

Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act

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I. INTRODUCTION

By now, most people are aware that the nation's fair housing laws prohibit discriminatory refusals to sell or rent housing to a person because of race or another protected characteristic.¹ Most would probably also assume that the law prohibits discriminatory treatment or harassment of individuals once they move into such housing. Indeed, the federal courts operated under this assumption for nearly thirty-five years, consistently recognizing the discrimination claims of housing occupants as well as housing seekers.

In recent years, however, a trend has emerged in which courts have denied plaintiffs' housing discrimination claims because the discrimination occurred after the plaintiffs moved into their homes. Consider the following cases:

- A Jewish couple's home is vandalized. Their property is damaged and sprayed with anti-Semitic graffiti. The culprit is an officer of the neighborhood homeowners' association (HOA), who then uses his position to threaten the couple with legal sanctions, fines, and the forced sale of their home.²
- A black woman rents an apartment. The apartment management, on a discriminatory basis, refuses to provide heat and hot water to her unit.³

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¹ MARTIN D. ABRAVANEL, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *DO WE KNOW MORE NOW?* 11 (2006) (finding that in 2005, 70% of survey respondents recognized that it would be illegal to require a higher down payment based on ethnicity, and 81% recognized that it would be illegal to refuse to sell a home to a person based on the person's race).

² See *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 208 F. Supp. 2d 896 (N.D. Ill. 2002), *aff'd in part*, 388 F.3d 327 (7th Cir. 2004).

³ See *Farrar v. Eldibany*, No. 04-C-3371, 2004 WL 2392242 (N.D. Ill. Oct. 15, 2004), *aff'd*, 137 F. App'x. 910 (7th Cir. 2005) (unpublished).

- A white woman lives in an apartment with her biracial son. The apartment manager repeatedly calls the son “nigger” and “biracial boy.”⁴

All of the actions described above — discriminatory terms and conditions, statements, and harassment — are squarely prohibited by specific portions of the federal Fair Housing Act (FHA).⁵ In each of these instances the plaintiff’s version of the facts was taken as true because the cases came to the court on a defense motion to dismiss or for summary judgment.⁶ Yet in each, the courts denied the plaintiff’s discrimination claims under the primary substantive provisions of the FHA⁷ because the discriminatory conduct occurred *after* the plaintiff had acquired his or her housing. In each case, the court stated that the FHA would have applied if the discriminatory conduct had prevented the plaintiffs from obtaining housing in the first place.⁸

This trend began with the Seventh Circuit Court of Appeals opinion in *Halprin v. Prairie Single Family Homes Ass’n*,⁹ the facts of which are described in the first example above. In that case, two homeowners alleged that they were the targets of religiously motivated harassment and discrimination by their HOA. The Seventh Circuit dismissed their substantive claims, however, because the couple already owned their home at the time of the discrimination. Federal courts across the country have since adopted this approach. In one case before the Fifth Circuit, the issue of post-acquisition claims was the subject of an unsuccessful petition for certiorari to the Supreme Court.¹⁰ The trend shows no sign of slowing.

⁴ See *Krieman v. Crystal Lake Apts., Ltd. P’ship*, No. 05-C-0348, 2006 WL 1519320 (N.D. Ill. May 31, 2006).

⁵ Fair Housing Act, 42 U.S.C. § 3601, et seq. (2000).

⁶ This is not to say that the plaintiff’s allegations in each case were viewed as credible. For example, in *Farrar* there were serious questions as to whether the defendant’s denial of heat and hot water was, in fact, discriminatory. Nevertheless, because the case came to the court on defendant’s motion to dismiss, the court made clear that it had to treat the plaintiff’s claims as true and that its doubts about her allegations did not form the basis for the court’s decision. See *Farrar*, 2004 WL 2392242, at *4.

⁷ In *Halprin*, the plaintiffs’ substantive discrimination claims were dismissed; however, as discussed in greater detail below, their claims under another part of the statute were allowed to stand. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327 (7th Cir. 2004).

⁸ See *Halprin*, 388 F.3d at 329 (7th Cir. 2004) (stating that the FHA is not concerned “with anything but *access* to housing”) (emphasis in original); *Farrar*, 2004 WL 2392242, at *4 (arguing that the FHA only prohibits “discrimination in services related to the acquisition of housing, not the maintenance of housing”); *Krieman*, 2006 WL 1519320, at *8 (“[T]he claims against Defendants for discriminatory statements are not tied to a denial of access to housing, or to the sale or rental of housing generally, and therefore cannot survive summary judgment.”).

⁹ 388 F.3d 327 (7th Cir. 2004).

¹⁰ *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005), *cert. denied* 126 S. Ct. 2039 (2006). The specific issue in the case was whether black homeowners were able to state a claim against a municipality for allowing a hazardous and illegal landfill to operate in their neighborhood, which they claimed both diminished the habitability of their homes and reduced their ability to sell them.

This Article argues that *Halprin* and its progeny were wrongly decided and that post-acquisition claims are indeed covered by the substantive provisions of the FHA. Part I describes the FHA provisions most commonly used to address post-acquisition claims. Part II discusses the pre- versus post-acquisition controversy, including the few early cases that addressed this issue. Part III analyzes the reasoning in the *Halprin* case, finding it wanting. Part IV examines the significant number of cases that have adopted *Halprin*'s holding and the few that have rejected it. Part V offers a more logical and appropriate way of looking at the issue. I argue that the language in the relevant portions of the FHA, which requires that discriminatory conduct occur in the context of the "sale or rental" of a dwelling, limits the statute's application not to a specific moment in time, but rather to particular types of defendants — those that exercise control over the plaintiff's housing situation. Viewing the issue this way ensures that the rights of occupants are protected against discriminatory actions taken by landlords, property owners' associations (POAs), and local governments, regardless of when they occur. This approach ultimately offers a more sensible interpretation of the language of the statute, and it is more consistent with both the broad remedial purpose of the FHA and the past several decades of fair housing case law. Finally, the Conclusion situates *Halprin*'s reasoning and ramifications within the broader critical discourse about the proper role of antidiscrimination law in the "post-Civil Rights" era of today.

II. FAIR HOUSING ACT PROVISIONS AS THEY RELATE TO POST-ACQUISITION CLAIMS

Although the FHA is a lengthy statute, it is primarily comprised of enforcement mechanisms. Only three relatively short sections — § 3604, § 3605, and § 3606 — deal with substantive rights. A fourth section, § 3617, prohibits interfering with the rights protected by §§ 3604-06. Of these provisions, § 3604 and § 3617 are the most relevant to post-acquisition claims and will be the focus of the remainder of this Article.¹¹

A. 42 U.S.C. § 3604

Section 3604, the most significant substantive provision in the FHA, is divided into six subparts. The first three — (a), (b), and (c) — are the most relevant to post-acquisition claims.¹²

¹¹ The two other substantive civil provisions are § 3605 and § 3606. Section 3605 prohibits discrimination in residential real estate transactions such as mortgage lending, and § 3606 prohibits discrimination in real estate brokerage services. Section 3605 is occasionally relevant in post-acquisition scenarios because it covers loans on existing properties, but on the whole neither of these sections figures very prominently in this debate.

¹² Section 3604(d) prohibits making false statements of availability to a person seeking housing. Section 3604(e) prohibits "blockbusting," the practice by which unscrupulous real estate agents encourage panic selling in a neighborhood by representing that blacks or other

1. Section 3604(a)

Section 3604(a) of the Fair Housing Act makes it unlawful “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person” because of a protected category. This section clearly covers discriminatory refusals to deal that prevent a person from acquiring housing in the first instance. The “otherwise make unavailable” language has also led to the conclusion that § 3604(a) applies to other discriminatory behaviors that prevent a person from obtaining housing, such as racial steering,¹³ discriminatory zoning,¹⁴ discriminatory provision of municipal services,¹⁵ and mortgage or insurance redlining.¹⁶

In addition to situations where discrimination prevents an individual from obtaining housing, § 3604(a) applies where the aggrieved individual already has housing and the discriminatory conduct causes her to lose or abandon that housing. Examples of such conduct include discriminatory evictions or discriminatory practices that result in evictions¹⁷ and harassment

minority groups are moving in. By their terms, neither of these subsections implicates the post-acquisition time frame.

Section 3604(f), which was added to the statute by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988), contains provisions specifically dealing with disability as a protected category. Disability is treated separately because it presents unique issues, particularly with respect to physical accessibility, reasonable accommodations, and group homes. The language and uses of the first two subsections of § 3604(f) correspond and are substantially similar to other substantive provisions of the FHA discussed herein. For example, § 3604(f)(1)’s prohibition on making housing unavailable on the basis of handicap parallels § 3604(a). Similarly, § 3604(f)(2)’s prohibition on discrimination 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,” is almost identical to the language of § 3604(b). Because of this similarity, in most respects the analysis of § 3604(a) can be used for any analysis of § 3604(f)(1), and the analysis of § 3604(b) can be used for any analysis of § 3604(f)(2). The minor difference in wording between § 3604(b) and § 3604(f)(2) does, however, become relevant to this inquiry, and is addressed *infra* note 171.

¹³ See, e.g., *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994); *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992).

¹⁴ See, e.g., *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 (1st Cir. 1993); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1219 (2d Cir. 1987).

¹⁵ 24 C.F.R. § 100.70(d)(4) (2007).

¹⁶ See, e.g., *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298-99, 301 (7th Cir. 1992) (insurance redlining); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (D. Ohio 1976) (mortgage redlining). It is worth noting, however, that several courts have found § 3604(a) inapplicable to discriminatory practices with respect to second mortgages or other home equity loans on a plaintiff’s *existing* home because such discrimination does not actually result in a denial of housing. See, e.g., *Thomas v. First Fed. Sav. Bank of Ind.*, 669 F. Supp. 915, 923 (N.D. Ind. 1987). As discussed, *supra* note 11, § 3605 covers such a situation.

¹⁷ See *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (noting that the landlord twice claimed not to have received black tenant’s rent check and twice served her with a three-day notice to vacate); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (acknowledging that building owners sought to evict all families with children, which had a disparate impact on minority tenants); *HUD v. Kogut*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25.100 (HUD ALJ 1995) (emphasizing that landlord evicted tenant after she refused his sexual advances); *HUD v. Tucker*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25.033

that has the literal or constructive effect of depriving a person of her dwelling.¹⁸

2. *Section 3604(b)*

Section 3604(b) of the FHA prohibits “discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” because of a protected characteristic.¹⁹ This provision is perhaps the most versatile of the FHA’s provisions, and it has been recognized to apply in at least seven distinct discrimination contexts: (1) proposed terms of sale or rental; (2) services or facilities connected to the initial sale or rental; (3) terms and conditions of housing after rental or sale; (4) maintenance or services connected to a dwelling; (5) privileges of a dwelling; (6) harassment; and (7) provision of municipal services.

a. *Discrimination in Proposed Terms of Sale or Rental*

Section 3604(b) plainly prohibits the inclusion of discriminatory terms in the documents that effectuate a sale or lease. These terms include differences in sale price, rent amount, security deposits, down payments, and closing requirements.²⁰ Today, cases involving blatantly discriminatory sale terms or lease provisions in which the protected group is actually singled out for different treatment are rare.²¹ To the extent that there are any modern cases of this sort, they tend to involve discriminatory provisions targeting children or families with children.²² Other prohibited actions include less obvious discriminatory practices, such as a housing developer offering to pay closing costs for white buyers but not minority buyers,²³ a landlord offering to waive security deposits for white tenants but not black tenants,²⁴ or

(HUD ALJ 1992) (noting that building manager refused to accept rent after white tenant sought to add her black boyfriend to lease).

¹⁸ See, e.g., *Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845, 851 (N.D. Ill. 2003); *Byrd v. Brandenburg*, 922 F. Supp. 60, 64 (N.D. Ohio 1996); *Woods v. Foster*, 884 F. Supp. 1169, 1174-75 (N.D. Ill. 1995); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 n.6 (N.D. Ill. 1985) (indicating in dicta that racially motivated firebombing intended to drive plaintiffs from their home would violate § 3604(a) as well as § 3617); *Waheed v. Kalafut*, No. 86-C-6674, 1988 WL 9092, at *3-4 (N.D. Ill. Feb. 2, 1988).

¹⁹ 42 U.S.C. § 3604(b) (2000).

²⁰ 24 C.F.R. § 100.65(b)(1) (2007); ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION* 14-4 (2005).

²¹ A blatantly discriminatory term, conveyed either orally or in writing, will also violate § 3604(c).

²² See, e.g., *Gorski v. Troy*, 929 F.2d 1183, 1185 (7th Cir. 1991) (striking down a lease which provided that children were not permitted without written consent from the owners).

²³ See *United States v. Pelzer Realty Co.*, 484 F.2d 438, 441 (5th Cir. 1973).

²⁴ 24 C.F.R. § 100.65(b) (2007).

a landlord charging black tenants higher rent than white tenants.²⁵ In such cases, the contractual terms offered to the minorities are not discriminatory on their face, but disparate treatment becomes apparent when the terms are compared with those offered to non-minorities.

b. Discrimination in Services or Facilities Connected to Initial Sale or Rental

Section 3604(b) can also apply to the services that are part of the initial sale or rental transaction, including sales, rentals, brokerage, and financial services.²⁶ Examples include when a property manager requires a credit check only of black applicants,²⁷ when a real estate agent fails to tell black home-seekers about available listings but does provide this information to white home-seekers,²⁸ or when institutions refuse to provide insurance coverage or loans because the homes in question are located in minority neighborhoods.²⁹

c. Discrimination in Terms and Conditions After Sale or Rental Is Complete

Section 3604(b) applies in situations where, after a tenant has entered into a lease, she is singled out on a discriminatory basis for a rent increase, made to pay fines, or made subject to different rules than other tenants.³⁰ The section will also apply if a landlord or property manager imposes a discriminatory rule — for example, prohibiting tenants from entertaining black guests in their apartments — even if that rule is applied equally to all tenants.³¹

²⁵ See *Brown v. Lo Duca*, 307 F. Supp. 102, 106 (E.D. Wis. 1969) (describing how black applicant was told the apartment cost \$200 per month plus a \$150 deposit, while white tester was told the apartment was \$125 per month with no deposit).

²⁶ SCHWEMM, *supra* note 20, at 14-7.

²⁷ See *HUD v. Joseph*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,072 (HUD ALJ 1994) (finding that landlord generally only performed credit checks on black applicants); *HUD v. Jerrard*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,005 (HUD ALJ 1990).

²⁸ See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990); *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980).

²⁹ See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 301-02 (7th Cir. 1992); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 642 (W.D. Tenn. 1999); *Step toe v. Sav. of Am.*, 800 F. Supp. 1542, 1545-47 (N.D. Ohio 1992).

³⁰ See, e.g., *N.D. Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 974, 980 (D.N.D. 2004) (denying summary judgment for defendants where plaintiffs alleged that they were discriminatorily singled out for rent increase, prohibited from having a pet, and made to pay a fee upon move-out); *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (upholding plaintiffs' claim under § 3604(b) where the condominium owner enforced a renter identification policy only against Hispanic tenants); *HUD v. Jerrard*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,005 (HUD ALJ 1990) (describing that landlord singled out white tenant for rent increase after tenant had black visitors).

³¹ See, e.g., *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982); *Bills v. Hodges*, 628 F.2d 844, 845 (4th Cir. 1980); *Lane v. Cole*, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976).

d. Discrimination in Maintenance or Services Connected to Dwelling

Section 3604(b) has been construed to prohibit “failing or delaying maintenance or repairs” of dwellings because of a protected characteristic.³² A landlord could violate this provision either by singling out individual tenants because of race or gender, and failing to provide them with maintenance on this basis,³³ or by providing inferior service to an entire building based on the ethnicity of its occupants.³⁴

e. Discrimination in the Privileges of Using the Dwelling

Section 3604(b) also prohibits discrimination with respect to the privileges associated with a dwelling.³⁵ If an apartment building has, for example, a pool, the landlord cannot deny tenants access to this amenity on a discriminatory basis.³⁶ Similarly, residents must be able to use the common areas of an apartment, condominium, or neighborhood on an equal basis.³⁷

f. Harassment

Section 3604(b) is commonly used to bring housing harassment cases, particularly those alleging sexual harassment. The origins of this use lie in Title VII’s employment harassment jurisprudence.

Title VII makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”³⁸ In the 1970s, federal courts began recognizing that

³² 24 C.F.R. § 100.65 (2007).

³³ See *Marbly v. Home Props. of N.Y.*, 205 F. Supp. 2d 736, 743 (E.D. Mich. 2002) (recognizing that plaintiff could state claim for discriminatory provision of maintenance, but denying claim for lack of proof); *Green v. Konover Residential Corp.*, No. 3:95CV1984, 1997 WL 736528, at *11 (D. Conn. Nov. 24, 1997) (upholding claim that apartment complex’s work crews refused to repair apartments occupied by black tenants).

³⁴ See, e.g., *Durrett v. Hous. Auth. of Providence*, 896 F.2d 600, 601, 605 (1st Cir. 1990) (approving class action settlement in claim brought by tenants of housing project); *Concerned Tenants Ass’n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980) (upholding plaintiffs’ § 3604(b) claim that management company ceased providing maintenance and services to building once the tenant population shifted from majority white to majority black); cf. *Fayyumi v. Hickory Hills*, 18 F. Supp. 2d 909, 910 (N.D. Ill. 1998) (noting plaintiffs’ claim that defendants failed to provide basic maintenance and services to buildings occupied by Arab-American tenants was brought under § 3617, the theory being that such conduct “interfered” with plaintiffs’ right to live in a safe and habitable apartment). Section 3617 claims are discussed *infra* Section I(B).

³⁵ 24 C.F.R. § 100.65(b)(4) (2007).

³⁶ *HUD v. Paradise Gardens*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,037 (HUD ALJ 1992) (finding children under age sixteen severely restricted in using pool); cf. *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 314 (4th Cir. 1980) (upholding plaintiff’s § 1982 claim based on his exclusion from country club).

³⁷ *Schroeder v. De Bertolo*, 879 F. Supp. 173, 176-77 (D.P.R. 1995) (noting that disabled woman prevented from using common areas of condominium complex; decided under § 3604(f)).

³⁸ 42 U.S.C. § 2000e-2(a)(1) (2000).

workplace harassment could create an environment so hostile that it would affect the terms and conditions of a person's employment.³⁹ The end of the decade saw an influx of claims of sexual harassment in the workplace before the lower federal courts, which preceded under both "hostile environment" and "quid pro quo" theories.⁴⁰ The Supreme Court eventually addressed the issue of hostile environment harassment in *Meritor Savings Bank v. Vinson*.⁴¹ *Meritor* involved a bank employee who alleged that her supervisor had made unwelcome sexual advances toward her and she engaged in a sexual relationship with him out of fear of losing her job. The defense argued that harassment which did not affect the economic aspects of the plaintiff's job could not constitute discrimination in the terms and conditions of employment. A unanimous Court disagreed, finding that the existence of a hostile work environment could violate Title VII even without job harm such as firing or demotion.⁴² The Court adopted a standard for evaluating the type and degree of conduct that could create a hostile work environment, requiring the plaintiff to demonstrate that the harassment was so severe or pervasive that it created an objectively abusive working environment.⁴³

Due to the similarities between Title VII's "terms and conditions" provision and the terms and conditions language in § 3604(b), courts have construed § 3604(b) to apply to housing harassment in the same way, endorsing both quid pro quo and hostile environment theories.⁴⁴ To make a hostile environment claim, a plaintiff must essentially allege that the defendant's har-

³⁹ *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971) (recognizing workplace harassment based on national origin).

⁴⁰ A hostile environment claim alleges that the harasser, through speech or conduct, has created an offensive or abusive working environment. A quid pro quo claim alleges that the harasser has conditioned tangible job benefits on the victim's acquiescence with sexual demands or threatened tangible job harms. Because of the sexual nature of the demands at issue, quid pro quo claims are unique to sexual harassment cases. Hostile environment claims can be asserted for harassment based on any protected category. The Supreme Court has since cautioned against creating an overly rigid distinction between these two theories, although the terms themselves remain useful descriptors. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751-54 (1998).

⁴¹ 477 U.S. 57 (1986).

⁴² *Id.* at 66.

⁴³ *Id.* at 67. The "severe or pervasive" standard was reaffirmed on multiple occasions. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998); see also *Oncala v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 78 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 17 (1993).

⁴⁴ *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1089 (10th Cir. 1993); *Richards v. Bono*, No. 5:04CV484, 2005 WL 1065141, at *5 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 980-81 (D. Neb. 2004); *United States v. Veal*, 365 F. Supp. 2d 1034, 1036 (W.D. Mo. 2004); *Walker v. Crawford*, No. 5:97-CV-1033, 1999 WL 33917846, at *7 (N.D. Ohio Sept. 16, 1999); *Williams v. Poretzky Mgmt., Inc.*, 955 F. Supp. 490, 495 (D. Md. 1996); *Woods v. Foster*, 884 F. Supp. 1169, 1172 (N.D. Ill. 1995); *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *HUD v. Kogut*, Fair Housing-Fair Lending Rep. (Aspen) ¶ 25,100 (HUD ALJ 1995); *N.Y. ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988); *Grieger v. Sheets*, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988); *Shellhammer v. Lewallen*, Fair Housing-Fair Lending Rep. (Aspen) ¶ 15,472 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985); cf. *Gnerre v. Mass. Comm'n Against Disc.*, 524 N.E.2d. 84, 87-88

assment has been so severe or pervasive that it has created a hostile housing environment, effectively altering the terms and conditions of the victim's housing. Section 3604(b) has been used to assert claims in many housing harassment cases, whether involving sexual harassment or not.⁴⁵

g. Discrimination in the Provision of Municipal Services

Section 3604(b) has also been applied to the discriminatory provision of municipal services. In decisions dating back to 1974, courts have addressed the issue of whether § 3604(b) should apply to a situation in which, for example, a county or municipality provides inferior water, trash, or snow-clearing services to the majority-minority areas of town.⁴⁶ While virtually every court presented with the issue has recognized the possibility of such claims,⁴⁷ a number of courts have limited § 3604(b) to particular types of services.⁴⁸

(Mass. 1988); *Chomicki v. Wittekind*, 381 N.W.2d 561, 564 (Wis. Ct. App. 1985) (both interpreting state fair housing law with analogous terms and conditions provisions).

