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# THE FAIR HOUSING ACT, DISPARATE IMPACT CLAIMS, AND *MAGNER V. GALLAGHER*: AN OPPORTUNITY TO RETURN TO THE PRIMACY OF THE STATUTORY TEXT

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*The authors discuss the text of the Fair Housing Act, its legislative history, and the past federal appellate court decisions holding that the FHA permits disparate impact claims. They argue that recent Supreme Court decisions cast doubt on the past federal appellate court decisions, and show that the statutory text of the FHA, unlike the text of some other civil rights laws, does not permit disparate impact claims. They also discuss the case currently pending before the Court in which the Court may address for the first time whether the FHA permits disparate impact claims.*

This term, the Supreme Court will hear an appeal involving the question of whether the Fair Housing Act ("FHA") permits claims based on a disparate impact theory of liability.[1] Eleven of the 12 federal courts of appeal and a number of federal district courts have assumed that it does, notwithstanding the fact that there is no support for this position in the text of the statute.[2] Ignoring the text of the FHA—which many of these courts acknowledge is troublesome for their conclusion—these courts

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analogize to Title VII jurisprudence, relying on what they characterized as the broad purpose of the FHA to find a disparate impact right of action.[3] This nebulous purpose led these courts to find a disparate impact right of action while expressly acknowledging that such a right of action conflicts with the plain language of the statute.[4] Too often, the statutory text was considered to be of secondary importance. This expanded view of the type of behavior that the FHA was designed to punish, however, is unjustified. Indeed, what evidence is available from the legislative history of the FHA makes plain that the drafters never intended—indeed, attempted to avoid—allowing for disparate impact claims under the FHA.

The Supreme Court has never decided whether the FHA permits plaintiffs to bring claims under a disparate impact theory. However, in recent years the Supreme Court has reconfirmed the primacy of the statutory text in anti-discrimination statutes. For example, in *Smith v. City of Jackson*[5] the Supreme Court clarified its Title VII jurisprudence and explained that disparate impact claims are firmly rooted in the text of Title VII. In clarifying the statutory basis of disparate impact claims under Title VII, the Supreme Court undermined the foundations of those decisions that permitted disparate impact claims under the FHA through analogy to Title VII. *City of Jackson* makes clear that the anti-discrimination provisions of the FHA do not permit disparate impact claims. No federal court of appeal has yet addressed whether the FHA permits disparate impact claims after *City of Jackson*.[6]

On November 7, 2011, the Supreme Court granted a petition for a writ of certiorari in *Magner v. Gallagher*,[7] which poses the question of whether disparate impact claims are cognizable under the FHA. In *Magner*, the City of St. Paul, Minnesota has asked the Supreme Court to consider whether the FHA permits disparate impact claims.[8] Private landlords, seeking to limit the City's "aggressive" enforcement of its housing code, have sued the City for violating the FHA.[9] The landlords argue that the City's attempt to close housing that violates its housing code reduces the amount of affordable housing available to minority renters.[10] The landlords claim that as a result, the City's enforcement efforts have a disparate impact on minority renters in violation of the FHA.[11] Although the District Court ruled for the City,[12] the Eighth Circuit reversed, holding that the landlords had stated a cognizable claim under the FHA.[13] The City petitioned the Eighth Circuit for rehearing en banc, but the court denied the petition.[14]

The result of the *Magner* appeal before the Supreme Court will have profound impact both in private litigation and government enforcement actions. Both the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ") have increasingly relied on disparate impact claims to further their policy goals without properly, much less formally, interpreting the text of FHA. Shortly after the Supreme Court agreed to hear the *Magner* appeal, HUD issued for the first time a proposed rule claiming to establish standards for applying its purported longstanding interpretation that the FHA allows claims under the disparate impact standard.[15] Even if HUD were to institute a formal rule following notice and comment, such an interpretation would not be entitled to deference because, as argued below, the statute is unambiguous. The DOJ—which does not have interpretive authority under the FHA—has made the disparate impact theory an important tool in its efforts to achieve settlements with lenders without needing to prove discriminatory intent.[16] Indeed, a plain reading of the statutory text makes clear that disparate impact claims are not allowed under the FHA.

This article will demonstrate that the text of the FHA and its legislative history show that Congress did not intend the FHA to permit disparate impact claims. Instead, the statute was purposely designed to combat intentional discrimination, not to create liability for facially neutral activities that may result in unequal effects.

## THE TEXT OF THE FHA DOES NOT PERMIT DISPARATE IMPACT CLAIMS

### The "Effects" Language: The Basis of Disparate Impact Claims

The Supreme Court's opinion in *City of Jackson* shows that the text of an anti-discrimination statute, not merely a broad interpretation of the statute's purpose, determines whether the statute permits disparate impact claims. The question before the Court in *City of Jackson* was whether the Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. Noting the similarity between the ADEA and Title VII, the Court reviewed its Title VII jurisprudence for guidance—and, in the process, clarified and emphasized that its Title VII disparate impact jurisprudence is firmly rooted in the statutory text.

Justice Stevens' plurality opinion in *City of Jackson* clarifies that the Court's holding in *Griggs v. Duke Power Co.*,[17] was based on the "interpretation of § 703(a)(2) of Title VII."[18] Indeed, in *Griggs* the Court began its analysis by quoting only one of the two anti-discrimination provisions in § 703(a) of Title VII. This section provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or o*therwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.[19]

The *Griggs* Court quoted only subsection (a)(2)—the subsection with the "effects" language—omitting subsection (a)(1).[20]

In discussing *Griggs*, Justice Stevens noted that the *Griggs* Court "explained that Congress had 'directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivation.'"[21] The *Griggs* Court "thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent." While Justice Stevens acknowledged that *Griggs* relied in part on the purposes of Title VII, he noted that the Court has "subsequently clarified" that its Title VII disparate impact jurisprudence "represented the better reading of the statutory text."[22] Indeed, in the two cases cited by Justice Stevens, the Court had cited only § 703(a)(2) in discussing disparate impact under Title VII.[23]

Justice Stevens explained that § 703(a)(2) permits disparate impact claims because of the "effects" language in the provision:

> Neither § 703(a)(2) [of Title VII] nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" per-

> sons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Ibid.* (explaining that in disparate-impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee'" (alteration in original) (quoting U.S.C. § 2000e-2(a)(2))). Thus, the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.[24]

Because ADEA § 4(a)(2) contains the same "effects" language as Title VII § 703(a)(2), the Court held that the ADEA permits disparate impact claims.[25] By showing that the original disparate impact holding in *Griggs v. Duke Power Co.* was rooted in specific language in the text of Title VII rather than being implied by the overall purposes of the statute—and by basing its disparate impact analysis under the ADEA on the text of the statute—the Supreme Court's decision in *City of Jackson* reaffirms the primacy of the statutory text in construing anti-discrimination statutes.

The Supreme Court's textual analysis in *City of Jackson* also makes clear that the "discriminate against…because of" formulation in § 703(a)(1) of Title VII—the same formulation in the FHA—permits only disparate treatment claims and requires a showing of intent. The Court noted that there are "key textual differences" between subsections (a)(1) and (a)(2) of both Title VII § 703 and ADEA § 4.[26] Whereas subsection (a)(2) permits disparate impact claims, the Court emphasized that subsection (a)(1) encompasses disparate treatment, but "*does not encompass disparate-impact liability*," and requires a showing of intent.[27] This is because "the focus of the paragraph is on the employer's actions with respect to the targeted individual."[28] Similarly, Justice O'Connor, with whom Justices Kennedy and Thomas joined in dissent, emphasized that subsection (a)(1) does not permit disparate impact claims: "Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and *I think it obvious that it does not. That provision plainly requires discriminatory intent*…."[29] Thus, while the Court was divided as to whether subsection (a)(2) of ADEA § 4 permits disparate impact claims, the Court was unanimous that subsection (a)(1)—the section containing the "discriminate against…because of" formulation—does not.[30]

This analysis is consistent with the Supreme Court's approach to other anti-discrimination statutes. When the statutory text creates a cause of action based on the "effects" or "results" of actions, the Court has held that the statute permits disparate impact claims as is demonstrated in the following chart:

| Statute | Text of Statute Permitting Disparate Impact Claims | Cases Finding Disparate Impact Claims Permitted |
|---|---|---|
| Title VII | "It shall be an unlawful employment practice for an employer:… (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). | *Griggs*, 401 U.S. at 429-31. |
| ADEA | "It shall be unlawful for an employer:… (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual's age…." 29 U.S.C. § 623 (emphasis added). | *City of Jackson*, 544 U.S. at 232-35. |

| | | |
|---|---|---|
| Americans with Disabilities Act ("ADA") | "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).<br><br>"As used in subsection (a) of this section, the term 'discriminate' includes: (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a[n]… arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited in this subchapter; (3) utilizing standards, criteria, or methods of administration: (A) ***that have the effect of discrimination*** on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control…." 42 U.S.C. § 12112(b) (emphasis added). | *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). |

| | | |
|---|---|---|
| Rehabilitation Act | "The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990…." 29 U.S.C. § 791(g). | *Alexander v. Choate*, 469 U.S. 287, 299 (1985). |
| Voting Rights Act | "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by a State or political subdivision in a manner which ***results*** in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color…." 42 U.S.C. § 1973(a) (emphasis added). | *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) |

In contrast, when the statutory text does not contain a provision creating a cause of action based on "effects" of actions, the Court has held that the statute does not permit disparate impact claims as is demonstrated in the following chart:

| Statute | Text of Statute Permitting Disparate Impact Claims | Cases Finding Disparate Impact Claims Permitted |
|---|---|---|
| Title IX | "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program | *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). |

| | | |
|---|---|---|
| | or activity receiving Federal financial assistance…." 20 U.S.C. § 1681. | |
| Title VI | "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000-d. | *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). |
| Equal Education Opportunities Act | "No State shall deny equal educational opportunity to any individual on account of his or her race, color, sex or national origin…." 20 U.S.C. § 1703. | *Castenada v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981). |
| Title II | "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a. | *Robinson v. Paragon Foods, Inc.*, 2006 WL 2661110, at *6 (N.D. Ga. Sept. 15, 2006) (Title II). |

