IS ACQUISITION EVERYTHING?
PROTECTING THE RIGHTS OF OCCUPANTS UNDER THE FAIR HOUSING ACT

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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’s protection extends to prohibit discriminatory treatment or harassment of individuals once they move in to such housing. Indeed, the federal courts operated under this assumption for nearly 35 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 deny plaintiffs’ housing discrimination claims for the sole reason that the discrimination occurred after the plaintiffs moved in to their homes. Consider the following cases:

- Jewish couple’s home is vandalized. Their property is damaged and sprayed with anti-Semitic graffiti. The culprit is the President of the neighborhood Homeowner’s Association, who then uses the Association to threaten the couple with legal sanctions, fines, and the forced sale of their home.²

¹ U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, “DO WE KNOW MORE NOW?,” at p. 11, tbl. 3 (Feb. 2006) (in a 2005 survey, 77% of respondents recognized that it would be illegal to refuse to rent to a person based on the person’s 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 The facts in this excerpt were taken from the district and appellate court opinions in Halprin v. The Prairie Single Family Homes of Dearborn Park Ass’n, 208 F.Supp.2d 896 (N.D.Ill. 2002) and 388 F.3d 327 (7th Cir. 2004).
A black woman rents an apartment. The apartment management, on a discriminatory basis, refuses to provide heat and hot water to her unit.3

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 cases the plaintiff’s version of the facts was taken as true because each came to the court on a defense motion to dismiss or for summary judgment.6 Yet in each, the plaintiff’s discrimination claims under the primary substantive provisions of the FHA were denied7 because the discriminatory conduct occurred after the plaintiff had acquired his or her housing. In each case the court stated that if the discriminatory conduct had prevented the plaintiffs from obtaining housing in the first place the FHA would have applied.8

This trend was set in motion by the District Court and 7th Circuit Court of Appeals opinions in the case of Halprin v. The Prairie Single Family Homes Association (the case from which the first example, above, derives). Multiple federal courts across the country have since followed suit. In one case before the 5th Circuit Court of Appeals, the issue of post-acquisition claims was the subject of an unsuccessful petition for certiorari to the Supreme Court of the United States.9 The trend shows no sign of

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3 The facts in this excerpt were taken from Farrar v. Eldibany, No. 04-C-3371, 2004 WL 2392242 (N.D.Ill. Oct. 15, 2004), aff’d, 137 Fed.Appx. 910 (7th Cir. 2005).
4 The facts in this excerpt were taken from Krieman v. Crystal Lake Apts., Ltd., No. 05-C0348, 2006 WL 1519320 (N.D.Ill. May 31, 2006).
5 42 U.S.C. § 3601, et seq.
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 its decision. Id. at *4.
7 In the first case, Halprin v. The Prairie Single Family Homes, 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.
8 See Halprin, 388 F.3d at 329 (stating that the Fair Housing Act is not concerned “with anything but access to housing”) (emphasis in original); Farrar, 2004 WL 2392242, at *4 (stating that the Fair Housing Act 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 Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005), Petition for Writ of Certiorari, 2006 WL 755783 (Mar. 23, 2006), denied 126 S.Ct. 2039 (May 15, 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 made them unsaleable.
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 provides an overview of the statute, and describes the FHA provisions most commonly used to address post-acquisition claims. Part II discusses the pre- vs. post-acquisition controversy, including the few early cases to address the issue. Part III addresses Halprin case. It contains an analysis Halprin’s statutory interpretation and reasoning, and finds each wanting. Part IV discusses 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, arguing that the language in the relevant portions of the FHA which requires that discriminatory conduct be carried out in the context of the “sale or rental” of a dwelling limits the statute’s application not (as Halprin apparently assumed) to a specific moment in time, but rather to particular types of defendants. Viewing the issue this way ensures that the rights of occupants are protected against discriminatory acts taken by landlords, Property Owner’s Associations, and municipalities, regardless of when they occur. This is ultimately a more logical approach, and it is more consistent with both the broad remedial purpose of the Fair Housing Act and the past several decades of fair housing case law. 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.

I. THE FAIR HOUSING ACT

A. Overview of the Statute

The Fair Housing Act prohibits various types of housing discrimination based on seven protected categories: race, color, religion, national origin, gender, disability, and familial status. Although the FHA is a lengthy statute, most of it is taken up with the manner in which the Act is to be enforced. The relatively few substantive provisions are contained in §§ 3604, 3605, 3606, and 3617. Of these, the most significant is § 3604, which is divided into several subparts.

Section 3604(a) prohibits discriminatory refusals to sell or rent a dwelling, or to negotiate for the sale or rental of a dwelling, and other conduct that results in a denial of housing. Section 3604(b) bans discriminatory terms and conditions in the sale or rental of dwellings, and
the discriminatory provision of services and facilities in connection therewith. Section 3604(c) bars discriminatory statements, notices, and advertisements, made in connection with the sale or rental of a dwelling.

Section 3604(f), which was added to the statute by the Fair Housing Amendments Act of 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 two the subsections of § 3604(f) correspond and are substantially similar to other substantive provisions of the FHA discussed herein. For example, § 3604(f)(1) prohibits making housing unavailable on the basis of handicap, which parallels § 3604(a). Similarly, § 3604(f)(2) 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 with such dwelling,” which is almost identical to the language of § 3604(b). Section § 3604(c) covers disability, and there is therefore no corresponding provision for discriminatory statements in § 3604(f).

Section 3617 prohibits interference, coercion, or intimidation with anyone seeking to exercise or enjoy their rights under the other substantive portions of the statute, or with anyone who attempts to help others exercise or enjoy these rights.

The remaining substantive FHA provisions cover conduct that is not relevant to the discussion of post-acquisition claims, and so the rest of this Article will focus only on the provisions described above.

B. How These Provisions Relate to Pre-Acquisition Claims

1. 42 U.S.C. § 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 lead courts to conclude that § 3604(a) can apply 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) can apply where the aggrieved individual already has housing, and the discriminatory conduct causes him or her to lose or abandon that housing. Examples of such conduct include discriminatory evictions or discriminatory practices that result in evictions,17 and harassment that has the literal or constructive effect of depriving a person of their dwelling.18

2. 42 U.S.C. § 3604(b)

Section 3604(b) of the Fair Housing Act 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. This is perhaps the most versatile of the FHA’s provisions, and it has been recognized to apply in at least seven distinct contexts: (1) discrimination in the proposed terms of sale or rental, (2) discrimination in services or facilities connected to the initial sale or rental, (3) discrimination in the terms and conditions of

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13 See, e.g., Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994); City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (7th Cir. 1992).
14 See, e.g., Casa Marie v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993); United States v. Yonkers Bd. of Ed., 837 F.2d 1181 (2d Cir. 1987).
15 24 C.F.R. § 100.70(d)(4).
16 See, e.g., NAACP v. American Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992) (insurance redlining); Cartwright v. American Savings & Loan Ass’n, 880 F.2d 912 (7th Cir. 1989) (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 Federal Savings Bank of Indiana, 669 F.Supp. 915 (N.D.Ind. 1987). As discussed, supra note 12; § 3605 would cover such a situation.
17 Harris v. Izhaki, 183 F.3d 1043 (9th Cir. 1999) (landlord twice claimed (falsely) not to have received black tenant’s rent check and twice served her with a 3-Day Notice to Vacate); Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1986) (building owners sought to evict all families with children, which had a disparate impact on black tenants); HUD v. Kogut, Fair Housing-Fair Lending Rptr. ¶ 25,100 (HUD ALJ 1995) (landlord evicted tenant after she refused his sexual advances); HUD v. Tucker, Fair Housing-Fair Lending Rptr. ¶ 25,033 (HUD ALJ 1992) (building manager refused to accept rent after white tenant sought to add her black boyfriend to lease).
housing after rental or sale, (4) discrimination in maintenance or services connected to a dwelling, (5) discrimination in the privileges of a dwelling, (6) harassment, and (7) discrimination in the 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 can include differences in sale price, rent amount, security deposits, down payments, and closing requirements.19 Today, cases involving blatantly discriminatory sale terms or lease provisions – where the protected group is actually singled out for different treatment – are rare.20 To the extent that there are any modern cases of this sort, they tend to involve discriminatory provisions targeting children, or families with children.21 More common are less obvious discriminatory practices, such as a housing developer offering to pay closing costs for white buyers but not minority buyers,22 a landlord offering to waive security deposits for white tenants but not black tenants,23 or a landlord charging black tenants higher rent than white tenants.24 In such cases the contractual terms offered to the minorities are not discriminatory on their face, but the disparate treatment becomes apparent when the terms are compared with those offered to non-minorities.

b. Discrimination in services or facilities connected to the 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.25 For example, when a property manager requires a credit check only of black applicants,26 when a real estate agent fails to tell black home-seekers about available listings but does provide this information to white home-seekers,27 or when insurance companies refuse

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19 24 C.F.R § 100.65(b)(1); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION (Thompson/West 2005) § 14:2, p. 14-4.
20 A blatantly discriminatory term, conveyed either orally or in writing, will also violate § 3604(c).
21 See, e.g., Gorski v. Troy, 929 F.2d 1183 (7th Cir. 1991) (lease provided that children were not permitted without written consent from the owners).
23 24 C.F.R. § 100.65(b).
24 Brown v. LoDuca, 307 F.Supp. 102 (E.D.Wisc. 1969) (black applicant was told apartment cost $200 per month plus a $150 deposit, while white tester was told the apartment was $125 per month with no deposit)
26 HUD v. Joseph, Fair Housing-Fair Lending Rptr. ¶ 25,072 (HUD ALJ 1994) (landlord generally only performed credit checks on black applicants); HUD v. Jerrard, Fair Housing-Fair Lending Rptr. ¶ 25,005 (HUD ALJ 1990) (same).
27 Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990); McDonald v. Verble, 622 F.2d 1227 (6th...
to provide coverage to homes because they are located in minority neighborhoods.28

c. Discrimination in terms and conditions after sale or rental is completed

Section 3604(b) will apply 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 subject to different rules than other tenants.29 It will also apply if a landlord or property manager imposes a discriminatory rule – for example, that tenants are not allowed to entertain black guests in their apartments – even if that rule is applied equally to all tenants.30

