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James J. Sing

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# Case Note

## Integration as a Two-Way Street

*Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998)

It was a judge's nightmare in every respect: two racial groups, both the victims of serious yet incomparable injustices, pitted against one another in litigation. This was precisely the unpleasant scenario facing the First Circuit in *Raso v. Lago*,<sup>1</sup> a case that inspired "conflicting sympathies" for white former tenants of a Boston neighborhood ousted by "urban renewal" on the one hand and racial minorities wrongly denied fair housing opportunities on the other.<sup>2</sup> In the end, the First Circuit ruled that the defendant housing agencies did not violate the constitutional rights of a class of white plaintiffs when they curtailed the plaintiffs' preferential status as displaced former tenants in a housing draw.

This Case Note argues that although the court correctly determined that the defendants' housing plan did not involve the use of a forbidden racial classification, its constitutional analysis confounds the criteria for triggering the strict scrutiny standard and results in undesirable implications for future policy. Rather than relying on the consent decree and fashioning an outcome-determinative justification of the denial of preference, the court should have focused on the broader integrative objectives of the Fair Housing Act (FHA)<sup>3</sup> in order to show the constitutionality of the defendants' action.<sup>4</sup> Reading the housing plan in accordance with the goals of the FHA would have provided more convincing support for the panel's contention that the intervention would be

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1. 135 F.3d 11 (1st Cir. 1998).

2. *Id.* at 18.

3. 42 U.S.C. §§ 3601-3631 (1994).

4. Of course, statutory legitimacy is not dispositive of the constitutionality of a state action, and no language in this Case Note should be read to propose simply supplanting adjudication under equal protection principles with Title VIII analysis. Title VIII's limited function within the context of this Case Note is to illustrate how the defendants' statutory obligations constituted a motive for housing intervention, a motive that would in turn illuminate the ways in which race played a role in the action.

compelled in any racially imbalanced housing environment, thereby insulating the housing plan against strict scrutiny.

## I

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, was aimed at both eliminating housing discrimination and promoting housing integration. Although it has been nearly thirty years since the passage of the Act, much of the housing in this country's large urban cities remains deeply segregated.<sup>5</sup> In Boston, as a result of litigation brought by the NAACP,<sup>6</sup> a federal district court ruled that the Department of Housing and Urban Development (HUD)<sup>7</sup> failed to ensure minorities equal access to public housing and entered a consent decree providing remedial guidelines to HUD for the enforcement of Title VIII. The consent decree stipulates that all Boston HUD housing marketing plans targeting white neighborhoods "shall have as their goal and measure of success" the achievement of a racial composition that "reflects the racial composition of the City [of Boston] as a whole."<sup>8</sup>

Recently, HUD's activities again were subjected to judicial scrutiny—this time, ironically, as a result of the department's attempts to implement an integrative housing measure. In Boston's Old West Side, an urban renewal plan resulted in the displacement of more than three thousand mostly white former residents of the neighborhood. Pursuant to Massachusetts law,<sup>9</sup> the developer who was selected to complete the project signed a participation agreement with a group of former West Enders promising displaced families first preference in the purchase of residential units in the new West End Place. HUD initially funded a substantial grant to the developer, but in light of the overwhelmingly white tenancy that would have resulted from the preferential system, HUD subsequently indicated that it viewed the participation agreement as contrary to both federal fair housing requirements and the consent decree. After rejecting a system of limited preference for displaced families proposed by a mediator, the plaintiffs sued in federal district court, alleging, *inter alia*, that the arbitration compromise violated their equal protection rights. The district court dismissed all complaints pursuant to the defendants' motion to dismiss.

Judge Boudin, writing for the First Circuit panel, upheld the constitutionality of the curtailment of preference. He reasoned that because (a) the West End apartments were made available to all applicants regardless of race,

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5. For overviews of the causes and extent of urban segregation, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 19-57, 61-82 (1993); and Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 *Nw. U. L. Rev.* 874, 883-85 (1988).

6. See *NAACP v. Pierce*, 624 F. Supp. 1083 (D. Mass. 1985), *vacated sub nom. NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987), *on remand NAACP v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989).