Thus, when a statute contains language addressing the "effects" or "results" of an action, disparate impact claims under the statute are permitted. When the statute lacks such "effects" language, disparate impact claims under the statute are prohibited.[31]

## The Text of the FHA: Disparate Treatment Only

The anti-discrimination provisions of the FHA do not contain "effects" language analogous to Title VII or the ADEA; rather, the provisions contain the "discriminate against…because of" formulation that the Supreme Court unanimously held permits only disparate treatment—and not disparate impact—claims. The following table compares the provisions of Title VII § 703(a), ADEA § 4(a), and FHA § 805 (the provision applicable to mortgage lending), and shows that the FHA's anti-discrimination provision mirrors the disparate-treatment-only provisions of Title VII and the ADEA and that the FHA has no provision analogous to the disparate impact provisions of Title VII and the ADEA:

| | Title VII | ADEA | FHA |
|---|---|---|---|
| Disparate Treatment Language | (a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin; | (a) It shall be unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; | (a) In general. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to *discriminate against any person* in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin. |

| | | | |
|---|---|---|---|
| Disparate Impact Language | (a) It shall be an unlawful employment practice for an employer – (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin. | "It shall be unlawful for an employer:… (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age…. | None. |

These similarities and differences between the text of the FHA and the text of Title VII and the ADEA are dispositive of Congress's intent in enacting the FHA. The Supreme Court has explained that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[32] Indeed, this was the basis for the Court concluding in *City of Jackson* that an "effects" provision in the ADEA comparable to Title VII's "effects" provision meant Congress intended to permit disparate impact claims.[33] In accordance with this rule of statutory construction, the "discriminate against…because of" language in the FHA must have the same meaning as that same language does

in Title VII and the ADEA. The Court was unanimous in *City of Jackson* that this language permits only disparate treatment claims, not disparate impact claims.[34]

Just as similar language in similar statutes must be interpreted to have the same meaning, different language in similar statutes must be interpreted as having different meanings. Then-Judge John Roberts has explained that "[t]his use of different language in two statutes so analogous in their form and content, enacted so closely in time, suggests that the statutes differ in their meaning.…[35] In contrast to Title VII and the ADEA which contain two different anti-discrimination provisions—a "discriminate against…because of" provision prohibiting disparate treatment only and an "effects" provision prohibiting disparate impact—the FHA lacks an "effects" provision comparable to Title VII § 703(a)(2) and ADEA § 4(a)(2). Because the FHA was enacted only four years after Title VII and only one year after the ADEA,[36] the omission of "effects" language from the FHA must be viewed as intentional—and shows conclusively that the FHA does not permit disparate impact claims.

## The Meaning of "Discriminate"

This view is also consistent with the ordinary meaning of the term "discriminate" used in the FHA. It is well established that when terms are not defined in a statute, those terms are given their ordinary meaning.[37] In ordinary usage, "discriminate" refers to the *intentional* treatment of one person differently than another.[38] In contrast, several commentators have noted that disparate impact causes of action do not, in fact, punish actions motivated by an intent to treat one person different than another but rather further notions of distributive justice.[39] In addressing what he referred to as the "nondiscrimination principle" in the context of voting rights legislation, Professor Blumstein has explained:

> [T]he substantive concept of "discriminatory effect" stemming from neutral legislation is not only anomalous but also analytically bankrupt. Legitimate and neutral legislation can have consequences that disadvantage a group with disproportional racial composition. Nevertheless, such legislation does not necessarily "discriminate" on the basis of race. The norm of nondiscrimination is at bottom one of procedural regularity.

> It requires that decisionmaking occur on the basis of relevant criteria, and simultaneously renders race irrelevant in almost all circumstances. Therefore, discrimination occurs only when decisions are impermissibly based on racial criteria. To determine whether a facially neutral law is discriminatory, one must focus on the legitimacy and plausibility of the asserted neutral rationale. In addition, one must look at the decisionmaker's good faith and the integrity of the decisionmaking process to determine whether either is infected with racial bias.
>
> Because only purposefully discriminatory conduct can violate the principle of nondiscrimination, disproportional racial impact by itself merely highlights the existence of racial disadvantage. If society considers such disadvantage undesirable because of independent principles of distributive justice, it can use the evidence of disproportional impact as a basis of relief. Such relief furthers the independent, affirmative value of improving the political influence of blacks and necessarily encompasses some notion of race-based entitlements to political influence or representation; such relief does not, however, rest on the nondiscrimination norm embodied in the fourteenth and fifteenth amendments.
>
> Despite this clear conceptual distinction, prohibiting discrimination and overcoming disadvantage are often lumped together in debates over civil rights legislation and enforcement policies…. The desire to remedy a racially disproportional impact is animated by policy objectives quite different from those behind the principle of racial nondiscrimination and is supported by an underlying, often unarticulated notion of race-based entitlements.[40]

Indeed, one prominent member of the plaintiffs' bar has noted that even actions intended to *prevent* discrimination can lead to disparate impact liability: "A defendant with the best of intentions—indeed, *even a defendant who undertakes a particular policy in the express hope of eliminating any possible discrimination*—can still be held liable if a plaintiff pursues a disparate impact claim."[41] Such an interpretation cannot be reconciled with the ordinary meaning of "discriminate"—and it is inconceivable that Congress could have intended "discriminate" to reach so far. Whether legislation should target only actions motivated by discrimination, or whether the legislation should

seek to further notions of distributive justice (as Title VII and the ADEA arguably do) is a decision that must be left to Congress.[42] In the case of the FHA, Congress chose to do only the former.

## The Purpose of the FHA Is Codified in the Text of the Statute

Proponents of a disparate impact right of action under the FHA no doubt will argue that the purpose of the FHA supports the view that disparate impact claims are cognizable. However, such an argument begs the question of what Congress intended to prohibit. The Supreme Court has explained that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President."[43] As discussed above, the plain language of the FHA prohibits only "discriminat[ion]"—not the disparate "effects" of facially neutral actions—and this shows that Congress intended the FHA to prohibit only actions motivated by discriminatory animus. The presence of language supporting only disparate treatment—and not disparate impact—shows that Congress did not intend either the FHA or ECOA to permit disparate impact claims.

Section 801 of the FHA, which provides Congress's statement of policy in passing the FHA, is consistent with this view. Section 801 provides that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[44] While Section 801 has been cited to justify giving the FHA a "generous construction" to the FHA's provisions,[45] it cannot support an interpretation of the FHA that goes beyond the text of the statute. Indeed, the legislative history shows that the words "within constitutional limitations" were intended to restrict the application of the statute, not expand it beyond the text of the statute itself. Because the fair housing legislation would affect individuals' basic property rights, including placing restrictions on the ability to buy, sell, rent, or encumber real property, many were concerned that the legislation exceeded Congress's authority under the Constitution.[46] The reference to constitutional limits was added to make clear that the FHA was not intended to exceed Congress's constitutional authority.

> The reference to "constitutional limits" was added by an amendment offered by Mr. Miller of Iowa who explained that it was intended to make

> "clear that the provision for fair housing must be within constitutional limitations upon Congress in so providing." Senator Hart of Michigan, floor manager on the bill, accepted the Iowa Senator's amendment on the basis of this explanation and so long as it was clearly understood that it was not an "acknowledgement that we consciously intend to legislate beyond the reach of the Constitution…"[47]

Even if the language of Section 801 was intended more broadly, a "generous construction" cannot add provisions to a statute that were not added by Congress. The Supreme Court has explained

> That principle [of liberal construction] may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be.[48]

Judge Easterbrook has similarly explained that "the essential question is not which way the statute points but how far it directs one to go" and that "[n]o principle of statutory construction says that after identifying the statute's accommodation of competing interests, the court should give the favored party a little extra."[49] Thus, an interpretation of the FHA that goes beyond the text of the statute does not simply further the purposes of the statute, it changes the statute. Indeed, Senator Mondale, a principal sponsor of the FHA in the Senate, explained that the language of Section 801 "is to be read in context with the entire bill"—in other words, the text of the FHA determines its scope.[50]

## THE LEGISLATIVE HISTORY FURTHER SHOWS THAT THE FHA DOES NOT PERMIT DISPARATE IMPACT CLAIMS

Where, as here, the language of the FHA is plain, the analysis of the FHA must begin *and end* with the statutory text.[51] Nevertheless, the legislative history of the FHA further shows that the FHA does not—and was not

intended to—permit disparate impact claims. Indeed, in a brief filed before the U.S. Supreme Court, Solicitor General Fried explained that "[t]he legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination."[52]

While there are no conference reports, committee reports, etc. from the Congress that passed the FHA, there is significant legislative history in the form of (1) the larger body of anti-discrimination laws, and (2) the evolution of fair housing legislation that ultimately resulted in the FHA.

## The FHA Within the Larger Body of Anti-Discrimination Law

The FHA was not the first federal anti-discrimination statute—and the differences between the FHA and previous anti-discrimination statutes are important to understanding Congress's intent in formulating the language of the FHA.[53] When the FHA is compared to the previous anti-discrimination statutes, it becomes evident that Congress did not intend the FHA to permit disparate impact claims.

When Congress enacted Title VII in 1964—four years before the enactment of the FHA—it crafted two different anti-discrimination provisions: one (§ 703(a)(1)) that makes it unlawful for an employer to "discriminate against" an individual "because of" the individual's membership in a protected class, and another (§ 703(a)(2)) that prohibits employers from taking actions that "adversely affect" an individual's employment status.[54]

When Congress enacted the ADEA in 1967—the year before it enacted the FHA—Congress similarly crafted two anti-discrimination provisions: one (§ 4(a)(1)) that makes it unlawful for an employer to "discriminate against" an individual "because of" the individual's membership in a protected class, and another (§ 4(a)(2)) that prohibits employers from taking actions that "adversely affect" an individual's employment status.[55]

In contrast, when Congress enacted the FHA in 1968, Congress crafted the FHA's anti-discrimination provisions using only the "discriminate against …because of" formulation found in subsection (a)(1) of both Title VII § 703 and ADEA § 4.[56] Congress did not enact "effects" language comparable to subsection (a)(2) of Title VII § 703 and ADEA § 4. The FHA does not contain a provision with the "adversely affect" formulation that the Supreme

Court in *City of Jackson* found to be the basis for disparate impact claims under Title VII and the ADEA. When anti-discrimination statutes enacted closely in time contain similar language, "it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[57] However, when such statutes have significant differences in language, it must be presumed that Congress intended the provisions to have different meanings.[58] If Congress had intended the FHA to permit disparate impact claims as it did with Title VII and the ADEA, then Congress would have incorporated into the FHA the "adversely affects" language it used in Title VII and the ADEA. It did not, and this is dispositive of congressional intent.

