



## Media Analysis: Coverage of Inclusive Communities Supreme Court Argument

On January 21, 2015, the U.S. Supreme Court heard oral arguments in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*. The case poses the question whether the Fair Housing Act will continue to prohibit housing policies that unnecessarily exclude or segregate some groups of people in practice—known as unjustified “disparate impact”—or only those motivated by intentional bigotry.

In order to assess the communications landscape surrounding the case, The Opportunity Agenda analyzed a random sample of 50 news and opinion pieces, from a total of 575 appearing in mainstream media between December 20, 2014 and January 23, 2015.<sup>1</sup> Our analysis focused on positions taken, facts and arguments cited, and sources and spokespeople quoted, as well as overarching themes and narratives.

### Major findings of the analysis include:

- The large majority of opinion pieces supported disparate impact.
- The majority of quotes were pro-disparate impact and, aside from the Justices and litigants, the majority of sources interviewed were fair housing proponents.
- News articles framed the opposing interests in the case as Civil Rights groups and the Obama Administration versus Big Banks, Conservative groups, and the State of Texas.
- Coverage reflected the fact that disparate impact is a longstanding principle, embraced by HUD and every court of appeals to consider the issue.
- Reporters routinely misconstrued how disparate impact works, or shorthanded it in a harmful way—suggesting that *any* unequal outcome would violate the Fair Housing Act. This occurred even in many otherwise friendly articles.
- Almost every article that we reviewed depicted the Supreme Court’s decision to consider the issue as an ominous sign, likely to result in a weakened Fair Housing Act.
- The “Why” of disparate impact was often missing from journalistic coverage—there was little explanation of why this principle matters from a values or impact perspective.
- There were very few descriptions of the practical applications or benefits of the disparate impact standard, and even fewer involving “real people.” The few that did appear were compelling.
- Opinion pieces, by contrast, were strong on both values and implications.
- Articles mentioned only the racial implications of the Act, omitting the other types of discrimination that it prohibits.
- There was no indication from reporting or commentary that an adverse Supreme Court decision might be corrected through legislative action.

Based on these findings, our primary recommendation for fair housing proponents going forward is to communicate a clear and compelling narrative that: lifts up the values of equal opportunity, common sense, and the national interest advanced by the Act; offers compelling examples and human stories that illustrate systemic causes and shared benefits; discusses the persistence of segregation; explains in plain language how the disparate impact approach actually works; details the characteristics other than race that the Act also covers; and lays the groundwork for a legislative fix, if necessary at the federal, state, and local levels.

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<sup>1</sup> We identified the larger pool of articles through a search of the Critical Mention database using the following search terms: (“disparate impact” OR “Texas Dept. of Housing and Community Affairs” OR “Inclusive Communities Project”) AND “housing.” We then identified 50 articles for content analysis using a random number generator.



## DETAILED FINDINGS

### Arguments, Facts and Narratives:

- ▶ Pro-disparate impact voices and arguments dominated the discourse in our random sample. Supportive quotes outnumbered opposing ones in the news articles surveyed, and opinion pieces were overwhelmingly on the side of preserving disparate impact. Only two of the nine opinion pieces in our sample opposed the principle.
- ▶ Most articles defined the opposing camps in the case as Civil Rights groups and the Obama Administration on one side, and Big Banks, Conservatives, and the State of Texas on the other. Insurance companies were also mentioned frequently, while there was little or no mention of landlords or real estate companies. Some articles noted that a number of states filed a bipartisan friend-of-the-court brief supporting disparate impact. And several articles reference supportive commentary by Senators Elizabeth Warren (D-MA) and Tim Caine (D-VA).
- ▶ Almost all stories noted that the disparate impact standard is a longstanding principle recognized by every court of appeals to consider the question.
- ▶ Most stories stated or suggested that the disparate impact standard is vulnerable at best and doomed at worst, with civil rights voices most frequently articulating that idea. Most stories similarly made clear that eliminating that cause of action would “limit,” “narrow the scope,” “weaken” or “gut” the Act’s current protections. And several stories mentioned recent Supreme Court cases weakening the Voting Rights Act and Title VII of the 1964 Civil Rights Act.
- ▶ Many stories included the idea that the Supreme Court aggressively reached out to take this case, noting that the Court has granted review on the same issue twice before, only to see the cases settled before argument. Several stories asserted that the Obama Administration had a hand in at least one of those settlements.
- ▶ Many stories mentioned that the U.S. Department of Housing and Urban Development (HUD) supports disparate impact and recently issued regulations to implement the principle. One suggested, incorrectly, that the HUD regulations created the principle.
- ▶ Opinion pieces more frequently carried a clear values statement, connecting The Act and disparate impact to our national aspirations and interests. For example:
  - “Fair housing is a bedrock civil rights principle that is needed to ensure the promise of equal opportunity for all.” (Barbara Arnwine, To realize Dr. King’s dream, promote desegregation, MSNBC, January 18, 2015).
  - “The availability of a safe, affordable home is part of the American dream, and we should be working to see that dream become a reality for all Americans.” (Tim Kaine statement on Supreme Court hearing on housing discrimination case, Augusta Free Press (online), January 21, 2015).



