2015

Disparate Impact and Integration: With TDCA v. Inclusive Communities the Supreme Court Retains an Uneasy Status Quo

Rigel C. Oliveri
University of Missouri School of Law, OliveriR@missouri.edu

Disparate Impact and Integration: With *TDHCA v. Inclusive Communities* the Supreme Court Retains an Uneasy Status Quo

Rigel C. Oliveri

On June 25, 2015, the Supreme Court handed down its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[1] and fair housing advocates breathed a collective sigh of relief. The decision, written by Justice Kennedy for a five-to-four majority, upheld the use of disparate impact theory in cases brought under the Fair Housing Act.

The fair housing community had been understandably nervous about the case. In recent years, the Supreme Court had expressed skepticism about disparate impact theory in other contexts[2] and a willingness to

1. 135 S. Ct. 2507 (2015).

2. For example, in *Smith v. City of Jackson*, a badly divided Court upheld the use of disparate impact theory in claims brought under the Age Discrimination in Employment Act, but narrowed the scope of such claims significantly. 544 U.S. 228 (2005). Only four justices endorsed the holding that disparate impact theory was cognizable under the statute. The fifth, Justice Scalia, concurred separately to

Rigel Oliveri (oliverir@missouri.edu) is Associate Professor of Law at the University of Missouri School of Law in Columbia. She received her J.D. from Stanford Law School and her B.A. from the University of Virginia. The author was formerly a trial attorney for the U.S. Department of Justice, Civil Rights Division, in the Housing and Civil Enforcement Section. *Thanks, as always, to Michael Byrne for comments.*

curtail the application of other civil rights statutes.[3] The Court had tried to take up the issue of disparate impact in housing, granting certiorari in two previous cases, *Magner v. Gallagher*[4] and *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action*.[5] Both of these cases settled before oral argument, in part because fair housing advocates were worried about the possible outcome. In the absence of a circuit split on disparate impact and with new regulations issued by HUD endorsing the theory, it was difficult to see why the Court was suddenly interested in hearing the issue. Commentators predicted the worst.[6]

In light of the fears about what the Court might have done, the recent ruling has certainly been cause for celebration. Besides upholding the availability of disparate impact theory, it contains a powerful affirmation of the law's commitment to advance residential integration. Yet supporters of fair housing, particularly as it relates to affordable housing and community development, might not want to crack open the champagne just yet. That is because in a relatively obscure paragraph buried deep within the opinion, the majority telegraphs a strong hint at how many of these cases will be reviewed—not favorably—on the merits. The extent to which this will represent a change from the status quo, in which many disparate impact claims already founder, remains to be seen. Nevertheless, the opinion contains a

make clear that his agreement was solely out of *Chevron* deference to an existing EEOC regulation that would allow it. *Id.* at 243. In *Ricci v. DeStefano*, the Court refused to allow a municipality to use fear of a disparate impact lawsuit as a reason for disregarding a qualifying exam for firefighter positions, where the exam had clearly had a disparate racial effect. 557 U.S. 557 (2009). Justice Scalia concurred separately in that case to warn of a coming collision between equal protection and disparate impact theory. *Id.* at 594. In *Alexander v. Sandoval*, the Court held that there is no private right of action to enforce disparate impact regulations promulgated under Title VI of Civil Rights Act of 1964. 532 U.S. 275 (2001). Many years earlier, in *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court held that disparate impact theory could not be used for constitutional claims.

3. The Court had recently struck down the pre-clearance portion of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and held that mixed motive theory was not available to plaintiffs in suits brought under the ADEA in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009).

4. 132 S. Ct. 548 (2011).

5. 133 S. Ct. 2824 (2013).

6. *See, e.g.*, Jamelle Bouie, *The Next Assault on Civil Rights*, SLATE, http://www.slate.com/articles/news_and_politics/politics/2014/10/the_supreme_court_s_next_attack_on_civil_rights_the_justices_will_likely.html (predicting that "[t]he court will hear disparate impact, and most likely . . . end it"); Heather Digby Parton, *Supreme Court's Civil Rights Backlash: How A New Case Could Set Us Back Decades*, SALON, http://www.salon.com/2014/10/20/supreme_courts_civil_rights_backlash_how_a_new_case_could_set_us_back_decades (noting that "[a] new challenge to anti-discrimination tools looks likely to prevail").

good deal of guidance for advocates, housing providers, and municipalities for how to navigate the legal landscape in which disparate impact remains a fixture.

This article begins with a brief history of disparate impact theory as it relates to fair housing cases. It then proceeds to an overview of two previous cases on this issue to reach the Supreme Court in recent years. Next, it analyzes the *Inclusive Communities* opinion, discussing both the Court's affirmation of integration as a fair housing goal and its skepticism of whether plaintiffs can succeed using disparate impact theory in cases like the one at bar. The article concludes by locating the opinion's focus on competing priorities within the historical tension between affordable housing/community development and integration and discussing the ramifications that this tension has for the use of disparate impact theory going forward.

