1971 ruling in *Griggs v. Duke Power Co.*[155] that Title VII barred job tests with an unjustified racial impact—because Title VII at that time did not apply to federal defendants like the District of Columbia.[156] Instead, the plaintiffs based their discrimination claim on the equal protection component of the Fifth Amendment, the 1866 Civil Rights Act's § 1981, and a local anti-discrimination law.[157]

The district court upheld the validity of Test 21, but the court of appeals reversed, holding that use of this test amounted to unconstitutional racial discrimination. In reaching this conclusion, the appellate court followed *Griggs*'s impact-claim standards, declaring "that lack of discriminatory intent in designing and administering Test 21 was irrelevant."[158] The Supreme Court

149. *Id.* at 303-04. The Section 8 program was created by the 1974 Housing and Community Development Act, *see id.* at 303, and by the year of the *Hills* decision, "$22.725 billion of a total of $24.8 billion in [HUD's] new contract commitments are to be made under the § 8 program." *Id.* at 303 n.19.

150. *Id.* at 304.

151. *Id.* at 305 (noting that under the Section 8 program, "local governmental units retain the right . . . to require that zoning and other land-use restrictions be adhered to by builders").

152. *Id.*

153. 426 U.S. 229 (1976).

154. 42 U.S.C. § 2000e (2023).

155. 401 U.S. 424 (1971).

156. *See Davis*, 426 U.S. at 236 n.6.

157. *Id.* at 233. "[T]the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Id.* at 239. At the time of *Washington v. Davis*, the Court interpreted this constitutional prohibition as identical to that of the Fourteenth Amendment's equal protection mandate. *Id.*

158. *Id.* at 237.

rejected this analysis:

> However this [Title VII analysis] proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.[159]

Washington v. Davis would ultimately be seen as one of the most significant efforts by the new conservative majority of the Supreme Court to curtail litigation seeking racial equality.[160] The Court's decision to apply a "discriminatory purpose" standard to equal protection claims was also dramatic evidence of how much the Court had changed as a result of President Nixon's appointment of four new justices.[161] Justice White wrote the Court's opinion, which was joined in full only by Nixon's four appointees.[162]

For the *Arlington Heights* plaintiffs, *Washington v. Davis* was problematic not only for its holding, but also because Justice White's opinion included an even more devastating point. After recognizing that language in some of the Court's prior decisions suggested an effect standard for constitutional claims and then discounting this language,[163] he identified for disapproval a lengthy list of lower-court decisions that were seen to have adopted an effect standard.[164]A footnote listed the disapproved cases, which included the Seventh Circuit's *Arlington Heights* decision.[165]

Justice Stevens, who had been elevated to the Court from the Seventh Circuit on December 19, 1975, filed a concurring opinion in which he "specifically . . . express[ed] no opinion on the merits of the

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159. *Id.* at 247–48.

160. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 785–86 (7th ed. 2023); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 951–56 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–20 (1987).

161. *See supra* note 120 and accompanying text.

162. Justice Stewart joined the Court's opinion on the constitutional issue, but not its concluding part that ruled against the plaintiffs' non-constitutional claims. *Davis*, 426 U.S. at 248–52.

163. *Id.* at 242–43.

164. *Id.* at 245 (concluding that "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement").

165. *Id.* at 244 n.12. This list also included three other decisions that had been important precedents for the *Arlington Heights* plaintiffs. *See id.* (identifying, as disapproved of, Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), and Hawkins v. Town of Shaw, 461 F.2d 1171 (1972) (en banc), which had been the basis for the Fifth Circuit's decision in *United Farmworkers*, *see supra* note 106).

cases listed" in this footnote.[166] Justice Brennan, joined by Justice Marshall, filed a dissent that was limited to the plaintiffs' non-constitutional claims but also disapproved of this footnote.[167] Despite these views, however, the *Arlington Heights* plaintiffs now faced a Court that required intentional discrimination for an equal protection violation and a majority of justices who had expressing disagreement with the decision below.

In early September, the *Arlington Heights* defendants filed a supplemental brief, arguing that the Court's new decisions supported their view that the Village's refusal to rezone the MHDC property was not unconstitutional.[168] The plaintiffs' reply brief dealt mostly with *Washington v. Davis*, arguing that its statement that the required invidious purpose could be "inferred from the totality of the relevant facts" and that the record of discrimination here justified affirming the Seventh Circuit's decision.[169] The plaintiffs' brief also devoted a section to their FHA claim, noting that *Washington v. Davis* had distinguished between the proof required in equal protection claims and those under a statute like Title VII and arguing that the FHA, like Title VII, should be construed to ban practices with unjustified discriminatory effects.[170] Whether these arguments would be persuasive, however, there was no denying that *Washington v. Davis* had changed the legal landscape and had relieved the Village-petitioners of their traditional burden of having to persuade the Court that the decision under review was wrong.

Oral argument took place on October 13, 1976, with Justice Stevens absent.[171] Both advocates began by declaring favorite

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166. *Id.* at 254 n.* (Stevens, J., concurring); *see also id.* at 256 (making the same point).

167.

> I feel constrained to comment upon the propriety of footnote 12 . . . . One of the cases "disapproved" therein is presently scheduled for plenary consideration by the Court in the 1976 Term [citing *Arlington Heights*]. If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.

Id. at 257 n.1.

168. Petitioners' Supplemental Brief, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (No. 75-616), 1976 WL 194238 (1976).

169. Respondents' Reply to Petitioners' Supplemental Brief, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (No. 75-616), 1976 WL 181308 (1976). The plaintiffs argued that, because the record here contains "substantial proof of Arlington Heights's discriminatory racial purpose in blocking Lincoln Green," *id.* at *3, the Seventh Circuit's *judgment*, as opposed to its *opinion*, was not disapproved by nor did it conflict with *Washington v. Davis*. *Id.*

170. *Id.* at *10–12.

171. Stevens did not participate in *Arlington Heights* at the Supreme Court level because of his practice of recusing himself from all Seventh Circuit cases in which he'd voted on an en banc petition while a member of that court. *See* JOHN C. TUCKER, TRIAL AND ERROR: THE EDUCATION OF A TRIAL LAWYER 235

themes: Jack Siegel for the defendants ("This is a zoning case."[172]) and Bill Caruso for the plaintiffs ("This is not a garden variety zoning case. This is a case of racial discrimination."[173]). Both were asked about the plaintiffs' standing to sue[174] and the number of Blacks currently living in Arlington Heights.[175] Caruso was asked how many more Blacks would be needed to defeat the view that Arlington Heights was racially exclusionary and whether, if the Village were required to accept this project, wouldn't "every village in this country have to have low cost housing?"[176] Siegel noted that the trial court had found no intentional discrimination,[177] and the justices pressed Caruso on this point, asking if he weren't "asking us to set aside the Court of Appeals' affirmance of the District Court's findings that there was no purposeful intent."[178] Toward the end of Caruso's argument, questions turned to the Fair Housing Act, and he insisting that the plaintiffs had pressed their FHA claim in both the trial and appellate courts and were again doing so here as an alternative ground for affirming the Seventh Circuit's judgment.[179]

(2005) (describing this practice in another Supreme Court case at the time).

172. Transcript of Oral Argument 1, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (No. 75-616) (Oct. 13, 1976).

173. *Id.* at 14.

174. *Id.* at 8-13 (Siegel's argument), 17–18 (Caruso's argument).

175. *Id.* at 32–34 (Siegel's argument) (claiming an increase to 200 from 27 in the 1970 census), 20–21 (Caruso's argument) (stating that the number may have increased by 100 since the 1970 census and noting testimony in the record that 3,500 Blacks would be expected to live in Arlington Heights based on its size and housing stock if the market there were free from racial discrimination).

176. *Id.* at 22. Caruso responded that Arlington Heights was unique based on its huge recent growth and its record of having approved scores of market-rate apartment developments. *Id.* at 24–25. But, pointed out a justice, the Village's zoning authorities had presumably weighed Lincoln Green's potential benefits and detriments in deciding against it, *id.* at 25, and didn't *Euclid* bar federal courts from reviewing these considerations? *Id.* at 18–19. Caruso responded that "*Euclid* does not override everything. Zoning is not above all." *Id.* at 19.

177. *Id.* at 14.

178. *Id.* at 17. Caruso responded by arguing that "the *Washington v. Davis* standard allows the determination of purpose and intent from the totality of the facts and that the totality of the facts here show the racial purpose for denying this development." *Id.* This did not directly answer the issue of how appellate courts should treat a trial judge's finding of "no purposeful intent," but it did make a point that Caruso would often repeat—that "the totality of the facts," which *Davis* said could be used to infer an invidious racial purpose, did establish an illegal intent here. And each time he used the "totality of facts" phrase, Caruso asserted that Lincoln Green was just as compatible with Arlington Heights's zoning policies as many of the market-rate apartment projects that the Village had approved. *Id.* at 24, 26.

179. *Id.* at 27–29. Here Justice White, noting that an appellate court should normally decide non-constitutional issues before moving on to a constitutional question, suggested that a "logical inference" was that the Seventh Circuit had held "that there was nothing to the statutory claim." *Id.* at 28–29. Caruso disagreed, *id.* at 30, and he "urge[d] the Court to consider . . . [the FHA claim]

B. Decision

1. Background and Overview

On January 11, 1977, the Supreme Court rendered its decision in *Arlington Heights* in an opinion by Justice Powell that reversed the Seventh Circuit.[180] As in *Warth*, Powell's opinion was joined in full by four other justices—Powell's three fellow Nixon appointees and Justice Stewart. Justice Marshall, joined by Justice Brennan, concurred in parts of Powell's opinion, but dissented as to the rest. Justice White dissented in an opinion that argued in favor of reinstating the trial court's decision for the defendants. Justice Stevens, as noted earlier, did not participate.[181]

Justice Powell's opinion for the Court was in five parts: (I) facts and proceedings below; (II) standing; (III) the proper Equal Protection Clause standard (following *Washington v. Davis*) and a list of evidentiary sources identified as "subjects of proper inquiry" to be used in applying this standard; (IV) application of Part III's rules to the *Arlington Heights* facts; and (V) conclusion (including directions regarding the Fair Housing Act claim).

Powell began with a paragraph that provided an overview of the case and then in Part I described the facts, claims, and proceedings below.[182] He noted that the plaintiffs' complaint alleged racial discrimination in violation of both the Fourteenth Amendment and the Fair Housing Act[183] and sought declaratory and injunctive relief.[184] He also mentioned that, while funds under the § 236 housing-assistance program that MHDC had originally relied on for Lincoln Green had been suspended, "[p]rojects which formerly could claim § 236 assistance . . . will now generally be eligible for aid under § 8."[185]

2. Standing

Part II's standing analysis began with the observation that this case was "similar in some respects to" *Warth v. Seldin*,[186] where the

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as well as the constitutional issue." *Id.* at 29.

180. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

181. *See supra* note 171 and accompanying text.

182. 429 U.S. at 254–60.

183. *Id.* at 254.

184. *Id.* at 258.

185. *Id.* at 255 n.2; *see also id.* at 261 n.7 (brushing aside the defendants' suggestion that suspension of the § 236 housing-assistance program would prevent MHDC from constructing Lincoln Green by noting that the Court need not decide "whether termination of all available assistance programs would preclude standing . . . in view of the current likelihood that subsidies may be secured under § 8").

186. *Id.* at 260 (referring to Warth v. Seldin, 422 U.S. 490 (1975)).

Court a year earlier had ruled against the standing of a variety of plaintiffs who sought to challenge a suburb's exclusionary zoning laws.[187] Here, however, Justice Powell distinguished *Warth* and concluded that, because "at least one individual plaintiff" has standing, the Court would "proceed to the merits."[188]

That individual was Willie Ransom, whose testimony that he would probably move to Lincoln Green if it were built asserted a particularized injury "that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory."[189] Having opined earlier that Lincoln Green could be funded under an alternative federal program to the one MHDC had originally relied on,[190] Justice Powell determined that a plaintiffs' victory here would probably result in Lincoln Green being built.[191] Therefore, Ransom's injury, in contrast to the situation in *Warth*, "is not a generalized grievance," but rather "focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court."[192] Thus, the Court concluded: "Unlike the individual plaintiffs in *Warth*, Ransom had adequately averred an 'actionable causal relationship' between Arlington Heights' zoning practices and his asserted injury."[193]

As for MHDC's standing, Justice Powell concluded that the developer here, unlike the one in *Warth*, clearly met the Article III "injury" requirement, in part because it had "expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning."[194] True, "MHDC would still have to secure financing, qualify for federal subsidies, and carry through with construction,"[195] but Justice Powell noted that "all housing developments are subject to some extent to similar uncertainties."[196] The economic losses that MDHC had already incurred were sufficient to establish an injury "likely to be redressed by a favorable decision."[197]

The Court then noted that economic losses were not "the only kind of injury that can support a plaintiff's standing."[198] In this case, MHDC's real "interest in building Lincoln Green stems not from a

187. *See supra* notes 124-41 and accompanying text.
188. *Arlington Heights*, 429 U.S. at 264.
189. *Id.*
190. *See supra* note 185.
191. *Arlington Heights*, 429 U.S. at 264.
192. *Id.*
193. *Id.* (quoting *Warth*, 422 U.S. at 507). The Court did not mention any of the other individual plaintiffs, including Maldonado, whom the trial judge had identified as the one who seemed to him to have standing sufficient to allow proceeding to the merits. *See supra* note 75 and accompanying text.
194. *Arlington Heights*, 429 U.S. at 262.
195. *Id.* at 261 (footnote omitted).
196. *Id.*
197. *Id.* at 262.
198. *Id.* at 262–63.

desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce,"[199] an interest that, given "[t]he specific project MHDC intends to build, . . . provides that 'essential dimension of specificity' that informs judicial decisionmaking."[200] Further, Justice Powell pointed out that MHDC's *Euclid*-based claim "to be free of arbitrary or irrational zoning decisions" was never "the heart of this litigation,"[201] which was instead its "claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment."[202] But this raised the question whether MHDC, as a corporation with no racial identify of its own and thus not the direct target of the Village's alleged discrimination, could overcome the prudential limitation on standing that ordinarily bars a party from asserting the rights of others.[203]

Having come all this way, the Court then concluded not to decide the issue of MHDC's standing, on the ground that it was not necessary because "we have at least one individual plaintiff [Ransom] who has demonstrated standing to assert these rights as his own."[204] Justice Powell's opinion cited no authority for this "one plaintiff is enough" principle, but it became one reason that *Arlington Heights* is cited so often. After the *Arlington Heights* decision, *all* multi-plaintiff cases—not just those involving constitutional challenges to exclusionary zoning—could go forward if only one of the various plaintiffs satisfied the standing requirements.[205]

Further, *Arlington Heights* has also proved important for establishing the standing of developers like MHDC. This is because, for reasons discussed below, future exclusionary zoning cases would be brought under the Fair Housing Act as well as constitutional provisions.[206] Having made clear that MHDC satisfied the Article III—if perhaps not the prudential—requirements of standing, the *Arlington Heights* opinion opened the way for future developers to bring such FHA claims, which the Court had earlier ruled were not subject to any prudential limitations on standing.[207]

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199. *Id.* at 264.

200. *Id.* at 263 (quoting Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221 (1974)).

201. *Id.*

202. *Id.*

203. *See id.*

204. *Id.* at 264. In a footnote to this statement, Justice Powell wrote: "Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Id.* at 264–65 n.9.

205. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

206. *See infra* Parts IV.A, IV.B, and V.A.

207. *See* Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209-12 (1972).

3. The Equal Protection Claim: Proper Standards and Relevant Evidentiary Sources

In Part III of the Court's opinion, Justice Powell dealt with the proper standard for evaluating the plaintiffs' equal protection claim. He began by holding that this standard was governed by the Court's decision a year earlier in *Washington v. Davis*, i.e., that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[208]

For Justice White, this would have been enough. His concurrence opined that the Court should simply vacate the Seventh Circuit's judgment and "remand the case for consideration of the [Fair Housing Act] issue and, if necessary, for consideration of the constitutional issue in light of *Washington v. Davis*."[209] But Justice Powell chose instead to flesh out the meaning of the *Davis* standard and to provide a roadmap for how courts should apply its "invidious discriminatory purpose" requirement.[210] His determination to do this and his ability to convince all of the other participating Justices to join him in this endeavor—an effort that Justice White saw as "wholly unnecessary"[211]—is what made the Court's decision in *Arlington Heights* so important.

Justice Powell first explained that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."[212] He noted that legislatures and administrative bodies rarely make a decision "motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."[213] Because such bodies "are properly concerned with numerous competing considerations," courts generally refrain from critically reviewing their decisions.[214] But, Justice Powell wrote, "racial discrimination is not just another competing consideration."[215] Thus, he concluded, "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the

208. *Arlington Heights*, 429 U.S. at 265. For more on *Washington v. Davis*, see *supra* notes 153-65 and accompanying text.

