

TRIMMING BACK THE FAIR HOUSING ACT

REVIEWING RECENT SUPREME COURT LITIGATION
OVER THE SCOPE OF THE FAIR HOUSING ACT

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This article discusses the likely Supreme Court invalidation of the disparate-impact test as a means for proving a violation of the Fair Housing Act. It analyzes the arguments of the competing sides in support of and opposed to continued use of the disparate-impact test, in particular the arguments of fair housing advocates, HUD, and the banking and insurance industries. It concludes that the disparate-impact test remains an important tool in the continued fight against unfair and unequal housing policies.

Shortly after Hurricane Katrina destroyed much of its multifamily housing stock, St. Bernard Parish, a predominantly white community bordering New Orleans, issued an ordinance restricting the rental of single-family residences to blood relatives of the property owners.¹ The city claimed the ordinance would preserve the character of the community—a community where 93% of homeowners are white.² It did not expressly mention race; however, its effect was to severely limit the number of rental units available to minorities. To all local observers, its discriminatory intent was clear. Under current federal law, the ordinance is a violation of the Fair Housing Act—an example of so-called disparate impact, where minorities fare worse than similarly situated whites without a legitimate justification. Without disparate impact, however, the law would likely stand in the absence of any evidence of intent to discriminate.

The Fair Housing Act (FHA), enacted in 1968, prohibits discrimination in housing. An early issue for courts was whether the FHA prohibits laws, regulations, policies, or actions, like the blood relative law described above, that appear racially non-discriminatory but nonetheless limit the availability of housing for minority groups. The Seventh Circuit, in the 1975 case *Metropolitan Housing Development Corporation v. Village of Arlington Heights*,³ determined that the FHA indeed permitted plaintiffs to bring disparate impact claims. Since then, ten other circuit courts have agreed with the Seventh Circuit, upholding the applicability of disparate impact in the fair housing context.

In recent years, however, the Supreme Court has agreed to hear three cases questioning the collective judgment of the circuit courts on the applicability of disparate impact under the FHA.⁴

Two of the cases settled before the Supreme Court could adjudicate them. The Court heard the third case—*Inclusive Communities Project v. Texas Department of Housing and Community Affairs*⁵—on January 21, 2015. Legal observers predict that the court will invalidate continued use of the disparate impact test in the fair housing context, likely ruling that Congress never intended to permit the use of the disparate impact test in the FHA context.⁶

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This paper will review that case and argue against the court's expected conclusion. Specifically, it will argue that the drafters of Title VIII of the Civil Rights Act (the Fair Housing Act) did intend to permit disparate-impact litigation, and in the event of any ambiguity, the court should defer to the interpretation of the agency tasked with enforcing Title VIII—the agency for Housing and Urban Development (HUD)—which has repeatedly endorsed the disparate-impact test. The first part will provide background on the disparate-impact test and the opinions of its proponents—fair housing advocates—and its detractors—large financial institutions, state housing agencies, and insurers. The second part will review the legal dispute over the disparate-impact test and argue in favor of affirming its application to fair housing cases.

PART I: WHAT IS THE DISPARATE-IMPACT TEST AND WHY DOES IT MATTER?

Signed into law only a few days after the assassination of Martin Luther King, Jr., Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA), provided much-needed updates to laws prohibiting housing discrimination.⁷ The text of the FHA begins boldly: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁸ It was an historic statement for a country that until then had largely sanctioned and even sponsored housing discrimination.

Specifically, the FHA makes it unlawful to “make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁹ Additionally, section 3605(a) provides that it is unlawful “for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race color, religion, sex, familial status, or national origin.”¹⁰ An early question for courts, however, was whether the language of the FHA permitted disparate impact claims.

WHAT IS THE DISPARATE-IMPACT TEST?

Disparate impact discrimination does not require intent to harm. It requires that a facially-neutral policy or practice create a situation where “minorities fare worse than similarly situated Whites.”¹¹ For example, it includes a lender who refused to even consider applications for mortgages of less than \$100,000 and thereby excluded a significant portion of the low-income minority market.¹² To avoid liability under the

FHA, the lender would need to show that the policy originates out of business necessity and that another policy that has a less discriminatory effect could not achieve the same goal.¹³ In the above example, the lender would likely be in violation of the Fair Housing Act, unless she could show that her business would lose money on any mortgage issued for less than \$100,000.

