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A Message from Ted Rood:

"Sometimes the best intentions aren't enough!"

Results Trump Intentions in Supreme Court's Fair Housing Ruling

It was buried by the release of the Supreme Court's decision upholding a portion of the Affordable Health Care Act, but the Court today also upheld an important feature of the **Fair Housing Act** (FHA). The Court, in its usual five-four fashion held that "disparate-impact" is enough to prove discrimination in housing.

The case, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, the State of Texas* was originally filed in 2008 by Inclusive Communities (ICP) a fair housing organization in Dallas. It sued the state agency (Texas) alleging that the state had disproportionally awarded the most important federal tax credits for low income housing in areas that already had a large populations of both poor and black residents. The plaintiffs claimed that the state's **method of scoring applications** for those credits and thus the subsequent awards helped keep those residents from moving into mostly white areas.

This, it was charged, was a violation of the Fair Housing Act which bars housing discrimination. Over the last 40 years a number of suits brought to various courts have held that plaintiffs had only to prove that an action had a "disparate-impact" on a protected group rather than that the action itself had been discriminatory. The State of Texas argued that Congress had, since its passage, changed the Fair Housing Act and had they wished to implicitly endorse **disparate impact** as part of the law they could have done so.

The District Court ruled in favor of ICP, concluding that ICP had established evidence showing disparate impact and the Texas had **failed** to meet the burden to show there were no less discriminatory alternatives for allocating the tax credits.

While Texas's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating claims. The Fifth Circuit Court held that while disparate-impact claims are recognized under FHA the District Court had improperly required Texas to prove less discriminatory alternatives.

National Average Mortgage Rates



Mortgage News Daily

	Rate	Change	Points
30YR Fixed	7.51%	+0.01	0.00
15YR Fixed	7.04%	+0.01	0.00
30YR FHA	7.08%	+0.03	0.00
30YR Jumbo	7.52%	+0.02	0.00
7/6 SOFR	7.12%	-0.01	0.00
30YR VA	7.10%	+0.03	0.00

Rates as of: 11/16

MBS and Treasury

	Price / Yield	Change
MBS UMBS 6.0	98.71	+0.01
10 YR Treasury	5.1266	-0.0076
30 YR Treasury	5.4758	0.0000

Pricing as of: 11/16 7:22PM EST

Recent Housing Data

		Value	Change
Mortgage Apps	Nov 4	204.6	+6.23%
Building Permits	Sep	1.4M	+0.43%
Housing Starts	Sep	1.22M	-4.24%
New Home Sales	Sep	676K	-1.17%
Pending Home Sales	Aug	71.2	0%
Existing Home Sales	Oct	3.99M	+0.25%
Builder Confidence	Oct	29	-9.38%

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Today's decision, written by Justice Kennedy held that both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA) were **relevant to the case** as both authorize disparate-impact claims. Kennedy cited specific language from the FHA; "it is unlawful to 'refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race' or other protected characteristic, §804(a), or "to discriminate against any person in' making certain real-estate transactions "be- cause of race" or other protected characteristic, §805(a)." The results-oriented phase "otherwise make unavailable" he said, refers to the consequences of an action rather than the actor's intent and this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language.

In all three statutes the operative text focuses on **results** (as opposed to intentions) and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is **even more compelling** because Congress passed the FHA only four years after Title VII and four months after the ADEA and Congress chose words with the same purpose and meaning but to be consistent with FHA's structure and objections.

Kennedy ruled further against the Congressional intent claim saying the changes made by Congress in 1988 signal its ratification of such liability. Congress knew that all nine Courts of Appeals had addressed the disparate-impact claims and concluded that any additional changes by them would have been superfluous.

Disparate-impact is also consistent with the law's central purpose, to eradicate discriminatory practices within the housing sector. "Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability." It permits plaintiffs to **counteract unconscious prejudices** and disguised animus that escape easy classification as disparate treatment.

Kennedy said however that disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise such as imposing liability solely on a showing of a statistical disparity. In this case, however the underlying dispute involves a novel theory of liability that is simply an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. This puts an onerous burden on actors who encourage revitalizing dilapidated housing merely because some other priority might seem preferable. A claim must also point to a defendant's policy as a robust causality requirement. "Policies, whether governmental or private, are **not contrary** to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." Interpretations of disparate-impact liability should not be so expansive as to inject racial considerations into every housing decision; limitations are necessary to protect defendants against abusive claims.

Courts, when finding liability under disparate-impact, must issue remedial orders that are constitutionally consistent, concentrating on the elimination of the offending practice. Courts must also strive to design **race-neutral remedies**, avoiding orders that impose racial targets or quotas.

Kennedy concluded that the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers but race may be considered in certain circumstances and in a proper fashion. Local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools. Mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."

Justice Kennedy was joined in the decision by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Thomas filed a dissenting opinion as did Justice Alito. Chief Justice Roberts and Justice Scalia joined in the Alito dissent.

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Responsive service, experienced expertise

I've dedicated my 26 year mortgage career to client education, superior service, and honest answers. The lending landscape has changed dramatically the past few years, and continues to do so. My job is to ensure client partners' loans close quickly, without surprises, and I take that responsibility very seriously. Referrals are a responsibility I appreciate; they're a measure of trust, and that trust must be earned every day, on every referral.

Ted Rood 

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