⁴⁵ In addition to the sexual harassment cases cited *supra* note 44, see *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (disability); *N.D. Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 980-81 (D.N.D. 2004) (race and disability); *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp. 2d 722, 727 (S.D. Tex. 2000) (national origin); *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No. 96-2495, 1997 WL 1877201, at *6 (D.D.C. Dec. 18, 1997) (race and gender); *Miller v. Towne Oaks East Apts.*, 797 F. Supp. 557, 561 (E.D. Tex. 1992) (race).

⁴⁶ SCHWEMM, *supra* note 20 at 14-19 to 14-20.

⁴⁷ *See, e.g.*, *United Farmworkers of Fla. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974) (discussing claim based on discrimination in sewage treatment); *Miller v. City of Dallas*, No. 3:98-CV-2955, 2002 WL 230834, at *14 (N.D. Tex. Feb. 14, 2002) (acknowledging in dicta that plaintiffs' claims about discriminatory flood protection, zoning, landfill practices, streets and drainage, and federal funding would be proper under § 3604(b)); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (contemplating claim based on disparate police protection). *But see Clifton Terrace Assoc., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (questioning in dicta applicability of § 3604(b) to municipal services).

A few courts and commentators have concluded that some courts completely refuse to recognize municipal services claims under § 3604(b). *See, e.g.*, *Lopez v. City of Dallas*, No. 3:03-CV-2223, 2004 WL 2026804, at *7 (N.D. Tex. Sept. 9, 2004); SCHWEMM, *supra* note 20 at 14-20 & n.37. A closer analysis of the cases they cite, however, reveals that these cases do recognize the *validity* of municipal services claims, they just limit the claims that they will recognize to those involving particular *types* of municipal services — those which are most “traditional” and directly related to housing. *See discussion infra* note 48.

⁴⁸ *See, e.g.*, *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (stating that the decision over the siting of a highway is not a “service” under § 3604(b)); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (holding that § 3604(b) only applies to “services generally provided by governmental units such as police and fire protection or garbage collection” and not to county decisions regarding maintenance of county-owned property); *South Camden Citizens in Action v. N.J. Dept. of Env'tl. Prot.*, 254 F. Supp. 2d 486, 502-03 (D.N.J. 2003) (stating that the grant of industrial air pollution permits is too far removed from “services” contemplated by the FHA); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (acknowledging in dicta that § 3604(b) cannot extend to a municipal zoning decision such as the selection of a stadium site); *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D. Pa. 1978) (denying plaintiffs' § 3604(b) claim based on disparate provision of police protec-

Prior to the *Halprin* decision, the most significant limitation that courts placed on municipal services claims was a requirement that only “traditional” city services be covered by § 3604(b).⁴⁹ In most of the cases denying relief, the challenged municipal action involved a zoning decision, such as siting a highway or granting permits for industrial uses. The courts are reluctant to broaden the definition of a “municipal service” to encompass decisions about how to manage property. To do so, they fear, would both unduly constrain the ability of local governments to make land-use decisions and turn the FHA into a “civil rights statute of general applicability rather than one dealing with the specific problem of fair housing opportunities.”⁵⁰

Of the seven types of § 3604(b) claims outlined above, the final five — discrimination in the terms and conditions of housing after rental or sale, discrimination in maintenance or services connected to a dwelling, discrimination in the privileges of a dwelling, harassment, and discrimination in municipal services — will almost always arise *after* the acquisition of housing. For example, a landlord cannot provide inferior maintenance to a person or enforce rules in a discriminatory manner against her until she becomes a tenant. Likewise, for a local government to provide discriminatory services to individuals in a particular area, people must first reside in that area. It makes little sense to think of a condominium association discriminatorily restricting a person’s access to the privileges and amenities of housing before the person has even purchased a unit. It is unlikely — although not impossible — for a landlord to harass a person before she has even become a tenant.⁵¹ Virtually all of the cases that assert these five types of § 3604(b) claims are brought by tenants or homeowners based on conduct that occurred after they obtained their housing.

3. Section 3604(c)

Section 3604(c) of the Fair Housing Act makes it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination” based on a protected category, “or an intention to make any such preference, limitation, or discrimination.” Section 3604(c) violations frequently occur in the pre-acquisition stage, when the housing is advertised or the housing provider is negotiating with prospective tenants or purchasers. This is logical because it is at this stage that the most information is conveyed about the housing, and

tion, because “[p]olice protection is not housing [n]or does it have any direct connection with the sale, rental, or occupancy of housing”).

⁴⁹ See cases cited *supra* note 48 and accompanying text.

⁵⁰ *Jersey Heights*, 174 F.3d at 193 (quoting *Vercher*, 454 F. Supp. at 424).

⁵¹ There are a handful of sexual harassment cases in which some harassment took place prior to the signing of the lease. See, e.g., *Krueger v. Cuomo*, 115 F.3d 487, 489-90 (7th Cir. 1997); *United States v. Koch*, 352 F. Supp. 2d 970, 975 (D. Neb. 2004); *N.Y. ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1102 (S.D.N.Y. 1988).

there is the most communication between home-seeker and housing provider. Paradigmatic examples of § 3604(c) violations at this stage include when a landlord advertises her property as being for white tenants only⁵² or states that she will not rent to blacks.⁵³

There are post-acquisition scenarios, however, in which a § 3604(c) claim could arise: where a landlord makes discriminatory statements to or verbally harasses her current tenants,⁵⁴ posts a discriminatory message, or issues an eviction notice that contains discriminatory language.⁵⁵

B. 42 U.S.C. § 3617

Section 3617 of the FHA makes it unlawful “[t]o coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by” the substantive provisions of the FHA (collectively referred to as “fair housing rights”). Because of its emphasis on coercion, intimidation, and threats, § 3617 is commonly used by harassment plaintiffs in addition to § 3604(b).⁵⁶

The “exercise or enjoy” language indicates that there are three plaintiff activities with which interference is forbidden: the first is the specific assertion of fair housing rights. For example, if a woman files a HUD complaint against her landlord because he is sexually harassing her, and the landlord evicts her as a result,⁵⁷ the tenant has been retaliated against for attempting to “exercise” her fair housing rights. The second protected activity is the simple act of seeking, obtaining, or residing in housing on a non-discriminatory basis. When the woman from the previous example moved into her apartment, she was enjoying the right to live there free of discrimination and

⁵² See *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972).

⁵³ See *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1041 (N.D. Ohio 1998) (noting that defendant stated that “we don’t want any of those”).

⁵⁴ *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (holding landlord’s agent’s racist statement to white tenant, overheard by black tenant, was covered by § 3604(c)); *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,078 (HUD ALJ 1994); *HUD v. Tucker*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,033 (HUD ALJ 1992) (holding apartment manager’s racist statements to tenant, tenant’s guest, and third parties about tenant violated § 3604(c)).

⁵⁵ *HUD v. Denton*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,014 (HUD ALJ 1991) (holding discriminatory statement attached to eviction notice violated § 3604(c)).

⁵⁶ Cases in which harassment plaintiffs proceeded under both provisions include *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1006 (7th Cir. 1996); *Richards v. Bono*, No. 5:04CV484, 2005 WL 1065141, at *2 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 972 (D. Neb. 2004); *N.Y. ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1102 (S.D.N.Y. 1988), and *Grieger v. Sheets*, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988). As discussed in greater detail below, a plaintiff who claims harassment by a housing provider or professional can proceed under both sections, but a plaintiff who claims harassment by a neighbor or a stranger can proceed only under § 3617.

⁵⁷ See, e.g., *Krueger*, 115 F.3d at 491.

harassment. When her landlord began harassing her, he interfered with her ability to enjoy this right, even if she never sought to specifically invoke or “exercise” this right. The third protected activity is assisting another person in exercising or enjoying fair housing rights. If a person is retaliated against for actions such as renting to Hispanics or helping a black tenant file a HUD complaint, this retaliation would violate § 3617.⁵⁸

There are thus three different types of behaviors that can constitute a § 3617 violation: (1) retaliating against someone because the person has exercised her own fair housing rights; (2) interfering with someone’s attempt to enjoy her own fair housing rights; and (3) retaliating against someone for aiding another person’s exercise or enjoyment of fair housing rights.⁵⁹ “Interference with enjoyment” claims in particular are likely to arise after the plaintiff has obtained housing because it is only then that she has the opportunity to enjoy the housing.

Section 3617 is not commonly regarded as having any kind of temporal limitation since it does not contain a direct link between the conduct it prohibits and the “sale or rental” of housing.⁶⁰ However, because of § 3617’s reference to rights “granted or protected by” the substantive provisions of the FHA, some courts have determined that it cannot provide a stand-alone basis for liability and instead requires a proven violation of one of the substantive provisions.⁶¹ Thus, if the substantive claims fail because they are raised post-acquisition, then the § 3617 claim will fail as well because it has no “predicate.”⁶²

As I discuss in greater detail below, §§ 3604(b) and (c) contain language limiting their application to discrimination in the “sale or rental” of housing, so most of the controversy over the application of the FHA to post-acquisition claims has centered upon these two subsections. They will therefore be the primary focus of the remainder of this Article. However, § 3604(a) and § 3617 remain relevant and will be addressed accordingly.

III. THE PRE-*HALPRIN* STATE OF THE LAW

Prior to *Halprin*, the question of the timeframe covered by §§ 3604(b) and (c), either for rentals or sales, did not cause much debate. The small amount of scholarship on the issue concluded that, at the very least, these

⁵⁸ *Meadows v. Edgewood Mgmt. Corp.*, 432 F. Supp. 334, 335 (W.D. Va. 1977); 24 C.F.R. § 100.400(c)(3)-(4) (2007).

⁵⁹ See 42 U.S.C. § 3617 (2000).

⁶⁰ *Gourlay v. Forest Lakes Civic Ass’n*, 276 F. Supp. 2d 1222, 1235 (M.D. Fla. 2003) (“Section 3617 regulates discriminatory conduct before, during, or after a sale or rental of a dwelling.”).

⁶¹ *Frazier v. Rominger*, 27 F.3d 828, 834 (2d Cir. 1994); *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. Civ.A. H-05-3197, 2005 WL 2669480, at *4 (S.D. Tex. Oct. 19, 2005).

⁶² *Halprin* raised the possibility of this outcome in dicta but was unable to rule decisively because the defendant had waived the argument. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004).

provisions should apply throughout the duration of a renter's lease.⁶³ As described in greater detail below, the few courts that considered the issue generally determined that §§ 3604(b) and (c) should not be limited to the pre-acquisition timeframe.

A. *Section 3604(b): Discriminatory Terms, Conditions, Services, and Facilities*

Where rental arrangements were concerned, many courts and practitioners apparently assumed that § 3604(b) covered the entire lease term. There are a number of cases in which the § 3604(b) claim was based on conduct that occurred while the plaintiff was a tenant in which the "post-acquisition" argument was neither raised before nor addressed by the court.⁶⁴ Thus, very few courts confronted the issue directly. Those that did all concluded that § 3604(b) should cover the full lease term.

In *Housing Rights Ctr. v. Donald Sterling Corp.*,⁶⁵ the plaintiffs were current tenants who complained of a wide variety of national origin-based mistreatment by their new landlord. One of the allegations was that the landlord had closed the building's parking garage and required the tenants to submit "applications" in order to use the garage. The application asked tenants to identify the place where they were born, their citizenship, and their date of naturalization.⁶⁶ The defendant argued that no violation of the law occurred because the discriminatory statements (the questions on the application) were directed to existing as opposed to prospective tenants and because the discrimination in amenities (garage parking) was not related to the initial rental of the apartments. Analyzing the issue under both § 3604(b) and § 3604(c), the court held:

Certainly a discriminatory statement made with respect to such services or facilities violates § 3604(c), even if not made at the moment of first sale or rental. Defendants' proposed distinction . . . makes little sense given that tenants denied garage access to which they previously were entitled are effectively denied the full benefit of the bargain entered into at the moment of first sale or rental.⁶⁷

⁶³ Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 798-99 (2002); Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 296-97 (2001). These arguments were made about the "sale or rental" language in § 3604(c), but they apply equally to the language in § 3604(b).

⁶⁴ Cases involving post-acquisition discrimination in which the timing issue is *not* mentioned include substantially all of the cases cited in notes 30, 31, 33, 34, 36, 44 (exceptions include *United States v. Koch* and *Richards v. Bono*, which dealt with the issue explicitly), 45, 47, 48, 54, and 55.

⁶⁵ 274 F. Supp. 2d 1129 (C.D. Cal. 2003).

⁶⁶ *Id.* at 1141.

⁶⁷ *Id.* at 1142.

In *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*,⁶⁸ a group of existing tenants brought a § 3604(b) claim against the owners of their building, contending that the latter had permitted the building to fall into disrepair after the tenant population had shifted from predominantly white to predominantly black. The defendants argued that § 3604(b) only covers activities that relate to the availability of housing. Because the plaintiffs failed to claim that the allegedly discriminatory provision of maintenance services was “intended to keep the blacks *out* and the whites in,” the defendants contended that the FHA did not apply.⁶⁹ The court emphatically rejected the defense’s argument, construed § 3604(b) to apply to post-acquisition claims, and found that the plaintiffs had indeed stated a claim under the FHA.⁷⁰

*Bradley v. Carydale Enterprises*⁷¹ was brought under a state fair housing law with a “terms and conditions” provision identical to § 3604(b). The plaintiff alleged that she had been racially harassed by another tenant in her apartment building, and that when she had complained about the harassment, she had been evicted. The court held that the provision had to apply to existing as well as prospective tenants because to conclude otherwise “would ignore and render ineffective a substantial portion of the statute and contravene the broad remedial policy of the Fair Housing Law to ‘prohibit discriminatory practices with respect to residential housing.’”⁷²

Finally, *HUD v. Williams*⁷³ addressed the post-acquisition issue, albeit in the course of interpreting the coverage of a HUD regulation and not the FHA itself. The case involved an HIV-positive tenant’s claim that his landlord had harassed and discriminated against him by improperly inquiring about his HIV status. A HUD regulation makes clear that § 3604(f) should be read to prohibit such questioning of “an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available.”⁷⁴ The question for the judge was whether § 3604(f)(2) was intended to protect “sitting” tenants or just applicants from such inquiries. The judge permitted the plaintiff’s claim to proceed, observing that “there is no reason readily imaginable or argued to support the concept that Congress would intend protection from intrusive questioning for prospective tenants, but not sitting tenants.”⁷⁵

Discussions of whether § 3604(b) could apply post-*sale* were even less common. Many of the municipal services cases clearly assumed that post-

⁶⁸ 496 F. Supp. 522 (N.D. Ill. 1980).

⁶⁹ *Id.* at 525.

⁷⁰ *See id.* (observing that “there need be no argument when the statutory language is so clear,” and characterizing the defense’s interpretation of the statute as “tortured” and “ludicrous”).

⁷¹ 707 F. Supp. 217 (E.D. Va. 1989).

⁷² *Id.* at 224 n.17.

⁷³ Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,007 (HUD ALJ 1991).

⁷⁴ 24 C.F.R. § 100.202(c) (2007).

⁷⁵ *Williams*, Fair Housing–Fair Lending Rep. (Aspen) at 25, 115.

sale claims were cognizable under § 3604(b) because virtually all of them involved plaintiffs who were homeowners.⁷⁶ As discussed above, the dispute over § 3604(b)'s application in these cases focused on whether the FHA should cover the type of municipal service at issue, not on whether the FHA could apply to people who already owned their homes.

There is only one reported pre-*Halprin* sale case in which a court analyzed the timing issue.⁷⁷ In *Schroeder v. De Bertolo*,⁷⁸ the plaintiffs were the representatives of a disabled woman, Maeso Schroeder. Ms. Schroeder had owned and occupied a condominium, and while she lived there she was subjected to disability-based discrimination by the condominium owners' association's (COA) board of directors and by an employee of the association. The alleged discrimination included harassment, false complaints about Ms. Schroeder to the police, unauthorized entry into her unit, and restrictions on her use of the common areas. Ms. Schroeder's representatives sued the association and the individual defendants under §§ 3604(f)(1) and (2) and § 3617. The defendants argued that the FHA did not apply because it only covered the initial sale of the dwelling. The court recognized this as an issue of first impression and disagreed, stating:

Once Ms. Maeso Schroeder became the owner of the unit, her housing rights did not terminate. She had the continuing right to quiet enjoyment and use of her condominium unit and common areas in the building. Her right to obtain a dwelling free from discriminatory conduct of others encompassed the right to maintain that dwelling.⁷⁹

⁷⁶ See *supra* notes 47 and 48. Some of these cases addressed the post-acquisition issue in an indirect way by holding that the municipal service did not need to be connected to the sale or rental transaction but only needed to be connected to the dwelling itself. See, e.g., *Miller v. City of Dallas*, No. 3:98-CV-2955-D, 2002 WL 230834, at *14 (N.D. Tex. Feb. 14, 2002) (stating in dicta that a § 3604(b) claim was available to the plaintiffs for discriminatory flood protection, protection from industrial nuisances, and other inferior municipal services, without requiring that those services be connected to the sale or rental of a dwelling).

⁷⁷ At least one other case raised the question of whether post-sale discrimination claims were actionable under § 3604(b), but the court failed to decide the question. In *Dunn v. Midwestern Indem., Mid-Am. Fire & Gas. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979), the plaintiffs were black homeowners whose homeowner's insurance had been cancelled for racially discriminatory reasons. The court decided it did not need to address the issue of whether current homeowners could allege a violation of § 3604(b) because it had already found the cancellation to be a violation of § 3604(a). *Id.* at 1110.

In addition, *Zhu v. Countrywide Realty, Co., Inc.*, 165 F. Supp. 2d 1181 (D. Kan. 2001), involved a homebuyer's post-acquisition sexual harassment claims against a real estate agent, brought under § 3617. The agent had sold her an older house with the promise that he would arrange for repairs to be made to it after closing. The plaintiff alleged that, after the sale was complete, the agent sexually harassed her and conditioned the repairs on her willingness to engage in sexual activity with him. The defense moved to dismiss, in part, because the conduct took place post-sale. *Id.* at 1191. The court did not address this argument in its opinion.

⁷⁸ 879 F. Supp. 173 (D.P.R. 1995).

⁷⁹ *Id.* at 176-77.

B. Section 3604(c): Discriminatory Notices and Statements

Pre-*Halprin*, there was also little debate surrounding the proper temporal scope of § 3604(c) in either the sale or the rental context.⁸⁰ As with § 3604(b), some courts apparently assumed that this sub-section applied throughout the lease term, finding — without analysis of the timing issue — that landlords' discriminatory statements to or about current tenants violated § 3604(c).⁸¹ A few courts actually considered the question and concluded that § 3604(c) applies throughout the lease term, such as in *Sterling*.⁸² In another case, a HUD administrative law judge rejected the argument that a landlord's racist statements to an existing tenant were not covered by § 3604(c) because the statements were not made in the context of seeking a buyer or renter.⁸³ However, two others held without analysis that § 3604(c) is limited to advertisements or statements made prior to rental.⁸⁴

Pre-*Halprin* case law, therefore, establishes that courts almost uniformly held, or at least assumed, that post-acquisition claims were cognizable under §§ 3604(b) and (c). In the final Section of this Article, I argue that these early court decisions correctly refused to make the point of acquisition the definitive factor in whether the plaintiff could assert a claim under the statute. *Halprin*, as the next Section discusses, abruptly reversed this trend.

IV. THE HALPRIN CASE

A. Facts

Rick and Robyn Halprin owned a home in a subdivision near Chicago, Illinois.⁸⁵ Rick Halprin is Jewish. The subdivision was managed by a homeowners' association (HOA), which enforced rules and provided services for the subdivision. The HOA was run by an elected board. The plaintiffs alleged that the board president, Mark Ormond, wrote "H-town property" ("H-town" being short for the derogatory term "Hymie Town") in red paint

⁸⁰ Schwemm, *supra* note 63 at 191 (observing that § 3604(c) in general has not been the subject of much litigation or debate).

⁸¹ See *supra* notes 54-55.

⁸² Hous. Rights Ctr. v. Donald Sterling Corp., 274 F. Supp. 2d 1129, 1142 (C.D. Cal. 2003).

⁸³ HUD v. Gutleben, Fair Housing-Fair Lending Rep. (Aspen) ¶ 25,078, 25,726 (HUD ALJ 1994).

⁸⁴ See *Texas v. Crest Asset Mgmt.*, 85 F. Supp. 2d 722, 730-32 (S.D. Tex. 2000) (holding that plaintiff presented "no evidence" in support of his § 3604(c) claim, despite the fact that he had introduced uncontroverted testimony that the manager of his apartment complex had called him racist names and epithets); *Michael v. Caprice*, No. 99-C-2313, 1999 WL 688733, at *2 (N.D. Ill. June 11, 1999) (concluding summarily that "[a]s a tenant already living in the building, Michael has not alleged a violation of § 3604(c)").

⁸⁵ The facts of the case as set forth in this paragraph are taken from the trial and appellate court opinions in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 208 F. Supp. 2d 896, 898-99 (N.D. Ill. 2002) and 388 F.3d 327, 328 (7th Cir. 2004).

or marker on a wall located on the Halprins' property. They further alleged that Ormond vandalized their property by damaging trees and plants and cutting down holiday lights. When the plaintiffs posted flyers offering a reward for identifying the vandal, Ormond destroyed or removed most of the flyers. The board then threatened the Halprins with legal sanctions, fines, and the forced sale of their home if they did not remove the remaining flyers. In addition, board members altered the minutes and destroyed a tape recording of a board meeting at which the Halprins were discussed.

