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Scott N. Gilbert

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YOU CAN MOVE IN BUT YOU CAN'T STAY: TO PROTECT OCCUPANCY RIGHTS AFTER *HALPRIN*, THE FAIR HOUSING ACT NEEDS TO BE AMENDED TO PROHIBIT POST- ACQUISITION DISCRIMINATION

SCOTT N. GILBERT*

I. THE FAIR HOUSING ACT NEEDS RENOVATING

The Blochs are Jewish, and their religious beliefs require them to display a religious symbol called a mezuzah on the outer doorframe of their residence,¹ which they did for over thirty years without conflict.² When the Blochs' condominium board reinterpreted an existing rule to prohibit display of the mezuzah, their longstanding practice now clashed with the association's new interpretation of the rule.³ They were denied an accommodation based on their faith,⁴ and building staff repeatedly removed the Blochs' displays.⁵ Prohibiting the mezuzah meant the Blochs could only remain in the building by living in violation of Jewish law.⁶

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1. A "mezuzah" is a small case containing a parchment scroll inscribed with religious passages. *Bloch v. Frischoltz*, No. 05 C 5379, at 1 (N.D. Ill. Aug. 7, 2006) (unpublished case on file with the JMLS Fair Housing Clinic and the author).

2. The Shoreline Towers Condominium Association Board amended the association rules on September 10, 2001, to prohibit boots, mats, and any other objects from being placed outside unit entrances. *Id.* Between its passage in 2001 and May 2004, the rule was not interpreted to apply to the Bloch's mezuzah. Plaintiff's Second Amended Complaint at 3, ¶ 16, *Bloch v. Frischoltz*, No. 05 C 5379, (N.D. Ill. Aug. 7, 2006) (unpublished Plaintiff's Second Amended Complaint on file with the JMLS Clinic and the author).

3. Plaintiff's Second Amended Complaint, *supra* note 2, at 3, ¶ 16.

4. The Board denied the Blochs' request for an exception to the rule in September 2004. *Bloch*, No. 05 C 5379, at 2.

5. *Id.*

6. Remaining in the building under the board's interpretation of the rule means that the Blochs are denied the full use and enjoyment of their dwelling

Armed with the knowledge that federal civil rights laws prohibit housing discrimination on the basis of religion and race,⁷ the Blochs reasonably believed that their rights had been violated. The Blochs sought the assistance of The John Marshall Law School Fair Housing Legal Clinic (“JMLS Clinic”) and filed suit in federal district court.⁸ To their surprise, the Blochs’ federal claims did not survive the defendant’s motion for summary judgment.⁹

The district court in *Bloch v. Frischoltz*¹⁰ relied on a recent Seventh Circuit case, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*,¹¹ which held the FHA inapplicable to “post-acquisition housing discrimination” or discrimination that occurs after a person takes possession of property.¹² Accepting that the Halprins had suffered housing discrimination because of their religion, the *Halprin* court nevertheless denied them a remedy because the conduct occurred after the sale.¹³ This interpretation and application of the FHA in *Halprin* is currently the law in the Seventh and Fifth circuits,¹⁴ and the Blochs are among the first to be directly harmed by its erroneous holding. Currently pursuing an appeal in the Seventh Circuit, the Blochs seek to have summary judgment reversed, so they can go to trial.¹⁵

because they are forced to live in violation of Jewish law. Plaintiff’s Second Amended Complaint, *supra* note 2, at 3, ¶ 10-11, and 5, ¶ 25.

7. 42 U.S.C. § 3604 (2006).

8. Originally filed in September 2005, the Bloch’s moved to file their second amended complaint on October 27, 2005. Plaintiff’s Second Amended Complaint, *supra* note 2, at 6, ¶ 40.

9. *Bloch*, No. 05 C 5379, at 2-4.

10. *Id.* at 2.

11. 388 F.3d 327 (7th Cir. 2004).

12. *Id.* at 328-30. In granting the defendant’s motion for summary judgment against the Blochs, Judge Guzman approvingly cited *Halprin* for the proposition that the FHA “does not reach post-acquisition discrimination in the enjoyment of property.” *Bloch*, No. 05 C 5379, at 2.

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

14. The Fifth Circuit has adopted the Seventh Circuit’s reasoning in *Halprin*. See *Cox v. City of Dallas*, 430 F.3d 734, 742-43, 745 (5th Cir. 2005) (holding that neither § 3604(a) nor § 3604(b) gave current owners a cause of action for discriminatory delivery of services).

15. Oral argument before a panel of the Seventh Circuit took place on February 20, 2008, and the Blochs’ lead attorney at the Clinic argued for reversing summary judgment and remanding for trial by distinguishing *Bloch* from *Halprin*. Interview with James P. Whiteside, Clinical Attorney, The John Marshall Law School Fair Housing Legal Clinic, in Chi., Ill. (Jan. 14, 2008). One point of distinction between the two cases is that *Bloch* involves an association rule, while *Halprin* involved the conduct of individual board members. *Id.* Discrimination by associations against housing occupants should be prohibited under the FHA because associations exercise ongoing control over occupancy rights. *Id.* The three judge panel issued its opinion on July 10, 2008, ruling against the Blochs two to one. *Bloch v. Frischholz*, 533 F.3d 562, 565 (7th Cir. 2008). Judge Wood dissented, arguing that the conduct in question violated the FHA, and that there were disputed issues of material

The Fair Housing Act (“FHA”) celebrated its fortieth anniversary in 2008.¹⁶ With the last significant amendment in 1988,¹⁷ it is time to amend the Act again. While overt housing discrimination may have decreased since 1968,¹⁸ fair and nondiscriminatory housing for all is still a distant goal, rather than a proud achievement.¹⁹ Another goal of the FHA was

fact making summary judgment inappropriate. *Id.* at 566. In an unusual move, however, the Seventh Circuit granted a rehearing en banc on October 30, 2008. *Id.* at 562. The en banc hearing took place on May 13, 2009, but as of September 7, 2009, no opinion has been released, so the Blochs’ hope of getting their day in court remains alive.

16. 42 U.S.C. §§ 3601-3619, 3631 (2006). The FHA is more formally referred to as “Title VIII of the Civil Rights Act of 1968,” in recognition of its place within the larger Civil Rights Act of 1968. Pub. L. No. 90-284, 82 Stat. 73 (1968).

17. The FHA was amended in 1988 to add “handicap” as another protected class and to enhance HUD’s enforcement powers. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). See *infra* text accompanying notes 85-88 (discussing the amendments made to the FHA in 1988). “Protected classes” are the groups expressly listed in the FHA against which discriminatory practices are illegal. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION 11-1 (Thomson/West 2007). The full list of current protected classes includes: race, color, national origin, religion, sex, handicap, and familial status. *Id.*; 42 U.S.C. § 3604 (2006).

18. Since the FHA was passed in 1968, HUD has carried out three major studies of housing discrimination in the United States: in 1979, 1991, and 2000. SCHWEMM, *supra* note 17, at 2-10 to -11. The 1979 study of forty metropolitan areas determined that a black who went to four real estate agents would face discrimination seventy-two percent of the time when renting and forty-eight percent of the time when buying. *Id.* at 2-11 (citing RONALD E. WIENK ET AL., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY ES-2 (U.S. Department of Housing and Urban Development 1979)). From the results of this study, HUD estimated that “2,000,000 instances of housing discrimination were occurring annually in the 1980’s.” *Id.* HUD’s second national study was published in 1991 and showed no significant change from the earlier study. MARGERY A. TURNER ET AL., HOUSING DISCRIMINATION STUDY: SYNTHESIS, at vii (HUD 1991). The 1991 study ran 3,800 paired tests in twenty-five markets to record housing discrimination faced by black and Hispanic testers. *Id.* at vi-vii. A “paired test” is where one white and one black or Hispanic tester go to the same housing with identical credentials except race. *Id.* Estimating from the test results, HUD found the rates of discrimination for buyers to be—fifty-nine percent for blacks and fifty-six percent for Hispanics; and for renters to be: fifty-three percent for black and forty-six percent for Hispanics. *Id.* HUD’s third national study was conducted in 2000 and the conclusion is quite disappointing after thirty plus years of federal fair housing law: despite declines since 1989, discrimination still persists nationally in the sale and rental markets of large metropolitan areas. MARGERY A. TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I OF THE HOUSING DISCRIMINATION STUDY 2000, at iii (HUD 2002), <http://www.huduser.org/publications/hsgfin/phase1.html>.

19. The 2000 HUD study estimated that in paired rental tests whites were consistently favored over blacks 21.6 percent of the time, and that non-

integration²⁰—here, progress has been almost glacial.²¹ The forty-one-year-old warning of the 1968 Kerner Commission²² about two different Americas, one for whites and one for blacks, is as relevant today as it was then.²³

Among a litany of issues that could be addressed by amending the FHA, this Comment is concerned with the fact that the FHA does not expressly prohibit “post-acquisition housing discrimination.”²⁴ Despite the lack of explicit language, fair housing commentators understandably thought²⁵ that

Hispanic whites were consistently favored 25.7 percent of the time. TURNER, *supra* note 18, at iii-iv. As for home sales, whites were consistently favored over blacks in seventeen percent of tests, while non-Hispanic whites were consistently favored in 19.7 percent of tests. *Id.*

20. Senator Mondale, the principal sponsor of the FHA, was opposed to the fact that the country was separating into “white ghettos” and “black ghettos.” 114 CONG. REC. 2, 2276 (1968). The purpose of federal fair housing legislation would be to replace this pattern with “truly integrated and balanced living patterns.” *Id.* at 3422.

21. Using the 2000 Census data, the extent of racially segregated housing in the United States has been calculated at sixty-four for blacks and whites, where a score of 100 equals total isolation of the races and 0 means total integration. JOHN ICELAND & DANIEL H. WEINBERG, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 60 (U.S. Census Bureau 2002), <http://www.census.gov/hhes/www/housing/housingpatterns/pdf/censr-3.pdf>. The 2000 score was down four points from the 1990 score of sixty-eight, which in turn was down five points from the 1980 Census score of seventy-three. *Id.* Although the score change reflects a decrease in segregation over the twenty-year period, one commentator states that there continues to be high levels of racial segregation and unlawful discrimination, and that “[o]nly modest changes in these deep-seated patterns have occurred since enactment of the 1968 Fair Housing Act.” SCHWEMM, *supra* note 17, at 2-1.

22. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) (hereinafter KERNER COMMISSION REPORT).

23. In the wake of racial riots in urban American cities in the summer of 1967, President Johnson formed a commission to answer three questions: what happened, why it happened, and how can it be prevented from happening again. *Id.* The report’s basic conclusion was that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.” *Id.*

24. *Halprin*, 388 F.3d at 330. Commentators and other jurisdictions have adopted and expounded on this phrase: “harassment that is alleged to have occurred after a sale or rental transaction has been completed is referred to as ‘post-acquisition harassment,’ tracking language employed by the Seventh Circuit.” Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 232 n.23 (2006). On remand, the district court adopted Judge Posner’s phrase. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, No. 01 C 4673, 2006 WL 2506223, at *1 (N.D. Ill. Jun. 28, 2006).

25. “Until recently, it was generally assumed that § 3604(b) not only protects homeseekers in their efforts to secure housing on a nondiscriminatory basis but also guarantees their right to equal treatment once they have

discrimination occurring *after* a person took possession of their dwelling²⁶ was covered by the FHA, as nearly forty years of broad construction given to the FHA in Federal courts,²⁷ and past cases successfully litigated²⁸ amply supported that view.

In *Halprin*, Judge Posner broke with past holdings and decided that the FHA does not prohibit post-acquisition housing discrimination,²⁹ at least where it did not rise to the level of actual or constructive eviction.³⁰ *Halprin* will foreclose the use of a federal court to remedy conduct that certainly appears to be an FHA violation, as the Blochs can attest. As a result of *Halprin*,

become residents of that housing.” SCHWEMM, *supra* note 17, at 14-9. “Congress must have intended the FHA to address housing disputes beyond simple denials of accommodation.” Short, *supra* note 24, at 220-21.