## The Evolution of Fair Housing Legislation

The FHA did not simply spring into existence in 1968; rather, it was the culmination of a three-year legislative effort. This effort began in 1966 with the introduction, at the behest of President Johnson,[59] of Title IV of the Civil Rights Act of 1966.[60] Among its various provisions, Title IV contained a provision for a Fair Housing Board that could hear and adjudicate complaints of violations of the Act.[61] This provision created intense opposition because of fear that it would have permitted a prima facie case of housing discrimination to be made based solely on results, without a showing of discriminatory intent. For example, early in the House debates Congressman Whitener expressed his concern that Title IV would allow claims to be brought based solely on results:

> Title IV, as had been said, leaves more questions unanswered than it answers.
>
> A provision was added in the committee about a fair housing board. At the time that seemed rather innocuous. As we look at it a little further it becomes objectionable. For example, it provides that we will use the NLRB procedure.
>
> We know that under the NLRB if a man is fired from a job and he was engaged in union activity, proof of these two facts establishes a prima facie case, and thereby shifts to the employer the burden of showing that the employer was not engaged in unfair labor practice.

> I assume, if that is the procedure followed, this new fair housing board, as it is called, if a house were up for sale and a member of a minority group sought to purchase that house and that effort to buy the house was fruitless, then a prima facie case would be established and the burden would shift to the owner to show that he had not discriminated.
>
> In the testimony before the Senate committee the Attorney General of the United States agreed that that would be the situation under the statement of facts I have just mentioned.[62]

The concern that the Fair Housing Board provision would permit a prima facie case to be made on results alone also featured prominently in the Senate debates. For example, Senator Long, a key member in the opposition to Title IV, presented four arguments against its passage. The fourth reason was the possibility that the Fair Housing Board provision would permit a plaintiff to make a prima facie case without a showing of discriminatory intent:

> A fourth reason for opposing the open housing section of the bill is that it would very likely result in the imposition of an unreasonable practical burden upon property owners—over and above the deprivation of basic property rights.
>
> Prof. Sylvestor Petro of the New York University School of Law, who testified before the Senate Subcommittee on Constitutional Rights, made some very interesting and appropriate comments on this aspect of the Senate bill. I should like to quote some of his remarks:
>
> * * *
>
> > [Petro] As we shall see, it is likely that the burden of proof will come to rest swiftly upon the homeowner, rather than, as is traditional, at least in due process countries, upon the complaining party.
> >
> > * * *
> >
> > And what will happen at trial? The law is vague, and forbids refusing to sell to any person because race, color, religion, or national origin. How much proof is required? On whom will the burden of proof come ultimately to rest?

> We have considerable experience with a similarly vague law. An analogous provision in the National Labor Relations Act prohibits discrimination by employers which tends to discourage union membership. The National Labor Relations Board considers itself as having a prima facie case of discrimination when a union man is discharged by an employer who has betrayed an antiunion sentiment. At that point the burden of proof shifts to the employer. He must show there was some good reason for the discharge.
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> * * *
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> The burden of proving lack of discrimination will fall upon the homeowner.…
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> * * *
>
> [Senator Long] Mr. President, I feel that Mr. Petro's logic is unimpeachable. He has made it plain that this bill would impose a very serious and unwarranted burden upon those to whom its provisions would apply. The imposition of this burden is indeed a compelling argument for rejecting so-called fair housing.[63]

Similarly, Senator Dirksen expressed concern about how discrimination could be proven under Title IV. After endorsing Professor Petro's views, he stated

> Mr. President, this is a brilliant treatise.
>
> * * *
>
> What Dr. Sylvester Petro of New York University Law School says is that this is the greatest assault upon the due process clause of the Constitution that anybody has ever undertaken….[64]

Similar concerns were expressed by several other opponents of the bill.[65] After cloture was defeated twice, the leadership voted to lay the bill aside.[66]

There can be no doubt that concern over the burden of proof—the ability of plaintiffs to establish a prima facie case based solely on results and without alleging discriminatory intent—played an important role in the defeat of Title IV.[67] Indeed, Senator Javits, a proponent of the bill, stated that Senator Dirksen's support was indispensible if cloture were to be invoked and the act

passed—and stated further that Dirksen's support was not forthcoming "because Title IV was included in the bill."[68]

The Senate hearings the following year further confirm that the provision of Title IV permitting claims without allegations of discriminatory intent was a central reason for the bill's failure. After Title IV had been defeated, another bill (S. 1358) was introduced by Senator Mondale in 1967. S. 1358 removed the Fair Housing Board provision and replaced it with a provision that vested enforcement with the Secretary of Housing and Urban Development.[69] This provision raised the same concerns: that a prima facie case of violation might be established solely by results and without a showing of discriminatory intent. For example, during the hearings on S. 1358, a spokesman for the National Association of Real Estate Boards testified that the burden of proof issue—the ability of a complainant to establish a prima facie case based solely on results—was a principal reason for Title IV's failure, and that S. 1358 presented similar problems:

> It [Title IV] proposed an elaborate, complicated method of enforcement deplored by opponents as well as proponents of the bill.
>
> It was subsequently revised in the House with a radical method of enforcement involving a Federal regulatory body with powers comparable to that of the National Labor Relations Board. Of course, this delighted the proponents but its oppressive terms were so manifest as to challenge the most objective analysis of the bill.
>
> Now in S. 1358, we have a third method of enforcement…which vests in the Secretary of Housing and Urban Development the power to issue complaints…to investigate with full subpoena power, to make findings of facts to render judgment, and to enforce judgment….
>
> All this to ascertain the subjective reasoning behind a property owner's decision not to rent a room in his home, or to sell his home to a certain individual. Due process dictates that he who alleges a fact has the burden of proving the fact.
>
> One would be most naive to believe that the Secretary or one of the thousands of employees who would be visited upon the public to enforce this law would accept as less than conclusive the mere denial of sale or rental as a fact of discrimination.[70]

The committee took no official action to report out the bill.[71]

## The Enactment of the FHA

Similarly, the bill that eventually became the FHA stalled in the Senate until the provisions that would allow plaintiffs to establish a prima facie case based solely on results and without alleging discriminatory intent were removed. In 1968, Senators Mondale and Brooke presented an amendment to a fair housing bill, H.R. 2516, which was substantively similar to S. 1358 that had failed the previous year.[72] With Senator Dirksen again opposing cloture, the Senate rejected cloture on the bill.[73] And, before the Dirksen compromise was reached, cloture was rejected a second time.[74]

To gain Senator Dirksen's support, the proponents of the fair housing title of the bill reached a compromise with him on the burden of proof.[75] Among other changes to his fair housing amendment, Senator Mondale described the Dirksen compromise:

> Last week's parliamentary tactics require us to put in a new version of the fair housing amendment today. With the exception of a few procedural changes, the new amendment is the same as the one voted on last week.
>
> * * *
>
> The changes that have been made in this amendment…are as follows:
>
> We have included a provision to make clear that the burden of proof with respect to allegations of discrimination rests on the complainant.[76]

In other words, the Dirksen compromise clarification that the prima facie case must be based on allegations of "discrimination," not on results alone. This can also be seen in the question and answer proponents of the bill prepared. One of these addressed this very issue:

> 15. Will a person against whom a complaint of discrimination is issued have to prove that he did not discriminate?
>
> No. The burden of proof rests on the Department of Housing and Urban Development, or the complaining person, to prove that the defend-

> ing person *did* discriminate on the basis of race, color, religion, or national origin.[77]

Additionally, an exchange between Senators Jordan and Ervin—both opponents of the bill—shows that they understood that the Dirksen compromise would require a showing of intent and would not permit a prima facie case be made solely on results:

> Mr. JORDAN of North Carolina. I commend my colleague [Sen. Ervin] for the fine explanation he has made of this Dirksen amendment, and the bill that it seeks to amend.
>
> Because my colleague is an able lawyer and a good judge,…I ask him this question. I know of a case of a family which inherited some property. One sister inherited a specific piece of land, and it belonged to her by inheritance. Some people wanted to buy a lot, and she said, "No, I am not going to sell you that lot, because I want my brother to have it."
>
> Under the Dirksen proposal, she would be violating the law in that case, would she not?
>
> Mr. ERVIN. No, I do not believe she would, if she wanted to sell it to her brother. This is true because she would have a motive other than a racial motive.
>
> But if she said, "I want to sell that lot, but I prefer to sell it to a person of his and my race because persons of our race inhabit this neighborhood," she would be violating the law.[78]

Thus, both proponents and opponents of the bill understood that, after the Dirksen compromise, a person could be held liable under the FHA only upon a showing of discriminatory intent.

Additionally, statements by the bill's two principal proponents—Senators Mondale and Brooke—confirm that the FHA was intended to reach only intentional discrimination, not disparate impact. For example, Senator Brooke explained that "[a] person can sell his property to anyone he chooses as long as it is by personal choice and not because of *motivation of discrimination*."[79] Similarly, Senator Mondale explained that "[t]he bill permits an owner to do

everything that he could do anyhow with his property…except to refuse to sell it to a person *solely on the basis of his color*. *That is all it does*."[80] Similarly, the proponents of the legislation in the House emphasized that claims require a showing of discriminatory intent. Congressman Steiger stated that "under the provisions of this legislation the burden of proof rests with the person alleging discrimination, who must in any court case which arises under this law, prove discrimination."[81] 114 Cong. Rec. 9573 (1968) (Rep. Steiger).

