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INTRODUCTION

The United States Supreme Court has often confronted the problem of a state’s imposition of a racial classification to disadvantage a racial minority.1 In the cases which have come before the Court, state attempts to discriminate or segregate have been held to be impermissible. These discriminatory measures have usually been intended to exclude minorities from benefits which the white majority enjoy and have been used as tools to perpetuate racial division.

However, there have also been other, more recent court decisions which have involved racial classifications designed to remedy past discrimination or allow access of minorities to opportunities previously denied them.2 Although racial classifications have been employed in these cases, the purpose of the classifications has ostensibly been a non-hostile one. Racial distinctions have been recognized as permissible in contexts in which the effects of past discrimination are not self-correcting and in which affirmative action is necessary if racial division is to be remedied.

It is against this background that the constitutionality of racial housing quotas is considered. The most recent example of the concept of a racial housing quota was a proposed, and subsequently rejected, amendment to the Oak Park, Illinois, Fair Housing Ordinance.3 The

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3. Oak Park, Illinois, An Ordinance Amending the Fair Housing Ordinance of the Village of Oak Park and Establishing Procedures for Achieving Stable Integrated Housing Patterns, December 10, 1973 [hereinafter cited as Oak Park Ordinance]. The Ordinance contains the following provisions relating to the quota:

24-1/2.10.3 Limitation on Sales in Designated Area. It shall be unlawful for any seller or any agent for any seller to knowingly sell any real property to a black person on any block in the designated area if thirty (30%) per cent
amendment placed a limitation on the sale or rental of property in the eastern area of Oak Park.4 Once 30 per cent of the property on each block had been sold or rented to black persons, no other blacks could buy or rent on that block. The amendment contained a provision requiring the Village to offer comparable housing to those who could not purchase or rent the property which they had originally chosen.6 The avowed purpose of the amendment, as stated in its Findings,6 was the achievement of a racially integrated community which would not become resegregated when white persons moved out or would no longer move into the area. The projected effect of the legislation was not to exclude a minority from housing in the community, but to provide housing while ensuring that it would be on an integrated and not a resegregated basis.

In developing this plan, Oak Park relied upon studies made of experiences in other communities7 which indicated that there is a theoretical maximum minority group proportion which white residents will tolerate.8 When this proportion, or “tipping point,”9 is exceeded, white residents will move from the area in increasing numbers. Since there is more good housing available for whites, their need to stay in the area is not as great as that of black residents. As white families move out and others refuse to move in, the available housing is soon filled by the greater number of black families who have fewer good housing

or more of the block between two intersecting streets on both sides of the street has been occupied by black persons.

24-1/2.10.4 Rentals in Designated Area. It shall be unlawful for any owner or any agent for an owner to knowingly rent any apartment in a multiple family dwelling of four or more units in the designated area to a black person if 30% or more of the multiple family dwellings in the building have been rented to or have been occupied by black persons. This section shall not apply to the renewal of an existing lease.

24-1/2.10.5 Alternate Housing to be Made Available. Any black person attempting to purchase or lease housing in Oak Park and refused pursuant to paragraph 3 or 4 hereof, shall be referred to the Community Relations Department of the Village of Oak Park. The Department is charged with the responsibility to locate comparable housing for the refused applicant in other areas of the Village of Oak Park. The Department is also charged with the responsibility of assisting owners to find white persons to purchase or lease real estate in the designated area.

4. See § 24-1/2.10.3-10.4, set forth in note 3 supra. The eastern area of Oak Park borders on an area in the city of Chicago which is predominantly black. Because of better housing opportunities in Oak Park, many blacks from this area of Chicago began to move into the neighboring Oak Park community. Many whites refused to remain in this part of Oak Park and the Village was faced with the possibility that its eastern area would become all black. The amendment was proposed in order to prevent this from occurring.

5. Id.

6. See Findings, Oak Park Ordinance at 1.

7. For a discussion of several such studies, see generally Navasky, The Benevolent Housing Quota, 6 How. L.J. 30, 31-37 (1960) [hereinafter cited as Navasky].

8. Id. at 31.

9. Id. at 31-37.
The refusal of white families to remain in the neighborhood and the influx of black or other minority families makes integration of the community impossible. The utilization of a racial housing quota provides assurance to white families that the minority population of the area will not go beyond the tipping point. The purpose of this plan is to avoid the situation in which whites refuse to remain in the community, causing it to become all black.

This quota plan does not fit neatly into either of the two types of racial classification cases which the Supreme Court has previously confronted. It is neither a state attempt to discriminate nor a remedy for past discrimination. The purpose of this plan is not to invidiously exclude blacks from housing opportunities. However, the quota does set limits on the extent to which blacks can utilize those opportunities. The goal of the quota is integration, not resegregation, and the achievement of that goal is facilitated by the use of a racial classification. Though Oak Park, after debate by its Community Relations Commission, has rejected the concept of a housing quota in favor of a more thorough integration plan, the idea of a racial housing quota is similar to plans which have been proposed or put into action in other communities. Racial percentages may vary, but the purpose of the quotas discussed herein is the achievement of integration in the community. The constitutional issue presented is whether this benign purpose can be a justification for using racial classifications in the housing context.

