

# Disparate Impact

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The "disparate impact" approach to civil rights has created many problems and aggravated others. Under this approach, a practice is said to be illegal if it results in racially disproportionate effects—that is, has a disparate impact—even if it is neutral on its face, is applied neutrally, and was adopted for race-neutral reasons. For instance, in a seminal Supreme Court decision, an employer who required a high-school diploma was found to have violated the civil rights laws because this disproportionately disqualified African Americans—even though there had been no finding that he adopted this rule as a way of keeping out blacks. (Note: The disparate impact approach can also be applied to ethnicity, sex, disability, age, and so forth.)

The use of the disparate impact approach has two results, both bad. First, it discourages employers and others from using perfectly legitimate selection criteria, with consequent effects on efficiency, productivity, and fairness. Second, it encourages employers and others to "get their numbers right"—that is, to use quotas so that their practices can't be targeted for having a disparate impact in the first place.

While the disparate impact approach began in the areas of voting and employment, it has been spread by federal bureaucrats, activist judges, and civil-rights groups to a wide variety of other contexts, like housing, credit, education, pollution—you name it.

Disparate impact theory should be aggressively challenged. It should not be allowed to spread, and it should be cut back or narrowed where it already exists. This part of CEO's website contains resource materials for opposing this pernicious doctrine.

A general overview of the history and abuses of the disparate impact approach, and suggestions for limiting it—including by federal legislation—has been published in a monograph written by CEO general counsel Roger Clegg.

Disparate Impact In the Private Sector: A Theory Gone Haywire

<http://www.aei.org/paper/100116>

The Fair Housing Act and the Age Discrimination in Employment Act are two statutes for which the Supreme Court has not recognized the disparate-impact approach. Here are recent briefs arguing that it should not; the Supreme Court still has not resolved the issue.

ADEA brief

FHA briefs

A CEO Policy Brief also discusses the issue in the context of the Fair Housing Act.

There are many federal regulations adopting the disparate impact approach that have been promulgated under Title VI of the Civil Rights Act of 1964, which forbids discrimination in federally funded programs. But such regulations are likely invalid, and should thus be challenged (and are being challenged), because Title VI itself does not use the disparate impact approach.

Friedlander letter

Washington Legal Foundation Briefs (1)

Washington Legal Foundation Briefs (2)

Washington Legal Foundation Briefs (3)

ProEnglish brief

The Supreme Court itself recently raised but then left unresolved the question of these regulations's validity, apparently inviting such a challenge.

Alexander v. Sandoval

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=99-1908>

The only areas in which federal statutes clearly use the disparate impact approach are employment and voting, but here there are still opportunities to narrow the mischief being done. Voting issues are discussed elsewhere on the CEO website.

Several law-review articles discuss the proper construction of the disparate-impact sections of Title VII of the Civil Rights Act of 1964, which forbids employment discrimination. [Carvin, Lund, and Gray articles: Michael Carvin, Disparate Impact Claims under the New Title VII, 68 Notre Dame L. Rev. 1153 (1993); Nelson Lund, Retroactivity, Institutional Incentives, and the Politics of Civil Rights, 1995 PUB. INTEREST L. REV. 87, 109-10; Nelson Lund, The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform, 6 GEO. MASON L. REV. 87, 116-17 (1997); C. Boyden Gray, Disparate Impact: History and Consequences, 54 LA. L. REV. 1487 (1994).]

Roger Clegg, December 2, 2002, National Review Online

Help Wanted: The administration has some civil-rights issues.

<http://www.nationalreview.com/clegg/clegg120202.asp>

Roger Clegg, February 1, 2002, National Review Online

Speak Now (In English) . . . Or forever hold your peace.

<http://www.nationalreview.com/clegg/clegg020102.asp>

Roger Clegg, October 7, 2002, Legal Times

Home Improvement: The Court should kill an unfair housing strategy with no basis in law

Jennifer C. Braceras, Vanderbilt Law Review

Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests

<http://law.vanderbilt.edu/lawreview/vol554/braceras.pdf>