

HUD's 'disparate impact' war on suburban America

By [MICHAEL BARONE](#) • 7/20/15 12:01 AM

Disparate impact — it's a legal doctrine that may be coming soon to your suburb (if you're part of the national majority living in suburbs).

Bringing it there will be the Obama Department of Housing and Urban Development's Affirmatively Furthering Fair Housing program. It has been given a green light to impose the rule from Justice Anthony Kennedy's majority opinion in the Supreme Court's 5-4 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.

The decision purported to interpret the Fair Housing Act of 1968 as authorizing lawsuits if municipal policies have a "disparate impact" as measured by the racial percentages of those affected. This despite the fact that the words of the Fair Housing Act prohibit only intentional racial discrimination, with no mention of policies that might incidentally appear to have a discriminatory effect.

HUD's 377-page Affirmatively Furthering Fair Housing rule requires municipal governments to "perform an assessment of land use decisions and zoning to evaluate their possible impact on fair housing choice." An accompanying document says that this includes "land use and zoning laws, such as minimum lot sizes, limits on multi-unit properties, height limits, or bedroom-number limits as well as requirements for special use permits [and] occupancy regulations" that might be "factors contributing to segregated housing patterns."

Note the use of the word "segregated." Historically, segregation was the total exclusion of blacks enforced by state and local law, by deliberate individual or corporate action or by threat of force and violence. Back in the 1960s, when the Fair Housing Act was passed, housing really was effectively segregated in large parts of the country.

If you looked through the 1960 Census of large suburban counties block by block, as I did at the time, you would find the number of blacks as something like 0, 0, 0, 0, 2, 0, 3, 1, 0, 0, 0. In Northern cities where large numbers of blacks migrated in the years from 1940 to 1965, you could find whole square miles that switched from 100 percent white to over 90 percent black within a single year.

That's not how America works today. In large metropolitan areas with significant black populations, you won't find a single census tract with 0 black residents. Blacks sometimes encounter resistance when trying to buy or rent a house which they can afford — something which, everyone should be able to understand, is unjust and infuriating, and for which the Fair Housing Act provides remedies.

But of course, that has not created an America in which every community has the same percentage as the national average of blacks and whites, Hispanics and Asians, marrieds and singles, gays and straights, Protestants and Catholics and Jews and Muslims. Free choice never shakes out that way. Throughout history, Americans and immigrants have tended to choose to cluster with likeminded people.

In addition, in a free market economy, those with more money inevitably have a wider choice of where to live than those with less. They, too, tend to cluster (look up "locations" on luxury store websites to see where). Free choice inevitably has a disparate impact.

Affirmatively Furthering Fair Housing is intended to shake this up. HUD Secretary Julian Castro, the former part-time mayor who is mentioned by some as a vice presidential candidate, wants to use the disparate impact doctrine to overturn local zoning laws and place low-income housing in suburbs across the nation. Such social engineering is likely to be widely unpopular.

How did disparate impact come into the law? In a 1971 Supreme Court case, *Griggs v. Duke Power Co.* The court, acting when memory was still fresh of Southern resistance to desegregation, ruled that the company's aptitude test amounted to discrimination because whites passed at higher rates than blacks. But that's true of most aptitude tests — which as a result aren't used much in hiring any more.

An approach more appropriate for a society where there is no significant forcible resistance to desegregation was advanced by Justice Clarence Thomas in his dissent. "We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proven innocent," he wrote. "The absence of racial disparities in multi-ethnic societies has been the exception, not the rule."

Disparate impact jurisprudence has not been politically challenged: corporate defendants don't want to be attacked as racists. Perhaps disparate impact policymaking will be challenged if HUD starts installing low-income housing in suburbs across the land.