209. *Arlington Heights*, 429 U.S. at 273 (White, J., concurring). This concurrence also criticized the Court for its "wholly unnecessary" discussion of the *Davis* standard, because Justice White—the author of that opinion—viewed the trial court's finding that the defendants were motivated by a legitimate concern (i.e., protecting property values and the integrity of the Village's zoning plan)—which the Seventh Circuit had accepted and the Supreme Court here "properly refuses to overturn"—as sufficient under *Davis* to dispose of the plaintiffs' equal protection claim, even if the Court chose to rule on it rather than remanding it along with their statutory claim. *Id.*

210. *Id.* at 265–68.

211. *Id.* at 273 (White, J., concurring).

212. *Id.* at 265.

213. *Id.*

214. *Id.*

215. *Id.*

decision, this judicial deference is no longer justified."[216]

Later in the *Arlington Heights* opinion, Justice Powell added a further important refinement to the "a motivating factor" test. He declared in a footnote that proving the defendant's decision "was motivated in part by a racially discriminatory purpose" would not necessarily invalidate it, but rather would merely shift "to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[217] If the defendant met this burden, its decision would not be unlawful.[218]

Thus, in a single paragraph in Part III and a later footnote, the *Arlington Heights* opinion set the standard for "how much" racial discrimination must be shown for an equal protection claim under *Washington v. Davis*'s discriminatory-purpose requirement. As Justice White's concurrence noted, the Court's articulation of this standard was "nowhere mentioned in *Davis*" and indicated the majority's view that applying *Davis* to the *Arlington Heights* facts "calls for substantial analysis."[219]

Quite so. The Court in *Arlington Heights* was indeed making key modifications to the *Washington v. Davis* standard. Furthermore, its determination to do so was a conscious decision, underscored by the fact that, on the same day it produced the *Arlington Heights* opinion, the Court decided another case, *Mt. Healthy City School Dist. Bd. of Education v. Doyle*,[220] that adopted this same "a motivating factor" standard for First Amendment retaliation claims.[221] *Mt. Healthy* was a unanimous opinion that cited *Arlington Heights* for the "motivating factor" test,[222] and, in turn, the *Arlington Heights* opinion cited *Mt. Healthy*.[223]

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216. *Id.* at 265–66.

217. *Id.* at 270–71 n.21.

218. *Id.*

219. *Id.* at 272 (White, J., concurring).

220. 429 U.S. 274 (1977).

221. *Id.* at 287.

222. *Id.* at 287 & n.2. As a 9-0 decision, *Mt. Healthy* meant that the two Justices who did not join in Part III of the *Arlington Heights* opinion (White and Stevens, *see supra* notes 180-81 and accompanying text) did join in *Mt. Healthy*'s endorsement of the "a motivating factor" standard for First Amendment retaliation claims.

223. *Arlington Heights*, 429 U.S. at 271 n.21. Not only was this a conscious effort by the Court, it turned out to be a long-lasting one. The "a motivating factor" test first articulated in *Arlington Heights* and *Mt. Healthy* have continued to this day to govern their respective areas of equal protection and First Amendment retaliation claims. *See* Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1869, 1915 (2020) (citing *Arlington Heights* in applying the "a motivating factor" standard to a race-based equal protection claim); Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945, 1955 (2018) (holding that *Mt. Healthy* provides the correct standard for assessing this First Amendment retaliation claim). In other types of civil rights claims, however, the Court has decided this "how much" (causation) issue in other ways. *See* Comcast Corp. v. Nat'l Ass'n of Afr.Am.-Owned Media, 140 S. Ct. 1009, 1014

Another noteworthy feature about Part III's effort to establish standards and a methodology for evaluating proof of a defendant's racial intent was the absence of any reference to the Court's 1973 decision in *McDonnell Douglas Corp. v. Green*,[224] which had, in a unanimous opinion by Justice Powell, created a burden-shifting framework for dealing with this same issue in employment discrimination claims under Title VII.[225] The framework that Justice Powell created in *McDonnell Douglas* not only became the favored methodology used in countless Title VII intent cases, but it also was eventually extended to most other civil rights areas, including housing discrimination.[226] In *Arlington Heights*, however, Justice Powell did not mention *McDonnell Douglas* nor explain why its framework could not be used in this case, leaving one to wonder why he felt the proper standards for judging racial intent in equal protection challenges to exclusionary zoning must be different from those applicable to the same issue in Title VII cases.[227] Whatever his thinking, the result was clear: the Court in *Arlington Heights* meant to establish an alternative method, distinct from *McDonnell Douglas*, for evaluating proof of a defendant's discriminatory intent, and later lower-court decisions would indeed apply these methods separately, sometime even the same case.[228]

In the remaining paragraphs in Part III of the *Arlington Heights* opinion, Justice Powell noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[229] He then identified six "subjects of proper inquiry in determining whether racially discriminatory intent existed."[230] Again, Justice White's concurrence criticized this

(2000) (holding that the "but for" causation standard governs racial discrimination claims under 42 U.S.C § 1981 and is also the default standard for other statutory civil rights claims).

224. 411 U.S. 792 (1973).

225. For a description of *McDonnell Douglas*'s burden-shifting framework, see *supra* note 80.

226. *See* SCHWEMM, *supra* note 11, § 11:2 nn.26–29 (gathering housing discrimination cases).

227. Both opinions did, however, identify as relevant some of the same factors (e.g., the defendant's legitimate reasons for its challenged action and the plaintiff's meeting the defendant's legitimate requirements). *See McDonnell Douglas*, 411 U.S. at 802–03; *Arlington Heights*, 429 U.S. at 269–70.

228. Recent examples of housing discrimination cases applying both methods include Oxford House, Inc. v. Twp. of N. Bergen, No. 22-2336, 2023 WL 4837835, at *3-6 (3d Cir. July 28, 2023); Brookline Opportunities, LLC v. Town of Brookline, No. 21-CV-770-PB, 2023 WL 4405659, at *9-12 (D. N.H. July 7, 2023); Nat'l Fair Hous. All. v. Bank of Am., N.A., No. CV SAG-18-1919, 2023 WL 2633636, at *15 (D. Md. Mar. 24, 2023); *see also* SCHWEMM, *supra* note 11, at § 11:2 n.56, para. 2 (gathering FHA intent-based cases that have relied on the *Arlington Heights* method).

229. *Arlington Heights*, 429 U.S. at 266.

230. *Id*. at 268. These six subjects are discussed in greater detail in Part III.C.1. *See infra* notes 273–306 and accompanying text.

effort, opining that there was "no need for this Court to list various 'evidentiary sources' or 'subjects of proper inquiry' in determining whether a racially discriminatory purpose existed,"[231] but Justice Powell's determination to do so would prove to be one of the most enduring features of the *Arlington Heights* opinion.[232]

The first evidentiary item that Justice Powell identified was, as *Washington v. Davis* had recognized, whether the impact of the challenged action "'bears more heavily on one race than another.'"[233] This disparate impact, according to the *Arlington Heights* opinion, "may provide an important starting point,"[234] but it would not in most cases be "determinative, and the Court must look to other evidence."[235] The opinion then listed and briefly commented on five other potential sources of intent evidence:

> the historical background of the decision;[236]
>
> the specific sequence of events leading up to the challenged decision;[237]
>
> departures from the normal procedural sequence;[238]
>
> substantive departures;[239] and

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231. 429 U.S. at 272 (White, J., concurring).

232. *See infra* notes 341–46 and accompanying text.

233. *Arlington Heights*, 429 U.S. at 266 (quoting *Davis*, 426 U.S. at 242).

234. *Id.*

235. *Id.* According to Justice Powell, the impact evidence would suffice only in those "rare" cases where its size was "as stark as that in *Gomillion* or *Yick Wo*." *Id.* (referring to Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

236. *Id.* at 267. This factor, according to Justice Powell, would be "particularly [noteworthy] if it reveals a series of official actions taken for invidious purposes." *Id.* (citing, *inter alia*, Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 207 (1973)). For more on the *Keyes* case, see *infra* notes 318–36 and accompanying text.

237. 429 U.S. at 267. As for this factor, Justice Powell noted, with respect to the *Arlington Heights* facts, that "if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case." *Id.* A footnote to this passage described two cases as examples of how a sudden change might indicate a racial purpose. *Id.* at 267 n.16 (describing Progress Development Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) and Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970)). For more on the *Kennedy Park* case, see *supra* notes 37–43 and accompanying text.

238. 429 U.S. at 267. Justice Powell made no comment about this factor, but later in his discussion of how the identified factors applied to the *Arlington Heights* facts, he observed that the plaintiffs' "zoning request progressed according to the usual procedures." *Id.* at 269.

239. *Id.* at 267. As to this factor, Justice Powell commented that it might be "particularly [noteworthy] if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* A footnote to this comment described *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) as an example of how courts might infer racial purpose from a municipality's refusal to rezone land for an affordable housing project absent a legitimate zoning rationale. 429 U.S. at 267 n.17. For more on the *Dailey* case,

the legislative or administrative history.[240]

Justice Powell then concluded Part III by noting that this list of "subjects of proper inquiry" relevant to the discriminatory-intent issue did not "purport[] to be exhaustive."[241] He did, however, announce that in the opinion's next section, he would address the *Arlington Heights* facts with these topics "in mind,"[242] and, in fact, Part IV's analysis dealt with each of these topics in the order he'd presented them in Part III and with no others.[243]

4. The Equal Protection Claim: Applying the Proper Standards to the Arlington Heights Facts

In Part IV of the *Arlington Heights* opinion,[244] the Supreme Court engaged in the highly unusual practice of making fact-findings relating to the case before it.[245] Justice Powell began Part IV by reviewing the lower courts' findings concerning the Village's

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see *supra* notes 37-43 and accompanying text.

240. 429 U.S. at 268. Here Justice Powell added the comment that members of the decisionmaking body might, in "some extraordinary instances," be called "to testify concerning the purpose of the official action." *Id.* He then noted, however, that "such testimony frequently will be barred by privilege," *id*. (citing two cases and a treatise), and added the following footnote to this passage:

> This Court has recognized, ever since Fletcher v. Peck, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). The problems involved have prompted a good deal of scholarly commentary [citing four sources].

Id. at 268 n.18.

241. *Id*. at 268.

242. *Id*.

243. *Id*. at 269–70.

244. Part IV, unlike Parts I-III, was not joined by Justices Brennan and Marshall, which meant it represented the views of only a five-justice majority. *See id.* at 271–72 (Marshall, J., with whom Brennan, J., joins, concurring in part and dissenting in part).

245. *See supra* note 100 (setting forth Fed. R. Civ. P. 52(a)'s "clearly erroneous" standard for appellate review of a federal trial court's findings of fact in a nonjury trial).

The Court's finding facts about the case being reviewed (sometimes called "adjudicative facts") should be distinguished from its determining facts involving more generalized statements about the world (sometimes called "legislative facts"). *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1264-66 (2012) (noting this distinction as first pointed out by Kenneth Culp Davis in a 1942 article). In the post-*Arlington Heights* era, the Court has regularly engaged in legislative fact-finding, *see Larsen, supra,* at 1271–77, but has generally avoided adjudicative fact-finding. *See infra* notes 270–71 and accompanying text (describing Supreme Court decisions after *Arlington Heights* requiring appellate-court deference to a trial judge's findings of fact).

purposes in rejecting MHDC's rezoning petition. He noted that the district court ruled that "the evidence 'does not warrant the conclusion that [opposition to minority groups] motivated the defendants'"[246] and that the Seventh Circuit "approved" this ruling based on its determination that "[t]he evidence does not necessitate a finding that Arlington Heights administered [its buffer] policy in a discriminatory manner."[247] As noted above, this was enough for Justice White—along with his view that these findings should not be overturned here—to defeat the plaintiffs' equal protection claim under *Washington v. Davis*'s racial-purpose requirement, and he criticized as "unnecessary" the Court's "re-examination of concurrent findings of fact below."[248]

As we have seen, however, the *Arlington Heights* opinion had earlier made an important modification to *Washington v. Davis* by adding the "a motivating factor" test.[249] This would have justified a remand to allow the lower court to apply this new test in the first instance,[250] which is what Justices Brennan and Marshall and also Justice White advocated.[251]

But Justice Powell, on behalf of the Court's five-member majority, chose a different path. As he put it, "[w]e also have reviewed the evidence,"[252] and not merely under the traditional "clearly erroneous" standard required of appellate courts.[253] Instead, the Court made its own findings and ultimately determined that the evidence failed to show "that discriminatory purpose was a motivating factor in the Village's decision."[254]

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246. *Arlington Heights*, 429 U.S. at 269 (quoting 373 F. Supp. at 211).

247. *Id.* (quoting 517 F.2d at 412).

248. *Id.* at 272 (White, J., concurring).

249. *See supra* notes 212–19 and accompanying text.

250. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982) (noting that "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue"). For a more recent statement of the Court's preference for this approach, see *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1018 (2020) (noting that "we are a court of review, not of first view" and therefore remanding the case to allow the lower court "the chance to determine the sufficiency of [the issue] under the correct legal rule in the first instance").

251. *Arlington Heights*, 429 U.S. at 271–72 (opinion of Justices Brennan and Marshall); *id.* at 272 (opinion of Justice White).

252. *Id.* at 269.

253. *See supra* note 100, *infra* notes 270-71 and accompanying text (describing Fed. R. Civ. P. 52(a)'s "clearly erroneous" standard). A finding is not "clearly erroneous" unless "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Further: "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 573–74.

254. *Arlington Heights*, 429 U.S. at 270; *see also id.* at 270–71 n.21 (reiterating the conclusion that the plaintiffs "failed to make the required threshold showing" of proving that "the decision by the Village was motivated

Justice Powell's two-paragraph review of the evidence followed the list of "subjects of proper inquiry" set forth in Part III. He thus began with the "impact of the Village's decision," which he found did "arguably bear more heavily on racial minorities" based on statistics showing that "[m]inorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green."[255] This impact, however, was not large enough to establish discriminatory purpose without resort to other evidence,[256] and, in Justice Powell's view, all of these other evidentiary considerations favored the Village. Thus, he determined:

- "[T]here is little about the sequence of events leading up to the decision that would spark suspicion."[257] This was because "[t]he area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map," and also "[s]ingle-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use."[258]
- MHDC's "rezoning request progressed according to the usual procedures."[259]
- "The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions."[260]
- "There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity [because the] Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this

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in part by a racially discriminatory purpose").

255. *Id.* at 269.

256. *See supra* notes 234–35 and accompanying text.

257. *Arlington Heights*, 429 U.S. at 269.

258. *Id.*

259. *Id.* In a footnote to this finding, Justice Powell did note one "curious" procedural departure—"that the Village Planner, the staff member whose primary responsibility covered zoning and planning matters, was never asked for his written or oral opinion of the rezoning request"—but he discounted this fact because the plaintiffs "failed to prove at trial what role the Planner customarily played in rezoning decisions, or whether his opinion would be relevant to [plaintiffs] claims." *Id.* at 269 n.19. Justice Powell also noted that the Village's Plan Commission had "even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing," *id.* at 269-70, apparently by way of suggesting that the Village's procedural departures were actually designed to *favor* the plaintiffs.

260. *Id.* at 270.

case."[261]

- "Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose."[262]

Based on these views, Justice Powell concluded not only that "the evidence does not warrant overturning the concurrent findings of both courts below," but also that the plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[263] According to Justice Powell, "this conclusion ends the constitutional inquiry," and the Seventh Circuit's "further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance."[264] In short, Part IV held that the plaintiffs lost on their equal protection claim.

5. The Fair Housing Act Claim

In a brief concluding paragraph that was labeled Part V, the Court noted that the plaintiffs' complaint "also alleged that the refusal to rezone violated the Fair Housing Act of 1968" and they "continue to urge here" that the defendants' action "did violate [the

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261. *Id.*

262. *Id.* A footnote to this finding endorsed the trial court's barring plaintiffs from:

> questioning Board members about their motivation at the time they cast their votes . . . in the circumstances of this case [because plaintiffs] were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision.

Id. at 270 n.20; *see also infra* note 306.

263. 429 U.S. at 270. Justice Powell here appended a footnote that, though not relevant to the *Arlington Heights* litigation, would prove to be extremely important as a further addition to the meaning of the "a motivating factor" test that his opinion in Part III had added to *Washington v. Davis*'s purposeful-discrimination standard:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case [plaintiffs] failed to make the required threshold showing.

Id. at 270-71 n.21 (citation omitted). For more on the importance of *Arlington Heights*'s version of the discrimination-intent standard in subsequent civil rights cases, see *infra* notes 341-43 and accompanying text.

264. *Arlington Heights*, 429 U.S. at 271.

FHA's] § 3604 or § 3617."[265] The Seventh Circuit "did not decide th[is] statutory question,"[266] and Justice Powell concluded the *Arlington Heights* opinion by declaring that "[w]e remand the case for further consideration of [plaintiffs'] statutory claims."[267] Thus, the plaintiffs' FHA claim had survived and would be decided in the litigation's next phase by the Seventh Circuit.

