

Silver Linings Playbook: “Disparate Impact” and the Fair Housing Act

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I. Introduction

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (“*Inclusive Communities*”),¹ the Supreme Court at last resolved the issue of whether “disparate impact” causes of action may be brought under the Fair Housing Act (FHA), which was first passed in 1968 and then substantially amended and expanded in 1988. In brief, disparate-impact cases result in liability if a defendant’s actions—typically involving a selection criterion of some sort—have a disproportionate adverse effect on a racial or other group, even if the criterion was selected without discriminatory motive and is nondiscriminatory by its terms and in its application. By contrast, disparate-treatment cases, which are indisputably covered by the Act, are triggered when a defendant’s actions are taken because the plaintiff is a member of such a racial or other group.

The issue was before the Court in 1988 and 2003.² Later, in the two terms preceding this year’s decision, the Court granted review of petitions presenting this same question, but both cases settled at the eleventh hour.³ It should be noted that the issue of whether a disparate-impact cause of action may be brought under a civil rights statute is

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¹ 135 S. Ct. 2507 (2015).

² *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); *City of Cuyahoga Falls v. Buckeye County Hope Fund*, 538 U.S. 188 (2003).

³ As noted in the first footnote of Justice Samuel Alito’s dissent in *Inclusive Communities*, those cases were *Gallagher v. Magner*, 132 S. Ct. 548 (2011); and *Township*

a recurrent one for the Court; the question has been decided for Title VII of the 1964 Civil Rights Act (yes); Section 2 of the Voting Rights Act (no); and the Age Discrimination in Employment Act (yes).⁴

Justice Anthony Kennedy wrote the 5–4 majority opinion in *Inclusive Communities*, in which he was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Samuel Alito’s dissent was joined by the remaining justices; Justice Clarence Thomas also wrote a separate dissenting opinion, which focused on and criticized the origins of the disparate-impact approach in *Griggs v. Duke Power Co.*⁵

The Court’s decision is disappointing. It fails to follow the clear language of the statute and will not only result in unfair liability for many defendants, but will encourage race-based decisionmaking in the housing area—exactly what the Fair Housing Act was meant to prohibit. The only silver linings are that Justice Kennedy’s opinion itself recognizes these problems, and some of the language toward the end might be useful in stemming the worst abuses.

To elaborate: The question presented in this case was, “Are disparate-impact claims cognizable under the Fair Housing Act?” Under a disparate-impact claim, discriminatory motive is irrelevant: It need not be alleged or proved, and it doesn’t even matter if the defendant proves that there was no actual disparate treatment. If a policy or procedure results in a disproportion of some sort—on the basis not only of race, color, or national origin but also (under the FHA) of religion, sex, or familial status (that is, having children)—then that’s enough, even if the policy is nondiscriminatory by its terms, in its intent, and in its application. The defendant can prevail only by showing—to the satisfaction of a judge or jury who may know or care nothing of the defendant’s needs—some degree of “necessity” for

of *Mount Holly v. Mt. Holly Gardens*, 133 S. Ct. 2824 (2013). See further discussion in Part II.B, *infra*.

⁴ The Title VII and ADEA decisions are discussed below and in all three opinions in the case at hand. *Mobile v. Bolden*, 446 U.S. 55 (1980), determined as a practical matter that Section 2 of the Voting Rights Act prohibited only disparate treatment; that statute has since been amended, although the extent to which it now allows disparate-impact lawsuits is unresolved. See Roger Clegg & Hans A. von Spakovsky, “Disparate Impact” and Section 2 of the Voting Rights Act (Mar. 17, 2014), available at <http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act>.

⁵ 401 U.S. 424 (1971).

the policy. This numbers-driven, we-don't-much-care-about-your-reasons approach inevitably results in pushing potential defendants away from perfectly legitimate and race-neutral policies and toward race-based decisionmaking: again, just the opposite of what civil rights laws are supposed to do.

This article will begin by summarizing the various opinions in the case, and will then explain some of the problems with the disparate-impact approach, both generally and with respect to housing discrimination in particular. It will then discuss what might be done to address these problems in the future, through litigation and through legislation.

II. Summary of the Opinions

A. Majority Opinion

Majority opinions typically begin by laying out the facts of the case, noting the applicable statutes or other laws, and tracing the litigation's procedural history, and Justice Kennedy's opinion here is no exception. But then, and ominously for those hoping that he would ground his opinion in statutory text rather than junk social science, he adds a second section to the overture. In that section, he paints with a broader brush about the intractability and evil of housing segregation, citing the notoriously liberal Kerner Commission Report (formally, the “Report of the National Advisory Commission on Civil Disorders”). He concludes that, after the assassination of Dr. Martin Luther King Jr. in April 1968, and the ensuing “social unrest in the inner cities,” “Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act.”⁶

⁶ *Inclusive Communities*, 135 S. Ct. at 2516. Justice Kennedy also references the Kerner Commission in his conclusion, citing its “grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.' The Court acknowledges the Fair Housing Act's continued role in moving the Nation toward a more integrated society.” *Id.* at 2525–26. On the other hand, “At a 1998 lecture commemorating the 30th anniversary of the report, Stephan Thernstrom, a history professor at Harvard University, stated, ‘Because the commission took for granted that the riots were the fault of white racism, it would have been awkward to have had to confront the question of why liberal Detroit blew up while Birmingham and other Southern cities—where conditions for blacks were infinitely worse—did not. Likewise, if the problem was white racism, why didn't the riots occur in the 1930s, when prevailing white racial attitudes were far more barbaric than they were in the 1960s?’” *An Unfilled Prescription for Racial Equality*, Bay State Banner (Feb. 28, 2008), available at <http://www.baystate-banner.com/issues/2008/02/28/news/blackhistory02280890.htm>.

Part II of Justice Kennedy's opinion resolves the question presented in the case, namely "whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited."⁷ But "[b]efore turning to the FHA," Kennedy thinks it first "necessary to consider two other antidiscrimination statutes that preceded it."⁸ The two statutes are Title VII of the 1964 Civil Rights Act⁹ and the Age Discrimination in Employment Act.¹⁰ He proceeds to discuss them, the Court's decisions about them, and what those decisions mean for the current dispute. Turning, finally, to the language in the Fair Housing Act itself, Kennedy argues that Title VII and the ADEA and the Court's decisions about them somehow reveal a disparate-impact cause of action cloaked in the FHA's text.

Justice Kennedy then purports to adduce other evidence in favor of this interpretation of the FHA. He argues that, when the 1988 amendments were added, Congress was aware of the fact that "all nine Courts of Appeals to have addressed the question had concluded that the Fair Housing Act encompassed disparate-impact claims."¹¹ He notes that the 1988 amendments also "included three exemptions from liability that assume the existence of disparate-impact claims."¹² Finally, Kennedy asserts, "Recognition of disparate-impact claims is consistent with the FHA's central purpose,"¹³ which he apparently thinks is about "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain

⁷ *Inclusive Communities*, 135 S. Ct. at 2516.

