



2013

## Kàn Bú Tài Dong: The Fair Housing Act, Language Discrimination, and Chinese Classifieds

R. Ian Forrest  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Housing Law Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

### Recommended Citation

Forrest, R. Ian (2013) "Kàn Bú Tài Dong: The Fair Housing Act, Language Discrimination, and Chinese Classifieds," *Kentucky Law Journal*: Vol. 101 : Iss. 4 , Article 6.

Available at: <https://uknowledge.uky.edu/klj/vol101/iss4/6>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

## NOTES

# Kàn Bú Tài Dǒng:<sup>1</sup> The Fair Housing Act, Language Discrimination, and Chinese Classifieds

*R. Ian Forrest*<sup>2</sup>

## INTRODUCTION

While flipping through the classifieds in search of a new apartment, you come across the following two advertisements:

Philadelphia. Duplex N of town, rent 5K

費成盛發地產/貸款: 東北區9個家庭新裝修全租4600售46萬<sup>3</sup>

Which are you more likely to answer? The vast majority of Americans will respond to the first advertisement, coincidentally picking the more expensive option, because the nine recently refinished homes in the northeast part of town will be sought only by those who can comfortably read Chinese. The Fair Housing Act, as the law currently stands, has no answer to the economic and civil rights implications of advertising that, while facially neutral, screens tenants and buyers through choice of language.

Since its enactment in 1968, the Fair Housing Act (FHA)<sup>4</sup> has worked to integrate housing markets across the United States with an aggressiveness and breadth unmatched by other civil rights statutes of the 1960s. In particular, § 3604(c) renders discriminatory advertising practices illegal, with an eye to eradicating bias not only in the rental and sale of housing, but even in communicating that homes are available. While the

---

<sup>1</sup> This is the pinyin transliteration of “看不太懂,” or “I don’t quite understand what I’m reading.”

<sup>2</sup> J.D. 2013, University of Kentucky College of Law; A.B. Religion, 2005, Duke University. The author sincerely thanks Professors Robert G. Schwemm and Scott R. Bauries for their guidance and patience throughout the writing process.

<sup>3</sup> WORLD JOURNAL (N.Y.C.), Oct. 16, 2011, at D8. In rough translation, the text reads “Philadelphia development property. Northeast section, 9 houses newly outfitted and repaired. All renting 4600, sale 460K.”

<sup>4</sup> Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

statute's enactment primarily addressed the disparity in housing options between black and white tenants and buyers,<sup>5</sup> it barred discrimination on wider grounds. Foreign language is not among these barred grounds, and though the statute makes unlawful any housing advertisement indicating an intention to prefer a specific national origin,<sup>6</sup> the role of language in this field has been analyzed thoroughly in only one prior case, now forty years old.<sup>7</sup> Advertisers have been free to publish ads which select for the primary language of their tenants and buyers, in effect targeting first- and second-generation immigrants of particular nationalities. This system has provided an end-run to the statute, allowing language-minority advertisers to discriminate both against other minorities and the public at large. These practices fly in the face of the integrative goals of the Act.

This paper will show how advertising in a foreign language, in spite of facially neutral text, violates the Fair Housing Act by selecting for national origin through a study of Chinese-language newspapers in the United States and the advertising they carry. Given that case law fails to directly address this question, a significant portion of the paper will focus on analogous cases under the roughly contemporaneous Title VII and analyze its applicability to the housing context. The solution to the problem posed by foreign language advertisements is to squarely address them and enforce the FHA to require parity across languages, both to effectuate the statutory goal of integrating housing markets and to protect language minorities from illegal housing practices that go unnoticed due to language barriers. Part I examines the history of the Fair Housing Act in general and § 3604(c) in particular, establishing both the relevant legal standards and the general tenor of FHA jurisprudence as a guide for future analysis. Part II examines the history of national origin jurisprudence under the civil rights statutes of the 1960s to clarify the established contours of the national origin category. Part III studies statutory and judicial approaches to the link between language and national origin and proposes a definition of national origin specific to the FHA, one which includes language in order to fully effectuate statutory objectives. Part IV couples this definition with the legal standards of § 3604(c) and shows how ads that are neutral in content become discriminatory through the language in which they are written. Part V outlines how the FHA can fairly be applied to these ads by balancing competing interests of statutory civil rights aspirations and protection of language-minority communities. In Part VI, I suggest

---

5 See, e.g., 114 CONG. REC. 2274 (1968) (statement of Sen. Walter Mondale) (suggesting that failure by Congress to "abolish the ghetto [would] reinforce the growing alienation of white and black America" and "insure [sic] two separate Americas constantly at war with one another . . .").

6 See 42 U.S.C. § 3604(c) (2006).

7 *Holmgren v. Little Vill. Cmty. Reporter*, 342 F. Supp. 512 (N.D. Ill. 1971); see *infra* notes 80-83 and accompanying text.

a compromise course for courts and advertisers to pursue and offer some best practices for advertisers and publishers in order to minimize possible liability.

# I. THE FHA AND § 3604(C): ENACTMENT, LEGISLATIVE INTENT, AND SUBSEQUENT JURISPRUDENCE

The Fair Housing Act was enacted in April of 1968,<sup>8</sup> following enactment of the 1964 Civil Rights Act<sup>9</sup> and the 1965 Voting Rights Act,<sup>10</sup> and was motivated by largely the same concerns: integrating the black and white racial binary of 1960s America. While the FHA was revised in 1974<sup>11</sup> and 1988,<sup>12</sup> the substance of the law has remained largely unchanged since its inception.<sup>13</sup> As the last piece of a larger legislative scheme that had already been thoroughly debated and rushed to a vote following the assassination of Dr. Martin Luther King,<sup>14</sup> “the legislative history of [the Fair Housing Act] is somewhat sketchy”<sup>15</sup> and “not too helpful.”<sup>16</sup> The lack of clarity in the legislative history has required frequent reference to sister statutes like Title VII, whose debates are, at times, much more voluminous and instructive.<sup>17</sup> Unlike its contemporaries, however, subsequent FHA jurisprudence has so expanded its scope and applicability that the word “broad” seems a significant understatement. This tension, between the

8 Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

9 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 26 U.S.C.) (barring discrimination in public accommodations, federally-funded programs, and employment).

10 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C §§ 1971, 1973-1973bb-1 (2006)).

11 The 1974 amendments added “sex” to the list of prohibited bases of discrimination. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 829 (1974).

12 The 1988 amendments added “familial status” and “handicap” to the list of prohibited bases of discrimination. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 5, 102 Stat. 1619, 1619-20 (1988).

13 See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5 (2001) (recording the broader legislative history of the FHA).

14 While the Fair Housing Act was debated on and passed by the Senate on March 11, 1968, 114 CONG. REC. 5992 (1968), almost a month prior to King’s assassination (April 4, 1968), the bill was passed by the House within a week (April 10), 114 CONG. REC. 9620-21 (1968).

15 Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977).

16 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972).