The Halprins sued the HOA, Ormond, and other individual members of the board, claiming religiously motivated discriminatory treatment, discriminatory statements, and harassment in violation of §§ 3604(b), 3604(c), and 3617. The defendants filed a Rule 12(b)(6) motion to dismiss all claims, which the trial court granted in its entirety based on the fact that the discriminatory conduct all took place *after* the Halprins had purchased their home.⁸⁶ The plaintiffs appealed.

The Seventh Circuit, with Judge Posner writing for a unanimous panel, affirmed in part and reversed in part. The court upheld the dismissal of the plaintiffs' § 3604(b) claim, arguing 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."⁸⁷ The court reasoned that because the plaintiffs were complaining "not about being prevented from acquiring property but about being harassed by other property owners," their claim did not fall under § 3604.⁸⁸ The court did not directly address the plaintiffs' § 3604(c) claim, although it is clear that it believed they had none.⁸⁹

The Halprins' case did not completely vanish. The Seventh Circuit reluctantly reinstated their § 3617 claim. The defendants had argued that, absent an underlying violation of any part of § 3604, the § 3617 claim had to fail. However, a HUD regulation indicated that plaintiffs need not show an underlying violation.⁹⁰ Judge Posner argued that this regulation might be invalid because it "stray[s] too far" from the statutory language tying § 3617

⁸⁶ See *Halprin*, 208 F. Supp. 2d at 899-905 (N.D. Ill. 2002).

⁸⁷ *Halprin*, 388 F.3d at 329 (7th Cir. 2004) (emphasis in original).

⁸⁸ *Id.* The opinion is phrased broadly, with the Court concluding that "the plaintiffs have no claim under section 3604." *Id.* at 330.

⁸⁹ Early in the opinion the Court states that the only enumerated sections that are "possibly relevant here" are § 3604(a) and § 3604(b). *Id.* at 328. Given § 3604(c)'s prohibition of discriminatory notices and statements, and the allegation that one defendant painted a religious slur on the plaintiffs' property, this conclusion is certainly wrong. Regardless, in light of Judge Posner's conclusions regarding § 3604(b), we can assume that he would make similar work of § 3604(c).

⁹⁰ 24 C.F.R. § 100.400 (2007). The regulation provides as an example of prohibited conduct: "Threatening, intimidating or interfering with persons in their enjoyment of a dwelling" because of a protected characteristic. *Id.* § 100.400(c)(2). By requiring only that the threats, intimidation, or interference be tied to a person's enjoyment of a dwelling, rather than the enjoyment of a particular right under the FHA, this example has been taken to mean that a predicate violation need not be found in order for § 3617 to apply. *United States v. Pospisil*, 127 F. Supp. 2d 1059, 1062-63 (W.D. Mo. 2000); *Bryant v. Polston*, No. 00-1064, 2000 WL 1670938, at *4 (S.D. Ind. Nov. 2, 2000); *Ohana v. 180 Prospect Place Realty Corp.*, 996 F.

to violations of the substantive provisions of the Act.⁹¹ Nevertheless, because the defendants failed to challenge the validity of the regulation, Posner concluded that the regulation's "possible invalidity has been forfeited as a ground upon which we might [have] affirm[ed] the district court."⁹²

B. Critique

The *Halprin* opinion departed dramatically from previous fair housing case law and is the progenitor of a growing line of cases in which courts have denied the discrimination claims of housing occupants. Therefore, a detailed analysis of how Judge Posner arrived at this result is in order. In reaching the conclusion that "3604" does not apply to post-acquisition claims, Judge Posner looked to the language of both § 3604(a) and (b), case law, the analogous provisions in Title VII, and the legislative history of the FHA. Judge Posner's analysis on all of these points is significantly flawed, and his conclusions led to clearly anomalous results.

1. Statutory Interpretation

a. The Language of §§ 3604(a) and (b)

Judge Posner began his analysis by looking at the language of §§ 3604(a) and (b). From the outset, this analysis was problematic because the plaintiffs never alleged a violation of § 3604(a);⁹³ rather, they alleged violations of §§ 3604(b) and (c). Nevertheless, Judge Posner concluded that §§ 3604(a) and (b) were the only two sections that were "possibly relevant here."⁹⁴ After setting forth each subsection in its entirety, he concluded that their language "indicates concern with activities, such as redlining, that prevent people from acquiring property."⁹⁵ Judge Posner was correct that § 3604(a) is concerned with activities that prevent people from acquiring property. By making it illegal "[t]o refuse to sell or rent . . . or to refuse to

Supp. 238, 242 (E.D.N.Y. 1998); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 210 (N.D. Ill. 1985).

⁹¹ *Halprin*, 388 F.3d at 330 (7th Cir. 2004).

⁹² *Id.* at 330. The § 3617 claim was subsequently upheld by the District Court on remand, which noted that the vast weight of authority — including two recent Seventh Circuit cases — endorses a broader view of § 3617. *Halprin v. Prairie Single Family Homes*, No. 01C 4673 (N.D. Ill. June 28, 2006).

⁹³ Indeed, because § 3604(a) requires a denial of housing, it is difficult to see how the plaintiffs could have made such a claim on these facts. It is all the more bewildering that Judge Posner looked to § 3604(a) as one of the only relevant provisions. By focusing on an obviously inapplicable portion of the statute, upon which the plaintiffs themselves did not even rely, Judge Posner doomed the plaintiffs' claim to fail. He essentially argued that: (1) section 3604(a) is the only relevant part of the FHA to this case, (2) section 3604(a) requires a denial of housing, (3) the plaintiffs have not alleged a denial of housing, thus (4) the plaintiffs' claims fall outside of the entirety of the statute. *Halprin*, 388 F.3d at 328-29 (7th Cir. 2004).

⁹⁴ *Id.* at 328.

⁹⁵ *Id.*

negotiate for the sale or rental of, or otherwise make unavailable or deny” dwellings based on protected characteristics, § 3604(a) clearly covers activities that prevent people from acquiring property. Indeed, each of the six cases Judge Posner cited to support his conclusion contained a claim, based on § 3604(a) or analogous disability provisions,⁹⁶ that the defendant’s actions prevented the plaintiff from obtaining housing.⁹⁷

Section 3604(b) prohibits discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.” Unlike § 3604(a), § 3604(b) contains no direct reference to the acquisition or availability of housing. It appears that Judge Posner simply lumped § 3604(b) into his conclusions about § 3604(a), without any explanation or further analysis⁹⁸ and without addressing the multitude of cases that either held or assumed that § 3604(b) can apply post acquisition.⁹⁹ Indeed, at least one court characterized § 3604(b)’s language as completely unambiguous in its coverage of post-acquisition claims.¹⁰⁰ Nevertheless, there is one area of potential haziness in § 3604(b): whether the “services or facilities in connection therewith” language modifies the “sale or rental” of the dwelling, or whether it applies to the dwelling itself.¹⁰¹ Courts and commentators have noted that if the answer is the former,

⁹⁶ See *supra* note 12 for discussion of how and why certain disability-related claims are treated separately under the FHA. Section 3604(f)(1) prohibits denying or otherwise making housing unavailable and so corresponds to § 3604(a). Section 3604(f)(3) requires housing providers to make reasonable accommodations in terms of policies or modifications to property, and it has no analog in the non-disability-related provisions of § 3604. To the extent that a failure to make such an accommodation or modification makes the housing unavailable to a disabled person, however, the person would have a claim under both §§ 3604(f)(1) and (f)(3).

⁹⁷ Cases cited by *Halprin* include: *Mitchell v. Shane*, 350 F.3d 39 (2d Cir. 2003) (discriminatory negotiations and refusal to sell, brought under §§ 3604(a) and (b)); *Hamad v. Woodcrest Condo. Ass’n*, 328 F.3d 224 (6th Cir. 2003) (steering, brought under § 3617 and § 3604); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (failure to grant zoning variance, brought under § 3604(f)(3)); *San Pedro Hotel v. City of Los Angeles*, 159 F.3d 470 (9th Cir. 1998) (blocking sale of property for group home, brought under § 3617 and § 3604(f)(1)); *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994) (refusal to sell, brought under § 3604(a) and § 3617); *NAACP v. American Family Mutual Ins.*, 978 F.2d 287 (7th Cir. 1992) (mortgage redlining claim, brought under §§ 3604(a) and (b)).

⁹⁸ *Richards v. Bono* highlights this problem in its criticism of *Farrar v. Elibany* for dismissing the plaintiff’s claim “without discussing the distinctions between § 3604(a) and § 3604(b).” *Richards*, No. 5:04CV484, 2005 WL 1065141, at *4 (M.D. Fla. May 2, 2005). This problem was also addressed by the Court in *Krieman v. Crystal Lake Apts., Ltd. P’ship*, which noted that “it is arguable that the Seventh Circuit in *Halprin* intended to preclude all § 3604 claims that do not involve a denial of housing access,” including those brought under § 3604(b) because it “summarily concl[ud] that post-purchase plaintiffs ‘have no claim under § 3604’ after mentioning § 3604(b).” *Krieman*, No. 05-C0348, 2006 WL 1519320, at *6 (N.D. Ill. May 31, 2006).

⁹⁹ See cases cited in *supra* notes 30, 31, 33, 34, 36, 44, 45, 47, 48, and 65-83.

¹⁰⁰ *Concerned Tenants Ass’n v. Indian Trails Apts.*, 496 F. Supp. 522, 525 (N.D. Ill. 1980) (construing § 3604(b) to apply post-acquisition based on “the plain and unequivocal language of the statute” and observing that “there need be no argument when the statutory language is so clear”).

¹⁰¹ See *Lopez v. City of Dallas*, No. 3:03-CV-2223, 2004 WL 2026804, at *7, *9 (N.D. Tex. Sept. 9, 2004) (noting ambiguous language and resulting circuit split). Compare Mackey

then § 3604(b)'s reach is considerably limited in both time and subject matter.¹⁰² It is difficult to tell from the text of the statute which is the correct interpretation;¹⁰³ however, if the grammatical rule of "the last antecedent" is invoked, it would seem that "services or facilities in connection therewith" should be understood to modify "dwelling."¹⁰⁴ In that case, § 3604(b) would reach any discriminatory provision of services and facilities related to the dwelling, at any time.

There is another flaw in Judge Posner's statutory interpretation. Section 3604(a)'s catch-all "otherwise make unavailable" provision prohibits any discriminatory conduct that has the effect of depriving people of housing. This provision covers a wide variety of behavior, including harassment or discriminatory terms and services, so long as the behavior has the effect of making housing unavailable. In such a case, a plaintiff could properly proceed under both §§ 3604(a) and (b).¹⁰⁵ Put another way, sometimes a denial of housing, a § 3604(a) violation, can occur through the use of discriminatory terms and conditions, a § 3604(b) violation. Judge Posner contended, however, that both § 3604(a) and (b) apply only to activities that prevent people from acquiring property. Under this formulation, § 3604(b) is nothing more than one means by which a § 3604(a) violation can arise and is therefore devoid of any independent significance: Section 3604(b) can only apply when § 3604(a) is also violated but can never apply when it is not.¹⁰⁶ Posner's reasoning contradicts one of the most basic canons of statutory in-

v. Nationwide Ins. Co., 724 F.2d 419, 424 (4th Cir. 1984) (holding that § 3604(b) "prohibits discrimination against any person in the provision of services or facilities in connection with a dwelling. . . .") with *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (concluding that "the most natural reading of the statute is the narrower reading").

¹⁰² See SCHWEMM, *supra* note 20 at 14-13 to 14-14; Ralph Santiago Abascal, *Tools for Combating Environmental Injustice in the 'Hood: Title VIII of the Civil Rights Act of 1968*, 29 CLEARINGHOUSE REV. 345, 357-59 (1995); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189, 226-30 (1998); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 213 (2006).

¹⁰³ This ambiguity is addressed (albeit in a frustratingly opaque manner) by HUD Regulation 24 C.F.R. § 100.65, discussed in the next section.

¹⁰⁴ See WILLIAM N. ESKRIDGE, JR. ET. AL., *LEGISLATION AND STATUTORY INTERPRETATION* 258 (2000). Another argument in favor of this reading is that if "services or facilities in connection therewith" is assumed to modify "sale or rental," the provision is rendered almost meaningless in the case of rental housing. The typical rental transaction involves few, if any, "services and facilities," ordinarily consisting of little more than the filling out of an application, a tour of the unit, and the payment of a deposit.

¹⁰⁵ That was the situation in the only two cases cited by Judge Posner that contain § 3604(b) claims. See *Mitchell v. Shane*, 350 F.3d 39 (2d Cir. 2003); *NAACP v. Am. Family Mut. Ins.*, 278 F.2d 287 (7th Cir. 1992). Each of these cases involved claims under both § 3604(a) and § 3604(b).

¹⁰⁶ One could argue that even under Judge Posner's formulation, § 3604(b) has independent significance because it applies to discriminatory terms and conditions that are *designed* to prevent someone from acquiring property, even if that person ultimately succeeds in acquiring the property. Judge Posner himself made no such distinction. The opinion clearly and repeatedly said that § 3604 only addresses acts that prevent people from acquiring property, not that are intended to dissuade people from acquiring property. Moreover, nothing in the language of subsection (b) mentions acquiring housing, or actions intended to impede the acquisition of housing. If Judge Posner's interpretation was correct, it would make a good deal more sense if

terpretation, which requires that terms of a statute are not construed in a manner that renders any of them surplusage.¹⁰⁷ This canon is especially relevant when the clause or term at issue occupies a pivotal place in the statutory scheme,¹⁰⁸ which § 3604(b) unquestionably does.

Judge Posner acknowledged that, “as a purely semantic matter the statutory language might be stretched far enough to reach a case of ‘constructive eviction’ . . . ‘privileges of sale or rental’ might conceivably be thought to include the privilege of inhabiting the premises.”¹⁰⁹ This reading cannot possibly represent the limits of § 3604(b). If the farthest that § 3604(b)’s terms and conditions provision can extend is to encompass residing in a dwelling, it remains congruent with § 3604(a), and, as discussed above, is superfluous.¹¹⁰

b. 24 C.F.R. § 100.65 and Trafficante v. Metropolitan Life

The *Halprin* opinion leaves out two critical guidelines for the statutory construction of the FHA. Significantly, the opinion fails to discuss the HUD regulation, 24 C.F.R. § 100.65, which interprets § 3604(b). Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules.¹¹¹ The FHA delegated HUD the power to make substantive rules,¹¹² and, therefore, interpretations by HUD of the FHA’s language are entitled to deference.¹¹³ The regulation provides a strong argument for § 3604(b)’s application to post-acquisition claims, although it is not without ambiguity.¹¹⁴

§ 3604(b) had been drafted to prohibit “discriminatory terms and conditions designed, intended, or attempting to make housing unavailable.”

¹⁰⁷ See *Babbitt v. Sweet Home Chapter, Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *ESKRIDGE, supra* note 104, at 266; see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as “a cardinal principle of statutory construction”); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (“A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (quoting *MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW* 239-40 (1845)).

¹⁰⁸ *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹⁰⁹ *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004).

¹¹⁰ One court commented on Judge Posner’s reasoning: “In my view, it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein.” *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004).

¹¹¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

¹¹² 42 U.S.C. § 3614a (2000) (providing that the Secretary of HUD shall make rules to implement the FHA).

¹¹³ See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); see also *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 494 (S.D. Ohio 1976).

¹¹⁴ *Guill, supra* note 102 at 228-29 (noting that the regulations and the legislative history contain examples both in favor of and against a broad reading of the FHA).

The first part of 24 C.F.R. § 100.65 states that it shall be unlawful “to deny or limit services or facilities in connection with the sale or rental of a dwelling.”¹¹⁵ By specifically tying the “sale or rental” clause to the “sale or rental” of the dwelling (as opposed to the dwelling generally), this part of the regulation appears to limit the scope of the services covered by § 3604(b) to those provided in connection with the actual sale or rental transaction.

The next part of the regulation, however, provides examples of prohibited conduct, three of which almost always occur after the initial sale or rental of a dwelling:

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of [a protected characteristic].

. . .

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of [a protected characteristic] of an *owner, tenant* or a person associated with him or her.

(5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.¹¹⁶

These examples, particularly subsection (4)’s direct reference to owners and tenants, are powerful evidence that HUD considers the services provision of § 3604(b) to apply both throughout a person’s tenancy and after the sale of a dwelling. Indeed, HUD’s commentary on this regulation makes it clear that the agency intended it to cover a broad range of conduct, extending beyond the initial sale or lease agreement:

The illustrations in § 100.65(b) indicate that the coverage of this section extends beyond restrictions or differences in a lease or sales contract and the provision of different levels of maintenance. . . . In order to indicate the broad range of conduct which would constitute different terms and conditions, the department has added another illustration to this section (§ 100.65(b)(5)) indicating that denying or limiting services or facilities to persons based on a person failing or refusing to grant sexual favors can constitute a discriminatory housing practice.¹¹⁷

Several courts and commentators agree that, while the first part of the regulation appears to indicate a more limited reach, the broader coverage described in the examples and commentary is clearer and should prevail.¹¹⁸

¹¹⁵ 24 C.F.R. § 100.65(a) (2007).

¹¹⁶ 24 C.F.R. § 100.65(b) (2007) (emphasis added).

¹¹⁷ Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3239 (Jan. 23, 1989).

¹¹⁸ For example, in *Lopez v. City of Dallas*, the court recognized the apparent conflict between the initial language of the HUD Regulation and the examples HUD provides to illus-

This agency construction warrants deference under traditional administrative law principles.

Finally, *Halprin's* crabbed view of the statute's language ignores the clear and long-standing Supreme Court directive set forth in *Trafficante v. Metropolitan Life*.¹¹⁹ *Trafficante* was the first Supreme Court case to address the interpretation of the FHA. The Court found that the FHA's terms are "broad and inclusive" and that, as a remedial civil rights statute, the FHA must be subjected to "generous construction."¹²⁰ Virtually every court to interpret the FHA has cited these words, which have become a mantra in fair housing law.¹²¹ Even Judge Posner has recognized elsewhere that judicial interpretation of statutes should be more generous when the structure or language of the statute itself indicates that it is to be broadly construed.¹²²

Trafficante did not specifically address the language of § 3604(b). The Supreme Court, however, has broadly interpreted the analogous terms and conditions provision in another remedial civil rights statute, Title VII.¹²³ Because Title VII is similar in purpose and language to the FHA, courts frequently use it to guide interpretations of the FHA.¹²⁴ In *Meritor Savings Bank v. Vinson*, the Court recognized that a hostile environment due to sexual harassment could constitute a terms and conditions violation despite the fact that it did not cause economic injury or result in a "tangible" job detriment.¹²⁵ In so doing, the Court held that "[t]he phrase 'terms, conditions, or

trate prohibited conduct and determined that the broader interpretation suggested by the examples should prevail. No. 3:03-CV-2223, 2004 WL 2026804, at *8 (N.D. Tex. Sept. 9, 2004). See also *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) ("This regulation plainly contemplates making post-acquisition discrimination, including sexual harassment, actionable."); Abascal, *supra* note 102, at 358 (1995); Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968*, 14 VA. ENVTL. L.J. 741, 750 (1995); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 784 (1993). But see Guill, *supra* note 102, at 226-28 (warning that conservative courts may not read the regulation broadly).

¹¹⁹ 409 U.S. 205 (1972).

¹²⁰ *Id.* at 209, 212.

¹²¹ SCHWEMM, *supra* note 20 at 7-3 ("This mandate by a unanimous Supreme Court to construe Title VIII broadly has become the foundation for all subsequent judicial interpretations of the Fair Housing Act."). At least 82 federal cases cite this language from *Trafficante*, including one Seventh Circuit case, *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1011 (7th Cir. 1980), and six cases from the Northern District of Illinois.

¹²² Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983). One of the "clues" that Posner cites for determining whether Congress intended for a statute to be generously interpreted is if the statute is worded broadly, rather than setting forth its requirements with specificity. *Id.* As discussed above and in Section I, *supra*, the FHA is worded quite broadly. Moreover, the Act's Declaration of Policy is quite expansive, stating that it is "to provide . . . for fair housing throughout the United States." 42 U.S.C. §3601 (2000).

¹²³ 42 U.S.C. § 2000e, et. seq. (2000). The following Section discusses the link between Title VII and the FHA.

¹²⁴ See *Trafficante*, 409 U.S. at 209; SCHWEMM, *supra* note 20 at 7-9.

¹²⁵ 477 U.S. 57, 64 (1986).

privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment' [between protected classes]."¹²⁶

2. Title VII

Although Judge Posner failed to consider *Meritor's* broad interpretation of Title VII's analogous "terms and conditions" provision, he nonetheless engaged in a Title VII analysis. He began with a cursory suggestion that post-acquisition housing discrimination claims have only been recognized when brought under a "constructive eviction" theory similar to the "constructive discharge" theory recognized in Title VII cases.¹²⁷ This is simply not the case. It is true that a "constructive eviction" theory has been recognized in housing, for the unremarkable proposition that actions falling short of formal eviction proceedings can still drive a person from her home or render aspects of the dwelling unavailable to her.¹²⁸ This theory is not, however, the foundation for the majority of § 3604(b) claims, which merely rely on the language of the provision making it illegal "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."¹²⁹ In fact, none of the cases Judge Posner cited to support this claim even mentioned the constructive eviction doctrine in the context of the FHA.¹³⁰

Title VII does have a direct analog to § 3604(b): a provision making it illegal "to discriminate against any individual with respect to his compensa-

¹²⁶ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978)). As discussed in greater detail below, because of their similar language, structure, and purpose, Title VII case law can serve as an interpretive tool for the FHA. For example, *Trafficante* looked to Title VII in reaching its conclusions about the broad reach of the FHA. 409 U.S. at 209.

