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Brooke Wright

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Fair Housing and Roommates: Contesting a Presumption of Constitutionality

I. INTRODUCTION

Gene Kavenoki wanted to rent out a room in his apartment to a stable person with whom he could get along well.¹ Unaware that he was engaging in multiple violations of federal law, the graduate student posted the following advertisement on Roommates.com: “I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black Muslims or mortgage brokers.”² Responding to allegations that he was discriminating on the basis of race, Kavenoki explained that he was doing “no such thing,” but was instead “discriminating against people who don’t share my slightly warped sense of humor.”³

Although Kavenoki intended only to find a suitable roommate, his advertisement violated section 3604(c) of the Fair Housing Act (“FHA”) because the language of the advertisement was facially discriminatory on both racial and religious grounds.⁴ While, under an exception to the FHA,⁵ Kavenoki could legally discriminate⁶—

1. See Adam Liptak, *Fair Housing, Free Speech and Choosy Roommates*, N.Y. TIMES, Jan. 22, 2007, at A12, available at <http://select.nytimes.com/2007/01/22/us/22bar.html>.

2. *Id.* Various fair-housing councils sued Roommates.com in 2004 alleging that Roommates.com was liable under the Fair Housing Act for advertisements, which were similar to Kavenoki’s advertisement, placed on Roommates.com’s website. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (holding that Roommates.com may be liable for a subscriber’s Fair Housing Act violation and remanding the case for a judgment on whether Roommates.com violated the Fair Housing Act).

3. Liptak, *supra* note 1.

4. Fair Housing Act, 42 U.S.C. §§ 3601–19 (2006). FHA § 3604(c) states that it is unlawful to

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 race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

5. *Id.* § 3603(b)(2) (stating that the discrimination prohibition in section 3604(c) does not apply if “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence”).

6. *Id.*

based on race, religion, or any other basis—in his actual roommate choice, he could not legally declare his discriminatory intentions or criteria in an advertisement.

Kavenoki's situation underscores the incongruous effects of the FHA on those searching for a roommate: Although someone looking for a roommate is making a choice about a person to share living spaces and private circumstances, the person looking for a roommate may not put personal preferences in a roommate advertisement. Additionally, while someone looking for a roommate may actually discriminate in making his choice, he may not state his "discriminatory" preferences in his advertisement.

This Comment argues that section 3604(c) of the FHA is unconstitutional as applied to roommate choice.⁷ Specifically, section 3604(c) is unconstitutional under the First Amendment as embodied in the commercial speech doctrine and in the right to freedom of intimate association.⁸ Because real tension exists between anti-discrimination policies and constitutional rights, Congress and the courts must carefully consider how to best accommodate both core constitutional rights and important anti-discrimination policies.

This Comment will first introduce the FHA and the historic treatment of the current question in Part II. Part III will argue that section 3604(c) of the FHA is unconstitutional under the commercial speech doctrine. Part IV will argue that section 3604(c) is also unconstitutional under the right to freedom of intimate association. Part V will discuss the importance of anti-discrimination laws and the costs and benefits of three possible options that attempt to accommodate both individual constitutional rights and anti-discrimination policies. Part VI will provide a brief conclusion.

7. This Comment uses the term "roommate" but presumes that "roommate" is synonymous with "housemate," "shared living," and similar terms.

8. The unconstitutionality of section 3604(c) can be argued on many other bases. See John T. Messerly, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949 (2008). Messerly considers all of the following as invalidating section 3604(c) in the roommate context: the right to privacy, intimate and expressive association, free exercise of religion, and freedom of speech. Messerly's analysis of expressive association (based on the assumption that some individuals in shared-living arrangements, such as halfway houses or homes for the elderly, consider whether to express a message); free exercise of religion (based on the idea that, although facially neutral, housing discrimination laws also violate other constitutionally protected freedoms and are therefore also suspect on freedom of religion grounds); and freedom of speech are facially and substantively flimsier arguments.

II. THE FAIR HOUSING ACT

The FHA, which has its roots in emotionally charged historical practices, contains provisions that put some individuals, including those seeking roommates, in a precarious position. While courts have generally rejected assertions that portions of the FHA are unconstitutional, their rejection is unfounded because these claims rest on strong constitutional doctrines and absolutely merit attention.

A. Introduction to the Fair Housing Act

1. The historical background

In 1968, Congress enacted the FHA⁹ in a desperate attempt to reduce racial discrimination in housing.¹⁰ Although it had been two decades since the Supreme Court had found that the enforcement of racially discriminatory housing covenants violated the Equal Protection Clause,¹¹ racial discrimination in housing was still rampant and discrimination had merely retreated to less transparent forms.¹² For example, mortgage lenders refused to make loans to individuals in minority-predominant neighborhoods, loan application procedures discouraged minorities, and marketing policies often excluded minority areas.¹³

In the 1960s, riots in urban areas made the need for change blatantly apparent. Trying to understand the urban dynamic, the government created the National Advisory Commission on Civil Disorders. The Commission's findings were clear: segregation and discrimination were creating "frustrations of powerlessness" that

9. When Congress first passed fair housing legislation in 1968, the legislation was part of the Civil Rights Act. *See* Civil Rights Act of 1968, § 801–20 (current version at 42 U.S.C. §§ 3601–19 (2006)). This Comment refers to Congress's 1968 fair housing legislation and all of Congress's subsequent fair housing legislation as the "Fair Housing Act."

10. Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 339–40 (giving a brief overview of the discriminating housing practices of the time).

11. *Id.* at 339; *see also* Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

12. Klein & Doskow, *supra* note 10, at 339–40.

13. *Id.*; *see also* JONATHAN BROWN & CHARLES BENNINGTON, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES (1993).

contributed significantly to the nationwide disorder.¹⁴ The Commission suggested that Congress take action to promote antidiscrimination, empowerment, and integration. Relying on these findings and on a growing certainty that action was necessary to prevent further disorder, the Senate passed the FHA on March 14, 1968.¹⁵

While the FHA waited on House approval, the assassination of Dr. Martin Luther King, Jr., on April 4 added an exclamation mark to the warnings of the Commission's report.¹⁶ Following rioting across the country, the House passed the FHA on April 10. President Johnson signed the FHA into law the next day.¹⁷

2. The Fair Housing Act's provisions that are relevant to roommate selection

The FHA declares that it is U.S. policy to "provide, within constitutional limitations, for fair housing throughout the United States."¹⁸ Section 3604 of the FHA originally made it unlawful to discriminate in selling or renting due to a prospective buyer's or renter's "race, color, religion, or national origin."¹⁹ Congress added protection of sex in 1974 and protection of familial status and handicap in 1988.²⁰

While the language of the FHA is broad, it provides a few exceptions. The most famous of these, the "Mrs. Murphy Exception," allows the owner of housing to discriminate in his tenant choice where the owner (1) owns living quarters intended for four or fewer families and (2) personally lives in one of the four units.²¹ Individuals seeking a roommate fall into this exception

14. Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1621–23 (2007); see also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1068–69 (1998).

15. Larkin, *supra* note 14, at 1623–24; see also Calmore, *supra* note 14, at 1068–69.

16. Larkin, *supra* note 14, at 1624.

17. *Id.*

18. 42 U.S.C. § 3601 (2006).

19. 42 U.S.C. § 3604(a)–(b) (1976).

20. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109, 88 Stat. 633 (1974); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

21. See 42 U.S.C. § 3603(b)(2); *Bills v. Hodges*, 628 F.2d 844, 845 n.1 (4th Cir. 1980). Although the language of the provision applies only to "owners," the courts,

because they own fewer than four units (or generally do not own any units) and live on the premises. Thus, the FHA does not prohibit them from discriminating in their roommate choice.

Regardless of whether an individual fits into the Mrs. Murphy Exception and may legally discriminate, the FHA still prohibits discriminatory housing statements and advertisements. Specifically, section 3604(c) states that an advertisement of, or any intention to advertise, a “preference, limitation, or discrimination” based on race, color, religion, sex, handicap, or familial status is illegal.²² Consequently, while a person may legally rent out her basement only to a “good Muslim couple” or a “church-going Christian man,” she may not indicate this preference in an advertisement.

