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On Second Thought: Post-acquisition Housing Discrimination In Light Of *Bloch V. Frischholz*

Jessica D. Zietz

On Second Thought: Post-Acquisition Housing Discrimination in Light of *Bloch v. Frischholz*

JESSICA D. ZIETZ*

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 . . . .

–The Honorable Warren K. Urbom[1]

I. INTRODUCTION

For almost forty years, courts nationwide appeared to share Judge Urbom's opinion, extending the protections of the Fair Housing Act to

* Articles and Comments Editor, *University of Miami Law Review*; J.D. Candidate 2012, University of Miami School of Law; B.A. 2006, University of Central Florida. I would like to thank my parents, Jonathan, and Joshua for their unwavering love and support. I would also like to thank Professor David Abraham for his insight and guidance.

1. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004).

homeowners and home seekers alike. However, in 2004, the Seventh Circuit pushed aside decades of precedent when it decided *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*[2] and held that discrimination occurring after the purchase or rental of a dwelling is not actionable under the Fair Housing Act. The decision opened up a circuit court split, and its aftermath dismayed fair housing advocates. Relying on *Halprin*, district courts[3] and one other federal appellate court[4] swiftly dismissed cases from homeowners and tenants claiming post-acquisition discrimination.

The Seventh Circuit Court of Appeals adhered to *Halprin* when it decided *Bloch v. Frischholz*.[5] In *Bloch*, the court held that harassment of a Jewish family by their condominium association did not give rise to a cause of action under the Fair Housing Act because the conflict occurred after the Blochs purchased their units. However, on rehearing en banc, the Seventh Circuit changed course, reversing the earlier decision and partially overruling *Halprin*.[6] In the en banc opinion, the court declared that the Fair Housing Act can indeed reach post-acquisition discrimination.[7]

This note argues that the Fair Housing Act's protections should cover pre- and post-acquisition discrimination alike. It provides an examination of the Fair Housing Act as it relates to post-acquisition discrimination and an analysis of case law on the issue. Part II examines the history and purpose of the Fair Housing Act. Part III sets forth the relevant Fair Housing Act provisions. Parts IV–V summarize pre-*Halprin* case law and the *Halprin* decision. Part VI explores the aftermath of *Halprin*. Part VII details the *Bloch I–II* decisions. Finally, Part VIII analyzes whether the *Bloch II* decision will repair the damage done by *Halprin*, concluding that further action from Congress or the Supreme Court is necessary to fully secure fair housing rights.

II. A Brief History of the Fair Housing Act (FHA)

A. *Historical Perspective*

Between 1910 and 1970, African Americans relocated from the

2. 388 F.3d 327 (7th Cir. 2004).

3. *See, e.g.*, Krieman v. Crystal Lake Apartments Ltd. P'ship, No. 05 C 0348, 2006 WL 1519320 (N.D. Ill. May 31, 2006); Jones v. South Bend Hous. Auth., No. 3:08-CV-596, 2009 WL 1657466 (N.D. Ind. June 10, 2009).

4. *See* Cox v. City of Dallas, Texas, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006).

5. 533 F.3d 562 (7th Cir. 2008).

6. Bloch v. Frischholz (Bloch II), 587 F.3d 771, 782 (7th Cir. 2009) (en banc).

7. *Id.* at 772.

South to the North in massive numbers.[8] This movement, which became known as the Great Migration, was spurred by several factors. Technological developments in the automobile and appliance industries created employment opportunities in the North, while demand for African American farmworkers declined in the South.[9] Furthermore, black Southerners struggled with oppressive social and political conditions.[10] Unemployed and besieged by discrimination, around 877,000 African Americans relocated to the North during the 1920s alone.[11] The Great Depression slowed migration in the 1930s, but by the close of the decade, another 400,000 African Americans had left the South.[12] Over the next three decades, close to 4.38 million African Americans headed north or west, often to "the consternation of the middle-and-working-class whites already living in those regions."[13]

Once resettled in the North, African Americans lived in poor, urban areas and worked low-paying, industrial jobs.[14] White Northerners were suddenly forced to compete for employment and affordable housing, and race relations in northern cities went from "mostly harmonious to strained or even hostile."[15] In cities such as Detroit, black families who moved into all-white neighborhoods suffered attacks ranging from burning crosses to broken windows.[16] Construction of highways and increased automobile usage gradually made it easier for white city workers to live in surrounding areas and commute to work.[17] As city schools were desegregated and violence broke out, white families relocated to suburbs, while black residents stayed behind in slum-like neighborhoods.[18] Additionally, federally-funded highway projects often displaced city residents.[19] In some instances, highway construction projects "intentionally removed minorities from particular neighborhoods and segregated them into others."[20] Poor African American residents faced exceptional difficulty securing affordable housing, and had little choice

8. CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 26–27 (2005).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 28.

15. *Id.*

16. Thomas J. Sugrue, Op-Ed, *A Dream Still Deferred*, N.Y. TIMES, March 26, 2011, at WK11.

17. LAMB, *supra* note 8, at 13.

18. *Id.* at 28.

19. *Id.* at 13.

20. *Id.*

but to remain in overcrowded, predominantly black neighborhoods.[21] Furthermore, under the guise of "federal urban renewal," the United States frequently destroyed decaying African American neighborhoods, replacing them with inadequate public housing.[22] Local authorities consciously assigned public housing on a segregated basis, sometimes "creating racial segregation in housing where it did not exist before."[23] Some federal courts held that these policies were unconstitutional.[24] However, the "renewal" continued into the 1960s.[25]

B. *Fair Housing Legislation Takes Shape*

During the 1950s, Texas Senator Lyndon B. Johnson opposed a variety of civil rights measures. He objected to voting rights and anti-lynching legislation, supported poll taxes, and publicly spoke out against forced integration.[26] However, as public opinion "grew more sympathetic to the plight of African Americans in the South," Johnson softened his positions, becoming one of the few Southern politicians to support the Civil Rights Act of 1957.[27] As vice president in the Kennedy Administration, Johnson chaired the President's Committee on Equal Employment Opportunity.[28] When Johnson became president following John F. Kennedy's assassination, he advocated civil rights in America, supporting the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[29] These landmark laws prohibited private as well as public discrimination in crucial areas such as employment and education. However, they did not address the housing discrimination that so many African Americans were facing.[30] In his 1964 State of the Union address, President Johnson vowed to abolish racial discrimination, including housing discrimination.[31] Congress initially rejected the president's proposals.[32] Some states attempted to fill in the gaps; by 1968, twenty-one states and the District of Columbia had passed legislation barring discrimination in either or both the sale and rental of housing.[33]

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21. *Id.* at 13–14.
22. *Id.* at 14.
23. *Id.*
24. *See, e.g.*, Detroit Housing Commission v. Lewis, 226 F.2d 180 (6th Cir. 1955) (holding that the intentional segregation of public housing projects was unconstitutional and violated federal law).
25. LAMB, *supra* note 8, at 15.
26. *Id.* at 29.
27. *Id.* at 30.
28. *Id.*
29. *Id.*
30. *Id.* at 31.
31. President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964).
32. LAMB, *supra* note 8, at 31.
33. *Id.* at 32.

Many states, however, remained silent. The states' patchwork efforts demonstrated the need for uniform, federal fair housing legislation.

