Is HUD's Disparate Impact Rule Unconstitutionally Vague?

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After twice in recent years having had cases settled before it could rule on whether the disparate impact doctrine is encompassed in the Fair Housing Act (FHA), the Supreme Court has once again agreed to consider that issue. The disparate impact doctrine, originally developed in the employment context, holds that unlawful discrimination may occur when (a) a practice disproportionately disadvantages a protected group even when the practice is not motivated by intent to discriminate and (b) the entity responsible for the practice cannot provide a sound justification for it.

The case in which the issue Court will address the FHA disparate impact issue – *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* – hardly involves a straightforward application of the disparate impact doctrine. The finding of an FHA disparate impact violation was based on the facts that a public housing authority approved a higher proportion of low income housing tax credit applications in areas with very high minority representations than in areas with lower minority representations and that the difference in approval rates was believed to contribute to a pattern of housing segregation. Minorities probably would be able to secure more low income rental units under the challenged procedures. But fewer of those units would be available to them outside of predominantly minority areas.

While that aspect of the matter may receive some attention in the Court, the outcome as to the general applicability of the disparate impact doctrine to the FHA would seem to turn on whether the Court finds that the Department of Housing and Urban Development's (HUD's) February 2013 rule titled "Implementation of the Fair Housing Act's Discriminatory Effects Rule" specifically applying the disparate impact doctrine to the FHA was a reasonable interpretation of the statute. Those supporting the application of the disparate impact doctrine to the FHA will urge the Court to give great deference to the enforcing agency's interpretation of a statute even if the Court itself would be inclined to reach a different result.

But there are reasons why the Court might not accord that deference in this case, including the possibility that the FHA, as interpreted by HUD's rule, is too vague to withstand constitutional scrutiny. The principal vagueness problem rests not in the application of the disparate impact concept itself (though that concept is murky enough in many settings including the instant one). Rather, the problem lies in the provision whereby a covered entity can be held liable even for a justified practice if there exists a practice that equally serves the covered entity's legitimate interest while having "a less discriminatory effect."

I have explained in a great many places since 1987, the statistical pattern whereby the rarer and outcome the greater tends to be the relative (percentage) difference in experiencing it

and the smaller tends to be the relative difference in avoiding it.[1] Since 1992, I have often discussed the implication of this pattern in the lending context, where relaxing standards or otherwise reducing the frequency of the reducing the frequency of an adverse lending outcome, while tending to reduce relative (percentage) differences in the corresponding favorable outcome, will tend to increase relative differences in experiencing the adverse outcome.[2] That is, for example, lowering a credit score or income requirement for receipt of a home mortgage loan (and hence reducing the frequency of mortgage loan denials), while tending to reduce relative racial differences in loan approval, will tend to increase such differences in loan denial rates.

The existence of this pattern is not debatable.[3] But the pattern remains almost universally unknown either in the fair lending context or in the varied other contexts where it has important implications regarding the interpretation of data on group differences in outcome rates.[4]

Discussing the pattern in the lending context in recent years, including four 2014 articles,[5] I have explained a perverse aspect of fair lending enforcement arising from the failure of federal regulators to understand the pattern. Since at least 1994, in accordance with the notion that the FHA encompasses the disparate impact doctrine, regulators have been encouraging

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[1] Most of my published articles describing the pattern are collected on the Bibliography subpage of the Scanlan's Rule page of jpscanlan.com.

[2] Most of the articles discussing the implications of the statistical pattern in the fair lending context are collected on the Lending Disparities page of jpscanlan.com. The first was "Bias Data Can Make the Good Look Bad," American Banker (Apr. 27, 1992). That article, like some other earlier articles on the statistical pattern (see, e.g.,"An Issue of Numbers," National Law Journal (Mar. 5, 1990); The Perils of Provocative Statistics," Public Interest (Winter 1991)), tended to take for granted that the appropriate measure of disparate impact was the relative difference in the favorable outcome. This was in accord with the approach in the Uniform Guidelines in Employee Selection Procedures. As discussed infra, I have since come to recognize that measurement of disparate impact is more complicated that suggested in those articles. See also the Four-Fifths Rule subpage of the Disparate Impact page of jpscanlan.com regarding the fact that the four-fifths rule of the Guidelines, like all rate ratios, is an illogical measure of association. See also note 7 infra.

[3] For graphical illustrations of the pattern of relative differences with actual credit score or income data, see my March 4, 2013 letter to the Federal Reserve Board and my Spring 2006 Chance magazine editorial "Can We Actually Measure Health Disparities?"

[4] The most comprehensive explanation of the failure to understand the above-described and related patterns by which standard measures tend to be systematically affected by the prevalence (frequency) of an outcome see my "Race and Mortality Revisited," Society (July/Aug. 2014). See also "Measuring Health and Healthcare Disparities," Proceedings of the Federal Committee on Statistical Methodology 2013 Research Conference (March, 2014); "The Mismeasure of Discrimination," Faculty Workshop, University of Kansas School of Law (Sept. 20, 2013); "Rethinking the Measurement of Demographic Differences in Outcome Rates," Methods Workshop, Maryland Population Research Center of the University of Maryland (Oct. 10, 2014); "The Mismeasure of Group Differences in the Law and the Social and Medical Sciences," Applied Statistics Workshop, Institute for Quantitative Social Science at Harvard University (Oct. 17, 2012).

