



# What the Supreme Court's 'Disparate Impact' Decision Means for the Future of Fair Housing

The surprising 5-4 decision affirms the original intent of the 50-year-old Fair Housing Act: that implicit discrimination is as destructive as explicit discrimination.

KRISTON CAPPS |  @kristoncapps | 10:39 AM ET |  1 Comment



Carlos Barria/Reuters

The Supreme Court of the United States issued an opinion Thursday morning that affirms the understanding of housing discrimination that has guided the nation for nearly 50 years.

Led by Justice Anthony Kennedy, the Supreme Court ruled by 5-4 to affirm the decision of the Fifth Circuit in [Texas Department of Housing and Community Affairs v. The Inclusive Communities Project](#). The ruling supports one of the tentpoles of the nation's Civil Rights legislation. (Read the opinion [here](#).)

Chief Justice John Roberts dissented. He was joined in his dissent by Justices Clarence Thomas, Samuel Alito, and Antonin Scalia.

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At the heart of the decision is the notion of "disparate impact": whether the Fair Housing Act can be read to prohibit policies that adversely affect minority groups even when that's not the stated goal of the policy. Explicit racial discrimination is illegal under the Fair Housing Act. According to the Court's ruling today, disparate impact is recognizable as a category of racial discrimination under the law.

The 5-4 decision bolsters a critical reading of the Fair Housing Act since its passage in 1968, one week after the assassination of Martin Luther King Jr. The Supreme Court decision [supports prior decisions about disparate impact by 11 courts of appeals](#).

*Inclusive Communities*, which the Court heard in January, centered on housing in Texas. The Inclusive Communities Project, a nonprofit outfit, has successfully sued Texas in recent years for allocating federal tax credits for lower-income housing in mostly poorer, mostly minority neighborhoods in cities and suburbs around Dallas—which has had the effect of keeping low-income housing out of wealthier, whiter neighborhoods.

Texas then countersued, arguing that the Fair Housing Act doesn't prohibit implicit discrimination, only explicit discrimination. ([Read the complete CityLab primer](#) on *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* and the connection between this case and [contentious pool party in McKinney, Texas](#).)

The opinion—in a case that the Cato Institute described as [“very likely \[...\] the third-most-noted case from this term”](#) before Thursday morning's news—was something of a surprise. Court watchers widely predicted that Justice Kennedy would deliver the verdict, for several docket and calendar reasons. Since he has typically sided with conservatives on discrimination issues in the past (on [affirmative action](#) in particular), many speculated that he would do so again with regard to disparate impact.

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Kennedy's decision centers on the phrasing of the act. (Another surprise, perhaps, since the case that Texas mounted narrowed like an originalist laser on the wording of the law.) Under the Fair Housing Act, it is illegal to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected status, as the Justice notes. One phrase there is key.

"The results-oriented phrase 'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent," Kennedy writes.

Two other similar Fair Housing Act cases [settled](#) before they reached the Supreme Court. “The settlements weren’t a coincidence: Civil rights groups and the federal government were worried that the conservatives on the Roberts Court would hold that the [Fair Housing Act] does not allow disparate-impact lawsuits,” [wrote](#) Amy Howe, a SCOTUSblog reporter, in the run-up to today’s verdict.

Some Civil Rights advocates worried that the Supreme Court might take the opportunity to declare disparate impact altogether unconstitutional. Instead, the Court decided that the key phrasing in the Fair Housing Act—“otherwise make unavailable”—is cousin to text from [Title VII of the Civil Rights Act of 1964](#) and the [Age Discrimination in Employment Act of 1967](#)—“otherwise adversely affect.” Kennedy’s decision supports disparate impact throughout the law.

“In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment,” Kennedy writes. “The introductory word ‘otherwise’ also signals a shift in emphasis from an actor’s intent to the consequences of his actions.”

The majority opinion offers some caution about what courts should order when they do find disparate-impact liability. “Remedial orders that impose racial targets or quotas might raise difficult constitutional questions,” Kennedy writes. He further warns about the “special dangers” of the “automatic or pervasive injection of race into public and private transactions” covered under fair housing.

But ultimately, the Supreme Court decided not to overturn nearly 50 years of precedent in addressing widespread discrimination in housing. From Kennedy’s conclusion: “[M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”

## About the Author





Kriston Capps is a staff writer at CityLab. He writes about housing, architecture, design, and other factors that shape cities. Previously, he was a senior editor at *Architect* magazine.

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