

## **Disparate Impact is Illegal Discrimination**

### *A guide to understanding disparate impact under the Fair Housing Act*

*Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph - - even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it. . . .*

Senator Edward Brooke (R-MA)  
Co-Author of the Federal Fair Housing Act  
114 CONG. REC. 2281, 2527-28 (1968)

**After the assassination of the Rev. Dr. Martin Luther King, Jr.**, Senator Edward Brooke, a key drafter of the Fair Housing Act, remarked on the structural and institutional barriers to housing choice that were largely invisible to most Americans. He and Fair Housing Act co-author Walter Mondale called for an end to housing bias including policies that result in discrimination and present barriers to equal opportunities. Their goal, to see a nation free from all forms of housing discrimination, has yet to be fulfilled. President Johnson's words when he signed the Fair Housing Act into law in 1968, still ring true today – “we have come some of the way, not near all of it. There is much yet to do.” Today, the African-American homeownership rate is roughly where it was 50 years ago when the Fair Housing Act was passed. Racial wealth disparities, largely tied to home equity, are growing rather than decreasing because we have not had full, effective implementation and enforcement of the law. Our nation is at a pivotal time for racial justice. Long-standing protections, like Disparate Impact, are more important than ever and must be preserved.

#### **What is disparate impact theory?**

**A tool used to challenge a policy that has a discriminatory effect.**

If a policy has a discriminatory effect, the disparate impact theory generally states that the policy must be changed so it is both *fair* and *effective*. If the policy has a legitimate reason behind it, and no other policy could achieve the same goal with a less discriminatory effect, then the policy stands.

*In this NFHA Info Pack, you will find information about **what disparate impact is, why it's important** for our economy and our nation's future, and **how it helps families**.*



- Title VIII of the Civil Rights Act of 1968  
“Fair Housing Act,” 42 U.S.C. 3602

## How does the Fair Housing Act protect basic American fairness?

### **It prohibits housing discrimination and promotes diverse, strong communities.**

The Fair Housing Act prohibits both intentional discriminatory acts *and* facially “neutral” policies that may limit housing opportunities based on race, color, national origin, religion, or sex or the presence of families with children and people with disabilities.

## Why is fair housing disparate impact theory vital to our economy?

### **It promotes efficiency in financial and housing markets.**

The disparate impact theory helps us maintain open markets free from discrimination – a critical component to the prosperity of America’s future. Discrimination disrupts our economy, causing inefficiency and instability by constraining the full economic participation of all Americans.

## What are some policies that have a disparate impact?

**(a) Survivors of Domestic Violence** – A landlord or municipality adopts a policy that penalizes people who call emergency services for assistance more than once. This kind of policy can cause eviction for victims of domestic violence.

**(b) Disabled Veterans or Seniors** – An apartment complex only allows people with full-time jobs, despite how much income they have. This bars disabled veterans or elders who cannot work, even if they can afford it.

**(c) Minimum Value Insurance Policies** – An insurance company won’t provide homeowners coverage for properties valued under \$75,000 even if the property is in excellent condition. This type of policy has been found to disproportionately exclude African-American and LatinX homeowners. It also contributes to insurance redlining in Communities of Color.

**(d) Discretionary Pricing Policies** – Lenders who allow their loan officers or brokers to use their own discretion when pricing consumers can be unintentionally causing discriminatory outcomes, particularly when lenders do not provide effective oversight to ensure that borrowers with the same financial profiles are treated similarly.

**(e) Algorithmic Based Systems** – Algorithms that merely reflect the biases replete throughout the financial and housing markets perpetuate discriminatory outcomes. Data is not innocuous. When misused, it can be extremely harmful. It’s simple. Bad data in = bad outputs. Racially tainted data in = racially disparate outcomes.

## Disparate impact theory safeguards the right to a fair shot for everyone.

Where you live impacts everything about you – how long you will live, how much money you will earn, your net worth, your ability to obtain quality healthcare or healthy foods, your child’s ability to attend a good school, your ability to access quality credit, your chances of becoming a homeowner, your chances of being incarcerated, your chances of being subjected to municipal fines, the likelihood of your child graduating from high school and so much more. This is because, in the U.S., place is inextricably linked to opportunity. Unfortunately, policies and practices still exist that – intentionally or unintentionally - keep some people from accessing important amenities like affordable housing and safe neighborhoods.