17 This trend began in *Trafficante* when the Court analyzed standing under the FHA through reference to Title VII standing jurisprudence, *id.* at 205, and the technique has been used extensively by lower federal courts since that decision. See Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 240 (2006) (briefly outlining several applications of the Title VII analogy in FHA jurisprudence).

persuasive effect of Title VII jurisprudence and the fact that the FHA has consistently construed the same language to give it broader effect, will guide much of this paper's analysis.

Section 3604(c) of the FHA was enacted to render discriminatory advertising illegal, regardless of the form of publication it appeared in.<sup>18</sup> In its current form, § 3604(c) in its entirety states that it shall be 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.<sup>19</sup>

Even in light of the scant legislative history of the FHA, little time appears to have been devoted to § 3604(c) in particular. As Robert G. Schwemm notes, due to a lack of committee reports, hearings, or meaningful floor debates, "the meaning of this provision must be derived almost exclusively from the words of the statute, unaided by additional materials."<sup>20</sup> What little textual evidence exists points to an intent to adopt broad language and expansive enforcement of the substantive provisions of § 3604(c),<sup>21</sup> a critical element that differentiates the FHA from some of its siblings.

While there were initially some questions as to the range of defendants to which § 3604(c) might apply, the Fourth Circuit's opinion in *United States v. Hunter* set the tone for future FHA jurisprudence.<sup>22</sup> Although few questioned that landlords and sellers were within the ambit of § 3604(c)'s substantive provisions, there was some doubt as to whether newspapers could be held liable for publishing discriminatory advertisements, particularly in their classifieds section, where they had no hand in drafting or editing. The Fourth Circuit answered this question quickly, putting newspapers squarely in the statutory crosshairs:

The section here under examination provides on its face no exemptions in favor of newspapers. Rather, it uses precisely the language which would lead the ordinary reader to conclude that newspapers are to be brought within its purview. . . . In the context of classified real estate advertising, landlords and brokers "cause" advertisements to be printed or published and generally newspapers "print" and "publish" them. Since each phrase

---

18 See *United States v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972).

19 42 U.S.C. § 3604(c) (2006).

20 Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 198-99 (2001).

21 See generally *id.* at 200-11 (comparing the wording of several drafts of the bill that became the FHA, the final text, and sister statutes as evidence of broad enforcement goals).

22 See *Hunter*, 459 F.2d at 209-11.

in a statute must, if possible, be given effect, both landlords and newspapers are within the section's reach.<sup>23</sup>

About two months later, the D.C. Circuit expanded the range of potential defendants further by finding that the recorder of deeds for the District of Columbia had violated the FHA by accepting instruments for filing that included racially restrictive covenants, noting that the recorder “certainly *publishes* [barred notices and statements] by collecting them in a manner that facilitates access to them by prospective buyers.”<sup>24</sup> More recent cases have also made clear that live-in landlords exempt from many of the FHA's other strictures are not exempt from § 3604(c).<sup>25</sup> In sum, these decisions show that § 3604(c) applies to a wide range of defendants, perhaps wider than any other section of the FHA.

The class of potential plaintiffs able to show standing in § 3604(c) claims is similarly expansive. The statute on its face authorizes a suit by any “aggrieved person,”<sup>26</sup> meaning a person injured by any practice barred by §§ 3604, 3605, 3606, or 3617.<sup>27</sup> Even the mere *belief* that one is about to be injured by a discriminatory housing practice is enough to satisfy the statutory requirements to bring a suit.<sup>28</sup> In 1972, the Supreme Court concluded that this language evidenced “a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,”<sup>29</sup> and a decade later reaffirmed that “the sole requirement for standing to sue under [the Fair Housing Act] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered

---

<sup>23</sup> *Id.* at 210 (citations omitted).

<sup>24</sup> *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972).

<sup>25</sup> The “Mrs. Murphy” exemption of § 3603(b)(2) provides a broad but not absolute exemption from § 3604 for live-in landlords. The text of the section does not exempt live-in landlords from § 3604(c), nor has subsequent jurisprudence barred enforcement of § 3604(c) against live-in landlords who have made discriminatory statements or advertisements. *See, e.g.*, *HUD v. Roberts*, Fair Hous.-Fair Lending Rep. ¶ 25,151, at 26,215–16 (HUD ALJ 2001); *HUD v. Schmid*, Fair Hous.-Fair Lending Rep. ¶ 25,139 (HUD ALJ 1999); *HUD v. Gruzdaits*, Fair Hous.-Fair Lending Rep. ¶ 25,137 (HUD ALJ 1998); *HUD v. Dellipaoli*, Fair Hous.-Fair Lending Rep. ¶ 25,127 (HUD ALJ 1997).

<sup>26</sup> 42 U.S.C. §§ 3610(a)(1)(A)(i), 3613(a)(1)(A) (2006).

<sup>27</sup> 42 U.S.C. §§ 3602(i)(1), 3602(f) (2006).

<sup>28</sup> 42 U.S.C. § 3602(i)(2) (2006).

<sup>29</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). All of these decisions have hinged upon the words “persons aggrieved.” Though Title VII employs the same language, it has recently been construed more narrowly:

For Title VII standing purposes, the term ‘person aggrieved’ must be construed more narrowly than the outer boundaries of Article III. Dictum in *Trafficante v. Metropolitan Life Ins. Co.*, suggesting that Title VII’s aggrievement requirement reaches as far as Article III permits, is too expansive and the Court declines to follow it.

*Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 866 (2011) (citations omitted).

'a distinct and palpable injury.'"<sup>30</sup> This requirement may be satisfied by a wide range of injuries, including financial losses, emotional damages, and loss of interracial relations.<sup>31</sup>

The standard for finding a violation of § 3604(c) also sets a low threshold, enough so that many claims surviving the standing inquiry have a solid chance of winning on the merits. The statute itself states that it shall be unlawful "to . . . publish . . . any . . . advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on [a barred ground]."<sup>32</sup> The significance of this language was analyzed extensively in the *Human Models Cases*, a series of suits focused on the discriminatory effects of housing ads displaying white models to the exclusion of other races. Through the late 1980s and early 1990s, courts focused upon the expansiveness of the words "indicate" and "preference" to develop an objective "ordinary reader" standard. As summarized by the Seventh Circuit:

"[T]he statute [is] violated if an ad for housing suggests to an ordinary reader that a particular [protected group] is preferred or dispreferred for the housing in question." In applying the "ordinary reader" test, courts have not required that ads jump out at the reader with their offending message, but have found instead that the statute is violated by "any ad that would discourage an ordinary reader of a particular [protected group] from answering it."<sup>33</sup>

This low threshold establishes an immense field of potential plaintiffs when coupled with § 3604(c)'s expansive standing jurisprudence. "[C]ourts have generally held that the mere receipt or observation of such ads is sufficient to confer standing on a minority reader."<sup>34</sup> In so construing the statute, courts have not been blind to the potential for crippling liability to newspaper publishers, particularly given the sheer volume of classified advertising in any given paper. Even so, the immense liability that could flow from a single page of ads has done little to change lower federal courts' application of § 3604(c):

[A] claimant may establish a prima facie case for such damages simply by oral testimony that he or she is a newspaper reader of a race [disfavored by a body of advertisements] and was substantially insulted and distressed by a certain ad. The potential

---

30 *Havens Realty Corp. v. Coleman*, 455 U.S. 372 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

31 ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 12A:3 (2010).