26. Under the FHA:

“Dwelling” means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3603(b) (2006).

27. The Supreme Court set the tone in 1972 when it stated that “[t]he language of the Act is broad and inclusive.” *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). *Trafficante* held that white and black apartment tenants had standing to sue under the FHA because the landlord’s discrimination, although aimed at third-party minorities seeking to rent, had harmed the tenants by depriving them of the benefits of interracial associations. *Id.* at 210. “We can give vitality to [§ 3604(a)] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.” *Id.* at 212.

28. Other courts that have upheld FHA claims based on post-acquisition discrimination include: *Trafficante*, 409 U.S. at 212; *see also* Krueger v. Cuomo, 115 F.3d 487, 492 (7th Cir. 1997) (holding that landlord’s pattern of sexual harassment before and after occupancy stated a claim under § 3604(b) and § 3617, without expressly dealing with the post-acquisition issue); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (accepting a “hostile housing environment” cause of action, where the harassment must be “pervasive” enough to “create an abusive [housing] environment,” implicitly endorsing the post-acquisition reach of the FHA because the harassment occurred after the tenant took possession); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (recognizing the hostile housing environment claim where the harassment “alters the conditions of the housing arrangement,” implying post-possession interference with occupancy); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (upholding an analogous disability harassment cause of action under the FHA, implicitly sanctioning post-acquisition claims because the alleged harassment occurred during the tenant’s occupancy).

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

30. Black’s Law Dictionary defines “constructive eviction” as: “1. A landlord’s act of making premises unfit for occupancy, often with the result that the tenant is compelled to leave. 2. The inability of a land purchaser to obtain possession because of paramount outstanding title.” BLACK’S LAW DICTIONARY 594 (8th ed. 2004).

aggrieved persons³¹ seeking shelter under the FHA will be denied a remedy for discrimination that used to be, and still should be, actionable.³² While national data on the prevalence of post-acquisition discrimination is unavailable, this author reviewed both the open cases and the new intakes at the JMLS Clinic in 2007 and found the problem to be quite common.³³

This Comment utilizes *Halprin* to argue that the FHA needs to be amended to explicitly prohibit post-acquisition housing discrimination. Part II briefly covers the history of housing discrimination in the United States, followed by a review of the legislative history of the FHA. Part III analyzes the ambiguous language of the FHA with regard to post-acquisition discrimination and then examines the *Halprin* decision. Part IV concludes that the FHA as written should cover post-acquisition discrimination but then proposes that in order to adequately protect the interest in nondiscriminatory occupancy, the FHA should be amended to make the prohibition express.

II. BY LOOKING BACK A PROPOSAL FOR CHANGE WILL EMERGE

A. A Brief History of Housing Discrimination in the United States

It is beyond the scope of this Comment to comprehensively trace the evolution of housing discrimination in the United States or adequately explain the causes of contemporary housing segregation.³⁴ An abbreviated overview is necessary, however, to

31. The FHA defines "aggrieved person" as "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (2006).

32. See *Cox*, 430 F.3d at 742-43, 745 (5th Cir. 2005) (holding that neither § 3604(a) nor § 3604(b) gave current owners a cause of action for discriminatory delivery of services); *Krieman v. Crystal Lake Apartments Ltd. P'ship*, No. 05 C 0348, 2006 WL 1519320, at *5 (N.D. Ill. May 31, 2006) (following *Halprin* by rejecting post-acquisition claim under § 3604(a)); *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. Civ. A. H-05-3197 2005 WL 2669480, at *4 (S.D. Tex. Oct. 19, 2005) (dismissing a § 3617 claim after claiming to adopt the Seventh Circuit view that 24 C.F.R. 100.400(c)(2) is invalid). But see *East-Miller v. Lake County Highway Dept.*, 421 F.3d 558, 562 (7th Cir. 2005) (upholding HUD regulation 100.400(c)(2) because its validity was not challenged); *Farrar v. Eldibany*, 137 F. App'x 910, 912 (7th Cir. 2005) (assuming that even if the HUD regulation 100.400(c)(2) phrase "enjoyment of a dwelling" could sever § 3617 from the rest of the FHA, there was no violation in the case at bar); *George v. Colony Lake Property Owners Assoc.*, No. 05 C 5899, 2006 U.S. Dist. LEXIS 45229, at *6 (N.D. Ill. June 19, 2006) (distinguishing *Halprin* on the ground that plaintiffs were discriminatorily evicted, thus rendering their housing unavailable under § 3604).

33. See *infra* Part III(A) (reporting the results of the quantitative study this author conducted at the JMLS Clinic).

34. See *ICELAND & WEINBERG*, *supra* note 21, at 60 (quantifying the extent

put the FHA in historical context.

1. Before 1968

There is some historical evidence that blacks and whites lived in mixed neighborhoods between the Civil War and the start of the twentieth century.³⁵ As many blacks moved north in the early 1900s,³⁶ there was a concurrent black migration from rural to urban areas.³⁷ The response was nearly a half century of official and institutionalized racial discrimination,³⁸ leading to hypersegregated housing patterns by 1940.³⁹

Government actions at times aided and abetted housing discrimination, including the fact that zoning laws mandating racial segregation were legal until 1917.⁴⁰ In 1926, the Supreme Court held that racially restrictive covenants in property deeds were constitutional,⁴¹ a ruling that was not reversed until 1948.⁴² During the 1930s, the Federal Housing Authority also officially practiced housing discrimination by insuring mortgages only to whites, for example.⁴³ The tide began to turn when President

of racial housing segregation in the U.S. based on data from the 2000 Census).

35. Average dissimilarity indices for large northern cities were forty-six in 1860, fifty-nine in 1910, and eighty-nine in 1940, highlighting the explosion in segregated housing that accompanied the Twentieth Century. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 21 (Harvard Univ. Press, 1993).

36. Only 70,000 blacks left the South during the 1870s, for example, while industrialization and labor shortages drove that number to 197,000 between 1900 and 1910. *Id.* at 27-28. World War I and the need for even more labor turned the "stream into a flood," such that 525,000 blacks migrated north between 1910 and 1920, and the number grew to 877,000 for the 1920s. *Id.* at 29.

37. In 1870, eighty percent of blacks lived in the rural south; while by 1970, eighty percent lived in urban areas. *Id.* at 18.

38. See *infra* notes 40-43 and accompanying text (summarizing the history of government complicity in promoting housing segregation before 1950).

39. See MASSEY & DENTON, *supra* note 35, at 21 (documenting the explosive rise in segregated housing between 1860 and 1940).

40. See *Buchanan v. Warley*, 245 U.S. 60, 70, 82 (1917) (invalidating a municipal ordinance that mandated segregated residential blocks as a violation of the Due Process Clause of the Fourteenth Amendment, meaning that such laws were constitutional prior to 1917).

41. See *Corrigan v. Buckley*, 271 U.S. 323, 330-31 (1926) (holding that racially restrictive covenants in real estate transactions did not violate the Fourteenth Amendment because there was no state action).

42. See *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948) (deciding that judicial enforcement of racially restrictive covenants constituted the 'state action' necessary to implicate the Fourteenth Amendment, and that the covenants violated the Equal Protection Clause). Sadly, *Shelley* did not outlaw racially restrictive covenants outright, and their use did not end until the FHA was passed in 1968. SCHWEMM, *supra* note 17, at 3-10 to -11.

43. The Federal Housing Authority guaranteed mortgages in response to the Great Depression, but the policies authorized racial discrimination by

Kennedy issued an Executive Order in 1962, ordering the federal government to stop discriminating in housing, although at that time its reach was limited.⁴⁴

Private action also contributed to segregated living patterns, as many Northern whites resented the influx of blacks.⁴⁵ Primarily fearing loss of jobs,⁴⁶ they reacted with violence⁴⁷ and by “white flight.”⁴⁸ As a result, the black “ghetto” was born.⁴⁹ The real estate agent profession is complicit in this history of discrimination as well, as they formally utilized a list that ranked races and nationalities based on their “beneficial effect on land values.”⁵⁰

protecting neighborhoods from “the infiltration of inharmonious racial groups.” Karl D. Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE LAW & POLY REV. 339, 341 (1988). Federally sanctioned discrimination occurred until 1962. See *infra* note 49 (describing the creation of black “ghettoes” in American cities).

44. President Kennedy signed Executive Order 11063 on November 20, 1962, that banned all racial discrimination in federal housing, which included federal property and private property bought with federal loans or covered by federal mortgage insurance. Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962). The Order did not reach conventionally financed housing, and it did not provide for judicial enforcement. SCHWEMM, *supra* note 17, at 3-7.

45. In response to black migration, Northern white resentment increased in the 1920s, as many whites responded negatively to the massive immigration of Southern blacks. MASSEY & DENTON, *supra* note 35, at 29.

46. Southern black migrants competed with Northern whites for jobs and were often employed as strikebreakers, which only compounded the existing racism and resentment Northern whites held towards the new arrivals. *Id.* at 28-29.

47. Race riots, where blacks were attacked specifically because of the color of their skin, erupted in large northern cities in response to the northern migration of blacks early in the twentieth century. *Id.* at 30. “In Chicago alone, between 1917 and 1921, fifty-eight black homes were bombed, averaging one every twenty-one days.” Short, *supra* note 24, at 252-53.

48. Flight to the suburbs after World War II was more attractive to whites than “defense of threatened neighborhoods” in racially changing areas. MASSEY & DENTON, *supra* note 35, at 45.

49. The Kerner Commission defined a “ghetto” as a part of a city affected by poverty and social disorganization, where racial minorities live “under conditions of involuntary segregation.” KERNER COMMISSION REPORT, *supra* note 22, at 12. The black ghetto was fundamentally different than ethnic European ghettos of the early Twentieth Century, because unlike blacks, which remained in segregated housing, those groups were quickly assimilated into white residential housing patterns. MASSEY & DENTON, *supra* note 35, at 10; see also *id.* at 17-59 (exploring the creation of the black ghetto in America).

50. Homer Hoyt’s infamous 1933 list was derived from real estate brokers on the West Side of Chicago. F. WILLIS CARUSO, CASES AND MATERIALS ON FAIR HOUSING AND FAIR LENDING LAWS 4 (5th ed. 2004). The rankings were: (1) English, Germans, Scotch, Irish, and Scandinavian; (2) Northern Italians; (3) Bohemians or Czechoslovakian; (4) Poles; (5) Lithuanians; (6) Greeks; (7) Russian Jews of the lower class; (8) South Italians; (9) Negroes [sic]; (10) Mexicans. *Id.* The National Association of Real Estate Brokers adopted a discriminatory code of ethics in 1924, ordering agents not to bring races or

2. 1968 and Beyond

The year 1968 was a pivotal fair housing year for two reasons: the Supreme Court decided a seminal housing rights case⁵¹ and Congress enacted the FHA.⁵² Relying on the Thirteenth Amendment, the Court in *Jones v. Alfred Mayer Co.* held that §§ 1981 and 1982 of the Civil Rights Act of 1866⁵³ reached private conduct.⁵⁴ As a result, a private individual can be liable for violating another individual's constitutional rights, without requiring state action.⁵⁵ *Jones* was argued before the FHA was passed⁵⁶ but decided afterward,⁵⁷ and the Court had to reconcile the fact that there were now two federal civil rights statutes that dealt with housing rights. *Jones* resolved the potential conflict by holding that both operate independently.⁵⁸

On March 1, 1968, the Kerner Commission released its report on the causes and solutions to the violent race riots that had swept the country's cities the previous summer.⁵⁹ The report stated, in no uncertain terms, that segregated housing was a primary cause of the social unrest⁶⁰ and that the United States was "moving toward becoming two societies, one black, one white."⁶¹ One of the Kerner Commission's principal recommendations was to call for the passage of a fair housing law.⁶²

nationalities into neighborhoods if it would lower property values. MASSEY & DENTON, *supra* note 35, at 37. This ethical gem remained in force until 1970. *Id.*

51. See *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 409 (1968) (holding that the Thirteenth Amendment gave Congress the power to allow § 1981 and § 1982 of the Civil Rights Act of 1866 to reach wholly private conduct—a significant change in Supreme Court jurisprudence).