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.31 A landlord could violate this provision either by singling out individual tenants and failing to provide them with maintenance because of race or gender,32 or by providing inferior service to an entire building based on the ethnicity of the tenants who occupy it.33

e. Discrimination in the privileges of using the dwelling

Cir. 1980).
29 See, e.g., North Dakota Fair Housing Council v. Allen, 319 F.Supp.2d 972 (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 San Marco, 893 F.Supp. 1051 (M.D.Fla. 1995) (upholding plaintiffs claim under § 3604(b) that condominium owner enforced a renter identification policy only against Hispanic tenants); HUD v. Jerrard, Fair Housing-Fair Lending Rptr. ¶ 25,005 (HUD ALJ 1990) (landlord singled out white tenant for rent increase after tenant had black visitors).
31 24 C.F.R. § 100.65(b)(2), (5).
33 See, e.g., Durret v. Housing Authority of City of Providence, 896 F.2d 600 (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 (N.D.III. 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 (N.D.III. 1998) (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 at ___.
Section 3604(b) also prohibits discrimination in the privileges of using a dwelling. 34 If an apartment building has, for example, a pool or a parking lot, the landlord cannot deny tenants access to these amenities on a discriminatory basis. 35 Similarly, residents must be able to use the common areas of an apartment, condominium, or neighborhood on an equal basis. 36

f. Harassment

Section 3604(b) is commonly used to bring housing harassment cases, particularly those alleging sexual harassment. The origins of its use in this manner 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.” 37 In the 1970s, federal courts started recognizing that workplace harassment could create an environment so hostile that it would affect the terms and conditions of a person’s employment. 38 The late 1970s saw an influx of claims before the lower federal courts of sexual harassment in the workplace, which proceeded under both the “hostile environment” and “quid pro quo” theories. 39 The Supreme Court eventually addressed the issue of hostile environment harassment in Meritor Savings Bank v. Vinson. 40 Meritor involved a bank employee who alleged that her supervisor had made unwelcome sexual advances toward her and, out of fear of losing her job, she engaged in a sexual relationship with him. 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 a tangible job harm such as firing or

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34 24 C.F.R. § 100.64(b)(4)
38 Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (workplace harassment based on national origin).
39 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 or threatened tangible job harms, based on the victim’s acquiescence with sexual demands. 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. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751-54 (1998).
The Court created a standard for evaluating the type and amount of conduct that could create a hostile work environment, requiring the plaintiff demonstrate that the harassment was so “severe or pervasive” that it created an objectively abusive working environment.42

Because of 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 the quid pro quo and hostile environment theories.43 The “hostile environment” plaintiff essentially alleges that the defendant’s harassment has been so severe or pervasive that it has created a hostile housing environment, which effectively alters 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.44

g. Discrimination in the provision of municipal services

Section 3604(b) has also been applied to the discriminatory provision of municipal services. Courts dating back to at least 1974 have addressed the issue of whether § 3604(b) should apply to a situation in which, for example, a municipality provides inferior water, garbage pick-up, or snow-clearing service to the majority-minority areas of town.45 While virtually every court presented with the issue has recognized the possibility of such claims,46 a number of courts have limited § 3604(b) to

41 Id. at 66.
Prior to the Halprin decision, the most significant limitation that courts placed on municipal services claims was a requirement that only “traditional” city services should be covered by § 3604(b). 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 local government’s powers 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.”

Of the seven types of § 3604(b) claims outlined above, the latter 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 – are by definition claims that will almost always arise after the acquisition of housing. For example, it would be impossible for a landlord to provide inferior maintenance to a person, or to enforce rules in a discriminatory manner against him, prior to his becoming a tenant. Likewise, for a municipality to provide discriminatory municipal services to individuals in a particular area, people must first be residing in that area. It makes little sense to think of a condo association acknowledging 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 (N.D.Ill. 1993) (police protection). But see, Clifton Terrace Assoc., Ltd. v. United Technologies Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (dicta questioning whether § 3604(b) can ever apply to municipal services).

A handful of courts and commentators have concluded that some courts completely refuse to recognize municipal services claims under 3604(b), see e.g., Schwemm, supra note /19/ at § 14.3, p. 14-20 & n.37; Lopez v. City of Dallas, No. 3:03-CV-2223, 2004 WL 2026804, at *7 (N.D.Tex. Sept. 9, 2004). 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. These cases are discussed in note /47/, infra.

47 See, e.g., Jersey Heights Neighborhood Assoc. v. Glendening, 174 F.3d 180, 193 (4th Cir. 1999) (decision over the siting of a highway is not a “service” under § 3604(b)); Southend Neighborhood Improvement Assoc. v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) (§ 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. New Jersey Dept. of Environmental Protection, 254 F.Supp.2d 486, 502-03, (D.N.J. 2003) (granting of industrial air pollution permits is too far removed from “services” contemplated by the FHA); Laramore v. Illinois Sports Facilities Authority, 722 F.Supp. 443, 452 (N.D.Ill. 1989) (dicta that § 3604(b) cannot extend to a municipal zoning decision such as the selection of a stadium site); Vercher v. Harrisburg Housing Authority, 454 F.Supp. 423, 424 (M.D.Penn. 1978) (denying plaintiffs’ § 3604(b) claim based on disparate provision of police protection, because “[p]olice protection is not housing. Nor does it have any direct connection with the sale, rental, or occupancy of housing.”).

48 See cases cited in note /47/, supra.

discriminatorily restricting a person’s access to the privileges and amenities of housing before the person has even purchased a unit there. It is unlikely (although not unheard of) for a landlord to harass a person before she has even become a tenant. 50 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. 42 U.S.C. § 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.”

By its terms, this provision prohibits discriminatory written notices, advertisements, and oral statements. Section 3604(c) violations frequently occur in the pre-acquisition stage, when the housing is being advertised or the housing provider is negotiating with prospective tenants or purchasers. This is logical, because it is at this stage where the most information is being conveyed about the housing, and there is the most communication between home-seeker and housing provider. Paradigmatic examples of a § 3604(c) violation at this stage occur where a landlord advertises his property as being for white tenants only, 51 or states that he will not rent to blacks. 52

There are post-acquisition scenarios, however, in which a § 3604(c) claim could arise. For example, where a landlord makes discriminatory statements to or verbally harasses his current tenants, 53 posts a discriminatory message, 54 or issues an eviction notice that contains discriminatory language.

E. § 3617

50 There are a handful of sexual harassment cases in which harassment took place prior to the signing of the lease, e.g., Krueger v. Cuomo, 115 F.3d 487 (7th Cir.1997); United States v. Koch, 352 F.Supp.2d 970 (D.Neb. 2004); New York ex rel. Abrams v. Merlino, 694 F.Supp. 1101 (S.D.N.Y. 1988).
53 Harris v. Itzhaki, 183 F.3d 1043 (9th Cir. 1999) (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 Rptr. ¶ 25,078 (HUD ALJ 1994); HUD v. Tucker, Fair Housing-Fair Lending Rptr. ¶ 25,033 (HUD ALJ 1992) (apartment manager’s racist statements to tenant, tenant’s guest, and third parties about tenant violated § 3604(c)).
54 HUD v. Denton, Fair Housing-Fair Lending Rptr. ¶ 25,014 (HUD ALJ 1991) (discriminatory statement attached to eviction notice violated § 3604(c)).
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). 55

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, a woman files a HUD complaint against her landlord because he is sexually harassing her, and the landlord evicts her as a result. 56 Here, the tenant is 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 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 type of protected activity is assisting another person in exercising or enjoying fair housing rights. If a person is retaliated against, say, for renting to Hispanics, or for helping a black tenant file a HUD complaint, this would violate § 3617. 57

Thus, there are three different types of behaviors that can constitute a § 3617 violation: (1) retaliating against someone because the person has exercised their own fair housing rights, (2) interfering with someone who is attempting to enjoy their own fair housing rights, and (3) retaliating against someone for aiding another person’s exercise or enjoyment of fair housing rights. All of these behaviors can take place in either pre- or post-acquisition settings. “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.

55 Cases in which harassment plaintiffs proceeded under both provisions include: Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); DiCenzo v. Cisneros, 96 F.3d 104 (7th Cir. 1996); Richards v. Bono, No. 5:04CV484, 2005 WL 1065141 (M.D.Fla. May 2, 2005); United States v. Koch, 352 F.Supp.2d 970 (D.Neb. 2004); New York ex rel. Abrams v. Merlino, 694 F.Supp. 1101 (S.D.N.Y. 1988), and Grieger v. Sheets, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988). As is 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.

56 See, e.g., Krueger, 115 F.3d 487.

Because it does not contain a direct link between the conduct it prohibits and the “sale or rental” of housing, § 3617 is not commonly regarded as having any kind of temporal limitation.\(^{58}\) However, because of its reference to rights “granted or protected by” the substantive provisions of the FHA, some courts have determined that § 3617 cannot provide a stand-alone basis for liability, but rather requires a proven violation of one of those substantive provisions.\(^{59}\) Thus, if the substantive claims fail because they are raised post-acquisition, then the § 3617 claim will also fail because it has no “predicate”.\(^{60}\)

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

II. THE PRE-HALPRIN DEBATE

Prior to *Halprin*, the question of the time frame covered by § 3604(b) and (c), either for rentals or sales, was not the subject of much debate. The small amount of scholarship on the issue concluded that, at the very least, these provisions should apply throughout the duration of a renter’s lease.\(^{61}\) As is described in greater detail below, the few courts to consider the issue almost all determined that §§ 3604(b) and (c) should not be limited to the pre-acquisition time frame.

A. § 3604(b) – discriminatory terms, conditions, services, and facilities

In rental situations, many courts and practitioners apparently assumed that § 3604(b) covers the entire lease term. There are a number of

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


\(^{60}\) *Halprin* raised the possibility of this outcome in dicta, but was unable to rule decisively because the defendant had waived the argument. 388 F.3d 327, 330 (7th Cir. 2004).

\(^{61}\) 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 apply equally to the language in § 3604(b).
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 to nor addressed by the court. Thus, very few courts addressed the issue head on. Those that did all concluded that § 3604(b) should cover the whole lease term.