I. Background on Disparate Impact and Fair Housing

Disparate impact theory allows a discrimination claim to be cognizable even in the absence of evidence of intentional discrimination. 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.

Disparate impact theory was first recognized by the Supreme Court in a Title VII case, *Griggs v. Duke Power Co.*[7] 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 an IQ test and the Wonderlic Personnel Test for hire and promotion. Although this had the effect of excluding a disproportionately high number of blacks, the company argued that the requirements were neutral, that they would be applied equally to whites and blacks alike, and that there was no showing of discriminatory purpose or invidious intent in their adoption.[8] The lower courts held that without evidence of disparate treatment or discriminatory intent, 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."[9] The Court went on to note that the key to

7. 401 U.S. 424 (1971). The theory had been advanced by the Equal Employment Opportunity Commission some years before. *Inclusive Cmtys.*, 135 S. Ct. at 2528–29 (Thomas, J., dissenting). *See also* Olatunde Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125 (2014).

8. While the first two contentions may have been true, the third was almost certainly not. The company had deliberately created a segregated work force by engaging in overtly discriminatory practices right up until the day Title VII took effect, at which point it adopted the challenged policies.

9. *Duke Power*, 401 U.S. at 431.

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."[10] In *Griggs*, the jobs at issue involved manual labor. The company was unable to persuasively argue the need for the testing and degree requirements. Moreover, the company had previously allowed white employees to work in higher-ranking positions without these credentials and these employees had apparently performed their jobs satisfactorily, further demonstrating that the requirements lacked any connection to job performance.

A series of cases followed in which lower federal courts allowed disparate impact theory to apply to Equal Protection claims in the housing context.[11] Although these cases dealt with housing, the claims were brought under the Equal Protection Clause because the defendants were municipalities. Some of these courts also recognized a housing-specific form of disparate impact claim, one that looked to the impact on the affected community as a whole rather than on any one particular group. Specifically, they found that a practice or policy could also violate the law if it "perpetuates segregation and thereby prevents interracial association."[12]

The first case to recognize disparate impact theory in a claim brought under the Fair Housing Act (FHA) was *United States v. City of Black Jack*.[13] When the events giving rise to the lawsuit began, Black Jack was an unincorporated area in suburban St. Louis. Black Jack's population was virtually all white, while nearby St. Louis had a significant black population that was trapped in overcrowded, dilapidated, and segregated housing conditions. A nonprofit organization began planning a multifamily development called Park View Heights in the area to create alternative housing opportunities for low- and moderate-income people living in the ghetto areas of St. Louis, with specific plans to affirmatively market the development to minorities.[14]

Opposition by white residents was both fierce and swift. They immediately began a drive to incorporate the area. One month after incorporation, the city's first official act was to pass a zoning ordinance prohibiting the

10. *Id.* at 430.

11. *See generally* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd sub nom.*, Vill. 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 Redev. Agency, 395 F.2d 920 (2d Cir. 1968). Adopting the language of strict scrutiny, these cases defined the defense burden as one of demonstrating a compelling government interest.

12. *See, e.g.* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

13. 508 F.2d 1179 (8th Cir. 1974).

14. *Id.* at 1182.

construction of any new multifamily dwellings, effectively killing the project. The ordinance was challenged by both the developer and the Department of Justice (DOJ). DOJ argued that the ordinance violated the FHA because it was both motivated by racial animus and was discriminatory in effect.

Despite significant evidence that the ordinance was in fact racially motivated,[15] the Eighth Circuit treated the case solely as one involving facially neutral actions. The court found that the ordinance would indeed have a disparate impact, both because it would disproportionately affect blacks living in the region (85 percent of whom would otherwise be priced out of Black Jack)[16] and because this would further entrench the area's segregated patterns.[17] In light of this impact, the court held that:

> 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.[18]

In doing so, the court cited almost exclusively to the Equal Protection Clause 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 (an equal protection standard) in order to avoid liability.[19]

The Supreme Court later overruled the equal protection cases in *Washington v. Davis*[20] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[21] holding that disparate impact theory could not 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. Significantly, however, *Washington* and *Arlington Heights* did not disturb the consensus that disparate impact theory could be used to challenge practices that perpetuate housing segregation.[22] They merely found that such claims could not be brought pursuant to the Equal Protection Clause.

---

15. *Id.* at 1185 n.3 ("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.").

16. *Id.* at 1186.

17. *Id.* ("[blocking the development] would contribute to the perpetuation of segregation in a community which was 99 percent white").

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

19. *Id.* at 1186–87.

20. 426 U.S. 229 (1976).

21. 429 U.S. 252 (1977).

22. *Washington* was an employment discrimination case, so the segregation issue was not presented. In *Arlington Heights*, the Court refused to weigh in on

Over the ensuing decades, a consensus developed among all nine of the federal courts of appeal to consider the issue that disparate impact theory was viable in FHA cases and that an unlawful disparate impact could include perpetuation of segregation.[23] Disparate impact theory has been used to challenge a variety of practices under the FHA, including exclusionary zoning ordinances, administration of Section 8 vouchers, mortgage lending practices, occupancy restrictions, and demolition and siting of subsidized housing. To the extent there was any disagreement among the courts, it was about how the respective burdens of the parties should be allocated when the claim was presented.