In January of 1966, President Johnson sent his first fair housing bill to Congress.[34] Although the bill garnered a few supporters, most Senators and members of Congress vocally opposed it.[35] In 1967, another fair housing bill, S. 1358,[36] was introduced at committee hearings, where it quickly died.[37] Undaunted, President Johnson continued to campaign for fair housing legislation, reaching out to both legislators and the public.[38] His efforts decreased his popularity, as white Americans were "voic[ing] concerns over the speed and aggressiveness of the civil rights movement" and the urban riots that took place throughout the last several years of the decade.[39] But the President persisted, arguing that African Americans' poor living conditions and overcrowded neighborhoods had a negative effect on the country at large.[40] In the beginning of 1968, President Johnson gave a civil rights address in which he explained that housing discrimination concentrated minorities in cities, leading to increased crime rates, poverty, and a lack of educational and employment opportunities for African Americans.[41] The President outlined legislation that would help assuage these problems, recommending that a fair housing bill:

> – Outlaw discriminatory practices in the financing of housing, and in the services of real estate brokers.
> – Bar the cynical practice of block-busting, and prohibit intimidation of persons seeking to enjoy the rights [the law] grants and protects.
> – Give responsibility for enforcement to the Secretary of Housing and Urban Development and authorize the attorney general to bring suits against patterns and practices of housing discrimination.[42]

Over the next three years, President Johnson continued to push for fair housing legislation, failing time and again to garner enough support for the bill.[43] But in 1968, three events occurred that led, finally and quickly, to the bill's passage. First, Senate Minority Leader Everett Dirksen (R-Ill.) "reversed his long standing-opposition to a national fair

34. *Id.* at 33.
35. *Id.* at 33–34.
36. 90th Cong. (1967).
37. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 26 (2008).
38. LAMB, *supra* note 8, at 34.
39. *Id.* at 34.
40. *Id.* at 35.
41. *Id.* at 39.
42. Special Message to the Congress on Civil Rights, 1 PUB. PAPERS. 189 (Jan 24. 1968), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=28871&st=block-busting&st1=#axzz1KMX3oOt8.
43. LAMB, *supra* note 8, at 40.

housing law and agreed to a compromise," a move Senator Walter Mondale (D-Minn.) called miraculous.[44] Second, the National Advisory Commission on Civil Disorders (nicknamed the Kerner Commission), created by President Johnson in 1967, released a report examining the reasons behind the 1967 and 1968 urban riots.[45] The report concluded that racial segregation in housing was causing urban violence and gravely threatening American society.[46] The Kerner Commission urged Congress to pass fair housing legislation.[47] Third, Dr. Martin Luther King, Jr. was assassinated.[48] Less than two weeks after the Kerner Commission's report was released, the Senate passed the bill that became the Fair Housing Act.[49] As riots raged in Washington, D.C., the House of Representatives passed the bill on April 11, 1968, just one day after Dr. King, Jr. was laid to rest.[50] The following day, President Johnson signed the Fair Housing Act into law.[51]

C. *Legislative History*

Although President Johnson pushed for the statute's enactment for years, the final version of the bill was passed quickly, in a chaotic month during which Congress was under intense political pressure. Just three days after the release of the Kerner report, the Senate voted cloture on a filibuster that was blocking the bill.[52] Furthermore, the House of Representatives was allowed just one hour of debate on the bill.[53] As Professor Rigel C. Oliveri notes, "the final version of the bill that became the FHA was never considered by committee, and no formal reports explaining its terms exist."[54] Congress did not discuss interpretation of the statute's language.[55] Committee hearings and floor debates centered mostly on whether Congress had the power to enact the bill and the scope of exemptions to the law's coverage, respectively.[56] In addition, "no specific discussion addresse[d] whether to interpret the FHA as

44. *Id.* The compromise placed most of the bill's enforcement powers in the Attorney General's hands, rather than with the Secretary of Housing and Urban Development. *Id.*

45. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

46. *Id.*

47. *Id.*

48. LAMB, *supra* note 8, at 41.

49. H.R. 2516, 90th Cong. (1968).

50. Oliveri, *supra* note 37, at 27.

51. LAMB, *supra* note 8, at 43.

52. Oliveri, *supra* note 37, at 27.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

applicable to post-acquisition housing" discrimination.[57] As a result, Oliveri asserts, the Fair Housing Act's legislative history provides little insight into the meaning of the bill's substantive terms.[58] Professor Robert G. Schwemm echoes this conclusion, noting that "[d]ue to the haste that characterized passage of the FHA . . . its legislative history produced little useful material concerning the proper interpretation of its substantive provisions."[59] Thus, the bill's legislative history does not resolve the question of whether Congress intended the Fair Housing Act to apply to post-acquisition housing discrimination.

III. PROVISIONS OF THE FAIR HOUSING ACT AND ACCOMPANYING REGULATIONS THAT RELATE TO POST-ACQUISITION DISCRIMINATION CLAIMS

In 1972, the United States Supreme Court made clear that the FHA carries out "a policy that Congress considered to be of the highest priority" and that its "broad and inclusive" language should be given "a generous construction."[60] It is therefore important to examine relevant FHA provisions under this broad, inclusive framework.

The first section of the Fair Housing Act declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[61] The majority of the FHA focuses on administration and enforcement.[62] The provisions that are most relevant to post-acquisition discrimination are 42 U.S.C. § 3604, which focuses on "[d]iscrimination in the sale or rental of housing and other prohibited practices," and 42 U.S.C. § 3617, which addresses coercion, interference, and intimidation directed at persons who exercise their fair housing rights.[63] 42 U.S.C. § 3605 also encompasses post-acquisition conduct. Of the six 42 U.S.C. § 3604 subsections, (a), (b), and (c) are potentially applicable to post-acquisition causes of action.[64]

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57. *Id.*

58. *Id.*

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

60. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–12 (1972). In *Trafficante*, the Supreme Court gave "standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the [FHA]." *Id.* at 212.

61. 42 U.S.C. § 3601 (2006).

62. *See, e.g.*, 42 U.S.C. §§ 3608, 3610, 3612–14 (2006).

63. 42 U.S.C. §§ 3604, 3617 (2006).

64. U.S.C. § 3604(d) prohibits falsely representing to a person, because of a protected ground, that a dwelling is unavailable. 42 U.S.C. § 3604(e) makes it unlawful to induce or try to induce a person to sell or rent a dwelling "by representations regarding the entry . . . of a person" falling into a protected category. 42 U.S.C. § 3604(f) details protections for handicapped persons.

A. *42 U.S.C. § 3604(a) (§ 3604(a))*

§ 3604(a) prohibits refusal "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 race, color, religion, sex, familial status, or national origin."[65] In pre-acquisition cases, § 3604(a) is invoked where a plaintiff claims to have been subjected to, for instance, racial steering.[66] In post-acquisition claims, § 3604(a) becomes relevant when an aggrieved homeowner or tenant claims that harassment or discrimination has essentially made the dwelling unavailable to him, despite his already residing in it. For example, a plaintiff may assert that he or she has been actually[67] or constructively[68] evicted from housing.

B. *42 U.S.C. § 3604(b) (§ 3604(b))*

§ 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," because of any of the six protected grounds: "race, color, religion, sex, familial status, or national origin."[69] The section's pre-acquisition application is straightforward, barring practices such as charging tenants of one race higher rent than tenants of a different race. Determining whether § 3604(b) has any relevance to post-acquisition discrimination claims has been a more controversial matter. Courts and commentators have argued over the statute's language and grammar, debating whether the "services or facilities" modified by "in connection therewith" applies to services or facilities in connection with a dwelling itself or to services or facilities in connection only with the *sale or rental* of a dwelling. The former interpretation would lend applicability of the statute to post-acquisition claims; the latter to pre-acquisition cases only. Schwemm constructed a grammatical diagram of the phrase and concluded that

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65. 42 U.S.C. § 3604(a) (2006).