The Senate's rejection of the so-called "Baker Amendment" is another aspect of the legislative history of the FHA commonly used to support the argument that the FHA does not require a showing of intent to discriminate.[82] The context of the Baker Amendment, however, undermines the argument. As noted above, to garner Senator Dirksen's support, on February 26, 1968, Senators Mondale and Brooke and others presented an amendment to the fair housing title of the bill "to make clear that the burden of proof with respect to the allegations of discrimination rests on the complainant."[83] A subsequent vote on cloture, however, failed.[84] Two days later, on the motion of Senators Mondale and Brook, the Senate tabled the amendment to the fair housing title of the bill and Senator Dirksen introduced a substitute amendment with the support of Senators Mondale and Brook.[85] The key difference between the Dirksen substitute and the tabled fair housing amendment was who the bill would cover.[86] The Dirksen substitute contained an exemption for:

> any single-family house sold or rented by an owner residing in such house at the time of such sale or rental….: *Provided*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this title only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person, and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 204(c) of this Title….[87]

In other words, the Dirksen substitute carved out owner-occupied single family housing from the bill's coverage except when the seller (i) used a real estate

agent or (ii) published advertisements to sell the home that indicated a racial preference or limitation. In the latter two cases, the seller would still be covered under the anti-discrimination provisions of the bill. The Senate rejected the first cloture motion on the Dirksen substitute, but agreed to the second cloture motion.[88]

The following day, Senator Howard Baker proposed an amendment that would have extended the owner-occupied single family home exemption to owners who used a real estate agent.[89] Under the Baker Amendment, however, an owner of a single-family owner-occupied home would lose the exemption if he "indicat[ed] any preference, limitation, or discrimination based on race, color, religion, or national origin" to the real estate agent.[90] In other words, under the Baker Amendment, all single-family owner-occupied homes would be exempt from the bill, regardless of whether the owners used real estate agents or not, *unless* the owners instructed their real estate agents to discriminate.[91]

Senator Charles Percy and others opposed the Baker Amendment because they believed that, as a practical matter, it would have exempted from the bill all sellers of owner-occupied single-family homes who used real estate agents—even those who in fact instructed their real estate agents to discriminate.[92] According to Senator Percy, it would be "impossible" for a plaintiff to produce evidence that a seller instructed his real estate agent to discriminate.[93] The Senate rejected the Baker Amendment the same day it was introduced.[94] The Senate debates strongly suggest that Senator Percy and others primarily opposed the Baker Amendment not because of the difficulty of proving an instruction to discriminate, but because the Baker Amendment would have exempted all sellers of single-family owner-occupied homes who used real estate agents—a group that was covered under the Dirksen substitute.[95] The debates do not, however, support the conclusion that certain senators opposed the Baker Amendment because it would have introduced an intent requirement.[96] Indeed, the intent requirement was already in the bill by the time the Baker Amendment was introduced.

## Subsequent Legislative History

The relevant portion of the FHA's anti-discrimination provision has remained unchanged since the FHA's 1968 enactment. In 1988, 20 years after the

FHA's enactment, Congress amended the FHA to apply the Act's prohibitions against discrimination to the additional categories of familial status and disability.[97] This legislation did not add "effects" language to the statute. Instead, Congress left the relevant language of the anti-discrimination unchanged.[98]

Although Congress did not change the relevant language, at least one court has relied in part on select portions of the legislative history from 1988 amendments to the FHA—20 years after the FHA's enactment—in holding that the FHA permits disparate impact claims.[99] Indeed, certain individual legislators asserted during the legislative process that the amendments permit disparate impact claims even though the relevant statutory language remained unchanged. For example, the House Committee Report relied on two court opinions to assert that the unchanged language permitted disparate impact claims.[100] Additionally, the day following the enactment of the 1988 amendments, Senator Kennedy stated that "Congress accepted th[e] consistent interpretation" of the federal courts of appeal and that the FHA "prohibit[s] acts that have discriminatory effects, and that there is no need to prove discriminatory intent."[101]

The legislative history to the 1988 amendments illustrates the problems with relying on legislative history to include concepts into a statute that do not exist in the text itself.[102] First, the statements mentioned above substantially overstate the "consistent" interpretation of the FHA by the court to that date. For example, the inconsistency in the case law at the time of the 1988 amendments—both with respect to whether the FHA permitted disparate impact claims and the types of effects that must be shown—was discussed in a 1987 opinion by Judge Greene of the United District Court for the District of Columbia:

> Several of the decisions are inconsistent with each other; others are incomplete in significant respects; and still others do not distinguish between the various relevant concepts. While, to be sure, proof of discriminatory intent by the landlord seems everywhere to be regarded as establishing a violation of the statute, there is a variety of opinion, usually not reconciled in any systematic fashion, whether a violation may also be predicated solely upon proof that the landlord's actions had a discriminatory effect, that is, a disproportionate effect on minorities.[103]

Thus, the case law at the time of the 1988 amendments was far from consistent with respect to whether the FHA permitted disparate impact claims.

Additionally, the statements discussed above fail to disclose that the United States—just three months before the 1988 amendments were enacted—filed an amicus brief before the Supreme Court arguing that the FHA did not permit disparate impact claims. In the United States' brief, the Solicitor General argued that the FHA did not permit disparate impact claims:

> Although proscribing a broad range of conduct, Congress limited that proscription to action taken "because of race." The words "because of" plainly connote a causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a requirement of discriminatory motivation. An action taken because of some factor other than race, i.e., financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute. [104]

The United States' brief further argues that the FHA's legislative history supports this reading of the statute. Indeed, the Solicitor General noted that "substantial practical problems result if this requirement is disregarded."[105]

Furthermore, the statements discussed above did not reflect the views of all those involved in the enactment of the 1988 amendments. For example, President Reagan made the following clarification when signing the 1988 amendments:

> I want to emphasize that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 [FHA] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. Title 8 speaks only to intentional discrimination.[106]

Because the 1988 amendments did not change the relevant language of the FHA's anti-discrimination provision—language that prohibits only discrimi-

nating against individuals "because of" certain characteristics, but does not address the "effects" of any particular action—the 1988 amendments would be relevant to interpreting the FHA only under the "reenactment doctrine." Under the reenactment doctrine, Congress is presumed to adopt prior interpretation of a statute when it "re-enacts a statute without change."[107] The doctrine applies, however, only if the interpretation is "well established."[108] As the discussion above shows, courts and government officials disagreed about whether the FHA permitted disparate impact claims. The reenactment doctrine cannot appropriately apply to the 1988 amendments.[109]

## THE CASE LAW MISCONSTRUES *CITY OF JACKSON* AND THE FHA

The notion that the FHA permits disparate impact claims originated in a trio of poorly-reasoned decisions in the 1970s that have since been eviscerated by subsequent Supreme Court decisions, including *City of Jackson*. Despite the plain import of *City of Jackson*, the lower courts that have continued to find disparate impact theory available under the FHA. To borrow from Hans Christian Andersen's classic tale, the child has declared that the emperor has no clothes, but the general populace still refuses to recognize the truth.

### Pre- *City of Jackson* Case Law Rested on a Questionable Foundation

The first court to hold that the FHA permits disparate impact claims drew on equal protection jurisprudence and ignored entirely the text of the FHA. In *United States v. City of Black Jack*,[110] the Eighth Circuit concluded that to establish a *prima facie* case of discrimination under the FHA, a plaintiff "need make no showing whatsoever that the [challenged] action resulting in racial discrimination in housing was racially motivated."[111] The court did not analyze the FHA or Title VII or even rely on case law concerning those statutes. Instead, the court cited a series of constitutional equal protection cases[112] without providing any rationale for why equal protection case law ought to apply to the FHA. Less than two years later, the Supreme Court overruled the series of equal protection cases relied upon in *Black Jack*[113] and

held that equal protection violations require a showing of discriminatory intent.[114] *Black Jack*'s flawed foundation was thus undermined and the opinion "must be regarded as having no vitality."[115]

Soon after *Black Jack*, the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*)[116] similarly concluded that the FHA permits disparate impact claims. Before discussing the opinion, a brief review of the procedural history is relevant. The complaint at issue in the *Arlington Heights* decisions alleged both constitutional equal protection and FHA claims. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights I*),[117] the Seventh Circuit held that a "racially discriminatory effect" was sufficient to support an equal protection claim but did not consider the FHA issue.[118] The Supreme Court reversed based on its decision in *Washington v. Davis* that equal protection violations require intent to discriminate and not merely a disparate impact.[119] The Court remanded for consideration of the FHA claim because the appellate court, "proceeding in a somewhat unorthodox fashion, did not decide the statutory question."[120]

On remand, the Seventh Circuit began with the observation that the "because of race" language contained in the FHA presented a "major obstacle" to applying disparate impact theory under the FHA.[121] The court acknowledged that a "narrow view of the phrase"—in other words, a plain interpretation of the text—"is that a party cannot commit an act 'because of race' unless he intends to discriminate between races."[122] The court observed, however, that *Griggs* permitted Title VII disparate impact claims based on "the broad purposes" of Title VII despite that statute's inclusion of the "because of race" language.[123] Thus, reasoned the *Arlington Heights II* court, the same phrase in the FHA should not be an impediment to disparate impact claims under the FHA. According to the court,

> The important point to be derived from *Griggs* is that the Court did not find the "because of race" language to be an obstacle to its ultimate holding that intent was not required under Title VII. It looked to the broad purposes underlying the Act rather than attempting to discern the meaning of this provision from its plain language.[124]

In *Griggs v. Duke Power Co.*,[125] a key decision in the *Arlington Heights II* opinion, the Supreme Court held that Title VII authorizes disparate impact claims. The appellate court in *Griggs* held that a plaintiff must show that a "racial purpose or invidious intent" motivated the challenged employment practice to prevail on a Title VII claim.[126] The Supreme Court reversed, setting forth its entire reasoning in the brief paragraph quoted below. Importantly, the Court did not analyze the text of Title VII in reaching its conclusion, but rather relied exclusively on what it characterized as the "objective of Congress" in enacting Title VII.