⁸ *Id.*

⁹ 42 U.S.C. §§ 2000e et seq. (2012).

¹⁰ 29 U.S.C. §§ 621 et seq. (2012).

¹¹ *Inclusive Communities*, 135 S. Ct. at 2519.

¹² *Id.* at 2520. This claim had been discussed at the case's oral argument before the Court. See Transcript of Oral Argument at 9–10, *Inclusive Communities*, 135 S. Ct. 2507 (2015) (No. 13-1371), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1371_g4ek.pdf. It is a dubious one, as the author explained in two posts on *National Review Online*. An Observation after the Disparate-Impact Oral Argument (Jan. 21, 2015), <http://www.nationalreview.com/bench-memos/396883/observation-after-disparate-impact-oral-argument-today-roger-clegg>; Three Short Trialogues on Disparate Impact and the Fair Housing Act (Feb. 2, 2015), <http://www.nationalreview.com/bench-memos/397592/three-short-trialogues-disparate-impact-and-fair-housing-act-roger-clegg>.

¹³ *Inclusive Communities*, 135 S. Ct. at 2521.

neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability."¹⁴

So far, so bad, but these are all arguments that one would expect to find in an opinion upholding the disparate-impact approach under the FHA. At this point, however, Justice Kennedy shifts gears, and provides some welcome relief that was not so predictable in a decision in plaintiff's favor. As I summarize this part of his opinion, I will go into a fair amount of detail and quote more heavily, since—as I discuss later—what Justice Kennedy says here will be of use to future litigants who want to limit the damage done by disparate-impact lawsuits.

In this latter part of the opinion, Justice Kennedy begins by noting "the serious constitutional questions that might arise under the FHA" if "liability were imposed solely on the basis of a statistical disparity." After all, it could take a race-conscious measure to prevent, or a race-conscious remedy to mitigate, a disparate racial impact; yet public actors are constitutionally mandated not to deny to any person the equal protection of the laws. In part to address that dilemma, Justice Kennedy would lessen the burden on defendants to rebut disparate-impact claims.

Defendants need not "reorder their priorities"; the problem is said to be with "arbitrarily" creating a disparate impact.¹⁵ On remand, wrote Justice Kennedy, the lawsuit "may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow"; again, it should be stressed that "reasonable" is a low bar, compared to the "necessity" standard that a plaintiff's lawyer would prefer.¹⁶ Defendants must be given "leeway to state and explain the valid interest"—that word "valid" again—"served by their policies."¹⁷

In the disparate-impact area, the definition of the defendant's rebuttal burden is important—rather like determining the level of "scrutiny" that courts will apply in reviewing the constitutionality of a statute. Defendants favor "rational basis" scrutiny, a low bar demanding only a "valid" or "legitimate" justification for legislation.

¹⁴ *Id.* at 2521–22.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Plaintiffs prefer “strict” scrutiny, which requires that the legislation be “essential” or at least “necessary.”

Justice Kennedy says that the “business necessity” standard used in employment cases is “analogous” to what he has in mind, but he then seems to mix standards when he refers to a policy that is “necessary to achieve a valid interest.” Worse, he says that this is something that the defendant must “prove.”¹⁸ To complete the muddle, Justice Kennedy ends the analogizing by concluding, “To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.”¹⁹ Present purposes?

Leaving the employment analogy behind, the opinion next alludes to a problem that Chief Justice Roberts identified at oral argument, namely that it seems unfair to subject defendants to disparate-impact lawsuits when they have to choose between two alternatives and either one could credibly be claimed to create a disparate impact.²⁰

But then, in perhaps the most opinion’s most interesting twist, Justice Kennedy asserts that plaintiffs must “point to a defendant’s policy or policies causing that [alleged] disparity.” “A robust causality requirement ensures that ‘[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.”²¹ Without this limit, he says, the pressure for racial quotas would raise “serious constitutional questions.”²² But it is one thing—albeit a welcome thing—to require a specific policy to be identified as causing the disparate impact; yet suggesting that a racial imbalance is not enough to make out a prima facie case arguably goes further than that, and saying that a defendant cannot be held liable for disparities he didn’t create could, if taken to its logical conclusion, dramatically change litigation in this area. For example, Duke Power Co. did not create the racial disparities in high-school

¹⁸ As discussed at note 76, *infra*, the Court, citing Fed. R. Evid. 301, rejected such burden-shifting under Title VII; Congress then reversed that.

¹⁹ *Id.* at 2523.

²⁰ See *id.*; Transcript of Oral Argument, *supra* note 12, at 39–45. Note that Justice Kennedy himself seemed to agree with Chief Justice Roberts on this point. *Id.* at 44.

²¹ Inclusive Communities, 135 S. Ct. at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

²² *Id.*

graduation rates or test-score performances at issue in *Griggs*, but it was found liable nonetheless.

Then Justice Kennedy once more suggests that the plaintiff’s case may be doomed on remand, referring again to the “serious constitutional concerns” that pushing defendants to adopt racial quotas would raise.²³ More broadly, “Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”²⁴

Justice Kennedy adds: “The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims.”²⁵ It would be a bad thing if the threat of such lawsuits discouraged low-income housing or other “legitimate objectives”—again, a low bar compared to “necessity.”²⁶ The opinion reiterates that “valid” priorities set by defendants, public or private, are legal. The FHA should target those policies devoted “solely” to creating “artificial, arbitrary, and unnecessary barriers” that could “set our nation back in its quest to reduce the salience of race in our social and economic system.”²⁷ “[R]emedial orders must be consistent with the Constitution,” should be aimed at discrimination that is “arbitrar[y]” and “invidious[,]” and should be as “race-neutral” as possible.²⁸ Conversely, “[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions.”²⁹

It’s noteworthy, by the way, that Justice Kennedy refers to Justice Alito’s “well-stated principal dissenting opinion in this case.”³⁰ Compared to the heated exchanges one typically observes between justices in high-stakes civil rights cases, this salute is remarkable, and suggests that Kennedy found the dissent’s arguments to be well-taken.

²³ *Id.*

²⁴ *Id.* at 2524.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (quoting *Griggs*, 401 U.S. at 431) (internal quotation marks omitted).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Finally, Justice Kennedy indulges himself by citing the point he made in an earlier case—*Parents Involved in Community Schools v. Seattle School Dist. No. 1*—that it’s all right to use “race-neutral” methods to “foster diversity and combat racial isolation.”³¹ Just how a policy that aims at a particular racial result can be said to be “race-neutral” is a matter that Justice Kennedy leaves unaddressed; presumably the answer lies in whether the result is, in Justice Kennedy’s eyes, a desirable one. Thus, a racist but neutrally worded “grandfather clause” in voting law would still have to go,³² but politically correct siting of low-income housing is fine.

