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Beyond Disparate Impact: How the Fair Housing Movement Can Move On

Rigel C. Oliveri*

I. INTRODUCTION

Disparate impact theory is a vital tool for fair housing advocates. It allows them to challenge institutional behaviors that harm minority groups and municipal practices that perpetuate long-standing segregated patterns, without having to go through the often impossible process of identifying a specific bad actor with explicitly discriminatory motives.

Disparate impact theory has been a failure for fair housing advocates. It is overly complicated, infrequently used, and seldom leads to plaintiff success. Moreover, the availability of this theory has led to the underdevelopment of the law surrounding intentional discrimination, which has ultimately made all fair housing cases with circumstantial evidence more difficult to prove.

According to respected commentators, both of the above paragraphs are true: it has been both an important mechanism for addressing housing discrimination and an underutilized, counterproductive disappointment. Suffice it to say, the disparate impact cause of action has been one of the most theoretically significant, misunderstood, and controversial doctrines to arise in the area of antidiscrimination law.

There is now a greater urgency to this debate, because whatever else disparate impact theory may be in the context of fair housing, it is clearly in danger. After decades of near-unanimous recognition of the theory by the U.S. Circuit Courts of Appeals, the U.S. Supreme Court has recently heard a case in which the sole issue presented is whether disparate impact theory is cognizable under the Fair Housing Act ("FHA").[1] Between a conservative majority on the Court and a handful of recent opinions that undermine other

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1. The case, *Texas Department of Housing and Community Affairs v. Inclusive Communities, Inc.*, is actually the third time that the issue has been before the court in as many years. *See* 135 S. Ct. 46 (2014). The Court granted certiorari in two earlier cases. *See* Twp. of Mt. Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, 133 S. Ct. 2824 (2013); Magner v. Gallagher, 132 S. Ct. 548 (2011); *infra* Part II(B)(1)–(2). Both cases settled after briefing but before oral argument. Many people believe these settlements were achieved in large part because fair housing advocates were hoping to prevent the issue from coming before the Court.

aspects of antidiscrimination law which had been previously viewed as sound, the Supreme Court may well pose an existential threat to the theory of disparate impact in housing cases.

This has provoked distress in the fair housing community—even among those who have pointed out the doctrine's flaws. With a social ill as pervasive and intractable as housing discrimination, fair housing advocates want every tool—even a flawed one—at their disposal. Moreover, despite problems in practice, disparate impact theory has a conceptual significance that cannot be denied. By decoupling strict concepts of intent from actionable discrimination, disparate impact theory permits a more expansive challenge to policies and decisions that can be seen as constituting societal discrimination.

Through this Article, I seek neither to praise disparate impact theory nor to bury it. Rather, I endeavor to make use of this particular legal moment to examine the doctrine and its application to fair housing cases. I begin with the assumption that disparate impact theory in housing is destined either for extinction or to continue in its current underperforming state. In light of these two, unsatisfactory outcomes, we must ask: What benefits does disparate impact really add? If it is not achieving its hoped-for results, how can it be improved? If it is to be eliminated, how can advocates achieve these benefits through other means? Put another way: How can fair housing advocates move beyond disparate impact, at least as it currently exists?

II. DISPARATE IMPACT BACKGROUND

A. Background and History

Disparate impact theory allows a discrimination claim to be cognizable even in the absence of evidence of an intentionally discriminatory act. Instead, the fact that a facially-neutral act, policy, or practice has a disproportionate adverse impact on a group of people with an identified, protected characteristic can be enough to allow a plaintiff to state a claim for discrimination.[2]

Disparate impact theory was first articulated in a Title VII case, *Griggs v. Duke Power Co.*[3] In that case, the Court was considering a challenge to a power company's policies for the hire and transfer of employees. Specifically, the company instituted a policy requiring a high-school diploma and/or a passing score on two tests—an IQ test and the Wonderlic Personnel Test. These requirements did not measure the ability to do the particular jobs in question—which involved manual labor—and had the effect of excluding a

2. The defendant is then permitted to raise the defense that the act, policy, or practice serves a substantial, legitimate, and nondiscriminatory interest, which will be discussed in Part III(A), *infra*.

3. 401 U.S. 424 (1971).

disproportionately high number of blacks from hire and promotion.[4]

The defendant had argued that the requirements were neutral, there was no showing of discriminatory purpose or invidious intent in their adoption, and that they would be applied equally to whites and blacks alike. Thus, the lower courts held that the plaintiffs could not state a claim for discrimination. The Supreme Court reversed, reasoning that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[5] The Court went on to note that the key to evaluating such practices is whether they can be justified by business necessity: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[6] Thus, the earliest Title VII disparate impact cases set forth an affirmative defense of business necessity.

A series of cases later followed in which lower federal courts allowed disparate impact theory to apply to Equal Protection claims.[7] Adopting the language of strict scrutiny, these cases defined the defense burden as one of demonstrating a compelling government interest.

The first case to recognize the theory in a claim brought under the FHA was *United States v. City of Black Jack, Missouri*.[8] At issue was the newly-formed City of Black Jack's zoning ordinance, which would have prohibited all multifamily housing within the city limits. Finding that the plaintiff could state a claim based on the exclusionary effect that the zoning ordinance would have on potential black residents, the court held:

> The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. . . . Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[9]

In doing so, the court cited almost exclusively to the Equal Protection cases and conducted its analysis accordingly, with just a bare reference to *Griggs*. In particular, the court required the city to prove a compelling government interest in order to avoid liability.

The Equal Protection cases were later overruled by *Washington v.*

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4. *Id.* The defendant had also previously permitted whites to work in the various positions without requiring a high school diploma or passing test scores. *Id.*

5. *Id.* at 431.

6. *Id.*

7. *See generally* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd sub nom.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 (1977); Hawkins v. Town of Shaw, Miss., 461 F.2d 1171 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

8. 508 F.2d 1179 (1974).

9. *Id.* at 1185 (internal quotations omitted).

Davis,[10] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[11] in which the Supreme Court refused to permit disparate impact theory to be used for constitutional claims. Subsequent housing cases thus had to rely more explicitly on the statutory basis for the theory, specifically the similarities in purpose and text between Title VII and the FHA.[12]

In the decades that followed, every circuit to hear the issue upheld the use of the disparate impact standard, although they employed different formulas. In 2013, the U.S. Department of Housing and Urban Development ("HUD") enacted a regulation which explicitly endorsed the use of the disparate impact theory and set forth the proper analytical framework. First, the plaintiff must prove that a challenged practice either caused or is likely to cause a disparate impact on a group of persons, or creates or perpetuates segregated housing patterns based on protected characteristics.[13] If the plaintiff makes this prima facie case, the burden of proof shifts to the defendant to demonstrate that the challenged practice "is necessary to achieve one or more substantial, legitimate, non-discriminatory interests."[14] If the defendant meets this burden the plaintiff may still prevail by demonstrating that these interests "could be served by a practice that has a less discriminatory effect."[15]

B. Utility in Fair Housing Law

Advocates have used disparate impact theory to challenge a variety of practices under the FHA, including exclusionary zoning ordinances, the administration of Section 8 vouchers, mortgage lending practices, occupancy restrictions, and the demolition and siting of subsidized housing.[16] There are a number of reasons why they find it particularly useful. What follows are three of the most salient ones.

