

Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act

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Introduction

The Fair Housing Act (“FHA”) boldly declares that “[i]t is the policy of the United States to provide . . . fair housing throughout the United States.”¹ To that end, § 3604 of the FHA prohibits discrimination on any basis in the sale, rental, or negotiation of housing.² The FHA’s coverage, however, is not complete. Section 3603(b)(2), the so-called Mrs. Murphy exemption,³ exempts dwellings intended to be occupied by four or fewer families⁴ from the prohibitions of § 3604, other than § 3604(c), if the owner lives in one of the units.⁵

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¹ 42 U.S.C. § 3601 (1994).

² Specifically, § 3604(a) makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, 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.” 42 U.S.C. § 3604(a) (1994).

³ The “Mrs. Murphy” concept predates the FHA, having its origins in the discussions that led to the passage of Title II of the Civil Rights Act of 1964. Title II prohibits “discrimination or segregation” in “any place of public accommodation, as defined in this section.” 42 U.S.C. § 2000a (1994). Republican Senator George D. Aiken of Vermont coined the term “Mrs. Murphy” when he reportedly suggested that Congress “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent their rooms to those they choose.” ROBERT D. LOEY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* at 51 (1990). The term “Mrs. Murphy” became shorthand to describe the exemption from Title II for owner-occupied housing accommodations with five rooms or less. *See* 42 U.S.C. § 2000a(b)(1) (1994) (stating the exemption). In 1968, “Mrs. Murphy” also came to describe landlords exempt from the FHA under § 3603(b)(2). *See, e.g.*, 114 CONG. REC. 2495 (1968).

⁴ For purposes of the FHA, “family” includes a single individual. *See* 42 U.S.C. § 3602(c) (1994).

⁵ *See* 42 U.S.C. § 3603(b)(2) (1994). It should be noted that § 3603(b) explicitly declines to exempt a Mrs. Murphy landlord from § 3604(c). Section 3604(c) makes it illegal:

[t]o make, print, or publish, or cause to be made, printed, or published any notice,

While the Mrs. Murphy exemption arguably has limited practical significance,⁶ the exemption continues to have great symbolic force. By cutting Mrs. Murphy from FHA coverage, the exemption ostensibly guards her First Amendment right not to associate.⁷ On the other hand, by permitting Mrs. Murphy to discriminate, the exemption permits infringement of a potential tenant's right to be free from discrimination. Thus, the exemption indicates where society, speaking through Congress, draws the line in the clash between civil rights and civil liberties.

This Note will argue that Congress drew the line in the wrong place, rendering the exemption over-inclusive as a protector of liberty. To make this point clear, it is important to recognize the breadth of the exemption. At one extreme, the law exempts a savvy businessperson who owns a four-unit building, renting three of the units to strangers and occupying the fourth unit as her own. Such a landlord would likely use a separate entrance/exit and rarely, if ever, interact with her tenants. At the other extreme, the law exempts an unsophisticated owner of a two-bedroom house, who, with the house as her only asset and source of income, rents one of the rooms to a tenant who will perforce share a bathroom, kitchen, and potentially meals with the owner. The former Mrs. Murphy has no cognizable rights of association, while the latter might. Yet, as now written, the FHA exempts them both.

This Note will also argue that repealing the exemption is preferable to modifying it. Even if coverage of the exemption were scaled back to

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.

42 U.S.C. § 3604(c) (1994).

Accordingly, while a Mrs. Murphy landlord may lawfully discriminate against others in choosing her tenants, she may not express her preferences in an advertisement. For simplicity, this Note refers to Mrs. Murphy landlords using feminine pronouns, though, of course, neither the exemption nor the practice of housing discrimination is gender-specific.

⁶In 1968, when the Senate debated the proposals that would become the FHA, it was estimated that the exemption would apply to 2 million units out of a national housing supply of 65 million units. See 114 CONG. REC. 3424 (1968) (statement of Sen. Mondale). Senator Walter F. Mondale testified that the total housing falling under the exemption would remain at an estimated three percent. See 114 CONG. REC. 2495 (1968). Today, it remains unclear what proportion of the national housing supply is exempt, since neither housing agencies nor the Department of Housing and Urban Development ("HUD") keep such statistics. See Keirsten G. Anderson, Note, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017, 1070-71 (1997). Nevertheless, Pat Sullivan, director of fair housing enforcement of HUD's Midwestern Region, estimates that the number of general housing discrimination complaints that are not pursued on the presumption that one or more of the FHA's exemptions apply was approximately 25 of 3000 complaints received in one year. See *id.* at 1071 n.319.

⁷See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (recognizing a First Amendment right to refuse to associate); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 638 (1980) (stating that the freedom of nonassociation is itself an associational freedom).

dwellings occupied by two families, for instance, the FHA would still condone overt discrimination. The existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination. Implicit in the exemption is the belief that there is something so unsavory about Mrs. Murphy's likely targets—African Americans, Latinos, Jews, families with children—that she should not have to live amongst them, even if they reside in separate units that she chose to make available on the market. For these reasons and others articulated below, the Mrs. Murphy exemption should be repealed, leaving the most intimate of situations to case-by-case, as-applied, First Amendment challenges.

Part I explores the “Mrs. Murphy” image and its relationship to the exemption's origins and purposes. I extrapolate from the legislative history and contemporaneous articles that inclusion of the exemption was as much a concession to racism as a recognition of Mrs. Murphy's rights of association. Part II contends that Mrs. Murphy does not have associational interests worthy of an exemption, even under the most sympathetic circumstances, under current case law. Part III explains that one of the exemption's unstated purposes—to shield Mrs. Murphy from close contact with African Americans—is undercut by the existence of § 1982 of the Civil Rights Act of 1866. Courts have interpreted § 1982 to prevent Mrs. Murphy from discriminating on the basis of race. Part IV contends that since Mrs. Murphy has no constitutionally recognized associational interests and modern interpretations of § 1982 have diluted the exemption's protection of racial discrimination, social policy demands that the exemption be repealed. Its negative symbolic value outweighs any value to be found in recognition of Mrs. Murphy's alleged right not to associate.

I. Purposes of the “Mrs. Murphy” Exemption

The Mrs. Murphy exemption was included in the FHA to protect Mrs. Murphy's First Amendment freedom of association. Senator Mondale, who co-sponsored the FHA, declared: “The sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants.”⁸ Yet implicit was an understanding that the First Amendment right at stake was specifically Mrs. Murphy's right not to associate with African Americans.

When Senator John Cooper, Democrat from Kentucky, introduced Amendment No. 567, which later became the Mrs. Murphy exemption, he patterned it after the “Mrs. Murphy Boardinghouse” exemption to Ti-

⁸ 114 CONG. REC. 2495 (1968).

title II of the Civil Rights Act of 1964.⁹ Statements in the legislative history of Title II suggest that from the beginning the Mrs. Murphy concept had First Amendment roots. During debates over Title II, Senator Hubert Humphrey commented that the “cut off point of five rooms was reached in balancing the right of privacy of one who hires out rooms in his own residence and the obligations of a proprietor who maintains a public lodging house.”¹⁰ At a later point in the debate, Senator Humphrey elaborated:

[Title II] is carefully drafted and moderate in nature. There is no desire to regulate truly personal or private relationships. The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.¹¹

While these exemptions were tied to the First Amendment, they were not purely motivated by fidelity to the First Amendment. Racial politics lurked in the background. In 1963, during the debates over Title II, “Mrs. Murphy” became a slogan by which opponents of Title II appealed to the public.¹² The image conveyed was “of the ancient widow operating a three or four room tourist home who would, by force of the bill, be required to accommodate transients *without regard to race*.”¹³

⁹ See 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1741–44 (Bernard Schwartz ed., 1970). From Title II’s prohibitions against discrimination or segregation in places of public accommodation, § 2000a(b)(1) exempts boardinghouses containing five or fewer rooms for rent if the owner resides in the house. See 42 U.S.C. § 2000a(b)(1) (1994). The legislative history of the Mrs. Murphy Boardinghouse exemption requires consideration for several reasons. First, the FHA provision was modeled on the Title II provision. Second, the provisions are similar in coverage (smaller scale providers of lodging) and stated purpose (protecting the association rights of Mrs. Murphys). Third, the provisions were included in related and controversial civil rights bills passed during the same volatile period in our nation’s history. Fourth, there was limited discussion of the Mrs. Murphy exemption in the debates leading up to passage of the FHA. Possibly because the “Mrs. Murphy” concept was a novel one in 1963 and 1964, the discussion surrounding the exemption’s inclusion in Title II is more expansive.

¹⁰ 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 9, at 1154.

¹¹ *Id.* at 1194.

¹² See LOEVY, *supra* note 3, at 52.

