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THE INTERNET IS FOR DISCRIMINATION: PRACTICAL DIFFICULTIES AND THEORETICAL HURDLES FACING THE FAIR HOUSING ACT ONLINE

*Everyone's a little bit racist, it's true.
But everyone is just about as racist as you!*¹

The song *Everyone's a Little Bit Racist* from the popular Broadway musical *Avenue Q* proclaims, axiomatically, that “[e]veryone makes judgments . . . based on race. . . . [n]ot big judgments, like who to hire or who to buy a newspaper from . . . just little judgments like thinking that Mexican busboys should learn to speak . . . English!”² It teaches a troubling lesson that, despite superficial equality of opportunity, structural racism remains embedded in our society. The show takes a farcical view of the dilemma, and it proposes a solution: “If we all could just admit that we are racist a little bit, and everyone stopped being so P.C., maybe we could live in—harmony!”³

The comedic song likely does not purport to make a serious policy statement addressing American racism; nonetheless, the message it sends is problematic. The song suggests that, instead of refraining from making racist jokes and using racial epithets, we should embrace such language. Racist speech, however, harms society both in a rhetorical sense, through discourse, and in economic terms by paralyzing—or at least stifling—a significant number of marketplace players. Hate speech in general, however, is not the focus of this Note. Rather, this Note specifically addresses the conflict between the Fair Housing Act⁴ and the Communications Decency Act,⁵ as well as

¹ ORIGINAL CAST, *Everyone's a Little Bit Racist*, on AVENUE Q (RCA Victor 2003).

² *Id.* (second alteration in original).

³ *Id.*

⁴ 42 U.S.C. §§ 3601–3619 (2006).

other problems facing enforcement of the Fair Housing Act's advertising provision⁶ in the context of online housing forums—an otherwise logical place to apply that provision.

In passing Title VIII of the Civil Rights Act of 1968, better known as the Fair Housing Act or the FHA,⁷ Congress aimed to combat one facet of the rampant racial discrimination that characterized the post-World War II era.⁸ Housing discrimination took the forms of racial steering, "blockbusting," racially motivated zoning laws, outright refusals to rent, sell, or buy properties based on racial bias, as well as unfair financing practices, such as neighborhood and racial redlining.⁹ Beyond the obvious aim of ending invidious discrimination, Congress hoped to further the goal of eliminating racial ghettos in favor of "truly integrated and balanced" communities.¹⁰

In light of Congress's integration goal, an especially important provision of the FHA is the prohibition against discriminatory advertising.¹¹ Discriminatory advertisements are problematic, both in housing and in other contexts,¹² because they engender dual injuries. First, using discriminatory advertising causes indignity similar to that resulting from a denial based on race. Second, and more importantly, expressing bias and intolerance in media outlets furthers the discrimination that the FHA is meant to prevent by creating an intolerant space. Moreover, because the media serves an important community-building function in addition to its function as an information disseminator, the FHA's advertising prohibition is integral to achieving Congress's goal of encouraging integrated communities.¹³

⁵ 47 U.S.C. § 230 (2006).

⁶ 42 U.S.C. § 3604(c).

⁷ Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

⁸ While this Note tends to address racism, rather than other forms of discrimination banned under the FHA, many of the principal arguments addressed here apply to those areas as well.

⁹ See 114 CONG. REC. 2278 (1968) (statement of Sen. Mondale) (calling the post-World War II era a "sordid story" in which "[f]ederal agencies encouraged, assisted, and made easy the flight of white people from the . . . cities of . . . America, leaving behind only [black people]" unable to take advantage of the agencies' policies).

¹⁰ 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

¹¹ See 42 U.S.C. § 3604(c) (making it unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement . . . indicat[ing] any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin").

¹² *E.g.*, 42 U.S.C. § 2003e-3(b) (2006) (prohibiting "notices or advertisements indicating prohibited preference, limitation, specification, or discrimination" regarding employment).

¹³ See *infra* notes 70–76 and accompanying text (discussing ghettoization and the

That important provision is in some danger of losing its teeth, and perhaps slowly being eviscerated, on account of an unexpected and seemingly unrelated statute—the Communications Decency Act of 1996 (“CDA”).¹⁴ The CDA provides, among other things, that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁵ This provision has been interpreted to broadly immunize providers of interactive computer services—Internet/Online Service Providers (“ISPs” and “OSPs”),¹⁶ Web hosts, and the like—against actions in which traditional media could be held liable.¹⁷ State and federal courts have held ISPs immune from suit in cases involving state law tort actions¹⁸ as well as state and federal statutory causes of action.¹⁹ The sweeping immunity courts have interpreted the CDA to provide to most recoverable defendants, whose content and conduct would otherwise be actionable, coupled with the increasing use of online housing forums for purposes of

reinforcement mechanisms in which racial slurs operate).

¹⁴ 47 U.S.C. § 230 (2006).

¹⁵ 47 U.S.C. § 230(c)(1).

¹⁶ For simplicity, this Note will refer to the whole class of defendants immunized under the CDA as “ISPs.”

¹⁷ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that the CDA barred aggrieved user’s defamation claims against AOL, which arose from messages posted by an unidentified third party). As will be further discussed in Part IV.B below, explicitly defining ISPs and OSFs as something other than “publishers” as a matter of law, see 47 U.S.C. § 230(c)(1), may make some sense. But the immunity that the CDA’s definition might still provide is problematic in light of the tangible results that virtual communication can engender. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–24 (9th Cir. 2003) (holding that the Act provided full immunity to Matchmaker.com when a third party provided the content essential to plaintiff’s invasion of privacy claim and other claims, despite the Web site’s “but for” causal relationship to the plaintiff’s receipt of sexually explicit phone calls, letters, and hand-delivered notes).

¹⁸ See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (finding the editor of an email newsletter was immune from a libel suit under section 230 of the CDA, despite his editorial responsibilities and his act of forwarding defamatory statements about a newsletter recipient to other recipients); see also *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007) (holding MySpace immune under the CDA in an action by the parent of a minor MySpace user alleging negligence, gross negligence, fraud, and negligent misrepresentation on the grounds that MySpace either knew or should have known sexual predators were using its services to contact minors and reacted inappropriately). But see *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192 (App. Ct. 2004) (concluding that CDA did not afford eBay immunity in a libel action where eBay knew of defamatory and possibly false statements posted by one user about another and did nothing to resolve the problem).

¹⁹ See *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding that Craigslist, a provider of online classifieds, was immune from plaintiffs’ FHA claim alleging discriminatory advertising because it was not an “information content provider” under the CDA); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (holding that GTE, an ISP, was not liable under provisions of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511, 2520 (2000), for postings by one of its customers displaying images of plaintiff athletes unclothed without their consent).

locating roommates and potential renters of property,²⁰ may create an online “safe haven” for housing discrimination.²¹ Such immunity for ISPs, combined with the fact that individual users are generally either anonymous or non-recoverable, is likely to result in real injury with no adequate means of redress.²²

While the actual merits of FHA claims against interactive service providers based on online housing advertisements may be in doubt,²³ the broad immunity provided to ISPs by the CDA is still problematic. While it is not one of the FHA’s explicit purposes,²⁴ the advertising provision has collateral importance as a prophylaxis against the use of communication tools for building racist and otherwise intolerant communities.²⁵ That forums calling themselves “classifieds”²⁶ exist that are untouchable using the FHA may allow for the construction of a semi-chaotic, racist and otherwise intolerant online community. Moreover, given the fact that Craigslist alone registers over twenty billion page views per month,²⁷ the same indignity injuries that would be actionable under the FHA if perpetrated by advertisers using the *New York Times* likely occur many times daily in the online forum.²⁸

²⁰ See, e.g., Craigslist Classifieds: Jobs, Housing, Personals, For Sale, Services, Community, Events, Forums, <http://www.craigslist.org> (last visited Feb. 11, 2010); see also Craigslist, About > Factsheet, <http://www.craigslist.org/about/factsheet> (last visited Feb. 11, 2010) (indicating that: (1) over 50 million people use Craigslist each month; (2) it registers over 20 billion page views per month; (3) its forums serve all 50 states and over 70 countries; and (4) it receives over 50 million new classified ads per month).

²¹ See Jeffrey M. Sussman, Student Article, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194 (2007).

²² See *GTE Corp.*, 347 F.3d at 657 (explaining that the default judgment of \$500 million dollars was essentially non-recoverable against users who posted images of the unclothed plaintiff athletes without their consent, and chiding plaintiffs for appealing the district court’s CDA immunity decision in pursuit of their claims against GTE, which the court deemed a search for the “deep pockets”).

²³ See *Craigslist*, 519 F.3d at 671 (Easterbrook, C.J.) (expressing some doubt whether any theory of causation could allow liability against Craigslist for “caus[ing] to be made, printed, or published,” any discriminatory ads, and observing that Craigslist no more caused to be made its users’ posts than “people who save money ‘cause’ bank robbery, because if there were no banks there could be no bank robberies” (quoting 42 U.S.C. § 3604(c) (2006))).

²⁴ See *infra* text accompanying notes 56–59.

²⁵ See 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (indicating that the FHA would further the goal of racial integration). Congressional desire to further racial integration can easily be analogized to further the integration of the other FHA-protected classes.

²⁶ See, e.g., Craigslist Classifieds: Jobs, Housing, Personals, For Sale, Services, Community, Events, Forums, <http://www.craigslist.org> (last visited Feb. 11, 2010).

²⁷ Craigslist, About > Factsheet, <http://www.craigslist.org/about/factsheet> (last visited Feb. 11, 2010).

²⁸ Because online forums function differently from the *New York Times* or the *Cleveland Plain Dealer*, a reasonable person who is a member of a protected class under the FHA may not feel the same indignity when viewing a discriminatory advertisement in an online forum than she would viewing the same ad in the *Plain Dealer*. Even if the measure of the indignity injury is not as great, however, the sheer breadth of Craigslist’s audience and billions of page views suggests that the indignity may be multiplied. Moreover, an objective analysis of the rhetorical

This Note argues that the Communications Decency Act's immunity provision for ISPs against claims under the FHA's advertising provision not only creates a "safe haven"²⁹ for discriminatory housing advertising and practices but also engenders an online community in which intolerant and destabilizing language has a palpable effect in furthering illegal activity and defeating the positive community-building aspects of the FHA's advertising provision. This Note further argues that the use of discursive analysis in this context would be helpful for redrafting the Fair Housing Act so that FHA claims against recoverable defendants, such as Craigslist, Roommates.com, and others, may be viable.³⁰

Part I discusses the congressional purposes in enacting the Fair Housing Act and the Communications Decency Act, and examines whether the two Acts are at cross purposes. Part II analyzes the merits of an FHA claim based on discriminatory advertisements posted to Craigslist-like forums, and entertains the notion that, despite so much commentary about saving the FHA from obsolescence in an online world, a claim against a company operating as Craigslist does may substantively lack merit. Part III will first apply community-building theories to communication over the Internet and will then address how application of these theories supports the need for the viability of FHA claims in the "Craigslist" context. Finally, Part IV addresses other proposals to save the FHA in cyberspace and concludes that, while amending the CDA may be the most obvious "quick-fix" to this problem, only an amendment to the FHA itself will assure that claims against Web hosts like Craigslist can survive a motion to dismiss.

I. THE COMMUNICATIONS DECENCY ACT IN CONFLICT WITH THE FAIR HOUSING ACT

In the era of Craigslist and Roommates.com, a huge amount of communication in the form of "notice[s], statement[s], . . . [and]

power of online forums should not be totally a game of comparing the relatively new medium with traditional media. See *infra* Part III (discussing the discursive and rhetoric power of the media and advertising).

²⁹ Sussman, *supra* note 21, at 194.

³⁰ In *Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, Judge Easterbrook explained that Craigslist is a small company, employing only about thirty people. 519 F.3d 666, 669 (7th Cir. 2008). His commentary suggested that, even if the company is the only readily identifiable defendant in many of these cases, *meaningful relief* may still be unavailable in a suit against them without forcing Craigslist either to close down its site or to drastically increase rates. See *id.* It might be then that if the FHA's advertising provision and similar statutes could get to Craigslist and other ISPs, the Internet landscape would be drastically altered.

advertisement[s]”³¹ regarding the sale or rental of housing passes over the Internet.³² With the immunity provided under the Communications Decency Act,³³ unless the companies operating these Web sites affirmatively involve themselves in the production of the discriminatory content,³⁴ the companies will be free to create forums wherein the activity specifically proscribed by the Fair Housing Act may be done with relative impunity.³⁵

A. The Fair Housing Act

1. Enactment, Purposes, and Provisions

The Fair Housing Act had its genesis in a proposal by President Lyndon B. Johnson in 1966 that urged Congress to pass further expansions of civil rights legislation.³⁶ The House passed an amended version of the President’s proposal in 1966.³⁷ In August 1967, debate began on Senator Walter Mondale’s proposal, S. 1358, which would successfully become fair housing legislation³⁸ as the Fair Housing Act.³⁹ S. 1358 put forward an ambitious plan that would eventually cover all available housing in the United States. The law would have approached the problem of unfair housing “in three stages,” applying those standards “first to all federally-assisted housing; then to all

³¹ 42 U.S.C. § 3604(c) (2006).