1. The Disparate Impact Theory Allows Advocates to Bypass Intent

From the litigator's point of view, perhaps the most significant

10. 426 U.S. 229 (1976).

11. 429 U.S. 252 (1977).

12. Peter Mahoney argues that courts have failed to keep these two different theoretical origins distinct, and that this has led the case law to be increasingly incoherent. *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 439–42 (1998).

13. 24 C.F.R. § 100.500(a), (c)(1) (2014).

14. *Id.* § 100.500(c)(2).

15. *Id.* § 100.500(c)(3).

16. Michael G. Allen, Jamie L. Crook, John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 157 (2014). The authors also argue that the theory would be useful for challenging the use of criminal background checks by landlords (because of the disparate impact on racial and ethnic minorities), and "disorderly conduct" policies, which require eviction of tenants who call the police (because of the disparate impact on female victims of domestic violence). *Id.* at 190–95.

advantage of the disparate impact theory is that it allows the plaintiff to avoid the difficult task of having to prove that the defendant engaged in an act of intentional discrimination. Intent and motivation can be notoriously difficult to prove. Most actors today are savvy enough not to announce their discriminatory intent. In the absence of direct evidence advocates must make a circumstantial case, relying on the increasingly complex *McDonnell-Douglas* burden-shifting analysis in which plaintiffs must essentially disprove every possible legitimate reason for the defendant's actions.[17] This process is difficult enough in cases involving an individual defendant; it becomes much harder in cases with an institutional defendant, where there may be multiple decision makers and decision-making processes. Simply identifying all of the people who may have had input into a particular policy or participated in a certain practice may be challenging in and of itself. Discerning the motives of each may well prove impossible.[18] Disparate impact theory permits the focus to shift from what was in the minds of the actors to the consequences of their actions.

Moreover, in the absence of direct evidence, a plaintiff's lawyer may be reluctant to brand a defendant as a purposeful discriminator. Doing so will almost certainly complicate settlement negotiations. It may also be seen as a difficult reach to ask a jury to come to this potentially inflammatory conclusion, particularly where the defendant is a government entity or respected institution.[19]

2. Disparate Impact Makes it Easier to Address Historic/Entrenched Discriminatory Patterns

Fair housing advocates also support the disparate impact cause of action because of its ability to reach long-standing patterns of residential segregation. Such patterns were invariably created through overtly discriminatory practices. Once established, they can easily be perpetuated through municipal policies which simply maintain the existing state of

17. The Supreme Court set forth the initial burden-shifting analysis for circumstantial cases of intentional discrimination in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802–03 (1973). This formula was modified in *Texas Department of Community Affairs v. Burdine*, which held that the defendant need only articulate a legitimate, nondiscriminatory reason in order to rebut the plaintiff's prima facie case of discrimination. 450 U.S. 248, 253–56 (1981). The plaintiff's case was made even more difficult by *St. Mary's Honor Center v. Hicks*, in which the Court held that even if the fact-finder disbelieves the legitimate reason proffered by the defendant, a verdict for the plaintiff does not automatically follow. 509 U.S. 502, 519 (1993).

18. Brief of Respondents at 57, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371) ("Proving intent can be time-consuming, costly, and unnecessary.").

19. *Id.* at 56–57 ("Inquiry into the motives of elected officials can be both difficult and undesirable. . . . The judicial and executive authorities charged with enforcing the laws may be reluctant to attribute racial intent to violate those laws on the part of state and local officials if they can avoid that unseemly task and still reach a just result. Charges of intentional discrimination can have a divisive impact on local communities.").

affairs.[20]

Because disparate impact theory focuses not on individual acts of discrimination but on institutional policies and practices that affect whole segments of the population, it is well-suited for disrupting these entrenched patterns. And because it focuses only on effects and not state of mind, disparate impact theory can reach the thoughtless bureaucrat or elected body that unwittingly perpetuates the status quo.

As one group of advocates put it:

> Many disparate impact claims relate to *de facto* conditions that are fairly traceable to *de jure* practices that were imbedded in federal and state policies. This is directly attributable to federal and state policies promoting racial segregation, and overt segregative practices by private individuals.
>
> Disparate impact, however, can fill the void and root out the discriminatory origins undergirding current social conditions and structures. The ability to bring claims against housing practices with highly racial effects is one of the few effective means to investigate and address the legacy of *de jure* practices.[21]

Another argued:

> Because of the enduring effects of federal, state, and local policies and actions that segregated metropolitan areas, subsequent public policies and private actions perpetuate these residential patterns and frequently exacerbate them. . . . Disparate impact claims require governmental entities to ensure they neither perpetuate patterns of residential segregation nor exacerbate them inadvertently.[22]

3. The Threat of Litigation Keeps Governmental and Institutional Actors Accountable

A third benefit to disparate impact theory is that the mere threat of it forces governmental and institutional actors to be mindful of the effects that their policies may have on protected groups. This in turn encourages them to elicit feedback from stakeholders, to closely examine their methods and consider different alternatives, and in general to operate in a more transparent, proactive, and inclusive manner.

For example, the American Planning Association notes that "[t]he FHA's disparate-impact framework furthers transparency and legitimacy by committing planning professionals and public institutions to a dialogue with

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20. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 416 (2013) ("A twenty-first century local government bureaucrat or elected official did not create racial segregation in housing, but he or she can virtually guarantee its perpetuation, with or without discriminatory purpose, by simply engaging in practices that help maintain the residential status quo.").

21. Brief of NAACP Legal Def. & Educ. Fund, Inc. as Amici Curiae Supporting Respondents at 12–13, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371).

22. Brief of Hous. Scholars as Amici Curiae Supporting Respondents at 42, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371); *see also id.* at 43 ("Disparate impact claims . . . are essential to redress and disestablish entrenched patterns of residential segregation.").

those affected by their actions."[23] It goes on to argue that "[t]he disparate-impact standard encourages planners and developers to engage proactively with communities affected by development plans," and "creates incentives for institutions and developers to share their findings with stakeholders and to explore less burdensome alternatives in an effort to obtain community support."[24]

Institutional actors in the mortgage and insurance fields agree, arguing that, "[t]o the extent that the housing, lending, and insurance industries have become fairer and more efficient in recent years—and they have—the disparate impact doctrine, and the principles underlying it, have driven much of that progress."[25] In particular, they point out that the disparate impact doctrine has "given entities an incentive to internalize fair housing principles and critically evaluate their own policies."[26]

III. DISPARATE IMPACT IN DANGER

A. The Supreme Court

The last few years have caused concern for supporters of disparate impact theory. Unlike Title VII, the FHA was never amended to clearly permit disparate impact theory. Despite the unanimous recognition of the theory by the federal circuits, the Supreme Court has recently granted certiorari in three cases in which the primary or sole issue for review was whether disparate impact claims are cognizable under the FHA. This has caused considerable distress among the fair housing advocacy community, as there appears to be no reason for the Court to hear this issue unless it is considering disallowing or restricting the use of disparate impact theory in FHA cases.

