MAKING THE FAIR HOUSING ACT MORE FAIR: PERMITTING SECTION 3604(B) TO PROVIDE RELIEF FOR POST-OCCUPANCY DISCRIMINATION IN THE PROVISION OF MUNICIPAL SERVICES—A HISTORICAL VIEW

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I. INTRODUCTION

WHILE it seems logical that the rights acquired through the purchase or rental of a home would include the right to *have* water, sewer service, or police protection provided to you in the same manner that it is provided to your neighbor, housing discrimination continues to occur throughout the United States.[1] Since 1968, however, the Fair Housing Act has been a source of protection from discriminatory treatment for both homeowners and renters.[2] Section 3604(b) of the Act prohibits discrimination in the sale or rental of a dwelling, or in the provision of services "in connection therewith."[3]

Over the past few years, the protection provided by the Fair Housing Act ("FHA" or "Act") has been under siege. Several recent cases have undermined the original purpose of the FHA by interpreting § 3604(b) to apply only to discrimination that occurs in connection with the initial sale or rental of a dwelling.[4]

Despite this interpretive setback, courts should re-evaluate the historical context in which the FHA was conceived, and again enforce the Act broadly to promote a "'truly integrated'" society.[5] The best approach, therefore, is to permit § 3604(b) of the FHA to provide relief from discrimination that is perpetuated by

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1. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 463 (S.D. Ohio 2007) (discriminatory provision of water service).

2. 42 U.S.C. § 3604(b) (2006) provides that it shall be unlawful "[t]o 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."

3. *Id.*

4. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004); Cox v. City of Dallas, 430 F.3d 734, 745 (5th Cir. 2005).

5. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211-12 (1972) (quoting 114 CONG. REC. 3422 (1968)).

municipalities against their citizens—even if that discrimination occurs after the property is acquired.[6]

Federal courts have taken two general approaches to their interpretation of § 3604(b).[7] Some courts view the statutory language as limiting the application of that section to discrimination in connection with the "sale or rental of a dwelling."[8] Other courts take a broader view and permit a § 3604(b) claim to arise from discriminatory actions in connection with a dwelling generally.[9] In addition to the statutory language, these courts consider regulations promulgated by the Department of Housing and Urban Development ("HUD"),[10] the legislative history of the FHA, and the traditionally expansive interpretation afforded the Act.[11] They permit a claim even when the discriminatory act occurs after the acquisition of the dwelling, and is not literally in connection with its sale or rental.[12]

Recent case law reveals that some municipalities continue to provide services to their residents in a racially discriminatory way.[13] When this occurs, homeowners may turn to the FHA for relief.[14] An FHA claim is often preferable to a constitutional claim because, unlike a fourteenth amendment claim, a

6. *See id.* ("[I]t is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein ….").

7. 42 U.S.C. § 3604(b) (2006).

8. *See, e.g.*, *Halprin*, 388 F.3d at 328 (noting that the FHA "indicates concern with activities … that prevent people from acquiring property"); Bloch v. Frischholz, 533 F.3d 562, 563-64 (7th Cir. 2008) (citing *Halprin* for the proposition that § 3604(b) did not "address discrimination after ownership has changed hands").

9. *See, e.g.*, Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *27 (N.D. Tex. Sept. 9, 2004) (finding Plaintiffs' claims of discriminatory provision of police services actionable under § 3604(b)); *Koch*, 352 F. Supp. 2d at 980 (denying Defendant's motion to dismiss simply because the alleged discrimination had occurred post-occupancy). *See also* Richards v. Bono, No. 5:04-CV-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *14 (M.D. Fla. Apr. 26, 2005) (rejecting, in the rental context, "the narrow construction of § 3604(b) and hold[ing] that [a] sexual harassment [claim] is actionable under [that section]").

10. *See* 24 C.F.R. § 100.65 (2009); 24 C.F.R. § 100.70 (2009).

11. *See, e.g.*, Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (noting that § 3604(b) has been held to "appl[y] to services generally provided by government units such as police and fire protection or garbage collection").

12. *Id.* (holding claim that police protection was denied based on race is "sufficient to state a valid claim under section 3604(b)").

13. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 463 (S.D. Ohio 2007) (discriminatory provision of water service); *Campbell*, 815 F. Supp. at 1140 (discriminatory provision of police service).

14. *See, e.g.*, *Kennedy*, 505 F. Supp. 2d at 469; *Campbell*, 815 F. Supp. at 1140; Cox v. City of Dallas, 430 F.3d 734, 736 (5th Cir. 2005).

plaintiff need only show a discriminatory impact.[15] In some jurisdictions, courts have granted homeowners relief under the FHA.[16] In others, they have not.[17]

To fully realize the initial purpose and goals of the FHA,[18] it is vital that courts recognize, and provide relief for, claims of racial discrimination in the provision of municipal services connected with housing, even if they occur after the homeowner has moved into their dwelling.

Part II of this article presents the facts of *Kennedy v. City of Zanesville*[19] as an example of the continuing problem of discriminatory provision of municipal services and of one neighborhood's use of the FHA to obtain relief. Part III discusses the intent and legislative history of the FHA, and Part IV discusses the pre- versus post-acquisition debate. Finally, Part V presents arguments in support of reading section 3604(b) of the FHA to prohibit the discriminatory provision of municipal services, even after housing is initially acquired, based on (1) the statutory language of the Act; (2) regulations promulgated by HUD;[20] (3) the legislative history of the FHA; and (4) considerations of general fairness (including the potential hypothetical results of failing to permit such claims).

II. *KENNEDY V. CITY OF ZANESVILLE*

While we, as a society, are somewhat removed from the tumultuous time period that gave birth to the FHA, the problem of discriminatory provision of municipal services still exists. In 2002, sixty-eight residents of the Coal Run neighborhood filed a complaint against the City of Zanesville, Washington Township, and Muskingum County.[21] The residents alleged that the city, township, and county had a "policy, pattern and practice of denying public water" to them since at least the mid-1950s.[22]

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15. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 28:2 (West 2002) (noting that "[s]ubstantively, there is now general agreement … that Title VIII may be violated by a decision that produces a discriminatory effect, even without proof of discriminatory purpose") [hereinafter SCHWEMM 2002].

16. *See, e.g.*, *Kennedy*, 505 F. Supp. 2d at 498; *Campbell*, 815 F. Supp. at 1144; *Lopez*, 2004 U.S. Dist. LEXIS 18220, at *27.

17. *Cox*, 430 F.3d at 745 (denying relief, even assuming that zoning was a service, because the discrimination was not in connection with "the sale or rental of a dwelling").

18. The original purpose of the FHA, as proposed by Senator Mondale, stated that "[i]t is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States." 114 CONG. REC. 2270 (1968) (emphasis added). *See also* United States v. Koch 352 F. Supp. 2d 970, 978 (D. Neb. 2004) (finding that reading the FHA as limited to pre-possession claims is not "mandated by the Act's language or its legislative history" and suggesting that "[o]n the contrary, a broad interpretation of the FHA that encompasses post-possession acts of discrimination is consistent with the Act's language, its legislative history and the policy to 'provide … for fair housing throughout the United States.'" (quoting 42 U.S.C. § 3601)).

19. 505 F. Supp. 2d at 456.

20. *See* 24 C.F.R. § 100.65 (1990); 24 C.F.R. § 100.70 (1990).

21. *Kennedy*, 505 F. Supp. 2d at 463, 469.

22. *Id.* at 463. The physical line between the white and black neighborhoods corresponded almost perfectly with the line between residents who had water, and those who did not: Vincent

The Coal Run neighborhood sits just outside the city limits of Zanesville, in Washington Township, and Muskingum County in southern Ohio.[23] It is a historically black neighborhood that consists of about twenty-five homes and is presently about 85% African American.[24] Conversely, "the County and Township [which surround Coal Run both] are over [95%] white."[25] Residents of Coal Run unsuccessfully requested water service from numerous public and private entities over the course of nearly half a century.[26] Finally, on August 18, 2003, "two months after the [Ohio Civil Rights Commission] issued its report alleging racial discrimination, Muskingum County decided that the residents of Coal Run … qualified for water."[27] Less than six months after that decision, the neighborhood had running water.[28]

The Coal Run residents claimed that each defendant had repeatedly "passed over" their neighborhood to construct water lines in other, predominately white areas.[29] The residents further alleged that the municipal defendants had each rejected their requests for water service to the neighborhood, while granting similar requests made in predominantly white areas.[30] Finally, the residents complained that the city, county, and township consistently rejected the plaintiffs' individual requests to connect to the nearby water line, while permitting requests made by white residents in the surrounding areas.[31]

Curry, the Executive Director of the Fair Housing Advocates Association stated: "This is a case of depraved indifference" because "[w]here the white people stop, that's where the water stops." *Water Ends Where Race Begins: Civil Rights Commission Rules Governments Guilty of Discrimination by not Extending Lines to Blacks*, AKRON BEACON J. (Ohio), June 22, 2003, at B10.

23. *Kennedy*, 505 F. Supp. 2d at 463.

24. *Id.*

25. *Id.*

26. *Id.* at 465. For instance, Plaintiffs alleged that they began asking to have the water line extended to Coal Run in 1954, before it was even complete. *Id.* From 1954 to 1967, neither the City nor the WRWA (Washington Rural Water Authority) permitted the Plaintiff's to connect to the original water line, which ran near the neighborhood. *Id.* Further, during the 1960s and 70s, "Plaintiffs claim that, while the City and WRWA allowed a number of white applicants to connect to the … line, none of the requests for water from the Coal Run residents [were] granted …." *Id.*

27. Claire Suddath, *Making Water a Matter of Race*, TIME, July 14, 2008, http://www.time.com/time/printout/0,8816,1822455,00.html.

28. *Id.*

29. Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 464 (S.D. Ohio 2007).

30. *Id.*

31. *Id.* Indeed, one Plaintiff stated, "[w]here the white people stop, that's where the water stops." *Water Ends Where Race Begins*, *supra* note 22, at B10. In one of the most egregious instances, while describing the racial disparity in access to water, Plaintiff Jerry Kennedy claimed that he could not "even remember the number of times that he asked the city's service director for help, only to have nothing happen." Suddath, *supra* note 27. Eventually,

> [A] house went up next door … [and a] white family moved in … [and] one day Kennedy saw his new neighbors watering their lawn. "They'd be out there with a hot tub out on the porch … and I was still going down the road [to the local water treatment plant] with a pickup truck everyday [to get water to fill his cistern]."

Id.