**EQUAL PROTECTION**

Because a housing quota makes availability of housing dependent upon a person's race, it may violate the equal protection clause of the fourteenth amendment. The Supreme Court has struck down many state statutes and city ordinances which disadvantage racial minori-
ties and deny them the equal protection of the laws.\textsuperscript{14} Since the quota contains a racial distinction, its proponents must bear "a far heavier burden"\textsuperscript{15} in order to justify it. They will need to show that the racial classification is necessary to achieve a legitimate state purpose and is not merely rationally related to accomplishing that purpose.\textsuperscript{16} This "rationally related" test would be the standard if no racial or other "suspect"\textsuperscript{17} classification were involved.

To sustain this greater burden, the state must show that the racial distinctions of the quota have a very high degree of relevance to the valid state purpose, that the objective could not be achieved by measures which do not employ racial distinctions and that the public interest of the measure clearly outweighs the private detriment of using such classifications.\textsuperscript{18} According to this standard, the use of racial classifications is not forbidden per se,\textsuperscript{19} so it may be possible for the state to meet its high burden of justification. But the fact that the burden of such quotas usually falls upon minorities, putting another limitation on their often already limited housing opportunities, weighs heavily against the meeting of that higher level of justification.

A racial housing quota may also conflict with the Constitution if it fails to accord equal protection to individuals who will be denied housing because of their race. In \textit{Shelley v. Kraemer},\textsuperscript{20} the Court, in refusing to enforce a restrictive covenant, stated that:

\begin{quote}
The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.\textsuperscript{21}
\end{quote}

This approach to the fourteenth amendment has been approved in many cases before and after \textit{Shelley}.\textsuperscript{22} It is the individual, and not merely the group to which he belongs, who is entitled to the equal protection of the laws. When the quota for any particular race has been filled, individuals will begin to be denied housing because of their race. Even assuming that the quota is used to achieve a valid goal of integration and racial understanding, group goals will be satisfied

\begin{flushright}
14. See note 1 supra. \\
16. \textit{Id.} at 196. \\
19. \textit{Id.} at 1106. \\
20. 334 U.S. 1 (1948). \\
21. \textit{Id.} at 22. \\
\end{flushright}
at the expense of individual rights. The emphasis of the equal protection clause on individual, personal rights decreases the probability of developing a constitutionally acceptable quota plan. The framework of most quotas which use a racial percentage to achieve community integration provides no way to avoid this denial of individual equal protection.

**DISCRIMINATION IN HOUSING**

Denial by the state of access to housing on the basis of one's race has been condemned by both the Supreme Court and the Congress. In the 1917 case of *Buchanan v. Warley*, the Supreme Court reviewed a Louisville city ordinance which prohibited blacks from occupying houses on blocks where the majority of houses were occupied by whites, and prohibited whites from occupying houses on blocks where the majority of houses were occupied by blacks. The Court held that the ordinance, because it conditioned the occupancy, purchase and sale of property upon the color of the proposed occupant, had exceeded the legitimate bounds of the state's police power and had invaded the constitutional right to acquire and enjoy property.

In *Shelley v. Kraemer*, the Court refused to enforce a restrictive covenant which forbade owners of property under the covenant from selling their land to non-Caucasians. The equal protection clause does not prohibit individuals from making such covenants, but it does prohibit the state from making or enforcing them. The Court has also held, in *Reitman v. Mulkey*, that a California constitutional amendment which had the effect of overturning the state's anti-discrimination housing law was an unconstitutional involvement of the state in racial discrimination and a violation of equal protection. These three cases indicate that the Court will invalidate actions by the state which make racial distinctions the basis for access or non-access to housing.

The Congress has also given protection to the right of all citizens to housing regardless of race. The Civil Rights Act of 1866 provides for the property rights of citizens. It states that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal

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23. 245 U.S. 60 (1917).
24. Id. at 74-75, 82.
26. Id. at 20.
property.\textsuperscript{28} This policy of extending equal property rights to all persons was reinforced by the 1968 Fair Housing Act. Section 3604(a) of the Act provides:

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.\textsuperscript{29}

A racial quota plan would seem to be in conflict with both of these provisions. Once a certain percentage of the housing in a given area is occupied by blacks, then any further prospective black occupants will not have the same rights as white citizens to purchase land in that area. They will be refused housing solely on the basis of race. Both sections rule out race as a proper consideration for determining the housing opportunities of an individual. Neither of the provisions makes an exception for actions which are similar to the proposed Oak Park Ordinance and which may have a benign purpose. The Civil Rights Act and the Fair Housing Act, like the equal protection clause of the fourteenth amendment, seem to give protection to the individual rather than to his racial group, while the quota plan accommodates only group equities.

