Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act

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I. INTRODUCTION

Housing, and in particular affordable housing, is a critical element of urban revitalization for at least two reasons. First, the placement and design of a revitalized community will depend on the extent that it is residential and affordable in nature. Second, the availability of financial resources may depend, at least to some degree, on whether affordable housing is part of the overall revitalization effort.[1]

Both the placement question and the finance question have been part of the affordable housing and community revitalization dialog for many years. Some have argued that the emphasis should be on community development strategies that upgrade the places where people are already living; others have argued that mandates of justice dictate residential integration and changing where people can choose to live.[2] In my view, it is necessary to determine which

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1. *See* J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. OF LAW & SOC. JUST. 101 (2010) (discussing project financing using low-income housing tax credits).

2. One community development goal encourages investment in low-income communities, thus "making separate equal." *See* Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L.

REV. 555, 555, 557–58 (2008) (noting the 1968 Kerner Commission report's declaration that the country was "moving toward two societies, one black, one white—separate and unequal"; stating that the progressive fair housing and community development movements "have seemed to operate in parallel universes and, at worst, have reflected tension and even conflict that belie their common commitment to social and racial justice[,]"; and arguing that this is a false dichotomy that must be overcome). Another view encourages geographic desegregation. *See* Owen M. Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua Cohen, et al. eds., 2003). These issues predate the 1968 Fair Housing Act. *See* THURSTON CLARKE, THE LAST CAMPAIGN: ROBERT F. KENNEDY AND 82 DAYS THAT INSPIRED AMERICA 258–60 (2008) (comparing Eugene McCarthy's and Robert Kennedy's urban plans); ARTHUR MEIER SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 785–89 (1978) (discussing Kennedy's Bedford-Stuyvesant plan). For a historian's perspective, see THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 181–209 (1996). *See also* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Program*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005) (noting that the most important low-income housing development programs are largely unregulated from a civil rights perspective; stating that this reflects a growing emphasis on community revitalization strategies (upgrading the places where disadvantaged people are already living) while efforts to promote residential integration (changing where people can and do choose to live) have faced repeated and seemingly intractable obstacles). Xavier de Souza Briggs argues that public debate over housing policy tends to ignore a "crucial distinction":

> Framed as a question of strategy, the distinction is this: Should we emphasize reducing *segregation* by race and class (through what I term 'cure' strategies), or should we emphasize reducing its terrible *social costs* without trying to reduce the extent of segregation itself to any significant degree (via 'mitigation' strategies)? Put differently, should we invest in changing where people are willing and able to live, or should we try to transform the mechanisms that link a person's place of residence to their opportunity set? . . . For ethical and practical reasons, it is hard to imagine choosing one strategy, always and everywhere, instead of the other . . . .

Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310, 329 (Xavier de Souza Briggs ed., 2005). In a more positive vein, although building subsidized housing in high-poverty neighborhoods may initially heighten poverty concentration, it can be argued that over time there will be a lessening of poverty concentration as neighborhoods improve

approach is to be taken, or more likely to determine the appropriate balance between the two approaches, as part of any overall community revitalization plan. As with other discussions of this nature, the law plays a significant role in resolving affordable housing siting questions, raising questions involving both the Fourteenth Amendment's Equal Protection Clause and the Fair Housing Act of 1968 ("FHA").

In order to claim that the siting of housing violates the Constitution's Equal Protection Clause, a plaintiff must be a member of a constitutionally protected class and must plead, and ultimately prove, that the complained-of action or inaction constituted "disparate treatment" resulting from a "[racially] discriminatory purpose."[3] Stated differently, an Equal Protection Clause claim cannot be based on disproportionate effect absent a showing of intent. Since most actors have the sophistication to avoid announcing their discriminatory intent, proof of intent generally relies on circumstantial evidence.[4] Proving intent is thus exceedingly difficult, and housing discrimination cases generally cannot be brought as a constitutional matter. In addition, discriminatory practices often occur due to structural, systematic causes, entirely without specific intent; in such cases, a disparate treatment claim would fail.

Based on the general unavailability of equal protection claims in the housing arena, the focus of this article is on the FHA, particularly on the application of the disparate impact theory under

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and higher-income people move into them. In this view, the LIHTC program is a tool for both neighborhood revitalization and neighborhood integration.