In 2013, HUD issued a disparate impact regulation that explicitly endorsed the use of the disparate impact theory to challenge practices that have a discriminatory effect or that "create, increase, reinforce, or perpetuate segregated housing patterns."[24] The regulation also sets forth the proper framework for the burden-shifting analysis.[25] First, the plaintiff must prove that a challenged practice causes a disparate impact or segregated housing patterns based on protected characteristics. The burden of proof then shifts to the defendant to demonstrate that the challenged practice "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[26] 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."[27]

II. The First Two Supreme Court Cases

In recent years, the Supreme Court has tried multiple times to hear the issue of whether disparate impact claims are cognizable under the FHA. It granted certiorari in two cases, both of which settled prior to oral argument, in as many years. The first case, *Magner v. Gallagher*,[28] was brought

whether any of the defendant's conduct might violate the FHA. 429 U.S. at 271. On remand, the Seventh Circuit found both that disparate impact theory was available under the FHA and that the defendant's actions, which perpetuated racial segregation, violated the statute. *See* 558 F.2d 1283 (7th Cir. 1977).

23. In addition to *Black Jack* and *Arlington Heights*, see, e.g., *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065–66 (4th Cir. 1982); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988); *City of Hawthorne v. Wright*, 493 U.S. 913 (1989); and *Jackson v. Okaloosa County*, 21 F.3d 1531 (11th Cir. 1994).

24. *See* 24 C.F.R. § 100.500; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

25. 24 C.F.R. § 100.500(c)(1)–(3).

26. 24 C.F.R. § 100.500(c)(2).

27. 24 C.F.R. § 100.500(c)(3).

28. The case was originally brought as *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987 (D. Minn. 2008), *aff'd in part rev'd in part*, 619 F.3d 823 (8th Cir.

by owners of low-income properties in St. Paul, Minnesota. The city's code enforcement authorities had recently begun aggressively enforcing its property maintenance code in an attempt to crack down on slum conditions, including health and safety violations and rodent infestations, in the city's low-income housing stock. As a result of the city's enforcement efforts, the property owners were potentially subject to increased maintenance costs, fees, condemnations, and forced sales of their properties.

The owners challenged the city's code enforcement practices using a number of statutes and theories, one of which was a disparate impact claim under the FHA. Specifically, they claimed 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 that rent to low-income tenants, and that this increased burden resulted in less affordable housing in the city because the owners would have to raise rents or potentially go out of business. All of this, they argued, would result in a disproportionate adverse effect on blacks. The district court found that the owners had failed to establish any of their claims. On appeal, the Eight Circuit upheld the dismissal of all claims except the one based on disparate impact theory. The Supreme Court granted certiorari to determine two issues: (1) whether disparate impact theory is cognizable under the FHA; and (2) if so, what burden-shifting analysis should be used.[29]

Magner settled before the Court could hear oral argument on the case, in large part because fair housing advocates feared a negative outcome.[30] The case did not present particularly good facts for the plaintiffs, who were raising the disparate impact claim not for themselves but on behalf of their tenants (who by all accounts were living in deplorable conditions). Moreover, HUD's disparate impact regulation had been proposed but was not yet final, so advocates needed to buy some time.

The following year the Court agreed to hear another disparate impact case, *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action*.[31] The 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. Seventy-five percent of the Gardens residents were minorities and most

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.

29. 132 S. Ct. 548 (2011) (granting cert.).

30. 132 S. Ct. 1306 (2012) (dismissing cert.). *See Review and Outlook, The Talented Mr. Perez*, WALL ST. J. (Mar. 21, 2013) (describing a deal that then-HUD Secretary Perez struck with the City of St. Paul to dismiss the case in favor for HUD's withdrawal of an unrelated claim against the city).

31. No. 08-2584, 2011 WL 9405 (D.N.J. 2011), *rev'd*, 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.

were classified as "very low" or extremely low" income. More than half of the properties were rentals, many of which were owned by absentee landlords that did not maintain them well. There was no homeowners association to provide for the upkeep of common areas or alleys. Overcrowding, vacancies, drainage, lack of parking, and crime were all problems. 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.

The township adopted a redevelopment plan that 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. The vast majority of Garden 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. It was also alleged that the plan would perpetuate segregation in the township because only 29 percent of minority households in the area would be able to afford housing in the redeveloped Villages, whereas 79 percent of the township's white households could afford to live there.