**BENIGN QUOTAS**

A threshold question to discussing a plan such as this is whether this quota or any quota can ever be benign.\textsuperscript{30} Because of the many Supreme Court decisions and the various pieces of legislation of the federal and state governments, explicit racial discrimination or exclusion is no longer possible in many fields. A quota may merely be used as an alternative and a subterfuge when blatant racism is no longer workable. The quota may also keep the number of blacks limited to a certain percentage, with community and political power comparably limited.\textsuperscript{31} The necessity of employing a quota in itself may have a detrimental psychological effect, similar to that which the Court recognized in *Brown v. Board of Education*\textsuperscript{32} as resulting from

\textsuperscript{29} 42 U.S.C. § 3604(a) (1970).
\textsuperscript{30} See Developments in the Law at 1115.
\textsuperscript{31} Id.
\textsuperscript{32} 347 U.S. 483, 494 (1954). But see Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L.J. 1387, 1396 (1962), suggesting that the invalidation of school segregation and the use of racial housing limitations are similar measures which have the common objective of eliminating these psychological wounds.
school racial segregation. The use of a quota implies that the majority of whites will not live with blacks without the imposition of an occupancy limitation. On the other hand, communities which desire to use a quota may be correct in assuming that racial harmony and understanding cannot be achieved if persons of both races do not have the opportunity to attempt integrated housing. 33

When a quota with a racial classification has integration and remediing past discrimination as its purposes, is it to be judged by the same standard as that by which hostile, segregation-oriented measures are judged? Since the Supreme Court has not placed a blanket prohibition on the use of racial distinctions, 34 but has merely said that that type of classification must bear a greater burden of justification, it seems that quotas may be used in some circumstances. In the past, the Court has dealt with legislation involving racial distinctions in which states attempted to justify discrimination on the theory that these acts would promote the public peace and avert racial conflict, 35 or reflect a "public decision to move slowly in the delicate area of race relations." 36 But these discriminatory measures had no beneficial purpose for those who suffered discrimination. Because it has the benign purpose of furthering integration, legislation involving housing quotas may differ from these past cases, and a more lenient standard may be appropriate. In reviewing this legislation, a court would first determine whether the classification was actually benign before applying this "less stringent" standard. 37 However, even if a court could accept a less severe standard of review, the fact that equal protection is a personal right accorded to individuals may make validation of the housing quota itself very difficult.

Quotas have found some judicial acceptance in other fields. In Brown v. Board of Education, 38 the Court held that the "separate but equal" doctrine could not be applied in the field of public education and that public schools must be desegregated. Various school systems experienced problems in complying with Brown's requirement to desegregate. The school authorities involved in Swann v. Charlotte-Mecklenburg Board of Education 39 had failed to remedy their segregated school system, and the Supreme Court held that the district

33. OAK PARK COMMUNITY RELATIONS COMMISSION, MINORITY REPORT 3 (February 20, 1974). See Navasky at 64-65.
34. See Developments in the Law at 1106.
35. See Buchanan v. Warley, 245 U.S. 60 (1917).
37. See Developments in the Law at 1107.
court could use its broad powers to fashion remedies in order to de-
segregate. In Swann, the district court had directed the use of a lim-
ited racial quota as a beginning point of this process. It was a quota
of 71 per cent white children to 29 per cent black children in indi-
vidual schools. The Court held that this remedy, limited in scope and
flexible in application, was within the equitable discretion of the court
and was a proper method to use to begin the process of achieving a uni-
tary school system.

Some courts have also upheld measures which use racial classifica-
tions to achieve integration in school faculties and administrations.
In United States v. Montgomery County Board of Education, the Su-
preme Court required a school system to use a mathematical ratio to
achieve integration in its faculty. The racial composition of the fac-
ulty was to be substantially the same as that in the entire Montgomery
County school system. The Court upheld the ratio plan as a proper
and effective method for faculty integration.

The Newark, New Jersey, Board of Education, in order to make the
administration of its schools more racially integrated, abolished its
principal and vice-principal promotion list. Promotions to these ad-
ministrative positions were made in a way that made race the impor-
tant but not the only factor. The court of appeals, in Porcelli v. Tit-
us, held that this action by the Board of Education did not vio-
late the fourteenth amendment rights of the other teachers who had
previously been on the promotion list.

Some state courts have also approved school plans which took ra-
cial considerations into account to eliminate discrimination. In Bal-
aban v. Rubin and Tometz v. Board of Education, Waukegan City
School District # 61, state courts held that local boards of edu-
cation did not act arbitrarily or unreasonably in taking the future
racial balance of their schools into account when adopting zoning
plans. Specific racial quotas were not involved in these cases, but
the zoning was arranged so as to achieve a racial balance.

