

How Disparity in Impact is Changing How Americans View Justice

On Monday, the Department of Housing and Urban Development issued a guidance document warning landlords that they might violate the law if they refuse to rent to people with criminal backgrounds.

The warning is merely the latest example of the Obama administration making policy based on the concept of “disparate impact,” which holds that actions disproportionately affecting minorities are discriminatory even if there is no intention to discriminate. Disparate impact has been used to bully local authorities on matters from school detention rates to zoning laws.

Disparate impact is at odds with the traditional American belief that justice is blind to race, religion or ethnic background. It’s also at odds with the law as written; for example, HUD cites the Fair Housing Act as authority for its edict, but that law does not protect people with criminal records. Renting to people with such backgrounds may or may not be a good idea, but it’s hard to imagine that HUD knows any better than landlords dealing with potential tenants. Mandates like HUD’s are what happen when abstract ideas about justice are implemented by an executive branch unmoored from the law.

Congress shouldn’t play along. It can refuse to pay for rules that use disparate impact. In fact, the House of Representatives did just that last year when it approved an amendment sponsored by Rep. Paul Gosar (R-Ariz.) to defund HUD’s Affirmatively Furthering Fair Housing rule. The amendment never became law, but Congress can try again this

year, and expand its reach to other regulations influenced by disparate impact.

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