3. See *Washington v. Davis*, 426 U.S. 229, 238–39 (1976), for a discussion on employment discrimination. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), for a discussion of plaintiff's burden in cases alleging housing discrimination.

4. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), the Supreme Court adopted a burden-shifting analysis which, in order to prove discriminatory intent, plaintiffs must disprove legitimate reasons offered by the defendant for the defendant's actions. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–56 (1981) (holding that a defendant need only "articulate legitimate, nondiscriminatory reason" to rebut an allegation of intent. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993) (explaining that even if trial court disbelieves defendant's offered legitimate purpose, verdict does not automatically follow).

the FHA. Courts have recognized that statutory claims can be brought under the FHA using a disparate impact theory, which directs tribunals to consider the racial effects of facially neutral, unintentional practices.[5] In a disparate impact case, the plaintiff does not need to show intentional discrimination.[6] Instead, the plaintiff needs to demonstrate that the defendant has engaged in practices that have a "disproportionately adverse effect on minorities" or other statutorily protected group and show that the practices or policies are not justified by a legitimate governmental rationale.[7] Given the infirmity of constitutional discrimination claims, if there were no disparate impact basis, there would likely be significantly fewer civil rights claims brought under the FHA. Historically, all federal appellate courts have recognized claims for FHA violations under a disparate impact theory.[8] Since the courts of appeals were unanimous in the conclusion that the FHA can be violated through disparate impact, there was concern that the United States Supreme Court's repeated acceptance of these cases on *certiorari* indicated that the Court was likely to reverse the field and hold that disparate impact claims are not cognizable under the FHA.[9] It did not do so, as the next part of this article demonstrates.

II. THE *INCLUSIVE COMMUNITIES* CASE

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[10] the Inclusive Communities

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5. See *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), for a decision regarding employment discrimination. For a decision regarding housing discrimination, see *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). A recent Supreme Court case limited Title VII's disparate impact doctrine with respect to employment discrimination, and created concern whether the doctrine ultimately could withstand constitutional scrutiny. Ricci v. DeStefano, 557 U.S. 557, 584–85, 593 (2009).

6. *See Ricci*, 557 U.S. at 577.

7. *Id.*

8. Most of the appellate cases are cited in *Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc*. (*Inclusive Cmtys. Project III*), 135 S. Ct. 2507, 2519 (2015).

9. *See* Twp. of Mount. Holly v. Mount Holly Gardens Citizens in Action, Inc., 658 F.3d 375, *cert. granted*, 133 S. Ct. 2824 (2013); Magner v. Gallagher, 636 F.3d 380, *cert. granted*, 132 S. Ct. 548 (2011).

10. 132 S. Ct. 2507.

Project ("ICP"), a nonprofit corporation that promotes housing integration in the Dallas area, alleged that the Texas Department of Housing and Community Affairs ("TDHCA") violated FHA sections 804(a)[11] and 805(a)[12] by allocating too many low-income housing tax credits ("LIHTC") for housing in inner-city neighborhoods and too few for housing in suburban neighborhoods.[13] ICP argued that TDHCA's allocation plan ceased to prioritize the goal of desegregation and caused minorities to be segregated in poor areas of Dallas.[14] TDHCA argued that it legitimately prioritized high-poverty neighborhoods, which often require investment and may have outdated housing stock.[15] The district court accepted ICP's statistical evidence of a disparity in LIHTC allocations and concluded that ICP had established a prima facie disparate impact case.[16] The district court then shifted the burden to TDHCA to

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11. Section 804(a) provides that it shall be unlawful: "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2014).

12. Section 805(a) provides: "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a tion, [533] or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2014).

13. *Inclusive Comtys. Project III*, 135 S. Ct. at 2514; *see* Callison, *supra* note 1, at 231–33 (discussing LIHTC allocations). From 1989 to 2008, TDHCA allocated LIHTCs for 49.7% of proposed non-elderly housing projects in areas where white individuals and families made up less than 10% of the population, while allocating LIHTCs for 37.4% of non-elderly housing projects in areas where more than 90% of the population was white. In Dallas, 92.29% of all housing units built using LIHTC financing were located in majority-minority census tracts. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2514.

14. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2514.

