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## A HERCULEAN LEAP FOR THE HARD CASE OF POST-ACQUISITION CLAIMS: INTERPRETING FAIR HOUSING ACT SECTION 3604(b) AFTER MODESTO

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## **Cover Page Footnote**

I dedicate this Note to my mother, grandparents, and uncle. I will always be eternally grateful for their unwavering love and support, and the countless hours they spent with me contributing to all of my endeavors. I would also like to thank Council Member Gale A. Brewer for her valuable insight into housing discrimination, Kunal Malhotra for his input, and the Editors and Staff of the Fordham Urban Law Journal for their hard work and guidance throughout the Note writing process. In addition, special thanks are due to Ryan Merola and Danny Kane for their continuous encouragement.

**A HERCULEAN LEAP FOR THE HARD CASE OF  
POST-ACQUISITION CLAIMS: INTERPRETING  
FAIR HOUSING ACT SECTION 3604(b) AFTER  
MODESTO**

*Mary Pennisi\**

*The hard truth on the matter is  
that American courts have no  
intelligible, generally accepted,  
and consistently applied theory  
of statutory interpretation.<sup>1</sup>*

*Housing was the last plank in  
the civil rights revolution, and  
it is the realm in which we  
have experienced the fewest  
integration gains.<sup>2</sup>*

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1. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskeridge, Jr. & Philip P. Frickey eds., 1994).

2. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 3 (2004).

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## INTRODUCTION

Lynne Bloch and her family peacefully occupied their Chicago condominium for over thirty years.<sup>3</sup> Lynne even served on the condominium's association board.<sup>4</sup> As observant Jews, the Blochs kept a mezuzah affixed

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3. *Bloch v. Frischholz*, 533 F.3d 562, 567 (7th Cir. 2008) (Wood, J., dissenting), *aff'd in part and rev'd in part en banc*, 587 F.3d 771 (7th Cir. 2009).

4. *Id.*

to their doorframe facing the hallway as required by the Jewish faith.<sup>5</sup> A mezuzah is a small parchment inscribed with Torah verses and encased in a carved box that is typically a few inches long and one inch wide.<sup>6</sup> Its size is comparable to that of a cigarette lighter or roll of Lifesavers candy. In September 2001, the board passed the “Hallway Rule,” prohibiting residents from placing “[m]ats, boots, shoes, carts or objects of any sort” outside their doors.<sup>7</sup> Lynne did not foresee that the rule would impact her family’s mezuzah.<sup>8</sup> However, in 2004, while repainting the hallways, the association removed all mezuzot and other religious symbols.<sup>9</sup> When Lynne affixed another mezuzah, the association once again removed it over her objections.<sup>10</sup> The removals continued even during the funeral of Lynne’s husband, despite her request that the association allow her to display the mezuzah during the weeklong shiva.<sup>11</sup> Upon returning from her husband’s burial with the family’s rabbi, she found the mezuzah removed and felt humiliated while explaining its absence to him.<sup>12</sup> When she sued under the Fair Housing Act (FHA), the Seventh Circuit found that the Blochs could not raise a claim for post-acquisition discrimination under § 3604(b).<sup>13</sup> Judge Frank Easterbrook wrote, “[o]ur job is not to make the law the best it can be, but to enforce the law actually enacted.”<sup>14</sup>

Housing discrimination remains pervasive during the post-acquisition phase, i.e., after homeowners or renters take possession of their dwellings, particularly in urban areas.<sup>15</sup> A split in federal circuit courts has left protection against housing discrimination for dwellers such as the Blochs under FHA § 3604(b) in a state of uncertainty. The FHA prohibits housing providers, e.g., landlords, homeowners, real estate companies, municipalities, and insurance companies, from discriminatorily making housing unavailable to members of certain groups based on their race, religion, sex, national origin, familial status, or disability.<sup>16</sup> Section 3604(b) specifically prohibits “discriminat[ion] against any person in the terms, conditions, or

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5. See *id.* at 564; see also *Deuteronomy* 6:4-21 (explaining the religious obligation).

6. See Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 67 n.340 (1992) (describing mezuzot and related consumer protection statutes).

7. *Bloch*, 533 F.3d at 563, 567.

8. *Id.* at 563.

9. *Id.*

10. *Id.* at 567.

11. *Id.*

12. *Id.* at 567-68.

13. *Id.* at 565-66.

14. *Id.* at 565.

15. See *infra* notes 438-42 and accompanying text.

16. 42 U.S.C. § 3604 (2006).

privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” because of a protected characteristic.<sup>17</sup>

On October 8, 2009, *Committee Concerning Community Improvement v. City of Modesto*<sup>18</sup> created a split in federal circuit courts over whether FHA § 3604(b) applies to discrimination that occupants suffer *after* acquiring their dwellings. The Ninth Circuit<sup>19</sup> and many district courts<sup>20</sup> have held that § 3604(b) applies to post-acquisition events. By contrast, the Fifth Circuit<sup>21</sup> and Seventh Circuit<sup>22</sup> narrowly interpret the FHA to limit § 3604(b) to claims involving discrimination that occurs during the pre-acquisition phase or that amounts to constructive eviction. The Seventh Circuit’s recent decision to rehear the Blochs’ case en banc after *Modesto* reflects the exceptional importance and timeliness of this circuit split in civil rights jurisprudence.<sup>23</sup> The Seventh Circuit’s painstaking effort to re-fashion the Blochs’ post-acquisition claim into a pre-acquisition claim also demonstrates the arbitrariness of these temporal distinctions and reveals how the statute is fundamentally ambiguous.

This Note examines the split in federal circuit courts created by *Modesto*. Part I examines the history of the FHA and theories of statutory interpretation. Part II discusses the split in federal authority and both sides’ interpretative methodologies and rationales. It demonstrates how the circuits subscribe to the same intent-based and meaning-based theories of statutory interpretation, yet arrive at different conclusions. Part III.A maintains that meaning-based and intent-based theories are unavailing because the disagreement between the circuits arises from a fundamental ambiguity in the statute regarding what constitutes housing access, integration, and the “pri-

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17. 42 U.S.C. § 3604(b).

18. 583 F.3d 690 (9th Cir. 2009).

19. *Id.* at 713.

20. *See* *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*3-4 (M.D. Fla. May 2, 2005) (differentiating the rental context, where the discrimination can be ongoing, from the sale context, where the buyer and seller relationship quickly concludes); *United States v. Koch*, 352 F. Supp. 2d 970, 977 (D. Neb. 2004) (finding that tenant’s post-acquisition sexual harassment claims under § 3604 were cognizable under the FHA); *Landesman v. Keys Condo. Owners Ass’n*, No. C 04-2685 PJH, 2004 WL 2370638, at \*2 (N.D. Cal. Oct. 19, 2004) (permitting a claim against condominium association facilities rules alleging discrimination against families with children).

21. *See* *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding that the city’s allegedly racially discriminatory failure to prevent illegal dumping in a predominantly African American neighborhood was not a cognizable claim under § 3604(b) of the FHA because the service was “not connected to the sale or rental of a dwelling”).

22. *Bloch v. Frischholz*, 533 F.3d 562, 563-64 (7th Cir. 2008), *aff’d in part and rev’d in part en banc*, 587 F.3d 771 (7th Cir. 2009); *see also* *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004).

23. *See* *Bloch v. Frischholz*, 587 F.3d 771, 771 (7th Cir. 2009).

vileges of sale or rental.” Because traditional interpretive theories fail to resolve this ambiguity, Part III.B offers a solution based on an alternative interpretive theory, the Coherence Theory, developed by Ronald Dworkin.<sup>24</sup> The Coherence Theory posits that *Modesto* presents a Dworkinian tie because housing “access” can be conceptualized as either achieving genuine ongoing integration and discrimination-free housing or enabling protected classes to merely take and maintain physical possession of dwellings. This Note suggests that the Supreme Court should resolve the split in authority by interpreting the FHA to advance the “policies or principles that furnish the best political justification for the statute” as maintained by Dworkin.<sup>25</sup> It analyzes the related principles and policy issues concerning housing discrimination underlying the FHA and posits that the Supreme Court should recognize that the distinction between pre- and post-acquisition discrimination is arbitrary because housing availability, access, and integration involve ongoing rights that do not end at the point of acquisition. This Note concludes that the Supreme Court should abolish the distinction between pre- and post-acquisition discrimination by adopting the Ninth Circuit’s interpretation and by allowing occupants such as the Blochs to seek redress under § 3604(b) for discriminatory treatment that occurs after acquiring their dwelling not amounting to constructive eviction.

## I. BACKGROUND OF THE FAIR HOUSING ACT

Part I explains the FHA and its history. It also reviews methods of interpretation that courts use to resolve close questions of statutory law.

### A. History of the FHA

This section discusses the substantive provisions and enforcement mechanism of the FHA along with its legislative and social history. Congress enacted the FHA as Title VIII of the Civil Rights Act of 1968.<sup>26</sup> The FHA states that it “is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>27</sup> It protects particularly vulnerable groups against discrimination in housing.<sup>28</sup>

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24. RONALD DWORKIN, A MATTER OF PRINCIPLE 325-29 (1985) [hereinafter MATTER OF PRINCIPLE] (applying Coherence Theory to a hard case of statutory interpretation).

25. *See id.* at 327.

26. *See* Fair Hous. Council of Orange Cnty., Inc. v. Ayres, 855 F. Supp. 315, 316 (C.D. Cal. 1994).

27. 42 U.S.C. § 3601 (2006).

28. *See* Karen Wong, *Narrowing the Definition of “Dwelling” Under the Fair Housing Act*, 56 UCLA L. REV. 1867, 1867 (2009).

### 1. *The Statute*

Sections 3604, 3605,<sup>29</sup> and 3606<sup>30</sup> of the FHA enumerate substantive rights and protections enforced under § 3617.<sup>31</sup> Sections 3604(a)-(c) and 3617 prominently figure into the debate over post-acquisition claims.

Section 3604(a) protects particular classes of individuals against discriminatory refusals, which hinder them from acquiring a dwelling in the first instance by making it unlawful “[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>32</sup> The phrase “otherwise make unavailable” covers discriminatory acts that hinder individuals from obtaining housing through such means as racial steering,<sup>33</sup> discriminatory zoning,<sup>34</sup> discriminatory provisions of municipal services,<sup>35</sup> and mortgage or insurance redlining.<sup>36</sup> Section 3604(a) also protects dwellers against discriminatory acts that cause them to abandon or lose their dwellings, such as constructive eviction.<sup>37</sup>

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29. 42 U.S.C. § 3605 (2006) (prohibiting discrimination in residential real estate transactions).

30. 42 U.S.C. § 3606 (2006) (prohibiting discrimination in real estate brokerage services).

31. 42 U.S.C. § 3617 (2006); *see also* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 11-12 (2008).

32. 42 U.S.C. § 3604(a) (2006).

33. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982); *Casa Marie, Inc. v. Super. Ct. of P.R.*, 988 F.2d 252, 257 n.6 (1st Cir. 1993); *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992); *Vill. of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321, 1330 (N.D. Ill. 1979); *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977); *Heights Cmty. Cong. v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1, 3 (N.D. Ohio 1975).

34. *See, e.g.*, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1219 (2d Cir. 1987); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) (“An authority may not . . . select sites for projects which will be occupied by non-whites only in areas already heavily concentrated with a high proportion of non-whites.”); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 811-12 (3d Cir. 1970).

35. *See* 24 C.F.R. § 100.70(d)(4) (2010).

36. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995) (addressing insurance redlining); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298-99, 301 (7th Cir. 1992) (addressing insurance redlining); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976) (addressing mortgage redlining).

37. 42 U.S.C. § 3604(a) (“[I]t shall be unlawful . . . [to] make unavailable or deny[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”); *see also, e.g.*, *Cox v. City of Dallas*, 430 F.3d 734, 745-46 (5th Cir. 2005); *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (finding discrimination where a landlord falsely claimed not to receive a black tenant’s rent check and gave her notice to vacate); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (noting that owners’ attempt to evict families with children had a disparate impact on minority tenants); *Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845, 851 (N.D. Ill. 2003); *Byrd v. Brandenburg*, 922 F. Supp. 60,



Section 3604(b) prohibits “discriminat[ion] 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 a protected characteristic.<sup>38</sup> The section applies to: (i) proposed terms of sale or rental;<sup>39</sup> (ii) services or facilities related to the initial sale or rental transaction;<sup>40</sup> (iii) terms and conditions of housing after rental or sale, including discriminatorily subjecting a specific tenant to different rules or fines, imposing higher fines, increasing rent,<sup>41</sup> or adopting similar generally discriminatory rules;<sup>42</sup> (iv) maintenance or services connected to a dwelling, especially delaying repairs;<sup>43</sup> (v) privileges of using a dwelling;<sup>44</sup> (vi)

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64 (N.D. Ohio 1996); *Woods v. Foster*, 884 F. Supp. 1169, 1174-75 (N.D. Ill. 1995); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 n.6 (N.D. Ill. 1985) (finding that a racial-based firebombing intended to evict plaintiffs would violate § 3604(a)).

38. 42 U.S.C. § 3604(b).

39. *See* 24 C.F.R. § 100.65(b)(1) (2010); *see also, e.g.*, *Gorski v. Troy*, 929 F.2d 1183, 1189 (7th Cir. 1991) (striking down a lease which barred children without owners’ written consent); ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION* 14-4 (2005). The statute also applies to contractual terms that are facially neutral but have a disparate impact. *See, e.g.*, 24 C.F.R. § 100.70(a) (2010) (proscribing the “discourage[ment] or obstruct[ion] [of] choices in a community, neighborhood or development”); *see also* *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980) (upholding a victim of discrimination’s claim of racial steering although the victim was ultimately permitted to purchase the home); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 445 (5th Cir. 1973) (finding an FHA violation where the terms of sale differed between blacks and whites); *Brown v. Lo Duca*, 307 F. Supp. 102, 106 (E.D. Wis. 1969) (granting injunction where a landlord charged black tenants higher rent than white tenants).

40. *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 302 (7th Cir. 1992) (finding FHA to be applicable where lending institutions refused to offer insurance coverage in minority areas); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (finding discrimination where a real estate agent withheld information about listings to black home-seekers while informing white home-seekers); SCHWEMM, *supra* note 39, at 14-17.

41. *See, e.g.*, *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995).

42. *See, e.g.*, *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982); *Bills v. Hodges*, 628 F.2d 844, 845 (4th Cir. 1980); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976).

43. 24 C.F.R. § 100.65(b) (“Prohibited actions . . . include . . . [f]ailing or delaying maintenance or repairs . . .”). Many courts have upheld claims against landlords who deprive tenants of services based on a protected characteristic. *See, e.g.*, *Marbly v. Home Props. of N.Y.*, 205 F. Supp. 2d 736, 743 (E.D. Mich. 2002). Courts have also allowed tenants to sue landlords for providing substandard services to an entire dwelling based on its tenants’ shared protected characteristics. *See, e.g.*, *Durrett v. Hous. Auth.*, 896 F.2d 600, 601, 605 (1st Cir. 1990); *Concerned Tenants Ass’n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980) (permitting FHA claim to proceed where management stopped servicing the dwelling when its occupants became predominantly black).

44. 24 C.F.R. § 100.65(b)(4). Landlords cannot discriminatorily exclude tenants from an amenity or common area. *See, e.g.*, *Schroeder v. De Bertolo*, 879 F. Supp. 173, 175 (D. P.R. 1995) (noting that a disabled woman was excluded from common areas).

harassment;<sup>45</sup> and (vii) provision of municipal services.<sup>46</sup> Post-acquisition claims under § 3604(b) most often involve discrimination in the terms and conditions of housing *after* rental or sale, such as maintenance, privileges, harassment, and municipal services.<sup>47</sup> In the conflicting federal cases, vic-

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45. This application evolved from Title VII jurisprudence, which prohibits employers from “discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment . . . .” 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII’s “terms and conditions” provision is similar to the terms and conditions language of § 3604(b) and led courts to apply § 3604(b) to housing harassment claims similar to both quid pro quo and hostile environment theories. *See* United States v. Veal, 365 F. Supp. 2d 1034, 1036 (W.D. Mo. 2004); *see also* Krueger v. Cuomo, 115 F.3d 487, 491 (7th Cir. 1997); Bellevue v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); Grieger v. Sheets, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988); New York *ex rel.* Abrams v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988).

46. Courts have applied § 3604(b) to situations where a municipality provides substandard services to areas dominated by occupants from a protected class. *See, e.g.*, United Farmworkers of Fla. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974) (dealing with sewage treatment); *see also, e.g.*, Franks v. Ross, 313 F.3d 184, 191 (4th Cir. 2002); McCauley v. City of Jacksonville, No. 86-1674, 1987 WL 44775, at \*2 (4th Cir. Sept. 8, 1987); Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) (“That subsection [(b)] applies to services generally provided by governmental units such as police and fire protection or garbage collection . . . .”); Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*6-9 (N.D. Tex. Sept. 9, 2004); Middlebrook v. City of Bartlett, 341 F. Supp. 2d 950, 960-61 (W.D. Tenn. 2003) (dealing with discrimination in water services); Miller v. City of Dallas, No. 3:98-CV-2955-D, 2002 WL 230834, at \*14 (N.D. Tex. Feb. 14, 2002) (dealing with flood protection, zoning, landfill practices, street drainage, and federal funding); Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (addressing discrimination in the provision of police protection). However, because the FHA is not a “civil rights statute of general applicability,” but instead “deal[s] with the specific problems of fair housing opportunities,” some courts have only recognized claims involving “traditional” municipal services directly related to housing. Jersey Heights Neighborhood Ass’n v. Glendening, 174 F.3d 180, 193 (4th Cir. 1999) (citing Vercher v. Harrisburg Hous. Auth., 454 F. Supp. 423, 424 (M.D. Pa. 1978)); S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot., 254 F. Supp. 2d 486, 502-03 (D. N.J. 2003) (holding that industrial air pollution permits do not constitute “services”); Laramore v. Ill. Sports Facilities Auth., 722 F. Supp. 443, 452 (N.D. Ill. 1989) (noting that § 3604(b) does not cover municipal zoning decisions).

47. *See, e.g.*, Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 690 (9th Cir. 2009) (alleged discrimination concerning provision of municipal services to predominantly Hispanic communities, including sewage treatment and law enforcement); Bloch v. Frischholz, 533 F.3d 562, 563-64 (7th Cir. 2008) (prohibiting residents from affixing objects, including religious symbols, to doorways), *aff’d in part and rev’d in part en banc*, 587 F.3d 771 (7th Cir. 2009); Cox v. City of Dallas, 430 F.3d 734, 749 (5th Cir. 2005) (dismissing complaints of illegal dumping in a predominantly black neighborhood); Richards v. Bono, No. 5:04-CV484-OC-10GRJ, 2005 WL 1065141, at \*3-4 (M.D. Fla. May 2, 2009) (claiming male landlord sexually harassed female tenant and made quid pro quo sexual demands); Landesman v. Keys Condo. Owners Ass’n, No. C 04-2685 PJH, 2004 WL 2370638, at \*1-2 (N.D. Cal. Oct. 19, 2004) (alleging discrimination against families with children for restricting minors’ access to common areas and amenities); United States v. Koch, 352 F. Supp. 2d 970, 973 (D. Neb. 2004) (claiming male landlord sexually harassed female tenants).

tims typically allege violations that arise during the post-acquisition phase when a housing provider, such as a landlord or condominium board, interferes with a dwelling or withholds services from the tenant or owner.<sup>48</sup>

Section 3604(c) prohibits “mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published [any] . . . notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination” based on a protected category, “or . . . inten[ding] to make any such preference, limitation, or discrimination.”<sup>49</sup> Courts typically apply § 3604(c) to pre-acquisition violations where the housing provider discriminatorily advertises the dwelling or negotiates with prospective dwellers.<sup>50</sup> Some courts have upheld § 3604(c) claims concerning post-acquisition discrimination, such as where a landlord makes discriminatory statements to current tenants<sup>51</sup> or presents an eviction notice containing discriminatory language.<sup>52</sup>

Section 3617 provides an enforcement mechanism for § 3604 by making it 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” the substantive rights.<sup>53</sup> The phrase “exercise and enjoyment” protects a dweller’s ability to exercise her substantive rights by filing a HUD complaint without facing retaliatory eviction,<sup>54</sup> assist another person in enjoying her substantive rights by helping the third party file a HUD complaint without facing retaliatory eviction,<sup>55</sup> and acquire or reside in a dwelling free from discrimination, even if the dweller elects not to invoke or exercise her § 3604 rights.<sup>56</sup> Therefore, a housing provider violates § 3617 if she interferes with a dweller’s enjoyment of her § 3604 rights or retaliates against a dweller because the dweller either directly exercised her § 3604 substantive

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48. *See supra* note 37.

