

# COX, HALPRIN, AND DISCRIMINATORY MUNICIPAL SERVICES UNDER THE FAIR HOUSING ACT

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## INTRODUCTION

When the Federal Fair Housing Act ("FHA")<sup>1</sup> was passed forty years ago, its proponents saw it as a way of breaking the bonds of race-based ghettos and, with

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1. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601-3619 (2000).

them, the limits on blacks' access to equal opportunity in education, suburban jobs, and all other aspects of the American dream.<sup>2</sup> The goal of the FHA was not merely to end housing discrimination based on race and national origin, but to replace the ghettos "by truly integrated and balanced living patterns."<sup>3</sup>

The FHA's goal of integrated communities has not been achieved. Widespread residential segregation remains the norm throughout most of the Nation.<sup>4</sup> As a result, commentators at every decade celebration of the FHA have bemoaned the failure of this law to achieve its goal of changing America's race-based residential patterns.<sup>5</sup>

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2. See, e.g., *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (commenting that the FHA was designed "to prohibit discrimination . . . so that members of minority races would not be condemned to remain in urban ghettos . . . [and] to fulfill . . . the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups"); see also congressional hearings cited *infra* notes 261, 278.

3. 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale). Senator Mondale was the FHA's principal sponsor. *Id.* Proponents of the FHA repeatedly argued that this law was intended not only to expand housing opportunities for individual minorities, but also to foster residential integration for the benefit of all Americans. See *id.* (statement of Sen. Mondale) (noting the alienation of whites and blacks caused by the "lack of experience in actually living next" to each other and that "[i]f America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation"); 114 CONG. REC. 9959 (1968) (statement of Rep. Cellar, Chairman of the House Judiciary Committee) (calling for elimination of "the blight of segregated housing patterns"); see also Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 372-86 (2007) (citing other relevant legislative history).

4. Residential segregation is commonly measured on a 100-point "dissimilarity" index, with 100 indicating total segregation (i.e., blacks and whites live separately in racially homogeneous areas) and zero indicating a population that is randomly distributed by race. See, e.g., JOHN LOGAN, LEWIS MUMFORD CTR., *ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND* 2 (2001), available at <http://www.s4.brown.edu/cen2000/WholePop/WPreport/MumfordReport.pdf>. "A value of 60 or above is considered very high." *Id.*

Data from the 2000 census yield a nationwide figure of sixty-four for white-black residential segregation in major metropolitan areas, which was modestly down from sixty-eight in 1990 and seventy-three in 1980. JOHN ICELAND & DANIEL H. WEINBERG, U.S. CENSUS BUREAU, *RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000*, at 60 (2002), available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/censr-3.pdf](http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf). If this rate of progress were to continue, "it may take forty more years for black-white segregation to come down even to the current level of Hispanic-white segregation." LOGAN, *supra*, at 1. The nationwide figure for Hispanic-white segregation remained at about fifty from 1980 through 2000. ICELAND & WEINBERG, *supra*, at 78.

5. See, e.g., *Fair Housing Act: Hearing on H.R. 3504 and H.R. 7787 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 2-3 (1978) (statement of Rep. Edwards, Chairman, S. Comm. on Civil and Constitutional Rights of H. Comm. on the Judiciary) (noting that "housing segregation and discrimination has [sic] become more

One of the reasons for this disappointing story is that race and national origin discrimination in housing remains pervasive.<sup>6</sup> It has also become apparent, however, that even if full compliance with the FHA were to be achieved, residential integration would still face significant obstacles, including a growing acceptance by African Americans that living in communities where their own race predominates may be preferable to making pioneering moves into white areas. As Professor Calmore wrote fifteen years ago, “blacks increasingly value black community attachment and affiliation at the expense of integration.”<sup>7</sup>

Two other introductory observations are pertinent here. First, 2008, like 1968 when the FHA was passed, is a presidential election year that seems likely to mark a shift in national emphasis on minority rights, played out against the background of an unpopular foreign war. Forty years ago, President Lyndon Johnson, perhaps the greatest advocate of civil rights to occupy the White House in the twentieth century and the original proponent of the FHA, was so weakened by the national strife that accompanied his prosecution of the Vietnam War that his party, so dominant four years earlier, gave way to Republican Richard Nixon. Nixon’s “Southern Strategy” won over to the Republican banner virtually all of the old entrenched white power structure of the South and eventually most of the reactionary forces from all parts of the country, ultimately turning the party of Abraham Lincoln into a bastion of anti-minority sentiment. The success of this

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pervasive and more intractable in the last [ten] years” since “the signing of the bill which committed our government to the elimination of all barriers to equal opportunity in housing”); THE FAIR HOUSING ACT AFTER TWENTY YEARS (Robert G. Schwemm ed., 1989) (regarding the twentieth anniversary); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIA MIL. REV. 1067 (1998) (regarding the thirtieth anniversary); john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 605-08 (2008) (regarding the fortieth anniversary).

6. See, e.g., MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000, at i-iv (2002) (reporting on a nationwide testing study showing that whites were favored in rental tests over blacks 21.6% of the time and over Hispanics 25.7% of the time and that whites were favored in sales tests over blacks 17.0% of the time and over Hispanics 19.7% of the time).

7. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1506 (1993); see also *id.* (“[A] growing segment of the black middle class is voluntarily attaining housing in black areas. This may stem in part from the increase in black alienation from white society that has developed from the late 1960s and into the early 1980s among all segments of the black community.”); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM xii-xiii, 9-10 (2004) (“Black people . . . have become integration weary. . . . [F]or some of us integration now means a majority-black neighborhood . . . African Americans are increasingly reluctant to move into neighborhoods without a significant black presence.”); Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 45, 59 (Xavier de Souza Briggs ed., 2005) (reporting “a growing preference among blacks for neighborhoods that are majority same-race, contrary to previously more distinct preferences for 50-50 neighborhoods”).

strategy helped Republicans occupy the White House for most of the next forty years, with presidents characterized by an ever increasing hostility to the civil rights goals of the 1960s and an ever stronger commitment to filling the federal judiciary with anti-civil rights reactionaries. This political era may be coming to an end now, but what will replace it is not yet clear.

A second and related phenomenon is that the modern federal judiciary has grown so hostile to civil rights that decisions narrowing the coverage of the Nation's anti-discrimination laws have become the norm.<sup>8</sup> With respect to the FHA, this trend is reflected in two recent appellate decisions—Judge Posner's 2004 decision for the Seventh Circuit in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*<sup>9</sup> and Judge Higginbotham's 2005 opinion for the Fifth Circuit in *Cox v. City of Dallas*<sup>10</sup>—which took remarkably narrow views of the FHA and are the subject of this Article.

For most of its forty-year history, the FHA has been accorded a generous construction by the courts.<sup>11</sup> These expansive judicial decisions, however, have generally dealt with litigation issues, such as standing to sue and the timeliness of FHA claims.<sup>12</sup> As for its substantive provisions, the FHA has often been interpreted simply by following the doctrine developed under Title VII, the federal employment discrimination law passed four years before the FHA.<sup>13</sup> Many of the FHA's key substantive provisions do track Title VII's language, but

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8. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171-72 (2007) (interpreting Title VII's statute of limitations to cut off plaintiff's claim of long-term sex discrimination); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting) (expressing the view that "no Member of the Court that I joined in 1975 would have agreed with today's decision," which interpreted the Equal Protection Clause to bar race-based efforts to achieve public school integration); see also *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 49-69 (William L. Taylor et al. eds., 2007), available at [http://www.cccr.org/downloads/civil\\_rights2.pdf](http://www.cccr.org/downloads/civil_rights2.pdf) (critiquing the Bush Administration's judicial appointments from a civil rights perspective).

9. 388 F.3d 327 (7th Cir. 2004).

10. 430 F.3d 734 (5th Cir. 2005).

11. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-12 (1972) (noting that the FHA's language is "broad and inclusive," that the statute carries out "a policy that Congress considered to be of the highest priority," and that it should be given "a generous construction"); accord *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (reaffirming *Trafficante*'s view that the FHA is entitled to a "generous construction"); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (commenting on the FHA's "broad remedial intent").

12. For example, the Court in *Trafficante*, 409 U.S. at 209-10, and *Havens*, 455 U.S. at 372-79, extended standing to sue under the FHA to the limits of Article III. In *Havens*, 455 U.S. at 380-81, the Court also recognized the "continuing violation" theory as a way of defeating the statute-of-limitations defense in FHA cases. In *City of Edmonds*, 514 U.S. at 731-37, the Court dealt with an FHA exemption that the Court narrowly construed.

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000). For cases interpreting the FHA by referring to Title VII precedents, see ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 7:4 nn.4-5 (2007).

some FHA coverage issues do not have a ready analogy in Title VII law and have, as a result, caused difficulties. One such issue is whether the FHA prohibits the discriminatory provision of municipal services to minority communities, which was the issue presented in *Cox*<sup>14</sup> and which is the main focus of this Article.

Municipalities have always been understood to be proper defendants under the FHA.<sup>15</sup> From the beginning, courts have made clear that the FHA prevents such defendants from operating their public housing projects in racially discriminatory ways<sup>16</sup> and from using their zoning powers to block housing developments on racial grounds.<sup>17</sup> In providing services like garbage removal or police protection, however, municipalities exercise a less direct impact on housing choice, and whether the FHA may be used to challenge the inferior provision of such services to residents of minority neighborhoods is an unsettled issue. This issue is not clearly addressed in the text of the FHA, nor was it discussed in the statute's legislative history. Indeed, the pre-condition for claims of discriminatory municipal services—the existence of identifiable minority-race, ghetto-like neighborhoods—is a situation that the FHA's proponents sought to end.<sup>18</sup>

Both the pre-condition and the claims, however, have continued. In the FHA's first two decades, a handful of courts expressed conflicting views about whether the statute covered discriminatory municipal services.<sup>19</sup> This issue was not dealt with by the Congress that passed the 1988 Fair Housing Amendments Act,<sup>20</sup> but soon thereafter, regulations promulgated by the Department of Housing & Urban Development ("HUD") announced that the FHA did outlaw discriminatory municipal services, at least in some circumstances.<sup>21</sup> With this

14. 430 F.3d 734 (8th Cir. 2005).

15. *See, e.g.,* *Ventura Vill., Inc. v. City of Minneapolis*, 419 F.3d 725, 727-28 (8th Cir. 2005) (citing numerous cases in support of the proposition that "[v]arious types of municipal actions have been challenged under the FHA . . . [including]: refusal to grant a special-use permit; enforcement of a spacing restriction; denial of government funding needed for a housing project; and enforcement of an ordinance or policy restricting multi-family residences to certain areas of the city or excluding public housing from non-minority neighborhoods" (footnotes omitted)); *see also* SCHWEMM, *supra* note 13, § 12B:5.

16. SCHWEMM, *supra* note 13, § 28:5 n.11 (citing pertinent cases); *see also* *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134-35 (2d Cir. 1973) (opining that the FHA requires consideration of "the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built").

17. *See, e.g.,* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *infra* note 158. *See generally* SCHWEMM, *supra* note 13, §§ 13:8 to -:10.

18. *See supra* note 3 and accompanying text.

19. *See infra* Part II.A.4.

20. Pub. L. 100-430, 102 Stat. 1619 (1988). *See infra* Part II.B.1 for a discussion of the 1988 FHAA's impact on the issue of whether the FHA covers discriminatory municipal services.

21. *See infra* notes 220-27 and accompanying text.

background, Professor Calmore, writing in 1993 on the verge of a new Democratic Administration, argued that “there is tremendous untapped potential to further the goal of spatial equality [i.e., equal treatment for minority communities]” through reliance on the FHA, which, he concluded, “protects not only the person seeking to secure housing on a non-discriminatory basis, but also . . . the right of equal services and facilities once the person actually has secured the housing.”<sup>22</sup>

The courts, however, have continued to take a decidedly mixed view of this matter,<sup>23</sup> and the most recent appellate review of this issue—the Fifth Circuit’s decision in *Cox*<sup>24</sup>—produced a resounding “No.” According to the *Cox* opinion, homeowners in a black neighborhood have no FHA rights to complain that they are receiving inferior municipal services to those enjoyed in comparable white neighborhoods, at least unless the discrimination becomes so egregious that the plaintiffs are “constructively evicted” from their homes.<sup>25</sup> Indeed, a key precedent relied on by *Cox*—the Seventh Circuit’s decision in *Halprin*<sup>26</sup>—suggests that the FHA generally does not provide *any* protection for homeowners, as opposed to homeseekers.<sup>27</sup> Together, *Cox* and *Halprin* marked the first time in four decades that the federal appellate courts have determined that the FHA’s substantive coverage should be significantly narrowed.

This Article deals with *Cox*, *Halprin*, and the issue of whether the FHA should be interpreted to outlaw discrimination in the provision of services by local governments. Part I describes the *Cox* litigation and its connection with *Halprin*. Part II surveys the pre-*Cox* cases that have dealt with discriminatory municipal services. Part III analyzes the FHA’s relevant provisions and their legislative history and concludes that *Cox* and *Halprin* were wrong to deny FHA protection to current residents. Part IV builds on this analysis to provide a sounder approach to FHA claims alleging discriminatory municipal services. Although the result in *Cox* may be defended, this Article’s ultimate conclusion is that the analysis in *Cox* and *Halprin* is so flawed, and in particular has so misconstrued § 3604(b) of the FHA, that it should be rejected by other courts.<sup>28</sup>

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22. Calmore, *supra* note 7, at 1514 (referring to 42 U.S.C. § 3604(b), which is the FHA’s provision outlawing discriminatory housing services and facilities).

23. See *infra* Parts II.A.4, II.B.3.

24. 430 F.3d 734 (5th Cir. 2005).

25. *Id.* at 740-47.

26. 388 F.3d 327 (7th Cir. 2004).

27. See *id.* at 328-30.

28. This comment is not limited to federal courts outside the Fifth and Seventh Circuits, but also includes state courts, which may entertain FHA-based claims, see 42 U.S.C. § 3613(a)(1)(A) (2000), and which may also be called upon to interpret their own state or local fair housing laws. Most states and scores of local governments have fair housing laws that are substantially equivalent to the FHA. For a list of these states and localities, see SCHWEMM, *supra* note 13, app. c.

## I. THE COX LITIGATION AND THE HALPRIN ISSUE

A. Cox v. City of Dallas: *Background*

The Cox litigation involved an illegal dump site in the predominantly black neighborhood of Deepwood in Dallas, Texas.<sup>29</sup> Deepwood had been annexed by the City of Dallas in 1956 and zoned residential, but in 1963, the City authorized operation of a gravel pit at an eighty-five-acre site in the neighborhood.<sup>30</sup> Prior to 1963, Deepwood was predominantly white, but during the 1970s, the area changed to predominantly black.<sup>31</sup>

As this racial transition was occurring, the owner of the gravel pit replaced the pit's excavated sand and gravel with solid waste.<sup>32</sup> Beginning in 1982, residents complained to the city that massive illegal dumping was going on at this site.<sup>33</sup> At one point in 1988, "the site caught fire and burned for seven months."<sup>34</sup> At various times, even city contractors used the site to improperly dispose of solid wastes.<sup>35</sup> Another fire broke out and continued to burn for at least two months in 1997.<sup>36</sup> For over twenty-five years, illegal dumping occurred, resulting in substantial deposits of uncovered solid waste, "including household waste, tires, demolition debris, insulation, asphalt shingles, abandoned automobiles, jugs and bottles labeled 'sulfuric acid' and 'nitric acid,' 55-gallon drums, and syringes."<sup>37</sup> Snakes and rats were attracted to the area, and the site was easily

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29. Cox v. City of Dallas, 430 F.3d 734, 736 (5th Cir. 2005).

30. *Id.*

31. *Id.*

32. *Id.* Cox was one of a number of cases that arose in the 1970s and 1980s alleging that waste dumps were being placed in minority and poor neighborhoods based on intentional discrimination against these groups. See, e.g., Vicki Been, *What's Fairness Got To Do With It? Environmental Justice in the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1004 n.10, 1009-14 (1993) (citing cases and describing studies finding that undesirable land uses were being disproportionately sited in black and poor areas). As Professor Been points out, however, a "chicken-and-egg" issue existed in many of these cases; that is, whether municipalities were allowing hazardous waste sites and other undesirable uses more often in minority neighborhoods because of racial discrimination or whether minorities moved to neighborhoods that had low-priced housing because these areas had earlier been targeted for such uses. See *id.* at 1015-27; see also Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1383 (1994). The Cox case never depended on a resolution of this issue, however, because the minority plaintiffs there alleged that after they had become the predominant race in Deepwood, the City discriminated against their neighborhood by allowing illegal dumping to continue. See *infra* text accompanying notes 33-47.

33. Cox, 430 F.3d at 736.

34. *Id.* at 737.

35. *Id.*

36. *Id.* at 739.

37. Cox v. City of Dallas, 256 F.3d 281, 285 (5th Cir. 2001).

accessible to neighborhood children.<sup>38</sup>

During this time, the City undertook a number of steps to limit continued dumping, including twice suing the site's owners (one of whom spent forty-nine days in jail for ignoring an anti-dumping restraining order), issuing scores of code-violation citations, and arresting dozens of people.<sup>39</sup> These enforcement efforts were ultimately characterized by the courts as "inconsistent, inadequate, and largely ineffective,"<sup>40</sup> "erratic," and "ineffectual."<sup>41</sup>

In 1998, residents of Deepwood who had purchased their homes between 1970 and 1978 filed two federal lawsuits against the City and others alleging both civil rights and environmental law violations.<sup>42</sup> The district court dealt with these claims separately.<sup>43</sup> Turning first to the environmental claim under the Resource Conservation and Recovery Act,<sup>44</sup> the court certified an injunctive relief class action on behalf of homeowners near the Deepwood dump site and, after a bench trial, ruled against the City in 1999.<sup>45</sup> The Fifth Circuit affirmed

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38. *Id.* The Fifth Circuit also noted additional effects from the Deepwood dump: resulting fumes polluting the neighborhood air; a significant fire hazard continues to exist at the dump; the State's reports reveal that there is an imminent threat of the discharge of municipal solid waste into Elam Creek, a tributary of the Trinity River, because of the massive illegal dumping; the State itself has noted that waste at the Deepwood dump may cause contamination of surface water and ground water through the leaching of contaminants from the debris by rainwater; asbestos, benzo(a)anthracene, and benzene (in excess of state limits) have been detected at the Deepwood dump; and the City itself has long maintained that the Deepwood dump poses a hazard to the public health.

*Id.* at 300.

39. *Cox*, 430 F.3d at 738-39.

40. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*11 (N.D. Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005).

41. *Cox*, 430 F.3d at 737; *see also infra* text accompanying note 60.

42. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 370242, at \*4 (N.D. Tex. Feb. 24, 2004) (describing procedural history of both suits, which were consolidated and later bifurcated).

43. *Id.* (addressing the civil rights claims); *Cox v. City of Dallas*, No. 3:98-CV-0291, 1999 WL 33756551 (N.D. Tex. Aug. 27, 1999), *aff'd*, 256 F.3d 281 (5th Cir. 2001) (addressing environmental law violations).

44. 42 U.S.C. §§ 6901-6992k (2000). This law, inter alia, authorizes private litigation against those who have contributed to the prohibited open dumping of solid wastes. *See id.* § 6972(a)(1)(B).

45. *Cox*, 1999 WL 33756551. Certain state defendants were exonerated. *Id.* at \*1. As to the City, the court held that it had, in the words of the statute, *see* 42 U.S.C. § 6972(a)(1)(B), been a "generator" of solid waste "who has contributed to" the "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *See id.* As relief, the court ordered the City, inter alia, to erect a fence around the site to exclude unauthorized use; to monitor the site to determine its current hazards and to prevent additional dumping; to remove all solid wastes from the site; and to restore the site "to a condition that is free

this ruling two years later.<sup>46</sup>

As to the civil rights claims, which were not prosecuted as a class action, the plaintiffs alleged racial discrimination, pointing to “two sites located in . . . white neighborhoods where the City did remedy illegal dumping and/or illegal mining.”<sup>47</sup> This discrimination was claimed to violate § 3604(a)<sup>48</sup> and § 3604(b)<sup>49</sup> of the FHA, certain HUD regulations implementing the FHA,<sup>50</sup> the 1866 Civil Rights Act (specifically 42 U.S.C. § 1981),<sup>51</sup> and the Equal Protection Clause of the Fourteenth Amendment (on the basis of which plaintiffs claimed relief under 42 U.S.C. § 1983).<sup>52</sup>

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from hazardous or nuisance conditions.” *Id.* at \*2; *see also* *Cox v. City of Dallas*, 256 F.3d 281, 288 (5th Cir. 2001).

46. *Cox*, 256 F.3d at 284.

47. *See Cox*, 2004 WL 370242, at \*11.

48. Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2000). This section of the FHA makes it unlawful to “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.” *Id.*

49. Fair Housing Act § 804(b), 42 U.S.C. § 3604(b) (2000). This section of the FHA makes it unlawful to “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.” *Id.*

50. *See Cox*, 2004 WL 370242, at \*8-9 (citing 24 C.F.R. § 100.70(b) and § 100.70(d)(4), the texts of which are set forth *infra* in, respectively, the text accompanying note 220 and note 219).

51. The 1866 Civil Rights Act is made up of two substantive sections, now codified at 42 U.S.C. § 1981(a) and § 1982, the texts of which are set forth *infra* in, respectively, note 129 and the text accompanying note 131. The former provision, which was relied on in *Cox*, guarantees all persons nondiscrimination in contracts, while § 1982 guarantees all citizens nondiscrimination in property rights. As shown later in this Article, § 1982 has regularly been used to challenge discriminatory municipal services for over three decades, *see infra* Part II.A.2 and notes 150 and 171, and it is unclear why the *Cox* plaintiffs did not rely on § 1982 along with § 1981. The only textual advantage of § 1981 appears to be that it protects “persons within the jurisdiction of the United States,” whereas § 1982 protects only “citizens of the United States,” and perhaps the *Cox* plaintiffs included some non-citizens. *See* Plaintiffs’ First Amended Complaint ¶¶ 22, 80, *Cox v. City of Dallas*, 2004 WL 370242 (N.D. Tex. Feb. 24, 2004) (No. Civ.A.3:98-CV-1763BH), 1998 WL 35231051 (alleging, as to the plaintiffs, only that they “are African-American homeowners who reside near or adjacent to the illegal Deepwood dump” and citing, as the bases for the plaintiffs’ race discrimination claims, only § 1981 and § 3604(a) of the FHA).

52. *See Cox v. City of Dallas*, 430 F.3d 734, 739 (5th Cir. 2005). 42 U.S.C. § 1983 (2000) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

As to the FHA claims, the district court granted the City's motion for summary judgment in early 2004.<sup>53</sup> It rejected the plaintiffs' § 3604(a) claim on the ground that this provision's ban of discriminatory practices that "make unavailable or den[y]" housing does not cover homeowners who seek to "protect intangible interests in already-owned property, such as habitability or value."<sup>54</sup> The § 3604(b) claim failed because this provision was seen as applying "only to discrimination in the provision of services that precludes the sale or rental of housing[, and p]laintiffs have not alleged discrimination related to the acquisition of their homes."<sup>55</sup> Under these circumstances, the court also rejected the plaintiffs' claim based on HUD's FHA regulations.<sup>56</sup>

At the same time it disposed of these FHA claims, the district court rejected the City's motion for summary judgment on the § 1981 and § 1983 claims,<sup>57</sup> holding that there was sufficient evidence for a trier of fact "to find racially discriminatory intent in the City's failure to stop the illegal dumping"<sup>58</sup> and, as to the additional requirement for municipal liability under § 1983, that there was a triable issue as to "whether the City's failure to terminate the illegal dumping at the Deepwood site was the result of execution of one of its customs or policies."<sup>59</sup> Shortly thereafter, these claims were tried to the court, which issued an opinion later in 2004 in favor of the City, holding that the § 1983 claim failed for lack of proof of an official policy and the § 1981 claim failed because the evidence, while supporting "an inference of gross negligence by the City exemplified by lackadaisical code enforcement, absence of communication between city departments, and virtually no follow-through by either the Board of Adjustment or the City Attorney's office," did not establish "an intent to discriminate against [the plaintiffs] on the basis of race, rather than gross negligence."<sup>60</sup>

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42 U.S.C. § 1983 is the vehicle by which claims based on violations of the U.S. Constitution and certain federal statutes may be asserted. *See, e.g.,* *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

53. *Cox*, 2004 WL 370242, at \*14.

54. *Id.* at \*6 (citing *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

55. *Id.* at \*8.

56. *Id.* Once it determined that the plaintiffs' FHA claims should fail, the district court ordered summary judgment against them on their § 1983 claim based on HUD's FHA regulations, concluding that

[e]ven if the Court were to find that the regulations at issue were enforceable through a private cause of action, [p]laintiffs' claims fail as a matter of law for the same reason that their claims under the FHA fail. When regulations authoritatively construe a statute, it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute."

*Id.* at \*8 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)).

57. *Id.* at \*13.

58. *Id.* at \*12.

59. *Id.* at \*13.

60. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*12, 16 (N.D.

### B. Halprin and Post-Acquisition Claims

While the *Cox* plaintiffs were appealing their losses on the FHA and other civil rights claims to the Fifth Circuit, the Seventh Circuit decided *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*.<sup>61</sup> *Halprin* was the first appellate decision to deny that current residents could invoke the protections of §§ 3604(a) and 3604(b), although this position had been taken in a few trial court opinions, including the one in *Cox*.<sup>62</sup>

The plaintiffs in *Halprin* were a couple who owned a home in an area where a homeowners' association provided various services.<sup>63</sup> One of the plaintiffs was Jewish, and the couple alleged that the association, its president, and other association members engaged in a campaign of religious harassment against them that included anti-Jewish epithets, verbal threats, and vandalizing the plaintiffs' property.<sup>64</sup> The couple sued under § 3617 of the FHA,<sup>65</sup> which outlaws interference with persons who have exercised their rights under the FHA's substantive provisions, here §§ 3604(a) and 3604(b).

Judge Posner's opinion concluded that these substantive provisions were concerned only with "access to housing" and that, because the plaintiffs were not complaining "about being prevented from acquiring property," they had "no claim under [§] 3604."<sup>66</sup> *Halprin* conceded that if the defendants had burned down a minority's house, they might have engaged in a form of "constructive eviction" that would make the house "unavailable" under § 3604(a) or deny the homeowner the § 3604(b)-covered "privilege of inhabiting the premises."<sup>67</sup> Short of this extreme example, however, Judge Posner opined that §§ 3604(a) and 3604(b) did not protect current residents. In doing so, he distinguished a number of prior FHA cases brought by current residents, which he dismissed as not

Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005).

61. 388 F.3d 327 (7th Cir. 2004).

62. See *supra* notes 54-55 and accompanying text; note SCHWEMM, *supra* note 13, § 14:3 para. 1 nn.20-21 (citing relevant cases); *Walton v. Claybridge Homeowners Ass'n*, No. 1:03-CV-69-LTM-WTL, 2004 WL 192106, at \*4 (S.D. Ind. Jan. 22, 2004), *aff'd*, 191 F. App'x 446 (7th Cir. 2006); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989).

63. 388 F.3d at 328.

64. *Id.*

65. Fair Housing Act § 817, 42 U.S.C. § 3617 (2000). Section 3617 provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617.

66. 388 F.3d at 329-30.