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While eleven circuit courts have endorsed the use of the disparate-impact test, they have disagreed over the legal standards to apply to the test.¹⁴ In 2013, a few days after the Supreme Court agreed to hear *Magner v. Gallagher*—the second of the three FHA disparate impact cases—HUD issued a rule that clarified the burden-shifting test, which the Fifth Circuit expressly adopted in *Inclusive Communities*.¹⁵ That test has three parts:

- (1) *Plaintiff must prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect;*
- (2) *If the plaintiff makes a prima facie case, the defendant must then prove ‘that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests;’*
- (3) *If the defendant meets its burden, the plaintiff must then show that the defendant’s interests ‘could be served by another practice that has a less discriminatory effect.’¹⁶*

In a recent case, D.C. Circuit Judge Richard Leon suggested that HUD published this rule not only to provide clarity to federal courts applying the FHA,

but also to prevent invalidation of the disparate-impact test.¹⁷ In essence, proponents of this theory argue that HUD created and published the rule with the hope that the Supreme Court would grant deference to it based on a decades-long string of cases concerning the level of deference afforded executive branch agencies.¹⁸ This theory seems far-fetched despite the suspicious timing. First, followers of HUD policy are quick to point out that HUD policy has been consistent for over twenty years of formal adjudications since the passage of amendments to the FHA in 1988 expanding HUD's role in enforcing the FHA; thus, its position on disparate impact is already clear.¹⁹ But more importantly, as the Solicitor General argued in *Inclusive Communities*, no federal agency creates and publishes a rule in less than nine days.

ARGUING THE CASE FOR DISPARATE-IMPACT

Fair housing advocates argue that the disparate-impact test is necessary to counteract the long history of housing discrimination and to stop the status quo from self-perpetuating.²⁰ This most certainly was the congressional purpose behind the FHA. Moreover, fair housing advocates are concerned about the invalidation of the disparate-impact test because the leftover source of legal liability under the FHA—intentional discrimination—is difficult to prove.²¹ Advocates also say that opponents of the test overinflate its usage and concentrate unfairly on the most unusual cases.²² Finally, they charge that the test maintains its relevancy and could even prevent housing discrimination stemming from the mass incarceration of minorities.

Michael Allen, Jamie Crook, and John Relman—all long-time fair housing attorneys—argue in their paper *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective* that, even in the most atrocious cases, evidence of intentional

discrimination is difficult to obtain and, consequently, the disparate-impact test serves an important role in fighting discriminatory housing practices.²³ For instance, in the case *Greater New Orleans Fair Housing Action Center v. Saint Bernard Parish*,²⁴ a suburb of New Orleans took repeated steps to limit the availability of rental and multifamily units that black families disproportionately occupied. In the first case, the Greater New Orleans Fair Housing Action Center (GNOFHAC) fought an ordinance that limited the rental of single-family homes to only blood relatives.²⁵ After the GNOFHAC won that case, Saint Bernard Parish reacted by enacting an ordinance that banned multifamily housing.²⁶ The ordinance clearly had a disproportionate impact on black families, but the GNOFHAC had not yet uncovered smoking-gun evidence of

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discriminatory intent. A disparate-impact analysis permitted the practitioners to make a strong case against the ordinance without any evidence of intent and eventually the court overturned both ordinances. The Parish remains under a consent decree issued by the court, which monitors its zoning and planning efforts.²⁷

Allen, Crook, and Relman also argue that disparate-impact analysis complements an inquiry into disparate treatment. Specifically, in the case *Baltimore v. Wells Fargo*,²⁸ their law firm used statistical analysis of racial disparities in foreclosure rates jointly with evidence of

intentional discrimination to win a multi-million-dollar settlement for the city, which required the issuance of at least \$425 million in prime loans in the Baltimore area. The first complaint alleged reverse-redlining based on a statistical analysis, showing that Wells Fargo had disproportionately issued subprime loans in minority neighborhoods, and charged a higher cost to minority borrowers. Only later did evidence of intent surface.²⁹ Thus, disparate-impact served “as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership.”³⁰