66. *See, e.g.*, Heights Cmty. Congress v. Hilltop Realty, Inc., 774 F.2d 135 (6th Cir. 1985) (affirming the trial court's decision that a realty company's agents violated § 3604(a) by deliberately sending black customers to black-owned available homes only); United States v. Space Hunters, Inc., 429 F.3d 416 (2d Cir. 2005) (allowing the plaintiff to go forward with a § 3604(a) claim where the defendant admitted to "steer[ing] prospective tenants to rooms on the basis of race."); Spencer v. Conway, No. CV 00-350GLTEJ, 2001 WL 34366573, at *1 (C.D. Cal. July 5, 2001) (holding that it is a violation of § 3604(a) "for an apartment owner to instruct residential managers not to rent to minority applicants, even if no further discriminatory action is taken as a result of the instruction.").

67. *See, e.g.*, Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984).

68. *See, e.g.*, Stackhouse v. DeSitter, 620 F. Supp. 208 (N.D. Ill. 1985). Constructive eviction occurs when a landlord's wrongful act renders premises useless to a tenant, causing the tenant to abandon the premises. *See generally* 49 AM. JUR. 2D LANDLORD AND TENANT § 515 (2006).

69. 42. U.S.C. § 3604(b) (2006).

> [F]rom a grammatical standpoint, neither "a dwelling" nor "the sale or rental of a dwelling" is the target for § 3604(b)'s "therewith" clause; rather, "therewith" refers to the phrase "in the terms, conditions, or privileges." This is an adverbial prepositional phrase describing *how* one discriminates under § 3604(b), while both "a dwelling" and the "sale or rental of a dwelling" are prepositional phrases that further explain what types of "terms, conditions, and privileges" discrimination are prohibited. In other words, the phrase "*of* sale or rental *of* a dwelling" is itself comprised of two modifying prepositional phrases, and thus the "thing" referenced by the "therewith" clause is discrimination in the entire phrase "terms, conditions, or privileges of sale or rental of a dwelling."[70]

This grammatically correct reading, concluded Schwemm, does not aid in interpreting § 3604(b)'s "services or facilities in connection therewith" clause, "which clearly was intended by Congress to add new types of prohibited discrimination to the earlier prohibitions against 'terms, conditions, or privileges' discrimination."[71] Courts have therefore employed both interpretations.[72] Whichever interpretation a court chooses, noted Schwemm, "its choice cannot be defended on the basis of correct grammar, as Judge Higginbotham[73] tried to do in *Cox*."[74] Instead, "the choice must turn on what Congress intended substantively."[75] As noted earlier, however, there is little legislative history available to help resolve the issue.

C. *42 U.S.C. § 3604(c) (§ 3604(c))*

§ 3604(c) prohibits making, printing, or publishing "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling" that expresses a preference based on a protected class.[76] Violations of this section occur most frequently before acquisition, where, for example, a seller advertises a property as being available to whites only.[77] However, the statute has sometimes been invoked in cases of post-acquisition discrimination. For instance, in *Harris v. Itzhaki*,[78] the court held that a landlord's agent's discriminatory statement to a white tenant, overheard by an African American tenant, was actionable under § 3604(c).

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70. Schwemm, *supra* note 59, at 770–71.
71. *Id.*
72. *Id.*
73. *See infra* Section VI.
74. Schwemm, *supra* note 59, at 770–71.
75. *Id.*
76. 42 U.S.C. § 3604(c) (2006).
77. *See, e.g*, United States v. Hunter, 459 F.2d 205, 210 (4th Cir. 1972).
78. 183 F.3d 1043, 1054 (9th Cir. 1999).

D. *42 U.S.C. § 3605 (§ 3605)*

§ 3605 addresses discrimination in residential real estate-related transactions, barring discrimination in the "making or purchasing of loans . . . for purchasing, constructing, *improving, repairing, or maintaining a dwelling*."[79] It is difficult to see how an argument could be made that this section does not apply to post-acquisition discrimination. As Judge Urbom noted in *United States v. Koch*,[80] § 3605 demonstrates that, in enacting the FHA, "Congress was not unconcerned with the need to prevent discrimination that might arise during a person's occupancy of a dwelling."[81]

E. *42 U.S.C. § 3617 (§ 3617)*

§ 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right granted or protected by" §§ 3603–3606.[82] This portion of the FHA has also been the focus of much debate. Scholars, courts, and commentators have debated the meaning of the section, attempting to discern whether a cause of action under § 3617 can exist even where no violation of §§ 3603–3606 occurs.[83] The *Bloch II* decision emphatically stated that a § 3617 cause of action can exist independent of a violation of the other FHA provisions.[84]

F. *U.S. Department of Housing and Urban Development (HUD) Regulations*

The Fair Housing Act gave HUD the "authority and responsibility" to administer the FHA's provisions.[85] The Department is responsible for implementing regulations that interpret the Fair Housing Act. Under *Chevron, USA v. Natural Resources Defense Council*,[86] these formal regulations are generally entitled to deference by courts, as long as *Chevron*'s two criteria are met. First, the court must first decide whether

79. 42 U.S.C. § 3605(b)(1)(A) (2006) (emphasis added).

80. United States v. Koch, 352 F. Supp. 2d 970, 977 (D. Neb. 2004).

81. *Id.*

82. 42 U.S.C. § 3604(a) (2006).

83. *Compare* United States v. Hayward, 36 F.3d 832, 836 (9th Cir. 1994) (stating that a § 3617 claim could involve a situation "where no discriminatory housing practice may have occurred at all . . . ."), *with* Frazier v. Rominger, 27 F.3d 828, 834 (2d Cir. 1994) (asserting that § 3617 prohibits "the interference with the exercise of Fair Housing rights" only as enumerated in §§ 3603–3606).

84. *See infra* Section VII.

85. 42 U.S.C. § 3608(a) (2006).

86. 467 U.S. 837 (1984).

Congress "has directly spoken to the precise question at issue."[87] If so, the court (and the agency) must give effect to Congress's intent.[88] If Congress's intent is ambiguous, the court "does not simply impose its own construction on the statute."[89] Rather, the court merely decides if the agency's interpretation of the statute is "permissible."[90]

1. 24 C.F.R. § 100.400(c)(2)

24 C.F.R. § 100.400(c)(2) forbids "[t]hreatening, intimidating or interfering with persons in their *enjoyment of a dwelling* because of the race, color, religion, sex, handicap, familial status, or national origin of such persons . . . ."[91] This regulation has also been the subject of much discussion, because it obviously reaches post-acquisition conduct. A buyer or renter cannot, of course, begin to enjoy a dwelling until he or she has actually moved into it. Thus, courts and commentators have pointed to the regulation in support of the argument that the FHA covers post-acquisition discrimination.

2. 24 C.F.R. § 100.65(b)(4)

24 C.F.R. § 100.65(b)(4) prohibits "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status or national origin of an *owner, tenant or a person associated with him or her*."[92] Again, the agency interpreting the FHA clearly contemplated post-acquisition discrimination and accordingly extended the statute's protections to owners and tenants.