52. Pub. L. 90-284, Title VIII, § 801, Apr. 11, 1968, 82 Stat. 81.

53. Act of April 9, 1866, ch. 31, sec. 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870; Act of May 31, 1870, ch. 114, sec. 18, 16 Stat. 140, 144, and codified in §§ 1977, 1978 of the Revised statutes of 1874, now 42 U.S.C. §§ 1981, 1982.

54. *Jones*, 392 U.S. at 439.

55. *Id.*

56. *Jones* was argued on April 1 & 2, 1968. *Id.* at 409.

57. *Jones* was decided on June 17, 1968. *Id.*

58. *Id.* at 416-17. Justice Stewart found "vast differences" between § 1982 and the FHA. *Id.* Section 1982 only covers racial discrimination and requires private enforcement, while the FHA is "applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." *Id.*

59. KERNER COMMISSION REPORT, *supra* note 22, at 1.

60. The bipartisan commission stated the matter bluntly regarding racial segregation in housing: "[w]hat white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." *Id.* at 2.

61. *Id.* at 1.

62. *Id.* at 27-28.

In the context of this history of housing discrimination and segregation as well as the subsequent efforts to find a legal solution to the problem, it is just as important to note what the Supreme Court has *not* said in the area of housing rights. Generally, the Supreme Court must find that a fundamental right⁶³ or a suspect class⁶⁴ has been implicated before the Court will apply heightened review of governmental policies.⁶⁵ Housing is not a fundamental right under the Fourteenth Amendment,⁶⁶ although the right to establish a home is.⁶⁷ Also, poverty, homelessness, and disability are not suspect classes under the Fourteenth Amendment.⁶⁸ There is, however, a fundamental right to free association implicit in the First Amendment.⁶⁹ These holdings highlight the boundaries of any legal remedy to segregated housing. While the Warren Court found public school segregation to be an Equal Protection violation warranting an

63. Black's Law Dictionary defines "fundamental right" as:

A significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment. As enunciated by the Supreme Court, fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights).

BLACK'S LAW DICTIONARY 697 (8th ed. 2004).

64. Black's Law Dictionary defines "suspect classification" as "[a] statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." *Id.* at 1487.

65. Black's Law Dictionary defines "strict scrutiny" as "[t]he standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question." *Id.* at 1462. Justice Stone set the stage in 1938 for the later development of the concept of "strict scrutiny" in his famous "footnote four" from a case about interstate commerce, when he wrote that "more exacting judicial scrutiny" may be required when legislation appears to encroach on fundamental liberties or affect only "discrete and insular minorities." *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 (1938).

66. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that housing is not a fundamental right).

67. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (deciding that the right "to marry, establish a home and bring up children" were fundamental rights under the Fourteenth Amendment).

68. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (listing recognized suspect classes as race, alienage, or national origin, and recognized quasi-suspect classes as: gender and illegitimacy, but declining to extend to further disadvantaged groups).

69. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (recognizing a right to free association in the Due Process Clause of the Fourteenth Amendment, implicitly incorporating the First Amendment).

affirmative mandate that public schools desegregate,⁷⁰ no such order with regards to private residential housing is forthcoming.⁷¹

B. A Brief History of the Fair Housing Act

Before analyzing the ambiguous language of the FHA as it pertains to post-acquisition discrimination, a short overview of the passage of the FHA is pertinent. This review will include the legislative history of the FHA and the state of the FHA today.

1. Legislative History of the Original FHA

At the outset, it is important to note that the FHA was passed under strained and extraordinary circumstances.⁷² As a result, traditional reliance on legislative history as a window into what Congress intended is difficult at best.⁷³ Fair housing legislation that would expand on what President Kennedy ordered in 1962⁷⁴ was not included in the landmark 1964 Civil Rights Act.⁷⁵ Subsequent efforts at enacting fair housing legislation also failed in 1966⁷⁶ and 1967.⁷⁷ The stalemate was broken in 1968 primarily

70. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955) (*Brown II*), (mandating the desegregation of public schools as the remedy for the violation found in *Brown I*: that racially segregated schools violate the Equal Protection Clause).

71. The Supreme Court recently rejected two public school policies that used racial classifications to promote racial balance, which is impermissible under the Court's current equal protection jurisprudence. *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2755 (2007). The Seattle school district argued that it needed the racially based school assignment policy to "address the consequences of racially identifiable housing patterns." *Id.* at 2758. The Court rejected this argument, noting that "accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society." *Id.* at 2757. Without explicitly referring to segregated housing, it is clear by inference that the current Court will not mandate any form of housing desegregation pursuant to the United States Constitution.

72. See *infra* notes 78-80 (recounting the circumstances under which the FHA was enacted).

73. "[S]ince Title VIII was enacted substantially unchanged from the way it was first introduced by Senator Dirksen on the floor of the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation." SCHWEMM, *supra* note 17, at 5-6; see also *infra* note 81-82 (discussing the difficulty of using legislative intent with the FHA).

74. Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962).

75. The word "housing" does not appear in the 1964 Act. Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 874 n.2 (2005).

76. President Johnson submitted fair housing legislation to Congress in 1966, S. 3296 and H.R. 14765, the House passed it, but it was filibustered and died in the Senate. SCHWEMM, *supra* note 17, at 5-2 to -3.

77. President Johnson again called for a fair housing bill in 1967, but the House Judiciary Committee reported out a civil rights bill not pertaining to

because of three events: (1) the assassination of Dr. Martin Luther King, Jr.;⁷⁸ (2) the tumultuous aftermath of Dr. King's death;⁷⁹ and (3) the release of the Kerner Commission Report.⁸⁰

The legislative history of the FHA is not particularly helpful in analyzing whether coverage of post-acquisition housing discrimination was intended.⁸¹ While it is true that the Act does not use language that expressly prohibits post-acquisition discrimination,⁸² the broad congressional intent was to integrate American society, not just to end housing discrimination.⁸³

2. *FHA Amendments and HUD Regulations*

The first important amendment to the FHA included sex as a protected class in 1974.⁸⁴ The next major amendment was in

fair housing ("H.R. 2516"). *Id.* The House passed H.R. 2516, but the full Senate did not consider it in 1967. *Id.* Yet, H.R. 2516 was the genesis of a federal fair housing bill because when H.R. 2516 came before the Senate in February 1968, Senators Mondale and Brook sponsored a fair housing amendment to the bill. *Id.* But even after switching the Mondale amendment with a compromise fair housing bill offered by Senator Dirksen, the Senate filibuster remained until the release of the Kerner Commission Report. *Id.*

78. "Martin Luther King's assassination in the evening of April 4th accomplished one thing: it dislodged the Civil Rights Bill of 1968 from the [House] Rules Committee." Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149, 160 (1969).

79. On April 10, 1968, "with National Guard troops called up to meet riot conditions in Washington still in the basement of the Capitol, the House debated fair housing." *Id.* No additional amendments were allowed and debate was limited to one hour. *Id.*

80. KERNER COMMISSION REPORT, *supra* note 22, at 1. The Kerner Commission Report is important to the legislative history of the FHA because "[t]hree days after release of the Commission's report, the Senate voted cloture on the filibuster blocking the Dirksen proposal." SCWHEMM, *supra* note 17, at 5-5.

81. "[A] fair reading of the FHA's voluminous legislative history does not unequivocally resolve" [the post-acquisition question], and although "[g]uaranteeing nondiscriminatory access was certainly a fundamental part of the solution . . . discussions about fair housing legislation never limited the law's scope to access." Short, *supra* note 24, at 239.

82. While the phrase "post-acquisition" does not appear in the FHA, commentators disagree with Judge Posner that the FHA shows no concern with anything but access: "the statutory language . . . demonstrates that Congress must have intended the FHA to address housing disputes beyond simple denials of accommodation." Short, *supra* note 24, at 221; *see also infra* Part III(E) (analyzing the language of the FHA in the post-acquisition context).

83. 114 CONG. REC. 2, 2276 (1968). The *Trafficante* Court quoted and adopted Senator Mondale's statement on integration being the goal of the FHA. *Trafficante*, 409 U.S. at 211.

84. 1974 amendment, Pub. L. 93-383, § 808, 88 Stat. 633, 729 (1974). The FHA's ban on sex discrimination in housing means "housing suppliers must lease, sell, and negotiate with women on the same basis as they do with similarly situated men." SCHWEMM, *supra* note 17, at 11C-2.

1988, when the FHA was substantially altered at its twentieth anniversary.⁸⁵ The Amendments added two more protected classes: “familial status”⁸⁶ and “handicapped.”⁸⁷ The Amendments also created a new administrative enforcement mechanism for handling housing discrimination complaints, giving the Department of Housing and Urban Development’s (“HUD”) administrative law judges the power to award damages and impose injunctions for FHA violations.⁸⁸

HUD is the primary federal agency responsible for enforcing the FHA.⁸⁹ HUD is authorized and required to promulgate regulations interpreting and implementing the FHA.⁹⁰ HUD regulations, which protect occupants from post-acquisition discrimination, exist⁹¹ and are to be accorded great weight by federal courts.⁹²

Analyzing the ambiguous language of the FHA and *Halprin* in Part III will help determine whether the FHA as written is susceptible to a post-acquisition reach.

85. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988) (the Amendments and the unaltered portions of the original Act are codified at 42 U.S.C. §§ 3601-3619, 3631 (2006)).

86. The FHA defines “familial status,” in pertinent part, as meaning “one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals.” 42 U.S.C. § 3602(k) (2006).

87. Under the FHA, “handicapped” is defined in part as a person having “a physical or mental impairment which substantially limits one or more of such person’s major life activities.” 42 U.S.C. § 3602(h) (2006).

88. HUD enforcement provisions at 42 U.S.C. § 3610-12 (2006). One commentator summarized the goal of the amended enforcement procedures:

[T]he basic purpose of the 1988 Act’s reformation of the HUD procedure was to provide an administrative enforcement system for persons aggrieved by discriminatory housing practices that would handle complaints quickly, easily, and inexpensively and would include “teeth” in the form of serious sanctions against violators and substantial remedies for complainants.

SCHWEMM, *supra* note 17, at 24-7; *id.* at 24-2 to -3 (summarizing the HUD enforcement changes brought by the 1988 Amendments).

89. 42 U.S.C. § 3608(a) (2006).

90. 42 U.S.C. § 3614(a) (2006).

91. “Since 1989, HUD regulations interpreting § 3604(b) have identified a number of practices barred by this provision that affect current residents.” SCHWEMM, *supra* note 17, at 14-9. HUD regulations prohibit “[f]ailing or delaying maintenance or repairs . . . because of [a protected class].” 24 C.F.R. § 100.65(b)(2) (2007). HUD regulations also proscribe “[l]imiting the use of privileges, services or facilities associated with a dwelling because of [a protected class].” 24 C.F.R. § 100.65(b)(4) (2007).

92. HUD’s determination that Petitioner’s had standing to sue was “entitled to great weight.” *Trafficante*, 409 U.S. at 210. “Deference must be given to these interpretive regulations, so long as they do not violate the plain meaning of the statute and are a ‘permissible’ or ‘reasonable’ construction of the law.” SCHWEMM, *supra* note 17, at 7-13.