The district court denied the residents' request for injunctive relief, concluding that they failed to establish a prima facie case of discrimination under the FHA and that, even if they had, they failed to show an available alternative that would have had a lesser impact. The residents appealed to the Third Circuit, which reversed the district court's decision. The Supreme Court granted certiorari on the question of whether disparate impact was cognizable under the FHA.[32] This case also settled before the Court could hear oral argument, apparently due to a change in political leadership in the township.[33]

III. *TDHCA v. Inclusive Communities*

Inclusive Communities arose out of a challenge to the Low Income Housing Tax Credit (LIHTC) allocations made by the Texas Department of Housing and Community Affairs (TDHCA) in the Dallas metropolitan area. The Inclusive Communities Project, Inc. is a non-profit organization whose mission is to further racial and socioeconomic integration in the Dallas metropolitan area. In 2004, it was appointed to be the fund administrator and housing mobility provider in order to implement the remedy in a Dallas public housing desegregation case.[34] In particular, Inclusive Communities assists low-income families, a significant number of whom are black, who are eligible for the Dallas Housing Authority's Housing Choice Voucher Program in finding affordable housing in predominantly white

32. 133 S. Ct. 2824 (2013) (granting cert.).
33. 134 S. Ct. 636 (2013) (dismissing cert.).
34. Walker v. HUD, 734 F. Supp. 1289 (N.D. Tex. 1989).

suburban neighborhoods. A development that receives an LIHTC cannot refuse to accept tenants because of their use of vouchers. As a result, Inclusive Communities has an interest in where LIHTC developments are located in the Dallas metropolitan area because this will determine where it can help place its clients.

Competition for LIHTCs is fierce and the program has historically been oversubscribed by a ratio of two-to-one in Texas. 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) that includes particular selection criteria and preferences. One such criterion is the length of the waiting list for public housing in the area.[35] Preferences include that the housing contribute to a "concerted community revitalization plan" and be built in predominantly low-income census tracts.[36] Texas state law requires the department to first determine whether an application satisfies the QAP threshold criteria. Then it must use a point system in order to score and rank qualifying applications, specifically by prioritizing the 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 in 2008, alleging that the department disproportionately approved LIHTCs in minority concentrated neighborhoods and disproportionately disapproved them in predominantly white neighborhoods.[37] Inclusive Communities alleged that from 1995 to 2009, the department did not allocate any LIHTCs 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, between 1999 and 2008, the department approved tax credits for 49.7 percent of proposed units in areas that were at least 90 percent minority, but approved only 37.4 percent of proposed units in areas that were at least 90 percent white. Thus, according to Inclusive Communities, 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 it to use fixed criteria and preferences, some of which are correlated with race, in its

35. 26 U.S.C. § 42(m)(1)(C).

36. 26 U.S.C. § 42(m)(1)(B).

37. 860 F. Supp. 2d 312 (N.D. Tex. 2012), *rev'd*, 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.

decision making. Although the district court assumed that the department's interest in complying with the law was legitimate and bona fide, it concluded that the department had failed to prove the absence of any alternative that would reduce the statistical disparity in allocation rates.[38]

After the trial, while the district court was considering the injunctive remedy, it granted permission to Frazier Revitalization, Inc. (FRI) to intervene on the side of the department to represent the interests of developers and other organizations that seek to revitalize low-income neighborhoods.[39] FRI is a nonprofit organization that was formed to implement a revitalization plan for the Frazier Courts neighborhood, a predominantly black area that has experienced significant decline. The Frazier Neighborhood Plan called for more than $270 million in new development to create a mixed-income neighborhood with affordable housing and a full range of basic services. FRI depends upon LIHTC to fund these efforts. It argued that requiring the department to increase its allocation of tax credits to projects in more affluent white areas would reduce the amount of credits available to Frazier and other low-income minority neighborhoods, which are the areas that the credits were intended to help in the first place.

The case was appealed to the Fifth Circuit. While the appeal was pending, HUD issued its regulation setting forth the burden-shifting framework for adjudicating disparate impact claims. The regulation clarified that the plaintiff has the burden at "step three" of showing that the defendant's interests can be served by another practice that has a less discriminatory effect.[40] The Fifth Circuit determined that the lower court had erred by placing the burden on the defendant to prove that no less discriminatory alternative existed. Thus, it upheld the use of disparate impact theory but reversed and remanded the case for a proper "step three" analysis. The department petitioned for certiorari; the petition was granted on the question of whether disparate impact claims are cognizable under the FHA.[41]

IV. The Supreme Court's Opinion

The opinion, written for a five-to-four majority by Justice Kennedy, held squarely that disparate impact claims are cognizable under the FHA. Other than the fact that many prognosticators feared the Court would come out the other way, this result is not particularly remarkable in the sense that it merely leaves existing law and precedent undisturbed. As noted previously, the circuits had long unanimously recognized

38. The Court suggested that the Department could add "below-the-line" criteria or otherwise adjust its scoring formula to achieve greater parity in LIHTC allocation. No. 3:08–CV–0546–D, 2012 WL 3201401 (Aug. 7, 2012).

39. No. 3:08–CV–0546–D, 2012 WL 2133667 (N.D. Tex. June 12, 2012).

40. 24 C.F.R. § 100.500(c)(3).

