

WHAT'S WRONG WITH MY NATIVITY SCENE?:
RELIGIOUSLY DISCRIMINATORY RESTRICTIVE
COVENANTS IN NEW YORK

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I. INTRODUCTION

If a person cannot place a sukkah hut¹ on their front lawn, where can they put it? Religious symbols are important in many belief systems. Often these symbols are prominently displayed on residential properties, especially around important holidays. In order to eliminate the display of religious symbols, property associations have privately imposed restrictive covenants on what property owners may display outside their homes.² New York Senate Bill 2222 (hereinafter, the “Religious Symbol Bill”) seeks to eliminate restrictive covenants on seasonal religious symbols as against public policy in order to preserve religious freedom.³ The bill has grown old on the legislative shelf,⁴ and the time to enact is now, while the lawmaking eye is still focused on protecting religious freedom in this manner.

First, this article will describe the unique history of restrictive covenants, religious symbols, and the background of this bill. Next, this article will analyze New York’s current legislative scheme regarding discriminatory covenants and determine whether new legislation is necessary. Lastly, this article will explore the Fair Housing Act and whether this federal scheme effectively deals with the issue of religiously discriminatory covenants on religious symbols.

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1. A sukkah hut is a small hut constructed by Jewish people to celebrate the holiday of Sukkot. Herbert Levine, *The Symbolic Sukkah in Psalms*, 7 PROOFTEXTS 259 (September 1987).

2. S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011).

3. *Id.*

4. The Religious Symbol Bill was introduced January 18, 2011. *Id.* No action has been taken since the bill’s introduction. *Id.*

II. BACKGROUND

Historically, restrictive covenants have been used to minimize neighbor conflicts, allowing the original promising parties to contract regarding the use of the land.⁵ Subsequently, restrictive covenants were imposed in a discriminatory manner.⁶ The recent restrictive covenants barring religious symbols may be discriminatory because the limitations force individuals to refrain from displaying religious items on their lawn. The Religious Symbol Bill seeks to void those covenants in order to protect the religious freedom of property owners.⁷

A. Restrictive Covenants

Restrictive covenants are “written promises that run with the land.”⁸ These covenants are generally disfavored because they restrict alienation of the land.⁹ Thus, courts strictly construe these types of covenants and resolve doubts in favor of voiding restrictions.¹⁰ Restrictive covenants are desirable to landowners because the written limitations may increase the value of the land.¹¹ While

5. PROPERTY 848 (Jesse Dukeminier et al. eds., Aspen Publishers, 7th ed. 2010).

6. See William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 *FORDHAM URB. L. J.* 197, 215 (1999) (There is no “doubt about the utilization of restrictive covenants to accomplish discrimination on ethnic and religious grounds.”).

7. S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011).

8. 1 Zoning and Land Use Controls (MB) § 1.03. This article will assume that the restrictive covenants are valid as to the requirement of running with the land.

9. 12B-33 Purchase and Sale of Real Property (MB) § 34.04; Richard R. Powell, 9 *POWELL ON REAL PROPERTY* (MB) § 60.05.

10. Purchase and Sale of Real Property, *supra* note 9, at § 34.04; J. David Breemer, *Hiner v. Hoffman: Strict Construction of a Common Restrictive Covenant*, 22 *HAWAII L. REV.* 621, 626 (Summer 2000) (Although most courts apply a strict construction analysis, some jurisdictions have abandoned this method of interpretation.).

11. The value of property may be increased by “[p]rotecting a property owner against undesirable or improper use of adjoining or nearby lots that would depreciate the value of his or her property; [p]reserving the property’s natural beauty; [p]reventing the erection of poorly designed or constructed improvements; [a]llowing the construction of improvements economically compatible with other improvements situated in the development; [p]romoting a harmonious color or

some restrictions serve useful purposes,¹² other restrictions may restrain alienation too much or discriminate against a certain group of people.¹³ Therefore, courts, often with statutory support, deem these restrictive covenants void as against public policy.¹⁴