49. 42 U.S.C. § 3604(c) (2006).

50. *See, e.g.*, *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972) (alleging landlord advertised rental property as available to white tenants only); *see also, e.g.*, *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1041 (N.D. Ohio 1998) (noting defendant’s statement that she refused to rent to black dwellers).

51. *See, e.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (applying § 3604(c) to a landlord’s agent who made racist statements to a white tenant overheard by a black tenant).

52. *See, e.g.*, *HUD v. Denton*, Fair Hous.—Fair Lending Rep. (Aspen) ¶ 25,014 (HUD ALJ 1991) (concerning a discriminatory statement appended to an eviction).

53. 42 U.S.C. § 3617 (2006).

54. *See Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997).

55. *See Meadows v. Edgewood Mgmt. Corp.*, 432 F. Supp. 334, 335 (W.D. Va. 1977).

56. *See Oliveri, supra* note 31.

rights or helped a third party exercise her § 3604 rights.<sup>57</sup> Section 3617 contains no explicit temporal element and does not link the violative conduct it specifies with the “sale or rental of housing.”<sup>58</sup> Some have suggested that this section may furnish a source for post-acquisition claims where a housing provider interferes with a dweller’s enjoyment of her housing.<sup>59</sup> However, many courts have held that a plaintiff must prove that her housing provider has violated a substantive right granted by the other provisions of the FHA to establish a § 3617 claim.<sup>60</sup> These courts do not permit victims to allege independent violations of § 3617.<sup>61</sup>

## 2. *Legislative History*

Congress passed the FHA amid an avalanche of nationwide riots and the social outcry that followed Dr. Martin Luther King, Jr.’s assassination.<sup>62</sup> Throughout the late 1960s, Congress confronted racial tensions on a daily basis as violence ran rampant blocks away from the Capitol.<sup>63</sup> In response to this social upheaval, a presidential commission called upon Congress to enact fair housing legislation in 1966.<sup>64</sup> As Congress scrutinized various drafts of bills, segregation abounded in residential housing and severely limited African Americans’ abilities to access and integrate into quality dwellings.<sup>65</sup> The FHA’s advocates sought to overturn housing segregation by eliminating pervasive discrimination and promoting integration.<sup>66</sup>

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57. See 42 U.S.C. § 3617.

58. See *Gourlay v. Forest Lakes Civic Ass’n*, 276 F. Supp. 2d 1222, 1235 (M.D. Fla. 2003) (“Section 3617 regulates discriminatory conduct before, during, or after a sale or rental of a dwelling.”).

59. See Oliveri, *supra* note 31.

60. See, e.g., *Frazier v. Rominger*, 27 F.3d 828, 834 (2d Cir. 1994); *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. Civ.A. H-05-3197, 2005 WL 2669480, at \*4 (S.D. Tex. Oct. 19, 2005).

61. *Frazier*, 27 F.3d at 834; *Reule*, 2005 WL 2669480, at \*4.

62. See Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 757 (2008).

63. See Oliveri, *supra* note 31, at 27.

64. PRESIDENT’S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 473 (1968).

65. See *id.* at 259-60; see also DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26-59 (1993).

66. See Richard Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 902, 920 (1988) (citing J. McGrew, HUD Memorandum to L. Simons (1981)) (“Congress anticipated that the abolition of racially discriminatory housing practices would ultimately result in residential integration.”).

The FHA's legislative history is scant compared to the voluminous records that accompany other civil rights-era legislation.<sup>67</sup> It primarily includes floor debates and committee hearings on three prior versions of the bill.<sup>68</sup> Hearings that evaluated prior drafts of the FHA focused on Congress' general imperative to lead African Americans out of urban ghettos and achieve equality through fair housing legislation rather than scrutinizing § 3604's substantive provisions.<sup>69</sup> Floor debates also did not discuss § 3604's substantive language, but instead clarified the FHA's exemptions<sup>70</sup> and identified the proper defendants.<sup>71</sup> Hearing and floor debates are therefore silent on the rationale behind the language adopted in § 3604(b).<sup>72</sup>

Although Congress considered five variations of the bill, the language of § 3604(b) remained largely unchanged throughout the drafting process.<sup>73</sup> In 1966, the Johnson Administration submitted a proposed draft of the provision to Congress.<sup>74</sup> It prohibited homeowners, real estate brokers, and other categories of persons from "discriminat[ing] 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>75</sup> Later, the Senate and House evaluated identical bills<sup>76</sup> in committee hearings using the same language as the Administration's proposal.<sup>77</sup> Subsequently in 1967, Senator Walter

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67. For an example of civil rights-era legislation with voluminous legislative history, see 42 U.S.C. § 1983 (1979).

68. See H.R. 14765, 89th Cong. (1966); S. 3296, 89th Cong. (1966); S. 1358 89th Cong. (1966); see also Schwemm, *supra* note 62.

69. See *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 438-59 (1967); *Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. (1967).

70. The FHA sets forth a limited exemption for owners whose dwellings contain four or fewer units and who reside in one of the units, 42 U.S.C. § 3603(b)(2) (2000), and for single-family homes sold or rented by private individuals who own no more than three such homes and who do not use real estate brokers, agents, or salespeople. 42 U.S.C. § 3603(b)(1).

71. See 114 CONG. REC. 4907 (1968).

72. See Oliveri, *supra* note 31, at 25-30; see also *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992) ("Silence . . . could imply that the debate was about the principle of non-discrimination, leaving details to the future. The backward phraseology of § 3604 suggests [this] possibility.").

73. See 114 CONG. REC. 9612-13 (1968) (stating that the 1968 Senate-passed version of § 3617 was "comparable" to the 1966 House version, which was identical to the Johnson Administration's initial proposal).

74. 112 CONG. REC. 9397 (1966).

75. *Id.*

76. S. 3296, 89th Cong. (1966); H.R. 14765, 89th Cong. (1966).

77. H.R. 14765; S. 3296; 112 CONG. REC. 9394-98.

Mondale submitted another version of the bill<sup>78</sup> with similar language that omitted the word “lease” from the provision.<sup>79</sup> The House passed Senator Mondale’s version,<sup>80</sup> however, the Senate Judiciary Committee rejected it.<sup>81</sup> In early 1968, Senators Mondale and Brooke presented a new proposal that retained the language of Senator Mondale’s original version of § 3604(b).<sup>82</sup> The proposal amended another civil rights bill<sup>83</sup> already under the Senate’s consideration.<sup>84</sup> Senator Everett Dirksen then sponsored a compromise amendment that replaced the Mondale-Brooke proposal.<sup>85</sup> Senator Dirksen changed its enforcement mechanism, but retained Mondale’s and Johnson’s substantive language in section (b).<sup>86</sup> The House then added the amendment to the civil rights bill<sup>87</sup> on the Senate floor.<sup>88</sup> However, when the fair housing title was introduced, no one explained the particular meaning of its substantive provisions.<sup>89</sup>

In 1968, the President’s National Advisory Committee on Civil Disorders released a report on urban riots that accelerated Congress’ progress on

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78. S. 1358, 90th Cong. (1967).

79. See *Proposed Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516, and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. (1967).

80. S. 1358; see also 112 CONG. REC. INDEX 1183 (1966); 112 CONG. REC. 18,739-40 (1966) (reporting passage of the bill); *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. (1967).

81. See 112 CONG. REC. INDEX 1183 (1966).

82. See 114 CONG. REC. 4570-73 (1968). The proposal merely added the “Mrs. Murphy” exemption. *Id.* at 2270 (§ 4(f)). It omitted the phrase “oral or written” in § 3604(c), which remained identical to the original language used by the Johnson Administration as amended by the House Judiciary Committee. See *id.* at 4572; see also 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, 204-05 nn.67-73 (2001).

83. H.R. 2516, 90th Cong. (2d Sess. 1968).

84. See 114 CONG. REC. 2270-72 (proposal printed); *id.* at 2279 (amendment formally offered); see also Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 208 (1978). The bill prohibited racially motivated violence against African Americans and civil rights workers. *Id.*

85. See 114 CONG. REC. 4570-73. The Dirksen amendment incorporated an enforcement mechanism through HUD. See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149, 157 (1969).

86. See 114 CONG. REC. 4571; see also Dubofsky, *supra* note 93, at 157. Senator Dirksen merely placed the substantive provisions at the end of the statute and inserted a conclusion sentence, stating that “[t]his section may be enforced by appropriate civil action.” *Id.* The 1988 Fair Housing Amendments Act made a § 3617 enforceable through the FHA’s other enforcement procedures. 42 U.S.C. § 3602(f) (1988).

87. H.R. 2516.

88. Dubofsky, *supra* note 85, at 158.

89. See 114 CONG. REC. 4907 (1968).

the FHA.<sup>90</sup> The report emphasized that racial segregation remained pervasive in housing and threatened the stability of American society.<sup>91</sup> It called Congress to thus expedite the fair housing legislation.<sup>92</sup> One week later, on March 11, 1968, the Senate passed Dirksen's bill with minor amendments and sent it back to the House for approval.<sup>93</sup> On April 10, 1968, while riots raged outside the Capitol and the nation mourned the death of Dr. Martin Luther King, Jr., whose funeral occurred on the preceding day, the House re-considered the bill.<sup>94</sup> The Rules Committee allowed the House to debate the bill for only one hour without committee consideration or the publication of formal reports explaining its terms.<sup>95</sup> While evaluating the Senate-approved version, the House Judiciary Committee Chairman Emanuel Celler compared the bill to the 1966 House-version and noted that the substantive provisions "prohibited almost the exact same type of conduct with respect to housing discrimination."<sup>96</sup> House Republican leader Gerald Ford also noted that § 3604(b) was similar to the House-passed version.<sup>97</sup> The House ultimately voted in favor of the Senate's version.<sup>98</sup>

On April 11, 1968, President Johnson signed the bill and enacted the FHA into law.<sup>99</sup> Congress thereby incorporated Johnson's original language of the substantive provisions into the final version of § 3604(b).<sup>100</sup> The Mondale-Brooke proposal and Dirksen's compromise proposal effectively preserved it.<sup>101</sup>

Because the language of § 3604(b) underwent little scrutiny over the two year drafting process, no legislative records address the subsection's applicability to post-acquisition claims. While the original versions limited po-

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90. See Dubofsky, *supra* note 85, at 158-59; see also PRESIDENT'S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, *supra* note 64, at 263.

91. See Dubofsky, *supra* note 85, at 158-59; see also PRESIDENT'S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, *supra* note 64, at 263.

92. See Dubofsky, *supra* note 85, at 158-59; see also PRESIDENT'S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, *supra* note 64, at 263.

93. See 114 CONG. REC. 5992 (1968); see also Dubofsky, *supra* note 85, at 159.

94. See Oliveri, *supra* note 31, at 27.

95. *Id.*

96. See 114 CONG. REC. 9560 (1968).

97. *Id.* at 9611-13.

98. *Id.* at 9620-21, 5992.

99. See Lyndon B. Johnson, *Remarks Upon Signing the Civil Rights Act*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1968-69, at 509 (1970).

100. 42 U.S.C. § 3604(b) (2006); see also 114 CONG. REC. 4570-73.

101. The Dirksen proposal's alteration of the Mondale-Brooke version did not relate to the eventual wording of § 3604(a) and § 3604(b). See Schwemm, *supra* note 82.

tential defendants to those renting or selling dwellings,<sup>102</sup> Senator Mondale's 1967 proposal replaced this phrase with a general prohibition stating "[i]t shall be unlawful," which makes the FHA applicable to all persons and entities, including municipalities.<sup>103</sup> Some suggest that the original version's inclusion of "manager[s]" and those who have "the authority to . . . manage" dwellings indicates that the Johnson Administration originally intended the substantive provisions to cover discrimination against residents after they acquired their dwellings.<sup>104</sup> Nevertheless, because the language of the subsections was subject to little change and virtually no discussion, the statute's legislative history provides little guidance to courts interpreting the FHA's substantive rights.<sup>105</sup>

Alternatively, the FHA's introduction setting forth its overarching policy goals underwent significant alteration. The Johnson Administration's 1966 original proposal stated, "[i]t 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 Nation."<sup>106</sup> Some have suggested that the phrase "use and occupancy" may indicate that the original drafters intended subsections (a) and (b) to apply to current dwellers and provide post-acquisition claims.<sup>107</sup> Senator Mondale's 1967 proposal, however, partially omitted the phrase, stating, "[i]t is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States."<sup>108</sup> Legislative history sheds no light on Mondale's rationale behind deleting the word "use."<sup>109</sup> Senator Dirksen's version, which later became the FHA, further simplified it with-

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102. The Johnson Administration's proposed bill applied to an "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). The House version only covered real estate professionals, including 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." *Id.* at 18,193.

103. *See* *Ventura Vill., Inc. v. City of Minneapolis*, 419 F.3d 725, 727-28 (8th Cir. 2005) (listing "[v]arious types of municipal actions [that] have been challenged under the FHA").

104. *See, e.g.,* Schwemm, *supra* note 62, at 762 n.272.

105. *Id.*

106. 112 CONG. REC. 9396 (1966) (emphasis added).

107. *See* Schwemm, *supra* note 62, at 762 n.272.

108. *See Proposed Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. 439-41 (1967).

109. *See* Schwemm, *supra* note 62, at 762.



out explanation to state, “[i]t is the policy of the United States to provide for fair housing throughout the United States.”<sup>110</sup>

### 3. Social History

In the 1960s, racial segregation in housing was rampant throughout the United States.<sup>111</sup> Racially-motivated threats, intimidation, and harassment fueled housing discrimination and the development of urban ghettos.<sup>112</sup> Housing segregation particularly stymied underrepresented groups in their efforts to achieve civil rights because the home represents “one of the most psychologically significant locations in society . . . .”<sup>113</sup> The home signifies a major source of stability, continuity, belonging, and connection to social networks.<sup>114</sup> One’s sense of home is vital to his or her psychological

110. 114 CONG. REC. 4571 (1968).

111. See Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399, 404 (2003); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 410-13 (2001). See generally Martin E. Sloane, *One Year’s Experience: Current and Potential Impact of the Housing Order*, 32 GEO. WASH. L. REV. 457, 468 (1964) (noting that President Kennedy stated that the “objective” of achieving “a decent home and a suitable living environment for every American family . . . cannot be fulfilled as long as some Americans are denied equal access to . . . housing”).

112. See Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 254 (2006); see also JOE R. FEAGIN ET AL., *WHITE RACISM* 1-50 (2d ed. 2001) (explaining the impact of racial violence). Douglas S. Massey and Nancy A. Denton define a “ghetto” as “a set of neighborhoods that are exclusively inhabited by members of one group, within which virtually all members of that group live . . . [which] has been the paradigmatic residential configuration [for urban blacks] for at least eighty years.” MASSEY & DENTON, *supra* note 65, at 18-19; see also *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (noting “Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing”).

113. See Short, *supra* note 112.

114. See, e.g., Sandy G. Smith, *The Essential Qualities of A Home*, 14 J. ENVTL. PSYCHOL. 31, 31-33 (1994) (observing that people associate home environments with continuity, privacy, self-expression, social relationships, and warmth); see also, e.g., Roberta M. Feldman, *Settlement-Identity: Psychological Bonds with Home Places in a Mobile Society*, 22 ENV’T & BEHAV. 183, 186 (1990) (observing how individuals tend to renovate a new property when they switch residences so that it will resemble their prior residence); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (noting how people tend to become psychologically attached to homes); Karin Zingmark, Astrid Norberg & Per-Olof Sandman, *The Experience of Being at Home Throughout the Life Span; Investigation of Persons Aged From 2 to 102*, 41 INT’L J. AGING & HUM. DEV. 47, 54 (1995) (noting how individuals associate home with family life). Today, the metaphor of one’s “home as a castle” remains powerful in both cultural perceptions and legal treatment of housing. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 276 (2006). Congress identified providing every American family with a “decent home” as a national objective in 1949. See 42 U.S.C. § 1441 (2000). Many areas of law protect one’s right to

well-being<sup>115</sup> because it strongly relates to one's concept of privacy, security, family, and continuity.<sup>116</sup> The significance of home has always been greater for minority groups, especially as they struggled for civil rights.<sup>117</sup> "To the extent that members of minority groups feel discriminated against or oppressed in their daily lives, home is where they may retreat to receive support, comfort, and strength."<sup>118</sup> Therefore, by directly attacking their sense of home, segregation and race-based violence that propelled minorities to relocate adversely impacted their psychological well-being.<sup>119</sup> In identifying housing discrimination as an invidious impediment to minorities' civil rights, the FHA recognized the unique significance of housing in the context of racial discrimination.<sup>120</sup>

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possess his or her house to a greater extent than other types of property. *See* Barros, *supra*, at 277.

115. *See* Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions from the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516, 1517 (1996) ("[T]he sense of belonging . . . is necessary for psychological well-being, [and] depends on strong, well-developed relationships with nurturing places . . . . [D]isturbance in these essential place relationships leads to psychological disorder."); *see also* Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 112-13 (2002). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1110-16 (2009).

116. *See* Barros, *supra* note 114, at 256-57; *see also* *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting) (noting the importance of the concept of home in the Supreme Court's jurisprudence); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1231-32 (2005); Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 277 (2006) (examining "[t]he sacred status of a home"); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786-87 (2006) (explaining how the Fourth Amendment recognizes the sanctity of the home); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 511-13 (2007). *See generally* Avital Margalit, *The Value of Home Ownership*, 7 THEORETICAL INQUIRIES L. 467 (2006).

117. *See* Short, *supra* note 112, at 253-54.

118. *Id.* at 254; *see also* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 886-88 (1997). "[H]ome often represents the only reliable anchor available to them in a hostile white-dominated world." Joe R. Feagin, *A House is Not a Home: White Racism and U.S. Housing Practices*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 17, 20 (Robert D. Bullard et al. eds., 1994).

119. *See* FEAGIN ET AL., *supra* note 112, at 37-39 (noting that one black individual recounted that the cross burnings and racially-motivated violence caused him to feel "personally violated").

120. *See* 42 U.S.C. § 3601 (1988); *see also* 114 CONG. REC. 2280 (1968) (statement of Sen. Edward W. Brooke) (describing housing discrimination and segregation as "a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition").

Housing discrimination undermined minorities' sense of home throughout the twentieth century.<sup>121</sup> Although the urban ghetto has become a ubiquitous image associated with cities, segregation was not always so pervasive. In the nineteenth century, northern cities were not as segregated as they later became.<sup>122</sup> During the early twentieth century, aggressive Jim Crow laws in the South and the rise of industrial jobs in the North sparked an influx of southern black migrants in northern cities.<sup>123</sup> Hostility and resentment against Southern blacks grew among Caucasian workers as indus-

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121. See Short, *supra* note 112, at 253-55. See generally Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 371 (2000).

122. See Michael B. de Leeuw et. al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 355-56 ("Indeed, before 1900, nothing resembling the modern racially identifiable ghetto existed in northern cities."); see also DARREL E. BIGHAM, *WE ASK ONLY A FAIR TRIAL: A HISTORY OF THE BLACK COMMUNITY OF EVANSVILLE, INDIANA* 26-27 (1987) (explaining that Evansville was racially integrated during the late nineteenth century); JAMES A. KUSHNER, *APARTHEID IN AMERICA: A HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES* 6 (1980); MASSEY & DENTON, *supra* note 65, at 20-21, 26-42; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 100 (2001) (noting that housing segregation was uncommon until the beginning of the twentieth century); Short, *supra* note 112, at 250-51; Henry L. Taylor, *Spatial Organization and the Residential Experience: Black Cincinnati in 1850*, 10 SOC. SCI. HIST. 45, 46-49 (1986) (describing neighborhoods during the Civil War as "highly heterogeneous; different populations lived side by side in the city"); Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third*, 94 NW. U. L. REV. 1049, 1053 (2000). Although employment discrimination caused African Americans to occupy poorer quality housing, they lived alongside Caucasians of the same income bracket. See MASSEY & DENTON, *supra* note 65, at 19-20; Taylor, *supra*, at 63 ("Occupation and socio-economic status functioned as the primary determinants of residential location in antebellum Cincinnati."). As minorities obtained better jobs, they obtained higher quality housing alongside their white counterparts. See MASSEY & DENTON, *supra* note 65, at 19-20. For instance, housing discrimination in Chicago began in 1917 when real estate brokers adopted a policy actively excluding Blacks from White neighborhoods. See Leonard S. Rubinowitz & Kathryn Shelton, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663, 674-75 (2008).