[5] See "Race and Mortality Revisited," note 4 supra; "The Perverse Enforcement of Fair Lending Laws," Mortgage Banking (May 2014); "Things government doesn't know about racial disparities," The Hill (Jan. 28, 2014); Let's Hope Insurer Lawsuit Makes HUD Rethink "Disparate Impact", American Banker (Jan. 8, 2014).

lenders to relax standards and otherwise reduce the frequency of adverse lending outcomes. Regulators have done so in the belief that reducing the frequency of adverse outcomes like rejection of mortgage applications will reduce relative racial differences in rates of experiencing those outcomes. And, unaware that reducing the frequency of an outcome tends to increase, not reduce, relative differences in rates of experiencing it, regulators have consistently monitored the fairness of lender practices on the basis of relative differences in adverse outcomes. Thus, by responding to regulator encouragements to generally reduce adverse outcome rates, lenders have increased the chances that the government will sue them for discrimination.

The simple application of disparate impact doctrine to the FHA raises complex measurement issues with respect to such things as whether the disparate impact is sufficiently large to trigger a requirement to justify the practice causing the impact. As explained in the 2014 Society article referenced in note 4, those problems undermine virtually all efforts to appraise group differences in the law and the social and medical sciences, showing the many ways different measures yield different conclusions about whether a disparity between the circumstances of two groups is larger in one setting than another or whether a disparity should be deemed large or small.

But at least with respect to the determination of whether there exists a disparity adverse to one group or another, each measure tends tells the same story as to which group is disadvantaged (putting aside some aspects of the Texas housing case).[6] That might be seen as a reason why the measurement issues I raise, and which are pertinent as well to appraisals of intentional discrimination cases, would not make the application of disparate impact to the FHA unconstitutionally vague.

The provision concerning a less discriminatory alternative may be quite another matter, however. For it requires that one make judgments about whether one difference between outcome rates is larger than another. It thus raises the question, for example, whether by lowering a credit score requirement, and thereby reducing relative differences in meeting the requirement while increasing relative differences in failing to meet it, reduces or increases the discriminatory effect. As explained in a 2013 University of Kansas faculty workshop page referenced in note 4, issues concerning whether relaxing a standard increases or reduces a disparate impact are extremely complex even when one fully understands the patterns by which measures tend to change as the frequency of an outcome changes. They are all the more complex when one does not even know such patterns exist.

The void for vagueness doctrine, which requires that a statue provide sufficient guidance for a person to know what is or is not unlawful, is principally applied in to criminal laws. But it can be applied in a civil context as well. Whether the measurement issues implicated in the HUD rule, and highlighted by the incongruous enforcement policies over the last two decades, are sufficient to render HUD's interpretation of the FHA unconstitutionally vague, they may be sufficient to cause the Court to decline to accord the usual deference to such an interpretation.

[6] See Table 5 in "Race and Mortality Revisited." While each of the measures provides a different interpretation as to the comparative size of the outcome differences reflected in each row, each shows the same group to have the poorer outcome.

In determining whether to accord an agency's construction of a statute controlling deference, the Court has given weight to the fact that an agency "considered the matter in a detailed and reasoned fashion." Notably, the preamble to HUD's rule discusses a comment urging that the agency provide guidance on how large an impact would be necessary to trigger the justification requirement and explains why the agency thought such guidance unnecessary. There is not like discussion of how one might determine whether one practice has a less discriminatory effect than another. Whether or not the agency has ever considered that issue at all, it has not done so while understanding that it is even possible for the two relative differences to change in opposite directions, much less that they tend to do so systematically.

So far, of course, the Court itself does not know such issues exist.[7] Once it does, however, there may be need for it to rethink a number of disparate impact issues.

[7] To date, no Supreme Court decision has reflected an awareness of the problems with standard measures of differences between outcome rates for appraising demographic difference or that relative differences in favorable outcomes and relative differences in adverse outcome tend to change in opposite directions as the prevalence of an outcome changes. In the Court's most recent disparate impact case, Ricci v. DeStefano, 557 U.S. 557 (2009), both Justice Kennedy's opinion for the Court and Justice Ginsburg's dissent referenced the EEOC's 80 percent (four-fifths) rule, which is a measure of the relative difference in the favorable outcome (and one tending to yield opposite conclusions about the comparative size of disparate impacts from that employed in the fair lending context. Justice Ginsburg also discussed disparities, including with respect to their comparative size, in terms of the proportion the disadvantaged group comprised of persons potentially experiencing an outcome the proportion it comprised of persons actually experiencing the outcome. Such comparisons do not provide sufficient information to appraise the strength of the forces causing outcomes rates to differ, as discussed in Section C of the University of Kansas School of Law faculty workshop paper referenced in note 4.