67. *Id.* at 329. "Constructive eviction" generally refers to a "landlord's act of making premises unfit for occupancy, often with the result that the tenant is compelled to leave." BLACK'S LAW DICTIONARY 594 (8th ed. 2004).

having “contain[ed] a *considered* holding on the scope of the Fair Housing Act.”<sup>68</sup> Judge Posner also refused to interpret the FHA as broadly as Title VII, which he recognized “protects the job holder as well as the job applicant.”<sup>69</sup> The FHA’s language is different, he noted, concluding that this difference reflects the fact that Congress’s concern in the housing statute extends only to the property-acquiring stage and ceases once persons are “allowed to own or rent homes.”<sup>70</sup> Thus, the *Halprin* plaintiffs, as current homeowners whose complaint was that the defendants were harassing them on discriminatory grounds, could not assert a claim relating to the “sale or rental” of their dwelling in violation of either § 3604(a) and § 3604(b).<sup>71</sup>

Having determined that current homeowners have no § 3604 rights—other than possibly not to be burned out or otherwise constructively evicted from their homes—*Halprin* strongly suggested that the anti-interference guarantee of § 3617 could also not be invoked by such plaintiffs.<sup>72</sup> However, because of two special circumstances in *Halprin*, the plaintiffs’ § 3617 claim was upheld.<sup>73</sup> First, HUD’s regulation interpreting § 3617 extends to interference with “enjoyment of a dwelling,”<sup>74</sup> which *Halprin* conceded “can take place after the dwelling has been acquired.”<sup>75</sup> This regulation, Judge Posner argued, goes well beyond § 3617’s language and may therefore be invalid “because that section provides legal protection only against acts that interfere with one or more of the other sections of the Act,” which he had earlier held “is not addressed to post-acquisition discrimination.”<sup>76</sup> Second, the *Halprin* defendants had not challenged this regulation’s validity, and therefore the Seventh Circuit held that the plaintiffs’ § 3617 claim survived.<sup>77</sup> Still, the clear implication of this part of *Halprin* is that in future cases brought by current residents, defendants may challenge the HUD regulation, and, if successful, defeat a post-acquisition interference claim under § 3617.<sup>78</sup>

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68. 388 F.3d at 329 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993)).

69. *Id.*

70. *Id.*

71. *Id.* at 329-30.

72. *Id.* at 330.

73. *Id.*

74. 24 C.F.R. § 100.400(c)(2) (2007). This regulation provides that conduct made unlawful by § 3617 includes “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.” *Id.*

75. 388 F.3d at 330.

76. *Id.*

77. *Id.*

78. On remand, the district court upheld HUD’s regulation, thereby preserving the plaintiffs’ § 3617 claim. *See Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, No. 01 C

The *Halprin* opinion may be criticized on a variety of grounds, many of which I have identified elsewhere.<sup>79</sup> Furthermore, the Justice Department and HUD have taken the position in their FHA-enforcement litigation that *Halprin* was wrong in holding that § 3604 does not apply to post-acquisition discrimination.<sup>80</sup> *Halprin*'s flaws have also been discussed in two fine articles, one by Professor Short dealing primarily with harassment cases under the FHA<sup>81</sup> and one by Professor Oliveri dealing more broadly with the FHA's coverage in § 3604.<sup>82</sup> Among the identified failures of Judge Posner's opinion in *Halprin* are: (1) its cavalier dismissal of prior case law, which had generally assumed that § 3604(b) does protect residents from discriminatory treatment after they have acquired their homes;<sup>83</sup> (2) its failure to confront HUD regulations interpreting

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4673, 2006 WL 2506223, at \*1 (N.D. Ill. June 28, 2006). Other post-*Halprin* decisions have generally agreed that this regulation is valid. See, e.g., *George v. Colony Lake Prop. Owners Ass'n*, No. 1:05 CV-05899, 2006 WL 1735345, at \*2-3 (N.D. Ill. June 16, 2006); *King v. Metcalf 56 Homes Ass'n*, 385 F. Supp. 2d 1137, 1144 (D. Kan. 2005); *United States v. Altmayer*, 368 F. Supp. 2d 862, 863 (N.D. Ill. 2005); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*6 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 978-80 (D. Neb. 2004). The only exception seems to be *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. CIV.A. H-05-3197, 2005 WL 2669480, at \*4 n.4 (S.D. Tex. Oct. 19, 2005) (rejecting current resident's § 3617 claim, which was brought pro se, and adopting the view that "24 C.F.R. § 100.400(c)(2) is invalid").

As is implicit in the *Altmayer* and *Koch* decisions, the Justice Department has actively defended HUD's view that § 3617 covers post-acquisition claims. See generally *Altmayer*, 368 F. Supp. 2d 862; *Koch*, 352 F. Supp. 2d 970. For its part, the Seventh Circuit has twice after *Halprin* avoided ruling on the regulation's validity by finding that the defendant, as in *Halprin*, waived this issue and then ruling against the plaintiff-resident's § 3617 claim on the merits. See *Walton v. Claybridge Homeowners Ass'n*, 191 F. App'x 446, 450-52 (7th Cir. 2006); *East-Miller v. Lake County Highway Dep't*, 421 F.3d 558, 562-64 & n.1 (7th Cir. 2005).

79. See SCHWEMM, *supra* note 13, § 14:3 nn.10-42 and accompanying text.

80. See, e.g., Brief of the United States as Amicus Curiae in Support of Plaintiffs' Opposition to Defendant's 12(b)(6) Motion to Dismiss at n.3, *George v. Colony Lake Prop. Owners Ass'n*, No. 1:05-CV-05899, 2006 WL 1735345 (N.D. Ill. June 16, 2006), 2006 WL 1437953 (stating the Justice Department's belief "that [§] 3604 applies to post-acquisition discrimination" and its disagreement with *Halprin*'s contrary conclusion); Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Charges Virginia Beach Landlord with Violating the Fair Housing Act: Owner Accused of Treating Black Families Worse, Using Racial Slurs (May 17, 2007), available at <http://www.hud.gov/news/release.cfm?content=pr07-067.cfm> (describing HUD's charge accusing apartment owner of violating the FHA by, inter alia, "subjecting African-American tenants to stricter rules than others").

81. See Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

82. See 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 (2008).

83. See, e.g., *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1263-64 (11th Cir. 2002) (dealing with sexual harassment); *Hous. Rights Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1192-93 (C.D. Cal.

§§ 3604(a) and 3604(b) to apply to discrimination against current residents;<sup>84</sup> (3) its misreading of the FHA's legislative history to indicate a concern only with access to housing;<sup>85</sup> (4) its lack of awareness of the impact of the 1988 Fair Housing Amendments Act;<sup>86</sup> (5) its refusal to interpret the FHA in line with Title VII doctrine;<sup>87</sup> and (6) its failure to see how its narrow interpretation of the FHA would frustrate the statute's policy goals.<sup>88</sup>

Despite these flaws,<sup>89</sup> Judge Posner's ultimate conclusion in *Halprin* that the

2004) (dealing with racial and national origin harassment); *N.D. Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 974, 980-81 (D.N.D. 2004) (dealing with racial harassment); *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp. 2d 722, 730-33 (S.D. Tex. 2000) (dealing with national origin harassment); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1292-93 (C.D. Cal. 1997) (dealing with restricting families with children from using apartment complex's swimming pool); *Reeves v. Carrollsburg Condo. Owners Ass'n*, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at \*5-8 (D.D.C. Dec. 16, 1997) (dealing with race and sexual harassment); *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (upholding § 3604(b) claim based on allegation that condominium enforced a renter-identification and monitoring policy only against Hispanic tenants); *Concerned Tenants Ass'n v. Indian Trails Apartments*, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980) (upholding § 3604(b) claim against landlord who provided poorer services over a period of time as its tenants changed from white to black); *HUD v. Jerrard*, Fair Housing—Fair Lending Rep. (Aspen) ¶ 25,005, at 25,090 (HUD ALJ Sept. 28, 1990) (dealing with race-based harassment and rent increase); *HUD v. Murphy*, Fair Housing—Fair Lending Rep. (Aspen) ¶ 25,002, at 25,053 (HUD ALJ July 13, 1990) (holding that § 3604(b)'s ban on familial status discrimination was violated by mobile home park that precluded current tenants from building a clubhouse for their children and by maintaining the playground in an unsafe and unusable condition for children); *see also* cases cited *infra* notes 174, 180, and 241 (pre-*Halprin* decisions suggesting or holding that § 3604(b) covers claims by residents of minority neighborhoods alleging discriminatory municipal services); sources cited in SCHWEMM, *supra* note 13, § 14:3 nn.3 & 5; sources cited *id.* § 14:3 n.26 (dealing with sexual harassment).

As the court stated with respect to § 3604(b) in *Housing Rights Center v. Sterling*: "The FHA thus not only demands that tenants be able to secure an apartment on a nondiscriminatory basis, but also 'guarantees their right to equal treatment once they have become residents of that housing.'" 404 F. Supp. 2d at 1192 (quoting *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1148 (C.D. Cal. 2001)).

84. *See, e.g.*, Oliveri, *supra* note 82, at 13-16. Since 1989, HUD regulations interpreting § 3604(b) have identified a number of practices banned by this provision that affect current residents. *See, e.g.*, 24 C.F.R. § 100.65(b)(2), (4) (2007) (both of which were promulgated at 54 Fed. Reg. 3232, 3285 (Jan. 23, 1989) and are quoted *infra* note 217 and accompanying text).

85. *See* Oliveri, *supra* note 82, at 18-21, 25-32; Short, *supra* note 81, at 222-39; *infra* Part III.B.

86. *See infra* Part II.B.1.

87. *See* Oliveri, *supra* note 82, at 24-25; Short, *supra* note 81, at 240-44; *infra* Part III.C.1.

88. *See* Oliveri, *supra* note 82, at 25-32, 62; Short, *supra* note 81, at 250-54; *infra* notes 271-78 and accompanying text.

89. In addition to the reasons discussed in the text, the *Halprin* court's narrow reading of § 3604(b) is inconsistent with the long-held view that the FHA should be given a broad interpretation.

FHA does not cover post-acquisition discrimination may still be correct if it is an accurate reading of the statutory language used in §§ 3604(a) and 3604(b). This language is, of course, the primary consideration in interpreting these provisions.<sup>90</sup> As will be discussed in more detail later, the statutory language may justify an interpretation of § 3604(a) that is limited to the acquisition of housing, but § 3604(b)'s terms are far more ambiguous on this issue.<sup>91</sup>

### C. *The Fifth Circuit's 2005 Decision in Cox*

The FHA and other civil rights aspects of *Cox* were argued to the Fifth Circuit after the *Halprin* decision. On November 9, 2005, the Fifth Circuit affirmed the defendants' victory on all counts in an opinion by Judge Higginbotham.<sup>92</sup>

As to the FHA, the Fifth Circuit rejected the plaintiffs' "make unavailable or deny" claim under § 3604(a), concluding that: "The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,' but such results do not make dwellings 'unavailable' within the meaning of the Act."<sup>93</sup> The court concluded, based on a review of *Halprin* and other decisions, that "the simple language of § 3604(a) does not apply to current homeowners whose complaint is that the value or 'habitability' of their houses has decreased because such a complaint is not about 'availability.'"<sup>94</sup> Judge Higginbotham recognized—as *Halprin* had<sup>95</sup>—that a defendant's discrimination could have such a devastating effect on a homeowner that the latter might have a § 3604(a) claim for "constructive eviction,"<sup>96</sup> but he held that current owners have no right under § 3604(a) based on the claim that "the value or 'habitability' of their property has decreased due to discrimination in the delivery of protective city services."<sup>97</sup>

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See SCHWEMM, *supra* note 13, § 7:2; *supra* note 11 and accompanying text; see also SCHWEMM, *supra* note 13, § 14:3 n.10 (elaborating on this principle to criticize the *Halprin* court's misuse of the FHA's legislative history).

90. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("[T]he starting point in every case involving the construction of a statute is the language itself.") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); see also *infra* note 255 and accompanying text.

91. See *infra* Part III.

92. *Cox v. City of Dallas*, 430 F.3d 734, 736 (5th Cir. 2005).

93. *Id.* at 740.

94. *Id.* at 741 (referring, inter alia, to the Fourth Circuit's decision in *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (described *infra* notes 231 and 234 and the text accompanying note 237) and the Third Circuit's decision in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (described *infra* note 231)).

95. See *supra* note 67 and accompanying text.

96. 430 F.3d at 742-43 & nn.20-21.

97. *Id.* at 742-43 (footnote omitted).

As for the plaintiffs' § 3604(b) claim, the Fifth Circuit held that, even were the City's action considered a "service" under this provision, "§ 3604(b) is inapplicable here because the service was not 'connected' to the sale or rental of a dwelling as the statute requires."<sup>98</sup> To accept the plaintiffs' argument that § 3604(b)'s "services" need not be connected with a sale or rental would, according to the *Cox* opinion, turn the FHA into a "general anti-discrimination [statute], creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area."<sup>99</sup> Judge Higginbotham wrote that the FHA must "remain[] a housing statute. . . . That the corrosive bite of racial discrimination may soak into all facets of black lives cannot be gainsaid, but this statute targets only housing."<sup>100</sup> Thus, § 3604(b), while available to homeowners whose complaints deal with discrimination in the initial purchase of their homes or their actual or constructive eviction therefrom, "does not aid plaintiffs, whose complaint is that the value or 'habitability' of their houses has decreased."<sup>101</sup>

Finally, as to the *Cox* plaintiffs' § 1981 and equal protection claims, the Fifth Circuit held that the trial judge's findings that the plaintiffs' proof failed to show official action or discriminatory intent were not clearly erroneous.<sup>102</sup> The appellate court opined that municipal liability under both § 1981 and the Equal Protection Clause requires proof that the violation of the plaintiff's rights resulted from an official policy or custom.<sup>103</sup> It held that, although the district court correctly concluded that "the City's efforts to stop the illegal dumping at Deepwood were inconsistent, inadequate, and largely ineffective for years," those efforts only "amounted to 'negligence,' not a custom."<sup>104</sup>

The *Cox* plaintiffs sought rehearing en banc, which the Fifth Circuit denied in late 2005.<sup>105</sup> Thereafter, the plaintiffs filed a petition for certiorari with the Supreme Court, seeking review only of the ruling on their FHA claim,<sup>106</sup> but the

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98. *Id.* at 745. The court's opinion in *Cox* noted what it viewed as a split among the circuits as to whether the City's enforcement of its zoning laws could be considered a service for purposes of § 3604(b). *Id.* at 745 n.34. This part of the *Cox* opinion is further discussed *infra* note 369 and accompanying text.

99. 430 F.3d at 746.

100. *Id.*

101. *Id.*

102. *Id.* at 747-49.

103. *Id.* at 748. This part of the appellate opinion in *Cox* is further discussed *infra* note 373 and accompanying text.

104. 430 F.3d at 749 (footnotes omitted).

105. *See Cox v. City of Dallas*, 166 F. App'x 163 (5th Cir. 2005) (unpublished table decision).

106. *See* Petition for Writ of Certiorari, at \*i, *Cox*, 547 U.S. 1130 (2006) (No. 05-1226), 2006 WL 755783. The question presented by this petition was

[w]hether black homeowners are denied the protection of an aggrieved persons claim [sic] under the Fair Housing Act, 42 U.S.C. § 3604, solely because they already own their homes where they allege their homes have been made ineligible for sale because of the conditions created by the City's racially discriminatory provision of zoning

Court denied this petition on May 15, 2006.<sup>107</sup>

## II. PRE-COX LAW INVOLVING DISCRIMINATORY MUNICIPAL SERVICES

Litigation accusing municipalities of providing inferior services to minority communities dates back at least to the 1960s and continues to the present day.<sup>108</sup> This Part reviews the pre-*Cox* cases involving discriminatory municipal services. As in *Cox*, the plaintiffs in these cases often invoked the Equal Protection Clause and other civil rights laws, as well as the FHA. Indeed, decisions opining on the FHA's applicability to such cases generally came after the availability of these other legal theories had become well established.

### A. The 1968-1988 Period

1. *Equal Protection Claims: Hawkins v. Town of Shaw and Its Progeny.*—In the early 1970s, the Fifth Circuit ruled in *Hawkins v. Town of Shaw*<sup>109</sup> that the defendants' practice of providing inferior municipal services to black neighborhoods violated the Equal Protection Clause.<sup>110</sup> Shaw's 1500 black and 1000 white residents were residentially segregated, with 97% of the black-occupied homes being located in neighborhoods where no whites resided<sup>111</sup> and where dramatically inferior municipal services were provided.<sup>112</sup> Shaw's black residents sought injunctive relief against the relevant Town officials under 42 U.S.C. § 1983<sup>113</sup> in a class action filed before the FHA became effective.<sup>114</sup>

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enforcement and other municipal services?

*Id.*

107. *Cox*, 547 U.S. 1130.

108. For examples of modern cases, *see infra* note 398.

109. 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g en banc*, 461 F.2d 1171 (5th Cir. 1972).

110. *Id.* at 1291-92.

111. *Id.* at 1288.

112. The evidence showed that: (1) blacks accounted for 98% of all persons "who live[d] in homes fronting on unpaved streets"; (2) high-power street lights were installed only in white areas; (3) "while 99% of white residents [were] served by a sanitary sewer system, nearly 20% of the black population" was not; (4) while the drainage problems in white communities had been addressed by underground storm sewers or drainage ditches, black neighborhoods had only a "poorly maintained system of drainage ditches" or none at all; and (5) water pressure was inadequate far more often in black than white neighborhoods. *Id.* at 1289-91.

113. *See supra* note 52. During this time, the prevailing view of § 1983 was that it covered local officials, but not municipalities. *See Monroe v. Pape*, 365 U.S. 167 (1961), 187-92, *overruled by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). In 1978, after the *Hawkins* litigation had ended, the Supreme Court changed its interpretation of § 1983 to permit claims against municipalities as well as their officials. *See Monell*, 436 U.S. 658.

114. *See Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1163 n.1 (N.D. Miss. 1969) (referring to an early order in the case dated July 12, 1968). The FHA became effective as to most non-governmental housing on January 1, 1969. *See Fair Housing Act* § 803(a)(2), 42 U.S.C. § 3603(a)(2) (2000).

In 1969, the district court ruled for the defendants, concluding that their "policy of slowly providing basic municipal services to the town's inhabitants"<sup>115</sup> was not based on race, but on fiscal conservatism and other "rational considerations."<sup>116</sup> In 1971, a panel of the Fifth Circuit reversed, holding that the demonstrated racial differences in municipal services required a compelling justification that the defendants had failed to provide.<sup>117</sup> The panel held that this violated the Equal Protection Clause, and the defendants were ordered to submit a remedial plan "to cure the results of [this] long history of discrimination."<sup>118</sup> A year later, the Fifth Circuit, sitting en banc, affirmed this judgment and order.<sup>119</sup>

Both the panel and en banc decisions rejected the defendants' argument that, because their inferior treatment of black neighborhoods was not shown to have been prompted by discriminatory intent, no equal protection violation was established.<sup>120</sup> As the en banc opinion put it: "In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials."<sup>121</sup> This view would ultimately be rejected by the Supreme Court in 1975 in *Washington v. Davis*,<sup>122</sup> which adopted a purposeful discrimination requirement for equal protection claims.<sup>123</sup>

Even with this intent requirement, however, a number of cases patterned after *Hawkins* were successfully prosecuted in the South under the Equal Protection Clause in the late 1970s and early 1980s.<sup>124</sup> Like *Hawkins*, these cases often

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115. *Hawkins*, 303 F. Supp. at 1168.

116. *Id.* at 1168-69.

117. *Hawkins*, 437 F.2d at 1292. At the trial court level, the *Hawkins* plaintiffs alleged wealth, as well as race, discrimination, but they did not pursue their wealth-based claim on appeal. *Id.* at 1287 n.1.

118. *Id.* at 1293.

119. *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972).

120. *See id.* at 1172-73 (en banc opinion); 437 F.2d at 1291-92 (panel opinion).

121. *Hawkins*, 461 F.2d at 1172.

122. 426 U.S. 229 (1976).

123. *Id.* at 238-48. In *Washington*, the Supreme Court cited *Hawkins* with disapproval as an example of an equal protection decision based on discriminatory effect instead of discriminatory purpose. *Id.* at 244 n.12. For examples of post-*Washington* appellate decisions recognizing that equal protection challenges to discriminatory municipal services now require proof of the defendant's discriminatory intent, see *Ammons v. Dade City*, 783 F.2d 982, 987 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185-86 (11th Cir. 1983).

124. *See, e.g., Ammons*, 783 F.2d at 983 (affirming judgment in a class action filed in 1981 based on finding that defendants intentionally discriminated in providing inferior street paving and related services and storm water drainage facilities to black neighborhoods in violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 573, 590 (M.D. Fla. 1986) (finding in a class action filed in 1981 that defendants intentionally discriminated in providing inferior street paving and related services to black neighborhoods in violation of the Equal Protection Clause); *Bryant v. City of Marianna*, 532 F. Supp. 133, 135 (N.D. Fla. 1982) (entering default judgment in a class action filed in 1980 based

revealed municipal discrimination against black neighborhoods that dated back to the Jim Crow era, making discriminatory intent easy to infer. The *Hawkins* theory was also endorsed by a few courts outside of the South in the 1970s, but these cases generally resulted in judgments for the municipal defendants based on insufficient evidence of illegal discrimination.<sup>125</sup> In 1981, the Supreme Court appeared to approve the *Hawkins* theory, at least for intent-based claims, when it commented that a municipality could not take “action benefitting white property owners that would be refused to similarly situated black property owners.”<sup>126</sup>

2. § 1982 Claims and *City of Memphis v. Greene*.—Two months after passage of the 1968 FHA, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*<sup>127</sup> that the 1866 Civil Rights Act (42 U.S.C. § 1981 and § 1982) outlaws private, as well as public, discrimination in housing.<sup>128</sup> Although the *Jones* opinion cited § 1981’s right to “contract,”<sup>129</sup> its main focus was § 1982’s

on defendants’ discrimination in providing inferior street paving and maintenance, water and sewer services, drainage facilities, fire protection, parks and recreation facilities, and street lighting to black neighborhoods in violation of the Equal Protection Clause and Title VI); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1376-79 (M.D. Fla. 1978) (finding in a class action filed in 1976 that defendants intentionally discriminated in providing inferior street paving, parks and recreation facilities, and water service to black neighborhoods in violation of the Equal Protection Clause and Title VI); *Selmont Improvement Ass’n v. Dallas County Comm’n*, 339 F. Supp. 477, 481 (S.D. Ala. 1972) (ruling for plaintiffs under the *Hawkins* theory based on defendants’ discrimination in providing inferior street paving to black neighborhoods); *see also* *Campbell v. Bowlin*, 724 F.2d 484, 489-90 (5th Cir. 1984) (reversing directed verdict for defendants in § 1983 claim against municipality and its officials who were accused of denying water and sewer facilities to plaintiff’s land in a predominantly black neighborhood based on intentional discrimination).

125. *See, e.g.*, *Beal v. Lindsay*, 468 F.2d 287, 288-91 (2d Cir. 1972) (accepting the *Hawkins* “principle that serious and continued discrimination in the level of effort expended on municipal services to areas predominantly populated by minority racial groups violates the equal protection clause,” but affirming ruling in favor of defendants because their failure to maintain a particular park in a minority area was based not on their lack of effort, but continuous vandalism); *Burner v. Washington*, 399 F. Supp. 44, 46, 54 (D.D.C. 1975) (accepting *Hawkins* as the “leading case on discrimination in the provision of municipal services,” but holding that the plaintiffs had failed to show illegal racial discrimination in police, fire, recreation services, trash removal, and sidewalk construction); *see also* *Mlikotin v. City of L.A.*, 643 F.2d 652, 653-54 (9th Cir. 1981) (affirming dismissal of equal protection claim of inferior municipal services to poor neighborhood because this claim, unlike the one in *Hawkins*, was not based on racial discrimination).

126. *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981) (§ 1982 case). This case is discussed *infra* notes 134-48 and accompanying text.

127. 392 U.S. 409 (1968).

128. *Id.* at 419-44.

129. *See id.* at 441-43. At the time of *Jones*, § 1981 provided:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and

guarantee of equal property rights,<sup>130</sup> which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>131</sup>

*Jones* resurrected § 1981 and § 1982 as legal weapons against private discrimination, but even before *Jones*, the 1866 Act was understood to outlaw governmental discrimination.<sup>132</sup> Furthermore, in post-*Jones* cases, the Supreme Court has made clear that § 1982 guarantees equal treatment in the terms and conditions affecting a resident's property rights, as well as in the initial opportunity to purchase and lease.<sup>133</sup>

The principal Supreme Court case involving a § 1982 claim by minority homeowners challenging discriminatory municipal services is *City of Memphis v. Greene*,<sup>134</sup> which was decided in 1981. In *City of Memphis*, residents of a black neighborhood claimed that closing a street that linked them to a neighboring white area adversely affected their rights to hold and enjoy their property in violation of § 1982.<sup>135</sup> In a 6-3 decision, the Supreme Court rejected this claim. Justice Stevens, writing for five members of the Court,<sup>136</sup> reviewed

property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, taxes, licenses, and exactions of every kind, and to no other.

See Civil Rights Act of 1991, Pub. L. No. 102-166, § 1981, 105 Stat. 1071, 1071-72 (1991). As a result of amendments made to § 1981 by the Civil Rights Act of 1991, the quoted language became 42 U.S.C. § 1981(a), with two additional subsections providing, respectively, that the term "'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" and that the rights protected by this provision extend to private, as well as public, discrimination. See 42 U.S.C. § 1981(a) (2000).

130. See 392 U.S. at 412-13.

131. 42 U.S.C. § 1982 (2000).

132. See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 30 (1948) (holding that § 1982 bars "judicial enforcement of [racially] restrictive covenants by the courts of the District of Columbia"); *Buchanan v. Warley*, 245 U.S. 60, 78-82 (1917) (relying on the 1866 Act, along with the Fourteenth Amendment, to strike down a municipal zoning ordinance that required residential racial segregation).

133. See *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 435-37 (1973) (holding that § 1982 guarantees a black purchaser of residential property the opportunity to join a local recreation club that ties membership benefits to residency in the area); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234-38 (1969) (holding that § 1982 guarantees a black tenant the right to obtain a membership share in a local recreational facility that ties membership to residency in neighboring homes). *Tillman* is further discussed *infra* notes 346-48 and accompanying text. *Sullivan* is further discussed *infra* notes 333-39 and accompanying text.

134. 451 U.S. 100 (1981).

135. *Id.* at 105.

136. Justice White concurred on another ground. *Id.* at 129-35 (White, J., concurring). Justice Marshall, joined by Justices Brennan and Blackmun, dissented. *Id.* at 135-55 (Marshall, J., assenting).

the record and determined that the City's decision was motivated not by racial factors, but by traffic safety and other legitimate considerations.<sup>137</sup> He also found that the street closing conferred a benefit on property owners in the white neighborhood, but that there was no evidence that the City would refuse to do the same for black property owners.<sup>138</sup> It was acknowledged that the closing caused some inconvenience to black motorists who now had to find other routes around the white neighborhood,<sup>139</sup> but Justice Stevens termed this "a routine burden of citizenship"<sup>140</sup> that had not affected the value of any property owned by the plaintiffs.<sup>141</sup> Based on this view of the record,<sup>142</sup> Justice Stevens concluded that no § 1982 violation had been shown.<sup>143</sup>

Even though the Court in *City of Memphis* rejected the plaintiffs' particular claim, it did recognize three separate theories upon which § 1982-based challenges to governmental action might succeed.<sup>144</sup> The first of these covers claims of discriminatory municipal services: "[T]he statute would support a challenge to municipal action benefitting white property owners that would be refused to similarly situated black property owners. For official action of that kind would prevent blacks from exercising the same property rights as whites."<sup>145</sup> The second theory recognized in *City of Memphis* involves "official action that depreciated the value of property owned by black citizens."<sup>146</sup> "Finally, the statute might be violated if the street closing severely restricted access to black homes, because blacks would then be hampered in the use of their property."<sup>147</sup>

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137. *Id.* at 119 (majority opinion).