41. 135 S. Ct. 46 (2014).

disparate impact theory and HUD has issued a regulation endorsing it.[42] The opinion is noteworthy, however, for what it says both about the reach and purpose of fair housing law and for the limitations that it sets on that reach.

A. Broad Integrationist Purpose

Although the word "integration" is nowhere mentioned in the Fair Housing Act, the majority opinion offered unequivocal recognition of the fact that segregation is a serious social harm that the statute was intended to combat. Early in the opinion, Justice Kennedy cited the President's Advisory Commission Report on Civil Disorders (commonly known as the Kerner Commission) and its urgent, clarion call to end the deepening racial division in American society.[43] Justice Kennedy admitted that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation"[44] and acknowledged "the Fair Housing Act's continuing role in moving the nation toward a more integrated society."[45]

Additionally, the majority opinion acknowledged that today's segregated residential patterns can be traced back to government policies[46] and recognized how entrenched and intractable these patterns can be.[47] All of this led to the sweeping conclusion that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose . . . to eradicate discriminatory practices within a sector of our Nation's economy."[48]

Finally, and significantly, the Court addressed a potential conflict between disparate impact theory and equal protection. In previous cases, the Court and individual justices had questioned whether race-conscious measures to achieve integration and avoid disparate impact liability were constitutional.[49] In their briefs in *Inclusive Communities*, the department

42. It is significant that the Court based its conclusion on its interpretation of the statute rather than on deference to the HUD regulation.

43. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2516 (2015).

44. *Id.* at 2525.

45. *Id.* at 2525–26.

46. *Id.* at 2515 ("[V]arious practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races.").

47. *Id.* ("De jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life.").

48. *Id.* at 2521.

49. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down a school assignment plan that would assign students in a pro-integrative manner, with Chief Justice Roberts admonishing that "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race." 551 U.S. 701, 748 (2007). In *Ricci v. DeStefano*, a municipality

and its amici argued that interpreting the FHA to incorporate disparate impact theory would violate the Constitution because it would force municipalities into race-based or, at least, race-conscious decision-making.

This argument, taken to its logical conclusion, would forbid municipalities from ever considering the racial impacts of their zoning, community development, and housing policies. The majority rejected this claim, holding that laws imposing liability for unjustified disparate impact are not themselves unconstitutionally discriminatory even though they aim to achieve a result—integration—that is racially defined. "When setting their larger goals," Justice Kennedy advised, "local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor from the outset."[50]

B. Limitations in Practice: Housing and Neighborhood Improvement

The only issue before the Court in *Inclusive Communities* was whether disparate impact theory could be used in a FHA case. Nevertheless, the majority included a brief, but crucial, paragraph about the merits of the plaintiff's case that hints at a significant limitation on the use of disparate impact theory in the future. Specifically, the opinion referred critically to the plaintiff's use of disparate impact theory in the case at bar as a "novel theory of liability."[51] Justice Kennedy distinguished this case from what he called "the heartland" of disparate impact suits that target artificial barriers to housing, particularly "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[52]

This somewhat opaque reference is to a distinction first noted by Stacy Seicshnaydre in her article, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*.[53] In the article, which the Court cites, Professor Seicshnaydre

administered a qualifying exam for firefighting jobs that clearly had a disparate impact on minorities. The municipality chose to disregard the exams and justified this decision by arguing that if it used the test results in hiring, it would almost certainly be sued by disappointed minority applicants under a disparate impact theory. The Court refused to allow this fear to justify the disregarding of the test results. It reasoned that such an action was itself race-based, and therefore using disparate impact theory to require this result would itself violate Title VII. 557 U.S. 557 (2009). Justice Scalia wrote separately to warn about the coming "war" between disparate impact and equal protection. *Id.* at 594–96.

50. *Inclusive Cmtys.*, 135 S. Ct. at 2525.

51. *Id.* at 2522.

52. *Id.* at 2521–22.

53. 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 (2013).

posits that housing disparate impact cases can be sorted into two basic types: (1) "housing barrier" cases, which challenge policies that prevent the construction of housing for minority group members or otherwise deny minority households freedom of movement in the wider housing marketplace;[54] and (2) "housing improvement" cases, which challenge policies that are intended to improve the condition of housing and/or the surrounding neighborhood.[55] In the first type of case, the remedy sought is simply the removal of the housing barrier so that new housing opportunities can be created in the private market. In the latter, the remedy sought is typically to prevent a plaintiff's displacement from existing housing, usually by altering or enjoining the policy meant to improve the housing or neighborhood.

City of Black Jack is an example of a housing barrier case. There, a municipal action prevented the construction of affordable housing that might attract minority families. In other words, the city stood in the way of minority housing opportunities that otherwise would have been created by a private organization. All the plaintiffs sought was the modification of the exclusionary zoning ordinance so that the housing could proceed.