Typically, state law determines which restrictive covenants are enforceable.¹⁵ However, in *Shelley v. Kraemer*, the United States Supreme Court mandated that individual state courts void racially discriminatory covenants because the covenants denied individuals equal protection under the laws.¹⁶ Since the Supreme Court decided *Shelley* under the Fourteenth Amendment,¹⁷ the argument may extend to religiously discriminatory covenants because the Fourteenth Amendment has been used to incorporate the Bill of Rights against the states.¹⁸ The Bill of Rights, specifically the First Amendment,¹⁹ guarantees the right to the free exercise of religion.²⁰ Despite a possible federal ban, numerous states have enacted legislation to void restrictive covenants that discriminate on the basis of religion, in addition to restricting other types of discriminatory covenants.²¹

design scheme; [m]aintaining adequate building setback lines; and [p]rohibiting certain uses that residents would find offensive.” Powell, *supra* note 9, at § P8.01.

12. Property issues that may be addressed by restrictive covenants include size of the home, type of utilities used, existence of pools, ability to discharge firearms, type and size of fences, kind of pets allowed, and payment of homeowner’s association assessments. Powell, *supra* note 9, at § P8.01.

13. Powell, *supra* note 9, at § P8.01.

14. Russell J. Davis, 43A NY JUR. DEEDS § 123 (2011) (“Such a restriction is wholly unenforceable and cannot constitute a defense in any action, suit, or proceeding.”).

15. Wilford Lundberg, Restrictive Covenants and Land Use Control: Private Zoning, 34 MONT. L. REV. 199, 199 (1973).

16. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). For an in-depth analysis of *Shelley v. Kraemer*, see Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (April 2007).

17. *Shelley*, 334 U.S. at 20.

18. Raoul Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 OHIO ST. L.J. 435, 435 (1981).

19. U.S. CONST. amend. I, cl. 2 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

20. The First Amendment was incorporated against the states. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

21. Cal. Civ. Code § 1352.5 (Deering 1999) (“No declaration or other governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code,” which prohibits discrimination against a person because of, among other categories, religion.); Ga. Code Ann. § 44-5-60 (1962) (“No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.”); Haw. Rev.

In New York, restrictive covenants were widely used to discriminate against people based on religion.²² In fact, “[r]eligiously restrictive covenants were used to shape local demographics long after the original [religious] establishments were discontinued.”²³ In the suburban areas of New York, “[r]estrictive covenants were a second legal device for keeping Jews, Catholics and Blacks out of communities.”²⁴ Another property law instrument used for discriminatory purposes was zoning ordinances.²⁵ Although many of the zoning ordinances remained in effect, New York courts banned discriminatory restrictive covenants in 1949 in response to the United States Supreme Court’s ruling in *Shelley*.²⁶

Despite such a ban, there are still impediments to religious freedom regarding residential property.²⁷ Today, neutral zoning laws still have discriminatory impact on religious structures on residential property.²⁸ Additionally, many courts will not treat covenants regarding religious uses differently from other restrictions.²⁹ Therefore, the historical religious biases have continued to the present although discrimination is ostensibly banned.

Stat. Ann. § 515-6 (LexisNexis 1967) (“Every provision in an oral agreement or a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection, is void.”); Mass. Ann. Laws ch. 184, § 23B (LexisNexis 1969) (“A provision in an instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, color, religion, national origin or sex shall be void.”); Minn. Stat. § 507.18 (1953) (“No written instrument hereafter made, relating to or affecting real estate, shall contain any provision against conveying, mortgaging, encumbering, or leasing any real estate to any person of a specified religious faith, creed, race or color, nor shall any such written instrument contain any provision of any kind or character discriminating against any class of persons because of their religious faith, creed, race or color.”).

22. Nelson & Williams, *supra* note 6, at 215.

23. Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 166 (2005).

24. Nelson & Williams, *supra* note 6, at 215.

25. In New York, zoning laws were also utilized to discriminate through 1956. William E. Nelson, *The Changing Meaning of Equality in Twentieth Century Constitutional Law*, 52 WASH & LEE L. REV. 3, 43-44 (1995).

26. Nelson & Williams, *supra* note 6, at 221.

27. Angella C. Carmella, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37(3) J. OF CHURCH AND STATE 573, fn. 47 (1995), available at <http://jcs.oxfordjournals.org/content/37/3/573.full.pdf>.