138. *Id.*

139. *Id.* at 128.

140. *Id.* at 129.

141. *Id.* at 124, 129.

142. Justice Marshall's dissent provided a much different view of the record, which led him to conclude that the City's actions had violated § 1982. *Id.* at 136-54 (Marshall, J., dissenting).

143. *Id.* at 124 (majority).

144. *See id.* at 123.

145. *Id.*

146. *Id.* For a post-*City of Memphis* example of such a claim, see *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1536 (11th Cir. 1986) (ruling against black property owners' § 1982 claim on the ground that the plaintiffs "suffered zero damages from the [defendants'] closing of Industrial Boulevard").

147. *City of Memphis*, 451 U.S. at 123. Here, the *City of Memphis* opinion cited with apparent approval the Fifth Circuit's decision in *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974), as an example of this theory:

In *Jennings*, the defendants placed a barricade across a street on the outskirts of Dadeville, Ala., and prohibited landowners on the other side of the barricade from using the street. All but one of the landowners so restricted were black, and the one white landowner was given private access to the closed street. The street closing had the effect of adding [one-and-one-half] to [two] miles to the trip into town. The court held that the plaintiffs, "because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens." Thus *Jennings*, unlike this case,

The *City of Memphis* case also presented the issue of whether § 1982 requires proof that the defendant's actions are motivated by a discriminatory purpose, but the Court did not decide this issue.<sup>148</sup> A year later, however, the Court held that § 1981 claims do require such proof,<sup>149</sup> and subsequent lower court decisions have assumed that § 1982 is subject to the same requirement.<sup>150</sup> Thus, even though the *City of Memphis* opinion endorsed the use of § 1982 for some types of discriminatory municipal services claims, such claims, like those under the Equal Protection Clause, now require proof of discriminatory intent.<sup>151</sup>

3. *Title VI.*—Cases dating back to the 1970s have upheld discriminatory municipal services claims based on Title VI of the 1964 Civil Rights Act,<sup>152</sup> which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”<sup>153</sup> Since those earlier days, Title VI law has undergone some important changes, and although private litigants may sue

involved a severe restriction on the access to property.

451 U.S. at 123 n.36 (quoting *Jennings*, 488 F.2d at 442). Thus, discriminatory municipal actions that impose the kind of hardships on black homeowners that occurred in *Jennings* may be challenged under § 1982. For a post-*City of Memphis* “road-closing-access-to-property” case where the Fifth Circuit relied on *Jennings* to uphold a § 1982 claim, see *Evans v. Tubbe*, 657 F.2d 661, 662 n.2 (5th Cir. 1981).

148. See *City of Memphis*, 451 U.S. at 129-30 (White, J., concurring).

149. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382-91 (1982).

150. See SCHWEMM, *supra* note 13, § 27:19 n.12 and accompanying text.

151. Modern lower court cases, in addition to *Cox*, where the 1866 Act has been relied on as a basis for challenging discriminatory municipal services include *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492-98 (S.D. Ohio 2007) (described *infra* note 398); *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*2 (N.D. Tex. Feb. 14, 2002) (denying summary judgment for defendants in § 1981 claim alleging discrimination in various municipal services and judging this claim by the same standards as an equal protection claim under § 1983); see also *Franks v. Ross*, 313 F.3d 184, 194-96 (4th Cir. 2002) (upholding timeliness of § 1982 claim brought by residents of black town claiming that the county was siting an undesirable landfill nearby based on race); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1211-12 (7th Cir. 1984) (rejecting claims based on, inter alia, § 1981 and § 1982 (discussed *infra* note 171)); cf. *Ross v. Midland Mgmt. Co.*, No. 02-C-8190, 2003 WL 21801023, at \*2-4 (N.D. Ill. Aug. 1, 2003) (reading *City of Memphis* as holding that § 1982 creates “a right of action not only with respect to the purchase of property but also with respect to the use of property” and therefore upholding tenant's discriminatory services claim under § 1982).

152. 42 U.S.C. § 2000d (2000).

153. *Id.* The cases include those so designated in *supra* note 124; those cited *infra* notes 157 and 236; and *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1014-17 (6th Cir. 1989) (upholding standing of neighborhood organization to bring a Title VI complaint alleging that their members' property values were reduced because defendant “provides municipal services . . . to racially identifiable neighborhoods in a substantially inferior quality and quantity than the services provided to other areas of Canton”).

under this statute,<sup>154</sup> their claims are now limited to intent-based discrimination.<sup>155</sup> Furthermore, a defendant accused of such discrimination must be a recipient of federal financial assistance.<sup>156</sup> Thus, plaintiffs bringing municipal services claims under Title VI must show that the defendant-municipality received federal financial assistance and has “discriminated against them on the basis of race, the discrimination was intentional, and the discrimination was a substantial or motivating factor for the City’s actions.”<sup>157</sup>

4. *Early FHA Cases.*—Court decisions extending back to the earliest years of the FHA have considered whether the discriminatory denial of municipal services is actionable under this statute. In 1970, the Second Circuit in *Kennedy Park Homes Ass’n v. City of Lackawanna*<sup>158</sup> ruled that the defendants violated the Equal Protection Clause and the FHA based on their intentional discrimination in blocking a minority housing project planned for a white neighborhood.<sup>159</sup> Lackawanna had initially blocked the project by rezoning the proposed site as a park and by declaring a moratorium on new developments.<sup>160</sup> After suit was filed, the defendants rescinded these actions, but continued to stymie the project by refusing it permission to tie into the City’s sewer system.<sup>161</sup> The case, therefore, had elements of both exclusionary zoning and discriminatory municipal services. In affirming the district court’s judgment for the plaintiffs in *Kennedy Park*, the Second Circuit did not distinguish between their equal protection and FHA claims, but simply endorsed the trial court’s view that the City’s overall behavior toward the proposed project manifested illegal racial discrimination.<sup>162</sup>

Four years later, the Fifth Circuit reached a similar conclusion in *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*,<sup>163</sup> where

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154. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (recognizing that Title VI creates individual rights justifying an implied cause of action); *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) (stating that “private individuals may sue to enforce . . . Title VI”).

155. See *Alexander*, 532 U.S. at 280-93.

156. See 42 U.S.C. § 2000d, d-4a (2000); see, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555, 557 (1984).

157. *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*2 (N.D. Tex. Feb. 14, 2002) (citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001)). In *Miller*, the court dismissed the plaintiffs’ Title VI claim based on lack of evidence of defendant’s racially discriminatory motive in the City’s use of CDBG funds, *id.* at \*11, while upholding other theories requiring discriminatory intent. 2002 WL 230834. For a recent decision upholding a Title VI claim based on discriminatory municipal services, see *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492-98 (S.D. Ohio 2007); cf. *Ross v. Midland Management Co.*, 2003 WL 21801023, at \*3-4 (N.D. Ill. Aug. 1, 2003) (upholding tenant’s Title VI claim of discriminatory services).

158. 436 F.2d 108 (2d Cir. 1970), *aff’d* 318 F. Supp. 669 (W.D.N.Y. 1970).

159. *Id.* at 109-10.

160. *Id.* at 109.

161. *Id.* at 111.

162. *Id.* at 112-15.

163. 493 F.2d 799 (5th Cir. 1974).

the court's opinion took note of, but did not rely on, §§ 3604(a) and 3604(b) of the FHA in holding that the defendant's refusal to extend water and sewer service to a subsidized, heavily minority housing project violated the Equal Protection Clause.<sup>164</sup> The next appellate court to weigh in was the Fourth Circuit in 1984 in *Mackey v. Nationwide Insurance Cos.*,<sup>165</sup> which opined in dicta that § 3604(b)'s prohibition against discriminatory housing services "encompasses such things as garbage collection and other services of the kind usually provided by municipalities."<sup>166</sup> At least one court disagreed, however; in 1978, a Pennsylvania district judge in *Vercher v. Harrisburg Housing Authority*<sup>167</sup> rejected the view that § 3604(b) outlaws inferior police protection for black-occupied housing, concluding that to say "that every discriminatory municipal policy is prohibited by the Fair Housing Act would be to expand that Act to a civil rights statute of general applicability rather than one dealing with the specific problems of fair housing opportunities."<sup>168</sup>

The first appellate case to provide a focused analysis of FHA coverage of discriminatory municipal services was *Southend Neighborhood Improvement v. County of St. Clair*,<sup>169</sup> which was decided by the Seventh Circuit in 1984. The plaintiffs in *Southend* were homeowners in a poor, black neighborhood who alleged that the value of their homes was being diminished by the County's poor maintenance of its tax delinquent properties in the plaintiffs' neighborhood.<sup>170</sup> They asserted claims under §§ 3604(a), 3604(b), and 3617 of the FHA, the 1866

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164. *Id.* at 801-02, 802 n.4, 811 n.12.

165. 724 F.2d 419 (4th Cir. 1984).

166. *Id.* at 424. *Mackey* held that the FHA did not outlaw home insurance discrimination, specifically that such discrimination did not make housing "unavailable" in violation of § 3604(a), *id.* at 423, nor could home insurance "reasonably be described as the provision of a service in connection with dwellings" under § 3604(b). *Id.* at 424. This holding was later rejected by a number of courts, in part based on a subsequent HUD regulation interpreting the FHA to cover home insurance. See 24 C.F.R. § 100.70(d)(4) (2007) (providing that the FHA outlaws "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race [or other prohibited grounds]"); SCHWEMM, *supra* note 13, § 13:15 nn.16, 25 & 32 (citing pertinent cases).

167. 454 F. Supp. 423 (M.D. Pa. 1978).

168. *Id.* at 424. *Vercher* was a § 3617 action by a former employee of the defendant housing authority who claimed he had been fired for pursuing the complaints of black tenants that they received less protection by city police than did white-occupied housing. *Id.* The court noted that this § 3617 claim could succeed if the FHA's substantive provisions covered such discrimination, but it held that § 3604(b) could not be extended to include police protection: "Police protection is not housing. Nor does it have any direct connection to the sale, rental, or occupancy of housing. Certainly the amount of police protection citizens receive has some impact on their use and enjoyment of their homes; but the same could be said of any municipal service." *Id.* While the plaintiff's FHA claim thus failed, the court went on to hold that his situation could be remedied with a claim under 42 U.S.C. § 1983. *Id.* at 425.

169. 743 F.2d 1207 (7th Cir. 1984).

170. *Id.* at 1208.

Civil Rights Act, and the Thirteenth and Fourteenth Amendments, all of which were rejected by the Seventh Circuit.<sup>171</sup> With respect to § 3604(a), the *Southend* opinion noted that this provision by its terms focuses on practices that “affect[] the availability of housing” and “is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons.”<sup>172</sup> Thus, according to the Seventh Circuit, § 3604(a) “does not protect the intangible interests in the already-owned property” alleged by the plaintiffs.<sup>173</sup> As to the § 3604(b) claim of discriminatory services, *Southend* reasoned that “[t]hat subsection applies to services generally provided by governmental units such as police and fire protection or garbage collection” and that “the County decisions regarding how to administer properties it holds by tax deed are distinct from these types of services.”<sup>174</sup> The Seventh Circuit ended its FHA analysis by concluding that “[t]he Act was not designed to address the concerns raised by the complaint.”<sup>175</sup>

The *Southend* opinion proved to be influential with respect to both §§

171. *Id.* at 1210, 1210 n.4, 1212-13. After disposing of the FHA claims in *Southend*, the Seventh Circuit rejected the 1866 Act claims on the ground that “[t]he relationship between the County’s conduct and the alleged injuries to the plaintiffs’ neighboring properties is too tenuous to support a claim that the plaintiffs’ contract or property rights under [§§] 1981 and 1982 were infringed.” *Id.* at 1211. Furthermore, *Southend* viewed the plaintiffs’ injuries as not significant enough under *City of Memphis v. Greene*, 451 U.S. 100 (1981), *see supra* notes 134-48 and accompanying text, to give rise to a violation of the 1866 Act. 743 F.2d at 1212. “Here, the . . . plaintiffs’ ability to make contracts and manage their properties as protected under [§§] 1981 and 1982 could not have been affected in a significant manner by a County decision not to board up or demolish a building.” *Id.*

The *Southend* opinion did imply that the plaintiffs’ § 1982 claim might have been upheld if they had alleged that the County’s neglect “affirmatively altered the character of their communities in a manner that worsened their perceived plight” and thereby “constituted discriminatory damage to their contract and property rights.” *Id.* The Seventh Circuit also implied that a § 1982 claim would be appropriate if the County “refused discriminatorily to extend available services to blacks.” *Id.*

The *Southend* plaintiffs’ constitutional claims were dismissed on essentially the same ground that doomed their 1866 Act claims—that is, that “[t]he County’s conduct could have had at most minimal impact” on the plaintiffs’ neighborhood. *Id.* at 1213.

172. 743 F.2d at 1210.

173. *Id.*

174. *Id.* (citing *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423-24 (4th Cir. 1984)). *Mackey* held that home insurance discrimination did not violate either §§ 3604(a) or 3604(b), *see supra* note 166, but it did opine in dicta that the latter provision outlaws some discriminatory municipal services. 724 F.2d at 423-24. As the text indicates, *Mackey*’s technique of holding against the particular § 3604(b) claim presented, while commenting in dicta that this provision does cover common municipal services, was followed by the Seventh Circuit in its *Southend* opinion. 743 F.2d at 1210.

175. *Southend*, 743 F.2d at 1210. The plaintiffs’ § 3617 claim was rejected on the ground that, given the failure of their other FHA claims, the County’s conduct could not be said to constitute “interference with Fair Housing Act rights.” *Id.* at 1210 n.4.

3604(a) and 3604(b). As to § 3604(a), a number of pre-*Southend* decisions had opined that this provision's "otherwise make unavailable or deny" prohibition was "as broad as Congress could have made it."<sup>176</sup> *Southend* obviously disagreed, and the limitation it noted concerning this phrase's focus on making housing "unavailable" has been followed in many subsequent cases rejecting § 3604(a) claims,<sup>177</sup> including some brought by minority homeowners alleging discriminatory municipal services.<sup>178</sup>

In contrast, *Southend's* treatment of § 3604(b) had a broadening effect. Although the Seventh Circuit ruled against the particular § 3604(b) claim there, the court's dicta that this provision "applies to services generally provided by governmental units such as police and fire protection or garbage collection"<sup>179</sup> became the foundation for numerous subsequent decisions that recognized § 3604(b) as covering discriminatory municipal services.<sup>180</sup>

### B. Modern FHA Law

1. *The 1988 Fair Housing Amendments Act.*—In 1988, after nearly a decade of consideration, Congress passed a major set of amendments to the FHA, known as the Fair Housing Amendments Act ("FHAA").<sup>181</sup> Among other things, the FHAA outlawed familial status and handicap (disability) discrimination, broadened the FHA's prohibition against financial discrimination in § 3605, strengthened the FHA's enforcement system, brought § 3617 claims under this enforcement system, and directed HUD to issue regulations interpreting the amended FHA.<sup>182</sup>

The latter provision soon resulted in a detailed set of FHA regulations, whose relevance to this Article is explored in the next section. The FHAA's new enforcement procedures are not directly relevant here, although they do reflect the 1988 Congress's awareness of and frustration with the failure of the 1968 FHA to more effectively reduce housing discrimination against racial and ethnic minorities.<sup>183</sup> The other three changes made by the FHAA are also not directly

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176. See SCHWEMM, *supra* note 13, § 13:4 n.2 and accompanying text (citing relevant cases).

177. See *id.* § 13:4 n.5 (citing relevant cases).

178. See *infra* cases cited in note 231.

179. *Southend*, 743 F.2d at 1210.

180. See *infra* cases cited in note 234; see also *McCauley v. City of Jacksonville*, No. 86-1674, 1987 WL 44775, at \*2 (4th Cir. Sept. 8, 1987) (unpublished decision) (upholding § 3604(b) claim by developer of low-income, integrated housing based on allegation that City denied sewer service to his proposed development because of race).

181. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619. The FHAA's legislative history is described in SCHWEMM, *supra* note 13, § 5:4.

182. See SCHWEMM, *supra* note 13, § 5:3.

183. Aware of HUD estimates that "2 million instances of housing discrimination [were continuing to] occur each year," the Congress that passed the FHAA saw the 1968 FHA as having been "ineffective because it lacks an effective enforcement mechanism." H.R. REP. NO. 100-711, at 15-16 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2176-77. Thus, the FHAA was intended

relevant to the FHA's coverage of municipal services discrimination against minorities, but each lends itself to an argument as to how the relevant provisions of the original FHA should be construed.

First, the FHAA substantially broadened the FHA's prohibition in § 3605 of discrimination in home mortgages and other "real estate related transactions."<sup>184</sup> The practices covered by this new § 3605 explicitly include making loans for "improving, repairing, or maintaining" dwellings, as well as those for "purchasing or constructing" housing.<sup>185</sup> This clearly indicates, contrary to Judge Posner's opinion in *Halprin*,<sup>186</sup> that the post-1988 FHA *does* extend its protections to current residents as well as homeseekers. While this does not directly challenge the *Halprin-Cox* determination to limit § 3604 to homeseekers, it does undercut their view that the FHA is generally unconcerned with discrimination against residents who have already acquired their homes.<sup>187</sup>

As for outlawing discrimination against families with children, the technique by which the FHAA barred this type of discrimination was simply to add "familial status" to the list of prohibited bases of discrimination in each of the FHA's substantive prohibitions, including § 3604.<sup>188</sup> Otherwise, Congress left the language of all of § 3604's subsections—including that of §§ 3604(a) and 3604(b)—precisely the same. The fact that the FHAA did make some changes in the FHA's substantive provisions (i.e., in § 3605) and that it "opened up" § 3604 by amending this section to include familial status discrimination suggests that Congress approved of the existing understanding of §§ 3604(a) and 3604(b).<sup>189</sup> Therefore, to the extent that judicial interpretations of §§ 3604(a) and

to provide the FHA with "an effective enforcement system" in order to make the FHA's promise of nondiscrimination "a reality." *Id.* at 13. The FHAA strengthened all three of the FHA's enforcement techniques by: (1) eliminating the punitive damage cap, lengthening the statute of limitations, and making attorney's fees awards easier to obtain in private litigation; (2) establishing an expedited administrative complaint procedure that could result in injunctive relief, damages, and civil penalties; and (3) authorizing the Justice Department to collect monetary damages for aggrieved persons in its "pattern or practice" and "general public importance" cases. *See* 42 U.S.C. §§ 3610-3614 (2000); *see generally* SCHWEMM, *supra* note 13, ch. 24-26.

184. *See* 42 U.S.C. § 3605 (2000). For a description of the differences between the original § 3605 and the FHAA version, *see* SCHWEMM, *supra* note 13, § 18:1.

185. *See* 42 U.S.C. § 3605(b)(1)(A).

186. *See supra* notes 66-71 and accompanying text.

187. For other examples of FHA provisions that demonstrate a concern for protecting current residents, *see* Short, *supra* note 81, at 213-14, 217-21 (discussing the FHA's § 3604(b) (defining "dwelling" to include structures that are "occupied" as residences)), and 42 U.S.C. § 3617 (outlawing interference on account of one's "having exercised" a §§ 3604-3606 right); *infra* text accompanying notes 194-95 (discussing the FHA's § 3604(f)(1)(B) and § 3604(f)(2)(B), both of which outlaw discrimination because a person with a disability is "residing in" a dwelling); *see also* 42 U.S.C. § 3631 (provision, passed along with the FHA, making it a crime to use force because a person has "occupied" a dwelling)).

188. *See* 42 U.S.C. §§ 3604(a)-(e), 3605, 3606, 3617.

189. *See, e.g.,* *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware

3604(b) (e.g., the Seventh Circuit's opinion in *Southend*)<sup>190</sup> had delineated how these provisions applied to claims of discriminatory municipal services, the FHAA may be taken to have tacitly approved those interpretations.

The FHAA's prohibition against disability discrimination was handled somewhat differently. With respect to most of the FHA's substantive prohibitions, "handicap," like "familial status," was simply added to the list of FHA-prohibited bases of discrimination,<sup>191</sup> but this was not done in §§ 3604(a) and 3604(b). As to the practices outlawed by these provisions, they were copied almost verbatim in two new parts of the FHA—§§ 3604(f)(1) and 3604(f)(2)—that dealt exclusively with handicap discrimination.<sup>192</sup>

This was apparently done to make clear that the FHAA would not condemn housing made available especially *for* people with disabilities (i.e., that the statute does not authorize "reverse discrimination" suits against such housing by non-handicapped persons).<sup>193</sup> Thus, §§ 3604(f)(1) and 3604(f)(2) only make their identified practices unlawful if done "because of a handicap of—

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or

(C) any person associated with that buyer or renter."<sup>194</sup>

Among other things, the "residing in" language in part (B) of § 3604(f)(1) and § 3604(f)(2) shows that these provisions cover current residents as well as homeseekers.<sup>195</sup>

Two additional points are worth noting about § 3604(f)(2), the disability counterpart to § 3604(b)'s prohibition of discriminatory terms, conditions,

of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)); see also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117 (2002) (finding "tacit congressional approval" of an interpretation of Title VII based on Congress's "being presumed to have known of [the] settled judicial treatment" of that statute when it made other amendments to that law); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) (holding it appropriate to assume that Congress knew of lower court decisions interpreting a statute and presuming that Congress intended to carry this interpretation forward in a similarly worded statute).

190. See *supra* note 174 and accompanying text; *supra* note 180.

191. See 42 U.S.C. §§ 3604(c)-(e), 3605, 3606, 3617.

192. See *id.* § 3604(f)(1)-(2).

193. See, e.g., H.R. REP. NO. 100-711, at 24-25 (1988), as reprinted in 1988 U.S.C.A.N. 2173, 2185-86 (describing § 3604(f)(1) and § 3604(f)(2) as prohibiting discrimination "against" handicapped persons); Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3246 (Jan. 23, 1989) (noting in HUD's commentary on its FHAA regulations that the statute "does not prohibit the exclusion of non-handicapped persons from dwellings").

194. 42 U.S.C. § 3604(f)(1). The quoted language is from § 3604(f)(1); identical language is used in § 3604(f)(2), except that the latter substitutes "that person" for "that buyer or renter" in subparts (A) and (C).

195. See Short, *supra* note 81, at 216-17; see also *infra* note 201 and accompanying text and *infra* note 204 para. 2.

privileges, services, and facilities. First, the principal congressional report on § 3604(f)(2) gives some examples of the conduct it outlaws. This report states that § 3604(f)(2)

would guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of the premises, benefits and privileges made available to other tenants, residents, and owners. To the extent that terms, conditions, privileges, services or facilities operate to discriminate against a person because of a handicap, elimination of the discrimination would be required in order to comply with the requirements of this subsection.<sup>196</sup>

The examples in this commentary may help give meaning to the terms “facilities,” “privileges,” and “services” in § 3604(b) and § 3604(f)(2), and they also provide additional evidence that § 3604(f)(2) was intended to protect current residents as well as homeseekers.

However, before we can extend this understanding to the similar provision for other protected classes in § 3604(b), a second point about § 3604(f)(2) must be noted. The prohibitory language used in § 3604(f)(2) is nearly identical to that of § 3604(b), but the small difference may be important to the issue of whether current residents are covered by § 3604(b).<sup>197</sup> The first phrase of § 3604(f)(2) and § 3604(b) are the same, outlawing discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling.”<sup>198</sup> However, the second phrase in § 3604(f)(2) extends this prohibition to “services or facilities in connection with *such dwelling*,”<sup>199</sup> whereas this second phrase in § 3604(b) reads “services or facilities in connection *therewith*.”<sup>200</sup> The “in connection with such dwelling” language in § 3604(f)(2) clearly affirms that this provision protects current residents as well as homeseekers, and post-FHAA decisions have so held.<sup>201</sup> However, the use of “therewith” in § 3604(b) has been interpreted by

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196. H.R. REP. NO. 100-711, at 23-24.

197. The prohibitory language used in § 3604(f)(1) is also not quite identical to that of its counterpart, § 3604(a), *see supra* note 48, and SCHWEMM, *supra* note 13, § 13:1, text accompanying nn.1-3, although the slight differences between these provisions do not seem relevant to the issue of whether they cover claims by current residents.

198. 42 U.S.C. §§ 3604(b), (f)(2) (2000).

199. *Id.* § 3604(f)(2) (emphasis added).

200. *See id.* § 3604(b) (emphasis added).

201. *See, e.g.,* Neudecker v. Boisclair Corp., 351 F.3d 361, 363-65 (8th Cir. 2003) (upholding § 3604(f)(2) claim by disabled tenant against his landlord based on disability harassment during plaintiff's residency); Wilstein v. San Tropai Condo. Master Ass'n, No. 98 C 6211, 1999 WL 262145, at \*7 (N.D. Ill. Apr. 22, 1999) (upholding § 3604(f)(2) claim by disabled owner of condominium against his condominium association); Project Life, Inc. v. Glendening, No. WMN-98-2163, 1998 WL 1119864, at \*2 (D. Md. Nov. 30, 1998) (upholding § 3604(f)(2) claim challenging discrimination by governmental officials in providing parking and utility services); *see also* Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 176 (3d Cir. 2005) (noting, in

some courts to revert back to the “sale or rental” language in the first phrase as opposed to that phrase’s “of a dwelling” language, thus leading them to agree with *Halprin* that § 3604(b) is limited to the “sale or rental” stage and does not protect current residents.<sup>202</sup>

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group home’s challenge to municipality’s decision concerning plaintiff’s sewer rates based on § 3604(f)(2), that “[b]y its express terms, this section applies to ‘the provision of services or facilities’ to a dwelling, such as sewer service”); *Good Shepherd Manor Found. v. City of Mومence*, 323 F.3d 557, 565 (7th Cir. 2003) (suggesting in dicta that City’s cut-off of water supply to group home for disabled persons would violate the FHA if it were motivated by discriminatory intent); *Congdon v. Strine*, 854 F. Supp. 355, 360-62 (E.D. Pa. 1994) (rejecting for lack of proof tenants’ claim under § 3604(f)(2) that landlord discriminated against them by poorly maintaining the building’s elevator).

This conclusion reflects the fact that the Congress that passed the 1988 FHAA was aware of post-acquisition housing problems faced by disabled tenants. *See, e.g., Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong. 240 (1988) (statement of Homer C. Floyd, Executive Director, Pennsylvania Human Relations Commission) (noting that “[o]nce housed, the handicapped may face additional problems” and providing examples of difficulties encountered by disabled tenants).

As indicated by the Seventh Circuit’s comment in the *City of Mومence* case *supra*, § 3604(f)(2) of the FHA would appear to provide current residents with a basis for challenging inferior municipal services based on disability discrimination. 323 F.3d at 565. In any event, such discrimination also seems to be outlawed by Title II of the 1990 Americans with Disabilities Act and, if the defendant receives federal financial assistance, by Section 504 of the 1973 Rehabilitation Act. *See, e.g., Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-46 (2d Cir. 1997).

202. *See Cox v. City of Dallas*, No. Civ.A. 3:98-CV-1763BH, 2004 WL 370242, at \*7-8 (N.D. Tex. Feb. 24, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005) (opining, in § 3604(b) claim alleging discriminatory municipal services, that in order to determine whether this provision “extends beyond the sale or rental of housing, it is necessary to decide whether the language ‘in connection with’[sic] refers to the ‘sale or rental of a dwelling’ or merely the ‘dwelling’ in general” and adopting the former interpretation in deciding against plaintiffs’ claim (citing *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989)); *King v. Metcalf 56 Homes Ass’n*, No. 04-2192-JWL, 2004 WL 2538379, at \*2 (D. Kan. Nov. 8, 2004) (rejecting black resident’s § 3604(b) claim against her condominium association for discriminatory treatment on the ground that this provision’s “in connection therewith” phrase plainly limits § 3604(b)’s scope “to discrimination in connection with the sale or rental of housing”); *Ross v. Midland Mgmt. Co.*, No. 02 C 8190, 2003 WL 21801023, at \*4 (N.D. Ill. Aug. 1, 2003) (rejecting black resident’s § 3604(b) claim against her landlord for discriminatory services on the ground that this provision’s “in connection therewith” phrase limits § 3604(b)’s scope to “services in connection with the acquisition of housing, not its maintenance” (citing *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 717, 719-20 (D.C. Cir. 1991)); *Laramore*, 722 F. Supp. at 452 (rejecting black plaintiffs’ § 3604(b) claim challenging governmental agency’s decision to locate sports facility in their neighborhood in part on the ground that this provision’s “in connection with” phrase is more naturally read to refer to “sale or rental” than to “a dwelling”).