³² See Craigslist, About > Factsheet, <http://www.craigslist.org/about/factsheet> (last visited Feb. 11, 2010) (providing specific data on how often and how much Craigslist users post and view advertisements through the Web site).

³³ See 47 U.S.C. § 230(c) (2006).

³⁴ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc) (recognizing ISP immunity under the CDA insofar as the ISP is not an “information content provider,” but holding that defendant’s degree of control over the content posted by its users made Roommates.com an information content provider that could be held liable under the FHA if the plaintiffs’ FHA claims proved meritorious on remand).

³⁵ Cf. *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (stating that, if GTE was immune, the \$500 million jury award could likely never be collected because there was “little prospect” of locating the remaining defendants, so the individuals who posted the videos were effectively able to violate the plaintiffs’ privacy, contrary to established federal law, without facing any legal ramifications).

³⁶ 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, 197 (2001) (citing Special Message to the Congress Proposing Further Legislation to Strengthen Civil Rights, 1 PUB. PAPERS 461, 467–69 (Apr. 28, 1966)).

³⁷ See 112 CONG. REC. 18, 112 (1966). The amended version included exemptions for private clubs, religious organizations, and properties with less than four rental units if the owner occupies one of them (“Mrs. Murphy”). See *id.*; Schwemm, *supra* note 36, at 202.

³⁸ Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149 (1969) (citing *Hearings on S. 1358, S. 2114, and S. 2280 Before a Subcommittee of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. (1967)).

³⁹ Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

multi-unit housing, and finally to all single-family residences.”⁴⁰ The bill faced strong opposition from southerners and conservatives, who presented several arguments against it: the tired one for the inalienability of property rights; a slightly more plausible argument that the bill amounted to “forced housing” legislation, coercing white individuals to live in proximity with minorities; and, of course, arguments that respect for states’ rights precluded this form of federal legislation.⁴¹ Of course, as Mondale’s bill moved forward in the Senate, it took on amendments limiting its scope.⁴² Although the FHA was ultimately more limited than supporters initially hoped, the organization and tenacity of Senate liberals, the release of the Kerner Commission Report, (“Kerner Report”), and likely the assassination of Martin Luther King, Jr. would push Senator Mondale’s bill into law.⁴³

⁴⁰ Dubofsky, *supra* note 38, at 149–50.

⁴¹ See *id.* at 152–53. The inalienability argument was “tired” by that point in light of *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that court enforcement of racially restrictive covenants violates the Equal Protection Clause of the 14th Amendment. See *id.* at 20.

⁴² See, e.g., Dubofsky, *supra* note 38, at 156–57 (noting that one of the changes included a one-year delay in application to all private, non-exempt dwellings); Schwemm, *supra* note 36, at 204–05 (same). One of those limits is the so-called “Mrs. Murphy” exemption, which excuses from FHA liability single-family homes sold by the owner or owner-occupied dwellings with four or fewer units. 42 U.S.C. § 3603(b)(1); see also 112 CONG. REC. 18, 112. For criticism of the exemption, see generally James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999). The amendment process also eliminated most of the proposed enforcement powers for the Secretary of the Department of Housing and Urban Development. See Dubofsky, *supra* note 38, at 157. Note that the HUD’s primary role under the FHA is supervisory in nature. See 42 U.S.C. § 3608 (2006). The law ultimately passed provides that private complaints may be filed with the HUD and the HUD may bring enforcement actions on the basis of those private complaints, see 42 U.S.C. § 3610, but it does not bestow upon the Department any independent enforcement or regulatory power. See 42 U.S.C. § 3608. The HUD had some investigative and enforcement powers, but only where state and local fair housing laws and procedures were substantially the same as under the federal Act. See Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 75–77 (1993) (discussing the HUD’s limited powers under the 1968 Act). The executive power to directly enforce the FHA without a private cause of action or on account of deficient state procedures lies with the Attorney General, who may bring suits alleging a pattern or practice of discrimination in housing. 42 U.S.C. § 3614. The FHA therefore is largely dependent on private litigation via petitions to HUD and the efficacy of state and local enforcement agencies to effect its goals. See Dubofsky, *supra* note 38, at 157.

⁴³ See Dubofsky, *supra* note 38, at 149, 158; see also Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1623 (2007) (identifying the NAT’L COMM’N ON CIVIL DISORDERS, REPORT OF THE COMM’N ON CIVIL DISORDERS (1968) [hereinafter KERNER REPORT] as a major source of support for Senators Mondale and Brooke because of the connection it drew between civil unrest among inner city blacks and lack of access to adequate and integrated housing). The assassination of Martin Luther King, Jr. aided in pushing the bill through the House of Representatives, though passage in the Senate predated that tragic event. See Dubofsky, *supra* note 38, at 158. Many commentators suggest that the FHA would have languished in House committees for years, and may never have passed, if Dr. King had not been assassinated. See, e.g., John A. Powell, *Reflections on the Past, Looking to the Future: The Fair*

Supporters of the Fair Housing Act identified, not only the broad policy goals of integration and cross-racial understanding as factors favoring the Act, but also the practical concern that militants—both black separatists and white racists—might exploit racial misunderstandings to incite racially motivated violence.⁴⁴ The Kerner Report proved helpful because it demonstrated a practical need for the legislation beyond the “mere” rhetoric of substantive equality—that is, combating race riots and public outrage.⁴⁵ In order to begin to quell the civil unrest among black Americans that characterized the 1960s, the Commission recommended a “national, comprehensive and enforceable open-occupancy law” to pursue integrated suburban—and, ultimately, urban—communities to replace urban black and suburban white ghettos.⁴⁶

The Commission recommended that government action focus on three main objectives: “[1] eliminating barriers to choice (antidiscrimination); [2] removing the frustration of powerlessness (empowerment); and [3] increasing contact across racial lines to destroy stereotypes and hostility (integration).”⁴⁷ The first of these objectives is reflected in the Fair Housing Act, which outlaws discrimination by those who make properties available for rent or purchase.⁴⁸ The second goal is reflected in section 805 of the FHA, which prohibits discrimination “in residential real estate-related transactions . . . in making available such a transaction, or in the terms or conditions of such a transaction.”⁴⁹ It also supplies an element of empowerment, as does § 804(c), by quelling rhetorically harmful speech in the marketplace.⁵⁰ Finally, section 805 gives aggrieved

Housing Act at 40, 41 IND. L. REV. 605, 605 (2008).

⁴⁴ See Larkin, *supra* note 43, at 1623.

⁴⁵ See *id.*

⁴⁶ KERNER REPORT, *supra* note 43, at 263.

⁴⁷ Larkin, *supra* note 43, at 1622 (citing KERNER REPORT, *supra* note 43, at 230). Larkin also explains that, according to the Commission, integration initially would benefit black and white middle class Americans more than others because the purpose of national legislation would be to empower black Americans to move into white neighborhoods, rather than encourage the opposite result. See *id.* at 1625. Whose interests the Fair Housing Act was meant to advance in the short term is beyond the scope of this Note, but Larkin’s explanations on how the white middle class chooses not to integrate, see *id.* at 1630–40, are supportive of a continuing need to remove racist speech from discourse in as far-reaching a manner as is constitutionally permitted.

⁴⁸ See 42 U.S.C. § 3604 (2006).

⁴⁹ *Id.* § 3605(a).

⁵⁰ Cf Larkin, *supra* note 43, at 1627 (explaining that “protecting private housing choice was the direct result of the Act”); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 72 (1995) (arguing that racist speech and decision making construct a community rhetoric that subverts the upward

minority applicants a reasonable ground to challenge racial redlining and other practices that prevent them from obtaining necessary financing that is readily available to similarly situated non-minority applicants. Taken together, these subsections work to further the Commission's integration goal by eliminating practical barriers of choice and limiting rhetorical injuries that may preempt the mobility of housing-seeking minorities.

With those purposes in mind, Congress enacted Title VIII of the Civil Rights Act of 1968,⁵¹ better known as the Fair Housing Act. The Act establishes as civilly enforceable the right of persons in the United States to buy or rent housing free of discrimination on the basis of "race, color, religion, sex, familial status, or national origin."⁵² The FHA's prohibition against outright refusals, denials, or other actions that make housing unavailable on the basis of invidious bias is limited, however, and does not apply to "single-family house[s] sold or rented by an owner" without the use of a real estate broker.⁵³ "[R]ooms or units in dwellings containing . . . no more than four families," provided that the "owner actually maintains and occupies one of such living quarters as his residence," also escape the FHA's prohibitions.⁵⁴ The exceptions to the statute's prohibitions seem to have some basis in freedom of association, but in reality, the so-called "Mrs. Murphy" exemptions are products of legislative compromise between liberals and moderates in Congress.⁵⁵

The Act's discriminatory statements provision is broader than the plain refusals prohibition. Section 804(c) makes it unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement . . . indicat[ing] any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention" to express such a discriminatory motive.⁵⁶ Unlike the denials prohibition

mobility of blacks in the U.S.).

⁵¹ Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

⁵² 42 U.S.C. § 3604(a) (prohibiting refusals to "sell or rent . . . or negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" because that person belongs to one of the protected categories).

⁵³ *Id.* § 3603(b)(1). The broker herself cannot engage in outright discrimination. *See id.* § 3605(a) (prohibiting discrimination by those whose business includes "engaging in residential real estate-related transactions").

⁵⁴ *Id.* § 3603(b)(2).

⁵⁵ *See* Dubofsky, *supra* note 38, at 155-57 (discussing the Dirksen compromise, which led to the creation of the Mrs. Murphy exception, and explaining that one of the major concerns of the FHA's opponents was states' rights).

⁵⁶ *Id.* § 3604(c).

in Section 804(a), 804(c) is not limited by the "Mrs. Murphy" exception.⁵⁷ Further, the discriminatory advertising prohibition is substantively more expansive than the plain refusal prohibitions because of its application to discrimination on the basis of "handicap."⁵⁸ The sheer breadth of section 804(c)'s prohibition suggests that the indignity injury engendered by discriminatory language was important in congressional deliberation over the Fair Housing Act. Also, there is some evidence that section 804(c) was intended to further the substantive goal of integration in addition to the elimination of discrimination.⁵⁹

Judicial interpretation of the statute in the standing area has further highlighted the purposes of the Fair Housing Act, particularly with regard to the limited scope of the discriminatory advertising provisions. While courts have interpreted section 804(c) to clearly prohibit the use of discriminatory advertisements to effect outright denials and discrimination, an indignity injury alone may or may not confer standing to address an FHA violation.⁶⁰ An individual unquestionably would have standing under the FHA if she were offended by a discriminatory advertisement for housing that she would have pursued but for the offensive advertisement.⁶¹ These standing rules, though somewhat murky, suggest that courts interpret Title VIII's main concerns to be integration and antidiscrimination. In many situations, however, the indignity injury itself is not given much weight, and the ads are only actionable where they affect decisions in

⁵⁷ See 42 U.S.C. § 3603(b) ("Nothing in section 3604 of this title (*other than subsection (c)*) shall apply to [the listed exceptions].") (emphasis added)).

⁵⁸ *Id.*

⁵⁹ See Schwemm, *supra* note 36, at 213 (explaining that "congressional desire to promote integrated living patterns through the FHA is an important basis for the proper interpretation of § 3604(c)").

⁶⁰ Compare *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) (holding that a protected person had a viable claim based entirely upon viewing advertisements that may have a discriminatory effect, despite the fact that the claimants were not actively seeking housing), with *Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590 (10th Cir. 1996) (holding that receipt of discriminatory ads results only in abstract injury unless the claimant is actually deterred from seeking the advertised rental). Cf. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (holding that testers who are steered away from certain housing on the basis of race have standing to sue under 42 U.S.C. § 3604(d), despite not having actual intent to rent the space for themselves); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972) (holding that non-protected individuals have standing to sue for integrative practices in their city on the ground that plaintiffs had "lost the social benefits of living in an integrated community").