III. WHETHER THE CURRENT FHA APPLIES POST-ACQUISITION: HALPRIN'S NEGATIVE ANSWER WARRANTS SCRUTINY

A. *How Prevalent is Post-Acquisition Housing Discrimination?*

Currently, there are no known quantitative studies documenting the frequency of post-acquisition discrimination.⁹³ The number of federal court cases where the alleged discrimination occurred during occupancy suggests that it is a common occurrence,⁹⁴ but a more accurate estimate would be useful both to this discussion and to the fair housing bar.⁹⁵

The John Marshall Law School operates The John Marshall Law School Fair Housing Clinic ("JMLS Clinic").⁹⁶ In pursuit of quantitative information regarding the frequency of post-acquisition claims, this author examined every intake form generated by the JMLS Clinic between January 1, 2007, and December 31, 2007.⁹⁷ The intakes were sorted into four categories: (1) pre-acquisition claims; (2) post-acquisition claims; (3) not applicable; and (4) unknown.⁹⁸ Current open cases at the JMLS

93. Professor Schwemm observed that he knew of no agency or organization that distinguishes pre- and post-acquisition discrimination in their reporting, and he knew of no studies examining this topic. Telephone Interview with Robert G. Schwemm, Ashland Professor of Law, University of Kentucky College of Law, in Lexington, Kentucky (Oct. 8, 2007).

94. See *infra* note 219 (listing cases where federal appellate courts found post-acquisition discrimination actionable); *supra* note 28 (documenting other federal cases where post-acquisition claims were upheld).

95. Professor Schwemm stated that an accurate statistical estimate of the frequency of post-acquisition discrimination would be useful. Interview with Robert G. Schwemm, *supra* note 93. Professor Caruso stated that an estimate of the prevalence of post-acquisition housing discrimination would be "helpful to the fair housing bar." Interview with F. Willis Caruso, Clinical Professor, The John Marshall Law School, in Chicago, Illinois (Oct. 29, 2007).

96. The JMLS Clinic provides legal services to victims of housing discrimination while also training law students in civil rights litigation practice. Interview with F. Willis Caruso, *supra* note 95. The JMLS Clinic receives hundreds of contacts each year, and an intake form is generated for each contact. *Id.* If the legal problem is not something the JMLS Clinic can help with, the person is referred to another legal agency. *Id.* The case may involve housing discrimination, yet still be referred out, as the Clinical professors running the JMLS Clinic need to take into account JMLS Clinic resources and educational value to the students, alongside the merits of the case. *Id.*

97. The author conducted this survey at the JMLS Clinic on December 11, 2007, and January 28, 2008, to capture intakes received after December 11th. Scott Gilbert, Survey of Post-Acquisition Claims at the JMLS Fair Housing Clinic in 2007, January 28, 2008 (unpublished, on file with the author). A total of 454 intakes were included. *Id.*

98. The pre-acquisition category is defined as those contacts where it is clear from the face of the intake form that the alleged conduct involved housing discrimination that occurred *prior* to the person obtaining the property in question. *Id.* The post-acquisition category is defined as those

Clinic were also sorted into three categories: (1) pre-acquisition; (2) post-acquisition; and (3) not applicable.⁹⁹

The results were striking. Of the fifty-four open cases at the JMLS Clinic in 2007, twenty-four are post-acquisition claims, nineteen are pre-acquisition claims, and eleven are not applicable.¹⁰⁰ Post-acquisition claims constitute forty-four percent of the JMLS Clinic's open cases,¹⁰¹ and fifty-six percent of the JMLS Clinic's cases which were being actively litigated at that time.¹⁰² Of the 454 intakes received by the JMLS Clinic in 2007, fourteen percent are post-acquisition claims.¹⁰³ The "not applicable" category should arguably be removed from this tally because it contains numerous intakes not related to housing discrimination at all.¹⁰⁴ Excluding the "not applicable" intakes means that post-acquisition claims comprise thirty-eight percent of the JMLS Clinic's housing discrimination intakes in 2007.¹⁰⁵ If only the pre- and post-acquisition intakes are compared, the result speaks for itself: sixty-eight percent of the housing discrimination complaints made to the JMLS Clinic in 2007 were post-acquisition in nature.¹⁰⁶

Discrimination after the transaction is clearly frequent enough to warrant an exploration as to whether the current FHA prohibits such conduct as written.

contacts where it is clear from the face of the intake form that the alleged conduct occurred *after* the person obtained the property. *Id.* The "not applicable" ("N/A") category is defined as contacts where the legal problem does not appear to be a housing discrimination issue, at least not from the face of the intake form. *Id.* Finally, the "unknown" category is defined as contacts that cannot be classified at all from the face of the intake form (for various reasons including: (1) the caller did not give enough information, or (2) the student intern did not describe the alleged conduct adequately). *Id.*

99. As of December 11, 2007, the Clinic had fifty-four open cases. A fourth category for unknown cases was not needed to sort the open cases, as there is enough information on file at the Clinic to classify every open case. *Id.*

100. *Id.* For open cases, the not applicable category encompasses cases that are: (1) settled but not finalized; (2) currently inactive but not formally closed; or (3) consolidated with other open cases. *Id.*

101. Twenty-four out of fifty-four equals forty-four percent. *Id.*

102. Eleven Clinic cases were not active in 2007. *Id.* Twenty-four out of forty-three equals fifty-six percent. *Id.*

103. Sixty-five out of 454 equals fourteen percent. *Id.*

104. The not applicable category contains 282 intakes, and it includes calls about divorce, criminal matters, landlord tenant disputes, etc., that do not implicate the FHA. *Id.*

105. The actual percentage may be even higher, as the "unknown" category contained seventy-six intakes, the majority of which are likely unrelated to housing discrimination (but this could not be confirmed for the stated reason that the intake contained insufficient information). *Id.* Subtracting both the "N/A's" and the "unknown" intakes leaves ninety-six intakes, of which sixty-eight percent were post-acquisition in nature. *Id.*

106. When both the "N/A's" and the "unknowns" are excluded, it leaves sixty-five post-acquisition intakes and thirty-one pre-acquisition intakes. *Id.*

B. Legislative Intent Behind the FHA: Not too Helpful

While Judge Posner may be superficially correct in saying that the FHA's drafters were primarily concerned with access to housing and not occupancy,¹⁰⁷ the Supreme Court¹⁰⁸ and other commentators disagree that the FHA's focus was so narrow.¹⁰⁹

As previously discussed in Part I(B), the legislative history of the FHA provides little assistance toward resolving the post-acquisition question.¹¹⁰ What is clear, however, is that the primary sponsors of the bill spoke of two goals: ending housing discrimination and integrating America's residential housing.¹¹¹ While Congress did not appear to think that merely ending housing discrimination would directly lead to integration, it did see the denial of access as a major obstacle to achieving integration.¹¹² *Trafficante v. Metropolitan Life Insurance Co.*, the first Supreme Court case to interpret the FHA, reached the same conclusion that Congress intended to both end housing discrimination and foster integration.¹¹³

Trafficante is also pertinent because a unanimous Supreme Court held the FHA was to be construed broadly by giving it a "generous construction"¹¹⁴ because, according to the Court, Congress considered it to be of the "highest priority."¹¹⁵ It hardly seems logical, therefore, that Congress would pass a law affording access to housing in order to facilitate integration, while at the same time contemplating that such a law would *not* protect the owner or renter once in possession.¹¹⁶

107. In *Halprin*, Judge Posner stated that "[t]he Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but access to housing." *Halprin*, 388 F.3d at 329.

108. "The legislative history of the [FHA] is not too helpful." *Trafficante*, 409 U.S. at 209.

109. "It is not at all clear that the 1968 Congress' focus was as narrow as Halprin imagines." SCHWEMM, *supra* note 17, at 14-13 n.10. "[P]assage of the FHA did not involve thoughtful, meticulous drafting or consideration of the statute's language." Short, *supra* note 24, at 224.

110. See *supra* notes 72-83 and accompanying text (examining the chaotic circumstances of the FHA's passage and the low value, this history provides, when searching for legislative intent behind the FHA).

111. Senator Mondale wanted to replace America's ghettos with "balanced and integrated" housing patterns. 114 CONG. REC. 2, 2276 (1968).

112. Senator Mondale admitted in floor debate that "fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that." *Id.* at 3422. Prohibiting discrimination, however, will at least provide an opportunity for integration. *Id.*

113. 409 U.S. at 211 (quoting and adopting Senator Mondale's statement on integration being the goal of the FHA).

114. *Id.* at 212.

115. *Id.* at 211.

116. "[I]t is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein." *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004).

C. Compare the FHA to § 1982 of the 1866 Civil Rights Act

The Civil Rights Act of 1866¹¹⁷ provides inferential evidence of whether the Ninetieth Congress intended the FHA to cover occupancy and not just the real estate transaction.¹¹⁸ Unlike the FHA, § 1982 expressly protects occupancy by establishing the right “to hold” property.¹¹⁹ Section 1982 is also narrower than the FHA because it is limited to racial discrimination.¹²⁰ Also, when the FHA was passed, before *Jones* had been decided, § 1982 did not yet reach private conduct.¹²¹ Despite these limitations,¹²² § 1982 does cover racially-based housing discrimination that occurs long after the sale or rental.¹²³ If Judge Posner is right about Congressional intent regarding the FHA, then an anomaly results: a broad fair housing law enacted in 1968 was actually intended to have a much shorter reach than a narrow racial discrimination law enacted in 1866.¹²⁴

D. Compare the FHA to Title VII of the 1964 Civil Rights Act

The FHA has often been compared to Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination.¹²⁵

117. Act of April 9, 1866, ch. 31, sec. 1, 14 Stat. 27, re-enacted by sec. 18 of the Enforcement Act of 1870; Act of May 31, 1870, ch. 114, sec. 18, 16 Stat. 140, 144, and codified in §§ 1977, 1978 of the Revised statutes of 1874, now 42 U.S.C. §§ 1981, 1982 (2006).

118. The inference goes like this: when the FHA was passed, § 1982 was not yet applicable to private action, but it did cover post-acquisition discrimination. Therefore, Congress intended the new FHA to rectify this gap by reaching private action, while retaining the post-acquisition reach of its predecessor. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 28-29 (2008).

119. Section 1982 states, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (2006). “Numerous cases have held that § 1982’s “right to hold” is violated by discrimination directed at in-place residents.” SCHWEMM, *supra* note 17, at 14-15.

120. Section 1982 “deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.” *Jones*, 392 U.S. at 413.

121. *See id.* at 439 (comparing *Jones* decision date of June 17, 1968, with FHA passage date of April 8, 1968, to confirm that § 1982 did not reach private conduct until after the FHA was enacted).

122. *See* SCHWEMM, *supra* note 17, at 11-1 (tallying the seven protected classes in the FHA). Compare this to § 1982, which only prohibits discrimination based on race. *Jones*, 392 U.S. at 413.

123. “[Section] 1982 has always contained specific language indicating that its guarantee of nondiscriminatory treatment is intended to extend beyond purchase or lease to include the ‘hold’ stage of a housing transaction.” SCHWEMM, *supra* note 17, at 27-12.

124. *Id.* at 14-14 to -15.

125. 42 U.S.C. § 2000e (2006).

The *Trafficante* Court looked to Title VII, passed just four years before the FHA, to decide by analogy how broadly to define “standing”¹²⁶ under the FHA.¹²⁷ Lower courts have looked to Title VII caselaw when interpreting the FHA ever since.¹²⁸

It is settled caselaw that Title VII protects the job holder, as well as the job seeker from discrimination; not even Judge Posner disputes this.¹²⁹ Similar language in the FHA and Title VII has led many courts and commentators to make the analogy that the FHA protects housing “holders” as well as housing seekers from discrimination.¹³⁰

Having looked to two other prominent federal civil rights statutes for guidance on occupancy rights, an examination of the language of the FHA is warranted before moving on to analyze *Halprin*.

