The Power of the Supreme Court’s Decision in the Fair Housing Act Case, *TDHCA v. ICP*

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Courts and commentators will have much more to say about the significance of the U.S. Supreme Court’s June 25, 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project (*TDHCA v. ICP*). I believe it makes three enormously important contributions to the law and policy governing housing discrimination and segregation.

The three contributions regard residential racial segregation, disparate impact, and the Low Income Housing Tax Credit program. Although the case went to the Supreme Court as a challenge to disparate impact as a basis for liability and usually is discussed in that context, I think the ruling’s implications for residential segregation are even more important, so I discuss those first.

1. Residential Racial Segregation

The opinion does three important things with respect to residential racial segregation: it identifies integration as a purpose of the Fair Housing Act (FHA); it indicts federal, state, and local governments for causing and exacerbating residential racial segregation; and it affirms the obligation to advance integration.

The Fair Housing Act does not use the words “integration” or “segregation.” The legislative history, early Supreme Court decisions, and many opinions from the courts of appeals identify residential racial integration as a purpose of the statute, but there has not been a recent Supreme Court acknowledgment of this. This decision provides that acknowledgment and reaffirmation.

The Court underscores the contemporary significance of the Kerner Commission report, which “identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of . . . social unrest” and “found that both open and covert racial discrimination prevented black families from . . . moving to integrated communities.” (Slip opinion 6.) The Commission recommended enactment of a fair housing act “[t]o reverse ‘[t]his deepening racial division . . . .’” (Sl. op. 6.) Congress enacted the FHA “to resolve the social unrest in the inner cities.” (Sl. op. 7.) The Court concludes its opinion by writing of our “striving to achieve our ‘historic commitment to creating an integrated society,’” admonishing (Sl. op. 24, emphasis added): 

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 unequal.” . . . *The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.*

The Court also acknowledges the role of federal, state, and local governments in creating this racial division. On this point, even the dissent agrees, citing “the country’s shameful history of segregation and de jure housing discrimination . . . .” (Dissent of Justice Alito, Sl. op. 10.) The majority’s review cites work by Michael Klarman, Kenneth Clark, and a group of Housing Scholars who filed a brief *amicus curiae* in the case.

The Court says that the FHA makes unlawful “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.” (Sl. op. 17.) Indeed, the Court states that “[s]uits targeting such practices reside at the heartland of disparate-impact liability” and cites three archetypal cases in which Huntington, NY, Black Jack, MO, and St. Bernard Parish, LA were held liable for such practices. (Sl. op. 17, emphasis added.) The Court says that the FHA enables litigants “to counter unconscious prejudices and disguised animus that escape easy classification as disparate treatment,” to “stop . . . municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units,” to “prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.” (Sl. op. 17-18.)

The Court notes that while *de jure* residential racial segregation has been declared unconstitutional, “its vestiges remain today, intertwined with the country’s economic and social life.”

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encompasses disparate impact claims is a welcome confirmation for civil rights advocates. It is especially significant that the Court’s decision rested on an interpretation of the statute, not on deference to the HUD regulation. The Court’s holding relied on the FHA’s “results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA [Age Discrimination in Employment Act], Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.” (Sl. op. 23.)

An important aspect of the opinion is the recognition that the disparate impact standard helps to identify intentional discrimination that is not overt. As the Court says, disparate impact liability “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” (Sl. op. 17.) The decision’s recognition of “unconscious” or implicit bias will enable advocates to “prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.” (Sl. op. 18.)

The Court had not agreed to decide the question about what standards or burdens of proof should apply in disparate impact cases. The Fifth Circuit Court of Appeals had held that the district court should apply the burden-shifting standards in the HUD regulation. The Supreme Court, quoting the employment discrimination standard, said that “Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers’ . . . ” so that governmental priorities “can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.” (Sl. op. 18.) Plaintiffs must “allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection” between the defendants’ policy or policies and the disparity. (Sl. op. 20, 21.) Defendants have to “state and explain the valid interest served by their policies” (Sl. op. 18) and must “prove [each policy] is necessary to achieve a valid interest.” (Sl. op. 19.) This seems to me a restatement of existing law — the consensus of the courts of appeals in FHA cases and the HUD regulation. On remand in this case and in other cases, the courts will sort out whether this is the case.

