RACIAL AND ETHNIC QUOTAS: THE TIPPING PHENOMENON IN *OTERO V. NEW YORK CITY HOUSING AUTHORITY**

I. INTRODUCTION

Otero v. New York City Housing Authority[1] combines two complex issues in a novel context. The first, an increasing problem for the Department of Housing and Urban Development (HUD), is the extent to which federal funds will be used to finance low-income public housing when the effect of the tenant assignment and site selection procedures is to perpetuate or to increase existing patterns of racial concentration.[2] The second is the extent to which courts will give legal recognition to the tipping phenomenon in determining the effect of tenant assignment and site selection procedures on racial concentration.

Sociologists use the term "tipping phenomenon" to describe the process of whites' leaving a neighborhood once black residents entering the neighborhood reach a certain percentage point. That point is called the tipping point.[3] If the tipping point is predictable, the tipping phenomenon is a relevant factor to be considered in assessing the effect of a federally funded project on existing patterns of racial concentration.[4]

This Note is devoted to an analysis of the tipping phenomenon in the context of *Otero*.

II. *OTERO*: THE FACTUAL BACKGROUND

In *Otero* plaintiffs and defendants were cross-claimants for a limited number of apartments in the Seward Park Extension Urban Renewal Area (Seward Park), a

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* 354 F. Supp. 941 (S.D.N.Y. 1973), rev'd on other grounds and remanded, 484 F.2d 1122 (2d Cir. 1973).

[1] 354 F. Supp. 941 (S.D.N.Y. 1973), rev'd on other grounds and remanded, 484 F.2d 1122 (2d Cir. 1973). In April, 1972, plaintiffs moved for preliminary relief. The late Judge McLean granted a temporary restraining order barring the New York City Housing Authority (HDA) from renting apartments to anyone other than members of the plaintiff class. On May 23, 1972, Judge Frankel, on a motion for preliminary injunction, filed an extensive opinion, reported at 344 F. Supp. 737 (S.D.N.Y. 1972), holding that: 1) the Housing Authority's actions in renting apartments to persons other than members of the plaintiff class violated the Authority's own regulation, GM 1810, and thereby deprived plaintiffs of due process; and 2) in renting apartments on a priority basis to Jewish tenants, the Authority violated the establishment clause of the first amendment, the equal protection clause and the supremacy clause of the Constitution. On June 23, 1973, Judge Gurfein filed an order permitting intervention as defendants of Akiva Miller and other similarly situated persons who were not former site occupants, but who had been given leases or commitments for apartments in the project.

[2] This problem has confronted several federal courts, see, e.g., Crow v. Brown, 457 F.2d 788 (5th Cir. 1972), aff'g 332 F. Supp. 382 (N.D. Ga. 1971); Shannon v. United States Dept. of Housing & Urban Dev., 436 F.2d 809 (3d Cir. 1970); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), supplemental judgment order, 304 F. Supp. 736 (N.D. Ill. 1969).

[3] See text accompanying notes 76-82 infra.

[4] Even if the tipping point is predictable, its relevance as a factor for courts and administrative agencies to consider hinges on the extent to which courts and administrative agencies will dictate public policy on assumed, future action of individuals.

complex of middle and low-income housing constructed with the aid of federal funds on Manhattan's lower east side.[5] Plaintiffs, predominantly low-income blacks and Puerto Ricans, originally resided in Seward Park.[6] Title to Seward Park vested in the city of New York on November 1, 1967, and over the succeeding years the New York City Housing Authority (HDA) demolished the existing structures in Seward Park and relocated plaintiffs in various accommodations throughout the city.[7] The majority of plaintiffs were relocated in public housing in the lower east side.[8] Throughout the relocation process plaintiffs relied on HDA assurances that they would have first priority to return to the buildings completed on the site of their former homes.[9]

Plaintiffs sued HDA and HUD claiming that: 1) HDA regulation GM 1810 applied to plaintiffs; 2) HDA's failure to follow GM 1810 and their failure to honor their promises to plaintiffs violated the due process clause; and 3) HDA's action and HUD's inaction were racially discriminatory as to plaintiffs, thus violating the equal protection clause and the 1968 Civil Rights Act.[10]

HDA, HUD and defendant-intervenors claimed that: 1) GM 1810 did not apply to plaintiffs; and 2) requiring HDA to follow GM 1810, thus leasing all apartments to plaintiffs, would result in a racial imbalance in the buildings which would operate to tip the neighborhood to a predominantly black and Puerto Rican one, thereby violating constitutional, legislative and federal regulatory requirements to provide for balanced communities.[11]

The district court found that if plaintiffs prevailed, the two buildings would be 80 percent nonwhite to 20 percent white by family.[12] If defendants prevailed, the buildings would be 60 percent white to 40 percent nonwhite by family.[13] The district court found further that the lower east side had changed from 58.9 percent white in 1965 to 48.3 percent white in 1970[14] and that if plaintiffs prevailed the entire Seward Park project would be 27 percent nonwhite to 73 percent white by family.[15] This last finding was vigorously challenged by defendants.[16]

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[5] 354 F. Supp. at 943. Underlying this litigation is a bitter racial confrontation between plaintiffs, predominantly black and Puerto Rican, and defendants, predominantly Jewish. This confrontation prompted Judge Frankel in enjoining HDA from renting apartments to defendants to comment:

> It appears that defendant City officials, though apparently not from evil motives, have fueled fires of racial competition by lapsing into a rare departure from what all here agree is their usual stance of neutrality in matters of race and creed. Specifically, it appears that the City defendants are, in the peculiar circumstances of this case, effecting a discrimination adverse to non-white applicants for public housing by allowing two unlawful factors to affect the granting of applications:
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> (2) a preference given to Jews – and, thus, an obstacle interposed against others – . . . .

344 F. Supp. 737, 739 (S.D.N.Y. 1972).

[6] 344 F. Supp. at 739.

[7] 354 F. Supp. at 944.

[8] Id.

[9] Id. When the first two low-income buildings were completed 360 apartments became available. A total of 483 original residents applied for apartments and, although they had been repeatedly assured first priority in obtaining leases, only 161 were successful. The plaintiff class therefore numbered 322. Id. at 945.

[10] Id. at 946. A total of 171 apartments were not leased to plaintiffs, but rather to predominantly low-to-middle-income Jews. These persons, none of whom originally resided in Seward Park, comprised the defendant-intervenor class. 344 F. Supp. at 739.

[11] 354 F. Supp. at 946.

[12] Id. at 945-46.

[13] Id. at 946.

[14] Id. at 952.

[15] Id. at 946.

[16] 484 F.2d at 1137.

The *Otero* case posed three critical issues: 1) determination of which HDA regulation would govern plaintiff's case; 2) construction of the 1968 Act and, in light of that, the constitutionality of HDA regulation GM 1810; and 3) whether courts should give legal recognition to the tipping phenomenon as a matter of public policy.