In *Housing Rights Center v. Sterling*, 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. 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. The court analyzed the issue under both § 3604(b) and § 3604(c), and held that:

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.

In *Concerned Tenants Assoc. v. Indian Trails Apts.*, a group of existing tenants brought a § 3604(b) claim against the owners of their building, contending that he 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 allege 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 didn’t apply. The court emphatically rejected the defense’s argument, construed § 3604(b) to apply post-acquisition claims, and found that the plaintiffs had indeed stated a claim.

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62 Cases involving post-acquisition discrimination in which the timing issue is not mentioned include substantially all of the cases cited in notes /29/; /30/; /32/; /33/; /35/; /43/ (exceptions include *United States v. Koch* and *Richards v. Bono*, which dealt with the issue explicitly), /44/; /46/; /47/; /53/; and /54/.


64 Id. at 1141.

65 Id. at 1142.


67 Id. at 525.
Bradley v. Carydale Ent. was brought under a state fair housing law with a “terms and conditions” provision that was 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.’”

Finally, HUD v. Williams addressed the post-acquisition issue, albeit in the course of interpreting the coverage of a HUD Regulation as opposed to the FHA itself. The case involved an HIV-positive tenant’s claim that he was harassed and discriminated against by his landlord. One of the plaintiff’s allegations was that his landlord had invaded his privacy 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, or a person intending to reside in that dwelling after it is so sold, rented or made available.” The question for the judge was whether § 3604(f)(2) was intended to protect “sitting” tenants from such inquiries, or just applicants. 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.”

Discussions of whether § 3604(b) could apply post-sale were even more rare. Many of the municipal services § 3604(b) cases clearly assumed that post-sale claims were cognizable, because virtually all of them involved plaintiffs who were homeowners. As discussed above, the dispute over § 3604(b)’s application in these cases focused on whether the FHA should

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68 Id. at 525-26 (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”).
70 Id. at 224.
71 Fair Housing-Fair Lending Rptr. ¶ 25,007 (HUD ALJ 1991).
72 24 C.F.R. § 100.202(e)
73 Williams, Fair Housing-Fair Lending Rptr. ¶ 25,007 (HUD ALJ 1991).
74 See cases cited in notes /46/ and /47/. 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).
cover the type of municipal at 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 the timing issue was analyzed by a court. In *Schroeder v. De Bertolo,* the plaintiffs were the representatives of a disabled woman, Maseo Schroeder. Ms. Schroeder had owned and occupied a condominium, and while she lived there she was subjected to disability-based discrimination by the Condominium Association’s 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 Fair Housing Act 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. Maseo 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.

**B. § 3604(c) – discriminatory notices and statements**

There was even less pre-Halprin debate surrounding the proper temporal scope of § 3604(c), in either the sale or the rental context. As with § 3604(b), some courts apparently assumed that this sub-section applied throughout the lease term, because they found – without analysis of the timing issue – that landlords’ discriminatory statements to or about

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75 Two other cases raised the question of whether post-sale discrimination claims were actionable under § 3604(b), but in each the court failed to decide the issue. *Zhu v. Countrywide Realty, Co., Inc.,* involved a homebuyer’s sexual harassment claims against a real estate agent. 165 F.Supp.2d 1181 (D.Kan. 2001). 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 all of the conduct took place post-sale. *Id.* at 1191. The Court did not address this argument in its opinion.

In *Dunn v. Midwestern Indem., Mid-American Fire & Cas. Co.,* the plaintiffs were black homeowners whose homeowner’s insurance had been cancelled for racially discriminatory reasons. 472 F.Supp. 1106 (D.Ohio, 1979). 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.


77 *Id.* at 176-77.

78 Schwemm, *supra* note 61/ at 191 (observing that § 3604(c) in general has not been the subject of much litigation or debate).
current tenants violated § 3604(c). A few courts actually considered the question and concluded that § 3604(c) applies throughout the lease term, for example, the Sterling case discussed above. In another case, a HUD administrative law judge rejected the argument that a landlord’s racist statements to an existing tenant should not be covered by § 3604(c) because the statements were not made in the context of seeking a buyer or renter. Two others, however, held without analysis that § 3604(c) is limited to advertisements or statements made prior to rental.

III. THE HALPRIN CASE

A. Facts

Rick and Robyn Halprin owned a home in a subdivision near Chicago, IL. Rick Halprin is Jewish. The subdivision was managed by a homeowner’s 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 or marker on a wall located on their 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, as well as 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.84 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.”85 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 § 3604.86 The Court did not directly address the plaintiffs’ § 3604(c) claim, although it is clear that it believed they had none.87

The Halprins’ claim did not completely vanish. The Seventh Circuit reinstated their § 3617 claim, although it did so reluctantly. The defendants had argued that, absent an underlying violation of any part of § 3604, the § 3617 claim had to fail. However, a HUD regulation indicates that an underlying violation need not be shown.88 Judge Posner argued that this regulation might be invalid, because it “strays too far” from the statutory language tying § 3617 to violations of the substantive provisions of the Act.89 Nevertheless, because the defendants failed to challenge the validity of the regulation, he concluded that “its possible invalidity has been forfeited as a ground upon which we might have affirmed the district court.”90

84 208 F.Supp.2d 896, 901-03 (N.D.Ill. 2002).
85 388 F.3d at 329 (emphasis in original).
86 Id. The opinion is phrased broadly, with the Court concluding that “the plaintiffs have no claim under section 3604.” Id. at 330.
87 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 plaintiff’s 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).
88 24 C.F.R. § 100.400. 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. at § 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 (W.D.Mo. 2000); Bryant v. Pulte, No. 00-1064, 2000 WL 1670938 (S.D.Ind. Nov. 2, 2000); Ohana v. 180 Prospect Place Realty Corp., 996 F.Supp. 238 (E.D.N.Y. 1998); Stackhouse v. DeSitter, 620 F.Supp. 208 (N.D.Ill. 1985).
89 388 F.3d at 330.
90 Id. at 330. The § 3617 claim was subsequently upheld by the District Court, which noted that the vast weight of authority — including two recent 7th Circuit cases — endorses a broader view of § 3617. Halprin v. Prairie Single Family Homes, 2006 WL 2506223, *1 (N.D.III., June 28 2006).
B. Critique

The *Halprin* opinion departed dramatically from previous fair housing case law and it was the progenitor of an ever-increasing line of cases in which courts deny 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 would lead to clearly anomalous results.

1. Statutory Interpretation

a. The language of §§ 3604(a) and (b)

Judge Posner begins his analysis by looking to the language of sections §§ 3604(a) and (b). This is problematic from the outset, because the plaintiffs never alleged a violation of § 3604(a);91 rather, they alleged violations of §§ 3604(b) and (c). Nevertheless, Judge Posner concludes that §§ 3604(a) and (b) are the only two sections that are “possibly relevant here.”92 After setting forth each subsection in its entirety, he concludes that their language “indicates concern with activities, such as redlining, that prevent people from acquiring property.”93 Judge Posner is 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 negotiate for the sale or rental of, or otherwise make unavailable or deny” dwellings based on protected characteristics, 3604(a) quite clearly covers activities that prevent people from acquiring property. By making it illegal “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny” dwellings based on protected characteristics, 3604(a) quite clearly covers activities that prevent people from acquiring property. Indeed, each of the six cases Judge Posner cites to support his conclusion contains a claim, based on § 3604(a) or analogous disability provisions,94 that the defendant’s actions prevented the plaintiff from obtaining housing.95

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91 Indeed, because § 3604(a) requires a denial of housing, it would be difficult to see how the plaintiffs could have made such a claim on these facts. This makes it 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, which the plaintiffs themselves did not even rely on, Judge Posner dooms the plaintiff’s claim to fail. He essentially argues that: (1) § 3604(a) is the only relevant part of the FHA to this case, (2) § 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.
92 388 F.3d at 328.
93 Id. at 328.
94 Supra note 11/ and the accompanying text discusses how and why certain disability-related claims are treated separately under the FHA. Section 3604(f)(1) prohibits denying or otherwise making housing unavailable,
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 analysis, and without addressing the multitude of cases that either held or assumed that § 3604(b) can apply post acquisition. Indeed, at least one court has characterized 3604(b)’s language as completely unambiguous in its coverage of post-acquisition claims.

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 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 it would be proper for a plaintiff to proceed under both § 3604(a) and (b). Put another way, 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 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, the person would have a claim under both § 3604(f)(1) and (f)(3).

Cases cited by Halprin include: 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)); N.A.A.C.P. v. American Family Mutual Ins., 978 F.2d 287 (7th Cir. 1992) (mortgage redlining claim brought under §§ 3604(a) and (b)); 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”); 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)); and 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).

Richards v. Bono mentions this problem with the analysis, when it criticizes Farrar v. Elibany for dismissing the plaintiff’s claim “without discussing the distinctions between 3604(a) and 3604(b).” 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., 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 conclu[ded] that post-purchase plaintiffs ‘have no claim under § 3604’” after mentioning § 3604(b). No. 05-C0348, 2006 WL 1519320, at *6 (N.D.Ill. May 31, 2006).

Concerned Tenants Assoc. v. Indian Trails Apartments, 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”). 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. Courts and commentators have noted that if the answer is the former, then § 3604(b)’s reach is considerably limited. See, SCHWEMM, supra note 19/ at § 14.3, p. 14-13-14-14; Terenia Urban Guil, Environmental Justice Suits Under the Fair Housing Act, 12 TUL. ENVTL. L.J. 189, 187 (Winter 1998); 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 (1995); Lopez v. City of Dallas, No. 3:03-CV-2223, 2004 WL 2026804, at *7 (N.D.Tex. Sept. 9, 2004); Larimore v. Illinois Sports Auth., 722 F.Supp. 443, 452 (N.D.III. 1989). This ambiguity is addressed (albeit in a frustratingly opaque way) by HUD Regulation 24 C.F.R. § 100.65, discussed infra.