28. *Id.*

29. Powell, *supra* note 9, at § 60.01.

B. Religious Symbols

The Religious Symbol Bill seeks to foster religious freedom by allowing the display of religious symbols on residential property.³⁰ Some disagree with the premise of the bill and argue that limitations on the display of religious symbols are desirable because the restrictions encourage diversity.³¹ Despite concerns about religious diversity, religious symbols are necessary or recommended in many belief systems, especially around important holidays. Therefore, the policy concerns of promoting religious freedom should be weighed against concerns of religious heterogeneity.

Religious symbols may be detrimental to society because societal markers, such as religious symbols, diminish diversity. Adam M. Samaha, Assistant Professor at University of Chicago Law School, argues that publicly displayed religious symbols “could be roughly accurate representations of community character and therefore helpful warnings or welcome signs.”³² Therefore, religious symbols may decrease religious diversity by displaying privately held beliefs.³³ Samaha further discusses the concern as “people judging the religious character of a community and then sorting themselves accordingly.”³⁴ The danger of religious symbols is a reduction in religious diversity in communities and neighborhoods.

A counterbalance to the danger of religious homogeneity is the importance of religious symbols. Many religions use religious symbols in holiday celebrations.³⁵ As previously mentioned above, followers of Judaism erect sukkah huts to celebrate the holiday of Sukkot.³⁶ On this nine-day holiday, it is commanded by God to live outside in the sukkah hut so that the Jewish people may be reminded of when the Israelites were exiled in Egypt.³⁷ Another ex-

30. S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011).

31. Samaha, *supra* note 23, at 139.

32. *Id.* (Samaha centers his discussion around religious symbols in public places).

33. *Id.* at 151.

34. *Id.* at 144.

35. Michael W. McConnell, Religious Participation in Public Programs: Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115,163 (Winter, 1992).

36. Joel Lurie Grishaver, SUKKOT AND SIMHOT TORAH 3 (Torah Aura Productions 1987).

37. *Id.* at 3-6; Bob Aaron, *Religious Freedom Trumps Condo Rules*, THE STAR, July 17, 2004, <http://www.aaron.ca/columns/2004-07-17.htm>. *But see*, Sheldon Gordon, *Canada's Court Weighs Religious Freedom*, FORWARD, Jan. 23, 2004,

ample of a seasonal religious symbol is a nativity scene. While Christians are not commanded to erect a nativity scene, they place great symbolic value on the display.³⁸ Additionally, the Lantern Festival, a holiday in Eastern cultures and the Taoist religion, is celebrated by prominently displaying lanterns.³⁹ Therefore, although displaying religious symbols may decrease diversity, residents have a significant interest in displaying these symbols as integral parts of their religion.

The true importance of symbols lies not in what religion encourages or mandates but in the hearts and minds of individuals. In New York City, Zev Geller, a Jewish man, built a sukkah hut on his terrace outside his condominium.⁴⁰ His neighbor filed suit in order to force Geller to remove the religious symbol.⁴¹ Geller commented, "I'm literally just a Jewish person living in New York City, but I guess my neighbor doesn't like that."⁴² Clearly, the display of the sukkah hut held great personal religious significance to Geller. The inability to build a sukkah hut would infringe on Geller's freedom of religion. Therefore, the religious significance of displaying religious symbols is a significant counterbalance to the policy of encouraging religious diversity.

C. *The Religious Symbol Bill*

The New York legislature recognized the concern of religious freedom through the display of religious symbols and proposed the Religious Symbol Bill. If the bill were enacted, the legislation would fit into a cohesive property law scheme and would invalidate religiously discriminatory covenants as against public policy. The crux of the bill is as follows:

Certain covenants and restrictions in conveyances and other agreements affecting real property void as against public policy.

<http://forward.com/articles/6192/canada-s-court-weighs-religious-freedom/> (discussing that building a sukkah hut is not a divine commandment).

38. See generally David O. Stewart, *Taking Christ Out of Christmas?*, 69 A.B.A.J. 1832 (December 1983) (presenting evidence that the nativity scene is a strong religious symbol through disputes over separation of church and state).

39. *The Lantern Festival*, CHINA DAILY, last visited March 14, 2012, http://www.chinadaily.com.cn/english/doc/2004-08/09/content_363534.htm.