The recent case of DeFunis v. Odegaard presented a factual situ-
ation which focused upon the propriety of using racial distinctions in
the selection of students. The University of Washington Law School

40. Id. at 23.
41. Id. at 25.
43. 431 F.2d 1254 (3d Cir. 1970).
45. 39 Ill. 2d 593, 237 N.E.2d 498 (1968).
Loyola University Law Journal

had established a policy of considering the racial backgrounds of prospective students, instead of merely their law school admission test scores and academic records, in order to achieve a reasonable minority group representation among its students. Marco DeFunis was a white student who had been denied admission to the law school but who would probably have been accepted had the school not used its new admission procedure. He filed suit against the school, claiming that the school had discriminated against him on account of his race and had violated the equal protection clause of the fourteenth amendment. The trial court issued an injunction and ordered the school to admit DeFunis as a student. The Washington Supreme Court reversed the trial court and held that the admission policy was not unconstitutional. Because the plaintiff DeFunis had been allowed to remain in school even after the Washington Supreme Court decision and had almost completed law school, the United States Supreme Court, after granting certiorari, decided that the case was moot and would not consider the merits.48

However, Justice Douglas wrote a dissenting opinion in which he did address the merits of the DeFunis case.49 He stated that, although the use of race in judging an applicant’s qualifications was usually an invidious discrimination, “[t]he key to the problem is the consideration of each application in a racially neutral way.”50 A separate classification of minority students, he stated, might be acceptable if it was used to ensure that racial and cultural differences did not mask an applicant’s true capabilities and potential.51 This approach stresses the importance of recognizing an individual's actual qualifications rather than giving a group representation in the school. Justice Douglas’ approval of this limited use of a racial classification, though, cannot be broadly extended to the racial housing quota situation. While Justice Douglas used a racial classification in order to ascertain an individual’s capabilities in a racially neutral way, racial classifications in housing quotas are used to judge persons on the basis of race per se. However, his opinion does indicate that racial classifications which are relevant and not invidiously discriminatory may be permitted under the equal protection clause. Justice Douglas would have remanded the case for a new trial to consider the admission pro-

47. 82 Wash. 2d 11, 507 P.2d 1169 (1973).
49. Id. at 320.
50. Id. at 334, 340.
51. Id. at 336.
Quotas have also been used to achieve minority representation in employment opportunities. In the 1950 case of Hughes v. Superior Court, the Supreme Court sustained an injunction against picketers who demanded that an employer hire clerks in proportion to the racial balance of his customers. The Court stated that compelling an employer to hire on the basis of racial distinctions was against California's state policy and that the element of communication in picketing should not be allowed to prevail over that policy. However, when a governmental policy of considering racial distinctions in employment has been established, courts have not held them to be prohibited. In Contractors Association of Eastern Pennsylvania v. Secretary of Labor, the executive order which promulgated the Philadelphia Plan for minority hiring on federally assisted construction projects was challenged. The Plan required builders, in order to be awarded federally funded construction contracts, to submit affirmative action programs containing goals for minority hiring within the quota ranges set by the federal government. The court held that the power to compel builders to submit affirmative action programs was within the implied authority of the President and that the federal government could fix the terms on which it would deal with contractors.

Other courts have considered cases which did not specifically involve these broad powers of the federal government. To eradicate the effects of past discrimination, the court of appeals in Carter v. Gallagher required that a 535-man fire department which had no minority members, though the total city minority population was over six per cent, hire minority applicants on a two-to-one ratio until twenty qualified minority persons had been hired. In United States v. Central Motor Lines, Inc., a carrier had discriminated against blacks in hiring its drivers. The court held that it must immediately hire six black drivers and thereafter hire on a 50 per cent-50 per cent ratio. These quotas were imposed after there had been a showing of past discrimination by the companies. The quotas were remedial measures, thought to be necessary if blacks and other minorities were to achieve access to equal employment opportunities. These were not to be permanent, inflexible standards, but were considered starting points toward goals of equal opportunities.

52. Id. at 344.
54. 442 F.2d 159 (3d Cir. 1971).
55. 452 F.2d 315 (8th Cir. 1971).
EARLY BENIGN HOUSING QUOTAS

Quotas in the field of housing have not been as well received as they have been in other areas. When quotas have been used in the fields of school desegregation and employment, the effect has been to widen opportunities to minorities which had previously been restricted. Housing quotas, on the other hand, are used to restrict what would otherwise be available to minorities. A quota imposed because of fear that minority occupancy will reach the tipping point acts to exclude minority applicants after the stated percentage has been reached.

The use of quotas for admission to public housing was condemned in Taylor v. Leonard. In that case, the New Jersey Superior Court stated that the quota was impermissible even if it bore a relationship to the existing ratio of races within the community. The quota concept was unacceptable because:

[1]t assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis.

In Progress Development Corp. v. Mitchell, a subdivision developer sued the local park district and various officials when the property on which he had begun to build was condemned and a park was constructed upon it. The officials had taken this action after learning that the developer planned a "controlled occupancy pattern" for the development which would integrate it at a ratio of 80 per cent whites to 20 per cent non-whites. This quota was to be maintained through the use of an unrecorded agreement with each purchaser that would give the developer the exclusive right to select a new buyer at the time of resale. After holding that the developer had failed to show a conspiracy among the officials, the district court stated that the developer's plan was evidently an attempt to circumvent Shelley and Buchanan and was an illegal arrangement. It further held that the "controlled occupancy pattern" was racial discrimination violative of the Civil Rights Act and the fourteenth amendment. The court condemned the plan as a straightjacket to Negro housing and a betrayal of the right to equality.