III. THE ADMINISTRATIVE LAW ISSUE

Although the city of New York took title to the property involved in this dispute on November 1, 1967,[17] plaintiffs relied on HDA regulation GM 1810 which became effective on August 14, 1968.[18] GM 1810 specifies six categories of persons who have priority in admission to public housing. First priority is granted to former site occupants. This category includes persons who resided on any site in the urban renewal area as well as those who resided on the actual site of a particular building, called project site tenants.

Defendants claimed that plaintiffs' case was governed by HDA regulation GM 1282, in effect from 1961 through 1968, which granted first priority to project site tenants only.[19] In the alternative, defendants claimed that if GM 1810 were the applicable regulation, then urgency of housing need became a threshold requirement to

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17 354 F. Supp. at 944.

18 New York City Housing Regulations for Admission to Public Housing, GM 1810:

PRIORITY IN SELECTION

The number of eligible applicants greatly exceeds the number of apartments. The Authority therefore has established an objective system, based upon urgency of housing need, for the selection of applicants for available apartments. Priority in assignment of apartments is given to eligible applicants in the following order:

1. site residents of the site upon which the project was built, and if the project is within an urban renewal area, model city area, or other redevelopment area, site residents of sites acquired to effectuate the plan for such area;
2. families in emergency need of housing, including families who are homeless, under order of eviction, living in buildings condemned as unfit for human habitation, living under housing conditions which because of illness or disease endanger life, or facing displacement from sites, buildings or dwelling units, being cleared or vacated by governmental action;
3. families residing under extremely substandard conditions, and severely handicapped persons who reside under conditions which create extreme hardship;
4. families residing under grossly overcrowded conditions;
5. families residing under conditions which create a health hardship for one or more persons;
6. families residing under other substandard or hardship conditions.

If the head of the household is a Vietnam veteran or serviceman, the family is considered for admission immediately following families in emergency need of housing, unless it qualifies for a higher priority on the basis of housing need.

Where the applicant's housing need is of an emergent nature (categories 1, 2 and 3, above), preference in apartment assignment within each category is given first to applicants who have resided in the City for at least two years and then to those with less than two years residence. Where housing need is of a less urgent nature (categories 4, 5 and 6, above), applicants who have resided in the City for two years or more are assigned first. Assignment of families with less than two years residence follows such assignments in parallel order of priority.

344 F. Supp. at 748-49. The Regulation apparently has not been published. "The policy of the Authority is established by its three members in the form of resolutions. Broad policy determinations are translated into staff directives as general memoranda, called 'GM's,' issued by the Director of Management. Testimony of Irving Wise, Director of Management of the Housing Authority, transcipt at 16-17." 354 F. Supp. at 944 n.5.

19 354 F. Supp. at 949.

any of the six categories of priority listed in GM 1810. Defendants maintained that since plaintiffs were presently living in public housing they could not demonstrate sufficient housing need.[20]

Despite the fact that HDA strenuously urged this interpretation of their regulation, the district court agreed with plaintiffs' argument that former site occupant status conferred an exemption from the requirement of "urgency of housing need."[21] In so deciding, the district court reasoned that in the eight years that GM 1810's predecessor GM 1282 was in effect, HDA had acted in accordance with plaintiffs' interpretation. Furthermore, Judge Lasker noted that granting plaintiffs this exemption promoted community stability and facilitated initial clearing of the project site by voluntary relocation.[22] The district court questioned the motive behind HDA's interpretation of GM 1810 in *Otero*, noting that if plaintiffs had to demonstrate a threshold requirement of need by showing that they lived in unsanitary, unsafe conditions, the conjunctive requirement in 42 U.S.C. § 1455(c)(1), that persons displaced by the construction of federally funded housing projects be relocated in decent, safe and sanitary dwellings, would render former site occupant status meaningless.[23]

The district court's decision, however, should be narrowly construed since local housing authorities operating under regulations similar to GM 1810 may find themselves in a situation where they must give white residents displaced by low-income projects in white suburbs priority in such projects, thus maintaining segregated, predominantly white neighborhoods.[24] This anomaly is particularly glaring if, as the district court found with respect to GM 1810, need is not a threshold requirement for priority as a former site occupant.

In decisions involving dislocation of tenants in low-income housing projects, two theories are commonly advanced to give them special status. The first relies on the mere fact that they have been dislocated, thus experiencing the upheaval of their homes, and the time, energy and money involved in their two moves. The second is based on maintaining community ties.[25] Relying on either theory to grant special status superseding urgency of housing need requires careful guidelines if the regulation conferring the special status is not to be abused by communities that have shown a pervasive ability to subvert national housing objectives through novel uses of prima facie nondiscriminatory regulations.[26] The district court concluded that because HDA had acted as if GM 1810 were the controlling regulation and since innocent, reasonable persons relied on those actions, it would violate due process to hold plaintiffs to the earlier regulation.[27] The court held that GM 1810 applied to plaintiffs' case.

On appeal, the Second Circuit agreed with the district court that HDA, having adopted regulation GM 1810, having bound itself to that course in statements to plaintiffs, having publicly held itself out as prepared to follow that course with respect to this project and having in fact acted accordingly, could not switch in midstream to its earlier policy, even though it might have done so ab initio.[28]

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20 Id. at 948.

21 Id.

22 Id.

23 Id. at 949.

24 See Gautreaux v. Chicago City Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), supplemental judgment order, 304 F. Supp. 736 (N.D. Ill. 1969). See text accompanying notes 42-46 infra.

25 354 F. Supp. at 948.

26 See, e.g., Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971); Gautreaux v. Chicago City Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

27 354 F. Supp. at 947.

28 484 F.2d at 1132. In so ruling both courts relied on the landmark administrative law decision, Vitarelli v. Seaton, 359 U.S. 535 (1959). In Vitarelli v. Seaton petitioner was an employee of the Department of the Interior. Although petitioner could have been discharged summarily and

IV. CONSTRUCTION OF THE 1968 ACT

Had plaintiffs exercised their right of first priority under GM 1810, defendants argued, the resulting racial ratio of tenants in the project would have been 20 percent white to 80 percent nonwhite. Defendants claimed that this ratio would tip the neighborhood, driving whites out and leaving the neighborhood a segregated one. According to defendants, this was "impermissible ghettoization" violating the Civil Rights Acts of 1871[29] and 1964,[30] the Fair Housing Act of 1968[31] and, consequently, the equal protection[32] and supremacy clauses[33] of the Constitution.[34]

While recognizing the broad construction of the constitutional and statutory rights against discrimination set forth in the above acts and in *Gautreaux v. Chicago Housing Authority*[35] and *Shannon v. HUD*,[36] the district court found the critical question in *Otero* to be a different and complex one: namely, "whether the constitutional and statutory obligation of a Housing Authority to provide fair housing and balanced communities *bars* it from granting former site occupants *who are members of minority groups* an absolute priority to public housing accommodations, if such a grant would tend to tip the racial balance in the area."[37] The court held that GM 1810 is constitutional; that is, that constitutional and statutory obligations to provide fair housing and balanced communities do not bar HDA from granting former site occupants who are members of a minority an absolute priority to public housing.[38] In so holding the court noted that the parties agreed that the 1968 Act sets stringent antidiscrimination standards.[39]

The district court began its reasoning with the relevant statutory language from the 1968 Act:

> It is the policy of the United States to provide within constitutional limitations for fair housing throughout the United States (42 U.S.C. § 3601) (d) The Secretary of Housing and Urban Development shall—
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> (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter. (42 U.S.C. § 3608(d) (5))[40]

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without cause independent of a security hearing and proceeding, the Secretary of the Interior chose to proceed against him on security grounds. Having done so, the Court held that the Secretary was bound by the regulations which he had promulgated for dealing with such cases.