123. See STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 32 (2000) (explaining that between 1901 and 1930, over 235,000 African-Americans moved to New York, Philadelphia's African-American population more than doubled to 220,000, Detroit's African-American population increased ten-fold, and Chicago received more than 200,000 African-Americans); Willie Brown, *The Forgotten Type of Capital: Addressing the Social Capital Deficiency in the Inner City*, 11 GEO. J. ON POVERTY L. & POL'Y 527, 539-40 (2004); Dash T. Douglas, *A House Divided: The Social and Economic Underdevelopment of America's Inner Cities*, 10 U. FLA. J.L. & PUB. POL'Y 369, 371 (1999) ("From 1910 to 1930, approximately 1.25 million African Americans migrated from the South to northern cities in search of work [and] . . . formed a northern urban proletariat.").

trial leaders recruited them to work as strikebreakers.<sup>124</sup> Racial tensions abounded as Northerners perceived blacks to be inferior<sup>125</sup> and to pose a threat to white workers' job security.<sup>126</sup> Southern blacks were met with antagonism over housing.<sup>127</sup> White neighborhoods used violence and racially restrictive covenants to exclude them.<sup>128</sup> To escape the mounting violence

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124. See KUSHNER, *supra* note 122, at 559-61; Robert J. Cottrol, *Submission is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1057 n.92 (1998); Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 84-85 (1995) (discussing "competition for jobs and employers' use of African-American workers as strikebreakers"); Stephen Plass, *Dualism And Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 844 n.88 (2000); William Patrick Nicholson, Note, *Just Another Day in the Neighborhood? The Shaping of a Legal (and Social) Consciousness in Harlem*, 64 U. MIAMI L. REV. 267, 273 n.29 (2009) (citing GILBERT OSOFSKY, *HARLEM: THE MAKING OF A GHETTO* 42 (1966)).

125. See WOODWARD, *supra* note 122, at 18-19; see also MADISON GRANT, *THE PASSING OF THE GREAT RACE* xxvii (1916) (calling intellectuals to "rou[s] fellow Americans to the overwhelming importance of race and to the folly of the Melting Pot"); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 711 n.195 (2005) (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927)); Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 124 (1998) (discussing racial purity theories of American eugenicists); Rachel D. Godsil, *Viewing the Cathedral From Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1839-40 (2004); Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 651-57 (1985) (examining racial inferiority theories that abounded during the late nineteenth and twentieth centuries); Bernie D. Jones, *Southern Free Women of Color in the Antebellum North: Race, Class, and a "New Women's Legal History"*, 41 AKRON L. REV. 763, 765 (2008); Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 870 (2005) (noting the "prevailing view of the day that Blacks were socially inferior").

126. See MASSEY & DENTON, *supra* note 65, at 28-29; Godsil, *supra* note 125, at 1839 ("[W]orking class whites, many of whom were recent immigrants, feared the economic competition from Blacks . . ."); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 910 (1998). See generally CHARLES CARROLL, *THE NEGRO A BEAST* (1900).

127. See ALLEN BALLARD, *ONE MORE DAY'S JOURNEY: THE STORY OF A FAMILY AND A PEOPLE* 157 (1984); MASSEY & DENTON, *supra* note 65, at 30; see also Douglas, *supra* note 123, at 371-72 ("[Southern black migrants] were . . . relegated to separate and dilapidated urban ghettos."); Godsil, *supra* note 125. Prevailing theories of racial inferiority led whites to fear race mixing and spurred support for segregation. See *id.*; Hovenkamp, *supra* note 125, at 656-58 (examining how racial inferiority theories that abounded promoted segregation). See generally Paul A. Lombardo, "The American Breed": *Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743 (2002).

128. See KUSHNER, *supra* note 122, at 17; see also Alexander, *supra* note 116, at 1235-37, 1240-42, 1247-50 (examining how restrictive covenants served as a mechanism for social control and noting cases where courts upheld restrictive covenants); Lawrence B. De Graaf, *The City of Black Angels: Emergence of the Los Angeles Ghetto 1890-1930*, 39 PAC. HIST. REV. 323, 336-37 (1970); de Leeuw, *supra* note 122, at 356 ("Legally enforced segregation outside of the South was a product of the twentieth century . . ."); Tom I. Romero, Kelo, *Parents and the Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia*, 2008 UTAH L. REV. 947, 957 (2008); Rubinowitz & Shelton, *supra*

and intimidation,<sup>129</sup> fearful blacks moved to minority areas, which became concentrated ghettos.<sup>130</sup> African American residents who *attempted* to relocate to white neighborhoods faced strong retaliation ranging from vitriolic letters<sup>131</sup> to bombings.<sup>132</sup> Throughout the first half of the twentieth century, racial dissonance over housing escalated and riots eventually swept through major cities.<sup>133</sup> Today, minorities continue to face threats, harass-

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note 122. In 1935, the Federal Housing Administration required its contractors to adhere to a model racially restrictive covenant. *See* MEYER, *supra* note 123, at 7; Rachel Kurth, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 807-08 (2007); *see also* Terry A.C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998*, 11 STAN. L. & POL'Y REV. 173, 174 (1999). "Restrictive covenants are contractual agreements among property owners restricting the use of land; they can be enforced against the signatories and their successors in interest with a damages remedy. Racially restrictive covenants typically prohibited property owners from selling, occupying, or leasing their property to Blacks and Hispanics." Godsil, *supra* note 125, at 1843-44 (citing JESSE DUKE-MINIER & JAMES E. KRIER, PROPERTY 858-59 (5th ed. 2002)). Local governments' zoning ordinances also included these types of covenants to prevent integration in response to mounting racially motivated violence. MEYER, *supra* note 123, at 8. The Supreme Court eventually outlawed racially restrictive covenants. *See* Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

129. *See, e.g.*, BIGHAM, *supra* note 122, at 113-14 (describing "outbursts of hostility to those few blacks who dared to consider moving into regions tacitly understood as for whites only"); De Graaf, *supra* note 128, at 336, 346; de Leeuw, *supra* note 122, at 356; Romero, *supra* note 128; *see also* Harper v. Hunter Coll., No. 95 Civ. 10388, 1999 WL 147698, at \*1 (S.D.N.Y. Mar. 15 1999).

130. *See* MASSEY & DENTON, *supra* note 65, at 34-35; *see also* Phyllis E. Bernard, *Oklahoma: The New Africa*, 26 OKLA. CITY U. L. REV. 901, 903 (2001). *See generally supra* note 112 and accompanying text. Both the private and public sectors contributed to white flight, suburbanization, and the rise of urban ghettos. *See* Douglas, *supra* note 123, at 372-74. The government also used public housing as a "tool to accomplish racial segregation." Kenn, *supra* note 124; *see also* Douglas, *supra* note 123, at 372-73. *See generally* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST (1995).

131. *See* MEYER, *supra* note 123, at 34. Real estate agents also offered to help quell "impending invasion[s]." MASSEY & DENTON, *supra* note 65, at 37-38; Godsil, *supra* note 125, at 1844.

132. *See* MASSEY & DENTON, *supra* note 65, at 35. "The racial issue was becoming centered around the home, the most emotional possession of the American family . . ." CHARLES ABRAMS, FORBIDDEN NEIGHBORS 8 (1955); *see also* Godsil, *supra* note 125, at 1839 ("[A]nyone seeking to transgress racial boundaries was subject to violence . . ."); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance To Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 346-47 (2001); Rubinowitz & Shelton, *supra* note 122, at 675.

133. *See* ABRAMS, *supra* note 132, at 87 (listing examples of nationwide race-based housing violence); MASSEY & DENTON, *supra* note 65, at 30, 34-35 ("In white eyes, black people belonged in black neighborhoods . . ."); MEYER, *supra* note 123, at 30-35; Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 607-08 (2001); Godsil, *supra* note 125, at 1839 n.192 (listing urban race riots); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1969 (2000) ("Race riots, like lynchings, performed the function of protecting white symbolic and

ment, and violence over housing.<sup>134</sup> In many areas, housing remains segregated, particularly in large cities with long histories of racial discord such as New York and Detroit.<sup>135</sup>

The next section will discuss the theories that courts use to interpret statutes, which will provide a background for the examination of cases interpreting the FHA in Part II.

## B. Theories of Statutory Interpretation

This section discusses interpretive theories that courts utilize in adjudicating questions of statutory law. In applying statutory law such as the FHA, courts primarily begin by interpreting the statute and inquiring into its meaning.<sup>136</sup> Theories of statutory interpretation guide a court's inquiry by providing "coherent method[s] for explaining what occurs when judges decide cases correctly."<sup>137</sup>

### 1. Meaning-Based Theories

Meaning-based methods of statutory interpretation require courts to uncover a statute's meaning by determining how certain readers would understand its language.<sup>138</sup> Under plain meaning theories, the binding law only

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material interests."); Klarman, *supra* note 126, at 910; Kurth, *supra* note 128, at 808; Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 175 n.30 (2001) (providing examples of racial violence in several cities); S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 410 (2007) (explaining racially motivated riots in Oklahoma); *see also* Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653, 674-75 (2002). *See generally* Danney Goble, Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921 (2001), available at <http://www.tulsareparations.org/FinalReport.htm>.

134. *See* YINGER, *supra* note 130, at 112-13 (providing indices of segregation for a variety of cities).

135. *See id.*

136. *See, e.g.*, Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009) (discussing the statutory language first); *see also* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950), reprinted in 5 GREEN BAG 297, 302 (2002) ("[T]he accepted convention still, unhappily requires discussion as if only one single correct meaning could exist.").

137. Benjamin Lin, *Conspiracy! Section 1985(3) Political-Patronage Discrimination and the Quest for Purpose*, 9 J. L. SOC'Y 211, 224-25 (2008).

138. *See* Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 634 (1986) ("Under a meaning theory, the standard of interpretation is how the statute would be understood by a hypothetical appropriate reader."); *see also* James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 435 (1982) ("[W]e can ask what [the statute] means in a different way: how would the ideal reader contemplated by this document, indeed constituted by it, understand its bearing in the present circumstances?").

includes the statute's text, not its legislative intent.<sup>139</sup> Under this approach, courts only evaluate the "literal" or "natural" meaning of the disputed language and disregard its legislative intent.<sup>140</sup> If the statute is unclear, a court discerns the meaning of the words in dispute and applies the statute based on the meaning that it determines.<sup>141</sup> Courts typically identify the statute's meaning as the "presumed" or "obvious" legislative intent, suggesting that the legislature "intended what it expressed and intended nothing more than what it expressed."<sup>142</sup> In applying the words of a statute, courts emphasize that judges should defer to the legislature's "supremacy," even if it may have drafted the statute with "greater clarity or foresight" because courts lack the authority "to redraft statutes . . . to achieve that which Congress is perceived to have failed to do."<sup>143</sup> Some commentators maintain that plain

139. See Lin, *supra* note 137, at 225-26; see also LINDA D. JELLUM & DAVID CHARLES HRICIK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 35-38 (2006) ("[S]tatutory interpretation: the words. It begins at the atomic level, with interpretation of individual words, punctuation, and grammar . . . [J]udges often write that they simply determine the plain and ordinary meaning of the words in issue.")

140. See 5A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 48A:15 (6th ed. 2009) (citing *Koshland v. Helvering*, 298 U.S. 441, 446-47 (1936); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935); *Wilbur v. United States ex rel. Vindicator Consol. Gold Mining Co.*, 284 U.S. 231, 237 (1931); *Banco Mexicano v. Deutsche Bank*, 263 U.S. 591, 602 (1924); *R.R. Comm'n. v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588-89 (1922); *Pennsylvania R. R. v. Int'l Coal Mining Co.*, 230 U.S. 184 (1913); *Cornell v. Coyne*, 192 U.S. 418, 430 (1904); *Hamilton v. Rathbone*, 175 US 414, 419 (1899); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 353 (1897)) ("Thus, in representative opinions, the Supreme Court has employed the plain meaning doctrine as a rule of exclusion, barring the presentation, as aids to interpretation, of committee reports, records of the legislative history of an act, administrative construction, and other sources extrinsic to the text of an enactment."); Lin, *supra* note 137, at 231 n.67; see also *Matson Nav. Co. v. United States*, 284 U.S. 352, 356 (1932) ("As the words of the [statute] are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history."); *United States v. Mo. Pac. R. R.*, 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."). See generally Rev. Robert John Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 *MISS. L.J.* 225 (1998).

141. See JELLUM & HRICIK, *supra* note 139, at 35 ("[S]tatutory interpretation: the words. It begins at the atomic level, with interpretation of individual words, punctuation, and grammar."); see also Letter from Justice Holmes, reprinted in Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 538 (1947) ("I don't care what [the legislature's] intention was. I only want to know what the words mean."); Lin, *supra* note 137, at 226.

142. Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 *ARIZ. L. REV.* 413, 457-58 (1987).

143. *United States v. Locke*, 471 U.S. 84, 95 (1985).

While we will not allow a literal reading of the statute to produce a result "demonstrably at odds with the intentions of its drafters," . . . [t]o attempt to decide whether some date other than the one set out in the statute is the date actually "in-

meaning interpretation ensures consensus and predictability.<sup>144</sup> Other judges and scholars criticize it as incoherent and misleading.<sup>145</sup> Courts do not adhere to the plain meaning rule if it would produce absurd results or “[a] grave injustice.”<sup>146</sup>

Textualism is another meaning-based theory.<sup>147</sup> Scalia’s textualist school maintains that every word has a range of meanings.<sup>148</sup> It directs judges to interpret a statute exclusively through its words and avoid extra-legal textual references, even if the interpreter faces contrary judicial interpretations over the same language, a drafting mistake, or incongruent views among government agencies.<sup>149</sup> Unlike plain meaning theories, a textualist judge evaluates both the particular language of a provision and refers to re-

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tended” by Congress is to set sail on an aimless journey . . . . [D]eference to the supremacy of the legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the “legislative purpose is expressed . . . .”

*Id.* at 93-95 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

144. *See, e.g.*, David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1581 (1997).

145. *See* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 25, 36 (1995) (describing the plain meaning rule as “intellectually incoherent” and “institutionally impermissible”); *see also* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1249 (1997) (distinguishing between “fidelity to the Constitution’s text and fidelity to past constitutional practice”). *But see* James Fagan, *The Legal Phoenix: The Plain Meaning Rule is Dead, Long Live the Rule!*, 29 CAL. W. L. REV. 373, 392 (1993).

146. Anthony D’Amato, *Counterintuitive Consequences of “Plain Meaning,”* 33 ARIZ. L. REV. 529, 576 (1991) (“[W]hen it would be unjust to follow a rule, then the courts should throw away literalness, ‘plain language,’ textualism, and all other seductive trappings of formalism, and do what they are supposed to do: dispense justice to the parties.”); *see also* CONN. GEN. STAT. ANN. § 1-2 (West 2010); *Bilski v. Kappos*, 130 S. Ct. 3218, 3238 n.5 (2010) (Stevens, J., concurring) (“The Court attempts to avoid [] absurd results . . . .”); *Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1285 (5th Cir. 1994) (“A well-accepted canon of statutory construction requires the reviewing court to avoid any interpretation that would lead to absurd or unreasonable outcomes.”); *Lange v. United States*, 443 F.2d 720, 722-23 (D.C. Cir. 1971); *DeCoteau v. Sentry Ins. Co.*, 915 F. Supp. 155, 157 (D. N.D. 1996) (“When adherence to the plain terms of a statute would lead to an absurd result, the court can look to the intent of Congress and interpret the statute to fulfill that intent and avoid the absurd result.”); *Johnson Serv. Co. v. H. S. Kaiser Co.*, 324 F. Supp. 745, 749 (N.D. Ill. 1971); 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (7th ed.) (“It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.”); J. Woodfin Jones, *The Absurd Results Principle of Statutory Construction in Texas*, 15 REV. LITIG. 81 (1996).

147. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

148. *Id.* at 23-24.

149. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting) (consulting a dictionary for the definition of “use”); *McBoyle v. United States*, 43 F.2d 273, 274 (10th Cir. 1930).



lated legal texts, such as other provisions in the same statute or other related texts that address the same issue.<sup>150</sup> Like plain meaning, textualism has also met with an avalanche of criticism.<sup>151</sup>

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150. See *Smith*, 508 U.S. at 229 (O'Connor, J.) (noting that language "cannot be interpreted apart from context"); *Bowen v. Massachusetts*, 487 U.S. 879, 912 (1988) (Scalia, J., dissenting); *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 439 (1939) (Cardozo, J., dissenting) ("[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."); *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1942) (Hand, J.) ("[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."); see also *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (where the Supreme Court of Canada applied the textualist approach to a criminal statute and the Canadian Charter of Rights); SCALIA, *supra* note 147, at 16 ("[A]mbiguities in a newly enacted statute are to be resolved in such fashion as to make the statute . . . internally consistent, [and] compatible with previously enacted laws."); Araujo, *supra* note 140 ("[T]he interpreter is concerned with the complete fabric of the text, i.e., the entire body of law that relates to the issue under consideration."); Llewellyn, *supra* note 136 ("Statutes *in pari materia* must be construed together."); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1615, 1620-22 (1991) (noting that Scalia's textualism extends beyond "the enacted statute" to examine "the text of other related statutes," and concluding that Scalia "views the entire United States Code . . . as a product of a perfectly rational[,] . . . sensible[,] . . . [and] omniscient legislature").

151. See, e.g., *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 516 n.8 (1992) (Souter, J., plurality opinion) ("The meaning of . . . a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning." (quoting *United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting))); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 113-14 (1990) (arguing that "the textualist approach is inadequate" because "words are not self-defining; their meaning depends on both culture and context"); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 661-64 (1990) (critiquing new textualist approaches and arguing that they "rest upon precepts of grammar and logic, proceduralism, and federalism"); William Funk, *Faith in Texts—Justice Scalia's Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?*, 49 ADMIN. L. REV. 825, 845-46 (1997) (maintaining that textualism provides little guidance when the statute "truly remains ambiguous"); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 662 (1994) ("[M]any of the interpretative techniques relied upon most extensively by Justice Scalia presuppose . . . that Congress is a perfect grammarian, that different provisions of a statute reflect a single, unified structure, that words are used the same way in different statutes, and that Congress is familiar with all provisions in the United States Code." (citations omitted)); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 764-76 (1995) (criticizing the Court's "hypertextualism"); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 245 (1998) (maintaining that courts should be "cautious about proposing principles of interpretation that . . . devalue knowing the context within which the legislature has spoken"); Nicholas S. Zeppos, *Chief Justice Rehnquist, the Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 681-82 (1994) (finding that "[t]he subsequent legislative history and more recently enacted statutes increase the sources of interpretive information and require the judge to inject fewer of her personal opinions").

## 2. *Intent-Based Theories*

Intent-based approaches call upon judges to ask: “what was the ‘intent of the drafter’ in enacting the statute or other normative legal text?”<sup>152</sup> Intent refers to the meaning that the institution or drafters imposed on a statute when selecting its particular words,<sup>153</sup> and the surrounding circumstances that propelled its drafting.<sup>154</sup> In utilizing intent-based methods to interpret a statute, a judge determines and enforces the legislature’s collective intent<sup>155</sup> by assessing the statute’s legislative history and analyzing how the drafters intended the statute to be applied during its enactment.<sup>156</sup> To evaluate legislative history, a judge consults legislative committee reports involved in the drafting process, contemporaneous history of events that oc-

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152. Araujo, *supra* note 140; *see also* Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 700 (1956); Zelenak, *supra* note 138 (“Under an intent theory, the standard of interpretation is the intent of the legislature that enacted the statute.”).