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.[127]

Based on *Griggs* and despite the plain language of the FHA, the Seventh Circuit in *Arlington Heights II* held that "at least under some circumstances a violation of [the FHA] can be established by a showing of discriminatory effect without a showing of discriminatory intent."[128] As additional support for its conclusion, the court cited *Black Jack* and *Rizzo*.[129] The Seventh Circuit then identified four factors relevant to determining whether conduct lacking a discriminatory intent but which has a disparate impact would be considered a violation of the FHA.[130]

The Supreme Court in *City of Jackson* rejected the same interpretation of *Griggs* that the *Arlington Heights II* court relied on, thereby undermining the decision and subsequent cases relying upon it.[131] *City of Jackson* made clear that Title VII permits disparate impact claims only because of the language in section 703(a)(2) regarding conduct that "otherwise adversely affect[s]" an employee's status because of a protected class, language which is absent from the FHA, and not because of the broad purposes of Title VII. It follows that had Title VII included only the "discriminate…because of race" language, it would not permit disparate impact claims. Thus, *City of Jackson* directly

contradicts the *Arlington Heights II* court's conclusion that the broad purpose of Title VII permits disparate impact claims and that the "because of race" language in Title VII presents no obstacle to disparate impact claims. This conclusion was critical to the *Arlington Heights II* holding.

The third of the original FHA disparate impact cases, the Third Circuit's decision in *Resident Advisory Board v. Rizzo*,[132] relied on three flawed or subsequently discredited arguments. First, the Third Circuit put significant stock in the Supreme Court's remand in *Arlington Heights*. According to the Third Circuit, the Supreme Court would not have remanded for consideration of the FHA claim on facts demonstrating only disparate impact and not intent unless the Court believed that the FHA permitted disparate impact claims. On the contrary, the Supreme Court's remand was entirely consistent with its duty to address only issues properly before it and is irrelevant to an issue neither briefed nor properly before the Court.[133] Second, the Third Circuit relied on case law permitting disparate impact claims under Title VII, reasoning that the broad purpose of the FHA supported disparate impact theory just as the purpose of Title VII had supposedly permitted disparate impact claims in *Griggs*.[134] The court also asserted that the "because of race" language in Title VII did not require discriminatory intent and thus similar language in the FHA did not require discriminatory intent either.[135] Finally, the Third Circuit cited cases from other circuits, primarily *Arlington Heights II* and *Black Jack*.[136] As explained previously, *City of Jackson* completely discredited the second and third arguments.

After *Black Jack*, *Arlington Heights II*, and *Rizzo*, other circuits and district courts reached the same conclusion, relying on that trio of cases and the analysis advanced therein. The Fourth Circuit's decision in *Smith v. Town of Clarkton, NC*, is typical of these subsequent cases.[137] The court performed no additional analysis and cited only *Black Jack*, *Arlington Heights II*, *Rizzo*, and *Griggs* as support. Its statement that "some courts have reasoned that since the anti-discrimination objectives of Title VIII [the FHA] are parallel to the goals of Title VII, the *Griggs* rationale must be applied in Fair Housing Act cases," has been rejected by *City of Jackson*. Parallel text—not objectives—are what matter post- *City of Jackson*, and the FHA and Title VII do not have parallel language. A second example of post- *City of Jackson* case law, the Ninth Circuit's decision in *Keith v. Volpe*, relied on *Black Jack*, *Arlington Heights II*,

*Rizzo*, and *Town of Clarkton* to support its conclusion that the FHA permits disparate impact claims.[138] Other decisions followed the same pattern.[139]

## Post-*City of Jackson* Case Law Fails to Recognize the Implications of *City of Jackson*

After the Supreme Court's 2005 decision in *City of Jackson*, courts continue to follow the pre-*City of Jackson* line of cases. For example, in *National Community Reinvestment Coalition v. Accredited Home Lenders*, the D.C. district court held that "*City of Jackson* does not preclude disparate impact claims pursuant to the FHA."[140] The court relied on several grounds, each of which has been discredited in this article, including (i) the legislative history of the FHA; (ii) agency interpretations of the FHA; (iii) *Arlington Heights II*, *Rizzo*, and other circuit cases that "are 'grounded on Supreme Court rules of FHA construction, legislative history, purpose, analogy to Title VII, issues of proof, and the Act's text'"; and (iv) several post-*City of Jackson* district court decisions.[141] The court's reasoning is typical of the post-*City of Jackson* district court cases, which generally assert that although the FHA's text does not support disparate impact theory, other factors justify perpetuating pre-*City of Jackson* precedent.

In *Guerra v. GMAC LLC*, the Eastern District of Pennsylvania also held that the FHA permits disparate impact claims even after *City of Jackson*, relying on a distorted view of the *City of Jackson* decision.[142] The court stated that "the *City of Jackson* decision was not based merely on the text of the ADEA, but also on the governing regulations, the purposes of the act, and the uniform interpretation of the appellate courts."[143] Justice Steven's plurality opinion in *City of Jackson*, however, is inconsistent with the district court's statement. The plurality opinion "beg[a]n with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[144] In other words, two statutes must have *both* the same text and similar purposes for the presumption that they also have the same meaning to attach. Different language in similar statutes enacted closely in time, as is true of Title VII and the FHA, in fact suggests different meanings.[145] Furthermore, if purpose

alone sufficed, then any statute prohibiting discrimination would authorize disparate impact claims, which is clearly not the case.[146]

The *Guerra* court's reliance on governing regulations and general consensus among lower courts is also incorrect. Although the *City of Jackson* plurality opinion also cited governing regulations as additional support for its position, the core rationale of *City of Jackson* was the text of the ADEA. Absent a firm textual foundation, it is highly unlikely that the other factors alone would have supported the Court's conclusion. Indeed, as demonstrated in this article, other factors such as legislative history and agency interpretations do not support the notion that the FHA permits disparate impact claims. Nor does the widespread consensus of lower courts lend legitimacy to the notion. The *City of Jackson* plurality opinion's reference to the uniform interpretation of appellate courts that the ADEA permitted disparate impact theory was merely an observation that the appellate courts' interpretation was correct, not a justification for the Court's opinion.[147] In any event, the Court has rejected the uniform interpretations of the appellate courts in the past when it disagreed[148] and, on the question of whether *City of Jackson* negates the availability of disparate impact theory under the FHA, no circuit court has squarely addressed the issue and thus no consensus on the issue exists among the appellate courts.

In *Beaulialice v. Federal Home Loan Mortgage Corp.*, another post-*City of Jackson* opinion addressing disparate impact under the FHA, the Middle District of Florida decided that the statute continues to permit disparate impact claims in conclusory fashion without any analysis.[149] The court first cited the pre-*City of Jackson* decision in *Jackson v. Okaloosa County*[150] to support the proposition that the FHA permits disparate impact claims. Its discussion of *City of Jackson* was confined to one sentence noting only that *City of Jackson* did not "prohibit disparate impact claims under [the ADEA]."[151] It then concluded that, "in light of this precedent," the "Plaintiff may bring a disparate impact claim under the FHA." The decision is devoid of any discussion of the rationale underlying *City of Jackson* or analysis of the text of the FHA.

Other district courts have also held that *City of Jackson* does not preclude disparate impact claims under the FHA but have made no additional arguments not previously addressed in this article.[152] Several other post-*City of Jackson* district court decisions assert that the FHA permits disparate impact

claims but do not discuss *City of Jackson*.[153] Ironically, several of these district court cases cite to *City of Jackson* for the substantive disparate impact standard without recognizing that the same case precludes disparate impact claims under the FHA.[154]

After the Supreme Court issued its decision in *City of Jackson*, no circuit court—including the Eighth Circuit in *Magner*—has analyzed the decision to preclude disparate impact claims under the FHA. Although several circuit courts in post-*City of Jackson* decisions have asserted that the FHA permits disparate impact claims, they have done so without analysis or acknowledgement of *City of Jackson* and in reliance on pre-*City of Jackson* precedent that has since been discredited.[155] In the Eighth Circuit *Magner* decision, however, five judges dissented from the full court's denial of rehearing en banc, stating that "recent developments in the law," primarily *City of Jackson*, "suggest that the issue is appropriate for careful review by the en banc court."[156] The D.C. Circuit has also called into doubt whether disparate impact claims are viable under the Equal Credit Opportunity Act—and by implication under the FHA—after *City of Jackson*, but did not resolve the issue.[157] The D.C. Circuit's comment is equally applicable to the FHA, which also lacks the "otherwise adversely affect" language the Supreme Court has stated gives rise to disparate impact claims under Title VII and the ADEA.

## HUD AND DOJ INTERPRETATIONS ARE NEITHER REASONABLE NOR ENTITLED TO DEFERENCE

Recently, both HUD—the executive agency charged with administering, interpreting and enforcing the FHA[158]—and the Department of Justice ("DOJ") have taken the position that the FHA provides for liability under the disparate impact standard. Curiously, soon after the Supreme Court granted the cert. petition in *Magner*, HUD for the first time issued a proposed rule ostensibly to establish standards for determining whether an action or policy has a disparate impact violative of the FHA.[159] In issuing the proposed rule, however, HUD puts the cart before the horse because it has never formally interpreted the FHA to allow for claims under the disparate impact theory.[160] Nonetheless, according to HUD, it "has repeatedly determined that the [FHA] is directed to the consequences of housing practices, not simply their purpose."[161]

In support of its contention that it recognizes a disparate impact claim under the FHA, HUD lists a number of occasions on which it "has concluded that the [FHA] provides for liability based on discriminatory effects without the need for a finding of intentional discrimination," including (i) its "Title VIII Complaint Intake, Investigation and Conciliation Handbook" (the "Handbook"), (ii) the holdings of (non-Article III) HUD administrative law judges, (iii) its regulations interpreting the FHA, and (iv) its joining "with the [DOJ] and nine other Federal enforcement agencies to recognize that disparate impact is among the 'methods of proof of lending discrimination under the [FHA]' and provide guidance on how to prove a disparate impact fair lending claim.[162] HUD also refers to regulations it has issued implementing statutes other than the FHA, as if these have any bearing on an appropriate interpretation of the FHA.[163] None of these instances, however, provides HUD with the justification to declare that application of the disparate impact test itself is a reasonable interpretation of the FHA. Indeed, the only formal regulation applicable to the FHA cited by HUD—24 C.F.R. § 100.70—does not stand for the proposition claimed by HUD, instead simply mirroring the broad remedial language of Section 3604 itself.[164]

Lacking a formal interpretation supporting its current position on the disparate impact test, HUD relies on the fact that "all Federal courts of appeals to have addressed the question have held that liability under the Act may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group…even if such a policy or practice was not adopted for a discriminatory purpose."[165] Of course, HUD's reliance on case law for its position is not entitled to deference.[166] Parroting the erroneous conclusions of these courts—as demonstrated above—HUD concludes that "[t]he [FHA's] discriminatory effects standard is analogous to the discriminatory effects standard under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), which prohibits discriminatory employment practices.