⁶¹ See, e.g., *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1986) (explaining that under *Havens Realty Corp.*, 455 U.S. 363, the individual plaintiff had standing to sue on the basis that she "noticed and was deeply offended by the virtual absence of blacks in the brochure, which indicated to her, quite understandably, that GSC did not wish to appeal to blacks").

the housing marketplace.⁶² The courts' interpretation of the Act's purposes is well founded, however limiting it might be.⁶³

2. Effects and Problems

De facto housing segregation remains a major problem in the United States, though some gains in neighborhood integration have been recorded.⁶⁴ The modest integration and slight decrease in ghettoization witnessed since the FHA's passage cannot exclusively be attributed to the Act. Many state and local governments and agencies have instituted rules and regulations that further integration and the eradication of blatant housing discrimination.⁶⁵ Most of those state regulations were instituted in a post-FHA environment, however.⁶⁶ The local and state programs, like the Fair Housing Act, also further the goal of educating the majority on what it means to be segregated and to suffer discrimination, as well as the effects that discrimination has on society generally.

One problem that fair housing efforts using the FHA continue to face is the reliance on the adversarial process to effect change. The

⁶² *E.g.*, *Glenwood*, 98 F.3d 590 (actual deterrence from seeking housing required to state a claim under the FHA). It is true that *Havens Realty Corp* suggests that Congress intended standing under the Fair Housing Act to be as broad as U.S. CONST. art. III will allow. *See* 455 U.S. at 372–73. It is important to remember, however, that Article III standing is only broad enough to embrace claims based on demonstrable, particularized injuries. *See* *Warth v. Seldin*, 422 U.S. 490 (1975) (denying third-party standing for plaintiffs in a 42 U.S. §§ 1981, 1982, 1983 action, explaining that the claimants had to be able to show that defendant's conduct actually interfered with their pro-integrative housing choices). Thus, mere "offense" at the discriminatory content of an advertisement will not confer standing unless a plaintiff can show that, at a minimum, she is a member of the group against which the ad discriminates.

⁶³ Underlying the analysis in Part III, *infra*, however, is a basic agreement with the position that offensive statements alone should give standing to an aggrieved minority individual, notwithstanding that individual's lack of interest in acquiring the property. *Cf.* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words that Wound*] (arguing for creation of a tort action for racial insults, modeled after intentional infliction of emotional distress).

⁶⁴ *See* George C. Galster, *The Evolving Challenges of Fair Housing Since 1968: Open Housing, Integration, and the Reduction of Ghettoization*, 4 CITYSCAPE 123, 128 (1999), available at <http://www.huduser.org/Periodicals/CITYSCAPE/VOL4NUM3/galster.pdf> (citing data suggesting that integrated neighborhoods have lost their previous pariah status—"between 1980 and 1990, 76.4 percent of the mixed [neighborhoods] remained so, whereas only 61 percent remained so during the 1970s"). *But see* NAT'L FAIR HOUS. ALLIANCE, DR. KING'S DREAM DENIED: FORTY YEARS OF FAILED FEDERAL ENFORCEMENT 12–13 (2008), available at <http://www.nationalfairhousing.org/Portals/33/reports/2008%20Fair%20Housing%20Trends%20Report.pdf> (citing statistics showing that "segregation does seem to be declining on some dimensions nationwide, [though] . . . very slowly, and . . . increasing in some areas").

⁶⁵ *See* Galster, *supra* note 64, at 128 (explaining that "pro-integrative practices, such as limits on for-sale signs, affirmative marketing, and financial incentives" have had some effect on integration and that "the upsurge in such practices has been a major change in the fair housing landscape since 1968").

⁶⁶ *See id.*

1988 Amendments⁶⁷ strengthened the Act by providing new administrative enforcement procedures and less onerous burdens on complainants in private causes of action, but both of these depend on the existence of specific instances of housing discrimination.⁶⁸ The specter of litigation has been shown to change behavior, of course, but too heavy a reliance on actions commenced by private actors inevitably slows change.⁶⁹

Also frustrating the purpose underlying the FHA are two of the substantive goals identified by Congress—antidiscrimination and integration—because the intense focus on these objectives has limited efforts to further the goal of empowerment.⁷⁰ Empowerment takes tangible form in economic and educational opportunities and intangible form in the psychological benefits of de-ghettoization.⁷¹ By focusing too much on segregation indices and stabilizing integration patterns, fair housing regulation—at both federal and state levels—has undercut efforts to improve actual equality of opportunity.⁷² Such

⁶⁷ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3619 (1988)).

⁶⁸ See Ware, *supra* note 42, at 80–82 (explaining that the 1988 Amendments empowered administrative law judges to assess fines against violators and enhanced the effectiveness of private causes of action by providing a longer statute of limitations, eliminating the need to exhaust administrative remedies before a proceeding may begin in federal court, and increasing the sources of monetary relief available such as attorneys' fees and punitive damages). Obviously, the 1988 Amendments will only enhance the FHA's effectiveness insofar as they are utilized, and they may only be used when a justiciable controversy (a specific instance of discrimination) presents itself.

⁶⁹ See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341–42 (2000) (explaining that rules of law change behavior because of individual endeavors to "maximize satisfaction of his preferences, given his beliefs about how he can accomplish these ends, subject to the constraints of his opportunities" and because of an economic choice process) (emphasis added). Inherent in the attitudinal model is the economic actor's awareness of limits on her choices, so litigation is only truly effective as a regulator when cases are brought either directly against the economic actor or in her community. *But cf.* ANDREW P. MORRIS, BRUCE YANDALE & ANDREW DORCHAK, REGULATION BY LITIGATION 47 (2009) (explaining that use of litigation as a regulatory technique is comparable in effectiveness to regulation by rulemaking and regulation by negotiation).

⁷⁰ See Powell, *supra* note 43, at 617–18 (arguing that new regulation should focus on empowerment through opportunity specifically "directed to affirmatively connect affordable housing to neighborhoods of opportunity, whether they are in a revitalized inner city or in an affluent suburb"); Larkin, *supra* note 43, at 1649–50 (citing KERNER REPORT, *supra* note 43, at 224) (arguing for empowerment and identifying one step as "ghetto enrichment"). *But see* Christopher C. Ehrman, *Integration Versus Antidiscrimination: Which Policy Should Prevail When Applying the Fair Housing Act?*, 24 MEM. ST. U. L. REV. 33, 55–58 (1993) (arguing that integration is the FHA's greatest goal).

⁷¹ See Galster, *supra* note 64, at 131 & fig.1 (showing that behavioral adaptations along "path A" result from "the spatial confinement of a poor, minority population in an area of attenuated opportunity").

⁷² See *id.* at 128–29 (highlighting integration's meager successes and explaining de-ghettoization's massive failures). This argument does assume, however, that there is a limited pool of resources available for addressing fair housing concerns and that energetically pursuing integration reduces the resources accessible for fair housing efforts.

inequality leads to behavioral adaptations among minorities, which reinforce racial prejudice, eventually buttressing individual choices to segregate.⁷³

The FHA's advertising provision furthers the substantive policy goal of empowerment by eliminating just one form of rhetorical violence against minorities. Professor Delgado has explained that, at least in the race context, "[t]he psychological harms caused by . . . stigmatization are often much more severe than those created by other stereotyping actions."⁷⁴ Because of its effect of removing from the housing marketplace objectionable and stigmatizing language, a reasonably foreseeable—though maybe unexpected—outcome of section 804(c) is that the FHA's statements prohibition will promote community building. The advertising provision, as is the case with all hate speech prohibitions, eradicates from the "master narrative" the "story" of minority inferiority.⁷⁵ Replacing noxious racist advertisements with race-neutral ones both protects minority individuals from the stigma and interferes with the perpetuation of racial prejudice among the majority.⁷⁶

The ever-increasing use of online advertising resources in the housing market only exacerbates the FHA's enforcement challenges and its corresponding ability to further these substantive goals.⁷⁷ Between the practical problems facing plaintiffs suing users⁷⁸ and the substantive problems with the merits of a claim against providers of online services for FHA violations⁷⁹ and the Communications

⁷³ See Galster, *supra* note 64, at 131 & fig.1. Another serious problem affecting housing efforts is the "resegregation" scenario. See generally Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1988–94 (2000) (discarding the inflexible "tipping point" theory for other dynamic game-theory models of "resegregation," and arguing that resegregation is a product of multiple economic factors that may be neutralized to avoid ghettoization).

⁷⁴ Delgado, *Words that Wound*, *supra* note 63, at 136. Richard Delgado also notes that "[t]he psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. Consequently, it is neither unusual nor abnormal for stigmatized individuals to feel ambivalent about their self-worth and identity." *Id.* at 137; see also *id.* at 136–43 (explaining "[t]he [h]arms of [r]acism").

⁷⁵ See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1988) [hereinafter Delgado, *Storytelling*] ("The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.").

⁷⁶ See Galster, *supra* note 64, at 131 fig.1. The advertising provision impedes both "path B" and "path C" by obstructing racist speech, a reinforcement mechanism along both of those pathways. *Id.*

⁷⁷ See *infra* Part II.

⁷⁸ Cf. *Doe v. GTE Corp.*, 347 F.3d 655, 656–57 (7th Cir. 2003) (explaining that the individual users in that case were at worst anonymous or at best non-recoverable).

⁷⁹ See *infra* Part II (analyzing hurdles to stating a cause of action for a section 804(c) violation in the "Craigslis context").

Decency Act's immunization for the most powerful,⁸⁰ perhaps section 804(c) cannot do its work. While it might seem overblown to declare that the advertising provision will become a dead letter in the future, it cannot be denied that while Craigslist's and Roommate's users "in the past . . . might have placed an ad in local and college newspapers, or hung a sign in a laundromat or coffee shop, today [they] would surely go online."⁸¹ Thus, unless liability can be imposed on the powerful defendants, only the (usually semi-anonymous) individual users will be accountable for these advertisements, and meaningful relief will be impossible.⁸²

B. The Communications Decency Act—Enactment, Purposes, and Provisions

On October 24 and 25 of 1994, a "poster" on Prodigy Services Company's "Money Talk" bulletin board posted statements about Stratton Oakmont, Inc., a securities investment banking firm. The statements alleged, among other unfavorable things, that the firm's president "committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd."⁸³ Stratton Oakmont and its president sued Prodigy and the unidentified user, alleging that the ISP was liable in ten separate causes of action, including one for defamation as the publisher of the user's posts.⁸⁴ A

⁸⁰ See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (finding that a provider of forums for online classifieds was immune from an FHA claim alleging discriminatory advertising because it was not an "information content provider" under the CDA); see also Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1169–70 (9th Cir. 2008) (en banc) (finding that a provider of housing forums was an "information content provider" under the CDA and thus not immune from FHA claim).

⁸¹ Diane J. Klein & Charles Duskow, *HousingDiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 331 (2008). Klein and Duskow conclude that "the Ninth Circuit has correctly held that the [Communications Decency Act] does not relieve housing websites from their obligation under the federal Fair Housing Act (and related state civil rights laws) to refrain from facilitating and disseminating discriminatory advertisements." *Id.* at 378–79.

⁸² Meaningful relief in this context does not only mean money damages, though that is a significant concern for some plaintiffs. In the invasion of privacy context, for example, money damages are necessary to compensate an individual for the injury caused by such an invasion. See *GTE Corp.*, 347 F.3d at 656–57 (finding that a multi-million dollar judgment would likely never be recovered because GTE, the Internet services provider, was immune under the CDA, and individual sellers were either anonymous or non-recoverable). Meaningful relief in the Fair Housing context anticipates behavior modification of the big players, resulting in improved policing of FHA-offensive content. Essentially, meaningful relief would mean a paradigm shift from "hands-off" policing to "hands-on" policing by ISPs.