*The disparate impact doctrine of the Fair Housing Act strengthens our communities and our nation.*



## **Disparate impact theory has been used to open housing for all people.**

Recent cases brought by fair housing organizations and the Department of Justice show how fundamental disparate impact claims are to maintaining an open housing market.

### *People with Disabilities*

Sally Wiesman was a woman from Fitchburg, Massachusetts, living in a housing authority apartment. She suffered from multiple sclerosis, major depression, and a panic disorder – all of which substantially limited her ability to sleep, work, and carry on other important daily activities. Ms. Wiesman's condition worsened after her downstairs neighbor initiated and repeated confrontational behavior toward her. Ms. Wiesman asked to be transferred to a different apartment to help with her condition. The housing authority denied her request, citing a policy that only allowed tenants with mobility impairments to transfer apartments. DOJ filed on Ms. Wiesman's behalf in 2009 and obtained a consent decree. The housing authority had to revise its transfer policy so as to not have a disparate impact on people with non-mobility-related disabilities. *United States of America v. Fitchburg Housing Authority, et al.*

### *Families with Children*

Drita and Florim Gashi lived in a one-bedroom condo they owned in Stamford, CT. After they had their first child, they got a notice from the condo association informing them that they were in violation of a two-person per bedroom occupancy limit. They could either pay a \$500 monthly fine to stay, or vacate their home. Not being able to afford the additional monthly rent, the Gashis had to sell their condo at a loss. The Gashi's contacted the Connecticut Fair Housing Center, which brought a fair housing case on their behalf. The Center and the Gashis claimed the two-person per bedroom rule had a disparate impact on families with children. In June 2011, a District Court granted the Gashi's motion for summary judgment noting that the condo association could not justify the policy and the association dropped its restrictive occupancy standards, opening 150 units of housing to families with children. *Gashi, et al. v. Grubb & Ellis, et al.*

### *Race and National Origin*

From 2004 to 2008 Countrywide Financial Corporation had a business practice that allowed its loan officers and brokers discretion in varying a borrower's interest rate and other fees after the price was set based on -objective credit-related factors. This resulted in more than 200,000 African-American and Latinx borrowers paying more for prime loans. Additionally, thousands of Borrowers of Color were wrongly steered to higher-cost subprime loans as compared to similarly qualified White borrowers who got prime loans. In a similar case, DOJ alleged that Wells Fargo's business practices allowed brokers and officers to place individuals in subprime loans even if they qualified for prime loans, resulting in 300,000 African-American and Latinx borrowers paying more than similarly-situated White borrowers. In December 2011, DOJ reached a \$335 million settlement with Countrywide and in July 2012, a \$175 million settlement with Wells Fargo. Both Countrywide and Wells Fargo were required to revise their discretionary policies. *United States of America v. Countrywide Financial Corporation; United States of America v. Wells Fargo.*





**On June 25, 2015, the Supreme Court rendered a 5-4 decision, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, affirming that disparate impact claims are cognizable under the Fair Housing Act.** The majority opinion, written by Justice Kennedy, upheld the over 40 years of legal precedent supporting disparate impact claims. Kennedy relied on legal precedent and the language of the Fair Housing Act writing “antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors...” The majority opinion also references HUD’s 2013 Disparate Impact Rule. The Fair Housing Act includes language stating it is unlawful to “otherwise make unavailable” housing or housing related services. The court found that this “results-oriented” framing relates to “the consequences of an action rather than the actor’s intent.”

**There are over 4 million acts of discrimination each year.** Barriers still exist that prevent people from fulfilling their potential. Entire communities are cut off from quality schools, good jobs, and quality credit. A strong and effective Fair Housing Act is essential for ensuring that America is a place where everyone has the same chance to thrive and provide for their family.

Visit [www.nationalfairhousing.org/disparateimpact](http://www.nationalfairhousing.org/disparateimpact) to learn more.

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