That was the situation in the only two cases cited by Judge Posner that contain § 3604(b) claims, N.A.A.C.P. v. American Family Mut. Ins., 278 F.2d 287 (7th Cir. 1992), and Mitchell v. Shane, 350 F.3d 39 (2d
sometimes a denial of housing (a § 3604(a) violation) can be accomplished through the use of discriminatory terms and conditions (a § 3604(b) violation). Judge Posner contends, 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 be accomplished and therefore devoid of any independent significance: § 3604(b) can only apply when 3604(a) is also violated, and can never apply when it is not.\(^{100}\) This violates one of the most basic canons of statutory interpretation, that terms of a statute not be construed in a manner that renders any of them as surplusage.\(^{101}\) This is especially so when the clause or term at issue occupies a pivotal place in the statutory scheme,\(^{102}\) which § 3604(b) unquestionably does.

Judge Posner acknowledges 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.”\(^{103}\) This reading cannot possibly represent the limits of § 3604(b). If the farthest that 3604(b)’s terms and conditions provision can be stretched is to encompass residing in a dwelling, it remains congruent with § 3604(a), and, as discussed above, superfluous.\(^{104}\)

b. HUD Regulation and Trafficante v. Metropolitan Life

The *Halprin* opinion leaves out two very important 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.\textsuperscript{105} HUD is such an agency for the FHA,\textsuperscript{106} and interpretations by HUD of the FHA’s language are entitled to great weight.\textsuperscript{107} The Regulation provides a strong argument for §3604(b)’s application to post-acquisition claims, although it is not without ambiguity.\textsuperscript{108}

The first part of the Regulation states that it shall be unlawful “to deny or limit services or facilities in connection with the sale or rental of a dwelling.”\textsuperscript{109} 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 that are 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 will 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.\textsuperscript{110}

These examples – including (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 clear that HUD intended it to cover a broad range of conduct, extending beyond the initial sale or lease agreement:

\textsuperscript{106} 42 U.S.C. § 3614a (providing that the Secretary of HUD shall make rules to implement the FHA).
\textsuperscript{108} \textit{Terenia Urban Guill, Environmental Justice Suits Under the Fair Housing Act}, 12 TUL. ENVTL. L.J. 189, 228 (Winter 1998) (noting that the regulations and the legislative history contain examples both in favor of and against a broad reading of the FHA).
\textsuperscript{109} 24 C.F.R. § 100.65(a).
\textsuperscript{110} 24 C.F.R. § 100.65(b) (emphasis added).
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.”

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.

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. 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, it must be “construed generously.” Virtually every court to interpret the FHA has specifically cited back to these words, which have become something of a mantra in fair housing law.

Trafficante did not specifically address the language of § 3604(b). However, the Supreme Court has given a broad interpretation to the analogous terms and conditions provision in another remedial civil rights statute, Title VII. In Meritor Savings Bank v. Vinson, the Court...
recognized that hostile environment 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.117 In so, doing, the Court held that “[t]he phrase ‘terms, conditions, and privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment between [protected classes].”118

2. Title VII

Judge Posner next looked to Title VII, which, because of its similarities in purpose and language, is frequently used to guide interpretations of the FHA.119 He begins 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.120 This is simply not the case. It is true that a “constructive eviction” theory has been recognized in housing, for the unremarkable proposition that there can be actions falling short of formal eviction proceedings which still drive a person from her home or render aspects of the dwelling unavailable to her.121 This 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.”122 In fact, none of the cases Judge Posner cites to support this claim even mentions the constructive eviction doctrine in the context of the FHA.123

118 Id., at 64. 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.
119 See SCHWEMM, supra note 19/ at §7:4, p. 7-9; Trafficante, 409 U.S. at 209.
120 Halprin, 388 F.3d at 329.
121 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).
122 One area in which there has been doctrinal importation from Title VII to Title VIII, 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 notes 38/-/44/, supra, and accompanying text. Nowhere in the Supreme Court’s employment 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 v. Vinson, 477 U.S. 57, 64 (1986). Nor is there any housing harassment case – including the ones Judge Posner cites in support of his argument – that imposes an analogous requirement of actual or constructive eviction.
123 One of the cases Judge Posner cites, Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993) contains a discussion of
Title VII does have a direct analog to § 3604(b): a provision making it illegal “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” because of a protected characteristic. There is no question that this part of Title VII is intended to reach 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 that falls short of discharge (actual or constructive). Judge Posner argues that there is a “difference in language” between Title VII and the FHA which requires a different application. He never articulates what this important difference in language is, however, and a comparison of both provisions reveals there is no pertinent difference between the two. Nevertheless, Judge Posner relies on this supposed difference 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 marshals in support of this conclusion is the legislative history, discussed in the next section.

3. Legislative History

Finally, Judge Posner looked to the legislative history of the FHA. Citing to several passages from the congressional hearings and debates on the bill that would eventually become the Fair Housing Act, he 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 problem . . .

From the outset, it should be noted that any reliance on legislative history in interpreting the FHA is problematic because of the unconventional way the law came into being. Beginning in 1966, at the...
behest of President Johnson, identical fair housing bills were proposed in both houses of Congress. Each was the subject of committee hearings. An amended bill passed the House, but the legislation was not acted favorably upon in the Senate Judiciary committee. The following year another fair housing bill, S. 1358, was sponsored in the Senate, was again the subject of committee hearings, and again died in committee. At the same time an unrelated bill, H.R. 2516, was working its way through the House. H.R. 2516 was a narrow measure designed to outlaw racially-motivated violence against African-Americans and civil rights workers. The House passed H.R. 2516.

While it was being debated in the Senate, Senators Mondale and Brooke proposed an amendment to H.R. 2516 which would add fair housing provisions that were substantially identical to S. 1358. This proposal was withdrawn in favor of a compromise amendment sponsored by Senator Dirksen and added to H.R. 2516 on the Senate floor, which was similar in most (but not all) respects to the earlier versions of the bill. 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 housing segregation as one of the greatest threats facing American society and called for the passage of fair housing legislation. Three days after the report was issued, the Senate voted cloture on the filibuster that had been blocking H.R. 2516, and the bill passed with only minor amendments within a week. The Senate-passed 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, the Rules Committee allowed the House only one hour of debate on the Senate bill.

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128 Hearings before Subcomm. no. 5 of the H. Comm. on the Judiciary on Misc. Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, 89th Cong. (1966); Hearings before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 3296, the Civil Rights Act of 1966, and Related Bills, 89th Cong. (1966).
131 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 /126/ at 157. As will be discussed in this Section, however, there were some minor changes in language that may have a significant impact in how the statute is to be interpreted.
132 REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 1, Ch. 6 & p. 263 (March 1, 1968) (hereinafter KERNER COMMISSION REPORT).
133 Dubofsky, supra note /126/ at 159.
As a result, the final bill that became the FHA was never considered by committee and there are no formal reports explaining its terms. 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. Neither provides much insight into the FHA’s substantive terms. The committee hearings focused mainly on whether a fair housing bill was necessary and within Congress’s power to enact. The floor debates were largely taken up with the scope of proposed exemptions to the bill’s coverage or non-technical amendments that dealt with other topics entirely. There is no discussion anywhere in this legislative history about how to interpret the language of § 3604(b). To the extent there is any discussion of § 3604(c), the debate centers around its relation to the exemptions contained elsewhere in the statute and the First Amendment implications of including discriminatory “statements” to the list of prohibited conduct. There is no specific discussion about whether the FHA should be construed to apply to post-acquisition housing. Thus, any attempt to discern Congress’s “intent” with respect to this issue must be done by inference.

With the above caveats in mind, Judge Posner’s characterization is at least facially correct. During the mid-1960s, when the various fair housing bills were being debated, the degree of segregation in residential housing was extraordinarily high and discrimination in access to housing was rampant. Congress was primarily concerned with promoting integration by eliminating the discrimination that confined African Americans into crumbling urban centers. These two goals – the elimination of discrimination and the promotion of integration – were viewed as one by the legislation’s proponents. The belief was apparently that once housing discrimination was banned, housing segregation would naturally disappear. 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.

It is inaccurate, though, to say that Congress gave “no thought” to the need to prevent discrimination that might arise during a person’s occupancy of a dwelling. The Declaration of Policy in all three of the draft

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135 Dubofsky, supra note /126/ at 159.
136 Schwemm, supra note /61/ at 198-212.
versions of the legislation read: “It is 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.” This language was changed by the Dirksen amendment 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 why this change was made. There is, however, no indication that the change was meant to signal Congress’s intent to exclude discrimination that affects occupancy from the list of conduct that the Act prohibits. If anything, the fact that a prohibition against discrimination in all aspects of housing – sales, rentals, financing, and occupancy – was included in the first three versions of the bill but left out of the final version in favor of a broad statement of commitment to fair housing, signals that Congress specifically intended for “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 was operating 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 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.” The inclusion of the right to “hold” property free of discrimination indicates that § 1982 applies to post-acquisition claims. At the time the FHA was passed, however, § 1982 had a serious deficiency: it had been interpreted as applying only to state actors.

One of the primary goals of the FHA was to expand the protections contained in § 1982 by providing a means to redress private acts of discrimination. The FHA 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. The Supreme Court characterized the FHA as such when it ruled – two months after the FHA had been passed –

139 S. 3296, (emphasis added); S. 1358 (1967) (Mondale bill); 114 Cong. Rec. 2270 (1968) (Mondale amendment).
140 42 U.S.C. § 1982
141 Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (citing Civil Rights Cases, 109 U.S. 3 (1883)).
142 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 characterized its potential for effectiveness as “probably much greater than (s 1982) because of the sanctions and the remedies that it provides.”).
Under the Fair Housing Act

that § 1982 could in fact reach private acts of discrimination. 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.

Congress was aware that § 1982 reached post-acquisition conduct and Congress intended for the FHA to expand upon § 1982. The result mandated by Halprin, however, would mean that the FHA has a significantly narrower reach than the century-old statute it was meant to improve upon.