B. Dissenting Opinions

Much of Justice Alito’s dissent—which is about one-and-a-half times longer than the majority opinion—will be cited later in my own, broader critique of the disparate-impact approach, so I give only a brief summary of it here. He begins with an attention-grabbing sentence: “No one wants to live in a rat’s nest.”³³ That’s a reference to an earlier case, presenting the same issue being decided here, involving a claim by slumlords that the City of St. Paul’s stepped up enforcement of health and safety ordinances would have a “disparate impact” on racial minorities because of the resulting rent increases for them. As Justice Alito says in ending his overture, “Something has gone badly awry when a city can’t even make slumlords kill rats without fear of a lawsuit.”³⁴

Having gotten the reader’s attention, Justice Alito in Part I discusses why the FHA’s prohibitions against discrimination are, as a textual matter, aimed only at disparate treatment. Part II continues, “The circumstances in which the FHA was enacted only confirm what the text says.”³⁵ Part III focuses on the 1988 amendments to the FHA and how they, in particular, contain nothing that supports a disparate-impact approach to its enforcement, and Part IV distinguishes *Griggs* and subsequent Court decisions from this case. The

³¹ *Id.* at 2525 (citing *Parents Involved*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

³² See, e.g., *Guinn v. United States*, 238 U.S. 347 (1915).

³³ *Inclusive Communities*, 135 S. Ct. at 2532 (Alito, J., dissenting).

³⁴ *Id.*

³⁵ *Id.* at 2537.

practical problems with extending the disparate-impact approach from employment to the housing area are discussed in Part V, and Part VI concludes the dissent by rejecting the majority’s “pretext,” “federalism,” and “purpose” arguments.

Justice Thomas joins Justice Alito’s dissent “in full” but writes separately “to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.*—is made of sand.”³⁶ In Part I of his dissent, Justice Thomas analyzes the text of Title VII of the 1964 Civil Rights Act, and, finding no support for the disparate-impact approach there, then explains how the real author of the approach was not Congress but the federal bureaucrats at the Equal Employment Opportunity Commission (which Justice Thomas chaired for a time, from 1982 to 1990—well after that particular bit of mischief had been completed and become entrenched). In Part II, he discusses why, statutory text aside, it makes no sense to equate racial imbalances with racial discrimination, since they can have all kinds of other causes and, indeed, “do not always disfavor minorities.”³⁷ Without a plausible remedial justification, there is no justification at all, since “racial balancing” by state actors is “patently unconstitutional.”³⁸ And, in Part III, Justice Thomas laments that the Court has spread its error in *Griggs* for Title VII first to the Age Discrimination in Employment Act and, now, to the Fair Housing Act, where it will have unintended and unfortunate consequences.

III. Problems with the Disparate-Impact Approach

A. In General³⁹

As noted, under a disparate-impact claim of discrimination, discriminatory motive is irrelevant: It need not be alleged or proved, and it doesn’t even matter if the defendant proves that there was no discriminatory motive. If a policy or procedure results in a

³⁶ *Id.* at 2526 (Thomas, J., dissenting).

³⁷ *Id.* at 2530.

³⁸ *Id.* (citation omitted).

³⁹ The author has critiqued the disparate-impact approach at length in a monograph, *Disparate Impact in the Private Sector: A Theory Going Haywire* (Dec. 2001), available at <https://www.aei.org/wp-content/uploads/2011/10/Briefly-Disparate-Impact.pdf>. That monograph drew from his earlier article, *The Bad Law of “Disparate Impact,”* 138 *Public Interest* 79 (Winter 2000), available at http://www.nationalaffairs.com/doclib/20080709_20001386thebadlawofdisparateimpactrogerclegg.pdf.

disproportion of some sort, then that's enough, even if the policy is nondiscriminatory by its terms, in its intent, and in its application. The defendant can prevail only by showing—to the satisfaction of a judge or jury who may know or care nothing of the defendant's needs—some degree of “necessity” for the policy.

Now, suppose that you are a potential defendant and that you have some nondiscriminatory selection criterion that has helped you run your business well, but the criterion has a disparate impact on some group. You know you are vulnerable to a lawsuit, which you may or may not win, depending on the judge or jury you draw, and you know that lawsuits are expensive, win or lose. If you don't want to get sued—and who does?—the potential of a disparate-impact lawsuit is going to push you to do one of several things, none of which is good. You might keep the criterion but apply it in a way that gets your numbers right—in other words, you will adopt surreptitious quotas. Or you might get rid of the criterion altogether, and just accept the fact that your business will not be run quite as well as it could be. Or you might decide to replace the old criterion with a new one, which you will choose and/or apply in a race-conscious way. You might, that is, now choose a criterion because of the racial outcomes that will result, or choose some criterion that can be applied in a biased way so that the resulting racial double standard will ensure that the numbers come out right. No matter what, you are no longer using the criterion you freely chose because you thought it to be the best, but are instead weighing race—directly or indirectly—in what you do.

In other words, we're supposed to stop judging people by the content of their character, and start judging them by the color of their skin. In addition to this moral dilemma, there is this overwhelming practical one: There is probably *no* selection or sorting criterion that doesn't have a disparate impact on some group or subgroup.

And here's the most fundamental point of all: If a business, agency, or school has standards for hiring, promoting, admissions, or offering a mortgage that aren't being met by individuals in some racial or ethnic groups, there are three things that can be done. First, the standards can be relaxed for those groups. That's what racial preferences do. Second, the government or aggrieved private party can attack the standards themselves. That's what the disparate-impact approach to enforcement does. Third, one can examine the underlying reason

why a disproportionate number of individuals in some groups aren’t meeting the standards—such as failing public schools or being born out of wedlock—and do something about *that*. But this option holds little interest on the political left.

Speaking of which, the Obama administration has made no secret of its love for disparate-impact civil rights enforcement, and has been aggressive in applying it to every imaginable situation. In employment, for example, the government complains if fire or police departments administer physical or written tests that have politically incorrect results,⁴⁰ or if companies use criminal background checks;⁴¹ in voting, it objects if voter ID is required;⁴² in education, it is hostile to school discipline policies if they have a disproportionate racial or ethnic result;⁴³ it has even insisted on drawing distinctions between acceptable and unacceptable pollution, depending on the skin color and national origin of those affected by the pollution.⁴⁴ The disparate-impact approach is also employed to require the use of a foreign language—on driver’s license exams, for example—on the theory that using only English might have a disproportionate effect on the basis of national origin.⁴⁵ And it has been used to pressure banks with regard to their lending requirements,⁴⁶ even though

⁴⁰ See, e.g., Roger Clegg, *The Obama Administration Sues the Jacksonville Fire Department*, National Review Online (Apr. 23, 2012), <http://www.nationalreview.com/corner/296812/obama-administration-sues-jacksonville-fire-department-roger-clegg>.

⁴¹ See, e.g., Roger Clegg, *EEOC Opposes Criminal Background Checks*, National Review Online (June 13, 2013), <http://www.nationalreview.com/corner/351011/eec-opposes-criminal-background-checks-roger-clegg>.

⁴² See, e.g., John Fund & Hans von Spakovsky, *Democrats Losing Long War against Voter ID*, Washington Examiner (Oct. 6, 2014), <http://www.washingtonexaminer.com/democrats-losing-long-war-against-voter-id/article/2554195>.