153. *See* Araujo, *supra* note 140; *see also* 5A SINGER & SINGER, *supra* note 140, at § 48:4.

154. 5A SINGER & SINGER, *supra* note 140, at § 48:4.

155. *See* Lin, *supra* note 137, at 226-28; *see also* Araujo, *supra* note 140.

156. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (“[The drafters’] intentions must be controlling.”); United States v. Am. Trucking, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); *see also* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 36-37 (1975) (“[W]e are interested in the intended meaning of the author in the sense that the process of communication makes no sense unless some intention can be attributed to him. Intended meaning, therefore, remains the ultimate object of search even though no method has yet been devised by which this meaning can be directly known.”); Lin, *supra* note 137, at 226-28; Zelenak, *supra* note 138 (“Under an intent theory, the standard of interpretation is the intent of the legislature that enacted the statute.”). Intent-based theories are distinguishable from purposive theories. Courts using purposive theories interpret statutes by ascertaining the goals that the drafters designed the text to accomplish. *See* DICKERSON, *supra*, at 88; *see also* Araujo, *supra* note 140. Purpose refers to “general understanding of the legislature which acknowledges the existence of some actual or potential situation [that] the text was designed to address by establishing guidelines that would be followed to address these situations in the future.” *Id.* While legislative intent focuses on the drafters’ consciousness of the circumstances that motivated the legislation, purpose focuses on the text’s future goals. *Id.* Karl Llewellyn, a distinguished jurisprudential scholar and prominent legal realist, wrote, “[i]f a statute is to make sense, it must be read in the light of some assumed purpose.” Llewellyn, *supra* note 136, at 400. *See generally* KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). The purposive interpreter evaluates how the drafters would apply the statute to the case at bar by assessing both the statute’s legislative intent and defined purposes in the context of the case. M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 420 (1985). The interpreter relates the case’s facts to the issues that the drafters faced more abstractly than when they originally wrote it, and then concludes whether the statute was designed to regulate the particular situation. *Id.*

curred during and after enactment, and prior drafts of the statute.<sup>157</sup> In deciding whether a particular source constitutes part of a statute's legislative history, courts inquire into whether the source was "generally available" and "relied upon by the legislator in passing the bill."<sup>158</sup> Like meaning-based theories, intent-based theories maintain that the statute reflects the legislature's intent and contains an answer to the legal question, so that the judge "take[s] the actual situation . . . and tailor[s] it to conform to . . . preexisting dictates."<sup>159</sup> According to Judge Posner, if the legislative history is silent, a judge must "imagine as best he can how [the drafters] would have wanted it applied to situations that they did not foresee."<sup>160</sup>

Courts interpreting civil rights legislation often applied intent-based theories.<sup>161</sup>

However, some commentators have found that intent-approaches suffer from problems of "epistemology, aggregation and projection."<sup>162</sup> Courts cannot definitively divine the motivation of each legislator for voting in fa-

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157. *See* *United States v. Wyoming*, 331 U.S. 440, 451-52 (1947) (considering historic events after enactment); *Markham v. Cabell*, 326 U.S. 404, 407-08 (1945) (reviewing the contemporaneous wording); *United States v. Nelson*, 277 F.3d 164, 186 (2d Cir. 2002); *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("[O]fficial committee reports . . . provide the authoritative expression of legislative intent."); *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983) ("[C]ommittee reports represent the most persuasive indicia of Congressional intent (with the exception, of course, of the language of the statute itself).").

158. 5A SINGER & SINGER, *supra* note 140, at § 48:4; *see also* *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421-22 (7th Cir. 1993).

159. Lin, *supra* note 137, at 228; *see also* Daniel A. Farber & Philip Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 468-69 (1988); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 13-14 (1988).

160. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983).

161. 5A SINGER & SINGER, *supra* note 140, at § 45.05 (suggesting that most courts favor intent-based theories). For instance, while interpreting the Civil Rights Act of 1964 in *Regents of the University of California v. Bakke*, Justice Powell considered Congress' intent to "halt federal funding of entities that violate a prohibition of racial discrimination." 438 U.S. 265, 284 (1978).

162. Wellman, *supra* note 142, at 454; *see also* *Bakke*, 438 U.S. at 284 (noting "it is easier to discern legislative intent the closer in time the interpretation is to the enactment of the statute" and that "[a]s time passes, the ability to identify something about the legislature's intent becomes increasingly difficult"). Epistemologically, courts can never conclusively know the individual legislators' actual motivations that led them to vote on a bill. *Id.* The problem of "aggregation" refers to a judge's inability to derive a group's collective intent from a select number of individual motivations. *Id.* Finally, the "projection" problem relates to the original drafters' inability to foresee all future disputes that might arise from applications of the statute, even if a judge can discern a group's collective intent. *Id.* Because a legislature cannot possibly predict or account for all situations that the statute may apply to, courts are often left to apply the statute to unforeseen problems as they arise without significant legislative input. *Id.*

vor of a bill with particular language.<sup>163</sup> Lin posits, “perhaps it was a particularly bad cup of coffee or perhaps a persuasive argument.”<sup>164</sup> In addition, while voting for the statute, the legislature could not possibly foresee all future disputes.<sup>165</sup> If the legislature never foresaw the dispute, its intent or language might not be dispositive.<sup>166</sup> Furthermore, although the legislature passed a statute with particular language, it did not enact a particular version of “intent” into law.<sup>167</sup> Overall, many commentators and courts have critiqued the reliability of intent-based methods.<sup>168</sup>

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163. *Bakke*, 438 U.S. at 284.

164. Lin, *supra* note 137, at 227.

165. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-02 (1979); *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 177 Misc. 2d 985, 991 (N.Y. Sup. Ct. 1998) (citing N.Y. STAT. LAW § 239(b) (McKinney 1971)); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 110 (1839) (noting that the legislatures “cannot foresee all possible complex cases”); Jeffrey Barnes, *The Continuing Debate About “Plain Language” Legislation: A Law Reform Conundrum*, 27 STATUTE L. REV. 83, 93 (2006); Randall R. Bovbjerg & Joel M. Schumm, *Judicial Policy and Quantitative Research: Indiana’s Statute of Limitations for Medical Practitioners*, 31 IND. L. REV. 1051, 1082 (1998) (“Legislatures can gather facts about whole populations affected by a phenomenon or social system, consider budgetary implications, and generally do a broad cost-benefit analysis across all types of cases to be affected in light of perceived popular and political opinion and pressures—though they cannot foresee all implementation problems or unexpected consequences of their decisions.”); Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1671 (1997) (“[T]he reality is that the legislature cannot foresee all contingencies and may deliberately avoid providing even for those it can foresee because it is unable to make hard political choices.”); Henry H. Drummonds, *The Dance of Statutes and the Common Law: Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 959 (2000) (“Legislators, being human, cannot possibly foresee all the myriad situations in which a statutory duty finds expression in common law cases.”); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 927 (1999) (“Legislatures create general laws both because they cannot foresee every variation that may arise and also because legislators may have competing views about what should be included in legislation and must settle for broad language if any laws are to be passed.”); Katherina Pistor & Chenggang Xu, *‘Incomplete Law,’* 35 N.Y.U. J. INT’L L. & POL. 931, 933 (2003) (maintaining that drafters cannot write a complete law); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 392 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975); Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. C.L. & C.R. 43, 48 (“[T]he legislature cannot foresee all the eventualities . . . required to implement legislation.”); Loren Speziale, Comment, *Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretation in Jurisdictions with Similar Limited Liability Laws*, 12 SETON HALL J. SPORT L. 65, 84 (2002).

166. See Lin, *supra* note 137, at 227.

167. Wellman, *supra* note 142, at 454-55.

168. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 211-47 (2000) (describing the debate over whether courts should reference legislative history to justify their holdings); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424-25 (2005); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

### 3. *Alternative Theory: Coherency Theory*

In response to problems that arise from other interpretive methods and their inadequacy in resolving hard cases of statutory law, Ronald Dworkin advanced an alternative theory called Coherence Theory.<sup>169</sup> It provides a neo-natural law method for resolving difficult statutory disputes.<sup>170</sup> Dworkin explains his interpretive theory using a fictional character named Hercules,<sup>171</sup> a judge and lawyer of “superhuman skill . . . [who] accepts . . . uncontroversial . . . rules . . . [and] accepts . . . that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions.”<sup>172</sup> He acknowledges other methods of interpretation but presents Hercules’ approach as the best for resolving “hard cases.”<sup>173</sup>

Coherence Theory maintains that there are two conceptions of legislative intent: institutionalized intention and collective understanding.<sup>174</sup> “Institutionalized intention” refers to a policy or principle *enacted* with a statute, either in its preamble or committee reports, which becomes part of the legislation by the legislature’s express decision.<sup>175</sup> The legislature’s procedure to enact the statute legitimizes its institutional intentions, rather than each drafter’s motive.<sup>176</sup> In contrast, collective understanding represents a purely psychological concept combining the individual legislatures’ beliefs.<sup>177</sup> Dworkin objects to collective understanding and posits that a judge should interpret a statute to advance the policies or principles that furnish the best

169. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

170. See Ronald A. Dworkin, “*Natural*” *Law Revisited*, 34 U. FLA. L. REV. 165, 165-66 (1982). Natural law theories are normative and strive to explain what the law *ought to be*. See Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, 5 OXFORD J.L. STUD. 1, 3 (1985). These theories are contrary to positivist legal theories such as the “Legal Process School” advanced by H.L.A. Hart, which seek to describe the law *as it is*. *Id.*

171. The name of Dworkin’s hypothetical judge, Hercules, refers to a legendary ancient Greek mythological figure designated as the world’s greatest hero renowned for his extraordinary strength, virtue, piety, courageousness, and dedication to protecting the common people. JOHN LEMPRIÈRE, *A CLASSICAL DICTIONARY* (8th ed., 1812); see also JOHN LEMPRIÈRE, *LEMPRIÈRE’S CLASSICAL DICTIONARY OF PROPER NAMES MENTIONED IN ANCIENT AUTHORS* 274-75 (1984). In particular, Hercules performed twelve seemingly impossible assignments, the “Twelve Labors of Hercules.” *Id.* In using the name “Hercules,” Dworkin positions his hypothetical judge as an ideal.

172. *TAKING RIGHTS SERIOUSLY*, *supra* note 169, at 105-06.

173. *Id.* at 107-08.

174. See *MATTER OF PRINCIPLE*, *supra* note 24, at 320-21.

175. *Id.* at 320.

176. *Id.* at 321.

177. *Id.* at 321-22.

political justification for the statute consistent with its provisions and the political ethos that prevailed during its enactment.<sup>178</sup>

Where two equally tenable justifications for a statute exist, Dworkin directs judges to revert to principles of morality and examine the legislation's context.<sup>179</sup> According to Dworkin, a judge should not exclusively rely upon legislative intent,<sup>180</sup> but "must ultimately rely on his own opinions in developing and applying a theory about how to read a statute."<sup>181</sup> When evaluating a statute, Dworkin calls judges to interpret "history in motion"<sup>182</sup> and uphold "his convictions about justice . . . [and] his convictions about the ideals of political integrity and fairness and procedural due process . . . ."<sup>183</sup> A judge must consider a statute's coherent development by developing "a more accurate or more sensitive or sounder analysis of [its] underlying moral principles."<sup>184</sup> In Dworkin's view, law is "constructive" and "aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction."<sup>185</sup> In practice, judges strive to achieve this ideal in difficult cases, particularly those that present inequities.<sup>186</sup> In *A Matter of Principle*,<sup>187</sup> Dworkin contends

178. *Id.* at 327-28.

179. *Id.* at 328-29.

180. Dworkin introduces another hypothetical judge, Hermes, who is "almost as clever as Hercules and just as patient" and "accepts law as integrity" but adopts an intent-based interpretive method, which seeks to discern the legislator's "communicative will" when he or she voted in favor of the statute. *See* DWORKIN, *LAW'S EMPIRE* 317 (1986) [hereinafter *LAW'S EMPIRE*]. Dworkin finds Hermes' intent-based method problematic because the judge has no way of determining whose intention counts. *Id.* at 319.

181. *Id.* at 334.

182. *Id.* at 350.

183. *Id.* at 338-39.

184. *See* *MATTER OF PRINCIPLE*, *supra* note 24, at 328-29.

185. *See* *LAW'S EMPIRE*, *supra* note 180, at 413.

186. *E.g.*, *Riggs v. Palmer*, 22 N.E. 188, 188-91 (N.Y. 1889) (considering a statute's purpose, evaluating how the legislatures would have decided the case if they had considered the facts in dispute in view of their overall goal, and ultimately applying the principle that the law should not allow a person to profit from his own wrongdoing where a grandson murdered his grandfather and stood to inherit the majority of his estate under the Statute of Wills); *see also* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (Powell, J., dissenting); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 102 (N.J. 1960) (applying the principle of fairness over recognized contract law and refusing to allow a manufacturer to limit its liability for defective parts); *LAW'S EMPIRE*, *supra* note 180, at 15-25. In general, courts often apply "principle over practice" in particularly hard cases rather than simple applications law. *See* Jeremy B. Stein, Note, *The Necessary Language of Exceptions: A Response To Frederick Schauer's "Exceptions"* 63 N.Y.U. ANN. SURV. AM. L. 99, 124 n.75 (2007) ("[W]e might say cases in which a competing principle trumps a clearly applicable rule are not easy cases.").

that the Supreme Court's landmark interpretation of Title VII of the Civil Rights Act of 1964 in *United Steelworkers of America v. Weber*,<sup>188</sup> follows his Coherence Theory.<sup>189</sup>

The next Part will discuss the cases that have interpreted FHA § 3604(b) and caused the split in authority over its applicability to post-acquisition claims. All of the cases use intent-based and meaning-based theories to arrive at their interpretations—not Dworkin's Coherence Theory.

## II. CIRCUIT SPLIT AFTER *COMMITTEE CONCERNING COMMUNITY IMPROVEMENT V. CITY OF MODESTO*

This part will examine the recent federal cases that have led the circuit courts to diverge over whether post-acquisition claims are cognizable under § 3604(b) where the discrimination in dispute has not resulted in constructive eviction. On October 8, 2009, the Ninth Circuit decided *Committee Concerning Community Improvement v. City of Modesto* and created a federal circuit split over whether § 3604(b) bans discrimination in providing services to existing homeowners and renters after they acquire their dwellings.<sup>190</sup> The Ninth Circuit<sup>191</sup> and many district courts<sup>192</sup> held that the FHA

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187. See MATTER OF PRINCIPLE, *supra* note 24, at 320.

188. 443 U.S. 193 (1979).

189. See MATTER OF PRINCIPLE, *supra* note 24, at 319. Citing the overarching policy of Title VII to improve “the economic inferiority of blacks and other minorities,” the Court held that a preferential training program did not violate Title VII because it was within the statute’s spirit and drafters’ intention, even though it was not within its “letter” or legislative history. *Weber*, 443 U.S. at 201. Dworkin contends that “the question of how Title VII should be interpreted cannot be answered simply by staring at the words Congress used.” MATTER OF PRINCIPLE, *supra* note 24, at 318. He suggests that the majority’s interpretation reflects Coherence Theory, “suppos[ing] that a statute should be interpreted to advance the policies or principles that furnish the best political justification for [it].” *Id.* at 327. In *Weber*, the underlying moral principle that the judges relied upon included fostering minorities’ economic equality. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488-93 (1987). Justice Brennan’s opinion focuses on how affirmative action programs will increase the percentage of minority workers employed by private firms and provide them with equal opportunities. See MATTER OF PRINCIPLE, *supra* note 24, at 326-27. In contrast, Justice Rehnquist’s dissent warns that affirmative action programs contradict Title VII’s literal requirements because they express a discriminatory preference for one group over others. *Id.* at 324-26. The statute was therefore indeterminate over whether Congress allowed affirmative action. *Id.* Consistent with Coherence Theory, the majority resolved this indeterminacy through gap-filling the statute’s open texture and deciding between the statute’s competing underlying moral principles. *Id.* It ultimately upheld the remedial hiring plan without displacing Congress’ goal of achieving equal opportunity. *Id.*

190. 583 F.3d 690, 716 (9th Cir. 2009).

191. See *id.* at 713.

192. See *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*3-4 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 977 (N.D. Cal. 2004);

applies to post-acquisition events. In contrast, the Fifth<sup>193</sup> and Seventh Circuits<sup>194</sup> interpreted the FHA more narrowly, refusing to apply § 3604(b) to post-acquisition claims unless they amount to constructive eviction.

### A. *Modesto* and Other Federal Cases Applying FHA To Post-acquisition Claims

#### I. Modesto

In *Modesto*, residents of four predominantly Latino neighborhoods sued the county and city of Modesto for violating FHA §3604(b).<sup>195</sup>

##### a. Facts

The plaintiffs' neighborhoods are urban islands that are located outside of the city and consist of mid-twentieth century residential developments originally constructed without sewers, sidewalks, curbs, or gutters.<sup>196</sup> By 2000, Latino populations constituted a majority in the plaintiffs' areas, which still lacked basic infrastructure.<sup>197</sup> Infrastructure improvements remain at a standstill. The City and County adopted a policy of annexing urban islands into the city, which provided the areas with municipal services.<sup>198</sup> However, the plaintiffs' territories have not been annexed because the city and county failed to enter the requisite independent tax-sharing agreement and excluded the islands from the "Master Tax Sharing Agreement."<sup>199</sup> Meanwhile, the county remains hesitant to invest in the areas' infrastructure without the city's guarantee that it will eventually reach a

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Landesman v. Keys Condominium Owners Ass'n, No. C 04-2685, 2004 WL 2370638, at \*6 (N.D. Cal. Oct. 19, 2004).

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

194. See *Bloch v. Frischholz*, 533 F.3d 562, 563-64 (7th Cir. 2008), *aff'd in part and rev'd in part en banc*, 587 F.3d 771 (7th Cir. 2009); *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 330 (7th Cir. 2004).

195. 583 F.3d at 696.

196. *Id.*

197. *Id.* at 696-97.

198. *Id.* at 697. For an island to be annexed, the city and county must: (1) determine whether the island's community desires annexation; (2) establish the percentage of property taxes that each government authority will receive; and (3) confirm that the island's infrastructure meets city standards. *Id.*

199. *Id.* In 1983, to satisfy the second annexation requirement, the city and county entered into a Master Tax Sharing Agreement (MTSA), which stipulated that upon annexation, the city would collect thirty-four percent of the annexed area's property taxes and the county would receive the remainder. *Id.* The MTSA excludes the plaintiffs' areas. *Id.* To annex them, the county and city must enter into an independent tax-sharing agreement. *Id.* at 697-98.



tax-sharing agreement and annex the islands.<sup>200</sup> The city's "Measure A" and "Measure M" have further estranged the neighborhoods' prospects of infrastructure development by prohibiting the city from extending sewer lines to or improving sewage facilities in urban islands without an advisory election.<sup>201</sup> However, "substantial islands" are not eligible for "Measure M" votes until fiscal negotiations have ended.<sup>202</sup> The City Council has discretion to designate areas as "substantial" or "insubstantial," and has only imposed this infrastructure condition on predominantly Latino neighborhoods.<sup>203</sup>

Plaintiffs alleged that the city and county violated § 3604(b) by discriminating against majority Latino areas in providing municipal services.<sup>204</sup> They argued that the MTSA's exclusion of their areas has dissuaded the county from improving infrastructure.<sup>205</sup> Plaintiffs also contended that defendants failed to provide adequate sewage facilities.<sup>206</sup> Third, Plaintiffs complained of insufficient law enforcement services and slower emergency response times in majority Latino neighborhoods than in other areas.<sup>207</sup> The District Court held that § 3604(b) only applies to pre-acquisition claims.<sup>208</sup> Plaintiffs then appealed to the Ninth Circuit.<sup>209</sup>

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200. *Id.* at 697.

201. *Id.* at 698.

202. *Id.* Fiscal negotiations would "require that the [c]ounty agree to install all non-sewer infrastructure" to an area in compliance with city standards. *Id.* In contrast, "insubstantial islands" are entitled to a Measure M vote without fiscal negotiations. *Id.*

203. *Id.* Meanwhile, majority white islands have had Measure M votes before building infrastructure and undertaking fiscal negotiations. *Id.*

204. *Id.* at 699.