¹²⁷ *Halprin*, 388 F.3d at 329.

¹²⁸ Constructive eviction is a term that originated with the cause of action for breach of the covenant of quiet enjoyment. It "occurs when the landlord has substantially deprived the tenant of the beneficial use of the premises, and the tenant vacates, or when the landlord's actions are meritless, done in malice or bad faith, and so severe as to interfere with the tenant's peaceful enjoyment of the premises." *Honce v. Vigil*, 1 F.3d 1085, 1091 (10th Cir. 1993).

¹²⁹ One area in which there has been doctrinal importation from Title VII to the FHA, harassment, demonstrates the insignificance of discharge/eviction to a terms and conditions claim. As discussed earlier, courts originally developed the hostile environment cause of action in the Title VII context, under the theory that harassment can alter the terms and conditions of a person's employment, and subsequent housing cases applied this theory to housing hostile environment claims. See *supra* note 45 and accompanying text. Nowhere in the Supreme Court's hostile environment jurisprudence is there any requirement that the plaintiff allege actual or constructive discharge in order to state a claim for harassment. Indeed, the whole point of the Court's recognition of the hostile environment form of sexual harassment was that plaintiffs need *not* argue that the harassment resulted in a "tangible loss" of job or economic benefits. *Meritor Savings Bank*, 477 U.S. at 64. Nor is there any housing harassment case — including the ones Judge Posner cited in support of his argument — that imposes an analogous requirement of actual or constructive eviction.

¹³⁰ One of the cases Judge Posner cited, *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993), contains a discussion of constructive eviction, but this takes place in the evaluation of the plaintiff's common law claim for breach of the covenant of quiet enjoyment, not with respect to the FHA claim. *Id.* at 1090-91.

tion, terms, conditions, or privileges of employment” because of a protected characteristic.¹³¹ There is no question that this part of Title VII is intended to cover discrimination against existing employees. There are a multitude of employment discrimination cases — far too many to cite here — in which plaintiffs allege discriminatory on-the-job treatment falling short of actual or constructive discharge. Judge Posner argued that the “difference in language” between Title VII and the FHA requires a different application, but he never articulated what this important difference in language is, and a comparison of both provisions reveals no pertinent distinction between the two.¹³² Nevertheless, Judge Posner relied on this supposed discrepancy to conclude that although Title VII can protect the “job holder as well as the job applicant,” the FHA can only protect the housing applicant. The only additional evidence he marshaled in support of this conclusion was the legislative history, discussed in the next section.

3. *Legislative History*

Judge Posner looked to the legislative history of the Fair Housing Act to provide additional justification for his ruling in *Halprin*. Citing several passages from the congressional hearings and debates on the bill that eventually became the FHA, Posner concluded:

Behind the Act lay the widespread practice of refusing to sell or rent homes in desirable residential areas to members of minority groups. Since the focus was on their exclusion, the problem of how they were treated when they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking. That problem—the problem not of exclusion but of expulsion—would become acute only when the law forced unwanted associations that might provoke efforts at harassment, and so it would tend not to arise until the Act was enacted and enforced. There is nothing to suggest that Congress was trying to solve that future problem¹³³

From the outset, one should note that the reliability of legislative history as an interpretive tool has been widely debated.¹³⁴ Moreover, looking to

¹³¹ 42 U.S.C. § 2000e-2(a)(1) (2000).

¹³² See Short, *supra* note 102, at 243 (arguing that “[f]rom the face of virtually identical statutory language, it is difficult to justify a post-hiring dimension to Title VII while also rejecting a post-acquisition scope for the FHA”). It is true that Title VII contains references elsewhere in the statute that clearly implicate current employees. However, as discussed *infra* note 171, the FHA also contains references that implicate current residents.

¹³³ *Halprin v. Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004).

¹³⁴ See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 211-247 (2000) (providing an overview of the debate over whether, how, and why it is appropriate for courts to use legislative history); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424-25 (2005) (outlining

legislative history in interpreting the FHA is problematic because of the unconventional way the law came into being.¹³⁵ A brief description of the FHA's inception demonstrates why its legislative history is particularly unhelpful. In 1966 identical fair housing bills were proposed in both houses of Congress¹³⁶ and each became the subject of committee hearings.¹³⁷ An amended bill passed the House, but the Senate Judiciary Committee did not act favorably upon the legislation.¹³⁸ The following year, another fair housing bill, S. 1358, was subjected to committee hearings,¹³⁹ and likewise died in committee. At the same time, an unrelated civil rights bill, H.R. 2516, designed to outlaw racially motivated violence against African Americans and civil rights workers, was passed by the House.¹⁴⁰

While the Senate debated H.R. 2516, Senators Mondale and Brooke proposed an amendment that would add fair housing provisions substantially identical to S. 1358. This proposal was withdrawn in favor of a compromise amendment, similar in most respects to the earlier versions of the bill, which was sponsored by Senator Dirksen and added to H.R. 2516 on the Senate floor.¹⁴¹ The compromise bill was filibustered until the President's National Advisory Committee on Civil Disorders, commonly referred to as the Kerner Commission, issued a report on the urban riots of the previous summer. In no uncertain terms, the report identified racial segregation in housing as one of the greatest threats facing American society and called for the passage of

textualist arguments against using legislative history); Adrian Vermuele, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1885-1895 (1998) (proposing that courts, because of their lack of competence in discerning legislative intent from legislative history, should never consider legislative history); cf. Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke*, 16 SETON HALL LEGIS. J. 57, 61 (1992) (arguing that, while legislative history may be useful in some cases, it is "not the Rosetta Stone of statutory interpretation" and that "uncritical use of legislative history may result in the misinterpretation and erroneous application of statutory provisions").

¹³⁵ SCHWEMM, *supra* note 20, at 5-2 (describing the legislative history as "protracted and chaotic"). For an excellent article on the FHA's history and passage, see Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149 (1969).

¹³⁶ H.R. 14765, 89th Cong. (1966) and S. 3296, 89th Cong. (1966).

¹³⁷ *Civil Rights, 1966: Hearings on Misc. Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States H.R. 14765 Before the Subcomm. on the Judiciary*, 89th Cong. (1966); *Civil Rights: Hearing on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170 Before the Comm. on the Judiciary*, 89th Cong. (1966).

¹³⁸ 112 Cong. Rec. Index 1183 (1966).

¹³⁹ *Fair Housing Act of 1967: Hearing on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. (1967).

¹⁴⁰ Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 208 (1978).

¹⁴¹ The only substantive differences between the Mondale and Dirksen amendments were in the enforcement mechanism available through HUD, and a slight reduction in coverage. Dubofsky, *supra* note 135, at 157.

fair housing legislation.¹⁴² Three days after the report was issued, the Senate voted cloture on the filibuster blocking H.R. 2516, and within a week, the bill passed with only minor amendments.¹⁴³ Having passed in the Senate, the bill was sent back to the House, which considered it on April 10, 1968 — the day after the funeral of Dr. Martin Luther King, Jr. Under intense pressure, with riots raging just blocks from the Capitol, the Rules Committee allowed the House only one hour of debate on the Senate bill.¹⁴⁴

As a result, the final version of the bill that became the FHA was never considered by committee, and no formal reports explaining its terms exist. The legislative history consists of committee hearings on the three previous fair housing bills (H.R. 14765, S. 3296, and S. 1358) and the various floor debates. None of these reflect a particularly reliable form of legislative history,¹⁴⁵ and on this matter, none provides much insight into the FHA's substantive terms. The committee hearings focused mainly on whether a fair housing law was necessary and within Congress' power to enact. The floor debates consisted largely of discussion of the scope of proposed exemptions to the law's coverage¹⁴⁶ and non-technical amendments that dealt with other topics entirely.¹⁴⁷ There was no discussion anywhere in this legislative history about how to interpret the language of § 3604(b). To the extent there was any debate over § 3604(c), it centered around its relationship to the exemptions contained elsewhere in the statute and the First Amendment implications of including discriminatory "statements" on the list of prohibited conduct.¹⁴⁸ No specific discussion addresses whether to interpret the FHA as applicable to post-acquisition housing. Under such circumstances, where legislative history does not directly address an issue, it makes little sense to consult the legislative history at all.¹⁴⁹

Despite these caveats, Judge Posner is at least facially correct in characterizing the Congress that passed the FHA as primarily concerned with pro-

¹⁴² PRESIDENT'S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 263 (1968) [hereinafter KERNER COMMISSION REPORT].

¹⁴³ Dubofsky, *supra* note 135, at 158-59.

¹⁴⁴ STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS, PART II 1629-32 (Bernard Schwartz ed., 1970).

¹⁴⁵ See ESKRIDGE, FRICKEY & GARRETT, *supra* note 34, at 304 ("After committee reports and sponsor statements, the reliability of legislative history falls off markedly."); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (Feb. 1990) (discussing the traditional view that floor debates are less reliable than committee reports, and concluding that, despite some debate on the issue, this remains true today).

¹⁴⁶ The statute as enacted contains a limited exemption for individuals who own buildings that contain four or fewer units and who reside in one of those units (the so-called "Mrs. Murphy exemption"), 42 U.S.C. § 3603(b)(2) (2000), as well as for single-family homes sold or rented by private individuals who own no more than three such homes and who do not use real estate brokers, agents, or salespeople, 42 U.S.C. § 3603(b)(1) (2000).

¹⁴⁷ Dubofsky, *supra* note 135, at 159.

¹⁴⁸ Schwemm, *supra* note 63, at 198-212.

¹⁴⁹ ESKRIDGE, FRICKEY & GARRETT, *supra* note 145, at 296 (suggesting that legislative history should only be consulted when it is relevant to the precise interpretive question).

tecting access to housing. During the mid-1960s, when Congress debated the various fair housing bills, the degree of segregation in residential housing was extraordinarily high, and discrimination in access to housing was rampant.¹⁵⁰ Congress wanted to promote integration by eliminating the discrimination that confined African Americans to crumbling urban centers. The legislation's proponents considered eradicating discrimination and encouraging integration as one goal, and they believed that once housing discrimination was banned, housing segregation would naturally disappear.¹⁵¹ Thus, much of the language and rhetoric used by the bill's supporters during the committee hearings and floor debates centers on reducing housing segregation by outlawing discrimination.¹⁵²

It is inaccurate, however, to say that Congress gave "no thought" to the need to prevent discrimination that might arise during one's occupancy of a dwelling. The Declaration of Policy in all three of the draft versions of the legislation explained that it was the policy of the United States to prevent discrimination on account of protected characteristics in the "purchase, rental, financing, and *occupancy* of housing throughout the United States."¹⁵³ The Dirksen amendment changed this language to its current form: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Because the Dirksen amendment essentially inserted a new bill into the pending legislation on the floor of the Senate, there is no written explanation for this change. There is, however, no indication that the change signaled Congress' intent to exclude discrimination that affects occupancy from the list of conduct that the Act prohibits.¹⁵⁴ If anything, the fact that a prohibition against discrimination in all aspects of housing — sales, rentals, financing, and occupancy — was included in the first three versions of the bill but omitted from the final version in favor of a broad statement of commitment to fair housing, indicates that Congress specifically intended "fair housing" to include the right to purchase, rent, finance, and occupy housing free of discrimination.

It is also significant that the Congress that passed the FHA operated in the shadow of 42 U.S.C. § 1982, a Reconstruction-era civil rights statute that was the primary mechanism for bringing housing discrimination claims prior

¹⁵⁰ KERNER COMMISSION REPORT 259; DOUGLAS S. MASSEY & NANCY H. DENTON, *AMERICAN APARTHEID* 26-59 (1993).

¹⁵¹ Richard Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 Nw. U. L. REV. 874, 902, 920 (1988).

¹⁵² One commentator has concluded that "a fair reading of the FHA's voluminous legislative history does not unequivocally resolve whether Congress understood the statute to apply to post-acquisition harassment claims." See Short, *supra* note 102, at 239.

¹⁵³ S. 3296, 89th Cong. (1966) (emphasis added); S. 1358 90th Cong. (1967) (Mondale bill); 114 Cong. Rec. 2270 (1968) (Mondale amendment).

¹⁵⁴ This is especially so because, as Aric Short points out, Dirksen's change in the statement of policy's language was not accompanied by any substantive changes to the proposed legislation itself. See Short, *supra* note 102, at 230-31.

to the passage of the FHA. Section 1982 states that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, *hold*, and convey real . . . property.”¹⁵⁵ The inclusion of the right to “hold” property free of discrimination indicates that § 1982 applies to post-acquisition claims. At the time Congress passed the FHA, however, § 1982 had a serious deficiency: it had been interpreted as applying only to state actors.¹⁵⁶

One of the primary goals of the FHA was to expand the protections contained in § 1982 by offering a means to redress private acts of discrimination. The FHA also improved upon § 1982 in several other ways: by including more protected characteristics, providing a more expansive and detailed list of prohibited conduct, and creating an administrative and judicial enforcement mechanism.¹⁵⁷ The Supreme Court characterized the FHA as such when it ruled, two months after the FHA had been passed, that § 1982 could in fact reach private acts of discrimination.¹⁵⁸ Explaining why its construction of § 1982 did not obviate the need for the FHA, the Court noted

the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.¹⁵⁹

Congress recognized that § 1982 reached post-acquisition conduct and intended for the FHA to expand upon § 1982. The result mandated by *Halprin*, however, would give the FHA a significantly more limited reach.

Even assuming that the Congress that passed the FHA was primarily concerned with opening up access to housing in order to promote integration, this victory would be hollow if African Americans were freely discriminated against once they secured that housing.¹⁶⁰ Moreover, a failure to

¹⁵⁵ 42 U.S.C. § 1982 (2000) (emphasis added).

¹⁵⁶ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)).

¹⁵⁷ See *Jones v. Mayer*, 392 U.S. 409, 416 n.19 (1968) (observing that the Attorney General had described the pending FHA as a law that “would provide open housing rights on a complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation,” and characterizing its potential for effectiveness as “probably much greater than [§ 1982] because of the sanctions and the remedies that it provides.”) (citations omitted).

¹⁵⁸ *Id.* at 416.

¹⁵⁹ *Id.* at 417; see also *id.* at 413 (stating that § 1982 “is not a comprehensive open housing law”).

¹⁶⁰ *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (“In my view, it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein; therefore the Fair Housing Act should be (and has been) read to permit the enjoyment of this privilege without discriminatory harassment.”); cf. *Stirgus v. Benoit*, 720 F. Supp. 119, 122 (N.D. Ill. 1989) (“Defendant’s argument that section 1982 prohibits racial discrimination in the sale or lease of property, but not acts of

address post-acquisition discrimination practically guarantees that the legislative goal of promoting integration will remain unmet. Residential housing integration has been elusive, in part because of reluctance on the part of many African Americans to endure the discrimination and hostility they believe they would face if they moved into a majority white neighborhood or building.¹⁶¹ The tendency of many blacks to “self-segregate” cannot be explained away by differences in socioeconomic status: the fact that race plays a far greater role than class in determining housing patterns is well-documented.¹⁶² Middle- and upper-class blacks are more likely to live in predominantly black neighborhoods, with neighbors who have lower incomes, than in white areas where their neighbors will have incomes similar to their own. John O. Calmore explains that, “[r]egardless of class, there is the experience and perception of white resentment toward blacks. In the suburbs, blacks perceive that they would be unwelcome, isolated, and, perhaps, at risk of physical violence.”¹⁶³ In addition, research indicates that disparate provision of municipal services and undesirable land uses can cause those areas to become more segregated.¹⁶⁴

discrimination which essentially prevent the victim from living on that property once it is acquired is untenable[.]”).

¹⁶¹ For example, survey data from the 1970s indicated a “considerable reluctance” on the part of blacks to move into all-white neighborhoods. Only 37% of blacks surveyed were willing to move into such a neighborhood, and 66% listed it as their last choice, after all-black, predominantly black, evenly mixed, and predominantly white. This reluctance was due to fears of white hostility and rejection. Thirty-four percent thought white neighbors would be unfriendly and make them feel unwelcome, 37% thought they would be made to feel uncomfortable, and 17% expressed a fear of violence. Reynolds Farley, Suzanne Bianchi & Diane Colasanto, *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, ANNALS AM. ACAD. POL. & SOC. SCI. 441 (1979). This highly respected study was updated and expanded to additional cities in 1994. See Reynolds Farley, Elaine L. Fielding & Maria Krystan, *The Residential Preferences of Blacks and Whites: A Four-Metropolitan Analysis*, 8 HOUSING POLY DEBATE 763 (1997). The researchers found black respondents slightly less willing to move in to majority white neighborhoods than in the 1979 study. *Id.* at 791; see also Camille Zubrinsky Charles, *Can We Live Together?* in THE GEOGRAPHY OF OPPORTUNITY 45, 52-59 (Xavier de Souza Briggs ed., 2005); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1853-54 (1994) (describing the reluctance of minorities to move to the “alien and sometimes hostile environment” of majority-white neighborhoods as an effective “tax” on integration that will undoubtedly cause many to remain in majority-black neighborhoods); Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 900, 903 (1988) (noting that racial hostility is a cost black homeseekers bear, and that it distorts their market decisions, discourages them from entering white neighborhoods, and reinforces segregation).

¹⁶² See MASSEY & DENTON, *supra* note 150, at 84-88; John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998).

¹⁶³ Calmore, *supra* note 162, at 1107.

¹⁶⁴ Vicki Been notes that neighborhoods with a large population of minorities are disproportionately more likely to be chosen as sites for undesirable uses. Once this happens, people with means — typically whites — move out of such areas, while those with fewer resources or whose housing options are limited due to discrimination — typically blacks or other racial/ethnic minorities — move in. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383, 1388-89 (1994); Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1018-19 (1993). Similarly, Rich-

Moreover, a deeper analysis of the fears and motivations of the Congress that passed the FHA leads to a more nuanced conclusion. Congress acted in the wake of the urban riots of the 1960s, in which minority communities erupted in frustration and anger over their substandard living conditions, physical isolation in urban ghettos, and general second-class citizenship. Supporters of the bill wanted to pass housing legislation that would erase the root causes of the violence and signal that African Americans were full members of society who were deserving of respect.¹⁶⁵ A law that encouraged African Americans to live in the same neighborhoods and apartment buildings as whites, but did nothing to protect them from discrimination once they moved in, could not possibly accomplish these goals. Indeed, it is difficult to imagine a situation more likely to spark further degradation and violence.

Even if we conclude that no member of the Congress that passed the FHA contemplated protecting the rights of occupants, the fact remains that the text of the statute, which must be interpreted broadly, allows for this possibility. The Supreme Court has recognized that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁶⁶ As an earlier Seventh Circuit opinion observed in trying to ascertain congressional intent on a different FHA question:

Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply [to a particular type of defendant]. Silence equally could imply that the debate was about the principle of non-discrimination, leaving details to the future. The backward phraseology of § 3604 suggests the latter possibility. What was in the heads of the legislators is not, however, the measure of their enactment.¹⁶⁷

The FHA’s proponents certainly comprehended that discrimination takes many forms; discriminators can be creative, and the law must, therefore, have enough flexibility to adapt to changing circumstances.¹⁶⁸ Judge

ard Ford argues that when different levels of city services are provided to neighborhoods with different racial compositions, “a vicious circle of causation” will result, leading to even more profound segregation. Ford, *supra* note 161, at 1854-55. Thus, the disparate provision of municipal services and the discriminatory placement of negative uses are both causes and effects of segregation.

¹⁶⁵ See, e.g., *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496-97 (D. Ohio 1976) (undertaking “a realistic examination of the concerns that led to the adoption of [the FHA]” and interpreting the statute broadly); *Dubofsky*, *supra* note 135, at 154; *Sander*, *supra* note 151, at 920.

¹⁶⁶ *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 79 (1998).

¹⁶⁷ *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992).

¹⁶⁸ See 114 CONG. REC. S2991 (daily ed. Feb. 14, 1968) (statement of Sen. Brooke) (“The segregation problem is too complex to be solved without a total approach which recognized all the manifold forces which brought it to its present magnitude and threaten to enlarge it further

Posner himself has argued elsewhere that when examining legislative history for a point on which the legislative history is unavailing, the judge must “imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations that they did not foresee.”¹⁶⁹

Finally, it is significant that Congress substantially amended the FHA in 1988. At that point, several federal cases had held that plaintiffs complaining of harassment or discrimination that had occurred after they had acquired their housing were permitted to bring claims under § 3604(b) and (c).¹⁷⁰ If Congress believed that these cases improperly applied the FHA to the post-acquisition stage, it could have amended the statute to make clear that it only applied pre-acquisition. It did not.

4. *Anomalous Results*

A detailed analysis of the flaws in the reasoning behind *Halprin* should not obscure one of the most problematic aspects of the opinion: it leads to extremely anomalous results.¹⁷¹ According to *Halprin*, it would not violate § 3604(b) for a condominium owners’ association to prevent a disabled person from using the laundry facilities or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate

. . . . [This approach] must be adaptable . . . and flexible enough to permit changes as ‘feedback’ from early applications dictates.”); *Hearings on the Fair Housing Act of 1967 before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong., at 363 (1967) (statement of Sen. Proxmire) (“I think we can anticipate the ingenuity of prejudice being such as to accommodate in some ways that might frustrate the objectives of this bill.”).

¹⁶⁹ Posner, *supra* note 122, at 818.

¹⁷⁰ See *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988); *Grieger v. Sheets*, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988) (recognizing that plaintiff could bring a hostile environment claim based on harassment that occurred during her tenancy, but finding that this claim failed for lack of evidence); *Concerned Tenants Ass’n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 525 (N.D. Ill. 1980).