During the course of litigation, the defendants raised several defenses.[32] In essence, each defendant argued that it was not responsible for providing water when a Coal Run resident requested service.[33] The City of Zanesville argued that, because a private entity decided who was eligible to receive water or connect to the initial line, the city had no responsibility to provide water to neighborhoods—like Coal Run—that lied outside the city limits until 1998 (the year the city assumed responsibility for the provision of water to the areas served by the regional water authority).[34] Similarly, the county claimed that it did not assume any responsibility to provide water until 2000 at the earliest, when it merged with a local water district that had previously provided water to the area.[35] Finally, the township asserted that it had "never … provid[ed] water to any resident[] of the Township" and therefore could not have done so on a discriminatory basis.[36]

The Southern District of Ohio engaged in a flexible four-prong analysis to determine whether the plaintiffs had successfully raised an inference of discrimination.[37] The court applied a modified *McDonnell Douglass*[38] test and concluded that a reasonable jury could find that the defendants' explanations[39] for their failure to provide water were merely a pretext, and declined to grant the defendants' summary judgment motion.[40]

The jury eventually awarded the Plaintiffs over ten million dollars,[41] to be distributed among each of the residents of Coal Run—in amounts ranging from

32. *Kennedy*, 505 F. Supp. 2d at 469-77.

33. *Id.* at 497 (noting that "[t]he record shows that individuals from Coal Run tried on multiple occasions to get water for their families but were unsuccessful, and likely frustrated by the rejection and finger-pointing between the actors in public water service").

34. *Id.* at 470-71.

35. *Id.* at 474-75.

36. *Id.* at 472. The court found that Plaintiffs lacked standing against the Township. *Id.* at 484-85.

37. *Id.* at 493-99.

38. *Id.* at 492 (the test when indirect evidence of discrimination in the Title VII employment discrimination context is found in *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 802 (1973)). In this case, in order to establish their prima facie case of indirect discrimination, Plaintiffs needed to show that "(1) they were members of a protected class or residents of a protected neighborhood; (2) they submitted a request for public water service; (3) such requests were rejected; and (4) Defendants provided water service to similarly situated individuals outside the protected-class neighborhood." *Id.* at 495.

39. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 470-71 (S.D. Ohio 2007) (city arguing that it had no responsibility to provide water outside its border). *See also id.* at 474 (county arguing that it did not have responsibility to provide water until recently, when it merged with a local water authority).

40. *Id.* at 498.

41. Press Release, Nancy H. Rogers, Attorney General of Ohio, Federal Jury Finds Racial Discrimination in Zanesville Water Case: Ohio's Attorney General, Ohio Civil Rights Commission Praise Jury's Verdict (July 10, 2008), http://www.relmanlaw.com/AG%20statement.pdf. *See also* Randy Ludlow, *Racism Ruled, Jury Finds*, COLUMBUS DISPATCH, July 11, 2008, at 1A. "The jury found that city and county officials violated federal and state fair-housing and civil-rights law by not extending waterlines to Coal Run until 2004." Consequently, after "two weeks of deliberations,

$15,000 to $300,000—depending on their length of residence in the neighborhood.[42] Although not specifically discussed by the *Kennedy* court, the outcome of this case suggests that the Southern District of Ohio has adopted the position advocated by this article and other commentators.[43] Specifically, the fact that discrimination occurs after housing is acquired should not prevent a suit under the FHA, especially when the discrimination is related to a municipal service.[44] Beyond that, however, this case demonstrates that municipal actors continue to discriminate against their own citizens in the provision of some of the most basic necessities of life.

III. THE FAIR HOUSING ACT

The FHA is the primary federal statute addressing discrimination in the sale or rental of housing.[45] The legislative history of the FHA suggests that its supporters in Congress were also concerned with issues beyond home ownership and rental, including racial integration, occupation—as distinguished from acquisition—of housing, and the effects that discriminatory housing practices have on minority employment and educational opportunities, as well as concern for the public safety during a time of increasingly violent race riots. This part, therefore, will discuss the legislative history of the FHA, and in particular, its proponents' belief that it would help remedy a wide variety of problems.

A. Generally

The FHA addresses discrimination in housing opportunities.[46] The Act is included in the United States Code beginning at 42 U.S.C. § 3601.[47] Relevant provisions of the Act include § 3601, which is the statement of policy of the FHA,[48] and § 3602, which provides definitions for the Act.[49] Additionally, § 3603 provides various effective dates for provisions of the Act,[50] while

jurors awarded damages of $15,000 to $300,000 each to current and former residents of the … neighborhood." *Id.*

42. Press Release, Rogers, *supra* note 41.

43. *See* SCHWEMM 2002, *supra* note 15, § 14-3. *See also* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 3 (2008).

44. Oliveri, *supra* note 43, at 3 (suggesting that "*Halprin* and its progeny were wrongly decided and … post-acquisition claims are indeed covered by the substantive provisions of the FHA").

45. *Id.* at 28 (noting that prior to the FHA, 42 U.S.C. § 1982 "was the primary mechanism for bringing housing discrimination claims").

46. BARRY G. JACOBS, HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW § 8:1 (West 2009) (stating that the FHA was "enacted originally as Title VIII of the Civil Rights Act of 1968 (hence frequently called Title VIII) and amended by the Fair Housing Amendments Act of 1988").

47. 42 U.S.C. §§ 3601–3619, 3631 (2006).

48. 42 U.S.C. § 3601 (2006).

49. 42 U.S.C. § 3602 (2006).

50. 42 U.S.C. § 3603 (2006).

§ 3604(a) to (f) deal with discrimination and other prohibited actions in the sale or rental of housing, particularly on the basis of race or handicap.[51]

More specifically, § 3604(a) generally prohibits outright "refusals to sell, to rent, and to negotiate" based on race or other protected traits,[52] and has been called "[t]he most important substantive provision of the Fair Housing Act."[53] Section 3604(a) provides that it is unlawful "[t]o 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."[54] Additionally, § 3604(b) prohibits discrimination "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."[55] In order to fully understand the intended broad scope of § 3604(b), however, it should be interpreted in light of the congressional debates and historical context surrounding its passage.[56]

B. The Legislative History and Intent Behind the Fair Housing Act Indicates That Its Supporters Were Concerned with Issues Beyond Home Ownership and Rental

Congress initially intended the FHA to be a broad statute, concerned with racial integration in society as a whole,[57] and there is evidence that supporters of the Act intended it to remedy a number of other pressing issues.[58] For example, there is evidence that Congress was concerned with discrimination in both the occupancy and acquisition of housing.[59] Moreover, Congress understood the effect that racially segregated housing had on both education and employment

51. 42 U.S.C. § 3604 (2006).

52. SCHWEMM 2002, *supra* note 15, § 13:2.

53. *Id.* § 13:1.

54. 42 U.S.C. § 3604(a) (2006).

55. 42 U.S.C. § 3604(b) (2006).

56. *See Symposium, The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation*, 41 IND. L. REV. 717, 757-77 (2008) (discussing the legislative history and the choice of language for § 3604(b)).

57. *See* SCHWEMM 2002, *supra* note 15, § 2:3 ("Difficult as housing integration may be to achieve, it is clear that this goal was important to the Congress that passed the 1968 Fair Housing Act.").

58. *See* 113 CONG. REC. 3395 (1967) ("[Discrimination] irritates and affects … problems of education, health and welfare, employment, attitude, and aspiration.").

59. The original purpose of the FHA, as proposed by Senator Mondale, stated: "It is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States." 114 CONG. REC. 2270 (1968) (emphasis added). *But see* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 227, 229 (7th Cir. 2004) (noting that the FHA "contains no hint either in its language or its legislative history of a concern with anything but access to housing").

opportunities for minorities.[60] Finally, given the outbreak of race riots throughout U.S. cities, Congress was deeply concerned with the state of public safety in the country.[61] As a result of the multitude of concerns surrounding passage of the FHA, courts have, until recently, given it a broad interpretation.[62]

From its inception, the FHA was intended to tackle a number of issues plaguing communities around the nation.[63] During the congressional debates of 1967 and 1968, Senator Walter Mondale of Minnesota, the primary sponsor of the Act,[64] proposed that the statement of policy of the fair housing section of the Civil Rights Act read: "It is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States."[65] Congress also believed that this legislation would help solve other problems, and as a result, viewed passage of the FHA as a "keystone to any solution of our present urban crisis."[66]

Consequently, the legislative history of the Civil Rights Act of 1968, particularly the FHA, and the debates surrounding its passage, suggest several purposes and goals of the legislation that have direct bearing on its interpretation.[67] Specifically, the FHA sought to (1) provide housing on a non-discriminatory basis throughout the country,[68] (2) deal with the realization that housing opportunities had a direct impact on both the education and employment opportunities of the predominately minority residents of inner cities,[69] and (3) alleviate the concerns over racial tensions that were simmering in the inner cities.[70]

60. *See* 113 CONG. REC. 3395 (1967) ("[D]iscrimination in housing confines a substantial portion of our people to the ghetto. This confinement irritates and affects adversely all of our racial problems—problems of education, health and welfare, employment, attitude, and aspiration.").

61. DENNIS E. GALE, UNDERSTANDING URBAN UNREST: FROM REVEREND KING TO RODNEY KING 71 (1996) (noting that in 1967, nearly 16,000 people were arrested during riots in cities such as Chicago, Detroit, Newark, Wichita, and New Haven).

62. *See, e.g.*, Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984) (noting that "[c]ourts … have applied the [Fair Housing] Act broadly within its terms").

63. *See* 113 CONG. REC. 3395 (1967) ("[Discrimination] irritates and affects … problems of education, health and welfare, employment, attitude, and aspiration.").

64. SCHWEMM 2002, *supra* note 15, § 2:3.

65. 114 CONG. REC. 2270 (1968).

66. 114 CONG. REC. 2274 (1968).

67. *See* SCHWEMM 2002, *supra* note 15, § 2:3.

68. 114 CONG. REC. 2270 (1968) (according to Senator Mondale, the goal of the FHA was to prevent discrimination in "housing throughout the United States").

69. *See, e.g.*, United States v. Koch, 352 F. Supp. 2d 970, 977-78 (D. Neb. 2004) (noting that Congress "sought to promote integrated neighborhoods" and hoped that this would "lead to the reduction of the deleterious effects of ghettos on the employment and education of the Americans trapped therein").

70. 114 CONG. REC. 2274 (1968) (Congress was aware that its "failure to abolish the ghetto [would] reinforce the growing alienation of white and black America [and] would insure two separate Americas constantly at war with one another").