¹³ Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 672 (1965) (emphasis added). See also 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 9, at 1154–55. A dialogue about the Mrs. Murphy exemption to Title II, between Senators John Sparkman, Democrat from Alabama, and Russell Long, Democrat from Louisiana, suggests that the right to discriminate was cherished not so much to protect privacy as to insure that the choice to be around others like oneself. Senator Sparkman declared that segregation is 99% by choice, depicting black-from-white segregation as by choice. See *id.*

Although average Americans could not understand much of the bill's complexity, "Mrs. Murphy" was an image with which average Americans could identify.¹⁴ Proponents of Title II, fearing that public empathy for Mrs. Murphy would defeat the bill, supported the exemption.¹⁵ For the bill's proponents, the number of establishments that would be cut from Title II's coverage was not significant enough to warrant becoming embroiled in the political battle that would have ensued.¹⁶

Circumstantial evidence also points to the influence of racial politics in the inclusion of the Mrs. Murphy exemption in the FHA. In the same breath in which Senator Mondale extolled the exemption as protecting Mrs. Murphy's privacy, he said, "I want it clearly understood as well that I do not agree with the need for granting this exemption."¹⁷ Moreover, he doubted that concerns for Mrs. Murphy's privacy or associational freedoms motivated those who supported such an exemption.¹⁸ Rather, he speculated, politics was driving support for the exemption.¹⁹ Noting the widespread support for the exemption—both within and outside Congress—Senator Mondale stated for the record that "[s]ome argue on the merits and most, I would say, argue on the basis of a belief that it is politically necessary."²⁰ Despite disagreeing with the basis of the exemption and recognizing the questionable motivations of its adherents, Mondale was willing to make a concession in order to save his bill.²¹

Senator Mondale's comments do not make clear why he thought the exemption was "politically necessary," but it seems clear that Mrs. Murphy's First Amendment rights were not the underlying concern of most of those supporting the exemption. Mondale's distinction between those few proponents of the exemption who argued "on the merits" and the majority who believed it was "politically necessary" leave the impression that he was distinguishing between honorable First Amendment argu-

¹⁴ See LOEY, *supra* note 3, at 51. The Mrs. Murphy image became so powerful a symbol that a news correspondent from Maine asked President John F. Kennedy about Mrs. Murphy at a presidential news conference. Mrs. May Craig asked the President if he thought that "Mrs. Murphy should have to take into her home a lodger whom she does not want, regardless of her reason, or would you accept a change in the civil rights bill to except small boarding houses like Mrs. Murphy?" With a straight face President Kennedy answered that it depends on "whether Mrs. Murphy had a substantial impact on interstate commerce." Kennedy's response brought a roar of laughter. See *Mrs. Murphy's Impact Is Felt at News Session*, N.Y. TIMES, July 18, 1963, at A8.

¹⁵ See Quick, *supra* note 13, at 672.

¹⁶ See *id.*

¹⁷ 114 CONG. REC. 2495 (1968).

¹⁸ See *id.*

¹⁹ See *id.* See also Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 156 (1969) (noting that from the beginning, Senator Mondale believed that coverage of any proposed fair housing bill would have to be cut to enable its passage).

²⁰ 114 CONG. REC. 2495 (1968).

²¹ See *id.* In Mondale's words: "Where the loss in coverage represents a very small fraction of the housing supply—now and in the future—then I think we can give one slice of the loaf in order to save the remainder of the loaf." *Id.*

ments and arguments that the exemption was necessary to make the FHA more palatable to white Americans opposed to open housing.²² Accordingly, the exemption is more accurately understood as a political concession, born more out of racist prejudice than faithfulness to the First Amendment.

II. First Amendment Rights of Mrs. Murphy

While the exemption was ostensibly included in the FHA to protect Mrs. Murphy's First Amendment rights, only those Mrs. Murphys in particularly intimate settings have legitimate First Amendment interests—for example, a Mrs. Murphy who rents out a room in her two-bedroom house and shares a kitchen and bathroom with her tenant. Everyday experience, however, suggests Mrs. Murphy typically lives in a separate unit from her tenant(s) with whom she has friendly, but not intimate (in the constitutional sense described below), relationships. For the purposes of the discussion in this section, I will assume this type of Mrs. Murphy.

A. *The First Amendment Framework*

In *Roberts v. United States Jaycees*,²³ Justice Brennan reviewed the Supreme Court's freedom of association jurisprudence.²⁴ He concluded that the constitutional right of freedom of association encompasses two distinct constitutional rights: the freedom of intimate association and the freedom of expressive association.²⁵ The freedom of intimate association, according to Justice Brennan, "protects certain intimate human relationships" from "undue intrusion by the State," because these intimate relationships help safeguard individual freedom.²⁶ The freedom of expressive association protects individuals engaging in activities protected by the First Amendment, such as speech, assembly, and the exercise of religion.²⁷

Jaycees involved challenges premised on both rights. The Jaycees, a national all-male organization, challenged a state law forbidding dis-

²² See *New Controversy in the Wake of the Kerner Report*, N.Y. TIMES, Mar. 10, 1968, at E2.

²³ 468 U.S. 609 (1984).

²⁴ See *id.* at 617-18. The freedom of association arguments presented in this Note draw much of their support from cases dealing with the private club exemption to the public accommodations provisions of the Civil Rights Act of 1964 since the face-off between the rights of freedom of association and freedom from discrimination often arises in this context.

²⁵ See *id.*

²⁶ *Id.* The constitutional right of intimate association relies on the right to privacy. See Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. MICH. ST. U.L. REV. 629, 640.

²⁷ See *Jaycees*, 468 U.S. at 618; Shropshire, *supra* note 26, at 640.

crimination on the basis of sex “in a place of public accommodation.”²⁸ By requiring it to accept women as full members, the Jaycees argued, the state law violated its members’ rights of free speech and association.²⁹

A statute that significantly interferes with protected associational activity is subject to strict scrutiny,³⁰ meaning that the statute must serve a compelling state interest that cannot be achieved by less restrictive means.³¹ Accordingly, the *Jaycees* Court began its analysis by examining whether the Jaycees were engaged in protected associational activity that would trigger strict scrutiny.³²

First, the Court addressed the question whether the Jaycees’ right to intimate association had been infringed. The Court found that the relationships among Jaycees members were not sufficiently intimate to be worthy of constitutional protection.³³ The intimacy between the organization’s members did not resemble that of a family, which the Court viewed as paradigmatic of the sort of intimate relationships the constitution protects.³⁴ Family relationships are distinguishable, in part, by their “relative smallness, high degree of selectivity,” and “seclusion from others in the critical aspects of the relationship.”³⁵ The Jaycees’ local chapters, by contrast, are large and unselective, admitting members “with no inquiry into their backgrounds.”³⁶ The Court also noted that the Jaycees permitted nonmembers of both genders to participate in many of its activities and allowed women to join as associate or less-than-full members.³⁷

Next the Court found that the statute had infringed the Jaycees’ expressive associational interests.³⁸ Despite this fact, the Court found that the statute satisfied strict scrutiny. In the Court’s view, the state’s “compelling interest in eradicating discrimination against its female citizens justifies” any restrictions imposed by the state on the Jaycees members’ associational freedoms.³⁹ Moreover, the Court found that the Jaycees had not made a substantial showing that admitting women as full members would impede the Jaycees’ ability to express its views.⁴⁰ The Jaycees

²⁸ *Jaycees*, 468 U.S. at 615.

²⁹ *See id.*

³⁰ *See NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958).

³¹ *See Jaycees*, 468 U.S. at 623.

³² *See id.* at 618.

³³ *See id.* at 621.

³⁴ *See id.* at 619–20.

³⁵ *Id.* at 620.

³⁶ *Id.* at 621.

³⁷ *See id.* at 613, 621.

³⁸ The right of expressive association at stake for the Jaycees was its right to be free from interference with its internal organizations and its ability to express only those views that brought its members together. *See id.* at 623.

³⁹ *Id.*

⁴⁰ *See id.* at 627. In her concurrence, Justice O’Connor questioned the Court’s focus on whether or not admitting women would impact the Jaycees’ message and the Court’s application of a “compelling interest test.” *Id.* at 632–33 (O’Connor, J., concurring). Ac-

could continue to promote the interests of young men and exclude individuals with ideologies or philosophies differing from those of its members.⁴¹ Concluding its analysis, the Court found that the statute's impact on the Jaycees' protected speech was narrowly tailored to achieve its purposes.⁴²

B. Application of the Framework to Mrs. Murphy

Mrs. Murphy has no associations, either intimate or expressive, that would afford her constitutional protection to discriminate. Even when a right of freedom of association is predicated on the recognized right not to associate,⁴³ as is Mrs. Murphy's, that right must be asserted in furtherance of some affirmative right to associate.⁴⁴ Otherwise, Mrs. Murphy would be simply arguing for a right to discriminate. The Supreme Court has explicitly and repeatedly refused to grant "constitutional protection for invidious private discrimination."⁴⁵

1. Right of Intimate Association and Mrs. Murphy

a. The Intimacy of Mrs. Murphy's Home

Mrs. Murphy may argue that she seeks the right to discriminate to protect her home from outside interference. Such a basis, were it legitimate, would be quite powerful. Indeed, the *Jaycees* Court stated that family relationships exemplify the sort of relationship worthy of consti-

cording to Justice O'Connor, rather than examining this membership-message connection, the Court should have determined, as a threshold matter, whether the Jaycees was an expressive association worthy of First Amendment protection. *See id.* at 633. Distinguishing between expressive and commercial associations, she argued that commercial associations should receive only the minimal constitutional protection of the freedom of commercial association. *See id.* at 634. Otherwise, commercial associations "might improperly gain protection from discrimination" by "engaging occasionally" in expressive activities. *Id.* at 632. Because the Jaycees was primarily a commercial association—focusing on solicitation and management—Justice O'Connor argued that the statute only needed to be rationally related to a legitimate state interest to be constitutional. *See id.* at 635, 639. Under a rational relation test, Mrs. Murphy's claim to associational freedom would be more likely to fail. In the typical situation, where Mrs. Murphy's relationships with her tenants are primarily business ones—that is, lodging in return for rent—any statute impinging on Mrs. Murphy's associational freedoms would only need to be rationally related to a legitimate state interest.