- ▶ The vast majority of stories described the Fair Housing Act, the disparate impact standard, and the *Inclusive Communities* case as about race. Exceedingly few mentioned the other characteristics covered by the Act—color, national origin, gender, religion, disability, or family status.
- ▶ Reporters routinely misconstrued how disparate impact works, or shorthanded it in a harmful way—suggesting that *any* unequal outcome would violate the Fair Housing Act. This occurred even in many otherwise friendly articles. Examples include:
  - “The suit couldn’t prove intent, but it was successful in showing that blacks and other minorities were disproportionately affected by the housing agency’s policies....The Dallas non-profit cited a legal argument called ‘disparate impact.; This means ICP doesn’t have to prove intentional racial discrimination, only that the result hurt a protected group.” (Doualy Xaykaothao, Dallas housing discrimination case takes center stage at U.S. Supreme Court, KERA News, January 21, 2015)
  - “...disparate impact claims, which are allegations made based on neutral practices that may have a discriminatory effect—thus allowing litigation to be brought for discrimination even when there is no discriminatory intent.”
  - “The justices will weigh whether the Fair Housing Act bars only intentional discrimination, or whether discriminatory effects, regardless of intent, are illegal too.” (Catherine Dunn, Supreme Court could limit discrimination claims in fair housing case, International Business Times, January 21, 2015).
  - “In other words, America’s highest court is going to decide if companies and policies can be accidentally racist.” (Melvin Backman, Can you discriminate without meaning to? The US Supreme Court will decide, Quartz, January 21, 2015).
- ▶ A few stories did, however, set out the proper standard. A standout article in this and many other respects was one by Nikole Hannah-Jones of ProPublica: “For four decades, federal courts have held that the law should be interpreted more broadly, ruling again and again that if the policies of governmental agencies, banks or private real estate companies unjustifiably perpetuate segregation, regardless of their intent, they could be found in violation of the Fair Housing Act....Landlords or lenders who implement policies or practices that disproportionately impact racial minorities can be found in violation of civil rights law if they cannot justify those practices—even if no one can show they acted out of racial animus.” (Nikole Hanna-Jones, US Supreme Court’s latest race case: Housing discrimination, Money Life, January 22, 2015).
- ▶ Opinion pieces on both sides generally provided an accurate description as well, e.g.:
  - “Those challenges are only successful if the defendant in such a case does not have a substantial justification for their policy or if there is an alternative policy that would also serve that interest without resulting in a disparate impact.” (Barbara Arnwine, To realize Dr. King’s dream, promote desegregation, MSNBC, January 18, 2015).
- ▶ Some stories mentioned as a justification for disparate impact covert and subtle (intentional) discrimination that is difficult to prove and, therefore, requires the disparate impact standard. A widely published AP story, for example, notes, “fair housing advocates



say eliminating such claims means courts will recognize only the crudest forms of intentional discrimination and not more subtle forms of bias that persist today." (Sam Hananel, Supreme Court sharply divided over housing bias cases," Associated Press, January 21, 2015).