The first goal of the FHA was to "promote the replacement of segregated ghettos with 'truly integrated and balanced living patterns'" in the United States.[71] This goal—and civil-rights legislation in general—led to vigorous dissent in Congress.[72] Frequently expressed concerns included (1) the effect that federal "open housing" legislation would have on states' rights,[73] (2) the rights of individual property owners and the ability of homeowners to sell or rent their property to whomever they wished,[74] and (3) the effect that racially integrated housing would allegedly have on property values.[75]

Many senators expressed concern that fair-housing laws, and civil-rights legislation in general, constituted impermissible federal interference into areas traditionally regulated by the states.[76] That is, they felt that state governments should prosecute civil rights offenders, not the federal government.[77] Similarly, others found a bureaucrat in Washington vested with "autocratic" power to file and prosecute complaints against individual citizens troubling.[78] Senator Sam Ervin, for example, feared that such a bureaucrat would be empowered to make, investigate, and prosecute complaints, without judicial oversight.[79]

Senator Ervin also felt that "open housing" laws would impede individual's private-property rights.[80] He was especially concerned that citizens would no longer be free to sell or rent their property to whomever they chose.[81] The response to this concern, of course, was that individuals would remain free to sell or rent their property to anyone they chose, as long as their choice was not motivated by discrimination.[82] To further alleviate this concern, however, the FHA included an exception known as the "Mrs. Murphy" exception.[83] This exemption applied when homeowners leased out units within their own dwellings.[84] Provided that certain conditions were met,[85] the Mrs. Murphy

71. *Koch*, 352 F. Supp. 2d at 976 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968)).

72. *See, e.g.*, 114 CONG. REC. 3423 (1968) (statement of Sen. Dirksen).

73. *See, e.g.*, *id.* *See also* 114 CONG. REC. 3423 (1968) (statements of Sens. Ervin and Dirksen).

74. *See, e.g.*, 114 CONG. REC. 3423-24 (1968) (statement of Sen. Ervin).

75. *See, e.g.*, 114 CONG. REC. 3421 (1968) (statement of Sen. Mondale) ("The fear that property values will fall [due to integration is] a myth of the most pernicious sort.").

76. *See* 114 CONG. REC. 3423 (1968) (statement of Sen. Dirksen).

77. *Id.* (Senator Dirksen noted that the "crux" of the issue was "whether the State shall have the opportunity first to bring an offender to the bar of justice before the long arm of the Federal Government reaches in").

78. 114 CONG. REC. 3424 (1968) (Senator Ervin suggested that open housing laws would "make Americans equal by making them the helpless subjects of a centralized Federal oligarchy operating on the banks of the Potomac").

79. 114 CONG. REC. 3424 (1968) (statement of Sen. Ervin).

80. *See, e.g.*, 114 CONG. REC. 3423 (1968) (Senator Ervin stating that "[t]his so-called open housing amendment is a proposal to bring about equality by robbing all Americans of their basic rights of private property").

81. 114 CONG. REC. 3424 (1968) (statement of Sen. Ervin).

82. 114 CONG. REC. 2283 (1968) (statement of Sen. Brooke).

83. 42 U.S.C. § 3603(b)(2) (2006).

84. 114 CONG. REC. 3424 (1968) (statements of Sens. Mondale, Javits, and Dirksen).

exception would permanently exclude from the FHA the situation "in which an occupant of a house [with four units or less] leases some part of that house … to someone else."[86] At the time, the Mrs. Murphy exception applied to about two million of sixty-five million housing units in the United States.[87] The Mrs. Murphy exception demonstrates that supporters of the FHA were aware of concerns that open-housing laws raised and attempted to reach a reasonable middle ground.[88]

Despite these conciliatory gestures, supporters of Title VIII of the 1968 Civil Rights Act maintained that a link existed between access to housing and employment and educational opportunities.[89] One source relied on during the debates found that, in the first half of the 1960s, between "one-half [and] two-thirds of all new factories, stores, and other mercantile buildings in all sections of the country, except in the South[,] were located outside the central cities of metropolitan areas."[90] This shift away from central cities had the effect of "leaving poverty and despair as the general condition" of inner city residents.[91]

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85. 42 U.S.C. § 3603(b)(2) (2006) is the Mrs. Murphy exception and provides that the FHA does not apply to "(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." An additional exception is provided by § 3603(b)(1), which states:

> Nothing in section 3604 of this title (other than subsection (c)) shall apply to–(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title ….

42 U.S.C. § 3603(b)(1) (2006).

86. 114 CONG. REC. 3424 (1968) (statement of Sen. Mondale).

87. *Id.*

88. 114 CONG REC. 3422-23 (1968).

89. *See* 113 CONG. REC. 3395 (1967) ("Discrimination in housing confines a substantial portion of our people to the ghetto. This confinement irritates and affects adversely all of our racial problems—problems of education, health and welfare, employment, attitude and aspiration.")

90. 114 CONG. REC. 2276 (1968).

91. 114 CONG. REC. 2280 (1968) (statement of Sen. Brooke).

Furthermore, as business left the central cities, so did the tax base that had helped provide services to those areas.[92]

In addition to lost tax revenue, the movement of businesses away from inner cities had a deleterious impact on minority employment opportunities.[93] This effect was compounded by the fact that in 1967, nearly 80% of the non-rural minority population of the United States resided in central cities.[94] Many in Congress understood that the exodus of business from the inner city would create serious handicaps on non-white job seekers.[95] It was thus apparent to Congress that as businesses continued to move away from inner cities, the predominately minority populations of those areas would be deprived of many jobs.[96]

Similarly, Congress was concerned with the effect centralized minority residential patterns in the inner city had on education.[97] Congressional hearings revealed that there was a direct correlation between existing racial housing patterns and segregation in public schools.[98] This correlation resulted from the limitations segregated housing patterns created for students to attend "school with members of other racial and ethnic and economic groups."[99] When such integration occurred, it "tend[ed] to improve the educational achievement of disadvantaged children."[100] When it did not, there could be a negative impact on minority students.[101] Indeed, concern over the effect that segregated housing patterns had on education was reflected in the statement of one congressional witness who testified that "[f]air housing is … more than merely housing[,] [i]t is part of an educational bill of rights for all citizens."[102]

Finally, in addition to the relationship between segregated housing and educational and employment opportunities, Congress was concerned about increasing racial tensions and race riots that were occurring at the time that the FHA was being debated.[103] There was a growing perception by Congress that its

92. *Id.*

93. 114 CONG. REC. 2276 (1968) ("[W]ithout … doubt … housing discrimination has had a serious [adverse] effect on [African American] employment ….").

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (one congressional witness testified that "[d]e facto segregation in schools and education is directly traceable to the existing patterns of racially segregated housing").

99. *Id.*

100. *Id.*

101. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). In *Brown*, the Supreme Court agreed with the court below that "[s]egregation of white and [African American] children in public schools has a detrimental effect on the [African American] children." *Id.* Consequently, the Court held that the "separate but equal" doctrine expounded in *Plessy v. Ferguson*, 163 U.S. 537 (1896), had no application "in the field of public education" since, despite the equality of tangible facilities, "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

102. 114 CONG. REC. 2276 (1968). *See also* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 153 (1969) (noting that "[t]he case for fair housing included its psychological significance to blacks who will be able to escape the ghetto and the increased opportunities for employment and for decent education").

103. *See, e.g.*, Dubofsky, *supra* note 102, at 154.

failure to act would "insure two separate Americas constantly at war with one other increasingly unable" to agree on any issue.[104] Some members of Congress worried that "white" society's failure to act toward "abolish[ing] the ghetto [would] reinforce the growing alienation of white and black America" and would increase the racial divide.[105] To some extent, it seems that Congress wanted to show the "basic decency of 'white America'"[106] to "black militants [who] preached [its] basic indecency" in the hope of decreasing the potential for violence.[107] Part of the goal of the legislation was to relieve some of this tension "[a]t a time when riots threatened to close down every major city in the country."[108]

The extent of this threat was readily apparent to members of Congress; the worst rioting in the nation's history occurred during the mid-to late-1960s.[109] In 1967, for instance, "[s]eventy-one cities experienced outbreaks of 'mob unrest.'"[110] The unrest was classified as "serious" in twenty-five of those cities.[111] These were frequently multi-day events and often involved looting and arson.[112] Nearly 16,000 people were arrested that year in cities from Chicago and Newark, to Wichita and New Haven.[113] In Detroit alone, forty-three people died and over 7,200 were arrested during an eight-day period.[114]

Moreover, the riots of the 1960s were unlike any violence the country had witnessed before.[115] Earlier periods of turmoil were often characterized by white-initiated violence against minorities.[116] The riots of the 1960s, however, commonly erupted after an "African American[] [citizen] [was] arrested by police for [a] minor infraction[], followed by actual or alleged police brutality toward the suspect."[117] Inner city violence was also a result of racism, including "the concentration of poor blacks in rundown ghettos."[118] No doubt, the increasing "assertive[ness]" of African Americans in "attacking white symbols of authority and power," such as police stations,[119] concerned the lawmakers in Washington.

104. 114 CONG. REC. 2274 (1968).

105. *Id.*

106. *Id.*

107. Dubofsky, *supra* note 102, at 154.

108. *Id.*

109. GALE, *supra* note 61, at 10. *See also id.* at 19 (noting that "[i]n August 1965 … the nation experienced its worst outbreak of urban interracial mob violence").

110. *Id.* at 71.

111. *Id.*

112. *Id.* at 72.

113. *Id.* at 71.

114. *Id.* at 72.

115. *Id.* at 10-11.

116. *Id.* at 10.

117. *Id.* at 11.

118. *Id.* at 12 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)).

119. *Id.* at 11.

Commentators have argued that the "danger-of-violence rationale" was a compelling force behind the passage of urban-oriented legislation during the 1960s, including the FHA.[120] This rationale posited that, if Washington failed to intercede on behalf of the minority poor, the "fragile social fabric … holding … cities together" might tear.[121] Indeed, by 1965, the Johnson White House was "traumatized" by the violence in American cities,[122] HUD viewed the need for access to housing as paramount,[123] and "many in Washington … were growing increasingly uneasy [with the idea that racial violence was] not simply [an] aberration[]."[124]

In addition to the general violence the country was witnessing in its major cities, the late 1960s also saw the assassinations of Robert F. Kennedy and Martin Luther King, Jr.[125] This combination of events "convince[d] members of Congress to take a decisive step to combat racism."[126] In April of 1968, President Johnson signed Title VIII of the Civil Rights Act into law, despite the fact that only a month earlier, the Act had avoided a filibuster by one vote.[127] In sum, Congress was well aware of the racial violence growing in the inner cities, and this knowledge helped push the passage of the FHA.

Debate surrounding the passage of the Civil Rights Act and its fair-housing component demonstrates that, while Congress was primarily concerned with fair housing, it also understood the effects that segregated housing patterns would have on other social issues,[128] as well as the potential negative consequences that might result from its failure to act. Congress therefore hoped to positively affect minority educational[129] and employment opportunities.[130] It also hoped to reduce the possibility of rioting.[131] Supporters of the Act believed that positive change in the area of fair housing would help lead to resolution of these other problems.[132] It is through this broad historical and contextual lens that the FHA should be interpreted today. To view the FHA narrowly, or to disparage a broad

120. *Id.* at 33.