B. Courts Generally Hold that Section 3604(c) is Constitutional

In the forty years since Congress passed the FHA, multiple parties have asserted that section 3604(c), in prohibiting housing advertisements that indicate discriminatory intent, is unconstitutional. In each case, the court dismissed the constitutional claims.²³ After forty years of accepting the constitutionality of section 3604(c), it is no surprise that courts and scholars generally view claims of unconstitutionality with deep skepticism.²⁴

newspapers, and others involved in fair housing widely recognize that the provision also applies to renters or lessees who invite others to live with them as roommates. *See* Equal Housing Covers Roommates Too!, <http://www.equalhousingonthenet.com/> (last visited Nov. 2, 2009); Fair Housing and Equal Opportunity, <http://www.wheelerdeeler.com/housing.aspx#roommates> (last visited Nov. 2, 2009); LAmarketplace.com, Fair Housing Notice: All Roommate/Real Estate Adv., <http://la.kaango.com/feViewAd/12630714> (last visited Nov. 2, 2009).

22. 42 U.S.C. § 3604(c) (2006).

23. *See, e.g.*, *United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002–03 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972). Most recently, the Ninth Circuit considered this issue in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). *See supra* note 2.

24. *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1164; *see also* Klein & Doskow, *supra* note 10, at 374 (“Such arguments are not especially promising when it comes to violations of § 3604(c).”); Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 200 (2007) (providing a similar response); Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 1006 (2002) (providing a similar response). *But see* Posting of Dave Fagundes to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/first_amendment/page/2/ (Feb. 15, 2006, 06:38 AM); Posting of Will Baude to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/first_amendment/page/2/ (Feb. 15, 2006, 06:38 AM); Posting of Will Baude to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/first_amendment/page/2/ (Feb. 15, 2006, 06:38 AM).

Although courts and scholars generally dismiss the idea that section 3604(c) is unconstitutional, their reasons are largely unfounded and are based in part on the perpetuation of bad law. Not only is the commercial speech doctrine incompatible with section 3604(c), but the right to freedom of intimate association likely also protects roommate choice. The following analysis should influence courts and legislatures as they formulate and consider the constitutionality of laws that restrict a person's ability to advertise for a roommate.

III. THE CONSTITUTIONALITY OF SECTION 3604(C) IN LIGHT OF THE COMMERCIAL SPEECH DOCTRINE

In a recent case, Judge Easterbrook wrote that “any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment [sic].”²⁵ Since the FHA was passed in 1968, fundamental shifts in the protection of commercial speech have gone unrecognized to the extent that they apply to housing advertisements. This Part considers developments in the commercial speech doctrine and how the courts have ignored these developments by perpetuating old law. This Part also argues that section 3604(c), which restricts individuals from advertising the discriminatory criteria they use in roommate selection, is unconstitutional.

A. The Commercial Speech Doctrine

Commercial speech is exactly what it sounds like—speech made for a commercial purpose and, generally, with the intent of making a profit. Advertisements are a classic form of commercial speech. While it is now understood that the First Amendment protects commercial speech from unwarranted governmental regulation, the Supreme Court did not clarify this doctrine until the 1970s. This section will consider the great shift in the Supreme Court's treatment of commercial speech, the current test to determine protection and the

com/prawfsblawg/first_amendment/page/2/ (Dec. 1, 2005, 05:05 PM).

25. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

policy supporting this test, and the problem of prohibiting speech regarding a legal act.

1. The Supreme Court shifts its view of the commercial speech doctrine

The Supreme Court's treatment of commercial speech has drastically changed since the early 1970s. For the first century and a half of its existence, the Supreme Court did not address commercial speech issues; the Court heard its first commercial speech case, *Valentine v. Chrestensen*, in 1942.²⁶ In *Valentine*, the Court differentiated between noncommercial and commercial speech: while "freedom of communicating information and disseminating opinion" is highly protected under the First Amendment, purely commercial speech is not constitutionally protected.²⁷ Under this rule, a regulation prohibiting leafleting was constitutionally valid because the speech interest was purely commercial.²⁸

In the mid-1970s, the Court's stance on this doctrine changed significantly. In 1975, the Court held that a Virginia statute making it a misdemeanor to prompt the procuring of an abortion was invalid as applied to a weekly newspaper that printed an advertisement on how and where to get an abortion.²⁹ In addressing the assumption of the lower courts that the First Amendment did not protect commercial advertisements, the Court stated that "speech is not stripped of First Amendment protection merely because it [is] in [commercial] form."³⁰

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³¹ the Court clarified the commercial speech doctrine: "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for

26. 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976).

27. *Id.* at 54. *Valentine* has since been overruled. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 n.22 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 n.6 (1983).

28. *Valentine*, 316 U.S. at 54–55.

29. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

30. *Id.* at 818 (citing *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 384 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

31. 425 U.S. 748 (1976).

what reason, and at what price.”³² The Court went on to explain: “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”³³

2. *The modern commercial speech doctrine*

Since 1976, the Supreme Court has continued to clarify the extent of First Amendment protection of commercial speech and the policy behind this protection. Recognizing that the Constitution provides less protection to commercial speech than to other expression, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* laid out the test to determine whether the First Amendment protects specific examples of commercial speech.³⁴ First, the speech must be legal and not misleading—it must inform, rather than deceive, the public.³⁵ Second, if a regulation restricts commercial speech, then three criteria must be met: (1) the government interest in that regulation must be substantial; (2) the regulation must directly advance the asserted government interest; and (3) the regulation must be narrowly tailored to serve that interest.³⁶

The Supreme Court has also continued to clarify the policy behind a limited First Amendment protection of free speech. A recurring rationale is that commercial speech is worth protecting because it disseminates information and thereby allows people to perceive their best interests.³⁷ Additionally, commercial speech is “hardier” than other types of expression—it is not “particularly susceptible to being crushed by overbroad regulation.”³⁸ Limited regulation is appropriate because some forms of advertising such as

32. *Id.* at 765.

33. *Id.* at 770.

34. 447 U.S. 557, 562–66 (1980).

35. *Id.* at 563–64.

36. *Id.* at 564–66; *see also* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). In 44 *Liquormart*, the Court clarified that bans on “truthful, nonmisleading [sic]” commercial speech generally “serve only to obscure an ‘underlying governmental policy’ that could be implemented without regulating speech.” 517 U.S. at 502–03 (quoting *Cent. Hudson*, 447 U.S. at 566 n.9)

37. *Cent. Hudson*, 447 U.S. at 561–62; *see also* *Linmark Ass’n, Inc. v. Willingboro*, 431 U.S. 85, 92 (1977).

38. *Cent. Hudson*, 447 U.S. at 564 n.6 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)); 44 *Liquormart*, 517 U.S. at 485.

untruthful or misleading advertisements may exert “undue influence” over consumers.³⁹

3. The modern commercial speech doctrine stands, in part, for the premise that legal action equals legal speech

Today, the commercial speech doctrine additionally stands for the premise that while the government may restrict speech about an illegal action, it may not restrict speech about a legal action.⁴⁰ The Court, in both *Virginia Pharmacy* and *Central Hudson*, advocated an approach based on consistency, stating that a state could not completely suppress the “dissemination of concededly truthful information about entirely lawful activity.”⁴¹ In other words, the government must be consistent because supporting an act while simultaneously disallowing speech regarding that act will almost always fail the *Central Hudson* test.

While it is clear that the Court in *Virginia Board* and *Central Hudson* advocated this consistency approach, commentators today are occasionally confused by a mid-1980s exception to this doctrine.⁴² In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, the Court considered the constitutionality of a Puerto Rican statute that restricted the advertising of casino gambling to Puerto Ricans even though the underlying conduct—gambling—was legal.⁴³ The Court reasoned that because the Puerto Rican legislature could have prohibited Puerto Rican residents from engaging in casino gambling, the legislature necessarily had the lesser power to ban advertising of casino gambling.⁴⁴

Ten years later, however, in *44 Liquormart*, the Supreme Court explicitly rejected its *Posadas* analysis to reaffirm that blanket bans on speech about legal actions must be reviewed with “special care” and are rarely constitutional.⁴⁵ Because the ban in *Posadas* was designed to “keep truthful, nonmisleading [sic] speech from members of the public” for their protection, the state legislature was engaging in

39. *44 Liquormart*, 517 U.S. at 498 (citing *Bates*, 433 U.S. at 366).

40. *See id.* at 502–03.

41. 425 U.S. 748, 773 (1976).

42. *See, e.g.*, Posting of Will Baude to PrawfsBlawg, http://prawfsblawg.blogspot.com/prawfsblawg/first_amendment/page/2/ (Dec. 1, 2005, 05:05 PM).

43. 478 U.S. 328, 333–34 (1986).

44. *Id.* at 345–46.