32 42 U.S.C. § 3604 (2006).

33 *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995) (quoting *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991) (citations omitted)).

34 Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 310 (2001).

for large numbers of truly baseless claims for emotional injury thus exists, and there appears to be no ready device, other than wholly speculative judgments as to credibility, to separate the genuine from the baseless. However, *we do not regard this possibility as a reason to immunize publishers from any liability under Section 3604(c)* . . . .<sup>35</sup>

Thus, the FHA (and § 3604(c) in particular) has established vast classes of discriminatory conduct and potential parties to suit, through both its plain language and subsequent judicial interpretation of that language. For small newspapers serving minority communities, the issue of potential § 3604(c) liability is a critical one: FHA litigation and liability arising from a single advertisement (much less daily classifieds stretching across multiple pages) could pose a significant threat to their survival. The contours of the protected classes, and the question of whether language implicates any of those classes, are by extension proportionately weighty issues.

## II. NATIONAL ORIGIN IN THE STATUTORY CIVIL RIGHTS CONTEXT

Though Congress adopted a broad range of prohibited grounds for discrimination in the civil rights statutes of the 1960s, the historical context and legislative history show that congressional attention was squarely focused on addressing problems specific to the African American community. “America in that era was a white and black society divided approximately nine to one, respectively, between Caucasians and African-Americans. . . . [T]he situation . . . was very different from today’s demographics where Hispanic-Americans form the largest minority community in America.”<sup>36</sup> Census Bureau statistics back up the history: “[p]eople of races other than White or Black represented less than 1 percent of the U.S. population between 1900 and 1960.”<sup>37</sup> In the years soon after the FHA’s adoption, this number rested at 1.4%.<sup>38</sup> Congressional preoccupation with the predominant racial binary of the time kept debates on Title VII and the FHA from addressing subtle contours of the protected classes.

National origin in particular received precious little attention in the debates. As Juan Perea notes, national origin “was part of the ‘boilerplate’ statutory language . . . . At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope.”<sup>39</sup> In his

<sup>35</sup> *Ragin*, 923 F.2d at 1005 (emphasis added).

<sup>36</sup> James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for Justification*, 72 MO. L. REV. 745, 748 (2007) (footnotes omitted).

<sup>37</sup> FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS, SERIES CENSR-4: DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 76 (2002).

<sup>38</sup> *Id.*

<sup>39</sup> Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination*



examination of the legislative history leading up to the adoption of Title VII, Perea found that "references to the term were sporadic and relatively insignificant, certainly so in relation to the extensive consideration given to the problems of discrimination against African Americans. The debate in the House of Representatives yielded no definition or explanation of what national origin discrimination meant."<sup>40</sup> While Perea is correct that no *definitive* meaning was established, there was some meaningful debate on national origin that clarifies congressional thought at the time. Given the close relationship between Title VII and the FHA,<sup>41</sup> these have significant persuasive (though by no means decisive) value in establishing definitions applicable to the FHA.

During floor debates on what would become Title VII, in response to a question on whether an employer advertising for an "Anglo-Saxon" would offend the prohibition on national origin discrimination, Representative James Roosevelt responded:

May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from [sic]. You may come from Poland, Czechoslovakia, England, France, or any other country. It has nothing to do with such broad terms such as the gentleman has referred to.<sup>42</sup>

Roosevelt's statement is arguably the clearest articulation of Congressional intent on national origin.<sup>43</sup> Other statements during the floor debates are consistent with this narrow construction, such as Representative Charles Dent's statement that national origin "has nothing to do with color, religion, or the race of an individual."<sup>44</sup>

Subtler aspects of national origin were left to the judiciary to develop. In 1974, the Supreme Court largely adopted Congress's reasoning in the debates, stating that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."<sup>45</sup> While this definition is arguably circular,<sup>46</sup> it appears to restrict the word "nation" to an ancestral origin within the

---

*Under Title VII*, 35 WM. & MARY L. REV. 805, 807 (1994) (footnote omitted).

<sup>40</sup> *Id.* at 817-18 (footnotes omitted).

<sup>41</sup> The language of the statutes largely track each other, and any differences between the two have been interpreted as significant. The protected classes in the two statutes are identical, and the closeness in the enactment dates suggest that where the language is the same, Congress intended the language to have identical significance.

<sup>42</sup> 110 CONG. REC. 2549 (1964) (statement of Rep. Roosevelt).

<sup>43</sup> See generally Perea, *supra* note 39, at 817-22 (1994) (illustrating the paucity of discussion of the national origin term within Title VII legislative history).

<sup>44</sup> 110 CONG. REC. 2549 (1964) (statement of Rep. Dent).

<sup>45</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

<sup>46</sup> Black's Law Dictionary defines "country" as "[a] nation or political state." BLACK'S LAW DICTIONARY 404 (9th ed. 2009).

geographic bounds of a particular political territory, a construction which substantially narrows the range of protected characteristics associated with a nationality. Secondary physical and cultural traits would not appear to be within the ambit of such a definition.

Since that decision, however, some lower federal courts have ignored the geographical or nation-state construction and redefined national origin more broadly, based on the vagueness inherent in the term “nation.” Black’s Law Dictionary’s entry for nation points out the difficulty of giving the word any single definition:

The nearest we can get to a definition is to say that a nation is a group of people bound together by common history, common sentiment and traditions, and, usually (though not always, as, for example, Belgium or Switzerland) by common heritage. A state, on the other hand, is a society of men united under one government. These two forms of society are not necessarily coincident. A single nation may be divided into several states, and conversely a single state may comprise several nations or parts of nations.<sup>47</sup>

A reading of national origin premised on this construction of nation can easily expand beyond the bounds of the narrow readings endorsed by Congress and the Supreme Court, an approach which many courts have pursued to better protect minority plaintiffs. The Ninth Circuit and Northern District of California have read national origin to include physical characteristics (particularly height) common to that nationality.<sup>48</sup> Some courts have found national origin where a nation-state no longer existed, such as the Ninth Circuit’s holding that “Serbian” was a protected national origin, though Serbia no longer existed at the time of filing,<sup>49</sup> and a similar holding in the District of Minnesota on Ukrainian national origin.<sup>50</sup> There are even cases recognizing a protected national origin where the nation in question has existed neither as a political entity nor a consistent and definable geography, turning the Supreme Court’s definition on its head and adopting an ethnicity-based model.<sup>51</sup>

---

47 BLACK’S LAW DICTIONARY 1121 (9th ed. 2009) (quoting JOHN SALMOND, JURISPRUDENCE 136 (Glanville L. Williams ed., 10th ed. 1947)). The entry for “national origin,” however, adopts a definition nearly identical to the Supreme Court’s nation-state take in *Espinoza*. *Id.* at 1124.

48 See *Davis v. Cnty. of Los Angeles*, 566 F.2d 1334, 1341-42 (9th Cir. 1977) (holding minimum height requirement for firemen had a disparate impact on Mexican Americans and was not proven to be job related); *Officers for Justice v. Civil Serv. Comm’n*, 395 F. Supp. 378, 380-81 (N.D. Cal. 1975) (holding minimum height restriction for police officers had a disparate impact on Hispanics, Asians, and women).