In contrast, the two recent disparate impact cases to reach the Supreme Court, *Magner* and *Mt. Holly Gardens*, can be classified as housing improvement cases. Both involved challenges to municipal attempts to improve housing conditions, either through code enforcement or neighborhood redevelopment. In both cases, these attempts were likely to displace the existing residents who were disproportionately minority. In both cases, the plaintiffs were asking that the municipality significantly alter or abandon its efforts.

As Professor Seicshnaydre notes, housing improvement cases do not fare well in the courts. At the appellate level, housing improvement cases are half as likely to result in positive decisions for plaintiffs as housing barrier cases.[56] Put another way, 44 percent of all positive disparate impact outcomes at the appellate level were housing barrier challenges, while just 16.7 percent involved housing improvement challenges.[57] All of this leads Professor Seicshnaydre to conclude that in the forty years that courts have been applying disparate impact theory to housing cases, "they have been far more receptive to Housing Barrier claims than to Housing Improvement Claims."[58]

54. *Id.* at 360–61.

55. *Id.* at 361.

56. Housing barrier challenges were successful 42 percent of the time, whereas housing improvement challenges were successful only 21 percent of the time. *Id.* at 400–01.

57. *Id.* at 402.

58. *Id.*

Justice Kennedy clearly viewed *Inclusive Communities* as a housing improvement case, describing the use of disparate impact theory as "novel" and casting serious doubt on whether Inclusive Communities could prevail on the merits. He cautioned that disparate impact claims should not be used to micromanage the complex, multifactor decisions of housing developers and municipal officials:

> It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. . . .The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.[59]

Ultimately, Kennedy opined, "[t]his case on remand may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing."[60]

And therein lies the rub: in disparate impact cases, the analysis almost always turns on the defendant's ability to demonstrate that the challenged practice, in the language of the rule, "is necessary to achieve one or more substantial, legitimate, non-discriminatory interests," versus the plaintiff's ability to prove that another, less discriminatory alternative is available. The *Inclusive Communities* opinion, in essence, reminds us that fostering integration is just on one of many legitimate interests, such as revitalizing dilapidated neighborhoods, ensuring compliance with health and safety codes, and providing affordable housing, that a local government might pursue.[61] This may well mean that housing improvement cases, which by definition involve legitimate goals, will always be an uphill battle on the merits for fair housing advocates using disparate impact theory.

V. Analysis and Ramifications

A. Enrichment–Integration Tension

The Court's approach in *Inclusive Communities* reflects a tension that has existed since the dawn of the modern fair housing movement. In its thorough discussion of the riots that took place throughout the United States in 1967, the Kerner Commission identified housing discrimination and segregation, as well as the slum conditions in urban ghettos with a

59. *Inclusive Cmtys.*, 135 S. Ct. at 2523.

60. *Id.* at 2522.

61. *Id.* at 2522 ("An important and appropriate means of ensuring that disparate impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interests served by their policies.").

high concentration of black residents, as contributing factors to the unrest.[62]

The Commission also recognized that responding to these conditions was one of the great policy challenges of our time. As for how to do so, the Commission identified two plausible approaches.[63] The first was "a policy of 'enrichment'" aimed at improving the quality of life in segregated areas while abandoning integration as a goal.[64] The second was to pursue integration by combining enrichment measures with policies that will break up segregated patterns and encourage freedom of mobility.[65] The Commission was clear that the enrichment choice without a commitment to integration would ultimately fail to advance the cause of equality. "[E]quality cannot be achieved," wrote the Commission, "under conditions of nearly complete separation. In a country where the economy, and particularly the resources of employment, are predominantly white, a policy of separation can only relegate Negroes to a permanently inferior economic status."[66]

Thus, the Commission advocated the use of both approaches, but with enrichment being the adjunct or interim strategy and integration being the ultimate goal.[67] The Commission recommended an "all of the above" approach, including a massive increase in affordable housing; significant urban renewal, but with a focus on preserving housing for low-income people; and programs to expand low and moderate income housing into higher income areas.[68]

If we fast forward to the present day, it would seem that the Commission's suggestions have gone unheeded. Segregation has declined slightly over the past few decades, but still persists at unacceptably high levels in most major metropolitan areas.[69] The consequences of this are numerous

62. Report of the National Advisory Commission on Civil Disorders 1 (1968).

63. Technically, the Commission offered three approaches, but the first was to do nothing at all ("the Present Policies" choice). Inaction, the Commission determined, was not a valid option. *Id.* at 218–21.

64. *Id.* at 222–24.

65. *Id.* at 224–25.

66. *Id.* at 10.

67. *Id.* ("Enrichment must be an important adjunct to integration, for no matter how ambitious or energetic the program, few Negroes now living in central cities can be quickly integrated. In the meantime, large-scale improvement in the quality of ghetto life is essential. But this can be no more than an interim strategy. Programs must be developed which will permit substantial Negro movement out of the ghettos.").

68. *Id.* at 260–63.