The first two cases were settled prior to oral argument. The third was heard on January 12, 2015, and at the time of this writing, a decision is pending from the Court. All three cases will be briefly reviewed here.

1. *Magner v. Gallagher*[27]

In 2003, the City of St. Paul, Minnesota established a new executive

23. Brief of the Am. Planning Assoc. and Hous. Land Advocates as Amici Curiae Supporting Respondents at 5, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371).

24. *Id.* at 12; *see id.* at 14 ("The FHA's disparate-impact framework is critical to ensuring that transparency and inclusiveness remain part of the planning and development landscape.").

25. Brief of the Nat'l Fair Hous. Alliance, Ctr. for Cmty. Self-Help, and Hope Enter. Corp. as Amici Curiae Supporting Respondents at 17, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371).

26. *Id.* at 18.

27. 619 F.3d 823 (8th Cir. 2010). This summary is based on the facts as set forth in the appellate court opinion as well as the briefs filed by the parties to the Supreme Court. *See id.*

agency to administer the city's housing code. The agency increased the level of housing code enforcement targeted at rental properties. In addition to responding to citizen complaints about properties, the agency inspectors conducted proactive sweeps for housing code violations. The inspectors were instructed to write up every observed violation—not just what was called in—and to write up all nearby properties—not just the reported property. The agency also increased enforcement efforts regarding so-called "problem properties," in an attempt to force property owners to take greater responsibility for their properties or to compel changes in ownership. It employed a variety of tactics to this end, including orders to correct or abate conditions, condemnations, fees, tenant evictions, real estate seizures, revocations of rental agreements, and court actions.

The plaintiffs were current and former owners of rental property that was subject to the city's housing codes. They rented their properties primarily to low-income households, a disproportionate percentage of whom were black. As a result of the city's code enforcement, the plaintiffs were subjected to increased maintenance costs, fees, condemnations, and forced sales of their properties. The plaintiffs alleged that the city's code enforcement practices violated the FHA because they created a disparate impact on racial minorities. Specifically, they argued that the city had an affordable housing shortage, that blacks made up a disproportionate percentage of households in the city that relied on affordable housing, that the city's code enforcement practices increased costs for property owners who rent to low-income tenants, and that this increased burden resulted in less affordable housing in the city, resulting in a disproportionate adverse effect on black city residents.

2. *Mt. Holly Gardens Citizens in Action v. Township of Mt. Holly, New Jersey*[28]

This case arose out of a plan by the Township of Mt. Holly, New Jersey to redevelop one of its neighborhoods, an area called Mt. Holly Gardens ("the Gardens"), which contained 329 townhouses. In 2000, the Gardens had approximately 1605 residents, 46 percent of whom were black and 29 percent of whom were Hispanic (as compared with 21 percent and 9 percent, respectively, in the Township overall). Almost all of the Gardens' residents were low-income, and most were classified as "very low" or "extremely low" income.

The Gardens was built in the 1950s, and by the 1990s the neighborhood had begun to fall into disrepair. More than half of the properties were rentals and many were owned by absentee landlords who did not maintain them well.

28. 658 F.3d 375 (3d Cir. 2011). This summary is based on the facts as set forth in the appellate court opinion, as well as the briefs filed by the parties to the Supreme Court. *See id.*

A lack of parking led some residents to pave their backyards for use as driveways, which in turn led to drainage problems. There was no homeowners association to provide for the upkeep of common areas or alleys. Overcrowding, vacancies, and crime were all problems. Despite community attempts to revitalize and police the area, it continued to deteriorate. Nevertheless, the population of the Gardens was relatively stable: 81 percent of the homeowners had lived in their homes for at least nine years, and 72 percent of renters had lived there for at least five years.

In 2000, the Township commissioned a study to determine whether the Gardens was an area in need of redevelopment under New Jersey law. The resulting report concluded that the area did indeed offer a "significant opportunity for redevelopment" because of blight, excess land coverage, poor land use, and excess crime.[29] The Township then adopted a series of redevelopment plans, ultimately settling on the Revised West Rancocas Redevelopment Plan (the "Plan"). The Plan called for the acquisition and demolition of all of the existing homes in the Gardens. A new community called the Villages at Parker's Mill would be built in its place, consisting of 520 new townhomes and apartments.

It was clear that the vast majority of the Gardens' residents would be permanently displaced by the Plan. While existing homes in the Gardens sold for between $64,000 and $81,000, the estimated cost of a new home in the Villages was between $200,000 and $275,000. Only 56 of the 520 newly-constructed units would be deed-restricted affordable housing units, and just eleven of these would be offered on a priority basis to existing Gardens residents. It was also clear that a significant amount of demographic shift would likely occur in the neighborhood. The residents contended that only 29 percent of minority households in the area would be able to afford housing in the redeveloped Villages, whereas 79 percent of the white households could afford to live there.

3. *The Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*[30]

The Plaintiff, Inclusive Communities Project, Inc. ("Inclusive Communities"), is a non-profit organization that's mission is to further racial and socioeconomic integration in the Dallas metropolitan area. In particular, Inclusive Communities assists low-income families, a significant number of which are black, who are eligible for the Dallas Housing Authority's Housing Choice Voucher Program (commonly referred to as "Section 8 Vouchers") in finding affordable housing in predominantly white suburban neighborhoods.

29. *Id.* at 379.

30. 747 F.3d 275 (5th Cir. 2014). This summary is based on the facts as set forth in the appellate court opinion, as well as the briefs filed by the parties to the Supreme Court. *See id.*

A development that receives a Low-Income Housing Tax Credit ("LIHTC") cannot refuse to accept tenants because of their use of Section 8 Vouchers. As a result, it is important to Inclusive Communities where LIHTC developments are located.

Competition for LIHTCs is fierce. The Texas Department of Housing and Community Affairs ("the Department") awards LIHTCs according to a complex formula governed by both state and federal statutes. For the most desirable LIHTC, the 9 percent credit, federal law requires that designated agencies adopt a Qualified Allocation Plan ("QAP") which includes particular selection criteria and preferences. Texas state law requires the Department to first determine whether an application satisfies the threshold criteria in the QAP. Then it must use a point system in order to score and rank qualifying applications, specifically by prioritizing eleven statutory criteria (referred to as "above-the-line" criteria) in descending order. The Department may use additional "below-the-line" criteria to supplement its decision making, but none of these criteria may outweigh any "above-the-line" factors.