IV. PRE-*HALPRIN* CASE LAW

Before *Halprin*[93] was decided, decisions on post-acquisition discrimination generally fell into two categories. Some courts simply heard the cases without ever specifically addressing the post-acquisition issue. These cases seemed to implicitly accept that the claims were actionable, despite the harassment's or conflict's occurring after the plaintiffs had moved in. For example, in *Campbell v. City of Berwyn*,[94] the plaintiffs alleged that they received inferior police protection for their home based

87. *Id.* at 843.
88. *Id.* at 843–44.
89. *Id.* at 844.
90. *Id.*
91. 24 C.F.R. § 100.400(c)(2) (1989) (emphasis added).
92. 24 C.F.R. § 100.65(b)(4) (1989) (emphasis added).
93. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 898 (N.D. Ill. 2002), *aff'd in part, rev'd in part, remanded by* 388 F.3d 327 (7th. Cir. 2004).
94. 815 F. Supp. 1138 (N.D. Ill. 1993).

on their race.[95] The court considered their claims under §§ 3604 and 3617 without first addressing whether the statutes applied post-acquisition.[96]

Other courts deliberately addressed whether the FHA applied to post-acquisition claims, usually answering the question in the affirmative. For example, in *Concerned Tenants Ass'n v. Indian Trails Apts.*,[97] the court rejected the defendants' argument that § 3604(b) applied only to the availability of housing.[98] Such a "tortured interpretation," asserted the court, ran counter to the "plain and unequivocal language of the statute."[99] In *Hous. Rights Ctr. v. Donald Sterling Corp.*,[100] minority renters complained of discriminatory mistreatment by their landlord.[101] Among their complaints was an allegation that, based on their nationality, the landlord attempted to deny the renters use of a parking garage amenity.[102] In no uncertain terms, the court declared that "a discriminatory statement made with respect" to the provision of services or facilities offered in connection with a home "violates § 3604(c), even if not made at the moment of first sale or rental."[103] In *United States v. Pospisil*,[104] the court held that a post-acquisition § 3617 violation could occur absent a substantive violation of §§ 3603–3606.[105] Refusing to recognize independent § 3617 claims, explained the court, would render the section redundant and conflict with the HUD regulations.[106]

V. THE *HALPRIN* CASE

A. *Facts*

Rick Halprin, a Jewish man, and his wife, Robyn, owned a home in a suburb of Chicago, Illinois.[107] The Halprins' subdivision was managed by a homeowners' association (HOA), which was responsible for man-

95. *Id.* at 1141.

96. *See also* Landesman v. Keys Condomium Owners Ass'n, No. C 04-2685 PJH, 2004 WL 2370638, at *1, *4 (N.D. Cal. Oct. 19, 2004) (enjoining condominium association from discriminatorily barring plaintiffs from use of a common pool, without first considering whether the FHA applied to post-acquisition claims).

97. 496 F. Supp. 522 (N.D. Ill. 1980).

98. *Id.* at 525.

99. *Id.*

100. 274 F. Supp. 2d 1129 (C.D. Cal. 2003).

101. *Id.* at 1141.

102. *Id.*

103. *Id.* at 1142.

104. 127 F. Supp. 2d 1059 (W.D. Mo. 2000).

105. *Id.* at 1063.

106. *Id.*

107. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 898 (N.D. Ill. 2002), *aff'd in part, rev'd in part, remanded by* 388 F.3d 327 (7th. Cir. 2004).

aging and providing services to the neighborhood's occupants.[108] The Halprins alleged that the HOA board's president, Mark Ormond, engaged in anti-semitic behavior toward them, including painting "H-town property" (short for the derogatory epithet "Hymie Town") on a wall on the Halprins' property.[109] Furthermore, "a tape recording of a board meeting at which the Halprins were discussed" was destroyed, and the meeting's minutes were altered.[110] The Halprins also claimed that Ormond vandalized their property.[111] Additionally, Ormond blocked Robyn Halprin's efforts to address the HOA's board regarding management of the Association.[112] The Halprins sued Ormond, the HOA, and other members of the board, alleging violations of Fair Housing Act §§ 3604 and 3617.[113] The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).[114] The trial court granted the motion, based on the fact that the defendants' alleged conduct took place *after* the Halprins bought their home.[115] The Halprins appealed.

B. *Decision*

In an opinion written by Judge Posner, the Seventh Circuit affirmed in part and reversed in part.[116] The court ignored the Halprins' § 3604(c) claim,[117] stating early in the opinion that the only FHA provisions that were "possibly relevant here" were §§ 3604(a)–(b) and § 3617.[118] Regarding § 3604, Judge Posner proclaimed 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."[119] The Halprins, explained the court, were "complaining not about being prevented from acquiring property but about being harassed by other property owners."[120] Under this interpretation of the statute, the Halprins' § 3604

108. *See id.*

109. *Id.*

110. *Id.* at 898–99.

111. *Id.* at 898.

112. *Id.*

113. *Id.* at 899.

114. *Id.*

115. *Id.* at 902–03.

116. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 331 (7th Cir. 2004).

117. Oliveri criticized Judge Posner's decision to not consider the Halprins' § 3604(c) claim, arguing that "[g]iven § 3604(c)'s prohibition of discriminatory notices and statements, and the allegation that one defendant painted a religious slur on the plaintiffs' property, this conclusion is certainly wrong." Oliveri, *supra* note 37, at 17 n.89.

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

119. *Id.* at 329.

120. *Id.*

claims were swiftly dismissed.[121]

Fortunately for the Halprins, the court grudgingly reinstated their § 3617 claim.[122] The court cited to 24 C.F.R. § 100.400(c)(2), which forbids interference with "enjoyment of a dwelling," noting that this language "cuts section 3617 loose from section 3604 . . . ."[123] Judge Posner questioned the HUD regulation's validity, stating that it "may stray too far from section 3617 . . . to be valid."[124] However, because the defendants had not challenged it, the regulation's "possible invalidity ha[d] been forfeited as a ground upon which we might affirm the district court."[125] As Schwemm noted, "the clear implication of this part of *Halprin* is that in future cases brought by current residents, defendants may challenge the HUD regulation, and, if successful, defeat a post-acquisition interference claim under § 3617."[126]

Judge Posner did concede that some post-acquisition discrimination might be reached by the statute. He wrote that "[a]s a purely semantic matter the statutory language might be stretched far enough to reach a case of 'constructive eviction' . . . ."[127] For example, he suggested, burning down someone's house would succeed in making it unavailable.[128] However, less extreme (but still insidious) post-acquisition discrimination would simply not be actionable under the FHA.

VI. THE AFTERMATH OF *HALPRIN*

Courts were quick to react to the *Halprin* decision. Some district court judges relied on the Seventh Circuit's reasoning to dismiss post-acquisition discrimination claims.[129] For example, in one Florida case, an African American couple claimed that a neighbor was harassing them based on their race.[130] The couple sued their homeowners' association, arguing that the association failed to act against the neighbor, even though the neighbor's conduct violated community rules.[131] Citing to *Halprin*, the court dismissed the claim, noting that the "alleged discriminatory conduct was not related to the sale or rental of the plaintiffs'

121. *Id.* at 330.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Schwemm, *supra* note 59, at 728.
127. *Halprin*, 388 F.3d at 329.
128. *See id.*
129. *See, e.g.*, AHF Cmty. Dev., LLC v. City of Dallas, 633 F. Supp. 2d 287 (N.D. Tex. 2009) (questioning whether even constructive eviction could give rise to a § 3604(a) claim).
130. *See* Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1138 (S.D. Fla. 2004).
131. *Id.*

dwelling . . . ."[132] Other courts have grappled with the status of 24 C.F.R. § 100.400(c)(2), since Judge Posner's opinion in *Halprin* questioned the regulation's validity.[133]