Other courts, however, have disagreed. *See, e.g., Edwards v. Johnston County Health Dep’t*,

Can this tiny difference between § 3604(f)(2) and § 3604(b) bear such weight? It seems unlikely, given the total absence in the FHAA's legislative history of any mention of this difference, much less any comment on its potential significance. Furthermore, both the courts and HUD have opined that § 3604(b)'s outlawed practices are identical to those banned by § 3604(f)(2).<sup>203</sup> But the difference is there, and it presumably means something.<sup>204</sup>

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885 F.2d 1215, 1224 (4th Cir. 1989) (assuming that § 3604(b)'s second phrase bans discrimination "in the provision of services 'in connection with a dwelling'"); *Thompson v. HUD*, 348 F. Supp. 2d 398, 416 (D. Md. 2005) (same); *see also* *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 453 (E.D. Pa. 2006) (noting that "the statute is somewhat vague on the question of what 'the provision of services or facilities' modifies"); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*2-5 n.16 (M.D. Fla. May 2, 2005) (described *infra* note 342); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004) (viewing HUD's regulation in 24 C.F.R. § 100.65(a) as interpreting "the 'in connection therewith' language of § 3604(b) as referring to the 'sale or rental of a dwelling,' rather than the 'dwelling' in general," but nevertheless upholding § 3604(b) claim alleging discriminatory municipal services based, in part, on interpreting that provision's "therewith" phase to cover services "associated with a dwelling" based on this HUD regulation).

203. HUD's view is described *infra* note 228 and accompanying text. Court opinions include *Smith v. Pacific Properties & Development Corp.*, 358 F.3d 1097, 1103 (9th Cir. 2004) ("statutory language of § 3604(f)(2) . . . replicates that of § 3604(b)"); *Clifton Terrace*, 929 F.2d at 719 (§ 3604(f)(2) "extends the same protection to the handicapped" as § 3604(b) does to other protected classes); *United States v. Koch*, 352 F. Supp. 2d 970, 971-76 (D. Neb. 2004) (relying on § 3604(f)(2) precedent to hold that § 3604(b) applies to current residents).

Even Judge Posner's opinion in *Halprin* did not make a distinction between § 3604(b) and § 3604(f)(2). *See Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004) (citing *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003) (a § 3604(f)(2) case); *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) and *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993) (§ 3604(b) cases involving sexual harassment of tenants)) as among those decisions that had recognized § 3604 claims by current residents, but dismissing all of these decisions as not containing "a *considered* holding").

204. *See, e.g., Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (in determining "whether Congress intended its different words to make a legal difference[, w]e normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

One possible explanation for why Congress felt the need to make § 3604(f)(2) explicit in covering services and facilities connected to dwellings (as opposed to those connected only with sales and rentals of dwellings) is that this provision—along with § 3604(f)(1)—is the target of § 3604(f)(3), which defines certain practices as "discrimination" for purposes of these earlier subsections. Two of the practices identified in § 3604(f)(3)—required modifications in § 3604(f)(3)(A) and required accommodations in § 3604(f)(3)(B)—are primarily directed against landlords and other housing providers who are dealing with current residents. *See, e.g., Wilstein*, 1999 WL 262145, at \*7-8 (upholding § 3604(f)(3) reasonable accommodation claim under § 3604(f)(2) by disabled owner of condominium against his condominium association); 24 C.F.R.

2. *The 1989 HUD Regulations.*—As mandated by the 1988 FHAA,<sup>205</sup> HUD promptly published a lengthy set of FHA regulations that became effective on March 12, 1989.<sup>206</sup> These regulations are accorded *Chevron* deference.<sup>207</sup> This means that, unless “Congress has directly spoken to the precise question at issue” (i.e., the statute “unambiguously expressed the intent of Congress”),<sup>208</sup> courts are to follow the HUD regulations so long as they are a “permissible” or “reasonable” construction of the FHA (i.e., they “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”).<sup>209</sup> HUD’s FHA regulations deal explicitly with § 3604’s coverage of discriminatory municipal services and also provide additional indications that § 3604(b) applies to current residents.

The regulations interpreting § 3604 are set forth in 24 C.F.R. §§ 100.50–.85, with § 100.50 providing an overview,<sup>210</sup> § 100.60 providing examples of conduct prohibited by § 3604(a);<sup>211</sup> § 100.65 providing examples of § 3604(b)-prohibited conduct;<sup>212</sup> § 100.70 providing examples of “other prohibited sales and rental conduct”;<sup>213</sup> and succeeding provisions providing examples of conduct prohibited by other subsections of § 3604.<sup>214</sup> These regulations, like § 3604 itself, simply describe the conduct prohibited, without identifying who might be appropriate defendants, thereby implying that any person or entity who engages in such FHA-prohibited conduct may be held liable.<sup>215</sup>

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§ 100.203(c) ex. 1 (2007) (illustrating a violation of § 3604(f)(3)(A)’s reasonable modifications requirement with an example involving a current tenant’s request to his landlord). The idea suggested here is that, as the substantive prohibition that is target of these requirements, § 3604(f)(1)-(2) must be especially carefully written to make clear it covers current residents. *See generally Burlington Northern*, 548 U.S. at 63-67 (relying on the purpose of provisions involved in determining whether Congress’s use of different language in these provisions should make a legal difference).

205. *See* 42 U.S.C. § 3614a (2000).

206. Implementation of the Fair Housing Amendments of 1988, 54 Fed. Reg. 3232 (Jan. 23, 1989).

207. *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (relying on HUD regulation to interpret the FHA). For a list of decisions that have accorded deference to HUD’s FHA regulations, *see SCHWEMM, supra* note 13, § 7:5 n.17.

208. *Chevron*, 467 U.S. at 842-43.

209. *Id.* at 843-45.

210. *See* 24 C.F.R. § 100.50 (2007).

211. *See id.* § 100.60.

212. *See id.* § 100.65.

213. *See id.* § 100.70.

214. *See id.* § 100.75 (dealing with § 3604(c)); § 100.80 (dealing with § 3604(d)); and § 100.85 (dealing with § 3604(e)).

215. *See NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) (noting that § 3604 is written “in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence”); *see also Meyer v. Holley*, 537 U.S. 280,

In light of *Southend* and the few other cases that had dealt with municipal services prior to these regulations,<sup>216</sup> one might have expected this matter to be dealt with in § 100.65, the regulation specifically dealing with § 3604(b). Indeed, this regulation does include an example of prohibited conduct by providers of housing-related services that seems potentially applicable to municipalities: “Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>217</sup> According to HUD’s commentary, this and the other examples indicate that “the coverage of [§ 3604(b)] extends beyond restrictions or differences in a lease or sales contract [to outlaw discriminatory] denials of, or limitations on the use of privileges, services or facilities, relating to the sale or rental of a dwelling.”<sup>218</sup>

However, the explicit reference to municipal services in the regulations does not appear in § 100.65, but in § 100.70, which deals with “other prohibited sales and rental conduct.” Specifically, § 100.70(d)(4) identifies as a prohibited activity: “Refusing 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.”<sup>219</sup>

This provision appears as the last of four examples of “[p]rohibited activities

285-86 (noting that the FHA “focuses on prohibited acts” and “says nothing about [defendants’] vicarious liability”).

216. See *supra* notes 168, 174 and accompanying text (discussing, respectively, *Vercher*, *Mackey*, and *Southend*); see also *infra* notes 337-39 and accompanying text (discussing Justice Harlan’s dissent in *Sullivan*).

217. 24 C.F.R. § 100.65(b)(4). For a pre-*Cox* decision interpreting this regulation to apply to discriminatory municipal services, see *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004).

Another possibly relevant example of prohibited conduct in HUD’s § 3604(b) regulation is: “Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.65(b)(2). “Maintenance or repairs” here could conceivably cover, for example, a municipality’s program of road improvements, but the HUD example is limited to maintenance and repairs that are “of sale or rental dwellings,” implying that the example is directed only against housing providers. This latter phrase is also odd in that it suggests exclusion of some “dwellings” (i.e., those not encompassed by the phrase “sale or rental dwellings”). See *id.* In short, there are sufficient ambiguities in this latter example to conclude that it may not be particularly useful to support claims of discriminatory municipal services by current residents.

218. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3239 (Jan. 23, 1989).

219. 24 C.F.R. § 100.70(d)(4). For cases referring to this regulation’s coverage of municipal services discrimination, see *supra* note 50 and *infra* note 224. Cases according *Chevron* deference to this regulation’s coverage of insurance discrimination include *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351, 1356-60 (6th Cir. 1995); *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 300-01 (7th Cir. 1992); *Strange v. Nationwide Mutual Insurance Co.*, 867 F. Supp. 1209, 1214 (E.D. Pa. 1994).

relating to dwellings under paragraph (b) of this section,” which outlaws any discriminatory conduct “relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.”<sup>220</sup> In other words, the regulation that outlaws discriminatory municipal services does so as an example of a more general prohibitive regulation whose language combines the “services and facilities” wording of § 3604(b) with the “otherwise make unavailable or deny” phrase in § 3604(a).

By so placing the prohibition against discriminatory municipal services, HUD has indicated that this practice might violate § 3604(a) as well as § 3604(b). HUD’s commentary on this regulation notes how discriminatory municipal services might violate § 3604(a)’s “make unavailable” provision—that is, that “discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including discriminatory refusals to provide municipal services . . . render dwellings unavailable” in violation of the Fair Housing Act.<sup>221</sup> Thus, for example, in cases like *Kennedy Park* and *United Farm Workers* where municipalities blocked proposed developments by denying them water or sewer service for racial reasons,<sup>222</sup> housing would be made unavailable in violation of § 3604(a).<sup>223</sup>

On the other hand, a claim based on a municipality’s provision of inferior services to homeowners in a minority neighborhood would presumably be more appropriate under § 3604(b), with a § 3604(a) claim arising in this situation only if the discrimination became so egregious that the plaintiffs’ homes were made “unavailable.” In the former situation—the one presented in *Cox*—the HUD example’s language seems directly on point; that is, it identifies prohibited action as “providing such [municipal] services . . . differently because of race.”<sup>224</sup> However, the context of this example confuses the matter, because the example is given to illustrate the principle that such discriminatory action is outlawed if it relates “to the provision . . . of services . . . in connection [with housing] that

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220. 24 C.F.R. § 100.70(b).

221. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3240 (Jan. 23, 1989). Similarly, HUD’s earlier commentary on this regulation noted that “discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including discriminatory refusals to provide municipal services . . . , has been interpreted by the Department and by courts to render dwellings unavailable under the ‘otherwise make unavailable’ [part of § 3604(a)] in the Fair Housing Act.” Fair Housing; Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44992, 44997 (Nov. 7, 1988).

222. See *supra* notes 158-64 and accompanying text.

223. For an example of a case decided after the 1989 HUD regulations took effect, see *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958-60 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App’x 560 (6th Cir. 2004) (described *infra* note 232).

224. See *supra* text accompanying note 219. For a pre-*Cox* decision relying on this regulation to uphold a § 3604(b) claim by homeowners in a minority neighborhood who alleged discrimination in various municipal services, see *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004).

otherwise makes unavailable or denies dwellings to persons.”<sup>225</sup> In other words, providing discriminatory municipal services is an FHA violation, but perhaps only if it makes housing unavailable. If this is so, then HUD’s example dealing with discriminatory municipal service does not provide guidance with respect to a *Cox*-type case brought by current homeowners.<sup>226</sup>

One final comment about the HUD regulations and their relevance to the issues discussed in this Article is that these regulations reflect HUD’s view that the practices outlawed by § 3604(b) are identical to those banned by § 3604(f)(2). The latter, as we have seen, protects current residents as well as homeseekers.<sup>227</sup> HUD’s belief that § 3604(b)’s coverage is co-equal with § 3604(f)(2)’s is reflected in the fact that its regulation interpreting § 3604(b) also deals with the handicap prohibitions of § 3604(f)(2).<sup>228</sup> Indeed, HUD’s other regulations dealing with handicap-based discrimination do not address the coverage of § 3604(f)(2) at all, other than to paraphrase the text of this provision.<sup>229</sup> Further, evidence of HUD’s belief that § 3604(b) and § 3604(f)(2) outlaw identical practices appears in its commentary on the regulation dealing with these provisions, which states that, subject to reasonable health-and-safety rules, this regulation requires “full access of handicapped persons and children to all facilities provided in connection with dwellings;”<sup>230</sup> that is, the protection against “facilities” discrimination accorded families with children in § 3604(b) is the same as its counterpart for persons with disabilities in § 3604(f)(2).

3. *Post-Regulation Cases.*—Most FHA-based municipal services cases decided after HUD’s 1989 regulations took effect have been brought by current homeowners. Courts in these cases have generally not been receptive to § 3604(a)-“make unavailable” claims by such plaintiffs.<sup>231</sup> The decisions have thus

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225. See *supra* text accompanying note 220.

226. Despite this ambiguity, courts have relied on this regulation to hold that § 3604(b) bars home insurance discrimination in the context of claims brought by current, as well as would-be, homeowners. See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1354, 1356-60 (6th Cir. 1995); *Franklin v. Allstate Corp.*, No. C-06-1909 MMC, 2007 WL 1991516, at \*1-2, \*6-7 (N.D. Cal. July 3, 2007).

227. See *supra* notes 197-201 and accompanying text.

228. See 24 C.F.R. § 100.65 (2007); see also *supra* note 217 and accompanying text (quoting examples of conduct prohibited by § 3604(b) in 24 C.F.R. § 100.65(b) as including those based on handicap as well as those based on the six protected classes covered by § 3604(b)).

229. See 24 C.F.R. § 100.200-.205. The paraphrasing of § 3604(f)(2) occurs in 24 C.F.R. § 100.202(b), which includes no examples of prohibited behavior, in contrast to the other parts of the handicap-based regulations, which often provide examples and deal in detail with, inter alia, prohibited inquiries of applicants, reasonable modifications and accommodations for disabled persons, and the FHAA’s design-and-construction requirements. See 24 C.F.R. § 100.202(c)-.205.

230. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989).

231. See *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192-93 (4th Cir. 1999) (dismissing, based on *Southend* and other cases, black homeowners’ § 3604(a) claim challenging the siting of a new highway near their neighborhood on the ground that no one was

agreed with *Southend* that this provision is limited to situations where municipal action blocks the development of housing<sup>232</sup> or is so disruptive of current residents' habitability that their housing is effectively made unavailable to them.<sup>233</sup>

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evicted or denied housing by this decision, and it therefore did not make housing unavailable under § 3604(a)); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*2-3 (N.D. Tex. Sept. 9, 2004) (dismissing, based on *Southend*, black homeowners' § 3604(a) claim of discrimination in various municipal services); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp. 2d 486, 500-02 (D.N.J. 2003) (dismissing, based on *Southend* and other cases, § 3604(a) claim by residents of minority neighborhood against governmental agency whose permitting of a nearby cement plant had only an indirect effect on availability of housing in plaintiffs' neighborhood); *Miller v. City of Dallas*, No. Civ.A. 3898-CV-2955-D, 2002 WL 230834, at \*12-13 (N.D. Tex. Feb. 14, 2002) (rejecting, based on *Southend*, black homeowners' § 3604(a) claim alleging discrimination in various municipal services); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993) (rejecting, based on *Southend*, black homeowners' § 3604(a) claim that defendants terminated police protection of plaintiffs' home because of their race); *see also* *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (rejecting § 3604(a) claim by current residents based on municipality's removal of Jewish religious symbols from its utility poles on the ground that this action did not make housing "unavailable" to the plaintiffs and that, while it may have made "their living in the Borough less desirable," § 3604(a) could not be stretched "to encompass actions that both (1) do not actually make it more *difficult* (as opposed to less *desirable*) to obtain housing and (2) do not directly regulate or zone housing or activities within the home"); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1542 (11th Cir. 1994) (noting, while upholding § 3604(a) claim here, that this provision requires plaintiffs to "allege unequal treatment on the basis of race that affects the availability of housing"); *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 719-20 (D.C. Cir. 1991) (rejecting, based on *Southend*, § 3604(a) claim of discriminatory services on behalf of black apartment residents on the ground that this provision—while perhaps extending to sewer hook-ups and certain other "essential services relating to a dwelling . . . [that] might result in the denial of housing"—cannot reach beyond issues of housing availability to those of habitability); *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1221-24 (4th Cir. 1989) (affirming dismissal of § 3604(a) claim that County inappropriately approved substandard housing for migrant farm workers in part on the ground that such approval did not make any housing "unavailable").

232. A modern example of such a case is *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958-60 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004), which upheld FHA claims—citing §§ 3604(a), 3604(b), 3604(c), and 3617—by a black lot owner who alleged that municipal officials denied water service to his planned home because of his race. *See also* *McCauley v. City of Jacksonville*, No. 86-1674, 1987 WL 44775, at \*2 (4th Cir. Sept. 8, 1987) (described *supra* note 180).

233. *See, e.g.*, *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 684-85 (D.C. Cir. 2006) (rejecting defendant-municipality's argument that, absent its actual closing of Hispanics' apartment buildings, its posting of "closure" notices on those buildings was insufficient to violate tenants' § 3604(a) rights, because "[t]elling the tenants either that their 'occupancy . . . is . . . prohibited' or that they must 'seek alternative housing' certainly qualifies as making the buildings 'unavailable' under the FHA"); *cf.* *United Farm Bureau Family Mut. Ins. Co. v. Metro.*

On the other hand, the years following publication of the HUD regulations produced many decisions endorsing § 3604(b) claims by current residents.<sup>234</sup> This body of cases includes only a handful that cited the HUD regulation,<sup>235</sup> but

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Human Relations Comm'n, 24 F.3d 1008, 1014, 1014 n.8 (7th Cir. 1994) (upholding resident's claim that insurance company's refusal to renew his homeowner's policy on racial grounds violates the FHA's § 3604(a) and § 3604(b) along with similarly worded state and local fair housing provisions and determining that the goal of these laws is to eliminate "discrimination in the acquisition, and one must presume retention, of real property and housing" and that nonrenewal of a home insurance policy "undoubtedly could make owning and retaining real property unavailable"); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20-22 (D.D.C. 2000) (upholding resident's predatory lending claim based on § 3604(a) on the ground that "predatory practices . . . can make housing unavailable by putting borrowers at risk of losing the property which secures their loans").

234. See, e.g., *Lopez*, 2004 WL 2026804, at \*6-9 (denying summary judgment for defendants in § 3604(b) claim by homeowners in black neighborhood who alleged discrimination in various municipal services); *Middlebrook*, 341 F. Supp. 2d at 960 (upholding, based on the "clear language of § 3604(b) and § 3617," black property owner's FHA claim alleging that municipal officials denied water service to plaintiff's planned home because of his race); *Miller*, 2002 WL 230834, at \*14 (denying summary judgment for defendants in § 3604(b) claim alleging discrimination in various municipal services); *Campbell*, 815 F. Supp. at 1143-44 (upholding black homeowners' § 3604(b) claim of discrimination in the provision of police protection and, as a result, also their § 3617 claim); see also 2922 *Sherman Ave. Tenants' Ass'n*, 444 F.3d at 682-85 (upholding claim based on both § 3604(a) and § 3604(b) alleging that municipality discriminated against Hispanic-occupied apartment buildings in its enforcement of housing code violations); *Franks v. Ross*, 313 F.3d 184, 191 (4th Cir. 2002) (citing § 3604(b) as the FHA's relevant provision in case brought by residents of black town claiming that County sited undesirable landfill near it based on race); *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 193 (rejecting the particular § 3604(b) claim presented, but noting that this provision does require "such things as garbage collection and other services of the kind usually provided by municipalities" (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (9th Cir. 1989)); *Clifton Terrace Assocs.*, 929 F.2d at 720 (suggesting, without deciding, that § 3604(b) covers utilities and other "sole source" providers of services essential to a dwelling's habitability who, although not themselves housing providers, "otherwise control the provision of housing services and facilities"); *Edwards*, 885 F.2d at 1224-25 (assuming that the defendant's inspection and permit system for approving housing for migrant farm workers would fall within the scope of § 3604(b), but dismissing claim because plaintiffs failed to allege that different services were being accorded housing for whites); *S. Camden*, 254 F. Supp. 2d at 499, 502-03 (rejecting the particular § 3604(b) claim presented, but noting that this provision would cover governmental units that provide "specific residential services [including those] responsible for door-to-door ministrations such as . . . police departments [and] fire departments"); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (rejecting the particular § 3604(b) claim presented, but noting that this provision may cover police and fire protection and garbage collection).

235. See, e.g., *Shaikh v. City of Chi.*, 341 F.3d 627, 631-32 & n.2 (7th Cir. 2003) (citing the HUD regulation in support of the proposition that withholding police or fire protection would be covered by the FHA); *Lopez*, 2004 WL 2026804, at \*7-9 (described *supra* note 202 ¶ 2); see also

they, along with this regulation, seemed to settle the basic issue of the FHA's coverage of discriminatory municipal services.<sup>236</sup>

Still, a number of cases decided after publication of the 1989 HUD regulations resisted the idea that § 3604(b) could be extended to all governmental activities that might have a negative impact on the use and enjoyment of housing. These included:

—a 1999 Fourth Circuit decision rejecting a § 3604(b) claim by black homeowners challenging the siting of a new highway near their neighborhood on the ground that the defendants' decision was not a "housing or housing related service" under this provision;<sup>237</sup>

—a 2003 district court decision rejecting a § 3604(b) claim by residents of a black neighborhood against a governmental environmental protection agency that permitted operation of a near-by cement plant on the ground that this defendant did not provide "a service . . . in a manner contemplated by the Fair Housing Act" as distinguished from governmental units "responsible for door-to-door ministrations such as those provided by police departments, fire departments, or other municipal units";<sup>238</sup> and,

—a 1989 district court decision rejecting a § 3604(b) claim by area residents challenging a governmental agency's decision to locate a sports stadium in their neighborhood on the ground that, while § 3604(b) might cover police and fire protection and garbage collection, it "cannot be extended to a decision such as the selection of a stadium site."<sup>239</sup>

In addition, dicta in a 1991 D.C. Circuit decision expressed skepticism about whether all discriminatory municipal services that "have an impact on the use and enjoyment of residential property rights" would be redressable under § 3604(b).<sup>240</sup>

*Clifton Terrace Assocs.*, 929 F.2d at 719-20 (described *infra* note 240).

236. The one contrary decision seems to be *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012 (6th Cir. 1989), which affirmed dismissal of an FHA claim based on defendant's providing inferior police protection to a minority neighborhood. *Id.* at 1017. The opinion, however, upheld the plaintiffs' equal protection and Title VI claims and did not explicitly discuss the reason for rejecting the FHA claim. *Id.*

237. *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 193. The *Jersey Heights* opinion also commented that § 3604(b) does "not extend to every activity having any conceivable effect on neighborhood residents. . . . The Fair Housing Act does not grant to residents the right to have highways sited where they please. . . . We do not think the drafters of the Fair Housing Act ever contemplated such a reading." *Id.* at 193-94.

238. *S. Camden*, 254 F. Supp. 2d at 499, 502-03.

239. *Laramore*, 722 F. Supp. at 452.

240. *Clifton Terrace Assocs.*, 929 F.2d at 720 (rejecting § 3604(b) claim by apartment owner against elevator company that allegedly refused to repair the elevators in plaintiff's building

To summarize, in the fifteen years after the FHAA's enactment and the 1989 HUD regulations, three propositions seem to have become well established:

—First, the FHA through § 3604(a) provides a remedy for discriminatory municipal services, but only where such discrimination has the effect of making housing unavailable (e.g., where a municipality totally blocks development of new housing or renders current housing virtually uninhabitable);

—Second, § 3604(b) outlaws the discriminatory provision of basic, housing-related municipal services, such as police and fire protection and garbage collection; and,

—Third, determining whether certain other government acts qualify as “services” or negatively impact the “privileges” covered by § 3604(b) requires a case-by-case analysis, with the answer probably being “No” if the challenged act involves such one-time decisions as the siting of a highway, factory, or other residentially-disruptive use in or near the plaintiffs' neighborhood.

As we have seen, however, the appellate decisions of *Halprin* in 2004 and *Cox* in 2005 undercut the second of these well-established propositions by holding that current residents could not invoke § 3604.<sup>241</sup> This limited view of § 3604(b) was also espoused in a few district court opinions that preceded *Halprin*<sup>242</sup> and has been the subject of a split among district judges outside the Seventh and Fifth Circuits after *Halprin* and *Cox*.<sup>243</sup>

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because of the residents' race on the ground that § 3604(b) was intended to protect residents with discriminatory service claims *against* housing providers and could not generally be invoked *by* housing providers against third parties who offer services to them). The *Clifton Terrace* opinion, which also rejected the plaintiff's § 3604(a) claim, is further described *supra* notes 231 and 234 and *infra* text accompanying notes 355-65.

241. See *supra* Parts I.B (*Halprin*) and I.C (*Cox*).

242. See sources cited *supra* note 62.

243. Decisions adopting the *Halprin-Cox* position include *Steele v. City of Port Wentworth*, Civ. A. No. CV405-135, 2008 WL 717813 (S.D. Ga. Mar. 17, 2008) (described *infra* note 398); *Miller v. City of Knoxville*, No. 3:03-CV-574, 2006 WL 2506229, at \*2 (E.D. Tenn. Aug. 29, 2006) (stating “that the [FHA] does not apply to municipalities in failing to enforce codes, as such action goes to the habitability of a dwelling, not the availability” (citing *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005)); see also *Roy v. Bd. of County Comm'rs of Walton County, Florida*, No. 3:06cv95/MCR/EMT, 2007 WL 3345352, at \*12 (N.D. Fla. Nov. 9, 2007) (rejecting § 3604(b) claim based on County's denial of zoning approval for plaintiffs' proposed housing development in part because the delays and impediments imposed by the defendants “were not connected with the sale of the property to the plaintiffs and only affected their use of property previously purchased”).

Decisions upholding § 3604(b) claims by homeowners and other current residents include *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 808-09 (W.D. Tenn. 2005); *United*

As indicated in the previous discussion of *Halprin*, the Seventh Circuit's opinion in that case is flawed,<sup>244</sup> but the validity of its basic conclusion denying § 3604 protection to current residents—and of the Fifth Circuit's decision in *Cox* to endorse this conclusion—turns mainly on the specific language used in subsections (a) and (b) of § 3604. We turn next to an examination of that language.

