HOUSING AND THE LAW: LESSON 7: HANDOUT 2

TEXAS DEPT. OF HOUSING AND COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC[1].

MAJORITY OPINION

SUPREME COURT OF THE UNITED STATES

Decided on June 25, 2015

Justice Kennedy delivered the opinion of the Court.

The Court must determine whether the Fair Housing Act (FHA) recognizes disparate-impact claims.
***cognizable** means identifiable
***liability** means responsibility for harm

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a **disparate-impact theory of liability**. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale. The question presented for the Court's determination is whether disparate-impact claims are **cognizable** under the Fair Housing Act (or FHA)...I

A **disparate impact** claim is against practices that have negative consequences on minoritized communities, regardless of intent or motive.

De jure refers to legal practice. De jure segregation means legally segregated.

Here, the Court acknowledges that the effects of segregation have lasted even after ruled unconstitutional.

It describes the effects of industrialization and suburbanization, including white outmigration from cities. The Court also discusses the harmful impact of various discriminatory practices in housing.

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan* v. *Warley*, but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley* v. *Krae-mer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. By the 1960's, these

[1] This is not the full opinion. Adapted from: https://www.law.cornell.edu/supremecourt/text/13-1371#writing-13-1371_OPINION_3

policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs.

Here, the Court provides important history of the civil rights era. It references the Kerner Report, a document that highlighted the problems of inequality that led to social unrest in society. The report found that these forms of discrimination denied Black families equal housing opportunities. The Commission called for a policy that would make it illegal to discriminate based on race. Otherwise, the country's racial division would continue to grow.

The mid-1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban **blight**." The Commission further found that both open and **covert** racial discrimination prevented black families from obtaining better housing and moving to integrated communities. The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." To reverse "[t]his deepening racial division," it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin."

***blight:** a thing that spoils or damages something. This term was often used to describe housing in poor Black neighborhoods.

***covert:** not openly shown

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." (Civil Rights Act of 1968) Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic.

Here, the Court recalls when Black communities erupted in protest following the murder of MLK. Fearful of violence and uprisings, Congress passed the Fair Housing Act that prohibited discrimination in housing.

Here, the Court must determine whether or not housing decisions that negatively impact minoritized communities are unconstitutional according to the FHA.

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a **disparate impact** are prohibited...

....Turning to the FHA, the ICP relies on two **provisions.** Section 804(a) provides that it shall be unlawful:

The ICP refers to two **provisions,** or requirements, of the FHA that make housing discrimination illegal.

"To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

"It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."...

Here, the Court has applied a previous case that suggests the FHA does include disparate-impact claims. The language "otherwise make unavailable" refers to consequences of an action, which meets the disparate-impact claim.

...Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. This results-oriented language counsels in favor of recognizing disparate-impact liability. The Court has construed statutory language similar to §805(a) to include disparate-impact liability...

...The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Here, the Court says that it is concerned that is hard to say whether decisions behind where to build low-income housing (whether in suburbs or inner-city neighborhood) are discriminatory, and that challenging these decisions may lead to racial quota systems in which target numbers of a certain race have to be met. There are constitutional concerns about this.

Courts must therefore examine with care whether a plaintiff has made out a **prima facie** case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case.

The Court says that courts must examine whether a plaintiff (in this case ICP) has made a **prima facie** case of disparate impact. This means that it would be obvious based on a first impression of harm to minoritized communities. ICP would have to show statistics or numbers that prove the construction of low-income housing in predominantly Black neighborhoods caused harm. This is difficult to prove.

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. 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. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes...

Here, the Court says that defendants such as the Texas Dept. of Housing should be protected against abusive disparate-impact claims that may overreach and undo the benefits that FHA provides. For instance, litigation should not result in outcomes where low-income housing in general is harmed. Government and private priorities to provide affordable housing should not be replaced–only unnecessary discriminatory barriers.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers." And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their **remedial orders** must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

If courts do find liability, their **remedial orders** that require defendants such as the Texas Dept. of Housing to pay damages must be constitutional. Orders should remove discriminatory barriers but any additional measures should be **race-neutral**, which means race is not taken into account.

Here, the Court says that race can be considered in certain situations. Housing authorities can pay particular attention to communities who have been harmed by patterns of segregation. They can choose to aim for racial diversity through race-neutral tools.

The Court finds that disparate-impact claims are recognized and included in the FHA, because it uses language focused on results.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion…Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, 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 at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language…

III

…Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and un- equal." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.