⁴¹ *See id.* at 627.

⁴² *See id.* at 628.

⁴³ *See Karst, supra* note 7.

⁴⁴ *See Jaycees*, 468 U.S. at 618–19; *see also* Paula J. Finlay, Note, *Prying Open the Clubhouse Door: Defining the "Distinctively Private" Club after New York State Club Association v. City of New York*, 68 WASH. U. L.Q. 371, 379–80 (1990).

⁴⁵ Finlay, *supra* note 44, at 380.

tutional protection.⁴⁶ By publicly renting, however, Mrs. Murphy is involved in a business, which is a decidedly non-private endeavor.⁴⁷ Mrs. Murphy can hardly justify her discrimination as a desire to seclude her family when she seeks to rent her units to outsiders. As the *Jaycees* Court noted, one characteristic that distinguishes families is "seclusion from others in critical aspects of the relationship."⁴⁸ Forcing Mrs. Murphy to rent to those she would otherwise reject would not open her doors to the public. She has already chosen to open them.⁴⁹

Mrs. Murphy's argument based on the intimacy of her home is also weakened by the fact that her tenants might live independently from her family. As written, the Mrs. Murphy exemption applies to owner-occupied "dwellings"⁵⁰ containing no more than four rooms or units for independent living.⁵¹ Thus, interaction with her tenants may be limited to encountering them in the hallway. Of course, Mrs. Murphy's argument becomes stronger the lesser the physical separation between her and her tenants.

In *Senior Civil Liberties Ass'n v. Kemp*,⁵² an elderly couple challenged the constitutionality of the 1988 amendments to the FHA, which added "familial status" to the classes protected by the FHA.⁵³ The plaintiffs alleged the "familial status" provision violated their privacy and association rights.⁵⁴ The plaintiffs lived in a condominium complex that excluded children under the age of sixteen in violation of the FHA's "familial status" provision.⁵⁵ The Eleventh Circuit rejected these constitutional arguments, holding that the amendments did not violate the plaintiffs' rights of association because the amendments' prohibitions "stop[] at the [plaintiffs'] front door."⁵⁶ The court declared that whatever the right of privacy might include, "it excludes without question the right to dictate or to challenge whether families with children may move in next door to you."⁵⁷ Accordingly, the right of intimate association does not protect Mrs. Murphy's right to discriminate in determining who will

⁴⁶ *Jaycees*, 468 U.S. at 619.

⁴⁷ Edward A. Adler asserted that: "the phrase 'private business' is a contradiction in terms Every man engaged in business is engaged in a public profession and a public calling." Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 158 (1914).

⁴⁸ *Jaycees*, 468 U.S. at 620.

⁴⁹ See generally Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1431 (1996).

⁵⁰ For purposes of the FHA, "'dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b) (1994).

⁵¹ See 42 U.S.C. § 3603(b)(2) (1994).

⁵² 965 F.2d 1030 (11th Cir. 1992).

⁵³ See 42 U.S.C. § 3604 (1994). In 1988, Congress added handicapped persons and families with children under the age of 18 to the groups protected by the FHA.

⁵⁴ See *Senior Civil Liberties Ass'n*, 965 F.2d at 1036.

⁵⁵ See 42 U.S.C. § 3602(k) (1994).

⁵⁶ *Senior Civil Liberties Ass'n*, 965 F.2d at 1036.

⁵⁷ *Id.*

rent the units neighboring hers. As the court noted, a different case would be presented if the FHA forced Mrs. Murphy and the *Kemp* plaintiffs to take undesired groups into their living quarters.⁵⁸

b. The Intimacy between Mrs. Murphy and her Tenants

There are two exemptions to the FHA that shield landlord-tenant relationships in recognition of the special associational interests at play. The typical Mrs. Murphy, however, qualifies for neither. Mrs. Murphy is neither affiliated with a religious organization whereby she only rents her units "for other than a commercial purpose" to those who share her religious beliefs, nor is she affiliated with a private club that provides lodging to its members "for other than a commercial purpose," both of which are the only affiliations exempted from the FHA under § 3607.⁵⁹ Rather, Mrs. Murphy rents her units to the public in return for consideration.⁶⁰

Even still, Mrs. Murphy may argue that she discriminates to shield the intimate relationships she has developed with her tenants. This argument would parallel those asserted by private clubs seeking First Amendment refuge from anti-discrimination laws.⁶¹ Not only is the intimacy this argument suggests contrary to the common perception of landlord-tenant relations, but it also argues for recognition of relationships the First Amendment does not protect.

As noted above, the relationships that the Court is willing to grant constitutional protection resemble those "that attend the creation and sustenance of a family."⁶² Though the Court has not limited constitutional protection to relationships among family members, it has made clear that it will protect only those sharing the attributes of family relationships.⁶³

⁵⁸ See *id.* This is not to suggest that the line should necessarily be drawn at Mrs. Murphy's door. Rather, the physical separation provided by a door and independent units indicate less intimacy. A line more true to the First Amendment might be drawn by focusing on the degree to which Mrs. Murphy interacts with her tenants. For example, the FHA might only exempt landlords who share bathroom and kitchen facilities with their tenants. See the discussion of local fair housing laws, *infra* Part IV.C.

⁵⁹ 42 U.S.C. § 3607(a) (1994).

⁶⁰ The religious organization and private club exemptions to the FHA are more closely tied to associational rights than the Mrs. Murphy exemption because they only apply where the landlord is not renting for a commercial purpose. The commercial versus non-commercial distinction is a more legitimate basis for exempting housing owners from the FHA.

⁶¹ See generally *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁶² *Jaycees*, 468 U.S. at 619.

⁶³ See *Duarte*, 481 U.S. at 545. Significantly, the only intimate relationships the Court has recognized involve family members, namely, marriage, *Zabocki v. Redhail*, 434 U.S. 374, 383-86 (1978); the begetting and bearing of children, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977); child rearing and education, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); and cohabitation with relatives, *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion).

The relationships between the typical Mrs. Murphy and her tenants replicate neither the social nor the legal bonds among family members. Mrs. Murphy, for example, does not have a duty to direct the upbringing and education of a child living in her building.⁶⁴ That is the role of the child's parents or guardians.⁶⁵ Nor does Mrs. Murphy's relationship with the child resemble that between a grandmother and her grandchild, who, due to a family crisis, may have joined together to form a home, a tradition worthy of constitutional recognition.⁶⁶

Family relationships, according to the Court, involve deep attachments and commitments where members share special community of thoughts, experiences, beliefs, as well as personal aspects of their lives.⁶⁷ As stated above, Mrs. Murphy's dwelling is not intended solely for the use of members of a religious organization;⁶⁸ nor is it a private club or community of thought.⁶⁹ Accordingly, Mrs. Murphy's dwelling is not a center of value formation or expression.⁷⁰ Rather, it more closely resembles what Professor Laurence Tribe describes as "a collection of persons."⁷¹

That Mrs. Murphy welcomes strangers also cuts against recognizing her landlord-tenant relationships as intimate ones, for the Court has declared that family relationships are distinguished by a high degree of selectivity.⁷² Like the Jaycees, which routinely admits new members with no inquiry into their backgrounds,⁷³ a Mrs. Murphy renting for a commercial purpose is primarily concerned with whether the would-be renter can pay rent and will abide by her rules. Even a Mrs. Murphy less concerned about her rent money is unlikely to exercise the selectivity that attends family relationships in accepting a renter. In addition, a policy of discrimination does not necessarily demonstrate selectivity. Were Mrs. Murphy to discriminate as the present FHA permits and reject all African

⁶⁴ See *Pierce*, 268 U.S. at 534-35.

⁶⁵ See *id.* at 535. In fact, Mrs. Murphy may be precluded by law from playing such a role. See, e.g., *Fair Hous. Congress v. Weber*, 993 F. Supp. 1286 (C.D. Cal. 1997) (safety concerns do not justify apartment complex's policy of not renting second-floor-entry units to families with small children).

⁶⁶ See *Moore*, 431 U.S. at 504-05.

⁶⁷ See *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984); cf. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989). The relationship between Mrs. Murphy and her tenants also falls short of that between two gay men that the Court of Appeals of New York recognized as "family members" for purposes of a noneviction provision in a rent-control statute. These life partners had lived together for more than ten years, shared all obligations including a household budget, and had joint checking and savings accounts. See *id.* at 213.

⁶⁸ See *Roberts*, 468 U.S. at 615.

⁶⁹ See *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁷⁰ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-17, at 1406 (2d ed. 1988).

⁷¹ *Id.*

⁷² See *Jaycees*, 468 U.S. at 620.

⁷³ See *id.* at 621.