⁸³ Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063-94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

⁸⁴ See *id.*

huge hurdle in the case for the plaintiffs was establishing that Prodigy was in fact the publisher of the statements, not just because it was necessary to their claim, but also because of the novelty—at the time—of suits against ISPs.⁸⁵

The court in *Stratton Oakmont, Inc. v. Prodigy Services Co.* applied the common law doctrine of publisher liability,⁸⁶ inquiring whether the defendant exercised sufficient editorial control over the content on its Web sites.⁸⁷ The common law requires that the publisher be more than a mere conduit of content,⁸⁸ which is precisely what Prodigy claimed to be.⁸⁹ The court held for the plaintiffs on the issue, explaining that Prodigy “held itself out to the public and its members as controlling the content of its computer bulletin boards [and] . . . implemented this control through its automatic software screening program” and enforcement of its content guidelines.⁹⁰ The court’s decision was the obvious result under the common law doctrine, given that Prodigy claimed editorial control over its content by openly proclaiming that it “pursu[ed] a value system that reflects the culture of the millions of American families [they] aspire[d] to serve.”⁹¹ It is the obvious result unless, as Judge Kozinski put it in a different context, “conduct [that] is unlawful . . . face-to-face or by telephone, magically become[s] lawful” because it is done online.⁹²

While Judge Kozinski’s position in *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.* seems utterly reasonable, Congress disagreed with the *Stratton* result. Congress found that it threatened other Internet policy goals, such as encouraging ISPs to exercise some degree of control over the content disseminated by its services but refraining from imposing affirmative obligations on them to do so. Many members of Congress expressed alarm about the prevalence of online pornography, objectionable “chat rooms,” and the ready accessibility to minors of such explicit material.⁹³

⁸⁵ See *id.* at *3.

⁸⁶ See *id.* (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977)).

⁸⁷ See RESTATEMENT (SECOND) OF TORTS § 578 (describing a publisher’s liability for defamation).

⁸⁸ *Stratton*, 1995 WL 323710, at *3.

⁸⁹ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (explaining that a publisher exercises significant editorial control over the content it disseminates and is more than a conduit or passive receptacle).

⁹⁰ *Stratton*, 1995 WL 323710, at *4.

⁹¹ *Id.* at *2.

⁹² Klein & Doskow, *supra* note 81, at 379 (alterations in original) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157 (9th Cir. 2008) (en banc)).

⁹³ See 141 CONG. REC. 22,045 (1995) (statement of Rep. Wyden) (“We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents

The mid-1990s, it might be said, were characterized by fascination about the Internet's possibilities and borderline irrational apprehension about how access to obscene content might become overly free.⁹⁴ Running concurrent to Congress's desire to restrict minors' access to pornography on the Internet was another stated goal to "preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."⁹⁵ The fallout after *Stratton* in 1995, along with Congress's conflicting goals, led to the passage of the Cox-Wyden Amendment,⁹⁶ which yielded section 230 of the Communications Decency Act.⁹⁷

Following the result in *Stratton*,⁹⁸ Congress believed that the only prudent thing to do was to immunize ISPs and their users of publisher liability, so that they might be incentivized to do something about the offensive content that other users post.⁹⁹ They thought it a "backward" result that an ISP that made a sincere effort to clean its Web sites of offensive content could be held liable as a publisher of the content it failed to remove, while an ISP that made no effort to remove offensive posts would get off scot-free.¹⁰⁰ As a commonsense matter, Congress might have been right. After all, the law should encourage ISPs to do something about wanton displays of indecent material, and it might seem illogical that an ISP that is not doing what Congress would like comes out better than one that is attempting to further Congress's wishes. But the Cox-Wyden Amendment falls short of encouragement because it provides—at best—a carrot and no

cringe.").

⁹⁴ See 141 CONG. REC. 17,083–89 (1995) (statements of Sens. Grassley & Exon and supporting documents); Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38. The Communications Decency Act included another provision in addition to problematic section 230 that arguably went to the heart of the congressional purpose in passing the Act. 47 U.S.C. § 223(d) (1994). Later held unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), section 223(d) criminalized any knowing sending or display of content that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" *Reno*, 521 U.S. at 860 (citing 47 U.S.C. § 223(d)). For background on section 223 and analysis of the Court's reasoning in *Reno*, see Steven D. Burt, Statute Note, *Strict Scrutiny in Cyberspace: The Invalidity of the Communications Decency Act and the Slow Demise of the Child Online Protection Act*, 8 J.L. FAM. STUD. 241 (2006).

⁹⁵ 47 U.S.C. § 230(b)(2) (2006).

⁹⁶ Pub. L. No. 104-104, § 509, 110 Stat. 137, 137–39 (1996) (codified as amended at 47 U.S.C. § 230 (2006)).

⁹⁷ 47 U.S.C. § 230.

⁹⁸ No. 31063-94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

⁹⁹ See 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (explaining that his amendment protects ISPs from liability in return for helping solve the obscenity problem).

¹⁰⁰ See *id.*

stick.¹⁰¹ It does not, though one commentator has suggested otherwise, imply any good faith requirement.¹⁰²

Section 230(a) of the CDA explains in broad terms Congress's perceptions of the Internet's development.¹⁰³ In subsection (b), the Act delineates Congress's aspirations in passing the CDA, which include: promoting the "continued development of the Internet," preserving the "vibrant and competitive free market" that exists on the Internet, and, most importantly here, "remov[ing] disincentives for the development and utilization of blocking and filtering technologies."¹⁰⁴ Curiously, Congress also purports to empower "parents to restrict their children's access to objectionable or inappropriate online material" by removing the disincentives to service providers to create new filtering technologies.¹⁰⁵ All told, while the statute¹⁰⁶ has had a huge impact on limiting ISP responsibility, it has actually had little discernible effect on encouraging ISPs to create filters.

The most problematic section of the CDA for purposes of this Note, however, is section 230(c). It provides first that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another *information content provider*."¹⁰⁷ It then precludes civil liability on account of blocking or removing offensive material or any policies that enable others to remove or block such material.¹⁰⁸ The Act puts ISPs in precisely the position that Congress intended. Without the Act, if an ISP did not create the offensive material, the only

¹⁰¹ Actually, it likely provides neither a carrot nor a stick. It removes a disincentive for ISPs to create filtering mechanisms, but it does not incentivize them either with some legal benefit or via the specter of litigation or regulation.

¹⁰² See Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. the Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 835 (2007) (arguing that the conflict between the FHA and the CDA can be read out by reading into the CDA a good faith requirement for immunity). Kurth's suggestion finds some support in the Act's legislative history and text, but to reach her suggested result, courts would have to read the good faith requirement into the statute, not merely find it *in the text*.

¹⁰³ See 47 U.S.C. § 230(a) (2006) (finding that there existed "a rapidly developing array of Internet and other interactive computer services," that users exercise "a great degree of control over the information" available, that the Internet "offer[s] a forum for a true diversity of political discourse," that the "Internet . . . flourished, to the benefit of all Americans, with a minimum of government regulation," and that Americans were "[i]ncreasingly . . . relying" on online services for "political, educational, cultural, and entertainment services").

¹⁰⁴ 47 U.S.C. § 230(b)(1)–(2), (b)(4).

¹⁰⁵ *Id.* § 230(b)(4).

¹⁰⁶ See *id.* § 230(c). Craigslist's flagging system, described *infra* in notes 143–47 and the accompanying text, may be one example of the CDA's incentivizing purpose at work.

¹⁰⁷ 47 U.S.C. § 230(c)(1) (emphasis added).

¹⁰⁸ *Id.* § 230(c)(2).

alternative for liability is as a publisher or, perhaps, a distributor.¹⁰⁹ With the CDA, ISPs can meddle in the activities of their users without fear of publisher liability. They can also stand back and let the “unfettered” free market prevail, and likewise face no liability as a publisher or on any other basis.

Congress’s failure to include any sort of stick in section 230 is no doubt the result of the goal of encouraging unfettered development of the Internet. It was also the result of an assumption that “parents and families [and ISPs] are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.”¹¹⁰ The biggest logical flaw in the theory behind the Cox-Wyden Amendment is its reliance on the good faith efforts of ISPs. It assumes that all ISPs are like Prodigy and “pursu[e] a value system that reflects the culture of . . . American families”¹¹¹ Contrary to that assumption, it is more likely that ISPs operate their Internet businesses entirely for profit and have little interest in policing the content of their users’ posts. Moreover, the Cox-Wyden Amendment’s specific preclusion of publisher liability¹¹² may actually disincentivize ISPs from exercising editorial control over their sites because, *no matter what they do*, they are not liable as publishers for user-generated content.

C. The FHA–CDA Conflict

The FHA aims to eliminate discrimination as exhaustively as constitutionally permissible,¹¹³ and the advertising provision furthers that goal in two separate ways. First, section 804(c) provides a general prophylaxis to quell the use of discriminatory speech, and thus combats the indignity injury suffered by those who in fact see advertisements that discriminate against them.¹¹⁴ Second, it prevents

¹⁰⁹ See *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192 (Ct. App. 2004) (finding that the CDA precluded publisher liability, but finding that eBay could be liable as a distributor of allegedly defamatory statements posted by an eBay user).

¹¹⁰ 141 CONG. REC. 22,045 (1995) (statement of Rep. Wyden).

¹¹¹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063-94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995).

¹¹² See 47 U.S.C. § 230(c)(1).

¹¹³ See 42 U.S.C. § 3601 (2006) (“It is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States.” (emphasis added)). The advertising provision, for example, does not infringe upon the First Amendment because it regulates purely commercial speech where the underlying transaction—discrimination in housing—would be illegal and the actual message is misleading and/or has a negative effect on the housing market. See *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) (explaining that section 804(c) does not hinder the “freedom of communicating information and disseminating opinion” that the First Amendment is meant to protect (internal quotation marks omitted)).

¹¹⁴ See 42 U.S.C. § 3604(c) (making it unlawful to “make, print, or publish” discriminatory statements or advertisements related to the sale or rental of a dwelling).

the use of public forums, newspapers, and other means of making, printing, or publishing notices, statements, or advertisements to further illegal activities.¹¹⁵ Without the advertising provision, one might argue, the right embodied in section 804(a) would be a dead letter. While section 804(a) would prevent landlords, realtors, and others from affirmatively denying or making housing unavailable to customers or prospective tenants on the basis of membership in a protected category,¹¹⁶ they could place advertisements in their local newspapers declaring “NO MINORITIES” and effectively paralyze protected individuals from applying to them in the first place. The advertising provision thereby furthers Congress’s goal of creating “integrated and balanced communities,”¹¹⁷ with the welcome side effect of deterring and quelling discriminatory speech in public forums, as well as in tangible advertisements and notices.

Given the incredible development of the Internet, which the CDA has in no small part furthered, without some resolution of the conflict between immunity under the CDA and the logical application of the FHA’s advertising provision, section 804(c) may eventually be all but lost. Moreover, given that the advertising provision is the most far-reaching and widely applicable of the Fair Housing Act’s provisions, the CDA may have a palpable effect on limiting the continuing expansion of integrated housing opportunities. This result is unfortunate, especially given the importance that fair housing practices play today in both state and federal law.¹¹⁸

Unfortunately for the plaintiffs in *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*¹¹⁹ and others similarly situated, the evident conflict between the statutes does not present a tough statutory construction issue. Given the high hopes Congress vested in the FHA and its understanding of the facts at the

¹¹⁵ See *id.* (making it unlawful to “cause to be made, printed, or published” any discriminatory statements or advertisements regarding housing).

¹¹⁶ See *id.* § 3604(a).

¹¹⁷ 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

¹¹⁸ Nearly every state has enacted its own fair housing statute. Some of the statutes are almost entirely coextensive with the Fair Housing Act. See, e.g., DEL. CODE ANN. tit. 6, § 4603 (1974 & Supp. 2007) (prohibiting discrimination against essentially the same classes as listed in 42 U.S.C. § 3604(a)–(c)). Other states have identified their own names for the protected categories, but closely resemble the FHA. See, e.g., N.H. REV. STAT. ANN. § 354-A:8 (2008) (age, sex, race, color, marital status, physical or mental disability, religion, and national origin). Another set of states protects a list of categories more limited than the federal Act. See, e.g., ARK. CODE ANN. § 16-123-204 (2006) (protecting essentially the same categories as the FHA, but not including “handicap” as a protected group). Finally, some states have more expansive protections than the FHA. See, e.g., CAL. GOV’T CODE § 12955 (West 2005 & Supp. 2008) (protecting all of the same categories as the FHA, but also protecting against discrimination on the basis of sexual orientation, source of income, and age).