¹⁷¹ Commentators have also remarked on the anomaly presented by the fact that other portions of the FHA apply post-acquisition. SCHWEMM, *supra* note 20, § 14:3, at 14; Short, *supra* note 102, at 216-220. For example, § 3604(f)(2), which was modeled after § 3604(b), clearly states that it extends to discriminatory terms and services related to a dwelling, and not just to the sale or rental of the dwelling. Section 3604(f)(3) requires property owners to permit reasonable modifications to “existing premises occupied or to be occupied” by a disabled person so that he or she can fully use and enjoy the dwelling. Section 3605 bars discrimination in real-estate related financial transactions. The list of covered transactions includes the making of loans “for improving, repairing, or maintaining a dwelling,” which will clearly only occur after a person has first obtained the dwelling. As discussed above, § 3617 can apply both before and after the housing is acquired. Finally, the criminal provision in the FHA, § 3631, prohibits using force or threats to injure, intimidate, or interfere with a person in the exercise of fair housing rights. The provision makes clear that it protects people who are “occupying” a dwelling, as well as “selling,” “purchasing,” and “renting” dwellings.

An argument could be made that, by including express post-acquisition language in some parts of the statute but not others, Congress intended that only those parts should be construed to apply post-acquisition. However, one could also argue that the more detailed language contained in these provisions should serve as guidance in how to interpret the statute as a whole. At the very least, the language demonstrates that Congress did indeed intend for the FHA to apply in many post-acquisition contexts. See Short, *supra* note 102, at 220-21.

§ 3604(b) for a landlord to sexually harass a tenant or to raise the rent of only Jewish tenants. It would not violate § 3604(c) for a landlord to use racial slurs to or about existing tenants or to spray-paint such a slur on an occupant's door. Nor would it violate § 3604(c) for a homeowners association to print up flyers denigrating a particular resident due to her religious faith and post them throughout the neighborhood. All of these behaviors would be beyond the law's purview solely because of when they occurred.¹⁷²

Most practitioners and scholars — and certainly most laypeople — would likely be alarmed to discover that the nation's remedial and comprehensive fair housing legislation had such a limited reach.¹⁷³ And with good reason: such a regime would eviscerate nearly forty years of fair housing jurisprudence, particularly in the landlord-tenant context and would invalidate the results of hundreds of cases.

V. THE AFTERMATH OF *HALPRIN*

Halprin's impact was immediate. Courts around the country began to rely on the decision to dismiss the §§ 3604(b) and (c) discrimination and harassment claims of existing tenants and homeowners. For example, *Lawrence v. Courtyards at Deerwood Ass'n*¹⁷⁴ involved a black couple who owned a home in a subdivision that was governed by an HOA. The couple

¹⁷² The Supreme Court faced a popular and legislative backlash over a similarly restrictive interpretation of 42 U.S.C. § 1981. Section 1981 prohibits racial discrimination in the making and enforcement of contracts. In a controversial decision, a divided Supreme Court held that § 1981 could not apply to a black employee's claims of racial harassment against her employer, because the conduct occurred after she had entered into her employment contract. *Patterson v. McLean Credit Union*, 491 U.S. 164, 179 (1989). The Court noted that “the conduct which petitioner labels as actionable racial harassment is post [contract-]formation conduct by the employer relating to the terms and conditions of continuing employment.” *Id.* at 179. It concluded that “[t]his type of conduct, reprehensible though it be . . . is not actionable under § 1981, which covers only conduct at the initial formation of the contract” *Id.* (The Court did, however, hold that discriminatory alterations to the terms and conditions of employment were plainly actionable under Title VII. *Id.* at 180.)

Congress responded swiftly, enacting legislation that amended § 1981 to make clear that the term “make and enforce contracts” included “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Civil Rights Act of 1991, 42 U.S.C. § 1981(b) (2000). Significantly, Congress stated that it took this action “in order to provide adequate protection to victims of discrimination.” *Id.* § 3(3).

¹⁷³ It is important to note that, so long as the court does not require a “predicate” violation of § 3604, § 3617 may cover some post-acquisition claims. Nonetheless, § 3617 is virtually always limited to conduct that is threatening, violent, or retaliatory, or that in some other way “directly . . . disrupt[s] the exercise or enjoyment of a protected right,” such as exclusionary zoning and redlining. *Michigan Protection & Advocacy Serv. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994). Thus, § 3617 is available for a harassment claim (as it ultimately was in *Halprin*), but probably does not apply to a claim for (non-retaliatory) discriminatory provision of maintenance or services, a discriminatory rent increase or fine, or discriminatory (but non-harassing) statements. The author could locate only one case in which a claim for discrimination in maintenance or services was recognized under § 3617. *See Fayyumi v. Hickory Hills*, 18 F. Supp. 2d 909, 916 (N.D. Ill. 1998).

¹⁷⁴ 318 F. Supp. 2d 1133 (S.D. Fla. 2004).

alleged that their neighbor had engaged in a racially motivated campaign of harassment against them, which included leaving derogatory messages on their car and fence, placing dead rats on their front and back steps, using racial epithets, cutting their cable television line, and putting a mask similar to the one in the horror movie “Scream” on their car. The Lawrences asked the HOA to intervene. The HOA sent a letter to the neighbor telling her not to post personal signs and letters in the common areas of the community but took no further action.¹⁷⁵ Eventually, after the neighbor confronted Mr. Lawrence as he arrived home from work and threatened to kill him, the family moved out.

The Lawrences sued the neighbor and the HOA under §§ 3604(a) and (b), and § 3617. Their claim against the HOA was based on the argument that the HOA had discriminatorily refused to enforce community rules against the neighbor, which resulted in a denial of their housing, and that by failing to act after being made aware of the problem, the HOA had tolerated and ratified the neighbor’s harassment. The court granted summary judgment to the HOA based on *Halprin*, arguing that “sections 3604(a) and (b) are limited to conduct that directly impacts the accessibility to housing.”¹⁷⁶ Because the defendants’ failure to stop the neighbor “did not have any impact on the Lawrences’ ability to *purchase* their home” the court concluded that “the Defendants cannot be held liable under 42 U.S.C. § 3604.”¹⁷⁷

In another case, *King v. Metcalf 56 Homes Ass’n*,¹⁷⁸ the plaintiff was a black woman who rented a duplex in a neighborhood governed by an HOA. She alleged that the president of the HOA and another HOA member engaged in a pattern of racially motivated harassment in order to drive her from the neighborhood. The plaintiff ultimately moved as a result of this harassment and sued the HOA as well as the individual perpetrators, alleging a violation of § 3604(b). The court granted the defendants’ motion to dismiss, citing *Halprin* and stating: “[P]laintiff’s allegations relate entirely to her use and enjoyment of a residence that she had already acquired. She does not allege that the defendants discriminated against her in connection with her initial rental of the residence or that defendants’ conduct impacted the accessibility or availability of housing to her.”¹⁷⁹

¹⁷⁵ This failure to act was deliberate. The HOA had determined that the dispute was a mutual “neighbor on neighbor” conflict in which it should not get involved. *Id.* at 1137.

¹⁷⁶ *Id.* at 1143.

¹⁷⁷ *Id.* (emphasis added). This conclusion is particularly perplexing in light of the fact that the neighbor’s conduct, and the HOA’s refusal to intervene, *did* in fact drive the Lawrences from their home, thus clearly making housing unavailable to them under a constructive eviction theory of § 3604(a).

¹⁷⁸ No. 04-2192, 2004 WL 2538379 (D. Kan. Nov. 8, 2004).

¹⁷⁹ *Id.* at *3. As with *Lawrence*, this statement is difficult to square with the evidence that the harassment, in fact, drove the Plaintiff out of her home. The court did, however, give Ms. King leave to re-file under § 3617. *Id.*

In *Krieman v. Crystal Lake Apartments Ltd. Partnership*,¹⁸⁰ the plaintiffs were long-time tenants of an apartment building. They alleged that Dotti Danca, the new property manager, had engaged in a variety of discriminatory behaviors, including violating § 3604(c) by calling their son “nigger” and “biracial boy.” Citing *Halprin*, the court dismissed the plaintiffs’ § 3604(c) claim. Specifically, the court held that:

[N]one of the statements that are attributed to Danca are statements made in connection with the sale or rental of the property. Danca may have been the housing manager of the apartment complex, and the statements made by Danca about the Kriemans may have been personally offensive, but the record contains no allegation that any of the statements were made in connection to access to housing.¹⁸¹

In *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*,¹⁸² a condominium owner asserted a § 3617 claim against a member of the board of directors for her condo association, whom she accused of physically assaulting her and entering her home without permission. The court found that she failed to state a claim under § 3617 because she could not prove an underlying violation of the substantive portions of the FHA.¹⁸³ In reaching this conclusion, the court, citing *Halprin*, stated that, “[s]ection 3604 relates to discriminatory activities that prevent people from acquiring property. . . . Plaintiff, who owns her condominium, has failed to allege any facts that would bring her complaints within §§ 3603-3606.”¹⁸⁴

*Gourlay v. Forest Lake Estates Civic Ass’n*¹⁸⁵ involved a couple who owned a home and who alleged that their HOA threatened and harassed them, made disparaging public statements about them, and initiated litigation against them because they were foster parents. The court dismissed the couple’s § 3604(b) claim, citing the district court opinion in *Halprin* and stating: “[B]ecause . . . the alleged discriminatory misconduct . . . occurred nearly three years after the Plaintiffs purchased their house and there is no evidence that any discriminatory conduct precluded Plaintiffs’ ownership of a dwelling, this Court concludes that [the defendant] cannot be liable to

¹⁸⁰ No. Civ. A. H-05-C-0348, 2006 WL 1519320 (N.D. Ill. May 31, 2006).

¹⁸¹ *Id.* at *8.

¹⁸² No. 05-3197, 2005 WL 2669480 (S.D. Tex. Oct. 19, 2005).

¹⁸³ As discussed earlier, *Halprin* suggested in dicta that § 3617, by its plain language, requires a plaintiff asserting a § 3617 violation to also allege a violation of an underlying substantive housing right protected by §§ 3603-06. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004). In *Halprin*, however, the court was forced to find otherwise on this point because the defendant did not question the validity of HUD. Reg. 24 CFR § 100.400(c)(2), which indicates that an underlying violation need not be proven. The *Reule* court confuses this holding, claiming to adopt “the Seventh Circuit view that 24 CFR § 100.400(c)(2) is invalid.” *Reule*, 2005 WL 2669480, at *4.

¹⁸⁴ *Reule*, 2005 WL 2669480, at *4.

¹⁸⁵ 276 F. Supp. 2d 1222, 1234 (M.D. Fla. 2003), *order vacated upon settlement*, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003 (No. 8:02CV1955T30TGW)).

Plaintiffs under § 3604(b).” The court similarly denied the plaintiffs’ § 3604(c) claims, because the alleged discriminatory statements were not made “in connection with a sale or rental or potential sale or rental of Plaintiffs’ dwelling.”¹⁸⁶

Claims of discriminatory provision of maintenance and other services also failed in the wake of *Halprin*. In *Farrar v. Eldibany*¹⁸⁷ and *Ross v. Midland Management Co.*,¹⁸⁸ the plaintiffs were black women who rented apartments and accused their landlords of racially motivated failures to provide them with necessary maintenance and services.¹⁸⁹ Both cases were brought under § 3604(b), and both were dismissed based on *Halprin* because the claims did not relate to the acquisition of apartments.¹⁹⁰

Municipal services claims have also fared badly after *Halprin*. Courts relied on the decision in holding that § 3604(b) only covers those services which directly affect a transaction encompassing the sale or rental of a dwelling, regardless of whether the service involved is a traditional city service.¹⁹¹ For example, *Cox v. City of Dallas* involved a municipal services claim brought by black homeowners who alleged that the City knowingly permitted an illegal landfill to operate for decades in their neighborhood. The plaintiffs filed suit against the City under §§ 3604(a) and (b), contending that the landfill diminished the habitability of their homes and prevented them from being able to sell their houses. The district court granted summary judgment to the City. Citing *Halprin*, it held that “[b]ecause Plaintiffs here have not alleged discrimination related to the acquisition of their homes,” they failed to state a claim under § 3604(b).¹⁹² The Fifth Circuit agreed, holding that “[e]ven assuming that the enforcement of zoning laws alleged here is a ‘service,’ . . . § 3604(b) is inapplicable here because the service was not ‘connected’ to the sale or rental of a dwelling”¹⁹³

¹⁸⁶ *Gourlay*, 276 F. Supp. 2d at 1234.

¹⁸⁷ No. 04-C-3371, 2004 WL 2392242 (N.D. Ill. Oct. 15, 2004).

¹⁸⁸ No. 02-C-8190, 2003 WL 21801023 (N.D. Ill. Aug. 1, 2003).

¹⁸⁹ In *Farrar*, the plaintiff alleged that she had been denied heat and hot water. 2004 WL 2392242, at *1. In *Ross*, the plaintiff alleged that her landlord failed to remedy mold accumulation, poor air quality, and unclean water filtration in her unit. 2003 WL 21801023, at *1.

¹⁹⁰ *Farrar*, 2004 WL 2392242, at *4 (“The Seventh Circuit has interpreted § 3604 to prohibit discrimination in services related to the acquisition of housing, not the maintenance of housing.”); *Ross*, 2003 WL 21801023, at *4 (“[B]ecause the Plaintiff did not allege discrimination relating to the acquisition of her apartment, a private right of action under § 3604(b) is unavailable”).

¹⁹¹ See, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 745-47 & n.37 (5th Cir. 2005); *Edwards v. Media Borough Council*, 2006 WL 1147527, at *5-6 (E.D. Pa. Apr. 28, 2006).

¹⁹² *Cox v. City of Dallas*, No. 398-CV-1763, 2004 WL 370242, *8 (N.D. Tex. Feb. 24, 2004).

¹⁹³ *Cox*, 430 F.3d at 745 (5th Cir. 2005). The court tried to temper this holding by allowing that “[t]his is not to say that § 3604(b) applies only if the plaintiff was precluded from finding housing. For example, § 3604(b) may encompass the claim of a current owner or renter for . . . actual or constructive eviction.” *Id.* at 746. As discussed in Section B.1.a, *supra*, this does nothing to extend the reach of § 3604(b). It simply describes additional actions that make housing unavailable, which constitute a violation of § 3604(a).

The *Cox* plaintiffs petitioned the Supreme Court for a writ of certiorari. The question presented was:

Whether black homeowners are denied the protection of an aggrieved persons claim under the Fair Housing Act, 42 U.S.C. § 3604, solely because they already own their homes where they allege their homes have been made ineligible for sale because of the conditions created by the City's racially discriminatory provision of zoning enforcement and other municipal services?¹⁹⁴

The court denied their petition.¹⁹⁵

Not all courts have followed *Halprin's* lead. The first court to issue a decision on the post-acquisition issue after the Seventh Circuit opinion came down was *United States v. Koch*.¹⁹⁶ *Koch* involved sexual harassment claims brought against an Omaha landlord by the Department of Justice on behalf of multiple female tenants and applicants for tenancy. The complaint alleged violations of §§ 3604(a), (b), (c), and § 3617.¹⁹⁷ The *Halprin* decision was issued while the trial was ongoing. At the close of the plaintiffs' case, the defense moved for judgment as a matter of law, arguing that *Halprin* precluded all "post-residence acquisition claims" under the FHA, including those grounded in § 3617. In denying the defendant's motion, the court analyzed and rejected all of Judge Posner's arguments for restricting the application of § 3604(b):

[I]t is the Seventh Circuit's view that Congress sought to allow members of minority groups to acquire housing without facing discrimination but was not concerned with allowing such people to live in that housing without facing discrimination. I do not believe that this interpretation of the scope of the FHA is mandated by the Act's language or its legislative history. On the contrary, a broad interpretation of the FHA that encompasses post-possession acts of discrimination is consistent with the Act's language, its legislative history, and the policy "to provide for fair housing throughout the United States."¹⁹⁸

The following year, in *Richards v. Bono*,¹⁹⁹ another sexual harassment case against a landlord, the court was also presented with a *Halprin*-based

¹⁹⁴ Petition for Writ of Certiorari, *Cox*, 2006 WL 755783, at *i (No. 05-1226 March 23, 2006).

¹⁹⁵ 126 S. Ct. 2039 (2006).

¹⁹⁶ 352 F. Supp. 2d 970, 971 (D. Neb. 2004). The author, while working as a trial attorney for the Department of Justice, Civil Rights Division, Housing and Civil Enforcement Section, was the lead counsel for the plaintiff in this case. She argued against the defendant's *Halprin*-based motion for judgment as a matter of law, discussed herein.

¹⁹⁷ Complaint at 1-3, *United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004) (No. 8:03 CV 406), 2003 WL 23790973.

¹⁹⁸ *Koch*, 352 F. Supp. 2d at 978.

¹⁹⁹ No. 5:04CV484, 2005 WL 1065141 (M.D. Fla. May 2, 2005).

motion to dismiss because of § 3604(b)'s supposed inapplicability to post-acquisition claims. The *Richards* court reached a conclusion similar to that in *Koch*, holding that:

To hold that § 3604(b) does not reach post-acquisition discrimination in the rental context would be inconsistent with the spirit of the Fair Housing Act, contrary to the Act's broad and inclusive language, and at odds with a generous construction of its provisions. It would be anomalous to say, for example, that a landlord is prohibited from refusing to rent a dwelling on the basis of sex (or any other protected classification), but would not be prohibited from raising the rent mid-tenancy because of the sex of the tenant.²⁰⁰

In *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Ass'n, Inc.*,²⁰¹ a religious group comprised of members of an HOA sued the association over a rule that prohibited religious services in the common areas of the property. The court endorsed the basic holding of *Halprin* but found that it could not apply to a "planned community" like the Savanna Club, in which access to particular amenities, such as common areas, is "part and parcel with homeownership."²⁰²

Finally, in *Krieman v. Crystal Lake Apartments Partnership Ltd.*, the court held that a race-based denial of service claim brought under § 3604(b) could continue even though the alleged discrimination happened well after the tenant-plaintiffs had begun renting their apartment.²⁰³ The court acknowledged that *Halprin's* broad holding appeared to foreclose the viability of any post-acquisition § 3604(b) claims, but distinguished the case on the grounds that the *Halprin* court was dealing only with a post-acquisition *harassment* claim. Because the § 3604(b) claim before the *Krieman* court involved a denial of service, the court found that *Halprin* did not apply.²⁰⁴ As discussed above, however, *Krieman* also contained a claim under § 3604(c), which the court denied based on *Halprin* because the statements were not tied to a denial of access to housing.²⁰⁵

²⁰⁰ *Id.* at *3.

²⁰¹ 456 F. Supp. 2d 1223 (S.D. Fla. 2005).

²⁰² *Id.* at 1229.

²⁰³ *Krieman v. Crystal Lake Apartments, Ltd.*, No. 05 C 0348, 2006 WL 1519320, at *6-*7 (N.D. Ill. May 31, 2006). The plaintiffs had been residing in their apartment for more than ten years at the time the alleged discrimination began. *Id.* at *1.

²⁰⁴ *Id.* *Krieman* ultimately granted summary judgment to the defendants on plaintiffs' § 3604(b) claim because the plaintiffs failed to produce evidence that other tenants were treated more favorably. *Id.* at *7.

²⁰⁵ *Id.* at *8.

VI. BETTER POINTS FOR ANALYSIS

In addition to the flaws in reasoning and interpretation discussed above, *Halprin* makes a broad statement about the inapplicability of § 3604 to all post-acquisition claims without acknowledging the different contexts in which housing discrimination can occur. The opinion's conclusions can be — and have been — applied to bar claims by tenants against landlords, homeowners against HOAs, and residents against local governments. However, acquisition, the variable that Judge Posner introduced to the inquiry, means different things in different contexts. Entering into a lease is much different from purchasing a home. Buying a condo that is governed by a condo association or a home in a neighborhood with an HOA is considerably different from buying a dwelling not subject to such an association. The failure of *Halprin*'s broad-brush approach to countenance such differences is in large part what leads to the anomalous and unfortunate results described above. The opinion has been criticized for this failure, both by courts that have rejected its conclusion and by courts that have endorsed it.²⁰⁶

Ideally, Congress would solve the problems *Halprin* has created by clarifying the statutory language. Clearer guidance from HUD in the form of a more carefully-worded interpretive regulation would help as well. In the absence of legislative or administrative action, however, there are a number of remaining options for resolving this difficulty. The courts could keep *Halprin*'s pre-acquisition/post-acquisition framework and attempt to address the context issue. This approach would require courts to range further from the language of the FHA. They would have to develop a doctrine of what it means to “acquire” housing — a term that is neither used nor defined in the statute — and then apply this doctrine to different scenarios.²⁰⁷ This approach would be preferable to the inflexible status quo, but it is still problematic. Neither the language nor the structure of the statute suggests that courts should move in this direction. Moreover, such an approach would conflict with concepts of property law, which is concerned not simply with “acquisition,” but also with the rights and obligations inherent in different forms of ownership.

I propose another way of looking at the issue, one that focuses less on the point of acquisition and more on the identity of the defendant and the relationship between the parties. As the remainder of this section argues, this approach stays truer to the structure, language, and intent of the FHA, is

²⁰⁶ See *Richards v. Bono*, No. 5:04CV484, 2005 WL 1065141, *3-4 (M.D. Fla. May 2, 2005); *Gourlay v. Forest Lakes Civic Ass'n*, 276 F. Supp. 2d 1222, 1230-31 (M.D. Fla. 2003).

²⁰⁷ In essence, the court took this approach in *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005), discussed in the previous section. There, the court adhered to *Halprin*'s basic principles that acquisition is significant to the FHA's application and that post-acquisition claims were not cognizable. Still, it carved out an exception for property located within a “planned community.” *Id.* at 1229.

consistent with a significant body of federal precedent, eliminates the anomalous results of *Halprin*, and comports with property law principles.

A. *The Defendant's Identity and Relationship to Plaintiff*

The approach adopted by *Halprin* treats the “sale or rental” language in § 3604(b) and (c) as a temporal modifier. Specifically, the phrase “sale or rental” is assumed to refer to the time period during which the sale or rental agreement is negotiated and entered into by the parties. The FHA does not define the phrase “sale or rental” at all, much less in this manner.

