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Could The Fair Housing Act Be Used To Abolish Restrictive Zoning?

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In the debate on how to solve the urban housing affordability issue, there is a theoretical side and a political side. On the theoretical side, a growing bipartisan cluster of journalists, academics, business people, and even the president himself has concluded that zoning and other land use regulations increase housing costs, and must be reformed or abolished. But politically speaking, such deregulation is unlikely, since these regulations are enforced at local level, where they are preserved by homeowners who benefit from restricting the housing supply. As a result, there have been calls for states and the federal government to intervene, using various carrots and sticks to encourage local-level reform. One of the more provocative recent ideas is to use the Fair Housing Act, with its "disparate impact" clause, as a cudgel against regulations that disproportionately hurt low-income minorities.

The Fair Housing Act was signed in 1968 by President Lyndon Johnson to curb nationwide housing discrimination against minorities. In 2015, the act was strengthened following the Supreme Court case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* The court found that by concentrating most of its federally-funded affordable housing in segregated, low-income areas, Texas' housing department was disproportionately harming minorities, thus violating the Fair Housing Act.

Before then, the act was meant to prevent overt cases of discrimination against minorities--such as hanging signs that exclude certain races or nationalities--which is defined as "disparate treatment." The Supreme Court ruled in 2015 that the act also outlaws policies that have a negative "disparate impact" on minorities, even if those policies aren't intentionally discriminatory. As Justice Anthony Kennedy wrote in his majority opinion, "in contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."

The decision has since been celebrated by Cato Institute economist Randal O'Toole as a way to abolish certain land-use restrictions. In several speeches, along with a white paper for the Grassroot Institute, O'Toole argues that such laws, while not written with intentional bias (at least not provable bias), nonetheless disproportionately hurt racial minorities. He notes that

various regulations, such as zoning, rent control, and urban growth boundaries, have been found demonstrably to increase housing costs. And because certain groups--such as African-Americans--have lower median incomes, these regulations have a "disparate impact" on them, often driving them from select cities. Meanwhile, the “legitimate rationale” that Justice Kennedy said must be a precondition for such regulations is largely non-existent, since most would not survive a valid cost-benefit analysis. While some regulations provide public protections--such as preventing runoff from entering streams, or demolition of historic structures--most are built on subjective aesthetic notions. People living in a single-family neighborhood, for example, may find nearby multi-family housing distasteful. But this doesn't justify outlawing it, if the result is housing shortages.

O'Toole's argument that land use regulations have disparate impacts on minorities is so blatantly obvious, it's surprising no other urban commentator mentioned it following the Supreme Court decision. The only debate is which regulations the federal government should target first. O'Toole believes state-level growth management plans, which restrict new sprawl housing in rural areas, drive up prices the most. A recent "housing toolkit" published by the Obama administration focused more on regulations preventing urban infill housing, such as minimum parking requirements, setback requirements, and density limits. Perhaps more odious than the regulations targeting density or sprawl, specifically, are the broader approval barriers affecting all housing types. These include overly-strict building codes, lobbying costs, affordability set-asides, design review, environmental review, fire department review, community benefits agreements, and on and on. According to a National Association of Home Builders survey, government regulations add 24% to final home prices in America. These figures vary by location, adding the highest costs to already-expensive metros like New York City and San Francisco.

So how could the Fair Housing Act be used to attack these regulations? O’Toole writes that affected parties—in this case minorities—could file lawsuits against cities and states whose land-use laws prevent them from living there. Concerned citizens could also sue these entities for accepting federal housing funds when their regulations clearly violate federal housing laws (in this case the Fair Housing Act). And, of course, the federal government could withhold funds from localities using the same rationale. In some respects, O'Toole's idea seems like an act of fighting America's ridiculously convoluted legal and regulatory state with yet more legalism and regulation. But it may well be effective at loosening laws that have overstayed their welcome.