7. Under § 3608 of the Fair Housing Act, the Secretary of HUD is charged with the task of enforcing Title VIII and affirmatively promoting fair housing. 42 U.S.C. § 3608.

8. *NAACP v. Kemp*, No. 78-850-S, slip op. at 2 (D. Mass. Mar. 8, 1991) (consent decree), *cited in Raso*, 135 F.3d at 14.

9. See MASS. GEN. LAWS ch. 121B, § 49 (1986).

and (b) the consent decree did not foreclose future HUD challenges to housing plans that exclude whites, the defendants' action did not trigger strict scrutiny. As a threshold matter, Judge Boudin noted that *Adarand Constructors v. Pena*<sup>10</sup> does not require that every state action reflecting a concern with race be subjected to strict scrutiny. A "racial classification" in equal protection jurisprudence refers only to a governmental standard that burdens or grants preferential treatment to a group based on its race.<sup>11</sup> As Judge Boudin observed, the constitutional litmus test for the defendants' action under this standard was whether it was motivated by the fact that the former West Enders were nearly all white.

## II

Unfortunately, the panel could not demonstrate that the defendants' action passed this litmus test because it failed to consider how the defendants' Title VIII obligations factored into the constitutional analysis. The first prong of Judge Boudin's analysis confused the action taken by the defendants with the "race-blind" result it produced. The majority could not reasonably infer that a race-blind housing lottery either retroactively determines or necessarily flows from a housing plan free of racial classifications. This problematic *ex post* reasoning betrays a more fundamental incompatibility between Judge Boudin's "racial concern" argument and his treatment of the consent decree—which only addresses housing in predominantly white neighborhoods—as the sole predicate of the defendants' action. Seizing on this inconsistency, Judge Stahl in dissent challenged the vision of "two-way" integration that the majority ascribed to the plan: "[B]ecause the consent decree operates only in favor of racial and ethnic minorities, it could not be read to require the curtailment of the preference if the former West Enders were predominantly black."<sup>12</sup> Reading the defendants' action together with the consent decree indeed necessitates singling out the plaintiffs because they are white,<sup>13</sup> casting doubt upon the panel's suggestion that the plan's integrative function does not take into account the race of the burdened group.<sup>14</sup> Judge Stahl was right to observe that the disparate impact necessarily implicated by the majority's reading of the housing plan plainly violates the Constitution.<sup>15</sup>

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10 515 U.S. 200 (1995).

11. See *Raso*, 135 F.3d at 16 (citing *Adarand*, 515 U.S. at 226-27, 235).

12. *Id.* at 19 (Stahl, J., dissenting).

13. There is little doubt that taken alone, the consent decree passes constitutional muster since it merely identifies goals for racial composition and does not implement a formal quota. See *id.* at 17. It is only when the court reads the housing plan as an intervention taken in exclusive compliance with the decree that it fixes and formalizes the decree's guidelines, transforming them into impermissible racial quotas.

14. In defending its adherence to the decree, the panel relied on the somewhat disingenuous conflation of race-based actions that are affirmatively compelled by the consent decree and actions that are merely permitted by the decree. See *id.* Although it is certainly true that the consent decree does not preclude hypothetical HUD challenges to a housing plan that excludes whites, more germane to the analysis is the fact that the decree does not at all speak to this "inverse" scenario. Thus, a court would be hard pressed to characterize the consent decree as the motivation for a similar HUD intervention had the plaintiffs been predominately black.

15. See *Adarand*, 515 U.S. at 224.

Both Judge's Stahl's critique and Judge Boudin's outcome-determinative test, however, share a myopic view of the statutory underpinnings of the consent decree and the defendants' action. Since HUD was subject not only to the consent decree but also to the federal fair housing obligations that gave rise to it,<sup>16</sup> the plaintiffs' constitutional claim must be viewed against the backdrop of the FHA. Judge Stahl argues that in filing their motion to dismiss, the defendants did not dispute the plaintiffs' claim that the curtailment of preference was motivated exclusively by concern for achieving the consent decree's target racial composition.<sup>17</sup> But it is impossible to separate the consent decree from the defendants' statutory duties under Title VIII since the decree merely provides guidelines to HUD for enforcing the FHA. Compliance with the consent decree necessitates performance of the defendants' Title VIII obligations, even if the latter are not explicitly mentioned in the plaintiffs' complaint. Judge Boudin therefore should have read the complaint to include the defendants' federal fair housing duties as the cause of the housing intervention.