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 secure that housing. Moreover, a failure to 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 blacks to endure the discrimination and hostility they believe will be forthcoming should they move into a majority white neighborhood or building. The tendency of many blacks to “self-segregate” cannot be

143 Id.
144 Id. at 417 (emphasis added). See also, id. at 413 (§ 1982 “is not a comprehensive open housing law”).
145 Commentators have remarked on the potential anomaly presented by the fact that other portions of the FHA seem to apply post-acquisition. SCHWEMM, supra note 19 at § 14:3, p. 14-14. For example, § 3604(d)(2), which was added to the FHA in 1988 in order to create protections for the disabled and which was modeled after § 3604(b), states clearly that it extends to discriminatory terms and services related to a dwelling, not just the sale or rental of the dwelling. Similarly, § 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. United States v. Koch, 352 F.Supp.2d 970, 977 (D.Neb. 2004).

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, an equally strong argument can be made that the more detailed language contained in these provisions should serve as guidance in how to interpret § 3604(b). At the least, these provisions demonstrate that Congress was indeed concerned with occupancy when it passed the FHA.

146 Koch, 352 F.Supp.2d at 976 (“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.II. 1989) (“Defendant’s argument that section 1982 prohibits racial discrimination in the sale or lease of a property, but not acts of discrimination which essentially prevent the victim from living on that property once it is acquired is untenable[.]”).

147 For example, survey data from the 1970s indicated a “considerable reluctance” on the part of blacks to move into all-white neighborhoods. Only 38% of blacks surveyed were willing to move in to such a neighborhood, and 66% listed it as their last choice, after all-black, predominantly black, evenly mixed, and
explained away by differences in socio-economic status: the fact that race plays a far greater role than class in determining housing patterns is well-documented. Middle- and upper-class blacks are more likely to live in predominantly black neighborhoods, with neighbors who have lower incomes, rather than move to white areas where their neighbors will have similar incomes 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.” In addition, research indicates that disparate provision of municipal services and the failure to prohibit undesirable land uses in residential areas can cause those areas to become more segregated.

Moreover, a deeper analysis of the fears and motivations of the Congress which passed the FHA leads to a more nuanced conclusion. Congress was acting 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, deserving of 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, and 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. Reynolds Farley, Elaine L. Fielding & Maria Krystan, The Residential Preferences of Blacks and Whites: A Four-Metropolitan Analysis, 8 HOUSING POL’Y DEBATE 763 (1997). The researchers found black respondents even less willing to move in to majority white neighborhoods than in the 1979 study. See also Camille Zubirinsky Charles, Can We Live Together? in THE GEOGRAPHY OF OPPORTUNITY at 52-59; Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 HARV. L. REV. 1841, 1855-54 (1994) (describing the reluctance of minorities to move to the “alien and sometimes hostile environment” of majority-white neighborhood 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 (Spring 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).


Vicki Been notes that neighborhoods with a large population of minorities are disproportionately more likely to be chosen for the siting of 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, What’s Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses, 78 CORNELL L. REV. 1001 (Sept. 1993); Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics? 103 YALE L.J. 1383 (April 1994). Similarly, Richard 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. Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 HARV. L. REV. 1841, 1854-55 (1994). Thus, the disparate provision of municipal services and the discriminatory siting of negative uses are both causes and effects of segregation.
These goals could not possibly be met by a law which encouraged African Americans to live in the same neighborhoods and apartment buildings as whites, but did nothing to protect them from discrimination once they got there. Indeed, it is difficult to imagine a situation more likely to spark further degradation and violence.

The Congress that passed the FHA may not have devoted a great deal of time to explicit discussion of whether and how the law should address post-acquisition discrimination, but the bill’s proponents were cognizant of the fact that discrimination takes many forms, discriminators can be creative, and the law must therefore be flexible enough to adapt to changing circumstances.

Even if we conclude that no member of the Congress that passed the FHA was concerned with protecting the rights of occupants, the fact remains that the text of the statute – which must be interpreted broadly – leaves room for it. 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.” As an earlier Seventh Circuit opinion observed:

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.

Finally, it is significant that Congress substantially amended the FHA in 1988. At that point, several federal cases had been decided in which the plaintiffs were current occupants of housing. 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 was only to apply 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. According to *Halprin* it would not violate § 3604(b) for a Condo Association to prevent a disabled person from using the laundry facilities, or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate § 3604(b) for a landlord to sexually harass a tenant or to raise the rent only of Jewish tenants. It would not violate § 3604(c) for a landlord to use racial slurs to or about existing tenants – or even to spray-paint such a slur on someone’s door. Nor would it violate § 3604(c) for a Homeowner’s Association to print up flyers denigrating a particular resident due to her religious faith and post them throughout the neighborhood. Despite the FHA’s prohibitions of such conduct, all of these behaviors would be beyond the law’s purview because of when they occurred.

Most practitioners and scholars (indeed, most laypeople), would likely be alarmed to discover that the nation’s remedial and comprehensive fair housing legislation – whose stated purpose is to provide “for fair housing . . . throughout the United States” – had such a limited reach.\(^{156}\) And with good reason: Such a regime would eviscerate nearly 40 years of fair housing jurisprudence, particularly in the landlord-tenant context, and would invalidate the results of hundreds of cases. A brief review of the cases that followed *Halprin* indicates that the federal courts are well on their way toward establishing just such a regime.

IV. THE AFTERMATH OF *HALPRIN*

*Halprin’s* impact was immediate. Courts from widespread jurisdictions started relying on it to dismiss the §§ 3604(b) and (c)
discrimination and harassment claims of existing tenants and homeowners. For example, *Lawrence v. Courtyards at Deerwood Assoc.*, 157 involved a black couple who owned a home in a subdivision that was governed by a HOA. The couple 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, leaving dead rats on their front and back steps, using racial epithets, cutting their cable television line, and leaving a mask similar to the one in the 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 on the common areas of the community, but took no further action. 158 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 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.” 159 Because the Defendants’ failure to stop the neighbor “did not have any impact on the Lawrence’s ability to purchase their home” the Court concluded that “the Defendants cannot be held liable under 42 U.S.C. 3604.” 160

In another case, *King v. Metcalf*, 161 the plaintiff was a black woman who rented a duplex in a neighborhood that was governed by a HOA. She alleged that the president of the HOA and another HOA member engaged in a pattern of racially-motivated harassment to try 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

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158 This failure to act was deliberate. The HOA had determined that the dispute was a mutual “neighbor on neighbor” conflict that it should not get involved in. Id. at 1137.
159 Id. at 1143
160 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).
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.162

In Krieman v. Crystal Lake Apts. Ltd. Partnership,163 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.164

In Ruele v. Sherwood Valley I Council of Co-Owners, Inc.,165 a condominium owner asserted a § 3617 claim against a member of the board of directors for her condo association, who 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 prove no underlying violation of the substantive portions of the FHA.166 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.”167

Gourlay v. Forest Lake Estates Civic Assoc.,168 involved a couple who owned a home, and who alleged that the HOA threatened and harassed them, made disparaging public statements about them, and initiated litigation against them because they were foster parents. The court

162 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.
163 No. 05-C-0348, 2006 WL 1519320 (N.D.Ill. May 31, 2006).
164 Id. at *8.
166 As discussed earlier, in dicta Halprin suggested 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, 388 F.3d at 330. Halprin, however, was forced to find otherwise on this point because the validity of HUD. Reg. 24 CFR § 100.400(c)(2), which indicates that an underlying violation need not be proven, was not questioned by the defendant. The Ruele court confuses this holding, claiming to adopt “the Seventh Circuit view that 24 CFR § 100.400(c)(2) is invalid.” Ruele, 2005 WL 2669480, at n.4.
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 Plaintiff’s 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 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.”

Claims of discriminatory provision of maintenance and other services also failed in the wake of Halprin. In Farrar v. Eldibany,169 and Ross v. Midland Mgmt. Co.,170 the plaintiffs were black women who rented apartments, and accused their landlords of racially-motivated failures to provide them with necessary maintenance and services.171 Both cases were brought under § 3604(b), and both were dismissed based on Halprin because the claims were not related to the acquisition of apartments.172

Municipal services claims similarly fared badly after Halprin. Courts relied on the decision in holding that only those municipal services which directly affect a transaction encompassing the sale or rental of a dwelling should be covered by § 3604(b), regardless of whether the service involved is a “traditional” city service.173 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 make out a claim under 3604(b).174 The 5th 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

171 In Farrar the plaintiff alleged that she had been denied heat and hot water. In Ross, the plaintiff alleged that her landlord failed to remedy mold accumulation, poor air quality, and unclean water filtration in her unit.
172 Farrar v. Eldibany, 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 v. Midland Mgmt. Co., 2003 WL 21801023, at *4 (“[B]ecause Plaintiff did not allege discrimination relating to the acquisition of her apartment, a private right of action under 3604(b) is unavailable.”)
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? 176

The petition was denied. 177

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. 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. 178 The complaint alleged violations of §§ 3604(a), (b), (c), and 3617. 179 Halprin was issued while the trial was on-going. At the close of the plaintiff’s case, the defense moved for judgment as a matter of law, arguing that Halprin precluded all “post-residence acquisition claims” under the FHA (including § 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.” 180

175 430 F.3d 734 (5th Cir. 2005). The court tried to temper this holding by allowing that: “[i]t 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 --, 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).


178 352 F.Supp.2d 970 (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, and argued against the defendant’s Halprin-based motion for judgment as a matter of law, discussed herein.


The following year, in *Richards v. Bono*, another sexual harassment case against a landlord, the court was also presented with a *Halprin*-based motion to dismiss because of § 3604(b)’s supposed inapplicability to post-acquisition claims. *Richards* reached a conclusion similar to *Koch’s*, 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.

In *Savanna Club Worship Service, Inc. v. Savanna Club Homeowner’s Association*, a religious group comprised of members of a homeowner’s association 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” such as the Savanna Club, in which access to particular amenities (such as common areas) is “part and parcel with homeownership.”

Finally, in *Krieman v. Crystal Lake Apartments, 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. The court acknowledged that *Halprin’s* broad holding appeared to foreclose the ability 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* didn’t apply. 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.