29 42 U.S.C. § 1983 (1970).

30 Id. § 2000d.

31 Id. §§ 3601-08 (Supp. V, 1970). The Fair Housing Act of 1968 is part of the Civil Rights Act of 1968 [hereinafter 1968 Act].

32 U.S. Const. amend. XIV.

33 U.S. Const. art. VI.

34 354 F. Supp. at 950.

35 296 F. Supp. 907 (N.D. Ill. 1969).

36 436 F.2d 809 (3d Cir. 1970).

37 354 F. Supp. at 952.

38 Id. at 953.

39 Id. at 950.

40 Id.

Judge Lasker ruled that this legislative command undoubtedly went beyond constitutional and prior congressional requirements and imposed new, positive responsibilities on those constructing or operating federally assisted housing.[41]

The district court then examined two leading low-income public housing decisions: *Gautreaux* and *Shannon*. First, the court agreed with the reasoning in *Gautreaux*[42] that a deliberate policy of separating the races could not be justified by the good intentions with which other laudable housing goals were pursued.[43] The court also agreed with the *Gautreaux* finding that funding by HUD of segregated housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of local community and Chicago City Council resistance to building low-income housing outside existing areas of minority concentration.[44] Second, although noting the "considered review of history" in the *Shannon* decision[45] and a parallel situation, inasmuch as a further concentration of low-income black residents was being attacked, the district court distinguished *Shannon* on the ground that the key issue there was the location of the proposed project, not the proposed mix of tenants in a given project.[46] This is misleading. The plaintiffs in *Shannon* challenged a change in the type of project proposed for their area. That change was significant precisely because it meant that the incoming tenants would be low-income blacks rather than middle-income blacks and whites.[47]

The district court then enunciated the key distinction between the *Gautreaux* and *Shannon* decisions and *Otero*: in the former cases the plaintiffs were predominantly black, complaining that HUD and the local housing authority were not taking affirmative action toward ending segregation; in *Otero*, however, plaintiffs argued that HDA regulation GM 1810 is consistent with the affirmative obligations of the 1968

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41 354 F. Supp. at 950. In so finding, however, the district court did not explore the full legal implications. First, the court never articulated the bases for these new positive responsibilities. Second, if HUD's positive responsibilities are constitutionally mandated, then it seems a statutory and administrative regulation that contradicts that mandate is unconstitutional. If the legislative mandate goes beyond constitutional requirements, however, then the issue of whether GM 1810, a local statutory and administrative regulation, should give way to a contrary federal statute is less clear.

42 *Gautreaux*, the principle low-income public housing case, has been in litigation for more than seven years and covers practically every facet of the problem of public housing. Plaintiffs, black tenants in or applicants for public housing, brought suit on behalf of themselves and all others similarly situated, alleging that the Chicago Housing Authority (CHA) had adopted and acquiesced to procedures that violated their constitutional rights under the fourteenth amendment. 304 F. Supp. at 741. The court held that CHA intentionally adopted tenant assignment procedures imposing a black quota for the purpose of maintaining existing patterns of residential segregation in Chicago. 296 F. Supp. at 909. Subsequently, the district court issued a complex judgment order requiring CHA to administer its public housing system affirmatively in every respect, to the end of dismantling the segregated public housing system which had resulted from CHA's history of intentional discriminatory site selection and tenant assignment procedures. 304 F. Supp. at 741.

43 354 F. Supp. at 951.

44 Id.

45 While the judgment order in *Gautreaux* was being formulated litigation started in *Shannon*. In 1966 HUD informally approved a modification of a 1958 urban renewal plan which replaced single-family, owner-occupied homes with a low-income project. 436 F.2d at 809. Plaintiffs, a group of predominantly black residents, contended that HUD violated the 1968 Act and the thirteenth and fourteenth amendments by funding a project that would increase the already high concentration of black residents in their neighborhood.

The essential procedural complaint preserved on appeal was that in reviewing and approving this type of project for the site chosen, HUD had no procedures for consideration of and, in fact, did not consider the project's impact on racial concentration in plaintiffs' neighborhood. The Third Circuit rested its decision on administrative grounds, holding that HUD must utilize some institutionalized method whereby in considering site or type selection it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts. Id. at 821.

46 Id.

47 Id. at 814.

Act.[48] Defendants argued that, should plaintiffs prevail, the resulting ratio of 80 percent nonwhite to 20 percent white in the new buildings would prove to be the tipping factor in a neighborhood that declined over a period of five years from 58.9 percent white to 48.3 percent white.[49] Defendants maintained this would violate the 1968 Act and HUD's mandate enunciated in *Shannon* which, they claimed, compels local housing authorities to provide integrated communities, even if the accomplishment of that objective must be at the expense of blacks and Puerto Ricans.[50]

The district court found that the 1968 Act had been "universally construed by court decisions (referred to in detail below) to require housing authorities not merely to follow a policy of 'color blindness', but literally to act affirmatively to achieve fair housing, that is, not merely to desegregate, but to integrate housing."[51] The district court, however, did not subsequently specify which decisions these were. One must assume the court was referring to *Gautreaux* and *Shannon*. Neither case held there is a constitutional or statutory right to integration.

The argument in *Gautreaux* rested on a history of intentional discrimination, and the imposition of benign quotas by the Chicago Housing Authority.[52] This history provided the basis for the broad remedy requiring the location of future low-income housing in white areas.[53] Some commentators have incorrectly assumed that this *remedy*, which resulted in integration, was the constitutional and statutory *right* upon which the case was decided.[54] Since there is no history of intentional discrimination in *Otero*, it follows that the *Gautreaux* decision is not directly in point.

Shannon has also been misinterpreted, with legal literature overstating the holding.[55] *Shannon* does not hold that HUD has a duty to integrate. *Shannon* rests on narrow administrative grounds: "When an administrative decision is made without consideration of relevant factors it must be set aside."[56] The court insisted that "the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."[57] With respect to the agency's duties, the court found that under the 1949, 1964 and 1968 Civil Rights Acts HUD is directed to achieve fair housing, to deal effectively with the problem of urban blight and slums, and to establish well planned communities.[58] Concerning relevant racial and socioeconomic information, the court maintained that "[i]ncrease 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."[59] Finally, the court said: "We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration."[60]

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48 354 F. Supp. at 953.

49 Id.

50 Id.

51 Id. at 943.

52 296 F. Supp. at 913. See text accompanying note 42 supra.

53 304 F. Supp. at 741.