Inclusive Communities brought a disparate impact claim against the Department in 2008, alleging that the Department disproportionately approved LIHTCs in minority-concentrated neighborhoods and disproportionately disapproved them in predominantly white neighborhoods. Inclusive Communities alleged that from 1995 to 2009, the Department did not allocate any LIHTC for units in predominantly white census tracts within the City of Dallas. As a result, by 2008 more than 92 percent of LIHTC units in Dallas were located in minority census tracts. When looking at the metro area as a whole, from 1999 to 2008 the Department approved tax credits for 49.7 percent of proposed units in areas that were at least 90 percent minority, but only approved 37.4 percent of proposed units in areas that were at least 90 percent white. Thus, the Department's allocation practices have caused low-income housing to be concentrated in minority areas and less available in white areas, which in turn maintains and perpetuates segregated housing patterns.

The Department countered that any statistical disparity in LIHTC allocation arose directly from federal and state laws that required the Department to use fixed criteria, some of which are correlated with race, in its decision making. Specifically, federal law requires the state's QAP to give preference to projects built in low-income areas, and these areas often contain a disproportionately high number of minority residents.

B. Criticisms and Failures

Fair housing advocates are understandably worried about the future of disparate impact theory in light of the conservative Supreme Court's recent activity and the pending *Inclusive Communities* case. But this concern for the

theory's viability may be diverting attention from other, equally valid concerns about the theory's utility. We can fear disparate impact's demise and simultaneously be honest about the theory's shortcomings and limitations, for even if it does survive, these problems will still remain.

1. Theoretical

Disparate impact theory, in both housing and employment, has been subject to a good deal of academic criticism. Some clearly take issue with the theory because they feel it goes too far, and would seek in general to limit discrimination-based causes of action. The more interesting criticism for my purposes here is criticism which comes from people who are otherwise supportive of expansive civil rights enforcement, but who perceive flaws in the way disparate impact theory seeks to accomplish it. For example, Professor Michael Selmi argued, in an influential article, that the focus on disparate impact in the 1970s diverted attention away from the theory of disparate treatment.[31] This was especially problematic given the fact that in many of the early impact cases there actually was a fair amount of evidence of intentional discrimination behind the ostensibly neutral practices at issue.[32] For example, in *Black Jack* there was significant evidence of discriminatory intent behind the municipality's zoning ordinance on the part of the citizens and municipal leaders of Black Jack.[33] *Griggs* itself involved an employer that had engaged in overtly discriminatory practices until the day Title VII took effect, at which time it adopted the facially neutral practices that served no purpose other than to entrench the prior segregated patterns it had created.[34]

These courts had the opportunity to define intentional discrimination more broadly, to include intentionally engaging in an ostensibly-neutral practice with the knowledge and/or intent that it will create a discriminatory effect. Instead, they chose to define the challenged conduct as something entirely different: as completely neutral acts which cause a disparate impact, in which intent or motive is irrelevant. The availability of disparate impact theory allowed courts and advocates to side-step difficult issues of proof and motive in discrimination cases, but this came at the price of truncating disparate treatment theory. Paradoxically, then, disparate impact theory may

31. *See generally* Michael Selmi, *Was The Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

32. This approach, of bringing disparate impact claims even in cases with evidence of discriminatory intent because the impact claim is seen as easier to prove, has been referred to as "evidentiary dragnet". *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518–23 (2003).

33. United States v. City of Black Jack, Mo., 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) ("The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone.").

34. Griggs v. Duke Power Co., 401 U.S. 431, 428–32 (1971).

have actually contributed to the very problems with proof in disparate treatment cases that are invoked to justify its existence in the first place.

Professor Selmi also took issue with the notion that it is beneficial to avoid tying liability for disparate impact claims to moral blame.[35] While it may make it easier for plaintiffs to negotiate with defendants or for courts to hand down liability rulings—because they can avoid labelling the defendant as a discriminator—in the long run it leads to a skewed perception of what blameworthy discriminatory behavior is. As a result, the very concept has become underdeveloped, both in law and in public discourse, and today is seen as constituting only obvious, intentional, animus-based discrimination.[36] We are left with a situation in which overt racism, such as the use of racial epithets caught on tape or discovered in an email, will elicit strong and immediate condemnation, but anything less is viewed as morally neutral and therefore not "discrimination" at all. Because displays of overt animus-based discrimination are increasingly rare, this may leave the impression that intentional discrimination—the racist behavior of old—scarcely exists.[37] As a result, systemic racial inequities and the policies and practices that further them simply fade into the background of modern society, and large segments of the American populace are convinced that discrimination is a thing of the past.

2. Practical

Perhaps more problematic than the theoretical criticisms of disparate impact, from an advocate's standpoint at least, is the fact that disparate impact claims are seldom brought. When plaintiffs do bring them, they are likely to be ineffectual.

Professor Stacy Seicshnaydre recently conducted an exhaustive review of every FHA case in the last forty years to reach the federal courts of appeals in which a disparate impact claim was made.[38] The results were not encouraging from a plaintiff's perspective: plaintiffs received positive decisions in less than 20 percent of the disparate impact claims considered on appeal.[39] This statistic fails to capture the state of play today, as the numbers have been steadily dropping over time. Most of the successes occurred in the 1970s and 80s. By the 1990s the success rate had dropped to 13 percent, and

35. Selmi, *supra* note 31, at 773.

36. *See id.* at 776 ("[T]he effort to expand the theory led to judicial neglect of the disparate treatment theory, and also created the false impression that disparate treatment equaled animus."); *see also id.* at 782 ("The creation of the disparate impact theory . . . has contributed to a stiflingly limited view of intentional discrimination, one that even today is tied to animus and conscious motives, and one that leaves us awash in racial and gender inequities but without any clear sense of responsibility or liability for those inequities.").

37. *Id.* at 774 ("The turn away from blame was even more problematic in that it implied that intentional discrimination was a thing of the past.").

38. *See generally* Seicshnaydre, *supra* note 20.