HUD's new proposed rule is entitled to no more deference than its previous interpretations of case law. The language of Section 3604 is unambiguous. Accordingly, HUD's interpretation of Section 3604 is not entitled to deference.[167] A regulatory agency is not authorized to attempt to effectuate an interpretation of a statute by prohibiting conduct the statute permits. As Justice O'Connor has explained: "an agency's legislative regulations will be upheld

if they are 'reasonably related' to the purposes of the enabling statute,…[W]e would expand considerably the discretion and power of agencies were we to interpret 'reasonably related' to permit agencies to proscribe conduct Congress did not intend to prohibit."[168] "'[R]egulations that would proscribe conduct by the recipient having only a discriminatory *effect*…do not simply "further" the purpose of the [statute]; they go well *beyond* that purpose.'"[169]

DOJ's position regarding disparate impact claims under the FHA is even less justified. Since its creation in early 2010, DOJ's Fair Lending Unit of the Housing and Civil Enforcement Section has relied on the disparate impact theory in charging lenders with lending discrimination in violation of the FHA based on statistical analysis rather than proof of discriminatory intent.[170] Of course, DOJ has no rulemaking or interpretive authority under the FHA.[171] As a result, DOJ's interpretation, which is being carried out through its enforcement function, is not entitled to deference.[172]

## CONCLUSION

In *Magner*, the Supreme Court has an opportunity to reign in the unjustifiably expansive and unjustified interpretation of the FHA by lower courts and regulators that permits disparate impact claims. As demonstrated above, such claims were neither provided for in the FHA nor anticipated by the lawmakers who enacted the Act. A plain reading of the statutory text makes clear that disparate impact claims are not allowed under the FHA. Such a decision would not only correct decades of misinterpretation and misapplication of the FHA, but also would provide a powerful signal to courts interpreting other antidiscrimination laws, like the Equal Credit Opportunity Act, that similarly lack statutory language providing for claims based on "effects" rather than intentional discrimination.

## NOTES

[1] *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm (*Magner v. Gallagher*, No. 10-1032 (U.S.) docket). The disparate impact theory of discrimination allows a plaintiff to establish "discrimination" based solely on the results of a neutral policy, without having to show any actual intent to discriminate.

*See, e.g.*, *Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007).

[2] *Graoch Assocs.,* 508 F.3d at 374; *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Charleston Housing Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *judgment aff'd*, 488 U.S. 15 (1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149–50 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[3] *See, e.g.*, *Arlington Heights II*, 558 F.2d at 1289.

[4] *See, e.g., id.* at 1288.

[5] 544 U.S. 228 (2005).

[6] *See, e.g.*, *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, J., dissenting) (noting that there has been "virtually no discussion of the matter [of whether the FHA permits disparate impact claims] by any court of appeals since the Court in *Smith [v. City of Jackson]* explained how the text of Title VII justified the decision in *Griggs*.")

One federal court of appeal suggested, in dicta, that a similar statute—the Equal Credit Opportunity Act—does not permit disparate impact claims after *City of Jackson*. *See Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("The Supreme Court has held that this ['effects'] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language." (citations omitted)).

[7] No. 10-1032.

[8] Petition for Writ of Certiorari, 2011 WL 549171, *i (Feb. 14, 2011).

[9] *Gallagher v. Magner*, 619 F.3d 823, 830 (8th Cir. 2010).

[10] *Id*. at 834.

[11] *Id*.

[12] *See Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987 (D. Minn. 2008).

[13] *Gallagher v. Magner*, 619 F.3d at 838.

[14] *Gallagher v. Magner*, 636 F.3d 380, 381 (8th Cir. 2010).

[15] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (to be codified at 24 CFR Part 100).

[16] *See, e.g.*, Thomas E. Perez, Speech to 15th Annual Community Reinvestment Act and Fair Lending Colloquium (Nov. 7, 2011), *available at* http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111107.html. Critics of this approach

have argued that DOJ has used the disparate impact theory to "intimidat[e] banks into lending to minority borrowers at below-market rates in the name of combating discrimination." *Mary Kissel*, "Justice's New War Against Lenders," WALL ST. J. Aug. 31, 2011.

[17] 401 U.S. 424 (1971).

[18] *City of Jackson*, 544 U.S. at 234.

[19] Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (emphasis added).

[20] *Griggs*, 401 U.S. at 426 (quoting Section 703(a)(2), but omitting quotation of Section 703(a)(1)).

[21] *City of Jackson*, 544 U.S. at 234 (quoting *Griggs*, 401 U.S. at 432 (emphasis in original)).

[22] *Id.*

[23] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (quoting only Section 703(a)(2) in discussing disparate impact); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) (same).

[24] *City of Jackson*, 544 U.S. at 235-36 (emphasis in original).

[25] *Id.* at 235-38.

[26] *Id.* at 236 n.6.

[27] *Id.* at 236-38 (emphasis added).

[28] *Id.* at 236 n.6. Justice Scalia concurred in judgment and explained that he agreed with the plurality's analysis. *See id.* at 243 (Scalia, J., concurring) ("I agree with all of the Court's reasoning….").

[29] *Id.* at 249 (O'Connor, J., dissenting) (emphasis added).

[30] The *City of Jackson* Court's limited foray into the purpose of the statute was to address the dissent's view that the "because of" language in section (a)(2) also required a showing of intent. The Court reasoned that the "because of" language could plausibly be interpreted as referring to the "motive of the employer's action" rather than the "cause of the adverse effect." *See, e.g.*, *City of Jackson*, 544 U.S. at 249 (O'Connor, J., dissenting). A broad reading of the purpose of the statute was the basis for holding that "because of" did not refer to the employer's intent. *City of Jackson* makes clear, however, that disparate impact claims are rooted in the "effects" language of the statute and not the broad purpose.

[31] *See, e.g.*, *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("The Supreme Court has held that this ['effects'] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language." (citations omitted)).

[32] *City of Jackson*, 544 U.S. at 233-34.

[33] *Id.* at 235-38.

[34] *See id.* at 236 n.6; *id.* at 243 (Scalia, J., concurring); *id.* at 249 (O'Connor, J.,

dissenting).

[35] *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring).

[36] Pub. L. 90-284, April 11, 1968, 82 Stat. 73 (FHA); Pub. L. 88-352, July 2, 1964, 78 Stat. 241 (Title VII); Pub. L. 90-202, Dec. 15, 1967, 81 Stat. 602 (ADEA).

[37] *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

[38] *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of *intentional* unequal treatment." (emphasis added)). It should be noted, however, that in the aftermath of the creation of disparate impact causes of action the term "discrimination" is occasionally used generically, and imprecisely, to refer to any conduct prohibited by antidiscrimination laws—even if that conduct is unrelated to "discrimination" per se. *See, e.g.*, James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 635 (1983) (noting that, despite the "clear conceptual distinction" between intentional discrimination and neutral conduct that results in disparate impacts, the two concepts "are often lumped together in debates over civil rights legislation and enforcement policies.") Nevertheless, in its ordinary usage "discriminate" refers to the intentional treatment of one person differently than another—not to whether the consequences of a particular action affect all persons the same. *See, e.g.*, RANDOM HOUSE UNABRIDGED DICTIONARY, "Discriminate" (2006).

[39] *See, e.g.*, Blumstein, *supra* note 38, at 633-36; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 524-25 (2003) (noting that, under this view, disparate impact is "a cousin of affirmative action"); David A. Strauss, *The Myth of Color Blindness*, 1986 SUP. CT. REV. 99 (arguing that affirmative action and disparate impact doctrine lie on the same conceptual continuum); D. Marvin Jones, *Plessy's Ghost: Grutter, Seattle and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583, 592 & n.59 (2008) ("Most people think of racism as something that involves decisions.").

We note that an alternative view of the goal of disparate impact claims is as a proxy for disparate treatment claims where intent may be difficult to prove. *See, e.g.*, Primus, *supra*, at 523-24. However, courts have generally allowed the use of statistical evidence to show intent to discriminate. *See, e.g.*, *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998). Consequently, disparate impact claims cannot be justified as a proxy for disparate treatment claims.

[40] Blumstein, *supra* note 38, at 634-46; *see also id.* at 643-44 ("Because the nondiscrimination notion is a procedural concept assuring evenhanded treatment of similarly situated individuals, it is breached when similarly situated people are treated differently because of their race. Such differential treatment has an essential ingredient of volition, and a finding of unconstitutional discrimination therefore

rests on a finding of intent.").

[41] 1 JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:24 (2005) (emphasis added).

[42] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 248 (1976) (explaining that any "extension of [disparate impact] beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription").

[43] *W.Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *see also Neal v. Honeywell Inc.*, 33 F.3d 860, 862-63 (7th Cir. 1994) ("[A]ll laws…are compromises among competing interests…. [W]hether one of these interests triumphs over the other, or whether instead they coexist uneasily, is determined not by natural justice but by the political process, which created a text."); Laurence H. Tribe, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 74-75 (1997) (emphasis added) (explaining that "[t]he text of the law is not just evidence about how much one interest…should be preferred over another…; the text is the *decision* about what to do" regarding the accommodation of competing interests—"a decision approved by the Constitution's own means, bicameral approval and presidential signature.").

[44] FHA § 801, 42 U.S.C. § 3601.

[45] *See, e.g.*, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

[46] *See, e.g.*, *Hearings Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency on S. 1358, S. 2114, and S. 2280, Relating to Civil Rights and Housing*, at 338-42 (1967) (testimony of Alan L. Emlen, National Association of Real Estate Boards) (testifying that fair housing legislation is unconstitutional); *see also* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 152-53 (1969) (explaining that opponents of fair housing legislation "argued the…familiar constitutional grounds of states' rights and the right of the individual to control the disposal of his property").

[47] Raymond J. Celeda, *The Civil Rights Act of 1968: Background and Title-by-Title Analysis,* at LRS-40 (Congressional Research Service 1968) (quoting 114 Cong. Rec. S 2061 (daily ed. March 4, 1968)).

[48] *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995); *see also id.* at 135 (referring to "the proposition that the statute at hand should be liberally construed to achieve its purposes" as "the last redoubt of losing causes"); *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230-32 (1994) (noting that even when the Court itself in other contexts has determined an alternative policy may better serve the legislative purpose, the statutory text controls).