¹¹⁹ 519 F.3d 666 (7th Cir. 2008).

time it passed the CDA,¹²⁰ it might seem that Congress could not have intended to obviate the FHA completely by enacting the CDA. It is, however, “always appropriate to assume that our elected representatives, like other citizens, know the law,”¹²¹ and so the effects of a newer statute upon an older one bear a heavy presumption of validity. While wholesale repeals by implication are rightly disfavored,¹²² where two statutes bear on a subject or case, to the extent that the two cannot be reconciled, the old gives way to the new.¹²³ Of course, one may argue that, because the FHA was never mentioned in the CDA’s legislative history, the fair advertising provision should not be muted out.¹²⁴

At least one commentator has suggested that the conflict between the FHA and the CDA can be read out of the latter by understanding the CDA as an invitation for ISPs to protect users from actionable conduct, rather than a provision of sweeping, intractable immunity.¹²⁵ The argument goes that the CDA actually provides immunity for affirmatively removing content, rather than for failing to take any action at all,¹²⁶ despite contrary judicial construction of the statute.¹²⁷ That is certainly a reasonable position, given that the CDA uses the words “protection for blocking and screening” seven times in the “rather brief § 230.”¹²⁸ In addition, the legislative history of the CDA suggests that Congress may have intended such a result.¹²⁹ But, as is

¹²⁰ See 47 U.S.C. § 230(a)(1), (a)(3) (2006) (recognizing the “rapidly developing array of Internet and other interactive computer services available to individual Americans” offering “a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity”).

¹²¹ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97 (1979).

¹²² See *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“It is a cardinal principle of construction that repeals by implication are not favored.”).

¹²³ See *id.* at 198–99 (explaining that there must be a “positive repugnancy between the provisions of the new law and those of the old” and that the new law repeals the old only insofar as is necessary to give the new one effect).

¹²⁴ See *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (rejecting a construction of amendments to the Voting Rights Act that would impliedly exclude vote dilution claims involving judicial elections from the statute’s coverage, since “if Congress had such an intent [to exclude those claims] . . . at least some of the Members would have identified or mentioned it at some point in the . . . extensive legislative history”).

¹²⁵ See Kurth, *supra* note 102, at 835 (arguing that “limiting the interpretation of the CDA to immunizing only those host Web sites that make a good faith” effort to screen offensive material would eliminate the apparent conflict between the CDA and the FHA).

¹²⁶ *Id.* at 827.

¹²⁷ See *id.* (citing cases and noting that courts have expanded the CDA’s protection to those who make no good faith efforts).

¹²⁸ *Id.* at 835 (citing 47 U.S.C. § 230 (2006)).

¹²⁹ See 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (indicating that among the purposes of the CDA’s drafters was to explicitly overrule *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, No. 31063-94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), and explaining that it was illogical and bad policy if ISPs would “face higher, stric[t]er liability . . . [if they] tried to exercise some control over offensive material” than if they did nothing about it).

always the case, the legislative history can easily be manipulated to support much broader immunity.¹³⁰

A stronger position is that the CDA's immunity provision is *merely* definitional. The argument goes that section 230(c)(1), which directs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"¹³¹ specifically defines ISPs as something other than publishers. Under the definitional theory, the CDA thus exempts ISPs from liability in actions requiring that they *publish* material. Under a definitional theory of the statute, the CDA precludes enforcement of the FHA's advertising provision against ISPs because that provision is legally inapplicable to them.¹³² The text of the CDA does support this somewhat limited interpretation of the statute, and the Seventh Circuit adopted it in *Craigslist*.¹³³ While the definitional interpretation delimits the immunity provided by the CDA, it does nothing to save FHA claims lodged against ISPs. In fact, it precludes relief.

Beyond the legal arguments and distinctions, the CDA and the FHA seem to butt heads at a more fundamental level. The FHA's advertising provision seeks to condemn use of the media to further discrimination in housing and thereby eliminate illegal speech from the marketplace.¹³⁴ The CDA, by contrast, specifically precludes actions against ISPs on any reasonable theory of liability under the FHA, except insofar as the user or provider on its own becomes an "information content provider."¹³⁵ So while the FHA's advertising provision places a very slight burden on the marketplace to the benefit of a set of protected groups, the CDA limits ISP responsibility in order to attain whatever the unfettered free market might allow.

¹³⁰ *See id.*

¹³¹ 47 U.S.C. § 230(c)(1) (2006).

¹³² *See* Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 696–98 (N.D. Ill. 2006) (holding that because the CDA specifically defines ISPs as not "publisher[s] or speaker[s]" under 47 U.S.C. § 230(c)(1), the action brought under the FHA for "publish[ing] . . . or caus[ing] . . . to be published," 42 U.S.C. § 3604(c), a discriminatory advertisement was meritless as presented against Craigslist, an ISP), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

¹³³ 519 F.3d at 671.

¹³⁴ *See* 42 U.S.C. § 3604(c) (2006).

¹³⁵ *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (en banc) (explaining that section 230 "immunizes providers of interactive services against liability arising from content created by third parties" though "[t]his grant of immunity applies only if the interactive computer service provider is not also an 'information content provider'" (footnote omitted)). For commentary disclaiming the validity of the definitional reading of § 230(c)(1), see Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 174–78 (2006) (rebutting the "definitional" reading of section 230(c)(1)).

At the very least, it is reasonable to believe that Congress did not affirmatively desire that the CDA would eviscerate the FHA's advertising provision. In fact, it is likely that "Congress did not even remotely contemplate discriminatory housing advertisements when it passed § 230,"¹³⁶ leaving to be determined only whether, from a policy standpoint, the state of the law should remain as it currently stands. In a broad sense, Congress has already made a statement about what the state of the law ought to be, given that it has enacted a new statute that conflicts with one previously passed. But it's incredible that Congress would accept the fact that its substantive policy ambitions may be thwarted in the digital age because of immunity they provided without ever considering its effects on the FHA.

II. THE MERITS OF AND THEORETICAL ISSUES FACING A § 804(C) CLAIM AGAINST CRAIGSLIST-LIKE WEB HOSTS

Assume the following: A Craigslist user posts an advertisement in the apartments/housing forum for the rental of a duplex in a residential area. After describing the premises and stating the rent price, the last line of the ad explains that the landlord requires the tenant(s) to be "quiet, respectful non-smokers who have no children and who speak English fluently." The landlord does not live in the duplex, and owns several other rental properties on the same block. Doris Chang, a recently immigrated Chinese graduate student in chemistry at a nearby university, searches through the Craigslist housing forums for her area and comes across the ad at issue. The advertisement distresses Chang, who thought the location and price were ideal for her, her husband—also a newly immigrated Chinese graduate student—and their one-year old daughter. She knows that she and her husband do not speak English especially well, and she believes that the landlord will likely reject them on that basis, though they are quiet, respectful non-smokers.

Disregarding for now the CDA problem she faces,¹³⁷ Ms. Chang's distress might give rise to claims under section 804(c) against the landlord and Craigslist. Because the advertisement expresses discriminatory intent on the basis of "familial status" (no children) and "national origin" (tenants must speak English fluently), the content of the advertisement violates the FHA.¹³⁸ Applying the

¹³⁶ *Craigslist*, 519 F.3d at 671 (internal quotation marks omitted).

¹³⁷ See *supra* Part I.C (explaining the immunity provided under the CDA and its conflict with the FHA's advertising provision).

¹³⁸ See generally U.S. DEP'T OF HOUS. AND URBAN DEV., GUIDANCE REGARDING ADVERTISEMENTS UNDER § 804(C) OF THE FAIR HOUSING ACT 3-4 (1995), at <http://www.hud.gov/offices/theo/disabilities/sect804achtenberg.pdf> (explaining construction of

language of section 804(c) to the landlord, there is no question that he can be held liable under the section. The landlord clearly has made a “notice, statement, or advertisement” that “indicates . . . preference[s] or limitation[s]” on the bases of “familial status, or national origin.”¹³⁹ Applying section 804(c) to Craigslist, however, presents difficult construction questions in two different theories of liability.

Chang might say that Craigslist published the advertisement. The big hurdle for her, obviously, will be the same one presented to the plaintiffs in *Stratton*.¹⁴⁰ To establish that Craigslist is subject to publisher liability, Chang would have to show that Craigslist exercised some degree of editorial control over the content of the advertisement.¹⁴¹ Unlike ads printed in traditional media like newspapers or magazines, which are pored over by editorial staff before printing/publishing, Craigslist ads appear approximately fifteen minutes after the user enters the information.¹⁴² The advertisements are policed using a user-generated editing system, whereby Craigslist’s viewers may “flag” ads that they believe are miscategorized, prohibited, “spam,” or something that falls within the “best of Craigslist.”¹⁴³ Presumably, some employee at Craigslist then reviews the flagged material and determines whether it must be removed.¹⁴⁴ Craigslist also warns its users that “stating a discriminatory preference in a housing post is illegal,”¹⁴⁵ and links its users to a page¹⁴⁶ explaining that most states and the federal government prohibit discrimination in housing advertisements, and that Craigslist, itself, prohibits such discrimination.¹⁴⁷ It might be

“race, color, or national origin,” and “familial status”).

¹³⁹ 42 U.S.C. § 3604(c) (2006).

¹⁴⁰ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063-94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (analyzing that “hurdle”).

¹⁴¹ See RESTATEMENT (SECOND) TORTS § 577 (1977) (requiring either intentional or negligent conduct to establish publisher liability).

¹⁴² See Craigslist, About > Help > How, <http://www.craigslist.org/about/help/how> (last visited Feb. 13, 2010).

¹⁴³ To view the available options, see Cleveland Craigslist, Apartments/Housing for Rent Classifieds, <http://cleveland.craigslist.org/apa/> (last visited Feb. 13, 2010), and click on any ad and the options will appear at the top right corner of the screen.

¹⁴⁴ The Craigslist “Help” pages, see *supra* note 142, do not explain what happens after a post has been flagged. The author flagged an arguably discriminating ad and it did not immediately disappear. If “flagging” does anything, it likely brings posts to the attention of Craigslist employees.

¹⁴⁵ Cleveland Craigslist Apartments and Housing for Rent Classifieds, <http://cleveland.craigslist.org/apa/> (last visited Feb. 13, 2010).

¹⁴⁶ See *id.* (follow “stating a discriminatory preference in a housing post is illegal” hyperlink).

¹⁴⁷ See Craigslist, About > FHA, <http://www.craigslist.org/about/FHA> (last visited Feb. 13, 2010).

reasonable to argue that Craigslist holds itself out as a publisher in the same way that Prodigy Services did in *Stratton*¹⁴⁸ because Craigslist both takes on the responsibility for removing FHA-offensive content and prohibits, through its own policies, the expression of discriminatory intent. Any user familiar with Craigslist, however, would not think that the site holds itself out in that way, because the impetus for any changes in the content of its ads is always user-generated.¹⁴⁹ Craigslist is more likely liable as a distributor than as a publisher,¹⁵⁰ and that theory of liability is presently unavailable under the FHA.¹⁵¹

Alternatively, Chang might advance the theory that, under section 804(c), Craigslist would be liable for “caus[ing] to be made . . . or published” the discriminatory advertisement.¹⁵² Craigslist, however, does not “cause” the ads to be made or published, except in a but-for sense, because Craigslist is less like a newspaper and more like the owner of a bulletin board. Section 804(c) is probably best read to apply the causation requirement to the discriminating intent with respect to entities that either are, or resemble, publishers, rather than apply the causation requirement to the mere existence of the ad. Thus, it is not enough that the entity causing the publication of the ad is a mere conduit of the text; rather some causal relationship with the discriminatory text is required. If no causal connection to the discriminatory intent is required, then a mere conduit might be liable, and Congress likely would have used some less particular term. Because Craigslist likely has no causal connection to the discriminatory intent expressed in the landlord’s advertisement, it also seems unlikely that Craigslist could be held liable under the “cause to be . . . published” theory.¹⁵³

Even if Congress eliminates the CDA immunity problem by amending the CDA to make publisher liability theoretically available, the practical requirements for FHA liability likely allow an entity like Craigslist to get off scot-free for any failure to address a discriminatory ad on its Web site. Even the *Roommates.com* case is of

¹⁴⁸ See No. 31063-94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

¹⁴⁹ It seems, however, that even if the viewer would not expect Craigslist to address the problem, he or she would still likely be deterred from contacting the individual who posted the advertisement to inquire about the property.

¹⁵⁰ See RESTATEMENT (SECOND) TORTS § 581 (1977) (explaining distributor liability).

¹⁵¹ Distribution is not included among the prohibited actions listed in the FHA. See 42 U.S.C. § 3604(c) (2006).