⁴³ See, e.g., Roger Clegg, *How the Obama DOJ’s School-Discipline ‘Guidance’ Will Hurt Well-Behaved Poor Kids*, National Review Online (Jan. 8, 2014), <http://www.nationalreview.com/corner/367901/how-obama-dofs-school-discipline-guidance-will-hurt-well-behaved-poor-kids-roger-clegg>.

⁴⁴ See, e.g., Roger Clegg, *Make Sure Your Pollution Is Racially Fair*, National Review Online (May 13, 2015), <http://www.nationalreview.com/corner/418327/make-sure-your-pollution-racially-fair-roger-clegg>.

⁴⁵ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁴⁶ See, e.g., Ari Karen, *How Disparate Impact Ruling Affects Lenders’ Daily Operations*, National Mortgage News (July 6, 2015), <http://www.nationalmortgagenews.com>.

many believe this to have been a contributing cause of the mortgage meltdown and the following recession.

*B. Under the Fair Housing Act in Particular*⁴⁷

While the points that will be made in this section obviously did not carry the day with the Supreme Court, they are useful as part of an analysis of Justice Kennedy's opinion—and, more important, because many of the points made here can still be made in future cases involving the use of disparate impact in other areas.

1. Text

Disparate-impact claims may now be brought under the Fair Housing Act, which applies not only to race, color, or national origin, but also to religion, sex, or familial status (that is, having children). This approach is flatly inconsistent with the Act's text. The text uses not only the phrase "because of" race but also "on account of" and "based on."⁴⁸ All of these phrases are naturally read to require a showing of motive or intent—that is, disparate treatment. The phrase "on account of" also appears in a section of the Act that bans coercion and intimidation of those exercising fair-housing rights, and intent is clearly implied there. The "because of" and "on account of" language also is used to delineate certain fair-housing violations as crimes, and criminal prosecutions cannot be based on a disparate-impact theory.⁴⁹ A construction of the Fair Housing Act that interprets a phrase one way in one section and another way elsewhere is implausible.

The disparate-impact approach renders superfluous many of those provisions in the statute regarding the disabled. For instance, the failure to make or allow "reasonable modifications" and "reasonable

com/news/regulation/how-disparate-impact-ruling-affects-lenders-daily-operations-1055261-1.html.

⁴⁷ The National Association of Mutual Insurance Companies submitted excellent testimony at congressional hearings on this issue in November 2013. A General Overview of Disparate Impact Theory: Hearing before the Subcomm. on Oversight & Investigations, House Comm. on Fin. Servs., 113th Cong. 110–33 (2013), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhr86686/pdf/CHRG-113hhr86686.pdf>.

⁴⁸ See 42 U.S.C. §§ 3604, 3631 (2012).

⁴⁹ Justice Alito's dissent makes these points. *Inclusive Communities*, 135 S. Ct. at 2533–37 (Alito, J., dissenting).

accommodations” could have been attacked under a disparate-impact theory without those provisions.

The federal government’s brief stressed three provisos—which, it was argued, were aimed at specific kinds of possible disparate-impact causes of action—to suggest that any other disparate-impact cause of action must be permissible. The three provisos specified that occupancy limits for dwellings were permissible, that conduct against people because they had convictions for the illegal manufacture and distribution of illegal drugs is not prohibited by the statute, and that real-estate appraisals may take into consideration factors other than race, color, national origin, etc. But in the first two instances the nonprotected characteristics are close enough to protected characteristics that Congress likely wanted to spell out what was and wasn’t protected a bit more. That is, drug crimes—which were especially unpopular when this proviso was enacted, another explanation for why politicians might have found it attractive to go on record against them—get close to the line of disability, since addiction is often viewed as a disability; likewise, occupancy limits get close to the line prohibiting discrimination on the basis of familial status. As for the exemption for real-estate appraisals, perhaps the appraiser lobby was really effective—that sort of thing happens sometimes, which is why good lobbyists are well-paid. In all events, according to the Supreme Court’s interpretation of the statute, now anyone can be liable under a disparate-impact cause of action except for real-estate appraisers—and what, exactly, is the logic in that? ⁵⁰

2. History

If there is no textual support for a disparate-impact cause of action in the original act or its 1988 amendments, and since, as Justice Alito noted, the act’s history points in the other direction as well, the remaining argument to support disparate impact in fair housing law is that many lower courts had recognized a disparate-impact cause of action under the original 1968 version of the Act. Congress thus implicitly endorsed the approach when it reenacted the statute in 1988 with full knowledge of those decisions.⁵¹

⁵⁰ The three provisos are discussed at greater length in the sources cited at note 12, *supra*. Justice Alito’s dissent also discusses them. *Id.* at 2541.

⁵¹ See, e.g., *id.* at 2537, 2540–41.

But, as Justice Alito also pointed out, Congress likewise knew that the Supreme Court had not resolved this question.⁵² During the summer of 1988, while the amendments were still before Congress, the Justice Department was arguing to the Supreme Court that it ought to grant certiorari in a Second Circuit case and rule against a disparate-impact approach. In other words, Congress could hardly be said to have been endorsing settled case law by passing the 1988 legislation, because no settled case law existed.

3. Deference

During the course of this litigation, the Department of Housing and Urban Development (HUD) did conveniently mint new regulations that endorse the disparate-impact approach, and the government argued that the Court should defer to the agency's interpretation of the statute. But, as Justice Alito's dissent discusses, there are very good reasons why these regulations are entitled to little deference. It is interesting, by the way, that the majority opinion does not give such deference as a reason for its decision.

First and foremost, the meaning of the statute is clear: only actual discrimination—"disparate treatment"—is banned. Further, the Fair Housing Act has been on the books since 1968, and during that time the executive branch has sometimes endorsed the disparate-impact approach and sometimes not. For example, President Reagan explicitly rejected the approach in signing the 1988 amendments to the Act,⁵³ and his Justice Department argued against it in a brief to the Supreme Court; the Bushes didn't think much of it, either. The Obama administration, on the other hand, was attempting to game the system here; it orchestrated a rather shady deal with the City of St. Paul to get it to withdraw an earlier term's petition for writ of certiorari that had been granted (the case had been fully briefed and was about to be argued), and meanwhile worked on promulgating new regulations. "We were afraid we might lose disparate impact in the Supreme Court because there wasn't a regulation," said Sara Pratt, a HUD official.⁵⁴

⁵² *Id.* at 2538–39.

⁵³ This is noted in Justice Alito's dissent. *Id.* at 2540–41.