### III. KEY FHA PROVISIONS AND THEIR LEGISLATIVE HISTORY

#### A. Overview

The FHA's first section boldly declares that it "is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>245</sup> After two sections dealing with definitions, effective dates, and exemptions, the fourth section contains the FHA's main substantive prohibitions. As we have seen, the first two subsections of this provision—§ 3604(a) and § 3604(b)—have been the basis for most FHA claims of discriminatory municipal services.<sup>246</sup> Additional discriminatory practices are outlawed in the other subsections of § 3604 and in §§ 3605-3606.<sup>247</sup> Finally, § 3617, which is also occasionally relied on in discriminatory municipal services cases,<sup>248</sup> prohibits interference "with any person in the exercise or enjoyment of,

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*States v. Koch*, 352 F. Supp. 2d 970, 975-78 (D. Neb. 2004); *North Dakota Fair Housing Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 980-981 (D.N.D. 2004); see also *United States v. Matusoff Rental Co.*, 494 F. Supp. 2d 740, 745, 758 (S.D. Ohio 2007) (holding that the defendant violated § 3604(b) in part because it refused to perform needed maintenance on the apartment of a mixed-race couple); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 452-53 (E.D. Pa. 2006) (recognizing that § 3604(b) may cover police and fire protection, garbage collection, and similar municipal services, but rejecting the present claim based on defendant's denial of a zoning variance for plaintiff's property on the ground that this is instead "a discretionary decision comparable to administering city-owned properties or deciding where to site a highway, conduct that is not covered under § 3604(b)"); *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1228-31 (S.D. Fla. 2005) (described *infra* note 349).

244. See *supra* notes 79-89 and accompanying text.

245. 42 U.S.C. § 3601 (2000).

246. The texts of subsections (a) and (b) of § 3604 are set forth in *supra* notes 48 and 49 respectively.

247. See 42 U.S.C. § 3604(c) (outlawing discriminatory advertisements, notices, and statements); § 3604(d) (outlawing discriminatory misrepresentations of availability); § 3604(e) (outlawing "blockbusting"); § 3605 (outlawing discrimination in home financing and certain other real estate related transactions); and § 3606 (outlawing discrimination in brokerage services).

248. See, e.g., *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 n.4 (7th Cir. 1984) (described *supra* note 175); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 960 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004) (described *supra* note 232); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (described *supra* note 234); *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D.

or on account of his having exercised or enjoyed . . . any right granted or protected by [§§ 3603-3606].”<sup>249</sup> The relevant substantive prohibitions in § 3604(a), § 3604(b), and § 3617 have remained the same since the FHA was enacted in 1968.<sup>250</sup>

The language used in these substantive provisions evolved as the FHA was being considered by Congress beginning in 1966. The rest of Part III describes this evolution, which provides some insight into the meaning of the phrases used and thus some perspective for answering the two questions at the heart of this Article: (1) May the prohibitions set forth in § 3604—and particularly in § 3604(b)—be invoked by current residents to challenge discrimination by local municipalities? and (2) Do the “services” and “privileges” mentioned in § 3604(b) cover municipal services? With respect to both questions, the FHA’s key language originated in the first fair housing bill proposed by President Johnson in 1966, although the context, and therefore the possible interpretation, of this language did change somewhat in subsequent versions of the bills that became the FHA.

### *B. Legislative History of § 3604(a) and § 3604(b)*

The legislative history of the 1968 FHA has been recounted a number of times,<sup>251</sup> and its key features should be familiar to this audience. The FHA was passed after the assassination of Dr. Martin Luther King, Jr. led to riots in Washington, D.C., and other cities, whose counterparts in 1966 and 1967 had prompted a presidential commission that called for a national open housing law.<sup>252</sup>

Due to the haste that characterized passage of the FHA in 1968, its legislative history produced little useful material concerning the proper interpretation of its substantive prohibitions. No committee report was ever issued on the bill that became the FHA, and the hearings that were held on prior proposals generally dealt with the overall need for a fair housing law to allow blacks to escape urban ghettos and with Congress’s power to enact such a law.<sup>253</sup> Even the 1968 floor debates, to the extent they dealt with coverage issues, focused mainly on the statute’s exemptions and who would be proper defendants, rather than on the meaning of the phrases used in § 3604(a), § 3604(b), and the other substantive

Pa. 1978) (described *supra* note 168).

249. 42 U.S.C. § 3617.

250. See *infra* note 257 and accompanying text. Furthermore, all of these prohibitions are, and have been for many years, mirrored in scores of state and local fair housing laws. See *supra* note 28.

251. See, e.g., Jean Eberhart Dubofksy, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 197-206 (2001).

252. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 8-13 (1968).

253. See generally hearings cited *infra* notes 261 and 278.

prohibitions.<sup>254</sup> Thus, the proper interpretation of these provisions—even more so than with most legislation—must be derived almost exclusively from the words of the statute, unaided by legislative history.<sup>255</sup>

Five distinct versions of the bill that eventually became the FHA were considered by Congress, beginning with the Johnson Administration's initial proposal in early 1966.<sup>256</sup> In all five versions, the language of what became § 3604(a) and § 3604(b) remained virtually unchanged.<sup>257</sup> Thus, the key language

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254. For example, an analysis of Senator Dirksen's late proposal, *see infra* note 264 and accompanying text, that was prepared by the Justice Department and introduced on the Senate floor, simply paraphrased the bill's various prohibitions, including those that became § 3604(a) and § 3604(b), without providing any additional explanation of their specific meaning. *See* 114 CONG. REC. 4907 (1968). Similarly, when the Senate-passed version reached the House floor, Judiciary Committee Chairman Cellar offered a comparison of this bill to the 1966 House-passed version, *see infra* note 260 and accompanying text, that did not describe the substantive prohibitions other than to say that the House-passed version "prohibited almost the exact same type of conduct with respect to housing discrimination" as did the Senate bill. *See id.* at 9560-61. Later in the House floor debates, Republican Leader Gerald Ford introduced a memorandum prepared by the staff of the House Judiciary Committee that did point out a number of differences between these two versions, but none of these dealt with the prohibitions in § 3604(a) and § 3604(b), as to which the memorandum provided no description other than to say that they were the equivalent of the House-passed version's § 403(a)(1) and § 403(a)(2). *See id.* at 9611-13. Thus, for example, Professor Oliveri has determined: "There [is] no discussion anywhere in [the FHA's] legislative history about how to interpret the language of § 3604(b). . . . [There is] [n]o specific discussion [about] whether . . . the FHA [should be construed to apply] to post-acquisition housing." Oliveri, *supra* note 82, at 27.

255. *See, e.g.,* *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (relying on the "plain language" to interpret a Title VII provision and remarking that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'" (citations omitted)).

256. The Johnson Administration's proposal was embodied in identical bills, S. 3296 and H.R. 14765, 89th Cong. (1966). A copy of S. 3296 is printed at 112 CONG. REC. 9394-98 (1966), with the fair housing title appearing at 9396-97.

257. The provision that became § 3617, *see supra* note 65 and text accompanying note 249, also is similar to the one included in the Johnson Administration's initial proposal. *See, e.g.,* 114 CONG. REC. 9612 (1968) (describing the 1968 Senate-passed version of § 3617 that was ultimately enacted as "comparable" to the 1966 House-passed version of this provision, which was identical to the Johnson Administration's initial version, in a memorandum prepared late in the FHA's legislative history by the staff of the House Judiciary Committee).

As first proposed by the Johnson Administration in 1966, the FHA's § 3617-predecessor provided:

No person shall intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404.

of these provisions traces back to the Johnson Administration's initial proposal, which made it unlawful for homeowners, real estate brokers, and certain other categories of persons:

(a) To refuse to sell, rent, *or lease*, refuse to negotiate for the sale, rental, *or lease* of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale, rental, *or lease* of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.<sup>258</sup>

Other than the inclusion of the emphasized "lease" phrases, this is the same language that was ultimately adopted as § 3604(a) and § 3604(b).<sup>259</sup>

In response to the Administration's proposal, the House passed a fair housing bill later in 1966 with this identical language, albeit applying the language to a narrower group of potential defendants,<sup>260</sup> but this bill died in the Senate. In 1967, Senator Mondale proposed a fair housing bill,<sup>261</sup> which generally tracked

See 112 CONG. REC. 9397 (1966) (sec. 405). Senator Mondale's 1967 version, consistent with its general approach, changed the introductory phrase to simply declaring these activities unlawful and also changed the order of the verbs (to "coerce, intimidate, threaten, or interfere with") and inserted "or protected" between "granted" and "by" in the final phrase. See *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. (1967) [hereinafter *1967 Banking Hearings*] (setting forth sec. 7 of Senator Mondale's bill). Substantively, this version was adopted verbatim in Senator Dirksen's version. See 114 CONG. REC. 4573 (1968) (sec. 217). The Dirksen version, which ultimately was enacted, did change the placement of this provision to the end of the statute and therefore made it not subject to the enforcement provisions governing the FHA's other substantive prohibitions, but instead provided a new concluding sentence, stating: "This section may be enforced by appropriate civil action." 42 U.S.C. § 3617 (Supp. V 1969) (amended 1988). The 1988 FHAA reversed this last change, making a § 3617 violation "a discriminatory housing practice" that, like those in §§ 3604-3606, may be enforced through the FHA's regular enforcement procedures. See 42 U.S.C. § 3602(f) (2000).

258. See 112 CONG. REC. 9397 (1966) (emphasis added).

259. See *supra* notes 48-49.

260. See 112 CONG. REC. 18,739-40 (1966) (reporting passage of the bill); *infra* note 268 ¶ 2 (describing narrower group of potential defendants). The House-passed version included a number of other changes to the Administration's proposal, none of which is relevant to the meaning of § 3604(a) and § 3604(b). These changes are described in Schwemm, *supra* note 251, at 201-02 nn.56-59.

261. Senator Mondale's bill (S. 1358) was the subject of hearings by a subcommittee of the Senate Banking and Currency Committee. See *1967 Banking Hearings*, *supra* note 257. S. 1358, which is printed in *id.* at 438-59, was identical to the fair housing title of a civil rights bill proposed by the Johnson Administration in 1967 (S. 1026 and H.R. 5700), which was the subject of hearings by a subcommittee of the Senate Judiciary Committee. See *Hearings before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 1026, S. 1318, S. 1359, S. 1362, S.*

the House-passed version, but deleted the "or lease" phrase from these two provisions and thus contained the exact language that ultimately became § 3604(a) and § 3604(b).<sup>262</sup> This same language was also included in the Mondale-Brooke proposal of early 1968<sup>263</sup> and in Senator Dirksen's compromise proposal later that year,<sup>264</sup> which, with a few minor floor amendments,<sup>265</sup> eventually became the FHA.<sup>266</sup>

Although the wording of § 3604(a) and § 3604(b) changed little throughout this two-year process, two other provisions relevant to the meaning of these subsections did undergo important changes. The most significant was that the early versions limited those covered by these prohibitions to certain specified entities, following the approach of Title VII, the employment discrimination law passed in 1964.<sup>267</sup> Thus, in both the initial Johnson Administration proposal and the 1966 House-passed version, only those directly involved in selling or renting

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1462, H.R. 2516 and H.R. 10805 (Proposed Civil Rights Act of 1967), 90th Cong. (1967) [hereinafter *1967 Judiciary Hearings*]. Apart from these hearings, no further action was taken on these bills in 1967.

262. For a description of the changes made by Senator Mondale's 1967 bill to the 1966 House-passed version, see Schwemm, *supra* note 251, at 202-03 nn.60-63 and accompanying text. Senator Mondale's deletion of "lease" from the key substantive provisions, thus limiting these prohibitions to "sales" and "rentals," was accompanied by adding a definition of "to rent" that included "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant," which ultimately was enacted as § 3602(d). Thus, deleting "lease" from the substantive prohibitions served only to simplify the phrasing of these provisions, without narrowing their coverage.

263. The Mondale-Brooke proposal took the form of an amendment offered to another civil rights bill that had been passed by the House without a fair housing title and was then pending on the Senate floor. See 114 CONG. REC. 2270-72 (proposal printed), 2279 (amendment formally offered by Sen. Mondale) (1968). The Mondale-Brooke proposal was identical to Senator Mondale's 1967 bill in all key respects, save one: it added the House-passed version of the "Mrs. Murphy" exemption at the end of its main substantive section. See 114 CONG. REC. 2270 (1968) (§ 4(f)).

264. The Dirksen proposal is printed at 114 CONG. REC. 4570-73 (1968). The changes made by this proposal to the Mondale-Brooke version, none of which related to the language that became § 3604(a) and § 3604(b), are described in Schwemm, *supra* note 251, 204-05 nn.67-74 and accompanying text.

265. For a description of these amendments, none of which related to the substantive scope of what became § 3604(a) and § 3604(b), see Schwemm, *supra* note 251, at 205 n.76.

266. As so amended, the Dirksen proposal was passed by the Senate on March 11, 1968. See 114 CONG. REC. 5992 (1968). Shortly after Dr. King's assassination, the House voted to accept the Senate-passed version. See *id.* at 9620-21. The next day, April 11, President Johnson signed the bill into law. See Lyndon B. Johnson, *Remarks upon Signing the Civil Rights Act*, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1968-69, at 509-10 (1970).

267. Title VII's prohibitions are limited to employers, employment agencies, labor organizations, and training programs. See 42 U.S.C. §§ 2000e-2(a) to (d), 2000e-3(a) (2000).

housing were to be covered by the prohibitions of § 3604(a) and § 3604(b).<sup>268</sup> Therefore, had either of these versions passed, local governments would not have been included as potential defendants, except to the extent they were involved in selling, renting, or managing housing.<sup>269</sup>

Beginning with Senator Mondale's 1967 proposal, the lead-in to what became § 3604 was changed by deleting these lists of potential defendants and simply declaring that "[i]t shall be unlawful" to engage in the practices set forth in this provision's subsections. This version was ultimately enacted, with the result that § 3604(a) and § 3604(b) have been read to cover *all* persons and entities, including municipalities, that violate these provisions.<sup>270</sup> However, because Senator Mondale's version did not significantly change the substantive phrases used in subsections (a) and (b), these phrases continued to owe their origin to drafters who had in mind only covering persons engaged in the sale, rental, or management of housing.

The second noteworthy change occurred in the FHA's introductory section defining the law's policy. The initial version of this section set forth in the Johnson Administration's 1966 proposal provided: "It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the

268. In the Johnson Administration's proposed bill, the introduction to the substantive provision containing these subsections provided:

*It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling, or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman—*

112 CONG. REC. 9397(1966) (emphasis added to show language ultimately deleted in the FHA).

In the House-passed version, this lead-in list of covered entities was narrowed to apply only to real estate professionals and others in the housing business, thereby excluding homeowners and other non-professionals, as follows:

*It shall be unlawful for any person who is a real estate broker, agent, or salesman, or employee or agent of any real estate broker, agent, or salesman, or any other person in the business of building, developing, selling, renting, or leasing dwellings, or any employee or agent of any such person—*

See 112 CONG. REC. 18,112 (1966) (emphasis added to show language ultimately deleted in the FHA).

269. A noteworthy feature of the list of potential defendants in the Johnson Administration's proposed bill is that it included "manager[s]" and those who have "the authority to . . . manage" dwellings, *see supra* note 268 ¶ 1, thereby indicating coverage of discrimination directed against residents *after* they obtained their housing through a sale or rental agreement. Although the House-passed version deleted this reference to managers and otherwise narrowed the scope of this list, *see id.* ¶ 2, the fact remains that the Administration's version was the one that first proposed the operative language of what became § 3604(a) and § 3604(b), indicating that the drafters of these provisions *did* intend them to cover a time period extending beyond when housing is first acquired.

270. *See supra* notes 15-17 and accompanying text.

Nation.”<sup>271</sup> The significant point here is that the discrimination declared to be addressed by this statute was not limited to the purchase, rental, lease, and financing of housing, but also extended to discrimination in its “use and occupancy.” Had this version survived, it would have provided a strong indication that the protections of § 3604(a) and § 3604(b) were intended to cover current residents of housing and not just those seeking to buy or rent, as *Halprin* and *Cox* later concluded.<sup>272</sup>

But this version did not survive. It was part of the 1966 House-passed version,<sup>273</sup> but Senator Mondale’s 1967 version deleted the phrase “and the right of every person to be protected against” and also deleted “lease” and “use,” leaving it to 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.”<sup>274</sup> The deletion of “lease” makes sense because Mondale also deleted this word from the rest of the statute,<sup>275</sup> but it is unclear why he deleted “use” while leaving in “occupancy.”

In any event, whatever interpretive meaning this version may have had was ultimately diluted by the fact that Senator Dirksen’s version changed it to read simply: “It is the policy of the United States to provide for fair housing throughout the United States.”<sup>276</sup> Senator Dirksen gave no explanation for this change,<sup>277</sup> and his version was ultimately enacted, after being amended on the Senate floor to include the phrase “within constitutional limitations.”<sup>278</sup>

271. See 112 CONG. REC. 9396 (1966).

272. See also *supra* notes 187, 269.

273. See 112 CONG. REC. 18111 (1966).

274. See 1967 *Judiciary Hearings*, *supra* note 261, at 439.

275. See *supra* note 262.

276. 114 CONG. REC. 4571 (1968).

277. *Id.* For an argument that “the Dirksen substitute was seen by Congress as making only superficial changes to the bill’s policy statement” and that this statement’s changes from “use and occupancy” to “occupancy” and finally simply to a broad guarantee of “fair housing” do not indicate the statute should be limited to home-seeking as opposed to home-occupancy, see Short, *supra* note 81, at 231.

278. See 114 CONG. REC. 4985-86 (1968) (reporting passage of the amendment adding “within constitutional limitations”).

Despite these late changes in the FHA’s policy statement, its original version may still have some interpretive value. For example, Professor Oliveri has argued that the original policy statement supports construing the FHA to apply to post-acquisition discrimination:

There is . . . no indication that the change signaled Congress’ intent to exclude discrimination that affects occupancy from the list of conduct that the Act prohibits. If anything, the fact that a prohibition against discrimination in all aspects of housing—sales, rentals, financing, and occupancy—was included in the first three versions of the bill but omitted from the final version in favor of a broad statement of commitment to fair housing, indicates that Congress specifically intended “fair housing” to include the right to purchase, rent, finance, and occupy housing free of

### C. Source of the Language in § 3604(a) and § 3604(b)

1. *The 1964 Civil Rights Act.*—While it is clear that the key language of § 3604(a) and § 3604(b) traces back to the original 1966 proposal by President Johnson, it is not clear *why* such language was included in the Administration’s fair housing bill. None of the Administration’s explanations of this proposal focuses on the specific purpose or language of what was to become § 3604(a) and § 3604(b).<sup>279</sup>

Despite this lack of direct evidence concerning the rationale for the language used in the Administration’s 1966 bill, it seems likely that the source for much of this language was the employment discrimination law that Congress had enacted two years earlier as Title VII of the 1964 Civil Rights Act.<sup>280</sup> Indeed,

discrimination.

Oliveri, *supra* note 82, at 28 (footnote omitted).

The argument is that the original drafters of § 3604(a) and § 3604(b) thought they were providing substantive prohibitions that could fairly be described as protecting, inter alia, the “use and occupancy” of housing. *See also Civil Rights: Hearing on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2846, S. 2923 and S. 3170 Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong. 308 (1966) [hereinafter 1966 Hearings]* (setting forth a memorandum dated June 2, 1966, by the Library of Congress Legislative Reference Service on “The Power of Congress to Prohibit Racial Discrimination in the Rental, Sale, Use, and Occupancy of Private Housing” (emphasis added)); *id.* at 362 (statement of Frankie Freeman, U.S. Commission on Civil Rights) (describing the fair housing title of S. 3296 as outlawing discrimination “in the rental, sale, financing, use, and occupancy of housing” (emphasis added)); *id.* at 904 (statement of Sen. Robert C. Byrd) (addressing the question “Does Congress Have Power to Prohibit Racial Discrimination in the Rental, Sale, Use, and Occupancy of Private Housing?” (emphasis added)). As further evidence of the broad substantive scope of the original Johnson Administration’s proposal, a memorandum prepared for the House described the Administration’s bill as “imply[ing] the total elimination of discrimination in housing.” 112 CONG. REC. 18,117 (1966) (Legislative Reference Service, Library of Congress, “Analysis of the Open Housing Provisions of the Administration’s Proposed ‘Civil Rights Act of 1966’ as Amended by the House of Representative’s Committee on the Judiciary”).

This argument is the reason I use the word “diluted”—rather than, say, “eliminated”—in the text to describe the impact of the Dirksen changes to the FHA’s policy statement on the interpretive value of this statement’s earlier versions.

279. *See, e.g.*, 112 CONG. REC. 9399 (1966) (providing the Attorney General’s explanation of the bill, which includes only general statements about coverage and no specific reference to the prohibitory phrasing of the bill’s substantive provisions).

280. 42 U.S.C. §§ 2000e-2000e-17 (2000). The structure and much of the language used in the other two substantive antidiscrimination titles in the 1964 Civil Rights Act—Title II (“Public Accommodations”) and Title VI (“Federally Assisted Programs”)—generally do not parallel those of the Administration’s fair housing proposal. For example, unlike Title VII and the fair housing bill, which outlaw a series of enumerated practices if undertaken because of race or other prohibited ground, Title II simply uses one sentence to declare that “[a]ll persons shall be entitled to the full

many of the substantive provisions of the Administration's fair housing proposal closely track the language in Title VII,<sup>281</sup> and, to the extent these similarities were maintained in the enacted version of the FHA, courts have generally found it appropriate to interpret these provisions consistently with their Title VII counterparts.<sup>282</sup>

Specifically, Title VII made it unlawful for employers and certain other entities "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>283</sup> This single provision includes a prohibition against "otherwise . . . discriminat[ing] [in] terms, conditions, or privileges" that presumably spawned both the FHA's prohibition against "otherwise make unavailable" in § 3604(a) and its "terms, conditions, or privileges" prohibition in § 3604(b).

Beyond dividing these prohibitions into two subsections in the FHA, the Johnson Administration's 1966 proposal also added to subsection (b) a prohibition against discrimination "in the provision of services or facilities in

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and equal enjoyment" of places of public accommodations. *Id.* § 2000a-(a). Title VI provides a similarly cryptic guarantee that "[n]o person in the United States shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." *Id.* § 2000d.

As ultimately enacted, the FHA does contain certain exemptions that parallel some of those in Title II as well as Title VII. Compare 42 U.S.C. §§ 2000a(e), (b)(1) (Title II exemptions dealing with private clubs and "Mrs. Murphy" lodgings), and *infra* note 281 (describing Title VII exemptions) with the FHA's private club and "Mrs. Murphy" exemptions in 42 U.S.C. § 3607(a) and § 3603(b)(2), respectively. However, these FHA exemptions were not a part of the original fair housing bill proposed by the Johnson Administration in 1966. *See* sources cited *supra* note 256.

281. *See, e.g., infra* text accompanying note 283 (quoting Title VII's key substantive provision, 42 U.S.C. §§ 2000e-2(a)(1), which outlaws practices that roughly correspond to the FHA's prohibitions in §3604(a) and §3604(b)). Title VII also prohibits retaliation against those who have exercised their rights under this statute, *id.* § 2000e-3(a), a provision that is somewhat similar to § 3617's protections against coercion and interference with fair housing rights. In addition, Title VII's exemptions for religious organizations, private clubs, and small employers, *see id.* § 2000e-1(a), § 2000e(b)(2), and § 2000e(b) respectively, are reflected in similar exemptions in the FHA. *See id.* §§ 3603(b), 3607(a).

282. *See, e.g.,* cases cited in SCHWEMM, *supra* note 13, § 7.4 nn.3-4. *See generally* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion) ("when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes" (citing *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973)); *see also* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-21 (1985) (relying on precedents interpreting Title VII's guarantee of nondiscrimination in "privileg[es] of employment" to interpret the same phrase in the 1967 Age Discrimination in Employment Act).

283. 42 U.S.C. § 2000e-2(a)(1); *see also id.* §§ 2000e-2(b), (c)(1), (d).

connection therewith.”<sup>284</sup> This phrase’s “services and facilities” language, while not in Title VII, may have been adopted from Title II of the 1964 Act, which prohibits discrimination in public accommodations by guaranteeing the “equal enjoyment of the goods, *services, facilities*, privileges, advantages, and accommodations” in such facilities.<sup>285</sup> Another possible source for the FHA’s “services and facilities” language may have been state fair housing laws in existence at the time the Johnson Administration drafted its 1966 proposal.<sup>286</sup>

Whatever its source, the FHA’s guarantee of nondiscrimination “in the provision of services or facilities in connection therewith” is a phrase whose meaning both with respect to the “services” covered and the target of the “in connection therewith” reference (i.e., “sale or rental of a dwelling” or just “a dwelling”) is important for purposes of determining the extent of § 3604(b)’s coverage. However, as to both issues, the meaning of this crucial phrase in § 3604(b) was never satisfactorily explained in the FHA’s legislative history.

Title VII’s prohibitory language makes clear that this statute protects against discrimination directed at current employees as well as job seekers by outlawing discrimination with respect to one’s “compensation, terms, conditions, or privileges of employment.”<sup>287</sup> However, in confining § 3604 to homeseekers, Judge Posner in *Halprin* wrote that, in contrast to Title VII, the FHA “contains no hint either in its language or its legislative history of a concern with anything but *access to housing*.”<sup>288</sup>

As shown in the previous section, this statement is clearly wrong as to the FHA’s legislative history.<sup>289</sup> As for the operative language of § 3604(b), it is, if anything, more broadly drawn than its Title VII counterpart. The FHA provision is not confined, as Title VII is, to discrimination “against an[] individual with respect to his” employment terms;<sup>290</sup> rather, § 3604(b) simply declares the discriminatory practices listed to be illegal without identifying the potential targets of such discrimination.<sup>291</sup> This, among other reasons, has led courts to entertain § 3604 claims by a variety of plaintiffs who were not the direct targets

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284. See *id.* § 3604(b); *supra* text accompanying note 258.

285. See 42 U.S.C. § 2000a(a) (emphasis added).

286. See, e.g., *1966 Hearings, supra* note 278, at 430-31 (setting forth provisions of the Rhode Island fair housing law that barred managing agents and those having the right to manage housing accommodations from discriminating “in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of *facilities or services in connection therewith*” (emphasis added)); *id.* at 531 (setting forth the Ohio fair housing law that barred discrimination “in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any commercial housing or in furnishing *facilities, services, or privileges in connection with the ownership, occupancy, or use of any commercial housing*” (emphasis added)).

287. See *supra* text accompanying note 283.

288. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004).

289. See *supra* notes 258-78 and accompanying text.

290. 42 U.S.C. § 2000e-2(a)(1).

291. *Id.* § 3604(b).

of the defendant's discrimination.<sup>292</sup> Furthermore, as we have seen, § 3604(b)'s "services and facilities" phrase goes beyond anything included in Title VII's comparable provision. Therefore, the next section takes a closer look at this phrase and other key terms in § 3604(b).

2. *Other Interpretive Sources for Key Terms in § 3604(b): Dictionary Definitions, FHAA Examples, and § 1982 Precedents.*—The FHA has a section devoted to defining certain important terms and phrases in the statute,<sup>293</sup> however, except for "to rent,"<sup>294</sup> this section does not define the terms crucial to this Article, such as "services," "privileges," "sale," and "therewith" in § 3604(b).<sup>295</sup> The absence of such definitions in the FHA has been noted in a number of court opinions, particularly those attempting to give meaning to the word "services" in § 3604(b).<sup>296</sup>

Specific words in civil rights and other statutes are often interpreted by the modern Supreme Court by reference to their definitions in dictionaries that were commonly used at the time of enactment.<sup>297</sup> The theory is that Congress intends a statute's words to bear their contemporary common meaning.<sup>298</sup>

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292. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-78 (1982); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-12 (1972); cf. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005) (construing Title IX to cover retaliation claims by indirect victims of sex discrimination because it bans discrimination "on the basis of sex" rather than, like Title VII, "on the basis of *such individual's sex*").

293. See 42 U.S.C. § 3602.

294. See *id.* § 3602(e). The definition of "to rent" is set forth *infra* in the text accompanying note 340; see also *supra* note 262 (discussing this definition).