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181 No. 5:04CV484, 2005 WL 1065141 (M.D.Fla. May 2, 2005).
182 Id. at *5.
184 Id. at 1229.
185 No. 05-C0348, 2006 WL 1519320, at *6 (N.D.Ill. May 31, 2006). The plaintiffs had been residing in their apartment for more than 10 years at the time the alleged discrimination began.
186 Id. *Krieman* ultimately granted summary judgment to the defendants on plaintiffs’ § 3604(b) claim because they failed to produce evidence that other tenants were treated more favorably.
187 Id. at *8.
V. 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 homeowner’s associations, and residents against municipalities. However, the variable that Judge Posner introduced to the inquiry, acquisition, means different things in different contexts. Entering into a lease is obviously much different than purchasing a home. Buying a condo that is governed by a condo association or a home in a neighborhood with a homeowner’s association is considerably different than buying a dwelling that is 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 results described above. The opinion has been criticized for this failure, both by courts that rejected its conclusion as well as by courts that endorsed it.\textsuperscript{188}

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 Regulation would help, too. In the absence of legislative or administrative action, however, what should be done? The courts could keep Halprin’s acquisition/post-acquisition framework and attempt to address the context issue. This would require courts to range further afield from the language of the FHA. They would have to develop a doctrine of what it means to “acquire” housing – a term not used or defined anywhere in the statute – and then apply this doctrine to different scenarios. 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 travel down this path. Moreover, such an approach would butt up against concepts of property law, which is concerned not simply with “acquisition” but 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 “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 consistent with a significant body of federal caselaw, eliminates the

\textsuperscript{188} 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, 1231 n.11 (M.D.Fla. 2003).
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, “sale or rental” is be taken as referring 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?” but “who?” This limitation is necessary because unlike, for example, Title VII, the FHA does not define who is a proper defendant. Instead, it lists “discriminatory housing practices,” and anyone who is capable of engaging in such a practice is a proper defendant. 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 a FHA violation, he must qualify as an “aggrieved person,” which is broadly defined as “any person who claims to have been injured by a discriminatory housing practice.”

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.

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189 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.

190 SCHWEMM, supra note /19/ at 12B:1; N.A.A.C.P. v. American Family, 978 F.2d 287, 298 (7th Cir. 1992).

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


193 42 U.S.C. § 3602(i). It is clear that the aggrieved person need not be the target of the discriminatory practice. All that is required is that he suffer some harm as a result of the practice. Thus, a white tenant in a virtually all-white building can be considered aggrieved by his landlord’s racially-restrictive policies, because as a result he suffers the harm of living in a segregated environment. Trafficante v. Metropolitan Life, 409 U.S. 205 (1972).

In addition to a private right of action, the FHA provides for government-initiated suits by DOJ, and administrative complaints filed by HUD. 42 U.S.C. § 3610(a)(1)(A)(i) (Secretary-initiated complaints), § 3614 (DOJ). 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. § 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 enter into such agreements. The final “otherwise make unavailable” clause, however, widens the field considerably. Essentially, it means that this subsection can be violated by anyone who is capable of making housing unavailable to someone else. In practice, this 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). However, § 3604(a) 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. As one early case involving conduct by a neighbor pointed out, “Section 3604(a) is not limited to discriminatory practices by actual lessors and vendors of dwellings.”

2. §3604(b)

This subsection 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 going to be 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.\footnote{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. 96-2495, 1997 WL 1877201 (D.D.C. Dec. 18, 1997); Miller v. Towne Oaks East, 797 F.Supp. 557, 561 (E.D.Tex. 1992); Bradley v. Carydale Ent., 707 F.Supp. 217 (E.D.Va. 1989) (construing state fair housing law provision identical to § 3604(b)).}

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., 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 that:

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.\footnote{929 F.2d 714, 720 (D.C.Cir. 1991).}

Similarly, in 3304 Albany Crescent Tenants’ Assoc. v. City of New York, the court found that a municipal agency whose responsibility was 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 direct control over the conditions were the property owners and managers.\footnote{No. 95-Civ.-10662, 1997 WL 225825 (S.D.N.Y. May 5, 1997) (“The regulations enumerated in 42 U.S.C. § 3604 apply to those individuals and entities responsible for building, selling, and leasing private accommodations.”).} In Puglisi v. Underhill Park Taxpayer Assoc., a private “citizens’ taxpayers’ organization” threatened a landlord with retaliatory action if he continued to rent to blacks. The court found 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.\textsuperscript{200} And in \textit{Steptoe v. Beverly Area Planning Assoc.}, 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).\textsuperscript{201}

In \textit{Schroeder v. De Bertolo}, the only pre-\textit{Halprin} case to explicitly address the issue of § 3604(b)’s applicability post-sale, 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.\textsuperscript{202}

The exception to this general rule of § 3604(b)’s limitation to housing providers or professional comes with municipalities, who are not themselves providers of housing but who are usually the sole source provider of essential housing-related services. These cases, and the relationship between municipality and resident, will be discussed more fully at \textsection{___}.

3. § 3604(c)

This subsection requires that the discriminatory statement be made “with respect to the sale or rental” of a dwelling. As a practical matter, this appears to limit § 3604(c) to statements made by housing providers or professionals who are engaged in the sale or rental of a particular dwelling,\textsuperscript{203} because usually they are the only people capable of making statements “in connection” with such a sale or rental, at least in any meaningful way.\textsuperscript{204} This is not to say, however, that a § 3604(c) claim can

\begin{itemize}
\item \textsuperscript{200} 947 F.Supp. 673, 695 (S.D.N.Y. 1996).
\item \textsuperscript{201} 674 F.Supp. 1313, 1322 (N.D.Ill. 1987).
\item \textsuperscript{202} 879 F.Supp. 173, 178 (D.P.R. 1995).
\item \textsuperscript{203} HUD Regulation 24 C.F.R. § 100.75(b) 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).
\item \textsuperscript{204} Schwemm, \textit{supra} note /61/ 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, \textit{supra} note /61/ at n.
only be brought 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.

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. For example, in United States v. Space Hunters, Inc., a plaintiff sued the operator of an apartment locator service under § 3604(c). The district court had dismissed the claim, finding that § 3604(c) only applied to building owners or their agents who have a direct influence on the disposition of a particular piece of property. The Second Circuit reversed, noting that “Nothing in [3604(c)’s] language limits the statute’s reach to owners or agents or to statements that directly affect a housing transaction.”

133. Limiting the reach of § 3604(c) in this manner is also necessary to avoid potential First Amendment problems. White v. Lee, 227 F.3d 1214, 1232-37 (9th Cir. 2000).

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

206 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 section § 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. Hurry Macklowe Real Estate, 6 F.3d 898, 903-04 (2d Cir. 1993) (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 Housing of Marin v. Combs, No. C 97-1247, 2000 WL 365029 (N.D.Cal. Mar. 29, 2000) (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 Rptr. ¶ 25,106 (HUD ALJ 1995) (black social worker was 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. Gatebren, Fair Housing-Fair Lending Rptr. ¶ 25,078 (HUD ALJ 1994) (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 Rptr. ¶ 25,033 (HUD ALJ 1992) (property manager’s racist statements about tenant to tenant’s boyfriend and co-workers violated § 3604(c)); cf. Harris v. Izhaki (racial statement by landlord’s agent to white tenant, overheard by black tenant, may be covered by § 3604(c)).

207 United States v. Space Hunters, Inc., No. 00-Civ.-1781, 2001 WL 968993 (S.D.N.Y. Aug. 24, 2001), rev’d. in relevant part, 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 (M.D.Pa. 1986) (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) (“While 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.”).
There are limits, however, 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).\(^\text{209}\)

4. § 3617

This section does not require that the prohibited conduct – interference, coercion, and intimidation – be made with respect to the sale or rental of housing. Rather, it simply requires that the interfering activity be undertaken because the victim is exercising or enjoying fair housing rights, or has helped another do so. Section 3617 can therefore be applied against any manner of defendant, whether they are housing providers or complete strangers. For example, in *People Helpers v. City of Richmond*, 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 choices.”\(^\text{210}\)

To summarize: §§ 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 proper defendants under these sub-sections 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*

\(^{209}\) *Wainwright v. Allen*, 461 F.Supp. 293 (D.N.D. 1978) (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 (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); *United States v. Northside Realty Assoc.*, 474 F.2d 1164, 1169-71 (5th Cir. 1973) (improper to find liability based on the fact that defendant stated in court proceedings that he believed the FHA was unconstitutional).

Timing does enter into the “sale or rental” equation here, but only insofar as it relates to the identity of the defendant with respect to the aggrieved person at a particular time.\textsuperscript{211} 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. This concept was recognized in Richards v. Bono, where the court observed:

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.\ldots 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.\textsuperscript{212}

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.\textsuperscript{213} 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 time, according to a lease.\textsuperscript{214} 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.\textsuperscript{215} 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...
as smoking) in the unit.\textsuperscript{216} As a result of this, the landlord can alter the terms, conditions, and privileges of that relationship at any time through harassment, by imposing discriminatory policies, or by enforcing facially neutral rules in a discriminatory way.\textsuperscript{217} Similarly, the landlord can affect the “services and facilities” of the rental at any time by refusing to provide maintenance.\textsuperscript{218} Finally, a landlord’s discriminatory statements to or about his tenants have a powerful effect, even if they don’t 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 his 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.\textsuperscript{219}

The relationship between a seller and a potential buyer begins when the parties commence negotiating for 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 connections 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 comes to an end. It is difficult to imagine a scenario where the seller would be in a position to engage in this sort of discrimination post-sale. The only realistic scenario is if the seller were to harass the buyer after the sale was consummated. Even then, unless there was some type of on-going relationship between the seller and the buyer, the harassment would no longer be related to the seller-purchaser relationship.\textsuperscript{220} 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 they are made post-sale \textit{per se}, but because a post-sale seller will almost never be in a position to

\textsuperscript{216} \textit{Id.} at § 16.1 (obligations between landlord and tenant, when based on promises made in lease, continue after the possessory right is transferred).

\textsuperscript{217} \textit{Id.} at § 5.6 (tenant remedies where landlord’s conduct interferes with permissible use).

\textsuperscript{218} \textit{Id.} at § 5.5 (tenant remedies where landlord fails to maintain property).

\textsuperscript{219} A landlord is capable of violating § 3617 with respect to a former tenant, for example if he retains her security deposit in retaliation for the fact that she filed a HUD complaint against him.