⁵⁴ The shady circumstances were noted in both dissents. See *id.* at 2529 n.4, 2543 n.8; see also Mary Kissel, HUD's Shady St. Paul Dealings, *Wall St. J.* (Oct. 31, 2012), avail-

In any event, the principle of deference is trumped in this case by the “constitutional-doubt canon,” as Justice Scalia calls this long-honored principle in his book *Reading Law: The Interpretation of Legal Texts*.⁵⁵ The Supreme Court has repeatedly acknowledged—and that includes all nine justices in this case—that a statute mandating the disparate-impact approach also can encourage race-conscious decisionmaking; this of course raises serious constitutional issues. (Note that the racial classifications that the approach would require in the FHA are more constitutionally problematic than, say, the age classifications that the Court has accepted under the Age Discrimination in Employment Act.) The approach raises further constitutional problems here by altering the state-federal balance in far-reaching ways.⁵⁶ For example, it renders race-neutral state rules—such as rules for preserving order in public-housing projects—suspect. The approach will also result in federal micromanagement of insurance practices, which is at odds with the McCarran-Ferguson Act—a point emphasized in a recent federal district court decision striking down the HUD regulations.⁵⁷

4. Coherence

One would also expect that, if a statute contemplates use of the disparate-impact approach, it would answer some fundamental questions like how to measure the kind and degree of disparate impact that is required and what sort of rebuttal is needed.⁵⁸ But there’s none of that. What’s more, the resulting problems are myriad and severe.

able at <http://www.wsj.com/articles/SB10001424052970203707604578090581653496960>; NOMIC testimony, *supra* note 47, at 122, 124.

⁵⁵ “A statute should be interpreted in a way that avoids placing its constitutionality in doubt.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 247–51 (2012).

⁵⁶ See Roger Clegg & Ralph W. Kasarda, *Take the Mt. Holly Case*, National Review Online (June 7, 2013), <http://www.nationalreview.com/bench-memos/350506/take-mt-holly-case-roger-clegg-ralph-w-kasarda>.

⁵⁷ *American Insurance Ass’n v. HUD*, No. 13-00966 (RJL), 2014 WL 5802283 (D.D.C. Nov. 7, 2014).

⁵⁸ One of the amicus briefs filed in the case focused on the frequent misuse of statistics in disparate-impact cases. See Brief Amicus Curiae of James P. Scanlan, *Inclusive Communities*, 135 S. Ct. 2507 (2015) (No. 13-1371).

For example, what should decisionmakers do if a practice has a disparate impact in one location but not in another? It is astonishing to interpret a national civil rights statute in a way that makes conduct in one city illegal while allowing exactly the same conduct in another city, just because of the different racial makeup of the two cities. Or suppose the impact ebbs and flows over time? And what should landlords do if a policy (for instance, excluding violent felons as tenants) has an unfavorable disparate impact on *potential* tenants of a particular race, but is welcomed by the *incumbent* tenants who are predominately of that same race?

And what if a practice is favorable for some racial minority groups (say, Asian Americans) but not for others (say, Latinos)—and, what’s more, the opposite is at the same time true for some minority *sub*-groups (e.g., the practice is unfavorable for Hmong but favorable for Asian Americans more broadly)? Is there any way that a potential defendant could know that a policy will have a disparate impact on the basis of, say, religion (e.g., it turns out to favor most Jews over most Muslims)—and, here again, what if that policy’s disparate impact gets more complicated the more one delves into it (Shiites do well with it compared to Hasidim)? And remember, also, that “majority” groups—whites and men and Christians, for example—must be able to bring these lawsuits, too, or you’ve added an even greater equal-protection problem.

Thus, for example, in the mortgage lending context: (a) a foreclosure policy may have no disparate impact on a particular group in pre-recession 2006, but a severe one in 2009; (b) an income requirement may have no disparate impact on Latinos in Nashville but a severe one in Denver; and (c) the use of, say, credit scoring may have a disparate impact on Latinos but not Asians, even if there’s no disparate impact on Cubans but a severe one on the Hmong. Geographic disparities are especially problematic: Companies with identical policies in different locations could have very different liability risks, or the same company might be liable in one city but not in the other, but only if city-by-city data control rather than aggregate statistics.

There’s an even more fundamental problem, noted by Chief Justice John Roberts at oral argument⁵⁹ and in both the majority opinion⁶⁰

⁵⁹ See note 20, *supra*.

⁶⁰ Inclusive Communities, 135 S. Ct. at 2523.

and Justice Alito’s dissent⁶¹: It is often hard to say whether the impact a practice has on a group is adverse or not. In fact, all three cases that the Court has taken recently illustrate this. In *Magner v. Gallagher*, was it bad for African Americans that landlords who disproportionately rented to blacks were being cited for violating safety and health code requirements? In *Mount Holly v. Mount Holly Gardens Citizens in Action*, was the urban renewal there bad for African Americans?

And in the present case, is it bad for African Americans that low-income housing is being disproportionately located in black areas? Poor black people might prefer to have housing opportunities near where they already live rather than far away, and they could complain about the disparate impact of deliberately changing the system so that they had fewer such opportunities. Yes, social engineers might prefer that blacks relocate to white areas, but that goal of greater integration might also be met in some cities or counties by encouraging non-blacks (not just whites, but also Latinos and Asians) to live in black areas.⁶²

These problems make it difficult to decide not only whether there is a disparate impact in the first place, but also how to weigh properly the defendant’s rebuttal, which in the public housing context—versus, say, employment—will often involve balancing myriad and hard-to-quantify interests. That is, it is relatively straightforward to ask an employer how a selection criterion will help hire more productive employees. But the reason for a particular zoning decision, for example, might involve all kinds of considerations: health, safety, aesthetics, traffic, money, nonracial politics, you name it.⁶³

Two final points. First, it’s frequently asserted that we must allow “disparate impact” causes of action because actual discrimination—disparate treatment—is difficult to prove. Indeed, this is

⁶¹ *Id.* at 2548–49 (Alito, J., dissenting).

⁶² Soon after the oral argument before the Court, the chairman of another Texas organization—who appears to be just as committed to helping racial minorities and is also one of the case’s plaintiffs—published an op-ed complaining that what’s needed is more low-income housing in minority areas, not less. Richard Knight, Supreme Court Case Could Deprive Areas of Needed Low-Income Housing Credits, *Dallas Morning News* (Feb. 9, 2015), available at <http://www.dallasnews.com/opinion/latest-columns/20150209-richard-knight-supreme-court-case-could-deprive-areas-of-needed-low-income-housing-credits.ece>.

⁶³ Justice Alito makes a similar point in his dissent. 135 S. Ct. at 2549–50 (Alito, J., dissenting).

the principal justification for the disparate-impact approach.⁶⁴ But this is simply not true: The overwhelming majority of housing cases brought and won by the federal government are disparate-treatment cases, as anyone who reads the Department of Justice's press releases every day (as we do at the Center for Equal Opportunity) can attest. Within a month of the Court's decision, the Obama administration posted press releases about successful disparate-treatment housing cases—one involving "testers" (a particularly easy and available way to prove housing discrimination) and the other involving a defendant who had actually placed ads indicating illegal preferences.⁶⁵ And Justice Alito's dissent notes, correctly, "Disparate impact can be *evidence* of disparate treatment."⁶⁶

Relatedly, many on the other side argue that you need the disparate-impact approach in order to go after segregated housing patterns. These arguments, indeed, may have carried the day with Justice Kennedy.⁶⁷ But of course that's not true if the segregation stems from actual discrimination, proof of which can be reinforced by adducing the same sort of statistical evidence that is used in a disparate-impact case. But if there's no actual discrimination, then using the disparate-impact approach raises all the usual problems noted above. For example, how much racial balancing is to be required? What if the reasons for the racial imbalance reflect voluntary decisions or economic realities? What sort of remedies will be required (like deliberate assignments on the basis of race), and what if those remedies end up hurting people (including minorities) on

⁶⁴ It's odd for the government to argue for redefining an offense to make it easier to prove. It's as if the government were to say that, because it is hard for us to prove arson, we are going to make it a crime if you allow a building you own to burn down—even if you can prove that the building burned down by accident—since that way all we have to prove is that you owned the building and it did burn down, and that's easy.