58. Id. at 119, 103 A.2d at 633.
61. Id. at 707.
Housing Legislation

National legislation in the field of housing has had a much broader purpose than simply to prevent discrimination. In the declaration of policy in the National Housing Act of 1949, Congress stated that:

[The national housing policy was] . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation . . . .

This section stresses the fact that Americans should not have merely a place in which to live, but that that place should be decent and livable. Congress has thus expressed its concern for the quality of the living environment in which Americans must find housing. A "decent home and suitable living environment" are rarely found in the ghettos of most large cities, and the process of increasing ghettoization cannot be in accord with such a national housing policy.

In providing for non-discriminatory housing opportunities, Congress passed the 1968 Fair Housing Act. Its policy was to "provide, within constitutional limitations, for fair housing throughout the United States." In order to further this goal, executive departments and agencies involved in the administration of housing policy were instructed to "administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter. . . ." The secretary of housing and urban development was similarly instructed to act affirmatively to further the purposes of the Fair Housing Act. It is apparent from the Fair Housing Act that officials in the Department of Housing and Urban Development (H.U.D.) are authorized not only to act when there has been discrimination, but also to take affirmative steps to prevent discrimination or its effects.

Public Housing Cases

Some courts have found this legislation to be instructive when faced with a housing authority's consideration or non-consideration of racial factors when choosing public housing sites and residents. In

63. Id. § 3601.
64. Id. § 3608(c).
65. Id. § 3608(d)(5).
66. For a more complete discussion of integration and racial controls in public housing, see Ackerman, Integration for Subsidized Housing and the Question of Racial Occupancy Controls, 26 Stan. L. Rev. 245 (1974).
Shannon v. United States Department of Housing and Urban Development, the plaintiffs alleged that the location of a housing project on the planned site would have a harmful effect on the area by increasing the already high concentration of low-income black residents. The court found that there had been no deliberate discrimination in the site selection process but that H.U.D. had not considered the effect of the project on the racial balance of the area. The court held that this failure to consider the racial factors involved was a breach of the department's duty under the Civil Rights Acts. The court stated that the agency should have considered the relevant racial and socio-economic information before it selected a site for the housing project. Referring to the fact that the agency had not discriminated consciously in its site selection and had attempted to exclude racial factors entirely, the court stated:

Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight, and is thus prima facie at variance with the national housing policy.

The court in El Cortez Heights Residents and Property Owners Association v. Tucson Housing Authority was confronted with a fact situation similar to Shannon. The Tucson Housing Authority had selected the only middle income black community in the county as the site for a low income housing project. Though there was no indication that any such project had ever been placed in a white middle class area, officials testified that the racial character of the neighborhood was not considered in the site selection. The court, as in Shannon, stated that the racial composition of the area was an important factor in that selection. The housing authority not only had a duty to avoid deliberate discrimination but also was prohibited from acting in a manner that caused inadvertent discrimination.

Classification by race was also required in Norwalk CORE v. Norwalk Redevelopment Agency to ensure that blacks and Puerto Ricans who had been displaced by an urban renewal project would be relocated to the same extent as whites. The difference in relocation opportunities was due to the fact that the available housing was higher priced and that some housing in other areas of the city was unavail-

67. 436 F.2d 809 (3d Cir. 1970).
68. Id. at 821.
69. Id. at 820-21.
72. 395 F.2d 920 (2d Cir. 1968).
able because of discrimination. The court required the agency to use a racial classification to achieve equality in opportunities for relocation. Even though the inequality was not a wilful plan of the agency and the difficulties in relocation were not entirely under its control, it was required to make this racial distinction to avert a discriminatory effect.\(^7\)

In these public housing cases, agencies had acted on the theory that it was their duty to refrain from employing racial classifications or distinctions as factors in site selection. They, in effect, acted as though their mandate to avoid discrimination was also a mandate to be color-blind in their deliberations. However, the decisions stress that color-blindness is not to be the standard. To be non-discriminatory does not mean that agencies should ignore the effects of racial factors. Rather, they have a positive duty to consider these factors before they make their decision to ensure that there are no inadvertent discriminatory effects. These effects may include increasing the racial density of an area and contributing to the continuation of a ghetto. The fact that race must be considered in these cases indicates that race is not prohibited as a valid classification for some purposes in the housing context.