C. Critique of Justice Powell's Handling of the Equal Protection Claim

1. Justice Powell's Analysis of the Intent Evidence

There is much to criticize about Part IV of Justice Powell's opinion in *Arlington Heights*. For starters, the whole fact-finding effort should never have been undertaken in the first place because, as Justice White pointed out,[268] it violated the long-established rule that appellate courts may only examine a trial judge's factual findings based on the deferential "clearly erroneous" standard.[269] Indeed, the Court in two decisions a few years later criticized appellate courts for not sufficiently deferring to trial-court findings on the defendant's discriminatory intent;[270] one of these noted, as a reason for this rule of appellate deference, "[t]he trial judge's major role in the determination of fact, and with experience in fulfilling that role comes expertise."[271] (Justice Powell did not join this

265. *Id.*

266. Here Justice Powell lightly chastised the appellate court for "proceeding in a somewhat unorthodox fashion" by deciding a constitutional issue that might have been avoided by first ruling on a non-constitutional matter. *Id.* For a recent reference to this "canon of constitutional avoidance," see United States v. Hansen, 599 U.S. 762, 781 (2023).

267. *Arlington Heights*, 429 U.S. at 271.

268. *Id.* at 272 (White, J., concurring).

269. *See supra* note 100 (setting forth the text of the "clearly erroneous" standard in Fed. R. Civ. P. 52(a)).

270. *See* Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573–76 (1985) (Title VII case); Pullman-Standard v. Swint, 456 U.S. 273, 287–90 (1982) (same). Justice White wrote the Court's opinions in both of these cases. According to the *Pullman-Standard* opinion: "'[F]actfinding is the basic responsibility of district courts, rather than appellate courts.' . . . [Under Title VII,] discriminatory intent is a finding of fact to be made by the trial court . . . . Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a)." 456 U.S. at 287-90 (citation and footnote omitted). This view has endured. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2348–49 (2021) (relying on *Pullman-Standard* and *Anderson* in holding that appellate review of a district court's no-discriminatory-purpose finding "is for clear error" and then affirming that finding based in part on the Court's approval of the district judge's use on the factors set forth in Part III of the *Arlington Heights* opinion in analyzing the defendants' intent).

271. *Anderson*, 470 U.S. at 574–75. Further, in commenting on which tribunal has "superior knowledge" or "greater insight" into the defendants'

opinion.[272])

More importantly, Justice Powell's fact analysis in *Arlington Heights* was often flawed and certainly raised as many questions as it answered. Start with his treatment of the racial impact of the defendants' challenged action, which he found to be "arguably" shown based on the difference between the minority make-up of Lincoln Green's eligible population (40%) and that of the overall metropolitan population (18%).[273] But focusing on this comparison says nothing about the motives of Arlington Heights's officials, because the same statistical disparity would exist if Lincoln Green had been proposed for *any* town in the Chicago area, including a well-integrated suburb or even the city itself. Indeed, using this

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"state of mind" in rejecting the plaintiff, the *Anderson* opinion noted:

> Even the trial judge . . . can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. Our task—and the task of appellate tribunals generally—is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous.

Id. at 580–81.

272. *Id*. at 581 (Powell, J., concurring) (endorsing the appellate court's "comprehensive review of the entire record of this case"). Another example of Justice Powell's proclivity for appellate fact-finding that pre-dated *Arlington Heights* was his opinion for the Court in the *McDonnell Douglas* case, which determined, despite the need for a remand for a new trial, that some key issues at this new trial should be considered established based on his view of the facts:

> If the evidence on retrial is substantially in accord with that before us in this case, we think that [plaintiff] carried his burden of establishing a prima facie case of racial discrimination and that [defendant] successfully rebutted that case. . . . The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

It is worth speculating *why* Justice Powell often chose to make his own findings of fact. One possibility is that Powell, who had never been a judge at any level before joining the Court, did not fully accept the role that appellate courts should generally defer to a trial court's fact-findings. This may be true about Powell, but it is not explained by his lack of prior lower-court experience, for the same could be said about Justice White, who in *Arlington Heights* and elsewhere was a strong proponent of deferring to facts found below. Further, three of the other Justices who joined Powell's fact-finding opinion in *Arlington Heights* (Stewart, Burger, and Blackmun) did have prior appellate-court experience. A more likely explanation for Powell's effort in Part IV of the *Arlington Heights* opinion was his desire to use this case to accomplish a "teaching" function, i.e., as a guide for how his articulation of the purposeful-discrimination standard should be applied by the lower courts in future cases. *See infra* note 339 and accompanying text (noting how Powell in the *Bakke* opinion took the opportunity to provide guidance for future affirmative action cases beyond the one he was deciding).

273. *Arlington Heights*, 429 U.S. at 269. For the rest of this section, it is worth noting that the only topic identified by Justice Powell in Part III that he did not explicitly deal with in Part IV was the "historical background" of the Village's decision to reject Lincoln Green. *See id*. at 264–70.

comparison simply reflects the fact that minorities generally have less income than whites, which presumably means it would also hold true in every metropolitan area in the country. As Justice Powell had observed earlier in Part III, showing such an impact "is merely to acknowledge the 'heterogeneity' of the Nation's population"[274] and thus is "of limited probative value" in revealing a particular defendant's discriminatory purpose.[275]

Justice Powell's impact analysis here is particularly surprising given the Court's recent experience in evaluating the racial impact of a defendant's challenged action in employment discrimination cases. In *Washington v. Davis* itself, the Court considered the impact of a defendant's job test, as it regularly had in the wake of its 1971 decision in *Griggs v. Duke Power Co.*[276] In these cases, the Court focused on the racial impact *caused* by the defendant's use of the challenged screening device, i.e., an impact that could be fairly seen as probative of the racial result desired by the particular defendant.[277]

But in *Arlington Heights*, Justice Powell simply pointed to region-wide racial statistics that the Village neither caused nor could be fairly held responsible for. The record did contain evidence tending to show that the Village had applied its zoning policies more favorably to market-rate apartment proposals than Lincoln Green, but the Court did not mention this evidence, at least not in connection with its finding regarding disparate impact.[278]

And even as to the type of impact identified by Justice Powell, he stated only that it was "arguably" shown. What does this mean? "Arguably" suggests skepticism, but instead of fleshing out whatever concerns he may have had on this point, Justice Powell simply left the subject of impact and moved on to review the other sources of intent evidence. For lower courts in future exclusionary zoning cases, *Arlington Heights* thus offered an alternative, albeit confusing, method—in addition to the *Griggs* analysis—of judging whether racial impact has been shown.[279]

Two other types of confusion were raised by Justice Powell's

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274. *Arlington Heights*, 429 U.S. at 266 n.15 (quoting Jefferson v. Hackney, 406 U.S. 535, 548 (1972)).

275. *Id.*

276. 401 U.S. 424 (1971).

277. *See generally* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 542 (2015) (noting, based on Title VII precedent, that a disparate-impact claim "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement . . . protects defendants from being held liable for racial disparities they did not create.").

278. Justice Powell did mention this evidence later in Part IV in connection with his review of a different evidentiary factor. *See infra* notes 290-93 and accompanying text.

279. The proper methodology for proving disparate impact would, indeed, become a problematic issue in future FHA cases. *See* SCHWEMM, *supra* note 11, at § 10:6 nn.15–27 and accompanying text.

impact analysis in *Arlington Heights*. First, while *Griggs* and other prior employment cases had measured impact by relative *acceptance* rates, Powell's *Arlington Heights* analysis focused on those that the Village *rejected*, a methodological change that can lead to significantly different legal conclusions.[280] Second, the Court in subsequent cases would limit *Griggs*'s disparate-impact theory to cases that challenged a defendant's policies as opposed to its single-decision actions.[281] The plaintiffs' claim in *Arlington Heights*, however, was focused only on the Village's decision to reject Lincoln Green and did not challenge the defendants' general zoning policies. In recognizing that these plaintiffs had, at least "arguably," shown a racial impact, Justice Powell suggested that this type of impact proof would be appropriate in single-decision cases as well as those challenging a defendant's policies.[282]

Beyond impact, Justice Powell's findings that the other sources of evidence favored the Village were also problematic and certainly one-sided. As for the "events leading up" to the Village's decision to reject Lincoln Green, he found "little [to] spark suspicion,"[283] citing the facts that the "area around the Viatorian property has been zoned R-3 since 1959 . . . when Arlington Heights first adopted a zoning map" and "[s]ingle-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use."[284] This presumably was to be contrasted with the two other cases that Justice Powell described as "far different" in which the defendant-municipality had changed

280. *See* Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 706–07 (2016). This methodological problem was almost certainly not appreciated by Justice Powell, who was fully aware of his own limited understanding of statistical analysis. *See* JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 439 (1994) (quoting a Powell memo stating that "[m]y understanding of statistical analysis . . . ranges from limited to zero").

281. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project*, 576 U.S. at 542 (noting that disparate-impact claims under *Griggs* relying "on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity").

282. This single-decision versus policy issue was particularly important in subsequent exclusionary zoning cases based on the FHA's "segregative effect" theory. *See* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEG. & PUB. POL'Y 709, 736-38 (2017); *see also* Kate Gehling, *The Fair Housing Act after Inclusive Communities: Why One-Time Land-Use Decisions Can Still Establish a Disparate Impact*, 90 U. CHI. L. REV. 1474, 1506–12 (2023) (arguing, based in part on *Arlington Heights*, that FHA-impact claims should generally be allowed to challenge one-time land-use decisions); South Carolina State Conference-NAACP, v. Georgetown County, No. 2:22-CV-04077-BHH, 2023 WL 6317837, at *18 n.4 (D. S.C. Sept. 28, 2023) (rejecting defendant's argument that impact-based exclusionary zoning claim "should be dismissed because a one-time denial of a zoning application is not a 'policy' of discrimination").

283. *Arlington Heights*, 429 U.S. at 269.

284. *Id.*

a proposed development's favorable zoning classification to one blocking it.[285] Thus, the key to this "events leading up to" factor was seen to be a recent change. Note, however, that this means that suburbs desiring to block affordable housing projects would be best served by zoning *all* their residential land as single-family, with no changes ever being allowed for any multi-family uses. In other words, Justice Powell's treatment of this factor seemed to encourage the most extreme form of "no growth" exclusionary zoning.

In dealing with the "procedural sequence," Justice Powell found that the rezoning petition here "progressed according to the usual procedures," a finding that was based on a selective and pro-defendant view of the record. As noted earlier, he did identify one "curious" procedural departure (i.e., the Village's failure to ask its Planner's opinion on the MHDC proposal), but he discounted this because the record didn't show what role the Planner "customarily" played in such matters.[286] Here, Justice Powell failed even to mention a much more important procedural departure that the plaintiffs *had* stressed throughout the litigation—i.e., that the Village's Plan Commission was forced to hold two additional hearings to accommodate the vociferous, overflow crowds opposing Lincoln Green and that two Commission members felt compelled in their official statements to assure the local citizenry that their votes for Lincoln Green were based on good zoning and not the "social issue" raised by this proposal.[287] Justice Powell glossed over these unusual comments by simply observing that the Plan Commission members' statements "focused almost exclusively on the zoning aspects of the MHDC petition."[288] And he did the same regarding the Plan Commission's two extra hearings by describing them as an accommodation for MHDC which, in his view, meant that these unusual procedures actually reflected favorably on the defendants' motives.[289]

As for his review of "substantive departures" and whether "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," Justice Powell again favored the defendants. Here, he found that the Village had relied on traditional zoning criteria in rejecting Lincoln Green, citing two such criteria with apparent approval. First, he stated that "[t]there is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity."[290] But was this *legitimate* reliance? Recall that the Seventh Circuit had discounted any such reliance by noting that "the neighboring residents certainly could not expect that the

285. *Id.* at 267; *see supra* note 237 (describing these cases).
286. *See supra* note 259.
287. *See supra* note 26 and accompanying text.
288. *Arlington Heights*, 429 U.S. at 270.
289. *See supra* note 259.
290. *Arlington Heights*, 429 U.S. at 270.

zoning plan would always be adhered to even when a racially discriminatory effect would be the result."[291] An alternative reading of Justice Powell's comment here is that it was meant to suggest that the Village's concern for a possible reduction in local property values—whether proven or not—should always be considered legitimate. This would, of course, be a huge advantage for any suburb seeking to block a multi-family development, whose negative impact on local property values could always be alleged.[292]

Second, Justice Powell found that "[t]he Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case."[293] Note that the latter statement is similar to the Seventh Circuit's conclusion on this point,[294] but that Justice Powell here neither cited to that court's conclusion nor provided any factual basis for his own determination on the matter (although a similar failure by the trial judge had, according to the Seventh Circuit, amounted to an unfortunate gap in fact-findings).[295]

This focus on the Village's past zoning decisions raises important issues about how to apply *Arlington Heights*'s discriminatory-purpose test. These issues concern *whose* purposes should be examined and *when*; that is, should a court focus only on the purpose underlying the challenged decision or also the municipality's purposes over time as reflected in its zoning decisions regarding other multi-family developments? Put another way, is the key only the motives of the specific Trustees who voted against Lincoln Green or also the motives of various groups of Trustees in the past?[296] And, in deciding this issue, what weight should a court

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291. *See supra* note 109.

292. Municipal defendants in exclusionary zoning cases often argue that their rejection of a proposed affordable housing project was justified by fear of reduced local property values, regardless of whether this fear has any evidentiary support. *See, e.g.*, Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 6008-10 (2d Cir. 2016); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 111, 114 (2d Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); United States v. City of Black Jack, 508 F.2d 1179, 1187-88 (8th Cir. 1974).

293. *Arlington Heights*, 429 U.S. at 270.

294. *See supra* notes 98–99 and accompanying text.

295. *See* 517 F.2d at 412 (noting that "more detailed factual findings concerning these [other] zoning changes would have been helpful").

296. Note that there is a "multi-entity" problem even if the proper focus is only on the motives of the specific Trustees who voted against Lincoln Green, for the motivation of individual Trustees may well differ (e.g., some may be totally innocent of racial bias, some may be totally biased, and others may vote based on a combination of bias and legitimate reasons). This problem is inherent in any group-made decision, and Justice Powell was well aware of it. *See infra* note 332 and accompanying text. His opinion in *Arlington Heights*, however, spoke only about the intent of the "decisionmaker" (*see* 429 U.S. at 267) as if that were a single entity here, thereby eliding this issue even in the context of a case that clearly presented it.

give to the motives of other Village officials who had or should have had input to the Trustees, but did not have a vote on the final decision concerning Lincoln Green.[297]

These are difficult questions inherent in deciding discrimination cases governed by an intent standard. But, as with the policy vs. single-act issue discussed earlier,[298] Justice Powell's opinion in *Arlington Heights* did not mention them, instead offering only some vague hints as to their proper solution. These issues would require subsequent Supreme Court consideration,[299] and it would be unfair to criticize Justice Powell for not resolving all of them in *Arlington Heights*. Still, it is fair to question his decision to offer a roadmap for future judicial decisionmaking without identifying these issues and in ways that may have confused their ultimate resolution.

Next, Justice Powell reviewed the "legislative or administrative history" as reflected in official documents giving the views of "members of the decision making body," again applying a selective, pro-defendant lens by simply commenting that the Trustees' statements, like those of the Plan Commission members, "focused almost exclusively on the zoning aspects of the MHDC petition."[300] The "almost" here ignored one important exception: the statement by Village President Walsh after he voted to reject Lincoln Green that, while there was a need for low- and moderate-income housing in Arlington Heights, he felt "the objections of the residents is [sic] a mandate to reject this proposal."[301] By not mentioning this comment, Justice Powell swept under the proverbial rug the role that bigoted views expressed by local citizens to their elected officials might play in proving those officials were at least partly motivated by such bias, a topic that had been considered in some earlier exclusionary zoning cases and would often arise in these cases after *Arlington Heights*.[302]

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297. *See, e.g.*, exclusionary zoning cases referred to *infra* note 302 recognizing that elected officials may be liable if they were at least partially motivated by the bigoted views expressed by local citizens; *cf.* Staub v. Proctor Hospital, 562 U.S. 411, 422 (2011) (endorsing the "cat's paw" theory of proof in employment discrimination cases by holding that an employer is liable for an unbiased supervisor's decision that is influenced by a biased subordinate).

298. *See supra* notes 281-82 and accompanying text.

299. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (dealing with the standard for determining the intent of a Title VII defendant whose challenged decision was made by a large group).

300. *Arlington Heights*, 429 U.S. at 270. *But see supra* note 287 and accompanying text (noting Plan Commission members' statements about non-zoning matters).

301. *See supra* note 27 and accompanying text.