Fair housing advocates also argue that the Supreme Court has agreed to hear fair housing cases that do not represent most disparate-impact cases.³¹ The cases that have reached the Supreme Court all involve local policies intended to improve housing quality and housing supply in low-income areas. Scholars characterize such cases as housing improvement cases—cases that generally seek to avoid the disproportionate displacement of minorities from existing opportunities. For instance, the 2012 case *Magner v. Gallagher* involved claims against policies or regulations that displaced minorities at disproportionate rates while aiming to improve the quality of the housing stock in a blighted area; *Inclusive Communities* involves the construction of affordable housing in majority-minority neighborhoods under the Low Income Housing Tax Credit program.³² In contrast, most disparate-impact cases involve barriers to integration, such as a ban on multi-family housing or reverse redlining by mortgage brokers.³³ Scholars emphasize the importance of drawing such distinctions because housing barrier challenges always further the nondiscrimination and integration purposes of the FHA, while housing improvement challenges can sometimes have the unintended effect of perpetuating segregated and substandard housing—a result contrary to the purpose of the FHA.³⁴ Housing

barrier cases also represent most of the FHA disparate-impact claims heard on appeal and the majority of cases fair housing advocates have won.³⁵ Legal scholars argue that the Court has cherry-picked cases that are not representative of disparate impact litigation as a whole.³⁶

ARGUING THE CASE AGAINST DISPARATE-IMPACT

In contrast to fair housing advocates, business interests, some state housing agencies, and conservative legal scholars argue strongly against continued usage of the disparate impact test, even as they equally assert the importance of rooting out housing discrimination and unfair practices. The property insurance and mortgage industries have argued that the disparate impact rule as currently enforced by HUD “would require a disastrous departure from long-established risk-based underwriting practices.”³⁷ Conservative legal scholars fear that the disparate-impact test will result in unfair implicit racial preferences.³⁸ State agencies argue that disparate impact cases have proceeded without showing that a particular policy or procedure is the cause of the disparate impacts observed. They also argue that these cases prevent or slow down redevelopment efforts that would help low-income communities.³⁹ In essence, both groups argue that HUD should limit the act to remedying unfair processes, but that, currently, it remedies unequal outcomes of otherwise fair and non-discriminatory processes.⁴⁰

The property insurance industry takes particular issue with disparate impact and has been at the center of a number of lawsuits involving HUD’s new rule.⁴¹ Although no case involving disparate impact and property insurance has been fully litigated, insurers fear that the new HUD rule could result in a fundamental readjustment to risk-assessment and, paradoxically, in a rate structure that is unfairly discriminatory.⁴² Specifically,

insurers fear that courts might invalidate location-based risk analysis in a poorly targeted attempt at equalizing insurance rates across communities. The fear seems grounded in the uncertainty of litigation. As scholars have even noted, the FHA disparate-impact test does permit businesses to identify a legitimate business purpose furthered by the discriminatory policies as long as no less-discriminatory alternatives exist. The Houston Housing Authority filed an amicus

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brief with the Supreme Court in the Inclusive Communities case, arguing essentially that the Texas Department of Housing and Community Affairs has denied approval to three-quarters of the housing authority's development projects in the last two years due to fear of disparate-impact litigation.⁴³ More specifically, the Houston Housing Authority relies on the Low Income Housing Tax Credit (LIHTC) program—a highly-competitive affordable housing development subsidy run by individual states—to fund its development projects. The new Texas underwriting standards imposed after the Fifth Circuit ruling in Inclusive Communities made it highly unlikely that it would receive funding because most of its projects are in minority communities. They argue further that the disparate-impact test as applied under Inclusive

Communities does not take sufficient account of local conditions. As Houston is over two-thirds minority, nearly any LIHTC project will have a disproportionate effect on minorities. The Houston Housing Authority claims it must therefore develop small scale-projects in “high opportunity areas” where land prices are higher. As a result of the new preference for high opportunity areas, the housing authority argues that it cannot develop a sufficient supply of affordable, quality housing, as blighted areas deteriorate even further.⁴⁴

PART II: THE ROOTS OF THE LEGAL DISPUTE

Eleven circuit courts have found that the Fair Housing Act prohibits practices or procedures that have a discriminatory effect (disparate impact), absent any evidence of intent.⁴⁵ The circuit court justices who upheld the rule stated (and restated) that “[a]s overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.”⁴⁶ This is a good policy argument for continued enforcement of the disparate-impact test, but is it a good legal argument for sustaining the disparate-impact test? Several members of the Supreme Court seem to think not. This section will provide an overview of the legal arguments for and against the disparate-impact test, specifically addressing the meaning of *Smith v. City of Jackson*, a case reigniting this debate,⁴⁷ as well as competing interpretations of the statutory text and the appropriate weight due to HUD's interpretation of the Fair Housing Act. Ultimately, I argue that the text of the FHA speaking to legal remedies is sufficiently ambiguous that HUD's interpretation should be given deference.