The most prominent decision to follow *Halprin* came from the Fifth Circuit in *Cox v. City of Dallas, Texas*.[134] The *Cox* plaintiffs alleged that Dallas violated FHA §§ 3604(a)–(b) by consistently failing to stop the operation of an illegal dump in a predominantly African American neighborhood.[135] The court dismissed the § 3604(a) claim, explaining that the statute's language "does not apply to current homeowners whose complaint" is focused on habitability, rather than availability.[136] The court did note, however, that § 3604(a) could reach an actual or constructive eviction case.[137] The court also took a narrow view when it addressed the plaintiffs' § 3604(b) claim. "[A]ssuming that the enforcement of zoning laws alleged here is a 'service,'" explained Judge Higginbotham, § 3604(b) was inapplicable because the service was not "'connected' to the sale or rental of a dwelling . . . ."[138] The court asserted that such a reading of the section was "grammatically superior."[139] Unfortunately for renters and owners in the Fifth Circuit's jurisdiction, *Cox* appears to foreclose any potential claims for discrimination in the provision of municipal services, such as police protection and garbage collection.[140]

However, not all post-*Halprin* courts rushed to limit FHA protections. In *United States v. Koch*,[141] Judge Urbom expressly rejected the Seventh Circuit's reasoning and held that a landlord's sexual harassment of his tenants gave rise to a cause of action under the FHA.[142] In *The Comm. Concerning Cmty. Improvement v. City of Modesto*,[143] the court discussed both *Halprin* and *Bloch I* and succinctly concluded that "the FHA reaches post-acquisition discrimination."[144] *Modesto* involved

132. *Id.* at 1143.

133. *See, e.g.*, George v. Colony Lake Prop. Owners Ass'n, No. 05 C 5899, 2006 WL 1735345, at *2 (N.D. Ill. June 16, 2006) (noting that *Halprin* "raised a question as to the validity" of the regulation, but did not ultimately rule on the issue); Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ.A. H-05-3197, 2005 WL 2669480, at *4 (S.D. Tex. Oct. 19, 2005) (adopting "the Seventh Circuit view that 24 C.F.R. § 100.400(c)(2) is invalid.").

134. 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006).

135. *See id.* at 736.

136. *Id.* at 741.

137. *Id.* at 742.

138. *Id.* at 745.

139. *Id.*

140. For a detailed analysis of *Halprin*'s effect on discrimination in municipal service provisions, *see* Schwemm, *supra* note 59.

141. 352 F. Supp. 2d 970 (D. Neb. 2004).

142. *Id.* at 980.

143. 583 F.3d 690 (9th Cir. 2009).

144. *Id.* at 713.

residents of a predominantly Hispanic neighborhood who claimed the city discriminated against them in the provision of municipal services.[145] The court explained that § 3604(b)'s use of the word "privileges" implicated "continuing rights, such as the privilege of quiet enjoyment of a dwelling."[146] The court referred to the grammatical debate,[147] concluding that the narrower interpretation "is hardly a necessary reading."[148] Under what it called a "natural reading," the court argued that "the reach of the statute encompasses claims regarding services or facilities perceived to be wanting *after* the owner or tenant has acquired possession of the dwelling."[149] The court also cited to 24 C.F.R. § 100.65(b)(4)[150] in support of its conclusion.[151]

VII. THE *BLOCH* CASE

A. *Facts*

Lynne, Helen, and Nathan Bloch owned three units and were longtime residents at Shoreline Towers, a Chicago condominium building.[152] Lynne, who is Helen and Nathan's mother, was serving on Shoreline Towers' condominium board when it enacted a series of hallway rules.[153] Hallway Rule 1 forbade the placement of "[m]ats, boots, shoes, carts or objects of any sort . . . outside Unit entrance doors."[154] The Blochs, who are Jewish, each had a mezuzah affixed to their doorposts.[155] A mezuzah is a small scroll of parchment, inside a cover or case, on which certain biblical passages are handwritten.[156] The mezuzah reminds Jews of their faith, and symbolizes God's "watchful care over the house and its dwellers."[157] The Torah commands Jews to "place these words of Mine upon your heart and upon our soul . . . and write them on the doorposts of your house and upon your gates . . . ."[158] When entering their homes, it is customary for Jewish persons to touch the

145. *Id.* at 696.
146. *Id.* at 713.
147. *See supra* Section III.B.
148. *Modesto*, 583 F.3d at 713.
149. *Id.* (emphasis added).
150. *See supra* Section III.F.1.
151. *Modesto*, 583 F.3d at 713–14 (emphasis added).
152. Bloch v. Frischholz (Bloch I), 533 F.3d 562, 567 (7th Cir. 2008) (Wood, J., dissenting), *aff'd in part, rev'd in part, remanded en banc by* 587 F.3d 771 (7th Cir. 2009).
153. *Id.*
154. *Id.*
155. *Id.* at 566.
156. Dovid Zaklikowski, *What is a Mezuzah – Handbook*, CHABAD.ORG, http://www.chabad.org/library/article_c3do/aid/256915/jewish/What-Is-a-Mezuzah.htm (last visited Sept. 3, 2011).
157. *Id.*
158. *Deuteronomy* 11:13–21.

mezuzah and kiss their fingertips.[159] The Torah urges Jews to follow this ritual "so that you will prolong your days and the days of your children . . . ."[160]

Hallway Rule 1 was enacted in 2001.[161] The Blochs' mezuzot[162] remained in place without objection until 2004, when the family removed their mezuzot to comply with the condominium's hallway renovation plan.[163] Once the work was completed, the Blochs reaffixed their mezuzot to the outer doorposts of their units.[164] Only then did the defendants begin "removing and confiscating the mezuzot, without notice to the Blochs and without their permission."[165] Despite having never used Hallway Rule 1 to remove mezuzot in the past, the defendants relied on the rule as they continued confiscating the Blochs' mezuzot.[166] The family provided information to the condominium association detailing the importance of the mezuzah in their religion. The confiscation, however, continued.[167] The condominium association even threatened the Blochs with a fine if they continued to display their mezuzot.[168]

During the conflict with the condominium association, Lynne Bloch's husband, Dr. Marvin Bloch, passed away.[169] While the grieving family prepared to sit shiva,[170] their lawyer contacted the condominium's board and asked that the Blochs' mezuzot not be removed during the seven-day shiva period.[171] In a shocking display of insensitivity, the defendants waited until the family was attending Dr. Bloch's funeral to remove the Blochs' mezuzot.[172] The mourners returned to their homes, accompanied by a rabbi, to discover their mezuzot had been confiscated again.[173] Notably, the defendants did not confiscate a coat rack and card table that had been placed near the Blochs' door for funeral guests to use.[174] Although these larger items were exactly the type of "hallway

159. Zaklikowski, *supra* note 156.

160. *Deuteronomy* 11:21.

161. *Bloch I*, 533 F.3d at 567 (Wood, J., dissenting).

162. Mezuzot is the plural form of mezuzah.

163. *Bloch I*, 533 F.3d at 567 (Wood, J., dissenting).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Shiva is the traditional weeklong Jewish mourning period. MAURICE LAMM, THE JEWISH WAY IN DEATH AND MOURNING 80–88 (2d ed. 2000).

171. *Bloch I*, 533 F.3d at 567 (Wood, J., dissenting).