54 See, e.g., Comment, *Gautreaux v. Public Housing Authority*: Equal Protection and Public Housing, 118 U. Pa. L. Rev. 437 (1970). For an excellent discussion of *Gautreaux* see Note, Public Housing and Urban Policy: *Gautreaux v. Chicago Housing Authority*, 79 Yale L.J. 712 (1970).

55 See, e.g., Comment, HUD Must Institutionalize Procedures for Determining Racial and Socioeconomic Effects of Site Location for Federally Assisted Housing Projects, 46 N.Y.U.L. Rev. 560, 564 (1971).

56 436 F.2d at 819.

57 Id. at 821.

58 Id. at 813.

59 Id. at 821.

60 Id. at 822.

The strength of the *Shannon* decision is that the court pursued an administrative remedy requiring HUD to make an informed decision, and recognized the court's incompetence to create suitable public housing policy.[61] Reading *Shannon* to require an unqualified affirmative duty to integrate communities, the district court found it necessary to distinguish *Shannon* from *Otero* by resorting to the fiction noted above, claiming *Shannon* dealt with site selection, not tenant makeup.[62]

To support its ruling that the 1968 Act requires integration, but not at the expense of minority groups, the district court resorted to the legislative history of the 1968 Act to discover the intended beneficiary.[63] Although admitting the dearth of such history, the court found that a careful reading of the extended remarks of the chief sponsor of the affirmative action clause, Senator Mondale, made it clear that the objective of that clause is to benefit minority groups, particularly blacks, who, as a result of the nation's history of discrimination, had previously been prevented from securing decent housing.[64] According to the district court, it would be ironic indeed to make housing available to minority groups in such a way as to deprive them of that very commodity.[65] The court concluded that HDA deprived plaintiffs of a governmental benefit to which they were entitled solely because they were nonwhite and, consequently, violated the equal protection clause and federal statutes prohibiting racial discrimination in federally assisted programs.[66]

On appeal the circuit court disagreed with the district court as to the congressional intent behind the 1968 Act. According to the Second Circuit, Congress' desire in providing fair housing throughout the United States was to promote integrated housing and to stem the spread of urban ghettos, even though the effect might to be to deny some members of a racial minority access to publicly assisted housing in a particular location.[67] According to the district court, however, the primary intention of the 1968 Act was to guarantee blacks a right to equal opportunity and freedom from discrimination in housing. An analysis of Senator Mondale's remarks in Congress supports the district court's interpretation. Senator Mondale and his cosponsor, Senator Brooke, pointed to the long history of discrimination against blacks in the housing market and emphasized the primary need for equal opportunity in housing. They noted that an additional feature of their bill would be to encourage integrated communities.[68]

The Second Circuit also disagreed with the district court as to the effect of GM 1810. The circuit court held that to the extent GM 1810 conflicts with HDA's duty to integrate, the latter prevailed and HDA may limit the number of apartments to be made available to persons of white or nonwhite races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that tip neighborhoods into segregated communities.[69] The court reasoned that allowing housing officials to make decisions having the long-range effect of increasing or maintaining racially segregated housing patterns

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61 See Comment, HUD Has Affirmative Duty To Consider Low Income Housing's Impact Upon Racial Concentration, 85 Harv. L. Rev. 870 (1972).

62 See text accompanying note 47 supra.

63 354 F. Supp. at 951.

64 Id. at 953.

65 Id.

66 Id. at 954. The district court granted summary judgment permanently enjoining HDA from renting apartments in the Seward Park project to persons other than former occupants of the urban renewal area on which the project was built, until all eligible former site occupants applying for appropriate size apartments had been accommodated, and declaring null and void the leases entered into by HDA with defendants who were not former site occupants. Id. at 957.

67 484 F.2d at 1134.

68 114 Cong. Rec. 2270-2284, 3421-3426 (1968) (remarks of Senator Mondale and Senator Brooke).

69 484 F.2d at 1135.

merely because minority groups might gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward making ghettos of our urban centers.[70]

In adopting this line of reasoning the circuit court recognized the tipping phenomenon and gave legal sanction to it by ordering that if the district court believed, upon further fact-finding, that this ratio of 80 percent nonwhite to 20 percent white within these two buildings would tip the community to a segregated one, the defendants had to prevail.[71] The district court correctly reasoned that tipping was not an issue in *Otero* since, by definition, former site occupants are persons who originally resided in the neighborhood. In so arguing the district court implicitly recognized but did not articulate an essential difference between the fact patterns of the *Gautreaux* and *Shannon* cases and *Otero*. In the former cases, the low-income housing projects with minority group tenants were built in exclusively segregated neighborhoods, whereas in *Otero* the low-income project is located in a racially mixed area, 48.3 percent white in 1970.[72]

The circuit court concluded that since GM 1810 on its face appeared to be neutral and to constitute a presumptively valid exercise of HDA's discretionary power, the burden should properly be upon HDA to show that its adherence to the regulation would probably result in a violation of its duties under the Constitution and the 1968 Act.[73] The circuit court found that there was a genuine dispute as to material facts concerning the ultimate racial ratio in the urban renewal area and, hence, summary judgment was an inappropriate procedure.[74] The court ordered a trial at which the parties could offer evidence with respect to the ultimate racial ratio of the urban renewal area. "Such evidence," it noted, "should permit the trial judge to make findings as to whether adherence to GM 1810 would tend to precipitate a racial imbalance which might *ultimately* prevent the Authority [HDA] from exercising its duty to maintain racial integration in the community"; in other words, an imbalance that would tip the community.[75]

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[70] Id. at 1134.

[71] Id. at 1140.

[72] 354 F. Supp. at 952. HUD recognizes the significance of this distinction in its newly promulgated project selection criteria. These were developed concurrently with the *Shannon* decision to evaluate the racial impact of proposed projects. The criteria cover eight basic categories. A project may receive a rating of "superior," "adequate" or "poor" for each category. Priority goes to applications receiving the most "superior" ratings; however, one "poor" rating will disqualify any application.

The second categroy, "Minority Housing Opportunities," is designed to assess the racial impact of a project. In this category a "superior" rating is given to a project if it is in "an area of minority concentration, but the area is part of an official state or local agency development plan ..." (A)(2). An "adequate" rating is given to a project if it is "[o]utside an area of minority concentration but the area is racially mixed, and the proposed project will not cause a significant increase in the proportion of minority to non-minority residents in the area ..." (B)(1).

Had these ratings existed when the project in *Otero* was proposed it would have received at least an adequate rating under the second category above, (B)(1). The district court's reason for finding that tipping was not an issue in *Otero* is relevant to the requirements in (B)(1). The project in *Otero* could not cause a significant increase in the proportion of minority residents in the area since by definition former site occupants are persons who originally resided in the area. It is likely that the project in *Otero* would have received a superior rating since it is part of a local urban renewal plan as well as being in a racially mixed area.

[73] 484 F.2d at 1135.

[74] Id. at 1137.

[75] Id. (emphasis added).