302. *See* SCHWEMM, *supra* note 11, at § 13:12 nn.21–22 (gathering cases); *see also* City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194, 196 (2003) (noting in equal protection challenge to city's blocking of a low-income housing project that "statements made by private individuals [are] sometimes relevant to equal protection analysis" of the challenged action and

In his final comment on the evidence, Justice Powell noted that, with respect to the one Trustee who had testified at trial, he found "[n]othing in her testimony supports an inference of invidious purpose."[303] This is an amazing finding by an appellate judge. True, Trustee Harms never admitted any bias in her testimony, but was she a credible witness on this point? Judging a witness's credibility is, of course, the classic example of an area thought to be within the exclusive province of the trial judge who personally observed the witness.[304] But Justice Powell made no reference here to Judge McMillen's views on this witness's credibility (Judge McMillen had offered none[305]), instead making his own finding on this matter presumably based only on his reading the witness's testimony in the record.[306]

After this review of the evidence, Justice Powell concluded Part IV with one more set of confusing observations, first stating as to the Village's innocent intent that "the evidence does not warrant overturning the concurrent findings of both courts below" on the Trustees' motives and then that the plaintiffs "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[307] The former statement suggests that Justice Powell had only been reviewing the evidence in order to apply an appellate court's traditional "clearly erroneous" standard to the facts found below. But this cannot be so, because Justice Powell never invoked this phrase and also in light of Justice White's unsuccessful attempt to have the Court limit its review here in this way.[308] There is no doubt, therefore, that Justice Powell in Part IV engaged in his own fact-finding and then concluded on the

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that the plaintiff's evidence here supported "the allegation that the City . . . gave effect to the racial bias reflected in the public's opposition to the project").

303. *Arlington Heights*, 429 U.S. at 270.

304. *See supra* note 100 and accompanying text (setting forth Rule 52(a)'s text mandating that a trial court's findings of fact must not be set aside on appeal "unless clearly erroneous" and that "the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

305. *See* 373 F. Supp. at 210–11.

306. In a footnote concluding this topic, Justice Powell upheld the restrictions that Judge McMillen had placed on the plaintiffs' inquiries as to the Trustees' motives "even if such an inquiry into motivation would otherwise have been proper." 429 U.S. at 270 n.20. The Court held that Judge McMillen did not abuse his discretion on this point, in part because the plaintiffs "were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision." *Id*. A further reason given by Justice Powell was that the plaintiffs had repeatedly insisted at trial "that it was effect and not motivation which would make out a constitutional violation," *id*., which, though true, seems unfair in that it was the Supreme Court in *Washington v. Davis*, not the plaintiffs, that had shifted the law from effect to motivation *after* the trial here (i.e., how could the plaintiffs be faulted for not more strongly focusing on the Trustees' motives when the law did not call for such a focus at the trial-court stage?).

307. *Arlington Heights*, 429 U.S. at 270.

308. *See supra* notes 268–69 and accompanying text.

basis of his view of the record that discriminatory purpose had not been shown to be even one motivating factor in the Village's decision.[309]

Part IV of the *Arlington Heights* opinion amounts to the Supreme Court demonstrating how the evidence should be evaluated in an intent-based challenge to an exclusionary zoning decision. As the preceding paragraphs show, however, Justice Powell's effort here was often one-sided, incomplete, and confusing. But it commanded the votes of five Justices and thus represented the Court's authoritative guidance on how lower courts should deal with such cases in the future. The result was that subsequent equal protection claims challenging exclusionary zoning became more difficult to win, although some did prevail based on an analysis of the *Arlington Heights* factors.[310]

2. Additional Thoughts on Justice Powell and the Court in the 1970s

Five years before the *Arlington Heights* decision, Justices Powell and Rehnquist joined the Court as the last of President Nixon's four appointees, all of whom were chosen with the goal of making the Court more conservative. Along with Justice Stewart, these four Justices made up the five-member majority that joined all of the Court's opinion in *Arlington Heights*. This same five-member group had also been alone in ruling against the exclusionary zoning claims in 1975 in *Warth v. Seldin*[311] and the school desegregation remedy in 1974 in *Milliken v. Bradley*,[312] the

309. Reinforcing this view is the fact that Justice Powell added a footnote describing what would have been the proper result if the plaintiffs had indeed proved that the Village's decision "was motivated in part by a racially discriminatory purpose." 429 U.S. at 270–71 n.21. According to this footnote, *see supra* notes 217-18 and accompanying text, such proof would have shifted to the Village the burden of showing that "the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270-71 n.21. But Justice Powell made clear at the end of this footnote that, in his view, the plaintiff had not even met "the required threshold showing" that the Village's decision was even partly motivated by a racial purpose. *Id*.

310. *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 605–15 (2d Cir. 2016); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1066-67 (4th Cir. 1982); Dews v. Town of Sunnyvale, Tex., 109 F. Supp. 2d 526, 570-73 (N.D. Tex. 2000); *see also* Avenue 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493, 503-09 (9th Cir. 2016) (reversing dismissal of plaintiff's claim); *cf*. WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 55 (1985) ("To many observers, [*Arlington Heights*] effectively closed off the use of the Fourteenth Amendment as a basis for attacking exclusionary zoning [as its requirement that plaintiffs prove the defendants' discriminatory intent] set up a nearly impossible barrier to surmount for this type of litigation."). It is noteworthy that all of the decisions cited here, in addition to ruling in favor of the plaintiffs' equal protection claims, endorsed their Fair Housing Act claims as well.

311. *See supra* notes 124–41, 187 and accompanying text.

312. 418 U.S. 717 (1974).

decision whose limits on inter-district relief were carried over in the Court's 1976 opinion in the *Gautreaux* case.[313]

For his part, Justice Powell's background seemed to guarantee a reliably conservative judge. A lifelong Virginian, Powell was the first Justice appointed from the South since 1937. From the time of his 1931 graduation from Washington & Lee's law school until he joined the Court in 1972, Powell's entire career (except for service in World War II as an Air Force officer) was spent in private practice with a large Richmond law firm, mainly representing business interests.[314] The only "No" vote in the Senate against Powell's nomination to the Court was cast by an Oklahoma progressive (Fred Harris), who said that Powell "was an elitist [who] has never shown any deep feeling for little people."[315]

Powell's limited civil rights background suggested an indifference, if not outright hostility, to racial discrimination claims. He was chairman of the Richmond Board of Education from 1952 through 1961, overseeing that system's resistance to desegregation after the Court's 1954 ruling in *Brown v. Board of Education*.[316] When "Powell left the Richmond School Board in 1961 . . . , only two of the city's 23,000 black children attended school with whites."[317]

In the early 1970s, the key civil rights issue before the Court was school desegregation and particularly the degree to which court-ordered busing should be used to achieve *Brown*'s promise of integration. The first of these cases to reach the Court during Powell's tenure—*Keyes v. School District No. 1, Denver, Colorado*[318]—involved a large urban system that had never mandated racial separation but whose schools were still highly segregated. *Keyes* produced a divided decision, with Powell writing a noteworthy lone concurrence that foreshadowed some of his views in *Arlington Heights*. The five-justice majority, in an opinion by Justice Brennan, ruled that a Constitutional violation required proof of intentional (*de jure*) racial discrimination, which here could be shown by the defendants' segregative acts in some of the Denver schools and which would justify system-wide relief (including

313. For more on the Court's decision in *Gautreaux*, see *supra* notes 32, 144–45 and accompanying text. For more on the role of *Milliken v. Bradley* in the *Gautreaux* case, see POLIKOFF, *supra* note 120, at 118-51.

Justice Blackmun's views on civil rights and constitutional issues would eventually become more moderate, but there was little sign of this in his early years when "on crucial issues, the Nixon Justices could be expected, more often than not, to end up on the same [conservative] side." JEFFERIES, *supra* note 280, at 253. There were, of course, exceptions. *See, e.g.*, *infra* note 319 and accompanying text (describing the votes in the 1973 *Keyes* case where each Nixon appointee took a different position).

314. *See* JEFFERIES, *supra* note 280, at 44–130.

315. *Id.* at 240.

316. 347 U.S. 483 (1954).

317. JEFFERIES, *supra* note 280, at 434.

318. 413 U.S. 189 (1973).

busing) unless, on remand, the school authorities proved "their actions as to other [*de facto*] segregated schools within the system were not also motivated by segregative intent."[319]

Justice Powell's opinion in *Keyes* set forth at length his approach to school desegregation cases, which accepted the idea of integrated schools but strongly opposed busing.[320] He began by noting that the "situation in Denver is generally comparable to that in other large cities across the country in which there is . . . segregation in the schools . . . fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half."[321] According to Powell, the lack of progress in desegregating northern schools was "primarily because of the *de facto*/*de jure* distinction nurtured by the courts . . . [I]f our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."[322]

In Justice Powell's view, operating a *de facto* segregated school system should be presumptively unconstitutional, regardless of whether school board members could be shown to have intended this result.[323] Thus, he argued that the Court should abandon the

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319. *Id*. at 209. Justice White did not participate. *Id*. at 214. Chief Justice Burger concurred in the result without an opinion. *Id*. Justice Rehnquist was the lone dissenter, concluding that the trial court's finding that the defendants' overall system was not intentionally segregated should be affirmed. *Id*. at 254-65.

Justice Rehnquist's dissent made two points that seem relevant to the Court's later treatment of *Arlington Heights*. First, he argued that the Court should defer to the fact-finding of the courts below on the crucial discriminatory-intent issue: "[I]t would be contrary to settled principles for this Court to upset a factual finding sustained by the Court of Appeals." *Id*. at 264. In Rehnquist's view, the trial judge's no-segregative-intent finding, having been affirmed below, "is binding on us." *Id*. at 265. The second point concerned the difficulty of determining the intent of a public body over time:

> The "intent" with which a public body performs an official act is difficult enough to ascertain under the most favorable circumstances. Far greater difficulty is encountered if we are to assess the intentions with which official acts of a school board are performed over a period of years. Not only does the board consist of a number of members, but the membership customarily turns over as a result of frequent periodic elections.

Id. at 261 (citations omitted).

320. *See* JEFFERIES, *supra* note 280, at 298.

321. *Keyes*, 413 U.S. at 218.

322. *Id*. at 218–19 (footnotes omitted).

323. *Id*. at 226–28. This presumption could be overcome if school authorities proved "that they have in fact operated an integrated system." *Id*. at 236. Liability would result if "there is a failure to rebut the prima facie case." *Id*. This burden-shifting method for determining liability anticipated a similar approach that Powell would adopt for the Court in Title VII cases in *McDonnell Douglas v. Green* and in his *Arlington Heights* opinion. *See supra*, respectively, note 80 (*McDonnell Douglas*), note 263 (*Arlington Heights*).

de facto/de jure distinction and instead "formulate constitutional principles of national . . . application."[324] As a matter of constitutional principle, this was an extremely pro-plaintiff position, one that the Court's most aggressive integrationist (Justice Douglas) endorsed in a separate concurring opinion.[325] But Powell failed to convince a majority of Justices to agree,[326] and thereafter in *Washington v. Davis* and *Arlington Heights*, he joined the Court's majority in holding that only intentional discrimination violated the Constitution.[327]

Powell in *Keyes* also made clear his view that segregated neighborhoods were the result of "natural" demographic forces and thus not the fault of any public officials. Early in this opinion, he noted that Denver's *de facto* segregated schools had never been mandated by law "[n]or has it been argued that any other legislative actions (such as zoning and housing laws) contributed to the segregation which is at issue."[328] Rather, according to Powell, the "principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs."[329] In opposing a system-wide

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324. 413 U.S. at 218–19.

325. *See id*. at 214-16 (Douglas, J., concurring).

326. It was a near thing. According to Powell's biographer, the negotiating that preceded publication of the final *Keyes* opinions at one time had a majority agreeing with Powell's argument to abandon the *de facto/de jure* distinction, with Brennan offering to adopt this view in the Court's opinion but insisting on a busing remedy that Powell was unwilling to accept. *See* JEFFERIES, *supra* note 280, at 303–05.

Although Powell failed in *Keyes* to persuade his colleagues to turn away from busing, his opinion included a long paean to neighborhood schools and strong anti-busing comments. Neighborhood schools systems, he opined, "reflect the deeply felt desire of citizens for a sense of community in their public education. . . . Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest." 413 U.S. at 246. As for busing, Powell declared, without any supporting documentation, that "[t]he single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grade levels." *Id*. at 253. His commitment to neighborhood schools, among other considerations, led him to question court-ordered busing, whose burden "is borne by children and parents who did not participate in any constitutional violation." *Id*. at 250. Busing "risk[ed] setting in motion unpredictable and unmanageable social consequences," *id*., which "nothing in the Constitution . . . mandates." *Id*. According to his authorized biographer: "Powell believed in the neighborhood school. . . . Like most opponents of busing, he was moved chiefly by fear that it would hurt education in mostly white, middle-class neighborhoods." JEFFERIES, *supra* note 280, at 285.

327. "Powell's position in *Keyes* died with that case. Never again did he argue for the unconstitutionality of de facto segregation." JEFFERIES, *supra* note 280, at 306.

328. *Keyes*, 413 U.S. at 217.

329. *Id*. at 236. Powell noted that "a high degree of residential segregation

busing order for Denver, Powell noted that this would do nothing to alter "the fundamental problem of residential segregation" and would, inappropriately, "require so much greater a degree of forced school integration than would have resulted from purely natural and neutral nonstate causes."[330] This understanding of residential segregation and its "natural and neutral" causes has obvious implications for exclusionary zoning cases, and Powell adhered to this view in school cases both before and after *Arlington Heights*.[331]

Another theme of Powell's *Keyes* opinion that seems relevant to his approach in *Arlington Heights* was recognizing the difficulties of proving that a public body intentionally discriminated. Powell noted that "[t]his Court has recognized repeatedly that it is 'extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment,' [and w]hatever difficulties exist with regard to a single statute will be compounded in a judicial review of years of administration of a large and complex school system."[332] This was part of Powell's argument for abandoning an intent-based

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based on race is a universal characteristic of American cities" and that such segregation exists "regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation or discrimination." *Id*. at 223 n.9 (quoting works of the racial demographer Karl Taeuber). According to Powell, neither busing nor any other policy could overcome these "demographic conditions" to achieve racially balanced schools in most urban areas; "[o]nly a reordering of the environment involving economic and social policy on the broadest conceivable front might have an appreciable impact." *Id*. at 242 (quoting Professor Bickel).

330. *Id*. at 246 (footnote omitted).

331. For a post-*Arlington Heights* example, see Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting) (arguing that the "unintegrated schools in every major urban area . . . result[] primarily from familiar segregated housing patterns, which—in turn—are caused by social, economic, and demographic forces for which no school board is responsible"). Prior to *Arlington Heights*, Powell joined the Court's 5-4 decision in the Detroit school case that barred suburban relief, *Milliken v. Bradley*, 418 U.S. 717 (1974) (discussed *supra* notes 312-13 and accompanying text), a decision, according to Powell's biographer, that "absolved white America of legal responsibility for the ghetto. Because the suburbs did not create segregation in Detroit, they had no duty to relieve it." JEFFERIES, *supra* note 280, at 315.

332. *Keyes*, 413 U.S. at 233-34 (citations omitted). Further:

> The intractable problems involved in litigating this issue are obvious to any lawyer. The results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school authorities with respect to action taken or not taken over many years—will be fortuitous, unpredictable and even capricious.

Id. at 233. The "subjectivity" of this inquiry was repeatedly mentioned. *See, e.g., id*. at 225 (" . . . the facts deemed necessary to establish de jure discrimination present problems of subjective intent which the courts cannot fairly resolve"); *id*. at 227 (better to avoid "the murky, subjective judgments inherent in the Court's search for 'segregative intent'" that will always be "nebulous and elusive").

constitutional standard, which he wrote would "lead inevitably to uneven and unpredictable results."[333]

In assessing Powell's effort in *Keyes*, Dean Jefferies has called it "one of the most creative and controversial opinions of his career. . . . Powell had been energetic, independent, creative, and even courageous."[334] But this effort was "wholly unsuccessful," and it left Powell "wearied."[335] He much preferred to be on the winning side, and his influence on the Court grew substantially in the years between *Keyes* and *Arlington Heights*. Indeed, by the end of the 1975-76 term that included *Warth* and *Washington v. Davis*, Powell "was elated" and "saw himself as a leader of the Court [and] as a Justice of real influence."[336]

Powell's post-*Arlington Heights* record in civil rights was highlighted by his influential centrist opinion on affirmative action in 1978 in the *Bakke* case, which served to protect limited forms of pro-minority programs for decades.[337] According to his biographer: "Powell's support for affirmative action was surprising. He had never shown particular concern for racial issues."[338] One notable aspect of Powell's opinion in *Bakke* that seemed to reflect his approach in *Arlington Heights* was the desire to use the case not only to decide the issue presented, but also to establish a roadmap for future courts faced with similar claims.[339]

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333. *Id.* at 235. Another part was Powell's view that "the Court has never made clear what suffices to establish the requisite 'segregative intent' for an initial constitutional violation," which meant that "[e]ven if it were possible to clarify this question, wide and unpredictable differences of opinion among judges would be inevitable." *Id.* at 233. As noted earlier, Justice Rehnquist, though accepting this standard, also wrote in *Keyes* about the proof difficulties involved. *See supra* note 319.

334. *See* JEFFERIES, *supra* note 280, at 292, 305.

335. *Id.* at 305.