39. *Id.* at 393.

by the 2000s it was down to just over 8 percent.[40]

Another useful way to look at how plaintiffs fare is by comparing the affirmance and reversal rate of plaintiff-favorable district court rulings to those of rulings that favor defendants. While the overall affirmance rate for federal civil appeals is roughly 80 percent, plaintiffs have gotten affirmances of favorable lower court decisions only 33.3 percent of the time. Defendants, in contrast, have an affirmance rate of 83.8 percent.[41]

Disparate impact claims in other areas of the law, specifically employment discrimination, have not fared much better. In the employment setting they have had limited impact outside of the context of employment tests, with plaintiffs prevailing at the appellate level in only 19.2 percent of cases.[42] As with the housing cases, the numbers look even worse when we look to more recent decades. In 1994–95 the plaintiff success rate was only 10 percent, and in 1999–2001 it was 15.6 percent.[43] The district court data for employment disparate impact claims are similarly underwhelming. Plaintiffs prevailed in only 25.1 percent of cases, but this figure counts simply surviving summary judgment as a win. When those cases are taken out, the plaintiffs' success rate on the merits drops to 16.9 percent. And when the analysis is restricted to more recent decades, that number falls further still, to 13.3 percent.[44]

There are a number of possible explanations for this poor showing. One is that disparate impact cases are often highly technical and therefore difficult to bring. In order to state a prima facie case, an advocate must use what may be a complex statistical analysis to define the potentially affected group of people. Failure to properly determine the affected groups will prove fatal to the plaintiff's case.[45] When it comes to countering the defense of legitimate business necessity, the advocate needs to have a close understanding of the intricacies of the defendant's undertaking—whether it be municipal zoning and development, loan or insurance underwriting, etc.—an area in which the defendant is very likely to have superior information.

Courts may be developing an intolerance to the disparate impact cause of action, and might be increasingly unwilling to ascribe liability to defendants who have not clearly shown themselves to be "blameworthy" in the sense

40. *Id.* at 393–94.

41. *Id.* at 398–99. In other words, as Professor Seicshnaydre notes, plaintiffs were able to reverse only 16.2 percent of adverse lower court decisions, while defendants were able to reverse 66.7 percent of adverse lower court decisions. *Id.* at 399.

42. Selmi, *supra* note 31, at 738. It is also worth noting that of these, more than half (60 percent) were remands rather than outright victories. *Id.* The defense victories, on the other hand, tended to be affirmance of summary judgment (59 percent) and the preservation of defense verdicts (38 percent). *Id.*

43. *Id.*

44. *Id.* at 739.

45. Presentation by John P. Rellman, *Disparate Impact: What it Means and How it Can Be Used Effectively*, for the John Marshall School of Law's Fair Housing Legal Support Center & Clinic's Annual Conference, "The Metrics of Inequality", Slide 7 (Sept. 12, 2014). PowerPoint slides of the presentation are on file with the author.

discussed above.[46] It may also be that some plaintiffs' lawyers are overplaying their hand, bringing cases against defendants who are attempting to address legitimate concerns and who have few other options.[47] These cases represent advocates making questionable decisions about whether to even pursue a disparate impact cause of action in the first place, which may contribute to judicial mistrust of the theory.

Of course, the numbers cited above do not tell the whole story. Many cases settle before ever reaching the summary judgment or trial phase, so FHA plaintiffs proceeding under disparate impact theory may be achieving favorable results through settlement.[48] And it is clear that many institutional actors, from municipal planning organizations to mortgage lenders and insurance underwriters, have made fundamental changes to the ways they operate as a result of the threat of disparate impact liability.[49] Thus, disparate impact theory has surely had more of an impact than the stark litigation numbers would indicate. Nevertheless, the infrequency of use and success of the disparate impact theory does suggest that it has failed to live up to its promise.

IV. WHAT NEXT?

Against this background of disparate impact theory's theoretical flaws and practical ineffectiveness, not to mention the existential threat posed by the Supreme Court, we would do well to focus on alternatives to disparate impact theory in housing discrimination cases. We must begin by acknowledging what we like about the theory—the uses that it serves and the goals that it promotes. As discussed previously, disparate impact theory has long been valued for its ability to get around the evidentiary and proof problems created by a too-difficult intent standard. Disparate impact theory also makes it easier to address historic and/or entrenched discriminatory patterns. Finally, it may

46. Mahoney, *supra* note 12 at 420 ("Disparate impact theory is reaching a crossroads. It either must undergo substantial theoretical reformulation, or it inevitably will be applied with standards of proof sufficiently rigorous to ensure that any defendant found liable is likely to have engaged in practices that are functionally equivalent to intentional discrimination.").

47. Rellman, *supra* note 45, at Slides 15–16. John Rellman cited *Gallagher v. Magner* as an example of this. The case involved a challenge to the City of St. Paul's application of its property maintenance code to force landlords to remediate slum conditions in their properties, which were disproportionately occupied by minority group members. *Id.* By all accounts, the properties were seriously distressed, which was causing their occupants—the parties upon whom the landlords were basing their disparate impact claim—a good deal of harm.

48. The dismal statistics for plaintiff success rates at trial and summary judgment, however, would almost certainly weaken their bargaining position at settlement. On the other hand, perhaps the strongest plaintiff cases settle, and thus the pool that reaches summary judgment is weaker and more prone to yield a defense victory. Further research would be needed to establish any clear patterns in this regard.

49. Brief of The Am. Planning Ass'n. and Hous. Land Advocates as Amici Curiae Supporting Respondents at 12–13, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371); Brief of Nat'l Fair Hous. Alliance, Ctr. for Cmty. Self-Help, and Hope Enter. Corp. as Amici Curiae Supporting Respondents at 12, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project., Inc., ___ U.S. ___ (2015) (No. 13-1371).

be a way of keeping governmental and institutional actors accountable for the consequences of their policies. The remainder of this article will be spent identifying alternative mechanisms for achieving these goals.

A. Redefine "Intent"

One of the most desirable aspects of disparate impact theory from an advocate's standpoint is that it helps to get around the practical difficulties in locating a biased actor and pinpointing a specific intentionally discriminatory act. Yet this also has led to a strict bifurcation of claims—into those with intent and those without—that fails to reflect real-life practices and that has stunted our understanding of what it means to "discriminate."

One solution might be for advocates and academics to press for the recognition of a *mens rea* spectrum for actionable discrimination. Rather than trying to fit all discrimination claims into either the "intent" category of disparate treatment or the "strict liability" category of disparate impact, we might acknowledge that discrimination can—and often does—more closely resemble negligent or reckless conduct.[50] For example, a municipality that undertakes a development plan without even considering the impact that the plan will have on minority residents might be described as behaving negligently. A mortgage company that continues to use underwriting criteria that it knows have very little correlation to risk and which screen out large percentages of minority applicants can easily be seen as behaving recklessly.

One clear benefit of this approach is that it corresponds with the legal system's traditional way of conceptualizing tort liability, which recognizes that a defendant can "do wrong" through indifference or carelessness as well as deliberation. This also provides a much more accurate description of the conduct that is typically pursued under disparate impact theory. As such, it may offer a more satisfying framework for lawyers, judges, juries, and the public at large to understand these cases.[51]

This approach has its challenges, too, the most significant of which is that courts would need to define the duty of care. If we start with the assumption that the FHA creates a duty not to discriminate in housing, we are still left with the definition of what it means "to discriminate." Thus, we may have to circle back to whether this definition should include conduct that

50. For an argument in favor of incorporating a negligence standard in employment discrimination cases, see generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

51. It may, however, be a hard sell to the Supreme Court. The Court has stated previously that " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action or at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal citations omitted) (refusing to allow a claim of intentional discrimination in an equal protection case alleging that a state's preference for veterans in civil service hiring discriminated against women, in which the defendant state clearly knew that the veterans preference would disproportionately benefit men).

causes disparate outcomes. Even if the duty not to discriminate in housing is interpreted to mean the duty to avoid any housing-related action which harms members of an identified protected group (much like ordinary negligence doctrine requires people to avoid inflicting harm) we would still need to determine what constitutes reasonable care.[52] These challenges are not insurmountable, however, given that courts already undertake this same analysis in tort cases.