121. *Id.* (citing B.J. FRIEDEN & M. KAPLAN, THE POLITICS OF NEGLECT: URBAN AID FROM MODEL CITIES TO REVENUE SHARING 34 (1975)).

122. *Id.*

123. *See id.* at 21-22.

124. *Id.* at 19.

125. *Id.* at 33-34.

126. *Id.* at 77.

127. *Id.*

128. *See* 113 CONG. REC. 3395 (1967) ("Discrimination in housing confines a substantial portion of our people to the ghetto. This confinement irritates and affects adversely all of our racial problems—problems of education, health and welfare, employment, attitude and aspiration.").

129. *See* 114 CONG. REC. 2276 (1968).

130. *See id.*

131. *See* 114 CONG. REC. 2274 (1968) (noting that "[t]he barriers of housing discrimination stifle hope and achievement, and promote rage and despair").

132. *See* 114 CONG. REC. 2274 (1968) (statement of Sen. Mondale) ("Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities.").

reading of § 3604(b) as creating a "general anti-discrimination"[133] statute ignores this context and Congress's fundamental concerns with multiple race-related issues at the time of its passage.

Because of this context, courts have long "applied the [Fair Housing] Act broadly within its terms."[134] Furthermore, § 3604(b) has been said to require a "broad and liberal construction," in order to keep with the broad intent of Congress to replace "racially segregated housing with 'truly integrated and balanced living patterns.'"[135]

An early Supreme Court decision that provided this "broad" interpretation was *Trafficante v. Metropolitan Life Insurance Co.*[136] In *Trafficante*, a group of black and white tenants sued the operator of their San Francisco apartment complex for discrimination against non-whites.[137] In the course of its decision, the Court determined that standing under the FHA was as "'broad[] as is permitted by Article III of the Constitution.'"[138] Furthermore, in finding that the white plaintiffs in the complex had standing to sue along side of the black residents who were denied housing, the Court relied on the fact that the "proponents of the legislation emphasized" that those who were not directly affected by discrimination (by being denied housing) also suffered from segregated housing patterns.[139] The injury suffered by the non-minority tenants in *Trafficante* included the lost business and social benefits of living in an integrated community, as well as the stigma associated with residence in a "white ghetto."[140] It is noteworthy that in *Trafficante*, the Court did not distinguish between discrimination that occurred before or after a dwelling was acquired.[141]

133. *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005).

134. Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984).

135. Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (quoting 114 CONG. REC. 2271 (statements of Sen. Mondale)). *See also Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210 (noting that "[t]he Act is concerned with ending racially segregated housing").

136. 409 U.S. 205 (1972).

137. *Id.* at 206-07.

138. *Id.* at 209 (quoting Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971)). *See also* Mackey v. Nationwide Ins. Co., 724 F.2d 419, 422-23 (4th Cir. 1984) (noting that standing under the FHA "'extend[s] to the full limits of Article III'" (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9 (1979)), and consequently, "[t]he normal prudential barriers to standing may not be set up as obstacles to the maintenance of actions under the Fair Housing Act." (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982))).

138. *Trafficante*, 409 U.S. at 211.

139. *Id.* at 210. *See also* Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 488 (S.D. Ohio 2007) ("'[N]on-minorities have standing to maintain discrimination actions *for injuries suffered by them* as a result of racially discriminatory practices' against a racial minority." (quoting Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987)).

140. *Trafficante*, 409 U.S. at 208.

141. *See generally id.*

IV. THE PRE- VERSUS POST-ACQUISITION DEBATE AND ITS EFFECT ON THE APPLICATION OF § 3604(B) TO CLAIMS OF THE DISCRIMINATORY PROVISION OF MUNICIPAL SERVICES AFTER HOUSING HAS BEEN ACQUIRED

Section 3604(b) of the FHA provides that "it shall be unlawful … [t]o 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."[142] As noted above, federal courts have disagreed over their interpretation of this section of the Act.[143] The crux of this disagreement turns on the meaning of "'therewith' in the phrase 'in connection therewith.'"[144]

One interpretation of the "in connection therewith" language is that the word "therewith" refers to the "sale or rental of a dwelling."[145] Under this view, the statute would read "it shall be unlawful … to discriminate … in the provision of services or facilities in connection [with the] *sale or rental of a dwelling*." If this is so, then any discriminatory act that occurred after the sale or rental of a dwelling[146] would fall outside the scope of § 3604(b).[147]

The other possible interpretation is that the "in connection therewith" language refers to a dwelling generally.[148] Thus, § 3604(b) would prohibit discrimination "in the provision of services or facilities in connection [with a dwelling.]" If this is the correct interpretation, discriminatory acts that occur after the sale or rental of a dwelling (including the discriminatory provision of

142. 42 U.S.C. § 3604 (2006).

143. *See* SCHWEMM 2002, *supra* note 15, §§ 14:2, 14:3 (stating that § 3604(b) cases generally fall into one of two categories: those that deal with discrimination in the proposed terms of the sale or rental prior to closing, and those cases that concern discrimination in the provision of services after the buyer or tenant moves in, or post-acquisition cases). *See also* Oliveri, *supra* note 43, at 3.

144. Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *21-22 (N.D. Tex. Sept. 9, 2004). *See also* Steele v. City of Port Wentworth, No. CV405-135, 2008 U.S. Dist. LEXIS 20637, at *34 (S.D. Ga. Mar. 17, 2008) (citing *Lopez* for the proposition that the "crux" of the split in authority "is the interpretation of the meaning of 'therewith' in the phrase 'in connection therewith'").

145. 42 U.S.C. § 3604(b) (2006).

146. In most cases, the discriminatory provision of municipal services would occur after the sale or rental of a dwelling since, presumably, a person would be unwilling to purchase or move into a dwelling that provided these services on a discriminatory basis.

147. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (stating that what happened after housing was acquired was "not at the forefront of congressional thinking"); Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (stating that § 3604(b) applies only to "services and facilities provided in connection with the sale or rental of housing").

148. *See, e.g.*, Richards v. Bono, No. 5:04-cv-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *14 (M.D. Fla. Apr. 26, 2005) (rejecting a "narrow construction" of § 3604(b) limiting it to post-occupancy claims and finding post-rental sexual harassment claim actionable under § 3604(b)); Campbell v. City of Berwyn, 815 F. Supp. 1138, 1144 (N.D. Ill. 1993) (discriminatory provision of police protection, post-sale, prohibited by § 3604(b)).

municipal services) fall squarely within the scope of § 3604(b)'s prohibition on discrimination.

These conflicting interpretations of § 3604(b) collectively describe the pre- versus post-acquisition debate.[149] Recently, courts have decided cases on both sides of this dispute.[150] However, a broad interpretation finding that post-acquisition claims are permitted under § 3604(b), particularly in the context of municipal service discrimination, is more consistent with the intent and legislative history of the FHA.[151] Unfortunately, some recent and influential cases have embraced the more limited interpretation of § 3604(b).[152]

A. In Support of a Narrow Reading

Until recently, it was generally accepted that § 3604(b) protected homeowners from discrimination during their occupation of a dwelling.[153] Indeed, HUD regulations have "identified a number of practices barred by [section 3604(b)] that affect current residents,"[154] including "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race …."[155] A number of recent cases have questioned this interpretation.[156] Often, courts supporting a narrow reading of § 3604(b) base their decision on either the language of the statute[157] or the concern of turning the FHA into a general civil rights statute,[158] or both.[159]

149. *Compare generally, e.g.*, *Halprin*, 388 F.3d at 327 (no post-occupancy claim), *with Campbell*, 815 F. Supp. at 1138 (post-occupancy claim permitted). *See also* Oliveri, *supra* note 43, at 3 (discussing *Halprin* and arguing that post-occupancy claims should be permitted under the FHA because "the language in the relevant portions of the FHA, which requires that discriminatory conduct occur in the context of the 'sale or rental' of a dwelling, limits the statute's application not to a specific moment in time, but rather to particular types of defendants—those who exercise control over the plaintiff's housing situation").

150. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 14:3 (2005) (noting that while a majority of opinions have allowed § 3604(b) claims in the context of the discriminatory provision of municipal services, a "significant number" have found that § 3604(b) does not cover this situation) [hereinafter SCHWEMM 2005].

151. Oliveri, *supra* note 43, at 3.

152. *See, e.g.*, *Halprin*, 388 F.3d at 327.

153. SCHWEMM 2005, *supra* note 150, § 14:3. *See also* Oliveri, *supra* note 43, at 1 (noting that until recently, federal courts "consistently recognize[ed] the discrimination claims of housing occupants as well as housing seekers").

154. SCHWEMM 2005, *supra* note 150, § 14:3.

155. *Id.* (quoting 24 C.F.R. § 100.65(b)(4) (2008)).

156. *See, e.g.*, Halprin, 388 F.3d at 330 (finding that the plaintiffs had "no claim under section 3604[(b)] for post-occupancy discrimination claims); Bloch v. Frischholz, 533 F.3d 562, 570 (7th Cir. 2008) (noting that "[section] 3604[(b)] (according to *Halprin*) extends only claims related to access [to housing]").

157. *See, e.g.*, King v. Metcalf 56 Homes Ass'n, Inc., No. 04-2192-JWL, 2004 U.S. Dist. LEXIS 22726, at *7 (D. Kan. Nov. 8, 2004) (finding that "[t]he plain language of the statute … limits the scope of section 3604(b) to discrimination in connection with the sale or rental of housing").

158. *See, e.g.*, Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (permitting § 3604(b) to cover situations not "in connection with the sale or rental of

One recent and influential[160] case supporting a narrow statutory reading of § 3604(b) of the FHA is *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n.*[161] In *Halprin*, Jewish plaintiffs alleged that the president of their neighborhood association vandalized their property and wrote racially disparaging remarks on a wall of their home.[162] In affirming the trial court's dismissal of the case for failure to state a claim under § 3604(b), the Seventh Circuit opined that "[t]he Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but *access* to housing."[163] The court conceded that "[a]s a purely semantic matter," § 3604(b) may be "stretched" to cover "constructive eviction" situations.[164] That was not the case in *Halprin*, and consequently, the court found that the plaintiffs had not claimed interference with any right protected by § 3604(b).[165]

A panel of the Seventh Circuit again denied relief to plaintiffs under § 3604(b) in *Bloch v. Frischholz*.[166] In *Bloch*, Jewish plaintiffs alleged that their condominium association's rules regulating hallway aesthetics discriminated against them because it forbade the display of a mezuzah, a traditional Jewish symbol, at the entrance of their apartment.[167] The Seventh Circuit cited *Halprin* for the proposition that § 3604(b) did not address "discrimination after ownership has changed hands."[168]

Upon review of the panel's decision, however, the full Seventh Circuit reversed the district court's grant of summary judgment with respect to the Blochs' § 3604(b) claim.[169] The full court appeared to limit *Halprin* somewhat, noting that after "careful review of the FHA and our prior opinion in *Halprin*, we conclude that in some circumstances homeowners have an FHA cause of action for discrimination that occurred after they moved in."[170] The court noted that, as *Halprin* suggested, a constructive eviction claim could create a § 3604(b) issue

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housing" would turn the FHA into a "'civil rights statute of general applicability rather than one dealing with the specific problem of fair housing opportunities'") (quoting Vercher v. Harrisburg Housing Auth., 454 F. Supp. 423, 424 (M.D. Pa. 1978)).

159. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

160. *See* Oliveri, *supra* note 43, at 2 (noting that "[f]ederal courts across the country have … adopted" *Halprin*'s limited approach).

161. 388 F.3d 327, 329 (7th Cir. 2004).

162. *Id.* at 328.

163. *Id.* at 329.

164. *Id.*

165. *Id.* at 329, 330.

166. 533 F.3d 562 (7th Cir. 2008).

167. *Id.* at 563-64.

168. *Id.* at 563. It is possible, however, that the court was less disposed to find favorably for the plaintiff's in this case because one of them had "led the committee that drafted" the rule and presumably was "not trying to undermine her own religious practices." *Id.* at 565. Additionally, the rule was apparently applied in a non-discriminatory way; Christmas ornaments, as well as secular items, were also removed from the hallway walls. *Id.* at 564.

169. Bloch v. Frischholz, 587 F.3d 771, 787 (7th Cir. 2009) (en banc) (upholding, however, the decision to grant summary judgment on the § 3604(a) claim).

170. *Id.* at 772.

stating that "the right to inhabit [a] premises is a 'privilege of sale'" and "[d]eprivation of that right by making the premises uninhabitable violates [§] 3604(b)."[171] However, the courts concluded that the plaintiffs in this case failed to establish a constructive eviction claim.[172]

The court went further, however, suggesting that § 3604(b) may permit post-occupancy claims when there is an agreement "contemplating future, post-sale governance" of the dwelling by some type of association.[173] That is, the agreement the Blochs' entered into with the condominium association, setting forth "rights, easements, privileges, and restrictions" that they agreed to be bound by in the future, constituted a "term or condition of sale [bringing] this case within [§] 3604(b)."[174]

Even before *Halprin* and the panel decision in *Bloch*, some courts interpreted § 3604(b) narrowly, citing concern over turning the FHA into a general civil rights statute.[175] In *Clifton Terrace Associates v. United Technologies Corp.*, for example, the owner of a "low-income housing complex" in Washington D.C. sought elevator repair service from the defendant elevator company.[176] When the repairs were not provided (allegedly for racially discriminatory reasons), the plaintiff sued under the FHA.[177] The D.C. Circuit held that recovery was not permitted under the Act because § 3604(b) applies only to "services and facilities provided in connection with the sale or rental of housing."[178] The court denied relief, explaining that permitting § 3604(b) to cover situations not "in connection with the sale or rental of housing" would turn the FHA into a "'civil rights statute of general applicability rather than one dealing with the specific problems of fair housing opportunities.'"[179]

Similarly, in *Cox v. City of Dallas*,[180] the Fifth Circuit expressed concern over broadly interpreting the FHA as a general civil rights statute.[181] In *Cox*, the plaintiffs alleged that the City of Dallas had discriminated against them in

171. *Id.* at 779.

172. *Id.*

173. *Id.*. While the en banc decision does not amount to a complete rejection of *Halprin*, the Seventh Circuit appears to have recognized that, at least in some circumstances, § 3604(b) may provide relief for claims of post-occupancy discrimination. *See id.* at 17-22.

174. *Id.* at 780 (stating that "because the Blochs purchased dwellings subject to the condition that the Condo Association can enact rules that restrict the buyer's rights in the future, § 3604(b) prohibits the Association from discriminating against the Blochs through its enforcement of the rules….").

175. *See, e.g.*, Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991).

176. *Id.* at 716.

177. *Id.* at 718.

178. *Id.* at 720.

179. *Id.* (quoting Vercher v. Harrisburg Housing Auth., 454 F. Supp. 423, 424 (M.D. Pa. 1978)). Additionally, since the service provider was a private company as opposed to a municipality, the court found that even if § 3604(b) did cover post-acquisition claims, it would not apply to the "private services contractor[]" here. *Id.*

180. 430 F.3d 734 (5th Cir. 2005).

181. *Id.* at 746.

violation of the FHA by failing to police an illegal dumping facility located in their neighborhood.[182] At the time suit was brought, the neighborhood was predominately black, and the dumping of waste there coincided temporally with a shift in the racial composition of the neighborhood from mostly white to mostly black.[183] Despite this fact, the court found that § 3604(b) did not apply because "the service [at issue here, enforcement of zoning laws] was not 'connected' to the sale or rental of a dwelling."[184] In reaching this conclusion, the court expressed concern that "unmooring the 'services' language from the 'sale or rental' language[, and pushing] the FHA into a general anti-discrimination pose,"[185] would broaden the scope of § 3604(b) to create a cause of action for any effect on property values caused by discrimination.

To summarize, several recent decisions have limited the application of § 3604(b) to discriminatory acts literally in connection with the sale or rental of a dwelling.[186] These cases, as well as several older ones, have relied on a narrow reading of the statutory language[187] and a concern over turning the FHA into a "general civil rights" statute.[188] Whatever the basis for these decisions, however, their effect is to essentially foreclose recovery for claims of discriminatory provision of municipal services where the claims are unlikely to arise at the time of the initial transaction.

B. In Support of a Broad Reading

While some recent court decisions have adopted a limited reading of § 3604(b) for various reasons,[189] other courts have reaffirmed the traditional and appropriately broad view of the FHA.[190] Courts taking a broader view have examined both the legislative history of the Act[191] and the HUD regulations

182. *Id.* at 736.

183. *Id.*

184. *Id.* at 745.

185. *Id.* at 746.

186. *See, e.g.*, Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714 (D.C. Cir. 1991); *Cox*, 430 F.3d at 745; Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

187. *See, e.g.*, King v. Metcalf 56 Homes Ass'n, Inc., No. 04-2192-JWL, 2004 U.S. Dist. LEXIS 22726, at *7 (D. Kan. Nov. 8, 2004) (finding that "[t]he plain language of … [§ 3604(b)] … limits … [its] scope … to discrimination in connection with the sale or rental of housing").

188. *See, e.g.*, *Halprin*, 388 F.3d at 327; *Cox*, 430 F.3d at 734; *Clifton Terrace Assocs.*, 929 F.2d at 714.

189. *See, e.g.*, *Cox*, 430 F.3d at 746 (expressing concern over turning the FHA into a general civil rights statute); Bloch v. Frischholz, 533 F.3d 562, 563 (7th Cir. 2008) (arguing that § 3604(b) did not address "discrimination after ownership has changed hands").

190. *See, e.g.*, Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, *27-31 (N.D. Tex. Sept. 9, 2004); Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993).

191. United States v. Koch, 352 F. Supp. 2d 970, 976-78 (D. Neb. 2004) (noting that, unlike the *Halprin* court's claim that the Act "contain[ed] no hint either in its language or its legislative history of a concern with anything but access to housing," *Halprin*, 388 F.3d at 329, "one need look no farther than [the] first section [of the Act] as it was initially presented by Senator Mondale [at

implementing it.[192] They have also given a more generous interpretation to the statutory language itself.[193] This broader view is the correct one and results in decisions that are both consistent with the initial purpose of the FHA and intuitively fair.

In *Campbell v. City of Berwyn*, for instance, the plaintiffs were a black family who had moved into a predominately white town.[194] The Campbells were harassed because of their race, and, thus, decided to move.[195] After putting up a "For Sale" sign, the family received police protection on a twenty-four hour basis.[196] Subsequently, the Campbells changed their mind and decided not to move from their home.[197] When the "For Sale" sign was removed, the police protection abruptly stopped.[198] The family alleged that the decision to terminate their police protection was based on race, in violation of the FHA.[199] The court noted that in *Southend Neighborhood Improvement Ass'n v. County of St. Clair*,[200] the Seventh Circuit had held that § 3604(b) "'applies to services generally provided by governmental units, such as police and fire protection.'"[201] Consequently, the *Campbell* court found that discriminatory denial of police protection was prohibited by § 3604(b) and denied the city's motion to dismiss.[202]

Similarly, in *Lopez v. City of Dallas*, the plaintiffs alleged that the City of Dallas provided the predominately black Cadillac Heights neighborhood with "inferior municipal services … because of the race of its residents."[203] In considering the city's motion to dismiss for failure to state a claim under § 3604(b), the court considered HUD's regulations to determine its appropriate scope.[204] The court read the applicable HUD regulation as broadly interpreting the requirement that services "be in connection with the sale or rental of a dwelling" to "include the discriminatory limiting of the use of services 'associated with a dwelling.'"[205] Finding HUD's interpretation to be reasonable,

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114 CONG. REC. 2270 (1968)] to recognize that Congress was not unconcerned with the need to prevent discrimination that might arise during a person's occupancy of a dwelling").

192. *See, e.g.*, *Lopez*, 2004 U.S. Dist. LEXIS 18220, at *23-27.

193. *See Koch*, 352 F. Supp. 2d at 976 ("[T]here is authority that the terms of the Fair Housing Act are to be construed generously ….").

194. *Campbell*, 815 F. Supp. at 1140.

195. *Id.*

196. *Id.*

197. *Id.* at 1141.

198. *Id.*

199. *Id.* at 1142.

200. 743 F.2d 1207, 1209 (1984).

201. Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (quoting Southend Neighborhood Improvement Ass'n v. County of St. Claire, 743 F.2d 1207, 1210 (7th Cir. 1984)).

202. *Id.* at 1144.

203. Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *2 (N.D. Tex. Sept. 9, 2004).

204. *Id.* at *23-24.

205. *Id.* at *24 (quoting 24 C.F.R. § 100.65(b)(4) (1990)).

the court found the plaintiffs' allegations actionable under § 3604(b) and denied the city's motion to dismiss.[206]

Again, in *United States v. Koch*, an expansive view of § 3604(b) was adopted.[207] In *Koch*, the defendant landlord argued that, based on *Halprin*, the plaintiffs sexual discrimination claims should be dismissed because, "to the extent the … claims [were] based upon incidents that occurred after they took possession of the … property" the claims were prohibited by § 3604.[208] Initially, the court noted that the Eighth Circuit permitted § 3604(b) claims for discrimination that occurred after the acquisition of housing.[209] Further, allowing the plaintiffs' claims to proceed, the court found *Halprin*'s § 3604(b) analysis "questionable in two key respects."[210] The court found problematic both *Halprin*'s "narrow interpretation" of the language of § 3604(b) and "narrow view" of the FHA's legislative history.[211]

Finally, there is some disagreement within the Seventh Circuit itself as to the proper scope of § 3604(b). Judge Wood engaged in a comprehensive analysis of the section in dissent to *Bloch v. Frischholz*.[212] Judge Wood's dissent found the language of § 3604(b) to be "broad, referring to any 'terms, conditions or privileges of sale.'"[213] The dissent also analyzed the HUD regulation implementing § 3604(b), 24 C.F.R. § 100.65, under *Chevron* to determine the level of deference owed it.[214] Based on the *Chevron* analysis and the traditionally "generous construction" given the FHA by the Supreme Court,[215] the dissent would have applied a broader reading of the FHA and granted the plaintiffs relief.[216]

206. *Id.* at *27.