69. John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US 2010, at 4–10 (Mar. 24, 2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf (finding that black-white segregation and isolation remain "very high").

and severe.[70] Higher concentrations of minorities in a neighborhood are associated with lower home values, even with all other variables held constant.[71] As a result, segregation limits people's accumulation of wealth through asset appreciation.[72] Racially segregated neighborhoods tend to experience reduced educational and employment opportunities, more crime, and higher mortality rates.[73] Finally, and perhaps most importantly, segregation undermines our national unity, leads to racial misunderstanding, and causes us to continue living, in the words of the Kerner Commission, as "two societies, one black, one white—separate and unequal."[74]

At least some of America's stubbornly persistent segregated patterns can be traced to state and federal housing policies that have focused more on the provision of affordable housing in and redevelopment of distressed minority areas than on the politically challenging work of encouraging integration.[75] The LIHTC is a prime example of such a policy. Commentators have long pointed out that the program reinforces segregated patterns because it encourages the siting of low-income housing in areas that already have a high concentration of poverty.[76] Between 1995

70. *See* James Robert Breymaier, *The Need to Prioritize the Affirmative Furthering of Fair Housing*, 57 CLEV. ST. L. REV. 245, 252 (2009) ("[Segregated housing patterns] are harmful to everyone. Promoting integrated communities would stimulate positive changes to improved affordable housing dispersion, balanced economic development, equitable school improvement, and sustainable growth patterns."). *See generally* Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

71. David R. Harris, *"Property Values Drop When Blacks Move In, Because . . .": Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461 (1999) (finding a pronounced skew in neighborhood desirability and housing prices in segregated neighborhoods).

72. Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1206 (2001).

73. Robert G. Schwemm, *Overcoming Barriers to Integrated Housing: A Back-to the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 135 (2011–12).

74. NATIONAL ADVISORY COMMISSION, *supra* note 62, at 1.

75. For a thorough discussion of the tension between fair housing and affordable housing policy, see Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14-4 J. AFFORDABLE HOUS. & CMTY. DEV. L. 292 (2005). *See also* Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. (2005); Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons From Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661 (2011).

76. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998);

and 2006, 36.8 percent of LIHTC units were located in census tracts with populations that were more than 60 percent minority, as compared to only 17.6 percent of households located in such census tracts generally.[77] In the St. Louis metropolitan area, for example, 62 percent of LIHTC properties are in majority black census tracts.

The Community Development Block Grant (CDBG) program is another example of a well-intentioned government program that has tended to intensify segregation. Many communities use their community development funds in a manner that perpetuates segregation, either by continuing to site low-income housing in predominantly minority neighborhoods or redeveloping minority neighborhoods and displacing the existing residents. Recent litigation against one such grant recipient, Westchester County, New York, illustrates the problem. From 2000 to 2006, Westchester County received CDBG funds totaling $52 million. The county was (and still is) extremely racially segregated. Although it certified to HUD that it would use these funds in a manner that affirmatively furthered fair housing, the county focused only on affordable housing, not fair, i.e., pro-integrative, housing. As a result, the country's development and siting of affordable housing actually exacerbated the segregated patterns.[78]

Even the Housing Choice Voucher program may exacerbate segregation and concentrate poverty.[79] Disparities in housing prices often mean that most of the housing units that a voucher can cover are located in lower-income, minority communities. When housing is located in more affluent white neighborhoods, voucher holders may experience hostility from existing residents and landlords may refuse to accept vouchers without laws in place prohibiting source-of-income discrimination. Bureaucratic obstacles may hinder voucher holders who wish to make a pro-integrative move from one jurisdiction to another.

These three programs represent some of the most significant federal programs that encourage access to and development of affordable

---

Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005).

77. U.S. Department of Housing and Urban Development, Office of Economic Affairs, *Updating the Low-Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2006*, at 57 ex. 4–15.

78. United States *ex rel.* Anti-Discrimination Center of Metro New York, Inc. v. Westchester Cnty., N.Y., 668 F. Supp. 2d 548, 559 (S.D.N.Y. 2009).

79. Stefanie DeLuca, Philip M. E. Garboden & Peter Rosenblatt, *Segregating Shelter: How Housing Policies Shape the Residential Locations of Low-Income Minority Families*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 268 (2013) (finding that minority voucher holders in Mobile, Alabama, rarely escape poor, segregated communities); John Eligon, *An Indelible Black-and-White Line*, N.Y. TIMES, at A1 (Aug. 9, 2015) (noting that there are nearly twenty times as many Section 8 renters in predominantly black north St. Louis County than in predominantly white south St. Louis County).

housing. But to the extent that they increase segregation, decisions that municipal governments and housing authorities make in implementing these programs also represent some of the most likely targets for "housing improvement" challenges based upon disparate impact theory.

The *Inclusive Communities* opinion reveals an understandable reluctance to impose liability on government attempts to revitalize neighborhoods, cure blighted conditions, and develop affordable housing. Such an outcome would not only be unsound as a matter of policy, it would also harm the very minority group members whom the FHA was intended to help. As Justice Kennedy makes clear, "If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system."[80] Yet truly sustainable long-term solutions will be elusive if local governments fail to make the hard choices necessary to foster integration.