Advocates seeking to redefine intent should also be vigorous in advancing theories of implicit bias. Social scientists have demonstrated that implicit or unconscious bias affects virtually everyone in society.[53] Because these biases operate at the subconscious level, describing the actions that people take as a result in terms of "intent" or "motivation" fails to accurately capture the reality of the cognitive processes at work.[54] So-called "social framework evidence" by social psychologists can educate judges and juries in the myriad of ways in which a person can honestly believe he or she is acting in a nondiscriminatory manner, yet still be treating members of a particular group in a negative way.[55]

Extreme care should be taken, however, not to equate implicit bias with disparate impact. The two theories accomplish very different functions, however because both arise in the absence of clear animus, motivation, or intent, courts and academics easily confuse them.[56] Implicit bias is useful to explain an actor's disparate treatment of minority individual or group members in the absence of clear evidence that the actor intended to treat the person or group differently. Disparate impact is used when facially neutral policies have a discriminatory effect on minority groups. Over the last few decades, advocates and courts have confused the two, and applied disparate impact analysis in cases alleging biased, subjective decision making with no obvious sign of intentional discrimination. This creates a number of problems: it sows doctrinal confusion, creates a disconnect between the theory and the reality of how discrimination is likely to operate, and fails to adequately address the deficiencies of the old discrimination framework that

52. Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1322–24 (1995).

53. The seminal work on this subject is Charles R. Lawrence III's article, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

54. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–90 (1995).

55. An example of this would be when an employer consistently rates black applicants lower on subjective measures of fitness for a position such as "intelligence" or "communication skills." The employer may have no idea that she is doing this, and harbor no conscious ill-will toward black people, but still do this. Even though there is no evidence of discriminatory intent, this would not be an appropriate case for disparate impact theory, because there is no facially neutral policy at work—the candidates are in fact being treated differently, just for reasons that are not immediately obvious.

56. An example of this is the case of *EEOC v. Joe's Stone Crab*, in which the lower court confused the two theories (in large part because the EEOC confused them when it filed the case) and the court of appeals had to work mightily to untangle them. *See generally* 969 F. Supp. 727 (S.D. Fla. 1997) and 220 F.3d 1263 (11th Cir. 2000).

relied on proof of intent.

As Professor Linda Hamilton Krieger argues:

> The disparate impact paradigm as currently constructed is an inappropriate analytical tool for addressing the intergroup biases inherent in subjective decisionmaking. . . .
>
> From a practical standpoint, disparate impact theory is inadequate because the empirical tools on which it depends cannot effectively or economically be applied in situations involving complex, subjective assessments. Further, it is only disparate impact's grounding in empiricism which provides its political legitimacy as a civil rights theory in the face of competing normative claims. Finally, as a theoretical matter . . . disparate impact theory is the wrong tool to address subjective decisionmaking because it presupposes a significantly different type of bias from those at play in subjective practices cases. From a phenomenological standpoint, subjective practices discrimination is a disparate *treatment* problem, not a disparate *impact* problem, and it requires a disparate treatment solution.[57]

It is thus important for fair housing advocates to realize that there is often a more appropriate tool for addressing cases that "look like" discrimination but lack clear evidence of discriminatory intent. This not only preserves the important analytical distinction between the two theories, it will hopefully assist courts and juries in coming to a better understanding of the complicated ways in which discrimination can manifest itself. And this is particularly important to keep in mind if disparate impact theory does, in fact, meet its demise.

B. Agency Practice

Advocates value disparate impact theory for its potential to reach deeply entrenched and long-standing discriminatory patterns. As such, many disparate impact cases have been brought against municipalities for their decisions involving zoning, resource allocation, urban renewal projects, and the siting of low-income, public, and affordable housing. Many of these undertakings are accomplished under the auspices of federal housing funding programs, which are overseen by HUD. Thus, agency practice may provide one promising alternative mechanism for achieving this goal, particularly in light of the renewed focus on HUD's mission to affirmatively further fair housing.[58]

HUD is responsible for the distribution and oversight of several key sources of federal housing funds, the most significant of which is the

57. Krieger, *supra* note 54 at 1231.

58. Professor Olatunde Johnson has pointed out that agency practice is particularly important in providing context for disparate impact theory. She argues that disparate impact theory was not simply a court-created doctrine, but also a reasonable implementation choice for agencies that were charged with helping to enforce broad civil rights laws. *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 126-27, 132–40 (2014). Moreover, she sees HUD as uniquely competent, relative to courts, to use its rule-making authority "to stabilize disparate impact law and to provide clarity to regulated entities subject to different judicial standards." *Id.* at 127, 151–53.

Community Development Block Grant ("CDBG"). The CDBG program's mandate is to help local governments develop "viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."[59] The funds, which totaled $3 billion for fiscal year 2014, are distributed to roughly 1200 jurisdictions across the country.[60]

The FHA contains a provision, § 3608, which directs HUD to administer its programs and activities relating to housing and urban development "in a manner affirmatively to further the [FHA's] policies."[61] The statute that created the CDBG also requires grant recipients to certify to HUD that their grant will be administered in conformity with the FHA and that the recipient will use the funds in such a manner to "affirmatively further fair housing."[62] Although the term "affirmatively further fair housing" is not defined, the legislative history of the FHA makes clear that Congress intended for the statute both to eradicate housing discrimination and to foster integrated living patterns.[63] In 1995 HUD adopted a set of regulations which required grant recipients, as part of their certification to HUD, to conduct an Analysis of Impediments (often referred to as an "AI") to fair housing in their jurisdiction, to take action to address the conditions identified as impediments, and to maintain adequate records of their analysis and actions.[64]

Despite this clear statutory and regulatory mandate, the grant recipients' record of compliance with the certification requirements has been "mixed at best."[65] Indeed, the persistent and pervasive nature of residential racial segregation across the nation, in the thousands of communities receiving billions of dollars in CDBG monies for decades, belies the notion that these jurisdictions were all working diligently to decrease segregation. And for many years HUD did virtually nothing to ensure compliance or to take action against recipients who failed to comply.[66]

All of this changed in 2006, when a ground-breaking suit was brought by a private fair housing group against one such grant recipient, Westchester County, New York. The suit alleged that Westchester County had applied for

59. 42 U.S.C. § 5301(c) (2012).