[49] *Neal*, 33 F.3d at 862.

[50] 114 Cong. Rec. 4975 (1968).

[51] *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *see also id.* ("We have never accorded dispositive weight to context shorn of text…in interpreting statutes generally…legal context matters only to the extent it clarifies text.").
[52] Brief of United States as Amicus Curiae, *Town of Huntington v. Huntington Branch, NAACP*, No. 87-1961 (U.S. filed June 1988) (emphasis added and citations omitted) (hereinafter "SG Brief"), *available at* http://www.usdoj.gov/osg/briefs/1987/sg870004.txt.
[53] *See, e.g.*, *W.Va. Univ. Hosps.*, 499 U.S. at 100 (explaining that where the language of a statute is ambiguous, courts must "construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").
[54] Pub. L. 88-352, § 703(a), 78 Stat. 241 (1964).
[55] Pub. L. 90-202, § 4(a), 81 Stat. 602 (1967).
[56] Pub. L. 90-284, § 805, 82 Stat. 73 (1968).
[57] *City of Jackson*, 544 U.S. at 233-34.
[58] *See, e.g.*, *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring).
[59] *See* 112 Cong. Rec. 9390-91 (Apr. 28, 1966).
[60] *See* H.R. 14765 (1966); S. 3296 (1966). For a detailed discussion of the evolution of the legislation that became the Fair Housing Act, see Marshall D. Stein, *The Fair Housing Act of 1968 and the Civil Rights Act of 1866: The Test for Liability in Housing Discrimination Cases*, *in* 1 ISSUES IN HOUSING DISCRIMINATION: A CONSULTATION/HEARING, at 94 (U.S. Comm'n on Civil Rights, 1985).
[61] *See* H.R. 14765, § 408; S. 3296, § 408 (1966).
[62] 112 Cong. Rec. 17196 (1966) (Rep. Whitener).
[63] *Id.* at 22313-14 (Sen. Long)
[64] 112 Cong. Rec. 22618 (1966) (Sen. Dirksen).
[65] *See, e.g.*, *id.* at 22625 (Sen. Sparkman) ("Title IV is premised on the mistaken belief that any rejection of an offer to buy or rent from a member of a racial minority is necessarily an act of racial discrimination.… Even though race might not be the reason a home owner decides to sell, he could, under this bill, become involved in expensive and lengthy litigation trying to prove that his refusal to sell was not because of race." (citation omitted)); *id.* at 23023 (Sen. Ervin) ("A prima facie case could be made in every case in which two people of different race, color, religion, or national origin are parties to an unsuccessful real estate transaction.").

Additionally, while much of the discussion focused on the impact the bill would have on individual homeowners and landlords, the Senate also focused on the similar effect the bill's provisions allowing claims to be brought without alleging discriminatory intent would have on governmental entities. *See, e.g.*, *id.* at 22300-01,

22304-05 (Sen. Stennis) ("Thus, in conducting investigations and filing complaints under the open housing provisions of Title IV, as well as in approving grants under Federal aid programs.…the Secretary will be in a position to force the balancing of the races in every neighborhood throughout the land, on whatever basis he may have in his mind at that particular time.").

[66] *See* 112 Cong. Rec. 22670 (1966) (1st cloture defeated); *id.* at 23042-43 (2d cloture defeated); *id.* at 23046-47 (laid aside consideration for 1966).

[67] *See* Stein, *supra note* 60, at 97.

68 *See* 112 Cong. Rec. 23013-14 (1966) (Sen. Javits). Stein notes that "[t]his assessment from a fellow Republican Senator seems unassailable, and Javits' acumen was verified when in 1968 Dirksen supported the amended fair housing provision; cloture was invoked, and the Civil Rights Act was passed." Stein, *supra note* 60, at 97 n.15. Additionally, Jean Eberhart Dubofsky, Senator Mondale's legislative assistant at the time, has recounted Senator Dirksen's central role in changing the momentum toward passage of the FHA. *See* Dubofsky, *supra* note 46, at 155-58.

[69] *See* S. 1358, 90th Cong., 1st Sess. §§ 11-12, 14 (1967).

[70] *Hearings Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency on S. 1358, S. 2114, and S. 2280, Relating to Civil Rights and Housing*, at 344 (Aug. 23, 1967) (hereinafter "Senate Subcommittee Hearings"), at 171 (Sen. Muskie); *id.* at 389 (Sen. Proxmire); *id.* at 418 (Sens. Meany and Proxmire).

[71] *See* Dubofsky, *supra* note 46, at 149-50.

[72] 114 Cong. Rec. S980-83, S1876 (1968); *see also* Dubofsky, *supra* note 46, at 152 ("The amendment was S. 1358 with the addition of the 'Mrs. Murphy exemption'….").

[73] *See* 114 Cong. Rec. S1454 (Sen. Dirksen); *id.* S1458 (1st failed cloture vote); *see also* Dubofsky, *supra* note 46, at 155 (recounting the Sen. Dirksen's role in opposing cloture and the vote against cloture).

[74] *See* 114 Cong. Rec. S1729.

[75] *See* 114 Cong. Rec. S4049 (1968) (Sen. Javitz) (expressing hope that Sen. Dirksen's support would result in passage of the act); *see also* Dubofsky, *supra* note 46, at 156-58 (describing process of reaching compromise with Sen. Dirksen).

[76] 114 Cong. Rec. S4060-61 (1968) (Sen. Mondale).

[77] 114 Cong. Rec. 2273 (1968).

[78] *Id.* at 4689-90.

[79] *Id.* at 3427 (emphasis added).

[80] *Id.* at 5643 (emphasis added). While Senators Brooke and Mondale clarified that the bill that became the FHA was intended to reach only intentional discrimination, some broader statements regarding the bill have caused some confusion. For example, the Supreme Court in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S.

205 (1972), noted that Sen. Mondale had stated that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" *Id.* at 211 (quoting 114 Cong. Rec. 3422 (Sen. Mondale)). Solicitor General Fried rightly noted that such statements, "although stating an admirable goal, do[] not address the means of achieving it. The argument that the ambitious goals of Title VIII require an expansive reading of the statute to include a discriminatory effect standard hardly surmounts the obstacles posed by the statute's plain language and legislative history." SG Brief, *supra* note 52, at n.21. And, in any event, the statements by Sens. Brooke and Mondale cited above interpret the actual provisions of the legislation—and therefore must be accorded greater weight than general statements. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 237 (1984) ("Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President.")

[81] *Id.* at 9573 (Rep. Steiger).

[82] *See, e.g., Resident Advisory Board v. Rizzo,* 564 F.2d 126, 147 (3d Cir. 1977).

[83] *See* 114 Cong. Rec. 4060-61 (Feb. 26, 1968).

[84] *Id.* at 4064-65.

[85] *See* 114 Cong. Rec. 4568, 4570 (Feb. 28, 1968).

[86] *Id.* at 4568.

[87] *Id.* at 4571.

[88] 114 Cong. Rec. 4845 (Mar. 1, 1968) (Senate rejected first cloture motion on Dirksen substitute); 114 Cong. Rec. 4960 (Mar. 4, 1968) (Senate agreed to second cloture motion on Dirksen substitute).

[89] 114 Cong. Rec. 5214 (Mar. 5, 1968); *see also id.* at 5218 (Senator Baker stating, "The purpose of this amendment, once again, is simply to remove the burden of forfeiting your exemption under the act because of the mere fact of hiring a real estate agency.").

[90] *Id.* at 5214-15.

[91] The Dirksen substitute also contained another exception to the exemption for owners of single-family owner-occupied homes who published advertisements indicating a racial preference or limitation. The Baker Amendment did not involve that exception.

[92] *Id.* at 5216.

[93] *Id.*

[94] *Id.* at 5221-22.

[95] *Id.* at 5217 (Senator Percy opposing the Baker Amendment, stating, "I would like to go further than the compromise bill [Dirksen substitute] goes…. Now I have withheld any amendment to further strengthen the bill, in the spirit of the compromise, I still do not intend to offer such amendments. By no implication do I wish to detract from [the Dirksen substitute]."); *id.* at 5217-5218 (Senator Brooke opposing the Baker Amendment, stating, "Under the [Baker Amendment], the same homes that would be covered under the Dirksen substitute would be exempt from fair housing legislation, is that not true?…. The Senator [Baker] knows that one of the purposes of the proponents of this legislation was to cover as much of the housing in the country as possible, and to make fair housing legislation applicable to as many dwelling units in the country as possible.").

[96] Other commentators agree that the rejection of the Baker Amendment was irrelevant to whether the bill required an intent to discriminate. *See* Stein, *supra note* 60, at 101 (describing Baker Amendment as "one last attempt to address the kind of proof necessary to prove discrimination, but this one focused on the issue of what kind of evidence could be employed to demonstrate an intent to discriminate, rather than whether a violation could be established by proof of results alone"); Note, 46 Geo. Wash. L. Rev. 615, 630 (1978) ("The Senate rejected the [Baker] amendment because it believed a plaintiff would encounter great difficulty proving the existence of discriminatory instructions, not because it believed plaintiff should not have to establish defendant's racial motivation.").

[97] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[98] *Id.* § 6(a)-(b).

[99] *Nat'l Community Reinvestment Coalition v. Accredited Home Lenders, Inc.*, 573 F. Supp. 2d 70, 77-78 (D.D.C. 2008).

[100] H.R.Rep. 100-711, at 21 (1988).

[101] 134 Cong. Rec. 23711-12 (1988).

[102] The Supreme Court's reluctance to rely on the statements of individual legislators during the legislative process is well founded. Such statements lend themselves "to a kind of ventriloquism" pursuant to which "[t]he Congressional Record or committee reports are used to make words appear from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists)." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50-73-74 (Scalia, J., dissenting); *see also* W. David Lawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383, 383-84 (1992) ("Members of Congress can make law by 'manufacturing' legislative history, thereby evading the Constitutional requirements for legislating that assure that laws receive the appropriate representative consent.").