Most commentators agree that the promotion of housing integration is a central objective of the FHA.<sup>18</sup> Of course, the integrative duties that fall upon HUD under Title VIII must be performed within constitutional limitations. The leading case law distinguishes between a constitutionally suspect system of inflexible racial quotas and a benign race-consciousness that extends equal treatment to different races. Like *Raso*, *Otero v. New York Housing Authority*<sup>19</sup> also involved a housing authority's curtailment of a placement preference to former tenants displaced by an urban renewal plan. The New York Housing Authority (NYHA), however, reneged on its agreement with the former tenants because admission of all displaced residents would have made the housing project over eighty percent *black*. Claiming that the granting of unconditional preferences would have "tipped" the racial balance in the community and prompted white flight, the NYHA sought to limit minorities to forty percent of the public units. In upholding the NYHA action, the Second Circuit commented that the purpose of Title VIII's racial integration goal is to benefit the community as a whole, not just certain of its members.<sup>20</sup>

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16. See *Raso*, 135 F.3d at 14.

17. See *id.* at 19 (Stahl, J., dissenting). Judge Stahl reasoned that the court must read into the complaint "the allegation . . . that defendants would not have acted as they did had the plaintiff class been predominantly of color." *Id.* Under this view, the defendants admitted to using a racial classification, and their action therefore must be subjected to strict scrutiny.

18. See, e.g., Dale J. Lois, Note, *Racial Integration in Urban Public Housing: The Method Is Legal, the Time Has Come*, 34 N.Y.L. SCH. L. REV. 349, 351-52 (1989); Sander, *supra* note 5, at 918. Although there are no committee reports discussing the bill's provisions, the limited legislative history of Title VIII reveals that a desire to foster housing integration was a key factor motivating enactment of the bill. See Lisa J. Laplace, Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing?*, 55 BROOK. L. REV. 197, 209-10 (1989).

19. 484 F.2d 1122 (2d Cir. 1973).

20. See *id.* at 1125 (rejecting the view that the duty to integrate under Title VIII is a "one-way street" limited to introduction of minorities into a predominantly white community"). In support of its "two-way street" argument, the *Otero* court observed that the Supreme Court held that even those who were not the direct objects of discrimination had an interest in fair housing and therefore had standing to sue for "the loss of important benefits" caused by the lack of integration. *Id.* at 1134 (quoting *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 210 (1972)).

Fifteen years after *Otero*, the Second Circuit in *United States v. Starrett City Associates*<sup>21</sup> determined that a state actor may not employ a system of strict quotas in public housing to promote the FHA's goal of integration.<sup>22</sup> In adopting an affirmative action analysis under equal protection and Title VII principles, however, the circuit explicitly rejected the Department of Justice's argument for a strict colorblind interpretation of the FHA.<sup>23</sup> The court's narrow holding carefully steered around *Otero*, striking down the quota system in question—not by ignoring race, but rather by focusing on it. The *Starrett City* decision in fact agreed with the *Otero* court that limited race-conscious measures to promote integrated housing were not proscribed by the FHA.<sup>24</sup> The Second Circuit distinguished the two cases by arguing that the action taken by the *Starrett City* defendants employed strict racial quotas that were unlimited in duration and therefore unlawful. In contrast, the challenge in *Otero* involved a “single event” that lacked “procedures for the long-term maintenance of specified levels of integration.”<sup>25</sup>

### III

An examination of *Starrett City*'s unique adjudicatory framework, which maps Title VIII principles onto equal protection analysis,<sup>26</sup> leaves little question of both the continued precedential value of the decision and its importance for evaluating the claims in *Raso*. *Starrett City*'s careful maneuvering around *Otero* carves out a limited sphere of constitutional legitimacy that both foreshadows Judge Boudin's “racial concern” argument and insulates *Starrett City* and *Otero* against the restrictions placed on race-based state action in the post-*Adarand* era. Restricting *Otero*'s scope to the limited, “one-time” nature of the curtailment of preference ensured that race-based state interventions would exclude actions that made use of the “racial classifications” outlawed seven years later by *Adarand*.<sup>27</sup> Indeed, the *Starrett City* court affirmed that racial quotas were forbidden precisely because they operate to single out and burden a racial group, reserving benefits for a favored race without making provisions for changing racial demographics.<sup>28</sup> These quota systems preclude “two-way” integrative measures even when the burdened racial group no longer overpopulates the housing complex or applicant pool.