15. Inclusive Cmtys. Project Inc. v. Tex. Dept. of Hous. & Cmty. Affairs (*Inclusive Cmtys. Project I*), 860 F. Supp. 2d 312, 319 (N.D. Tex. 2012). Building low-income housing in high-poverty neighborhoods arguably perpetuates segregation by economic class, and ICP argued that it perpetuated racial segregation as well.

16. *Inclusive Cmtys Project III*, 135 S. Ct. at 2514. The district court also held that ICP failed to prove its intentional discrimination claims. *Inclusive Cmtys. I*, 860 F. Supp. 2d at 319.

prove that its stated interests in the allocation were legitimate and that there were no less discriminatory alternatives available.[17] The court assumed the legitimacy question but held that TDHCA failed to prove there were no less discriminatory alternatives to the challenged allocations.[18] The court subsequently issued a remedial order requiring TDHCA to add additional selection criteria for its LIHTC allocations, including awarding points for projects constructed in neighborhoods with good schools and disqualifying projects located in high crime areas.[19]

On appeal, the Fifth Circuit Court of Appeals assumed that ICP established its *prima facie* case and addressed only the issue of whether the trial court had applied the appropriate burden-shifting standard to TDHCA.[20] The appellate court noted that different appellate courts had applied different standards and that following the district court's decision HUD had issued fair housing regulations setting forth a burden-shifting standard.[21] The Fifth Circuit adopted HUD's approach and remanded the case so that the trial court could consider and apply the HUD regulations.[22]

The concurring opinion stated that, on remand, the trial court also "should reconsider the State's forceful argument that [ICP] did not prove a facially neutral practice that caused the ob-

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17. Inclusive Cmtys. Project, Inc. v. Tex. Dept. of Hous. & Cmty Affairs (*Inclusive Cmtys. Project II*), 747 F.3d 275, 279–81 (5th Cir. 2014).

18. *Id.* at 279–80.

19. *Id.* at 280.

20. *Id.* at 280–81.

21. *Id*. at 280–282; *see* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (to be codified at 23 C.F.R. pt. 100). The HUD regulations interpret the FHA to encompass disparate impact liability and establish a burden-shifting framework for disparate impact claims. *Id.* A plaintiff must first make a prima facie case of disparate impact and cannot make such a case if a statistical discrepancy is caused by factors other than the defendant's practice. *Id.* After a plaintiff makes a prima facie showing, the burden shifts to the defendant to show that the challenged practice is necessary to achieve one or more substantial, legitimate and nondiscriminatory purposes. *Id.* The plaintiff can then present evidence that the same purposes can be accomplished without discriminatory effect. *Id.* Although the *Inclusive Communities* decision generally follows the approach taken in the HUD regulations, it is not grounded in deference to the regulatory agency. *Inclusive Cmtys. Project II*, 747 F.3d at 282.

22. *Inclusive Cmtys Project II*, 747 F.3d at 282–83.

served disparity" in LIHTC allocations.[23] It noted that Supreme Court employment discrimination decisions had required more than statistical evidence of a disparity to establish a prima facie case and to shift the burden, and that "plaintiff must specifically identify the facially neutral policy that caused the disparity" in order to avoid dismissal of the case.[24] The concurring opinion also noted that there are numerous criteria for allocating LIHTCs and that the allocation process is "anything but simple."[25] In particular, the concurrence stated that the LIHTC statute advantages projects "located in low income census tracts or subject to a community revitalization plan" and that ICP essentially seeks "a larger share of the fixed pool of tax credits at the expense of other low-income people who might prefer community revitalization."[26] As will be seen, the concurring opinion heavily influenced the Supreme Court's ultimate decision.

The United States Supreme Court granted *certiorari* to review the following question: "Whether disparate impact claims cognizable under the Fair Housing Act?"[27] Writing for a 5-4 majority, Justice Kennedy applied traditional canons of statutory interpretation to conclude that disparate impact claims are legally cognizable but also noted important limitations on the use of disparate impact theory that demonstrate the Court's current conception of the relationship between race and law.[28]

With respect to cognizability, TDHCA argued that statutory differences between the Age Discrimination in Employment Act ("ADEA"), which the Court previously held supports disparate impact liability, and the FHA demonstrate that disparate impact liability is unsupported by the FHA.[29] The Court rejected this ar-