E. What the FHA Actually Prohibits, Ambiguities and All

Although the FHA encompasses §§ 3601-3619 and § 3631, the main substantive provisions defining prohibited conduct under the FHA are contained within § 3604, § 3605, § 3606, and § 3617.¹³¹ In fact, the FHA defines a “discriminatory housing practice” as

126. In an early FHA case, the Supreme Court defined standing as “whether the litigant is entitled to have the court decide the merits of the dispute,” and that “[t]his inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The constitutional aspect is whether the plaintiff “has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III.” *Id.*

127. The *Trafficante* Court found that because both Title VII and the FHA define an aggrieved person as one who has claimed to be injured by a discriminatory practice, and that where such language in Title VII shows a congressional intent to define standing as broadly as allowed under Article III, such broad standing applied to the FHA as well. 409 U.S. at 209.

128. Other than the issue of standing, another prominent example of the FHA borrowing from Title VII precedent is with the disparate impact theory of discrimination. SCHWEMM, *supra* note 17, at 7-4. In 1971, the Court first interpreted Title VII to allow employment discrimination claims based on disparate impact, where there is no showing of intentional discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 432 (1971). In 1977, the Seventh Circuit, by analogy to Title VII, allowed a disparate impact claim of housing discrimination to proceed against a municipality. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

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

130. One commentator who examined the parallels between Title VII and the FHA documented the extensive fair housing case law where Title VII was used to support a post-acquisition reach of the FHA. Short, *supra* note 24, at 241-43. Professor Short concluded that the nearly identical statutory language made it hard to justify recognizing post-hiring claims under Title VII while rejecting post-acquisition claims under the FHA. *Id.*

131. 42 U.S.C. §§ 3601-3619, 3631 (2006). The “substantive heart” of the FHA is in the prohibitions within these four sections. SCHWEMM, *supra* note 17, at 4-4.

conduct that is unlawful under these four sections.¹³² The basic formula for finding an FHA violation is to determine: (1) if a “dwelling”¹³³ is involved; (2) if a “protected class”¹³⁴ is involved; (3) if a “discriminatory housing practice”¹³⁵ has occurred; and (4) whether an exception applies.¹³⁶

A major ambiguity in the FHA, unrelated to the post-acquisition debate, is whether housing discrimination must be intentional.¹³⁷ In order to violate the Equal Protection Clause of the Fourteenth Amendment, discrimination must be intentional.¹³⁸ Under the FHA, however, courts have accepted disparate impact claims, drawn by analogy from Title VII employment discrimination case law.¹³⁹ The intentional discrimination controversy is another topic unto itself but is worth noting here because it is also ripe for congressional intervention.¹⁴⁰

It is not necessary to document every housing-related practice that is prohibited under the FHA, but each substantive section will be briefly analyzed to determine how it applies generally, as well as whether it applies in the post-acquisition scenario.

132. 42 U.S.C. § 3602(f) (2006).

133. See 42 U.S.C. § 3603(b) (2006) (defining a “dwelling”); see also SCHWEMM, *supra* note 17, at 4-4 (relating that FHA protection is limited to dwellings).

134. SCHWEMM, *supra* note 17, at 11-1.

135. See 42 U.S.C. § 3602(f) (defining a “discriminatory housing practice”).

136. A full examination of the available FHA exceptions is outside the range of this Comment, but a good example is the statutory so-called “Mrs. Murphy exception,” where a private homeowner renting no more than three rooms out of her own home is exempt from the prohibitions of the FHA, so long as she does not use real estate professionals or advertise the rental. 42 U.S.C. § 3603(b)(2) (2006); see also SCHWEMM, *supra* note 17, at 9-3 (summarizing the exceptions to the FHA). Where an exception may be applicable, it is important to note, however, that FHA exceptions are to be construed narrowly. *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990) (determining that where the body of the statute is construed broadly, it is a natural corollary to construe the exceptions narrowly).

137. There are different standards of proof for different sections of the FHA, but several sections, including § 3604(a) and § 3604(b), define unlawful conduct as *some prohibited conduct* done “because of” a *protected class*. SCHWEMM, *supra* note 17, at 10-1. The meaning of “because of” is not defined in the FHA, and the Supreme Court has not resolved this dispute. *Id.*

138. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that proof of intentional racial discrimination must be shown to establish an equal protection violation).

139. See *supra* Part III(D) (exploring the relationship between the FHA and Title VII, and the use of Title VII precedent by analogy in fair housing cases).

140. Congress could also amend the FHA to statutorily provide for a disparate impact cause of action to prevent a hostile Supreme Court from judicially revoking the doctrine.

1. Section 3604

Section 3604 of the FHA contains six subparts, (a) through (f).¹⁴¹ Each subpart will be examined with a focus on whether the subsection could be construed to protect occupancy rights.

a. Section 3604(a)

Section 3604(a) makes it unlawful to “refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of . . . a dwelling . . . because” a person is part of a “protected class.”¹⁴² After this explicitly stated prohibited conduct, § 3604(a) also contains a catch-all phrase prohibiting conduct that would “otherwise make unavailable or deny” housing to a protected class.¹⁴³ Courts have construed this “otherwise deny” language to prohibit a wide range of discriminatory practices not amounting to outright refusals to deal or negotiate.¹⁴⁴ Federal courts have interpreted the § 3604(a) catchall “otherwise make unavailable” clause to prohibit discrimination directed at current occupants of dwellings and not just those seeking housing.¹⁴⁵

b. Section 3604(b)

Section 3604(b) makes it unlawful to discriminate “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith,” because a person is part of a protected class.¹⁴⁶ There is an active controversy over the proper interpretation of the “in connection therewith” phrase.¹⁴⁷

141. 42 U.S.C. § 3604(a) – § 3604 (f) (2006).

142. 42 U.S.C. § 3604(a) (2006).

143. *Id.*

144. Delaying tactics, more burdensome procedures, or other attempts to avoid dealing with a protected class member amounts to a § 3604(a) violation as much as an outright refusal. SCHWEMM, *supra* note 17, at 13-2. The catch-all “otherwise deny” phrase is broad; but to come within § 3604(a), discriminatory conduct must “deny housing or negatively affect its availability.” *Id.* Some of the other discriminatory practices held to be prohibited by § 3604(a) include racial steering, exclusionary zoning, mortgage redlining, and discriminatory property appraisals. *Id.* at 13-1.

145. While acknowledging that not every complaint would be severe enough to find that housing had been made “unavailable” under § 3604(a), one commentator proposes leaving that determination to the finder of fact. Short, *supra* note 24, at 215. Professor Short explains that “there is no textual reason to categorically reject the viability of harassment claims under § 3604(a) simply because such claims might occur post-acquisition.” *Id.*

146. 42 U.S.C. § 3604(b) (2006).

147. See Short, *supra* note 24, at 209 (indicating the debate over the proper way to read § 3604(b)—narrowly or broadly); Robert G. Schwemm, Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act, 41 IND. L. REV. 717, 769-71 (2008) (acknowledging the broad versus narrow debate, before examining the clause and concluding that either reading is

The broad reading would use the “in connection therewith” phrase to link the “provision of services” phrase with dwelling,¹⁴⁸ an interpretation that naturally opens the door to post-acquisition claims.¹⁴⁹ The narrow reading would link the “provision of services” phrase with the sale or rental,¹⁵⁰ and not dwelling. This constricted interpretation would appear to limit the use of § 3604(b) to discrimination that occurs during the sale or rental transaction.¹⁵¹

c. Section 3604(c)

Section 3604(c) prohibits statements or advertisements that express a preference based on a protected class.¹⁵² Despite this section containing the phrase “with respect to the sale or rental,” it is applicable in some post-acquisition situations, such as where a landlord makes discriminatory statements to a current tenant.¹⁵³

d. Section 3604(d)

Section 3604(d) prohibits anyone from representing that housing is not available, when in fact it is available.¹⁵⁴ This section has essentially been absorbed by § 3604(a)’s “otherwise make unavailable” clause,¹⁵⁵ except for “testers,”¹⁵⁶ who have standing to sue based on § 3604(d).¹⁵⁷ This section is not relevant to the post-acquisition discussion.

grammatically incorrect, and should not be the basis for denying post-acquisition claims).

148. The broad reading is supported by numerous HUD regulations, which have recognized that § 3604(b)’s “in connection therewith” phrase refers to the dwelling and not the transaction. SCHWEMM, *supra* note 17, at 14-3.

149. HUD regulations, courts, and commentators had assumed that § 3604(b) did not just protect homeseekers from discrimination but protected their right to equal treatment once they occupied the dwelling. *Id.*

150. *Halprin* appeared to implicitly rely on the narrow reading of § 3604(b) by stating that the section is only concerned with discrimination that prevents people from acquiring property. 388 F.3d at 328-29. When the Fifth Circuit followed the Seventh, it expressly held that the statute required a narrow reading of § 3604(b). *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005).

151. Short, *supra* note 24, at 209.

152. 42 U.S.C. § 3604(c) (2006).

153. Oliveri, *supra* note 117, at 11.

154. 42 U.S.C. § 3604(d) (2006).

155. SCHWEMM, *supra* note 17, at 16-1.

156. In the fair housing context, “testers” are people who pose as renters or purchasers, where they do not really intend to rent or buy, in order to collect evidence of housing discrimination. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

157. *Id.* at 373-74.

e. Section 3604(e)

Section 3604(e) makes it unlawful “[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a [protected class].”¹⁵⁸ This section outlaws a practice called “blockbusting,” where the allegedly changing character of a neighborhood is used to frighten people into leaving or not entering a neighborhood.¹⁵⁹ Section 3604(e) reaches post-acquisition discrimination, such as when blockbusting is employed against current homeowners to scare them into selling.¹⁶⁰

f. Section 3604(f)

Section 3604(f) is a subsection added to the FHA in 1988,¹⁶¹ extending FHA protection to the disabled.¹⁶² The language used in §§ 3604(f)(1) and (f)(2) largely tracks with the language used in § 3604(a) and § 3604(b), respectively,¹⁶³ and affords the same protections as those sections.¹⁶⁴ Relevant to this discussion, however, are several provisions relating to disability that clearly protect occupancy rights.

Sections 3604(f)(1) and (f)(2) expand the protections afforded beyond the disabled individual to “a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or . . . any person associated with that person.”¹⁶⁵

158. 42 U.S.C. § 3604(e) (2006).

159. The practices prohibited in § 3604(e) are generally referred to as “blockbusting.” SCHWEMM, *supra* note 17, 17-1 n.2. Section 3604(e) makes it unlawful: “[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3604(e) (2006).

160. *See United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 118 (5th Cir. 1973) (upholding blockbusting claim where prohibited conduct was directed at homeowners in possession of their homes).

161. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988); SCHWEMM, *supra* note 17, at 11D:3.

162. 42 U.S.C. § 3604(f) (2006). The other two federal statutes that ban discrimination based on disability, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, use the term “disability” in a way that is synonymous with the phrase “handicap” as used in the FHA. SCHWEMM, *supra* note 17, at 11-D:1. For purposes of this discussion, the two terms are to be considered interchangeable.

163. The language of § 3604(a) and § 3604(b) was copied almost exactly over to § 3604(f)(1) and § 3604(f)(2) respectively. SCHWEMM, *supra* note 17, at 11D:3. The reason these rights for disabled persons were separated from the other protected classes was to make clear that housing made available only for the disabled was lawful. *Id.*

164. *Id.* at 13-1, 14-1.