49 *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988).

50 *Kovalevsky v. West Publ’g Co.*, 674 F. Supp. 1379, 1384-85 (D. Minn. 1987).

51 See, e.g., *Janko v. Ill. State Toll Highway Auth.*, 704 F. Supp. 1531 (N.D.Ill.1989) (holding that “Gypsy” falls within the term “national origin” in the Title VII context, though

As the cases show, the definition of national origin under Title VII has been at best inconsistent—at times even ad hoc. It is hardly surprising, then, that the role of language in the national origin class under Title VII has been a subject of vigorous debate and further inconsistent jurisprudence.

### III. LANGUAGE AND NATIONAL ORIGIN

#### A. *Title VII Approaches*

In and of itself, language is not one of the enumerated classes protected under the civil rights statutes of the 1960s. Both Title VII and the FHA addressed a nation that was almost entirely monolingual English-speaking.<sup>52</sup> As one scholar noted, “the situation addressed . . . was very different from today’s demographics where . . . immigration has created language policy issues that didn’t exist in the monolingual Sixties.”<sup>53</sup> Thus it has largely been left to administrative agencies, academics, and courts to decide whether language is correlated with any one protected class so closely as to render language discrimination illegal. Much of this debate has centered on the potential link between language and national origin, with a particular focus on the conflicts between a growing Hispanic workforce and the rise in Speak-English-Only rules.<sup>54</sup> Some elements of this debate are relevant to the FHA, while others represent meaningful points of distinction between the statutes, distinctions that should inform their respective enforcement schemes.

Advocates of equivalence between language and national origin argue that characteristics closely intertwined with one’s national origin must be included to successfully deter subtler discriminatory conduct. These arguments proceed from the more expansive definition of nation, reading national origin as both a geographic origin point and those characteristics generally associated with it. The position has found some support in the federal agency administering Title VII, the Equal Employment Opportunity Commission (EEOC), which “defines national origin . . . as . . . an individual’s, or his or her ancestor’s, place of origin; or . . . the physical, cultural or linguistic characteristics of a national origin group.”<sup>55</sup>

---

the group famously lacks a common geography, and arguably even lacks many of the markers of a common ethnicity); *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980) (holding that “Acadian” is a protected national origin, though there was never a country of Acadia).

<sup>52</sup> See *supra* notes 36-38 and accompanying text.

<sup>53</sup> Leonard, *supra* note 36, at 748.

<sup>54</sup> See, e.g., Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347, 1349-50 (1997).

<sup>55</sup> 29 C.F.R. § 1606.1 (2012).

Elaborating on the “linguistic characteristics” element, the EEOC states that “[t]he primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin.”<sup>56</sup>

Some courts have subscribed to this position, though to varying degrees. One line of cases has found a consistent link between primary language and national origin, holding that discrimination on the basis of primary language, without reference to other linguistic or cultural markers, is national origin discrimination.<sup>57</sup> Other courts have recognized more attenuated connections, including a line of cases focusing on the relationship between accents and national origin, holding that adverse employment action based on accents that did not seriously impede job performance violated Title VII’s prohibition against national origin discrimination.<sup>58</sup>

Detractors of this model argue that the legislative history surrounding Title VII is simply too scant to allow for anything more than a plain-language reading of the statute, which lacks any indication of equivalence between language and national origin.<sup>59</sup> They also argue that recognizing such a link has potentially significant detrimental effects specific to the employment context: while national origin in and of itself is not likely to have any effect upon one’s ability to perform a particular job, an inability to speak English can seriously undermine one’s value to an employer, a point that even advocates of minority language rights concede.<sup>60</sup>

---

<sup>56</sup> 29 C.F.R. § 1606.7 (2012).

<sup>57</sup> *E.g.*, *Gutierrez v. Mun. Ct.*, 838 F.2d 1031, 1039 (9th Cir. 1988) (“[P]rimary language not only conveys certain concepts, but is itself an affirmation of [a national origin’s] culture.”), *vacated as moot*, 490 U.S. 1016 (1989); *Olagues v. Russoniello*, 797 F.2d 1511, 1520 (9th Cir. 1986) (en banc) (“[A]n individual’s primary language skill generally flows from his or her national origin.”), *vacated as moot*, 484 U.S. 806 (1987).

<sup>58</sup> *E.g.*, *Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (“An adverse employment decision may be predicated upon an individual’s accent when—but only when—it interferes materially with job performance.”); *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (“A foreign accent that does not interfere with a Title VII claimant’s ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions.”); *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1555 (M.D.N.C. 1984) (“[I]f plaintiff could prove that he had been discriminated against because of his accent, he would establish a prima facie case of national origin discrimination.”).

<sup>59</sup> This class even includes Juan F. Perea, a scholar who might be described as a radical multiculturalist. While Perea does advocate for protection of ethnic characteristics, he argues that courts cannot and should not shoehorn ethnic traits into the national origin class, but rather adopt a class of ethnic trait protections. *See* Perea, *supra* note 39.

<sup>60</sup> *See, e.g.*, Juan F. Perea, *English-Only Rules and the Right to Speak One’s Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 299 (1990) (conceding that a Spanish-speaking sales clerk who refuses to speak English to exclusively Anglophone customers is not performing his job of selling).

A further argument notes that the prohibited bases for discrimination, as a group, refer to immutable characteristics,<sup>61</sup> and that only a limited reading of national origin maintains this consistency, as bilinguals can presumably choose the language they speak.<sup>62</sup>

Many courts confronting the issue have adopted the narrow construction, excising language from the characteristics protected by the bar on national origin discrimination. While noting the significance of language and ethnicity to a particular national origin group, courts have generally held that Speak-English-Only rules in the workplace (and adverse employment actions pursuant to such rules) do not offend the bar on national origin discrimination when applied to bilingual employees speaking languages other than English as their primary language.<sup>63</sup> As the Fifth Circuit put it, "[n]either the statute nor common understanding equates national origin with the language that one chooses to speak."<sup>64</sup>

While both positions have a role to play in informing the debate on the significance of language in national origin discrimination under the FHA, perhaps most informative is the common ground between the two. Both positions underscore the "importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification,"<sup>65</sup> and note that "[d]ifferences in language and other cultural attributes may not be used as a fulcrum for discrimination."<sup>66</sup> Additionally, both agree that language, in particular a grasp of English, is critical in the employment context. As one scholar has put it, "a knowledge of English is plainly relevant

---

61 It has been argued that religion, insofar as it is possible to convert from or leave a faith, is a mutable characteristic, but that discrimination against it is nonetheless prejudicial in a legal sense. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 8 (2000).

62 See, e.g., Leonard, *supra* note 36 (arguing that language, as a mutable characteristic, cannot fall within the definition of national origin). Critics of this line of argument find that it operates as a mere smokescreen for discrimination against particular ethnic groups. As one scholar puts it:

Unlike African Americans who are incapable of changing their skin color, ethnic minorities technically possess the ability to give up their mother tongue or other traits closely tied to their national origin. Largely because of this technicality, discrimination against immigrants evokes less sympathy; a common view is that the responsibility lies with ethnic minorities themselves who choose to retain their ties with their own culture. In other words, discrimination becomes a natural consequence of their failure to assimilate into the dominant culture.

Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747, 781 (1997).

63 E.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) ("[T]he enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English."); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

64 *Gloor*, 618 F.2d at 268.

65 *Id.* at 270.

66 *Id.*

to job performance. No one would make a straight-faced argument that the ability to speak English is irrelevant or marginal to most jobs. English is the de facto national language. Our commercial and government culture is Anglophone.”<sup>67</sup> While the FHA must recognize the importance of language implied by these cases, the practical concerns so central to language use in employment are largely inapplicable to the housing context.

### *B. Defining National Origin under the FHA*

Given the similarity between the texts, purposes, and legislative histories of the two statutes, it would stand to reason that national origin under the FHA should be viewed through the same lens as that of Title VII, one which the Court has restricted to a geographical point of personal or ancestral origin. However, as previous sections of this paper have demonstrated, the language of § 3604(c) and subsequent jurisprudence have developed the FHA into a much wider-reaching statute in terms of the statements it bars, the identity of potentially liable parties, and the range of judicially cognizable injuries.<sup>68</sup> With § 3604(c) claims already being rare, finding judicial interpretations of national origin’s significance in the § 3604(c) context, let alone the significance of language to that class, is nearly impossible. However, one point is clear: to be consistent with the larger body of FHA jurisprudence, courts must adopt a more expansive interpretation of national origin. This FHA-specific definition must include language to fully effectuate the statute’s goals. This is particularly true of § 3604(c), given its intense focus on communication and its discriminatory effects, however subtle they may be.

As a starting point, it is necessary to distinguish the statutory objectives of the FHA from those of Title VII. In a vacuum, it would appear that Title VII’s construction of various terms would control the application of identical language in the FHA. However, the FHA’s purposes have always been distinguishable from those of Title VII and related statutes:

The Supreme Court’s first review of the FHA . . . conclud[ed] that residential integration was a major goal of the statute. Thereafter, courts regularly . . . conclud[e]d that the FHA is intended not only to advance minority housing rights but also to achieve integration. In this respect, the congressional concerns underlying the FHA were broader than those of Title VII, which is intended to expand minority employment opportunities and

---

<sup>67</sup> Leonard, *supra* note 36, at 758 (citations omitted).

<sup>68</sup> See *supra* Part II. The FHA bars discriminatory “statements,” and Congress briefly added “written or oral” during the drafting process; both the earlier Title VII and later-enacted Age Discrimination in Employment Act avoided such expansive language. See Schwemm, *supra* note 20, at 209–11.

lead to an integrated work force, but does not place a strong value on integration *per se*.<sup>69</sup>

As a result of these differences, courts have accorded different meaning to words appearing in both the FHA and Title VII.<sup>70</sup> Arguably, the reasoning behind the Supreme Court's narrow take on national origin in Title VII is distinguishable and may not even translate to the FHA. Given the history of broad administration and statutory construction it has enjoyed, it is reasonable to construe national origin under the FHA as not only an ancestral origin point, but also those secondary characteristics with which it is closely correlated.

As with Title VII, the initial question is whether language is so closely tied to national origin that one generally implies the other, keeping in mind the "congressional desire to promote integrated living patterns" specific to the FHA.<sup>71</sup> From a social science perspective, the assimilative language dynamic theory<sup>72</sup> suggests that such close ties exist, particularly in first- and second-generation immigrants—those most likely to bear the "physical, cultural or linguistic characteristics of a national origin group."<sup>73</sup> The assimilative language dynamic is a seemingly inescapable trend from monolingual foreign language fluency toward a monolingual English-speaking household. Studies of monolingual Spanish-speaking immigrants in the United States have

confirm[ed] a classic three-generation pattern of language acquisition. The first generation is primarily monolingual, the second generation is bilingual, and in the third generation English is the preferred language over Spanish. A second study . . . conclude[d] that the rate of Anglicization by Spanish speakers cannot be distinguished from prior waves of immigrants. . . . Spanish monolingualism persists because of continued immigration, not because Spanish immigrants fail to learn to speak English.<sup>74</sup>

Recent census data is consistent with this trend across a wide range of languages: as of 2007, the majority of those speaking languages other than

---

69 Schwemm, *supra* note 20, at 213 (citations omitted).

70 See, e.g., *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 866 (2011) (distinguishing the significance of the term "aggrieved person" in Title VII and the FHA through the former's comparatively narrow "zone of interests").

71 Schwemm, *supra* note 20, at 213 (citations omitted).

72 This theory, in broad strokes, posits that immigrant families move from linguistic isolation to monolingual English fluency over two to three generations. See, e.g., KEVIN F. MCCARTHY & R. BURCIAGA VALDEZ, *CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA* 54-66 (1986); CALVIN VELTMAN, *THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES* 3, 66 (Carol Oppenheimer & Stina Santiestevan, eds.) (1988).

73 29 C.F.R. § 1606.1 (2012).

74 Carol Schmid, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 71 (1992).

English in the home were foreign-born, and only foreign-born speakers were more likely than not to speak English “[l]ess than ‘very well.’”<sup>75</sup> At least statistically, discriminating on the basis of language would have the effect of selecting for first- or second-generation immigrants of a particular national origin.<sup>76</sup>

Given this correlation, language could easily be incorporated within an FHA-specific definition of national origin,<sup>77</sup> absent significant countervailing concerns. As noted previously, Title VII jurisprudence has established a range of such practical considerations, centering on the general incompatibility between multilingual workplaces and a monolingual society at large.<sup>78</sup> As informative as these arguments may be, they are tied to employment concerns that lack force in the housing context. While language barriers may complicate negotiation of lease terms or loan agreements, home rental is largely a series of arms-length payments, and the purchase of a home, while an immense undertaking, is a one-time transaction. The impact of a foreign language in the office is much deeper and may affect the employment relationship on a daily basis.<sup>79</sup> These concerns are generally inapposite to housing.

#### IV. APPLICATIONS – THE ORDINARY READER STANDARD AND FOREIGN LANGUAGE ADVERTISING

Having established that language is an element of national origin under the FHA and that selection for the former effects a selection for the latter, the next question is whether foreign language advertising for housing violates the strictures of § 3604(c). This issue appears to have evaded discussion in published opinion, though one case arising from facts closely related to the foreign-language advertising context offers some insight into how the question might be decided. Given that this case arose before the

---

75 HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2007 4, Fig.2b (2010), available at <http://www.census.gov/prod/2010pubs/acs-12.pdf>.

76 The Spanish language presents a rather difficult problem, given that it is by far the most widely spoken non-English language in the United States and is not specific to a particular nation. A colorable argument could be made that the selection here is for a particular race, but even this fails to capture the diversity of the Hispanic community.

77 An argument could be made that the assimilative language dynamic is more indicative of alienage than national origin, the former being outside the protections of the FHA. However, the assimilative language dynamic model states that second-generation immigrants (i.e., not foreign-born) are generally bilingual as well, and in any case foreign birth is not synonymous with alienage.