SMITH V. CITY OF JACKSON AND ITS DISCONTENTS

In 2005, the Supreme Court decided the case of *Smith v. City of Jackson*, which involved a disparate-impact claim brought by a cohort of older police officers against the City of Jackson, Mississippi under the Age Discrimination in Employment Act (ADEA), one part of the employment protections offered by Title VII of Civil Rights Act.⁴⁸ The officers claimed the city gave younger officers disproportionately larger salary increases, which amounted to an unfair disparate impact on older officers.⁴⁹ The lower court ruled in favor of the city and the Fifth Circuit affirmed, ruling that ADEA did not offer disparate-impact relief. The Supreme Court affirmed the decision of the lower court, but on different grounds: the Court argued that ADEA did entitle claimants to bring disparate-impact claims, but that the police officers did not meet the narrow requirements of a disparate-impact claim under ADEA.⁵⁰ The ruling depended in part on a textual analysis of the similarity between the ADEA statutory text and the disparate-impact language contained in Title VII employment cases. This ruling re-ignited a debate over disparate impact in the fair housing context. Defendants and interested parties, like the property insurance industry, have since sought to draw distinctions between the language contained in the FHA and the language enabling disparate-impact claims in the ADEA. They argue that unlike the ADEA, the FHA does not permit disparate-impact claims.

Since *Smith*, one circuit court has overruled the disparate-impact analysis. This occurred in November 2014, after the Supreme Court had already agreed to hear *Inclusive Communities*. That case, *American Insurance Association v. HUD*,⁵¹ may give insights into how the Supreme Court will adjudicate *Inclusive Communities*.

In particular, the majority opinion in *American Insurance Association* relied heavily on *Smith* in its invalidation of the disparate-impact test.

In 2013, the American Insurance Association and other financial industry plaintiffs filed suit against HUD to invalidate HUD's new regulation clarifying the rules of the disparate-impact test. The court began its analysis by reviewing whether HUD deserved deference as an agency interpreting an ambiguous statute. Judge Leon, author of the majority opinion, determined that the statute was unambiguous and, therefore, HUD's interpretation did not deserve deference.⁵² From then on, the court limited itself to a statutory analysis of whether the Fair Housing Act permits disparate-impact claims. A statutory analysis involves a review of the text of the statute in addition to the legislative history (statements by relevant Congressmen, committee reports, a statement by the President), and finally a comparison of the statute to similar statutes. Judge Leon began the statutory analysis by insisting that the Supreme Court demands clear language in a statute expressing intent to permit disparate-impact litigation before it will approve such a test. Judge Leon turned to the text of section 3604(a-b) of the Fair Housing Act and concluded that it did not contain such clear language. The section states:

(a) *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.*

(b) *To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.*

Instead, Judge Leon concluded that the language was only intended to prohibit intentional discrimination due to his interpretation of the verbs "to refuse," "make unavailable," "deny," and

most importantly “to discriminate.”⁵³ He argued that these words speak only to an action, but not its effect, and that when Congress intends to outlaw discriminatory effects, it uses language like “would deprive or tend to deprive” and “otherwise adversely affect.”⁵⁴ He further concludes that the text of the FHA supposedly supporting disparate-impact analysis in fact parallels text in ADEA and Title VII that supports only disparate-treatment claims.⁵⁵ His arguments are persuasive.

However, a strong counterargument remains. The plaintiffs in *Magner v. Gallagher*⁵⁶ begin their response to arguments like Judge Leon’s by noting that the Supreme Court “long ago explained that the FHA must be given a ‘generous construction’ in light of its ‘broad and inclusive’ language.”⁵⁷ Then, the plaintiffs argued that disparate-impact test opponents have too narrowly interpreted *Smith*. Specifically, they noted that the Supreme Court did not rely wholly on a textual reading of the statute in ADEA. It was just one of many reasons that the Court upheld a disparate-impact test in that case; however, they noted that the text still supported use of the disparate-impact test. They argue that the disparate treatment sections of the ADEA and Title VII focus on treatment with regard to “the targeted individual,” while the FHA makes no such reference.⁵⁸ Furthermore, they argued, the FHA uses the language “otherwise make unavailable or deny” which parallels the disparate-impact language in ADEA, “otherwise adversely affect his status as an employee.”⁵⁹ And most importantly, they argue that “the Judge Leons” of the legal world have given too much importance to the words “adversely affect.” They argue that the words are intended to encapsulate the diverse array of property interests affected in the employment context by discrimination: “reduced wages or benefits, deprivation of training opportunities or seniority, or assignment to less attractive or more dangerous tasks.”⁶⁰ The parallel catch-all phrase of the FHA is “otherwise make unavailable or deny.”