None of the previously discussed cases directly involved the use of a quota as a method of considering racial factors. A quota plan was, however, the primary issue in Otero v. New York Housing Authority.\(^7\) In Otero, the residents of a site on which a public housing project was being built were promised, through a published housing authority regulation, that they would have priority as prospective tenants in the housing to be built on that site. Nevertheless, the housing authority, in an effort to avoid increasing the non-white population in the project to a point which it believed would have a tipping effect, gave preference to many white families who had not been former residents of the area. The area had previously been 40 per cent white and 60 per cent non-white; the housing authority planned to establish a proportion of 64 per cent white and 36 per cent non-white.

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74. 484 F.2d 1122 (2d Cir. 1973).
In the district court decision, the court stated that the Civil Rights Act and the Fair Housing Act, as well as prior court decisions, were intended to benefit minority groups. The legislation and decisions could not be interpreted to require affirmative action to achieve integration at the expense of minority groups. The district court enjoined the housing authority from renting the apartments to any other persons until all former site residents who were eligible were offered leases.

The court of appeals reversed the decision of the district court and stated that the housing authority was obligated to take affirmative action to promote integration even if this was not to the immediate advantage of minority persons. The goal of integration was a benefit intended for the entire community, not just some of its members. Whereas the district court had decided that the agency could not take action which would deprive minorities of the available housing, the court of appeals stated:

We disagree. Such a rule of thumb gives too little weight to Congress' desire to prevent segregated housing patterns and the ills which attend them. To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.

The court held that the housing authority had the burden of showing that adherence to its administrative regulation giving former site residents priority would act as a tipping point and would precipitate ghettoization of the community.

The Otero decision reflects a recognition that the affirmative duty of agencies extends to preventing the ills which accompany segregated housing. Racial classifications in this context appear to be highly appropriate and may be the only type of classification which will pre-

76. Id. at 953.
77. 484 F.2d 1122 (2d Cir. 1973).
78. Id. at 1125.
79. Id. at 1134. In accordance with the court's statement that integration is a benefit intended for the entire community is the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). There, the Court held that white persons as well as black persons had standing to assert the issue of discriminatory housing practices under the 1968 Civil Rights Act. The loss of the social and business advantages gained by living in an integrated community is sufficient injury to give standing to one who lives in a non-integrated area.
80. 484 F.2d 1122, 1134 (2d Cir. 1973).
81. Id. at 1135.
vent the area from becoming resegregated. The agency in Otero was using a quota to the disadvantage of minority persons who could not obtain housing in the project because of the increased percentage of housing for whites. The court decided the case on the basis of the duties of the agency to promote integration and to prevent segregation and its concomitant problems. It did not stress the issue of whether the personal rights of those not provided housing were violated. The strong policy favoring integration dominated the court's reasoning. This failure to address the equal protection problems inherent in the quota is in sharp contrast to the approach of most courts which have considered the issue. Since the necessity of according equal protection to those denied housing under the quota is the major obstacle to the quota's constitutionality, the omission of a thorough review of this aspect of the problem leaves the court's decision incomplete. Though the policy favoring integration has a high priority, equal protection must also be accommodated to achieve a constitutional quota.

**Alternatives To The Use Of Quotas**

Because of the constitutional problems involved in using distinctions which may result in the denial of housing to persons on account of their race, a racial housing quota should be attempted only when other alternatives have not been or will not be effective. Courts are unlikely to look favorably upon racial housing quotas if the same purposes can be served by less drastic measures. In Shelton v. Tucker, the Supreme Court reviewed an Arkansas statute which required every teacher, as a condition of employment, to list every organization to which he or she had belonged within the previous five years. In holding the statute unconstitutional, the Court remarked:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Before choosing a racial housing quota as a response to community resegregation, other viable measures should be examined. If there are other reasonable, nondiscriminatory alternatives available,

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82. See text accompanying notes 14-22 supra.
83. 364 U.S. 479 (1960).
84. Id. at 488.
85. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951), in which the city of Madison, Wisconsin, enacted an ordinance which attempted to protect the
these will be constitutionally preferable to the seriously problem-laden quota concept.

The specific alternatives available to various communities may not all be equally viable. The problems faced by an older, established community may differ widely from those faced by a new community or development which is in the process of being planned or built. One of the early articles concerning benign housing quotas contains several recommendations as to methods by which a community can keep itself integrated without becoming resegregated. These suggestions are aimed at housing developments which are still new and possibly not yet fully occupied. The three main proposals involve the conscious manipulation of location, pricing, and promotion of the development to attract a desirable racial proportion.

The important factor in selecting a location for an integrated housing development is that it be built away from existing concentrations of minority groups. If it is built too close to a neighborhood which already has a high minority proportion, the development will tend to become all minority. There is also some indication that in communities which have separated their housing developments from existing minority neighborhoods, quotas have frequently not been needed to maintain integrated housing. The physical separation of the development from the existing minority neighborhoods seems to relieve the pressure arising from minority group housing needs.

Pricing may also be manipulated in order to control the demand of each racial group. If a community can compute the income and financial abilities of each group, it can adjust prices so that those of a certain income will either be encouraged or discouraged from attempt-

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local milk industry at the expense of industries operating in interstate commerce. The Court stated that the city could not discriminate against interstate commerce in this manner, even for health and safety reasons, if reasonable, nondiscriminatory alternatives were available to achieve legitimate local interests.