295. See 42 U.S.C. § 3602. The text here discusses § 3604(b)'s language, but the same lack of statutory definitions—and the corresponding need for additional interpretive sources—exists for many of § 3604(a)'s key terms, including the word "sale" that is shared with § 3604(b) and § 3604(a)'s unique "make unavailable" phrase. See *id.* § 3604(a). As to the latter, the common dictionary definitions of "make" and "available" suggest that "make unavailable" means "to cause [housing not] to be obtainable, accessible, or ready for immediate use." See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1363 (1966) [hereinafter WEBSTER'S] (defining "make" as "to cause to happen to or be experienced by someone"); *id.* at 150 (defining "available" as "that is accessible or may be obtained: personally obtainable").

296. See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356 (6th Cir. 1995) (noting that "[t]he Fair Housing Act does not define key terms such as 'service'" (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992))); *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, Inc.*, 456 F. Supp. 2d 1223, 1227-28 (S.D. Fla. 2005) (noting that the FHA does not define "services").

297. See, e.g., *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 63-67 (2006) (interpreting Title VII); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69 & n.9 (1989) (interpreting the 1871 Civil Rights Act, 42 U.S.C. § 1983); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987) (interpreting the 1866 Civil Rights Act).

298. See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning." (citing

As for the word “services” in § 3604(b), the most prominent American dictionary available at the time of the enactment of the 1968 FHA provided the following applicable definitions of “service”: “an act done for the benefit or at the command of another”; and an “action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental towards some object.”<sup>299</sup> This definition is so broad—e.g., any conduct that “assists or benefits someone”—that it is unhelpful.

More to the point would be what are considered “housing-related” services. In this regard, the 1988 FHAA’s legislative history does identify “cleaning and janitorial services” as an example of this concept for purposes of disability-based claims under § 3604(f)(2),<sup>300</sup> suggesting that “services” in the FHA does include those provided in the post-acquisition-of-housing stage.<sup>301</sup> As we have seen,

Smith v. United States, 508 U.S. 223, 228 (1993)); Perrin v. United States, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975))); *see also* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (relying, in choosing among various dictionary definitions of the relevant term in a statute, primarily on those dictionaries that were available at the time of the statute’s enactment); case described *supra* note 255.

299. WEBSTER’S, *supra* note 295, at 2075 (definitions 5 and 9 of “service”); *see also* BLACK’S LAW DICTIONARY 1533 (4th ed. 1968) [hereinafter BLACK’S] (defining “service” as: “Performance of labor for benefit of another, or at another’s command”).

300. *See supra* text accompanying note 196.

301. The 1988 FHAA included one other provision, since repealed, that mentioned “facilities and services.” This was in a part of the “housing for older persons” exemption to the FHAA’s prohibition of familial status discrimination. *See* 42 U.S.C. § 3607 (1988) (amended 1995). The FHAA’s § 3607(b)(2) described three types of housing that would qualify for this exemption, one of which was housing intended for occupancy by persons fifty-five years of age or older and that included “significant facilities and services specifically designed to meet the physical or social needs of older persons.” *Id.* § 3607(b)(2)(C). HUD promptly issued a regulation interpreting this provision, which provided:

“Significant facilities and services specifically designed to meet the physical or social needs of older persons” include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of [sic] programs, congregating dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them.

24 C.F.R. § 100.304(b)(1) (1993).

This “significant facilities and services” requirement spawned a great deal of litigation, which led Congress to repeal it in 1995. *See* Housing for Older Persons Act of 1995, Pub. L. 104-76, 109 Stat. 787; Taylor v. Rancho Santa Barbara, 206 F.3d 932, 935 (9th Cir. 2000). However, in the meantime, the courts produced a number of opinions dealing with the meaning of “significant facilities and services.” *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 11E:8 n.5 para. 3.

The value of these cases and the HUD regulation is limited for purposes of providing examples

Congress was clearly concerned with post-acquisition services as well as those connected with the acquisition of a dwelling.<sup>302</sup> With respect to acquisition-of-housing services—which *Halprin* and *Cox* contend was the only focus of the 1968 Congress in § 3604(b)<sup>303</sup>—the technique of using dictionary definitions is not too helpful. Clearly such housing-acquisition services do exist, as demonstrated by cases that have held § 3604(b) applicable to home insurance for would-be buyers<sup>304</sup> and to sales agents' racial steering of homeseekers.<sup>305</sup> Pre-

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of “services” covered by § 3604(b), however, because they tended to focus only on services provided by senior-oriented housing facilities, as opposed to those provided by more traditional housing and by third parties such as municipalities. *See, e.g.*, *United States v. City of Hayward*, 36 F.3d 832, 837-38 (9th Cir. 1994) (holding that the particular housing complex here—although having a swimming pool, sauna, shuffle board, laundry room, reading room, and clubhouse, and allowing outside health professionals to conduct blood pressure and glaucoma checks and administer flu shots—only “provided those facilities which any landlord expecting to please his or her tenants would provide” and thus did not satisfy the statute’s “significant facilities and services” for older persons requirement).

302. *See supra* notes 195-201 and accompanying text.

303. *See supra* texts accompanying notes 66-70 (*Halprin*) and notes 98-101 (*Cox*). According to the *Cox* opinion: “Even assuming that the enforcement of zoning laws alleged here is a ‘service,’ we hold that § 3604(b) is inapplicable here because the service was not ‘connected’ to the sale or rental of a dwelling as the statute requires.” *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (footnote omitted).

304. *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298-301 (7th Cir. 1992) (holding that property insurance is a “service” under § 3604(b) and noting: “If the world of commerce is divided between ‘goods’ and ‘services,’ then insurers supply a ‘service.’ . . . [Thus,] § 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.”); *cf. Nevels v. W. World Ins. Co.*, 359 F. Supp. 2d 1110, 1120 (W.D. Wash. 2004) (holding, in disability discrimination case under § 3604(f)(2), that defendant’s cancellation of housing providers’ liability insurance constituted discrimination “in the provision of services related to a dwelling” and that “[p]roperty insurance is without question a service provided in connection with a dwelling”); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 7-8 (D.D.C. 1999) (upholding § 3604(f)(2) claim of disability discrimination against insurance provider).

305. *See, e.g.*, *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (opining that a real estate broker who falsely states to a black customer that no homes are for sale in a white area because of the customer’s race violates § 3604(b) by discriminating “in the provision of real estate services”); *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980) (holding that a real estate agent who “failed to tell [black prospects] of the listing of the . . . property until forced to do so and still later . . . clearly made available information to a white prospect which he had not made available to a willing black buyer” thereby violated § 3604(b)); *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977) (holding that racial steering “violates the broader language of § 3604(b), which makes it unlawful to ‘discriminate . . . in the provisions of services’”); cases cited in SCHWEMM, *supra* note 13, § 14:2 n.18; *see also* 24 C.F.R. § 100.65(b)(3) (2007) (interpreting § 3604(b) to prohibit “[f]ailing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race [or other prohibited

*Halprin* cases had also applied § 3604(b)'s guarantee of nondiscriminatory services in post-acquisition situations, such as the provision of maintenance by landlords.<sup>306</sup>

The phrase "in connection therewith" that modifies "services" in § 3604(b) does not appear in traditional dictionaries. The word "therewith" is defined as "with that," and "that" means "being the person, thing, or idea pointed to, mentioned, or understood from the situation: being the one indicated."<sup>307</sup> However, these definitions do not help resolve the key question, which is to *what* the "services" in § 3604(b) point. The courts have thought the choices are the earlier references to either "a dwelling" (which would yield a broader reading of § 3604(b)-covered services) or the "sale or rental of a dwelling" (which would yield a narrower reading).<sup>308</sup> In any event, the proper interpretation is more a matter of grammar and syntax than the definition of terms.

"Therewith" is an ambiguous adverb, rarely used in grammar or style textbooks.<sup>309</sup> As noted in the previous paragraph, its meaning depends on the construction of the particular sentence involved. That is not helpful in examining § 3604(b), because the structure of that provision makes it difficult to determine exactly to what "thing" is being "pointed." The best way to make this determination is to diagram the sentence that makes up § 3604(b), which yields the following:

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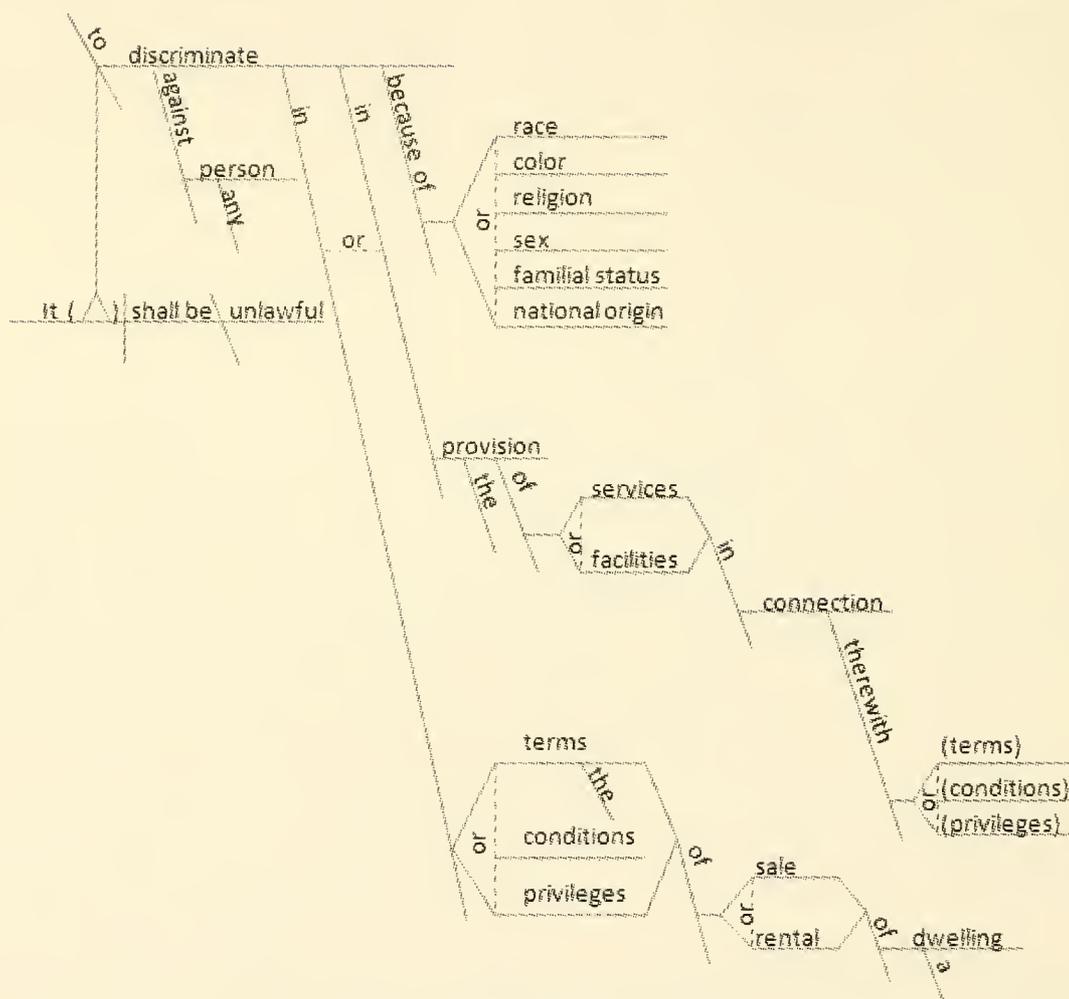
ground]").

306. *See, e.g.,* Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980); *see also* Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (commenting that § 3604(b) was intended to protect residents with discriminatory service claims against housing providers); Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999) (holding that defendant's non-renewal of property insurance and its charging higher rates in black areas may violate plaintiff-homeowners' § 3604(b) rights, because "the provision of property insurance can be reasonably interpreted as the 'provision of services or facilities in connection' with the sale or rental of a dwelling" and "[m]aintaining possession of a home is as important to a homeowner as obtaining possession of a home"); Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3239 (Jan. 23, 1989) (commenting, in the course of issuing HUD's regulations interpreting the FHA, that § 3604(b) covers "the provision of different levels of maintenance").

307. WEBSTER'S, *supra* note 295, at 2367, 2372.

308. *See supra* note 202 and accompanying text.

309. "Therewith" is generally not even mentioned in classic works on style. *See, e.g.,* THE CHICAGO MANUAL OF STYLE 917 (14th ed. 1993) (providing no reference in the index to "therewith"); LESTER FAIGLEY, THE PENGUIN HANDBOOK 856 (2003) (same); WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE 104 (4th ed. 2000) (same); *see also* MARGARET NICHOLSON, A DICTIONARY OF AMERICAN-ENGLISH USAGE 585-86 (1957) (containing no entry for "therewith").



(Bear with me here: my Mother was a grade-school English teacher, as was my current research assistant.<sup>310</sup>)

This diagram reveals that, from a grammatical standpoint, neither “a dwelling” nor the “sale or rental of a dwelling” is the target for § 3604(b)’s “therewith” clause; rather, “therewith” refers to the phrase “in the terms, conditions, or privileges.”<sup>311</sup> This is an adverbial prepositional phrase describing *how* one discriminates under § 3604(b), while both “a dwelling” and the “sale or rental of a dwelling” are prepositional phrases that further explain what types of

310. Sarah Sloan Wilson, J.D. Candidate, 2009, University of Kentucky College of Law. Ms. Wilson, who generated the diagram of § 3604(b) in the text, taught middle- and high-school English at King’s West School, Bremerton, Washington, in 2004-06, where her basic grammar text was WARRINER’S ENGLISH GRAMMAR AND COMPOSITION (1982 ed.).

311. See 42 U.S.C. § 3604(b) (2000).

“terms, conditions, and privileges” discrimination are prohibited.<sup>312</sup> In other words, the phrase “*of sale or rental of a dwelling*” is itself comprised of two modifying prepositional phrases, and thus the “thing” referenced by the “therewith” clause is discrimination in the entire phrase “terms, conditions, or privileges of sale or rental of a dwelling.”<sup>313</sup>

While this may be grammatically correct, it does not yield a helpful interpretation of § 3604(b)’s “services or facilities in connection therewith” clause, which clearly was intended by Congress to add new types of prohibited discrimination to the earlier prohibitions against “terms, conditions, or privileges” discrimination.<sup>314</sup> Therefore, it is understandable that courts have interpreted § 3604(b)’s use of “in connection therewith” to refer either to “a dwelling” or to the “sale or rental of a dwelling.”<sup>315</sup> The main point here is that, while a court may pick one or the other of these options, its choice cannot be defended on the basis of correct grammar, as Judge Higginbotham tried to do in *Cox*;<sup>316</sup> because either option is “wrong” grammatically, the choice must turn instead on what Congress intended substantively. And on this point, we have scant evidence from the 1968 legislative history.<sup>317</sup> However, even assuming the narrower interpretation (i.e., that “services” are limited to those “in connection” with the “sale or rental of a dwelling”<sup>318</sup>), the proper interpretation of § 3604(b) should still extend to many post-acquisition situations, as the following paragraphs show.

With respect to the concept of “privileges” in § 3604(b)—which the statute clearly does limit to those “privileges of sale or rental of a dwelling”<sup>319</sup>—the most prominent contemporary dictionary provided the following definitions of “privilege”: “a right or immunity granted as a peculiar benefit, advantage, or favor: special enjoyment of a good or exemption from an evil or burden: a peculiar or personal advantage or right [especially] when enjoyed in derogation of common right[s].”<sup>320</sup> The fact that a privilege is something to be “enjoyed”

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312. *See id.*

313. *See id.* (emphasis added).

314. *See id.*

315. *See id.*

316. *See Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding that § 3604(b)’s “in connection therewith” phrase refers to the “sale or rental of a dwelling” rather than “a dwelling” on the ground that the former reading is “grammatically superior”).

317. *See supra* Part III.B.

318. *See* 42 U.S.C. § 3604(b) (2000).

319. *Id.* § 3604(b); *see also Cox*, 430 F.3d at 745 n.32.

320. WEBSTER’S, *supra* note 295, at 1805 (definition 1 of “privilege”); *see also* BLACK’S, *supra* note 299, at 1359, 1361 (defining “privilege” as: “A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens” and defining “special privilege” as: “A right, power, franchise, immunity, or privilege granted to, or vested in, a person or class of person, to the exclusion of others, and in derogation of common right”).

may suggest that it is an on-going condition that exists over time.<sup>321</sup> Furthermore, a housing-related example based on the 1988 FHAA's legislative history is "parking privileges . . . and other facilities . . . made available to other tenants, residents, and owners."<sup>322</sup> This statement clearly contemplates post-acquisition privileges, but, as noted above, the 1988 Congress's concern with post-acquisition privileges was reflected in the statutory language of § 3604(f)(2).<sup>323</sup> In order to properly interpret "privileges" in § 3604(b)—and to determine whether this concept might include post-acquisition privileges—the entire phrase "privileges of sale or rental of a dwelling" must be considered.<sup>324</sup> This approach was the basis for Judge Higginbotham's determination in *Cox* that § 3604(b)'s "privileges" did not cover the plaintiff-homeowners' claim challenging the City's refusal there to use its zoning power to help clean up hazardous wastes in the plaintiffs' neighborhood.<sup>325</sup>

If *Cox* is right that enjoying municipal protection against hazardous wastes is not a "privilege of sale or rental,"<sup>326</sup> then what *is* such a privilege? Case law here is not too helpful, because, in contrast to the many "services" cases under § 3604(b),<sup>327</sup> there is a dearth of reported FHA cases dealing with a claim based solely on the term "privileges" in § 3604(b).<sup>328</sup>

Presumably, "privileges" here adds some protection to that of "services" and the other terms used in § 3604(b), for a basic tenet of statutory construction holds that each word in a statute must be accorded some meaning.<sup>329</sup> Thus, one must be able to imagine *some* "privileges of sale"<sup>330</sup> that do extend beyond the acquisition stage. One possibility is the classic "exclusion of others" that is a core right inherent in ownership of real property;<sup>331</sup> another possibility is

321. See also *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (criticizing *Halprin's* view that § 3604(b) does not extend beyond the housing-acquisition stage in the course of holding that this provision applies to a sex-harassment-in-rental claim and arguing that "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").

322. See H.R. REP. NO. 100-711, at 23 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2184.

323. See *supra* text accompanying notes 194-95.

324. See 42 U.S.C. § 3604(b) (2000).

325. See *Cox v. City of Dallas*, 430 F.3d 734, 745 n.32 (5th Cir. 2005).

326. See 42 U.S.C. § 3604(b) (2000).

327. See *supra* notes 296, 301, 304-06 and accompanying text.

328. For a rare example, see *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (described *supra* note 321).

329. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697-98 (1995) (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

330. See 42 U.S.C. § 3604(b).

331. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176-80 (1979) (noting that a landowner's right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" and that "the 'right to exclude' [is] universally held to be a fundamental element of the property right"). See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

discussed later in this section.<sup>332</sup>

A useful case to consider here is *Sullivan v. Little Hunting Park, Inc.*,<sup>333</sup> which the Supreme Court decided in 1969, one year after it first held that 42 U.S.C. § 1982 barred private housing discrimination along with the recently enacted FHA.<sup>334</sup> In *Sullivan*, the Court held that § 1982's guarantee of the equal right "to . . . lease . . . property" protected a black tenant who had rented a house and thereafter was denied access to a local park and community facility that tied membership to residency in the area.<sup>335</sup> According to the *Sullivan* opinion:

There has never been any doubt but that [the black renter] paid part of his \$129 monthly rental for the assignment of the membership share in Little Hunting Park. The transaction clearly fell within the "lease." The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor. [Defendants'] actions in refusing to approve the assignment of the membership share in this case was clearly an interference with [the black renter's] right to "lease."<sup>336</sup>

The lesson here is that, given the 1969 Court's determination that the right "to lease" in § 1982 protects tenants even after they have acquired their units, the same understanding of the time period covered by the FHA's "rental" in § 3604(b) would make this provision similarly applicable to the post-acquisition phase. This idea is further explored in the next two paragraphs.

Another dramatic point from *Sullivan* is provided by the dissent, which argued that the Court should avoid using this case to issue an expansive ruling on § 1982 because its fact pattern was so obviously covered by the new FHA. According to Justice Harlan for the three dissenters in *Sullivan*:

Petitioners here complain of discrimination in the provision of recreation facilities ancillary to a rented house . . . . [T]he Fair Housing Law has a provision that explicitly makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of . . . rental (of housing), or in the provisions [sic] of services or facilities in connection therewith, because of race . . . ."

. . . .  
 . . . [T]he existence of the Fair Housing Law renders the decision of this case of little "importance to the public." For, although the 1968 Act does not cover this particular case [because the events preceded the FHA's enactment], should a Negro in the future rent a house but be denied access to ancillary recreational facilities on account of race, he could in all likelihood secure relief under the provisions of the Fair

332. See *infra* text accompanying notes 347-49.

333. 396 U.S. 229 (1969).

334. See *supra* note 128 and accompanying text.

335. *Sullivan*, 396 U.S. at 237.

336. *Id.* at 236-37.

Housing Law.<sup>337</sup>

This passage shows that even the *Sullivan* dissenters understood that § 3604(b) protects renters after they take possession of their units. Furthermore, the less-than-certain tone of this passage's final sentence—reflected in the statement that such renters “could in all likelihood” secure relief under the FHA—was only based on the possibility that the unit involved might be subject to one of the FHA's exemptions, as Justice Harlan pointed out in a footnote;<sup>338</sup> if a unit is not exempt, the *Sullivan* dissent was clear that post-acquisition tenants subjected to discriminatory services or facilities are covered by § 3604(b).<sup>339</sup>

These points from *Sullivan* are reinforced by the FHA's definitions section, which provides: “‘To rent’ includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.”<sup>340</sup> Thus, the concept of “rental” in the FHA explicitly includes “to lease” (i.e., the concept given post-acquisition protection in *Sullivan*). Admittedly, the FHA's “rent” definition, which simply includes additional terms rather than defining what “rent” means, does not address the timing problem of whether § 3604(b)'s protections extend into the post-acquisition period. This, however, is where a dictionary definition is helpful. The standard definition in dictionaries available when the 1968 FHA was enacted defines “rent” to include “the possession and use” and the “possession and enjoyment” of property,<sup>341</sup> suggesting that “rental” in the FHA should be understood to cover the entire time period of a tenancy. Thus, both *Sullivan* and the common meaning of “rental” provide powerful arguments that § 3604(b) protects residents as well as homeseekers, at least in “rental” situations.<sup>342</sup>

337. *Id.* at 247-51 (Harlan, J., dissenting) (footnote omitted).

338. *Id.* at 251 & n.24.

339. *Id.* at 250-51.

340. 42 U.S.C. § 3602(e) (2000).

341. WEBSTER'S, *supra* note 295, at 1923; *see also* BLACK'S, *supra* note 299, at 1461 (defining “rent” as: “Consideration paid for use or occupancy of property”).

342. Post-*Halprin* decisions have generally upheld § 3604(b) claims by current tenants. *See, e.g.,* Krieman v. Crystal Lake Apartments Ltd. P'ship, No. 05C0348, 2006 WL 1519320, at \*6-7 (N.D. Ill. May 31, 2006) (reading *Halprin* as allowing plaintiff-tenants' discriminatory services claim under § 3604(b) because “the delay in maintenance services could be viewed as a denial of access to the services to which [plaintiffs] were entitled under the terms of the lease,” but entering summary judgment against this claim based on inadequate proof of illegal discrimination); Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*2-5 & n.16 (M.D. Fla. May 2, 2005) (upholding § 3604(b) claim by tenant alleging sexual harassment by her landlord in part based on deference to HUD's regulation interpreting § 3604(b) as applying to post-acquisition rental discrimination, which the court held to be a reasonable interpretation “even if one considered the phrase ‘in connection therewith’ to refer to ‘rental’ rather than ‘dwelling’”); *see also* United States v. Matusoff Rental Co., 494 F. Supp. 2d 740, 746-48 & n.11, 752 (S.D. Ohio 2007) (awarding damages to tenant for landlord's violations of § 3604(a) and § 3604(b) by, inter alia, denying repair work and other needed maintenance based on tenant's race); Campos v. Barney G, Inc., No.

The timing issue is less clear with respect to § 3604(b)'s coverage of "sales." The basic definition of "sale" is "the act of selling: a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price . . . ; *specif*: a present transfer of such ownership of and title to all of or a part interest in personal property."<sup>343</sup> The key here is not so much the body of this definition, but its introductory word—the use of "the" or "a"—which suggests that "sale," unlike "rental," generally refers to a one-time event rather than an on-going process. Significantly, *Halprin* and most other cases—including *Cox*—that have advocated limiting § 3604(b) to the pre-acquisition phase have been brought by plaintiff-homeowners rather than plaintiff-renters.<sup>344</sup> Dictionary definitions, therefore, provide some basis for arguing that § 3604(b) should not extend to the post-acquisition stage in "sale" situations, even if it is not so limited in "rental" cases.<sup>345</sup>

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8:06CV699, 2007 U.S. Dist. LEXIS 24841, at \*3-5 (D. Neb. Apr. 3, 2007) (awarding damages to Hispanic tenants who sued their landlord for post-acquisition "terms and conditions" discrimination); *United States v. Kreisler*, No. 03-3599, slip op. at 2, (D. Minn. Sept. 29, 2006), available at <http://www.usdoj.gov/crt/housing/documents/kreislersettle.pdf> (entering consent decree in case accusing landlord of violating the FHA by, inter alia, "failing to provide necessary and requested maintenance to black tenants while providing such maintenance to non-black tenants"); cases described *infra* note 345.

343. WEBSTER'S, *supra* note 295, at 2003 (definition 1 of "sale"); see also BLACK'S, *supra* note 299, at 1503 (defining "sale" as: "A contract between two parties . . . by which the [seller-vendor], in consideration of the payment or promise of payment of a certain price in money, transfers to the [buyer-purchaser] the title and the possession of property"; and "A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title").

344. See cases cited in SCHWEMM, *supra* note 13, § 14:3 n.20 ¶ 1. Even in "sale" situations, however, some courts have upheld § 3604(b) claims by current homeowners. *E.g.*, *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 808-09 (W.D. Tenn. 2005); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1083-84 (C.D. Cal. 2002); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993); see also *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 943-45 (8th Cir. 2006) (upholding standing of residents of minority neighborhood to sue under the FHA, § 1981, and § 1982 based on allegation that defendants charged higher rates for homeowner's insurance in plaintiffs' neighborhood than in comparable white areas); *United Farm Bureau Family Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1012-16 (7th Cir. 1994) (holding that the FHA and a substantially equivalent local fair housing ordinance cover claim by white resident that insurance company declined to renew his homeowner's policy because he lived in a racially mixed neighborhood); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20-22 & n.7 (D.D.C. 2000) (suggesting that "reverse redlining" claim by current homeowners targeted for predatory home-improvement loans might be maintained under § 3604); *Reeves v. Carrollsburg Condo. Owners Ass'n*, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at \*5-8 (D.D.C. Dec. 18, 1997) (citing § 3604(a), § 3604(b), and § 3617 in upholding condominium owner's FHA claim of race and sexual harassment against association of condominium unit owners).

345. Indeed, some post-*Halprin* decisions have noted this distinction explicitly as a basis for endorsing post-acquisition claims by renters. See *Gourlay v. Forest Lake Estates Civic Ass'n of*

However, the question of whether there is any such thing as a post-acquisition “privilege of sale” remains. One possibility might be the privilege of joining local recreational clubs whose membership is tied to residency in the area, as the Supreme Court has recognized in some § 1982 cases decided shortly after the FHA’s enactment. For example, in 1973 in *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*,<sup>346</sup> the Court relied on *Sullivan* to uphold a § 1982 claim by local black homeowners who were denied membership in an area swim club.<sup>347</sup> In *Tillman*, the Court noted that the club’s residency-linked preferences

may have affected the price paid by the [black homeowners] when they bought their home. Thus, the purchase price to them, like the rental paid by [the black tenant] in *Sullivan*, may well reflect benefits dependent on residency in the preference area. For them, however, the right to acquire a home in the area is abridged and diluted.