78 See Leonard, *supra* note 36, at 758; Perca, *supra* note 60, at 299.

79 Record-keeping, intra-office communication, workplace harmony, and client contact are just a few of the critical day-to-day employment functions affected by a multilingual office. Leonard, *supra* note 36, at 756, 758-59.



establishment of the ordinary reader standard, the issue will be further investigated under contemporary § 3604(c) tests.

Only one published opinion has discussed the legality of preferring a particular language in an advertisement for housing. In *Holmgren v. Little Village Community Reporter*,<sup>80</sup> three Chicago neighborhood newspapers published English-language classified ads which allegedly showed a preference for tenants and buyers of Polish, Bohemian, Slavish, German, Spanish and American nationalities. The plaintiff was a Swedish-American.<sup>81</sup> In response to the allegations, the publishers argued that they were not selecting for national origin, but instead preferring purchasers and tenants who could speak a certain language in the interest of facilitating communication between both sides of the transaction. The court was not convinced:

[T]o say that the ability to speak a certain language is not related to the country of origin of that language is mere sophistry. An advertisement for a Polish-speaking tenant, for example, is tantamount to an advertisement for an immigrant (or the offspring of an immigrant) of Poland itself. It is significant that § 3604(c) makes it unlawful not only to print an ad which indicates a preference base on national origin, but also an ad which indicates "an intention to make any such preference." Even if an ad for a person who speaks a certain language is deemed not to indicate a preference for a person of a certain national origin, a proposition which I find untenable, then the ad at least demonstrates "an intention" to make such a preference. Thus, the ads which indicate a preference for a purchaser or a tenant who speaks a particular language are unlawful under § 3604(c).<sup>82</sup>

Judge Decker noted the potential difficulties inherent in a multilingual housing relationship, but did not find them compelling enough to overcome the FHA's clear prohibition against national origin bias in a housing advertisement.<sup>83</sup>

*Holmgren* accepts that language and national origin are correlated closely enough to make selecting for a foreign language impermissible discrimination. However, it fails to address the more subtle question of whether an advertisement which expresses no such interest in its text might still effect discrimination through the language in which it is conveyed. It appears that no court has yet ruled on this particular question.

---

80 *Holmgren v. Little Vill. Cmty. Reporter*, 342 F. Supp. 512 (N.D. Ill. 1971).

81 *Id.* at 513.

82 *Id.*

83 "The court appreciates the difficulties inherent in any language barrier that comes between parties negotiating a contract. However . . . defendants cannot publish advertisements which indicate a preference for buyers or tenants of particular national origins." The court did note that the landlords would be free to exercise such discretion in their personal negotiations so long as they complied with the rest of the statute. *Id.* at 513-14.

The following analysis applies the ordinary reader standard to an ad typical of those appearing in Chinese language daily newspapers.<sup>84</sup>

A 2012 edition of the San Francisco Sing Tao Daily carried the following advertisement:

# 有屋出租

Castro Valley 二房一  
廳 新裝修好校區近高  
中，小學校包水垃  
圾，近地鐵和巴士站

In translation it reads, “House to rent: Castro Valley. Two bedrooms, one living room, all newly repaired. Good school district, near high and elementary schools. Rent includes water and garbage. Near subway and bus stations.”<sup>85</sup>

Recalling § 3604(c)’s statement, in relevant part, that it is unlawful “[t]o . . . publish . . . any . . . advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on . . . national origin,” the question becomes whether the advertisement indicates a barred national origin preference. As the Second Circuit noted in one of the *Human Models Cases*, “liability will follow only when an ordinary reader would understand the ad as suggesting a [national origin] preference. The ordinary reader is neither the most suspicious nor the most insensitive of our citizenry.”<sup>86</sup> As one commentator put it, he is “the reasonable man, reasonable juror, as found throughout American jurisprudence,”<sup>87</sup> without a particular national origin of his own.<sup>88</sup> Finally, the ad will only express

84 In researching the topic, I have relied mostly on ads from two national dailies: the SING TAO DAILY, founded in Hong Kong in 1938 with US offices and distribution since 1975; and the WORLD JOURNAL, founded in 1976 by Taiwanese ownership, which claims to be the most widely read Chinese paper in the United States. This is by no means the entirety of Chinese newspaper distribution in the United States. There are a number of more local weekly papers serving smaller communities, like THE SEATTLE CHINESE POST and the ST. LOUIS CHINESE AMERICAN NEWS. However, given that the national dailies are more widely distributed and attract more advertisers, they are richer sources of ads and better suited to this study.

85 Classifieds, SING TAO DAILY (S.F.), Feb. 3, 2012, at C6.

86 *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).

87 John A. Obee, *Advertising Discrimination in Housing: Fair Housing Center of Metropolitan Detroit v. Henry Ford Village: A Model for Effective, Affirmative Relief Under the Federal Fair Housing Statute*, 51 WAYNE L. REV. 1483, 1489 (2005).

88 See *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266-67 (7th Cir. 1996) (rejecting

a preference if it would “discourage an ordinary reader of a particular [national origin] from answering it.”<sup>89</sup>

Divorced from the language it is communicated in, the text itself shows no preference for one national origin over another. There is no overt statement that the landlord prefers Chinese residents,<sup>90</sup> any such message is conferred only through the fact that the content of the ad is almost entirely in Chinese.<sup>91</sup> The question is then, whether that language choice will indicate to the ordinary reader that a renter of some Greater-Chinese nationality is preferred.<sup>92</sup>

By any honest appraisal, keeping in mind that the ordinary reader has no national origin of his own, the ordinary reader is a monolingual English speaker. From a common-sense perspective, English is the “de facto national language,” as courts and advocates of minority language rights have acknowledged.<sup>93</sup> From a theoretical perspective, the assimilative language dynamic suggests that in immigrant communities, only the first and second generations of a particular national origin could understand a foreign language advertisement. Even a purely statistical inquiry supports this conclusion: for the vast majority of ancestries, including those with a stronger bilingual character, English fluency is the norm rather than the exception.<sup>94</sup> In effect, the *Sing Tao Daily* advertisement screens all tenants other than those from Greater China, with the added wrinkle that it narrows the field to those with ancestry in Taiwan, Hong Kong, or Macau

---

plaintiff’s arguments for an “ordinary African-American reader” and reaffirming the ordinary reader standard); *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp. 1213, 1227 n.7 (S.D.N.Y. 1992).

<sup>89</sup> *Ragin*, 923 F.2d at 1000.

<sup>90</sup> This is perhaps because no such statement is necessary; many ads will violate §3604(c)’s rules on other protected classes, for instance by describing apartments as suiting single men, a violation of both the family status and sex protected class provisions.

<sup>91</sup> More specifically, the ad is written in traditional Chinese, rather than the simplified form used in Singapore and Mainland China. Ads of this sort also almost never include text in any other language, nor translations (except in cases of words with no agreed-upon translation or transliteration).

<sup>92</sup> The term “Greater China” refers to the Sinophone world of China, Hong Kong, Taiwan, and Macau, as originally “coined by Japanese economists to describe the increasing economic integration [in the region].” AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* 60 (1999).