¹⁵² *Id.*

¹⁵³ *Id.*; see also *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (analogizing Craigslist’s ability to cause its users to make discriminatory posts to money-savers’ ability to cause bank robberies).

no help to someone like Chang because the Ninth Circuit's decision merely found that the ISP at issue did exercise editorial control over the content of its ads and, based on that control, an FHA "publisher" claim is viable.¹⁵⁴ Therefore, unless Congress affirmatively makes the policy decision that the Fair Housing Act's advertising provision should not apply to ISPs at all, it should address the problem by amending the FHA. The following section explains one possible theory for amending the Act that particularly bears in mind the advertising provision's importance in quelling the use of harmful speech in the housing marketplace.

III. RECOGNIZING THE INTERNET'S ROLE AS A COMMUNITY-BUILDING TOOL

*All media work us over completely. They are so pervasive in their personal, political, economic, aesthetic, psychological, moral, ethical, and social consequences that they leave no part of us untouched, unaffected, unaltered. The medium is the message.*¹⁵⁵

Discourse addressing the political, legal, and popular possibilities that the Internet provides generally falls into two camps. The first touts the Internet as the greatest technological advancement since the printing press because it will make a true "participatory democracy possible" and "the Internet and its various platforms are inherently democratic."¹⁵⁶ The second flouts the first's utopian view and instead focuses on dystopian "fears of cyberstalking and pornography."¹⁵⁷ Of course, neither position gets it entirely correct. Each fails to consider the possibility that the Internet can be both "democracy" and "pornography," and yet also neither of them. The central difficulty is that the pervasiveness of all communication technologies and their multi-faceted effects limit the clarity of any definition we might ascribe to such technologies.¹⁵⁸

¹⁵⁴ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1168–70 (9th Cir. 2008) (en banc).

¹⁵⁵ MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* 26 (1996).

¹⁵⁶ Collin Gifford Brooke, *Cybercommunities and McLuhan: A Retrospect*, in *RHETORIC, THE POLIS, AND THE GLOBAL VILLAGE* 24 (C. Jan Swearingen, ed., 1999).

¹⁵⁷ *Id.*

¹⁵⁸ See MCLUHAN & FIORE, *supra* note 155, at 74–75 (explaining that society has a tendency to look at present technologies "through a rear-view mirror"—attempting to categorize new technologies with old and glossing them with the predilections of the past, rather than identifying what new liberties and possibilities the technology offers). There is also the "unexceptionalist" view among legal scholars, which argues that the Internet is not so incredibly different from anything we have seen before that it defies regulation. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (arguing that cyberspace

It is important to recognize that interactive computer services, Web sites, and other forms of online communities¹⁵⁹ comprise a means of communication, a communal, non-physical space, and a channel of commerce.¹⁶⁰ As Internet communication and commerce gained prominence and importance during the 1990s, lawmakers began to address the issue, hoping to assuage society's concerns about its development. By way of example, the Clinton-Gore administration's conception of the infamous "information superhighway," a clever metaphor nearly synonymous with "Internet," was one important mode of quelling fears and furthering the conception of the Internet as the most powerful invention for promoting commerce and democracy since the telegraph.¹⁶¹

A. Communication, Rhetoric, and Discourse

Whatever the merits of the superhighway metaphor, the present analysis focuses on the Internet's role as a medium of communication and, within that role, the work it does—along with all other communication technologies—to build and maintain communities and narratives.¹⁶² Among discourse theorists, "[t]here is a strong sense . . . [that] the real is characterised [sic] as a set of constructs formed

transactions are not any less resistant than traditional transactions to governmental regulation and that regulation is feasible and legitimate). For an at length rebuke to the unexceptionalist view, see David G. Post, *Governing Cyberspace: Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883 (2008) (tracing the Internet's development and discussing possibilities for its regulation using THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1794) as a metaphorical guide).

¹⁵⁹ E.g., Craigslist, About > Factsheet, <http://www.craigslist.org/about/factsheet> (last visited Feb. 13, 2010) (self-titling itself an "Online Community"); Welcome to Facebook!, <http://www.facebook.com/> (last visited Feb. 13, 2010) (claiming to help "you connect and share with the people in your life").

¹⁶⁰ See generally Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality, and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541 (1998) (analyzing the metaphor that the Internet is the "information superhighway"); Harmeet Sawhney, *Information Superhighway: Metaphors as Midwives*, 18 MEDIA CULTURE & SOC'Y 291 (1996) (discussing how the metaphor, "information superhighway" is a tool for understanding change in technology and emerging technologies, the influence of such metaphors, and the implications of the use of metaphors in the case of the National Information Infrastructure).

¹⁶¹ See Calvert, *supra* note 160, at 543 (arguing that "the information superhighway metaphor is a strategically chosen rhetorical device employed . . . to frame debate about Internet and telecommunications regulation, to implicitly suggest that particular legal choices are more viable—and valid—than others").

¹⁶² For a broad explanation of community-building and community maintenance through community rhetoric, see J. Michael Hogan, *Rhetoric and the Restoration of Community*, in RHETORIC AND COMMUNITY: STUDIES IN UNITY AND FRAGMENTATION 292–301 (J. Michael Hogan ed., 1998); see also Calvert, *supra* note 160, at 557 (explaining that communication is a "symbolic social process whereby reality is produced, maintained, repaired, and transformed").

through discourse.”¹⁶³ This conception has varied applications, though it is summarized well by the phrase the “ritual view of communication.”¹⁶⁴ Under the ritual view, communications regulation focuses on “the preservation and maintenance of extant communities.”¹⁶⁵ “Preservation” is used somewhat neutrally in this context—discursive structures confirm for us what the world is, so they often reinforce prejudices, misunderstandings and inequalities of opportunity in addition to other more benign group perspectives.¹⁶⁶

Turning to the Fair Housing Act’s advertising provision,¹⁶⁷ while the framers of the provision likely were not influenced directly by discourse analysis or critical race theory, removing from the marketplace language that would deter minority individuals from seeking housing that they would otherwise have sought deconstructs one discursive barrier to the free choice of those individuals. It also prohibits one subset of hate speech, thereby preventing the wound caused by the racial slur.¹⁶⁸ Removing racial slurs from advertising disassembles the racial community established by such slurs.¹⁶⁹ Moreover, advertising itself is arguably the “largest, most pervasive, and most successful rhetorical enterprise on the planet”¹⁷⁰ While much of the power of advertising derives from the powerful individuals and corporations that place advertisements in the marketplace, it is also “the type of speech most likely to be witnessed by the *hoi polloi*” regardless of the power of its creator.¹⁷¹ If section

¹⁶³ SARA MILLS, DISCOURSE 45 (2d ed. 2004) (1997).

¹⁶⁴ Calvert, *supra* note 160, at 557 (quoting JAMES W. CAREY, COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY 18 (1989)) (internal quotation marks omitted). The transmission model stands in contrast to the ritual model. *See id.* at 558 (explaining that the transmission model focuses on “speed, efficiency, and control,” while the ritual model focuses on “common roots”).

¹⁶⁵ *Id.* at 559.

¹⁶⁶ *See* MILLS, *supra* note 163, at 128 (discussing conversational analysis and social psychology, explaining that “racist discourse [has] . . . outcomes in the real world in that it has the effect of categorising [sic] and discriminating between certain groups, and it legitimises [sic] the practices [keeping the dominant groups] . . . in their positions of power”); *cf.* Delgado, *Storytelling*, *supra* note 75, at 2412 (explaining that the use of stories and narrative by the majority—or the privileged—reinforces its position of authority and strength). The concept of the “master” or “grand narrative” derives from this concept as well, and some theorists argue that use of racist language engenders a master narrative of minority inferiority. *See, e.g.,* Robinson, *Master Narrative*, *supra* note 50, at 72 (“The master narrative of black inferiority means the absolutely dominant or privileged story that defines how blacks win or lose, succeed or fail.”).

¹⁶⁷ 42 U.S.C. § 3604(c) (2006).

¹⁶⁸ *See* Delgado, *Words that Wound*, *supra* note 63, at 143–49 (discussing the “[h]arms of [r]acial [i]nsults”).

¹⁶⁹ *Cf.* Delgado, *Storytelling*, *supra* note 75, at 2412 (discussing the way in which stories define and distinguish “outgroups” from the dominant group in society).

¹⁷⁰ Stephen McKenna, *Advertising as Epideictic Rhetoric*, in RHETORIC, THE POLIS, AND THE GLOBAL VILLAGE, *supra* note 156, at 103.

¹⁷¹ *Id.* at 105; *see also id.* (explaining that advertising is “corporate,” “multiply mediated,”

804(c) ceases to be applicable to advertising, as it might effectively become if online ads cannot be touched,¹⁷² then one of the most formidable rhetorical enterprises may be rife with speech that can perpetuate intolerance, misunderstanding, and inequality of opportunity.

B. Community-Maintenance Online: A Case Study

One concern about applying traditional community-building theories to Internet communication might be that, because the Internet provides such an incredible diversity of points of view, the usual rules do not apply.¹⁷³ Indeed, one might argue that, because Internet communication is so decentralized, it will have a greater effect on deconstructing traditional notions and community thinking, rather than on reinforcing it. But norm-reinforcing discourse and rhetoric occurs in regional, national, and international scopes.

This subsection addresses one specific anecdote of a community using the Internet's power to shame one of its local residents and reinforce its society's norms. Although this anecdote does not directly apply the discursive analyses thus far referenced in this Part,¹⁷⁴ it does highlight the idea that the Internet is communication, rather than an international system of interlocking pieces connecting every person in the world regardless of his or her desire to be connected.¹⁷⁵ Further, it refutes—at least rhetorically—the notion that the Internet is entirely cyberspace, rather than yet another iteration of mass communication technology.¹⁷⁶

and that its audience is “massive and heterogeneous”).

¹⁷² See Frank Ahrens, *Debt-Saddled Tribune Co. Files for Bankruptcy Protection*, WASH. POST, Dec. 9, 2008, at D1 (explaining that “the rise of the Internet and other options for news, information and reader time have sent readers and advertisers away from newspapers in the past half-decade, crippling them”); see also David Swensen & Michael Schmidt, Op-Ed., *News You Can Endow*, N.Y. TIMES, Jan. 28, 2009, at A31 (explaining that newspapers are quickly moving toward obsolescence in the age of free news available on the Web).

¹⁷³ Cf. Post, *supra* note 158, at 912–13 (discussing the possibility that virtual communities should be “self-governing” and ultimately arguing that old liability rules should not be presumed to apply in virtual worlds). Of course, the proposition that virtual communities are self-governing does not necessarily undermine the proposition that community-building theories ought to apply to them.

¹⁷⁴ Indeed, the anecdote relates a use of the Internet to directly enforce norms, rather than the use of communication to reinforce stigmas and stereotypes at a meta-dialogic level. Still, the anecdote illustrates a use of the Internet as a means of communication for reinforcing local norms and expressing dissatisfaction with the actions of members of the community.

¹⁷⁵ Users' choices about what points they want to connect to will likely be guided by what is relevant to them. For example, individual consumers are likely to read blogs that address a topic area that interests them or peruse the news and forums relevant to their geographic area, rather than blogs or forums that are irrelevant to their lives outside of cyberspace.

¹⁷⁶ “The Internet” is concrete, while “Cyberspace” is rhetorical. “The Internet” means,

In the summer of 2005, a South Korean woman's dog decided, while they were on the subway, "that [the subway] was a good place to do its business."¹⁷⁷ The woman failed to pick it up or to do anything else about the dog's business. Some onlookers jeered her for not addressing the problem, and she "grew belligerent in response."¹⁷⁸ Someone on the train photographed the incident using a camera phone and posted the pictures to a popular Web site. "Net dwellers soon began to call her by the unflattering nickname," Dog Poop Girl, and a "call to arms for . . . information about her" ensued.¹⁷⁹ Within days, the call produced data revealing the woman's identity and past, and people began to recognize her on the street.¹⁸⁰ Disgraced, "discussed in Sunday sermons in Korean churches in the Washington area," and forever bearing the unfortunate nickname Dog Poop Girl, the woman "reportedly quit her university."¹⁸¹

The South Korean woman's saga of public humiliation and ridicule teaches important lessons about the shaming power of Internet forums, but it also teaches that communities will use the Internet's tools to reinforce their norms just as other traditional media have been used. Of course, curbing one's canine is likely a norm in many places. The use of this anecdote does not mean to suggest that South Korean society has a particular penchant for dog curbing or that the forums that individuals used to track down information about Dog Poop Girl are particularly well suited to their interests. Rather, it suggests that the Internet's power has been used to do similar work to what discursive structures accomplish, and it furthers the theory that the Internet will be used to deal with the same problems that print and other more traditional media have been utilized to address.