Americans or Latinos, yet accept all whites able to meet other objective criteria, she would not demonstrate exclusiveness.⁷⁴ She would merely demonstrate bigotry. For example, the *Jaycees* Court, in determining that the Jaycees was not sufficiently selective, pointed to testimony by a local Jaycees officer that he could not recall an applicant ever being denied except on the basis of age or sex.⁷⁵

2. *Right of Expressive Association and Mrs. Murphy*

By claiming that her reason for discriminating is predicated on her religious beliefs, a Mrs. Murphy can argue compellingly that the FHA, as applied to her, is unconstitutional.⁷⁶ In a recent case, *Thomas v. Anchorage Equal Rights Commission*,⁷⁷ the Ninth Circuit paved the way for such a challenge by finding that the application of city and state anti-discrimination laws violates the First Amendment free exercise rights⁷⁸ of two religious landlords.⁷⁹

The laws at issue in *Thomas* make it unlawful for housing providers to discriminate on the basis of "marital status," which, for purposes of the laws, includes refusing to rent to unmarried couples.⁸⁰ Claiming that any enforcement of the laws against them would violate their free exercise rights, the plaintiff landlords filed suit, seeking prospective declaratory and injunctive relief.⁸¹ They argued that as Christians they believe that cohabitation between unmarried individuals is a sin and that renting to such individuals facilitates that sin.⁸²

A religious Mrs. Murphy⁸³ may similarly allege that the FHA's prohibitions violate her free exercise rights. However, her claim could not rest on "marital status," for the FHA does not proscribe discrimination on

⁷⁴ See *id.* (citing *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 438 (1973), which held that an organization whose only selection criterion is race has "no plan or purpose of exclusiveness" that might make it a private club exempt from federal civil rights statute)).

⁷⁵ See *Jaycees*, 468 U.S. at 621.

⁷⁶ Any facial challenge to the FHA would likely fail because of its enactors' intention that the provisions be separable. See 42 U.S.C. § 3601 (1994). This intention is also evident from the FHA's declaration of policy: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added).

⁷⁷ 165 F.3d 692 (9th Cir. 1999).

⁷⁸ The Free Exercise Clause of the First Amendment provides that, "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

⁷⁹ See *Thomas*, 165 F.3d at 696 (finding that those landlords "have committed themselves to practicing their faith in all aspects of their lives, including their commercial activities as landlords").

⁸⁰ See *id.* at 697 (describing ALASKA STAT. § 18.80.240(1) (Michie 1998) and ANCHORAGE MUN. CODE § 5.20.020 (A)).

⁸¹ See *id.*

⁸² See *id.* at 696.

⁸³ For purposes of this discussion, I will use the term "a religious Mrs. Murphy" to describe a Mrs. Murphy similar to the landlords in *Thomas*, see *supra* note 79.

the basis of marital status.⁸⁴ Nor can the FHA's "familial status" prohibition be applied to prevent her from discriminating against an unmarried couple.⁸⁵ Were Mrs. Murphy to discriminate against an unmarried couple, the FHA would not be implicated and thus there would be no clash between the FHA and her free exercise rights. A closer question under the "familial status" provision is presented if, however, Mrs. Murphy were to refuse to rent to a single parent on religious grounds. She might allege, if she knew, that the children were born out-of-wedlock and that sex outside of marriage violates her religious beliefs. Yet this situation is qualitatively different than the one presented in *Thomas*, for the "sin" has already occurred; she would not be facilitating it.⁸⁶ Moreover, Mrs. Murphy is discriminating not because of the existence of the children, but because the children were born to unmarried parents. The free exercise battle in the FHA context would more likely be fought over enforcement of the FHA's prohibition of discrimination on the basis of religion.⁸⁷ Were Mrs. Murphy to refuse to rent based on the fact that she and a would-be tenant held different religious beliefs, the refusal would likely violate the FHA.⁸⁸

In reaching its decision, the Ninth Circuit centered its analysis on the Supreme Court's decision in *Employment Division v. Smith*.⁸⁹ The respondents in the *Smith* case contested the denial of their applications for unemployment benefits under a state law that disqualified employees

⁸⁴ The FHA prohibits discrimination on the bases of race, color, religion, sex, familial status, or national origin. See 42 U.S.C. § 3604(a) (1994).

⁸⁵ The "familial status" prohibition was designed to protect families with children from housing discrimination. This is clear both from the way "familial status" is defined in the FHA and the provision's legislative history. The FHA defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with—

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person."

42 U.S.C. § 3602(k) (1994).

In discussing the Fair Housing Amendments Act of 1988, which added "familial status" to the bases on which the FHA prohibits discrimination, the House Report details pervasive discrimination against families with children, noting that the few state laws on the books were ineffective at fighting this discrimination. See H.R. REP. NO. 100-711 at 19-21 (1988).

⁸⁶ See *Thomas*, 165 F.3d at 696 (landlords/plaintiffs alleging that renting to unmarried couples facilitates the sin of fornication).

⁸⁷ See 42 U.S.C. § 3604(b) (1994). Mrs. Murphy might also allege that the ban on race discrimination unconstitutionally burdens her free exercise rights because interaction with African Americans or other minority groups is against her religion. That claim would fail. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (finding the government's compelling interests in eradicating racial discrimination in education justified denying tax benefits to a private university that claimed the denial unconstitutional burdened exercise of its religious beliefs).

⁸⁸ See *Chapp v. Bowman*, 750 F. Supp. 274 (W.D. Mich. 1990).

⁸⁹ 494 U.S. 872 (1990).

discharged for work-related misconduct.⁹⁰ They had been fired for ingesting peyote at a religious ceremony of the Native American Church, of which both were members.⁹¹ The Court examined whether the Free Exercise Clause permits a state to include within its general prohibition of peyote use the use of the drug for religious purposes.⁹² In upholding the law, the Court declared that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁹³ The Court expressly declined to apply the balancing test of *Sherbert v. Verner*,⁹⁴ an earlier Supreme Court case that required a compelling governmental interest to justify all laws, whether or not generally applicable, that substantially burden a religious practice.⁹⁵ By declining to apply the *Sherbert* test, the *Smith* Court declared that it will permit regulation “so long as the law [is] one of general applicability and not motivated by hostility towards religion or a particular religious sect.”⁹⁶

As a threshold matter, the Ninth Circuit found the anti-discrimination laws to be neutral laws of general applicability,⁹⁷ finding that the laws’ prohibitions were aimed at combating housing discrimination, not at suppressing religious exercise.⁹⁸ Any burden the laws would impose on religiously motivated conduct, even if substantial, would be incidental.⁹⁹ As the FHA is similar in scope and coverage to these laws and was enacted “to provide . . . for fair housing throughout the United States,”¹⁰⁰ its provisions are likewise neutral and generally applicable.

Yet, rather than upholding the laws under *Smith*, the court in *Thomas* seized upon the so-called “hybrid-rights” exception to *Smith*:

⁹⁰ See *Smith*, 494 U.S. at 874.

⁹¹ See *id.*

⁹² See *id.*

⁹³ *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

⁹⁴ 374 U.S. 398 (1963).

⁹⁵ See *id.* at 882–83. The Court noted that while it had applied the *Sherbert* test to generally applicable laws, it never applied the test to invalidate one. See *id.* at 884–85. In 1993, Congress attempted to overturn *Smith* by passing the Religious Freedom Restoration Act (“RFRA”), which commanded courts to apply strict scrutiny in all cases where free exercise of religion is substantially burdened, even if the state law is generally applicable. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1014 (13th ed. 1997). The Supreme Court struck down RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁹⁶ GUNTHER & SULLIVAN, *supra* note 95, at 1014.

⁹⁷ Had the court not found the laws to be neutral, but rather aimed at a conduct motivated by religious belief, it would have applied strict scrutiny, requiring the state and city to justify their laws with a compelling governmental interest. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down city ordinances targeted at the religious practices of the Santeria religion).

⁹⁸ See *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 702 (9th Cir. 1999).

⁹⁹ See *id.*

¹⁰⁰ 42 U.S.C. § 3601 (1994).

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections¹⁰¹

Under the Ninth Circuit's interpretation of the exception, if the party asserting that a generally applicable law burdened his or her religious exercise can join a second, "colorable" constitutional claim, strict scrutiny applies.¹⁰² By "colorable," the court meant that the plaintiff must demonstrate a "fair probability," or a "likelihood," of success on the merits of the companion claim.¹⁰³

The landlords put forth two companion, non-religious exercise claims, both of which Mrs. Murphy could levy against the FHA: (1) that the laws' prohibitions against "refus[ing] to sell, lease[,] or rent"¹⁰⁴ to unmarried couples violated their property rights under the Takings Clause of the Fifth Amendment,¹⁰⁵ and (2) that provisions in the laws preventing them from making their preferences known through representations or statements or advertising¹⁰⁶ violated their First Amendment free speech rights.¹⁰⁷ The Ninth Circuit found both claims to be "colorable."

First, the court examined whether by proscribing discrimination on the basis of "marital status," the state laws constituted an unconstitutional taking of the landlords' rights to exclude others from their property.¹⁰⁸ There was, according to the court, a literal taking in the sense that the laws prevented the landlords from fully exercising their rights to exclude.¹⁰⁹ To determine whether the taking was unconstitutional the court looked at the nature of the taking, distinguishing physical from regulatory takings.¹¹⁰

The court acknowledged that there had not been a physical taking,¹¹¹ noting that when homeowners "voluntarily open[ed] their property to occupation by others, [they could not] assert a per se right to compensa-

¹⁰¹ *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

¹⁰² *Thomas*, 165 F.3d at 711-12.

¹⁰³ *Id.* at 706.

¹⁰⁴ Similarly, § 3604(a) of the FHA makes it unlawful for a landlord "[t]o refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (1994).

¹⁰⁵ The Fifth Amendment provides that private property shall not be "taken for public use, without just compensation." U.S. CONST. amend. V.