45. *44 Liquormart*, 517 U.S. at 485 (citing *Cent. Hudson*, 447 U.S. at 566 n.9).

inappropriate paternalism.⁴⁶ The Court rejected the *Posadas* holding and reverted to the “unbroken line of prior cases [which strike] down similarly broad regulations on truthful, nonmisleading [sic] advertising when non-speech-related alternatives [are] available.”⁴⁷

B. The Commercial Speech Doctrine Promotes Free Speech Concerning Legal Actions, Yet Section 3604(c) Prohibits Speech Concerning Lawful Advertisements

Combining the commercial speech doctrine with section 3604(c) of the FHA is inherently problematic. Section 3604(c) outlaws discriminatory housing advertisements, yet allows discrimination in choosing roommates. This situation clearly violates the commercial speech doctrine’s premise that the government may not restrict speech about a legal action. Consequently, under the commercial speech doctrine, section 3604(c) is unconstitutional as it applies to those who may lawfully discriminate.

The following analysis will explain how section 3604(c) became unconstitutional; it will likewise address the analytical flaws in the post-*44 Liquormart* cases that have consistently held that section 3604(c) withstands all First Amendment challenges. This analysis will demonstrate how legislators have ignored assertions that section 3604(c) is unconstitutional as applied to those who may legally discriminate.

I. Before 44 Liquormart, the commercial speech doctrine was compatible with section 3604(c)

When Congress passed the FHA in 1968, the commercial speech doctrine and section 3604(c) were not yet incompatible. In 1968, the Supreme Court was still operating under its rule from *Valentine* that the First Amendment did not protect commercial speech.⁴⁸ For example, four years after Congress passed the FHA, in *United States v. Hunter*, a newspaper publisher who had violated the FHA by advertising a room for rent in a “white home” asked the Fourth Circuit Court to overturn section 3604(c) because it violated the First Amendment.⁴⁹ However, the court dismissed the First

46. *Id.* at 509–10.

47. *Id.*

48. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

49. 459 F.2d 205, 209, 211 (4th Cir. 1972).

Amendment claim after applying the commercial speech doctrine of the time. The court reasoned that the publisher had no valid claim because the First Amendment did not protect commercial speech.⁵⁰

Since *Hunter*, however, the Supreme Court has fundamentally changed the commercial speech doctrine, and commercial speech now receives limited constitutional protection.⁵¹ Specifically, in 1996 the Court in *44 Liquormart* affirmed that legislation restricting speech about a legal action rarely protects consumers and, so long as non-speech related alternatives are available, fails the “narrowly tailored” prong of the *Central Hudson* test and is thus unconstitutional.⁵² Because less restrictive alternatives to 3604(c) exist—from regulating the publishers of discriminatory materials to providing moral or other incentives to nondiscriminatory speech—the constitutionality of section 3604(c) as applied to those who may lawfully discriminate in tenant choice (such as roommates) is highly suspect.

2. Courts have consistently failed to recognize the holding in *44 Liquormart*

Although the Supreme Court fundamentally changed the commercial speech doctrine in *44 Liquormart*, courts have not recognized how this change affects the constitutionality of section 3604(c). Courts uniformly reject section 3604(c) challenges based on the First Amendment while maintaining that discriminatory housing speech, even by those who may legally discriminate, is not constitutionally protected.⁵³ Courts generally cite three cases as the basis of their rejection of First Amendment challenges to section 3604(c),⁵⁴ and each case is faulty and constitutes bad law when currently applied to speech regarding roommate choice.

50. See *id.* (citing *Valentine*, 316 U.S. at 54).

51. See Part III.A.1.

52. *44 Liquormart*, 517 U.S. at 502–03, 507; see *supra* notes 39–40 and accompanying text.

53. See *United States v. Space Hunters, Inc.*, 429 F.3d 416 (2d Cir. 2005); *Ragin v. N.Y. Times Co.*, 923 F.2d 995 (2d Cir. 1991); *Hunter*, 459 F.2d at 205. For a summary of Supreme Court assertions that section 3604(c) does not violate First Amendment protections of commercial speech, see William H. Danne, Jr., Annotation, *Validity, Construction, and Application of § 804(c) of Civil Rights Act of 1968 (Fair Housing Act) (42 U.S.C.A. § 3604(c)) Prohibiting Discriminatory Notice, Statement, or Advertisement with Respect to Sale or Rental of Dwelling*, 142 A.L.R. FED. 1, §§ 20–22 (2008).

54. See Danne, *supra* note 53, at §§ 20–22; see also *Hunter*, 459 F.2d at 211.

First, courts cite *United States v. Hunter*, the 1972 case that cited *Valentine* to reject a publisher's assertion that section 3604(c) violated his constitutional right to discriminate by including the words "white home" in his advertisement.⁵⁵ However, as discussed above, the *Hunter* decision pre-dated the Court's decision in *44 Liquormart*; thus, the *Hunter* decision did not follow the Supreme Court's new interpretation of the commercial speech doctrine. Because commercial speech now receives limited protection pursuant to *44 Liquormart*, *Hunter* is outdated law.

Second, courts cite *Ragin v. New York Times Co.*, a 1991 case heard in the Second Circuit.⁵⁶ In *Ragin*, a group of black prospective home purchasers sued the New York Times, alleging that the models used in housing advertisements in the newspaper indicated a racial preference that violated section 3604(c) of the FHA.⁵⁷ In response to the Times' claim that section 3604(c) was unconstitutional, the Second Circuit found that because housing discrimination was illegal the government could regulate "commercial speech related to [that] illegal activity."⁵⁸

While *Ragin* is valid in application to newspapers or those who rent or sell multiple dwellings, it is inapplicable in the roommate scenario. The New York Times was a large entity that, unlike roommates, did not fit under the Mrs. Murphy Exception of section 3603(b)(2).⁵⁹ Because the New York Times could not legally discriminate, there was no inconsistency in holding that its discriminatory speech was unprotected and was illegal under section 3604(c). This situation contrasts with a scenario where an individual (such as one searching for a roommate or a housemate), advertises directly because the individual may legally discriminate under the Mrs. Murphy Exception. The analysis in *Ragin* does not apply to those advertising for a roommate.

Third, courts have begun to cite a more recent case, *United States v. Space Hunters, Inc.*, in which a housing coordinator who operated a housing hotline offensively refused to help a deaf man who called the hotline.⁶⁰ The Second Circuit relied on both *Ragin*

55. *Hunter*, 459 F.2d at 209, 211 (citing *Valentine*, 316 U.S. at 54).

56. 923 F.2d 995 (2d Cir. 1991).

57. *Id.* at 998.

58. *Id.* at 1002-03 (internal citations omitted).

59. See 42 U.S.C. § 3603(b)(2) (2006).

60. 429 F.3d 416 (2d Cir. 2005).

and *Hunter* to state that “[c]ourts have consistently found that commercial speech that violates section [3604(c)] is not protected by the First Amendment.”⁶¹ However, because the court in *Space Hunters* reached its conclusion by relying on the outdated cases of *Ragin* and *Hunter*, the court in *Space Hunters* based its holding on bad law.

IV. THE CONSTITUTIONALITY OF SECTION 3604(C) IN LIGHT OF THE RIGHT TO FREEDOM OF INTIMATE ASSOCIATION

In addition to being unconstitutional on commercial speech grounds, section 3604(c) is likely also unconstitutional because it unduly burdens the right to freedom of intimate association. While the precise limits of the right to freedom of intimate association are unknown, the Supreme Court has provided some clear examples of associations that are protected and that are not protected and has clarified both the factors and the policies that help determine whether an association is protected. This Part examines this framework and argues that based on Supreme Court guidelines, precedent, and policies, roommate associations are constitutionally protected and that section 3604(c) unconstitutionally burdens roommate associations.

A. The Basics of Intimate Association

The word “intimate” or “intimacy” may connote a sexual relationship; however, the term means much more. Possible definitions include “marked by a warm friendship developing through long association,”⁶² “suggesting informal warmth or privacy,”⁶³ “closely acquainted,”⁶⁴ and “having sexual relations.”⁶⁵ The word is vague, with possible applications to relationships ranging from exclusive clubs to the closeness of a marital relationship.

Just as the word “intimate” is vague, the law regarding the constitutional right to freedom of intimate association has its origins

61. *Id.* at 425 (citing *Ragin*, 923 F.2d at 1002–03; *United States v. Hunter*, 459 F.2d 205, 211–13 (4th Cir. 1972)).

62. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 656 (11th ed. 2003).