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.<sup>348</sup>

Although *Tillman* used the word “benefits” rather than “privileges” to describe the residency-based right there, such a right could certainly be considered a “privilege” of sale for purposes of § 3604(b). Indeed, at least one post-*Halprin* opinion has ruled that the right of homeowners in a planned community to have access to their community’s clubhouse and other common areas is a “privilege” of sale covered by § 3604(b).<sup>349</sup>

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Port Richey, Inc., 276 F. Supp. 2d 1222, 1230-31 n.11 (M.D. Fla. 2003), *order vacated pursuant to settlement*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003) (commenting, in rejecting a post-acquisition § 3604(a) claim by homeowners, that the time frames covered in rental and sale situations are different, because “a landlord and tenant have an ongoing relationship that a purchaser and seller do not have. This would make activities by a landlord or others actionable after the rental of a dwelling.”); *see also* Corwin v. B’Nai B’Rith Senior Citizen Hous., Inc., 489 F. Supp. 2d 405, 408-09 (D. Del. 2007) (commenting, after quoting § 3604(b), that “[t]he FHA demands that tenants be able to secure an apartment on a nondiscriminatory basis, and also guarantees tenants the right to equal treatment once they have become residents of that housing” (citing *Inland Medication Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1148 (C.D. Cal. 2001))).

346. 410 U.S. 431 (1973).

347. *Id.* at 435-37.

348. *Id.* at 437.

349. *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Ass’n, Inc.*, 456 F. Supp. 2d 1223, 1229-31 (S.D. Fla. 2005). In *Savanna Club*, the court, while generally agreeing with *Halprin* and *Cox* that § 3604(b) is limited to the acquisition-of-housing stage, did not agree that such an interpretation could

apply to unique planned communities such as Savanna. Ordinarily, a homeowner

#### *D. Summary*

This Part's sections A-C yield the following conclusions:

—The original drafters of the substantive provisions of § 3604—and in particular its subsection (b)—were focused on identifying discriminatory practices that would be made illegal if engaged in by housing providers, including those who “manage” housing units.

—This fact means that the substantive prohibitions in § 3604(b)—and in particular its prohibition against discriminatory “services” and “privileges”—were drafted with housing providers in mind, which may be one reason why determining how to apply them to other types of defendants (e.g., municipalities) has proved difficult for the courts.

—It also means that these prohibitions were intended to protect current residents—as well as those seeking to acquire housing—from discrimination by housing managers (and ultimately other proper defendants) in such things as cleaning and janitorial services and maintenance, at least in “rental” settings.

purchases a home for the home itself. After the sale, provision or lack of provision of services for that homeowner might decrease his enjoyment of his home, but absent some interference with his ability to inhabit it, the *Halprin* line of cases have found the FHA to be inapplicable. *Halprin*, and other similar cases, however, did not directly address the provision of services as they relate to planned communities where some types of services are in fact part and parcel with home ownership.

....

Most of these communities have common areas which are maintained and regulated by the community's homeowner association for the use by the homeowner members. . . .

Accordingly, part and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community. It would appear, therefore, that in the context of planned communities, where association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the FHA. . . .

....

. . . . [Thus,] the Court finds that the FHA can apply to some post-acquisition provision of services in the planned community context where the services are an incident of ownership . . . .

*Id.* at 1229-31 (citations and footnotes omitted). As this quotation demonstrates, the *Savanna Club* opinion relies both on the “services” and “privileges” language of § 3604(b), but, in either case, the opinion recognizes the possibility that such services or privileges “of sale” may extend into the post-acquisition phase, at least in planned communities and other home-ownership situations where access to common areas is “part and parcel” of the right of ownership. *Id.*

—The conclusion that § 3604(b) extends to post-acquisition discrimination in rentals is reinforced by the fact that those same drafters wrote an introductory policy statement describing the FHA as protecting, *inter alia*, the “use and occupancy” of housing and by the fact that the common dictionary meaning of their oft-used word “rental” covers a tenant’s entire lease term.

—Even with respect to housing acquired through a “sale,” § 3604(b)’s guarantee of nondiscriminatory services and privileges should be read to apply in those post-acquisition settings where the “services” or “privileges” at issue are part and parcel of the rights obtained in buying the relevant property (e.g., access to membership in a local swim club or to the common areas of a condominium or other type of housing with communal rights).

—These conclusions as to § 3604(b)’s applicability to post-acquisition discrimination hold true regardless of whether that provision’s “therewith” clause—which controls the “services” part of § 3604(b)—is read to apply to “a dwelling” or only to “the sale or rental of a dwelling,” neither of which reading is mandated by the common meaning of “therewith” or the grammatically correct construction of § 3604(b). Thus, even if this “services”-controlling clause is thought to target “the sale or rental of a dwelling,” it would still support post-acquisition “services” claims in all “rental” cases and in some “sale” situations as well.

These conclusions undercut the rationales put forth by the Seventh Circuit in *Halprin* and by the Fifth Circuit in *Cox* to justify their view that § 3604 does not cover post-acquisition discrimination. These conclusions also mean that HUD’s regulation interpreting § 3604(b) to cover services and facilities “associated with a dwelling”<sup>350</sup> is a defensible reading of this provision in all “rental” and in some “sale” cases. This, in turn, means that HUD’s regulation applying § 3617 to interference claims by current residents is correct in all such cases, even if, as *Halprin* suggested, § 3617 must be tied to a predicate violation of §§ 3603-3606.

Despite all this, the question remains whether *Cox*’s holding that the practices challenged there are outside the scope of § 3604(b) was nevertheless justified because such practices are neither “services” nor “privileges” covered by this provision in a “sales” case. This question is addressed next in Part IV.

#### IV. A BETTER APPROACH TO MUNICIPAL SERVICES CASES

##### A. *What Do Post-Sale “Services” and “Privileges” Cover?*

Part III demonstrated that the FHA’s § 3604(b) covers housing-related

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350. *See supra* text accompanying note 217.

“services” and “privileges” even—contrary to *Cox*’s view—in some post-acquisition “sale” situations where current homeowners are challenging the defendant’s discrimination. This coverage would protect current homeowners to the extent that the rights they obtained in purchasing their homes included “services” or “privileges” that are part and parcel of those property rights, such as the right to use a condominium’s common areas.

Parenthetically, it might be argued that such sale-based privileges under § 3604(b) were intended to be co-extensive with the protections provided by § 1982’s right to “purchase [and] hold . . . real . . . property.”<sup>351</sup> The argument would be based on the fact that Congress, in passing the FHA, was fully aware of § 1982’s possible application to housing discrimination<sup>352</sup> and on the Supreme Court’s indication shortly thereafter in *Sullivan* and *Tillman* that § 1982 protects current residents against race-based discrimination in ways similar to what was intended by § 3604(b).<sup>353</sup> Whether § 3604(b)’s coverage in “sale” situations is exactly equal to § 1982’s may be debated, but certainly some similarity seems appropriate. In this regard, it is worth noting that the Supreme Court’s decision in *City of Memphis* thereafter placed some limits on situations where black homeowners could invoke § 1982 to challenge allegedly discriminatory municipal actions, although the Court did opine there that discrimination in municipal services is actionable under § 1982.<sup>354</sup> In any event and regardless of its connection to § 1982, § 3604(b)’s sale-based coverage would seem clearly to extend at least to those services and privileges that are tied to homeowners’ property-based rights.

To determine the extent of such rights, it is worth recalling here the D.C. Circuit’s 1991 opinion in *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*<sup>355</sup> There, the court ruled against an apartment owner who alleged that the defendant violated the FHA by refusing to provide elevator service based on the

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351. 42 U.S.C. § 1982 (2000).

352. The Congress that enacted the 1968 FHA was aware of the pending § 1982 litigation in what was to become *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968). See, e.g., *1967 Banking Hearings*, *supra* note 257, at 163 (response to Sen. Mondale’s question by Louis H. Pollak, Dean of Yale Law School).

353. See *supra* text accompanying notes 333-39 (discussing *Sullivan*) and notes 347-49 (discussing *Tillman*). The Court recently cited *Sullivan* in a far less analogous civil rights case for the proposition that “‘it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (alteration in original) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)). Although the 1968 Congress was not aware of *Sullivan*, it was aware of other § 1982-based litigation pending at the time of the FHA’s enactment. See *supra* note 352.

354. *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981); see also *supra* notes 134-47 and accompanying text.

355. 929 F.2d 714 (D.C. Cir. 1991). The *Clifton Terrace* case is further described *supra* in notes 231, 234, and text accompanying *supra* note 240.

race of the owner's tenants.<sup>356</sup> While holding that neither § 3604(a) nor § 3604(b) covered this situation, the D.C. Circuit did suggest that § 3604(a) would cover "the denial of certain essential services relating to a dwelling, such as . . . sewer hookups, zoning approval, or basic utilities" if they "result in the denial of housing."<sup>357</sup> As for § 3604(b), *Clifton Terrace* opined that this provision, unlike § 3604(a), goes beyond housing denials to address "habitability" issues, at least with respect to "services and facilities provided in connection with the sale or rental of housing."<sup>358</sup>

It was thus clear to the *Clifton Terrace* court that § 3604(b) is "directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or *those who otherwise control the provision of housing services or facilities.*"<sup>359</sup> The court noted that, in rental situations, this understanding would be consistent with HUD's regulation outlawing discriminatory maintenance and services.<sup>360</sup> As for post-acquisition "sales" situations, *Clifton Terrace* viewed § 3604(b)'s application to such services as "not so clear."<sup>361</sup> The court noted that, while the Fourth Circuit in *Mackey* and the Seventh Circuit in *Southend* had opined that § 3604(b) covered discriminatory municipal services, "[t]he fact that such a discriminatory practice could have an impact on the use and enjoyment of residential property rights . . . does not necessarily mean that it will also be redressable under [the FHA]."<sup>362</sup> The D.C. Circuit then avoided deciding this question, noting that the defendant before it—a private service contractor that was not the "sole source" of elevator services in the area—was distinguishable from a municipal service provider.<sup>363</sup> As to the latter, the *Clifton Terrace* opinion noted:

Like public utilities, municipalities often are the sole source of a service essential to the habitability of a dwelling. In the case of such an absolute monopoly, ultimate control over the service in question resides with the municipality or utility rather than with the provider of housing, and such a "sole source" could conceivably violate the [§ 3604(b)] rights of tenants without any intermediate action by the landlord.<sup>364</sup>

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356. *Clifton Terrace Assocs., Ltd.*, 929 F.2d at 723.

357. *Id.* at 719-20.

358. *Id.* at 720 (citing 42 U.S.C. § 3604(b), (f)(2) (1988)).

359. *Id.* (emphasis added).

360. *Id.* (citing 24 C.F.R. § 100.65 (1990)).

361. *Id.*

362. *Id.* (citing *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D. Pa. 1978)).

363. *Id.*

364. *Id.* In her concurrence, Judge Henderson chose not to endorse this "sole source" theory of liability, finding it unnecessary to deciding the case. *Id.* at 724 (Henderson, J., concurring). She did agree with the majority, however, that § 3604(b)'s intended targets were "those who provide housing and then discriminate in the provision of attendant services or facilities, or those who otherwise control the provision of housing services or facilities." *Id.* (quoting *id.* at 720 (majority opinion)).

Although this part of *Clifton Terrace* is entirely dicta, it does provide a useful theory for distinguishing between those services and privileges that are covered by § 3604(b) in “sales” situation and those that are not. The former would include—in addition to those offered by housing providers that are “attendant” to the sale—those provided by others who “control the provision of housing services and facilities” because only they can generate such services and facilities.<sup>365</sup>

On the other hand, § 3604(b) would not extend to every type of discrimination that could conceivably impact on post-acquisition owners’ use or enjoyment of their homes. Although one post-*Halprin* opinion has suggested such a position by arguing that “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,”<sup>366</sup> the suggestion implicit in this statement seems too broad, at least in “sale” situations. In these situations—unlike rentals—§ 3604(b)’s “privileges” should be tied to some ownership-based right and thus would not extend to every conceivable post-acquisition type of discrimination that might have a negative impact on the enjoyment of one’s home.

While such an interpretation of post-sale “services” and “privileges” would thus be somewhat limited, the reach of § 3604(b) would be far from trivial. Among other things, it would extend the FHA to ownership-based services and privileges due to residents in condominiums and other similar community-owned housing, which is becoming an increasingly important part of the American housing market.<sup>367</sup> It would also reinforce the view of those courts that have opined that § 3604(b) guarantees nondiscrimination in police and fire protection and garbage collection, as least to the extent that such services are provided to all local homeowners based on their ownership of property in the area.<sup>368</sup> How it would apply in other municipal services cases, like *Cox*, is explored in the next section.

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365. See *id.* at 720 (majority opinion).

366. *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004). This case is further described *supra* note 321. This comment was made after the court in *Koch* noted that the *Halprin* opinion, itself, had observed that “‘as a purely semantic matter,’” § 3604(b)’s “‘privileges of sale or rental’ might conceivably be thought to include the privilege of inhabiting the premises.” *Id.* at 976 (quoting *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004)).

367. See, e.g., ROBERT H. NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT* xiii (2005) (describing the tremendous growth since the 1960s in various types of community-based homeownership and noting that “[b]y 2004, 18 percent—about 52 million Americans—lived in housing within a homeowners association, a condominium, or a cooperative” and “since 1970 about one-third of all new housing units in the United States have been built within a private community association”).

368. See municipal services cases cited *supra* note 234.

*B. Application to Cox and Other Modern Municipal Services Cases*

*Cox*, itself, is tricky. For one thing, the Fifth Circuit's opinion—being based on the perceived inapplicability of § 3604(b) to post-acquisition cases—sidestepped the key issue of *which* post-sale situations might be covered by “assuming that the enforcement of zoning laws alleged here is a ‘service’” under § 3604(b).<sup>369</sup> *Cox* also seemed to accept those decisions holding that “general police and fire protection are within the scope of § 3604(b)” on the ground that such protection might “conceivably” be connected “to the ‘sale or rental of a dwelling.’”<sup>370</sup>

Still, the *Cox* opinion was clearly troubled by the implications of giving too broad a reading to “services” in § 3604(b), fearing that “unmooring the ‘services’ language from the ‘sale or rental’ language pushe[d] the FHA into a general anti-discrimination pose, creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area.”<sup>371</sup> Of course, such a right already exists by way of an equal protection claim under § 1983, as the *Cox* case itself shows.<sup>372</sup> Judge Higginbotham's opinion observed, however, that the FHA, unlike § 1983, “does not require a governmental policy or custom, and does not require proof of both discriminatory impact and intent.”<sup>373</sup>

This meant, according to *Cox*, that the FHA was intended to operate only “in the housing field and remains a housing statute.”<sup>374</sup> Because the FHA “targets only housing,” its “services” provision is limited to those services that are connected to housing sales or rentals, leading the Fifth Circuit to conclude that the *Cox* plaintiffs' complaint that “the value or ‘habitability’ of their houses has decreased” as a result of the defendants' alleged discrimination was not covered

369. *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005). The *Cox* opinion, after noting language in *Southend*, *Clifton Terrace*, and other appellate decisions offering conflicting views on this matter, ultimately chose “not [to] decide this issue.” *Id.* at 745 n.34.

370. *Id.* at 745-46 n.36 (citing *Southend Neighborhood Improvement Ass'n v. St. Clair County*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

371. *Id.* at 746.

372. *See supra* text accompanying notes 59 and 103-04. Part II.A.1 describes municipal services claims based on § 1983 and the Equal Protection Clause.

373. *Cox*, 430 F.3d at 746. The requirement that a § 1983 action against a local government be based on the defendant's “policy or custom” was established in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

In *Cox*, Judge Higginbotham also held that the plaintiffs' § 1981 claim, like their § 1983 claim, required such a showing of “governmental policy or custom.” *See Cox*, 430 F.3d at 746, 748. This view is supported by *Jett v. Dallas Independent School District*, where the Supreme Court held that a plaintiff asserting a § 1981 claim for damages against a governmental entity must show that the violation of his § 1981 rights “was caused by a custom or policy within the meaning of *Monell* and subsequent cases.” 491 U.S. 701, 735-36 (1989).

374. *Cox*, 430 F.3d at 746.

by § 3604(b).<sup>375</sup> Post-acquisition owners or tenants can only invoke § 3604(b), according to *Cox*, if they allege that the defendant's discrimination amounts to "actual or constructive eviction" from their homes.<sup>376</sup>

This part of the *Cox* opinion is open to a variety of criticisms. For one thing, it is not at all clear that an FHA-based claim of discriminatory municipal services would not be subject to the same "policy or custom" requirement as one brought under § 1983. Although the FHA does not explicitly include such a requirement, neither does § 1983; the requirement derives, in the latter case, from judicial interpretation of Congress's intent with respect to § 1983.<sup>377</sup> In similar situations, courts have seen fit to interpret the FHA in line with § 1983 precedents—for example, in extending § 1983 immunities to individual officials sued for money damages under the FHA<sup>378</sup>—perhaps because both statutes are considered to have been enacted against the background of, and thereby to have incorporated, traditional tort-law concepts.<sup>379</sup>

375. *Id.*

376. *Id.* Here, the *Cox* opinion cited a Fifth Circuit decision, *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982), which *Cox* described as upholding a § 3604(b) claim by a tenant who was forced to vacate his apartment for entertaining black guests in violation of the landlord's "whites-only" policy. *Cox*, 430 F.3d at 746. According to *Cox*, "[t]his was akin to constructive conviction [sic] and was a clear discriminatory condition of 'a sale or rental of a dwelling.'" *Id.* at 747.

*Cox's* reading of *Woods-Drake* is far too narrow. If actual or constructive eviction were all that was involved in *Woods-Drake*, the plaintiff there could have relied on § 3604(a)'s "otherwise make unavailable" provision, as both *Cox* and *Halprin* had already recognized. See *Cox*, 430 F.3d at 742 & n.20 (quoted *supra* text accompanying note 96); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004) (quoted *supra* text accompanying note 67). The § 3604(b) claim in *Woods-Drake* was based on the landlord's mere *threat* of eviction for the plaintiff's having entertained black guests. 667 F.2d at 1200. In this situation (i.e., threats and harassment that fall short of actual or constructive eviction), the availability of § 3604(b) apart from § 3604(a) is crucial and has regularly been relied on by courts, including the Fifth Circuit in *Woods-Drake*. See *id.* at 1201; *United States v. Lepore*, 816 F. Supp. 1011, 1024 (M.D. Pa. 1991) (holding that discriminatory eviction violates § 3604(a), while discriminatory attempted eviction violates § 3604(b)); other cases cited at SCHWEMM, *supra* note 13, § 14:3 n.30. Thus, *Woods-Drake* and these other cases stand for the proposition that § 3604(b) may be invoked in post-acquisition situations to complain of discrimination that interferes with a tenant's "privileges of . . . rental," even when this discrimination does not result in the plaintiff's actual or constructive eviction.

377. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

378. See, e.g., cases cited in SCHWEMM, *supra* note 13, § 12B:5 n.19.

379. See, e.g., *Meyer v. Holley*, 537 U.S. 280, 285-91 (2003) (interpreting the FHA); *Wood v. Strickland*, 420 U.S. 308, 316-18 (1975) (interpreting § 1983). But see *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733-34 (E.D. Va. 1992) (holding that, unlike under § 1983, a city may be held liable based on "respondeat superior" principles for its employees' FHA violations).

As *People Helpers* indicates, Judge Higginbotham may be right that FHA claims against local governments do not include a "policy or custom" requirement. In § 1983 cases, this requirement was adopted by the Supreme Court as a way of avoiding the imposition of "respondeat superior"

*Cox's* other reason for not allowing the FHA to be used to remedy discriminatory municipal services—that an FHA claim, unlike one under the Equal Protection Clause, could be based on discriminatory impact as well as discriminatory intent<sup>380</sup>—is also not very persuasive. While the FHA does cover impact-based claims,<sup>381</sup> the claim in *Cox* was based on discriminatory intent,<sup>382</sup> and this has been true for virtually all other modern claims of discriminatory municipal services.<sup>383</sup> While an impact-based claim is certainly conceivable—such a claim was made in the early *Hawkins* case discussed in Part II.A.1<sup>384</sup>—intent-based discrimination has been the basis for all modern municipal services claims brought under the FHA.

Furthermore, the intent and “custom or policy” requirements are related, at least as a practical matter. It will be recalled that in *Cox*, the trial court ruled against the plaintiffs’ § 1983 claim because they failed to prove an official “policy or custom” and ruled against their § 1981 claim because they proved only the City’s “gross negligence” rather than its “intent to discriminate against them on the basis of race.”<sup>385</sup> The Fifth Circuit upheld the lower court’s determination that the City’s actions “amounted to ‘negligence,’ not a custom” and thus affirmed its judgment on both the § 1981 and § 1983 claims as “sound in law and fact.”<sup>386</sup> On the other hand, if municipal officials were found to have intentionally discriminated against a black neighborhood in the provision of services, it seems likely that such action would usually be found also to reflect the municipality’s “policy or custom.” As Judge Higginbotham recognized in *Cox*, the concept of a municipality’s “policy or custom” covers more than its

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liability on municipal defendants for the federal-law violations of their employees. *See Monell*, 436 U.S. at 690-95. In contrast, the Court has endorsed such vicarious liability under the FHA, at least for private defendants. *See Meyer*, 537 U.S. at 285-86. However, vicarious liability was also thought proper in cases brought under the 1866 Civil Rights Act until the Court refused to extend this understanding to § 1981 actions against municipalities, determining that § 1983 principles should govern such actions. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-36 (1989) (noting that the Court had previously upheld damage claims based on vicarious liability “[i]n the context of the application of § 1981 and § 1982 to private actors,” but that this did not preclude limiting such claims against municipal defendants to “custom or policy” situations). In short, until the possibility of a *Jett*-type interpretation of the FHA has been authoritatively ruled out, Judge Higginbotham’s assumption in *Cox* that FHA claims against municipalities may succeed without a § 1983-like showing of “policy or custom,” *Cox*, 430 F.3d at 746, is not justified.

380. *Cox*, 430 F.3d at 746.

381. *See* cases cited in SCHWEMM, *supra* note 13, § 10:4 nn.18-34, 41-42.

382. *See Cox*, 430 F.3d at 736-38.

383. *See, e.g.*, cases cited *supra* notes 124, 151, and 234.

384. *See supra* text accompanying notes 120-21; *see also infra* notes 408-11 and accompanying text.

385. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*16 (N.D. Tex. Sept. 22, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005); *see also supra* text accompanying note 60.

386. *Cox*, 430 F.3d at 749.

written policies, ordinances, and regulations;<sup>387</sup> it extends as well to a “particular course of action [that] is properly made by that government’s authorized decisionmakers.”<sup>388</sup> Thus, if the municipal officials responsible for providing a particular service (e.g., garbage collection) do so by intentionally discriminating against a minority neighborhood, their actions may well establish a “custom or policy” sufficient to justify municipal liability under § 1983.<sup>389</sup> Of course, not every incident involving a municipal employee’s intentional discrimination would satisfy the “custom or policy” requirement,<sup>390</sup> but those involving an ongoing pattern or practice of discriminatory municipal services generally would.<sup>391</sup>

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387. *Id.*

388. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *see also Cox*, 430 F.3d at 748 (noting that “official policy” includes “a persistent, widespread practice of officials or employees . . . [that] is so common and well settled as to constitute a custom that fairly represents the municipality’s policy”).

389. *See, e.g., Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985) (noting in § 1983 case that “‘policy’ generally implies a course of action consciously chosen from among various alternatives”); *see also Pembaur*, 475 U.S. at 483 (“[M]unicipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.”) (plurality opinion).

390. Judge Higginbotham’s opinion in *Cox* described a scenario in which intentional discrimination might not reflect a municipality’s “policy or custom,” i.e., where those who are engaged in the intentional discrimination are not municipal policymakers and the policymakers did not have “actual or constructive knowledge of this practice . . . at the time it occurred.” *Cox*, 430 F.3d at 749 (quoting *Cox*, 2004 WL 2108253, at \*10). Thus, for example, if municipal employees, because of racial animus, refused to pick up garbage in black neighborhoods while providing better service in white neighborhoods, but this practice was not known to city policymakers, no “policy or custom”—and thus no governmental liability under § 1983—would be established. While this scenario is theoretically possible, *see, e.g., East-Miller v. Lake County Highway Dep’t*, 421 F.3d 558 (7th Cir. 2005) (dealing with minority homeowner’s claim under the FHA’s § 3617 that county highway crews had damaged her mailbox while plowing snow based on racial animus), such an example seems unlikely to produce the kind of municipal services litigation discussed in this Article, simply because the residents of the disfavored minority neighborhood, as they did in *Cox*, would generally seek relief informally by complaining to the relevant municipal policymakers before filing their lawsuit.

391. In addition to *Cox*, a number of other § 1983-based claims of discriminatory municipal services have noted that the municipality’s liability requires a showing of “policy or custom.” *See, e.g., Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*11 (N.D. Tex. Sept. 9, 2004); *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*1-2 (N.D. Tex. Feb. 14, 2002); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1141 (N.D. Ill. 1993). Few, if any, of these cases, however, have held that the plaintiffs’ § 1983 claim failed where plaintiffs were able to allege or prove intentional race discrimination. *See, e.g., Miller*, 2002 WL 230834, at \*2; *cf. New W., L.P. v. City of Joliet*, 491 F.3d 717, 720 (7th Cir. 2007) (noting that, for purposes of satisfying *Monell’s* “policy or custom” requirement, “there can be no doubt that § 1983 is available” here based on the fact that the defendant-municipality’s “filing condemnation and

Furthermore, in such cases, even were the municipality itself able to escape liability because no "custom or policy" is shown, its responsible officials could still be held liable under § 1983 for injunctive relief and perhaps money damages,<sup>392</sup> which, as shown by *Hawkins* and other early discriminatory municipal services claims based on § 1983, might provide a sufficient remedy in such cases.<sup>393</sup>

The point is that, in the vast majority of FHA-based municipal services claims (i.e., those alleging intentional discrimination), relief would also be available under § 1983 and the 1866 Civil Rights Act. Thus, Judge Higginbotham's fear in *Cox* of the dire consequences of applying the FHA to municipal services cases seems exaggerated. Indeed, the very way that *Cox* expressed this fear—that the FHA could become "a general anti-discrimination [law] . . .—say, for *generally inadequate police protection in a certain area*"<sup>394</sup>—misses the point of what the *Cox* plaintiffs were complaining about. Their claim was not based on "inadequate" municipal services in the plaintiffs' neighborhood, but on the fact that such services were being provided in a *discriminatory* way vis-a-vis the provision of those services in comparable white neighborhoods.<sup>395</sup> If, for example, a municipality could not afford to provide adequate police protection in *all* neighborhoods—or even just in *all poor* neighborhoods—but its inadequate protection was provided without regard to the racial make-up of these areas, then neither § 3604(b) nor any other civil rights statute would be violated. All that the *Cox* plaintiffs were advocating was that § 3604(b) be interpreted to reach as far as § 1983 and the 1866 Act had for decades.<sup>396</sup>

Another reason to discount *Cox*'s fear that the FHA might be used as a general remedy for all sorts of discriminatory municipal services is that, as the applicable HUD regulation provides, § 3604(b) only covers "services" and

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nuisance suits is action by the City itself, as are statements made . . . by the Mayor").