40. *Tenants Sue Neighbor Over Sukkot*, UNITED PRESS INTERNATIONAL, Feb. 26, 2012, http://www.upi.com/Top_News/US/2012/02/26/Tenants-sue-neighbor-over-sukkot/UPI-51661330309392/.

41. *Id.*

42. *Id.*

Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the freedom of religious expression including the display of temporary or seasonal symbols with religious or heritage significance by the owner, lessee or occupant of the real property, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding.⁴³

The bill arose because property owners associations imposed restrictive covenants on religious symbols in New York.⁴⁴ Sixty million Americans live in communities governed by an owner's association.⁴⁵ An increasing number of these communities are banning the display of religious symbols outside the home and in common areas.⁴⁶ The justification for the bill is to promote religious freedom in these communities and elsewhere.⁴⁷

If enacted, the Religious Symbol Bill would be placed in the New York's "Creation, Definition and Enforcement of Contractual Obligations" section of the laws.⁴⁸ The legislation would complement NY Gen. Oblig. § 5-331,⁴⁹ which regulates discriminatory covenants, promises, and restrictions in real property, and would add greater specificity to the current legislative scheme.⁵⁰

III. CURRENT NEW YORK LEGISLATION

The present state of legislation in New York does not expressly prohibit a restrictive covenant prohibiting the display of religious symbols. However, these covenants are indirectly regulated by

43. S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011).

44. "Recently it has become evident that groups such as property owner associations have attempted via the inclusion of restrictive covenants to homebuyers, to limit what people put on their property. Certain religions have their followers place symbols of their faith and religious heritage on their property surrounding their home. This legislation attempts to protect people's religious freedoms and their rituals and practices that go along with actively celebrating their faith. Structures protected by this bill would include outdoor symbols such as nativity sets and sukkah huts." *Id.*

45. Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57, 57 (2010).

46. *Id.*

47. *Id.*

48. *Id.*

49. NY Gen. Oblig. § 5-331 (Consol. 1963).

50. *Id.*

New York's General Law § 5-331.⁵¹ This statute regulates a broad category of covenants by voiding any restrictions that are deemed discriminatory.⁵²

In New York City, an administrative agency enforces fair housing. The New York City Human Rights Commission was created to promote "open housing for New York's racial and ethnic minorities."⁵³ However, the effectiveness of the agency has been criticized because of long delays, case backlogs, lack of funding, and decrease in manpower.⁵⁴ Also, at the administrative hearing, the agency represents the public interest rather than the injured party.⁵⁵ Although New York City is merely a section of New York, the city demonstrates the problem of enforcement. Additionally, the problem may be deeper in the rest of the state.

§5-331 is less successful at regulating discriminatory restrictive covenants than the Religious Symbol Bill. Under a §5-331 claim, a plaintiff would need to prove that the covenant is discriminatory in nature.⁵⁶ In proving discrimination, facially neutral covenant limitations may present an additional proof problem, as discussed below. Further, administrative remedies may be ineffective, if any exist at all. Therefore, the Religious Symbol Bill should fill the holes in the current New York legislation because the bill would effectively regulate religiously discriminatory covenants.

51. *Id.*

52. "Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of race, creed, color, national origin, or ancestry, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding. No such promise, covenant or restriction shall be listed as a valid provision affecting such property in public notices concerning such property." *Id.*

53. Michael H. Schill, Local Enforcement of Laws Prohibiting Discrimination in Housing: the New York City Human Rights Commission, 23 *FORDHAM URB. L.J.* 991, 991 (Summer 1996).

54. *Id.* at 1024.

55. *Id.* at 1025.

56. *Bachman v. State Div. of Human Rights*, 481 N.Y.S.2d 858, 861 (1984). There is no evidence that NY Gen. Oblig. § 5-331 claim would follow the McDonnell Douglas burden-shifting structure as described in the next section.