This is an equally strong textual analysis; in fact, it seems that neither side has established a clear textual analysis.

THE DEFERENCE DUE TO HUD’S ANALYSIS

Decades of Supreme Court jurisprudence have established that the Supreme Court assigns great deference to administrative agencies’ interpretation of their enabling statutes. The theory goes as follows: as a matter of the separation of powers, it is the executive branch’s role to administer the law, including all executive agencies like HUD. If the people do not like the way that the executive is administering the law, they may seek new legislation through Congress or elect a new president. However, the judiciary has generally stayed away from such cases except in extreme circumstances when an agency has abdicated its duties or exceeded the bounds of the statute. A two-part test has emerged as part of the jurisprudence supporting this theory. If the two parts are satisfied in favor of an agency, it receives deference. Since HUD passes the two-part test, the Supreme Court should defer to its interpretation of the Fair Housing Act.

Step one of the analysis is to ask whether the statute is ambiguous on the legal issue. As previously examined, the answer is yes. The statute neither clearly permits disparate-impact claims nor expressly prohibits them. The first step is satisfied. The second step asks whether the agency has abused its discretion in interpreting the statute, or, in other words, if its interpretation is reasonable. Given the clear legislative intent expressed in the FHA, I argue that HUD has not abused its discretion. But others disagree, including the D.C. Circuit and much of the financial sector supporting the State of Texas in *Inclusive Communities*.⁶¹ This will be a major issue for the Supreme Court, whatever its decision may be.

CONCLUSION

Because of ideological differences in how the government should balance business interests and the interests of minorities, the question of whether the Supreme Court will invalidate the disparate-impact test is not easy to answer. It is clear that four justices will support it and four will oppose it; this will not be a unanimous opinion. Reports from oral argument suggest that the vote hangs on Justice Scalia—a surprise swing vote given his general antipathy to civil rights laws

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14. See *Inclusive Communities Project v. Texas Department of Housing and Community Affairs*, 747 F.3d 275, 281 (2014).
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17. See e.g., *Am. Insurance Assoc. v. United States Dep't of Hous. & Urban Develop.*, ___ F. Supp. 3d ___, 2014 WL 5802283 at *2 (Nov. 7, 2014); SCHWARTZ, *supra* n.7 at 373, n.1.
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20. See, e.g., Bouie, *supra* n. 6; Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 AM. U. L. REV. 357-435 (2013).
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33. Seicshnaydre, *supra* n.20 at 361.
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46. *Metro. Hous. Develop. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977).
47. 544 U.S. 228 (2005).
48. *Id.*
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51. ___ F. supp. 3d ___, 2014 WL 5802283 (Nov. 7, 2014).
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53. *Id.* at *7-9.
54. *Id.*
55. *Id.*
56. No. 10-1032, 2011 WL 2441685 (S. Ct. 2011).
57. *Brief in Opposition to the Petition for Writ of Certiorari, Magner v. Gallagher*, No. 10-1032 (U.S. June 15, 2011) quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972).
58. *Id.* at *14.
59. *Id.*
60. *Id.*
61. See *American Insurance Assoc. v. HUD*, ___ F. supp. 3d ___, 2014 WL 5802283 (Nov. 7, 2014).
62. Lyle Denniston, *Argument analysis: Scalia versus Scalia on housing law?*, SCOTUSblog (Jan. 21, 2015, 1:40 PM), <http://www.scotusblog.com/2015/01/argument-analysis-scalia-versus-scalia-on-housing-law/>
63. Advocates are advised to pursue HUD enforcement of the affirmatively furthering fair housing contract clause attached to every Community Development Block Grant, and also to seek heavy enforcement of the Equal Credit Opportunity Act against unfair lenders. Advocates may also seek change at the state level, demanding that state legislators enforce "fair share requirements" on all municipalities.