Properly understood, the terms “sale” and “rental” do serve to limit the reach of the FHA but not in a strictly temporal way. Rather, they narrow the universe of possible defendants under different parts of the statute. Simply put, the term “sale or rental” does not answer the question “when does the law apply?” but rather “to whom does the law apply?”²⁰⁸ This limitation is necessary because unlike Title VII, the FHA does not define who is a proper defendant.²⁰⁹ Instead, it lists “discriminatory housing practices,”²¹⁰ and anyone who is capable of engaging in such practices is a proper defendant.²¹¹ Whether or not a person is capable of committing a particular act depends on the degree of control he or she exercises over another person’s housing situation. In order for a person to be entitled to relief for an FHA violation, she must qualify as an “aggrieved person,” broadly defined as “any person who claims to have been injured by a discriminatory housing practice.”²¹² Thus, any time a violation of the FHA is alleged, the court must determine whether the defendant was capable of committing the particular prohibited act with respect to a particular aggrieved person.

²⁰⁸ Of course, these two questions are not completely distinct. As the next section makes clear, who a potential defendant is with respect to a potential plaintiff may change over time.

²⁰⁹ See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992); SCHWEMM, *supra* note 20 § 12B:1.

²¹⁰ Section 3602(f) defines a “discriminatory housing practice” as a practice made unlawful by §§ 3604, 3605, 3606, or 3617.

²¹¹ See *Schroeder v. De Bertolo*, 879 F. Supp. 173, 177 (D.P.R. 1991); Schwemm and Oliveri, *supra* note 63, at 796 n.127.

²¹² 42 U.S.C. § 3602(i) (2000). It is clear that the aggrieved person need not be the target of the discriminatory practice. All that is required is that she suffer some harm as a result of the practice. Thus, a white tenant in a virtually all-white building can be considered aggrieved by her landlord’s racially restrictive policies, because as a result she suffers the harm of living in a segregated environment. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-10 (1972).

In addition to a private right of action, the FHA provides for government-initiated suits by the Department of Justice and administrative complaints filed by HUD. 42 U.S.C. § 3614(a) (2000) (DOJ suits), § 3610(a)(1)(A)(i) (2000) (Secretary-initiated complaints). In such situations, the government entity is technically the plaintiff. The government entity may proceed without any actual “aggrieved person” in the case and simply seek injunctive relief and civil penalties, or it may seek damages on behalf of any aggrieved persons that can be identified. Further discussion in this article of “proper plaintiffs” refers to aggrieved persons, and therefore this discussion will be limited to privately initiated lawsuits or government enforcement actions taken on behalf of aggrieved persons.

An analysis of the acts prohibited by each subsection illustrates this point. In addition, several courts have addressed the issue of who is a proper defendant under the different substantive provisions of the FHA, and their reasoning invariably looks to the identity of the defendant and the relationship between the parties — not the timing of the discriminatory act — to determine whether or not the discrimination is covered by the FHA.

1. Section 3604(a)

The first two clauses of § 3604(a) prohibit refusing to sell or rent property or refusing to negotiate for the sale or rental of property. Clearly, this is limited to individuals or entities who are in a position to engage in such negotiations or to enter into such agreements. The final “otherwise make unavailable” clause, however, widens the field considerably. Essentially, the final clause means that this subsection can be violated by anyone who is capable of making housing unavailable to someone else. In practice, this person is still likely to be a housing provider (such as a landlord, property developer, or home-seller) or a housing professional (such as a property manager or real estate agent).²¹³ Section 3604(a), however, could also cover a neighbor whose conduct prevents a person from acquiring housing or whose harassment is so severe that it actually or constructively drives a person out of their dwelling.²¹⁴ As one early decision involving conduct by a neighbor pointed out, “[s]ection 3604(a) is not limited to discriminatory practices by actual lessors and vendors of dwellings.”²¹⁵

²¹³ See, e.g., *Mich. Prot. and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) (“Congress’s intent in enacting § 3604(f)(1) was to reach property owners and their agents who directly affect the availability of housing for a disabled individual. However, the scope of § 3604(f)(1) may extend further, to other actors who, though not owners or agents, are in a position directly to deny a member of a protected group housing rights.”); *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1283 (3d Cir. 1993) (“The conduct and decision-making that Congress sought to affect was that of persons in a position to frustrate [housing] choices — primarily, at least, those who own the property of choice and their representatives.”).

²¹⁴ Claims brought under §§ 3604(a) and (f)(1) against neighbors have been recognized in many cases. See, e.g., *Step-by-Step, Inc. v. Lazarus*, 1997 WL 853508, at *1 (M.D. Pa. Oct. 17, 1997); *Martin v. Constance*, 843 F. Supp. 1321, 1323 (E.D. Mo. 1994); *Hogar Agua y Vida en el Desierto v. Suárez*, 829 F. Supp. 19, 20-21 (D.P.R. 1993), *vacated, remanded sub nom. Hogar Agua y Vida en el Desierto v. Suárez-Medina*, 36 F.3d 177 (1st Cir. 1994); *U.S. v. Scott*, 809 F. Supp. 1404, 1405-06 (D. Kan. 1992).

²¹⁵ *Evans v. Tubbe*, 657 F.2d 661, 663 n.3 (5th Cir. 1981) (holding that plaintiff could state claim under § 3604(a) against a neighbor who prevented him from gaining access to his house by blocking road). See also, *Mich. Prot. and Advocacy Serv., Inc.*, 18 F.3d at 344 (6th Cir. 1994) (noting that the scope of § 3604(f)(1) may extend to “actors who, though not owners or agents, are in a position directly to deny a member of a protected group housing rights”); *Growth Horizons, Inc.*, 983 F.2d at 1283 (“The conduct and decision-making that Congress sought to affect [through § 3604(f)(1)] was that of persons in a position to frustrate such choices”).

2. Section 3604(b)

This subsection of the statute prohibits discrimination in the “terms, conditions, or privileges of sale or rental of a dwelling” and in “the provision of services or facilities in connection therewith.” Because the discrimination is tied to the “sale or rental of a dwelling,” the discrimination must necessarily be engaged in by an individual or entity with the ability to control the terms, conditions, privileges, services, or facilities associated with a dwelling. As a result, a proper § 3604(b) defendant is virtually always a housing provider or professional. Barring a unique circumstance, § 3604(b) claims would not apply to neighbors or strangers, who generally have no authority, control, or obligations with respect to the plaintiff’s housing situation.²¹⁶

Several courts have been presented with claims brought under § 3604(b) against defendants who were *not* housing providers or professionals, and all decided that the defendants did not fall under the purview of the statute. For example, in *Clifton Terrace Associates v. United Technologies Corp.*,²¹⁷ a § 3604(b) claim was made against an elevator repair company for refusing to service the elevator in a building whose tenants were all black and/or disabled. The court dismissed the claim, finding:

These subsections [§ 3604(b) and § 3604(f)(2)] are directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or those who otherwise control the provision of housing services and facilities. In the case of rental units, the provision of such services primarily falls under the control of the provider of housing — the owner or manager of the property.²¹⁸

Similarly, in *3004 Albany Crescent Tenants’ Ass’n v. City of New York*,²¹⁹ the court found that a municipal agency that was responsible for conducting housing inspections and enforcing building codes could not be liable under § 3604(b) to tenants who claimed that their housing conditions had deteriorated due to lax code enforcement, because the only people with

²¹⁶ This is not to say that harassment committed by a stranger or a neighbor will never find its way into a § 3604(b) claim. Plaintiffs have successfully asserted § 3604(b) claims against housing providers based on the harassing conduct of a stranger or neighbor, under the theory that the housing provider had an obligation to protect them from this type of conduct, or that the housing provider tolerated and/or ratified the harassment by taking no action to stop it. *See, e.g.,* *Reeves v. Carrollsburg Condo. Unit Owners Ass’n*, No. Civ. A. 96-2495, 1997 WL 1877201, at *7-*8 (D.D.C. Dec. 18, 1997); *Miller v. Towne Oaks East Apts.*, 797 F. Supp. 557, 561 (E.D. Tex. 1992); *cf. Bradley v. Carydale Ent.*, 707 F. Supp. 217, 224 (E.D. Va. 1989) (construing state fair housing law provision identical to § 3604(b)).

²¹⁷ 929 F.2d 714 (D.C. Cir. 1991).

²¹⁸ *Id.* at 720.

²¹⁹ No. 95-Civ.-10662, 1997 WL 225825 (S.D.N.Y. May 5, 1997).

direct control over the conditions were the property owners and managers.²²⁰ In *Puglisi v. Underhill Park Taxpayer Ass'n*,²²¹ a private “citizens’ taxpayers’ organization” threatened a landlord with retaliatory action if he continued to rent to blacks. The court held that the organization was not capable of violating § 3604(b) under these facts, because it was not a landlord, housing provider, or municipal service provider.²²² Finally, in *Steptoe v. Beverly Area Planning Ass'n*,²²³ the court denied a § 3604(b) claim against a nonprofit organization that merely provided a limited amount of housing information to individuals interested in making pro-integrative moves, finding that these activities were “too far removed from transactions in the commercial residential market” to fall under § 3604(b).²²⁴

In *Schroeder v. De Bertolo*,²²⁵ the only pre-*Halprin* case to explicitly address the timing issue in the post-sale context, the court based its reasoning on the relationship between the plaintiff and the defendant condo board:

Because of their duties and responsibilities, members of the [condo] board have the ability to exert indirect control over individual owners in the use of the common areas. Therefore, although defendants were not decedent’s direct housing provider, they were in a position to . . . discriminate against plaintiff in the provision of housing services or facilities.²²⁶

Local governments, who are not themselves providers of housing but who are usually the sole source provider of essential housing-related services are the exception to the general rule limiting § 3604(b) to housing providers or professionals. Cases involving local governments, and the relationship between municipality or county and resident, will be discussed more fully in the next section.

3. Section 3604(c)

Section 3604(c) requires that the discriminatory statement be made “with respect to the sale or rental” of a dwelling. As a practical matter, this clause appears to limit § 3604(c) to statements made by housing providers or professionals who are engaged in the sale or rental of a particular dwelling²²⁷

²²⁰ *Id.* at *4 (“The regulations enumerated in 42 U.S.C. § 3604 apply to those individuals and entities responsible for building, selling, and leasing private accommodations.”).

²²¹ 947 F. Supp. 673 (S.D.N.Y. 1996).

²²² *Id.* at 695.

²²³ 674 F. Supp. 1313 (N.D. Ill. 1987).

²²⁴ *Id.* at 1322.

²²⁵ 879 F. Supp. 173 (D.P.R. 1995) (decided under § 3604(f)). Sections 3604(f) and 3604(b) have similar language and structure and are subject to the same form of analysis. See *supra* note 12 for further discussion of the relationship between the two provisions.

²²⁶ *Schroeder*, 879 F. Supp. at 178.

²²⁷ HUD Regulation 24 C.F.R. § 100.75(b) (2007) construes § 3604(c) to apply to “all written or oral notices or statements by a person engaged in the sale or rental of a dwelling” (emphasis added).

because usually they are the only people capable of making meaningful statements “in connection” with such a sale or rental.²²⁸ This is not to say, however, that one can *only* bring a § 3604(c) claim against housing providers or professionals. The phrase “print, or publish” has long been interpreted to mean that newspapers and other media that carry discriminatory advertisements can also be liable under this provision.²²⁹

Within this general limitation, courts are still likely to take a broad view of who is capable of making actionable statements “in connection with the sale or rental” of housing.²³⁰ For example, in *United States v. Space Hunters, Inc.*,²³¹ a plaintiff brought a § 3604(c) claim against an operator of an apartment locator service. The district court dismissed the claim, finding that § 3604(c) only applied to building owners or their agents who have a direct

²²⁸ Schwemm, *supra* note 63 at 297-300 (arguing that “3604(c) should be interpreted to ban discriminatory statements made not only by housing providers, but by others involved in the sale or rental process,” and concluding that unrelated third-parties who make or pass on discriminatory statements should not be covered if they do not play a role in the housing provider’s decisional process); Schwemm and Oliveri, *supra* note 63, at n.133. Limiting the reach of § 3604(c) in this manner is also necessary to avoid potential First Amendment problems. See *White v. Lee*, 227 F.3d 1214, 1232-37 (9th Cir. 2000).

²²⁹ See, e.g., *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003-05 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972). The point is that the discriminatory “statements” are those of the housing provider or professional taking out the ad, not the newspaper itself.

²³⁰ Courts are also likely to take a broad view of who can properly raise a claim under § 3604(c) and usually do not limit the class of aggrieved persons to individuals who were engaged in a particular housing transaction when they were exposed to discriminatory statements. This is because § 3604(c) seeks to prevent both the harm that occurs when a specific person is exposed to discriminatory housing-related statements and the harm that occurs at a societal level when such statements are published. The societal harm has been described as having two principle components: (1) discriminatory statements might perpetuate the notion that housing discrimination is acceptable; and (2) segregated living patterns will be reinforced because minority group members will come to understand that they can expect discrimination if they attempt to move into white areas. *Hunter*, 459 F.2d at 214. Thus, courts have found landlords liable for discriminatory statements made to, about, or within earshot of applicants or current tenants, even when the person who hears the statement is not the target of the discriminatory animus and even when no specific housing transaction is pending. *Ragin v. Harry Macklowe Real Estate*, 6 F.3d 898, 903-04 (2d Cir. 1993) (finding liability where black plaintiffs were aggrieved by discriminatory housing advertisements that they had seen in the newspaper, despite the fact that none were actively looking for housing when they read the defendant’s ads); *Fair Hous. of Marin v. Combs*, No. C 97-1247, 2000 WL 365029, at *2-3 (N.D. Cal. Mar. 29, 2000) (holding that landlord’s statement to white current tenants that he was happy to have an all-white building and did not wish to rent to blacks violated § 3604(c)); *HUD v. Ro*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,106 (HUD ALJ 1995) (finding black social worker aggrieved by property owner’s racist statement, even though she was not at the property to seek housing for herself but for a white client); *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,078, 25,726 (HUD ALJ 1994) (holding landlord’s racist statements to black tenant were covered by § 3604(c), despite the fact that they were not made in the context of seeking a renter); *HUD v. Tucker*, Fair Housing–Fair Lending Rep. (Aspen) ¶ 25,033 (HUD ALJ 1992) (holding that property manager’s racist statements about tenant to tenant’s boyfriend and co-workers violated § 3604(c)); cf. *Harris v. Itzhaki*, 183 F.3d 1043, 1050 (9th Cir. 1999) (stating racist comment by landlord’s agent to white tenant, overheard by black tenant, may be covered by § 3604(c)).

²³¹ No. 00-Civ.-1781, 2001 WL 968993 (S.D.N.Y. Aug. 24, 2001), *rev’d. in relevant part*, 429 F.3d 416, 424 (2d Cir. 2005).

influence on the disposition of a particular piece of property.²³² The Second Circuit reversed, noting that “[n]othing in [3604(c)’s] language limits the statute’s reach to owners or agents or to statements that directly affect a housing transaction.”²³³

There are limits to how far courts are willing to extend § 3604(c). General statements of racist beliefs that are neither made in connection with a housing transaction nor heard by a current or potential purchaser or tenant are usually found to be outside of the coverage of § 3604(c).²³⁴

4. Section 3617

Section 3617 does not require that the prohibited conduct — interference, coercion, and intimidation — be exhibited in connection with the sale or rental of housing. Rather, it requires that the interfering activity be undertaken because the victim is exercising or enjoying fair housing rights or has helped another to do so. Section 3617 can therefore be applied against a defendant regardless of whether she is a housing provider or complete stranger. For example, in *People Helpers v. City of Richmond*,²³⁵ the court noted that § 3617 “specifically prohibits unrelated third parties from interfering with anyone who is attempting to aid others protected under the Act from obtaining housing of their choice.”²³⁶

In sum, § 3604(b) and (c) contain a requirement that the prohibited conduct be made in connection with the “sale or rental” of housing. As a practical matter, this usually means that under these subsections proper defendants

²³² *Id.* at *1.

²³³ *Space Hunters, Inc.*, 429 F.3d at 424. Other courts have struggled with whether a Recorder of Deeds is sufficiently connected to a sale transaction to be covered by § 3604(c) for the act of recording a deed that contains a (non-enforceable) racially restrictive covenant. Compare *Woodward v. Bowers*, 630 F. Supp. 1205, 1208-09 (M.D. Pa. 1986) (holding that a recorder is not engaged in the sale or rental of housing, and so is not covered by § 3604(c)) with *Mayers v. Ridley*, 465 F.2d 630, 649 (D.C. Cir. 1972) (stating that “[w]hile it may be strictly correct to say the Recorder himself does not do any selling or renting, he is involved in the commercial real estate market”).

²³⁴ See *United States v. Northside Realty Assocs.*, 474 F.2d 1164, 1169-71 (5th Cir. 1973) (finding it improper to find liability based on the fact that defendant stated in court proceedings that he believed the FHA was unconstitutional); *Wainwright v. Allen*, 461 F. Supp. 293, 298 (D.N.D. 1978) (holding landlord’s racist statement to HUD investigator did not violate § 3604(c)); *United States v. Real Estate One*, 433 F. Supp. 1140, 1154 & n.8 (E.D. Mich. 1977) (stating that racist remark made by one real estate salesperson to another does not violate the FHA where no transaction, salesperson, seller, or buyer was influenced by it).

²³⁵ 789 F. Supp. 725 (E.D. Va. 1992).

²³⁶ *Id.* at 731. See also *Puglisi v. Underhill Taxpayer Ass’n*, 947 F. Supp. 673, 696 (S.D.N.Y. 1996) (recognizing that § 3617 extends beyond the activities of housing providers). There are numerous cases in which courts apply § 3617 to non-housing providers without specifically addressing the relationship issue. See *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991); *Evans v. Tubbe*, 657 F.2d 661, 663 & n.3 (5th Cir. 1981); *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238 (E.D.N.Y. 1998); *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989); *Seaphus v. Lilly*, 691 F. Supp. 127 (N.D. Ill. 1988); *Waheed v. Kalafut*, No. 86 C6674, 1988 WL 9092 (N.D. Ill. Feb. 2, 1988); *Stackhouse v. DeSitter*, 620 F. Supp. 208 (N.D. Ill. 1985).

are housing providers or professionals and that proper plaintiffs are tenants or occupants of or applicants for housing. Section 3604(c) will also apply to statements made by individuals who are engaged in the sale or rental of housing even when the statements are not read or heard by actual or prospective buyers or renters. In contrast, § 3604(a) and § 3617 contain no such limiting language and can therefore be violated by anyone capable of making housing unavailable or interfering with housing rights or enjoyment.

B. *Temporal Aspects of Defendant's Identity*

Timing does enter into the “sale or rental” equation but only insofar as it relates to the identity of the defendant with respect to the aggrieved person at a particular time.²³⁷ Thus, whether or not the aggrieved person has “acquired” property may be relevant to whether a housing relationship continues to exist between the parties such that the defendant remains capable of violating §§ 3604(b) or (c) with respect to the aggrieved person. The significance of acquisition, however, will depend on the type of transaction involved. The court recognized this concept in *Richards v. Bono*:

This Court finds the distinction between sale and rental to be crucial. A sale of real property is a singular event, something concluded at a determinable point in time. . . . Unlike a sale, a rental arrangement involves an ongoing relationship between the landlord and tenant in which the landlord typically retains various powers, such as the right to increase rent or evict a tenant, and concomitant obligations, such as the duty to make repairs or provide other services and facilities. These powers and obligations exist over the duration of the rental.²³⁸

The *Richards* court's analysis makes intuitive sense, and provides a useful place to begin an examination of the temporal aspects of the most common housing relationships — landlord/tenant, seller/buyer, and neighbor/neighbor. The hallmark of any legally recognized housing relationship is that each party has enforceable rights and obligations with respect to the other.²³⁹ As a result, one party maintains some degree of control or power over the other party's housing for the duration of the relationship.

The landlord-tenant relationship begins when the tenant obtains a present right to possession and lasts for either a fixed or computable amount of

²³⁷ See Schwemm, *supra* note 63 at n.363 (observing that § 3604(c)'s phrase “with respect to the sale or rental of housing” implies a “time-and-place element” as well as a “type of person” limitation).

²³⁸ *Richards v. Bono*, No. 5:04CV484, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005).

²³⁹ These rights and obligations may originate from property law, contract law, or the law of servitudes.

time, according to a lease.²⁴⁰ The tenancy can also be periodic, meaning that it endures from period to period (such as month-to-month) until one of the parties gives notice to terminate.²⁴¹ During this period, the landlord retains many rights to control the property. For example, a landlord typically exercises power that includes that ability to evict, to enter the unit under certain circumstances, to control who occupies the unit, to dictate whether the tenant can have pets, and to control whether the tenant can have particular items (such as waterbeds) or engage in particular activities (such as smoking) in the unit.²⁴² As a result, the landlord can alter the terms, conditions, and privileges of the relationship at any time through harassment, by imposing discriminatory policies, or by enforcing facially neutral rules in a discriminatory way. Similarly, the landlord can affect the services and facilities of the rental at any time by refusing to provide maintenance. Finally, a landlord's discriminatory statements to or about his tenants have a powerful effect, even if they do not directly involve the initial rental transaction. Such statements communicate that minority group members are unwanted and that discrimination against them is acceptable. Thus, a landlord's harassment of or discrimination against her current tenants falls squarely under §§ 3604(b) and (c). Once the relationship has ended, however, it is difficult to imagine how the landlord would be capable of violating these subsections with respect to a former tenant.²⁴³

The relationship between a seller and a potential buyer begins when the parties commence negotiating the sale and ends when the sale is consummated. During the negotiation period, the seller maintains a high degree of control over the terms and conditions of the housing. Similarly, the seller's statements about the transaction would obviously be considered to be made "in connection with the sale or rental of a dwelling." Thus, the seller is capable of violating both §§ 3604(b) and (c) during this time period. Once the sale is completed, however, the relationship — and therefore the seller's ability to discriminate against the buyer in the terms and conditions of the housing or to make discriminatory housing-related statements to the buyer — typically ends. It is difficult to imagine a scenario in which the seller would be in a position to engage in this sort of discrimination post-sale. The only realistic scenario would be if the seller were to harass the buyer after the sale was consummated. Even then, unless there was some type of ongoing relationship between the seller and the buyer, the harassment would

²⁴⁰ RESTATEMENT (SECOND) OF PROPERTY: LANDLORD TENANT §§ 1.2, 1.4 (1977). The vast majority of residential landlord-tenant agreements are subject to a lease, either periodic or determinate, and are not tenancies at will.