205. *Id.* at 697. Specifically, plaintiffs contended that the MTSA "imposes a chilling effect on [p]laintiffs' [] annexation efforts[,] . . . deters infrastructure development[,] . . . and makes it relatively easier for residents of predominantly-White unincorporated areas . . . to become Modesto citizens." Third Amended Complaint at ¶ 61, *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009) (Nos. 07-16715, 07-17407).

206. *Modesto*, 583 F.3d at 697. In particular, Rouse-Colorado and Hatch-Midway have failing septic systems that cause untreated sewage to leach into groundwater. *Id.* Consequently, the city made an exception to the infrastructure condition and agreed with the County to build sewers in 2004. *Id.* at 699. However, plaintiffs argued that the County discriminatorily assigned greater priority to other infrastructure, such as storm drains, in areas where white residents predominate despite the crisis. *Id.* Furthermore, the County postponed building infrastructure and sewer access in Hatch-Midway, but built infrastructure and sewers other neighborhoods such as Shackleford. *Id.* at 698.

207. *Id.* at 707-08.

208. *Id.* at 700.

209. *Id.* at 696.

*b. Holding*

The Ninth Circuit held that the District Court erred and claims based on discrimination occurring post-acquisition are indeed cognizable under § 3604(b).<sup>210</sup> The court began its analysis by considering § 3604(b)'s language. It concluded that the wording of the section's prohibition of discrimination in the "privileges of sale or rental of a dwelling" does not preclude post-acquisition claims.<sup>211</sup> Instead, the court found that the statute "implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling" because many services and facilities are provided during the occupancy phase.<sup>212</sup> Under a "natural reading" of the statute, the court thus determined that it covers claims concerning services or facilities provided after the initial acquisition.<sup>213</sup>

The court then found that the Department of Housing and Urban Development's (HUD) regulation<sup>214</sup> implementing § 3604(b) further supports the viability of post-acquisition claims under § 3604(b).<sup>215</sup> According to the court, the regulation's coverage of "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" and "[l]imiting the use of privileges, services or facilities associated with a dwelling" suggests that § 3604(b) applies to post-acquisition claims because problems with "maintenance or repairs" or "services or facilities associated with a dwelling" typically sur-

210. *Id.* at 711-13 (citing *Ojo v. Farmers Grp., Inc.*, 565 F.3d 1175 (9th Cir. 2009) (addressing discrimination in insurance rates for homeowners)); *Harris v. Itzhaki*, 183 F.3d 1043, 1047 (9th Cir. 1999) (holding that an African-American woman who faced eviction notices after complaining of racial discrimination could raise an FHA claim).

211. *Modesto*, 583 F.3d at 713.

212. *Id.*

213. *Id.*

214. *See* 24 C.F.R. § 100.65 (2010).

215. The regulation states:

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

(b) Prohibited actions under this section include, but are not limited to:

....

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

....

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.

*Id.*

face after the dweller takes possession.<sup>216</sup> The court warned that limiting § 3604(b) to pre-acquisition claims would prevent the FHA from protecting dwellers against discrimination that interferes with their services or enjoyment of their residences but falls short of constructive eviction.<sup>217</sup>

The Ninth Circuit therefore held that the “FHA [§ 3604(b)] does apply to post-acquisition discrimination, and [that] the District Court erred in deciding otherwise.”<sup>218</sup> However, the court only reinstated plaintiffs’ FHA claims concerning law-enforcement and found that plaintiffs failed to provide evidence of disparate impact regarding sewer services and infrastructure.<sup>219</sup>

## 2. Other Lower Federal Courts’ Interpretations of § 3604(b)

Lower federal courts have also recognized that § 3604(b) applies to post-acquisition claims. In *United States v. Koch*,<sup>220</sup> the District Court of Nebraska allowed plaintiff-tenants’ post-acquisition sexual harassment claims under § 3604 to proceed.<sup>221</sup> Female tenants claimed that the defendants violated § 3604 by harassing and retaliating against them after they took possession of rental properties.<sup>222</sup> The court rejected other courts’ conclusions that § 3604 does not encompass post-acquisition claims.<sup>223</sup> It found that those courts erroneously relied on unnecessarily narrow interpretations of Title VIII’s language and legislative history.<sup>224</sup>

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216. *Modesto*, 583 F.3d at 713.

217. *Id.* at 714. The court provided examples of absurd results that would occur in the post-acquisition phase, i.e., after a dweller purchased and moved into his or her dwelling, if § 3604(b) only applied to pre-acquisition claims. *Id.*

[I]t would not violate § 3604(b) for a condominium owners’ association to prevent a disabled person from using the laundry facilities or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate § 3604(b) for a landlord to sexually harass a tenant or to raise the rent of only Jewish tenants. It would not violate § 3604(c) for a landlord to use racial slurs to or about existing tenants or to spray-paint such a slur on an occupant’s door. Nor would it violate § 3604(c) for a homeowners association to print up flyers denigrating a particular resident due to her religious faith and post them throughout the neighborhood. All of these behaviors would be beyond the law’s purview solely because of when they occurred.

*Id.* (quoting Oliveri, *supra* note 31, at 32-33).

218. *Id.*

219. *Id.* at 715.

220. 352 F. Supp. 2d 970 (D. Neb. 2004).

221. *Id.* at 977.

222. *Id.* at 971.

223. *Id.* at 976-77.

224. *Id.*

In reviewing the language of the statute, the court explained that the FHA should be “construed generously in order to promote the replacement of segregated ghettos with ‘truly integrated and balanced living patterns.’”<sup>225</sup> Citing authorities that advocate for a broader reading of the FHA, the court concluded, “it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than . . . residing therein; therefore the Fair Housing Act should be (and has been) read to permit the enjoyment of this privilege without discriminatory harassment.”<sup>226</sup> It also noted that “privileges of sale or rental” may encompass privileges of occupancy.<sup>227</sup>

The court further justified its broad interpretation through the FHA’s legislative history.<sup>228</sup> It maintained that congressional records “reflect [that Congress had] a deep concern about exclusionary housing practices” and “was motivated by a desire to eliminate discriminatory business practices that confined African-Americans to harsh inner-city living conditions.”<sup>229</sup> Noting that Congress sought to pass “‘measures that have teeth and meaning, in the eyes of every American, black or white,’” the court found that restricting the FHA’s application to pre-acquisition claims would actually contravene Congress’ intent to promote racial integration in housing, employment, and education, expressed when passing the FHA.<sup>230</sup> The court concluded that “a broad interpretation of the FHA . . . encompass[ing] post-acquisition acts of discrimination is consistent with the Act’s language, its legislative history, and the policy ‘to provide . . . for fair housing throughout the United States.’”<sup>231</sup>

Finally, the court found that HUD’s regulation<sup>232</sup> interpreting § 3617 further supports the viability of post-acquisition claims under § 3604.<sup>233</sup> The court reasoned that the regulation prohibits discrimination occurring in the post-acquisition phase, including “[t]hreatening, intimidating or interfering with persons *in their enjoyment of a dwelling* . . . .”<sup>234</sup> The regula-

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225. *Id.* at 976 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211-12 (1972) (citing 114 CONG. REC. 3422 (1968))).

226. *Id.* (citing *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003); *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088-90 (10th Cir. 1993)).

227. *Id.* (citing *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004)).

228. *Id.* at 976-77.

229. *Id.* at 977 (citing 114 CONG. REC. 2274-84, 2703-09, 3421-22 (1968)).

230. *Id.* at 978 (quoting 114 CONG. REC. 2276 (1968)).

231. *Id.* (quoting 42 U.S.C. § 3601 (2006)).

232. 24 C.F.R. § 100.400(c)(2) (2010).

233. *Koch*, 352 F. Supp. 2d at 979.

234. *Id.*

tion's prohibition of these activities indicates that the FHA's substantive provisions cover similar claims.<sup>235</sup> Furthermore, the court conducted a *Chevron* analysis and found that the regulation was a valid and reasonable interpretation of the FHA.<sup>236</sup>

Likewise, in *Richards v. Bono*,<sup>237</sup> the Middle District Court of Florida held that a victim of sexual harassment could raise a claim under § 3604(b) where the harassment occurred after the victim rented the property.<sup>238</sup> The court drew a sharp distinction between claims involving sales, which constitute a "singular event," and rentals, which involve continuous relationships.<sup>239</sup> According to the court, rentals involve a disparate power relationship between a tenant and landlord, who has both duties and powers, such as the ability to provide services, increase rent, and evict.<sup>240</sup> In the rental context, the court noted that discrimination may be ongoing and affect the "terms, condition, or privileges" or provision of services or facilities "in connection with" the dwelling.<sup>241</sup> The court determined that § 3604(b) prohibits discrimination throughout the landlord-tenant relationship, even after the tenant takes possession.<sup>242</sup>

To support its application of the statute to a post-acquisition claim of harassment, the court referenced the FHA's "spirit" expressed in its "broad and inclusive language."<sup>243</sup> It found that a narrow interpretation of the statute allowing a landlord to raise rent based on a tenant's sex would be "anomalous."<sup>244</sup> Similar to the Ninth Circuit, the court cited HUD's regulation implementing § 3604(b)<sup>245</sup> and concluded that the court must defer

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235. *Id.*

236. *Id.* at 980 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Courts use *Chevron's* two-part test established by Justice Stevens to decide whether to defer to an executive agency's interpretation of a statute that it administers. *See id.*; *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). The reviewing court must (1) determine whether the statute is ambiguous and (2) whether the agency's interpretation of the ambiguous statute is reasonable. *Chevron*, 467 U.S. at 842-43. If the agency's interpretation is reasonable, then the reviewing court must defer to it. *Id.* For a detailed explanation of the *Chevron* analysis, see *supra* Part III.A.3.

237. No. 5:04CV484-OC-10GRJ, 2005 WL 1065141 (M.D. Fla. May 2, 2005).

238. *Id.* at \*3-4.

239. *Id.* at \*3.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211-12 (1972)).

244. *Id.*

245. 24 C.F.R. § 100.65(b) (2010).

to the regulation under *Chevron*, or read the statute consistent with the regulation.<sup>246</sup> Therefore, the court held that § 3604(b) covers post-acquisition harassment claims.<sup>247</sup>

Similarly, in *Landesman v. Keys Condominium Owners Ass'n*,<sup>248</sup> the Northern District of California allowed plaintiffs to challenge a condominium association's facility rules that allegedly discriminated against families with children under § 3406(b).<sup>249</sup> The court only ruled on the merits without providing a rationale.<sup>250</sup>

## B. Federal Cases Failing to Apply the § 3604(b) to Post-acquisition Claims

Contrary to the Ninth Circuit, the Fifth and Seventh Circuits have refused to apply § 3604(b) to post-acquisition claims where the discrimination in dispute falls short of constructive eviction.

### I. Fifth Circuit

In *Cox v. City of Dallas*,<sup>251</sup> the Fifth Circuit held that post-acquisition claims are not cognizable under § 3604(b) unless they involve discrimination amounting to constructive eviction.<sup>252</sup> African-American resident-plaintiffs argued that the city of Dallas violated § 3604(b) by discriminatorily providing municipal services, particularly in enforcing its zoning laws and failing to prevent illegal dumping in their neighborhood.<sup>253</sup> The dumping lowered their homes' resale values.<sup>254</sup> In interpreting the FHA, the court considered the language of the statute, its purpose, and HUD's implementing regulations.<sup>255</sup>

The court first considered whether § 3604(b)'s phrase "in connection with" referred to the "sale or rental of a dwelling" or the "dwelling" itself

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246. *Richards*, 2005 WL 1065141, at \*3-4 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

247. *Id.*

248. No. C-04-2685, 2004 WL 2370638 (N.D. Cal. Oct. 19, 2004).

249. *Id.* at \*1-2. Plaintiffs maintained that the association violated the FHA § 3604(b) by: (1) restricting children under the age of eighteen from using the main swimming pool; (2) limiting children under the age of fifteen from accessing the clubhouse, billiard room, and gym without adult supervision; and (3) prohibiting children under the age of sixteen from using gym equipment. *Id.*

250. *See id.*

251. 430 F.3d 734 (5th Cir. 2005).

252. *Id.* at 745-46.

253. *Id.* at 736-40.

254. *See id.* at 740.

255. *Id.* at 746.

generally.<sup>256</sup> It determined that a “grammatically superior” reading of the FHA indicates that the phrase “in connection with” refers to the “sale or rental.”<sup>257</sup> The court subsequently considered the statute’s purposes and found that a broader reading would “unmoor[] the ‘services’ language from the ‘sale or rental’ language.”<sup>258</sup> It concluded that such a reading would “push[] the FHA into a general anti-discrimination pose [similar to § 1983], creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area.”<sup>259</sup> According to the court, in enacting the FHA, Congress narrowly targeted housing.<sup>260</sup> It found that the FHA “remains a housing statute” only applicable to housing discrimination.<sup>261</sup> The court distinguished the FHA from § 1983’s general discrimination prohibitions, explaining that the FHA “targets private activity, [and] does not require a governmental policy or custom . . . [or] proof of both discriminatory impact and intent.”<sup>262</sup>

Finally, the court considered the language of HUD’s regulation implementing § 3604(b), and noted that it repeats the language used in the FHA.<sup>263</sup> The court thus concluded that the regulation prohibits conduct only as it “relat[es] to” or “in connection with [the] sale or rental of a dwelling.”<sup>264</sup> It held that the provision of services does not “relate to” and is not “in connection with” any sale or rental.<sup>265</sup> Alternatively, the court determined that the regulation prohibited actions such as “using different leases or contracts for sale and failing to process an offer or application” because these actions are connected to the sale or rental of a dwelling.<sup>266</sup> According to the court, “failing or delaying maintenance or repairs” is not sufficiently connected to the “sale or rental” unless the perpetrator’s goal is to “evict[] or constructively evict[] a tenant.”<sup>267</sup> Relying on *Woods-Drake v. Lundy*,<sup>268</sup> the court maintained that § 3604(b) applies to a current owner or ren-

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256. *Id.* at 745.

257. *Id.*

258. *Id.* at 746.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* (considering 24 C.F.R. § 100.65(b) (2010)).

264. *Id.* at 745.

265. *Id.*

266. *Id.* at 746 n.37.

267. *Id.*

268. 667 F.2d 1198, 1201-02 (5th Cir. 1982) (sustaining a tenant’s claim against a landlord under § 3604(b) for imposing a “whites-only” condition on the tenant’s lease because it was analogous to constructive eviction and a discriminatory condition of the sale or rental).

ter's claim alleging discrimination that amounted to actual or constructive eviction.<sup>269</sup> However, the court determined that § 3604(b) does not apply to complaints concerning current dwellers' value of their homes.<sup>270</sup> Therefore, the court held that current owners, who claim that discrimination in city services impacted their property's value or habitability, do not have a right of action under § 3604(b).<sup>271</sup>

## 2. Seventh Circuit

### a. Halprin v. Prairie Single Family Homes

The Seventh Circuit similarly refused to apply § 3604(b) to post-acquisition claims in *Halprin v. Prairie Single Family Homes*.<sup>272</sup> Jewish residents in a suburban subdivision alleged that their homeowners' association and other service providers violated § 3604(b) by harassing them and vandalizing their property.<sup>273</sup> Like the Fifth Circuit, the Seventh Circuit interpreted the statute by evaluating the language and legislative history of § 3604(b).<sup>274</sup> According to the court, when drafting the FHA, Congress was mainly concerned with housing access, not problems arising after sale or rental.<sup>275</sup> Although it acknowledged that § 3604(b) might cover constructive evictions,<sup>276</sup> the court found that the section's language primarily deals with property access or "prevent[ing] people from acquiring property."<sup>277</sup>

The court also explained that the legislative history affirms that the statute's "words mean what they seem to mean."<sup>278</sup> Distinguishing Title VII, which applies to both current employees and job applicants,<sup>279</sup> the court maintained that the FHA's legislative history "contains no hint . . . of a

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

270. *Id.*

271. *Id.*

272. 388 F.3d 327 (7th Cir. 2004).

273. *Id.* at 328. The association's president wrote "H-town property," short for "Hymie Town," on the plaintiffs' wall, damaged trees and plants on their property and cut down a string of holiday lights. *Id.* Defendants also applied chemicals to plaintiffs' yard and imposed rules limiting their property use. *Id.* Furthermore, defendants hindered plaintiffs' efforts to identify the vandal by: (1) removing flyers that they posted offering a reward; (2) destroying board meeting minutes; and (3) erasing a tape recording of a meeting during which the president threatened to "make an example" of plaintiffs. *Id.*

274. *Id.* at 328-30.

275. *Id.* at 329.

276. *Id.*

277. *Id.* at 328.

278. *Id.* at 330.

279. *See, e.g., Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744-45 (7th Cir. 2002).



concern with anything but *access* to housing.”<sup>280</sup> It noted that when Congress passed the bill, homeowners and landlords “refus[ed] to sell or rent homes in desirable residential areas to members of minority groups.”<sup>281</sup> According to the court, Congress primarily sought to remedy the exclusion of minority groups and was not concerned with how landlords and homeowners treated them after “they were included,” which the court refers to as the problem of “expulsion.”<sup>282</sup> The court reasoned that the problem of expulsion was a “future problem,” which did not arise until after Congress enacted the FHA and “the law forced unwanted associations that might provoke efforts at harassment.”<sup>283</sup> Therefore, the court concluded that § 3604(b) only provides redress for discrimination that occurred during the pre-acquisition phase.<sup>284</sup> Because the harassment in dispute occurred after plaintiffs acquired their dwellings, the court held that their claims were not cognizable under § 3604(b).<sup>285</sup>

*b. Bloch v. Frischholz*

The Seventh Circuit recently revisited the issue of post-acquisition claims in *Bloch v. Frischholz*.<sup>286</sup> The Blochs argued that their condominium association’s rule prohibiting owners from placing “[m]ats, boots, shoes, carts or objects of any sort” outside their doors and its continuous removal of Jewish residents’ mezuzot violated § 3604(b).<sup>287</sup> They contended that because observant Jews must affix a mezuzah at every entrance of their residences, the board’s rule forbidding mezuzot constituted a constructive eviction.<sup>288</sup>

The Seventh Circuit found that the rule was religiously neutral because it applied to “objects of any sort,” including Christmas ornaments, crucifixes, and mezuzot.<sup>289</sup> The court characterized plaintiffs’ complaint as seeking “a

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280. *Halprin*, 388 F.3d at 329 (citing *Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. & Urban Affairs of the S. Comm. on Banking & Currency*, 90th Cong. *passim* (1967); 114 CONG. REC. 2274 (daily ed. Feb. 6, 1968) (statement of Sen. Mondale)); BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II 1709-17, 1742-51, 1762, 1769 (1970).

281. *Halprin*, 388 F.3d at 329.

282. *Id.*

283. *Id.*

284. *Id.* at 330.

285. *Id.*

286. 533 F.3d 562 (7th Cir. 2008), *aff’d in part and rev’d in part en banc*, 587 F.3d 771 (7th Cir. 2009).

287. *Id.* at 563. For a detailed recitation of the facts, see *supra* notes 3-14 and accompanying text.

288. *Bloch*, 533 F.3d at 564.

289. *Id.*

religious exception to a neutral rule”—which the FHA does not require<sup>290</sup>— and refused to recognize “lack of accommodation” as a form of discrimination.<sup>291</sup> Citing *City of Boerne v. Flores*<sup>292</sup> and *Board of Trustees of the University of Alabama v. Garrett*,<sup>293</sup> the court emphasized that “a neutral, exception-free rule is not discriminatory and is compatible with the Constitution’s free exercise clause.”<sup>294</sup> Because the FHA only requires homeowners to make special accommodations for persons with disabilities and not for individuals’ race, sex, or religion, the court concluded that the word “discriminate” does not mean “failure to accommodate.”<sup>295</sup> In justifying the court’s narrow interpretation, Judge Easterbrook stated, “[o]ur job is not to make the law the best it can be, but to enforce the law actually enacted.”<sup>296</sup>

In contrast, Judge Diane Wood’s dissent found the Blochs’ post-acquisition claim admissible after examining the statute and related HUD regulation.<sup>297</sup> The dissent objected to the majority’s characterization of the Blochs’ claim as seeking an exception to a neutral rule.<sup>298</sup> Judge Wood explained that the rule’s coverage of mezuzot was a disputed material issue of fact.<sup>299</sup> She contended that the Blochs presented a triable claim of intentional discrimination because evidence suggested that the rule was not religiously neutral and the Association’s “reinterpretation” and enforcement of the Hallway Rule was intentionally discriminatory.<sup>300</sup>

In November 2009, the Seventh Circuit reheard the case *en banc*.<sup>301</sup> Reaffirming *Halprin*, the court acknowledged that victims of discrimination occurring in the post-acquisition phase may raise a claim under § 3604(a) only where it makes the premises “unavailable” or constructively

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290. *Id.* at 565.