63. *Id.*

64. OXFORD AMERICAN DICTIONARY AND THESAURUS 786 (Am. ed. 2003).

65. *Id.*

in one of the “least stable” of constitutional doctrines.⁶⁶ The Supreme Court has never provided an “explicit articulation” on which associations are protected;⁶⁷ however, case law does provide some definable limits and guidelines to this doctrine.⁶⁸

For example, case law indicates the strength of the intimate-association right and the applicable standard of review. Where courts find a right to freedom of intimate association, the government may only intrude upon that right if it provides justification for “impairment of the values of intimate association.”⁶⁹ This standard of review depends on where the association falls on a “sliding scale,” and thus requires “candid interest balancing.”⁷⁰ In addition, while standards of review may differ, if marital relations or “choices concerning family living arrangements” are involved, a reviewing court must apply strict scrutiny to determine the validity of the regulation.⁷¹

Roberts v. United States Jaycees provides perhaps the most comprehensive analysis of the right to intimate association.⁷² In *Roberts*, the Supreme Court clearly stated that the Bill of Rights, particularly the First Amendment, provides “certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the state.”⁷³ Thus, the Supreme Court protected intimate relationships, which are fundamental and integral to liberty and identity, from government intrusion.⁷⁴

The right to freedom of intimate association does not extend indefinitely. Instead, the Constitution protects only those relationships that “by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom

66. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).

67. *Id.*

68. *Id.* at 626–27.

69. *Id.* at 627; *see also* *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion) (“If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” (internal citations omitted)).

70. Karst, *supra* note 66, at 628.

71. *Id.* at 627–28 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion)).

72. 468 U.S. 609 (1984).

73. *Id.* at 618.

74. *See infra* Part IV.B.1.a.

one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."⁷⁵ Generally, relationships are protected only where they are distinguished by (1) the inclusion of relatively few people, (2) the use of "a high degree of selectivity in decisions to begin and maintain the affiliation," and (3) the "seclusion from others in critical aspects of the relationship."⁷⁶

B. Limitations on Intimate Association

While the test that the Supreme Court has provided is relatively vague, the Court has provided further limits. Both the policy behind the right to freedom of intimate association and case law provide an understanding of the murky borders of this right.

1. Policy and values underlying intimate association and privacy rights

The policy underlying intimate association generally stems from the necessity of protecting the rights of intimate association, the historic belief about the sanctity of the home, and the necessity of protecting the less intimate relationships in order to protect the more intimate relationships.

a. Emotional enrichment and self-identification. The Supreme Court has indicated, at least in part, the policy behind protection of intimate association. Specifically, protecting intimate association is necessary to provide shelter against government intrusion into certain relationships because "individuals draw much of their emotional enrichment from close ties with others"⁷⁷ and because "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."⁷⁸

Writing on the human need for emotional enrichment, Kenneth L. Karst states that a fundamental benefit of intimate association is the chance to love and care for another as well as the chance to be loved and "to be cared for by another in an intimate association."⁷⁹ Because caring for another requires a "patient effort to know him,

75. *Roberts*, 468 U.S. at 619–20.

76. *Id.* at 620.

77. *Id.* at 619.

78. *Id.*

79. Karst, *supra* note 66, at 632.

trust him, hope for him, and help him develop,” it implies personal commitment.⁸⁰ Just as one person can only have a personal commitment to a limited number of people, the time and energy required to know and to deal with a whole person “limits the number of intimate associations any one person can have.”⁸¹

Similarly, addressing the Supreme Court’s focus in *Roberts v. United States Jaycees* on the human need to “independently . . . define one’s identity,”⁸² Karst explains that it is through intimate associations that a person has the best opportunity both to see himself and to be seen as “a whole person rather than as an aggregate of social roles.”⁸³ Consequently, “[w]hether one’s intimate associations be affirming or destructive or both, they have a great deal to do with the formation and shaping of an individual’s sense of his own identity.”⁸⁴

b. Privacy and sanctity of the home. Both natural law and constitutional law affirm that an individual has a right to privacy, especially within his own home. While the right to freedom of intimate association stems from the First Amendment, the right to privacy is a fundamental liberty guaranteed by the Fourteenth Amendment.⁸⁵

The sanctity of the home is protected because the home is a sanctuary where privacy is expected and because most intimate associations are centered in the home.⁸⁶ The Constitution secures to a person the freedom to “satisfy his intellectual and emotional needs in the privacy of his own home.”⁸⁷ Consequently, when the government intrudes on choices concerning family living arrangements, “the usual judicial deference to the legislature is inappropriate.”⁸⁸ In *Moore v. City of East Cleveland*, for example, the

80. *Id.*

81. *Id.* at 634–35.

82. 468 U.S. 609, 619 (1984).

83. Karst, *supra* note 66, at 635–36.

84. *Id.* at 635.

85. *See* *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).

86. Karst, *supra* note 66, at 634.

87. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (finding that the First and Fourteenth Amendments prevent the state from making mere possession of obscene material in one’s own home a crime); *see also* *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting).

88. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977) (plurality opinion).

Court found a zoning ordinance that made it illegal for a grandmother to live with her two grandsons to be a violation of due process.⁸⁹ Further, a whole line of other cases recognize that there exists a “private realm of family life which the state cannot enter.”⁹⁰

c. Protecting short-lived relationships protects durable-intimate relationships. The Supreme Court has never specifically stated the principal that, in order to protect deep, emotionally-enriching relationships, some short-term or casual relationships must necessarily be protected as well; however, this rule is implicit.

Not all marital relationships are deep and enriching, and many are quite short—however, all are protected; similarly, some family members merely cohabit rather than emotionally enrich each other—yet they are protected. The protection provided to these relationships suggests that the right to intimate association protects some short-term relationships (at least those that occur in the home) where those relationships have the potential to become “durable intimate associations.”⁹¹ “To mandate that constitutional protection should extend only to cases of prolonged commitment requires ‘intolerable inquiries’ into extremely private, subjective feelings and states of mind.”⁹²

2. Limits provided by the Supreme Court

In addition to providing a theoretical guide to determine protected associations, the Supreme Court has set some clear limits through case law. These limits help guide analysis.

a. The clearly not protected relationships and the clearly protected relationships. Case law provides some clear cases of associations that are not protected. Membership in a club of large membership is not protected;⁹³ dance-hall patrons⁹⁴ and participants in one-night stands in motels⁹⁵ are likewise not protected in their associations. These

89. *Id.* at 506.

90. *Id.* at 499 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

91. *Karst*, *supra* note 66, at 633; *see also Messerly*, *supra* note 8, at 1967.

92. *Messerly*, *supra* note 8, at 1949 (quoting *Karst*, *supra* note 66, at 633).

93. *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545–47 (1987) (based on size of the clubs, the “inclusive” purpose, and the lack of limits on membership).

94. *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (“It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of ‘intimate human relationships’ referred to in *Roberts*.” (internal citation omitted)).

95. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (“Any ‘personal bonds’

associations are not sufficiently selective, exclusive, or limited in size. They also have little likelihood of developing into deep, enriching relationships.

Similarly, the Supreme Court has identified clear examples of protected associations. The right to freedom of intimate association protects marital associations,⁹⁶ associations between parent and child (through the begetting and bearing of children and “child rearing and education”),⁹⁷ and associations between cohabiting relatives.⁹⁸ Similarly, the right to liberty and privacy under the Due Process Clause protects those engaged in private sexual conduct.⁹⁹ Consequently, the government may not intrude into these relationship choices without first finding that the proposed legislation passes strict scrutiny.¹⁰⁰

The Supreme Court has also provided guidelines on what might be protected. As the Supreme Court stated in *Roberts*, associations in a marital relationship are clearly protected and those in a “large business enterprise” are clearly not protected.¹⁰¹ However, between the two lies “a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.”¹⁰² Determination of whether a relationship is protected depends on where it falls on the spectrum of intimacy. Relevant factors may include “size, purpose, policies, selectivity,” and other pertinent characteristics.¹⁰³

b. Aside from the clearly protected and the clearly not protected relationships, it is difficult to analyze whether a relationship is protected. For all cases falling somewhere in the middle of the

that are formed from the use of a motel room for fewer than 10 hours are not those that have “played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.” (internal citations omitted).

96. *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978).

97. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–86 (1977); *see also* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

98. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion).

99. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

100. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984); *see also* *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (“If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” (internal citations omitted)); *Karst*, *supra* note 66, at 628.

101. 468 U.S. at 620.

102. *Id.*

103. *Id.*

intimacy spectrum, the analysis of constitutionality is blurry at best. Although the Supreme Court has explicitly stated that it has not limited protection to relationships between family members,¹⁰⁴ the Court has not provided specific guidelines as to what other relationships qualify for protection.