### 3. The Low Income Housing Tax Credit Program

The third aspect of the decision that seems to me very important is its implications for the Low Income Housing Tax Credit (LIHTC) program, the largest subsidized housing production and rehabilitation program in the United States. The Court said that “this case involves a novel theory of liability.” (Sl. op. 18, citing Seicschnaydre, 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, 360-363 (2013)). Studies of the LIHTC program elsewhere have shown the same pattern as that of which ICP complains in this lawsuit: a disproportionate allocation of tax credits for family units to minority-concentrated, high-poverty, under-resourced neighborhoods with substandard schools, environmental hazards, inadequate employment opportunities, unsafe and unhealthy conditions. (See, Affordable Housing, Racial Isolation, Editorial, The New York Times, June 29, 2015.) State housing finance agencies administer the LIHTC program under the jurisdiction of the Department of the Treasury. Treasury, HUD, and the state housing agencies are obligated to eschew actions that discriminate against minorities and actions that perpetuate segregation; they also are obligated by the FHA affirmatively to further the policies and purposes of the FHA, which include “moving toward a more integrated society.” (Sl. op. 24.)

Advocates for inclusionary housing policies should make strong use of this Supreme Court opinion to induce local, state, and federal agencies to take...
effective action “to achieve our ‘his-
toric commitment to creating an inte-
grated society’ . . . .” (Sl. op. 24.)
In this process, “race may be consid-
ered in certain circumstances and in a
proper fashion.” (Sl. op. 22.) The
Supreme Court has encouraged “pri-
vate developers to vindicate the FHA’s
objectives and to protect their prop-
erty rights by stopping municipalities
from enforcing arbitrary and, in prac-
tice, discriminatory ordinances barring
the construction of certain types of
housing units.” (Sl. op. 17.) When
state and local governments block de-
developers’ proposals for family LIHTC
developments in high opportunity ar-
eas, those agencies will have “to state
and explain the valid interest served
by their policies.” (Sl. op. 18.) They
must “prove [the policy] is necessary
to achieve a valid interest.” (Sl. op.
19.) Merely uttering the word “revi-
talization” will not satisfy the LIHTC
statute’s reference to housing that con-
tributes to “a concerted community
revitalization plan.” As the district
court in this case indicated in its re-
medial order, the FHA counsels en-
dovery of family units in “neighbor-
hoods with good schools and disqualif[i]cation of sites that are lo-
cated adjacent to or near hazardous
conditions, such as high crime areas or
landfills.” (Sl. op. 3.) As advoca-
tes press these points with govern-
ment agencies, we may hope that the
Supreme Court’s opinion in TDHCA
v. ICP will lead these agencies affir-
matively to obey the command of the
Fair Housing Act before that statute
marks its 50th anniversary.

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change the demographics of the
classroom or school. This con-
cern could also be diminished if
No Child Left Behind require-
ments continue to be weakened
or if the reauthorization of ESEA
focused more attention on diver-
sity goals.
• Rather than the current punitive
labels, accountability systems
could reward districts and
schools for taking steps to be-
coming more diverse and im-
proving regional equity. This
may mean providing some re-
prieve for districts and schools
that receive students in terms of
labeling and sanctions or it could
mean providing schools that
have intentionally targeted at-
tracting diverse populations with
a special designation as a “Di-
versity School.” Providing this
designation on students’ high
school transcripts may provide an
advantage in an increasingly
competitive college admissions
environment and could poten-
tially attract both urban and sub-
urban families.

Concluding Thoughts

The programs that we studied have
worked hard, often against strong po-
itical and educational pressures, to
reduce inequities related to educational
access and opportunity in their metropoli-
an areas, though none have been able to stem the tide of growing racial
and socio-economic inequality. As a
result, at this point in time, state or
federal policy action is critical to not
only support these policies across the
country but also to foster the creation
of similar efforts in other metropoli-
an areas. Importantly, it is only with
the intentional focus on policies that
foster regional educational equity both
through schooling as well as through
broader policies to reduce racial and
socioeconomic isolation of families
(i.e., through affordable housing, eq-
uitable transit and workforce develop-
ment) that the urban school “crisis”
can be addressed, and that opportunity
can be improved for all youth.

Resources

Most Resources are available directly from the issuing
organization, either on their website (if given) or via
other contact information listed. Materials published by
PRRAC are available through our website:
www.prrac.org

Race/Racism

• “Black Girls Matter: Pushed Out, Overpoliced, and
Underprotected” (2015, 29 pp.), by Kimberlé Williams
Crenshaw, with Priscilla Ocen and Jyoti Nanda, for the
African American Policy Forum & Center for
Intersectionality and Social Policy Studies. Available at
www.aapf.org

• “Spotlighting the Work of Women in the Civil
Rights Movement’s Freedom Rides” By Anna Holmes
provides a detailed narrative of SNCC’s journey. The
article can be found at portside.org

• “A Social and Racial Justice Press by People of
Color” has been launched by Justice Matters Press. More
information can be found at justicematters.press

• “Black Lives Matter” by Resist examines the Black
Lives Matter movement, social impact, and vision for the
future. More information can be found at resist.org

• “Photographing Freedom: A Photographic Memoir
of the Civil Rights Movement”: Inf. from