336. *Id.* at 432. One other feature about Justice Powell's early years on the Court may also have influenced him in *Arlington Heights*. According to Dean Jefferies's biography: "From the beginning, Powell had shown himself sensitive to criticism—certainly more sensitive than anyone with life tenure needed to be." *Id.* at 280. And he had received substantial criticism, both from inside and outside the Court, for being hostile to the exclusionary zoning claims in *Warth v. Seldin*. *See supra* notes 124, 131–33 and accompanying text.

337. Regents of Univ. of California v. Bakke, 438 U.S. 265, 269–324 (1978). According to Dean Jefferies: "Thanks to Powell, affirmative action [became] familiar, widespread, and significantly successful. Racial integration of higher education and of the professional classes [was] underway." JEFFERIES, *supra* note 280, at 501. The Court's approval of limited forms of affirmative action in higher education lasted forty-five years, ending in 2023 with *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

338. JEFFERIES, *supra* note 280, at 469.

339. *Id.* at 485 (commenting that, in ruling against the actual plan under review while approving Harvard's affirmative-action plan in *Bakke*, "[i]n effect, Powell used Harvard to create the opportunity to decide two cases rather than one").

Powell's centrist position was also reflected in two post-*Arlington Heights*

D. The Decision's Importance

The Supreme Court's decision in *Arlington Heights* prompted a good deal of contemporary comment in the academic literature.[340] Ultimately, the decision would be seen as important for a number of reasons.

First, *Arlington Height*'s refinement of the *Washington v. Davis* intent requirement for equal protection claims became the standard not only for housing discrimination cases[341] but also for all Constitution-based claims[342] and for many intent-based statutory claims as well.[343] In FHA cases, the *Arlington Heights* approach became an alternative to the *McDonnell Douglas* method for analyzing proof of discriminatory intent in these claims, whether they involved exclusionary zoning or other types of housing discrimination and whether they alleged racial or other types of illegal discrimination.[344]

In all of these intent-based claims, *Arlington Heights*'s list of subjects of proper inquiry would be followed in an endless number of subsequent decisions. Indeed, some of these opinions, noting that Justice Powell had described this list as not "exhaustive,"[345] came

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cases that broadly interpreted FHA standing to allow a variety of plaintiffs to challenge racial steering. *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) (opinion by Justice Powell for a seven-justice majority); Havens Realty Corp. v. Coleman, 455 U.S. 363, 382–84 (1982) (concurring opinion by Justice Powell that joined a unanimous Court and further discussed standing requirements based on his opinions in *Warth* and *Gladstone Realtors*).

340. *See, e.g.*, *Proof of Discriminatory Intent*, 91 HARV. L. REV. 163 (1977); *Developments in the Law–Zoning: Exclusionary Zoning*, 91 HARV. L. REV. 1624 (1978); Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1398–99 (1978); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 511 (1977).

341. *See, e.g.*, Hawkins v. HUD, No. 20-20281, 2022 WL 1262100, *3 (5th Cir. Apr. 28, 2022), *cert. denied*, 143 S. Ct. 212 (2022). For post-*Arlington Heights* decisions applying this framework in constitution-based challenges to municipal actions that block housing projects, see SCHWEMM, *supra* note 11, § 28:2 n.26, para. 2.

342. *See, e.g.*, Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891, 1915 (2020) (Equal Protection Clause); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481–82 (1997) (Equal Protection Clause and Fifteenth Amendment); Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) (Equal Protection Clause); Burton v. City of Belle Glade, 178 F.3d 1175, 1188–89 (11th Cir. 1999) (Equal Protection Clause and Fifteenth Amendment).

343. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2348-49 (2021) (§ 2 of the Voting Rights Act); Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cty., Texas, 6 F.4th 633, 639–40 (5th Cir. 2021) (Title VI of the 1964 Civil Rights Act); *Burton*, 178 F.3d at 1202 (same); Dews v. Town of Sunnyvale, Tex., 109 F. Supp. 2d 526, 570–73 (N.D. Tex. 2000) (1866 Civil Rights Act's § 1981 and § 1982).

344. For exclusionary zoning cases, see SCHWEMM, *supra* note 11, at § 13:12 n.17; for other FHA cases, see *id*. at § 10:2 n.56, para. 2.

345. *See supra* note 241 and accompanying text.

up with additional sources of evidence that were also considered relevant to the defendants' intent.[346]

Finally and crucially for purposes of this Article, *Arlington Heights*'s adoption of the *Washington v. Davis* intent requirement for equal protection challenges to exclusionary zoning and Justice Powell's ruling against the plaintiffs' constitutional claim while keeping alive their FHA-effect claim[347] meant that—particularly after the Seventh Circuit's positive remand decision (described next)—the FHA would become the preferred legal basis for challenging exclusionary zoning in the future.[348]

IV. *ARLINGTON HEIGHTS* AFTER THE SUPREME COURT

A. The Seventh Circuit's Remand Decision

On July 7, 1977, the Seventh Circuit issued its remand decision on the plaintiffs' Fair Housing Act claim. The same three-judge panel whose earlier ruling had been reversed by the Supreme Court decided this claim and held that it could succeed under certain circumstances.[349] As in its earlier decision, the panel was divided, with Judge Swygert (joined by Judge Sprecher) writing a majority opinion and Chief Judge Fairchild concurring in an opinion that agreed the FHA claim could prevail under basically the same circumstances as identified by the majority.[350]

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346. *See, e.g.*, Greater Birmingham Ministries v. Sec'y of State for State of Alabama, 992 F.3d 1299, 1321–22 (11th Cir. 2021) (noting that the *Arlington Heights* list has been supplemented to add "(6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives").

347. *See supra* Part III.B.5.

348. For more on post-*Arlington Heights* exclusionary zoning litigation, see *infra* Part V.A.

Other aspects of the Supreme Court's *Arlington Heights* decision also established oft-followed principles, such as its recognition that only one plaintiff need have standing for a multi-plaintiff case to proceed. *See supra* notes 204–05 and accompanying text. As noted above, however, one aspect of the *Arlington Heights* opinion—Justice Powell's engaging in case-specific fact-finding that did not defer to the lower courts' views on these facts—was rejected in subsequent Supreme Court decisions. *See supra* notes 270–71 and accompanying text.

349. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1285 (7th Cir. 1977) (holding that "under the circumstances of this case defendant has a statutory obligation to refrain from zoning policies that effectively foreclose the construction of any low-cost housing within its corporate boundaries" and remanding "the case to the district court for a determination of whether defendant has done so").

350. *Id.* at 1296 (Fairchild, C.J., concurring) (opining that "[i]f on remand it be demonstrated that no suitable site with proper zoning is available, I can accept the conclusion that the denial of a change in zoning was, in the circumstances of this case, unlawful under [the FHA]"). Judge Fairchild disagreed with the majority only with respect to one burden-of-proof issue. *See infra* note 376.

The first part of Judge Swygert's majority opinion recounted the procedural history of the case. The opinion then identified the two FHA provisions—§ 3604(a) and § 3617[351]—that the Village had allegedly violated and, determining to focus on § 3604(a),[352] rejected the defendants' argument that this claim was untimely because they had waived this objection.[353]

Moving to the merits, Judge Swygert began by reaffirming his earlier ruling that "the Village's refusal to rezone had a discriminatory effect."[354] Thus, the question became whether such an effect was sufficient to violate the FHA's § 3604(a). In support of an affirmative answer, Judge Swygert noted that the Supreme Court's intent requirement for constitutional claims in *Washington v. Davis* had not disturbed the Court's ruling in *Griggs* that statutory claims under Title VII could succeed under a discriminatory-effect theory.[355] Thus, the key to resolving the FHA issue was to follow the *Griggs* approach,[356] because the FHA was seen to have the same broad remedial purpose as Title VII.[357] Thus, the Seventh Circuit held that, "at least under some circumstances," § 3604(a) could be violated based on "a showing of discriminatory effect without a showing of discriminatory intent."[358]

But what "circumstances"? One approach would have been to follow the basic *Griggs* analysis that used a plaintiff's showing of discriminatory effect to shift to the defendant a burden of justification for its challenged practice, which the Eighth Circuit had done three years before in the *Black Jack* case.[359] Instead, Judge Swygert identified four "critical factors" that he discerned from previous cases and determined that liability should depend on a balancing of these factors.[360]

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351. *Id.* at 1287.

352. *See id.* at 1288 (determining to focus on § 3604(a) because the § 3617 claim seemed merely derivative in that it "depends upon a finding that the Village interfered with rights granted or protected by" § 3604(a)).

353. *Id.* at 1287.

354. *Id.* at 1288.

355. *Id.* at 1288–89.

356. *Id.* at 1289.

357. *Id.* According to Judge Swygert, the FHA's basic purpose was to promote "open, integrated residential housing patterns," *id.* (quoting Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973)), and he opined that "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating" this purpose." *Id.*

358. *Id.* at 1290 (citing, *inter alia*, United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974) and Kennedy Park Homes Assoc., Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970)). For more on *Black Jack* and *Kennedy Park*, see respectively, *supra* note 90 and accompanying text, notes 37–43 and accompanying text.

359. *See Black Jack*, 508 F.2d at 1184–88.

360. 558 F.2d at 1290. The four factors were:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is

In applying this new four-factor approach, Judge Swygert began by offering another new insight—that "two kinds of racially discriminatory effects" may be produced by a facially neutral housing decision.[361] The first—that the "decision has a greater adverse impact on one racial group than on another"[362]—is the traditional one used in a *Griggs*-type analysis.[363] Here, according to the Seventh Circuit, this type of effect was "relatively weak" because, although "the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area[,] . . . the class disadvantaged by the Village's action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white."[364]

But the *Arlington Heights* plaintiffs had a stronger case based on Judge Swygert's recognition of a second, independent type of discriminatory effect also seen as "invidious" under the FHA—i.e., whether the challenged decision "perpetuates segregation and thereby prevents interracial association."[365] He felt that the facts in both *Black Jack* and *Kennedy Park* supported reading those cases as endorsing "racially discriminatory impact in the second sense."[366] And the same might be true for Arlington Heights, because the Village "remains overwhelmingly white at the present time, and the construction of Lincoln Green would be a significant step toward integrating the community."[367] Still, it was unclear "whether the Village's refusal to rezone would necessarily perpetuate segregated housing in Arlington Heights," because the parties disputed whether Lincoln Green could be built on an alternative site in the Village.[368] Thus, the Seventh Circuit remanded the case to the

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> there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id. Note that Factors (2) and (4) are not considered in the *Griggs-Black Jack* approach, which focuses first on Factor (1) and then, if (1) is satisfied, on Factor (3).

361. *Id.*

362. *Id.*

363. *See supra* notes 154-55 and accompanying text.

364. 558 F.2d at 1291.

365. *Id.* at 1290.

366. *Id.*

367. *Id.* (footnote omitted). The footnote to this passage noted that, even if defendants' claim that 200 Blacks now lived in the Village were accepted, "Arlington Heights would [still] be approximately ninety-nine percent white. We find these numbers to be evidence of 'overwhelming' racial segregation." *Id.* at 1291 n.9.

368. *Id.* at 1291.

district court to resolve this alternative-site issue.[369]

Judge Swygert then dealt with the other three factors to be considered, finding that Factors (2) and (3) favored the defendants and Factor (4) favored the plaintiffs.[370] With two for the defendants, one for the plaintiffs, and one as yet unclear, "this is a close case."[371] Its ultimate resolution would have to turn "on clarification of the discriminatory effect of the Village's zoning decision,"[372] which in turn would depend on whether Lincoln Green could be built on an alternative site in Arlington Heights.

The Seventh Circuit recognized that, even if the plaintiffs prevailed on the no-alternative-site issue and therefore on Factor (1), they would win on "only two of the four criteria on which we have focused."[373] But "we must decide close cases in favor of integrated housing."[374] Thus, the Seventh Circuit held that "if there is no land other than plaintiffs' property within Arlington Heights which is both properly zoned and suitable for federally subsidized low-cost housing, the Village's refusal to rezone constituted a violation of section 3604(a)."[375] In short, in close cases of this kind, a white suburb's "zoning powers must give way to the Fair Housing Act."[376]

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369. *Id.* at 1295.

370. *Id.* at 1292–93. The four factors are set forth *supra* note 360. As to Factor (2), Judge Swygert noted that, although other discriminatory-impact cases had not addressed what role intent evidence should play in determining liability, he felt that "the equitable argument for relief is stronger when there is some direct evidence that the defendant purposefully discriminated against members of minority groups." *Id.* at 1292. He concluded that "the absence of any such evidence in this case is a factor buttressing the Village's contention that relief should be denied," *id.*, but he added that "this criterion is the least important of the four factors that we are examining." *Id.* Factor (3) also favored the defendants, because "the Village was acting within the scope of the authority to zone granted it by Illinois law . . . , [and] municipalities are traditionally afforded wide discretion in zoning." *Id.* at 1293. Note that, in favoring the Village here simply because it was acting within the scope of its zoning authority, Judge Swygert did not consider the *strength* of the defendants' zoning interests in rejecting Lincoln Green's petition, which the *Griggs*/*Black Jack* analysis does. *See* United States v. City of Black Jack, 508 F.2d 1179, 1185-88 (8th Cir. 1974). Factor (4) favored the plaintiffs, because they "own the land on which Lincoln Green would be built and do not seek any affirmative help from the Village in aid of the project's construction. Rather, they seek to enjoin the Village from interfering with their plans to dedicate their land to furthering the congressionally sanctioned goal of integrated housing." 558 F.2d at 1293.

371. 558 F.2d at 1293.

372. *Id.* at 1294.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* In a concluding section, the Seventh Circuit described the procedures that the district court was to follow on remand. *Id.* at 1294–95. As to the crucial alternative-site issue:

> the district court should place on defendant the burden of identifying a parcel of land within Arlington Heights which is both properly zoned and

B. Importance of Seventh Circuit's Remand Decision

The Seventh Circuit's remand decision in *Arlington Heights* was important for a number of reasons. First, it was only the second appellate decision, after the Eighth Circuit's 1975 decision in *Black Jack*, to clearly hold that the FHA could be violated by a showing of discriminatory effect without discriminatory intent. Eventually, the appellate courts would come to agree with this position, but at the time of *Arlington Heights*, this was far from clear; indeed, the Second Circuit had rejected an effect standard for the FHA,[377] and the Sixth Circuit had shown some skepticism about such a standard in an exclusionary zoning case.[378] The influence of the Seventh Circuit's remand decision in *Arlington Heights* is reflected in the fact that by 2015 when the Supreme Court endorsed the FHA's effect standard,[379] "all nine of the Courts of Appeals to have decided the question had concluded the Fair Housing Act encompassed disparate-impact claims."[380]

> suitable for low-cost housing under federal standards. If defendant fails to satisfy this burden, the district court should conclude that the Village's refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within Arlington Heights, and should grant plaintiffs the relief they seek.

Id. at 1295. Judge Fairchild's concurring opinion disagreed on this burden-of-proof issue, concluding that "traditional principles should apply and [the] burden should be allocated to the plaintiffs." *Id*.

377. *See* Boyd v. Lefrak Organization, 509 F.2d 1110, 1114-15 (2d Cir. 1975). The comments to the contrary in *Kennedy Park* were dicta, because that case's holding was based on the Equal Protection Clause, not the FHA. *See* Kennedy Park Homes Assoc., Inc. v. City of Lackawanna, 436 F.2d 108, 109, 112–15 (2d Cir. 1970).

378. *See* Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977), *previous decision adhered to*, 558 F.2d 350 (6th Cir. 1977).

379. *See* Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 533–40 (2015).

380. *Id*. at 535; *see also* SCHWEMM, *supra* note 11, at § 10:4 nn.31–42 (gathering cases). Also, as described above, the Seventh Circuit's treatment of the FHA's effect-standard in *Arlington Heights* was new: it employed a four-factor approach to FHA-effect cases rather than the *Griggs*/*Black Jack* two-step approach. *See supra* notes 360–75 and accompanying text. This provided other appellate courts with a choice of how to proceed in analyzing such claims and led to their splitting on whether to follow the *Arlington Heights* or the *Black Jack* approach. *See* 2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia, 444 F.3d 673, 680 (D.C. Cir. 2006) (noting that the Seventh Circuit's approach differs from other circuits' burden-shifting framework); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 989 (4th Cir. 1984) (noting that the Fourth Circuit has adopted the Seventh Circuit's approach in FHA-effect claims against public defendants, but that this approach should not be applied in claims against private defendants). This issue would not be finally resolved until decades later. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11459-82 (Feb. 15, 2013) (adopting the burden-shifting approach (codified in 42 C.F.R. § 100.500)); *see also* Reinstatement of HUD's

Second, the Seventh Circuit's opinion recognized a separate "perpetuation of segregation" type of effect as well as the traditional *Griggs* disparate-impact type, and in so doing, raised a theory that would prove both valuable to exclusionary-zoning plaintiffs and controversial well into the 21st century.[381] One way that this second theory has expanded FHA-effect coverage—as illustrated by *Arlington Heights*—is to make it available in challenges to defendants' single-decision actions, whereas the traditional *Griggs*/disparate-impact theory only allows challenges to defendants' general policies.[382]

Finally, and perhaps most importantly for exclusionary-zoning law, the Seventh Circuit's decision in *Arlington Heights* essentially meant that the FHA would favor *any* subsidized housing proposal that conflicted with the land-use restrictions of *every* white suburb in a racially diverse metropolitan area. In such a case, the project's builder as plaintiff would always win on *Arlington Heights*'s Factors (1) and (4), which the Seventh Circuit determined should result not just in close cases, but ones that must be decided "in favor of integrated housing."[383] Even if the defendant had legitimate zoning reasons for objecting to a low-income project at a particular location, it would have to identify an alternative site within its boundaries to accommodate the proposal.[384]

It is not too much to conclude, therefore, that the Seventh Circuit's remand decision in *Arlington Heights* rejuvenated the entire field of exclusionary zoning law from the uncertain and weakened state brought on by the Supreme Court's decision in *Warth v. Seldin*. Under the Seventh Circuit's decision, the only apparent limit on this FHA-effect theory was the willingness of builders to undertake such projects in white suburbs and to follow up with appropriate litigation if necessary.[385]

C. Proceedings After the Seventh Circuit's Remand Decision

The *Arlington Heights* defendants sought review by the Supreme Court, but their petition for certiorari was denied on January 9, 1978.[386] Thereafter, the case was remanded and

Discriminatory Effects Standard, 88 Fed. Reg. 19450 (Mar. 31, 2023) (reinstating HUD's 2013 Rule).