V. THE TIPPING PHENOMENON

A. Sociological Definitions of Tipping

Before deciding the third issue raised by *Otero*, whether courts should recognize the tipping phenomenon (as the Second Circuit did), it is vital to determine whether the tipping phenomenon is valid and, if so, whether one can predict the point at which a neighborhood will tip. But before making these determinations one must first define the tipping phenomenon with some precision. The broadest definition states that tipping occurs when some recognizable minority group reaches such a percentage within a given area that others begin leaving the area.[76] Three key terms within this definition are "recognizable minority group," "reaches such a percentage" and "given area." The meaning of such terms will vary, depending upon whether one adopts an individual approach or an objective approach.[77]

An individual approach investigates the point at which an individual within the majority group will be tipped from the area; that is, his personal threshold. One individual definition is one's preference point: the point at which one voices one's disapproval of the ratio.[78] This, however, is likely to be unreliable, for what one says and does are often contradictory. A second and more reliable individual definition looks to the point at which one actually leaves the area.[79] Although this definition rests on a measurable fact, it is still subject to modification through future action. For example, the same individual might conceivably return to the area. Moreover, both of these definitions have the disadvantage of ignoring incoming members of the majority population. In other words, the rate of entry by majority members is a variable in determining the rate of departure necessary to tip the area. A third individual definition looks to the point at which members of the majority cease to enter the area.[80] This definition is also objective insofar as empirical evidence is available to establish when no more of the majority enter.

An objective definition would depend on measured empirical evidence of areas that have already tipped. The most common objective definition is that the tipping point is reached when there is a rapid acceleration in the percentage of the majority leaving. For example, if the minority percentage of the population were represented by an x axis, and the departing percentage by a y axis, we would have the following graph:

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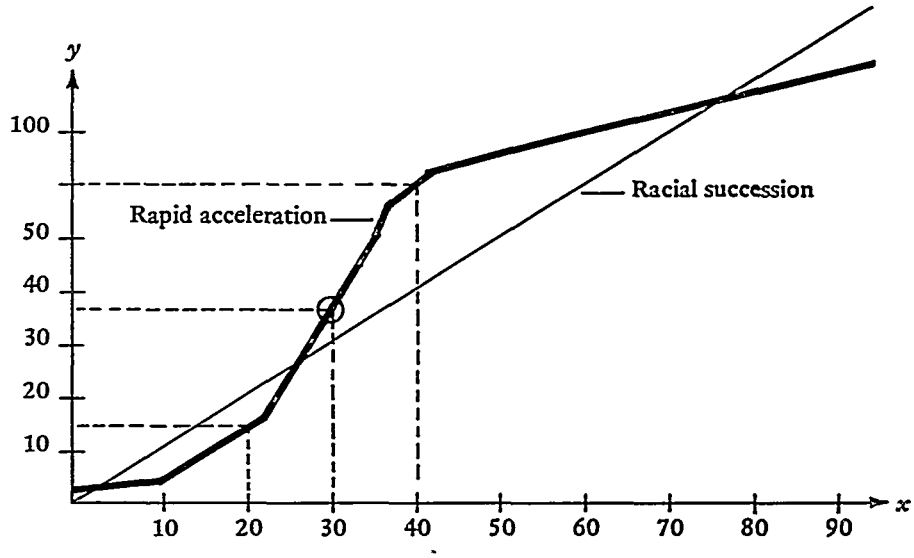
76 T. Schelling, A Process of Residential Segregation: Neighborhood Tipping, Racial Discrimination in Economic Life 181 (A. Pascal ed. 1972).

77 According to Schelling, tipping can be applied to a variety of contexts. Id. For a fascinating mathematical discussion of tipping points that postulates tipping-in and tipping-out points, see T. Schelling, Models of Segregation 74 (1969).

78 E. Wolf, The Tipping-Point in Racially Changing Neighborhoods, 29 American Institute of Planners Journal 217 (1963).

79 Id. at 219.

80 Id.



Thus, when the minority increases from 20 percent to 40 percent there is a rapid acceleration in the percentage of the white population leaving.[81] The tipping point is approximately 30 percent. A second objective definition takes empirical evidence of areas that have tipped and determines a percentage of minority entrance after which the areas do not reverse themselves; even if it takes a number of years the area may eventually become 99 to 100 percent the minority. This is called racial succession.[82] A rapid acceleration definition usually fixes the tipping point at a higher percentage of the minority than the succession definition. The succession definition may mean that the tipping point is reached with the first member of the minority to enter.

B. Analysis of the Tipping Phenomenon

Although the tipping phenomenon was recognized in real estate literature at an earlier date,[83] the first significant, analytical research on the subject appeared in 1957

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81 Schelling, supra note 76, at 158. Points on the straight line represent the relative majority and minority percentages of the population at any given time. Since the departing percentage is plotted on the y-axis, and the graph posits an initial population of 100% majority, the departing percentage must be subtracted from 100 in order to determine the majority percentage remaining. Thus the straight line represents racial succession, whereas the curve illustrates the tipping phenonmenon in rapid acceleration.

82 O. Duncan & B. Duncan, The Negro Population of Chicago 108 (1957).

83 The phenomenon of tipping is probably as old as the history of minority groups entering new areas. The rest of this analysis will be devoted to tipping in the context of housing. Although not called tipping, the phenomenon of nonwhites entering white neighborhoods and whites consequently leaving was probably first recognized in the professional real estate literature during the 1920's, a period of rapid in-migration of nonwhites from the South to work in industry in the North. In 1923 McMichael and Bingham wrote of "colored people" coming to Northern cities, "overruning old districts" and "sweeping into adjoining ones." L. Laurenti, Property Values and Race 9 (1960). They noted dryly that "few white people, however inclined to be sympathetic with the problem of the colored race, care to live near them." Id. at 9.

In the 1930's and 40's, real estate professionals were just as convinced that when nonwhites move in, whites tended to move out, with a consequent drop in property values. Some noted, however, that this drop might not be due to the nonwhites' entrance: "In fairness we must admit it is not always the Negro occupancy alone which causes the blight; the contributing factor may be the age and condition of buildings in which these people are housed that causes the trouble." Id. at 11.

and 1958. In 1958 Morton Grodzins' *The Metropolitan Area As a Racial Problem* was published. In this work Grodzins coined the term "tipping" and described it in the following manner:

> The process by which whites of the central cities leave areas of Negro in-migration can be understood as one in the social-psychology of "tipping a neighborhood." The variations are numerous, but the theme is universal. Some white residents will not accept Negroes as neighbors under any conditions. But others, sometimes willingly as a badge of liberality, sometimes with trepidation, will not move if a relatively small number of Negroes move into the same neighborhood, the same block, or the same apartment building. Once the proportion of non-whites exceeds the limits of the neighborhood's tolerance for interracial living (this is the "tip point"), the whites move out.[84]

In 1957 Otis and Beverly Duncan's book, *The Negro Population of Chicago*, appeared. The authors discussed the tipping phenomenon in terms of racial succession: "... the data for this decade reveal no instance of a tract with 'mixed population' (25-75 percent non-white to white) in which succession from white to Negro occupancy was arrested, though, to be sure, the succession was more rapid in some tracts than in others."[85] Consequently the Duncans defined the tipping point as 25 percent black.