⁶⁵ See Press Release, Dep't of Justice, Justice Department Obtains \$251,500 Settlement in Housing Discrimination Lawsuit Against Effingham, Illinois, Landlord (July 15, 2015), <http://www.justice.gov/opa/pr/justice-department-obtains-251500-settlement-housing-discrimination-lawsuit-against-effingham>; Press Release, Dep't of Justice, Justice Department Sues Nevada Housing Provider for Discriminating Against Families with Children (July 10, 2015), <http://www.justice.gov/opa/pr/justice-department-sues-nevada-housing-provider-discriminating-against-families-children>.

⁶⁶ *Inclusive Communities*, 135 S. Ct. at 2550 (Alito, J., dissenting) (emphasis in original).

⁶⁷ Justice Alito addresses these arguments at the end of his dissent. *Id.* at 2550–51.

the basis of race? And so on. Finally, if racial imbalances in housing patterns are a result of voluntary choices by individuals, then it’s unclear why the government needs to fix that situation.

IV. Going Forward

A. Litigation

While the Supreme Court’s ruling here is misguided, potential litigants should not lose sight of this counterintuitive fact: The law is actually better now than it was before Justice Kennedy wrote the opinion.

This is true partly because the bar was so low. All the courts of appeals to entertain this issue had adopted this approach, too, and the Obama administration and its allies in the civil rights establishment were already interpreting the law this way. So things could not have gotten a lot worse, no matter what the Court had done.

It is also true, however, that the law is now better because Justice Kennedy’s opinion recognizes that the disparate-impact approach can lead to very bad results. As the summary of the second part of the opinion above sets out, the Court has now set some limits on the law that will be useful. For example, Kennedy warns the lower courts against “second-guess[ing]” the nondiscriminatory reasons for challenged policies, requires a “robust causality requirement” rather than relying simply on racial disproportions, recognizes that “racial quotas” and “racial considerations” and “abusive . . . claims” can result from threatened and actual lawsuits, and cautions that any “remedial orders must be consistent with the Constitution.”⁶⁸ He all but says that he expects the plaintiffs to lose in this case. He even calls Justice Alito’s dissent, which of course makes similar points, “well-stated.”⁶⁹

Given that the Court was unanimous, then, in recognizing the constitutional problems and bad policy results that can arise from the disparate-impact approach, litigators should continue to press courts to reject or at least limit the approach. For example, the door is still open for courts to reject disparate impact under the Equal

⁶⁸ See *id.* at 2522–24.

⁶⁹ *Id.* at 2524.

Credit Opportunity Act,⁷⁰ to limit it under Section 2 of the Voting Rights Act,⁷¹ and to strike down disparate-impact regulations that have been promulgated under Title VI of the 1964 Civil Rights Act.⁷² Those regulations have been used, for example, to challenge school discipline, policing policies, and English-language requirements where they have a disproportionate effect on this-or-that racial or ethnic group.

Note that the approach that Justice Kennedy took in writing the majority opinion here is reminiscent of two employment discrimination cases decided in back-to-back terms in the late 1980s: *Watson v. Fort Worth Bank & Trust*⁷³ (in which Justice Kennedy did not participate) and *Wards Cove Packing Co. v. Atonio*⁷⁴ (in which he did). In *Watson*, the Court also decided to apply the disparate-impact approach to a new area—subjective employment practices—but a plurality then felt obliged to set out some limits on how that approach ought to be implemented, in order to avoid its abuse. A year later, in *Wards Cove*—in which Justice Kennedy joined Justice White’s opinion for the Court—a majority of the justices then endorsed those limitations.

The limitations in Justice Kennedy’s opinion now are similar to those laid out in *Watson* and, especially, *Wards Cove*; they are also what one would expect, given the nature of disparate-impact lawsuits and the potential abuse of them.⁷⁵ To begin with, simply point-

⁷⁰ See, e.g., Buckley Sander LLP, Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis (July 13, 2012), available at <http://www.bucklesandler.com/uploads/36/doc/disparateimpactwhitepaper.pdf>; Buckley Sander LLP, Disparate Impact under the Equal Credit Opportunity Act after Inclusive Communities (June 29, 2015), available at <http://www.lexology.com/library/detail.aspx?g=d472a830-c597-4da2-8ce8-801154360359>.

⁷¹ See, e.g., Roger Clegg & Hans A. von Spakovsky, “Disparate Impact” and Section 2 of the Voting Rights Act (Mar. 17, 2014), available at <http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act>.

⁷² The legal problems with Title VI regulations using a disparate-impact standard are set out in Letter from Roger Clegg & Edward Blum to Merrill Friedlander (Feb. 14, 2002), available at <http://www.ceousa.org/attachments/article/836/bilingual.comment.pdf>.

⁷³ 487 U.S. 977 (1988).

⁷⁴ 490 U.S. 642 (1989).

⁷⁵ In employment cases, the courts have also discussed a surrebuttal stage, where the plaintiffs can prevail if they can show that, while the defendant’s use of the challenged criterion is justified, there is some other criterion that will serve the defendant’s interests just as well and with less of a disparate impact. See, e.g., *Wards Cove*, 490

ing to raw statistical disparities ought not to be enough if the law is to be consistent with addressing actual discrimination and discouraging racial quotas. There must be “causation”—that is, a link must be shown between a particular challenged practice and the racially disproportionate results. Second, the defendant must have an opportunity to show that, even if challenged practice does lead to a disparity, its valid justifications mean that the practice should be allowed to stand. Defendants will want to argue, of course, that the justifications need not be a matter of dire necessity, but simply pursuant to a legitimate, nondiscriminatory interest. A third important element is whether the defendant’s burden here is one of *production* or actual *proof*. The general rule in civil litigation is the former, as indicated in Federal Rule of Evidence 301, and defendants should press for that rule.⁷⁶ Justice Kennedy’s opinion, while disappointing, has at least left the door open to defendants to try to make good case law on all three points.⁷⁷

U.S. at 660–61; see also 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012). This is dubious in the employment context (for one thing, it will always be the case that a criterion can be tweaked in some minor way that will improve the employer’s numbers). In the housing context, a surrebuttal process would be even worse, given the difficulty in quantifying the defendant’s interest. See Part III.B.4 at 181–82, *supra*.