381. *See* Schwemm, *supra* note 282, at 749–51; Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450, 19482–83 (Mar. 31, 2023).

382. *See* Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542–43 (2015).

383. *See supra* note 374 and accompanying text.

384. *See supra* notes 375–76 and accompanying text.

385. The segregative-effect theory would, of course, undergo some adjustments and refinements in subsequent cases. *See* Schwemm, *supra* note 282, at 720–35.

386. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 434 U.S. 1025

assigned to a new district judge, Nicholas Bua, who had been appointed the year before by President Carter.[387]

In June of 1979, the parties informed Judge Bua that they had reached an agreement in the form of a proposed consent decree that would resolve the litigation by providing "for construction of a modified development on an alternative site."[388] The agreement called for Arlington Heights to annex a parcel of unincorporated land near the Village's southeast boundary adjacent to another suburb (Mount Prospect), which would be used to accommodate the MHDC project and commercial uses.[389] Located about three miles from the St. Viator site, MHDC's new development would be on twelve acres along a major highway (known as "Golf Road") and would consist of 190 subsidized family units and a separate building for elderly housing.[390]

On July 5, 1978, the Arlington Heights Board of Trustees held a public hearing on this plan and voted to approve it.[391] Before the court could enter the consent decree, however, the Village of Mount Prospect, along with some its homeowners and their neighborhood associations, intervened in the case as defendants in order to object to the decree.[392] Judge Bua held three days of hearings in September on their objections,[393] but he rejected them in a lengthy opinion that approved and entered the proposed decree in April of 1979.[394] Mount Prospect and the other intervenor-defendants

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(1978).

387. *See Federal Judges-Biographies*, *supra* note 56, www.fjc.gov/history/judges/bua-nicholas-john [perma.cc/8S4X-ZPZF].

388 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 469 F. Supp. 836, 843 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

389. *Id*. The terms of the Consent Decree are set forth as an Appendix to Judge Bua's opinion. *Id*. at 869-73. It did not provide for attorney's fees or costs for either side nor for any monetary relief for the plaintiffs. *Id*.

390. *Id*. at 843.

391. *Id*.

392. *Id*. at 843-44.

393. *Id*. at 844.

394. *Id*. at 869. Judge Bua saw little merit in the intervenors' substantive objections, finding that the proposed development satisfied all traditional zoning concerns including consistency with neighborhood uses and that "[t]here has been no showing that there will be any substantial diminution in [property] value if the project is built." *Id*. The procedural objections were more troublesome, because, under Illinois law, "[t]he intervenors have a legal interest in the annexation and rezoning of the neighboring land," *id*. at 860, and "Arlington Heights did not follow normal annexation and zoning procedures in this case." The procedural claim ultimately failed, however, because Judge Bua ruled that the intervenors received all the process they were due as a result of his September hearing, which provided "a full hearing on the merits of their claims in this court." *Id*. at 862.

In Judge Bua's view, two strong federal policies supported approval of the consent decree—"the congressional policy favoring open housing and the judicial policy favoring the compromise settlement of cases." *Id*. at 844. Thus, after determining that the settlement was fair and equitable, *id*. at 865–66, he entered the consent decree as proposed. *Id*. at 869.

appealed, but the Seventh Circuit, with a new panel, affirmed by a 2–1 vote on March 4, 1980.[395]

Mount Prospect and the other losing intervenors did not seek Supreme Court review, thus allowing the litigation to finally end. As a result, some eight years after the complaint was filed and more than a decade after MHDC first petitioned Arlington Heights for rezoning for Lincoln Green, MHDC's housing project would be built, albeit in a somewhat altered form and at a different location.

D. Today: MHDC and Arlington Heights; Segregation and Zoning's Continuing Role

Construction of the MHDC project at the Golf Road site was completed in 1983. With 190 units in a single four-story building and named "Linden Place," it was subsidized under the federal Section 8 project-based program and continues to operate today, as does MHDC.[396] The original St. Viator site proposed for Lincoln

395. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980). The new panel was made up of Judge Sprecher (who had participated in the prior two appellate rounds), Judge Pell (a Nixon appointee in 1970), and Judge Ackerman (a district judge sitting by designation who had been appointed to the Central District of Illinois bench by President Ford in 1976). *See supra* note 89; *Federal Judges-Biographies*, *supra* note 56, at, respectively, www.fjc.gov/history/judges/pell-wilbur-frank-jr [perma.cc/MQ43-JX4S] and www.fjc.gov/history/judges/ackerman-james-waldo [perma.cc/4PAG-7HP9].

Judge Sprecher's majority opinion (joined by Judge Ackerman) stated that Judge Bua had analyzed the proposed decree "with such commendable and painstaking detail that we adopt, as well as affirm, his opinion except insofar as this opinion of affirmance may add to or vary its language." *Id*. at 1009. After noting the FHA's strong national policy favoring fair housing and four other appellate decisions that had by now relied on the FHA to "provid[e] relief from exclusionary zoning," *id*. at 1010 [citing *Kennedy Park*, *United Farmworkers*, *Black Jack*, and Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977)], Judge Sprecher observed that "[t]he often diverse interests of national policy and local zoning have merged here in the consent decree, which carries, in addition, its own presumption of regularity and is subject to approval by the trial court after hearing proffered objections." *Id*. at 1013. Recognizing that "[t]he law generally favors and encourages settlements," *id*., the majority opinion determined that "[t]he trial judge fulfilled his responsibilities in determining that the settlement embodied in the consent decree was fair, adequate, reasonable and appropriate." *Id*. at 1015. After determining that Judge Bua had adequately considered all of the intervenors' objections, the Seventh Circuit affirmed his judgment approving the consent decree. *Id*. at 1015.

In dissent, Judge Pell argued that the intervenors were not accorded procedural due process. *Id*. at 1019-21. He therefore advocated vacating the consent decree and enjoining "the parties from carrying out its terms until such time as intervenors have been afforded proper notice and an opportunity for a hearing, as is provided in the statutes of the state of Illinois." *Id*. at 1016.

396. *See* MHDC's website at www.mhdcchicago.com [perma.cc/PH4T-YU4E].

Green remains empty.[397]

Arlington Heights's population, which had exploded to 64,000 in 1970 from under 9,000 in 1950, grew only moderately in the next five decades, reaching just over 77,600 in 2020.[398] The Village's racial make-up is now: 77% white; 11% Asian; 9% Hispanic; and 2.8% Black (with the remaining being mixed-race or other categories).[399] Its median household income is about $113,500, with 5.7% of its residents living below the poverty line.[400] In 2023, the Chicago Bears bought the Arlington Park racetrack and began demolition work to prepare the site for construction of a new stadium and related developments.[401]

Although the housing stock in Arlington Heights remains mostly owner-occupied units (72.7%),[402] thousands of market-rate apartments have been built since 1970.[403] The median monthly rent for apartments is now about $1,660,[404] far above what is considered the maximum amount for affordable units.[405] In 2020, the Village passed an inclusionary housing ordinance—rare among Chicago suburbs—that requires up to 10% of the units in new multifamily developments be affordable (i.e., for those making at or below 60%

397. The high school and other facilities on the overall St. Viator property continue in active use. *See Saint Viator kicks offs school year with newly renovated classrooms, buildings upgrades*, DAILY HERALD (Aug. 11, 2023, 6:00 AM), www.dailyherald.com/20230811/lifestyle/saint-viator-kicks-off-school-year-with-newly-renovated-classrooms-building-upgrades/ [perma.cc/4W8F-94CS].

398. *See Explore Census Data–Arlington Heights Village, Illinois*, U.S. CENSUS BUREAU (July 1, 2023), www.census.gov/quickfacts/fact/table/arlingtonheightsvillageillinois/PST045222/data.census.gov [perma.cc/NU69-BY56] [hereinafter *Data–Arlington Heights*].

399. *Id.*

400. *Id.*

401. *See, e.g.*, Robert McCoppin, *Bears begin demolishing grandstand at horse track*, CHI. TRIB., June 17, 2023, at 3.

402. *See Data–Arlington Heights*, *supra* note 398.

403. *Id.* A 2023 commentary by an urban-sociologist noted that the Village welcomed many large multi-family developments during the 1970s and that:

> Arlington Heights was a front-runner in Illinois of what became known nationally as 'new urbanism,' which touts the benefits of density and walkability and the subsequent retrofitting of suburbs to this end. In the 50 years that followed [the *Arlington Heights* litigation], the village regularly authorized multiunit buildings in its downtown.

John Joe Schlichtman, *How Arlington Heights and its pursuit of the Bears can rectify a housing mistake*, CHI. TRIB. (Feb. 9, 2023, 9:18 PM), www.chicagotribune.com/2023/02/09/john-joe-schlichtman-how-arlington-heights-and-its-pursuit-of-the-bears-can-rectify-a-housing-mistake/ [perma.cc/83JL/A776].

404. See Data–Arlington Heights, *supra* note 398.

405. *See* Joint Ctr. for Housing Studies of Harvard Univ., The State of the Nation's Housing: 2023 36 (2023) [hereinafter 2023 HOUSING] (identifying this figure as $600).

of the area median income).[406] In some northwest suburbs, however, opposition to affordable housing projects continues, with local residents voicing many of the same concerns that their Arlington Heights counterparts did in opposing Lincoln Green in 1970.[407]

The housing market in the overall Chicago metropolitan area remains highly segregated. Using the 100-point "dissimilarity index" measure (with 100 indicating total segregation and over 60 considered highly segregated),[408] the Chicago-area figure was 74 in 2020, which made it the nation's fifth most segregated metro area (after Newark, Milwaukee, Detroit, and New York).[409] By 2000, "minority suburbanization" had increased markedly (with minorities accounting for more than 27% of the suburban populations in the nation's largest metropolitan areas),[410] but it was not clear whether this shift helped to integrate these areas or whether minorities were simply "re-segregated in separate communities within the suburbs."[411]

During the post-*Arlington Heights* period, the overall housing

406. *See* Schlichtman, *supra* note 403; *see also* Christopher Placek, *Arlington Heights: As one affordable housing project opens, another faces hurdles*, DAILY HERALD, Nov. 16, 2023, at 3 (reporting on the opening of a 40-unit subsidized apartment complex that had obtained a favorable rezoning decision from the Village Trustees despite neighbors' opposition and quoting the Village's mayor as saying that "[a]ffordable housing is an investment in our community's future"); Christopher Placek, *Arlington Heights: Apartments, retail pitched for southern gateway area*, DAILY HERALD, June 21, 2023, at 3 (reporting the Village Trustees's positive reaction to a large development proposal that would include hundreds of apartments, with one Trustee saying "she appreciated the developer's commitment to renting 10% of the apartments [in accordance with] the requirement of the village inclusionary housing ordinance").

407. *See* Joe Lewnard, *Affordable housing proposal—which called for annexation and rezoning—withdrawn after community opposition*, DAILY HERALD (Jan. 13, 2024, 5:15 AM), www.dailyherald.com/20240113/news/were-just-trying-to-figure-out-what-comes-next-affordable-housing-proposal-withdrawn-in-lake-zur/ [perma.cc/K84J-DLZ2]; Doug Graham, *Lake Zurich board delays vote on affordable housing project at former Midlothian Manor site*, DAILY HERALD (Oct. 19, 2023, 5:30 AM), www.dailyherald.com/20231019/news/lake-zurich-board-delays-vote-on-affordable-housing-project-at-former-midlothian-manor-site/ [perma.cc/6TP3-YW68].

408. For descriptions of the dissimilarity index and other methods of measuring an area's segregation, see John R. Logan & Brian Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2020 Census* 16 (2021), available at s4.ad.brown.edu/Projects/Diversity [perma.cc/2FMH-ZUCT]; SANDER ET AL., *supra* note 116, at 37–38.

409. *See* Logan & Stults, *supra* note 408, at 7, 17. Nationally, the dissimilarity index's average of Black-white segregation has dropped a few points in each of the last four decades to stand at 55 in 2020. *Id*. at 5. High segregation levels continue to plague most large metropolitan areas in the East and Midwest, while lower rates generally exist in the West (e.g., 44 in Seattle and 41 in Phoenix). *Id*. 7, 17–18.

410. William H. Frey, *Melting Pot Suburbs: A Census 2000 Study of Suburban Diversity* 13 (2001), www.brookings.edu/es/urban/census/frey.pdf [perma.cc/VM95-EGGC].

411. *Id*.

market has experienced a severe supply shortfall, which has resulted in a national "housing crisis" that now requires creation of millions of additional units.[412] The lack of affordable housing has become acute, with the number of low-cost rental units shrinking dramatically in recent times.[413] This has been particularly true in wealthier communities, in part because the two main federal housing-supply programs—the Section 8 project-based and Low Income Housing Tax Credit ("LIHTC") programs—encourage locating their units in poorer, segregated areas.[414]

Half of renters living in metropolitan areas are now "cost burdened"—defined as spending more than 30% of their income on housing[415]—with a record 21.6 million households falling in this category nationally.[416] "Renters today spend about 10 more percentage points of their earnings on housing than they did in the 1970s."[417]

Exclusionary zoning's role in exacerbating America's affordable-housing crisis and perpetuating racial segregation is well established.[418] Since at least 1970, wealthy suburbs have used zoning to limit or exclude rental units, thereby allowing their

412. *See, e.g.*, JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING 2022 5 (2022) [hereinafter 2022 RENTAL HOUSING] (noting "the shortage of 1.5 million rental units that are both affordable and available to [low-income] households"; Conor Dougherty & Ben Casselman, *Build Houses, Even if No One Is Buying Right Now*, N.Y. TIMES, July 23, 2022, at 1 (noting that the U.S. has "a deep, decades-old housing shortage" and concluding, based in part on Freddie Mac's supply-shortage estimate of 3.8 million units, that "the country hasn't been building nearly enough homes to keep up with demand—especially for middle and lower-income families, who bear the brunt of the housing crisis").

413. *See* 2023 HOUSING, *supra* note 405, at 36.

414. *See infra* Part V.B.3.

415. *See* 2023 HOUSING, *supra* note 405, at 37.

416. *Id.* at 5.

417. Annie Lowrey, *The U.S. Needs More Housing Than Almost Anyone Can Imagine*, THE ATLANTIC (Nov. 21, 2022), www.theatlantic.com/ideas/archive/2022/11/us-housing-gap-cost-affordability-big-cities/672184/ [perma.cc/JG2H-CHUC].

418. *See* Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 IOWA L. REV. 1963, 1993–94 (2022) (noting widespread agreement that "exclusionary zoning curtails housing supply and fuels segregation" and concluding that, because zoning laws prohibit the construction of multi-family homes on at least 75% of available land in most metropolitan areas, "[s]uch restrictions have the effect of separating wealthier white suburbs from communities of color in inner-city and inner-ring suburbs"); *see also* 2023 HOUSING, *supra* note 405, at 8 ("Exclusionary zoning contributes to this continued pattern of residential racial segregation."); Eric E. Stern, *A Federal Builder's Remedy for Exclusionary Zoning*, 129 YALE L. J. 1516, 1524–26 (2020) (noting that exclusionary zoning "contributes to the nation's affordable-housing crisis" and "further entrenches patterns of racial segregation"); *id.* at 1519–20 ("[Exclusionary zoning] lies at the heart of American's affordable-housing crisis and perpetuates patterns of racial and socioeconomic segregation.").

affluent residents to "self-segregate" from poorer communities and "sustaining racial segregation."[419] Part V explores the reasons for exclusionary zoning's lasting power and concludes by identifying some recent developments that may help loosen its grip.