172. *Id.*

173. *Id.*

174. *Bloch II*, 587 F.3d at 774.

clutter" the condominium's rules sought to stamp out, they remained untouched while the small mezuzot were taken down yet again.[175] During this time period, the defendants also removed the mezuzah of another Jewish resident, Debra Gassman.[176]

The defendants also displayed arguably anti-semitic behavior in other conflicts with the Blochs. For example, Edward Frischholz, the president of the condominium association board, admitted in deposition that he purposely scheduled board meetings on Friday nights, despite knowledge that Lynne Bloch could not attend due to the weekly Shabbat[177] holiday.[178] When questioned about the schedule, he claimed that Mrs. Bloch was "perfectly able" to attend, but chose not to do so.[179] Mr. Frischholz made these claims despite being aware of Mrs. Bloch's commitment to her religious practices.[180]

In September 2005, the Blochs sued Edward Frischholz and the condominium association, seeking an "injunction and damages for distress, humiliation, and embarrassment."[181] In support of their claim, the Blochs relied on three provisions of the Fair Housing Act,[182] along with federal Civil Rights Act and state law theories.[183] After a magistrate judge entered an order forbidding the defendants from confiscating the mezuzot, the condominium board created an exception to Hallway Rule 1 for religious objects.[184] Several months later, likely in response to public uproar created by these events,[185] Chicago changed its municipal code, prohibiting condos and rental properties from restricting the placement of religious symbols on doorposts.[186] The state of Illinois also

175. *Bloch I*, 533 F.3d at 569 (Wood, J., dissenting).

176. *Id.* Gassman, who initially thought she had been the victim of a hate crime, unsuccessfully sued Mr. Frischholz and the condominium association for religious discrimination and breach of fiduciary duty. *See* Gassman v. Frischholz, No. 05 C 5377, 2007 WL 1266291, at *1 (N.D. Ill. April 30, 2007).

177. From sundown Friday until nightfall on Saturday, religious Jews partake in a day of rest, during which work, business, and even the operation of electrical devices are forbidden. *Shabbat Rest – A Chance of Focus*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/735409/jewish/Shabbat-Rest.htm (last visited Jan. 17, 2011).

178. *Bloch II*, 587 F.3d at 773.

179. *Id.* at 773–74.

180. *Id.* at 774.

181. *Id.*

182. 42 U.S.C. §§ 3604(a), 3604(b), and 3617 (2006).

183. *Bloch I*, 533 F.3d at 569 (Wood, J., dissenting). Under state law, the plaintiffs alleged violations of the Illinois Condominium Act. *See* Brief of Plaintiffs-Appellants at 12, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376).

184. *Bloch II*, 587 F.3d at 773.

185. *See, e.g.*, Douglas Wertheimer, *More Mezuzah Bans*, CHI. JEWISH STAR, Aug. 19, 2005, at 1 (reporting outrage among Jewish Chicagoans and legislators over mezuzah bans and removal). In addition to the ban in the Blochs' building, there were reports of mezuzah bans in at least two other Chicago condominium buildings. *See id.*

186. CHICAGO, ILL., MUNICIPAL CODE § 5-8-30(H) (2011).

passed a law under its Condominium Property Act forbidding boards of managers from adopting property rules that impair "the free exercise of religion."[187] These changes made the Blochs' request for an injunction moot, but they proceeded with their claim for damages on both federal and state grounds.[188]

B. *Majority Opinion*

Over a dissent, a Seventh Circuit panel of judges affirmed the district court's grant of summary judgment in favor of the defendants.[189] Chief Judge Easterbrook noted that, under *Halprin*, "religiously motivated harassment of owners or tenants does not violate the Fair Housing Act or its regulations."[190] However, Judge Easterbrook also wrote that the defendants' actions did not amount to religious discrimination at all.[191] Rather, he called Hallway Rule 1 "neutral with respect to religion," both "as adopted in 2001 *and* as enforced in 2004."[192] The court noted that "[g]enerally applicable rules that do not refer to religion differ from discrimination."[193] The court interpreted the Blochs' actions as a request for a religious exception to the rule, commenting that the plaintiffs were asking the court to "treat failure to make an accommodation as a form of discrimination."[194] The Fair Housing Act, noted the court, requires accommodation for handicaps only, through 42 U.S.C. § 3604(f)(3)(b).[195]

C. *Dissent*

In a lengthy dissenting opinion, Judge Wood argued that the Blochs were "raising a straightforward claim of intentional discrimination based on their Jewish religion and ethnicity," rather than simply asking for a religious accommodation.[196] Judge Wood noted that the continued removal of the mezuzot, particularly during the family's period of mourning, would enable a trier of fact to find the condominium association's actions were intentionally discriminatory.[197]

Judge Wood reached her conclusions even under the narrow confines of *Halprin*. The Blochs' case, she concluded, fell within the Sev-

187. 765 ILL. COMP. STAT. 605/18.4(h) (2010).
188. *Bloch II*, 587 F.3d at 774.
189. *Bloch I*, 533 F.3d at 565.
190. *Id.* at 563.
191. *Id.* at 564.
192. *Id.* (emphasis added).
193. *Id.*
194. *Id.* at 565.
195. *Id.*
196. *Bloch I*, 533 F.3d at 566 (Wood, J., dissenting).
197. *Id.* at 571.

enth Circuit's constricted interpretations of §§ 3604(a)–3604(b). Judge Wood commented that the Blochs' case was secure under 3604(a), even though *Halprin* interpreted that portion of the statute as applying solely to the accessibility of housing.[198] She reasoned that the inability to affix a mezuzah in its proper place created "a constructive eviction for observant Jewish residents."[199] The condominium association, noted the judge, "might as well hang a sign outside saying 'No observant Jews allowed.' "[200] In support of the constructive eviction theory, Judge Wood noted that Debra Gassman did in fact move out because of the hallway rule's reinterpretation, and that the Blochs would have moved had the rule not been changed.[201]

Judge Wood also argued that the Blochs' case could go forward under § 3604(b), which is concerned with discrimination in "the terms, conditions, or privileges of sale or rental of a dwelling."[202] The judge noted that although a narrow interpretation of the statute was possible, nothing in its wording compelled the conclusion that it applies only to pre-sale discrimination.[203] She also cited to one of the statute's accompanying HUD regulations,[204] which extends § 3604(b) protection to tenants and owners (rather than merely housing seekers), noting that the regulation is entitled to deference under *Chevron, USA v. Natural Resources Defense Council*,[205] "assuming *Chevron*'s criteria are met."[206] (*Halprin* questioned the validity of one HUD regulation, 24 C.F.R. § 100.400(c)(2), but ultimately left the issue undecided.)[207]

D. *Rehearing En Banc*

Before the rehearing, the Seventh Circuit invited the United States to participate as amicus curiae. The United States filed a brief urging the court to hold that the FHA protects occupants from post-acquisition discrimination.[208] The brief argued that "[n]othing in the statute indicates

198. *Id.* at 570.

199. *Id.* Judge Wood cited to letters from the Rabbinical Council of Chicago, the Decalogue Society, and Rabbi Aron Wolf, all of which "stated that an observant Jew would be forced to move if he or she was not allowed to affix a mezuzah." *Id.*

200. *Id.*

201. *Id.*

202. 42 U.S.C. § 3604(b) (2006).

203. *Bloch I*, 533 F.3d at 571 (Wood, J., dissenting).

204. 24 C.F.R. § 100.65(b)(2) (1989).

205. 467 U.S. 837 (1984).

206. *Bloch I*, 533 F.3d at 571 (Wood, J., dissenting).

207. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004).

208. Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellants Urging Reversal and Remand on Fair Housing Claims, Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (No. 06-3376), 2009 WL 601419.

that it is limited to discrimination in the initial sale or rental transaction."[209]

On rehearing en banc, the Court of Appeals stated that the case presented two issues: whether the Blochs could seek relief under any federal theories, and, if so, whether the family offered "sufficient evidence of discrimination to proceed to trial" on any of their federal theories.[210] With regard to the Blochs' FHA claims, the court noted that their opinion in *Halprin* "left little room for a post-acquisition discrimination claim."[211] However, Judge Tinder cited to dicta in *Halprin* stating that § 3604(a) could potentially reach a constructive eviction case.[212] A homeowner or tenant, noted the court, could be denied the right to live in a dwelling *after* he or she moves in.[213] Prohibiting discrimination only until a buyer or renter "signs on the dotted line . . . would only go halfway toward ensuring availability of housing."[214] In terms much clearer than *Halprin*'s hypothetical dicta, the court concluded that § 3604(a) "may reach post-acquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant, somewhat like a constructive eviction."[215] While the court noted that "constructive eviction requires surrender of possession by the tenant," it refrained from deciding whether "'unavailability' means that a plaintiff must, in every case, vacate the premises" to raise a § 3604(a) claim.[216] As applied to the Blochs, however, Judge Tinder stated that the evidence would not allow a reasonable jury to conclude that the Blochs' units were unavailable, because the family remained in their condominiums throughout the dispute.[217] Thus, the court concluded that the Blochs could not proceed under § 3604(a).[218]

Next, the court analyzed the Blochs' § 3604(b) theory. The court noted that constructive eviction could give rise to a cause of action under § 3604(b), as well as § 3604(a), because the privileges of sale include the right to inhabit the premises.[219] However, the court recognized that the Blochs' case implicated additional provisions of § 3604(b).[220] Judge Tinder noted that when the Blochs purchased their units, they agreed to

209. *Id.*
210. *Bloch II*, 587 F.3d at 775–76.
211. *Id.* at 776.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 778.
217. *Id.*
218. *Id.*
219. *Id.* at 779.
220. *Id.*

be governed by a condominium association.[221] Such an agreement, explained the court, was a term or condition of sale that brought the case within the purview of § 3604(b), despite the agreement contemplating post-acquisition governance.[222] The court used this agreement to distinguish the case from *Halprin*, commenting that the defendants' conduct in *Halprin* was not "linked to any of the terms, conditions, or privileges that . . . were related to the plaintiffs' purchase of their property."[223] Because the Blochs agreed to be bound by the condominium board's restrictions when they purchased their units, § 3604(b) prohibited the condominium association from "discriminating against the Blochs through its enforcement of the rules," even when those rules were facially neutral.[224] The court also emphasized that allowing particular post-acquisition discrimination claims under § 3604(b) would be consistent with HUD regulations.[225]

Although the court expressed the plausibility of post-acquisition discrimination claims under §§ 3604(a)–(b), it did so within *Halprin*'s confines. However, when the court examined the Blochs' § 3617 claim, one of *Halprin*'s most damaging holdings was explicitly laid to rest. § 3617 prohibits interference with a person "in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right granted" by §§ 3603–3606 of the Fair Housing Act.[226] The Blochs argued that a § 3617 violation could occur even where a violation of the other FHA provisions did not.[227] Judge Tinder explained that the lack of a constructive eviction, in violation of §§ 3604(a)–(b), did not "foreclose the possibility that the defendants 'interfered' with the Blochs' enjoyment of their § 3604 rights or 'coerced' or 'intimidated' the Blochs on account of their having exercised those rights."[228] A different interpretation, noted the court, would render § 3617 "entirely duplicative of the other FHA provisions."[229] The court stated that *Halprin*'s interpretation of § 3617 would limit the section's application to pre-sale interference with FHA rights.[230] Such an interpretation was contradictory to *Halprin*'s own recognition that prohibited conduct, such as discriminatory evictions, could occur only *after* the sale or rental is complete. Thus, the court overruled *Halprin*'s § 3617 interpretation, agreeing with

221. *Id.*
222. *Id.* at 779–80.
223. *Id.* at 780.
224. *Id.*
225. *Id.* at 780–81.
226. 42 U.S.C. § 3617 (2006).
227. *Bloch II*, 587 F.3d at 781.
228. *Id.*
229. *Id.*
230. *Id.* at 782.

the Blochs that "§ 3617 reaches a broader range of post-acquisition conduct."[231] Furthermore, a claim of a § 3617 violation "does not require that the plaintiff actually vacate the premises."[232] The court stated that this interpretation was consistent with both HUD's interpretation of § 3617 and Congress's purpose in enacting the FHA.[233] The court also agreed with Judge Wood's opinion that the Blochs were "not seeking an exception to a neutral [hallway] rule," overruling Judge Easterbrook's contrary finding.[234] The court then remanded the case, stating that the Blochs could proceed on an intentional discrimination theory under § 3604(b), § 3617, and the Civil Rights Act (42 U.S.C. 1982).[235] The court also reinstated the Blochs' state law claims.[236]

VIII. ANALYSIS

Halprin opened up a circuit court split that *Bloch II* has since narrowed. Currently, only the Fifth Circuit Court of Appeals maintains *Halprin* and *Bloch I*'s constricted interpretation of the Fair Housing Act.[237] The Fifth Circuit relied on *Halprin* in deciding *Cox v. City of Dallas, Texas*.[238] Now that parts of *Halprin* are no longer good law, the Fifth Circuit will undoubtedly be watched closely to see if it too will begin to recognize a cause of action in post-acquisition housing discrimination. It is unlikely that *Bloch II* will lead to a reversal of *Cox*'s holding on § 3604(a). *Cox* held that § 3604(a) "gives no right of action to current owners claiming that the value or 'habitability' of their property has decreased due to discrimination in the delivery of protective city services."[239] *Bloch II* was in line with this reasoning, hinting that only constructive eviction, and not decreased habitability, could give rise to a post-acquisition discrimination claim.[240] The possibility remains, however, that *Bloch II* could influence the Fifth Circuit's future opinions on post-acquisition § 3604(b) claims. The *Cox* court employed the narrow interpretation of the section, applying it only to services connected to the

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 783.

235. *Id.* at 787.

236. *Id.* Because the district court originally granted summary judgment in favor of the defendants on each of the Blochs' federal claims, it declined to exercise supplemental jurisdiction over the plaintiffs' state law claims. *Id.* at 775.

237. *See* Cox v. City of Dallas, Texas, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006).

238. *Id.*

239. *Id.* at 742–43.

240. *Bloch II*, 587 F.3d at 777.

sale or rental of a dwelling.[241] Enforcement of zoning laws, reasoned the court, was not such a service.[242] It is possible that the Seventh Circuit's reconsideration of § 3604(b) could persuade the Fifth Circuit to acknowledge that the rights current homeowners obtain by purchasing their homes include "'services' or 'privileges' that are part and parcel of those property rights," such as the right to have local zoning laws enforced.[243]A reconsideration of *Cox* under this framework would turn the issue into "the one assumed away by the Fifth Circuit: that is, whether the defendant's enforcement of its zoning law was a 'service' or 'privilege' under § 3604(b). The answer would clearly be 'yes' if the targets of such zoning enforcement were the plaintiffs' own homes . . . ."[244] Moreover, *Cox* did not consider whether § 3617 was applicable to the case. Even if the Fifth Circuit maintains its narrow interpretation of §§ 3604(a)–(b), *Bloch II*'s wider application of § 3617 could influence the Fifth Circuit to consider post-acquisition discrimination cases that are outside the purview of § 3604.

Bloch II also left open the question of whether a § 3604(a) violation can occur if the claimants don't actually vacate the premises.[245] In a footnote, the court speculated that "a future case may require us to reconsider our understanding of constructive eviction, depending on how the Supreme Court treats the potentially analogous concept of constructive termination."[246] The court noted that "[a]vailability, not simply habitability, is the right that § 3604(a) protects."[247]

Although this interpretation is plausible, and the court did not give a firm answer on whether a claim of "unavailability" requires a plaintiff to move out, it dismissed the Blochs' § 3604(a) claim because they never moved away.[248] Asking harassed homeowners and tenants to move out of their homes before they can have a cause of action under § 3604(a) is an extreme requirement that does not take into account the myriad of difficulties a claimant would be forced to face.[249] Moving out may be financially impossible. It could impose severe hardships on eld-

241. *Cox*, 430 F.3d at 745.