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23. *Id.* at 283–84 (Jones, J., concurring).
24. *See id.* at 283.
25. *Id.* at 284.
26. *Id.*
27. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2513.
28. *Id.* at 2525.
29. *See* Smith v. City of Jackson, 544 U.S. 228 (2005). In *Smith*, a plurality of the Court held that section 4(a)(2) of the Age Discrimination in Employment Act ("ADEA"), which prohibits acts that "otherwise adversely affect" an employee because of his or her age supports a disparate impact claim and held that "the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer." 544 U.S. at 235–36. A

gument and held that there was sufficient evidence of congressional intent that the FHA supports disparate impact claims.[30] Specifically, the Court stated that the phrase "otherwise made unavailable" in FHA section 804(a) "refers to the consequences of an action rather than the actor's intent."[31] The Court also noted that FHA was amended in 1988 after nine courts of appeal had concluded that the FHA encompassed disparate impact claims. This constituted "convincing support" for a conclusion that Congress accepted and ratified the disparate impact rulings.[32] Finally, the Court recognized that the FHA's "central purpose" was served by recognizing disparate impact liability because it roots out systemic problems that have the effect of perpetuating segregation.[33] In addition, it "plays a role in uncovering discriminatory intent" by allowing "plaintiffs to counteract unconscious prejudices and disguised *animus* that escapes easy classification as disparate treatment."[34]

However, in *dictum* the Court articulated "cautionary standards" and stated "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, *e.g.*, if such liability were imposed based solely on a showing of statistical disparity."[35] The Court warned against taking an approach to disparate impact

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concurring opinion in *Smith* noted that ADEA section 4(a)(1)'s "because of" language required discriminatory intent and thus did not support disparate impact liability. *Id.* at 251. TDHCA argued that since the FHA does not contain "otherwise adversely affect" language but only "because of" language, FHA violations require a showing of discriminatory intent. *Inclusive Cmtys. Project II*I, 135 S. Ct. at 2519.

30. *Inclusive Cmtys.Project III*, 135 S. Ct. at 2519–20.

31. *Id.* at 2511. This "results-oriented language" was similar to provisions in Title VII of the Civil Rights Act of 1984, which was construed to allow disparate impact claims in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and ADEA section 4(c), discussed in *Smith*. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); *Smith*, 554 U.S. at 240.

32. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2520.

33. *Id.* at 2521–22.

34. *Id.* at 2522.

35. *Id*. at 2524, 2512. The fact that the Court's stated limitations on disparate impact analysis are dicta, and thus probably do not have stare decisis effect, point to the importance of the Court's composition in future fair housing cases.

liability that "may be seen simply as an attempt to second-guess which of two reasonable approaches [TDHCA] should follow in the sound exercise of its discretion" in making LIHTC allocations.[36] Instead, housing authorities and private developers should be given leeway to state and explain the valid interests served by their policies.[37] Similarly, courts should not "impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority may seem preferable."[38] The Court thus adopted a deferential attitude toward TDHCA's decisions.

Citing to its earlier decision in *Wards Cove Packing Co. v. Antonio*,[39] the Court stated, "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[40] Further, the Court stated that "policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers'" to housing.[41] This "barrier" requirement stands in contrast to the previous "facially neutral policy" requirement.[42] Thus, imbalance, without more, does not establish a *prima facie* case of disparate impact. In the Court's view, a robust causality requirement prevents race from being used in a pervasive way that would "almost inexorably lead governmental or private entities to use numerical quotas" resulting in "serious constitutional questions" by "perpetuat[ing] race-based considerations rather than mov[ing] beyond them."[43] Thus, if ICP were unable to show a causal connection between TDHCA's policies and a disparate impact, for example because federal law concerning LIHTC alloca-

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36. *Id*. at 2522.

37. *Id.* These can include objective factors, such as cost and traffic patterns and subjective factors, such as historical preservation. *Id.* at 2523.

38. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2523.

39. *490 U.S. 542 (1989).

40. *Inclusive Cmtys Project III*, 135 S. Ct. at 2523.

41. *Id*. at 2522 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

42. *See* Gallagher v. Magner, 619 F.3d 823, 833 (8th Cir. 2010) (holding that plaintiffs "must show that facially neutral policy had significant adverse impact on members of a protected group").

43. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2523–24.

tion priorities limits TDHCA's discretion, then the case should be dismissed. The Court further noted that "remedial orders must be consistent with the Constitution" and must "concentrate on the elimination of the offending practice" through race-neutral means.[44] The Court affirmed the Fifth Circuit Court of Appeals' decision, and remanded the case "for further proceedings consistent with [its] opinion."[45]

III. OBSERVATIONS

1. Disparate impact theory lives. The Court ruled 5-4 that disparate impact claims are recognized under the FHA. *Inclusive Communities* demonstrates that although disparate impact litigation, at least with respect to race,[46] is a costly, burdensome, and low probability strategy, it remains a strategy nonetheless.[47] Potential disparate impact liability creates risk for governmental and private actors, which may cause them to negotiate the fair housing thicket by including racial integration factors in their calculations. In addition, favorable results may be achievable through the settlement of disparate impact claims.

2. When applied as a tool to force racial desegregation in housing, the disparate impact theory is weak.

(a) Robust Causality. Other than its holding that disparate impact claims are actionable under the FHA, another important component to the *Inclusive Communities* decision is the Court's statement that a disparate impact claim relying on statistical disparities must fail if the plaintiff fails to allege facts or produce statistical evidence demonstrating a causal connection between the de-

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44. *Id*. at 2524.

45. *Id*. at 2526.

46. It is important to note that the FHA prohibits discrimination based on race, color, national origin, religion, sex, familial status and disability. *See* 42 U.S.C. §§ 3604–3606, 3617 (2002). *Inclusive Communities* permits disparate impact claims based on the six factors other than race: color, religion, sex, handicap, familial status, and national origin. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2518.

47. *See* Stacy E. Seicshnaydre, *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, 393–94 (2013) (concluding that Plaintiffs received positive decisions in fewer than twenty percent of disparate impact cases, and that the success rate has dropped since the 1980s).

fendant's "policies" and the disparity. It is unclear whether this "robust causality requirement", which is phrased by the Court in racial and constitutional terms, applies only in the case of race-based claims, or whether it extends to other FHA claims that do not implicate constitutionally protected categories. It seems likely that *Inclusive Communities* is limited to race and can be expanded only to other constitutionally protected classes, based on the Court's citation to *Wards Cove Packing Co.* and its references to racial imbalance and racial disparities.

In addition, although Justice Kennedy's decision states a broad "robust causality" requirement, *Inclusive Communities* offers little guidance concerning application of robust causality. The guidance that is offered in the majority opinion does little other than indicate that judgments, such as those made by TDHCA, should not be subject to challenge without adequate safeguards, that a "prompt resolution" of disparate impact cases is important, and that decisions that do not equate to "policies" may not be an appropriate subject of disparate impact litigation. Since developers likely do not have "policies" concerning one-time decisions concerning affordable housing location, micro-level location-based claims may not be cognizable even when the location disparately affects minorities. Larger institutions, such as governmental entities, banks and insurance companies, are more likely to have placement, financing, lending and insurance underwriting "policies" that bring disparate impact analysis into play.

However, even with respect to governments and large institutions, the "policy" requirement can be important. Since the *Inclusive Communities* decision, one trial court has considered the robust causality requirement. In *City of Los Angeles v. Wells Fargo & Co.*, the City of Los Angeles argued that Wells Fargo engaged in discriminatory and predatory lending practices that resulted in a disparate number of residential home foreclosures in Los Angeles.[48] The court granted summary judgment for Wells Fargo

48. City of Los Angeles v. Wells Fargo & Co., No. 2:13-cv-09007-ODW, 2015 WL 4398858, at *1 (C.D. Cal. July 7, 2015). The City argued that Wells Fargo engaged in "reverse redlining" by extending mortgage credit or predatory terms to minority borrowers in minority neighborhoods on the basis of race and ethnicity. *Id.*

because the City failed to point to a policy or policies that caused the disparity:

> First, the City fails to actually identify any policy that created an artificial, arbitrary or unnecessary barrier. Instead, the City argues that the *lack* of a policy [e.g., adequate monitoring policies] produced the disparate impact. There is no authority that suggests that disparate impact claims are designed to impose new policies on private actors. Guidance from the Supreme Court is unambiguous that disparate impact claims must solely seek to *remove* barriers . . . .
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> Second, the City is essentially advocating for racial quotas . . . . Such a policy is inapposite to instructions from the Supreme Court. . . . The City . . . advocates for the implementation of "serious constitution" concerns.[49]

Previous fair-lending cases relied on alleged statistical disparities to proceed past the dismissal stage, and the courts imposition of a positive "policy" requirement can be a formidable obstacle to a disparate impact case.