392. As for injunctive relief, see, e.g., *Will v. Michigan Department of State Police*, 491 U.S. 66, 71 n.10 (1989) (noting, in case holding that states may not be sued under § 1983, that state officials may still be sued in their official capacity for injunctive relief). As for money damage awards against officials sued in their individual capacities, see, e.g., *Jett v. Dallas Independent School District*, 491 U.S. 701, 707-08 (1989) (discussing plaintiff's § 1981 and § 1983 claims against defendant Todd); *Wood v. Strickland*, 420 U.S. 308, 314-22 (1975) (holding that § 1983 compensatory awards may be assessed against school board members and other officials with "qualified immunity" unless their deprivation of plaintiff's constitutional rights was done in good faith).

393. See cases cited *supra* notes 109 and 124, all of which were discriminatory municipal services cases decided in the plaintiffs' favor and brought solely against the responsible individual officials because, at the time, the Supreme Court had yet to permit § 1983 claims against a municipality itself.

394. *Cox*, 430 F.3d at 746 (emphasis added).

395. *Id.* at 747.

396. See, as to § 1983, *supra* note 124 and accompanying text and, as to the 1866 Act, *supra* note 146, note 151 and accompanying text, and note 171.

“privileges” that are “associated with a dwelling.”<sup>397</sup> Thus, a “services” claim in post-acquisition situations should be recognized for, but limited to, those services that are literally to be performed at a homeowner’s residence, such as discriminatory garbage collection and fire protection. Such an interpretation of § 3604(b) would also cover discrimination in municipal-supplied water and sewer service, as two recent cases in Ohio and Georgia alleged.<sup>398</sup> Police protection and road maintenance would probably also be covered, as these services, while not always directed at specific houses, are often provided in the vicinity of such houses.<sup>399</sup> By contrast, all other types of municipal services (e.g., public schools), while no doubt having an effect on the value of local residents’ housing, would not be covered by § 3604(b), because they are not directed at such housing and therefore would not be considered “associated with a dwelling.”

As for a “privileges of sale” claim under § 3604(b), these should be limited to those rights that are considered “part and parcel” of the property rights

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397. See *supra* note 217 and accompanying text (discussing 42 C.F.R. § 100.65(b)(4) (2007)).

398. See *Steele v. City of Port Wentworth*, Civ. A. No. CV405-135, 2008 WL 717813 (S.D. Ga. Mar. 17, 2008); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 463 (S.D. Ohio 2007).

In the *Zanesville* case, scores of individuals and two organizations sued a city, county, township, and certain officials, claiming that the defendants had “a policy, pattern, and practice of denying public water service to the individual [p]laintiffs during the last fifty years because they are African-American and/or because they reside in a predominantly African-American neighborhood.” *Zanesville*, 505 F. Supp. 2d at 463. These discriminatory actions were alleged to violate the FHA’s § 3604(a) and § 3604(b), the 1866 Civil Rights Act, Title VI, and § 1983, as well as certain state laws. *Id.* at 492-93 n.21. The defendants moved for summary judgment on a variety of grounds, including lack of standing, tardiness, inadequate evidence of discrimination, and inappropriate claims for relief, but not, apparently, on the merits of whether the FHA outlawed their alleged behavior. See *id.* at 483. The district court granted parts of this motion (including holding moot the plaintiffs’ claim for injunctive relief because water service had been extended to their neighborhood by January 2004), but it denied other parts and in particular upheld the plaintiffs’ compensatory damage claims against the City and County defendants under all of the cited federal laws. *Id.* at 483-501.

In the *Port Wentworth* case, residents of two black neighborhoods accused their city of an on-going practice of intentional racial discrimination by providing them inferior water, sewer, and other municipal services to those accorded comparable white neighborhoods. *Port Wentworth*, 2008 WL 717813, at \*1-10. The complaint was filed in 2005 and cited discriminatory acts dating back to the 1980s. *Id.* The defendant moved for summary judgment, arguing, *inter alia*, that the plaintiffs’ claims were not timely and that the FHA did not cover this situation. See *id.* at \*10. On March 17, 2008, the district court granted this motion, dismissing plaintiffs’ § 3604(b) claim on the basis of *Cox* and rejecting their § 1982 and § 1983 (equal protection) claims in part on statute-of-limitations grounds and in part because of insufficient proof of discrimination. *Id.* at \*11-20.

399. See, e.g., *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 254 F. Supp. 2d 486, 499, 502-03 (D.N.J. 2003) (opining that § 3604(b) would cover governmental units that provide “specific residential services” including those “responsible for door-to-door ministrations such as . . . police departments [and] fire departments”).

obtained in purchasing one's home. As discussed above in Part III.C, these would include use of the common areas in condominiums and other community-owned types of dwellings,<sup>400</sup> and, to the extent a local government ties access to other rights or services to property ownership (e.g., the use of recreational areas or city dumps), discrimination here would also be outlawed by § 3604(b). If ownership of a home includes the right to send one's children to local public schools, then discriminatory denial of access to these schools would also be actionable under § 3604(b). A right to nondiscriminatory *access*, however, would not include a claim based on the *inadequacy* of local schools, any more than it would under the Equal Protection Clause.<sup>401</sup>

In applying these principles to the plaintiffs' claims in *Cox*, the issue would become the one assumed away by the Fifth Circuit: that is, whether the defendant's enforcement of its zoning law was a "service" or "privilege" under § 3604(b). The answer would clearly be "yes" if the targets of such zoning enforcement were the plaintiffs' own homes, as is demonstrated by recent cases alleging discriminatory enforcement against Hispanics of land-use restrictions, building codes, and other municipal laws.<sup>402</sup> However, the *Cox* plaintiffs, like

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400. See *supra* notes 347-49 and accompanying text.

401. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973) (holding that providing inferior schools based on the wealth of the neighborhood does not violate the Equal Protection Clause).

402. See, e.g., *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 678, 682-85 (D.C. Cir. 2006) (described *supra* notes 233-34); *Hispanics United of DuPage County v. Vill. of Addison*, 988 F. Supp. 1130, 1171 (N.D. Ill. 1997) (approving settlement in class action by Hispanic residents who alleged that their village's program of acquiring and demolishing housing in plaintiffs' neighborhoods had a disparate impact and was based on intentional discrimination against Hispanics); Nick Miroff, *Culpepper Officials Targeting Illegal Immigrants: Enforcement of Zoning Rules on Hearing Limits Is Town Council's Final Step*, WASH. POST, Sept. 21, 2006, at T10 (reporting on alleged FHA violations resulting from City's actions directed against non-U.S. citizens); Nick Miroff, *Manassas Official Irked by Pace of Housing Inquiry: HUD Looks at Crowding Policy*, WASH. POST, Oct. 5, 2006, at PW01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100400069.html> (reporting on HUD investigation of alleged FHA violations by City's discriminatory enforcement of its "anti-crowding" ordinances against Hispanic families); Press Release, U.S. Dep't of Justice, *Illinois City Will Pay \$200,000 in Damages and Fines to Settle Housing Discrimination Suit (May 20, 1997)*, available at <http://www.usdoj.gov/opa/pr/1997/May97/208cr.htm> (describing settlement of FHA case alleging that the City of Waukegan, Illinois, enacted a housing code to limit the number of Hispanic family members living together); see also *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007), *appeal pending* (3d Cir. 2008) (enjoining as unconstitutional defendant-City's ordinances barring local landlords from renting to non-U.S. citizens, which allegedly had a disparate impact on Hispanics); *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (same); cf. *New W., L.P. v. City of Joliet*, 491 F.3d 717, 720-22 (7th Cir. 2007) (reversing dismissal of claim by apartment owner that City attempted to condemn its property and otherwise harassed it in violation of the FHA and § 1982 because of the race of its tenants); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 722, 733 (E.D. Va. 1992)

those in *Southend* and a number of other cases that have rejected § 3604(b) claims by local residents,<sup>403</sup> were complaining of the defendants' enforcement actions directed at other properties. In such a case, a "services" claim under § 3604(b) would be unavailing. As for a "privileges" claim, neighboring homeowners presumably have a right of *access* to complain to local zoning enforcement officials, but their homeowner-status would generally not give them the right to insist that these officials act in a particular way. In other words, a "privilege of sale" claim could also have been rejected in *Cox* based on a correct understanding of § 3604(b).

This analysis, then, suggests that the Fifth Circuit was justified in denying relief under the FHA in *Cox*. This is not to belittle the injuries suffered by the homeowner-plaintiffs there. Clearly, those injuries were serious; among other things, as the Fifth Circuit recognized, the *Cox* plaintiffs alleged that "the value or 'habitability' of their houses has decreased" as a result of the defendants' alleged discrimination.<sup>404</sup> This, however, merely gave the plaintiffs standing to sue. It did not establish that their injuries were the result of an FHA violation. As to this point, the *Cox* plaintiffs may well have been trying to stretch § 3604(b) beyond its proper scope.

### C. Why Does FHA Coverage Matter?

As the *Cox* litigation demonstrates, residents in minority neighborhoods who complain of discriminatory municipal services may proceed under the 1866 Civil Rights Act, § 1983 (to enforce an equal protection claim), and perhaps other federal laws, regardless of whether they have a claim under the FHA. This raises the question whether FHA coverage of this type of case is of any practical significance. It may be, but most of the reasons deal with procedures and relief rather than substance.

As for substance, Judge Higginbotham's opinion in *Cox* noted two differences between an FHA-based claim and those based on other federal civil rights laws: (1) the FHA includes an impact, as well as an intent, standard; and (2) municipal liability may be established under the FHA without a showing of governmental "policy or practice" as is required in § 1983 claims.<sup>405</sup> Earlier, I discounted the practical value of these differences, noting that discriminatory municipal services cases tend to be intent-based claims and that § 1983 concepts may be incorporated into FHA doctrine in such cases.<sup>406</sup>

As for the intent requirement, § 1982, an equal protection claim under §

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(upholding § 3617 claim based on municipality's discriminatory investigation of plaintiffs' group home for people with disabilities that was allegedly designed to shut down this home).

403. See *supra* note 174 and accompanying text (*Southend*); see also *supra* notes 237-39 and accompanying text (other cases).

404. *Cox v. City of Dallas*, 430 F.3d 734, 741 (5th Cir. 2005).

405. *Id.* at 746.

406. See *supra* text accompanying notes 377-93.

1983, and a private claim under Title VI all do require such a showing,<sup>407</sup> which means that, to the extent an impact-only claim of discriminatory municipal services is made, the FHA would be uniquely valuable. Still, such a claim seems unlikely to occur very often.<sup>408</sup> It would require that the defendant-municipality's inferior services to a black neighborhood result from a neutral policy that, albeit having a disproportionate impact on minorities, is being applied in a nondiscriminatory way.<sup>409</sup> Except for the defendants' assertion in *Hawkins* that they needed to upgrade services in poorer neighborhoods on a delayed basis because of fiscal constraints,<sup>410</sup> it is hard to imagine such a neutral policy and therefore hard to imagine an impact-only claim of discriminatory municipal services.

Apart from these issues, the arguments I have made for FHA coverage of discriminatory municipal services have gone no farther than what would be substantively outlawed by § 1982 and § 1983.<sup>411</sup> Therefore, the primary value of FHA coverage would be in those cases where the FHA's procedures or relief are more favorable than § 1982's and § 1983's. One possible difference here is that

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407. See *supra* notes 148-50 and accompanying text (§ 1982); *supra* notes 122-23 and accompanying text (equal protection claims under § 1983); *supra* note 155 and accompanying text (Title VI).

408. See, e.g., *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994) (noting that there is "no substantial difference between these [§ 1982 and § 1983] claims and the Fair Housing Act claim[] . . . , except that plaintiffs who make claims under § 1982, and under § 1983 based on equal protection, have been required to allege that some intentional discrimination took place. Because the plaintiffs do allege that the County intentionally discriminated against them, the complaint adequately states both claims.") (citation omitted); cf. *Good Shepherd Manor Found. v. City of Momence*, 323 F.3d 557, 565 (7th Cir. 2003) (suggesting that City's cut-off of water supply to group home for disabled persons would violate the FHA if it were motivated by "discriminatory intent," but that such a claim could not be based on discriminatory impact).

409. See SCHWEMM, *supra* note 13, § 10:6 nn.1-3 and accompanying text.

410. See *Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1168-69 (N.D. Miss. 1969), *rev'd*, 461 F.2d 1171 (5th Cir. 1972).

411. Even if FHA coverage only goes as far as § 1982 and § 1983, one advantage of such coverage would be the availability of the FHA's § 3617, see 42 U.S.C. § 3617 (2000), which outlaws, inter alia, retaliation against those who have exercised their § 3604 rights. Compare SCHWEMM, *supra* note 13, § 20:5 n.2 and accompanying text (describing § 3617 retaliation claims) with *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 30 (2007) (granting certiorari to determine whether retaliation claims may be brought under the 1866 Civil Rights Act).

The FHA's § 3617 also bans interference with current residents and others who have exercised their § 3604 rights, see SCHWEMM, *supra* note 13, § 20:1 nn.5-6 and accompanying text, but, given the text's conclusion that § 3604 itself covers discriminatory municipal services claims by such residents, the additional value of § 3617 in these cases—other than to protect against retaliation—would seem to be marginal. See, e.g., *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1144 (N.D. Ill. 1993) (upholding black homeowners' § 3617 claim of discrimination in the provision of police protection as a result of having held that such discrimination violates § 3604(b)).

standing to sue is broader under the FHA, extending not only to the direct victims of a defendant's discrimination (e.g., local homeowners in a discriminatory municipal services case), but also to all others injured by such discrimination, including fair housing organizations and other advocacy groups.<sup>412</sup> Furthermore, the FHA, unlike § 1982 and § 1983, authorizes both HUD and the Justice Department to bring enforcement suits,<sup>413</sup> and both have been active in certain types of discriminatory municipal services cases.<sup>414</sup>

Another clear difference between the FHA versus § 1982 and § 1983 is that the former is subject to different statutes of limitations, with the FHA having a one-year limitations period for administrative complaints and a two-year period for private lawsuits,<sup>415</sup> while § 1982 and § 1983, being silent on this matter, are governed by the local state's most analogous limitations period.<sup>416</sup> This difference has proved important in some cases challenging discriminatory government services.<sup>417</sup> Furthermore, the "continuing violation theory" as a way

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412. See, e.g., *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 476-77 (S.D. Ohio 2007) (noting, in a municipal services case, that the FHA claim was brought by organizational plaintiffs as well as homeowner-plaintiffs, whereas only the latter brought the § 1982, § 1983, and Title VI claims); *Reeves v. Carrollsburg Condo. Owners Ass'n*, No. Civ. A. 96-2495RMU, 1997 WL 187720, at \*2-5 (D.D.C. Dec. 18, 1997) (upholding fair housing organization's standing to bring FHA claim based on condominium association's toleration of race and sex harassment of condominium resident, but denying such standing under § 1981 and § 1982); see also *Jackson*, 21 F.3d at 1539-40 (upholding "neighborhood standing" under the FHA, but declining to address such standing under § 1982 and § 1983). See generally *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979) (holding that FHA standing "extend[s] to the . . . limits of Art. III" and that anyone may sue who is "genuinely injured by conduct that violates *someone's* . . . rights" under the FHA).

413. See 42 U.S.C. § 3610(a)(1)(A)(i) (authorizing HUD to file FHA administrative complaints) and § 3614(a) (authorizing the Attorney General to file FHA "pattern or practice" actions).

414. See, e.g., HUD and Justice cases cited *supra* note 402.

415. See 42 U.S.C. § 3610(a)(1)(A)(i) (addressing administrative complaints) and § 3613(a)(1)(A) (addressing civil lawsuits).

416. See SCHWEMM, *supra* note 13, § 27:21 n.7 and accompanying text (regarding § 1982) and § 28:10, nn.14-16 and accompanying text (regarding § 1983).

417. See, e.g., *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187-88 (4th Cir. 1999) (dismissing as "time-barred" § 1983 claim under Maryland's three-year limitations period in a claim by black residents' challenging the siting of a new highway near their neighborhood); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 450-51 (E.D. Pa. 2006) (dismissing, in case alleging discriminatory municipal services, § 1983 claim as time barred, but dealing with claim based on FHA's § 3604(b) on the merits); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 956-58 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004) (dismissing as time barred § 1982 and § 1983 claims based on Tennessee's one-year limitations period, while upholding some FHA claims by black property owner who alleged that municipal officials denied water service to plaintiff's planned home because of his race); cf. *Franks v. Ross*, 313 F.3d 184, 188 n.1, 194-96 (4th Cir. 2002) (upholding § 1982 and equal protection

for plaintiffs to extend the limitations period—which may often be important in cases involving discriminatory municipal services<sup>418</sup>—is well-established under the FHA,<sup>419</sup> but has a mixed record in such cases based on § 1982 and § 1983.<sup>420</sup> Another statute-of-limitations advantage of the FHA is that FHA actions brought by the Justice Department seeking injunctive relief are not subject to any time limits.<sup>421</sup>

Finally, while the same relief is generally available in FHA and § 1982 cases (i.e., injunctive relief, actual and punitive damages, and attorney's fees awards),<sup>422</sup> there may be two differences, both of which deal with limits on damage awards that may be assessed against municipalities and their officials. The problem derives from the fact that in § 1983-based cases against such defendants, individual officials have been accorded qualified ("good faith")<sup>423</sup> immunity from damage awards,<sup>424</sup> and municipalities are not subject to punitive damages.<sup>425</sup> It is unclear whether either or both of these limits applies to § 1982

claims based on North Carolina's three-year limitations period in case where residents of black town claimed County was siting undesirable landfill near them based on race and where plaintiffs' FHA claim had been dismissed).

418. *See, e.g.*, cases described *supra* notes 398, 417.

419. *See* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). In the 1988 FHAA, Congress endorsed the "continuing violation theory." *See* 42 U.S.C. § 3610(a)(1)(A)(i), § 3613(a)(1)(A); SCHWEMM, *supra* note 13, § 25:2 nn.22-23 and accompanying text.

420. *Compare* *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 488-92 (S.D. Ohio 2007) (upholding, based on continuing violation theory, timeliness of claims based on § 1982 and § 1983 as well as those based on the FHA), *with* *Middlebrook*, 341 F. Supp. 2d at 956-58, 957 n.5 (dismissing as time barred § 1982 and § 1983 claims on the ground that no continuing violation exists here for defendants' "passive inaction" in case brought by black property owner alleging that municipal officials denied water service to plaintiff's planned home because of his race), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004).

421. *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 26:5 nn.6, 8.

422. *See* 42 U.S.C. § 3613(c) (FHA); SCHWEMM, *supra* note 13, § 27:22-:24 (discussing § 1982). Punitive damages are not available against municipal defendants under § 1983. *See infra* note 425 and accompanying text.

423. *See, e.g.*, *Kennedy*, 505 F. Supp. 2d at 499 (discussing qualified immunity as "good faith' immunity").

424. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 806-08, 813-19 (1982). Local legislators have absolute immunity from § 1983 damage claims when acting in their legislative capacity. *See* *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). However, "qualified immunity represents the norm," *Harlow*, 457 U.S. at 807, and such "good faith" immunity would thus generally apply to zoning officials and others likely to be sued in municipal services discrimination cases. *See, e.g.*, *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 260-61 (Wash. 1998).

425. *See* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981); *see also* *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*17 (N.D. Tex. Feb. 14, 2002) (disallowing punitive damages in § 1983 claim alleging discriminatory services by municipality based on *City of Newport*, but denying such damages under the FHA only after analyzing the

or the FHA. One possibility, however, is that § 1982 would be interpreted with similar damage limits to those of § 1983 because both statutes were passed during the post-Civil War era,<sup>426</sup> whereas the FHA, as a modern civil rights statute, was not.<sup>427</sup> Although one recent municipal services decision read the FHA as subject to both of these limitations,<sup>428</sup> this view is not well established.<sup>429</sup> If it is not followed, then the FHA could be of unique value in such cases, particularly with respect to its potential authorization of punitive damage awards against municipal defendants.

### CONCLUSION

Four decades after passage of the federal Fair Housing Act, racially segregated housing patterns remain the norm throughout the United States, a

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specific facts alleged here).

Punitive damages are also not available under Title VI of the 1964 Civil Rights Act. *See Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002).

426. *See, e.g., Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 670 F.2d 1, 3-4 (1st Cir. 1982) (holding that municipalities' § 1983 immunity from punitive damages also applies to claims under § 1981); *cf. Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (described *supra* note 379 para. 2). *But see Phillips v. Hunter Trails Cmty. Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) (finding it "doubtful" that municipalities' immunity from § 1983 punitive damages also applies to § 1982 claims).

427. *See, e.g., Miller*, 2002 WL 230834, at \*17 (described *supra* note 425). Punitive damages are explicitly authorized in privately initiated enforcement actions under the FHA. *See* 42 U.S.C. § 3613(c)(1). Nor does the FHA explicitly provide for immunity for individual public defendants, although such immunity has been accorded to some public officials in FHA cases. *See SCHWEMM, supra* note 13, § 12:5 n.19 and accompanying text.

428. *See Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492 n.21, 499-500 (S.D. Ohio 2007).

429. As to whether municipalities may be sued for punitive damages under the FHA, *compare Phillips*, 685 F.2d at 191 (affirming FHA punitive award against defendant that was assumed to be a municipality for purposes of claiming immunity from such an award), *with N.J. Coal. of Rooming & Boarding House Owners v. Mayor of Asbury Park*, 152 F.3d 217, 225 (3d Cir. 1998) (expressing doubt in FHA case that punitive damages "can be . . . awarded against" municipalities) *and Developmental Servs. of Neb. v. City of Lincoln*, 504 F. Supp. 2d 726, 738 n.20 (D. Neb. 2007) (citing *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1158 (C.D. Cal. 2001) for the proposition that the FHA "does not authorize punitive damages against municipalit[ies]"); *see also Miller*, 2002 WL 230834, at \*17 (described *supra* note 425). Regardless of how this issue is settled, it appears that civil penalties may be assessed against municipalities in a proper FHA case brought by the government. *See, e.g., Smith & Lee Assocs. v. City of Taylor*, 13 F.3d 920, 933 (6th Cir. 1993); *United States v. Borough of Audubon*, 797 F. Supp. 353, 363 (D.N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992).

As to whether municipal officials sued for damages under the FHA enjoy § 1983-like immunities, some courts have held that they do, but this issue has not yet been authoritatively settled. *See SCHWEMM, supra* note 13, § 12B:5 nn.15-19 and accompanying text.

result that would have dismayed the FHA's original proponents. One consequence of this on-going segregation is that residents of minority neighborhoods continue to be in a position to allege that they are receiving inferior municipal services to those provided in comparable white communities. This type of claim was well known when the FHA was in its infancy and the primary bases for challenging such discrimination were thought to be the Equal Protection Clause and § 1982 of the 1866 Civil Rights Act.

The FHA soon emerged as an alternative basis for such challenges, particularly as the courts gave this statute a generous construction. The 1988 Fair Housing Amendments Act added to this momentum by, *inter alia*, providing the FHA with a much stronger set of enforcement mechanisms and directing HUD to issue substantive regulations, one of which soon identified discriminatory municipal services as being outlawed by the FHA.

In the meantime, however, the federal judiciary was becoming more hostile to civil rights claims, as a series of ever more conservative Republican presidents made good on their promises to appoint increasingly reactionary judges to the federal bench. Ultimately, the retrenchment of the federal judiciary on civil rights was reflected in two appellate decisions involving the FHA—by the Seventh Circuit in *Halprin* in 2004<sup>430</sup> and the Fifth Circuit in *Cox* in 2005<sup>431</sup>—that narrowly construed the FHA's most important provision, § 3604, as protecting only homeseekers rather than also current residents.<sup>432</sup> In *Halprin*, Judge Posner ruled that § 3604(a) and § 3604(b) did not extend to post-acquisition discrimination,<sup>433</sup> and, agreeing with *Halprin*, Judge Higginbotham in *Cox* held that neither of these provisions could be invoked by residents of a black neighborhood to challenge inferior municipal services that negatively affected the habitability of their homes.<sup>434</sup>

Focusing on the *Cox* issue of whether the FHA outlaws discriminatory municipal services, this Article has closely examined the language and legislative history of § 3604(a) and § 3604(b) and has shown that *Halprin* and *Cox* were wrong to interpret them not to apply in post-acquisition situations. In particular, § 3604(b)'s guarantee of nondiscrimination in housing-related "privileges" and "services"—even if limited to those connected with the "sale or rental of a dwelling"—should apply, as to "rentals," throughout a tenant's residency and, as to "sales," to privileges and services that are tied to homeownership.<sup>435</sup>

The latter would include fire and police protection, garbage collection, and a number of other services provided by local governments to residents based on their ownership of property in the area. This interpretation of § 3604(b), however, would not include the precise claim made by the plaintiffs in *Cox*,

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

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

432. *See Cox*, 430 F.3d at 744-45; *Halprin*, 388 F.3d at 329-30.

433. *Halprin*, 388 F.3d at 330.

434. *Cox*, 430 F.3d at 744-45.

435. *See* 42 U.S.C. § 3604(b) (2000).

which was that the municipal defendant discriminatorily failed to adequately enforce its zoning laws against another property owner.<sup>436</sup>

This Article's ultimate conclusion is that, while the result in *Cox* may be defended, its analysis and that of *Halprin* are so flawed—and in particular have so misconstrued § 3604(b) of the FHA—that they should be rejected by other federal and state courts, even as they stand as an unfortunate impediment to FHA enforcement in the Fifth and Seventh Circuits for the foreseeable future.<sup>437</sup> For these other courts, the analysis offered in this Article provides a sounder approach to FHA-based claims alleging discriminatory municipal services and, more generally, to § 3604(b) claims in post-acquisition situations.

A final comment is in order. While the misguided analysis in *Halprin* and *Cox* should be rejected in favor of a broader interpretation of the FHA, the ultimate problem in *Cox*—that of inferior services being provided to predominantly minority neighborhoods—will, in my judgment, be with us long after the *Halprin-Cox* analysis has been laid to rest. The problem of discriminatory municipal services is, after all, a function of the fact that ghetto-like, one-race neighborhoods continue to exist in the face of the clear desire of the FHA's proponents to replace them with truly integrated housing patterns. Until this 1968 dream becomes a twenty-first century reality, residents of heavily minority neighborhoods will suffer in countless ways,<sup>438</sup> not the least of which is that municipal officials will continue to be tempted to under-serve these areas regardless of the threat of an FHA lawsuit.<sup>439</sup> That threat, after all, has been available under the Equal Protection Clause and § 1982 for decades, and yet lawsuits alleging discriminatory municipal services continue to be filed on a regular basis throughout the Nation. The only long-term hope for ending such discrimination is to end the prerequisite for such claims. This means, at long last, to achieve the integrated housing patterns envisioned by the FHA.

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436. *Cox*, 430 F.3d at 740.

437. See, e.g., *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, 235 F. App'x 227, 227-28 (5th Cir. 2007) (affirming dismissal of FHA claims by condominium owner "because they go to the habitability of her condominium and not the availability of housing" (citing *Cox*, 430 F.3d at 741; *Halprin*, 388 F.3d 327)).

438.

Residential segregation is not benign. It does not mean only that blacks and Hispanics, Asians and whites live in different neighborhoods with little contact between them. It means that whatever their personal circumstances, black and Hispanic families on average live at a disadvantage and raise their children in communities with fewer resources. It cannot be a surprise, then, that it is harder for them to reach their potential.

JOHN R. LOGAN, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA* 20 (2002), available at [http://www.s4.brown.edu/cen2000/SepUneq/SUReport/Separate\\_and\\_Unequal.pdf](http://www.s4.brown.edu/cen2000/SepUneq/SUReport/Separate_and_Unequal.pdf).

439. "[Americans] seem to understand, if not accept, that the opportunities and amenities available in a neighborhood, as well as the responsiveness of local government to its needs, are often closely calibrated to its racial and economic makeup." CASHIN, *supra* note 7, at xvi.