165. 42 U.S.C. § 3604(f)(1) and (f)(2) (2006). This also means it is illegal to deny housing to a person because someone associated with the prospective

The key language is “residing in,” clearly expressing a legislative purpose to protect the disabled from discrimination after they have taken possession of the dwelling.¹⁶⁶

Section 3604(f) also confers housing rights to the disabled not available to the other protected classes, such as the right to “reasonable accommodations”¹⁶⁷ and “reasonable modifications.”¹⁶⁸ This is a substantial and complex area of fair housing law in its own right, but the important point for this Comment is that § 3604(f) confers extensive rights to disabled *occupants* of dwellings. As one commentator has argued, Congress must accept the post-acquisition reach of the FHA because when it was amended in 1988, there had already been post-acquisition cases, yet Congress chose not to write such conduct out of the Act.¹⁶⁹

2. Section 3605

Section 3605 prohibits discrimination against protected classes in transactions related to residential real estate, including loans and appraisals.¹⁷⁰ Germane to this discussion, § 3605(b)(1)(A) provides that this section does not just cover loans for buying or building homes, but also for “improving, repairing, or maintaining a dwelling.”¹⁷¹ The chosen language expresses a design to prohibit post-acquisition loan discrimination because one ordinarily would not improve, repair, or maintain a dwelling in

renter had a disability. SCHWEMM, *supra* note 17, at 11D:2.

166. Short, *supra* note 24, at 217. *See id.* at 217 n.101 (collecting cases recognizing a post-acquisition scope of disability discrimination under § 3604(f)).

167. Section 3604(f)(3)(B) defines a refusal to “make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling” as discrimination. 42 U.S.C. § 3604(f)(3)(B) (2006). “Reasonable accommodations” are feasible and practical changes that do not fundamentally alter the defendant’s program or impose undue financial and administrative burdens. SCHWEMM, *supra* note 17, at 11D:8. The elements for a reasonable accommodation claim are: (1) the request must be reasonable; (2) the plaintiff must be handicapped; (3) the defendant knew or should have known about the handicap; (4) the accommodation may be “necessary;” and (5) the accommodation was denied. *Id.*

168. Section 3604(f)(3)(A) defines “discrimination” as a “refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.” 42 U.S.C. § 3604(f)(3)(A) (2006). The elements of a reasonable modification claim are: (1) the tenant asked permission of the landlord to make modifications at her expense; (2) the tenant is disabled; (3) the modifications may be necessary to afford the tenant full enjoyment of the premises; and (4) the landlord refused the modification. SCHWEMM, *supra* note 17, at 11D:7.

169. Oliveri, *supra* note 118, at 32.

170. 42 U.S.C. § 3605 (2006).

171. 42 U.S.C. § 3605(b)(1)(A) (2006).

which they had no property interest.¹⁷²

3. Section 3617

Section 3617 makes it unlawful to “coerce, intimidate, threaten, or interfere with” rights defined in § 3603, § 3604, § 3605, or § 3606.¹⁷³ Such coercion is a violation under three circumstances: (1) when a person exercises or enjoys his own housing rights;¹⁷⁴ (2) when a person has exercised his housing rights in the past;¹⁷⁵ and (3) when a person has “aided or encouraged” another in the exercise of that person’s housing rights.¹⁷⁶

A broad reading of § 3617, by reference to the language alone, would accord weight to the past tense language used.¹⁷⁷ Logically, current interference with housing rights that were exercised in the past would likely involve interference directed at current occupants of housing.¹⁷⁸

A narrow reading of § 3617 would in essence ignore the past tense language and focus on the requirement that the interference be related to one of the other substantive provisions of the FHA.¹⁷⁹ Because the other provisions relate to sales and rentals, so the logic goes, there can be no violation of § 3617 without a sale or rental transaction.¹⁸⁰

Federal courts are not the only branch of government to have weighed in on the meaning of § 3617, however, as HUD has issued regulations defining § 3617¹⁸¹ that are to be accorded great

172. SCHWEMM, *supra* note 17, at 18:2.

173. 42 U.S.C. § 3617 (2006).

174. SCHWEMM, *supra* note 17, at 20:2.

175. *Id.*

176. *Id.*

177. *Id.*; see also Short, *supra* note 24, at 218 (arguing that the use of past tense language means that the real estate transaction in question is not prospective).

178. Reading § 3617 to reach post-acquisition claims would satisfy the requirement that a violation of § 3617 be tied to the rights granted by the FHA because the right to acquire a home free from discrimination was exercised in the past by a current occupant facing discrimination. Short, *supra* note 24, at 218.

179. Some courts have read § 3617 to require a current violation of § 3604 or § 3605 in order to find a § 3617 violation. Oliveri, *supra* note 118 at 12. See *Frazier v. Rominger*, 27 F.3d 828, 834 (2d Cir. 1994) (rejecting a § 3617 claim where there was no current violation of any right conferred by the other substantive provisions of the FHA because then § 3617 had no “predicate”).

180. Judge Posner, in *Halprin*, seemed to prefer the narrow reading of § 3617, noting that the lack of a § 3604 violation might “doom” the § 3617 claim as well, before reluctantly deferring to a HUD regulation on point. 388 F.3d at 330.

181. See 24 C.F.R. 100.400 (2007) (interpreting unlawful conduct under § 3617 of the FHA, promulgated by HUD).

weight.¹⁸² HUD regulation 100.400(c)(2) goes beyond the language of the FHA, providing that “enjoyment of a dwelling” is protected from the conduct prohibited in § 3617, i.e., coercion, interference, or intimidation.¹⁸³ Enjoyment of one’s dwelling clearly extends past acquisition and into occupancy.¹⁸⁴

4. Section 3631

Section 3631 is generally considered part of the FHA, even though it was initially passed as part of Title IX of the 1968 Civil Rights Act and not Title VIII.¹⁸⁵ Section 3631 criminalizes the use or threat of force that violates housing rights of a protected class member.¹⁸⁶ Unlike § 3617, however, § 3631 provides its own list of housing rights that trigger criminal sanctions when violated.¹⁸⁷ Material to this discussion is that § 3631(a) expressly protects *occupants* of dwellings from violence or interference because of protected class status.¹⁸⁸

Prior to *Halprin*, the general consensus among federal courts and fair housing commentators was that post-acquisition discrimination was prohibited in a number of contexts.¹⁸⁹ Before proposing an FHA amendment that would expressly protect occupancy, an analysis of *Halprin*’s reasoning is necessary.

F. The Halprin Decision

As a threshold matter, it is important to note that both the original *Halprin* district court opinion¹⁹⁰ and the *Halprin* Seventh Circuit opinion¹⁹¹ were decided on the defendant’s motion to dismiss.¹⁹² The procedural disposition of the case means that both

182. See *Trafficante*, 409 U.S. at 210 and SCHWEMM, *supra* note 17, at 7-13 (justifying the deference to be given HUD regulations).

183. 24 C.F.R. 100.400(c)(2) (2007).

184. Short, *supra* note 24, at 217-18.

185. *Id.* at 220.

186. 42 U.S.C. § 3631 (2006).

187. Section 3631 prohibits interference with protected class members who engage in “selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling.” 42 U.S.C. § 3631(a).

188. The use of the word “occupying” meant Congress intended to prohibit interference with persons already in possession. Short, *supra* note 24, at 220. See also *id.*, 220 n.123 (listing cases recognizing post-possession § 3617 claims).

189. See *supra* notes 25-28 and accompanying text (exploring the general consensus before *Halprin* that post-acquisition housing discrimination is prohibited by the FHA in numerous contexts).

190. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 208 F. Supp. 2d 896, 899-900 (N.D. Ill. 2002).

191. *Halprin*, 388 F.3d at 328.

192. For purposes of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, the court is required to assume the factual

the trial court and the appellate court accepted as true the Halprins' allegations that they were the victims of a pattern of housing discrimination because of their religion.¹⁹³ Nevertheless, the courts went on to hold as a matter of law that the FHA did not prohibit such conduct.¹⁹⁴ This was not a case where the facts were in dispute or where the plaintiff could not provide some proof of the conduct alleged, as would be required at the summary judgment stage.¹⁹⁵ Rather, these were court interpretations that even where housing discrimination was aimed at a protected class, the FHA was not implicated because the conduct occurred *after* the dwelling was acquired.¹⁹⁶

1. *Halprin I – The First District Court Case*

The Halprins brought their case to federal court, alleging violations of §§ 3604(a), (b), (c), and § 3617.¹⁹⁷ After finding no

allegations in the complaint are true and draw all reasonable inferences in the plaintiff's favor. *Halprin*, 208 F. Supp. 2d at 899.

193. Plaintiffs, Robyn Halprin ("Robyn") and Rick Halprin ("Rick"), owned a home in The Prairie Single Family Homes of Dearborn Park subdivision (hereinafter "Subdivision"). *Id.* at 898. Rick is Jewish. *Id.* The Subdivision was managed by the defendant homeowners association: The Prairie Single Family Homes of Dearborn Park Association (hereinafter "Association"). *Id.* Conflict began in November 2000 when Robyn was not elected to the Association Board and defendant Mark Ormond ("Ormond"), an Association Board member, refused to disclose the number of proxy votes. *Id.* At some point before January 10, 2001, Ormond vandalized the Halprin's home by writing "H-town property" in red letters on a stone wall, which plaintiffs alleged referred to "Hymie town," a place where Jewish people live. *Id.* Ormond's vandalism included damaging trees and plants as well as tearing down strings of holiday lights. *Id.* Robyn placed notices on public light poles and trees, offering a reward for identifying the vandals. *Id.* Although not on Association property, Ormond, nevertheless, removed the notices and pressured the Association lawyer to press the City of Chicago to demand removal of the notices. *Id.* On January 8, 2001, Ormond prevented Robyn from speaking to the board about the Association. *Id.* One or more defendants altered Board meeting minutes and destroyed a tape recording in order to conceal the fact that Ormond had threatened to "make an example" of Robyn. *Id.*

194. *Halprin*, 208 F. Supp. 2d at 901.

195. Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment bears the initial burden of establishing that there are no material facts in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is not proper, however, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

196. See *supra* Part III(F)(1) (briefing the first *Halprin* district court opinion); see *supra* Part III(F)(2) (examining the *Halprin* Seventh Circuit opinion).

197. The *Halprin* district court ruled on the plaintiffs' § 3604(b), § 3604(c),

violation of any provision of § 3604 because the conduct was not related to the sale or rental of a dwelling, the district court also dismissed the Halprins' § 3617 claim.¹⁹⁸ Because their § 3617 claim was based on the same underlying conduct as their § 3604 claim, the district court reasoned that dismissal of the § 3604 claim required the dismissal of the § 3617 one as well.¹⁹⁹

2. *Halprin II – The Seventh Circuit's Decision*

The Seventh Circuit's decision is not a model of clarity with regards to which provision of the FHA is being applied to the facts, and, at one point, both § 3604(a) and § 3604(b) are conflated.²⁰⁰ Without dealing with § 3604(c) at all, the Seventh Circuit rejected the Halprins' claims under § 3604(a) and § 3604(b) on the same logic as the trial court: that the alleged discrimination occurred after the plaintiffs had moved into their home.²⁰¹

Judge Posner, unlike the district court, acknowledged a circumstance when § 3604 could be implicated post-possession: where the conduct was severe enough to amount to "constructive eviction."²⁰² But this seems to set the bar very high before § 3604 could be invoked during occupancy, essentially only when occupancy was lost.²⁰³

After affirming the dismissal of the § 3604 claim,²⁰⁴ the Seventh Circuit noted that the lack of a § 3604 claim might appear "to doom their claim under § 3617 as well,"²⁰⁵ as the district court thought.²⁰⁶ But there is a HUD regulation that explains the conduct prohibited by § 3617, and it includes the right to

and § 3617 claims. 208 F. Supp. 2d at 900. The district court rejected the plaintiffs' § 3604(a) claim, however, ruling that it was not alleged in the plaintiffs' complaint and was therefore untimely. *Id.*

198. *Halprin*, 208 F. Supp. 2d at 903-04.

199. *Id.*

200. At one point, Judge Posner referred to making a home "unavailable" (an apparent reference to § 3604(a)) and then in the same sentence to "privileges or services" (an apparent reference to § 3604(b)) without distinguishing the two distinct FHA provisions. *Halprin*, 388 F.3d at 329.