The Court's emphasis on an early causation showing, coupled with its limitations on the use of statistical discrepancies, renders housing disparate impact claims particularly difficult. For example, the Court noted that "[i]f a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a *prima facie* case, there is no liability."[50] In effect this could mean that district courts may mandate more robust statistical controls to eliminate alternate causes for a disparity. It is also unclear how courts will engage in multivariate analysis, in which multiple factors including nonracial factors have a statistically significant effect, to make these determinations.

(b) Protections for defendants when the burden does shift.

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49. *Id*. at *8 (emphasis added).

50. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2514.

Even if a plaintiff pleads and presents a *prima facie* disparate impact claim, the Court emphasized that "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."[51] Thus, "[e]ntrepreneurs must be given latitude to consider market factors" and zoning officials "must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)."[52] Since "[t]he FHA does not decree a particular vision of urban development,"[53] it seems likely that a determination to revitalize an urban core, even if it means concentrating or deconcentrating affordable housing serving protected classes, would satisfy a "valid interest" test. However, it remains to be seen the type and strength of interest that is required to meet the "valid interest" test.[54]

Further, the court reaffirmed the lower court ruling that, after the defendant provides a "valid interest" served by its policy, the plaintiff has the burden of demonstrating that the justification is a pretext or must be rejected.[55] To meet that burden, the plaintiff must demonstrate "that there is 'an available alternative . . . practice that has less disparate impact and serves the [defendant's] legitimate needs.'"[56] In this equation, however, it is not sufficient for the plaintiff to second-guess the policies since "the FHA is not an instrument to force housing authorities to reorder their priorities."[57]

In conclusion, while *Inclusive Communities* did not eliminate disparate impact as a cause of action under the FHA, it severely limited the scope of the theory and expanded the discretion of the policy-making defendant.

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51. *Id.* at 2522.
52. *Id.* at 2523.
53. *Id.*
54. *Id.* at 2522.
55. *Id.* at 2518–23 (stating that "so too must housing authorities and private developers be allowed to maintain a policy if they can prove it necessary to achieve valid interest.").
56. *Id.* at 2518 (quoting Ricci v. DeStefano, 557 U.S. 557, 578 (2009)).
57. *Id.* at 2522.

(c) Limited Remedy. Even if a disparate impact claim succeeds on the merits, *Inclusive Communities* demonstrates that available remedies may be severely limited in order to "be consistent with the Constitution."[58] Thus, remedial orders should concentrate on elimination of the offending practice and, if additional measures are adopted "courts should strive to design them to eliminate racial disparities through race-neutral means."[59] It is likely that remedial orders imposing or perhaps even referring to, racial targets or quotas would be constitutionally offensive.[60]

3. Disparate impact also limps when applied as a tool to eliminate consideration of race. As noted above, the majority decision in *Inclusive Communities* is highly deferential to governmental actions. Although this means that it will be difficult for plaintiffs to argue that governmental and private action insufficiently addresses racial desegregation, it also means that other plaintiffs will have a difficult case when arguing that governmental and private actions are unlawful simply because they are motivated by racially integrative purposes. In this way, Justice Kennedy's decision in *Inclusive Communities* can be viewed as adopting the position he articulated in his concurring opinion in the *Parents Involved* case.[61]

In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy wrote that state actions that do not racially classify individuals are not constitutionally suspect simply because their purpose is racial integration.[62] This distinction between classification and purpose is constitutionally im-

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58. *Id.* at 2524.

59. *Id.*

60. *Id.* at 2525; *see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

61. *Parents Involved*, 551 U.S. at 789; *see also* Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).