207. United States v. Koch, 352 F. Supp. 2d 970 (D. Neb. 2004).

208. *Id.* at 975.

209. *Id.* at 975-76 (citing Nuedecker v. Boisclair Corp., 351 F.3d 361, 364-65 (8th Cir. 2003)).

210. *Id.* at 976.

211. *Id.*

212. Bloch v. Frischholz, 533 F.3d 562, 570-71 (7th Cir. 2008) (Wood, J., dissenting). Rehearing the case en banc, the Seventh Circuit ultimately agreed with the dissent's argument that "the majority [in the panel decision] prematurely characterized the Blochs' claim as one for an exception to … supposedly neutral … [r]ules." Bloch v. Frischholz, 587 F.3d 771, 775 (7th Cir. 2009). That is, the full court agreed that there was evidence of intentional discrimination that precluded summary judgment because the "Associations reinterpretation of the … [r]ule and clearing of all objects from doorposts was intended to target the only group of residents for which the prohibited practice was religiously required." *Id.* at 787.

213. *Bloch*, 533 F.3d at 571 (quoting 43 U.S.C. § 3604(b)).

214. *Id. Accord* Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *26 (N.D. Tex. Sept. 9, 2004).

215. *Bloch*, 533 F.3d at 566 (Wood, J., dissenting) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972)).

216. *Id.* at 566, 571 (Wood, J., dissenting).

V. SECTION 3604(B) SHOULD BE READ TO PROHIBIT THE DISCRIMINATORY PROVISION OF MUNICIPAL SERVICES POST-ACQUISITION

The traditionally broad interpretation of § 3604(b) is the preferred interpretation for several reasons. First, a broad reading is consistent with both the statutory language and the historically generous judicial interpretation given to the FHA.[217] Second, HUD regulations have interpreted § 3604(b) to permit post-sale claims of discrimination in the provision of municipal services.[218] Third, the legislative history and congressional debate surrounding passage of the FHA suggest that Congress was concerned about more than simply housing, and viewed the "open housing" goal of the Act as but one part of a holistic solution to multiple racial issues.[219] And finally, general fairness suggests that reading § 3604(b) to provide relief for those who have been discriminated against in the provision of municipal services is appropriate. Each of these reasons are supported below.

A. A Broad Reading of Section 3604(b) Is Consistent with the Statutory Language of the FHA

Several courts have noted that, although the language of § 3604(b) can be interpreted "restrictively to cover only pre-sale activities," nothing compels such a narrow reading of the section.[220] In *Koch*, for instance, the court observed that there was authority for the proposition "that the terms of the Fair Housing Act are to be construed generously in order to promote the replacement of segregated ghettos with 'truly integrated and balanced living patterns.'"[221] The court in *Koch* concluded, in explicit disagreement with *Halprin*, that "the language of the FHA does demonstrate that Congress was concerned with post-possession discrimination."[222]

Specifically, the court in *Koch* suggested that the initial policy statement of the FHA contained in § 3601 as proposed by Senator Mondale,[223] dispelled the contention that Congress was "unconcerned with the need to prevent discrimination that might arise during a person's occupancy of a dwelling."[224]

217. *See* SCHWEMM 2005, *supra* note 150, § 14:3 n.35 (noting that although the FHA was not specifically relied upon in *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (holding that the refusal to provide water and sewer service to a low-income housing development violated the EPC), the court did "take note" of § 3604(b)). *See also supra* Part IV.B.

218. 100 C.F.R. § 100.65 (1990); 100 C.F.R. § 100.70 (1990).

219. *See supra* Part III.B. (discussing the legislative history of the FHA).

220. *Bloch*, 533 F.3d at 571 (Wood, J., dissenting).

221. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211-12 (1972) (quoting 114 CONG. REC. 3422 (1968))).

222. *Id.* at 977.

223. 114 CONG. REC. 2270 (1968).

224. *Koch*, 352 F. Supp. 2d at 977.

While the court agreed that the present statement of policy[225] could be read as limiting § 3604(b) to post-acquisition claims, it suggested that this view was based on an incomplete reading of Senator Mondale's comments[226] and the initial policy statement of the Act.[227] The statements made by Senator Mondale that seemingly suggested a limited post-sale scope of § 3604 (as noted in *Halprin*) were actually made in response to a question about whether the FHA would require the government to affirmatively provide housing to citizens.[228] When viewed in this more complete context, this comment does not indicate that the Act was intended to apply only to pre-occupancy claims.[229]

B. Regulations Promulgated by the Department of Housing and Urban Development Suggest a Broad Reading of Section 3604(b)

Another source that supports a broad reading of § 3604(b) is the Department of Housing and Urban Development's implementation regulations.[230] Some commentators believe that HUD's regulations hold the "key" to the resolution of whether § 3604(b) provides relief in instances of post-occupancy municipal-service discrimination.[231] HUD implemented § 3604(b) with 24 C.F.R. § 100.65.[232] Section 100.65 provides:

> It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.[233]

Further, subsection (b) provides that "prohibited actions … include, but are not limited to … (4) limiting the use of privileges, services or facilities *associated with* a dwelling because of race, color, religion, sex, handicap, familial status, or national origin …."[234]

In *Lopez v. City of Dallas*, the court observed that HUD interpreted the "'in connection therewith'" language of § 3604(b) as requiring that the services be in

225. 42 U.S.C. § 3601 (2006) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

226. *Koch*, 352 F. Supp. 2d at 977 n.6.

227. The original proposed purpose of the FHA read: "It is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States." 114 CONG. REC. 2270 (1968) (emphasis added).

228. *Koch*, 352 F. Supp. 2d at 976 & 977 n.6.

229. *Id.* at 977 n.6.

230. 24 C.F.R. § 100.65 (1990).

231. SCHWEMM 2005, *supra* note 150, § 14:3.

232. 24 C.F.R. § 100.65 (1990).

233. *Id.*

234. 24 C.F.R. § 100.65(b)(4) (1990) (emphasis added).

connection with 'the sale or rental of a dwelling.'"[235] The court also found that HUD "broadly interprets the requirement that the services be 'in connection with the sale or rental of a dwelling' … to include the discriminatory limiting of the use of services 'associated with a dwelling.'"[236] Next, under *Chevron*,[237] the court found that Congress had not stated whether § 3604(b) applied to the discriminatory provision of municipal services, and there was ambiguity in the statute's meaning, as "evidenced by the split in authority interpreting its meaning."[238] Consequently, because HUD's interpretation was "based on a permissible construction of the statute," the court would defer to it.[239]

Furthermore, 24 C.F.R. § 100.70(b) provides that "[i]t shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin to engage in any conduct relating to the provision of housing or of services … in connection therewith that otherwise makes unavailable or denies dwellings to persons."[240] The regulation goes on to specify that "[p]rohibited activities relating to dwellings under paragraph (b)"[241] include "[r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."[242] Although this particular provision relates to § 3604(a),[243] "to the extent that these regulations indicate HUD's view that discrimination in municipal services amounts to a [FHA]

235. Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *8 (N.D. Tex. Sept. 9, 2004) (quoting 24 C.F.R. § 100.65 (1990)).

236. *Id.*

237. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court laid out the test for when judicial deference to an agency interpretation of a statute which it administers is proper:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

238. *Lopez*, 2004 U.S. Dist. LEXIS 18220, at *8-9.

239. *Id.* at *9. *See also* Bloch v. Frischholz, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting) (applying the *Chevron* test and finding that HUD's regulation in 24 C.F.R. § 100.65 was "consistent with the 'generous construction' that the Supreme Court gave to the statute in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972)").

240. 24 C.F.R. § 100.70(b) (1990).

241. 24 C.F.R. § 100.70(d) (1990).

242. 24 C.F.R. § 100.70(d)(4) (1990).

243. 42 U.S.C. § 3604(a) (2006) ("It shall be unlawful … (a) [t]o 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.").

violation, they should be determinative, given the deference that courts must accord such regulations in interpreting this statute."[244]

C. The Legislative History and Intent of the FHA Suggests a Broad Reading of Section 3604(b)

Without fully entering the debate over the appropriate extent to which legislative history should be used in statutory interpretation, some introduction is necessary. In most cases, the textual meaning is "critically important"[245] to the process of interpreting a statute, the end goal of which is to determine the intent of the legislature.[246] In some instances, however, strictly textual views must "give way" to other modes of interpretation.[247] Legislative history is one way to determine legislative intent.[248]

For instance, Justice Stephen Breyer has suggested that, until recently, appellate courts generally found it "natural, and often helpful" to use legislative history.[249] Despite recent criticism of the practice,[250] Justice Breyer suggests that when "statutory language is unclear,"[251] several circumstances warrant the use of legislative history, some of which are relatively non-controversial.[252] Justice Breyer further stated that the use of legislative history may be warranted in some circumstances to choose "among several possible 'reasonable purposes' for language in a politically controversial law."[253]

The Supreme Court has extensively relied on legislative history in Title VII employment discrimination cases,[254] which are similar to Title VIII cases.[255] In

244. SCHWEMM 2005, *supra* note 150, § 14:3.

245. KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 35 (1999).

246. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 211 (2000).

247. GREENAWALT, *supra* note 245, at 35. *See also* Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861 (1992) (arguing that in some cases, the use of legislative history is relatively non-controversial).

248. ESKRIDGE, FRICKEY & GARRETT, *supra* note 246, at 213.

249. Breyer, *supra* note 247, at 845.

250. *Id.* at 845-46 (for example, some commentators "maintain that it is constitutionally improper to look beyond a statute's language, or that searching for 'congressional intent' is a semi-mystical exercise like hunting the snark").

251. *Id.* at 847.

252. *Id.* at 860-61 (arguing that the use of legislative history to "(1) avoid[] an absurd result; (2) prevent[] the law from turning on a drafting error; [and] (3) understand[] the meaning of specialized terms" are "not very controversial").

253. *Id.* at 861 ("[I]n certain contexts reference to legislative history can promote interpretations that more closely correspond to the expectations of those who helped create the law (and whom the law will likely affect).").

254. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

255. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 495-96 (S.D. Ohio 2007) ("[r]ecognizing that fair employment concepts are often imported into fair housing analysis," the court applied the employment discrimination "futile gesture doctrine" to the fair housing context). *See also* United States v. Koch, 352 F. Supp. 2d 970, 974 (D. Neb. 2004) (noting that the Seventh

United Steelworkers of America v. Weber, the Court considered whether Title VII forbade employers and employees from entering into voluntary affirmative action plans to remedy past discrimination against African Americans in certain trades.[256] In deciding the issue, the Court gave considerable attention to the legislative history and intent of Title VII.[257] The Court stated that the "prohibition against racial discrimination [in Title VII] must … be read against the … legislative history of Title VII and the historical context from which [it] arose."[258] After reviewing these sources, the Court concluded that a complete ban on all affirmative action based on race had to be rejected as inconsistent with the purpose of the Act.[259]

All of this is simply to suggest that legislative history is an appropriate tool to discern legislative intent in order to properly interpret a statute. Indeed, the Supreme Court itself has used this procedure to interpret other sections of the Civil Rights Act in order to reach results consistent with the "legislative history of [the Act] and the historical context from which [it] arose."[260] This is especially so in cases, such as this one, where a statute is reasonably susceptible to either of two proposed interpretations.[261]

Consequently, the legislative history and commentary surrounding the passage of a statute is an appropriate source to use in considering the proper scope of the Act. In the FHA context, Congress hoped to achieve several goals through passage of open-housing legislation.[262] In addition to requiring that housing be provided on a non-discriminatory basis, Congress hoped that promoting integrated housing patterns would have a positive effect on both education and employment of the predominately minority inner-city residents.[263] Concern over the availability of employment was exacerbated by the increasing

Circuit in *Halprin* admitted that other circuits had "drawn analogies between the FHA and Title VII …"). *But see* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (noting that courts analogizing between Titles VII and VIII failed to "consider the difference in language between the two statutes").

256. *Weber*, 443 U.S. at 200.

257. *Id.* at 202-08.

258. *Id.* at 201.

259. *Id.* at 201-02. The Court stated that purpose of the Act was concern over the "plight of [African Americans] in our economy." *Id.* at 202. The ultimate holding of the case was that "Title VII's prohibition … against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208.

260. *Id.* at 201.

261. SCHWEMM 2005, *supra* note 150, § 14:3 (noting that there is a split of authority on the issue of whether § 3604(b) applies to municipal service cases).

262. *See, e.g.*, United States v. Koch, 352 F. Supp. 2d 970, 977-78 (D. Neb. 2004) (noting that Congress "sought to promote integrated neighborhoods" and hoped that this would "lead to the reduction of the deleterious effects of ghettos on the employment and education of the Americans trapped therein") (internal citations omitted).

263. 113 CONG. REC. 3395 (1967) (statement of Sen. Hart) ("Discrimination in housing confines a substantial portion of our people to the ghetto. This confinement irritates and affects adversely all our racial problems—problem of education, health and welfare, employment, attitude, and aspiration.").

flight of business away from the central cities during the first half of the 1960s,[264] and *Brown v. Board of Education* had already demonstrated the deleterious effects that segregated education has on minority students.[265]

More ominous, however, were congressional concerns over increasing racial tensions,[266] particularly those that resulted in violence,[267] and apprehension that two distinct Americas were being created along racial lines.[268] As argued above, Congress hoped that the passage of the FHA would help alleviate the racial tension.[269] Courts interpreting the FHA should bear this in mind.

These multifaceted congressional concerns, along with the arguments against them, can be found in the debates surrounding the passage of the FHA.[270] If legislative history is indeed a legitimate source of statutory interpretation, the history of the FHA suggests that the traditionally broad reading of the Act is the correct one. This broad interpretation encompasses the argument put forth here, that § 3604(b) provides relief in situations where a municipality discriminates against its residents in the provision of municipal services based on their race.[271] This should remain true even if the discrimination occurs post-acquisition, as opposed to pre-acquisition.

A disturbing trend may be developing as courts develop this newfound hostility toward a broad reading of the FHA.[272] When combined with the traditionally narrow interpretation given to services under § 3604(b),[273] the practice of narrowly interpreting § 3604(b) to preclude post-occupancy claims,

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264. 114 CONG. REC. 2276 (1968) ("[H]ousing discrimination has a serious [adverse] effect on [African American] employment" because, while many African Americans remained in the inner cities," 113 CONG. REC. 3395 (1967), "more and more jobs are fleeing the rotting core of American cities" 114 CONG. REC. 2276 (1968)).

265. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (noting that separating black children from "[white children] of a similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

266. Dubofsky, *supra* note 102, at 154-55.

267. *See, e.g.*, GALE, *supra* note 61, at 10 (noting that in the mid to late 1960s, cities such as Los Angeles, Chicago, Cleveland, Detroit, Newark, Washington D.C., and others experienced riots).

268. 114 CONG. REC. 2274 (1968) (perceiving that congressional failure to act toward "abolish[ing] the ghetto [would] reinforce the growing alienation of white and black America" and would "insure two separate Americas constantly at war with on another").

269. *See, e.g.*, Dubofsky, *supra* note 102, at 149 (noting that the assassination of Martin Luther King, Jr. had the effect of "jarring" the FHA out of committee hold up in the House). *See also* GALE, *supra* note 61, at 33-34.

270. *See, e.g.*, 114 CONG. REC. 3423 (1968) (where Senator Ervin stated that "[t]his so-called open housing amendment is a proposal to bring about equality by robbing all Americans of their basic rights of private property").

271. *See, e.g.*, Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *8 (N.D. Tex. Sept. 9, 2004).

272. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328-29 (7th Cir. 2004).

273. A service has been generally limited to something traditionally provided by a municipality, see *Mackey v. Nationwide Insurance Co.*, 724 F.2d 419, 424 (4th Cir. 1984), or by a government unit, see *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

without reference to the historical underpinnings of the Act, threatens to result in decisions that are inconsistent with the goals of the FHA.[274] To avoid this result, courts must remain cognizant that the original purpose of the FHA extended beyond mere access to housing,[275] and understand that the problems that created a need for the Act in the first place have not yet been alleviated.[276]

D. General Fairness Supports a Broad Reading of the FHA, and the Alternative Narrow Interpretation of the Act Would Lead to Results that Are Unfair and Unwise

A narrow reading of the FHA that excludes claims by those seeking redress for the discriminatory provision of municipal services will produce results that are inconsistent with general ideas of fairness and incompatible with the intent of the Act.[277] First, a narrow reading can create incentives for sham transactions.[278] Additionally, due to the narrow class of municipal actions that constitute a service, concern over turning the FHA into a general civil rights statute is over-emphasized.[279] Finally, a narrow interpretation of the Act may have the effect of denying relief altogether, since a comparable suit under the Equal Protection Clause would require a showing of discriminatory intent.[280] This section will address each of these concerns in turn.

1. *A Narrow Reading of Section 3604(b) May Incentivize "Sham" Transactions that Are Inefficient Because They Would Permit a Plaintiff to Achieve the Same Result Through a Circuitous Legal Route*

The first risk created by a narrow interpretation of § 3604(b) is that those seeking a remedy for municipal-service discrimination, if denied, may turn to a "sham" transaction or to the use of a strawman to meet the requirements of that narrow interpretation.[281] Consider the following example: Owner purchased a

274. Bloch v. Frischholz, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting).

275. *See, e.g.*, 114 CONG. REC. 2270 (1968) (the original policy of the Act, as proposed by Senator Mondale, was "to prevent discrimination on account of race, color, religion, or national origin, in the purchase, rental, financing and occupancy of housing throughout the United States").

276. *See generally, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007); Campbell v. City of Berwyn, 815 F. Supp. 1138 (N.D. Ill. 1993).

277. This would arise in a situation loosely based on *Halprin* (or more specifically, *Cox*, since that was a case involving the discriminatory provision of services from a municipal actor).

278. *See* BLACK'S LAW DICTIONARY 1408 (8th ed. 2004) (defining a sham transaction as "[a]n agreement or exchange that has no independent economic benefit or business purpose and is entered into solely to create a tax advantage"). Although a tax advantage is not necessarily the issue here, the principle is similar.

279. *See Mackey*, 724 F.2d at 424 (municipal services "encompass[] … services of the kind usually provided by municipalities"). *See also* Part V.D.ii.

280. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

281. *See* Cox v. City of Dallas,, 430 F.3d 734, 745 (5th Cir. 2005) (holding that the city did not violate § 3604(b) of the FHA because there was no connection between the denied service and the sale or rental of the dwelling).

home in a rural area in 1960 that was not served by a sewer system. Some years later, when a sewer system was installed near his house, the local water authority refused to permit Owner to connect to the system. Owner files suit under the FHA, alleging that he has been discriminated against in the provision of a municipal service based on his race.

In the above example, because there was no sewer in place when Owner bought his home, the discriminatory provision of sewer service could not have been in connection with the initial sale of the home. That is, because the sewer did not exist at the time of the initial sale, it is impossible that any discrimination as to the sewer was in connection with that sale. Consequently, under a narrow interpretation of § 3604(b), limiting its application to discrimination in connection with the "sale or rental"[282] of a dwelling, Owner would have no source of relief under the FHA for a clearly discriminatory municipal action.

Owner would now have three options. First, Owner could "deal with it" and continue to use whatever water system was in place prior to the sewer system. Second, Owner could sell his house to another person, Buyer. Assuming that Owner and Buyer are similarly situated and the discrimination continues, Buyer could sue under § 3604(b), prior to the purchase. This is because, presumably, if the discrimination is still occurring at the time of the sale, it is now related to the acquisition of the dwelling.[283]

Owner's third option would be to use a strawman.[284] In that case, Owner would transfer the property to Strawman, and either sue before the return transfer, or sue immediately upon the transfer so that, assuming the discriminatory provision of sewer service continued, it would now be "in connection with the sale or rental" of the dwelling. This is an unnecessarily circuitous endeavor.[285]

Because of similar anomalies in related contexts, some courts have moved away from the rigid, and sometimes ancient, formalism that necessitated such a result.[286] In *Riddle v. Harmon*, for instance, the court considered whether a joint tenancy could be destroyed by a conveyance from oneself as a joint tenant to oneself as a tenant in common.[287] Traditionally, one could not create a joint

282. 42 U.S.C. § 3604(b) (2006).

283. *Id.*

284. BLACK'S LAW DICTIONARY 1461 (8th ed. 2004) (defining a straw man as "[a] third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible").