86. See Navasky at 38-40. Victor Navasky is the author of one of the leading articles on benign housing quotas. His article contains several suggestions on achieving integration without the use of housing quotas.

87. Id.
88. Id. This process of a development becoming all black has occurred before in cases of deliberate racial discrimination. In Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), the court reviewed a site selection process by which a great majority of low income housing developments were located in areas which were already 50 per cent to 100 per cent black. Because of its discriminatory nature, the site selection process was condemned by the district court. However, a similar result can also occur from thoughtlessness and lack of planning rather than from discriminatory motives.

89. Id. Navasky quotes Davis McEntire, the Research Director of the Commission on Race and Housing, as giving this evaluation of the importance of a good location to a housing development.

90. Id. at 39.
ing to purchase housing in that development. This method appears to have only limited usefulness since the price of a home which has a particular market value cannot be raised or lowered beyond a certain range. Moreover, this idea may raise as many objections on the grounds of discrimination and violation of equal protection as does the quota itself.

A third method of obtaining an integrated development is promotion and publicity of the housing opportunities available to the audience desired to be reached. Publicity framed in terms of the "interracial" quality of the housing may spark minority demand, while no mention of its interracial nature and an emphasis merely upon the good value and quality of the housing may attract more white persons to the development. Promotions are geared to stress the qualities which each group would consider most important.

The methods of price control and promotional activity were also emphasized in a major study of interracial housing. The study concerned fifty private interracial housing developments located in various parts of the country. In a majority of the developments, blacks constituted one-half or fewer of the occupants. Yet only a few of these projects used quotas or occupancy controls. Use of the marketing techniques of promotion and publicity helped to maintain integration in these communities.

There are also additional features which make a racially integrated development successful. The desirability and value of the housing itself are of major importance; planning, transportation and landscaping are also paramount. The development must be sufficiently large so as to constitute almost a neighborhood in itself. And the ownership and management must work together toward their common goal of integration.

An older, more established community which faces the possibility of resegregation does not have the advantage of being able to utilize many of the proposals mentioned above. Matters such as location, pricing

91. *Id.*
92. *Id.* at 39-40.
93. *Id.*
95. *Id.* at 13-14.
96. *Id.* at 14.
97. Milgram, Commercial Development of Integrated Housing, 1 JOURNAL OF INTERGROUP RELATIONS 54 (Summer, 1960). Morris Milgram, a leader in the development of private integrated housing, has written about some of the features in his own housing projects which were successful in achieving integration.
98. *Id.* at 54-55.
and size have already been substantially fixed. However, there are some ways in which older communities can attempt to avoid the tipping process. Many proposals for this type of community can be found in the Oak Park racial integration plan\textsuperscript{99} which the Village of Oak Park developed after rejecting a proposed racial housing quota.

Of great importance to the maintenance of an integrated community is a high level of municipal services.\textsuperscript{100} These include police, safety, public works, educational services and strict housing code enforcement. If these services are maintained effectively, the community will be attractive to persons of all races, and those who already live there will have less incentive to move. Also important is the encouragement and support which must be given to local businesses.\textsuperscript{101} These businesses not only provide employment for persons in the community, but also are a source of leadership and financial support.\textsuperscript{102}

A recommendation which received strong support in the Oak Park integration plan was the adoption of an equity assurance program.\textsuperscript{103} Under this type of plan, the community would guarantee a homeowner that his property would not be devalued below a certain percentage of its appraised value. This assurance makes it less likely that homeowners will move because of fear that their property will lose its value. This measure may have a great psychological effect on residents\textsuperscript{104} and could remove another major obstacle facing those who desire to live in integrated housing.

To a certain extent, promotion and publicity can also be used advantageously in an older community. Oak Park's proposed racial integration plan contains a number of tentative methods of using "affirmative marketing" techniques so that individual housing decisions will be "influenced in favor of balanced community integration."\textsuperscript{105} The first part of the marketing plan involves influencing the Village's image in the media.\textsuperscript{106} The image desired is one of an interracial community committed to integrated, not resegregated, living. This goal of implanting an image in the public eye will require a long-

\textsuperscript{99} See Oak Park Integration Plan, \textit{supra} note 12.
\textsuperscript{100} \textit{Id.} at 6-10.
\textsuperscript{101} \textit{Id.} at 10-11. The Oak Park Integration Plan suggests that the encouragement of local businesses include: aggressively seeking new business and commercial development; new financing approaches to stimulate redevelopment; an improved transit system. By keeping the business economy sound, Oak Park officials foresee a strengthening of the entire community.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 4-5.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 14-18.
\textsuperscript{106} \textit{Id.} at 15.
range effort on the part of community leaders. But if it is successful, it may be an effective tool in achieving peaceful community integration.\footnote{Id.}

A second, though not particularly strong tool at the present time, is the involvement of the housing industry in achieving balanced racial integration.\footnote{Id. at 15-16.} The industry could provide forceful leadership in coordinating housing possibilities and preventing discriminatory abuses. However, the integration plan concludes that the housing industry is not yet ready to assume this leadership role.\footnote{Id. at 16.} For a community facing the immediate pressure of the tipping process, this alternative cannot be considered especially effective.