⁷⁶ These three elements were also addressed by Congress in the legislation that was introduced and, in less extreme form, passed in the wake of *Wards Cove*. See Roger Clegg, A Brief Legislative History of the Civil Rights Act of 1991, 54 La. L. Rev. 1459 (1994). That legislation adopted a causation requirement, shifted the burden of proof to the defendant at the rebuttal stage, and largely punted on defining the rebuttal. The Court noted in *Wards Cove*, 490 U.S. at 660, that “proof” doesn’t always mean “persuasion,” which may come in handy given Justice Kennedy’s unfortunate use of the word “prove” (see Part II.A at 170, *supra*).

⁷⁷ Others have also noted these silver linings in Justice Kennedy’s opinion. See, e.g., Michael Foreman, *Texas Department of Housing v. Inclusive Communities Project: Two Steps Forward, One Step Back?*, CaseText (July 9, 2015), <https://casetext.com/posts/texas-department-of-housing-v-inclusive-communities-project-two-steps-forward-one-step-back>; ABA Banking Journal, *ABA Staff Analysis Explores Disparate Impact Ruling* (July 7, 2015), <http://bankingjournal.aba.com/2015/07/aba-staff-analysis-explores-disparate-impact-ruling>; Buckley Sander LLP, *Disparate Impact under the Equal Credit Opportunity Act after Inclusive Communities* (June 29, 2015), available at <http://www.lexology.com/library/detail.aspx?g=d472a830-c597-4da2-8ce8-801154360359>; Melanie Brodie et al., *The Supreme Court Recognizes but Limits Disparate Impact in its Fair Housing Act Decision*, JD Supra (June 29, 2015), <http://www.jdsupra.com/legalnews/the-supreme-court-recognizes-but-limits-45493/> (for a nearly identical version of this analysis that appeared earlier, see also Paul Hancock & Andrew C. Glass, *Symposium: The Supreme Court Recognizes but Limits Disparate*

B. Legislation

While much can be accomplished through litigation in stemming the abuses of the disparate-impact approach to civil rights enforcement, ultimately there is no substitution for action by Congress, which ought now to amend the Fair Housing Act. And, while at it, Congress should clarify that, in other contexts as well, the disparate-impact approach is invalid.

Most civil rights laws have no “disparate impact” provisions—rather, they prohibit actual disparate treatment—but they have been expanded to include disparate impact through agency interpretation and unwarranted court rulings. The FHA is, of course, a case in point. Thus, Congress should make clear that laws prohibiting discrimination do not extend to mere disparate impact.⁷⁸ The Center for Equal Opportunity (CEO) has drafted legislation, the “Civil Rights Clarification Act of 2015,” to do just that in a way that includes the FHA and a number of other statutes.⁷⁹

Note that our proposed legislation doesn’t include Title VII of the Civil Rights Act of 1964 or the Voting Rights Act of 1965, because they explicitly mention the disparate-impact approach or, at least, go beyond mentioning “disparate treatment.” Ideally, Congress should amend those two laws to eliminate those provisions. (Section 2 of the Voting Rights Act uses a “results” test, which is not as bad, though

Impact in Its Fair Housing Act Decision, SCOTUSblog (June 26, 2015), <http://www.scotusblog.com/2015/06/paul-hancock-fha>); Trey Garrison, Hurdles Remain for Disparate Impact Claims in Housing Despite SCOTUS Ruling, *Housing Wire* (June 26, 2015), <http://www.housingwire.com/articles/34319-hurdles-remain-for-disparate-impact-claims-in-housing-despite-scotus-ruling>; Robert N. Driscoll, A Win for Disparate Impact, but Not a Total Loss for Lenders, 19 No. 5 *Consumer Fin. Services L. Rep.* 2 (July 12, 2015), available at <http://www.mcglinchey.com/A-Win-For-Disparate-Impact-But-Not-A-Total-Loss-For-Lenders-07-12-2015>; Robert Helfand, Not-So-Sudden Impact: Insurers Face A New Breed Of Claim Under the Fair Housing Act (Part 2 of 3), *JD Supra Business Advisor* (Aug. 4, 2015), available at <http://www.jdsupra.com/legalnews/not-so-sudden-impact-insurers-face-a-58688>. There has already been an encouraging federal district court decision: *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-cv-09007-ODW(RZX) (C.D. Cal. July 17, 2015).

⁷⁸ Even before the Court’s decision, Rep. Scott Garrett of New Jersey had introduced H.R. 2577, an appropriations rider that passed the House and forbid any funds being used to enforce HUD’s disparate-impact regulation. It might also be possible to persuade (another) administration not to bring disparate-impact lawsuits, even if that administration has authority to do so.

⁷⁹ See Appendix A, *infra*.

it raises many of the same problems.) At the very least, Congress could amend these statutes to provide defendants with an affirmative defense against disparate-impact claims: Where a defendant can demonstrate its nondiscriminatory intent for conduct that resulted in a disparate impact, it should not be liable for discrimination based on a disparate-impact claim. Justice Scalia has hinted at such an approach, noting that while disparate impact might be “an evidentiary tool used to . . . ‘smoke out’ . . . disparate treatment,” existing laws that authorize disparate-impact claims “sweep too broadly . . . since they fail to provide an affirmative defense for good-faith [conduct].”⁸⁰ Indeed, “[i]t is one thing to free plaintiffs from proving an employer’s illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.”⁸¹ CEO has drafted legislation to this effect as well, calling it the “Good Faith Civil Rights Act of 2015.”⁸²

V. Conclusion

The disparate-impact approach to civil rights enforcement is untenable as a matter of law and policy. It second-guesses nondiscriminatory selection criteria and encourages race-based decisionmaking.

Those are disturbing abuses of federal power at the expense of liberty and limited federal government. As a general matter, the presumption should be that the decisions of private, state, and local actors are no business of the federal government; an exception can be made in extraordinary circumstances of, for example, racial discrimination, but the disparate-impact approach is used precisely when racial discrimination has *not* been shown. And the problem is compounded here since it will be the federal government that is encouraging racial discrimination.

While Justice Kennedy’s opinion for the Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* unfortunately now allows this approach under the Fair Housing Act, it recognizes the problems with it, leaving the door open to future litigation that limits this approach under that statute, as well as to litigation that challenges or limits the approach under other statutes.

⁸⁰ *Ricci v. DeStefano*, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring).

⁸¹ *Id.*

⁸² See Appendix B, *infra*.

And instead of leaving this matter to the courts and the uncertain course of future litigation, Congress should act to preclude or at least limit the disparate-impact approach.

Appendix A: Civil Rights Clarification Act of 2015

To amend the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Equal Credit Opportunity Act, the Age Discrimination in Employment Act, the Fair Housing Act, Title IX of the Education Amendments of 1972, the Equal Educational Opportunities Act of 1974, the Age Discrimination Act of 1975, the Immigration and Reform Control Act of 1986, and other Acts of Congress to clarify that certain provisions of such measures prohibit only disparate treatment, not conduct that has a disparate impact on covered persons without disparate treatment, and to clarify that rules and regulations issued under those provisions must not proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Civil Rights Clarification Act of 2015.”

SECTION 2. AMENDMENT TO EQUAL PAY ACT OF 1963.