¹⁰⁶ See also 42 U.S.C. § 3604(c) (1994) (stating FHA version of this provision). Mrs. Murphy is expressly not exempt from this provision. See 42 U.S.C. § 3603(b) (1994).

¹⁰⁷ See *Thomas*, 165 F.3d at 702-03.

¹⁰⁸ See *id.* at 707.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 707-08.

¹¹¹ See *id.* at 709.

tion based on their inability to exclude particular individuals.”¹¹² This proposition would also block any argument by Mrs. Murphy that the FHA has physically taken her property rights.

Next, the court applied the three factors the Supreme Court has recognized to be important to a regulatory-takings analysis: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.¹¹³ According to the court, the plaintiffs (and presumably Mrs. Murphy) could not satisfy numbers one or two, for adherence to the laws would, if anything, increase their pool of possible tenants.¹¹⁴ But, the character of the government action prong was satisfied. While not authorizing a physical taking, the housing laws did, in the court’s view, physically invade the plaintiffs’ property, supporting the plaintiffs’ argument that the laws went “too far.”¹¹⁵

In finding the takings claim to be colorable, the court did not mention *Seniors Civil Liberties Ass’n v. Kemp*,¹¹⁶ in which the Eleventh Circuit rejected a similar argument. There, elderly tenants of a condominium complex claimed that the FHA’s prohibition of familial status discrimination took away their right to be free from children in violation of the Fifth Amendment.¹¹⁷ Rather than weighing factors like the Ninth Circuit, the court applied a deferential standard of review. According to the court:

It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.¹¹⁸

Alluding to the studies and hearings conducted by Congress that lead to the conclusion that discrimination against families with children was a serious problem, the court held that the plaintiffs failed to carry their burden.¹¹⁹

¹¹² *Id.* at 708 (alteration in original) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992)). The court also recognized that “[w]hen a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like . . . without automatically having to pay compensation.” *Id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

¹¹³ *See Thomas* at 708 (citing *Eastern Enters. v. Apfel*, 118 S.Ct. 2131, 2135 (1998)).

¹¹⁴ *See id.* at 709.

¹¹⁵ *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

¹¹⁶ 965 F.2d 1030 (11th Cir. 1992).

¹¹⁷ *See id.* at 1035.

¹¹⁸ *Id.* (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

¹¹⁹ *See id.*

Seniors Civil Liberties Ass'n suggests that Mrs. Murphy would be unable to assert a colorable claim that application of the "familial status" provision to her would constitute an unconstitutional taking. She would likely fare no better if she attacked the "religion" provision, for the prohibition of religious discrimination has even greater support. In addition to the FHA, religious discrimination is prohibited by the Civil Rights Act of 1866,¹²⁰ the Equal Credit Opportunity Act,¹²¹ and virtually all state and local fair housing laws.¹²²

Disregarding *Seniors Civil Liberties Ass'n*, the Ninth Circuit determined that the landlords also had colorable free speech claims. As an initial matter the court recognized that the degree of protection accorded speech depends on its label as commercial or non-commercial speech.¹²³ The court suggested that the only type of speech that is commercial is that which does "no more than propose a commercial transaction."¹²⁴ Finding the landlords' speech to be fully protected religious speech, the court declared that the landlords' speech did not fall even within older, broader notions of commercial speech.¹²⁵ The court also found the laws to be content-based, rendering them presumptively invalid under the First Amendment.¹²⁶ Under the laws, landlords can make inquiries and statements about certain subjects, but not others.¹²⁷

Section 3604(c) of the FHA is essentially identical to the provisions challenged in *Thomas* as violative of free speech.¹²⁸ Thus, not only does *Thomas* question whether the FHA can be enforced against religiously motivated Mrs. Murphys, it also raises constitutional doubts about the validity of one of the FHA's main provisions. Moreover, § 3604(c) is currently the only anti-discrimination provision in the FHA that applies to Mrs. Murphy.¹²⁹ Were it deemed unconstitutional, Mrs. Murphy could advertise and otherwise make known her discriminatory preferences. It

¹²⁰ The Supreme Court in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), held that Jews are among the "races" protected by the 1866 Act.

¹²¹ 15 U.S.C. § 1691(a)(1) (1994).

¹²² See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11.3, at 11-33 (7th ed. 1997).

¹²³ See *Thomas*, 165 F.3d at 709.

¹²⁴ *Id.* at 710 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993)).

¹²⁵ See *id.* Prior to suggesting a more narrow definition of "commercial speech" in *Discovery Network*, 507 U.S. 410 (1993), the Supreme Court set out three factors to determine non-commercial speech: (1) an advertising format; (2) a reference to a specific product; and (3) an underlying economic motive of the speaker. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65-67 (1983).

¹²⁶ See *Thomas*, 165 F.3d at 711.

¹²⁷ See *id.*

¹²⁸ Section 3604(c) makes it 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, familial status, or national origin." 42 U.S.C. § 3604(c) (1994).

¹²⁹ See 42 U.S.C. § 3603(b), which exempts Mrs. Murphy from all the prohibitions of § 3604 except § 3604(c).

seems that if any landlord could challenge § 3604(c), it would be Mrs. Murphy because the communication of her preferences is less likely to be labeled commercial speech than that of a landlord owning several large complexes.

Yet, § 3604(c) has been upheld against free speech challenge. In *United States v. Hunter*,¹³⁰ the Fourth Circuit rejected a newspaper's argument that § 3604(c) violated its First Amendment freedom of the press rights. The court found that a newspaper had violated § 3604(c) by publishing a landlord's advertisement for an apartment in a "white home." In rejecting the First Amendment argument, the court distinguished advertisements constituting "commercial speech," which courts accord less protection, from advertising that expresses ideas.¹³¹ The newspaper's advertisement fell under the former category. Preserving § 3604(c) will require, at a minimum, convincing courts that the speech prohibited by § 3604(c) is commercial.

However, even were courts to agree with the *Hunter* court and find the speech proscribed by § 3604(c) to be commercial, § 3604(c) would be susceptible, for the Supreme Court now accords commercial speech greater protection than it did when *Hunter* was decided.¹³² Yet, despite the trend toward greater protection for commercial speech, the Supreme Court has never protected advertising related to illegal activity.¹³³ In *Pittsburgh Press Co. v. Human Relations Commission*,¹³⁴ the Court decided that an ordinance prohibiting newspapers from carrying "help-wanted" advertisements in sex-designated columns did not burden constitutionally protected speech. The Court declared that: "Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of

¹³⁰ 459 F.2d 205 (4th Cir. 1972), *cert denied*, 409 U.S. 934 (1972).

¹³¹ *See id.*, 459 F.2d at 211-13. Courts have held that § 3604(c) cannot constitutionally reach noncommercial ideas. *See, e.g.*, *United States v. Northside Realty Assocs.*, 474 F.2d 1164, 1169-71 (5th Cir. 1973) (holding that the First Amendment protects defendant where defendant's criticism of the statute is the only basis for finding a policy and practice of racial discrimination); *Wainwright v. Allen*, 461 F. Supp. 293, 298 (D.N.D. 1978) (determining that defendant's racial statement cannot trigger FHA violation because the First Amendment protects even bigoted speech).

¹³² *See, e.g.*, *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that State's complete regulatory ban on price advertising for alcoholic beverages violated First Amendment free speech rights); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (finding federal statute prohibiting unsolicited mailing of contraceptive advertisements to be an unconstitutional restriction on commercial speech).

¹³³ *See* SCHWEMM, *supra* note 121, § 15.4(1), at 15-35.

¹³⁴ 413 U.S. 376 (1973). The Supreme Court has reaffirmed the principle that the government may prohibit advertising and other speech related to illegal activity. *See, e.g.*, *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (noting that "commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent").

narcotics or soliciting prostitutes.”¹³⁵ Similarly, discrimination in housing is illegal under the FHA. Accordingly, advertisements, notices, and representations stating preferences illegal under the FHA would not be constitutionally protected speech.¹³⁶

Finally, having found the takings and free speech claims to have hybridized the free exercise claim, the Ninth Circuit applied strict scrutiny.¹³⁷ The court concluded that the city and state did not have compelling interests in eradicating “marital status” discrimination to justify the burdens their laws imposed on the landlords’ free exercise rights. The court held that there is no “firm national policy” against “marital status” discrimination.¹³⁸

In contrast, there is a firm national policy against discrimination on the basis of religion.¹³⁹ To exemplify what it meant by a firm national policy, the court discussed the policy against race discrimination.¹⁴⁰ Among other indicators of a national policy, the court cited the many federal laws that proscribe race discrimination.¹⁴¹ Similarly, numerous federal, state, and local laws¹⁴² proscribe religious discrimination. Among others, the FHA, the Equal Credit Opportunity Act,¹⁴³ and the Public Accommodations Act¹⁴⁴ all prohibit discrimination on the basis of religion. Thus, even if the Ninth Circuit’s hybrid-rights approach were to prevail, Mrs. Murphy would not prevail in a challenge to the FHA on religious exercise grounds.

¹³⁵ *Pittsburgh Press*, 413 U.S. at 388.