The most extensive suggestion advanced is one involving a community-wide orientation program.\footnote{Id. at 15-17.} This program would be directed towards all persons who are seeking housing in the area. These persons would be apprised of the housing availabilities, municipal services, integration goals, and other information concerning their housing needs. There would be mandatory distribution of this information by the housing industry in the form of printed material. In addition, seminars and other media advertising would be used to convey this information to those seeking housing. This orientation would be intended to make the individual examine his own housing decision so that his selection might further the Village's goals. However, the final choice would be that of the person seeking the housing.\footnote{Id. at 16.} The community would have no absolute control over that decision.

Finally, in an effort to bring pricing under its control, the Village could use subsidies as economic incentives.\footnote{Id. at 15, 17-18.} These incentives would either discourage persons from buying in an area which is already integrated to a certain point or encourage persons to buy in an area which is not sufficiently integrated. One proposal even goes so far as to suggest the outright offer of payments to persons who will buy elsewhere in the community.\footnote{Id. at 18.} However, the concept of economic incentives is usually intended as a means of diverting racial concentration from one part of the community to another, not as a method of discouraging buying altogether.

\footnotesize{107. \textit{Id.}}
\footnotesize{108. \textit{Id.} at 15-16.}
\footnotesize{109. \textit{Id.} at 16.}
\footnotesize{110. \textit{Id.} at 15-17.}
\footnotesize{111. \textit{Id.} at 16.}
\footnotesize{112. \textit{Id.} at 15, 17-18.}
\footnotesize{113. \textit{Id.} at 18. This suggestion, however, does not appear to have received a great deal of emphasis in the Oak Park Integration Plan.}
CONCLUSION

All of these suggested alternatives are obviously not as quick and decisive as the imposition of a quota. To manipulate racial housing demands by methods short of a quota involves much more detailed planning and a great deal of sensitivity to the many diverse problems in the housing field. A serious problem which arises when considering various plans to prevent resegregation is that so few of the plans have been tried on a large urban scale. There are many alternatives, but a community facing immediate problems must choose its course without the benefit of experimentation. If its choice is wrong, in the interim, the process of resegregation may have become irreversible. The gravity of this decision may be the reason why a quota plan seems so attractive to some communities. The quota provides an answer which is sure to limit the racial concentrations in the community to a certain proportion. Because of the decisiveness of utilizing the quota, many other courses of action may be neglected or rejected without adequate consideration.

On a constitutional level, housing quotas present a conflict between two important goals. A truly benign housing quota has as its purpose the encouragement of integration and the prevention of an increase in ghettoization. However, the quota itself embodies certain discriminatory aspects and possible personal equal protection violations. If the Supreme Court eventually faces the issue of a racial housing quota plan, either the benign and the discriminatory aspects of the problem will have to be reconciled, or one will predominate over the other. The Court may choose to attempt to balance the two competing values rather than to make one absolute. If a balancing does occur, the precise facts surrounding the quota and the community will be extremely important. The viable, reasonable alternatives available to the community at the time the quota was chosen may then be very influential with the Court in its decision to accept or reject the community’s choice. An important factor may also be the attention which a particular plan gives to the rights of those who are denied housing because of the quota. Oak Park’s proposal in its original quota plan to offer comparable housing to those who could not purchase the property they had originally selected shows concern for

114. See text accompanying notes 14-29 supra.
115. The Supreme Court may be reluctant to face such a divisive problem. See De-Funis v. Odegaard, 416 U.S. 312 (1974) and the Court’s decision to hold the case moot.
116. See Navasky at 63-66.
117. See Oak Park Ordinance, supra note 3, at 3.
the rights of those persons, and it may be the type of proposal which could make a quota plan more palatable to a Court concerned with personal equal protection. In any case, supporters of a quota plan may have to justify the plan by showing the absence of other reasonable alternatives and/or an attempted accommodation with the rights of those denied housing under the quota.

The concept of racial housing quotas has, in addition, sparked other ideas on controlling racial balance which are less drastic than a quota. Instead of allowing presently integrated areas to become resegregated, some communities are now taking positive action on the theory that the process can be halted. Some of the alternatives suggested are of help not only to areas facing the immediate problems of resegregation, but also to areas which are farsighted enough to use them before their problems become critical. At the present time, the employment of alternative methods to control racial balance seems preferable to the enactment of a quota. However, given a quota sensitive to constitutional conflicts and a community which appears urgently to need this type of solution, a racial housing quota may receive judicial approval.

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118. See Oak Park Integration Plan, supra note 12.
119. See Navasky at 68.