60. *See Community Development Allocations and Appropriations*, HUD.GOV (last visited May 31, 2015) http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/budget.

61. 42 U.S.C. § 3608(e)(5).

62. *Id.* § 5304(b)(2).

63. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-To-The-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 127–28 (2011–2012) (noting that Congress passed the FHA shortly after the National Commission on Civil Disorders published its famous report describing the United States as increasingly segregated, and calling for "open housing" legislation to remedy this problem).

64. 24 C.F.R. §§ 570.904(c), 570.506(g) (2014).

65. Schwemm, *supra* note 63, at 153 (noting that a GAO audit determined that a majority of AIs were inadequate and/or outdated).

66. *Id.* at 153–54 (noting that few grants were denied or rescinded, and no noncompliant grantees were threatened with remedial action).

CDBG funds every year, from 2000 to 2006, and each time had certified that it would use the funds in a manner which affirmatively furthered fair housing. It had not, however, analyzed its impediments to fair housing choice nor had it taken appropriate action to overcome these impediments. The district court ultimately found that Westchester County had taken $52 million of CDBG money and used it in a way which only further exacerbated its already high levels of racial segregation.[67] In 2009, after President Obama took office, the U.S. Department of Justice on behalf of HUD moved to intervene in the litigation. A settlement agreement was reached which required Westchester to implement a housing policy that combats racial segregation, to spend $51.6 million to develop affordable housing units in municipalities with white populations, and to pay $10 million to the fair housing organization that originally brought the suit.[68]

The Westchester suit was unique in that it was brought under the federal False Claims Act, based on non-public information obtained by the plaintiff which made clear that Westchester's certifications had been knowingly false. It is unlikely that such a fact pattern will readily repeat itself. The case, however, represented a shot across the bow to local governments who receive CDBG funds, brought a heightened awareness to advocates about HUD's responsibility to police program recipients, and seemed to re-energize HUD officials.[69]

The hope is that HUD will continue to take its "affirmatively furthering" mandate seriously: by promulgating clear standards that will help ensure greater compliance,[70] devoting sufficient resources to reviewing grant recipients' certifications, and taking appropriate action against those who fail to comply. Advocates can and should monitor and publicize whether the agency is doing so.[71] While there is no private right of action to enforce § 3608 directly in court,[72] privately-initiated administrative complaints can be

67. Specifically, Westchester had sited all of the affordable housing units that it had developed in its few majority-minority neighborhoods, which already contained virtually all of the affordable and low-income housing in Westchester.

68. *See* Stipulation & Order of Settlement & Dismissal, United States *ex rel.* Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., 668 F. Supp. 2d 548, 4–5 (S.D.N.Y. 2009).

69. Housing Fairness Act of 2009: Hearing on H.R. 476 Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs., 111th Cong. 110 (2010) (statement by HUD Assistant Sec'y for Fair Hous. and Equal Opportunity John D. Trasvina) ("HUD has not always fulfilled its obligation to ensure that our money is spent in ways that affirmatively further fair housing. In this new day, however, there is a Department-wide commitment to incorporate our mandate to affirmatively furthering fair housing into all of our work so that we can fulfill our shared goal of truly integrated and balanced living patterns.").

70. HUD has proposed such a Rule, but despite a Final Action date of March 2015, has yet to promulgate it at the time of this writing. *See* HOUS. & URB. DEV. DEP'T., *Affirmatively Furthering Fair Housing*, (July 19, 2013) *available at* https://www.federalregister.gov/articles/2013/07/19/2013-16751/affirmatively-furthering-fair-housing.

71. Some have recently done so, and they describe HUD's record as "mixed." *See generally* Philip Tegler, Megan Haberle, & Ebony Gayles, *Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card*, 22 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 27 (2013); Schwemm, *supra* note 63 at 169.

72. *See* NAACP, Bos. Chapter v. U.S. Dep't of Hous. & Urb. Dev., 817 F.2d 149, 152–54 (1st Cir. 1987); Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 820 (3d Cir. 1970); Greater New Orleans

filed with HUD.[73] Finally, if HUD should falter in its responsibility, § 3608-based claims can be filed against *it* and reviewed under the Administrative Procedure Act.[74]

Another potential option for private enforcement of § 3608 is through suits brought under 42 U.S.C. § 1983.[75] Courts have been divided on the issue,[76] and the Supreme Court has not spoken on it. The question ultimately comes down to an interpretation of the Court's opinion in *Gonzaga University v. Doe*,[77] and whether this portion of the FHA provides an "unambiguously conferred right" to be enforceable under § 1983.

Finally, HUD can make improvements to its rental assistance programs so that these programs themselves do not exacerbate racial and economic segregation. The Center on Budget and Policy Priorities recommends a number of policy changes that will encourage low-income families who use Housing Choice Vouchers to move to lower-poverty communities, which will in many (if not most) cases decrease racial segregation.[78] For example, HUD could reward agencies that help families move to so-called "high opportunity areas" with additional funding, and extend the search period allowed for families who seek to make such moves.[79] At the same time, HUD could revise its metro-wide fair market rent system, and modify its administrative geography to reduce the extent to which existing service area boundaries interfere with agencies' abilities to help families move into high opportunity areas.[80]

Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 723 F. Supp. 2d 14, 26 (D.D.C. 2010), *aff'd in part, rev'd in part on other grounds*, 639 F.3d 1078, 1089 (D.C. Cir. 2011); Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398, 418 (D. Md. 2005); Pleune v. Pierce, 697 F. Supp. 113, 119–20 (E.D.N.Y. 1988); Lee v. Pierce, 698 F. Supp. 332, 342 (D.D.C. 1988). Congres's considered an amendment that would have provided for a private right of action to enforce § 3608 in 2010, but it did not pass. *See* Housing Opportunities Made Equal (HOME) Act, H.R. 6500, 111th Cong. § 3(f) (2010) (proposing to amend the FHA's definition of a discriminatory housing practice to include "a failure to comply with [§ 3608(e)(5)] or a regulation made to carry out [§ 3608(e)(5)]").

73. 42 U.S.C. § 3610. *See* Schwemm, supra note 63, at 166 (noting that as of April 2011, fourteen privately-initiated § 3608 claims were pending with HUD). The website for Rellman, Dane & Colfax, a prominent fair housing firm, listed four affirmatively furthering complaints the firm has pending before HUD as of March 2015. *See* http://www.relmanlaw.com/affh/affhenforcment.php.

74. *NAACP, Bos. Chapter*, 817 F.2d at 157–60; *Shannon*, 436 F.2d at 818–20.

75. For a discussion of the issue and argument in favor of this option, see generally Michelle Ghaznavi Collins, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. 1983*, 110 COLUM. L. REV. 2135 (2010).