¹³⁶ As the FHA is now written, Mrs. Murphy is not prohibited from discriminating on any basis. Thus, any statement, notice, or advertisement stating her preferences would not be related to illegal activity. Yet as Dean Schwemm points out, § 1982 of the Civil Rights Act of 1866 prohibits race discrimination, making no exception for Mrs. Murphy. *See* SCHWEMM, *supra* note 122, § 15.4(1), at 15-39. *See also infra* Part III (discussing § 1982). Thus, advertisements stating a racial preference may not be constitutionally protected.

¹³⁷ *See* *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 711-12 (9th Cir. 1999). The court determined that the “marital status” provision substantially burdened the landlords’ religious beliefs. According to the court, the laws would force the landlords out of the rental business. *See id.* at 712-13. Based on the Ninth Circuit’s reasoning, a religious Mrs. Murphy could also argue that the FHA’s religious discrimination prohibition would force her out of business.

¹³⁸ *See id.* at 714-15.

¹³⁹ *See supra* notes 94-96.

¹⁴⁰ *See Thomas*, 165 F.3d at 714-15.

¹⁴¹ *See id.* at 715.

¹⁴² In Appendix C to his fair housing treatise, Dean Schwemm lists all the state and local laws that HUD has determined to be substantially equivalent to the FHA. According to Dean Schwemm, all the laws listed presumably prohibit discrimination on the basis of religion. *See* SCHWEMM, *supra* note 122, § 11.3, at 11-33, n.153.

¹⁴³ 15 U.S.C. § 1691(a) (1) (1994).

¹⁴⁴ 42 U.S.C. § 2000(a) (1994).

3. *Recourse for Mrs. Murphy Involved in Sufficiently Intimate or Expressive Relationships*

Repealing the Mrs. Murphy exemption would not leave a Mrs. Murphy involved in protection-worthy relationships or expression without recourse. Although any facial challenge to the constitutionality of the revised FHA would fail,¹⁴⁵ a particular Mrs. Murphy could conceivably make out an as-applied claim.

Under those circumstances where the FHA would threaten valid associational rights, Mrs. Murphy could challenge the Act as it applies specifically to her. In *New York State Club Ass'n v. City of New York*,¹⁴⁶ the Court found that the law in question was constitutional because it was not substantially overbroad.¹⁴⁷ However, the Court added that those particular clubs asserting valid associational rights would not be without recourse: "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."¹⁴⁸ For example, a Mrs. Murphy who rents out a room in her two-bedroom apartment might challenge the FHA as it applies to her.

Nor would repeal of the Mrs. Murphy exemption leave unprotected those Mrs. Murphys with legitimate bases for discriminating against prospective tenants. Mrs. Murphy might turn away a single parent and his or her children not because of familial status,¹⁴⁹ but because he or she is not sufficiently creditworthy. Discussing the private club exemption to a city public accommodations law, the Court in *State Club* said that the law would not prevent a club from excluding individuals who do not share the views the club wishes to promote.¹⁵⁰ The law only prevents a club from using race, sex, and other illegitimate criteria to determine membership.¹⁵¹ Moreover, due process rights would enable Mrs. Murphy to discriminate on legitimate grounds. Mrs. Murphy would only have to demonstrate that she rejected the single parent and his or her children for a reason other than their familial status.¹⁵² Able to discriminate on legitimate bases, Mrs. Murphy does not need the broad protection the exemption now provides. Society should not support discrimination based on criteria that have nothing to do with whether a person will be a good tenant.¹⁵³

¹⁴⁵ See *supra* note 76.

¹⁴⁶ 487 U.S. 1 (1988).

¹⁴⁷ See *id.* at 14.

¹⁴⁸ *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

¹⁴⁹ The FHA prohibits discrimination on the basis of family status. See 42 U.S.C. § 3604 (1994).

¹⁵⁰ See *State Club*, 487 U.S. at 13.

¹⁵¹ See *id.*

¹⁵² See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 3.7, at 138 (3d ed. 1992).

¹⁵³ Cf. *id.* at 137-38 (describing the private club exemption to Title II of the Civil

III. The Mrs. Murphy Exemption has been Undermined by the Civil Rights Act of 1866

As noted above, Senator Walter Mondale suspected that broad support for the Mrs. Murphy exemption was not inspired by fidelity to the First Amendment,¹⁵⁴ but was simply “politically necessary.”¹⁵⁵ It seemed to be politically necessary because of widespread aversion to racial equality and forced integration, issues that the ongoing Civil Rights movement brought to the forefront of the nation’s conscience.¹⁵⁶ Given the social climate of the day, it is hard to imagine that supporters of the exemption were determined that Mrs. Murphy would not have to rent to men or Protestants. Yet, the exemption has likely been dispossessed even of this mooring, for § 1982 of the Civil Rights Act of 1866 has been interpreted to outlaw racial discrimination by Mrs. Murphy. Moreover, the Supreme Court has interpreted § 1982’s prohibition of racial discrimination to apply to members of identifiable classes, including those defined by ancestry and ethnicity,¹⁵⁷ as well as by religious belief.¹⁵⁸

A. *The Relationship between § 1982 and Mrs. Murphy*

Section 1982 of the Civil Rights Act of 1866 declares that “[a]ll citizens of the United States shall have the same right, in every State and

Rights Act of 1964 as enabling clubs, “by the grace of congressional exemption,” to “deny the personal dignity of all blacks simply because they are not open to all whites”); Shropshire, *supra* note 26, at 638–39 (arguing that the law should not play a supporting role in stigmatizing discrimination and that it should bar discrimination beyond the most intimate level).

¹⁵⁴ See *supra* text accompanying notes 18–22.

¹⁵⁵ 114 Cong. Rec. 2495 (1968).

¹⁵⁶ The comments made in the debates leading to passage of the Civil Rights Act of 1968 make clear that the bill was aimed primarily at protecting the rights of African Americans. For example, in noting the bill’s limitations yet supporting its passage, Representative Robert Kastenmeier (D-Wis.) spoke solely in terms of the bill’s impact upon African Americans. See 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 9, at 1667–68. Senator Ted Kennedy (D-Mass.) prefaced his comments in support of the bill by saying: “Will the subjugation of black Americans by white Americans by means of intimidation and violence be tolerated any longer in any part of our Nation?” *Id.* at 1670. Also clear from the comments made during the debates was congressional fear of the black militancy movement. For example, Representative Emmanuel Cella (D-N.Y.) discusses the riots and the “bestial behavior” of “vile creatures” such as Stokely Carmichael and H. Rap Brown. *Id.* at 1662–63.

¹⁵⁷ See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). In *Saint Francis College*, the Supreme Court interpreted § 1981 to protect a person of Arab ancestry from racial discrimination. The Court looked to the 19th-century conception of “race,” determining that those thought to belong to the caucasian race today were believed to be members of distinct races then. See *id.* at 610. The test was whether the plaintiff belonged to an identifiable class of persons against which the Congress of 1866 intended to protect from discrimination. See *id.* at 613. Since the same Congress passed §§ 1981 and 1982, the Court interpreted “race” to have the same meaning under both provisions. See *infra* note 180.

¹⁵⁸ See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

Territory, as is enjoyed by white citizens thereof to inherit, *purchase, lease, sell, hold, and convey* real and personal property."¹⁵⁹ By its terms, § 1982 prohibits *all racial discrimination*¹⁶⁰ in the sale or rental of property. It makes no exceptions. The issue raised, then, is whether those persons turned away by Mrs. Murphy because of their race can sue Mrs. Murphy under § 1982 even though they currently have no claim under the FHA. And if so, does this render the Mrs. Murphy exemption superfluous, at least as concerns race, thereby diminishing the exemption's impact and continued vitality?

After one hundred years of limiting its reach to discrimination by the state,¹⁶¹ the Supreme Court in *Jones v. Alfred Mayer Co.*¹⁶² interpreted § 1982 to prohibit private (as well as public) racial discrimination in the sale or rental of housing.¹⁶³ Though the Court did not address directly whether § 1982 would apply to those housing providers exempt from the FHA, it stopped just short, stressing that the Acts are independent and concurrent.¹⁶⁴

The Court declared that "[the FHA's] enactment has no effect upon § 1982."¹⁶⁵ Expanding upon this point in a footnote, the Court said "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to affect any change, either substantive or procedural, in the prior statute."¹⁶⁶ This omission is significant since prior to Congress's enactment of the FHA, it knew that the Court might interpret § 1982 to prohibit private discrimination.¹⁶⁷ Thus, Congress was or could have been aware that § 1982 might reach Mrs. Murphy.

Subsequently, lower courts have dealt with the issue head-on, finding that § 1982 covers Mrs. Murphy.¹⁶⁸ In *Morris v. Cizek*,¹⁶⁹ the Seventh Circuit, the highest court that has addressed the issue, heard a case involving an African American couple that alleged they were denied an apartment because of their race.¹⁷⁰ Their complaint charged violations of both the

¹⁵⁹ 42 U.S.C. § 1982 (1994) (emphasis added).

¹⁶⁰ The Supreme Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), held that § 1982 deals only with racial discrimination. Thus, it does not address discrimination based on sex, religion, familial status, or the other grounds covered by the FHA.

¹⁶¹ See JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* § 9.1.1.3, at 1002 (2d ed. 1997).

¹⁶² 392 U.S. 409 (1968).

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 416-17.

¹⁶⁵ *Id.* at 416.

¹⁶⁶ *Id.* at 417, n.20.

¹⁶⁷ See *id.* at 415.

¹⁶⁸ See, e.g., *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974); *Johnson v. Zaremba*, 381 F. Supp. 165 (N.D. Ill. 1973); *Fred v. Kokinokos*, 347 F. Supp. 942 (E.D.N.Y. 1972); *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969).