IV. A CALL FOR THE REVISION OF § 804(C)

Recognizing the Internet's role as a communication tool that does the same community-building work as other forms of communication, and acknowledging the FHA advertising provision's contribution to the deconstruction of discursive barriers, Congress must amend

essentially, infrastructure, and the term "Cyberspace" is used to explain the complex set of communities created through online interaction. See Michael J. Madison, *The Narratives of Cyberspace Law* (or, *Learning from Casablanca*), 27 COLUM. J.L. & ARTS 249, 249-51 (2004) (briefly explaining this distinction).

¹⁷⁷ Jonathan Krim, *Subway Fracas Escalates into Test of the Internet's Power to Shame*, WASH. POST, July 7, 2005, at D1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

section 804(c) of the Fair Housing Act to resolve the conflict between it and the Communications Decency Act and ensure that the fair advertising provision can do its work online. This Section provides additional background on the debates in cyberspace law and suggests the contours of the proposed amendment.

*A. Looking to Theories of Cyberspace Law*¹⁸²

To best ameliorate the conflict between the FHA and the CDA, Congress must bear in mind some of the medium-specific concerns about regulation of individuals and corporations on the Internet. In general, Congress has shied away from governing cyberspace, though it has been motivated to do so in some situations, either by pressing public concern or in reaction to troubling court decisions.¹⁸³ Indeed, Congress enacted the CDA in response to both popular concern about cyber pornography and the decision in the *Stratton* case.¹⁸⁴

Scholarship on cyberspace law does not evenly divide into separate camps, though how the legal options are formulated often depends on the “host of mostly physicalized constructs” that theorists use to explain cyberspace.¹⁸⁵ After conceptualizing cyberspace, commentators then approach it as either a polemic upon which traditional conceptions of law should be forced or for which those rules should be tailored to fit,¹⁸⁶ or by attempting to establish some semi-universal truth—or waiting for the truth to establish itself—about what rules ought to apply.¹⁸⁷ These approaches are typical when scholars attempt to deal with developments in technology.¹⁸⁸

¹⁸² For an entertaining read that provides exceptional background on the developments in, and debates surrounding, cyberspace law, see Madison, *supra* note 176.

¹⁸³ See, e.g., 47 U.S.C. § 223(d) (Supp. 1997) (provision of the CDA enacted in response to pressing public concern about “cyberporn”), *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997); 47 U.S.C. § 230 (2006) (responding to court decisions interfering with Congress’s conception of cyberspace).

¹⁸⁴ See 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (explaining that his amendment protects ISPs from liability and rejects the *Stratton* court’s “backward” result of holding a Web site accountable for its content where it actually monitors the activity of its users) (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063-94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995)).

¹⁸⁵ Madison, *supra* note 176, at 250. See also generally Calvert, *supra* note 160 (arguing that the “information superhighway” metaphor framed the legal options available for governing the Internet—at least during the Clinton-Gore administration).

¹⁸⁶ See, e.g., Keith N. Hylton, *Property Rules, Liability Rules, and Immunity: An Application to Cyberspace*, 87 B.U. L. REV. 1 (2007) (proposing a general set of torts for cyberspace).

¹⁸⁷ See, e.g., Post, *supra* note 158, at 913 (arguing that the laws applicable to “cybercommunities” ought to be determined by the members of those communities, rather than by Congress or other paternalistic bodies).

¹⁸⁸ See Lyria Bennett Moses, *Recurring Dilemmas: The Law’s Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL’Y 239, 242–43 (explaining that “many

Specifically with respect to liability for torts and similar injuries perpetrated in cyberspace—a category in which section 804(c) violations likely fall—the focus has been on three legal problems presented by technological advances: first, “the potential need for laws to ban, restrict, or, alternatively, encourage a new technology”; second, “the possible over-inclusiveness or under-inclusiveness of existing legal rules as applied to new practices”; and third, “alleged obsolescence of existing legal rules.”¹⁸⁹ The imposition of liability for various “cyber-wrongs” will continue to perplex lawmakers well into the future.¹⁹⁰

*B. Amending the FHA to Include Publisher and Distributor Liability
Against ISPs*

As Part II explained, even if FHA plaintiffs could get beyond the immunity hurdle that the CDA presents, they would still face a steep uphill battle to convince a court that any of the six bases of FHA liability apply to Craigslist-like corporations.¹⁹¹ Craigslist-like defendants are likely only liable under a distributor theory and, even then, only to the extent that they fail to fulfill the duties imposed upon them as distributors. Furthermore, advertising on the Internet—like other forms of communication—reinforces norms and does some work constructing a collective reality by employing discursive

legal problems arise in the context of technological change” and identifying four kinds of legal problems that advances in technology tend to present).

¹⁸⁹ *Id.* at 243. The Supreme Court, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928–29 (2005), addressed the problem of applying traditional liability rules for distribution of copyrighted material to decentralized organizations upon which traditional liability theories were difficult to impose, but whose effects on the infringed materials could not be readily overstated. The Court’s opinion, taken as a whole, reflects a concern about the issue of over- or under-inclusiveness in rulemaking.

¹⁹⁰ The copying of copyrighted digital material, for example, was recently addressed by Congress via the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006)). For a general overview of the DMCA’s provisions and its problematic application to the protection of software code, see Jacqueline D. Lipton, *IP’s Problem Child: Shifting the Paradigms for Software Protection*, 58 HASTINGS L.J. 205, 235–40 (2006). For some other interesting questions dealing with cyber-wrongs, see Ashleigh Bergeron, Case Note, *Butler v. Adoption Media, LLC: Eradicating Sexual Orientation Discrimination in Cyberspace*, 17 L. & SEXUALITY REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 173, 176–77 (2008) (addressing a choice of law problem as applied to a Web-based adoption services provider that discriminated on the basis of sexual orientation); Michael O. Finnigan, Jr., et al., Comment, *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795 (2007) (addressing a problem of judicial interpretation of “reasonable accommodation” under the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12116, as it applied to an airline’s Web site and its accommodations for the blind).

¹⁹¹ See *supra* Part II.

structures.¹⁹² Bearing these ideas in mind, Congress should amend the Fair Housing Act to include publisher and distributor liability for publishing or distributing discriminatory advertisements online. Explicitly providing liability for distribution and publication online would not only resolve the conflict between the FHA and CDA, but would also provide a firm basis for stating FHA claims against Craigslist-like “cyber bulletin boards” that do exercise some control over the content displayed on their sites.

Providing for ISP distributor liability directly within section 804(c) would clearly establish the contours of that liability for fair housing violations.¹⁹³ Also, distributor liability represents a balanced approach to the problem. Legally defining ISPs as publishers, even in this limited context, actually imposes burdens upon ISPs beyond what a reasonable citizen would expect of them.¹⁹⁴ Publisher liability in tort assumes that the publisher has notice of the content of its publications. It seems that imposing such a burden or expectation on Craigslist-like entities would actually effect the kind of over-deterrence that concerned Congress when it passed the CDA.¹⁹⁵

Distributor liability, by contrast, requires the imposition of a negligence or knowledge standard—only if the distributor knew or had reason to know of the offensive content can the individual or company be held liable for distributing it.¹⁹⁶ One obvious objection to this theory is that distributor liability would expose too many defendants to the possibility of FHA suits. Another might be that exposing ISPs to distributor liability would be a disincentive to the

¹⁹² See *supra* Part III.

¹⁹³ This Note’s proposal is also intellectually “cleaner” than the idea of amending the CDA to establish that ISPs are publishers only in the fair housing context. See Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1495 (2008) (advancing a cogent argument for such an amendment to the CDA). Amending the CDA to redefine ISPs as publishers only in this limited context resolves the conflict between it and the FHA, but it may be intellectually dishonest. The purpose of the CDA was to recognize the practical differences between ISPs and traditional print media, and the small carve out argued for in Collins’s comment would simply ignore those practical differences. See also *infra* Part V.A.2 (further analyzing the contours of this proposal, along with other CDA-amendment proposals).

¹⁹⁴ See generally RESTATEMENT (SECOND) OF TORTS §§ 578, 580B (1977) (declaring that if an individual can legally be defined as a publisher, that person is liable for defamation under a standard that approximates strict liability, though it might be “negligence minus”). This argument assumes that by using the term “publish,” the FHA meant to impose burdens on persons that, under common law principles, could be held liable for publishing documents.

¹⁹⁵ See generally 141 CONG. REC. 22,044–46 (1995) (statements of Reps. Cox and Wyden) (stating that the CDA was not meant to interfere with the robust development of the Internet, but was intended to provide an incentive for ISPs to protect their users from offensive material).

¹⁹⁶ See RESTATEMENT (SECOND) OF TORTS § 581 (1977). At least one commentator has suggested that a rule of negligence ought to apply in the case of cyberspace wrongs other than copyright infringement. See Hylton, *supra* note 186, at 29–36 (explaining the applicability of negligence standards, proximate cause, and last clear chance theories to cyberspace wrongs).

creation of flagging systems by companies like Craigslist. But either objection ignores the fact that the only alternative to imposing distributor liability is to just hope that all ISPs voluntarily exhibit the same responsibility that Craigslist does, even when the state of the law may actually disincentivize them from doing anything at all.

Distributor liability balances the interests of the Internet industry by providing a reasonably applicable standard, while protecting the public from the harms of section 804(c) violations. Merely adding the verb “distributes” to section 804(c)’s list of prohibitions may incur some overbreadth and over-deterrence because a commonsense understanding of the term would encompass far more individuals than distributor liability under tort law.¹⁹⁷ Because of that statutory construction issue, Congress would have to carefully craft new language that incorporates the mental state necessary under tort liability for distribution.

V. OTHER PROPOSALS AND OBJECTIONS

The problem of fair housing online has been a salient one at least since the *Craigslist* case,¹⁹⁸ though it was on the radar a few years before.¹⁹⁹ The CDA’s provision of immunity against publisher liability has also incited some scholarship independent of the concern about fair housing.²⁰⁰ This section first addresses proposals made by other commentators regarding this problem and then responds to some likely objections to this Note’s proposal.

A. Other Proposals

Proposals addressing the conflict between the FHA and the CDA in the commentary can be divided into two broad categories. The first argues that the conflict between the FHA and the CDA can be eliminated through a judicial construction of the CDA that either

¹⁹⁷ That is, a commonsense reading of the word “distribute” doesn’t inhere the common law limits on distributor liability. See OXFORD ENGLISH DICTIONARY vol. IV, at 867 (2d ed. 1989) (defining distribute to mean “deal out or bestow in portions or shares among a number of recipients” or to “spread or disperse abroad through whole space or over a whole surface”). Although imputing the word “distribute” with the common law knowledge requirement would limit its scope, Congress would have to be explicit about that imputation.

¹⁹⁸ Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006), *aff’d*, 519 F.3d 666 (7th Cir. 2008).

¹⁹⁹ See Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (2002).

²⁰⁰ See, e.g., Robert G. Magee & Tae Hee Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 COMM. L. & POL’Y 369, 369 (2007) (arguing that “[n]ews portals should be held to the same standard for defamation liability as traditional print outlets”).

limits the immunity in all contexts or specifically eliminates it in the FHA context. The second category argues that amending the CDA will resolve the problem most efficiently.

1. Reading Immunity Out of the CDA at Least Within the FHA Context

At least two commentators have argued that the apparent conflict between the FHA and the CDA can be resolved by reading immunity out of section 230(c)(1).²⁰¹ One commentator argues that, because the CDA does not explicitly state that it overrides the FHA's advertising provision, the courts must give effect to both statutes.²⁰² The argument rests on the foundation that repeals by implication are disfavored, and that the baseline purposes of the two Acts may coincide without contravening or effectively eliminating each other.²⁰³ Although the commentator convincingly proceeds to explain those assumptions and their validity, no courts have followed her theory.

Another commentator suggests that because Congress's goal in passing the CDA was protection, and because the language of the statute repeatedly uses the words "protection for blocking and screening," the statute was only intended to provide immunity for removal, rather than immunity for doing anything or nothing at all.²⁰⁴ The argument has some support in the legislative history and some in the statutory text. Indeed, the proposal adeptly balances the interests that Congress articulated in its deliberations concerning the CDA.²⁰⁵ Nonetheless, it has not been endorsed by any court.

2. Amending the CDA

After the well-explained and concededly logical pleas to interpret the CDA's immunity provision fell on the courts' deaf ears, a new round of commentary focused on amending the CDA to either

²⁰¹ See Chang, *supra* note 199, at 1011; Kurth, *supra* note 102, at 835.