Although Grodzins and the Duncans exhibited considerable insight into the actual reasons for the tipping phenomenon, real estate professionals and others seized the idea of a tipping point and ignored the authors' own qualifications.[86] For example, Grodzins noted that "areas of heavy Negro in-migration are most often areas already characterized by high mobility; and the process of Negroes taking up vacancies as they occur cannot be conceived as one in which the old residents have been 'pushed'."[87] The Duncans themselves noted that succession is a normal aspect of city growth; that a population with high socioeconomic status often vacates a residential area as the area ages and its housing becomes less desirable.[88] They suggested that the occurence and intensity of other variables affecting racial succession must be established by future research.[89] In spite of these qualifications, the tipping phenomenon became accepted as fact, describing white flight from neighborhoods which nonwhites had entered.[90] Tipping was associated with white racial prejudice, and the myth that nonwhite entry would mean declining property values.[91]

The research recommended by the Duncans was undertaken during the 1960's, principally by Karl and Alma Taeuber[92] and Luigi Laurenti.[93] According to the Taeubers, urban centralization of Negroes has two components: the uneven distribution of white and nonwhite households among concentric zones emanating from the central city, and the segregation within each zone.[94] Partly for this reason it is virtually impossible to isolate neighborhood changes owing to racial factors from those changes reflecting broader trends at work throughout an entire metropolitan area, or even the

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84 M. Grodzins, The Metropolitan Area as a Racial Problem 6 (1958).

85 Duncan & Duncan, supra note 82, at 120.

86 See, e.g., E. Wolf, The Tipping-Point in Racially Changing Neighborhoods, 29 American Institute of Planners Journal 217 (1963).

87 Grodzins, supra note 84, at 6.

88 Duncan & Duncan, supra note 82, at 109.

89 Id. at 108.

90 See Wolf, supra note 86, at 215.

91 Id.

92 K. Taeuber & A. Taeuber, Negroes in Cities 2 (1965).

93 Laurenti, supra note 83.

94 Taeuber & Taeuber, supra note 92, at 63.

nation. Understandably, then, the "processes of change in the racial composition of neighborhoods do not always follow such simple patterns" as implied in the popular notion of tipping.[95] The Taeubers' research indicates that the rate at which neighborhood racial transition proceeds is largely dependent on the rate of increase in black and white population. The greater the black population growth relative to the white population growth, the more likely an increase in the black proportion and the faster the rate of racial segregation.[96] On the other hand, a high growth rate of white population relative to black population is accompanied by a decline in the proportion of blacks and a slow rate of racial segregation.[97] The Taeubers concluded that "any tipping point would thus seem to have less to do with level of racial tolerance among whites than with the levels of supply and demand for housing in areas that will accept Negro residents."[98]

Most accounts of tipping, whether rapid acceleration or racial succession, have been based on the experience of northern and border cities during the 1940's and 1950's, periods of very rapid growth in black population and stasis or decline in white urban population.[99] Accordingly, the Taeubers and Philip Hauser, Director of the Population and Research Center at the University of Chicago, under whose auspices the Taeubers did their research, were quick to qualify the conclusions of the Duncans: "The present monograph is ample testimony to the fact that even the most careful case study of an individual city such as the Duncan study, *The Negro Population of Chicago*, cannot be generalized to other cities."[100]

In the past there have been three principal factors which have affected the racial makeup of communities and, consequently, have determined both the validity and predictability of the tipping phenomenon: migration patterns, structure of housing markets and self-fulfilling prophecies. The typical pattern of expansion of cities in the United States has been that of radial growth, with new residential development and population growth occuring on the periphery of the city, along with small population increases or decreases in the central cities.[101] Yet the proportion of blacks constituting the population of the central city is increasing.[102] Largely as a consequence of the heavy in-migration of blacks from the South during the 1940's, 80 percent of blacks now live in the central city.[103] Although the population of nonwhites in metropolitan areas continued to increase during the 1960's, in contrast to the preceding two decades, the greater proportion of this growth is attributable to natural increase rather than to in-migration.[104] Consequently, the migration patterns of the 1940's and 1950's which led Grodzins and the Duncans to postulate the idea of the tipping phenomenon will probably never be repeated. The volume of black in-migration from the South reached its apex and will continue to decrease, perhaps drastically, as the ranks of potential migrants are depleted.[105]

With respect to the housing market, during the 1940's wartime restrictions on new construction caused the housing supply to lag far behind population growth.[106] The substantial in-migration of blacks during this same period created a high black demand for housing.[107] Simultaneously, the tightness of the housing market and a

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95 Id. at 4.
96 Id.
97 Id.
98 Id.
99 Id.
100 Id. at vi.
101 Id.
102 *Current Population Reports*, Series P-23, No. 42, at 18 [hereinafter Current Population].
103 Id. at 20.
104 Id. at 19.
105 H. Rose, The Black Ghetto: A Spatial Behavioral Perspective 32 (1971).
106 Taeuber & Taeuber, supra note 92, at 3.
107 Id. at 25.

restrictive government lending policy which encouraged continuity of property occupancy by the same racial class prohibited whites and blacks from building or moving.[108] During the 1950's, however, construction increased dramatically, particularly in the suburbs, thus opening up the housing market.[109] The result was that vast numbers of whites with increasing access to credit moved to the suburbs and blacks moved into their former homes and neighborhoods.[110] This unique series of events also occurred during the time period covered by the Grodzins' and Duncans' research.

Finally, during the 1940's and 1950's the beliefs, policies and practices outlined above were interwoven with each other to produce a self-fulfilling prophecy.[111] A self-fulfilling prophecy is, in the beginning, a false perception of a situation evoking a response which turns the originally false perception into an actual phenomenon. For example, given the pull of the suburbs on a white living in the city, and given his misconceived fear that blacks entering his neighborhood will tip the neighborhood and, thus, will decrease the value of his property, he and his neighbors will put their houses up for sale. Owing to the sudden increased supply and anxiety to leave quickly, they often accept offers of less than the current market value. The result is that their fear that the neighborhood will tip and that they will lose money becomes a reality. Given this situation and the likelihood that real estate operators realize the effect of the self-fulfilling prophecy, they can capitalize on it by encouraging the original false perception. The result is that the tipping phenomenon became increasingly accepted as a valid one.[112]

The factors that led Grodzins and the Duncans to postulate the idea of the tipping phenomenon were probably unique to the 1940's and 1950's. The Taeubers and Laurenti have documented the fact that these factors have and probably will continue to change, making it highly unlikely that the tipping phenomenon is valid today. Even if it were valid, with respect to the critical question of whether one can predict the point at which a neighborhood will tip, the answer is clear. One cannot predict a tipping point.[113] The racial fortunes of a neighborhood are tied to broad changes in metropolitan areas with respect to migration, structure of the housing market and the extent to which self-fulfilling prophecies operate. Whether one's definition is rapid acceleration or racial succession, there are no manageable standards, judicial or sociological, to determine what the tipping point is. It is submitted that courts should not recognize or give legal sanction to the tipping phenomenon. Generally, there are two broad reasons for courts not to recognize the tipping phenomenon. The first is that there are no manageable standards to determine a tipping point and, hence, it is a political question under the criteria established in *Baker v. Carr.*[114] The second is that legal recognition of the tipping phenomenon leads to the imposition of benign quotas which are most likely unconstitutional.[115] This Note focuses on the second reason because it is more readily answerable and, having answered it, renders discussion of the first reason unnecessary.