291. *Id.*

292. 521 U.S. 507 (1997).

293. 531 U.S. 356 (2001).

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

295. *Id.*

296. *Id.* (citing *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006)).

297. *Id.* at 570-73 (Wood, J., dissenting).

298. *Id.* at 572-73.

299. *Id.*

300. *Id.*

301. *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc). The en banc panel agreed with Judge Wood’s dissent that the Blochs presented a triable claim for *intentional discrimination*. *Id.* at 783-84. The court found that the association’s reinterpretation of the rule to exclusively target observant Jews transformed it from a religiously neutral rule into a discriminatory one that sought to deprive Jewish residents of a required religious practice. *Id.* The court concluded that there were genuine issues of material fact for trial on the intentional discrimination question and remanded the case on this issue. *Id.* at 787.

evicts the dweller.<sup>302</sup> The court cited the statutory language, “otherwise make unavailable or deny,” which is separate from the “sale or rental” language.<sup>303</sup> In the court’s view, the “[a]vailability of housing is at the heart of § 3604(a).”<sup>304</sup> The court also acknowledged that the right to inhabit a dwelling constitutes a “privilege of sale” under § 3604(b).<sup>305</sup>

The court found that the Blochs did not have a constructive eviction claim.<sup>306</sup> The court explained that constructive eviction does not force the tenant to “move out the minute the landlord’s conduct begins to render the dwelling uninhabitable,” but requires the tenant to vacate the premises within a *reasonable time*.<sup>307</sup> Because the Blochs never vacated their dwelling but instead stayed and resisted the board’s conduct for over a year, the court found that the board’s rule did not render their premises “unavailable.”<sup>308</sup> However, the court declined to decide whether “unavailability” requires the plaintiff to vacate the premises in order to establish a *prima facie* § 3604 claim.<sup>309</sup>

The court sustained plaintiffs’ § 3604(b) claim on the alternative theory that related their post-acquisition claim to their initial purchase of the unit.<sup>310</sup> In other words, the court re-characterized the defendants’ post-acquisition discrimination as pre-acquisition discrimination, which the Seventh Circuit recognizes as actionable under § 3604(b). The court found that the discrimination related to the Blochs’ initial sale or rental because the Blochs agreed to be governed by the association when they purchased their dwellings.<sup>311</sup> The court recognized the agreement as “a term or condition of sale,” which § 3604(b) covers because it encompasses claims of current renters or owners concerning discrimination related to the initial sale.<sup>312</sup>

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302. *Id.* at 776.

303. *Id.*

304. *Id.*

305. *Id.* at 779 (citing *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004)).

306. *Id.* at 777-79.

307. *Id.*

308. *Id.* at 777.

309. *Id.*

310. *Id.* at 779-81.

311. *Id.* at 780 n.8 (“[A]s a condition precedent to purchasing or residing at Shoreline Towers Condominium Association, they explicitly agreed to be bound and governed by its Declaration and Bylaws.”).

312. *Id.* at 779-80 (citing *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005) (“[Section] 3604(b) may encompass the claim of a current owner or renter for attempted and unsuccessful discrimination relating to the initial sale or rental.”); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (“[W]hen a landlord imposes on white tenants the condition that they may lease his apartment only if they agree not to receive blacks as guests, the lan-

The court explained that when condominium owners purchase their units, they submit to the condominium's "Declaration," which establishes "rights, easements, privileges, and restrictions."<sup>313</sup> Under the "Declaration," the board may impose rules that it "deem[s] advisable for the maintenance, administration, management, operation, use, conservation and beautification of the Property, and for the health comfort, safety and general welfare of the Unit Owners . . . ."<sup>314</sup> Upon their purchase, plaintiffs agreed to be bound by the board's present and future rules.<sup>315</sup> The court identified the Blochs' agreement to submit to the board's rules as a "condition" of their purchase.<sup>316</sup> It explained that the board's power to limit owners' rights in the future "flow[ed] from the terms of the sale."<sup>317</sup> The court held that because the Blochs purchased the unit "subject to the condition that the Condo Association can enact rules that restrict the buyer's rights in the future" and they argued that the board discriminated against them using its power, "§ 3604(b) prohibits the board from discriminating against the Blochs through its enforcement of the rules, even facially neutral rules."<sup>318</sup>

The court distinguished the Blochs' claim from that in *Halprin*. It clarified that under *Halprin*, "§ 3604(b) is not broad enough to provide a blanket 'privilege' to be free from all discrimination from any source," such as isolated discriminatory acts by property owners.<sup>319</sup> It explained that the dispute in *Halprin* was unrelated to the terms, conditions, or privileges associated with the plaintiffs' initial purchase.<sup>320</sup> Consequently, the court held that victims of post-acquisition discrimination, which does not amount to constructive eviction, may still state a cognizable claim under § 3604(b) if the discrimination relates to the *original* terms and conditions that accompanied their purchase and thereby actually constitutes pre-acquisition discrimination.<sup>321</sup> In other words, if victims of *post-acquisition discrimination* can recharacterize the discrimination they suffered after moving into their dwellings as *pre-acquisition discrimination* by relating it back to the original terms and conditions of their purchase, the Seventh Circuit will allow their claim to proceed under § 3604(b). The Seventh Circuit's decision

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dlord has discriminated against the tenants in the 'terms, conditions and privileges of rental' on the grounds of 'race.'"))).

313. *Id.* at 780.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 780-81.

to rehear *Bloch* en banc and clarify *Halprin* after *Modesto* demonstrates the great extent to which this issue has presented itself in civil rights jurisprudence.

### III. TAKING A HERCULEAN LEAP: A DWORKINIAN RESOLUTION TO THE CIRCUIT SPLIT

This part suggests how the Supreme Court should interpret the FHA to resolve the split in authority over whether § 3604(b) applies to post-acquisition claims.

#### A. The Applicability of Dworkin's Theory

The Supreme Court should take a Herculean leap and recognize all post-acquisition claims as cognizable under § 3604(b) using Dworkin's Coherence Theory. The statute suffers from a fundamental ambiguity over what constitutes housing access, integration, and "privileges of sale or rental," which makes its text unavailing. The FHA's legislative history is also indeterminate because during the two year legislative deliberations, neither the House nor the Senate discussed or tinkered with the substantive provisions' language.<sup>322</sup> Each side correctly applied meaning-based and intent-based theories, but neither is determinative because the text and legislative history do not clearly elucidate whether housing access, integration, and "privileges of sale or rental" involve rights that continue during occupancy beyond merely taking possession of a dwelling.<sup>323</sup>

Because meaning-based and intent-based theories are inadequate in resolving the circuit split, alternative theories are better suited for this case. Coherence Theory is particularly well-suited for resolving the split in authority because this case presents a Dworkinian tie, which the court can resolve through the statute's best political justification—housing equality.<sup>324</sup>

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322. See *supra* notes 67-110 and accompanying text.

323. See *supra* notes 29-61, 67-110 and accompanying text.

324. See *Cass v. Am. Props., Inc.*, No. 94 C 2977, 1995 WL 132166, at \*2 (N.D. Ill. Feb. 27, 1995) (citing 42 U.S.C. § 3601 (2006)) ("Congress established the Fair Housing Act to ensure that people who have historically suffered from discrimination in housing markets have equal access to housing opportunities."); *supra* note 69 and accompanying text; see also *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (Newman, J., dissenting) ("Congress enacted the Fair Housing Act to prohibit racial segregation in housing."); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (citing *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)) (explaining that the FHA's goal is to provide "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos of racial groups, whose lack of opportunities the Act was designed to combat"); *Evans v. First Fed. Sav. Bank of Ind.*, 669 F. Supp. 915, 924 (N.D. Ind. 1987) ("[T]he FHA is designed to address the problem of increased segregation of minorities; the solution being sought by Congress through the FHA is to make housing

Under Coherence Theory, a statute is ambiguous if it yields two valid but competing interpretations, or a “Dworkinan tie,” over its application to a situation that the drafters never expressly addressed.<sup>325</sup> For instance, in

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equally available to all citizens.”); *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975) (stating that the primary justification for the FHA is “to provide fair housing throughout the United States”); 114 CONG. REC. 2274, 2276 (1968) (statement of Sen. Walter F. Mondale); *id.* at 3421 (“[F]air housing is one more step toward achieving equality in opportunity and education for the Negro.”); *id.* at 3422 (“It is impossible to gage the degradation and humiliation suffered by a man . . . when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood.”); Ankur Goel, *Restricting Minority Occupancy to Maintain Housing Integration*, 24 HARV. C.R.-C.L. L. REV. 561, 574 (1989) (noting that the general purpose of the FHA is to “achiev[e] equality by preventing subjugation”); Nicole Schmidt, Note, *San Francisco Public Housing as an Avenue for Empowerment: The Case for Spirited Compliance With Tenant Participation Requirements*, 6 HASTINGS RACE & POVERTY L. J. 333, 337 (2009) (citing *United States v. Henshaw Bros.*, 401 F. Supp. 399 (E.D. Va. 1974)) (“In further pursuit of the goal of equality, Congress passed . . . the ‘Fair Housing Act of 1968’ . . . which prohibits discrimination in the housing market based on race, color, religion or national origin. The Act was enacted to bar all racial discrimination, private as well as public, in sale and rental of real property.”); Michael R. Tein, Comment, *The Devaluation of Non-white Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1469-70 (1992) (discussing the anti-discrimination goal of the FHA). Senator Mondale stated that the FHA sought to replace the ghettos with “truly integrated and balanced living patterns.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 CONG. REC. 3422); Scott N. Gilbert, Comment, *You Can Move in But You Can’t Stay: To Protect Occupancy Rights After Halprin, the Fair Housing Act Needs to be Amended to Prohibit Post-Acquisition Discrimination*, 42 J. MARSHALL L. REV. 751, 766 (2009) (citing 114 CONG. REC. 2276) (“[T]he primary sponsors of the bill spoke of two goals: ending housing discrimination and integrating America’s residential housing.”). The impact of Martin Luther King’s assassination in spurring Congress to pass the FHA further demonstrates that equality is the best political justification of the statute. See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149, 160 (1969) (“Martin Luther King’s assassination on the evening of April 4th accomplished one thing; it dislodged the Civil Rights Bill of 1968 from the Rules Committee . . . with National Guard troops called up to meet riot conditions in Washington still in the basement of the Capitol, the House debated fair housing.”). King was an icon of racial equality. While the gunman who assassinated King originally believed that his bullet would sound the death knell for racial equality and integration, it actually ignited riots throughout the nation, which accelerated the FHA through Congress. *Id.* at 149. Later developments such as the addition of subdivision (f) to § 3604, which ensures the equality of persons with disabilities, further suggest that equality is the best political justification for the statute. See H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (“The right to be free from housing discrimination is essential to the goal of independent living.”); *Smith & Lee Assoc., Inc. v. City of Taylor*, 102 F.3d 781, 794-95 (6th Cir. 1996); *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994); *Proviso Ass’n of Retarded Citizens v. Vill. of Westchester*, 914 F. Supp. 1555, 1562-63 (N.D. Ill. 1996); Jennifer Matta, *Informed Choice: Expanding Housing Options in an Aging Society*, 48 WAYNE L. REV. 1503, 1517-18 (2003).

325. Dworkin describes the circumstances as follows:

[W]hen the words in the statute unambiguously require a certain decision about legal rights and duties, and when that decision is sensibly related to some widely supported political aim—then it is uncontroversial that the legislation includes that

*United Steelworkers v. Weber*, Title VII was ambiguous in its concept of racial equality and whether it prohibited employers from instituting affirmative action programs that expressed a hiring preference for certain minority groups.<sup>326</sup> Justice Brennan held that Congress designed Title VII to advance racial equality in employment, education, and other areas in order to end economic segregation, which limited African Americans to lower paying jobs.<sup>327</sup> He therefore found that it would be incoherent to construe Title VII to ban programs designed to achieve this objective.<sup>328</sup> Justice Rehnquist alternatively read the act to propose a colorblind conception of equality that prohibited any race-based distinction in employment, even those that sought to advance African Americans.<sup>329</sup> The FHA suffers from a fundamental ambiguity similar to that of Title VII because its text and legislative history do not explicitly outline the temporal limitations of housing access, integration, or the “privileges of sale or rental.”<sup>330</sup> The statute is thus ambiguous over what constitutes housing access, which produces a Dworkinian tie over whether the FHA requires protecting minority groups’ ability to merely take and maintain physical possession over a dwelling to achieve housing equality, or instead entails ensuring discrimination-free housing and genuine housing integration with ongoing rights beyond acquisition and constructive eviction. As Title VII sought to promote racial equality, the FHA was designed to achieve housing equality but does not clearly define the means to achieve that end.

The circuit split reflects the Dworkinian tie that results from the statute’s fundamental ambiguity. The Ninth Circuit conceptualizes housing access as involving rights that continue beyond the point of acquisition because it recognizes integration as an ongoing process that does not end with merely enabling minority groups to sign a lease or purchase agreement and physically possess a dwelling.<sup>331</sup> In contrast, the Fifth and Seventh Circuits conceptualize housing access and integration as only involving minority groups’ ability to initially obtain housing, i.e., purchase a dwelling or sign a lease or purchase agreement, and physically possess a dwelling initially

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decision, and judges are bound to enforce it . . . . When either of these conditions fails—when, for example, the words used might be used to express either of two decisions—then an argument must be provided establishing which decision, if either, does form part of the legislation.

MATTER OF PRINCIPLE, *supra* note 24, at 319

326. *Id.* at 318.

327. *Id.* at 319.

328. *Id.*

329. *Id.*

330. 42 U.S.C. § 3604(b) (2006); *see also supra* Parts I.A and I.B.

331. *See* *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009).

free from discrimination.<sup>332</sup> Hence, these courts draw a distinction between the pre- and post-acquisition phases except for constructive eviction claims.<sup>333</sup> They maintain that because the statute specifically targets initial housing access, the FHA is only concerned with enabling minority groups to acquire and physically possess dwellings.<sup>334</sup>

The dispute over post-acquisition claims thereby constitutes a hard case or close question of statutory law. The Circuits subscribe to the same theories of statutory interpretation but arrive at different conclusions because the statute is fundamentally ambiguous. They consider the statute's language, how other federal courts have interpreted it, how HUD has implemented the FHA in its regulations, the statute's original scope and purpose, its legislative history, and possible adverse effects of the competing interpretations.<sup>335</sup> The dissent in *Bloch* further provides an extensive *Chevron* analysis.<sup>336</sup> It concludes that HUD's regulation represents a valid interpretation of the FHA because § 3604(b) is ambiguous and HUD's statutory interpretation is reasonable based on the Supreme Court's previous construction of the statute and policy considerations.<sup>337</sup> Each side presents the best possible interpretation using these traditional tools of statutory interpretation. However, their interpretations are grounded upon conflicting foundational assumptions about the nature of housing integration, access, and the "privileges of sale." The disagreement between the Circuits therefore emerges over an ambiguous bedrock that Coherence Theory can resolve.

### 1. *The Inadequacy of Meaning-Based Theories*

Meaning-based interpretive theories fail to resolve the conflict over post-acquisition claims. While the opposing Circuits correctly apply meaning-based theories, the theories provide little guidance in choosing among reasonable competing meanings of the statute.<sup>338</sup> Indeed, as Justice Frankfurter recognized, "[t]he difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the [ ] ques-

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332. See *Bloch v. Frischholz*, 533 F.3d 562, 563-64 (7th Cir. 2008), *aff'd in part and rev'd in part en banc*, 587 F.3d 771 (7th Cir. 2009); *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005); *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004).

333. See *Bloch*, 533 F.3d at 563-64; *Cox*, 430 F.3d at 745; *Halprin*, 388 F.3d at 329.

334. See *Bloch*, 533 F.3d at 563-64; *Cox*, 430 F.3d at 745; *Halprin*, 388 F.3d at 329.

335. See *supra* notes 251-334 and accompanying text; see also *infra* notes 336-79 and accompanying text.

336. See 533 F.3d at 571-73.

337. See *id.* at 571.

338. Lin, *supra* note 137, at 233-34.



tion.”<sup>339</sup> The conflict over post-acquisition claims involves that exact scenario where the statute does not explicitly address “the troubling question,” but instead contains a fundamental ambiguity.

Section (b) of 42 U.S.C. § 3604 does not contain a temporal element and is thus ambiguous concerning the phases it covers.<sup>340</sup> It prohibits discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.”<sup>341</sup> On one hand, the phrases “privileges of sale or rental” and “provision of services or facilities” imply a more robust conception of housing access, including ongoing rights and integration that do not end when one takes possession but continue throughout one’s occupancy. Courts that uphold post-acquisition claims amounting to less than constructive eviction under section (b) properly note that the provision of services and facilities predominantly occurs during the occupancy phase after initial acquisition.<sup>342</sup> On the other hand, the phrase “in connection with” suggests that the statute’s conception of access is more limited, merely enabling protected classes to legally take and maintain physical possession of their dwellings. Courts that fail to recognize post-acquisition claims legitimately posit that “in connection with” refers to the “sale or rental.”<sup>343</sup> The Seventh Circuit found that the statute’s language “might be stretched” to encompass constructive eviction, which is the only post-acquisition claim the court recognized as cognizable under section (b), but contended that “the words mean what they seem to mean” in that section (b) only applies to the sale or rental phase.<sup>344</sup> Recognizing constructive eviction as cognizable under the statute but excluding other forms of discrimination is consistent with a narrower conception of access because the doctrine of constructive eviction only protects one’s legal physical possession.<sup>345</sup> Later in *Bloch*, the Se-

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339. Frankfurter, *supra* note 141, at 539.

340. 42 U.S.C. § 3604(b) (2006).

341. *Id.*

342. *See, e.g.*, *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009).

343. *Cox v. City of Dallas*, 430 F.3d 734, 745-46 (5th Cir. 2005).

344. *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 330 (7th Cir. 2004).

345. A landlord’s intentional action or omission constructively evicts a tenant where it materially or permanently deprives a tenant of his or her use or quiet enjoyment of a property by making the premises useless to serve its intended purpose, and the tenant consequently vacates the premises in a reasonable time. *See, e.g.*, *Auto. Supply Co. v. Scene-In-Action Corp.*, 172 N.E. 35, 37 (Ill. 1930); *Sewell v. Hukill*, 356 P.2d 39 (Mont. 1960); *Kimball v. Lincoln Theatre Corp.*, 261 N.W. 842 (Neb. 1935); *Leo v. Santagada*, 256 N.Y.S.2d 511 (City Ct. 1964); *Bronx Garment Ctr., Inc. v. Acme Multi-Stitching Corp.*, 235 N.Y.S.2d 92 (City Civ. Ct. 1962); *Couch v. Hall*, 219 Tenn. 616 (1967); *North Ridge Apartments v. Ruffin*, 257 Va. 481 (1999); *Erickson v. Elliott*, 31 P.2d 506 (Wash. 1934). By abandoning the premises, the tenant effectively ends his or her physical possession of the property. It ap-

venth Circuit focused on the word “unavailable” in holding that victims may raise claims of constructive eviction under § 3604(b).<sup>346</sup> However, the court allowed the Jewish plaintiffs to sue for post-acquisition discrimination by relating it back to an agreement “in connection with” the initial sale.<sup>347</sup> Although its relation of the Blochs’ discrimination back to the initial sale is problematic,<sup>348</sup> the court’s focus on the concept of “unavailable” is a valid meaning-based interpretation of the statute.<sup>349</sup> The court thereby embraced a more limited conception of housing access that only protects one’s right to take possession of a dwelling, which coexists with the broader conception endorsed by opposing courts that protects one’s right to occupy a dwelling free from discrimination.