Working their way across this blurry ground, courts have sent a contradictory message in regard to associations outside the realm of the family or of sexual intimates.¹⁰⁵ For example, in *Berrios v. State University of New York at Stony Brook*, a federal district court examined a case where both a man's wife and his work colleague claimed a right to freedom of intimate association with him.¹⁰⁶ The court in *Berrios* found that where the relationship "falls outside of the familial arena," it is not protected.¹⁰⁷

Despite the tendency of some lower courts to narrowly interpret intimate association, plentiful evidence suggests that the right to freedom of intimate association should be interpreted more broadly. First, the Supreme Court, in contrast to the court in *Berrios*, has never held that intimate association protection is limited to familial relationships.¹⁰⁸ Instead, the Supreme Court has held that attachment, commitment, and sharing within the relationship qualify an association for protection.¹⁰⁹

Additionally, several Supreme Court Justices have affirmed that intimate associations apply outside a familial relationship. The Supreme Court in *United States Department of Agriculture v. Moreno* explicitly considered the validity of legislation that penalized unrelated people living as a single household.¹¹⁰ While the majority determined that the legislation was invalid due to the lack of a rational basis in the classification,¹¹¹ Justice Douglas in his concurring opinion affirmed that the choice of one's associates, including those with whom one lives, is "basic in our constitutional scheme."¹¹²

104. Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987).

105. *Berrios v. State Univ. of N.Y. at Stony Brook*, 518 F. Supp. 2d 409, 418 (E.D.N.Y. 2007) ("Where, however, the relationship sought to be protected falls outside of the familial arena, it has been held to be not similarly protected.").

106. *Id.* at 420–21.

107. *Id.* at 418.

108. *Rotary Club*, 481 U.S. at 545; *see also* *Lawrence v. Texas*, 539 U.S. 558 (2003).

109. *Rotary Club*, 481 U.S. at 545.

110. 413 U.S. 528 (1973).

111. *Id.* at 533–38.

112. *Id.* at 541 (Douglas, J., concurring).

According to Justice Douglas, freedom of association is broad enough to encompass the “right to invite the stranger into one’s home.”¹¹³ “Taking a person into one’s home because he is poor or needs help or brings happiness to the household is of the same dignity” as the marital right to privacy or other rights of intimate association that the Supreme Court has recognized.¹¹⁴

In addition, Justice Marshall, in his dissenting opinion in *Village of Belle Terre v. Boraas* echoed Justice Douglas’ reasoning and statements to find that a zoning restriction that prohibited a group of students from living together should be invalid.¹¹⁵

Most recently, in *Lawrence v. Texas*,¹¹⁶ the Supreme Court expanded protection of intimate associations beyond the familial arena. In *Lawrence*, the Supreme Court invalidated a Texas law that prohibited certain homosexual acts.¹¹⁷ The Court reasoned that *Lawrence* was about far more than homosexual sex, it was about the liberty of people to choose and conduct their personal relationships in their own homes without being labeled and punished as criminals.¹¹⁸ The Court recognized that sexuality is only “one element in a personal bond” of intimacy; additionally, adults have the right to this bond “in the confines of their homes” and in “their own private lives.”¹¹⁹ The Court thereby indicated an expanded idea of protection of associations beyond the family, beyond sex, and between those who choose to live together.

C. Application in the Roommate and Housemate Scenario

The above factors and policy considerations combine for a strong case in favor of recognizing the constitutional protection of roommate choice and advertisements furthering that choice. Roommate associations meet the Supreme Court’s factor test to determine protection; additionally, the policies and values underlying

113. *Id.* at 543; *see also* *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 18 (1974) (Marshall, J., dissenting) (stating that the freedom of association is broad enough to encompass the “‘right to invite the stranger into one’s home’ not only for ‘entertainment’ but to join the household as well” (quoting *Moreno*, 413 U.S. at 438–45)).

114. *Moreno*, 413 U.S. at 542 (Douglas, J., concurring).

115. 416 U.S. at 18 (Marshall, J., dissenting).

116. 539 U.S. 558 (2003).

117. *Id.* at 562.

118. *Id.* at 567.

119. *Id.*

intimate association support the premise that roommate associations are valuable and merit constitutional protection.

1. Analyzing roommate situations under the Supreme Court's protection analysis

The Supreme Court has clearly expressed protection of relationships that “by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹²⁰ Because this test is vague, the Supreme Court has provided a list of factors to consider: (1) small size, (2) high selectivity, (3) exclusion of others from “critical aspects” of the relationship, and (4) the purpose of the association.¹²¹

a. Size. Roommate and housemate situations meet the size consideration. By necessity, roommate and housemate size is limited by the number of people that will fit under one roof. Thus, the number of roommates approximates the number of individuals in a family, and the number of people involved can easily be distinguished from the number involved in a large club or other impersonal association.¹²²

b. High selectivity. It is probable that many persons seeking roommates will screen scores of applicants. Meanwhile others, despite financial strain, will go months without a roommate while searching for someone who possesses the qualities that they desire.

This selectivity process is not generally as extensive as that which goes into choosing a partner in marriage. However, on the spectrum of selectivity, the selectivity that goes into choosing with whom to live may be second only to marriage and long-term sexual relationships.

Occasionally, roommate selection is based on less than this high degree of selectivity. For example, in short-term arrangements, individuals seeking roommates will likely be able to tolerate the presence of some roommates they would not seek for the long-term. Additionally, individuals may exercise a lower degree of selectivity where finances are pressing and an immediate roommate is necessary

120. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

121. *Id.* at 620.

122. *Id.*

or in dormitory situations where a university board may make the selections. However, it is likely that most people will fear the negative repercussions of a negative roommate experience and will exercise a high amount of selectivity in roommate choice.

c. Exclusion. Roommate scenarios are likely sufficiently “exclusive” in “critical aspects of the relationship”¹²³ to meet this part of the factor test. “Exclusive” means simply that others are not privy to or invited to participate in certain elements.¹²⁴ Additionally, because freedom of intimate association extends to those not involved in a sexual relationship,¹²⁵ “critical aspects” clearly involves something more general.

Cases in which a court has upheld constitutional protection of a relationship generally involve a relationship within the privacy of the home.¹²⁶ In sharing the privacy of a home, household members are necessarily exclusive in their relationships, in their financial discussions, in their arguments, in their personal knowledge of each other’s personal habits, and more. Finding that exclusivity is met where a small number of individuals live in a common household accords with the Supreme Court’s statement that intimate association protects relationships with the few with whom one shares “thoughts, experiences, . . . beliefs, . . . [and] distinctively personal aspects of one’s life.”¹²⁷

d. Purpose of the association. While “purpose of the association” is also a vague factor, it is likely that roommate scenarios meet it. While the Supreme Court has declined to explicitly define this term, it is likely that the Supreme Court is indicating that intimate association is not meant to protect relationships with a casual purpose—constitutional protection should extend only to purposes involving “deep attachments and commitments.”¹²⁸ Because of this, the Supreme Court has found a lack of protection where the purpose is

123. *Id.*; see also *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 545 (1987).

124. MERRIAM-WEBSTER, *supra* note 62, at 436.

125. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–86 (1977); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

126. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978); *Carey*, 431 U.S. at 684–86; *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); *Pierce*, 268 U.S. at 534–35.

127. *Roberts*, 468 U.S. at 619–20.

128. *Id.* at 620.

general society (such as in clubs)¹²⁹ or sexual relations alone.¹³⁰ Not only are relationships with club members or prostitutes fleeting and often shallow, but these relationships have a very low likelihood of ever developing into a deep attachment worthy of protection.

Accordingly, it seems likely that the right to freedom of intimate association protects relationships that indicate the inherent potential to develop into deep attachments. Associations with those with whom one shares living space and to whom one will likely turn for emotional support, constant society, and emergency help likely have a sufficiently intimate purpose to warrant protection.

2. Protecting roommate associations supports the policies underlying intimate association

Just as the associations of roommates seem to meet the Supreme Court's factor tests that determine protection, the policies and values underlying intimate association support the premise that roommate associations are of sufficient value to merit constitutional protection. Specifically, the fundamental values inherent in protected relationships, the sanctity of the home, and protection of the possibly short-term in order to protect the long-term all support extending the right to freedom of intimate association to roommate associations.

a. Emotional enrichment and self-identification. Roommate scenarios provide sources of emotional enrichment. While some roommates will admittedly share the kitchen and nothing more, many other roommate relationships will develop into close friendships and support systems. So long as roommates get beyond shallow initial relationships, they will try to know, trust, hope for, and help each other where possible.¹³¹ Due to close quarters and emotional and social ties, another roommate's well-being often becomes the deep concern of all inhabitants. Emotional enrichment is provided as other roommates take "the trouble to know him and deal with him as a whole person, not just as the occupant of a role."¹³²

129. Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546-47 (1987).

130. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990).

131. Karst, *supra* note 66, at 632.

132. *Id.* at 634.

