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What We're Talking About When We Talk About Disparate Impact

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On Wednesday, January 21, the Supreme Court will hear arguments in ***Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.***, one of the most important civil rights cases of the 2014-2015 Supreme Court term. Via this case, the Justices will decide whether disparate impact claims – that is, claims where members of a protected class are disproportionately affected, but where intent to discrimination cannot be proven – are cognizable under the Fair Housing Act.

Much has been written on the text, legislative history and case law that supports the validity of disparate impact analysis under the Fair Housing Act. Indeed, as pointed out by many, in the Fair Housing Act's over 45 year history, every circuit that has examined the issue has either assumed or decided that such claims are cognizable under the FHA. The Department of Housing and Urban Development also weighed in last year, issuing a rule that clarifies the burden-shifting structure of such claims. What is less examined, however, is *why* disparate impact analysis matters, not just as a litigation strategy, but as a behavior-modifier and as a moral imperative.

Housing segregation was not just sanctioned, but explicitly enforced by public and private actors in our country for over 200 years. During that time, minorities were systematically denied not just access to housing, but access to all of the benefits that flow from housing opportunities: educational opportunities, economic centers, healthy food, clean air, government services and many other critical threads in the fabric of American life.

After over 200 years of enforced segregation, housing discrimination has been prohibited for only 45 years. Housing discrimination has been outlawed for *less than one quarter* of this country's history. To say that prohibiting acts of intentional discrimination alone can reverse the ill-effects of our country's long relationship with housing segregation is a fallacy.

I am wary to use an analogy from the realm of physics, given my struggles with that course in high school. That said, I do recall Newton's Principle stating that a body in motion tends to stay in motion unless acted on by an outside force. Here, the "body in motion" is a boulder shaped from over 200 years of housing discrimination. That boulder has run over minority communities, denied educational opportunities, and thwarted efforts to fully participate in American society. Drafters of the Fair Housing Act hoped that the Act would be a powerful "outside force," aimed at reversing the harms of segregation. One of the Act's principle sponsors, Walter Mondale, **famously stated** that the Act's goal was to replace ghettos with "truly integrated and balanced living patterns." If the Supreme Court guts the Fair Housing Act by requiring proof of *intent* to discriminate (as opposed to proof that an act with a discriminatory effect occurred where a less discriminatory alternative was available), the Fair Housing Act will remain a useful tool in ferreting out those with intent to discriminate, but it will have little chance to address the real ills of segregation.

Proving disparate impact is not easy, and it shouldn't be. But litigants who can show that a facially-neutral decision impermissibly furthers segregation or disproportionately disadvantages the very people the framers of the Fair Housing Act sought to protect should, at the very least, have their day in court.