- ▶ A *Los Angeles Times* editorial also offered a succinct and persuasive case: "This is a reasonable and nuanced response to the fact that while residential segregation in the U.S. has declined, black Americans still live apart from whites in significant numbers as a result of myriad factors, including exclusionary zoning, poverty and countless transactions rooted in racial bias but difficult to prove in a court of law. As Justice Ruth Bader Ginsburg observed: 'There was a grand goal Congress had in mind. It meant to undo generations of rank discrimination.'" (Editorial: Discrimination is discrimination even if it's not intentional, Los Angeles Times, January 22, 2015).
- ▶ Very few stories described concrete examples of the disparate impact standard in action. Again, an exception is Nikole Hanna-Jones's ProPublica piece, which provided one of the most compelling examples: "A fair housing group used disparate impact to topple a 'blood relative' ordinance passed by nearly all-white St. Bernard's Parish in the wake of Hurricane Katrina. The ordinance barred homeowners from renting to anyone who was not kin. Civil rights lawyers were convinced officials passed this law to keep out black renters, but could not prove racist motivations. But when St. Bernard's Parish could not come up with a plausible justification for the ordinance, a court struck it down." (Nikole Hanna-Jones, US Supreme Court's latest race case: Housing discrimination, Money Life, January 22, 2015).
- ▶ Other exceptions to this trend are mentions of how the federal government used the Act to hold big banks accountable, and references to how "unrest" in Ferguson, MO, might relate to housing discrimination.
- ▶ A number of stories cited the State of Texas's contention that complying with the disparate impact standard will require governments and companies to make "race-conscious" decisions to avoid liability. No story discussed this idea in any depth, however.
- ▶ Very few of the journalistic pieces that we reviewed discussed the persistence of residential segregation in the 21<sup>st</sup> century.
- ▶ By contrast, supportive op-eds and commentary described both the benefits and the harms. For example:
  - Richard Rothstein of the Economic Policy Institute described at length the implications of disparate impact and residential integration for public education. (Valerie Strauss: A Supreme Court case that public education advocates should be watching, Washington Post Answer Sheet, January 13, 2015 (Republishing a piece from the EPI website)).
  - Senator Elizabeth Warren wrote that "the wrong decision would reduce economic opportunities for working families and raise the risk of another financial crisis," and



that “Housing segregation has a powerful impact on opportunities to build economic security....Data show that lower- and middle-income families living in more segregated communities have a harder time climbing the economic ladder.” (Stephanie Condon, Elizabeth Warren warns Supreme Court may continue “assault” on civil rights, CBS News, January 22, 2015 (quoting extensively from Warren’s *Washington Post* op-ed).

- ▶ There were very few stories in news or opinion pieces of “everyday” people affected by Disparate Impact, or by the Act generally. The few exceptions to this were compelling, however.
  - In a radio story, Doaly Xaykaothao interviewed Lupe Gutierrez, a woman “who’s been helping minorities find housing for years.” Gutierrez voiced the commonsense nature of disparate impact, as well as the human consequences: “She says building new low-income housing in already poor neighborhoods doesn’t make sense. ‘Yes, because they’re still stuck in the same place,’ she says. She’s had a hard time moving low-income families out of South Dallas....‘They want to help us,’ Gutierrez says. ‘They want us to become better persons or live in a better community, but if you’re low income, hello, you don’t have funds? And to fight against a developer, who has the upper hand?’” (Doualy Xaykaothao, Dallas Housing Discrimination Case Takes Center Stage at U.S. Supreme Court, KERA News, January 21, 2015).
  - A local Ohio television station profiled Vonda and Eric Williams, a Toledo couple who experienced disparate impact discrimination—they “were denied a home loan because Vonda was pregnant, and would soon be on maternity leave,” despite having the resources to pay the mortgage — and were activated by the experience. The piece describes the personal impact on the couple, their use of the Fair Housing Act, and their activism to see the Act preserved for others:

“It was upsetting to know that despite planning, and saving money and still being paid while on maternity leave that they would discount my income’ ....Sitting at home thinking about what we could have lost, I just felt like I needed to talk to someone to figure out what we could do because it just didn’t feel right’....So they went to the Toledo Fair Housing Center in Toledo, took the case to court and after a lengthy process, proved the family was discriminated against. Proving disparate impact is what helped the Williams, which is why the couple and [fair housing advocate Diana] Patton are going to Washington.... It’s exciting for us to be a part of history, but it’s more important to be able to help others that may encounter any discrimination.” (Ali Hoxie, Toledo couple headed to Washington D.C. for Supreme Court decision on Fair Housing Regulations).