Regardless of the relationship between them, roommates see each other with their defenses down, in pajamas, doing quirky or lazy things. In other words, inside the home individuals engage in behaviors that are often hidden from the public. Therefore, because roommates experience each other's personal circumstances and behaviors, each roommate's opinion and affirmation may be highly important. Consequently, "[t]he choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others"¹³³—requires deep and personal deliberation. The right to freedom of intimate association is intended to protect precisely these values.

b. Privacy and sanctity of the home. The privacy doctrine, relying heavily on the sanctity of the home, makes no distinction between those who live within the walls of the home. This doctrine provides a haven and recognizes the natural right to establish a home and choose with whom one associates within its walls.

Additionally, because roommate relationships often substitute for family relationships, the roommate relationship is traditionally protected under privacy doctrine. Privacy doctrine protects not just the home, but also "the life which characteristically has its place in the home."¹³⁴ Just as family members ideally meet a person's "intellectual and emotions needs" as a child, an adult makes the choice as to who will best meet her needs—family, friends, coworkers, or others.¹³⁵ These decisions determine "the kind and quality of intimate relationships within the home."¹³⁶ Consequently, these decisions involve the personal and emotional considerations that form the right to privacy protected by the Constitution.

c. Protecting the short-term to protect the long-term. While some roommates do share enduring emotional attachments, others merely share a kitchen and may only see each other in passing. However, marital and family relationships are constitutionally protected not because they are necessarily intimate but because they are located within the privacy of the home and have the potential to become

133. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting) (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

134. *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 n.12 (1977) (plurality opinion) (citing *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting)).

135. *See Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting).

136. *Id.*

intimate relationships.¹³⁷ While not all roommate relationships will have the same depth and commitment as these familial relationships, the possibility (and modicum of likelihood) of intimacy requires protection.

3. *The Supreme Court's decision in Belle Terre*

The Supreme Court's analysis in a 1974 case, *Village of Belle Terre v. Boraas*, initially seems contrary to an assertion that roommate associations are constitutionally protected. However, the Court's holding in *Belle Terre* and protection of roommate intimate association rights can peacefully coexist.

In *Village of Belle Terre v. Boraas*, a group of six unrelated students moved into a Long Island house that was zoned to prevent more than two unrelated people from living together.¹³⁸ After villagers raised a complaint, the case went all the way to the Supreme Court, which upheld the zoning ordinance as rationally related to the purpose of the ordinance.¹³⁹ The Court disregarded the students' claim to freedom of association.¹⁴⁰

Justice Marshall, however, provided a well-reasoned dissenting opinion stating that the zoning ordinance "burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments."¹⁴¹ According to Justice Marshall's rationale, while the policies behind the ordinance were valid, the city could have upheld its policies without sacrificing the students' constitutional rights.¹⁴²

In finding that Justice Marshall was correct in stating that the right to freedom of intimate association protects roommate associations, a court need not find that zoning laws that restrict occupancy (such as the zoning laws in *Belle Terre*) are unconstitutional. While the students in *Belle Terre* could not live in the village of Belle Terre, they could still live together because the zoning law restricted only the "where," but not the "how" or "with whom."

137. Karst, *supra* note 66, at 634.

138. *Belle Terre*, 416 U.S. at 2-3.

139. *Id.* at 7-8.

140. *Id.* at 8-9.

141. *Id.* at 13 (Marshall, J., dissenting).

142. *Id.* at 18.

Conversely, restrictions on housing advertisements can make it impossible for an individual who is seeking specific requirements in a roommate to find such a person. While these distinctions may initially seem minor, the result may be monumental: the *Belle Terre* students could easily find a place with different zoning regulations where they could live together as they desired; however, an individual seeking a roommate may be completely unable to legally find and establish a home—anywhere—with a person who meets her qualifications.¹⁴³ Because the burden on those unable to advertise their criteria is far heavier than the burden on those who are simply restricted from certain neighborhoods, advertising restrictions are far more constitutionally suspect.

D. Section 3604(c) Substantially Burdens the Right to Intimate Association

As the above section demonstrates, the right to freedom of intimate association affords individuals the substantive right to discriminate in actual choice of roommate; however, it is still possible to argue that the government may both recognize this substantive right and simultaneously burden this right by prohibiting discriminatory advertisements. In this line of analysis, so long as the substantive right is preserved, partial regulation is valid; additionally, because commercial speech is subject to a lower level of protection, the government is particularly free to regulate commercial housing speech.¹⁴⁴ However, while the government may regulate to an extent, laws prohibiting individuals from advertising for a roommate are excessively burdensome and invalid.

The Supreme Court has established that a law that imposes a direct and substantial burden on an intimate relationship is subject to strict scrutiny; alternatively, if a law does not impose a direct and substantial burden, it is subject only to rational basis review.¹⁴⁵ Consequently, if section 3604(c) does not amount to a direct and substantial burden on intimate association, it is almost certainly valid under rational basis review. Government action is considered to place a direct and substantial burden where “a large portion of those

143. See *infra* Part IV.D.

144. *E.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

145. *Zablocki v. Redhail*, 434 U.S. 374, 383–87 (1978).

affected by the rule are absolutely or largely prevented from [forming intimate associations],” or where “those affected by the rule are absolutely or largely prevented from [forming intimate associations] with a large portion of [people with whom they could form intimate associations].”¹⁴⁶

Under this test, government prohibition of discriminatory housing advertisements amounts to a “direct and substantial burden.” Although other avenues exist to find a suitable roommate—such as word of mouth or posting a non-discriminatory advertisement and then discriminating in practice—public advertisements are often essential. Consequently, by limiting the legal means of finding a suitable roommate, section 3604(c) substantially burdens roommate associations from forming with a “large portion” of the roommate pool.¹⁴⁷

The fact that 3604(c) burdens only commercial speech does not change the “substantial burden” analysis. While the Constitution gives lowered protection to commercial speech, the rationale for lowered protection is unsound when applied to roommate advertisements.¹⁴⁸ Commercial speech is accorded less protection largely because commercial speakers “have extensive knowledge of both the market and their products” and can easily “evaluate . . . the lawfulness of the underlying activity.”¹⁴⁹ Additionally, because commercial speakers are motivated by “economic self-interest,” commercial speech is considered “hard[er]” than other types of expression—it is not “particularly susceptible to being crushed by overbroad regulation.”¹⁵⁰

Individuals seeking roommates are distinctly different from the supposed commercial speaker. First, these individuals are generally unfamiliar with the housing market and housing laws. They are motivated in part by economic self-interest, but their desire for a comfortable living situation generally far outweighs economic interest. The speech of these individuals is not “hardier” than other speech—it is often particularly susceptible to overbroad regulations.

146. *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004); *see also* *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).

147. *Anderson*, 371 F.3d at 882.

148. *See Cent. Hudson*, 447 U.S. at 564.

149. *Id.* at 564 n.6 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

150. *Id.* (quoting *Bates*, 433 U.S. at 381); *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 n.24 (1976).

V. POSSIBLE OPTIONS THAT BALANCE ANTI-DISCRIMINATION
LAWS AND CONSTITUTIONAL VALUES

While the last decades have seen vast improvement in tolerance and acceptance, discrimination based on race, religion, handicap, and other factors continues to be a significant issue in this country. Consequently, Congress and the courts face a hard decision—decide whether to maintain the status quo, find a way to uphold 3604(c) while still upholding the First Amendment, or adopt a narrow exception to section 3604(c)'s ban on discriminatory advertising.

A. The Immediate Objection: Discrimination is Real

There is no doubt about it, discrimination remains a pertinent issue in the United States. While incidences of discrimination against minorities have decreased significantly in the last several decades,¹⁵¹ discrimination continues.¹⁵² While other aspects of the civil rights laws are deeply entrenched in society today, housing remains an area that is “uniquely intractable”¹⁵³—noncompliance remains common.¹⁵⁴

Much of this discrimination is institutional, hidden in financing procedures and insurance practices;¹⁵⁵ some of it, however, occurs in blatant form, both in practice and in discriminatory advertisements. Some advertisements discriminate in bizarre ways that may amaze

151. Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 799 (2008). According to HUD reports, discrimination incidents against African-American renters declined from 26% in 1989 to 22% in 2000. *Id.* Blacks are now more likely to be told about the same number of available units as comparable white renters. *Id.* In sales, discrimination against African-Americans is down from 29% in 1989 to 17%, while discrimination against Hispanics decreased from 27% to 20% during that time period. *Id.* Both minority groups are likely to be told about the same number of available homes as whites are likely to be told. *Id.*

152. *See, e.g., id.* While discrimination against African-Americans is decreasing, discrimination against Hispanics remained essentially unchanged from 1989 to 2000; additionally, Hispanic renters are now more likely to be quoted a higher rent compared to non-Hispanic whites. *Id.*

153. Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 460 (2007).