Therefore, the statute’s wording is ambiguous because it may either cover only discrimination connected with physical possession, i.e., the initial rental or sale of a dwelling and constructive eviction; or discrimination involved in the continuous provision of services or facilities both before and after the initial rental or sale. The statute’s “meaning” concerning different phases of residency is unclear and yields two equally reasonable but competing interpretations.

## 2. *The Inadequacy of Intent-Based Theories*

Intent-based theories are also inadequate in resolving the circuit split. These theories call upon courts to divine the drafters’ intention and use a statute’s legislative history to resolve a dispute over statutory law.<sup>350</sup> However, the legislative history of § 3604(b) is almost non-existent because Congress never substantially edited or discussed the provision.<sup>351</sup> Also, Congress never discussed the temporal limitations of the statute or discrimination in general.<sup>352</sup> Additionally, similar to how Congress never explicitly endorsed one of two competing conceptions of racial equality in *Weber*, Congress never espoused one particular conception of housing access.<sup>353</sup> The Circuits correctly apply intent-based theories using the only existent

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plies to egregious activities that make a dwelling uninhabitable, but does not cover basic discrimination. Therefore, constructive eviction relates to the narrower conception of housing access that only protects against discrimination that inhibits an individual’s taking and maintaining physical possession.

346. *Bloch v. Frischholz*, 587 F.3d 771, 777 (7th Cir. 2009) (en banc).

347. *Id.* at 779-80.

348. *See infra* Part III.A.1.

349. *See supra* Part I.B.1.

350. *See supra* notes 152-68 and accompanying text.

351. *See supra* Part I.A.2.

352. *See supra* Part I.A.2.

353. *See supra* Part I.A.2; *see also* MATTER OF PRINCIPLE, *supra* note 24.

legislative history available but characterize it differently according to their opposing conceptions of housing access, integration, and the “privileges of sale or rental . . . or . . . provision of services or facilities.”<sup>354</sup> Both sides rely on and recast the first section of the Act’s policy statement, Congress’ overall stated intentions, and comments from Senator Mondale to advance their opposing conceptions.<sup>355</sup> The legitimacy of both characterizations demonstrates the inadequacy of intent-based theories in resolving the Circuit split.

Courts supporting the application of § 3604(b) to post-acquisition claims cite the congressional record’s documentation of Congress’ concern over exclusionary and discriminatory housing practices and its overarching goal to help minorities escape from urban ghettos.<sup>356</sup> These courts suggest that limiting the FHA to pre-acquisition claims would prevent the Act from protecting dwellers against a “whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling.”<sup>357</sup> For instance, in *Koch*, where the plaintiff-tenants suffered post-possession harassment, the District Court of Nebraska relied on the first section of the Act as presented by Senator Mondale, which stated that “[i]t is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States.”<sup>358</sup> The court suggested that the original wording indicates that Congress sought to prevent discrimination during “occupancy” and considered post-possession problems.<sup>359</sup> However, its reliance on this provision is problematic because (1) the policy statement is not directly related to § 3604(b), albeit provides more of an overarching policy for the statute; and (2) Congress later altered the policy statement and omitted the word “occupancy.”<sup>360</sup> The court more appropriately cites another section of the

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354. 42 U.S.C. § 3604(b) (2006). *Compare* Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 712 (9th Cir. 2009), *and* United States v. Koch, 352 F. Supp. 2d 970, 976-77 (D. Neb. 2004), *with* Halprin v. Prairie Single Family Homes, 388 F.3d 327, 330 (7th Cir. 2004), *and* Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005).

355. *See* Cox, 430 F.3d at 746.

356. *See Modesto*, 583 F.3d at 713-14; *Koch*, 352 F. Supp. 2d at 977; Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*4 (M.D. Fla. May 2, 2005); Landesman v. Keys Condo. Owners Ass’n, No. C 04-2685 PJH, 2004 WL 2370638, at \*2 (N.D. Cal. Oct. 19, 2004).

357. *Modesto*, 583 F.3d at 714.

358. *Koch*, 352 F. Supp. 2d at 977 (citing 114 CONG. REC. 2270 (1968)).

359. *Id.*

360. 42 U.S.C. § 3601 (2006).

FHA,<sup>361</sup> which prohibits discrimination in real-estate transactions, including “making . . . loans [and] . . . improving, repairing, or maintaining a dwelling . . . [.]” to further evince that Congress considered post-acquisition situations.<sup>362</sup> These activities are indeed typically ongoing beyond one’s initial acquisition of a property. However, nothing in that section explicitly establishes a temporal boundary.<sup>363</sup> Loans, home improvements, and maintenance may conceivably only relate to the inhabitant’s taking and maintaining physical possession.<sup>364</sup> The court also acknowledged that Senator Mondale stated that § 3601 should be read in light of “the entire bill, the objective being to eliminate discrimination in the sale or rental of housing,” but suggested that this did not limit the statute to pre-acquisition claims when read in context.<sup>365</sup> Indeed, Senator Mondale made this statement while responding to his colleague’s objection to the words “to provide for fair housing throughout the United States,” which his colleague feared would lead courts to interpret § 3601 to require the federal government to provide housing.<sup>366</sup> The court correctly concluded that this context suggests that Senator Mondale’s comment did not limit the statute to pre-acquisition discrimination.<sup>367</sup> Although Congressional Records indicate that Congress was deeply concerned about housing practices that outright excluded individuals from living in areas solely on the basis of a protected characteristic, the court correctly suggested that Congress’ overall motivation “to eliminate discriminatory business practices that confined African-Americans to harsh inner-city living conditions” does not exclude its possibly intending to prohibit post-acquisition discrimination.<sup>368</sup> It further appropriately relied upon Congress’ overall “commit[ment] to the principle of living together,” integrating neighborhoods to eradicate ghettos that adversely impacted minorities’ education and employment, and intention to pass “measures that have teeth and meaning, in the eyes of every American, black or white,”<sup>369</sup> which strongly evidence the statute’s broader objective and conception of access as embracing genuine integration.

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361. 42 U.S.C. § 3605 (2006).

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

363. *See* 42 U.S.C. § 3604(b) (2006).

364. For instance, without adequate loans, one may not be able to finance his or her purchase of a dwelling. Likewise, without home improvements or maintenance, one may need to stop physically possessing the dwelling and vacate it.

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

366. *Id.* (citing 114 CONG. REC. 4975 (1968)).

367. *Id.*

368. *Id.*

369. *Id.*

In contrast, in *Cox*,<sup>370</sup> the Fifth Circuit recast the relevance of the policy statement in the current version of § 3601. The current policy statement omits the word “occupancy,” which could indeed indicate that Congress designed the FHA to only prohibit discriminatory actions that inhibit one’s initial access to and physical possession of a property. The court also relied on the following statement from Senator Mondale:

Obviously, [§ 3601] is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing . . . . Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.<sup>371</sup>

From Mondale’s statement, the court inferred that § 3604(b) only covers discrimination that hinders ownership and is thus limited to pre-acquisition claims.<sup>372</sup> Taken in isolation, this statement could indicate that the objective of the entire bill, including § 3604(b), is to only protect against discrimination in the “sale or rental” process. However, the statement’s context suggests a competing interpretation as explained above. Furthermore, in *Halprin*, the Seventh Circuit relied on Congress’ silence and lack of debate over the particular issue to suggest that the drafters never contemplated the possibility that discrimination might arise when “[minorities] were allowed to own or rent homes . . . [in] desirable residential areas.”<sup>373</sup> This view is also plausible because minorities were excluded from desirable residential areas throughout the first half of the twentieth century. Congress may not have been able to foresee the result of allowing minority groups to enter previously exclusive areas or that discrimination would continue even if minority groups could take possession of property. At this time, housing equality, like racial equality, was a social experiment. No government institution could guarantee the effectiveness of any method designed to achieve equality. The statutes merely represented a means to accomplish the goal. Congress may have indeed genuinely believed that breaking the rigid barriers of acquisition would suffice in ending housing discrimination, and therefore designed the FHA to only prohibit activities that would inhibit taking or maintaining physical possession. This legitimate interpretation of the scant legislative history led the Fifth and Seventh Circuits to draw a distinction between post-acquisition and pre-acquisition discrimination and hold that the § 3604(b) only applies to the latter.

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370. 430 F.3d 734 (5th Cir. 2005).

371. *Koch*, 352 F. Supp. 2d at 977 n.6 (quoting 114 CONG. REC. 4975 (1968)).

372. *See id.*

373. *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004).

The FHA's legislative history therefore fails to conclusively indicate whether § 3604(b) applies to post-acquisition discrimination. The disagreement between the courts over the legislative history is essentially due to its scant nature.<sup>374</sup> Both sides piece together isolated sections of the legislative history to support their *a priori* conflicting but equally legitimate conceptions of housing access. Because the courts rely on and refashion the same history to support their positions, intent-based theories of statutory interpretation are insufficient in resolving the circuit split.

### 3. *The Inadequacy of HUD Regulations and Chevron Analysis*

Because there are multiple reasonable ways to apply § 3604(b) to post-acquisition claims, two of which yield opposite results, courts have turned to HUD regulations to elucidate the section's meaning.<sup>375</sup> However, this approach is also inadequate because HUD regulations merely repeat the statute's language and thus suffer from the same fundamental ambiguity.<sup>376</sup> 24 C.F.R. § 100.65 identifies "failing or delaying maintenance or repairs of sale or rental dwellings" and "limiting the use or privileges, services, or facilities associated with a dwelling" because of discrimination as "prohibited actions" under § 3604(b)'s ban on discrimination in the "terms, conditions or privileges relating to the sale or rental" or "services or facilities in connection with the sale or rental of a dwelling."<sup>377</sup> Courts recognizing post-acquisition claims reason that these prohibited activities most often arise during the post-acquisition phase.<sup>378</sup> They maintain that the regulation evinces section (b)'s applicability to current dwellers and find that the regulation is a reasonable interpretation of the statute.<sup>379</sup> In contrast, courts that refuse to recognize post-acquisition claims emphasize that the regulation merely repeats the language used in § 3604(b).<sup>380</sup> They conclude that it prohibits conduct only as it "relat[es] to" or is "in connection with" the "sale or rental of a dwelling."<sup>381</sup> Indeed, because the regulation repeats the

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374. See *supra* notes 67-72 and accompanying text.

375. Compare *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) (reviewing 24 C.F.R. § 100.65), and *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*3-4 (M.D. Fla. May 2, 2005), with *Cox*, 430 F.3d at 745.

376. Compare *Modesto*, 583 F.3d at 713 (reviewing 24 C.F.R. § 100.65), and *Richards*, 2005 WL 1065141, at \*3-4, with *Cox*, 430 F.3d at 745.

377. 24 C.F.R. § 100.65 (2010).

378. See *Modesto*, 583 F.3d at 713; *Richards*, 2005 WL 1065141, at \*3-4.

379. See *Modesto*, 583 F.3d at 713; *Richards*, 2005 WL 1065141, at \*3-4.

380. See *Cox*, 430 F.3d at 745.

381. See *id.*

language of § 3604(b), it does not elucidate the statute's meaning, but suffers from the same fundamental ambiguity.<sup>382</sup>

Both courts' arguments are circular. In relying on the regulations, they essentially contend: "Section 3604(b) states X ambiguously. Section (b) really means Y because the regulation implementing it indicates Y. The implementing regulation also states X ambiguously but really means Y because section (b) states X." This argument is tautological because section (b) is ambiguous in its statement of X. In other words, the courts are interpreting the ambiguous statute through an ambiguous regulation. They resolve the regulation's ambiguity through the statute. However, the statute suffers from the same ambiguity as the regulation. Because it uses the same language as the statute, the regulation sheds no explicit or additional light on the meaning of § 3604(b)'s reference to the "privileges of sale or rental . . . and services or facilities." Because HUD's regulation suffers from the same ambiguity as the statute, the regulation fails to indicate whether the statute applies to post-acquisition claims.

Because both sides' interpretations are consistent with the ambiguous text and legislative intent, their interpretations would be equally reasonable under a *Chevron* analysis and entitled to deference. Under *Chevron*, to assess an agency's construction of the statute that it implements and administers, a reviewing court undertakes a two-part analysis.<sup>383</sup> The court must first determine "whether Congress has directly spoken to the precise question at issue."<sup>384</sup> To ascertain Congress' intention,

[c]ourt[s] employ[] the traditional tools of statutory construction. The first and foremost tool to be used is the statute's text, giving its plain meaning . . . . [I]f the text answers the question, that is the end of the matter. Beyond the statute's text, the tools of statutory construction include the statute's structure, canons of statutory construction, and legislative history.<sup>385</sup>

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>386</sup> If Congress has not addressed the question at issue and the statute is "silent or ambiguous," the court must determine "whether the agency's answer is based on a permissible construction of the

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382. Compare 24 C.F.R. § 100.65(a), with 42 U.S.C. §3604(b) (2006).

383. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

384. *Id.*

385. *Windmill Int'l PTE v. United States*, 193 F. Supp. 2d 1303, 1305-06 (Ct. Int'l Trade 2002).

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

statute.”<sup>387</sup> Here, all courts agree that § 3604(b) is ambiguous. Whenever Congress has “explicitly left a gap for the agency to fill,” the agency’s regulation is “given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”<sup>388</sup> “To survive judicial scrutiny, the agency’s construction need not be the only reasonable interpretation or even the most reasonable interpretation.”<sup>389</sup> If *Chevron* deference applies, then the court cannot substitute “its own construction of a statutory provision for a reasonable interpretation made by [an executive agency].”<sup>390</sup> The *Chevron* analysis here becomes problematic because by utilizing the statute’s unclear phrases, the regulation itself is ambiguous and susceptible to multiple interpretations. Therefore, it is difficult for the courts to definitively determine whether the regulation reflects a single reasonable interpretation. Consequently, the regulation provides courts with little guidance over how to interpret the statute.

#### 4. *Coherence Theory as a Viable Solution to the Dworkinian Tie*

Because post-acquisition claims involve a close question of statutory law with a fundamental ambiguity that produces two equally reasonable but competing interpretations which the text and legislative history cannot resolve, Dworkin’s Coherence Theory is better suited to solve the interpretative conflict.

The conflict over whether § 3604(b) applies to post-acquisition claims represents a hard case in which “there are two justifications [of a statute] available that point in opposite directions, both justifications will fit well enough both the text of the statute and the political climate of the day.”<sup>391</sup> In this dispute, the statute suffers from a fundamental ambiguity over what constitutes housing “access,” which produces a Dworkinian tie between conceptualizing “access” as achieving genuine ongoing integration in housing *versus* enabling protected classes to merely physically possess dwellings.

On one hand, Congress enacted the FHA to promote integration in housing as well as in other areas, such as employment and education, where discrimination continued to stymie minorities’ advancement.<sup>392</sup> This conception of access as integration recognizes housing as a fundamental social

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387. *Id.*

388. *Id.* at 843-44.

389. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).

390. *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

391. See *MATTER OF PRINCIPLE*, *supra* note 24, at 425-29.

392. See *supra* Part I.A.3.



experience that lays the foundation for equality in other social contexts.<sup>393</sup> It promotes discrimination-free housing and prohibits actions that both discriminate against particular inhabitants and diminish the general availability of discrimination-free housing, even if they do not constructively evict or change the inhabitant's legal status with respect to the dwelling. For example, this conception of access protects individuals' ability to live in an apartment without their landlord writing racial epithets on their door such as "Nigger" or "Hymie." Indeed, *ongoing integration* involves living in a dwelling and receiving services free from all discrimination, not just that which constructively evicts. Courts that uphold post-acquisition claims therefore recognize this broader justification and conceptualize housing access as an ongoing process that entails genuine integration extending beyond the moment of signing a lease or purchase agreement to facilitate genuine integration.<sup>394</sup>

Alternatively, access can be conceptualized as an individual's basic ability to take and maintain *physical possession* of a dwelling by signing a lease or acquiring title and not being constructively evicted. This conception of access only prohibits conduct that impedes individuals from physically possessing or assuming title to a dwelling. For example, this conception would protect minorities' ability to live in a condominium without the condominium board changing their locks or setting fire to their apartment because the board dislikes their skin color. It would also protect minority groups' ability to obtain an apartment without a condominium board denying their application solely because they dislike their religion. Indeed, when Congress passed the FHA, it sought to end discrimination by enabling protected classes to acquire and physically possess dwellings.<sup>395</sup> Courts limiting § 3604(b) to pre-acquisition claims emphasize this narrower goal and thus conceptualize access as ending when the dweller signs the lease or purchase agreement and takes possession of the property.<sup>396</sup>

Like *Weber*,<sup>397</sup> the text and legislative history are indeterminate and tenably support both sides.<sup>398</sup> Congress did not expressly outline the temporal elements of access or "privileges of sale," so it did not prohibit post-acquisition claims or explicitly allow them.<sup>399</sup> Because this dispute has

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393. See *supra* Part I.A.3.

394. See *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711-13 (9th Cir. 2009) (reviewing 24 C.F.R. § 100.65); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*3-4 (M.D. Fla. May 2, 2005).

395. See *supra* Part I.A.

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

397. *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-02 (1979).

398. See *supra* Part III.A.

399. 42 U.S.C. § 3604(b) (2006).

“two justifications available that point in opposite directions,” the circuit split over the application of § 3604(b) to post-acquisition discrimination claims constitutes a “hard case” with a Dworkinian tie suited for Coherence Theory analysis.<sup>400</sup>

### B. Applying Dworkin’s Theory to the Circuit Split

The Supreme Court should interpret the FHA to resolve the split using Dworkin’s Coherence Theory as it did in *Weber*.<sup>401</sup> Under Dworkin’s theory, the Court should interpret the ambiguous statute to advance the policies or principles that furnish the “best political justification” for it.<sup>402</sup> A proposed justification must be consistent with the statute’s institutional intention and supported by the political climate of the time.<sup>403</sup> The court should choose the justification that “provides the direction for coherent development of the statute.”<sup>404</sup> A justification provides for a statute’s coherent development if it “provides a more accurate[,] [] more sensitive or sounder analysis of the underlying moral principles.”<sup>405</sup> Using this approach, the critical inquiry is: “which of the two competing justifications is superior as a matter of political morality?”<sup>406</sup> In *A Matter of Principle*, Dworkin deconstructs Justice Brennan’s argument for upholding affirmative action programs under Title VII of the Civil Rights Act in *Weber*.<sup>407</sup> Coherence Theory would support post-acquisition claims by deconstructing the Ninth Circuit’s rationale in the same way as follows.

The circuit split over the viability of post-acquisition claims under § 3604(b) involves two competing justifications of the statute that constitute a Dworkinian tie – achieving genuine integration in housing *versus* enabling protected classes to merely physically possess dwellings. Housing equality, i.e., eliminating discrimination in housing to advance minorities’ socioeconomic and psychological well-being, is an uncontroversial political policy behind the FHA, which both houses of Congress endorsed and no one contested.<sup>408</sup> Congress continuously re-asserted that policy over the two year period during which it debated the FHA.<sup>409</sup> Allowing members of

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400. See *MATTER OF PRINCIPLE*, *supra* note 24, at 325-29.

401. 443 U.S. at 201-02.

402. See *MATTER OF PRINCIPLE*, *supra* note 24, at 327-29.

403. *Id.*

404. *Id.* at 329.

405. *Id.*

406. *Id.*

407. See *id.* at 326-31.

408. See *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496-97 (S.D. Ohio 1976); Dubofsky, *supra* note 85, at 153-55.

409. See *supra* notes 75-88 and accompanying text.

protected classes to raise claims alleging discrimination that occurred during their occupancy would advance the policy of genuinely integrating housing. Alternatively, denying dwellers the ability to raise post-acquisition claims under § 3604(b) and allowing landlords to discriminate against or harass minority dwellers with impunity under the FHA would severely thwart the statute's purpose of providing equal housing access and facilitating racial integration.