²⁴¹ *Id.* § 1.5.

²⁴² *Id.* § 16.1 (stating that obligations between landlord and tenant, when based on promises made in lease, continue after the possessory right is transferred).

²⁴³ In contrast, a landlord can violate § 3617 with respect to a former tenant by, for example, retaining her security deposit in retaliation for her filing of a HUD complaint against him.

no longer be related to the seller-purchaser relationship.²⁴⁴ In the absence of any agreement creating a continuing relationship between the two, such harassment would look more like neighbor or stranger harassment. Thus, in all but the rarest of circumstances, claims of post-sale discrimination against a seller would not be covered by §§ 3604(b) or (c), not because the discrimination takes place post-sale *per se*, but because a post-sale seller will almost never be in a position to discriminate against the buyer in ways that violate these subsections.

Finally, there is the relationship between a housing resident and individuals who are not housing providers or professionals. These individuals can be neighbors or total strangers.²⁴⁵ There is no legal housing relationship here, although the informal relationship that exists between neighbors by virtue of their proximity may be ongoing. Assuming there is no HOA or COA involved, one neighbor has no control over the sale or rental of another neighbor's dwelling. Thus, one neighbor is usually legally incapable of discriminating with respect to the terms, conditions, and privileges of the sale or rental of another neighbor's dwelling or any services or facilities in connection therewith, and § 3604(b) could not apply. Similarly, a neighbor is usually incapable of making statements that are sufficiently connected to the sale or rental of housing in order to trigger § 3604(c).²⁴⁶

A chart of fair housing defendants according to their relationship to the plaintiff, the degree of control over the plaintiff's housing situation they exercise within this relationship, and the duration of the relationship, follows:

²⁴⁴ The author could find only one example of a post-sale harassment claim brought by a buyer against the seller, and that claim was brought under § 3617 rather than § 3604(b). *See* *Zhu v. Countrywide Realty, Co., Inc.*, 165 F. Supp. 2d 1181, 1195-99 (D. Kan. 2001), discussed *supra* note 77.

²⁴⁵ For the purposes of this discussion, I will refer to this type of defendant as a "neighbor," although it could be anyone.

²⁴⁶ If one neighbor harasses the other, however, § 3617 could apply, and if the conduct is severe enough to deprive the victim of housing, then the neighbor has also violated § 3604(a).

RELATIONSHIP OF DEFENDANT TO PLAINTIFF	DEGREE OF CONTROL OVER HOUSING	DURATION OF RELATIONSHIP	FHA PROVISION CAPABLE OF VIOLATING
Landlord – Tenant	High	For the length of tenancy	*Before and during tenancy: §§ 3604(a), (b), (c), 3617 *After tenancy: see stranger or neighbor
Seller – Buyer	High	Until sale transaction is completed	*Prior to sale: §§ 3604(a),(b),(c), 3617 *After sale: see stranger or neighbor
Stranger or Neighbor – Resident	None	None	§ 3604(a) and § 3617, but only for acts that deprive a person of housing, or interfere with that person's housing

Using this matrix, we can predict, for example, that a discriminatory act taken by a landlord (high degree of control) against an existing tenant (ongoing relationship) should be reached by §§ 3604(b) and (c). Similarly, a discriminatory act by a seller against a buyer will be covered but only if that act occurs before the sale transaction is completed. A stranger, on the other hand, has no legally recognized relationship to a particular homeowner or tenant and, therefore, cannot discriminate in the terms and conditions of housing in violation of § 3604(b) or make discriminatory statements sufficiently related to the sale or rental of housing to violate § 3604(c).

To a large extent, this scheme reflects what most courts and practitioners have done all along, even if they seldom cast the issue in these specific terms. Most pre-*Halprin* claims of stranger or neighbor-on-neighbor harassment were brought under § 3617 alone,²⁴⁷ and most claims of landlord-tenant discrimination or harassment were brought under §§ 3604(b) and (c), as well as § 3617.²⁴⁸ The few cases to address the relationship issue, as discussed above, all concluded that § 3604(b) requires some existing housing

²⁴⁷ If the conduct results in a denial of housing, such cases will typically also contain a § 3604(a) claim.

²⁴⁸ In *King v. Metcalf 56 Homes Ass'n, Inc.*, for example, the court correctly allowed the plaintiff to re-file her claim under § 3617. No. 04-2192, 2004 WL 2538379, at *3 (D. Kan. Nov. 8, 2004). The § 3617 claim subsequently survived a motion to dismiss. *King v. Metcalf 56 Homes Ass'n, Inc.*, No. 04-2192, 2005 WL 767490, at *1 (D. Kan. April 5, 2005), and won a motion for summary judgment, *King v. Metcalf 56 Homes Ass'n, Inc.*, No. 04-2192, 385 F. Supp. 2d 1137, 1142 (D. Kan. 2005).

relationship between the defendant and the plaintiff. And as discussed in Section II, the few pre-*Halprin* decisions to address the timing issue almost all rejected the notion that § 3604(b) and/or (c) should be limited to pre-acquisition scenarios. It would seem, therefore, that most courts and advocates had the same understanding of the way the statute should operate and rarely questioned this perspective.

By viewing the issue solely in terms of acquisition, *Halprin* added a clumsy and ultimately unworkable element to the analysis that failed to account for the different relational contexts that most courts seem to understand implicitly. It is no coincidence that three of the four cases thus far to repudiate *Halprin* — *United States v. Koch*, *Richards v. Bono*, and (in part) *Kreiman v. Crystal Lake* — are rental cases. Because the landlord-tenant relationship comes into existence after the tenant obtains a possessory right to the property and because landlords retain a significant ability to control the terms and conditions of their tenants' housing for as long as the relationship exists, failure to allow §§ 3604(b) and (c) to apply here leads to anomalous results.

C. Local Governments and Property Owners Associations

While providing a useful starting point, the *Richards* court's binary categorization of housing relationships — as either "sale" (no on-going relationship) or "rental" (on-going relationship) — is ultimately too limited. There are two other types of housing relationships that must be addressed: (1) the relationship between a municipality (or other unit of local government)²⁴⁹ and one of its citizens and (2) the relationship between a homeowners' association (HOA) or condominium owners' association (COA) and its residents. These do not fit neatly into the binary view of property relationships as either rentals or sales, and because each involves an ongoing relationship, they do not fit at all into Judge Posner's temporal view in which the only significant marker is the point of acquisition. Perhaps as a result, they have been the most confounding to the courts: *Halprin* and six out of the nine cases that followed it involved defendants who were either municipalities, HOAs, or COAs.²⁵⁰

²⁴⁹ There are many types of local governmental units reflecting different levels of population density, manner of formation, and ability to exercise power delegated by the state. Generally, the two main categories of local governments are municipalities which include towns, cities, villages, and counties. Different regions of the country organize their local governments into more unusual political subdivisions, such as boroughs or parishes. For simplicity, this Article will refer to all such governmental units as either "municipalities" or "local governments."

²⁵⁰ The only HOA case that refused or in which the court refused to apply *Halprin* was *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Ass'n, Inc.*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005). As discussed in Section IV and note 207, the *Savanna* court endorsed the basic holding of *Halprin* but found this holding unworkable in the specific context of a planned community in which access to particular amenities is part of a resident's rights as a homeowner.

The remainder of this Section will apply the framework I have articulated — analyzing the housing relationship in terms of degree of control and duration of relationship — to municipalities, HOA, and COAs. The results make clear that §§ 3604(b) and (c) should cover both of these entities in most situations. The Section concludes with a discussion of the history of housing discrimination by municipalities, HOA, and COAs, which underscores the importance of ensuring that all parts of the FHA include these entities.

1. *The Housing Relationship: Duration and Level of Control*

Municipalities can act as housing providers, usually through the operation of housing authorities. In these situations, the municipality assumes the functions of a landlord. Even when a municipality is not acting as a housing provider, however, it has a housing relationship with each citizen, lasting as long as the citizen resides within the municipality. The municipality usually provides housing-related services such as utilities, engages in zoning relevant to residential property, levies taxes on such property, and enforces property maintenance codes. Thus, municipalities are in a unique position to affect the terms and conditions of housing for their residents and to make statements in connection with the sale or rental of housing, despite the fact that they are not acting as housing providers. In *Clifton Terrace Ass'n, Ltd. v. United Technologies Corp.*, the court articulated a “sole source provider” theory for explaining municipal liability under the FHA where the municipality is not a housing provider:

Like public utilities, municipalities often are the sole source of a service essential to the habitability of a dwelling. In the case of such an absolute monopoly, ultimate control over the service in question resides with the municipality or utility rather than with the provider of housing, and such a “sole source” could conceivably violate the [§ 3604(b)] rights of the tenants without any intermediary action by the landlord.²⁵¹

Although significant, this level of involvement is not as comprehensive as that of a landlord. While a municipality may have a dramatic impact on the terms and conditions of the housing of one of its citizens — for example, by allowing a toxic waste dump to locate next door or by disconnecting the house from the main sewer line — a municipality lacks the sort of day-to-

²⁵¹ 929 F.2d 714, 720 (D.C. Cir. 1991) (distinguishing “sole source” municipal service providers from private service contractors). This is similar to the common law tradition of fairness in the provision of services identified by Charles Haar and Daniel Fessler. See CHARLES HAAR & DANIEL FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986). This doctrine, which they trace through centuries of Anglo-American law, stands for the principle that “enterprises providing functions and services that are essential and public in character have a common law duty to serve — a positive obligation to provide all members of the public with equal, adequate and nondiscriminatory access.” *Id.* at 15.

day control over the housing that a landlord maintains, and many of a municipality's actions have little direct connection to the housing of its residents.

In contrast, the HOA or COA and the home or condominium owner have an ongoing relationship with many housing-related rights and responsibilities. There are a few basic types of common interest housing relationships, each of which is structured differently, creating a different set of rights and obligations between the associational entity and the owner.

HOAs are set up to govern a territorially defined area, such as a subdivision or planned community. The owner holds title to a unit on a lot, typically a free-standing house, and the HOA holds title to the common areas in the community, which owners have a right to use. COAs are similar in most relevant respects to HOAs, except that the owner usually purchases a unit in a building, as well as an undivided common interest in the common elements, such as the building exteriors, grounds, utilities, and recreational facilities. A housing cooperative, most commonly found in New York City, is a stock corporation.²⁵² The cooperative holds title to a building, and leases units to tenant-shareholders. Each shareholder pays a pro-rata share of the collective mortgage that financed the original building purchase. Thus, each tenant-shareholder has a financial interest in the corporate entity that owns the building and the capacity to build equity but lacks ownership rights with respect to her individual unit. Because HOAs and COAs are the most common forms of common interest housing, I will focus the rest of this discussion on them and will refer to them collectively as property owners' associations (POAs).

POA residents are subject to a great many rules and regulations. POAs are created by, and intended to enforce, a set of covenants, conditions, and restrictions (CC&Rs), considered legally binding on all present and future owners of the property.²⁵³ There are also bylaws associated with most common interest housing developments. The bylaws and CC&Rs are generally written by the property developer and are extremely difficult to change.²⁵⁴ POAs are administered by an elected Board, which has the authority to pass additional rules.²⁵⁵ The Board can assess dues to pay for general services for residents, such as maintenance of common areas, snow removal, lawn-care,

²⁵² See Rosemarie Maldonado & Robert Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community Based Living?*, 23 *FORDHAM URB. L.J.* 1245, 1251 (1996).

²⁵³ The principle that common interest housing CC&Rs "touch and concern" the land, and therefore can bind all subsequent purchasers was established in the early part of the twentieth century. See, e.g., *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 797 (N.Y. Ct. App. 1938); *Sanborn v. McLean*, 206 N.W. 496, 497 (Mich. 1925). For co-ops, these regulations are typically contained in the articles of incorporation.

²⁵⁴ *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* §6.10 (2000); EVAN MCKENZIE, *PRIVATOPIA* 127 (1994).

²⁵⁵ *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* §6.7 (2000).

road maintenance, and security.²⁵⁶ The POA is charged with managing common property.²⁵⁷ These common areas are a significant benefit to residents, who typically could not afford the open space or amenities such as golf courses, play grounds, and swimming pools on their own. If a member fails to pay dues or comply with the various rules, the POA can levy fines, sue for compliance, restrict access to amenities or common areas, or put a lien on the property and force a sale.²⁵⁸

Common interest housing relationships, while technically occurring because a sale has taken place, look quite different from the traditional “fee simple” model of homeownership.²⁵⁹ In a common interest development, everyone who buys a unit is automatically subject to the authority of the POA and the governing Board and required to comply with multiple sets of rules and regulations. As the Restatement of Property: Servitudes observes, “[t]hrough their control of maintenance and assessment levels, rulemaking powers, and enforcement efforts, community associations often have substantial power to affect both the quality of life and financial health of their members.”²⁶⁰ POAs can exercise detailed and rigid controls over their residents, limiting their use of common areas, regulating the interiors of their units, and even dictating their behaviors.²⁶¹ Board members are advised to be

²⁵⁶ *Id.* §6.5.

²⁵⁷ *Id.* §6.6.

²⁵⁸ *Id.* §6.8; see also, Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 *FORDHAM L. REV.* 2503, 2515-16 (2004); Michael C. Kim, *Involuntary Sale: Banishing an Owner From the Condominium Community*, 31 *J. MARSHALL L. REV.* 429, 432 (1998).

²⁵⁹ JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY*, 139 (Foundation Press 1989) (describing condominiums as a “useful legal tool” that creates housing somewhere between the traditional house owned in fee simple and the traditional rental, creating an intermediate housing option); RICHARD LOUV, *AMERICA II* 76-78 (JEREMY P. TARCHER 1983); Maldonado & Rose, *supra* note 252, at 1251 (“[T]he shareholder interest in a housing cooperative does not fit neatly into traditional categories of property ownership.”); Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 *PEPP. L. REV.* 1, 19-20 (1995) (“[Homeowner’s] organizations exert considerable influence over the bundle of rights normally considered integral to homeownership.”).

²⁶⁰ *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* at 67-68 (2000).

²⁶¹ Instances of extremely exacting and petty rule enforcement abound. For example, a POA ordered one Florida couple to stop entering and exiting their unit through the back door, because they were wearing down part of their lawn. MCKENZIE, *supra* note 254 at 16. Another POA in California regulated the color of the curtains people could hang in their windows, and yet another forbade residents from parking non-commercial pick-up trucks in their own carports. *Id.* at 14. Also in California, a POA posted notices throughout the complex accusing a resident of “parking in circular driveway kissing and doing bad things for over 1 hour.” The resident was threatened with fines if she did it again. *Id.* at 17-18. A POA in California tried to regulate the housekeeping of an elderly, cancer-stricken resident by ordering him to throw away “outdated clothing,” and to stop keeping books and papers on his bed. The POA did tell the resident he could keep “approved reading materials” on a bookshelf in his home. *Fountain Valley Chateau Blanc Homeowner’s Ass’n. v. Dep’t of Veterans Affairs*, 79 *Cal. Rptr. 2d* 248, 252 (*Cal. Ct. App.* 1998). A Texas POA sued a homeowner couple for not moving their cars from their driveway frequently enough (a covenant required that cars be moved every 48 hours). *Sobsey v. Shannon Forest Homeowners Ass’n*, No. 01-96-00206, 1997 WL 381387, at *2 (*Tex. App.* July 10, 1997). See generally Christopher Conte, *Boss Thy Neighbor*, *Gov-*

aggressive and inflexible in their enforcement of the CC&Rs because any leniency could be construed as a waiver and any relaxation of standards could reduce the property values of everyone who lives there.²⁶² Most boards also have the right to enter individual property if deemed appropriate and necessary.²⁶³

POAs are much more analogous to landlords than to home-sellers because of their on-going relationship with and significant degree of control over the occupants.²⁶⁴ Because of their governance structures and the types of services these entities — particularly HOAs in large developments — provide, they also function like local governments.²⁶⁵ In POA cases, it makes little sense to strictly interpret “sale” as referring only to the period of time during which the sale is negotiated and the contract signed because the contract for sale is really two contracts: one binding the buyer to the seller, obligating the buyer to pay the purchase price for the dwelling, and the other binding the buyer and the POA, obligating the buyer to abide by the Association’s CC&Rs, bylaws, and rules. While the former contract is complete once the deed and payment have changed hands, the latter remains in force indefinitely, until the property owner moves out.²⁶⁶

ERNING, April 2001, at 38; Laura Castro Trognitz, ‘Yes, It’s My Castle,’ 86 ABA J. 30, June, 2000, at 30 (both discussing overreaching by POAs).

²⁶² MCKENZIE, *supra* note 254, at 131.

²⁶³ *Id.* at 142.

²⁶⁴ See, e.g., Krieman v. Crystal Lake Apts., Ltd., No. 05-C0348, 2006 WL 1519320, at *5 n.2 (N.D. Ill. May 31, 2006) (“[W]hile the *Halprin* plaintiffs alleged discrimination by a homeowners’ association, the position of power held by an association in relation to the owners bears strong similarity to the power wielded by a rental housing manager over a renter.”); Schroeder v. De Bertolo, 879 F. Supp. 173, 178 (D.P.R. 1995) (“Because of their duties and responsibilities, members of the [defendant condominium] board have the ability to exert indirect control over individual owners in their use of common areas. Therefore, although defendants were not [plaintiff’s] direct housing provider, they were in a position . . . to discriminate against plaintiff in the provision of housing services or facilities.”); cf., Frances T. v. Village Green Owners Ass’n, 42 Cal.3d 490, 499 (Cal. 1986) (“The Association is, for all practical purposes, the Project’s ‘landlord’” with respect to tort liability.”). See generally, John M. Payne, *From the Courts: The Condominium as Landlord – Determining Tort Liability*, 15 REAL EST. L.J. 365 (1987).

²⁶⁵ There has been a great deal of scholarship on the issue of whether POAs should be considered “private governments,” state actors, or private contractual housing entities. See, e.g., Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982); Cayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994); Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41 (1990); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call”*, 30 VAL. U. L. REV. 509 (1996); Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322 (2001). This Article does not seek to resolve — or even to weigh in — on this question. Rather, the existence of such a vigorous debate indicates that there is merit in viewing POAs as analogous both to private landlords and to governmental entities.

²⁶⁶ This is particularly so because the very existence of the POA is created by a deed restriction which runs with the land and is therefore an integral and immutable part of the sale. Simply put, one condition of sale is that the buyer be willing to submit to the authority of the POA, for as long as she lives in the home.

POAs therefore have a unique ability to discriminate against owners after they purchase their homes, through harassment, by refusing to allow access to common areas and amenities, by adopting discriminatory rules or implementing rules in a discriminatory manner, or by making discriminatory statements. Commentators have warned about the potential for discrimination in the POA-resident relationship and the need for the law to address this context. Stewart Sterk cautions that, “[a]s community association law develops, judicial protection against abuses of minorities should increasingly reflect the particular institutional setting that surrounds community association decisions.”²⁶⁷

Any discriminatory conduct by the POA or Board acting as an entity, or by individual officials thereof, should be considered related to the “sale” of the property and, thus, should be covered by §§ 3604(b) and (c). Adopting this reasoning, in *Savanna Club*,²⁶⁸ the court allowed residents of a community governed by an HOA to proceed with a § 3604(b) claim against the HOA even though all of the plaintiffs already owned their homes. The court looked to the context in which the claim arose — homeowners in a common interest housing community were claiming that the HOA had denied them use of common areas — and found *Halprin’s* acquisition framework inapplicable:

Inherent in [the] relationship [between POAs and residents] is the concept that certain “provision of services” are associated with home ownership within these types of communities as contemplated by the HUD Regulation [C.F.R. § 100.65(b)(4)], and so complete deprivation of these services, even post-acquisition, would be addressable under the FHA.²⁶⁹

Adding local government and POA defendants into the chart set forth earlier would change the chart as follows:

²⁶⁷ Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 341 (1997).

²⁶⁸ *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Ass’n, Inc.*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005).

²⁶⁹ *Id.* at 1231.

RELATIONSHIP OF DEFENDANT TO PLAINTIFF	DEGREE OF CONTROL OVER HOUSING	DURATION OF RELATIONSHIP	FHA PROVISION CAPABLE OF VIOLATING
Landlord – Tenant	High	For the length of tenancy	*Before and during tenancy: §§ 3604(a), (b), (c), 3617 *After tenancy: see stranger or neighbor
POA – Owner	Significant to moderate	For the length of ownership	Prior to sale and during ownership: §§ 3604(a), (b), (c), 3617
Local Government – Citizen	Moderate to low	For the length of residence	Prior to and during residence: §§ 3604(a), (b), (c), 3617
Seller – Buyer	High	Until sale transaction is completed	*Prior to sale: §§ 3604(a), (b), (c), 3617 *After sale: see stranger or neighbor
Stranger or Neighbor – Resident	None	None	§ 3604(a) and § 3617, but only for acts that deprive a person of housing or interfere with that person’s housing

Thus, as with landlord-tenant relationships, most discriminatory acts and statements by POAs against current property owners should be covered by §§ 3604(b) and (c). Whether a discriminatory act by a local government against a citizen is covered will depend upon the level of impact the act has on the plaintiff’s housing. Under this analysis, *Halprin*, *Gourlay*, *Lawrence*, *King*, and *Ruele* would have been decided differently, at least with respect to the plaintiff’s ability to state a claim. The outcome of *Cox* would be thrown into question and would have ultimately come down to the degree of control that the local government exercised over the plaintiff’s housing — that is, whether the enforcement of zoning laws that affect habitability should be considered a “housing related service.”