242. *Id.*

243. Schwemm, *supra* note 59, at 779.

244. *Id.* at 788.

245. *Id.* at 778.

246. *Id.*, n.6. The Fair Housing Act has drawn repeated comparisons to Title VII, which even Judge Posner acknowledged "protects the job seeker as well as the job applicant." Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).

247. *Id.* at 777.

248. *Id.* at 778.

249. The court acknowledged this in its discussion of § 3617, noting that "[r]equiring the Blochs to vacate their homes before they can sue undoubtedly stifles" the purpose of the Fair Housing Act. *Id.* at 782.

erly plaintiffs or large families. Furthermore, a homeowner or tenant may simply not *want* to give up his or her home. (Even for plaintiffs who do move out, the *Bloch II* court recognized that "[p]roving constructive eviction is a tall order.")[250] A broader interpretation of "unavailable" could recognize that discrimination or harassment may make a dwelling functionally unavailable to its occupants, while not forcing a plaintiff to actually leave his home before a court will hear his case.

Of course, a court would have to strike a balance to ensure that "quarrels between neighbors [do] not become a routine basis for federal litigation."[251] Courts could achieve this balance by drawing analogies to sexual harassment claims under Title VII, where a defendant's conduct must create a hostile work environment before a claim arises.[252] As the Court noted in *Meritor*, not every offensive comment will "affect the conditions of employment to sufficiently significant degree to violate Title VII."[253] A court considering a post-acquisition discrimination claim under § 3604(a) could reason that harassment may create a hostile living environment that makes a dwelling functionally unavailable to its occupant, without forcing that occupant to find new housing before having standing to sue.[254]

The *Bloch II* court's interpretation of § 3604(b) was undoubtedly more favorable to fair housing advocates. The court held that agreement to be governed by a condominium association was a term or condition of sale that brought the Blochs' case within the section's purview.[255] The court distinguished *Bloch* from *Halprin*, noting that "*Halprin* made it clear that § 3604(b) is not broad enough to provide a blanket 'privilege' to be free from all discrimination from any source."[256] *Bloch II* does not appear to allow for post-acquisition causes of action under the FHA where the defendant's conduct is not linked to "any of the terms, conditions, or privileges that accompanied or were related to the plaintiff's purchase of their property."[257] Moreover, the court did not recognize a privilege of quiet enjoyment that could be encompassed by § 3604(b). Therefore, the court's interpretation of the section does not seem to

250. *Id.* at 777.

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

252. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

253. *Id.*

254. The court did hold that conduct that does not lead to constructive eviction can still give rise to a § 3617 claim; a broader interpretation of § 3604(a) may therefore seem unnecessary. However, in circuits that do not recognize a § 3617 claim absent a violation of §§ 3603–3606, the narrower construction of § 3604(a) could prevent plaintiffs from stating a cause of action.

255. *Bloch II*, 587 F.3d at 779–80.

256. *Id.* at 780.

257. *Id.*

allow for protection of plaintiffs who are harassed by other occupants, outside the scope of a homeowners' or condominium association. *Bloch II* also did not address whether discrimination in the provision of municipal services is covered by § 3604(b). The court's wide interpretation of § 3617 may make a similarly generous interpretation of § 3604(b) seem superfluous, but in circuits that require a §§ 3603–3606 violation before a § 3617 violation can occur, a broader interpretation is necessary.

It is through its reinterpretation of § 3617 that *Bloch II* most significantly repaired the damage done by *Halprin*. By broadening the section's reach, the court acknowledged that a defendant can, without violating §§ 3603–3606, discriminate against an occupant on account of that occupant exercising his or her rights to fair housing.[258] The court made clear that a plaintiff can state a cause of action under § 3617 without vacating the premises.[259] § 3604 prohibits discriminatory evictions, observed the court, and "*attempted* discriminatory evictions can violation § 3617's prohibition against interference with § 3604 rights."[260] Thus, *Bloch II* has paved a path to relief for aggrieved plaintiffs who wish to engage in "the simple act of seeking, obtaining, or residing in housing on a non-discriminatory basis."[261]

Although *Bloch II* is undeniably encouraging to fair housing advocates, a circuit court split still exists. Ultimately, resolution of the issue should come from the Supreme Court or Congress. The Supreme Court could grant certiorari to a post-acquisition discrimination case. However, as one commentator noted, "a positive Supreme Court holding would not likely address every relevant provision of the FHA . . . . Many provisions of the FHA operate independently, and each applies in some post-acquisition situations."[262] Moreover, a favorable Supreme Court ruling is not a certainty. Therefore, the most effective solution would be for Congress to amend the Fair Housing Act, as it did over two decades ago, when it passed the Fair Housing Amendments Act of 1988.[263] As part of the amendments, Congress added language protecting housing rights of disabled occupants. The amended statute makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter, [or] a person *residing in* or intending to reside in that dwelling

258. *Id.* at 782.

259. *Id.*

260. *Id.*

261. Oliveri, *supra* note 37, at 11.

262. Scott N. Gilbert, Comment, *You Can Move In But You Can't Stay: To Protect Occupancy Rights After Halprin, The Fair Housing Act Needs To Be Amended to Prohibit Post-Acquisition Discrimination*, 42 J. MARSHALL L. REV. 751, 782 (2009).

263. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988).

. . . ."[264] The amended statute clearly encompasses rights for occupants as well as home seekers. As Gilbert suggested, another series of amendments to the FHA could add similar occupancy protection language to the other § 3604 sections.[265] For example, Gilbert suggested amending § 3604(b) by substituting "in connection with such dwelling" for "in connection therewith."[266] This and similar changes would "set the stage by indicating that the FHA is concerned with what happens to the occupant of a dwelling after the sale or rental transaction."[267]

IX. CONCLUSION

Bloch II is, undoubtedly and justifiably, a relief to fair housing advocates discouraged by *Halprin* and *Cox*. Nevertheless, the future of the Fair Housing Act's application remains unclear. With the exception of the Fifth Circuit, courts are generally in agreement that post-acquisition discrimination claims are actionable under the FHA. However, courts were also in agreement before *Halprin* was decided, a factor that did not stop the Seventh Circuit from swiftly narrowing the FHA's protections. Moreover, segregated housing remains a fact of life throughout much of the United States,[268] a clear sign that the Fair Housing Act's goals remain unmet. With no final word or guidance from Congress or the Supreme Court, there remains the possibility that one or more circuits will issue an opinion similar to *Halprin* and reject post-acquisition causes of action. Therefore, although *Bloch II* has repaired some of the damage caused by *Halprin*, the Fair Housing Act's protections remain incomplete.

264. 42 U.S.C. § 3604(f) (2006) (emphasis added).

265. Gilbert, *supra* note 262, at 783–86.

266. *Id.* at 783.

267. *Id.* at 784.

268. *See, e.g.*, Sugrue, *supra* note 16 (detailing a rise in racial segregation in the Detroit metropolitan area). To compare segregation levels, or dissimilarity indices, in major metropolitan areas and all fifty states, *see New Racial Segregation Measures for States and Large Metropolitan Areas: Analysis of the 2005-2009 American Community Survey*, U. MICH. POPULATION STUDIES CTR., http://www.psc.isr.umich.edu/dis/census/segregation.html (last visited Sept. 4, 2011).