The FHA is also supported by a narrower policy to primarily focus the statute on facilitating minorities' ability to initially take and maintain possession of dwellings and prevent the FHA from becoming a general civil rights legislation.<sup>410</sup> This policy partially conflicts with the broader policy of integration because it may conceptualize the goal of housing equality to merely involve minority groups' ability to obtain housing, i.e. sign a lease or purchase agreement and take possession, which suggests that the statute should only target discriminatory events that occur in the pre-acquisition phase or that amount to constructive eviction. A rule allowing post-acquisition claims may seem to violate that policy by extending the statute's applicability beyond the scope of initial access and physical possession. However, a rule forbidding post-acquisition claims and maintaining the distinction between pre- and post-acquisition discrimination under § 3604(b) would actually violate the both principles.

*1. The Incoherency of Categorizing Discrimination as Pre- and Post-Acquisition and the Shortcomings of Bloch v. Frischold*

To facilitate the most coherent development of the FHA, the Supreme Court should eliminate the distinction between pre-acquisition and post-acquisition discrimination and allow individuals to raise claims under § 3604(b) concerning discrimination that occurs during any time in the acquisition process. As a matter of principle, courts should not impose an arbitrary limit on a statute's applicability.<sup>411</sup> Courts' decisions over whether

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410. See *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (citing *Cliften Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991)) (stating that the FHA is not a "civil rights statute of general applicability" but instead "deal[s] with the specific problem of fair housing opportunities"); see also, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 745-46 (5th Cir. 2005); Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1617 (2007) ("The Fair Housing Act serves as the primary federal statute prohibiting housing discrimination.").

411. See THE FEDERALIST NO. 78 (Alexander Hamilton) (warning against judicial "arbitrary discretion"); see also, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007); *Thornburg v. Gingles*, 478 U.S. 30, 101 (1986) (O'Connor, J., concurring); *United States v. Kinder*, 64 F.3d 757, 761 (2d Cir. 1995) (Leval, J., dissenting); *United States v. Burns*, 15 F.3d 211, 215 (1st Cir. 1994).

the discrimination in dispute relates to the pre- or post-acquisition phase would be unavoidably arbitrary and underinclusive. The distinction between pre-acquisition discrimination and post-acquisition discrimination is arbitrary and would lead to an incoherent development of the statute. The FHA does not mention time, but instead merely prohibits discriminatory conduct in the “privileges of rental or sale.”<sup>412</sup> The Seventh Circuit’s painstaking attempt to refashion the Blochs’ complaint about discrimination that occurred *after* the family took possession of its dwelling into a claim for pre-acquisition discrimination demonstrates the arbitrariness of the distinction.<sup>413</sup>

Courts would not be able to define the temporal contours of housing availability and consistently draw a definitive line between discrimination related to the pre- or post-acquisition phase because no objective procedure exists to temporally classify such discrimination. In *Bloch*, for example, the court struggled to define the temporal limitations of housing “availability” and constructive eviction, which is the only post-acquisition claim that the Seventh Circuit recognizes as cognizable under § 3604(b).<sup>414</sup> The court declined to define the exact amount of time in which a tenant must vacate the premises to establish a prima facie claim of “unavailability.”<sup>415</sup> The court found that “to establish a claim for constructive eviction, a tenant need not move out the minute the landlord’s conduct begins to render the dwelling uninhabitable . . . . [T]enants have a reasonable time to vacate the premises.”<sup>416</sup> However, the court never temporally defined the term “reasonable time.”<sup>417</sup> It instead sidestepped the issue by focusing on the Blochs’ overall failure to surrender the premises.<sup>418</sup> The court’s reluctance to define the parameters of reasonable time likely evidences the difficulty any court will have when attempting to clearly decipher the crucial point at which pre-acquisition ends and post-acquisition begins.

In addition, the distinction between pre- and post-acquisition discrimination would enable courts to concoct elaborate theories to arbitrarily determine the outcome of cases by re-characterizing the discrimination in dispute. For instance, in *Bloch*, the homeowners’ association enacted the discriminatory rule years after the Bloch family took possession of its dwelling,<sup>419</sup> which the Seventh Circuit in *Halprin* defined as the post-

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412. 42 U.S.C. § 3604 (2006).

413. *See Bloch v. Frischholz*, 587 F.3d 771, 780 (7th Cir. 2009) (en banc).

414. *Id.* at 778.

415. *Id.* at 777-80.

416. *Id.* at 778 (citing *Auto. Supply Co. v. Scene-in-Action Corp.*, 172 N.E. 35 (1930)).

417. *Id.*

418. *See id.*

419. *See id.* at 773.

acquisition phase.<sup>420</sup> Lynn Bloch even voted in favor of the rule before realizing that the association could use it to discriminate against her.<sup>421</sup> Overall, the court's theory<sup>422</sup> relating the rule back to the initial Declaration that the Blochs signed before acquiring their dwelling seems contrived. Courts may thereby use the distinction to devise theories that pre-determine the outcome of cases in an unjust manner.

Finally, the court's theory is underinclusive. A rule is underinclusive with regard to a public interest if the rule prohibits some conduct but fails to ban other similar conduct that it was designed to protect the public from.<sup>423</sup> As a matter of principle, courts should avoid overly underinclusive rules.<sup>424</sup> If the Blochs suffered from the same discrimination but had not signed such an agreement at the outset, or if the agreement was worded differently, the Seventh Circuit might not have been able to grant the Blochs relief. Such rule would deprive individuals of the right to sue under § 3604(b) based on the *type of agreement* that they signed upon purchasing or renting their dwellings. It might even enable landlords or homeowners' associations to coerce potential dwellers into contracting away their right to be free from the discriminatory activities prohibited under § 3604(b) after taking possession of their dwellings. Such a theory would thereby impose an arbitrary requirement and prevent others suffering from similar discrimination from suing under § 3604(b). However, recognizing a temporal element in § 3604(b) would lead courts to resolve cases on such arbitrary grounds.

Therefore, reading a temporal limit into the statute by distinguishing post-acquisition discrimination from pre-acquisition discrimination and allowing individuals to sue for the latter but not the former under § 3604(b) would lead to arbitrary decisions and possibly future splits in authority. The fact that the Seventh Circuit remarkably transformed Blochs' complaint into a claim of pre-acquisition discrimination shows that this distinction is not a coherent way to develop the statute. The Supreme Court should therefore abolish the distinction between pre-acquisition and post-

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420. *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 330 (7th Cir. 2004).

421. *See Bloch*, 587 F.3d at 773.

422. *See id.* at 777-78.

423. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521-22 (1993); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992).

424. *See, e.g., Mann v. Smith*, 796 F.2d 79, 81 (5th Cir. 1986) (overturning a county jail's prohibition on newspapers and magazines because the rule was "too underinclusive" to be constitutional); *see also, e.g., United States v. Morrison*, 529 U.S. 598, 657 (2000) (Breyer, J., dissenting) (finding a rule underinclusive); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267-72 (1974). *But see* Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 1022 (1995) (noting that all rules will be somewhat both over and underinclusive).

acquisition discrimination. Allowing dwellers to raise claims for discrimination suffered in either phase of the acquisition process would coherently develop the statute.

## 2. *A Coherent Solution*

Under Coherence Theory, the Supreme Court should allow individuals to raise claims of discrimination that occur after they take possession of their dwellings under § 3604(b) because it is consistent with facilitating housing equality—which is the best justification for the FHA—and consistent with both the statute’s provisions and the political climate at the time of enactment. Overall, when it enacted the FHA, Congress sought to end the rampant discrimination that fueled riots and race-based violence and achieve equality in housing as it had already done in other areas.<sup>425</sup> The FHA therefore represented an experimental panacea to eradicate the *de facto* barriers that continued to impede the progress of minority groups. Although Congress may have envisioned the means to achieve the goal in different ways, i.e., either protecting inhabitants from discrimination in taking and maintaining possession of their property or enabling inhabitants to live on their property continuously free from discrimination, the goal of housing equality remained similar to Title VII’s goal of achieving racial equality.

A rule forbidding post-acquisition claims under § 3604(b) would actually violate both the broad and narrow policies of the statute. Minorities would be dissuaded from moving into dwellings notorious for post-acquisition discrimination similar to how Southern African Americans’ fear of race-motivated violence in the early-twentieth century dissuaded them from moving into white neighborhoods and led them to form segregated ghettos.<sup>426</sup> Minorities continue to self-segregate and hesitate to relocate to majority white areas because they still fear hostility and discrimination.<sup>427</sup> The Ninth Circuit alluded to the importance of adhering to the statute’s best underlying political justification stating, “limiting the FHA to claims brought at the point of acquisition would limit the Act from reaching a whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a

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425. *See supra* Part I.A.

426. *See supra* Part I.A.3.

427. *See* Oliveri, *supra* note 31, at 30; *see also* Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolitan Analysis*, 8 HOUSING POL’Y DEBATE 763 (1997); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1853-54 (1994); Sander, *supra* note 66, at 900, 903.

dwelling or in the provision of services associated with that dwelling.”<sup>428</sup> Indeed, even if Congress conceived the FHA primarily as a means to enable minorities to take and maintain physical possession, the legislation would be toothless in promoting housing equality if it allowed landlords and homeowners to discriminate against minorities after they moved into their dwellings.<sup>429</sup> Forbidding individuals from raising *all* post-acquisition claims under § 3604(b) would thereby violate the FHA’s policies of facilitating racial integration in the housing context and narrowing the statute’s scope to specifically target housing-related discrimination that inhibits initial access and physical possession. Moreover, it would violate the statute’s best political justification of achieving housing equality.<sup>430</sup>

Alternatively, a rule recognizing post-acquisition claims as cognizable under § 3604(b) would not be limitless or violate the FHA’s narrower policy of specifically targeting *initial housing access* and physical possession because it would only eliminate temporal boundaries on the statute’s applicability, not its substantive limitations. The statute discusses the availability of housing and privileges of sale, not time. Case law and HUD’s regulations<sup>431</sup> have already defined the types of discrimination that the substantive sections of the FHA prohibit.<sup>432</sup> Allowing individuals to raise claims of discrimination that occurred after they obtained their dwellings would merely eliminate the arbitrary distinction between pre- and post-acquisition discrimination. Therefore, a rule allowing individuals to sue under § 3604(b) for discrimination they suffered after taking possession of their dwellings would not make § 3604(b) limitlessly applicable to all instances of discrimination. It would instead retain the parameters established by the robust body of case law and HUD regulations that have defined the FHA’s substantive application as a housing-specific statute and simply eradicate the arbitrary temporal distinction that endangers the statute’s coherent development.

Furthermore, recognizing post-acquisition claims would not exceed the scope of the FHA as a housing-specific statute. The Supreme Court has continuously recognized the need to flexibly apply civil rights-oriented sta-

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428. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 714 (9th Cir. 2009) (providing examples of such situations falling short of constructive eviction).

429. *See United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (“In my view, 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; therefore the Fair Housing Act should be (and has been) read to permit the enjoyment of this privilege without discriminatory harassment.”); *see also* Oliveri, *supra* note 31, at 29.

430. *See supra* note 324 and accompanying text.

431. *See, e.g.*, 24 C.F.R. § 100.70(d)(4) (2010) (stating that refusing to provide municipal services based on race is unlawful); *see also supra* Part I.A.1.

432. *See supra* Part I.A.1.

tutes in order to maintain their efficacy. Although Congress hesitated to transform the FHA into a general civil rights statute and sought to limit its scope, the Supreme Court acknowledged that “[s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>433</sup> The Supreme Court itself indicated that courts should give the FHA’s provisions “a generous construction.”<sup>434</sup> The Ninth Circuit presented examples of absurd results that would occur if courts limited the FHA to pre-acquisition claims such as landlords sexually harassing tenants or raising the rent of only Jewish tenants.<sup>435</sup> Furthermore, Senator Brooke, one of the FHA’s drafters, anticipated that discrimination is a “complex” problem that requires an “adaptable” approach “flexible enough to permit changes.”<sup>436</sup> Abolishing the distinction between pre- and post-acquisition claims would not substantively change the type of claim that one could raise, which case law has already established. Therefore, allowing post-acquisition claims to proceed under § 3604(b) would not impede the FHA’s principle of maintaining the statute’s scope.

A rule allowing victims of post-acquisition discrimination to sue under § 3604(b) would advance the statute’s overarching goal of promoting housing integration and equality. As discrimination against inhabitants during the post-acquisition phase remains pervasive, segregation persists and race continues to influence housing patterns.<sup>437</sup> New York City Council Mem-

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433. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

434. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972).

435. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009).

436. *See* 114 CONG. REC. S2991 (daily ed. Feb. 14, 1968) (statement of Sen. Brooke).

437. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 2:2 (2006) (“[T]he degree to which segregated housing patterns have persisted in the modern era is discouraging . . . Housing has proved to be ‘the last major frontier in civil rights’ and the area most resistant to change.” (quoting Charles M. Lamb, *Equal Housing Opportunity*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 148 (Charles S. Bullock & Charles M. Lamb eds., 1984))); YINGER, *supra* note 130; John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) (“Housing is the civil rights area that has most been plagued by slow, small advances, where the possibility for real change is viewed as most remote.”); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 47 (2009) (citing U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, at 4 (2002)) (“Approximately a third of all blacks live in areas categorized as hyper-segregated, i.e., reflecting extreme racial isolation.”); Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 596-99 (2002) (citing John Yinger, Housing Discrimination Study: Incidence and Severity of Unfavorable Treatment (prepared for the U.S. Dept. of Housing and Urban Development, Washington, D.C. (1991))) (“Segregation is the natural tendency in America . . . A black person who attempts to buy or rent a home



ber Gale A. Brewer, who represents a diverse community on the Upper West Side of New York City, confirms that housing discrimination remains a problem facing individuals in both New York and the United States nationwide.<sup>438</sup> Middle- and upper-class African Americans still tend to live

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has a 50% chance of being discriminated against . . . Latinos attempting to access housing can expect to be discriminated against 43-35% [sic] of the time.”); de Leeuw, *supra* note 122, at 388 (examining housing discrimination in the United States as it relates to the country’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and noting that “high levels of segregation persist” as “people of color continue to be disproportionately ‘concentrated in poor residential areas’” (internal citations omitted)); Ford, *supra* note 427, at 1844 (“[S]egregation continues to play the same role it always has in American race relations: to isolate, disempower, and oppress.”); Douglas S. Massey & Mitchell L. Eggers, *The Ecology of Inequality: Minorities and the Concentration of Poverty, 1970-1980*, 95 AM. J. SOC. 1153, 1185-86 (1990); Douglas Massey & Nancy Denton, *Trends in Residential Segregation of Blacks, Hispanics and Asians: 1970-1980*, 52 AM. SOC. REV. 802, 823-25 (1987); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act At 40*, 41 IND. L. REV. 605, 605 (2008) (“[P]atterns of neighborhood-based residential segregation in our metropolitan areas remain persistent.”); John A. Powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 CLEV. ST. L. REV. 209, 225 (2009) (“Personal and institutional discrimination in the housing market continues.”); Lisa Marie Ross, *Cyberspace: The New Frontier For Housing Discrimination—An Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act*, 44 VAL. U. L. REV. 329, 329 (2009) (“[D]iscrimination continues as was recently seen in advertisements stating racial preferences on websites designed to help Hurricane Katrina victims find housing.”); Rubinowitz & Alsheik, *supra* note 125, at 905 (“Housing discrimination seems to remain a largely intractable fact of America social life.”); Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 289 (2002) (“Using the law to promote diversity in residential communities is probably more difficult than promoting it in any other public policy domain.”); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 460 (2007) (“[W]e know that housing discrimination, and particularly rental discrimination, is uniquely intractable.”); John Yinger, *Housing Discrimination Is Still Worth Worrying About*, 9 HOUSING POL’Y DEBATE 894-920 (1998); Natasha M. Trifun, *Residential Segregation After The Fair Housing Act*, 36 HUM. RTS. 14, 14, 16 (2010) (“[H]ousing discrimination persists at unacceptable levels.”); Nat’l Fair Hous. Alliance, 2008 Fair Housing Trends Report 12 (2008), available at <http://www.nationalfairhousing.org/PublicPolicy/TrendsReport2008/tabid/2725/Default.aspx> (providing statistical evidence and documenting how communities remain segregated and discrimination continues); Haya El Nasser, *Minorities Reshape Suburbs*, USA TODAY, July 9, 2001, available at <http://www.usatoday.com/news/nation/census/2001-07-09-burbs.htm>; L. Rawlings et al., *Race and Residence: Prospects for Stable Neighborhood Integration*, in NEIGHBORHOOD CHANGE IN URBAN AMERICA 1, 3 (2004), available at [http://www.urban.org/uploadedpdf/310985\\_NCUA3.pdf](http://www.urban.org/uploadedpdf/310985_NCUA3.pdf) (“[A]mong the neighborhoods that were *exclusively white* in 1990, 81 percent remained so in 2000, while 15 percent shifted into the *predominantly white* category . . .”). Segregation also continues to abound in public housing. See de Leeuw, *supra* note 122, at 358; see also *Thompson v. HUD*, 348 F. Supp. 2d 398, 467-69 (D. Md. 2005).

438. Telephone Interview with Gale A. Brewer, Member of the Council of the City of New York (Mar. 31 2009). Council Member Brewer also emphasized the need to undertake more testing to identify instances of discrimination at the outset. *Id.* An organization called Open Housing undertook such studies in New York, but eventually ran out of funding and closed. *Id.*

in majority black neighborhoods rather than in predominantly white areas where residents earn similar incomes.<sup>439</sup> “In the suburbs, blacks perceive that they would be unwelcome, isolated, and, perhaps, at risk of physical violence.”<sup>440</sup> Furthermore, discriminatory provisions of municipal services and land use designations also segregate neighborhoods.<sup>441</sup> Federal protections promoting housing integration in all phases of the acquisition process are thus vital to breaking down these last barriers on the map of segregated neighborhoods and eradicating the lingering remnants of perceptions that stigmatize minority groups. Refusing to apply the FHA to post-acquisition claims may undermine federal protections, endanger civil rights, and reverse the strides that the FHA has made by giving landlords *carte blanche* under the FHA to harass and intimidate tenants.<sup>442</sup> Therefore, in accordance with Coherence Theory, the Supreme Court should apply § 3604(b) of the FHA to post-acquisition claims, ranging from constructive eviction to basic discrimination, and thereby abolish the distinction between post- and pre-acquisition discrimination in order to advance the policies and principles that furnish the best political justification for the statute.<sup>443</sup>

#### CONCLUSION

Despite the great progress achieved by the FHA, post-acquisition discrimination in housing remains a reality that residents face nation-wide on a daily basis.<sup>444</sup> Although Congress originally sought to pass a fair housing bill that would facilitate minorities’ access to housing, Congress’ overarching goal of achieving housing equality with integrated neighborhoods and

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439. Oliveri, *supra* note 31, at 30; *see also* MASSEY & DENTON, *supra* note 65, at 74-76, 84-88; Cashin, *supra* note 437, at 600 (“When confronted with the option of integrating with whites, blacks now most favor a heavily black neighborhood – one that is three – quarters black.”). Studies suggest that white residents are even willing to pay a premium to live in majority white areas. Calmore, *supra* note 437, at 1101.

440. *See* Calmore, *supra* note 437, at 1107. *See generally* Larkin, *supra* note 410.

441. Minority dominated neighborhoods are disproportionately more likely to be selected for undesirable uses, after which the white population often relocates and minorities with fewer resources are trapped. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388-89 (1994); Vicki Been, *What’s Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1018-19 (1993).

442. The FHA is an integral part of federal civil rights protections because plaintiffs can more easily state a cause of action under the FHA than the Equal Protection Clause or the Civil Rights Act. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (explaining that the Equal Protection Clause requires plaintiffs to prove discriminatory intent); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); Desiderio et al., *ALI-ABA Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation*, SL005 ALI-ABA 1947 (2005).

443. *See supra* note 324.

444. *See supra* notes 438-42.

eliminating housing discrimination represents the best political justification for the statute. This principle should lead the Supreme Court to resolve the split in authority between the Circuits over the statute's fundamental ambiguity by recognizing the viability of *all* post-acquisition claims, even those that fall short of constructive eviction, under § 3604(b) and thereby eliminate the distinction between pre- and post-acquisition discrimination. This resolution would facilitate the most coherent development of the FHA.