<sup>93</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down restriction on instruction in languages other than English, but noting that the failure to learn English hinders a child’s ability to become a fully participating citizen); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975) (“[T]he common, national language of the United States is English.”); Gerald P. López, *Learning About Latinos*, 19 *CHICANO-LATINO L. REV.* 363, 405 (1998) (“English has long been the de facto national language.”).

<sup>94</sup> HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, *LANGUAGE USE IN THE UNITED STATES: 2007* 7, tbl.3 (2010) (showing that for most languages, the majority of bilinguals will speak English “[v]ery well”), available at <http://www.census.gov/prod/2010pubs/acs-12.pdf>.

by appearing in Traditional Chinese.<sup>95</sup> The ordinary reader would likely be compelled to conclude that the ad would discourage those of other national origins from answering. The same rationale would apply to each advertisement in that day's classified section.

Even viewed in the best light, this conclusion is an ominous one: the FHA makes illegal the kind of advertising that would help a recent immigrant find a home in an unfamiliar city. As Judge Posner stated in a Title VII case on similar issues:

The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background . . . . Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal . . . antidiscrimination laws succeeded . . . kick[ing] these people off the ladder by compelling them to institute costly [advertising policies].<sup>96</sup>

Nonetheless, the legislative history of the FHA expresses an overt interest in breaking up ethnic enclaves. Senator Mondale, in sponsoring the bill, underscored his fear of a future in which “we are going to live separately in white ghettos and Negro ghettos,”<sup>97</sup> “two separate Americas constantly at war with one another.”<sup>98</sup> Representative Ryan saw the law as playing a role in “achiev[ing] the aim of an integrated society.”<sup>99</sup> Given that there is a clear violation of the statute, the balancing of interests in protecting immigrant rights and effectuating the statute's purpose is central to any principled system of judicial enforcement of § 3604(c).

## V. APPROACHES TO ENFORCEMENT

Having found that foreign language advertisements violate § 3604(c)'s bar on national origin discrimination, the only remaining issues are how the judiciary should adjudicate these claims, and what steps advertisers should take to avoid potential liability.

---

<sup>95</sup> Though the text would likely be comprehensible by readers of simplified Chinese (i.e., readers from Singapore or Mainland China), the overall “message” of the ads, even to an ordinary Chinese reader, would express a preference for a tenant from a territory which primarily uses traditional characters.

<sup>96</sup> *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 237–38 (7th Cir. 1993).

<sup>97</sup> 114 CONG. REC. 2276 (1968).

<sup>98</sup> *Id.* at 2274.

<sup>99</sup> *Id.* at 9591; see Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 460 (2007) (noting that the FHA's initial provision “boldly declares that ‘it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States’”).

One response to discrimination through monolingual non-English ads is simply to allow landlords to continue to publish foreign language advertisements absent a more overt discriminatory act. This position has an advantage in the normative policies of multiculturalism, protecting ethnic enclaves and maintaining foreign-language advertising's role in providing ready access to housing for recent immigrants by avoiding a strict enforcement model that could disadvantage those communities most in need of protection.

Maintaining the status quo in this fashion finds some additional support in law and economics theories, preferring market forces as the mechanism that will pressure landlords to comply with the statute. As Schwemm summarizes Judge Richard Posner's position on this point:

[B]ecause market participants with the least prejudice have a competitive advantage over those who discriminate, economic forces will on their own "tend to minimize discrimination." Posner recognizes that some people have a "taste for discrimination," that is, they are willing to pay a price to avoid associating with other races, by, for example, refusing "to sell their house to blacks who are willing to pay higher prices than white purchasers." This means, according to Posner, that providers with the least prejudice will have lower costs and will therefore ultimately "come to dominate the market."<sup>100</sup>

However, as Schwemm later notes, "to read Posner on civil rights is indeed to enter a fantasy world."<sup>101</sup> Even when restricted to the economic realm, competing theories suggest that absent intervention segregation will continue.<sup>102</sup> Given the expansive jurisprudence accorded the FHA by the courts, and the clear statutory intent to promote integration, law and economics hardly seems a workable model for enforcement in the face of a clear violation of § 3604(c).<sup>103</sup>

Against the backdrop of prior FHA jurisprudence, it would be a directional shift (if not a total about-face) to recognize a violation and elect not to confront it. The question of what form enforcement should take then becomes one of extent: whether to take the opposite extreme and mandate English-only advertising for housing, or construct a median, compromise position.

The English-only option is also likely at odds with the FHA's statutory objectives. From a strictly statutory perspective, though English-only advertisements will probably never violate § 3604(c) through their language

---

<sup>100</sup> See Schwemm, *supra* note 99, at 490-91 (citations omitted).

<sup>101</sup> *Id.* at 490.

<sup>102</sup> In particular, Schelling Segregation suggests that even a minimal preference for neighbors like oneself will rapidly segregate communities. See THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 147-55 (1978).

<sup>103</sup> See Schwemm, *supra* note 99, at 455 (examining how various economic theories may account for discrimination by landlords).

alone, it is hard to imagine that the FHA would mandate advertising practices that impede first- and second-generation immigrants from finding housing. Normatively, the English-only option is distasteful at best: any application of the FHA should be guided by the goal of integrating housing markets, not an abstract fear that Americans will feel like outsiders in their own hometowns. Mandatory English-only advertising smacks uncomfortably of the “strange brew of xenophobia, hysteria and sincere concern for the integrity of American society” that has marked the English-Only movement.<sup>104</sup> If nothing else, “[o]ne wonders what necessitates the power of law to reinforce the obvious fact that English is already the common language of the United States.”<sup>105</sup> One man working in an English-only workplace described the policy as a daily reminder “that I am second-class and subject to rules for my employment that the Anglo employees are not subject to. I feel that this rule is hanging over my head and can be used against me at any point . . . .”<sup>106</sup> A judicially sanctioned English-only policy for housing advertisements would say much the same to recent immigrants, bilinguals, and the newspapers serving them: they are not welcome until they successfully assimilate.<sup>107</sup>

Additionally, the economic impact on foreign-language newspapers could be substantial. Classifieds in foreign-language newspapers define themselves primarily as an alternative to mainstream publication or online classified services, providing a valuable service to recent immigrants while supporting a news service targeted at the interests and background of the community in question. Removing foreign-language classifieds entirely would both disserve their clientele and remove valuable advertising income from already vulnerable papers.

The best compromise between the interests of linguistic minorities and the larger English-monolingual populace of the United States is a standard of flexible parity between English and foreign-language advertising. Courts should mandate simply that relevant information is substantially conveyed in both the minority language and English. This would be a small extension of current Housing and Urban Development (HUD) regulations, in particular § 100.75 in HUD’s subchapter on Fair Housing, which states that “[d]iscriminatory notices, statements and advertisements include, but are not limited to: . . . [s]electing media . . . for advertising . . .

---

104 James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 755 (2007).

105 Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747, 757 (1997).

106 *Maldonado v. City of Altus*, 433 F.3d 1294, 1301 (10th Cir. 2006).

