

**Editor's Note :** On Tuesday at 10 a.m. we expect one or more opinions in argued cases. We will be live-blogging at this link. The Court has not yet announced whether there will be additional opinion announcements on Wednesday.



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## Symposium: Congress must decide for itself whether it wants to push the constitutional envelope

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As Justice Antonin Scalia explained in his concurring opinion in *Ricci v. DeStefano*, whether a statute authorizing a cause of action for “disparate impact” can be reconciled with the Fourteenth Amendment is a hard question. It is doubtful that the Fair Housing Act, or any law for that matter, exposing some racial groups to disparate treatment because a non-discriminatory policy negatively affects other racial groups can be squared with the guarantee of equal protection. So far, the Supreme Court has avoided addressing the issue. At some point, however, the “evil day” to which Justice Scalia alluded will arrive and the Court will need to confront the question.

But it does not need to be today. The FHA makes it 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.” As the Supreme Court explained in *Smith v. City of Jackson*, this is precisely the kind of statutory language Congress uses to prohibit disparate treatment. When Congress targets disparate impact, it uses markedly different statutory language. Title VII of the Civil Rights Act of 1964, for example, bans practices that “adversely affect” an employee “because of such individual’s race, color, religion, sex, or national origin.” Similarly, the Age Discrimination in Employment Act bans practices that “adversely affect” an employee “because of such individual’s age.” In other words, Congress knows what language to use in order to permit disparate-impact claims. It did not include that “adversely affects” language in the FHA. And Congress did not amend the FHA to add that language despite making many other changes to the law over the years. This is not a hard case.

The Inclusive Communities Project and its *amici* attempt to solve, or, more accurately, circumvent this problem by retreating to *Chevron* deference. Of course, for administrative deference to apply the statute must be ambiguous, and this one just is not. But the Project and those *amici* invoking deference have made an error in judgment far more serious than mistakenly relying on an interpretative doctrine that should have no application to this case. They have afforded the Court the opportunity to establish a comprehensive standard under which the lower courts can adjudicate whether *any* federal statute creates a disparate-impact cause of action. The Court can accomplish this simply (and quite properly) by resting its judgment on the “clear-statement rule.” In so doing, the Court can make explicit that ambiguity is not a basis for finding that a statute permits disparate-impact liability. The ambiguity confirms that it does not.

As the Supreme Court has explained in *INS v. St. Cyr* and myriad other decisions, the clear-statement rule requires “unmistakable clarity” in the statute’s text before concluding that the law “invokes the outer limits of Congress’ power.” To be sure, the clear-statement rule is a branch of constitutional avoidance – a canon that is rightfully not without critics. Notably, however, the rule approaches statutory construction from the opposite direction of its more frequently invoked siblings. Decisions such as *Ashwander v. Tennessee Valley Authority* and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* famously invite courts to read statutes more expansively than the text might allow in order to avoid constitutional issues. The clear-statement rule, by contrast, invites courts to read statutes more humbly in order to avoid constitutional issues. The former has the tendency to refashion a statute to the point where the judicial interpretation bears little resemblance to the words on the page. The latter merely assumes Congress only sought to accomplish in the statute what is clear from the text.

Clear-statement rules therefore show Congress the respect to which it is entitled. No less than the judiciary and the executive, Congress has a duty to support and defend the Constitution. It is for Congress, then, to determine in the first instance whether it wants to test the limits of its authority. The clear-statement rule ensures Congress has considered the potential ramifications of its legislative choice and made the conscious decision to risk a constitutional fight. Viewed in this light, clear-statement rules are not so much a limitation on congressional authority but a rule to guide both Congress and the courts as they wade into sensitive subjects. Congress can still force the courts to decide whether it has exceeded the bounds of its legislative authority. But it must do so willingly.

This case illustrates the concern. There is a good reason why the Court has always had concerns about the constitutionality of disparate-impact provisions. As noted above, laws creating civil liability based on how racial groups fare under neutral practices that treat all individuals equally are suspect under the Fourteenth Amendment. Worse still, lower courts have interpreted Title VII’s disparate-impact provision (on which the Project claims

the FHA is modeled) either to exclude non-minorities altogether from its protection or to impose special hurdles for “favored” racial groups to overcome in bringing so-called “reverse discrimination” claims. Either way, such differential treatment on the basis of race is subject to strict scrutiny.

Disparate-impact laws are even more troubling in practice. They place incredible pressure on those within their regulatory ambit to resort to racial quotas, set asides, or other more subtle means of ensuring racial balance. There is little else that could be done to avoid protracted litigation and potentially massive liability when a non-discriminatory policy has a statistically adverse effect on a racial group. As cases such as *Connecticut v. Teal* show, the threat of disparate-impact liability creates an inevitable incentive to engage in the very racial stereotyping and group-based discrimination that the Equal Protection Clause forbids.

Nor can disparate-impact laws be defended as somehow enforcing the Fourteenth Amendment. The Constitution forbids intentional racial discrimination. Banning non-discriminatory laws because of their effect on certain racial groups deviates too far from the Fourteenth Amendment to be seen as enforcing it. Characterizing disparate-impact laws as merely an evidentiary tool for rooting out disparate treatment fails for similar reasons. The lenient standard for disparate impact under federal statutory law does not remotely approach the magnitude of disproportionate effect needed to raise an inference of intentional discrimination under the Constitution. Borrowing from Justice Anthony Kennedy’s concurrence in *Georgia v. Ashcroft*, which highlighted this problem in a similar context, “considerations of race that would doom” a practice under “the Fourteenth Amendment . . . seem to be what save it under” federal disparate-impact laws.

The Project and its *amici* do not seriously dispute the constitutional doubts disparate-impact laws ordinarily raise. Instead, relying on Justice Kennedy’s concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, they argue that these serious concerns are not present in the housing setting because the judicial remedies tend to be generalized. But that does not solve the problem. Among other issues, the Project cannot (and does not) argue that disparate-impact remedies are *always* generalized in nature. Further, the disparate-impact theory has not been judicially and administratively engrafted into the FHA merely to remedy “racial isolation in schools” – the concern Justice Kennedy found sufficient to take race into account in a nuanced and general way.

To note just one example, disparate-impact claims have been brought challenging race-neutral lending practices as applied to individual borrowers seeking home loans. In such cases, there can be no claim that all people are being treated equally or that the FHA is being used to prevent housing segregation in specific communities. If a neutral lending practice has a disparate impact on a protected class of people, it is unlawful absent a winning business defense. Yet if that practice has the same effect on a class of individuals who are not protected, there is no statutory violation. This certainly is not the kind of zoning remedy the Project and its *amici* would like the Court to believe FHA disparate impact claims entail. At least some disparate-impact housing cases thus will trigger strict scrutiny even under the lenient rule the Project’s *amici* advocate. No more is needed to demand the clear statement from Congress the FHA lacks.

At the end of the day, there is no elegant solution to this problem. But that does not mean the Court lacks the power to delay the confrontation. Announcing that no federal statute authorizes disparate-impact claims without a clear statement not only properly resolves this case even accepting the Project’s dubious claim of ambiguity, but it forces Congress to declare its intentions going forward. Congress must decide if its desire for disparate-impact liability is so strong that it is willing to have the constitutional question finally adjudicated. After all, that is the legislature’s prerogative. But that difficult and important constitutional issue should not be foisted on this Court because litigants and a federal agency have chosen to read the FHA expansively. If that confrontation is to come, it should be because Congress clearly sought it.

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Posted in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Fair Housing Act*

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