²⁰² See Chang, *supra* note 199, at 1011 (arguing that "[e]nforcing the FHA's advertising provisions against [ISPs] would not contravene § 230's principal goal of removing disincentives to the private monitoring of online indecency," nor would it contravene other concerns identified by courts, such as the "chilling of legitimate speech [or] the imposition of an impossible burden on [ISPs]").

²⁰³ See *id.* (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)).

²⁰⁴ See Kurth, *supra* note 102, at 835.

²⁰⁵ See 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (explaining that his amendment protects ISPs from liability while encouraging them to combat the perceived Internet obscenity problem); see also *supra* Part I.B (discussing the factual backdrop leading to passage of the CDA and explaining the CDA's immunity grant).

preclude immunity or expressly provide for it.²⁰⁶ One commentator provides a theory for revision, arguing that section 230(c)(1) should be rewritten to expressly allow suits against ISPs for violations of the Fair Housing Act.²⁰⁷ While the revision is narrow and specific, it assumes that the FHA's advertising provision is the only one worth saving, even though other civil rights statutes contain similar provisions.²⁰⁸ This Note's proposal similarly would only affect claims under the FHA, but it does so by specifically amending the thwarted legislation, rather than by amending the CDA, which applies to all suits brought against ISPs.

Another suggested revision for protecting ISPs from suit, both in the FHA context and other publisher liability contexts, centers around altering the language in section 203(c)(1) concerning development of content.²⁰⁹ The proposal would resolve some ambiguity in the text of section 230(c)(1), but it would also likely eliminate the possibility of asserting FHA claims. The suggestion is that to eliminate ambiguity, Congress should strike out "development" from the CDA altogether and broaden the immunity.²¹⁰ The commentator concedes, however,

²⁰⁶ See Collins, *supra* note 193, at 1495 (proposing an amendment that would end ISP immunity for discriminatory online housing advertisements while maintaining immunity for other types of content that may be harder to identify); J. Andrew Crossett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195 (2008) (furthering no exact claim, but explaining that Congress should clarify the discrepancy between the CDA and FHA through legislation); see also Eric Weslander, Case Comment, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry* [Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)], 48 WASHBURN L.J. 267, 298 (2008) (explaining that an amendment to the CDA would solve the ambiguity problem and arguing that Congress should "consider a creative way to balance the interests of individuals against the interests of the Internet industry," and ultimately effectuate unquestionably broad immunity for Internet intermediaries). Weslander suggests that the distinction between the two leading cases on this issue—*Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) and *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc)—is not factual, but based upon the two courts differing interpretations of the CDA. See Weslander, *supra*, at 294–95 (disagreeing with the 9th Circuit's interpretation of the term "development"). While the results of the two cases might suggest a circuit split because their analyses are not identical, the factual dissimilarity between the defendants' roles as content developers likely explains the difference in the results.

²⁰⁷ See Collins, *supra* note 193, at 1495.

²⁰⁸ See, e.g., 42 U.S.C. § 2000e-3(b) (2006) (prohibiting "any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination").

²⁰⁹ See Weslander, *supra* note 206, at 297–98 (arguing that the decision in *Roommates.com*, 521 F.3d 1157, creates a need to revise section 230(c)(1), and that the development concept within the statute must be reexamined to effectuate congressional intent).

²¹⁰ See *id.* at 297 (arguing that "Congress should at a minimum strike the words 'or development' and 'in whole or in part' from the definition of information content provider in § 230").

that if Congress determines that section 230(c)(1) immunity actually goes too far, a different approach is warranted.²¹¹

*B. General Objections to ISP Liability in this Context*²¹²

1. Slippery Slopes

Whenever new technologies or new problems arise, proposals for imposing restrictions on actors or conduct are almost always met with slippery slope objections.²¹³ In this context, the slippery slope arguments might squarely address section 804(c) and similar speech statutes or they might address the application of legal burdens to the Web hosts at issue in the context of this Note. The slippery slope arguments applying to the advertising provision itself are plain First Amendment-protectionist arguments.²¹⁴ The argument proceeds to say that regulating against ISP liability would inevitably lead to regulation “for every form of potentially regulated content and, indeed, for all content as to which liability might be imposed.”²¹⁵ While reading the CDA differently might lead down that slippery slope, it is not clear that specifically amending section 804(c) would do the same. Of course, the fact that this Note suggests an expansion of liability in an existing statute might be an example of falling down the slippery slope that section 804(c) itself created. But this proposal does not greatly expand the provisions of the FHA’s advertising provision. Rather, it finally accounts for the technological changes that may be pushing section 804(c) into obsolescence.

2. First Amendment Problems

The First Amendment concerns often lodged against section 804(c) have not been well taken by the courts.²¹⁶ A renter or seller

²¹¹ See *id.* at 298 (explaining that “Congress should take note of Chief Judge Kozinski’s statement that the Internet is no longer in danger of being ‘smothered in the cradle,’” and that perhaps an alternative approach would better effectuate congressional goals).

²¹² Another fairly simple argument is the “floodgates” argument, which is easily set forth in the context of this Note’s proposal for creating inroads for liability. The argument does not deserve too much consideration, however, given the dearth of litigation on the issue.

²¹³ For helpful background on slippery slope arguments, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (explaining slippery slope inefficiencies, and generally addressing the causes and effects of the slippery slope).

²¹⁴ See *infra* Part V.B.2.

²¹⁵ Kurth, *supra* note 102, at 831–32 (quoting Brief for Amazon.com, Inc. et al. as Amici Curiae Supporting Defendant at 11, Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 881 (N.D. Ill. 2006) (No. 06-0657)) (internal quotation marks omitted).

²¹⁶ See, e.g., *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) (explaining that section 804(c) regulates purely commercial advertising and therefore does not unconstitutionally limit First Amendment freedom of expression).

may still express, in editorial fashion, that she disagrees with the Fair Housing Act and that she believes in a strict segregationist society. She is also not limited in her ability to say, "I hate [FHA-protected minority group]." She is actually prohibited only from making or causing to be made a notice, advertisement, or statement that would tend to indicate to a protected person that they should not apply either to rent or buy her property.²¹⁷ The advertising provision does not prevent a newspaper or an individual from expressing racist thoughts as a general matter, as it does not amount to a general hate speech prohibition.²¹⁸ Section 804(c) "merely" prohibits invidious discrimination in the housing marketplace.²¹⁹ Nonetheless, section 804(c) "is undeniably, in this narrow context, a content-based speech restriction."²²⁰ To that extent, the provision could be subject to strict scrutiny—a test that the provision likely would not satisfy²²¹—but it is likely exempted from that scrutiny because it only amounts to a restriction on commercial speech.²²² In the commercial speech area, the contours of First Amendment protection are quite limited, and, aside from applying section 804(c) to individuals otherwise exempted under section 804(b), the FHA's fair advertising provision likely survives constitutional inquiry.²²³

²¹⁷ See 42 U.S.C. § 3604(c) (2006).

²¹⁸ The fact that the FHA likely deters hate speech—and has, perhaps, a "chilling effect"—is probably a welcome result in the eyes of the FHA's supporters, though it may be that the chilling effect has some constitutional force in a slippery slope argument against general hate speech legislation. See, e.g., Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 246 (1996) (arguing that speech regulation can only lead to impermissible governmental intrusions, and explaining that in a world with speech regulation, "we must rely for our intellectual liberty on the wisdom, knowledge, moderation and good judgment of politicians"). *Contra* Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 877–79 (1998) (disagreeing with Gey, and arguing that "[i]n some respects, the hate-speech controversy is the *Plessy v. Ferguson* of our age," that indignity injuries are constitutional injuries under the Fourteenth Amendment that must be balanced against perceived First Amendment injuries, and that the real question for Congress and for the courts is "which interest is more morally significant" (footnote omitted)).

²¹⁹ But see generally Schwemm, *supra* note 36, at 284–90 (comparing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and explaining that section 804(c) likely falls within the *R.A.V.* category of constitutionally prohibited restriction of expression, rather than the *Mitchell* category of penalty enhancement based on insidious racial or other bias motivating otherwise illegal conduct).

²²⁰ Schwemm, *supra* note 36, at 268.

²²¹ See *id.* (explaining that section 804(c) "would ordinarily be subjected to the highest level of judicial scrutiny in a challenge based on the First Amendment, a level of scrutiny § 3604(c) would probably be unable to satisfy" but that section 804(c) should instead be analyzed under the "commercial speech" doctrine).

²²² See generally *id.* at 268–78 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)) (explaining that section 804(c) should be analyzed under the *Central Hudson* test and that it would survive such a challenge).

²²³ See generally *id.* at 267–93 (explaining in great detail the various First Amendment doctrines that could apply to section 804(c)). In his discussion of the First Amendment and section 804(c), Robert G. Schwemm observes:

3. Congress Should Regulate the Internet Only with Extreme Caution/the Internet is Different

Some scholars argue that the Internet ought to be treated with extreme caution by rule makers.²²⁴ The argument is that, because the medium is so different from anything we have seen before, applying what they might call “tired” rules of liability and decision would frustrate growth in cyberspace. Underlying this perspective is the assumption that there is some ideal set of rules that will spring up organically as the Internet develops. However, the theory has a major logical flaw that connotes a slippery slope problem: if we are still waiting for these rules to form themselves after nearly two decades of extensive development of the Internet and in cyberspace, then when does the waiting end? Waiting for universal truths to spring up and explain what legal rules ought to be employed presupposes that Internet communication is *sui generis*. Attempting to approach new technologies and media unsaddled by the baggage of old ones may allow us to fully understand the new media’s possibilities and liberties of expression, as Marshall McLuhan would argue.²²⁵ Forgetting the slow-changing nature of the media’s basic purposes and roles,²²⁶ however, will prevent us from addressing serious societal harms in reasonable ways. While a truly unsaddled view might lead to the springing-up of rules naturally applicable to the Internet’s big players, it is possible to refashion traditional rules to suit the needs of the newest technologies. Finally, as the Internet continues to develop

First Amendment challenge is only a concern in those few situations where the discriminatory statement is made by an FHA-exempt housing provider and involves non-racial discrimination not covered by the FHA or any other fair housing law, because it is only in those situations that the speech would be unregulatable under the commercial speech doctrine.

Id. at 289. That is, the only parties affected by section 804(c) that might be able to raise a First Amendment defense are those protected under the “Mrs. Murphy” exceptions. One could argue that, because the Internet is a special new space, even broader First Amendment protections should inhere. As is explained in the next sub-part, however, Internet exceptionalism should only be taken so far.

²²⁴ See generally Post, *supra* note 158 (discussing the development of Internet technologies and ultimately rejecting the view that traditional rules may be fashioned to apply to those technologies).

²²⁵ See MCLUHAN & FIORE, *supra* note 155, at 74–75 (discussing the “rear-view mirror” problem where society looks at new media through the lens of the old).

²²⁶ See *supra* Part III.B (discussing the Dog Poop Girl anecdote and arguing that Internet media also “work us over completely,” MCLUHAN & FIORE, *supra* note 155 at 26, just as traditional media do).

and replace traditional media, avoiding the need to regulate it will become impossible.²²⁷

CONCLUSION

Returning to the opening song, this Note could not express a more opposing view to the one espoused by *Everyone's a Little Bit Racist*.²²⁸ Rather than approach the polemic of hate speech from the semi-laissez-faire perspective that harmony will be achieved by just getting over it and accepting it as embedded in the fabric of our society, society should defy the construction of discursive structures that reinforce tired stereotypes and racial stigmas. Prohibiting the use of noxious language—at least in the limited commercial context subject to government regulation—combats the injurious effects of racial caricaturization.

To achieve this end, the FHA's advertising provision must be saved from evisceration by the increasing development of the Internet coupled with the immunity provided to ISPs under the CDA. Although other commentators have suggested attempting to read the immunity out of the CDA or simply redrafting the immunity provisions, these solutions are not enough. On the contrary, amending the FHA to include publisher and distributor liability for discriminatory advertisements either published or distributed by ISPs is the only way to truly ensure that the advertising provision will not become a dead letter in the digital age.

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²²⁷ See, e.g., Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 250 (2005) (arguing that "specific characteristics of the Internet make intermediary liability relatively more attractive than it has been in traditional offline contexts because of the ease of identifying intermediaries, the relative ease of intermediary monitoring of end users, and the relative difficulty of directly regulating the conduct of end users").

²²⁸ AVENUE Q, *supra* note 1.

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