IV. CURRENT FEDERAL LEGISLATION: THE FAIR HOUSING ACT

Another possible scheme that could regulate religiously restrictive covenants is The Fair Housing Act (FHA).⁵⁷ The FHA is a federal statute which prohibits discrimination based on “race, color, religion, sex, familial status, and national origin”⁵⁸ in the sale or rental of real estate.⁵⁹ The FHA was enacted in 1968 at the culmination of the Civil Rights Movement “as an effort to control the pervasive discrimination in the housing market.”⁶⁰

A. *Scope and Procedural Requirements of the FHA*

First, the FHA’s scope is narrow because the exemptions are expansive. The FHA does not apply to “all buildings with fewer than five housing units provided that the owner lives in the building.”⁶¹ Additionally, the FHA generally does not apply to single-family homes.⁶²

Next, the FHA has a procedural requirement of administrative exhaustion. “Under the Fair Housing Act, once HUD (the United States Department of Housing and Urban Development) determines probable cause exists to believe discrimination [is occurring], the complainant is given the choice of proceeding to an administrative hearing or, instead, opting for judicial review of the claims whereby he or she may receive punitive damages in addition to injunctive relief.”⁶³ Therefore, claims may be held up in the administrative system and cause delay.

The scope and procedural requirements are great obstacles to a claim against the use of covenants prohibiting the display of religious symbols. First, the discriminatory restrictive covenants may apply to single-family homes. These covenants would not be restricted under the FHA. Secondly, administrative exhaustion could take many years at great expense. People may wish to move, rather than wait an extensive amount of time for adjudica-

57. Fair Housing Act, 42 U.S.C. §3601 (1968).

58. *Id.*

59. Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 TEX. J. ON C.L. & C.R. 1, 1 (Fall 2005).

60. Chloe M. Jones, *Religious Accommodation and Housing: Fair Housing after Bloch v. Frischholz*, 75 BROOKLYN L. REV. 1405, 1406-1415 (Summer 2010).

61. Schill, *supra* note 53, at 1017.

62. *Id.*

63. *Id.* at 1025.

tion on the issue. Therefore, many plaintiffs will not be able to bring a claim under the FHA, and those individuals that bring suit will face an administrative exhaustion requirement.

B. *Proving Discrimination*

Although the FHA may effectively regulate discrimination in the housing market, the statute does not sufficiently protect against the situation of restrictive covenants in New York because bringing such a claim is a formidable task. Raising a claim against a covenant prohibiting religious symbols is difficult under the FHA for two reasons: (1) the claim is hard to prove, and (2) the statute permits neutral rules.

First, the claim is difficult to prove under the FHA. In order to prevail on a claim under the FHA, the plaintiff must prove discrimination in one of two ways: by evidencing discriminatory intent or by showing disparate impact.⁶⁴ The proof structure follows the framework set forth in *McDonnell Douglas Corp. v. Green*.⁶⁵ The framework utilizes a burden-shifting method to determine whether discrimination occurred.⁶⁶ First, the plaintiff must prove a prima facie discrimination case.⁶⁷ If proven, the burden shifts to the defendant to evidence a legitimate non-discriminatory reason for the contested action.⁶⁸ The burden then shifts back to the plaintiff to prove that the defendant's alleged reason is merely a pretext for discrimination.⁶⁹ While the *McDonnell Douglas* structure is applied in a variety of anti-discrimination contexts, it may be hard to effectively transpose this burden-shifting structure to ban discrimination through the use of discriminatory covenants.⁷⁰

64. Bloch v. Frischholz, 587 F.3d 771, 784 (7th Cir. 2009).

65. Ring v. First Interstate Mortg., Inc., 984 F.2d 924, 926-927 (8th Cir. 1993). In *McDonnell Douglas*, the plaintiff brought an employment discrimination suit against his employer for failure to rehire the plaintiff after the plaintiff was involved in both legal and illegal protesting during the Civil Rights Movement. 411 U.S. 792, 793-795 (1973). In this case, the United States Supreme Court established the evidentiary standard under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e et seq. *Id.* at 802.

66. William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 216 (Fall 2003) (criticizing the *McDonnell Douglas* structure).

67. *McDonnell Douglas*, 411 U.S. at 802.

68. *Id.*

69. *Id.* at 804-05 ("Petitioner may [perform the action at issue] but only if this criterion is applied alike to members of all races.").

70. *McDonnell Douglas*, 411 U.S. 792, 802-805.