B. Ongoing Difficulty of Disparate Impact Claims

Any discussion of disparate impact theory would be remiss without a realistic look at the existing state of affairs with respect to disparate impact claims in the courts: they are infrequently made and unlikely to result in a positive outcome for plaintiffs. As Professor Seicshnaydre's survey revealed, plaintiffs fare poorly in *all* types of disparate impact cases, not just housing improvement challenges. Her survey found that plaintiffs received positive decisions in less than 20 percent of all housing disparate impact claims considered on appeal.[81] This statistic fails to capture the state of play today: the numbers have been steadily dropping over time. Most of the successes occurred in the 1970s and 1980s. By the 1990s, the success rate had dropped to 13 percent, and it was down to just over 8 percent by the 2000s.[82]

Another 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. Professor Seicshnaydre found that, while the overall affirmance rate for federal civil appeals is roughly 80 percent, plaintiffs have gotten affirmances of favorable lower court decisions in housing disparate impact cases only 33.3 percent of the time.[83] Defendants, in contrast, have an affirmance rate of 83.8 percent.[84]

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. Failure to properly identify the affected groups will prove

80. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2524 (2015).

81. Seicshnaydre, *supra* note 53, at 393.

82. *Id.* at 393–94.

83. *Id.* at 399.

84. *Id.* at 398.

fatal to the plaintiff's prima facie case. Fair housing plaintiffs may be tacking weak disparate impact claims onto intentional discrimination claims as insurance in case their intent evidence fails. Courts may be increasingly unwilling to impose liability against defendants that are attempting to address legitimate concerns.

Of course, the litigation statistics 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. It is clear that local governments and housing authorities have made fundamental changes to the ways they operate as a result of the threat of disparate impact liability. Thus, disparate impact theory has surely had more of an impact than the stark litigation numbers would indicate. Still, disparate impact theory's infrequency of use and success in court does suggest that, despite its conceptual significance, it has failed to live up to its promise.[85]

Interestingly, just a few weeks after the *Inclusive Communities* opinion was handed down, new developments on the regulatory front may make disparate impact theory less important as a tool for combatting government policies that entrench segregation. The FHA has long stated that the federal government, federal agencies, and recipients of federal housing funds have the duty to "affirmatively further" fair housing, which includes a mandate to foster integrated living patterns.[86] For decades this provision lacked force because HUD failed to ensure compliance by program participants or to take action against recipients that failed to comply.[87] In July 2015, HUD promulgated a rule on the affirmatively furthering mandate.[88] The rule overhauls the AFFH assessment and planning framework for program participants and requires HUD to provide each jurisdiction with national data on racial segregation, poverty concentration, and access to community assets such as education, transportation, and jobs in order to facilitate regional planning efforts. It remains to be

85. Rigel C. Oliveri, *Beyond Disparate Impact: How the Fair Housing Movement Can Move On*, 54 WASHBURN L.J. 625 (2015).

86. Section 3608 of the FHA directs HUD to administer its programs and activities relating to housing and urban development "in a manner affirmatively to further the [FHA's] policies." 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." 42 U.S.C. § 5304(b)(2). Although the term "affirmatively further" 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.

87. Robert G. Schwemm, *Overcoming Barriers to Integrated Housing: A Back-to the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 153–54 (2011–12).

88. 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903 (July 16, 2015).

seen whether, and to what extent, this new rule helps to promote diverse, inclusive communities of opportunity.[89] Nevertheless, its passage suggests a renewed focus on the part of HUD toward working for this goal.[90]

VI. Conclusion

Ultimately, *Inclusive Communities* left existing precedent intact, preserving a legal theory that was in many ways more important in theory than in practice. Justice Kennedy's nuanced opinion plumbed longstanding tensions between the Fair Housing Act's pro-integrationist focus and affordable housing policy. By affirming the significance of integration as a goal but then questioning whether disparate impact theory can succeed in a number of the cases that might be brought to vindicate this goal, the Court handed fair housing advocates an unquestionable, but qualified, victory.

Still, a victory is a victory, and with social ills as pervasive and intractable as housing discrimination and residential segregation, fair housing advocates want every tool at their disposal. Recent events, including the racial unrest in Ferguson and other segregated cities, the litigation against Westchester County, and HUD's recent promulgation of rules both for affirmatively furthering fair housing and for disparate impact theory have reinvigorated the discussion about how government housing policy, agency practice, and the civil rights laws can be used to combat inequality and segregation. The *Inclusive Communities* opinion is a welcome addition to this debate.

89. *See* Jonathan J. Sheffield, *At Forty-Five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-Lift, But Will It Integrate America's Cities?*, 25 U. FLA. J.L. & PUB. POL'Y 51 (2014) (arguing that without a private right of action to enforce these requirements, and until they are adopted by other agencies, particularly the IRS, progress will remain mixed).

90. *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.").