V. EXCLUSIONARY ZONING LAW AND PRACTICE AFTER *ARLINGTON HEIGHTS*

A. Caselaw: Some Battles Won

The Seventh Circuit's 1977 remand decision in *Arlington Heights* opened the way for proponents of affordable housing projects to challenge municipal zoning restrictions under the FHA. Other cases endorsing the FHA's effect theory followed, highlighted by the Second Circuit's 1988 decision in the *Huntington* case.[420]

In 2015 when the Supreme Court approved the disparate-impact method of proving an FHA violation, it referred to exclusionary zoning cases as being "at the heartland" of this theory.[421] The Court observed that such suits target "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[422]

In this century, the steady stream of important race-based exclusionary zoning decisions has continued.[423] Last year alone, a half dozen such cases were reported.[424] The clear command of FHA

419. *See* SANDER ET AL., *supra* note 116, at 235, 243.

420. Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 929-32 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). For a detailed description of the Second Circuit's decision in *Huntington*, see SCHWEMM, *supra* note 11, § 13:10 nn.6-13 and accompanying text.

421. Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015).

422. *Id.*

423. *See, e.g.*, Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 617-19 (2d Cir. 2016); Avenue 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493 (9th Cir. 2016); Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34 (2d Cir. 2015); Greater New Orleans Fair Housing Action Center v. St. Bernard Parish, 641 F. Supp. 2d 563, 569 (E.D. La. 2009) (cited with approval in *Inclusive Communities*, 576 U.S. at 539); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 567-68 (N.D. Tex. 2000) (holding that 97%-white Dallas suburb's ban on apartments and less costly single-family housing "perpetuates segregation" in violation of the FHA); *see also* Causeway Landings, Ltd. v. City of New Smyrna Beach, Florida (M.D. Fla. 2014), reported at Fair Housing-Fair Lending Rptr. ¶8.7 (Aug. 1, 2014) (describing settlement providing $850,000 for defendants' having blocked affordable housing development).

424. *See* South Carolina State Conference-NAACP v. Georgetown County, No. 2:22-CV-04077-BHH, 2023 WL 6317837 (D. S.C. Sept. 28, 2023) (upholding both intent and impact race-based claims under the FHA and other laws as well as developer-plaintiffs' standing using *Arlington Heights* analysis); Brookline Opportunities, LLC v. Town of Brookline, No. 21-CV-770-PB, 2023 WL 4405659 (D. N.H. July 7, 2023) (denying summary judgment on both intent and impact

law now is that local governments cannot block or limit affordable housing if that action is motivated by racial discrimination or has an unjustified segregative effect.[425]

But even as FHA caselaw in the post-*Arlington Heights* era was creating strong legal doctrine to combat exclusionary zoning, little progress was made in desegregating metropolitan areas and in producing sufficient affordable housing in opportunity-rich suburban communities.[426] Some of the reasons for this disconnect are explored in the next section.

B. Bigger Battles Lost

1. Litigation's Limits: Warth's Site-Specific Restriction; Proof Problems and Costs

The standing limits imposed by *Warth* continued after *Arlington Heights* to restrict exclusionary zoning litigation to project-specific cases.[427] Litigation could not address

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claims under the FHA); 431 E Palisade Avenue Real Estate, LLC. v. City of Englewood, No. 2:19-CV-14515 (BRM) (JSA), 2023 WL 6121195 (D. N.J. Sept. 19, 2023) (upholding FHA-impact claim based on disability discrimination while dismissing plaintiff's Equal Protection Clause claim); Garvey Farm LP v. City of Elsmere, Kentucky, No. CV 2:23-105-DCR, 2023 WL 3690229 (E.D. Ky. May 26, 2023) (upholding FHA claims based on defendant's refusal to allow expansion of trailer park); Valentin v. Town of Natick, 633 F. Supp. 3d 366 (D. Mass. 2022), and 343 F.R.D. 452 (D. Mass. 2023) (upholding FHA and equal protection claims alleging race-based discrimination based in part on *Arlington Heights* analysis); *see also* Woda Cooper Development, Inc. v. City of Warner Robins, No. 5:20-CV-159 (MTT), 2023 WL 3985153 (M.D. Ga. June 13, 2023) (awarding summary judgment against race-based FHA exclusionary zoning claim using *Arlington Heights* analysis).

425. *See, e.g.*, *Mhany*, 819 F.3d at 606–15; *Avenue 6E Investments*, 818 F.3d at 503–13. *See generally* SCHWEMM, *supra* note 11, at §§ 13:8–13:10 (describing FHA exclusionary zoning claims).

The same principles have been applied in numerous cases challenging municipal restrictions on group homes for people with disabilities ever since 1988 when the FHA was amended to ban disability discrimination. *See, e.g.*, Pac. Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216-18 (11th Cir. 2008); Tsombanidis v. Haven Fire Dep't, 352 F.3d 565, 573–80 (2d Cir. 2003). *See generally* SCHWEMM, *supra* note 11, at § 11D:5 nn. 20-21 (gathering cases). Recent examples of such cases include Courage to Change Ranches Holding Co. v. El Paso County, Colorado, 73 F.4th 1175 (10th Cir. 2023) (ruling in favor of group home's challenge to defendant's occupancy limits that were held to be facially discriminatory and not adequately justified); Horizon House, Inc. v. East Norriton Township, No. CV 19-1252, 2023 WL 1765912 (E.D. Pa. Feb. 3, 2023) (awarding summary judgment to group home along with damages and attorney's fees).

426. *See supra* notes 408–19 and accompanying text.

427. *See supra* notes 191–93 and accompanying text; Sager, *supra* note 340 (noting that claims after *Warth* were limited to "the zoning status of the land on which a project is proposed to be built" and could not challenge "discriminatory or exclusionary land use restrictions elsewhere in the

"discriminatory zoning practices of a systemic nature" nor seek "broad equitable relief going to a municipality's entire zoning scheme."[428] Thus, as one commentator noted shortly after the Seventh Circuit's remand decision in *Arlington Heights*: "The *Arlington Heights* breach in the *Warth* wall [was] a narrow one."[429]

Even in single-project exclusionary zoning cases, proving a municipality's discriminatory intent or unjustified impact is often difficult, and, absent such proof, a challenged restriction is upheld.[430] Finally, even when an exclusionary zoning claim does ultimately prevail, the case may take years—and millions of dollars—to litigate,[431] and then may not result in the proposed housing actually being built.[432]

Thus, while FHA race-based claims challenging municipal restrictions on affordable housing have enjoyed some successes since *Arlington Heights*, they have generally failed to loosen the grip

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community [unrelated to] the implicated parcel itself").

428. Sager, *supra* note 340, at 1399. This meant claims could not be "based upon the discriminatory or exclusionary impact of the regime of land use restraints adopted by a community" or "on a community's exclusion of minorities through the combined impact, or malignant purpose, of its [overall] land use constraints." *Id.* at 1400.

429. *Id.* at 1399.

430. *See, e.g.*, Hallmark Developers, Inc. v. Fulton Cnty., Ga., 466 F.3d 1276, 1283–88 (11th Cir. 2006). The result of individual exclusionary zoning cases might also turn on the attitude of the assigned judges towards such claims. This seemed true in *Arlington Heights* itself, *see supra* notes 56, 60 and accompanying text, and the subsequent era has seen an even greater proclivity by Republican presidents to appoint federal judges hostile to civil rights. *See, e.g.*, Robert G. Schwemm, *Reflections on Moving Toward Integration and Modern Exclusionary-Zoning Cases Under the Fair Housing Act*, 70 CASE W. RES. L. REV. 691, 697 n.25 (2020). Further, another post-*Arlington Heights* trend—increased appellate deference to a trial court's fact-finding in civil rights cases, *see supra* notes 270–71 and accompanying text—has strengthened the ability of a hostile district judge to derail even a reasonably strong exclusionary zoning claim.

431. *See, e.g., Mhany*, 819 F.3d at 588–98 (describing key events beginning in 2003 in 2016 appellate decision); *Avenue 6E*, 818 F.3d at 498–501 (describing key events beginning in 2002 in 2016 appellate decision); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 929–32 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988) (describing key events beginning in 1980 in 1988 appellate decision); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1285–87 (7th Cir. 1977) (describing key events beginning in 1970 in 1977 appellate decision); *see also* Mhany Mgmt. Inc. v. Cnty. of Nassau, No. CV052301GRBARL, 2022 WL 20704399 (E.D. N.Y. Feb. 22, 2022) (dealing with post-relief disputes in the *Mhany* case some two decades after the initial case began).

432. *See, e.g.,* Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1037 (8th Cir. 1979); *see also* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1009 (7th Cir. 1980) (approving settlement of case calling for different project to be built at alternative site adjacent to defendant-village); *see also* Sager, *supra* note 340, at 1398–99 (noting "the quite substantial practical inhibitions to mounting a housing project in the hope of eventually prevailing in protracted litigation").

of exclusionary zoning and open up segregated areas of opportunity to racial minorities. This failure cannot be attributed solely to the limits of legal doctrine and litigation's practical realities, but also is based on an evolution of zoning's purposes and other changes in housing programs and societal attitudes during the past fifty years.

2. Zoning's Goals Change

One key change is that the basic goal of local zoning shifted to an emphasis on "growth control" from its original purpose of "good housekeeping." As described in a series of books by economist William A. Fischel,[433] this resulted from the inflation and environmental activism in the 1970s and produced a political movement he called "the rise of the homevoters," in which homeowners displaced pro-growth factions in local government.[434] According to Fischel:

> Because homeowners have so much of their net worth wrapped up in their houses, they pay close attention to the many things that local governments can do to enhance or detract from their value. This provides a political side for the famous vote-with-your-feet model of local government.[435]

This model posits that, in a metropolitan area made up of dozens of towns, people would be drawn to those that best suit their needs and thus:

> the affluent would self-segregate themselves in particularly wealthy suburbs. Zoning could abet and institutionalize this process if suburbs, in the competition for the most affluent suburbanites, required housing within their border to be single-family homes on large lots, and excluded rental housing altogether. . . . [T]hus, the most affluent towns tended to be those that could most easily implement restrictive zoning. . . . [E]xclusionary zoning would seem a classic instance of parochial goals triumphing at the expense of the general welfare. But at least in the 1960s and 1970s, few political leaders seemed inclined to meddle . . . , so legislative responses to exclusionary zoning were rare. The efforts of advocates were thus diverted to the courts.[436]

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433. *See* WILLIAM A. FISCHEL, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION (2015); FISCHEL, *supra* note 310; book cited *infra* note 435.

434. Fischel's basic theory is that "local governments should be thought of as active economic agents" and that "zoning is the product of rational, if not always admirable, economic calculation by voters in American municipalities." William A. Fischel, *Autobiographical Essay* 1 (Nov. 2021), www.sites.dartmouth.edu/wfischel/ [perma.cc/6U4M-KAEE] (last visited Feb. 12, 2024).

435. *Id.* at 2 (describing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (referring to this model as the Tiebout hypothesis)).

436. SANDER ET AL., *supra* note 116, at 235-36;.

Zoning's shift toward restricting growth was embraced by all segments of the political spectrum, including pro-environmental liberals. In the Supreme Court, for example, Justice Douglas, an otherwise staunch supporter of civil rights, waxed rhapsodic in upholding a small New York town's zoning limits on unrelated groups in *Village of Belle Terre v. Boraas*.[437] The *Belle Terre* opinion, on behalf of seven justices, also endorsed the village's effort to avoid the "urban problems" represented by "boarding houses . . . and the like," such as increased traffic and noise that occur when "[m]ore people occupy a given space."[438] Throughout the country, restrictive zoning practices became ubiquitous even in the most "progressive" states like California and Connecticut.[439]

3. The Limits of Federal Housing Programs

As noted above,[440] the subsidy program that the *Arlington Heights* developer originally sought to use was suspended in the early 1970s as the first step in what would become a major shift in

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437. 416 U.S. 1 (1974). According to Justice Douglas's opinion:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

438. *Id.* Justice Brennan dissented on procedural grounds. *Id.* at 10–12. Only Justice Marshall dissented on the merits, and even he "agree[d] with the majority that local zoning authorities may properly act in furtherance of . . . restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families." *Id.* at 13. All these were "legitimate and substantial interests," *id.* at 18, and he saw "no constitutional infirmity in a town's limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria." *Id.* at 17. As to the latter caveat, however, Justice Marshall viewed Belle Terre's zoning restriction as violating the plaintiffs' constitutional rights of association and privacy, *id.* at 15-20, and he also took note of recent race-based zoning cases in the lower courts that have "acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities." *Id.* at 14–15 & n.3 (citing, *inter alia*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), and Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973)).

439. *See, e.g.*, Binyamin Applebaum, *California Is Making Progress on Housing*, N. Y. TIMES, Oct. 5, 2022, at A23 (noting that California for many decades tolerated local resistance of housing construction); *Connecticut Zoning Atlas*, DESEGREGATE CONNECTICUT (2021), www.desegregatect.org/atlas [perma.cc/HG3C-8Z8H] (reporting, based on a detailed analysis of local zoning regulations, that only two percent of Connecticut land is available for multi-family housing and that a minimum one-acre lot size is required for 80 percent of all single-family homes built in the state).

440. *See supra* note 185 and accompanying text.

federal efforts to support low-income housing. These changes included: (1) ending funding for new public housing construction;[441] (2) a growing reliance on project-based Section 8 subsidies as the primary method for creating new affordable housing;[442] (3) the creation in 1986 of the Low Income Housing Tax Credit ("LIHTC") program that became, along with project-based Section 8, the principal source of new construction for low-income housing units;[443] and (4) the use of tenant-based vouchers as the key way of giving low-income individuals a wider choice of rental units.[444]

The problem is that the LIHTC and Section 8 programs have rarely been used to create housing in opportunity-rich suburbs. Indeed, LIHTC's authorization statute actually "favors the distribution of . . . development of housing units in low-income areas,"[445] with the result that, although LIHTC has helped produce millions of subsidized units, it "perpetuates economic and racial

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441. *See* 2023 HOUSING, *supra* note 405, at 41 (noting that the public housing stock, which federal law now caps at 1999 levels, has been "dwindling" and housed "only 835,000 households in 2022"); 2022 RENTAL HOUSING, *supra* note 412, at 7 (noting a year earlier that public housing, though plagued by chronic underfunding and huge maintenance needs, provided 958,000 units for low-income tenants).

442. *See* 2022 RENTAL HOUSING, *supra* note 412, at 7 (noting that the project-based Section 8 stock is now 1.3 million units). This shift to Section 8 projects began during and became part of the *Arlington Heights* litigation. *See supra* note 185 and accompanying text.

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> This [LIHTC] program provides tax credits for investors that finance affordable housing developments and has supported more than 2.5 million low-income units since its inception in 1986. However, many LIHTC units are now approaching the end of their affordability periods and could be lost from the subsidized stock.

2022 RENTAL HOUSING, *supra* note 412, at 8; *see also* 2023 HOUSING, *supra* note 405, at 41 (noting that LIHTC "has supported more than 3.6 million low-income units since 1986" and that "LITHC properties typically have a 30-year affordability period, after which the unit can flip to market rate"). For further descriptions of the LIHTC program, see *infra* notes 445-46 and accompanying text; Wesley Hous. Dev. Corp. of N. Virginia v. SunAmerica Hous. Fund 1171, 577 F. Supp. 3d 448, 453 (E.D. Va. 2021).

444. *See* 2023 HOUSING, *supra* note 405, at 40 (noting that tenant-based Housing Choice Vouchers in 2022 "served 2.3 million households").

445. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 525 (2015). This conclusion was based on the Court's description of the LIHTC program as Congress having "directed States to develop plans identifying selection criteria for distributing the credits [that] must include certain criteria, . . . including that low-income housing units . . . be built in census tracts populated predominantly by low-income residents." *Id.* (statutory citations omitted). This case grew out of an FHA-impact claim that challenged the location of LIHTC projects primarily in poor, minority communities in Dallas. *See id.* at 524–27. The Court remanded this claim after endorsing the FHA's impact theory, but the trial court ultimately ruled against it. *See* Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affs., No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

segregation by concentrating affordable housing in already-poor, often racially-segregated neighborhoods."[446] With regard to Section 8-subsidized projects, they are, as noted above,[447] subject to local zoning laws, which means that they, too, have generally not been located in exclusive suburbs.[448] And Section 8's tenant-based vouchers, though theoretically usable in any community, have tended to result in their users living "in the same high-poverty, segregated neighborhoods as they did before they received vouchers."[449]

Another major cause of the dearth of affordable housing in suburban communities has been HUD's failure during the post-*Arlington Heights* era to comply with the FHA's mandate that federal housing programs be administered "in a manner affirmatively to further" fair housing ("AFFH").[450] This AFFH mandate requires HUD to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increase."[451] For decades, virtually every suburban municipality has received a yearly Community Development Block Grant ("CDBG") or some other HUD grant,[452] which means that it was required to certify to HUD's

446. Oliveri, *supra* note 13, at 803.

447. *See supra* note 151 and accompanying text.

448. *See e.g.*, Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 676 (2011).