PROHIBITION OF SEX DISCRIMINATION.—Section 3 of such Act (29 U.S.C. § 206(d)) is amended by adding at the end the following new subsection:

“(5) This subsection proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment. No regulation shall be issued to effectuate the provisions of this subsection that proscribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex.”

SECTION 3. AMENDMENT OF CIVIL RIGHTS ACT OF 1964.

(a) PLACES OF PUBLIC ACCOMMODATION.—(1) Section 201 of such Act (42 U.S.C. § 2000a) is amended by adding at the end the following new subsection:

“(f) Disparate treatment

“This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that

proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin.”

(2) Section 202 of such Act (42 U.S.C. § 2000a-1) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin.”

(b) **FEDERALLY ASSISTED PROGRAMS.**—(1) Section 601 of such Act (42 U.S.C. § 2000d) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the ground of race, color, or national origin and not conduct that has a disparate impact on the ground of race, color, or national origin without disparate treatment.”

(2) Section 602 of such Act (42 U.S.C. § 2000d-1) is amended by adding at the end “No such rule, regulation, or order shall be issued to effectuate the provisions of section 601 of this title (42 U.S.C. § 2000d) that proscribes conduct that has a disparate impact on the ground of race, color, or national origin but does not constitute disparate treatment on the ground of race, color, or national origin.”

SECTION 4. AMENDMENT TO AGE DISCRIMINATION IN EMPLOYMENT ACT.

PROHIBITION OF AGE DISCRIMINATION.—(a) Section 4 of such Act (29 U.S.C. § 623) is amended by adding at the end of the following new subsection:

“(n) Disparate treatment

“This section proscribes conduct that constitutes disparate treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment.”

(b) Section 9 of such Act (29 U.S.C. § 628) is amended by adding at the end “No such rule or regulation shall be issued to carry out this chapter that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age.”

SECTION 5. AMENDMENT TO EQUAL CREDIT OPPORTUNITY ACT.

CREDIT TRANSACTIONS.—(a) Section 701 of such Act (15 U.S.C. § 1691) is amended by adding at the end the following new subsection:

“(f) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) and not conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age without disparate treatment.”

(b) Section 703(a) of such Act (15 U.S.C. § 1691b(a)) is amended by adding at the end the following new subsection:

“(6) No regulation prescribed to carry out the purposes of this subchapter shall proscribe conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) but does not constitute disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).”

SECTION 6. AMENDMENT TO FAIR HOUSING ACT.

FAIR HOUSING.—(a) Section 804 of such Act (42 U.S.C. § 3604) is amended by adding at the end the following new subsection:

“(g) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, familial status, or national origin without disparate treatment.”

(b) Section 805 of such Act (42 U.S.C. § 3605) is amended by adding at the end the following new subsection:

“(d) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment.”

(c) Section 806 of such Act (42 U.S.C. § 3606) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin and not conduct that has a disparate impact

on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment.”

(d) Section 815 of such Act (42 U.S.C. § 3614a) is amended by adding at the end “No such rule made to carry out this subchapter shall proscribe conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin but does not constitute disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin.”

SECTION 7. AMENDMENT TO TITLE IX OF EDUCATION AMENDMENTS OF 1972.

PROHIBITION OF SEX DISCRIMINATION.—(a) Section 901 of such Title (20 U.S.C. § 1681) is amended by adding at the end the following new subsection:

“(d) This section proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment.”

(b) Section 902 of such Title (20 U.S.C. § 1682) is amended by adding at the end “No rule, regulation, or order of general applicability shall be issued to effectuate the provisions of section 901 of this title (20 U.S.C. § 1681) that proscribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex.”

SECTION 8. AMENDMENT TO EQUAL EDUCATION OPPORTUNITIES ACT OF 1974.

PROHIBITION OF DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY.—Section 204 of such Act (20 U.S.C. § 1703) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the basis of race, color, sex, or national origin but does not constitute disparate impact on the basis of race, color, sex, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the basis of race, color, sex, or national origin but does not constitute disparate treatment on the basis of race, color, sex, or national origin.”

SECTION 9. AMENDMENT TO AGE DISCRIMINATION ACT OF 1975.

PROHIBITION OF DISCRIMINATION BASED IN AGE.—(a) Section 303 of such Act (942 U.S.C. § 6102) is amended by adding at the end “This section proscribes conduct that constitutes disparate

treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment.”

(b) Section 304(a)(1) of such Act (42 U.S.C. § 6103(a)(1)) is amended by adding at the end “No general regulation shall be published to carry out the provisions of section 303 of this title (42 U.S.C. § 6102) that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age.”

SECTION 10. AMENDMENT TO IMMIGRATION AND REFORM CONTROL ACT OF 1986.

PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.—(a) Section 102(a) of such Act (8 U.S.C. § 1324b(a)) is amended by adding at the end the following new subsection:

“(7) Disparate treatment

“Paragraph (1) proscribes conduct that constitutes disparate treatment on the basis of national origin or citizenship status and not conduct that has a disparate impact on the basis of national origin or citizenship status without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has disparate impact on the basis of national origin or citizenship status but does not constitute disparate treatment on the basis of national origin or citizenship status.”

SECTION 11. APPLICABILITY TO OTHER ANTI-DISCRIMINATION LAWS.

For any and all Acts of Congress that are not expressly amended by this Act, which contain provisions that prohibit discrimination by proscribing conduct that constitutes disparate treatment but do not explicitly state that they proscribe conduct that has a disparate impact on covered persons without disparate treatment, those provisions shall not be construed to proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment, and no regulation shall be issued to effectuate those provisions that proscribes conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

Appendix B: Good Faith Civil Rights Act of 2015

To amend the Civil Rights Act of 1964, as amended, and the Voting Rights Act of 1965, as amended, to allow nondiscriminatory intent as an affirmative defense in claims brought under those statutes that do not allege disparate treatment.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Good Faith Civil Rights Act of 2015.”

SECTION 2. AMENDMENT TO THE CIVIL RIGHTS ACT OF 1964, as amended.

In any action brought under 42 U.S.C. §§ 2000e-2(k), no respondent shall be found liable if it can demonstrate that the challenged practice was neither adopted with the intent of discriminating on the basis of race, color, religion, sex, or national origin nor applied unequally on the basis of race, color, religion, sex, or national origin.

SECTION 3. AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965, as amended.

- (a) For any allegation or part thereof under 42 U.S.C. § 1973 that does not assert discriminatory intent, no defendant shall be held liable if it can demonstrate that the challenged voting qualification or prerequisite to voting or standard, practice, or procedure was neither adopted with the intent of discriminating on the basis of race, color, or membership in a language minority group nor applied unequally on the basis of race, color, or membership in a language minority group.
- (b) In any matter or part thereof before the Attorney General or the United States District Court for the District of Columbia under 42 U.S.C. § 1973c in which discriminatory intent is not at issue, the State or subdivision shall not be prevented from enacting or administering any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, if it can demonstrate that in making a change, it lacks an intent to discriminate on the basis of race, color, or membership in a language minority group.