107 See generally Juan F. Perca, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 (2004) (arguing that bilingual Latinos have been subjected to a similar dynamic).

which deny particular segments of the housing market information about housing opportunities because of . . . national origin."<sup>108</sup>

The flexibility inherent in this solution should neither hamstring the discretion of the courts nor flood them with litigation. An adequate demonstration of standing remains a significant bar to many potential plaintiffs in a language-discrimination suit,<sup>109</sup> though this area continues to show some flux.<sup>110</sup> Courts should also take into account the context within which advertisements are placed, and whether the body of advertising has a discriminatory effect, rather than focusing narrowly on a single advertisement.<sup>111</sup> FHA jurisprudence has relied heavily on judicial discretion of this sort and has allowed for flexibility in deciding cases involving smaller advertising operations. In describing the ordinary reader standard, the Second Circuit has noted that the ordinary reader

does not apply a mechanical test to every use of a model of a particular race. An ad depicting a single model or couple of one race that is run only two or three times would seem, absent some other direct evidence of an intentional racial message, outside Section 3604(c)'s prohibitions as a matter of law. . . . It thus seems inevitable that the close questions of liability will involve advertisers that either use a large number of models and/or advertise repetitively. In such cases, the advertiser's opportunities to include all groups are greater, and the message conveyed by the exclusion of a racial group is stronger.<sup>112</sup>

This position may also serve language-minority communities by drawing attention to more overtly illegal advertising practices; many Chinese-language papers print ads whose content violates the FHA by expressing

---

<sup>108</sup> 24 C.F.R. § 100.75(c)(3) (2012).

<sup>109</sup> *See, e.g.,* *McDermott v. N.Y. Metro LLC*, 664 F. Supp. 2d 294, 305 (S.D.N.Y. 2009) (holding that "a person who reads a discriminatory advertisement has standing to sue only if they allege some form of personal injury, including psychic injury or substantial insult or distress.").

<sup>110</sup> At the very least, plaintiffs will find it difficult to bring a suit alleging psychic damages when they failed to comprehend the content of the ad. However, some courts have adopted a more conservative response to the standing question. *See, e.g.,* *Ragin v. N.Y. Times*, 923 F.2d 995, 1005 (discussing the potential flood of plaintiffs seeking to sue large newspapers in the wake of the Human Models cases, and how a court might manage such claims).

<sup>111</sup> *See* *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 235 (7th Cir. 1993). Although this case focused on Title VII rather than the FHA, Judge Posner's discussion of advertising in foreign newspapers shows evidence of discrimination is not necessarily compelling:

[Defendant] did buy newspaper advertisements on three occasions—once in a Korean-language newspaper and twice in the Chicago Tribune—but as these ads resulted in zero hires . . . . The EEOC argues that the single Korean newspaper ad, which ran for only three days and yielded not a single hire, is evidence of discrimination. If so, it is very weak evidence.

*Id.*

<sup>112</sup> *Ragin*, 923 F.2d at 1002.

sex or family status preferences on a daily basis, a practice whose continued existence can only be explained by the incomprehensibility of the advertisements to the populace at large.<sup>113</sup>

What exactly constitutes parity between languages will vary from case to case, though one of the few cases to raise the issue of foreign-language advertising, *Housing Rights Center v. Donald Sterling Corp.*,<sup>114</sup> shows how disparities in English- and foreign-language publications might subject a landlord or newspaper to liability. Real estate mogul, attorney, and Los Angeles Clippers owner Donald Sterling was sued for a series of discriminatory acts against non-Korean plaintiffs in apartment buildings located in Los Angeles's Koreatown neighborhood.<sup>115</sup> The complaint specifically addressed foreign language advertising, alleging that the defendants had engaged in a discriminatory marketing strategy:

Advertisements in the Korean language provide more information than found elsewhere about vacancies, rent, number of bedrooms, amenities, building facilities, the neighborhood profile, etc. For example, large banners in the Korean language posted at each of the subject properties provide more information about vacancies, rent, number of bedrooms, amenities, and building facilities.<sup>116</sup>

The case was eventually settled.<sup>117</sup> The court indicated in its ruling on plaintiff's motion for preliminary injunction based on the § 3604(c) claim only that "use of the word 'Korean' in the names of residential apartment buildings would indicate to the 'ordinary reader' that the buildings' owner is not only receptive to but actually prefers tenants of Korean national origin,"<sup>118</sup> never reaching issues of discrepancies in ad copy between

---

113 A single page of the Singtao Daily classifieds section containing ninety housing ads included over twenty-four that violated either §3604(c) or its California equivalent (Cal. Gov't Code § 12955(c) (West), which is functionally identical to the FHA but for the addition of several protected classes. Two ads specified a desired sex, fifteen a preferred marital status (barred by the California statute), six had both sex *and* marital status requirements, and one expressed a religious preference. While translation issues made determining whether several ads expressed familial status preference difficult, one clearly did so, saying roughly "one or two person space; if you have children don't bother asking."

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

115 *Id.* The allegations were extensive, but focused largely on management's extensive efforts to retain Korean tenants while excluding and evicting Black and Hispanic tenants.

116 Third Amended Complaint and Demand for a Jury Trial, *Hous. Rights Ctr. v. Donald Sterling Corp.*, No. 03-CV-859 (C.D. Cal. May 19, 2004) 2004 WL 5614121.

117 Sterling reportedly settled for \$1.5 million, was fined \$30,000 for failure to comply in discovery, eventually paid nearly \$5 million in attorney's fees to the Housing Rights Center. See Amanda Bronstad, *Discrimination Case Costs Sterling Even Without Verdict.*, L.A. Bus. J., Oct. 31, 2005, at 9.

118 *Hous. Rights Ctr.*, 274 F. Supp. 2d at 1139. The court declined to issue an injunction against using the word "Asian" and the appearance of the Korean Flag, largely due to their location in the paper. "The announcement on which Plaintiffs rely . . . does not advertise



languages. Nevertheless, the case highlights the kinds of information critical to potential tenants, and the sort of information that should be made available bilingually in order to achieve functional parity across languages.

Some advertisers in foreign-language papers have already adopted analogous practices in the employment context, particularly in positions requiring a degree of English fluency. Employment advertisements in the *Sing Tao Daily* and *World Journal* frequently reproduce Chinese text in English, some going so far as to repeat e-mail addresses and phone numbers already comprehensible across language barriers. Individual landlords applying these practices would significantly insulate themselves against liability, and a newspaper policy requiring bilingual classifieds with substantial parity between languages would do much the same for a publisher.

### CONCLUSION

The Fair Housing Act, in spite of the narrowness of the problem it originally addressed, continues to play an important role in civil rights litigation. Given the statute's continuing vitality, it stands to reason that it should be applied in previously unrecognized fields. Discrimination on the basis of language presents a significant barrier to housing integration; given the clear voice of the statute, any efforts to maintain ethnic enclaves should be left to the markets and preferences of particular tenants and buyers. Language discrimination should not be overlooked because it is subtle; on the contrary, it should be aggressively pursued in order to equalize housing opportunities across national origin barriers.

---

apartments for rent or sale and does not invite tenant or purchaser applications. . . . Plaintiffs acknowledged that the cited announcement appeared in the business section of the newspaper, not in the real estate or classified section." *Id.*