154. *Id.* at 459; *see also* Turner, *supra* note 151, at 799–800.

155. *See, e.g.,* Larkin, *supra* note 14, at 1640–41 (outlining institutionalized practices such as steering, lack of assistance with financing by real estate brokers, mortgage lending practices, and housing insurance practices that affect the racial makeup of a neighborhood); *see also* Turner, *supra* note 151, at 800–03. For a discussion on the gentrification of suburban cities, *see also* Calmore, *supra* note 14, at 1068, 1107.

rather than offend a reader: “We are 3 Christian females who Love our Lord Jesus Christ. . . . We have weekly bible studies and bi-weekly times of fellowship,”¹⁵⁶ or “The female we are looking for hopefully wont [sic] mind having a little sexual incounter [sic] with my boyfriend and I.’ [sic]”¹⁵⁷

However, other discriminatory ads may be harsh or derogatory, whether on racial, religious, family, or other grounds. For example, actual online postings cited in recent cases include the following: “NO MINORITIES,”¹⁵⁸ “NOT looking for black muslims [sic],” no “smokers, kids or druggies,” “MUST be a BLACK GAY MALE,”¹⁵⁹ and “No children.”¹⁶⁰

This discrimination may harm society in many ways. Robert Post has identified three types of harm that discriminatory speech, including advertisements, creates.¹⁶¹ First and most obviously, racist expression harms individuals through feelings of “humiliation, isolation, and self-hatred.”¹⁶² This is especially true where expression is delivered in public or by a person or entity in a powerful or authoritative position.¹⁶³ Second, discriminatory speech hurts “those groups that are the target of the expression.”¹⁶⁴ Finally, discriminatory speech creates “deontic harm” as society recognizes the “elemental wrongness” of this expression.¹⁶⁵

B. Possible Options

Because the Constitution and anti-discrimination policies are both highly significant, Congress and the courts will undoubtedly face many thorny issues as they address the constitutionality of section 3604(c). It is unnecessary to throw out either the

156. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1173 n.35 (9th Cir. 2008).

157. *Id.* at 1173 n.34.

158. Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

159. *Roommates.com*, 521 F.3d at 1173.

160. *Craigslist*, 519 F.3d at 668.

161. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 271–77 (1991) (quoted in Klein & Doskow, *supra* note 10, at 347).

162. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982).

163. *Id.* at 143.

164. Post, *supra* note 161, at 273–74.

165. *Id.* at 272.

Constitution or the FHA; instead, Congress and the courts should accommodate the values inherent in both by carefully considering the costs and benefits of various options. The following outlines three possible options that attempt to balance constitutional values and anti-discrimination laws.

1. Option A: Ignore the unconstitutionality of section 3604(c) and maintain the status quo

Because the Constitutional doctrines are complex and anti-discrimination policies are highly important, Congress and the courts may prefer to continue ignoring the unconstitutionality of 3604(c) in the roommate scenario. This option carries both possible benefits and negative ethical ramifications.

For example, there are benefits to having stringent laws that are leniently enforced. Constitutional law and anti-discrimination laws are two powerful and important interests; where these laws converge and oppose each other, strict anti-discrimination laws that are sometimes leniently enforced may relieve some of the tension.¹⁶⁶ Additionally, because facially stiff laws often carry a “moral force,” lenient enforcement may be sufficient—even if actual enforcement is relatively relaxed, the moral force of strict laws can influence behavior.¹⁶⁷ Consequently, people may be more likely to obey the law, and any lenity when they do not obey is unexpected and generally not widely known.

This method describes the status quo. Discriminatory housing advertisements are rampant on the Internet,¹⁶⁸ and individuals who post discriminatory housing ads in violation of section 3604(c) are seldom prosecuted.¹⁶⁹ It may be that individuals seeking roommates are simply seldom “worth” suing, but suing Roommate.com or Craigslist may be more effective.¹⁷⁰ However, it is also likely that the

166. See WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 184 (2007).

167. See *id.* at 185.

168. For examples, look on any online classifieds or search “roommate” to find roommate websites. Almost every site with housing ads will contain multiple discriminatory statements.

169. *But see infra* note 172 for exceptions.

170. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

Department of Housing and Urban Development consciously recognizes that it may be better off not strictly enforcing section 3604(c).¹⁷¹

Despite the possible benefits of maintaining section 3604(c) while leniently applying it, continuing with the status quo is ethically problematic. First, this option ignores the Constitution by continuing to allow section 3604(c) to abrogate the constitutional rights of those who should have recourse and protection. While many who advertise their discriminatory requirements as they search for an appropriate roommate never discover that this speech is illegal, some are prosecuted and forced to pay remedies.¹⁷² These individuals suffer in time, expense, and headache the costs of ignoring these constitutional issues. Similarly, maintaining strict laws that are loosely enforced hurts those who know the actual law and who wish to abide by it. While these individuals may have a constitutional right to advertise as they like for a roommate, a desire to be a law-abiding citizen and the fear of consequences of breaking the law may prevent these individuals from exercising their constitutional rights.

Second, this option does not uphold the integrity of law. Most individuals seeking roommates are unaware that the law prohibits them from posting discriminatory housing advertisements; as they eventually discover that this law exists, they may be unable to reconcile this law with their own experiences. They may possibly conclude that the government is not serious about its anti-discrimination laws—in housing or at all. By maintaining unconstitutional strict laws and by declining to enforce these laws, courts may taint public perception of the entire legal scheme.

171. See 24 C.F.R. § 109.20(b)(5) (1994) (withdrawn). 24 C.F.R. pt. 109(b)(5), laying forth HUD policy, formerly stated that advertisements indicating that the housing was available only to persons of a single sex were invalid; however, this section did not apply “where the sharing of living areas” was involved. While this regulation was withdrawn in 1996, it likely continues to reflect HUD’s enforcement policy. National Fair Housing Advocate Online, 24 C.F.R. 109.20 Use of words, phrases, symbols, and visual aids, http://www.fairhousing.com/index.cfm?method=page.display&pagename=regs_fhr_109-20 (last visited Nov. 2, 2009).

172. See, e.g., *State ex rel Sprague v. City of Madison*, 205 Wis. 2d 110 (Wis. Ct. App. 1996) (review of case requiring roommates who discriminated against another woman to pay almost \$30,000 in attorney’s fees and compensatory and punitive damages); *Dep’t of Fair Employment and Hous. v. De Santis*, FEHC Dec. No. 02-12, 2002 WL 1313078 (Cal. F.E.H.C. 2002) (case in which a woman was sued after she admitted to a housing “tester” that she was scared to live with a black man); see also Messerly, *supra* note 8, at 1958.

2. *Option B: Uphold section 3604(c) without disregarding the First Amendment*

A second option is for Congress and the courts to fully uphold 3604(c) while still upholding the First Amendment. The courts could do this by narrowly reading the right to freedom of intimate association and by creating an exception to the commercial speech doctrine.

a. *Narrow interpretation of intimate association rights.* Courts may narrowly interpret the right to freedom of intimate association by finding that this right exists only within familial and sexual relationships. This limit would continue to uphold past findings of intimate association rights¹⁷³ but would curtail expansion that would protect unrelated adults who platonically cohabit.

This interpretation would mesh well with some lower-court decisions,¹⁷⁴ however, it would also require a substantive withdrawal from the Supreme Court's rationale and rules as articulated in *Roberts v. United States Jaycees*.¹⁷⁵ Specifically, this interpretation would ignore the policy of protecting relationships that afford deep emotional enrichment and identity;¹⁷⁶ the current test of protecting based on size, selectivity, exclusion;¹⁷⁷ and the assurance that protection may extend beyond family.¹⁷⁸ It would additionally rest on some arbitrary limits.¹⁷⁹

b. *Finding an exception under the commercial speech doctrine.* Courts may create an exception to the commercial speech doctrine that allows them to both uphold the constitutionality of 3604(c) and retain the commercial speech doctrine without much alteration. In response to increased realization of the constitutional dilemma that

173. See *supra* Part III.B.2.a.

174. See, e.g., *Berrios v. State Univ. of N.Y. at Stony Brook*, 518 F. Supp. 2d 409 (E.D.N.Y. 2007).

175. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

176. *Id.* at 619; see also *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 992 (D. Neb. 2005).

177. *Roberts*, 468 U.S. at 620.

178. *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987).