- ▶ When stories described the facts of the Texas case, they generally did so in sympathetic terms, e.g.:
  - “The Inclusive Community [sic.] Project argues that Texas was approving tax credits for low-income housing only in heavily African-American neighborhoods of Dallas, and denying tax credits in white neighborhoods. That approach, they say, has prolonged



the city's racial segregation, making it harder for poor blacks to have a shot at upward mobility." (Zachary Roth, Roberts Court could cripple another key civil rights law, MSNBC, January 19, 2015).

- "Using statistical evidence to back up its argument, the group contends Texas officials are doing a form of red-lining, the finance practice that directs or limits minorities in the housing market to neighborhoods populated by the same ethnic group." (Ray Gronberg, City weighing in on federal housing case, Herald Sun, Dec. 29, 2014).
- The Inclusive Communities Project, which advocates for integrated neighborhoods, has criticized the state's approach as limiting low-income black families from being able to move to areas with better opportunities. (Catherine Dunn, Supreme Court could limit discrimination claims in fair housing case, International Business Times, January 21, 2015).
- "The latest case involves an appeal from officials accused of awarding federal housing tax credits in a way that steered low-income housing to mostly poor, black neighborhoods in Dallas and generally kept the units out of wealthier white enclaves." (Sam Hananel, Scalia could be surprise vote in Supreme Court housing case, Atlanta Journal-Constitution/AJC.com, January 21, 2015).
- "Housing advocates say the program concentrates poverty by putting too many developments in poor, minority areas and too few in wealthier, whiter neighborhoods." (Melvin Backman, Can you discriminate without meaning to? The US Supreme Court will decide, Quartz, January 21, 2015).

  

- ▶ A number of stories noted Dr. Martin Luther King Jr.'s role in the birth of the Act, and the fact that the case was argued just after the holiday celebrating his birth.
- ▶ Quotes in news stories tended to lack statements about the role of the Fair Housing Act in fulfilling our national values or goals. An exception is John Relman's widely quoted statement that "Housing lies at the fulcrum of civil rights....Where you live affects the opportunities that you have for jobs, for better schools, for connections that allow you to have opportunity in your life."

## Quotes and Sources:

The large majority of sources quoted were supporters of the disparate impact standard. Individuals quoted most frequently included fair housing attorney John Relman, Sherrilyn Ifill of the NAACP Legal Defense and Educational Fund, Myron Orfield of the Institute on Metropolitan Opportunity at the University of Minnesota, and Professor Ian Haney Lopez of UC Berkeley Law School.

In post-argument reporting, the Justices' comments from the bench were most frequently quoted:

- ▶ Justice Scalia received the most attention, noting his apparent "skepticism" of Texas' arguments in light of the text of the Act as amended in 1988. Justice Scalia's question to



Petitioners' counsel, "Why doesn't that kill your case?" was widely quoted. Several articles also noted that Justice Scalia critiqued the Inclusive Communities Project's position, stating that "racial disparity is not racial discrimination," and "the fact that the NFL is largely black players is not discrimination."

- ▶ Several stories quoted Justice Breyer for the proposition that disparate impact is a longstanding doctrine upheld by 11 Courts of Appeals, and "as far as I can tell, the world hasn't come to an end."
- ▶ A few articles cite Chief Justice Roberts's, assertion that it's difficult to distinguish "good" from "bad" housing decisions under the disparate impact doctrine.
- ▶ Justice Kennedy's comment that it "seems very odd" that two jurisdictions could be potentially liable for placing affordable housing in either a predominantly white or a predominantly minority neighborhood received some press attention.
- ▶ Some pieces cited Justice Ginsburg's comment that Texas's argument was "a little artificial" because disparate impact theory was not "mainstream" until the Supreme Court approved its use for employment discrimination cases in 1971.

Courtroom statements by the oralists (Scott Keller, Michael Daniel, and Solicitor General Donald Verrilli) were also frequently quoted in post-argument coverage, often as foils for the Justices.