449. Oliveri, *supra* note 13, at 798; *see also id*. at 802 (describing studies showing "the persistent discrimination against vouchers holders in wealthier neighborhoods").

In the 1980s as part of the remedial phase of the *Gautreaux* litigation, tenant-based vouchers were successfully used to help over 7,000 CHA residents relocate, mostly to predominantly white suburbs. *See supra* note 16; LEONARD S. RUBINOWITZ & JAMES ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000). This experience became the prototype in the 1990s for HUD's "Moving-to-Opportunity" program, which used tenant-based vouchers to assist some 4,600 low-income families living in public housing in Chicago and four other cities to move from poor neighborhoods to higher opportunity communities. *See* HUD, MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION (2011). Currently, a HUD program is funding public housing agencies in New York, Los Angeles, and six other cities to provide mobility-related services to some 9,400 families using housing-choice vouchers. *See Community Choice Demonstration*, HUD, www.hud.gov/program_offices/public_indian_housing/programs/hcv/communitychoicedemo [perma.cc/FQ4Z-QPVX] (last visited Feb. 12, 2024).

450. *See* 42 U.S.C. § 3608(d), (e)(5); *supra* note 147 and accompanying text.

451. NAACP, Boston Chapter v. HUD, 817 F.2d 149, 155 (1st Cir. 1987). Earlier cases dealing with the AFFH mandate are described in Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L. J. 125, 137-40 (2012).

452. Created by the 1974 Housing and Community Development Act, the CDBG program provides federal funds to local communities for housing-related public improvement projects. *See* 42 U.S.C. §§ 5301–5317 (2023). CDBG has

satisfaction that "the grantee will affirmatively further fair housing."[453] HUD, however, did virtually nothing to enforce these certifications (e.g., it continued to provide CDBG funds to suburbs whose exclusionary zoning practices barred low-income housing projects),[454] at least until late in the Obama Administration when it first promulgated a substantive AFFH regulation.[455] HUD soon reverted to form, however, and replaced this rule during the Trump Administration with a weaker version "that elevated local control above civil rights."[456] In 2021, President Biden ordered HUD to re-examine its AFFH actions during the prior administration, which resulted in HUD's 2023 proposal to restore much of the Obama-era regulations,[457] but no final rule has yet been issued on this matter.

C. Promising Developments

Part V has thus far described how, in the decades after *Arlington Heights* established the basic contours of exclusionary zoning law, powerful social and political trends encouraged affluent suburbs to continue to zone out affordable housing and maintain residential segregation despite regular FHA-based challenges. This concluding section identifies some current developments that might help undercut zoning's power to restrict low-income opportunities.

- Fair housing, long the "forgotten step-child" of the civil rights movement, has come to be seen in recent times as the key to progress in virtually all civil rights areas (e.g., school desegregation, job opportunities, and general quality-of-life issues). Research has established that, in

long been HUD's largest grant program subject to the AFFH mandate. In FY 2009, for example, it accounted for some $3.6 billion, providing annual grants to over 1,200 units of state and local governments, *see* Schwemm, *supra* note 451, at 147–48, and similar yearly funding levels for a comparable number of grantees have occurred since then. *See* HUD, www.hud.gov/program_offices/comm_planning/budget (last visited Feb. 12, 2024).

453. 42 U.S.C. § 5304(b)(2).

454. *See* Schwemm, *supra* note 451, at 144-69 (describing HUD's failure to use the AFFH mandate effectively prior to the Obama Administration); *see also* Abraham, *supra* note 418, at 1968 & n.19 (concluding in 2022 that "until now, the federal government has failed to enforce the [AFFH] mandate").

455. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

456. Abraham, *supra* note 418, at 1968 n.21 (describing Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020), *enjoined*, Massachusetts Fair Hous. Ctr. v. United States Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600 (D. Mass. 2020)); *see also* Nat'l Fair Hous. Alliance v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018), *motion to amend denied*, 397 F. Supp. 3d 1 (D.D.C. 2019) (upholding HUD directives early in the Trump Administration that effectively blocked key provisions of the Obama Administration's AFFH regulations).

457. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023).

colloquial terms, one's zip code is likely to play a major role in determining a person's life opportunities.[458]

- Opposition to exclusionary zoning has become bipartisan. While liberals have long championed reducing zoning's power as a way of expanding opportunities,[459] conservatives now also denounce undue zoning restrictions as a way of limiting government in general and as the key to expanding housing growth in particular.[460]
- The Biden Administration's commitment to a more aggressive use of the FHA's "affirmatively furthering" mandate holds out the hope that, at long last, this law might fulfill its potential of pressuring municipal recipients of HUD funds to loosen their exclusionary practices.[461]
- States and localities have taken a more active role in encouraging affordable housing.[462] These efforts include

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458. *See, e.g.,* Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016); *see also* Abraham, *supra* note 418, at 1966 (identifying research showing that segregated housing nurtures various inequities including "drastically diminish[ed] access to life opportunities like quality education and healthcare" and that greater integration "tends to improve black proximity to jobs . . . and, in general, improves the quality of public services for blacks"); Schwemm, *supra* note 430, at 692-93 (noting, in review of SANDER ET AL., *supra* note 116, "that blacks who live in racially segregated neighborhoods suffer a variety of life-limiting, even life-threatening, conditions likely to harm them far into the future").

459. *See, e.g.*, RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD WALLS WE DON'T SEE (2023); *President Biden Announces the Build Back Better Framework,* WHITE HOUSE (Oct. 28, 2021), www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/ [perma.cc/CPH7-THQK] (calling for "zoning reforms that enable more families to reside in higher opportunity neighborhoods"); U.S. HOUSE OF REPRESENTATIVE, COMMITTEE ON FINANCIAL SERVICE, SUBCOMMITTEE ON HOUSING, COMMUNITY DEVELOPMENT, AND INSURANCE, ZONED OUT: EXAMINING THE IMPACT OF EXCLUSIONARY ZONING ON PEOPLE, RESOURCES, AND OPPORTUNITY 3 (Oct. 15, 2021) [hereinafter *Zoned Out*] (testimony of Congresswoman Maxine Waters opining that "[c]ommunities across this country continue to use zoning . . . to preserve residential segregation" that limits minorities' "access to jobs, homeownership, affordable rent, and a child's access to quality education").

460. *See, e.g.*, Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, 84 Fed. Reg. 30853 (June 25, 2019) (announcing Executive Order 13,878 by President Trump establishing a HUD-chaired White House council to study regulatory barriers that "artificially raise the cost of housing development and help to cause the lack of housing supply," including local governments' "overly restrictive zoning and growth management controls" that "drive down the supply of affordable housing"); *Zoned Out*, *supra* note 459, at 44 (noting that members of Congress from both parties have introduced bills "intended to reduce exclusionary zoning, reflecting a growing bipartisan consensus on the need for land use reform").

461. *See supra* note 450–57 and accompanying text.

462. *See* 2022 RENTAL HOUSING, *supra* note 412, at 8 (noting estimate that

the adoption by California, New York, and some other states of local versions of the FHA's AFFH mandate.[463] New laws in these states and elsewhere have also curbed some exclusionary zoning practices.[464] Further, "inclusionary zoning" ordinances that require market-rate developers to include some affordable housing units in their projects—long associated only with New Jersey's *Mt. Laurel* program[465]—have now been adopted by a

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"state multifamily housing bonds support about 46,000 affordable rental units in 2019, and housing trust funds raise more than $2.5 billion each year to meet affordable housing needs").

463. *See* CAL. GOV'T CODE § 8899.50 (b)(1) (West 2023) (providing, based on legislation enacted in 2018, that every California state agency "shall administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing"); N.Y. PUB. HOUS. LAW § 600.2 (McKinney 2023) (providing, based on legislation enacted in 2021, that every New York state agency administering housing and community development laws and programs and any locality receiving state housing funds "shall administer such programs and activities relating to housing and community development in a manner to affirmatively further fair housing"); Andrew Darcy, *Using State Law to Enforce 'Affirmatively Further' Fair Housing Obligations: No Longer Fitting a Square Peg in a Round Hole*, 29 CARDOZO J. OF EQUAL RIGHTS & SOCIAL JUSTICE 593, 611 n.113 (2023) (providing citations of "affirmatively furthering" laws in Illinois, Maine, and Maryland).

464. *See, e.g.*, Mara Gay, *To Cut New York Housing Costs, Ease Suburbs' Zoning Laws*, N. Y. TIMES, Feb. 23, 2023, at A22 (reporting on proposal by New York's governor to require municipalities in the New York City area "to increase their housing supply by 3 percent every three years and . . . allow the state to override local zoning laws to approve projects in towns that refuse to meet these goals"); *id.* ("In 2021, California essentially banned single-family zoning. Two years earlier, Oregon did the same for cities with populations of 10,000 or more. . . . Massachusetts requires towns to allow multifamily housing near transit centers."); Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, 43 ZONING AND PLAN. L. REP. No. 8 (2020) (describing Oregon's new restrictions on local zoning); Minneapolis became, based on 2019 ordinance amending the zoning code, the first large city to eliminate single-family zoning; Portland: 2020 zoning-reform ordinance allows duplexes, triplexes, quadplexes, cottage homes, or a second accessory dwelling unit ("ADU") on most single-family residential lots.

465. Beginning in 1975 when the New Jersey Supreme Court held that municipalities were obligated under the state constitution to provide for their fair share of affordable housing in S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975), New Jersey has, through legislation and court decisions, pursued its own unique system of "inclusionary zoning." *See* In the Matter of the Application of the Township of Readington, No. A-2756-21, 2023 WL 7383052, at *1 (N.J. App. Nov. 8, 2023) (summarizing the legal elements of this program).

Though not as famous as New Jersey's program, Massachusetts enacted a statute years before the first *Mt. Laurel* decision that authorizes developers of projects that include 20-25% affordable units to bypass zoning restrictions in towns whose housing stock is not at least 10% affordable, a law that has produced over 60,000 affordable units since 1970. *See* MASS. GEN. LAWS ANN. Pt. 1, tit. VII, Ch. 40B (West 2023); *Chapter 40B: The State's Affordable Housing Law*, CITIZENS HOUS. AND PLAN. ASS'N (Jan 2014), www.chapa.org/sites/default/files/40%20B%20fact%20sheet_0.pdf [perma.cc/T7YV-ECTU].

variety of states and towns,[466] including Arlington Heights.[467]

- Bans on "source-of-income" discrimination have been added to so many state and local fair housing laws that now the majority of Americans live in jurisdictions with this type of antidiscrimination protection.[468] Though mainly designed to guarantee voucher-holders access to a fuller range of rental opportunities, these source-of-income laws have also been used to challenge exclusionary zoning.[469] Congress in recent years has also considered amending the FHA to outlaw this type of discrimination,[470] which would expand the federal statute's ability to challenge segregative zoning practices by municipalities.[471]
- Recent cases have recognized that substantial monetary awards, including punitive damages, may be appropriate in FHA-based exclusionary zoning cases against municipalities. The FHA has always been understood to apply to local governments,[472] but older decisions limited relief in these claims based on caselaw interpreting § 1983, which bars punitive damages against municipalities.[473] In 2023, however, a district court allowed a jury to award punitive damages against a town that violated the FHA by blocking a group home for disabled people and upheld the jury's punitive award of $5,000,000.[474] The defendants have appealed, but the

466. *See Zoned Out*, *supra* note 459, at 41 (testimony of Dora Leong Gallo noting that some 866 municipalities have adopted laws requiring "the inclusion of affordable units in a market rate housing development"); *id*. at 36 (testimony of Sheryll Cashin describing the inclusionary zoning ordinance of Montgomery County, Maryland, as "highly successful" in insuring that "this extremely diverse, wealthy suburban county has no pockets of concentrated poverty").

467. *See supra* note 406 and accompanying text.

468. For a list of the states and localities with such laws, see *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, POVERTY & RACE RES. ACTION COUNCIL app. B (Dec. 2023), www.prrac.org/pdf/AppendixB.pdf [perma.cc/WNE8-929R].

469. *See* Complaint at 58, Open Communities Trust, LLC v. Town Plan & Zoning Commission of the Town of Woodbridge, No. NNH-CV22-61126245-S (Conn. Super. Aug. 20, 2022) (alleging that town's exclusionary land-use regulations "make housing unavailable because of race and lawful source of income in violation of the Connecticut Fair Housing Act").

470. *See* Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 657-58 (2020) (listing bills).

471. *See id*. at 629-33.

472. *See* SCHWEMM, *supra* note 11, at § 12B:5 nn.1-8 and accompanying text.

473. *See* City of Newport v. Fact Concerts, 453 U.S. 247 (1981). For FHA cases applying this same restriction, see SCHWEMM, *supra* note 11, at § 25:11 n.6.

474. Gilead Community Services, Inc. v. Town of Cromwell, 604 F. Supp. 3d 1, 17-25 (D. Conn. 2022), *defendants' appeal pending*, No. 22-1209 (2d Cir. 2023). The *Gilead* court also upheld the jury's $181,000 compensatory award to the plaintiff-developer, *id*. at 30–31, and rejected the defendants' § 1983-based

United States as *amicus curiae* has argued in the Second Circuit that the FHA, unlike § 1983, does authorize a punitive award in such a case.[475] If this position is upheld, exclusionary zoning in race-based cases may prove much more expensive in the future, and, since one of the goals of punitive damages is deterrence,[476] the prospect of such awards against similarly situated municipalities may change the economic dynamics that have heretofore overly protected zoning which is racially discriminatory.

- Attitude changes: surveys show that, in the decades since enactment of the 1968 FHA, whites' attitudes about racial segregation have evolved, showing a steady increase in their tolerance for integration generally and in their willingness to live in integrated neighborhoods and oppose obstacles to integration in particular.[477] Suburban political leaders, like the Trustees of Arlington Heights, presumably will eventually embrace policies that reflect these attitudinal changes.

Whether these new developments will help curb exclusionary zoning and thus allow more affordable housing to reduce segregation in America's most opportunity-rich communities remains to be seen.

VI. CONCLUSION

The century-old story of race-based exclusionary zoning law began in 1917 with the Supreme Court's decision in *Buchanan v. Warley*, but only gained real clarity in the 1970s with the *Arlington Heights* decisions by the Supreme Court and Seventh Circuit. In the Supreme Court, Justice Powell's opinion confirmed that his earlier decision in *Warth* limiting standing in equal protection challenges to exclusionary zoning would continue and that these claims would also be limited by *Washington v. Davis*'s purposeful-discrimination requirement. But Justice Powell also took the Court well beyond these recent precedents by providing new guidance on how the evidence in these cases should be evaluated and then, in a radical departure from established judicial norms, by making his own

argument that the town could not be held liable for these damage awards based on a *respondeat superior* theory. *Id.* at 25–28.

475. *See* Brief for the United States as Amicus Curiae in Support of Appellees Urging Affirmance on the Issues Addressed Herein, Gilead Community Services, Inc. v. Cromwell, No. 22-1209 (2d Cir. Dec. 20, 2022), available at www.justice.gov/crt/case-document/brief-amicus-gilead-community-health-services-v-town-cromwell [perma.cc/ZR7C-98KG].

476. *See* SCHWEMM, *supra* note 11, § 25:10 nn.1–6 and accompanying text.

477. *See* SANDER ET AL., *supra* note 116, at 307-08, 459-62. Whether a similar increase has occurred in the tolerance of upper-class persons for economic integration is another question. And for their part, Blacks "are more skeptical about integration in 2018 than they were in 1968." *Id.* at 462.

findings about the *Arlington Heights* facts, findings that were decidedly pro-defendant. All of this could have been predicted by Powell's inclination, based on his background as a privileged leader of a southern city, to favor local governments and their white constituents. Still, the Court in *Arlington Heights* did preserve the plaintiffs' Fair Housing Act claim, thus opening the way for the Seventh Circuit on remand to construct an effect-based theory under the FHA that would allow exclusionary zoning law to flourish, at least when the cases arose from the rejection of a particular project.

For over fifty years, I have lived with the *Arlington Heights* case, first as one of the plaintiffs' lawyers and then as an academic studying housing discrimination. During this time, I have seen the FHA evolve into a strong statute that includes an impact-theory of liability and whose ban on racially discriminatory housing practices has now been acknowledged by the Supreme Court as playing a "continuing role in moving the Nation toward a more integrated society."[478]

Also during this time, the Village of Arlington Heights changed into a more diverse and welcoming community that, like many other suburban areas of the country, now regularly elects Democratic candidates. But residents of these high-opportunity communities, regardless of their other political tendencies, have generally continued to oppose subsidized housing projects. Thus, exclusionary zoning remained a battleground throughout the post-*Arlington Heights* years, as occasional FHA-based victories generally failed to overcome more powerful social and economic forces that encouraged affluent suburbs to use zoning to exclude affordable housing.

Economic self-interest has always been a powerful force, and that may never change. Other forces now arising, however, hold out some hope that zoning's power to limit housing choices, restrict opportunities, and maintain residential segregation may at long last be ebbing. Whether this will occur without taking another fifty years remains to be seen.

478. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 547 (2015).