201. Further conflating § 3604(a) and § 3604(b), two FHA provisions ordinarily dealt with separately, the Seventh Circuit held that the plaintiffs had no claim under § 3604. *Id.*

202. *Id.*; see also BLACK'S LAW DICTIONARY 594 (8th ed. 2004) (defining "constructive eviction").

203. See Short, *supra* note 24, at 215 (arguing that it is for the fact-finder to determine whether conduct was severe enough to violate the FHA). Constructive eviction occurs where a landlord "has substantially deprived the tenant of the beneficial use of the premises, or when the landlord's actions . . . [are] so severe as to interfere with the tenant's peaceful enjoyment of the premises." *Honce*, 1 F.3d at 1091.

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

205. *Id.*

206. *Halprin*, 208 F. Supp. 2d at 903-04.

“enjoyment of a dwelling.”²⁰⁷ The HUD regulation clearly authorizes a post-acquisition reach of § 3617, and as Judge Posner observed, it “cuts § 3617 loose from § 3604, contrary to the language of § 3617.”²⁰⁸ The validity of the regulation was not challenged by the defendant, so the *Halprin* court observed that it could not rely on the apparent overreach of the regulation as a route to affirming the dismissal.²⁰⁹ After implicitly encouraging future fair housing defendants to challenge the validity of HUD regulation 100.400, the Seventh Circuit reinstated the *Halprin*’s § 3617 claim and remanded.²¹⁰

3. *Halprin III—Remanded Back to the District Court*

On remand, the defendant again moved to dismiss, initially challenging the validity of the relevant HUD regulation.²¹¹ In the intervening time, however, the Seventh Circuit had upheld the validity of the regulation,²¹² so the argument failed.²¹³ The defendant next argued that the alleged conduct did not interfere with the plaintiffs’ “enjoyment of a dwelling,” but the court also rejected this argument.²¹⁴ Finally, the court disagreed with the argument that there was no evidence of a pattern of harassment.²¹⁵ After four years of litigation, without even getting to discovery, the district court ended its opinion with the admonition to end the “pleading wars.”²¹⁶

4. *The Aftermath of Halprin*

Other fair housing defendants have been quick to rely on *Halprin* and argue that the FHA does not apply to post-acquisition housing discrimination, and some courts accept these arguments.²¹⁷ Most significantly, the Fifth Circuit accepted

207. 24 C.F.R. 100.400(c)(2) (2007).

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

209. *Id.*

210. *Id.* at 330-31.

211. *Halprin*, 2006 WL 2506223, at *1.

212. See *East-Miller*, 421 F.3d at 562 (upholding HUD regulation 100.400(c)(2) because its validity was not challenged); *Farrar*, 137 F. App’x at 912 (assuming that even if the HUD regulation 100.400(c)(2) phrase “enjoyment of a dwelling” could sever § 3617 from the rest of the FHA, there was no violation in the case at bar).

213. *Halprin*, 2006 WL 2506223, at *1.

214. *Id.*

215. *Id.*

216. *Id.* at 2.

217. See *Bloch*, 533 F.3d at 563-64 (agreeing with the *Halprin* court that the FHA does not reach post-acquisition discrimination); *Cox*, 430 F.3d at 742-43, 745 (holding that in the Fifth Circuit neither § 3604(a) nor § 3604(b) was violated where the alleged discriminatory conduct was not related to the sale or rental of a dwelling); *Krieman*, 2006 WL 1519320, at *5 (following *Halprin* by rejecting post-acquisition claim under § 3604(a)); *Reule*, 2005 WL 2669480,

Halprin's holding, and thus the rule that the FHA does not protect occupancy is now binding precedent in the Seventh and Fifth Circuits.²¹⁸

G. Compare *Halprin* to the Law in Other Circuits

In contrast to the Fifth and Seventh Circuits, eight other federal circuits confronted with housing discrimination directed at occupants have recognized the post-acquisition scope of the FHA.²¹⁹ Although none of these cases deal directly with whether the FHA extends to post-acquisition discrimination, they implicitly endorse extending the FHA to protect occupancy by upholding claims arising after the real estate transaction.²²⁰ These cases

at *4 (dismissing a § 3617 claim after 'adopting' the Seventh Circuit view that 24 C.F.R. 100.400(c)(2) is invalid); *Steele v. City of Port Wentworth*, No. CV405-135, 2008 WL 717813, at *12-13 (S.D. Ga. Mar. 17, 2008) (adopting the narrow reading of § 3604(b) and holding that it does not reach post-acquisition discrimination).

218. *Cox*, 430 F.3d at 742-43, 745; *Halprin*, 388 F.3d at 330.

219. See *Hogar Agua Y Vida En El Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 179 (1st Cir. 1994) (reversing the district court ruling that an FHA exception applied, accepting post-acquisition claims where the plaintiffs were allegedly harassed after signing the rental agreement); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 988 (4th Cir. 1984) (upholding a disparate impact claim brought by current tenants and accepting the post-acquisition reach of the FHA); *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 229 (6th Cir. 2003) (continuing the pattern that other Circuits followed before *Halprin* and recognizing post-acquisition claims where some of the plaintiffs who alleged familial status discrimination were present occupants); *Neudecker*, 351 F.3d at 364 (8th Cir. 2003) (upholding a post-acquisition disability harassment cause of action under the FHA because the harassment occurred during tenant's occupancy); *Walker v. City of Lakewood*, 272 F.3d 1114, 1120 (9th Cir. 2001) (accepting the merits of the underlying FHA claim brought by tenants who had already acquired their units when ruling on other matters); *Honce*, 1 F.3d at 1090 (recognizing the hostile housing environment claim where the harassment "alters the conditions of the housing arrangement," implying post-possession interference with occupancy); *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1263 (11th Cir. 2002) (accepting that post-acquisition familial status discrimination is actionable by tenants); *Clifton Terrace Assoc., Ltd. v. United Tech. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (rejecting a third party claim, while generally accepting § 3604(b) discriminatory service claims by housing occupants).

220. Federal cases before *Halprin* did not explicitly discuss the temporal scope of the FHA. See *supra* note 219 (compiling a roundup of the Federal Circuits that recognize post-acquisition housing discrimination claims under the FHA without addressing the post-acquisition aspect). This author found only two federal district court cases prior to the Seventh Circuit's *Halprin* opinion that expressly discussed the reach of the FHA beyond the transaction: the original *Halprin* trial court case from 2002, 208 F. Supp. 2d at 901, and *Schroeder v. De Bertolo*, 879 F. Supp. 173, 176-78 (D. PR 1995). In *Schroeder*, the district court rejected the defendant's claim that FHA protection did not extend beyond the purchase, noting that the FHA "does not lend itself to such a narrow interpretation," because the "otherwise make unavailable or deny"

should not be criticized for their failure to discuss the temporal scope of the FHA, however, because *Halprin* was the first decision of the Federal Circuit Court of Appeals to talk about this so-called temporal scope of the FHA.²²¹ While Judge Posner seems to think that federal courts have been wrong about the FHA for nearly forty years, the vast weight of authority choosing to ignore the post-acquisition question supports the opposite contention: that the FHA unequivocally extends to post-acquisition discrimination as written. There is no Supreme Court holding on the post-acquisition scope of the FHA,²²² however, so the circuits remain split.

IV. AMENDING THE FHA IS THE BEST WAY TO PROTECT HOUSING OCCUPANTS FROM DISCRIMINATION

In light of the foregoing analysis, it is apparent the federal circuits are divided over the post-acquisition reach of the FHA, a split that needs to be resolved. It is also apparent that the FHA can be, and has been for many years, accorded a post-acquisition scope as written.²²³ This Comment, siding with the courts and commentators who recognize that the current FHA protects occupancy, argues for *Halprin* to be reversed. There are two primary ways to undo *Halprin*, judicially and legislatively.²²⁴ First, the judicial route to change will be examined, but ultimately rejected due to its unpredictability. Second, the legislative route to change will be examined and ultimately accepted as the preferred remedy to the problems created by *Halprin*.

Before proposing an FHA amendment, the wider context of

phrase “sweeps activities which go beyond initial sale.” *Schroeder*, 879 F. Supp. at 176-78. The occupant had a “continuing right to quiet enjoyment and use of her condominium and common areas,” and the owner’s right to acquire housing free from discrimination “encompassed the right to maintain that dwelling.” *Id.*

221. In *Halprin*, Judge Posner cited five earlier Circuit or Supreme Court cases that recognized a post-acquisition scope of the FHA but criticized them for not undertaking “a *considered* holding on the scope of the [FHA].” 388 F.3d at 329.

222. The Supreme Court denied certiorari in the *Cox* case from the Fifth Circuit, which if granted, would have afforded the Court an opportunity to address the post-acquisition issue. *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 2039, (2006).

223. See *supra* 219 (tallying Federal Circuits that recognize post-acquisition claims); *supra* note 28 (reporting other cases upholding post-acquisition claims).

224. Professor Schwemm suggested a third method of undoing *Halprin*: HUD issuing a regulation that expressly interprets the FHA to protect occupancy. Such a regulation would be “important to a judicial solution, because the courts are supposed to give heavy deference to HUD’s interpretations of the FHA.” Interview with Robert G. Schwemm, *supra* note 93.

whether the FHA has been, or can be, successful in combating housing discrimination needs to be addressed. Nearly forty-one years after the passage of the FHA, as previously reported, housing discrimination and housing segregation remains pervasive.²²⁵ University of Kentucky College of Law Ashland-Spears Professor Robert Schwemm, with over thirty-five years of experience in fair housing law, questions whether our society really wants to end housing discrimination.²²⁶ While calling the FHA's enforcement mechanisms "second to none,"²²⁷ Professor Schwemm contrasts the "high degree of noncompliance with the FHA" to the relative success that other federal civil rights laws have had in fostering integration in America's workplaces and public accommodations,²²⁸ before concluding that housing discrimination is a "uniquely intractable problem."²²⁹

In response to the common occurrence of post-acquisition housing discrimination, this Comment proposes a narrow amendment to the FHA to protect occupancy rights. Expressly protecting occupancy would make the FHA more logical, more fair, and more consistent with the legislative intent behind it.

A. A Judicial Overruling of Halprin Would be a Good Start but not Sufficient to Solve the Problem

The Supreme Court could take a suitable case and resolve the current circuit split by deciding whether the FHA prohibits post-acquisition discrimination.²³⁰ The benefit of a judicial overruling of *Halprin* is obvious—a High Court decision would immediately bind the Seventh and Fifth Circuits.²³¹ The downsides, however,

225. See TURNER, *supra* note 18, at iii (documenting state of housing discrimination in 2000); ICELAND & WEINBERG, *supra* note 21, at 60 (calculating the extent of racial housing segregation in the United States using data from the 2000 Census).

226. Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456 (2007).

227. *Id.* at 462.

228. *Id.* at 459.

229. *Id.* at 460.

230. Supreme Court rules state that resolving a circuit split is one of the primary reasons the Court grants a petition for a writ of certiorari:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.

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231. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

are numerous.

Even if the Supreme Court were to hold that the FHA protects the occupancy rights, its decision would not adequately settle the issue for two reasons. First, any judicial holding that the FHA protects occupancy could be overruled by a future Supreme Court.²³² Therefore, the permanence of a judicial solution is suspect. Second, a positive Supreme Court holding would not likely address every relevant provision of the FHA. As discussed previously, many provisions of the FHA operate independently, and each applies in some post-acquisition situations.²³³ Any single Supreme Court case, therefore, would be very unlikely to grant certiorari on every relevant provision of the FHA. In other words, even a favorable holding would not settle the issue for every pertinent part of the FHA. Some sections or provisions would remain unsettled. Because of this uncertainty, even a favorable Supreme Court ruling is not a sufficient solution.