285. SCHWEMM 2005, *supra* note 150, § 14:3 (suggesting other potentially problematic implications from a narrow reading of § 3604(b) denying claims that arise post-occupancy: (1) section 3604(b) (racial discrimination) would have a significantly more limited scope than section 3604(f)(2) (discrimination based on handicap), which permits claims for discrimination "in connection with such a dwelling" but is generally thought to be comparable to section 3604(b); and (2) the interpretation of section 3604(b) that limits its application to pre-occupancy claims is anomalous in a rental setting, since it is unclear whether rent means only the initial decision to rent, or includes the duration of the rental).

286. *See, e.g.*, Riddle v. Harmon, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980).

287. *Id.* at 531.

tenancy by a transfer to oneself.[288] To avoid this rule, a strawman could be used; the transferor would transfer his interest to the strawman, who would then transfer it back to the original owner/transferor and his desired joint tenant.[289] By statute, however, California altered the common-law prohibition and allowed the creation of a joint tenancy by a transfer to oneself, in part to "avoid the necessity of making a conveyance through a dummy."[290]

The *Riddle* court permitted the same result for the destruction of a joint tenancy.[291] In doing so, the court noted that the requirement that a strawman be used "to accomplish … what [one] could otherwise achieve indirectly by use of elaborate legal fictions" could not be justified by either "common sense [or] legal efficiency."[292]

Similarly, in the FHA context, it is anomalous to implicitly permit a party to achieve indirectly, through the use of a sham transaction, what was intended to be prohibited. That is, if the narrow interpretation of the FHA proposed by some courts[293] would still permit the desired result (relief from discrimination) to be achieved through the use of a strawman, why not discard the requirement that leads to that result, especially in light of other considerations that suggest a broader view of the Act anyways?[294]

Alternatively, the discriminatory provision of municipal services could be related to the sale or rental of a dwelling.[295] In several cases, courts have expressed concern that a broad reading of the FHA, extending beyond "in connection with the sale or rental of a dwelling" would turn it into a civil rights statute of general applicability.[296] In the modern era, however, most municipal services are considered "necessary" for housing, and constructive eviction should not be required for a § 3604(b) claim.[297] As one court noted, in a related context, "it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein."[298]

288. *Id.*

289. *Id.* at 532.

290. *Id.* (internal citations omitted).

291. *Id.* at 534.

292. *Id.*

293. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004); Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008); Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714 (D.C. Cir. 1991).

294. *See* SCHWEMM 2002, *supra* note 15, § 2:3 ("Integration as a goal of title VIII").

295. Cox v. City of Dallas, 430 F.3d 734, 745 (5th Cir. 2005).

296. *See, e.g.*, *id.* at 746; *Clifton Terrace Assocs.*, 929 F.2d at 720. Additionally, part of the premise of this paper is that, more than these cases give it credit for, the Act was proposed to impact the general racial situation in the country at the time.

297. *See Halprin*, 388 F.3d at 329 (noting the possibility that constructive eviction may give rise to a § 3604(b) claim).

298. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (discussing the "privileges or sale of rental" phrase of § 3604(b)).

2. *The Scope of Activities or "Services" Prohibited Under Section 3604(b) Is Quite Limited and Would Not Turn the Fair Housing Act into a General Civil Rights Statute*

The scope of activities considered "services" under the FHA is actually quite limited. Courts have generally limited the term "service" to something traditionally provided by a municipality[299] or government unit.[300] Moreover, courts have been hesitant to extend the term "service" to individual actors. In *Clifton Terrace*, for example, the court found that even if elevator repairs were a "service," "private service contractors," as opposed to municipalities, were not included under § 3604(b).[301]

Consequently, courts have rejected claims that redlining,[302] failing to upkeep tax delinquent properties,[303] failing to provide private elevator repair service,[304] picking the site for a highway bypass after considerable planning,[305] and determining the placement of a sports stadium[306] were not services under § 3604(b). On the other hand, discrimination in the provision of police services,[307] possibly zoning laws,[308] and the provision of water and sewer services[309] are services under the FHA.

This fact should help alleviate concern about the expansion of the FHA into a civil-rights statute of general applicability. Further, a review of cases granting relief under § 3604(b) suggest that, in many instances, relief is only provided when the discrimination is obvious.[310] For instance, the court in *Kennedy*[311] permitted relief where the service provided, running water, was clearly a municipal service, and the discrimination was quite obvious.[312] Conversely, in

299. Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 424 (4th Cir. 1984) (services include "such things as garbage collection and other services of the kind usually provided by municipalities").

300. Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) (stating in dicta that § 3604(b)'s "service" provision "applies to services generally provided by governmental units such as police and fire protection or garbage collection").

301. *See Clifton Terrace Assocs.,* 929 F.2d at 720.

302. *See Mackey*, 724 F.2d at 423.

303. *See Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1209.

304. *See* Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 719 (D.C. Cir. 1991).

305. Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 193 (4th Cir. 1999).

306. Laramore v. Ill. Sports Facilities Auth., 722 F. Supp. 443, 452 (N.D. Ill. 1989).

307. Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993).

308. Cox v. City of Dallas, 430 F.3d 734, 745 (5th Cir. 2005) (assuming, without deciding, that zoning laws are a service for § 3604(b) purposes).

309. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007). *See also generally* United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.3d 799 (5th Cir. 1974).

310. *Kennedy*, 505 F. Supp. 2d at 456.

311. *Id.* at 463.

312. *Id.* at 498.

Bloch,[313] the court denied relief where the activity in question was not a municipal service and the discrimination was unclear.[314] Thus, to some extent, the determination whether to grant or deny relief under § 3604(b) may be influenced by the distinction between whether something is a service or not, or how clear the discrimination is, as opposed to whether the discrimination occurs before or after the sale or rental of a particular dwelling.[315]

3. *The Fair Housing Act Provides Relief upon a Showing of Discriminatory Impact, Unlike Equal Protection Cases, which Require a Showing of Discriminatory Intent*

A FHA plaintiff need only show discriminatory impact to be successful.[316] An Equal Protection Clause plaintiff, on the other hand, must meet a much higher standard to prevail in their claim.[317] In *Village of Arlington Heights*,[318] the Supreme Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[319] A showing of a disproportionate impact alone is insufficient.[320]

In order to find discriminatory intent, courts must make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[321] The Court suggested a non-exhaustive list of considerations, including the following:

(1) Whether the action "bears more heavily on one race than another,[322] (absent extraordinary circumstances, however, this factor alone will be insufficient to show discriminatory intent);[323]
(2) The "historical background" of the decision in question;[324]
(3) "The specific sequence of events leading up to the challenged decision";[325]

313. Bloch v. Frischholz, 533 F.3d 562, 565 (7th Cir. 2008). *But see* Bloch v. Frischholz, 587 F.3d 771, 787 (7th Cir. 2009) (en banc).

314. The discrimination was particularly unclear because the plaintiff sat on the board of the building, helped draft the rule regarding hallway aesthetics, and the rule applied to all residents equally.

315. *Bloch*, 533 F.3d at 565.

316. SCHWEMM 2005, *supra* note 150, § 14:3.

317. Vill. of Arlington Heights v. Metro. Dev. Hous. Corp., 429 U.S. 252, 265 (1977).

318. *Id.* at 252.

319. *Id.* at 265. *See also* SCHWEMM 2002, *supra* note 15, § 28:2 ("Arlington Heights establishes that an equal protection violation requires a showing of discriminatory purpose, not merely discriminatory effect.").

320. *Arlington Heights*, 429 U.S. at 265 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).

321. *Id.* at 266.

322. *Id.* (citing *Davis*, 426 U.S. at 242).

323. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (finding an equal protection violation where it was shown that Chinese Americans never received permits to operate laundry facilities, while white applicants always received such permits).

324. *Arlington Heights*, 429 U.S. at 267.

(4) "Departures from the normal procedural [or substantive] sequences" in the case at hand;[326] and
(5) The applicable legislative history.[327]

In many cases, bringing a claim on equal protection grounds is difficult, if not impossible, due to the requirement of discriminatory intent.[328] If nothing else, it will increase the cost of litigation and add another hurdle to the vindication of the plaintiff's rights.

In conclusion, because a narrow reading of the FHA generally, and § 3604(b) specifically, can lead to anomalous results,[329] a broader reading is preferred. In order to achieve the broad intent of the FHA, it is important that courts permit post-acquisition claims involving the discriminatory provision of municipal services. Although the Equal Protection Clause of the Fourteenth Amendment may provide relief in some circumstances, proving discriminatory intent may often be an insurmountable obstacle.[330]

VI. CONCLUSION

Although the United States has made great progress toward achieving the goals of the FHA, several recent cases demonstrate that housing discrimination remains alive and well, particularly in the provision of municipal services.[331] Indeed, a recent court decision vindicated the rights of a group of citizens denied the most basic service, running water, for nearly fifty years.[332] However, gains made by the FHA have been threatened by recent court decisions questioning the scope and application of § 3604(b).[333]

Cases suggesting that § 3604(b) should be limited to claims of post-occupancy discrimination fail to recognize the purpose of the Act and the intent of its framers. A review of the legislative history demonstrates that the Congress that passed the FHA was concerned with the effect that discrimination in housing had on other areas of life, including employment, education and race

325. *Id.*

326. *Id.*

327. Vill. of Arlington Heights v. Metro. Dev. Hous. Corp., 429 U.S. 252, 268 (1977).

328. *Id.* at 265.

329. *See* SCHWEMM 2005, *supra* note 150, § 14:3.

330. *See id.* (stating that "the question of whether the Fair Housing Act also covers discriminatory municipal services is important, because the protection afforded by the Fourteenth Amendment extends only to purposeful discrimination, whereas a Fair Housing Act violation may be established merely by a showing of discriminatory effect").

331. *See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007); Campbell v. City of Berwyn, 815 F. Supp. 1138 (N.D. Ill. 1993); Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220 (N.D. Tex. Sept. 9, 2004).

332. *Kennedy*, 505 F. Supp. 2d at 456.

333. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004); Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005).

relationships.[334] Further, the statutory text, including HUD regulations, as well as the traditionally broad interpretation given to the FHA militate a broad reading that would include claims arising after a sale or rental, particularly when a municipality discriminates against its citizens.

It must be emphasized that the FHA may provide relief in situations where other avenues, particularly the Equal Protection Clause, may not. It is equally important to note that the framers of the FHA intended relief to be provided in those cases. If such a narrow reading of the FHA is accepted, it may incentivize the use of sham transactions to get around artificial barriers set up to recovery under the Act. Consequently, courts should return to a broad interpretation of the FHA that, consistently with its legislative history, plain meaning, and common sense, permits claims for post-occupancy municipal discrimination.

334. *See* 113 CONG. REC. 3395 (1967) ("Discrimination in housing confines a substantial portion of our people to the ghetto. This confinement irritates and affects adversely all of our racial problems—problems of education, health and welfare, employment, attitude, and aspiration.").