C. Tipping and *Otero*

Writing for the Second Circuit, Judge Mansfield asserted: "The 'tipping point,' or percentage of concentration of non-white residents in a given area that will cause white

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108 Laurenti, supra note 83, at 25.

109 Taeuber & Taeuber, supra note 92, at 3.

110 Id.; Laurenti, supra note 83, at 25.

111 Laurenti, supra note 83, at 25.

112 See Wolf, supra note 86, at 216.

113 National Urban League, Racial Bias and Housing 1 (1963).

114 369 U.S. 186 (1962).

115 See text accompanying notes 127-42 infra.

residents to flee, played a major role in *Gautreaux v. Chicago City Housing Authority*, supra. It has been recognized by others."[116] He then quoted the following passage from a law review article:

> This gradual tendency of integrated areas to become more and more Negro is accentuated by the popular belief – often transmitted into action – that the rate at which white families move out rises with the percentage of Negroes in the area, and, more important, that there exists a 'tipping point' – a given percentage of Negroes, after which the departure of whites from the areas will be greatly accelerated.[117]

These statements are misleading. First, the tipping phenomenon did not play a major role in *Gautreaux*; in fact, the court never acknowledged the tipping phenomenon.[118] Second, the circuit court neglected to quote a later passage from the same law review article: "... any law which attempts to specify a general tipping point will be subject to enormous error since that point – if it exists at all – will probably vary with the income level of the area, the distance from the Negro ghetto, the type of housing, the ethnic make-up of the surrounding white community, and many other factors."[119] Had the circuit court undertaken even a cursory investigation of the tipping phenomenon it would have realized that tipping has historically been associated with blacks entering all-white neighborhoods. In *Otero* the minority is predominantly Puerto Rican.[120] Research has not revealed any literature with respect to tipping and Puerto Ricans. Moreover, as the district court noted, the minority was not entering the area, but was classified as on-site tenants. Further, the neighborhood is not all white. In fact, the lower east side of Manhattan has been an integrated community for the last five decades. It has traditionally served a very mobile population, providing immigrants to New York City with a first home before settling in other locations. Thus to recognize the tipping phenomenon with respect to the facts in *Otero* shows a complete misunderstanding of the phenomenon.

D. Tipping in School Desegregation Cases

Finally, it is important to note that in school desegregation cases the Supreme Court has explicitly refused to recognize the tipping phenomenon. Ever since the landmark decision in *Brown v. Board of Education*,[121] attorneys for southern, and more recently northern, school systems have argued that introducing blacks into all-white schools would precipitate a white departure from the public school systems and result in a return to segregated schools. The solution often proposed by these school systems is to keep black students in a minority of 25 percent at any school where there are also white students.[122] Unfortunately this leaves many schools within the systems 99 percent black. "White flight" is the name ascribed to the tipping phenomenon is school desegregation cases.

Attempts to get courts to recognize "white flight" as a valid argument have consistently failed. Two leading Supreme Court decisions have explicitly rejected the

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116 484 F.2d at 1135.

117 Kaplan, Equal Justice in an Unequal World, 61 Nw. U.L. Rev. 363, 390 (1966).

118 296 F. Supp. at 736.

119 Kaplan, Equal Justice in an Unequal World, 61 Nw. U.L. Rev. 363, 393 (1966).

120 354 F. Supp. at 945.

121 347 U.S. 483 (1954).

122 See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The Court also rejected the idea of a district court fixing a mathematical racial ratio reflecting the pupil constituency of the system.

"white flight" argument. In *Monroe v. Board of Commissioners*[123] the critical issue was the constitutionality of a free transfer plan. Mr. Justice Brennan, speaking for a unanimous Court, rejected the "white flight" argument:

> Respondent's argument in the Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the validity of these constitutional principles cannot be allowed to yield simply because of disagreement with them." Brown II, at 300.[124]

More recently, in *United States v. Scotland Neck City Board of Education*,[125] the Supreme Court relied on its decision in *Monroe* and again explicitly rejected the "white flight" argument:

> The primary argument made by the respondents in support of Chapter 31 is that the separation of the Scotland Neck schools from those of Halifax County was necessary to avoid "white flight" by Scotland Neck residents into private schools that would follow complete dismantling of the dual school system. . . . But while this development may be cause for deep concern to the respondents, it cannot, as the Court of Appeals has recognized, be accepted as a reason for achieving anything less than complete uprooting of the public school system.[126]

VI. THE CONSTITUTIONALITY OF BENIGN QUOTAS

Giving legal recognition to the tipping phenomenon results in giving legal sanction to benign quotas.[127] Were a court or an administrative agency to determine that a given urban renewal area would tip once blacks entering the area reached 25 percent, then no more blacks would be allowed to move into the area once that level was reached. The public policy supporting such a benign quota would be to insure integrated communities. The validity of this line of reasoning rests upon three propositions: 1) that integration is a controlling policy of the United States; 2) that benign quotas result in integration; and 3) that benign quotas are constitutional.

With respect to integration as a national policy, it goes without saying that constitutional rights recognized by the courts are national policies.[128] The Constitution guarantees equal protection of the law for all persons.[129] Civil rights laws guarantee equal opportunity to housing, and judicial opinions have recognized the constitutionality of these laws.[130] It does not follow, however, that integration is a constitutional or statutory guarantee.[131] The controlling policy of the United States is equal opportunity to housing, not integration.

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123 391 U.S. 450 (1968).

124 Id. at 456.

125 407 U.S. 484 (1972).

126 Id. at 490-91.

127 See, e.g., Navasky, The Benevolent Housing Quota, 6 How. L.J. 30 (1960); Kaplan, Equal Justice in an Unequal World, 61 Nw. U.L. Rev. 363 (1966). These two articles constitute the definitive legal literature on benign quotas. Both touch on the tipping phenomenon. For a general discussion of benign quotas and the equal protection clause, see Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1104 (1969); Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

128 See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954).

129 U.S. Const. amend. XIV.

130 See cases cited in note 2 supra.

131 See text accompanying notes 55 & 57 supra.

A. The Practical Effect of Benign Quotas

The second proposition behind the argument supporting benign quotas is that they would achieve the public policy of integration. If benign quotas were based on the assumption that a project would tip at 25 percent black, then once that figure was reached no more blacks would be allowed within the project. The practical effect of such a limitation would be to restrict markedly the supply of housing available to blacks. As noted earlier, blacks have traditionally had access to a very restricted housing market.[132] According to the Taeubers, this is one of the principal factors behind the high degree of racial succession in this country.[133] Therefore benign quotas could have the effect of perpetuating existing patterns of segregation, with the added social cost of infringing blacks' individual rights to live where they choose. The Second Circuit noted this possibility:

> Absent convincing evidence that a color-blind adherence to GM 1810 would almost surely lead to eventual destruction of the racial integration that presently exists in the community, the Authority's denial of housing to a family because of its race could, whether or not labelled a "benign" quota, constitute a form of unlawful racial discrimination, in violation of the families' constitutional rights.[134]

Moreover, benign quotas would give legal sanction to the self-fulfilling prophecy of the tipping phenomenon, since the rationale of the benign quota is the false assumption that a neighborhood will tip if the black population exceeds 25 percent. The error of according sanction to the tipping phenomenon becomes clearest when the policy of benign quotas is pursued to its logical extension. Suppose, for example, that whites move out of a particular building or area because their homes start deteriorating or for any of several other reasons. As the whites move out, if the housing authority is to prevent tipping it will have to evacuate blacks to ensure that their population never exceeds 25 percent of the total. Eventually the area could be reduced to zero population. With respect to low-income public housing, benign quotas would result in an equally disturbing situation. Since in most large cities blacks make up 80 to 90 percent of the eligible applicants for low-income housing, a quota of 25 percent black units in any low-income project could mean that at least 55 percent of the units would be vacant.[135]

B. Benign Quotas and the Equal Protection Clause

Constitutional objections to benign quotas are based on the equal protection clause.[136] By definition benign quotas create a racial classification. The Supreme Court announced the standard of review accorded racial classifications in *Korematsu v. United States*:[137] " ... all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions."[138]

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132 See text accompanying note 108 supra.

133 Id.

134 484 F.2d at 1136.

135 See, e.g., Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972).

136 See note 125 supra.

137 323 U.S. 214 (1944).

138 Id. at 216.

When racial classifications have been used to extend rights to a racial class, the Court has not always applied a strict scrutiny standard of review.[139] In the tipping context, however, it is clear that benign quotas create a racial classification and then impose a burden on that classification. The Court has held that the equal protection clause confers individual rather than group rights.[140] Thus a claim for strict scrutiny seems undeniable in this context where an individual is burdened solely because of his race.

Although strict scrutiny purports to decide only the standard of review, when applied to suspect classifications it invariably decides the merits. Where the Court has applied strict scrutiny to racial classifications there has been a compelling state interest sufficient to sustain the constitutional attack in only one case, *Korematsu v. United States*. There the compelling state interest was found in the fact that the United States was at war and faced an imminent invasion from Japan.[141] The compelling state interest for benign quotas in the tipping context would be to insure integration. But as noted above, integration is not necessarily a controlling policy of the United States. Moreover, since benign quotas would operate to deprive individuals of a constitutional and statutory right to equal opportunity to housing, it is most unlikely that integration would meet the requirement of a compelling state interest.

Finally, although not directly in point, two Supreme Court decisions provide a formidable hurdle to declaring benign quotas in the housing context constitutional. *Buchanan v. Warley*[142] held unconstitutional a city ordinance which denied blacks the right to buy houses on a predominantly white block. In *Shelley v. Kraemer*,[143] the Court held that state court orders enforcing private restrictive covenants based on race and color were unconstitutional. Both cases gave the individual right to equal protection precedence over the legislative public purpose to promote peace (*Buchanan*) and the public purpose of ensuring the legality and enforceability of restrictive covenants (*Shelley*).

VII. CONCLUSION

In *Otero* the district court held that there is a statutory duty to integrate low-income public housing projects, but not at the expense of minority groups.[144] This holding goes one step further than the holdings of the two leading low-income public housing cases, *Gautreaux* and *Shannon*.[145] While one may question where the court found the statutory duty to integrate in the 1968 Act, the qualification that the duty to integrate not be accomplished at the expense of those it was designed to benefit seems sound. As a result of the circuit court's decision, however, the law in the Second Circuit is that the 1968 Act requires a duty to integrate low-income public housing projects even at the expense of minority groups.[146]

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139 See Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1102-1121 (1969). The argument and case which support this proposition rely on Katzenback v. Morgan, 384 U.S. 641 (1966). The distinction between measures which extend rights and those which deny them is unpersuasive. To extend a right to some is by implication to deny it to others. But see Defunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), cert. granted, 42 U.S.L.W. 3306 (U.S., Nov. 19, 1974).

140 See Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

141 323 U.S. at 219-20.

142 245 U.S. 60 (1917).

143 334 U.S. 1 (1948).

144 354 F. Supp. at 953.

145 See text accompanying notes 55 & 57 supra.

146 484 F.2d at 1140.

It is significant that neither the district court nor the circuit court discussed plaintiffs' substantial and compelling argument that, assuming a duty to integrate, a ratio of 80 percent nonwhite to 20 percent white is just as integrated as a ratio of, for example, 20 percent nonwhite to 80 percent white.[147] The failure of the circuit court to mention this argument and to deal with it suggests the degree of seriousness it accorded the tipping argument. The circuit court, in essence, ordered the district court to determine whether the ratio of 80 percent nonwhite to 20 percent white in these two buildings would tip the community into a segregated one.[148]

On remand the parties met before the district court and immediately disagreed as to the boundaries of the community.[149] Since the parties could not agree on even this primary, fundamental question,[150] and since the two apartment buildings have been vacant for over two years in the face of a severe housing shortage, the parties agreed to settle the case. To do so they resorted to a mediator from the Institute for Mediation and Conflict Resolution. The settlement provides for the two buildings to be 58 percent nonwhite to 42 percent white by apartment and 60 percent nonwhite to 40 percent white by population.[151] Owing to the settlement the district court did not have to grapple with the problem of determining the tipping point.

As a result of this settlement the Second Circuit's posture with respect to the tipping phenomenon remains what it was in the *Otero* opinion, undisturbed until a future district court ruling takes issue with it. It has been the purpose of this Note to demonstrate that the tipping phenomenon is not valid today.[152] Moreover, even if it were valid, it is submitted that there are no manageable standards, sociological or judicial, to determine the point at which a community will tip.[153] Accordingly, the tipping phenomenon has no place in a judicial determination of what constitutes integrated public housing.

WILLIAM RANKIN SNEED III

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147 Brief for Appellee at 14, 484 F.2d 1122 (2d Cir. 1973).

148 484 F.2d at 1140. The circuit court opinion has been relied on heavily in Hart v. Community School Bd. of Brooklyn, Civil No. 72-1041 at 122-23 (E.D.N.Y., filed January 28, 1974), to support Judge Weinstein's holding that HDA has a duty to integrate. But Judge Weinstein explicitly refused to accept the tipping argument in this school desegregation case. Id. at 108.

149 Interview with Nancy LeBlanc, attorney for plaintiffs, in New York City, December 20, 1973.

150 Determination of the relevant community would itself pose an almost insurmountable obstacle to determining a tipping point. Note the extensive litigation in antitrust suits surrounding the appropriate market. Tampa Electric Co., v. Nashville Coal Co., 365 U.S. 320 (1961).

151 Civil No. 72-1733 at 4 (S.D.N.Y., filed February 5, 1974).

152 See text accompanying notes 100-14 supra.

153 Id.