179. For example, this Author currently lives with two roommates. She and roommate A grew up in the same hometown and went to the same high school. She met roommate B only recently; after roommate B moved in with her, she discovered that she and roommate B are distant cousins. An arbitrary familial protection might protect the more casual short-term relationship with roommate B while not protecting the relationship with roommate A.

section 3604(c) and commercial speech doctrine create, academics have begun to theorize how section 3604(c) may still be constitutional.¹⁸⁰ They offer theories that would create only minor changes to the constitutional speech doctrine while also finding that individuals who may legally discriminate in roommate choice may still not advertise their discriminatory criteria.

The most plausible theory suggests that *44 Liquormart* should stand for the requirement that the government must “articulate a unified rationale with respect to regulated subject matter” and that the government may not enact schizophrenic legislation.¹⁸¹ Under this interpretation, where “speech about the activity creates a harm that is distinct from permitting the activity itself,”¹⁸² the government may be able to restrict commercial speech about a legal activity because the speech “creates an analytically separate warrant for its restriction.”¹⁸³

The legal community is likely to accept this interpretation. First, it appears to square, at least in part, with Supreme Court analysis. In *Virginia Pharmacy*, the Court attacked a statute intended to protect the public for supposedly harmful information. Criticizing the statute as paternalistic, the Court stated that it was determined “to assume” that the information was not harmful.¹⁸⁴ By presenting evidence of a separate harm that discriminatory speech creates, courts supporting this theory may rebut the Supreme Court’s assumption of a lack of harm and thereby create an exception to the commercial speech doctrine.

Several scholars have posited that discriminatory housing advertisements create social harms that differ from the harms that actual discrimination creates, and the most forceful arguments state that discriminatory speech creates psychic damage separate from the damage inflicted by the act of discrimination. Unannounced discrimination in actual choice of roommates may hurt those actually searching for housing, but may not affect the general public;¹⁸⁵ in

180. See also Klein & Doskow, *supra* note 10, at 375. See generally http://prawnsblawg.blogs.com/prawnsblawg/first_amendment/, (Feb. 15, 2006 and Dec. 1, 2005).

181. Posting of Dave Fagundes to Prawfsblawg, *supra* note 24.

182. *Id.*

183. *Id.*

184. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

185. Posting of Dave Fagundes to Prawfsblawg, *supra* note 24.

contrast, discriminatory advertisements may “generate interethnic animosity and social divisiveness.”¹⁸⁶ The Second Circuit, in *United States v. Space Hunters, Inc.*, supported this rationale while saying that section 3604(c) was intended to “protect[] against the psychic injury,” which discriminatory housing statements create.¹⁸⁷ In the same way that “[e]very person of color who ever walked by a restaurant, motel, restroom, or water fountain with a sign reading WHITES ONLY was damaged by that experience even if he or she had no occasion to enter the restaurant, motel, or restroom, or drink from the fountain,”¹⁸⁸ the case may be made that every person who sees a discriminatory housing advertisement—regardless of whether he is searching for housing and being discriminated against—is damaged.

While psychic harm is undoubtedly real and problematic, the analysis of separate harms will always come down to semantics—the fact that this proposed rule may be easily manipulated toward an end. It is possible to say that discriminatory action creates a direct harm and that discriminatory speech creates a wider harm—and that these harms differ, but it is just as possible to say that these harms are the same—whether a person directs the harm toward a single person or more generally, he is creating likely divisiveness and hurt.

Because these harms are difficult to measure and to distinguish, they become mere tools to be manipulated toward a desired result. This play with semantics lends itself to inconsistency and inequity.

3. Option C: Adopt a roommate advertising exception to section 3604(c)

Whether Congress finds either or both of the intimate association argument or the commercial speech analysis compelling, Congress has a third option: Congress may find that section 3604(c) is unconstitutional as applied to roommate choice. Congress may then uphold the constitutionality of 3604(c) by creating a narrow

186. *Id.*

187. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (internal citations removed). See generally Posting of Dave Fagundes to Prawfsblawg, *supra* note 24.

188. See Klein & Doskow, *supra* note 10, at 348. Because roommate choice seems to be an area of inherent individual discretion, most people do not even suspect that the government has regulated their speech in this area. Additionally, because few people who actually advertise are prosecuted, individuals have no experience with or even stories of prosecution that would alert them to the existence of 3604(c).

exception that allows those seeking roommates to use discriminatory language in their advertisements. The creation of an exception would likely have negative political ramifications but would not significantly set back anti-discrimination legislation.

The creation of a narrow exception would likely have negative political ramifications. While housing discrimination is not nearly as rampant as it was when the FHA was passed,¹⁸⁹ discrimination continues today.¹⁹⁰ A newspaper headline stating that “Congress Allows Discriminatory Housing Ads” is likely to upset both those who fear discrimination and those who are concerned with civil rights and do not know the details of the constitutional issues.

Despite public fears, an exception to section 3604(c) recognizing that those in the roommate scenario may legitimately advertise their discriminatory intents likely would not significantly set back anti-discrimination efforts. First, the recognition of these constitutionally-protected rights is unlikely to significantly alter behavior. For example, those who are likely to be discriminated against are also likely to not know their rights.¹⁹¹ Because people are unaware of the law, their use or lack of use of discriminatory language is not based on constraints of law, but on individual preference, culture, and the desire to follow social norms.¹⁹² Consequently, they are unlikely to increase their use of discriminatory language if they know that this language is legal.

Second, an exception to 3604(c) would apply narrowly to individuals and would not extend to newspapers, websites, or other forums. The Mrs. Murphy Exception applies only to an owner who owns or controls living quarters containing no more than four families where she maintains and occupies one of the living quarters

189. See *supra* Part II.A; see also Stephen L. Ross & George C. Galster, *Fair Housing Enforcement and Changes in Discrimination Between 1989 and 2000: An Exploratory Study* (Univ. of Conn., Working papers 2005-16, Dep’t of Econ.), available at <http://ideas.repec.org/p/uct/uconnp/2005-16.html#statistics>.

190. See *supra* Part V.A.

191. See Klein & Doskow, *supra* note 10, at 342–43 (finding that many persons seeking housing know little about anti-discrimination laws in housing). Those who advertise for roommates are often equally unaware of these laws.

192. See generally Schwemm, *supra* note 153, at 508 (“[P]eople generally . . . tend to obey laws more out of a sense of their moral value and fairness and a desire to adhere to social norms rather than from the threat of punishment.”).

as her residence.¹⁹³ Accordingly, newspapers still could not legally print these advertisements.¹⁹⁴

Third, following the Ninth Circuit's recent decision in *Roommate.com*, websites may not contrive discriminatory statements by asking discriminatory questions.¹⁹⁵ Accordingly, this exception would (1) extend only to individuals (and not institutions) and would (2) cover only speech that came directly from individuals. This exception would allow individuals to place ads on common boards or websites such as Craigslist; it would not, however, extend protection to print or other online sources.

A narrow exception to 3604(c) would additionally harmonize current law and signify a step forward in anti-discrimination law. An exception would recognize the constitutionality of what people are already doing while removing the inconsistency in the law. While people currently routinely break the law without repercussions,¹⁹⁶ this change would allow people to continue their activities—but legally.

Finally, an exception would benefit many people like Gene Kavenoki who want to advertise for and choose a roommate based on a “slightly warped sense of humor,”¹⁹⁷ attributes that they share, or common areas of interest. Like Kavenoki, such individuals may include technically discriminatory statements in their ads (“looking for a girl to share small apartment,” or “preferably someone interested in Jewish literature,” “just around the corner from a mosque”) while intending absolutely no offense. These individuals would be freed from the possibility of lawsuit and would receive the benefits of being able to legally advertise.

VI. CONCLUSION

For decades, section 3604(c) of the Fair Housing Act has prohibited discrimination in housing advertising based on race, religion, ethnicity, gender, handicap, or familial status. Despite long-

193. 42 U.S.C. § 3603(b)(2) (2006).

194. *Compare* *Ragin v. N.Y. Times Co.*, 923 F.2d 995 (2d Cir. 1991), *with* 42 U.S.C. § 3604(c) (2006).

195. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2007).

196. *See* *Turner*, *supra* note 151, at 805 (showing that few people who experience discrimination take action).

197. *Liptak*, *supra* note 1.

term and widespread acceptance of the constitutionality of this law, section 3604(c) is unconstitutional under the commercial speech doctrine and under the right to freedom of intimate association. Real tension exists between anti-discrimination policies and constitutional rights; therefore, Congress and the courts must carefully consider how to best accommodate the values of both core constitutional rights and important anti-discrimination policies. While some compromise will be necessary, it is possible to accommodate both values.

*Brooke Wright**

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