Other sources quoted were predominantly elected officials, such as Senators Warren (D-MA) (pro) and Kaine (D-VA)(pro), Congressman Randy Neugebauer (R-Texas) (con), Durham, NC City Attorney Patrick Baker (pro), Texas Attorney General Greg Abbott (con), and Congresswoman Maxine Waters (D-Calif.) (pro).

### Images

While we did not analyze the imagery used in broadcast media or newsstand editions of articles, we did perform a basic review of images accompanying the online versions of the 50 randomly selected stories.

- ▶ Most of the online versions did not include a photo. Those that did used mostly neutral imagery:
  - The plurality of images were of the U.S. Supreme Court building with no identifiable individuals present.
  - Several pieces included an image of the front door of the Texas Department of Housing and Community Affairs.
  - Opinion pieces by Senators Elizabeth Warren and Tim Kaine carried those Senators' images.
  - Two pieces featured photos of Supreme Court Justices.
  - One photo featured a row of apartment buildings.



- ▶ Only two photos included an obvious narrative element:
  - One photo included pro-disparate impact demonstrators in front of the Supreme Court with signs reading “Keep Housing Fair.”
  - An opinion piece carried a black and white AP photo of a “white mob that greeted a black Philadelphia family that attempted to move into an all-white housing development in 1963.”

### Implications and Recommendations:

Mainstream media coverage of Inclusive Communities during the period that we studied was, on the whole, positive for Fair Housing supporters. The case garnered over 500 stories, most of which featured pro-disparate impact quotes and spokespeople. Op-eds and other commentary were overwhelmingly favorable and many stories cast unpopular big banks and insurance companies as the chief enemies of disparate impact.

Supportive opinion pieces carried strong justifications of disparate impact on moral, factual, and legal grounds. At the same time, however journalistic coverage, lacked a common fair housing narrative rooted in shared values and societal benefits in reporting or commentary, and harmfully distorted how disparate impact works in practice. Audiences relying solely on these media outlets for information about the issue might be hard pressed to understand why the issue matters, or what the consequences of an adverse decision might be.

Accordingly, our main recommendation for fair housing advocates and allies is to communicate a more coordinated and compelling narrative, that includes:

- ▶ How addressing unjustified disparate impact advances our nation’s shared values of equal opportunity for all, common sense, and the national interest.
- ▶ The societal harm caused by contemporary housing segregation and exclusion.
- ▶ The benefits of diverse, inclusive, and prosperous communities fostered by the disparate impact approach.
- ▶ Compelling examples and human stories that illustrate those systemic causes and solutions.
- ▶ A plainspoken, accurate explanation of how the Fair Housing Act works, with an emphasis on *unjustified* disparate impact and knocking down unnecessary barriers to fair housing.
- ▶ The characteristics other than race—religion, gender, family status, disability, and national origin—that the Act also covers.<sup>2</sup>

For the existing base of fair housing supporters, it will also be important to lay the groundwork for a legislative fix, if necessary, at the federal, state, and local levels.

Also important going forward will be:

- ▶ Continuing to flood the media with pro-disparate impact stories, spokespeople, and commentary. The Associated Press and Reuters have, thus far, occupied a large share of the news hole – and

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<sup>2</sup> The Opportunity Agenda’s Pre-Argument Messaging Memo on the *Inclusive Communities* case discusses many of these elements in greater detail: [http://opportunityagenda.org/defending\\_fair\\_housing\\_21st\\_century](http://opportunityagenda.org/defending_fair_housing_21st_century)



should, therefore, receive disproportionate attention. ProPublica is also influential, and has featured stellar reporting thus far.

- ▶ Gathering and disseminating images that illustrate the narrative principles described above.
- ▶ Encouraging additional supportive statements from business, faith, and bipartisan elected leaders.
- ▶ Preparing communications responses now for the different ways in which the Court might decide the case.
- ▶ Using social media (#KeepHousingFair) as well as ethnic media, progressive media, and community organizing to rally the base in advance of decision day.

The Opportunity Agenda is a social justice communication lab. Working with leaders across the country, we use communication and culture to move hearts, minds, and policy for lasting change. For additional research, analysis, and resources, visit [www.opportunityagenda.org](http://www.opportunityagenda.org), and follow us on Twitter at @OppAgenda.