2. *History of Housing Discrimination by Local Governments and Property Owners' Associations*

Applying the analysis in this manner ensures that local governments and POAs, both of which have the opportunity to significantly affect the housing situations of current occupants, are governed by all sections of the Fair Housing Act. This is particularly important in light of the prevalence of these housing relationships and their discriminatory history.

a. *Common Interest Housing and Property Owners' Associations*

Common interest housing developments, which include condominiums, co-operatives, and properties governed by HOAs, have expanded exponentially in the last forty years. There were fewer than 500 such developments in 1964.²⁷⁰ By 1970, two years after the passage of the Fair Housing Act, there were 10,000.²⁷¹ As of 2006, there were 286,000 developments, encompassing 23.1 million housing units, with 57 million residents.²⁷² In many rapidly developing areas, particularly those in the West, nearly all new residential developments are under the jurisdiction of POAs. The trend shows no signs of slowing.²⁷³

In the early part of the Twentieth century, common interest housing schemes (and the POAs that went with them) were created, in large part, to prevent racial, religious, and ethnic minorities from moving into white neighborhoods by enforcing racially restrictive covenants.²⁷⁴ It was an understood phenomenon that the introduction of even a few black families to an all-white neighborhood would cause home prices to fall. The whites who lived in the neighborhood would view their own properties as rapidly losing value. The “panic selling” that followed would cause property values to decline even more. This self-fulfilling cycle was well-known to real estate professionals and developers. Although some sought to exploit and profit

²⁷⁰ MCKENZIE, *supra* note 254, at 11.

²⁷¹ Community Associations Institute (CAI), Industry Data, <http://www.caionline.org/about/facts.cfm> (last visited October 21, 2007).

²⁷² *Id.*

²⁷³ See Patrick J. Rohan, *Preparing Community Associations for the Twenty-first Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 5-9 (1999) (“[T]he age of detached, single-family homes and rental apartments is fast drawing to a close and is being replaced by community association living in one form or another.”).

²⁷⁴ MASSEY & DENTON, *supra* note 150 at 36 (“One of the most important functions of the neighborhood associations . . . was to implement restrictive covenants.”); MCKENZIE, *supra* note 254 at 58. One of the first POAs, established in 1922 in Los Angeles, was called the Anti-African Housing Association; it is now called the University District Property Owners' Association. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 391 (2005). Another early POA, Louisburg Square on Boston's Beacon Hill, excluded “Negroes, Irish [and] Mongolians”. See David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766 n.33 (1995).

from this phenomenon,²⁷⁵ others sought to create mechanisms that would guarantee to buyers that their home values would never decline because of the introduction of minorities to the neighborhood.²⁷⁶ As a result, restrictive covenants were drafted and endorsed by the real estate industry.²⁷⁷ Developers incorporated these covenants into their CC&Rs and created POAs to enforce them, and then used these covenants as marketing tools to assure buyers that their property values would remain stable.

Covenants also appeared in older neighborhoods that bordered on black-occupied areas. In those situations, real estate professionals helped form “neighborhood improvement associations,” “civic clubs,” and other types of POAs with the express purpose of keeping property values stable by keeping minorities out. The real estate industry actively encouraged such associations and drafted and promoted the racially restrictive covenants they were to enforce.²⁷⁸ These associations also occasionally used other more violent means of discouraging blacks from moving into the neighborhood and encouraging those who had already “encroached” to relocate.²⁷⁹

After the Supreme Court ruled in 1948 that racially restrictive covenants were not legally enforceable,²⁸⁰ developers began to rely even more heavily on POAs to ensure that neighborhoods could retain their racial homogeneity once all the units were sold.²⁸¹ The tactics became subtler and were increasingly couched in the euphemisms of promoting “lifestyle” developments and preserving “neighborhood integrity.”²⁸² POAs were encouraged to “self-enforce” their invalid covenants and to take other actions to discourage integration by, for example, making residence in the community contingent upon membership in a private club which would not admit blacks or threatening reprisals against any real estate agent who sold a home to a black family. Additionally, POAs began shifting to restrictions on the *type* of use which, while not explicitly race-based, were intended to, and did, have the effect of preventing minorities from moving into exclusive neighborhoods. Examples include occupancy standards that limited the number of people who could reside in a dwelling, requiring that all dwellings sell for a

²⁷⁵ Some encouraged the trend, by “blockbusting” neighborhoods. Blockbusting, which is prohibited by § 3604(e) of the FHA, occurs when a real estate professional attempts to induce panic selling in a white neighborhood by representing that properties in the neighborhood are being sold to minorities. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1049-50 (E.D. Mich. 1975) (discussing blockbusting at length); MASSEY & DENTON, *supra* note 151, at 37-39; MCKENZIE, *supra* note 254, at 62, 72 (citing a passage from a textbook produced by the National Association of Real Estate Brokers instructing brokers to take advantage of neighborhoods whose character is changing due to the “infiltration of racial groups”).

²⁷⁶ MCKENZIE, *supra* note 254 at 68-74.

²⁷⁷ MASSEY & DENTON, *supra* note 151, at 36-37.

²⁷⁸ MCKENZIE, *supra* note 254, at 71-74.

²⁷⁹ *Id.* at 73-74.

²⁸⁰ See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

²⁸¹ Until the passage of the FHA in 1968, the developer was free to discriminate in selling the units, so long as his property did not receive federal funds and there were no state laws prohibiting such conduct.

²⁸² MCKENZIE, *supra* note 254, at 75-76.

minimum price, requiring large lot sizes, and adhering to strict maintenance standards.²⁸³

The passage of the FHA forced common interest developments that wanted to remain racially exclusive to resort to even more subtle, but by no means ineffective, methods of discrimination. Although overtly discriminatory advertising was outlawed by § 3604(c), common interest communities still almost universally advertise themselves as “exclusive” and use language that is coded to signal both privilege and homogeneity.²⁸⁴ Such communities may form themselves around costly “lifestyle amenities” that seem designed to appeal only to whites.²⁸⁵ Even controlling for differences in income, common interest housing developments, particularly gated communities and co-ops, remain significantly more “white” today than non-common interest housing.²⁸⁶

b. Local Governments

Similarly, local governments, perhaps because of their proximity to the individuals they govern, have a long history of housing discrimination. Prior to 1917, overt racially restrictive zoning was a common practice in cities

²⁸³ *Id.* at 77-78.

²⁸⁴ D. Robert DeChaine, *From Discourse to Golf Course: The Serious Play of Imagining Community Space*, 25 J. COMM. INQUIRY 132, 141-43 (2001) (citing examples of “golf community” marketing materials, including the following: “As a member of Grasslands, you will . . . find it easy to foster friendships with people who share the same business and social interests, and be secure in the comfort of a private club environment.”).

²⁸⁵ For a description of the dramatic increase in the number of golf course communities that sprang up in the mid-1990s, see Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 437-38, 465 (2006). Strahilevitz notes that while these communities offer golf course privileges to residents and require the residents to pay hefty dues to support the course, a substantial number of people who purchased homes in these communities played no golf. He continues that the correlation between race and whether or not a person plays golf is high – a much higher correlation than the correlation between race and income. Therefore, the golf course as a centerpiece of the development may actually function to create racial homogeneity, for which even non-golfers are willing to pay a premium.

Of course, some communities that offered such amenities to residents continued to deny them to blacks, even when the black applicant was a resident of the community and therefore entitled to use the amenity. *See, e.g.*, *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431, 434 (1973) (swimming pool); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 235 (1969) (community recreation facilities); *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 311 (4th Cir. 1980) (country club attached to community).

²⁸⁶ MCKENZIE, *supra* note 254, at 188-92 (describing how class differences, historic patterns of homeownership and “lifestyle factors” create a homogeneity that is reinforced and amplified in common interest communities); EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA* 153-54 (1997) (gated communities); LOEWEN, *SUNDOWN TOWNS*, *supra* note 274 at 390-92 (2005) (describing how POAs and gated communities continue to perpetuate the racial segregation that was previously maintained by violence and discrimination); Maldonado & Rose, *supra* note 252, at 1248 & tbls. 1-3 (citing statistics that demonstrate, even when controlling for income, that minority group members are far less likely to live in housing co-ops than whites). *See also* Kennedy, *supra* note 274, at 767-68 (1995) (arguing that the very establishment of a residential association is “fraught with potential for discrimination on the basis of race and class,” and that such associations can “serve as a powerful tool for segregation”).

across the United States.²⁸⁷ After the practice was officially banned in 1917, municipalities continued to pass and attempt to enforce such zoning laws for thirteen more years.²⁸⁸

Even after race-specific zoning was forbidden, municipalities continued to engage in activities that had the intent and effect of moving minorities out, keeping minorities out, or relegating those minorities who were already “in” to segregated and inferior living conditions.²⁸⁹ Many municipalities passed zoning laws that would prevent affordable housing, public housing, or any multi-family housing from locating within their borders, or that would confine such housing to the minority areas of town.²⁹⁰ Some municipalities were formed after white suburbs essentially “seceded” from neighboring black areas.²⁹¹ Others deliberately provided inferior services to minority neighborhoods²⁹² or ceased to offer meaningful zoning protection from disruptive and incompatible industrial uses.²⁹³ Once the neighborhoods

²⁸⁷ MASSEY & DENTON, *supra* note 150, at 41. Cities with such laws included Atlanta, GA, New Orleans, LA, St. Louis, MO, Baltimore, MD, and Richmond, VA. *Id.* In 1917 the Supreme Court found that this practice violated the Due Process clause of the Fourteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

²⁸⁸ The Supreme Court continually struck down these attempts, and eventually the municipalities stopped passing such laws. *See City of Richmond v. Deans*, 281 U.S. 704, 704 (1930); *Harmon v. Tyler*, 273 U.S. 668, 668 (1927).

²⁸⁹ Yale Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions*, in *DIVIDED NEIGHBORHOODS* 208-26 (Gary Tobin ed., 1986).

²⁹⁰ *See, e.g., Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 16 (1988) (restriction of multi-family housing to largely minority “urban renewal” areas); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977) (refusal to zone for moderate-income multi-family housing); *United States v. City of Black Jack*, 508 F.2d 1179, 1182-83 (8th Cir. 1974) (attempt to ban all multi-family housing).

²⁹¹ NANCY BURNS, *THE FORMATION OF LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 83-92 (1994) (describing the significant role that racial separation and exclusion played in the formation of cities during the 1950s and 60s). *See, e.g., City of Black Jack*, 508 F.2d at 1182-83 (describing how Black Jack, MO, which was 99% white at the time it voted to incorporate itself into a separate city from the rest of the St. Louis metropolitan area, which was 41% black). Such segregation is self-perpetuating, both because the absence of minority group members impedes change from occurring through the democratic process, and because a community’s desire to define and preserve itself “as is” is viewed as a permissible goal of the zoning power. For a thorough discussion of this political phenomenon, see Ford, *supra* note 161, at 1860-78.

²⁹² *See generally HAAR & FESSLER, supra* note 251. *See, e.g., Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986) (inferior street paving, street maintenance, and storm drainage services in predominantly black part of town); *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983) (inferior water, street paving, and drainage services in predominantly black part of town); *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1288 (5th Cir. 1971), *aff’d on reh’g*, 461 F.2d 1171 (5th Cir. 1972) (en banc) (finding gross disparities between black and white neighborhoods with respect to street paving, street lighting, traffic controls, surface water drainage, and sewage treatment); *Selmont Improvement Ass’n v. Dallas County Comm’n*, 339 F. Supp. 477 (S.D. Ala. 1972) (no paved roads in black communities).

²⁹³ Yale Rabin calls this phenomenon “expulsive zoning.” In a fascinating book chapter, he documents twelve cases of expulsive zoning from cities across the country, in which black and Latino neighborhoods were deliberately blighted through overzoning of industrial and commercial uses. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 101-20 (Charles M. Haar & Jerold S. Kayden eds., 1989); *see also* Rabin, *supra* note 289, at 214-18.

became blighted after years of such official neglect, municipalities often engaged in “urban renewal” projects that literally or practically destroyed minority communities.²⁹⁴ Finally, between the 1890s and the 1960s, in a significant number of locations, particularly in the Midwest and the South, local officials, chambers of commerce, police departments, and private citizens colluded to remove blacks from their borders, and then to maintain their municipalities as all-white.²⁹⁵

As with POAs, local governments have, by virtue of their control over their residents’ housing situation, a distinct ability to discriminate against specific groups of people, even when not acting in their capacity as a housing provider. In many ways, such discrimination is worse than that perpetuated by private individuals because of the sheer number of people who can be affected. Moreover, any time discriminatory conduct is undertaken by those wielding the power of government, it becomes far more offensive to principles of liberty and equality. As one court noted in rejecting a municipality’s argument that it was not a proper defendant under § 3604(c):

Whatever one thinks of state action as a viable limiting principle on the constitutional command of equality, it should at least be clear that the most outrageous deprivations of equal rights are those perpetrated by the state itself. Surely Congress must have been aware of this principle – sanctified by 100 years of “state action” litigation – when it voted to enact Section 3604(c). We are unwilling to believe that the legislators who voted for that Act intended to exempt the most serious offenses from its coverage.²⁹⁶

²⁹⁴ For example, in the Supreme Court’s seminal case on eminent domain, *Berman v. Parker*, more than 97% of the people displaced by the Washington, D.C. urban renewal project at issue were black. 348 U.S. 16, 30 (1954). A more recent example can be found in the Village of Addison, IL., which targeted its two neighborhoods with the largest Latino population for demolition until the Department of Justice filed suit against it. The complaint and the consent decree the parties entered into can be found at <http://www.usdoj.gov/crt/housing/documents/addisoncomp.htm> and <http://www.usdoj.gov/crt/housing/documents/addisonsettle.htm>. See also BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 28-29 (1989) (observing that “[o]f all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite,” and that “[p]ublic works projects in the 1950’s and 1960’s destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland.”); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 47 (Winter 2003) (arguing that “a primary goal of postwar urban renewal was to channel minority settlement into certain areas and to uproot minority communities in other areas”); Rabin, *supra* note 290, at 101-20 (documenting twelve cases in which cities displaced thousands of black and Latino residents using “urban renewal” after the minority neighborhoods had been deliberately blighted through overzoning and lack of municipal services). The effect of urban renewal on the black population was so pronounced that in cities across the country, urban renewal came to be known as “Negro removal.” See MASSEY & DENTON, *supra* note 150, at 56.

²⁹⁵ LOEWEN, *supra* note 274, at 89.

²⁹⁶ *Mayers v. Ridley*, 465 F.2d 630, 635 (D.C. Cir. 1972).

This unfortunate history of discrimination underscores the importance of ensuring that all portions of the FHA apply to the actions of POAs and local governments throughout the duration of their relationship with residents. If the FHA's broad remedial purpose of providing for fair housing "throughout the United States" is to mean anything, the Act must reach the discriminatory conduct that local governments and POAs direct toward their residents.

D. Limitations on the Identity and Relatedness Analysis

A word of caution is required here. While looking to the identity of the defendant and the relationship between the parties provides a useful framework for determining when and under what circumstances §§ 3604(b) and (c) can apply, these concepts should not be employed too narrowly. It would be a mistake for a court to use the relationship test in the same rigid way as Judge Posner used the point of acquisition test — to bar claims regardless of the factual context in which they arise. The focus must ultimately be on the nature of the prohibited act because this is the only thing directly addressed by the statute.²⁹⁷ It may be possible to envision scenarios in which someone other than the above-described defendants discriminates in terms and conditions or makes discriminatory statements in connection with the sale or rental of housing. This person should not escape the reach of the FHA simply because her relationship to the plaintiff does not fall into a particular category.

VII. CONCLUSION

Halprin and the cases that have followed it are troubling. From a practical standpoint, they have created a rule that eliminates many of the FHA's substantive protections for existing housing residents. This rule is being adopted by more and more courts across the country and is now binding precedent in the Seventh and Fifth Circuits, overturning nearly 40 years of fair housing case law and doctrine. At this point, the only hope for repairing this damage is for the Supreme Court or Congress to weigh in on the issue.

More problematic are the ramifications of the *Halprin* mode of analysis. Most of the FHA's substantive provisions are short in length and few in number. They proscribe discriminatory conduct in basic terms, the vast majority of which are not defined in the Act. Discrimination can take many forms, from the predictable to the creative, and it would be practically impossible for a statute to specifically describe and prohibit each. This is precisely why the Supreme Court insists that remedial civil rights statutes like the FHA be given a generous construction. When a court approaches the

²⁹⁷ See Daniel W. Barkley, *Beyond the Beltway: Does the Fair Housing Act Cover Quality of Housing Issues?*, 7 J. AFFORDABLE HOUS. & CMTY. DEV. L. 11, 14-15 (1997).

FHA from an excessively parsimonious standpoint, construing every undefined term in the narrowest possible way and limiting the statute to whatever Congressional intent can be gleaned from the murky legislative history, it can eviscerate the statute's protections.²⁹⁸

Halprin is also worrisome for the broader view that it reflects. In many ways it embodies one of the primary neoconservative assumptions of the current post-Civil Rights age: the notion that equality of opportunity and access is the only legitimate goal of antidiscrimination law. Once the barriers to equality are removed, the argument goes, the law has no further place.²⁹⁹ Much of the criticism of this perspective comes from the Critical Legal Scholars, who contend that this assumption downplays the degree to which structural and institutional discrimination still bar access to social goods like jobs, education, and housing.³⁰⁰ Kimberle Crenshaw makes the argument:

The narrow focus on racial exclusion — that is, the belief that racial exclusion is illegitimate only where the “whites only” signs are explicit — coupled with strong assumptions about equal opportunity, makes it difficult to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.³⁰¹

Similarly, the neoconservative perspective also fails to appreciate the extent to which discrimination and harassment can alter these social goods for a minority group member able to obtain them. For such “privileged” minority individuals, discrimination, whether overt or subtle, can lead to profound feelings of alienation, anxiety, and anger.³⁰² For some, this contin-

²⁹⁸ *Halprin* is not the first time in recent years that the Seventh Circuit has taken a narrow view of the FHA. See, e.g., *DiCenso v. HUD*, 96 F.3d 1004, 1008-09 (7th Cir. 1996) (granting summary judgment to defendant landlord on plaintiff's claim for sexual harassment because “although [the defendant] may have harassed [the plaintiff], he did so only once.”). The *DiCenso* opinion is discussed at length in Schwemm and Oliveri, *supra* note 63, at 784-85.

²⁹⁹ See, e.g., THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 37-60 (William Morrow & Co. 1984); William Bradford Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 *VAND. L. REV.* 993, 998 (1989); William Bradford Reynolds, *Securing Equal Liberty in an Egalitarian Age*, 52 *MO. L. REV.* 585, 603 (1987).

³⁰⁰ See, e.g., Alan D. Freeman, *Antidiscrimination Law: The View from 1989*, 64 *TUL. L. REV.* 1407, 1433-41 (1990); Deborah Kenn, *Institutionalized Legal Racism: Housing Segregation and Beyond*, 11 *B.U. PUB. INT. L.J.* 35, 39-47 (2001); John O. Powell, *An Agenda for the Post-Civil Rights Era*, 29 *U.S.F. L. REV.* 889, 892-906 (1995); Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 *AKRON L. REV.* 693, 696 (2003).

³⁰¹ Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1384 (1988).

³⁰² For example, Ellis Cose presents compelling examples of high-income black professionals who are anguished and enraged by the discriminatory treatment they still encounter on the job. The treatment described ranges from “minor” slights such as a black partner at a financial firm being mistaken for an intruder in the building and challenged by a much younger white associate, to lack of mentoring and discrimination in promotions, pay, and benefits. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 48, 73-91 (1995). Similarly, in Darryl

ual reminder of their subordinate status is enough to prompt them to exit — to move, quit, or drop out — undoing the progress toward integration that “equal opportunity” is supposed to create.³⁰³ Those who stay may feel as though they are operating in a parallel universe from their white peers, technically within the same neighborhood, workplace, or university but for all practical purposes worlds apart.³⁰⁴ A legal focus purely on “acquisition,” therefore, can render the attainment of these social goods either temporary or hollow, or both.

It is difficult to know precisely what motivated the *Halprin* court. For all the sweeping doctrinal changes it suggests, Judge Posner’s opinion is only a few pages long and contains little citation. Nevertheless, the case is good law, and increasing numbers of courts are following the Seventh Circuit. This trend cannot continue. Future courts should base their treatment of post-acquisition claims on thoughtful analysis of the identity of the defendant and the relationship between the parties. The rights of occupants to live in housing free of discrimination and harassment must be safeguarded if the FHA’s protections are to have any meaning.

Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990), the author describes the profound alienation that minority university students feel when they experience both subtle and overt racist treatment by their peers and professors. Such treatment can range from professors refusing to call on black students and having diminished expectations of black students, to harassment by campus police and white student parties with racially offensive themes. *Id.* at 312-22.

³⁰³ Cose describes how such treatment and the rage that it spawns causes some black professionals to leave their jobs for less prestigious positions. COSE, *supra* note 302 at 5, 64. Brown argues that constant exposure to such treatment leads to stress and anxiety for the students, impairs their academic performance, and leads some to drop out. Brown, *supra* note 302, at 323-37, 318 n.93.

³⁰⁴ Ultimately, Brown concludes, racist treatment alters the terms and conditions of a student’s education in much the same way that discrimination can alter the terms and conditions of a workplace. *See* Brown, *supra* note 302, at 325.