Like the housing authority's action in *Otero*, the *Raso* defendants' curtailment of preference was a limited, “one-time measure” that would end as soon as it was implemented. Unlike the NYHA in *Otero*, the *Raso* defendants neither defined an explicit ceiling for white occupancy nor were concerned with a specified “tipping” point. The criteria by which some scholars have characterized

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21. 840 F.2d 1096 (2d Cir. 1988).

22. See *id.* at 1103.

23. See *id.* at 1101-02.

24. See *id.* at 1101, 1103.

25. *Id.*

26. See *id.* at 1100.

27. See text accompanying note 11.

28. See *Starrett City*, 840 F.2d at 1101-03.

the *Otero* plan as a racial quota are therefore inapplicable to *Raso*.<sup>29</sup> If the denial of preference in *Otero* falls within constitutional parameters, then surely the defendants' action in *Raso* must be permissible as well.

The defendants' action was motivated merely by a desire to prevent one race from constituting a super-majority in the housing complex, pursuant to HUD's statutory obligations under Title VIII. Judge Boudin should have considered these broader statutory requirements, not just the consent decree, in reviewing the constitutionality of the housing intervention. The affirmative duty placed on HUD involves the promotion of "two-way" integration, encompassing not only predominantly white neighborhoods but all segregated areas. Thus, since Title VIII would have compelled HUD to take similar action had the plaintiffs been black, the defendants' action was motivated only by the fact that the plaintiffs were "racially monolithic."<sup>30</sup> The curtailment of preference for the former West Enders therefore did not involve the use of inflexible quotas or racial classifications and should not have triggered strict scrutiny.

*Raso* may represent a Pyrrhic victory for housing integration, achieved ironically at the expense of some of the most segregated and impoverished communities in this country. While correctly ruling that the defendants' action did not violate the Constitution, the First Circuit relied on an adjudicatory model that ignores perhaps the most fundamental goal of the FHA: integrating the urban black ghetto.<sup>31</sup> To authorize a one-way integration plan without ensuring that the same efforts be made in black ghettos is to deny many African Americans<sup>32</sup> a privilege that, according to the Supreme Court, all members of society deserve to enjoy.<sup>33</sup> A failure to fulfill the obligation to integrate all segregated communities equally sends the clear message that those living in urban ghettos are neither deserving of nor eligible for the "important benefits"<sup>34</sup> of integrated housing. Such disparate treatment would be tantamount to turning our backs on some of the most disadvantaged populations in our society and would violate both the integration and antidiscrimination objectives of Title VIII.

—James J. Sing

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29. Some commentators seem to assume that the racial "tipping" point in *Otero* functioned as a de facto "ceiling" quota for blacks. See, e.g., Laplace, *supra* note 18, at 203. The *Otero* opinion itself is ambiguous as to whether the defendants' curtailment of preference makes use of a racial quota. See *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1136 (2d Cir. 1973).

30. *Raso*, 135 F.3d at 19 (Stahl, J., dissenting).

31. See Sander, *supra* note 5, at 874-75.

32. Over 80 percent of the black population in some cities lives in conditions of deep racial segregation. For a discussion of the vicious cycle of economic hardships and social ills that these segregated ghettos perpetuate for blacks, see MASSEY & DENTON, *supra* note 5, at 118-25, 137-42.

33. See *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 210 (1972). But see Michael R. Tein, Comment, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1492 (1992) (arguing that "the exclusive pursuit of neighborhood integration can inflict discriminatory stigma on nonwhite community").

34. *Trafficante*, 409 U.S. at 210.