The foregoing presumes a favorable Supreme Court ruling, something not at all assured. A strategy that depended on getting the Court to reverse *Halprin* would be shattered by a Court decision that endorsed the *Halprin* viewpoint. Suddenly, the reach of the FHA would not just be stunted in the Seventh and Fifth Circuits, but all across the country. While a negative Court ruling would suffer the same frailties as a positive one,²³⁴ in its aftermath an unknown number of aggrieved persons would suffer from post-acquisition discrimination, yet have no remedy under the FHA. A negative Supreme Court ruling could have a positive outcome for proponents of an FHA amendment because such a ruling may spur Congress into action.²³⁵

232. Although the doctrine of *stare decisis* calls for adhering to precedent and counsels against reversing past decisions, the Court can reverse itself when it chooses—"when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tenn.*, 501 U.S. 808, 827 (1991).

233. See *supra* Part III(E) (analyzing the provisions of the FHA applicable to post-acquisition discrimination).

234. A negative Court holding, rejecting the post-acquisition scope of the FHA, would be just as open to future reversal as a positive holding and would be just as likely to only address some but not all of the relevant provisions of the FHA.

235. Professor Schwemm suggested this scenario, comparing it to the situation in 2007 when "Congress [was] considering a corrective response to the [Supreme Court's] negative Title VII ruling in the Ledbetter (statute of limitations) case." Interview with Robert G. Schwemm, *supra* note 93. Professor Schwemm was referring to the controversial 2007 Supreme Court case that rejected, by a vote of 5-4, an employment discrimination claim as untimely, although the victim did not become aware of the discrimination for many years. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 618 (2007). Professor Schwemm made these prescient comments during a phone interview on October 8th, 2007. Interview with Robert G. Schwemm, *supra*

*B. A Legislative Overruling of Halprin, by
Amending the FHA, is the Best Solution*

While the unpredictability of any judicial solution to the *Halprin* problem has been examined, it merits noting that similar uncertainty affects any legislative solution. Once Congress opened the FHA, it would be subject to amendments and legislative priorities far afield of the narrow issue of occupancy that motivated the amendment process in the first place.²³⁶ Alternatively, if Congress failed to pass the proposed amendment, it could be taken by courts as an implied endorsement of the *Halprin* position.²³⁷

Although respectful of the risks, this Comment nevertheless recommends amending the FHA to protect occupancy. A number of post-acquisition claims are for sexual harassment, and this fact could be promoted when lobbying Congress to amend the FHA.²³⁸

1. Use § 3604(f) language from the 1988 FHA amendment

Perhaps the easiest way to amend the FHA, while maintaining internal consistency and similar use of language, would be to incorporate three phrases from the 1988 amendments into the original provisions of the FHA.²³⁹

a. Link “services and facilities” to the “dwelling”

First, the language in § 3604(f)(2) could be grafted onto § 3604(b). The exact words “in connection with such dwelling”²⁴⁰ would be substituted for “in connection therewith,”²⁴¹ thereby

note 93. Although Congress did not change employment discrimination law in 2007, it just recently legislatively overruled the *Ledbetter* decision. Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. By Professor Schwemm’s logic, a similarly harmful fair housing ruling from the Supreme Court could likewise spur a congressional amendment of the FHA. Interview with Robert G. Schwemm, *supra* note 93.

236. Professor Caruso warned that amending the FHA is dangerous because any attempt to improve or strengthen the Act would also open the door to other harmful amendments that could narrow or weaken it. Interview with F. Willis Caruso, *supra* note 95.

237. Professor Schwemm noted and then dismissed the risk, by pointing to the Supreme Court’s position that “unsuccessful Congressional attempts to amend are not worth much interpretative weight.” Interview with Robert G. Schwemm, *supra* note 93.

238. Professor Schwemm noted that by focusing on the landlord sexual harassment issue, Congress might be persuaded to take up the task of amending the FHA and to keep any such endeavor limited to the task at hand. *Id.*

239. The idea of looking to § 3604(f) for guidance on how to amend the other provisions of the FHA was originally proposed by Professor Schwemm during his interview. *Id.*

240. 42 U.S.C. § 3604(f)(2) (2006).

241. 42 U.S.C. § 3604(b) (2006).

resolving the § 3604(b) debate in favor of the broad interpretation.²⁴² As amended, § 3604(b) would read:

It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection *with such dwelling*, because of race, color, religion, sex, familial status, or national origin.²⁴³

This change alone would not prohibit post-acquisition discrimination, but it would set the stage by indicating that the FHA is concerned with what happens to the occupant of a dwelling after the sale or rental transaction.²⁴⁴

b. Link “services and facilities” to “use and enjoyment”

Second, a paraphrased version of the language from § 3604(f)(3)(B) could be inserted into § 3604(b). While § 3604(f)(3)(B) is about making “reasonable accommodations” for the disabled,²⁴⁵ the phrase “to afford such person equal opportunity to use and enjoy a dwelling”²⁴⁶ could be incorporated into § 3604(b).²⁴⁷ As a result of this proposed amendment, § 3604(b) would read:

It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection *with such dwelling, or in the provision of services or facilities that impaired the use and enjoyment of such dwelling*, because of race, color, religion, sex, familial status, or national origin.²⁴⁸

Inserting this or similar “use and enjoyment” language would clearly protect occupancy rights, in relation to the provision of services or facilities in connection with the dwelling.²⁴⁹

242. See *supra* Part III(E)(b) (examining the debate over the meaning of the “in connection therewith” phrase in § 3604(b) and noting the existence of both broad and narrow interpretations).

243. 42 U.S.C. § 3604(b) (2006) (emphasis added to indicate amended language).

244. See SCHWEMM, *supra* note 17, at 14-3 (noting that HUD regulations, courts, and commentators had assumed that § 3604(b) protected occupancy rights; amending § 3604(b) to codify the broad interpretation that would validate those previous assumptions).

245. 42 U.S.C. § 3604(f)(3)(B) (2006).

246. *Id.*

247. 42 U.S.C. § 3604(b) (2006).

248. 42 U.S.C. § 3604(b) (2006) (emphasis added to indicate modified language).

249. The “use and enjoyment” phrase in the current § 3604(f)(3)(B) protects occupancy rights. Short, *supra* note 24, at 217.

c. Link “use and enjoyment” to “intimidation and coercion”

Third, the same “use and enjoyment” phrase from § 3604(f)(3)(B)²⁵⁰ could be added to § 3617²⁵¹ to explicitly prohibit interference that occurs after the person has acquired the dwelling. Amended this way, § 3617 would read:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person *in their use and enjoyment of a dwelling*, in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.²⁵²

Incorporating the use and enjoyment language from § 3604(f) would not only maintain internal consistency, but it would track the HUD regulation interpreting § 3617, which presumes a post-acquisition reach of § 3617.²⁵³

2. Use § 1982 “to hold” language

Alternatively, the “to hold” phrase from the 1866 Civil Rights Act²⁵⁴ could be inserted into both § 3604(b) and § 3617 to protect the right to hold onto already acquired housing, free from discrimination.²⁵⁵ If § 3604(b) was modified in this way, the relevant part would read: “or in the provision of services or facilities *that impaired the right to hold such dwelling*.”²⁵⁶ If § 3617 was modified in this way, the relevant part would read: “[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person *in their right to hold a dwelling*.”²⁵⁷ While the “to hold” language is from the 1866 Civil Rights Act, the “use and enjoyment” language is taken from the 1988 amendments to the FHA. Use and enjoyment is the preferred language to use when amending the FHA because it maintains internal consistency within the FHA, and because it appears to be the more modern

250. 42 U.S.C. § 3604(f)(3)(B) (2006).

251. 42 U.S.C. § 3617 (2006).

252. 42 U.S.C. § 3617 (2006) (emphasis added to indicate amended language).

253. See 24 C.F.R. § 100.400(c)(2) (2007) (promulgating a HUD regulation that has prohibited “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling” since 1989).

254. 42 U.S.C. § 1982 (2006).

255. Using the “to hold” phrase in the FHA would presumably have the same effect as such language has in § 1982, where it has been construed to protect occupancy rights. See Schwemm, *supra* note 17, at 14-15 (reporting that numerous cases have held that the “to hold” language prohibits discrimination directed at occupants of housing).

256. 42 U.S.C. § 3604(b) (2006) (emphasis added to indicate amended language):

257. 42 U.S.C. § 3617 (2006) (emphasis added to indicated amended language).

phrasing.

3. Focus on the parties

Another approach would be to amend the FHA to add language that puts the focus on the parties by defining who could be a proper defendant.²⁵⁸ For example, post-acquisition claims would be appropriate against a housing provider or professional (such as a landlord),²⁵⁹ a homeowners' association,²⁶⁰ or a municipality,²⁶¹ which engaged in a discriminatory housing practice. The benefit of this transactional approach would be its thoughtful focus on those parties that have the ability to interfere with one's occupancy rights²⁶² and to hold those parties liable, even post-acquisition.

The detriment to this approach, however, outweighs its benefits. The current FHA language does not expressly link housing rights to the identity of the defendant. In fact, the FHA defines a proper defendant very expansively as "the person or other entity accused in a complaint of an unfair housing practice."²⁶³ An FHA amendment that aimed to protect occupancy by defining the proper defendants in a post-acquisition complaint would require extensive legislative drafting. Such an amendment would also mean post-acquisition rights would be defined quite differently than pre-acquisition housing rights.²⁶⁴ Therefore, the targeted amendments previously discussed in Part IV(B)(1) that call for inserting language protecting "use and enjoyment" is the preferred solution to the *Halprin* problem.

258. Professor Oliveri proposed this approach of looking at the parties when asking whether the FHA as written applies post-acquisition. Oliveri, *supra* note 118, at 39-40. Because this judicial approach to overruling *Halprin* has already been rejected, this Comment uses Professor Oliveri's proposed way of interpreting the current statute as an alternative basis for amending the FHA.

259. *Id.* at 40.

260. *Id.* at 53.

261. *Id.* at 49-50.

262. *Id.* at 39.

263. 42 U.S.C. § 3602(n)(1) (2006); Professor Schwemm observed that the FHA "makes little effort to define the scope of proper defendants." SCHWEMM, *supra* note 17, at 12B:1. As a result, "anyone who commits one of the acts proscribed by the statute's substantive provisions is liable to suit, unless he is covered by one of the exemptions." *Id.*

264. Professor Schwemm thought that this factor—the extensive change required to put the focus on proper parties—worked against this approach, as maintaining internal consistency within a federal civil rights statute was an important consideration. Interview with Robert G. Schwemm, *supra* note 93.

V. CONCLUSION

The FHA has had only limited success in eradicating housing discrimination, much less in actually ending housing segregation. A narrow amendment to the FHA could nevertheless expressly protect the right to occupy a dwelling free from discrimination. Many courts and commentators thought the FHA did sanction such conduct as it is currently written. The ongoing circuit split, with two circuits holding the opposite, indicates that the debate is far from settled.

For proponents of fair housing, waiting for the Supreme Court to resolve the conflict with a favorable holding is risky and uncertain. The more efficient and comprehensive solution is to amend the FHA as it approaches its forty-first anniversary, removing any question whether the FHA protects occupancy. The “use and enjoyment” language from the 1988 FHA amendment could extend occupancy protection to § 3604(b). The same use and enjoyment language from § 3604(f) could be used in § 3617 to further protect occupancy from interference, intimidation, or coercion. Such a focused amendment to the FHA may be achievable, and it would remedy an identified but continuing housing discrimination problem.

Perhaps the Blochs’ appeal will prevail and they will get to proceed to trial. This would reopen the doors of federal court to the Blochs, but not other victims of post-acquisition housing discrimination. Even if the *Bloch* appeal led to *Halprin*’s reversal, such a reversal would not change the law in the Fifth Circuit, nor would it protect such claims from adverse judicial interpretation in the future. Only a targeted FHA amendment protecting occupancy will solve the problem on a national scale.