¹⁶⁹ 503 F.2d 1303 (7th Cir. 1974).

¹⁷⁰ See *Cizek*, 503 F.2d at 1304.

FHA and § 1982.¹⁷¹ It was apparent that the FHA claim would be dismissed because the defendant owners fell under the Mrs. Murphy exemption.¹⁷² The lower court, however, granted the defendants' motion to dismiss *both* claims, finding that the exemption in the later statute contained specific terms which must prevail over the general language of the earlier statute.¹⁷³ The lower court reasoned that to apply § 1982 would render the Mrs. Murphy exemption meaningless.¹⁷⁴ Effectively, then, the lower court read the Mrs. Murphy exemption to limit the coverage of § 1982.¹⁷⁵

The Seventh Circuit reversed. It noted that by its own terms, § 3603(b), which contains the FHA exemptions, merely shields Mrs. Murphy from the FHA; it does not confer a positive right on Mrs. Murphy to discriminate nor exempt her from other anti-discrimination laws.¹⁷⁶ In that way, the court distinguished the case from *Reitman v. Mulkey*,¹⁷⁷ in which a state had created a positive right to discriminate by passing a constitutional provision forbidding laws that prohibit private discrimination in the sale or rental of property.¹⁷⁸ By passing this provision and creating a right to discriminate, the state repealed two prior fair housing laws that had prohibited discrimination.¹⁷⁹

B. Lessons from § 1981 Case Law

Because of the relationship between 42 U.S.C. §§ 1982 and 1981,¹⁸⁰ an examination of § 1981 case law is also instructive.¹⁸¹ Particularly illuminating are the cases examining the relationship between § 1981 and the private club exemptions to the public accommodations (Title II) and equal employment opportunities (Title VII) laws, both part of the Civil Rights Act of 1964.¹⁸² Just as there is some debate as to whether § 1982

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *Cizek*, 503 F.2d at 1304; see also 42 U.S.C. § 3603(b)(2) (1994).

¹⁷⁷ 387 U.S. 369 (1967).

¹⁷⁸ See *id.* at 374.

¹⁷⁹ See *id.*

¹⁸⁰ 42 U.S.C. § 1981 (1994) (declaring that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens").

¹⁸¹ Since §§ 1981 and 1982 are both broadly worded provisions of the Civil Rights Act of 1866, an interpretation of one is highly persuasive for interpreting the other. For example, the Supreme Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), in finding that § 1981 prohibited private discrimination, relied on its interpretation of § 1982 in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

¹⁸² See 42 U.S.C. § 2000e-2 (1994) (prohibiting employers from discriminating against employees or prospective employees on the basis of race, color, religion, sex, or national origin). Private membership clubs and employers with fewer than 15 employees are among those exempted. See 42 U.S.C. § 2000e(b), § 2000e(b)(2) (1994). Section 2000a(a) forbids

covers those exempt under the Mrs. Murphy exemption, there is debate as to whether § 1981 covers those exempt under the private club exemptions to Title II and Title VII.

Lower federal courts have disagreed over whether private clubs exempted from Title II are covered by § 1981. Two district courts have held that § 1981 does not apply to exempted private clubs.¹⁸³ In *Cornelius v. Benevolent Protective Order of the Elks*, the district court offered several reasons to support its finding—that the private club exemption is to be read by implication into § 1981—that could also work against interpreting § 1982 to cover Mrs. Murphy. First, courts may consider later acts when asked to extend the reach of an earlier, vaguely written act.¹⁸⁴ Second, a statute that deals expressly with an issue will take precedence on that issue over another statute more general in its coverage.¹⁸⁵ The FHA, unlike § 1982, was designed to deal specifically and comprehensively with housing discrimination.¹⁸⁶ Finally, applying § 1981 to a private club might violate the freedom of association protected by the First Amendment.¹⁸⁷ As discussed above, Mrs. Murphy might make the same charge were her exemption removed.

In *Watson v. Fraternal Order of Eagles*,¹⁸⁸ the Sixth Circuit challenged the reasons outlined above and held that the private club exemption does not preclude an independent action under § 1981. The court's analysis centered on the "savings clause" in Title II.¹⁸⁹ That clause declares that the Act shall not preclude lawsuits under any other law "not inconsistent" with the Act.¹⁹⁰ Thus, irrespective of whether Congress could have predicted *Jones*, Congress made clear that it did not intend Title II to limit any other law. The court also argued that applying § 1981 to private clubs is not inconsistent with Title II.¹⁹¹ The exemption states that "nothing in this subchapter" shall apply to private clubs.¹⁹² By its clear language, the provision only exempts private clubs from the prohi-

places of public accommodation from discriminating on the basis of race, color, religion, or national origin. 42 U.S.C. § 2000a(a) (1994). Section 2000a(e) exempts private clubs from this prohibition. 42 U.S.C. § 2000a(e) (1994).

¹⁸³ See *Wright v. Salisbury Club, Ltd.*, 479 F. Supp. 378, 386-87 (E.D. Va. 1979) *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980); *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182 (D. Conn. 1974).

¹⁸⁴ See *Cornelius*, 382 F. Supp. at 1201.

¹⁸⁵ See *id.*

¹⁸⁶ The Supreme Court distinguished § 1982 from the FHA by declaring: "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law." *Jones*, 392 U.S. at 413.

¹⁸⁷ See *Cornelius*, 382 F. Supp. at 1201.

¹⁸⁸ 915 F.2d 235 (6th Cir. 1990).

¹⁸⁹ See *Watson*, 915 F.2d at 240.

¹⁹⁰ *Id.* (quoting from 42 U.S.C. § 2000a-6(b) (1982)).

¹⁹¹ See *id.*

¹⁹² 42 U.S.C. § 2000a-6(b) (1994).

bitions of Title II; it does not exempt them from all other anti-discrimination laws.¹⁹³

The FHA, too, has a "savings clause"; § 3615 provides that "[n]othing in this subchapter shall be construed to invalidate or limit any law of a State . . . or of any other jurisdiction in which this subchapter shall be effective, that . . . protects the same rights as are granted by this subchapter."¹⁹⁴ Although § 3615 refers specifically only to state laws, the Supreme Court in *Jones v. Alfred Mayer*¹⁹⁵ cited the provision as support for its finding that passage of the FHA had no effect upon § 1982.¹⁹⁶ The Court quoted § 3615, leaving out the language referring to states, suggesting that "any law of . . . any . . . jurisdiction" included other *federal* laws.¹⁹⁷ Lower courts have similarly held that § 3615 permits actions under § 1982 that could not be brought under the FHA and that implicitly § 1982 protects the same rights as the FHA.¹⁹⁸

An analogy may also be made to the *Watson* court's argument that Congress could have amended either § 1981 or Title II following the Supreme Court's decision in *Runyon v. McCrary*,¹⁹⁹ holding that § 1981 applies to private discrimination.²⁰⁰ Similarly, by the time Congress amended the FHA in 1988, numerous federal courts had held § 1982 applicable to Mrs. Murphy.²⁰¹

The First Amendment issue raised in *Cornelius* was addressed in *Guesby v. Kennedy*,²⁰² where the court held that the private club exemption of Title VII does not preempt an employment discrimination action under § 1981. The court distinguished between cases brought under the private club exemptions of Title II and Title VII.²⁰³ In the Title II cases cited, courts had held that the private club exemption to Title II impliedly amended § 1981.²⁰⁴ This conclusion followed, the court argued, from the fact that if a plaintiff could sue under § 1981 for membership in a private association, § 1981 would violate an individual's right of association.²⁰⁵ There is no such First Amendment concern, the court continued, in the

¹⁹³ See *Watson*, 915 F.2d at 240.

¹⁹⁴ 42 U.S.C. § 3615 (1994).

¹⁹⁵ 392 U.S. 409 (1968).

¹⁹⁶ See *id.* at 417 n.20.

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *Hickman v. Fincher*, 483 F.2d 855 (4th Cir. 1973); *Johnson v. Zaremba*, 381 F. Supp. 165 (N.D. Ill. 1973).

¹⁹⁹ 427 U.S. 160 (1976).

²⁰⁰ See *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990).

²⁰¹ See *supra* note 168.

²⁰² 580 F. Supp. 1280 (D. Kan. 1984).

²⁰³ See *id.* at 1283-84.

²⁰⁴ See *id.* at 1284.

²⁰⁵ See *id.*

employment context.²⁰⁶ Accordingly, the court declined to follow Title II precedent.²⁰⁷

Likewise, as Part II of this Note demonstrates, there is no valid First Amendment right of association in the typical Mrs. Murphy context. This point is reinforced by the fact that the First Amendment was not an impediment in those cases recognizing § 1982 claims against Mrs. Murphy.²⁰⁸ In this way, the Mrs. Murphy exemption more closely resembles the Title VII than the Title II private club exemption. In sum, a review of pertinent § 1981 case law also suggests that plaintiffs can sue Mrs. Murphy under § 1982.