62. 551 U.S. at 788–90 (stating that governmental actors "may pursue the goal of bringing together students of diverse backgrounds and races through other means [i.e., not racial classifications], including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in targeted fashion; and tracking enrollments, performance and other statistics by race.").

portant, but the Court has never defined the term "classification."[63] By ruling that the FHA provides for disparate impact liability in some race-based cases, the Court essentially ruled that disparate impact law is itself constitutional and disavowed the "color blindness" argument espoused by Chief Justice Roberts and other members of the Court.[64] However, having done so, the Court focused on issues involving the application of the disparate impact theory and stated that considering race in an effort "to foster diversity and combat racial isolation" is a legitimate purpose for a policy.[65]

Notwithstanding the legitimacy of racial considerations, Justice Kennedy's opinion is clear that "we must remain wary of policies that reduce homeowners to nothing more than their race,"[66] and that race cannot be used in a "pervasive way" that would lead to the use of numerical quotas.[67] In essence, *Inclusive Communities* creates an environment of disparate impact law that allows governmental and other actors to consider race, unless consideration tips to classification and quotas. This is the flip-side of

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63. *See* Reva B. Siegel, *Foreward: Equality Divided*, 127 HARV. L. REV. 1, 48–49 (2013). The Court has held that racial classifications trigger strict constitutional scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The disparate treatment case demonstrates that discriminatory intent can cause a facially neutral policy to be treated as a racial classification, thereby triggering strict scrutiny. *Id.* at 213. The Court had not, at least until *Inclusive Communities*, decided whether disparate racial impact triggered strict constitutional scrutiny. *See* Ricci v. DeStefano, 557 U.S. 557, 595–56 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us now to begin thinking about how—and—on what terms—to make peace between them.").

64. *See Parents Involved*, 551 U.S. at 701, 748 ("The way to stop discrimination based on race is to stop discriminating on the basis of race."). On the other hand, the Court also did not adopt an anti-subordination theory, which might allow explicit racial consideration if used to benefit a marginalized racial group. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1281 (2011).

65. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2525 ("When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor from the outset.").

66. *Id.*

67. *Id.* at 2523.

the Court's limitations on using disparate impact theory to force the policymaker's hand since that might lead to prohibited racial classification and quotas. In either event, *Inclusive Communities* is deferential to governmental and private actors that can state some legitimate purpose for policies that do not cross over the line to constitute "classification." Stated differently, *Inclusive Communities* demonstrates that it will be very difficult both to force action to create racial integration and to forestall action that does purposefully encourage racial integration.[68]

4. *Inclusive Communities* may change the focus of fair housing litigation to discriminatory intent. As noted above, under *Inclusive Communities* it may prove exceedingly difficult for plaintiffs to allege and succeed on a disparate impact claim. Arguably, this may put pressure on "disparate treatment" arguments that actions or inactions, which might not meet the "policy" requirement, intentionally discriminate on the basis of race and, therefore, fail under the Equal Protection Clause's strict scrutiny standard. In this regard, one should not ignore the Court's statement that the "recognition of disparate-impact liability . . . plays a role in uncovering discriminatory intents," and that such intent can include both "disguised animus" and "unconscious prejudices."[69] This reference to "unconscious bias" may lead to further development of disparate treatment law.

IV. CONCLUSION

As a doctrinal matter, *Inclusive Communities* understanding of equal protection Justice Kennedy articulated in the *Parents Involved* case—namely, state actions that do not classify individuals based on race do not violate the Constitution only because they are motivated by racially integrative purposes. Thus, disparate impact theory does not surrender to equal protection theory as long as disparate impact does not stray into classification waters. *Inclusive Communities* thereby gives a fuzzy and perhaps unstable roadmap but a roadmap nonetheless, to guide state and private actors in

68. *Id.* at 2525 (explaining that disparate impact claims encourage "race-neutral efforts to encourage revitalization of communities that have long suffered the consequences of segregated housing patterns" and promote efforts "to foster diversity and combat racial isolation with race-neutral tools").

69. *Id.* at 2522.

making housing placement and financing decisions. It is clear that in the Court's view, disparate impact does raise constitutional questions, but these questions involve the application and not the existence of disparate impact theory. The focus will now likely shift to particular questions of whether consideration and purpose slide into prohibited classifications.

It seems clear that the Court has steered a path between the anti-subordination theory, in which explicitly racial considerations would be constitutional if used to benefit a marginalized class, and color-blind theory, in which all explicit racial considerations would be presumptively unconstitutional. *Inclusive Communities* attempts to straddle these approaches and supports a pragmatic view permitting racial considerations while retaining a renunciation of racial classifications and quotas. Race may be considered, but consideration must be expressed by using race neutral proxies and tools.