\textsuperscript{220} The author could find only one example of a post-sale § 3604(b) claim brought by a buyer against the seller, \textit{Zhu v. Countrywide Realty, Co., Inc.}, 165 F.Supp.2d 1181 (D.Kan. 2001) discussed \textit{supra} note 75/.
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.\textsuperscript{221} There is no legal housing relationship here, although the informal relationship that exists between neighbors by virtue of their proximity may be on-going. Assuming there is no homeowner’s or condominium owner’s association 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 his neighbor’s dwelling, or any services or facilities in connection therewith, and § 3604(b) could not apply. Similarly, the neighbor is usually incapable of making statements that are sufficiently connected to the sale or rental of housing in order to trigger § 3604(c).\textsuperscript{222}

Thus, if we were to chart these 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, it would look something like this:

<table>
<thead>
<tr>
<th>RELATIONSHIP</th>
<th>DEGREE OF CONTROL OVER HOUSING</th>
<th>DURATION OF LEGAL RELATIONSHIP</th>
<th>FHA PROVISION CAPABLE OF VIOLATING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landlord – Tenant</td>
<td>High</td>
<td>For the length of tenancy</td>
<td>*Before and during tenancy: §§ 3604(a), (b), (c), 3617 *After tenancy: see stranger or neighbor</td>
</tr>
<tr>
<td>Seller – Buyer</td>
<td>High</td>
<td>Until sale transaction is completed</td>
<td>*Prior to sale: §§ 3604(a), (b), (c), 3617 *After sale: see stranger or neighbor</td>
</tr>
</tbody>
</table>

\textsuperscript{221} For the purposes of this discussion, I will refer to this type of defendant as a “neighbor”, although it could be anyone.

\textsuperscript{222} 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).
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 that are sufficiently related to the sale or rental of housing to violate § 3604(c).

To a large extent, this reflects what most courts have been doing all along, even if they seldom specifically cast the issue in these terms. Most pre-Halprin claims of stranger or neighbor-on-neighbor harassment were brought under § 3617 alone, and most claims of landlord-on-tenant discrimination or harassment were brought under §§ 3604(b) and (c), as well as § 3617. The few cases to address the relationship issue, as discussed above, all concluded that § 3604(b) requires some existing housing relationship between the defendant and the plaintiff. And as discussed in Section --, the few pre-Halprin cases 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 this understanding was seldom questioned.

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 have taken into account all along. It is no coincidence that the three of the four cases thus far to repudiate Halprin – United States v. Koch, Richards v.

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

Under the Fair Housing Act

Bono, and (in part) Kreiman v. Crystal Lake – are all 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 the anomalous results, described infra.

C. Municipalities 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) and one of its citizens, and (2) the relationship between a Homeowners or Condominium Owners Association (HOA or COA) and one of its residents. These don’t fit neatly into the binary view of property relationships as either rentals or sales, and they don’t fit at all well into Judge Posner’s temporal view where 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 or HOA/COAs.

1. Duration of housing relationship and level of control over housing

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 in a housing provider capacity, however, it has housing relationship with each citizen that lasts 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.

225 There are many types of local governmental units reflecting different levels of population density, including towns, cities, and villages. For simplicity, this Article will refer to all such governmental units as “municipalities.”

226 The only HOA case not to apply Halprin was Savanna Club Worship Service, Inc. v. Savanna Club Homeowner’s Ass’n, Inc., 456 F.Supp.2d 1223 (S.D.Fla. 2005). As discussed in Section --, the Savanna court endorsed the basic holding of Halprin but found this holding unworkable in the context of a planned community in which access to particular amenities is part of a resident’s rights as a homeowner.
For example, in *Clifton Terrace Assoc., Ltd. v. United Technologies Corp.*, the court articulated a “sole source provider” theory:

> 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.”

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

In contrast, the HOA/COA and the home- or condo-owner have an ongoing relationship with many housing-related rights and responsibilities. There are a few basic types of Common Interest Housing (CIH) relationships, each of which is structured differently and thus creates a different set of rights and obligations between the associational entity and the owner.

Homeowners Associations 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. Condominium Associations are similar in most relevant respects to HOAs, except that the owner typically 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. The co-op holds title to a building, and leases units to

227 929 F.2d 714, 720 (D.D.C. 1991) (distinglishing “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, 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.

228 Rosemarie Maldonado and 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 (Summer 1996) (noting that 95% of co-ops are located in NYC).
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, yet they do not have ownership rights to their individual unit. Because HOA and COAs are the most common forms of common interest housing, I will focus the rest of this discussion on them, and refer to them collectively as “Property Owners Associations” or “(POAs)”.

Regardless of the specific type, 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”) that are considered legally binding on all present and future owners of the property. There are also bylaws associated with most CIH developments. The bylaws and CC&Rs are generally written by the property developer and are extremely difficult to change. POAs are administered by an elected Board, which has the authority to pass additional rules. The Board can assess dues to pay for general services for residents, such as maintenance of common areas, snow removal, lawn-care, road maintenance, and security. The POA is charged with managing common property. These common areas are a significant benefit to residents, who typically would not be able to 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.

Common interest housing relationships, while technically occurring because a sale has taken place, look quite different from the traditional “fee simple” model of homeownership. In CIH, everybody who buys a unit

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229 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., Sanborn v. McLean, 206 N.W. 496 (Mich. 1925); Neponsit Property Owner’s Ass’n, Inc. v. Emigrant Indus. Savings Bank, 15 N.E.2d 793 (N.Y.Ct.App. 1938). For co-ops, these regulations are typically contained in the articles of incorporation.


231 RESTATEMENT (THIRD) OF SERVITUDES: COMMON INTEREST COMMUNITIES §6.7.

232 Id. at §6.5.

233 Id. at §6.6.

234 Id. at §6.8; See also, Gemma Giantomasi, Note, A Balancing Act: The Foreclosure Power of Homeowners’ Associations, 72 FORDHAM L.REV. 2503 (May 2004); Michael Kim, Involuntary Sale: Banishing an Owner From the Condominium Community, 31 J. MARSHALL L. REV. 429 (Winter 1998).

235 JOHN E. CREEBET & CORWIN JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY, 139 (3d ed. 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 (1983); Rosemarie Maldonado and Robert Rose, The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community
automatically is 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 Servitudes observes, “Through 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.” POAs can exercise an incredible degree of detailed and rigid controls over their residents, limiting their use of common areas, regulating the interiors of their units, and even dictating their behaviors. Board members are advised to be 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.

Most boards also have the right to enter individual property if it is deemed appropriate and necessary. Because of this on-going relationship and this significant decree of control, POAs are much more analogous to landlords than to home-sellers. Because of their governance structures and the types of services these entities provide – particularly HOAs in large developments – they also

Based Living?, 23 FORDHAM Urb.L.J. 1245, 1251 (Summer 1996) (“the 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 (1995) (“[homeowner’s] organizations exert considerable influence over the bundle of rights normally considered integral to homeownership.”).

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. Privatopia, supra note /230/ 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 15-16. A POA in California tried to regulate the housekeeping of an elderly, cancer-stricken resident by ordering him to throw away “outdated clothes,” 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 (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 (Tex. App. July, 10, 1997). See generally, Christopher Conte, Boss Thy Neighbor, GOVERNING, April 1, 2001, at 38; Laura Castro Triguniz, ‘Yes, It’s My Castle,’ ABA JOURNAL, June, 2000, at 30 (both discussing overreaching by POAs).

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 homeowner’s 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 deny or make unavailable a portion of the building to plaintiff, or to discriminate against plaintiff in the provision of housing services or facilities.”); c.f., Frances T. v. Village Green Owners Ass’n, 42 Cal.3d 490 (Cal. 1986) (with respect to tort liability, “[t]he Association is, for all practical purposes, the Project’s landlord”). See generally, John M. Payne, From the Courts: The Condominium as Landlord – Determining Tort Liability, 15 REAL EST. L.J. 365 (1987).
function rather like municipalities. In POA cases it makes little sense to strictly interpret “sale” as referring only to the period of time during which the property is negotiated for and the sale contract signed. This is because the contract for sale is really two contracts: one binds the buyer to the seller, obligating the buyer to pay the purchase price for the dwelling. The other is between the buyer and the POA, obligating the buyer to abide by the Association’s CC&Rs, bylaws, and rules. While the former contract is considered complete once the deed and payment have changed hands, the latter remains in force indefinitely, until the property owner moves out.

POAs therefore have a unique ability to discriminate against owners after they purchase their homes, either through harassment, refusing to allow access to common areas and amenities, adopting discriminatory rules or implementing rules in a discriminatory manner, or 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, “As community association law develops, judicial protection against abuses of minorities should increasingly reflect the particular institutional setting that surrounds community association decisions.”

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). This was essentially the court’s reasoning in *Savanna Club*, in which it allowed residents of a community that was governed by a HOA to proceed with a § 3604(b) claim against the HOA despite the fact that all of the plaintiffs already owned their homes. The court looked to the context in which the claim arose – homeowners in a CIH community were claiming

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241 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., Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REA Est. L.J. 322 (Spring 2001); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call”*, 30 Val. U. L. REV. 509 (Spring 1996); Cayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. Chic. L. REV. 1375 (Fall 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); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. REV. 1519 (June 1982); Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. Pa. L. REV. 1589 (June 1982). 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.