[103] *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1114-15 (D.D.C. 1987) (citation omitted). Judge Greene ultimately held that disparate impact claims cannot be brought against private individuals.
[104] SG Brief, *supra* note 52 (citations and footnotes omitted).
[105] *Id.*
[106] President Ronald W. Reagan, *Remarks on Signing the Fair Housing Amendments of 1988* (Sept. 13, 1988), *available at* http://www.reagan.utexas.edu/archives/speeches/1988/091388a.htm.
[107] *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).
[108] *See, e.g.*, *id.*
[109] Because the reenactment doctrine does not apply, the statements by legislators during the process of passing and enacting the 1988 amendments have little relevance in interpreting the language of the statute. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight." (citations omitted)); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("Such *post hoc* statements of a congressional Committee are not entitled to much weight.").
[110] 508 F.2d 1179 (8th Cir. 1974).
[111] *Id.* at 1185 (footnote and citations omitted).
[112] *Id.*
[113] *Washington v. Davis*, 426 U.S. 229, 238-39, 244 n.12 (1976); *see also* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409, 429-30 (1998) (noting that the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), expressly overruled three non-employment equal protection cases relied upon in *Black Jack* and overruled the other cases by implication).
[114] *Washington*, 426 U.S. at 265.
[115] *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360-61 (1984).
[116] 558 F.2d 1283 (7th Cir. 1977).
[117] 517 F.2d 409 (7th Cir. 1975).
[118] *Id.* at 412.
[119] *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268-70 (1977).
[120] *Id.* at 271.
[121] *Id.* at 1288.
[122] *Id.* at 1288.
[123] *Id.* at 1289.
[124] *Id.* at 1289 n.6.

[125] 401 U.S. 424 (1971).
[126] *Id.* at 429.
[127] *Id.* at 429-30.
[128] *Arlington Heights II*, 558 F.2d at 1290.
[129] *Id.*
[130] *Id.* at 1290-94.
[131] *City of Jackson*, 544 U.S. at 235-37.
[132] 564 F.2d 126 (3d Cir. 1977).
[133] *See, e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).
[134] *Rizzo*, 564 F.2d at 147.
[135] *Id.*
[136] *Id.* at 148 n.31.
[137] 682 F.2d 1055, 1065 (4th Cir. 1982).
[138] 858 F.2d 467, 482-83 (9th Cir. 1988).
[139] *See Arthur v. City of Toledo*, 782 F.2d 1055, 1065 (6th Cir. 1986) (relying on *Black Jack*, *Arlington Heights II*, *Rizzo*, and *Town of Clarkton*); *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1100 (2d Cir. 1988) (relying on *Town of Clarkton*, *Arthur*, and *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979), which in turn relied on *Black Jack*, *Arlington Heights II*, and *Rizzo*); *Casa Marie, Inc. v. Super. Ct. of P.R.*, 988 F.2d 252, 269 n.20 (1st Cir. 1993) (relying on *Black Jack*, *Arlington Heights II*, *City of Clarkton*, *Starrett City*, and *Robinson*); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994) (relying on *City of Clarkton*, *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (which in turn relies on *Arlington Heights II*), and *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1558, n. 20 (11th Cir. 1984) (which in turn relies on *Black Jack*, *Arlington Heights II*, *Rizzo*, *City of Clarkton*, *Mitchell*, and *Griggs*)); *Mountain Side Mobile Home Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) (relying on *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (which in turn relies on *Black Jack*, *Arlington Heights II*, and *Rizzo*)); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (relying on *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986) (which in turn relies on *Mitchell*)).
[140] 573 F. Supp. 2d 70, 77-79 (D.D.C. 2008).
[141] *Id.* at 78 (quoting plaintiff's memorandum in opposition at 37).
[142] 2009 WL 449153, at *3 (E.D. Pa. Feb. 20, 2009).
[143] *Id.* (citing *City of Jackson*, 544 U.S. at 233-40).
[144] *City of Jackson*, 544 U.S. at 233.
[145] *See Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts J., concurring) ("This use of different language in two statutes so analogous in their

form and content, enacted so closely in time, suggests that the statutes differ in their meaning….").

[146] *See supra* note 31 and accompanying text (table summarizing anti-discrimination statutes that do not authorize disparate impact claims).

[147] *City of Jackson*, 544 U.S. at 1542-43.

[148] *See, e.g., Centr. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (reversing the interpretation of the Securities Exchange Act previously adopted by 11 circuits and approved in dicta by the twelfth).

[149] 2007 WL 744646, at *4 (M.D. Fla. 2007).

[150] 21 F.3d 1531, 1543 (11th Cir. 1994).

[151] *Beaulialice*, 2007 WL 744646, at *4.

[152] *See Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 926-27 (N.D. Cal. 2008); *Zamudio v. HSBC N. Am. Holdings Inc.*, 2008 WL 517138, at *2 (N.D. Ill. Feb. 20, 2008); *Payares v. JP Morgan Chase & Co. et al.*, 2008 WL 2485592, at *1 (C.D. Cal. June 17, 2008); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1066-67 (S.D. Cal. 2008); *Hoffman v. Option One Mortg. Corp.*, 589 F. Supp. 2d 1009, 1010-11 (N.D. Ill. 2008); *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 108-09 (D. Mass. 2009); *NAACP v. Ameriquest Mortg. Co.*, 635 F. Supp. 2d 1096, 1104-05 (C.D. Cal. 2009); *Garcia v. Countrywide Fin'l Corp.*, 2008 WL 7842104, at *3-*4 (C.D. Cal. Jan. 17, 2008).

[153] *HDC, LLC v. City of Ann Arbor*, 2010 WL 2232220, at *5 (E.D. Mich. 2010); *Rodriguez v. Bear Stearns Cos., Inc.* 2009 WL 5184702, at *6 (D. Conn. 2009); *Steele v. GE Money Bank*, 2009 WL 393860, at *3 (N.D. Ill. 2009); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255 (D. Mass. 2008).

[154] *HDC, LLC v. City of Ann Arbor*, 2010 WL 2232220, at *5 (E.D. Mich. 2010); *Rodriguez v. Bear Stearns Cos., Inc.* 2009 WL 5184702, at *6 (D. Conn. 2009); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255 (D. Mass. 2008).

[155] *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 746 (5th Cir. 2005); *Gallagher v. Magner*, 619 F.3d 823, 833-34 (8th Cir. 2010); *Charleston Hous. Auth. v. U.S. Dept. of Agric.*, 419 F.3d 729, 740 -741 (8th Cir. 2005) (stating that the FHA permits disparate impact claims and citing *Black Jack*); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005); *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 371 (6th Cir. 2007).

[156] *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010).

[157] 444 F.3d 625, 633 n.9 (D.C. Cir. 2006).

[158] *See* 42 U.S.C. §§3608(a), 3614a.

[159] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (to be codified at 24 CFR Part 100) (the "HUD Proposed Rule").

[160] *See, e.g.*, 1 RELMAN, *supra* note 41, § 2:24 ("HUD has not issued regulations addressing the use of disparate impact theory under the Fair Housing Act. . . .").

[161] 76 Fed. Reg. 70921, 70922.

[162] *Id*. (referring to Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,268 (Apr. 15, 1994)).

[163] *Id*. (referring to "regulations implementing the Federal Housing Enterprises Financial Safety and Soundness Act [that] prohibit[] mortgage purchase activities [by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation] that have a discriminatory effect."

[164] *See* 24 C.F.R. § 100.70(b); *see also* 24 C.F.R. § 100.50(b).

[165] 76 Fed. Reg. at 70923.

[166] *See, e.g.*, *TEVA Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (explaining that an agency's reliance on discredited case law "renders its decision arbitrary and capricious" and noting that "[a]n [agency] order may not stand if the agency has misconceived the law"); *PDK Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 795-798 (D.C. Cir. 2004) (explaining that an agency's reliance on case law is not entitled to deference, and that deference is appropriate only where the agency "bring[s] its experience to bear in light of competing interests at stake").

HUD's reliance on its *Title VIII Complaint Intake, Investigation & Conciliation Handbook* and the 1994 Policy Statement on Discrimination in Lending is particularly unconvincing, considering that both materials rely solely on court decisions rather than on any agency's independent interpretation of the FHA. *HUD Title VIII Complaint Intake, Investigation and Conciliation Handbook*, No. 8024.1, at 2-2 (REV-2, 2005) ("[T]he lower courts have generally held that these precedents from the employment discrimination field should be followed in interpreting the Fair Housing Act."), *available at* http://www.hudclips.org/sub_nonhud/cgi/selecthbk.cgi (select "search" and 8024.1); *id*. at 2-3 ("This chapter discusses the analytical structure and the proof necessary to establish and rebut three types of claims—single-motive, mixed-motive, and discriminatory impact—*that have been recognized* under the Fair Housing Act." (emphasis added)); *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18266, 18268 (Apr. 15, 1994) ("The courts have recognized three methods of proof of lending discrimination under the ECOA and FH Act:…."); *id.* at 18629 ("Although the precise contours of the law on disparate impact as it applies to lending discrimination are under development….").

[167] *Presley v. Etowah County Com'n*, 502 U.S. 491, 509-10, 112 S. Ct. 820 (U.S. 1992) (refusing to defer to an administrative interpretation of a statute except where

there is ambiguity and only if the administrative interpretation is reasonable).

[168] *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 614 (1983) (O' Connor, J., concurring); *see also id.* at 613 ("'Reasonably related to' simply cannot mean 'inconsistent with.'"); *American Federation of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1321-22 (D.C. Cir. 2007) ("If the relevant statutory language is plain but is inconsistent with the [agency's] regulations, we must hold the regulations invalid.").

[169] *Alexander v. Sandoval*, 532 U.S. 275, 286 n.6 (2001) (quoting with approval *Guardians*, 463 U.S. at 613 (O'Connor, J., concurring) (emphasis in original)).

[170] Assistant Attorney General Thomas E. Perez Speaks at the 15th Annual Community Reinvestment Act and Fair Lending Colloquium, Baltimore (Nov. 7, 2011) http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111107.html ("Many of our pricing cases relied, in part, on disparate impact theory to show a violation of the law. The Civil Rights Division will make use of all the tools in our arsenal to root out discrimination, including disparate impact theory if the facts support its application.").

[171] *See* 42 U.S.C. § 3614a.

[172] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) (giving deference to an agency's reasonable interpretation of a statute *it is charged with administering*).