76. *Compare* Wallace v. Chicago Hous. Auth., 298 F. Supp. 2d 710, 718 (N.D. Ill. 2003), *and* Langolais v. Abington Hous. Auth., 234 F. Supp. 2d 33, 52–53 (D. Mass. 2002), *and* Anderson v. Jackson, No. 06-3298, 2007 WL 458232, at *4 (E.D. La. Feb. 6, 2007) (finding § 3608 enforceable through § 1983), *with* S. Middlesex Opportunity Council, Inc. v. Town of Framingham, No. 07-12018, 2008 WL 4595369, at *14 (D. Mass. Sept. 30, 2008), *and* Thomas v. Butzen, No. 04 C 5555, 2005 WL 2387676, at *7–11 (N.D. Ill. Sept. 26, 2005) (finding § 3608 not enforceable through § 1983).

77. 536 U.S. 273 (2002).

78. *See generally* Barbara Sard & Douglas Rice, *Creating Opportunity for Children: How Housing Location Can Make a Difference*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 15, 2015) http://www.cbpp.org/research/creating-opportunity-for-children?fa=view&id=4211.

79. *Id.*

80. *Id.*

C. Coalition-Building and The Political Process

A third benefit of disparate impact theory is that the very threat of it has forced institutional and governmental actors to be more transparent, responsive, and accountable to their various constituent groups, particularly communities of color who might be affected by their policies and practices. The challenge, then, is for advocates to continue to hold these entities accountable and ensure that their decision making processes are fair in the absence of a litigation threat.

There are a number of ways that this goal can be met, many of which advocates have been pursuing for some time, with varying degrees of success. The most obvious, at least with respect to local governments, is through direct citizen participation in the processes of planning and community development. How this is accomplished has varied over time. Early attempts by the federal government to encourage citizen involvement in planning and development decisions included vague mandates in the Model Cities development funding program, the CDBG program, and the Empowerment Zone program—all of which suffered from too little structure and almost nonexistent enforcement.[81]

In the 1990s, more modern models of planning through consensus building came through efforts by the planning community.[82] Under the basic model, individual stakeholders engage in a deliberative process using trained facilitators in order to "create options, develop criteria for choice, and make the decisions on which they can all agree."[83] This approach has been successfully used in a number of cases across the country, including plans for affordable housing, siting waste treatment facilities, growth management, and management of water resources.[84] An updated version of this is the neighborhood collaborative planning movement. This movement "blends computer-based neighborhood indicator systems technology and alternative dispute resolution consensus-building techniques with traditional planning theories and processes."[85]

These processes are far from perfect. To succeed, they require proper design and careful implementation. By design, they mandate non-professional input into technical areas that typically require training and expertise. By bringing together vastly different groups with completely different interests, they can result in "delay, disruption, and perceptions of

81. *See* Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 874–92 (2000).

82. *See generally* Judith E. Innes, *Planning Through Consensus Building: A New View of the Comprehensive Planning Ideal*, 62 J. OF THE AM. PLANNING ASS'N. 460 (1996).

83. *Id.* at 464. This model is predicated on all participants having common information and all becoming informed of each other's interests.

84. *Id.* at 461, 464–65.

85. Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y 709, 710 (2000).

wasted time."[86] Such processes may be especially problematic in situations of profound social conflict and disruption, and serve only to exacerbate fissures along race, class, and gender lines.[87] Still, as advocates work to refine the models, addressing issues of ethics, representation, mediation, and implementation, they are a crucial tool for ensuring local government accountability.

A second mechanism for holding governments and institutions accountable is through coalition-building and grassroots advocacy. In this regard, it might be instructive for fair housing advocates to take a page from the property rights movement. The property rights movement suffered what many viewed as a devastating setback in 2005, in the wake of the Supreme Court's decision in *Kelo v. City of New London*.[88] After *Kelo* dramatically expanded municipalities' eminent domain powers, property rights activists teamed up with middle-class and working-class property owners and successfully lobbied for eminent domain reform in at least 42 states.[89] They also partnered with fair housing advocates to support plaintiffs like Mt. Holly Gardens Citizens in Action in their lawsuit against the Township of Mt. Holly.

While the property rights example is distinguishable in some significant respects—namely the extremely well-financed nature of its "grass roots" activism—it still resonates in many ways with the fair housing movement.[90] Professor Judith Koons described the struggle for fairness in "how a society directs the use of land and treats the property belonging to its citizens" as one of "locational justice."[91] She compared the post-*Kelo* activism with early battles fought by communities of color, such as the one fought by black citizens in Cocoa, Florida to resist a municipal redevelopment plan which would have destroyed their neighborhood. In the Cocoa case, black residents formed a committee called Save Our Neighborhood, which worked to challenge the redevelopment plan on multiple political and legal fronts. It compiled information about the relevant zoning, budgeting, and funding issues and disseminated it to its members; developed a media and public

86. Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 864 (2000).

87. Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Movement*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 149–65 (2009).

88. 545 U.S. 469 (2005).

89. Judith E. Koons, *Locational Justice: Race, Class, and the Grassroots Protest of Property Takings*, 46 SANTA CLARA L. REV. 811, 836–37 (2006) ("[A] nascent coalition of middle class and working class property owners has arisen in protest of the *Kelo* decision, showing the possibility of realignment of middle class loyalties and, with that new alliance, the potentiality of more than momentary political change."). *See generally* Anastasia C. Sheffler-Wood, Comment, *Where Do We Go From Here? States Revise Eminent Domain Legislation in Response to* Kelo, 79 TEMP. L. REV. 617 (2006).

90. *See* Institute for Justice, *IJ Thanks Its Cornerstone Supporters: Charles and David Koch*, http://www.ij.org/charles-a-david-koch-2 (last visited Apr. 11, 2015). The Institute for Justice—which brought the *Kelo* case on behalf of the property owners, conducted state-wide lobbying efforts for eminent domain reform—was created and is funded heavily by the billionaire Koch brothers. *Id.*

91. Koons, *supra* note 89 at 811.

relations strategy to publicize the plight; filed a number of successful legal challenges; and, finally, engaged in a get-out-the-vote campaign which ultimately changed the composition of the Cocoa City Council.

According to Professor Koons, "the struggle for locational justice may be advanced through racial and socioeconomic coalitions that seek political and economic participation in democratic processes, not simply through judicial or legislative protections of property rights."[92] Fair housing organizations, advocates for the poor, community organizers, and others are, and have been, engaging in this sort of multi-pronged, participatory approach for decades. If disparate impact theory is eliminated in housing, such efforts will be all the more significant.

V. CONCLUSION

Fair housing advocates are justifiably concerned right now, wondering whether disparate impact theory will survive its third trip to the Supreme Court, and if so, what form it may take. Perhaps the theory will both be upheld and left unchanged. Even so, this moment should provide the opportunity for some soul-searching about disparate impact, in light of its theoretical limitations and lack of practical success. In particular, we would do well to examine whether—and how—we can achieve the benefits of the theory through alternate means. This Article endeavors to begin this conversation.

92. *Id.* at 813.