242 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 he or she lives in the home.


that the HOA was denying them the use of common areas – and found that *Halprin’s* acquisition rule was not applicable:

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.245

If we were to add municipal and POA defendants into the chart set forth earlier, it would look something like this:

<table>
<thead>
<tr>
<th>RELATIONSHIP OF DEFENDANT TO PLAINTIFF</th>
<th>DEGREE OF CONTROL OVER HOUSING</th>
<th>DURATION OF RELATIONSHIP</th>
<th>FHA PROVISION D CAPABLE OF VIOLATING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landlord – Tenant</td>
<td>High</td>
<td>For the length of tenancy</td>
<td>*Before and during tenancy: §§ 3604(a), (b), (c), 3617 *After tenancy: see stranger or neighbor</td>
</tr>
<tr>
<td>POA – Owner</td>
<td>Significant to moderate</td>
<td>For the length of ownership</td>
<td>Prior to sale and during ownership: §§ 3604(a), (b), (c), 3617</td>
</tr>
<tr>
<td>Municipality – Citizen</td>
<td>Moderate to low</td>
<td>For the length of residence</td>
<td>Prior to and during residence: §§3604(a), (b), (c), 3617</td>
</tr>
<tr>
<td>Seller – Buyer</td>
<td>High</td>
<td>Until sale transaction is completed</td>
<td>*Prior to sale: §§ 3604(a),(b),(c), 3617 *After sale: see stranger or neighbor</td>
</tr>
<tr>
<td>Stranger or Neighbor – Resident</td>
<td>None</td>
<td>None</td>
<td>§ 3604(a) and § 3617, but only for acts that deprive a person of</td>
</tr>
</tbody>
</table>

245 *Id.* at 1231.
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 municipality against a citizen is covered will depend on how much impact the act has on the plaintiff’s housing. Under this mode of analysis, Halprin, Gourlay, Lawrence, King, and Ruele would have come out 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 municipality was exercising over the plaintiff’s housing – that is, whether the court believed that the enforcement of zoning laws that affect habitability is to be considered a “housing related service”.

2. History of housing discrimination by municipalities and POAs

Applying the analysis in this manner ensures that two types of defendants, 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 the discriminatory history of both municipalities and POAs.

Common Interest Housing (CIH), which includes condominiums, co-operatives, and properties governed by homeowner’s associations, has expanded exponentially in the last forty years. There were fewer than 500 CIH developments in 1964. By 1970, two years after the passage of the Fair Housing Act, there were 10,000. Today there are 286,000 developments, encompassing 23.1 million housing units, with 57 million residents. In many rapidly developing areas, particularly those in the West, nearly all new residential development is under the jurisdiction of a POA. The trend shows no signs of slowing.

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246 PRIVATOPIA, supra note /230/ at 11.
248 Id.
249 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.”).
In the early part of the 20th century, CIH developments, and the POAs that went with them, were created, in large part, as a device to prevent racial, religious, and ethnic minorities from moving into white neighborhoods by enforcing racially restrictive covenants.\(^\text{250}\) It was an understood phenomenon that the introduction of even a few black families to an all-white neighborhood would cause houses prices to fall. The whites who lived in the neighborhood would view their own property 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 from this phenomenon,\(^\text{251}\) others saw that the best way to profit was to create mechanisms that would guarantee to buyers that their home values would never decline because of the introduction of minorities to the neighborhood.\(^\text{252}\) As a result, the restrictive covenants were drafted and endorsed by the real estate industry.\(^\text{253}\) Developers incorporated these covenants into their CC&Rs and created a POA to enforce them, then used the covenant and the POA as a marketing tool 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.\(^\text{254}\) These associations also occasionally used other, more violent means of discouraging blacks from moving in, and encouraging blacks who had already “encroached” to get out.\(^\text{255}\)

\(^{250}\) A PARTHEID, supra note /138/ at 36 (“One of the most important functions of the neighborhood associations . . . was to implement restrictive covenants.”); PRIVATOPIA, supra note /230/ 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 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, at n.33 (Dec. 1995).

\(^{251}\) 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); PRIVATOPIA, supra note /230/ at 62 (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”) and 72; A PARTHEID, supra note /138/ at 37-39.

\(^{252}\) PRIVATOPIA, supra note /230/ at 68-74.

\(^{253}\) A PARTHEID, supra note /138/ at 36-37.

\(^{254}\) PRIVATOPIA, supra note /230/ at 71-74.

\(^{255}\) Id. at 73-74.
After the Supreme Court ruled in 1948 that racially restrictive covenants were not legally enforceable, developers came to rely even more heavily on POAs to ensure that neighborhoods could retain their racial homogeneity once all the units were sold. The tactics became subtler, and were increasingly couched in the euphemisms of promoting “lifestyle” developments and preserving “neighborhood integrity.” POAs were encouraged to “self-enforce” their invalid covenants, and to take other actions to discourage integration – 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 in the neighborhood to a black family. Additionally, POAs began shifting to restrictions on the type of use that, while not explicitly race-based, were intended to – and did – have the effect of preventing minorities from moving in to exclusive neighborhoods. For example, occupancy standards that limited the number of people who could reside in a dwelling, requiring that all dwellings sell for a minimum price, requiring large lot sizes, and adhering to strict maintenance standards.

The passage of the Fair Housing Act 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 advertise themselves as “exclusive,” and use language that is coded to signal homogeneity. Such communities may form themselves around costly “lifestyle amenities” that seem designed to appeal only to whites. Even controlling for differences in income, common interest housing developments, particularly gated communities and

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257 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 was no state laws prohibiting such conduct.
258 PRIVATOPIA, supra note 230/ at 75-76.
259 PRIVATOPIA, supra note 230/ at 77-78.
261 Lior Jacob Strahilevitz describes the dramatic increase in the number of golf course communities that sprang up in the mid-1990s. These communities offer golf course privileges to residents and require the residents to pay hefty dues to support the course. Strahilevitz notes that a substantial number of people who purchased homes in these communities played no golf. However, he notes 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 residential homogeneity, for which even non-golfers are willing to pay a premium. Exclusionary Amenities in Residential Communities, 92 VA. L. REV. 437 (2006). 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., Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980) (black buyer of home in country club community was prohibited from joining club); Tillman v. Wheaton-Haven Recreation Ass’n, Inc., 410 U.S. 431 (1973) (swimming pool); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (community recreation facilities).
co-ops, remain more “white” today than non-common interest housing.262

Similarly, municipal 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 across the United States.263 After the practice was officially banned in 1917, municipalities continued to pass and attempt to enforce such zoning laws for thirteen more years.264

Even after race-specific zoning was forbidden, municipalities continued to engage in activities that had the intent – and effect – of keeping blacks out, or of relegating those blacks that were “in” to segregated and inferior living conditions. For example, 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.265 Some municipalities were formed after white suburbs “seceded” from neighboring black areas.266 Others deliberately provided inferior services to black neighborhoods,267 and engaged in “urban renewal”

262 PRIVATOPIA, supra note /230/ at 188-192 (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 390-392 (2005) (describing how POAs and gated communities continue to perpetuate the racial segregation that was previously maintained by violence and discrimination); Maldonado and 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, 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, David J. Kennedy, Note, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 YALE L.J. 761, 768 (Dec. 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”).


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


267 See, generally, CHARLES M. HAAR AND DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS (1986). See, e.g., Ammons v. Dade City, 783 F.2d 982 (1986) (city intentionally provided inferior street paving, street maintenance, and storm drainage services to the predominantly black part of town); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (city intentionally provided inferior water, street paving, and drainage services to the 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) (gross disparities in treatment between black and white neighborhoods of the town with respect to street paving, street lighting, traffic controls, surface water drainage, and sewage treatment); Selmont Improvement Ass'n v. Dallas County Comm'n, 539 F.Supp. 477 (S.D.Ala. 1972) (failure to pave roads in black communities).
projects that literally or practically destroyed black neighborhoods.\textsuperscript{268} In a significant number of locations, particularly in the Midwest and the South, city or town officials, municipal chambers of commerce, police departments, and private citizens, worked in conjunction to remove blacks from their borders, and then to maintain their municipalities as all-white.\textsuperscript{269}

This unfortunate history underscores the importance of ensuring that all portions of the FHA apply to the actions of POAs and municipalities throughout the duration of their relationship to their residents. If the Fair Housing Act’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 municipalities and POAs direct toward their residents.

\textbf{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 – to bar claims regardless of the factual context in which they arise. The focus, ultimately, must be on the nature of the prohibited act, because that is the only thing directly addressed by the statute.\textsuperscript{270} It is 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, and that person should not escape the reach of the FHA simply because their relationship to the plaintiff does not fall into a particular category.

\textsuperscript{268} For example, in the Supreme Court’s seminal case on eminent domain, \textit{Berman v. Parker}, more than 97\% of the people displaced by the urban renewal project at issue were black. 348 U.S. 16, 30 (1954). See also, \textit{Bernard J. Frieden, Lynne B. Sagalyn, Downtown, Inc. How America Rebuilds Cities} 28-29 (1989) (observing that “Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite,” and that “Public works projects in the 1950’s and 1960’s destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland.”); Wendell E. Pritchett, \textit{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”). The effect of urban renewal on minority populations was so pronounced that in cities across the country, urban renewal came to be known as “Negro removal.” \textit{American Apartheid}, supra note /137/ at 56.

\textsuperscript{269} \textit{James W. Loewen, Sundown Towns} (2005).

\textsuperscript{270} \textit{Daniel W. Barkley, Beyond the Beltway: Does the Fair Housing Act Cover Quality of Housing Issues?}, 7 J. AFF. HOUSING & COMM. DEV. L. 11, 14-15 (Fall 1997).
Halprin and the cases that have followed it are troubling. From a practical standpoint, they have created a rule that eliminates most of the FHA’s substantive protections for existing residents of housing. 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 to weigh in on the issue.

More problematic are the ramifications of the Halprin mode of analysis. Most of the Fair Housing Act’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 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.271

Halprin is also worrisome for the broader view that it reflects. In many ways it embodies the 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.272 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, or housing.273 Kimberle Crenshaw argues:

271 Halprin is not the first time that the Seventh Circuit has taken a narrow view of the FHA in recent years. 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 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.\footnote{Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1384 (May 1988).}

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 who is able to obtain them. For such “privileged” minority individuals, discrimination – either overt or subtle – can lead to profound feelings of alienation, anxiety, and anger.\footnote{For example, in The Rage of a Privileged Class, 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. Id. at 48, 73-91. Similarly, in Note, Racism and Race Relations in the University, 76 Va. L. Rev. 295 (March 1990), Darryl Brown 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 312-322.}

For some, this continual 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.\footnote{Cose describes how such treatment and the rage that it spawns causes some black professionals to leave their jobs for less prestigious positions. RAGE 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. Racism and Race Relations, 76 Va. L. Rev. at 323-37 & n.93.}

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.\footnote{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. Racism and Race Relations, 76 Va. L. Rev. at 325.} 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 it. It is time for that trend to come to an end. Future courts should base their treatment of post-acquisition claims on a 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 protected if the Fair Housing Act’s protections are to have any meaning.