C. *Lingering Uncertainty*

Despite the one-sidedness of the case law, the Supreme Court, were it to hear such a case, might still rule that the FHA was meant to preempt the field, thus limiting by implication all prior fair housing laws. The current Supreme Court is not the Court that held § 1982 applicable to private discrimination in *Jones*, but rather the one that questioned whether § 1981, and thus § 1982, should apply to private discrimination.²⁰⁹

There are strong statutory interpretation arguments to be made on both sides. Professor Joseph Singer asks: "If the 1866 Civil Rights Act covers employers and housing providers and public accommodations exempt from the 1964 and 1968 [FHA] statutes, why were those exemptions created?"²¹⁰ Professor Singer questions whether the later statutes were attempts to narrow the scope of the 1866 statute, and if not, were they simply attempts to deny the particular remedies available under the 1964 and 1968 statutes to plaintiffs suing exempt defendants?²¹¹ A Supreme Court disposed to limit the reach of § 1982 could well seize upon such apparent inconsistencies.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *supra* note 168 (listing cases recognizing § 1982 claims).

²⁰⁹ See Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 597 (1988) (noting that in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court heard reargument on whether § 1981 applies to private parties); Singer, *supra* note 49, at 1426 (noting that the Court only grudgingly reaffirmed application of § 1981 to private discrimination).

²¹⁰ Singer, *supra* note 49, at 1432.

²¹¹ See *id.*

IV. The Argument for Repeal

A. *The Superior Associational Interests of Mrs. Murphy's Prospective Tenants*

The analysis in Part II demonstrates that freedom of association does not require shielding Mrs. Murphy from the prohibitions of the FHA. Part III suggests that even if Mrs. Murphy remains exempt from the FHA, she cannot discriminate on the basis of race. What remains is a statement of social policy whose existence or repeal is not constitutionally required. It is a statement, which by its very existence, has great symbolic significance.

What is often omitted from judicial discussions of the right of association is a discussion of the competing right of association of the excluded. Prospective tenants interested in renting from Mrs. Murphy also have rights of associational freedom at stake. The right of one person or group to exclude others limits the associational rights of those excluded.²¹² It follows that when Mrs. Murphy excludes all Asians or Protestants, those who are excluded suffer an associational deprivation. Professor Tribe labels this dilemma the "dual character of associational rights."²¹³ Despite judicial refusal to say so overtly, Professor Tribe argues that in resolving cases involving an associational claim, courts make value choices between competing associational rights.²¹⁴

Similarly, Congress made a value choice when it exempted Mrs. Murphy from the FHA. But it made the wrong choice and should correct it. The overriding fact remains that Mrs. Murphy makes her units or rooms available to the public in return for money. Even the more sympathetic Mrs. Murphys are engaged in a business, whether or not profit is their main motivation. Moreover, Mrs. Murphy does not seek to protect her family home from outside intrusion; she has welcomed outsiders. Nor does she make a persuasive religious exercise argument. The governmental interest in eradicating religious discrimination defeats strict scrutiny as applied by the Ninth Circuit's decision in *Thomas*.

Reduced to its essentials, Mrs. Murphy's claimed right not to associate is really a claim of a right to discriminate. According to Professor Sam Stonefield, "[w]ithin the area specified by the exemption, 'Mrs. Murphy' can express herself by indulging her racist tastes, if any, and societal support for her freedom to discriminate trumps the conflicting

²¹² See TRIBE, *supra* note 70, § 15-17, at 1401.

²¹³ *Id.*

²¹⁴ See *id.* at 1407. Following Tribe's reasoning, the *Jaycees* decision reflects a value judgment that a woman's associational right to join the club free of discrimination outweighed the Jaycees' right not to associate. See *id.* at 1408. Yet, the Court ducked any potential controversy by basing its decision on the ground that the Jaycees lack the *type* of relationship protected by associational rights. See *id.*

personal and societal interests in prohibiting discrimination."²¹⁵ Group membership tells Mrs. Murphy nothing about an individual's capabilities or her moral worth. Indeed, in the hearings leading up to the passage of the FHA, Senator Walter Mondale said that "[m]uch of the housing discrimination is caused by the bigotry of fearful ignorance, and not by the bigotry of racial hatred."²¹⁶ While society may understand the stereotypical Mrs. Murphy's aversion to renting to those whose group affiliation makes her uncomfortable, society should not support the perpetuation of ignorance.

As Professor Stonefield's description of the exemption suggests, more is involved than a mere stand-off between competing claims to associational freedom. Professor Kenneth L. Karst makes this general point by examining the competing associational interests of a private secondary school and the black applicants the school wishes to exclude.²¹⁷ Beyond the competing associational interests, Karst argues, is the white students' claim to racial superiority versus the black students' self-identifying statement that they are fit and entitled to associate with others.²¹⁸ Karst deems the school's denial of that statement a "'displacement of human personality' in the highest degree."²¹⁹

In a similar way, one could imagine African American parents heading off with their children to look at an available apartment they learned of in the paper.²²⁰ At the door, they might be greeted by a grandmotherly woman, who rents out the second-floor apartment of her building to make ends meet. The family's hurt would be palpable were this woman to say outright, "I do not rent to blacks," or if all indications made clear that this was the case. This woman's actions, whether motivated by racial animus or ignorance, would be no less hurtful to the family than if she owned five rather than two units. As Senator Mondale said in the debates leading up to passage of the FHA, "segregated housing is the simple rejection of one human being by another without any justification but superior power."²²¹

B. Recourse for Mrs. Murphy

As Part II.B.3 demonstrates, repeal of the FHA does not leave Mrs. Murphy without recourse. If a particular, atypical Mrs. Murphy is involved in intimate or expressive associations worthy of First Amendment

²¹⁵ Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 *BUFF. L. REV.* 85, 101 (1986).

²¹⁶ 114 *CONG. REC.* 3422 (1968).

²¹⁷ See Karst, *supra* note 7, at 638-39.

²¹⁸ See *id.* at 639.

²¹⁹ *Id.*

²²⁰ Section 3604(c) prevents Mrs. Murphy from advertising in a way that indicates a discriminatory preference. See 42 U.S.C. § 3604(c) (1994).

²²¹ 114 *CONG. REC.* 3422 (1968).

protection, she can challenge the FHA as it is applied to her. Moreover, even were Mrs. Murphy covered by the FHA, she could differentiate on legitimate bases against prospective tenants. Characteristics such as the applicant's demeanor or ability to pay the rent may be legitimate bases. The FHA would only prohibit Mrs. Murphy from rejecting a prospective tenant because of the tenant's race, color, religion, sex, familial status, or national origin.²²²

C. Narrowing the Exemption as an Alternative to Repeal

Since Mrs. Murphy's First Amendment concerns are not without merit, the exemption might be narrowed to protect only the most intimate of Mrs. Murphy settings rather than repealed.²²³ A sampling of state fair housing laws provides guidance.²²⁴

Connecticut's fair housing law, for example, exempts from its regulations the rental of a room or rooms in both a *single-family* dwelling if the owner lives in the dwelling, and a unit in a dwelling containing living quarters occupied by no more than *two families* living independently of each other, if the owner lives in one of the two units.²²⁵ The Mrs. Murphy exemption, in contrast, permits discrimination by owners of multi-unit dwellings in which as many as four families reside.²²⁶

Colorado's fair housing law excepts from its definition of "housing" any rooms offered for rent or lease in owner-occupied *single-family* dwellings.²²⁷ Rooms in two, three, or four-family owner-occupied dwellings exempt from the FHA are not exempted by the Colorado provision.

The District of Columbia exempts owner-occupied buildings meant for five or fewer families, but only with respect to a prospective tenant not related to the owner-occupant "with whom the owner-occupant anticipates the *necessity of sharing a kitchen or bath.*"²²⁸ Unlike the Mrs. Murphy exemption, which arbitrarily draws the line at four rooms or units, such a provision accounts for the level of intimacy of the particular living situation. As a result, the District's provision is more faithful to the spirit of the First Amendment. In addition, the District of Columbia

²²² See *supra* notes 61–69 and accompanying text.

²²³ Cf. Shropshire, *supra* note 26, at 641 (examining the private club exemption to Title II and arguing that such exemptions to protect privacy should be more narrowly construed so as to limit them to non-commercial, private, and particularly intimate decisions).

²²⁴ The FHA defers to any state fair housing law that "grants, guarantees, or protects the same rights as are granted by" the FHA. The FHA only trumps those fair housing laws that require or permit any discriminatory action prohibited by the FHA. See 42 U.S.C. § 3615 (1994). Accordingly, a State can choose not to exempt Mrs. Murphy from its fair housing law.

²²⁵ See CONN. GEN. STAT. ANN. § 46a-64c(b)(1) (West 1995).

²²⁶ See 42 U.S.C. § 3603(b)(2) (1994).

²²⁷ See COLO. REV. STAT. ANN. § 24-34-501(2) (West 1990).

²²⁸ D.C. CODE ANN. § 1-2518(a)(1) (1992) (emphasis added).

exempts buildings not meant for more than *two families* living independently of each other.²²⁹

Conclusion

Scrutiny of the justifications for the Mrs. Murphy exemption and a weighing of the competing associational interests at play command repeal. In recognition of widespread housing discrimination, Congress passed the FHA. There is no basis for treating Mrs. Murphy differently in this regime from owners of five or even a hundred units. Discrimination by Mrs. Murphy is no more excusable or less harmful to her victims. The exemption does not shield an intimate relationship or protection-worthy expression. It shields only Mrs. Murphy's "right" to discriminate, a right substantially outweighed by a prospective tenant's right not to be discriminated against.

²²⁹ See D.C. CODE ANN. § 1-2518(a)(2) (1992).