Additionally, in order to prove discriminatory intent in the prima facie case, the claimant will need to provide sufficient evidence of specific prejudicial intent.⁷¹ In *LeBlanc-Sternberg v. Fletcher*, the town reinterpreted a restrictive ordinance to disallow Orthodox Jews from gathering at homes as places of worship.⁷² An association in the town launched a campaign to minimize the number of Orthodox Jews living in town through zoning laws.⁷³ Plaintiffs presented sufficient evidence to support the association's intent.⁷⁴ Therefore, the Second Circuit Court of Appeals determined that the zoning laws were invalid because discriminatory intent was proven.⁷⁵

A different result occurred in *Tien Tao Association, Inc. v. Kingsbridge Park Community Association, Inc.*, where a property owner erected three thirty foot high flagpoles and replaced his backyard grass with limestone tiles in violation of restrictive covenants.⁷⁶ Additionally, the owner was using his residential property as a temple.⁷⁷ The Texas Court of Appeals stated, "[a]lthough such restrictions may have an impact on the manner in which homeowners observe their religions, this does not automatically equate to religious discrimination."⁷⁸ Additionally, the court described the defendant's legitimate non-discriminatory reason as follows: "not to abridge Tien Tao's right to religious freedom, or to exclude Taoist believers from the community, but to abate a nuisance."⁷⁹ The court distinguished *LeBlanc-Sternberg* on the basis that the defendants in *LeBlanc-Sternberg* "deliberately enacted [deed restrictions] as part of an express conspiracy to exclude the plaintiffs from the township."⁸⁰ *Tien Tao* sets the standard of proof particu-

71. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 435 (2d Cir. 1995).

72. *Id.* at 420-21.

73. *Id.* at 418-420.

74. *Id.* at 435.

75. *Id.*

76. 953 S.W.2d 525, 527 (Tex. App. Houston 1st Dist. 1997), reh'g overruled, (Dec. 4, 1997).

77. *Id.* at 527.

78. *Id.* at 532.

79. *Id.*

80. *Id.* But see *Seng supra* note 59, at 7-8 ("[I]f a condominium association pass a rule prohibiting the display of signs or symbols of any kind and a resident desires to display a mezuzah, which is required by Jewish custom, the rule should be illegal under the reasoning of *LeBlanc-Sternberg* if there is no independent religiously neutral reason that would justify the rule.").

larly high.⁸¹ Short of an express conspiracy, discriminatory intent is difficult to prove.⁸²

Proving discrimination under the FHA may also be difficult for a plaintiff challenging a restrictive covenant on outdoor symbols, including religious symbols. A plaintiff in this situation is unlikely to prove an express conspiracy like the situation in *LeBlanc-Sternberg*. In *LeBlanc-Sternberg*, there was smoking gun evidence of discriminatory intent.⁸³ Studies show that “[t]he level of discrimination practiced by participants in the housing market is often extremely difficult to identify and assess.”⁸⁴ Therefore, smoking gun evidence is unlikely. Thus, there is often little proof of discriminatory intent to meet the high standard set forth in *Tien Tao*.⁸⁵

An additional proof hurdle is that impact on a particular religion does not equate to discrimination without further evidence. This principle heightens the standard for proving disparate impact. Further, the defendants may prove a legitimate nondiscriminatory reason by using the nuisance aspect of *Tien Tao* as a sword.⁸⁶ After defendants assert this reason, it may be difficult to prove that this reason is a pretext for discrimination because property owner’s associations have an interest in abating nuisances and creating a certain community atmosphere. The proof standard causes a gap in the FHA that the Religious Symbol Bill would fill, consequently facilitating greater religious protections for property owners.

C. Neutral Rules Under the FHA

Secondly, restrictive covenants are difficult to regulate under the FHA because the statute permits neutral rules. In *Bloch v. Frischholz*, the Seventh Circuit Court of Appeals articulated that neutral rules affecting the freedom of religion were enforceable.⁸⁷ A neutral law of general applicability, “under an equality ration-

81. *Tien Tao*, 953 S.W.2d at 532.

82. *Id.*

83. “[The association] emphasized the need for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community” and made emphatic statements about the goal of keeping Jews out of the community. *LeBlanc-Sternberg*, 67 F.3d at 418.

84. Schill, *supra* note 53, at 993.

85. *Tien Tao*, 953 S.W.2d at 532.

86. *Id.*

87. 533 F.3d 562, 565 (7th Cir. 2008).

ale, causes only mere inconvenience, and is not seen as impeding free exercise.”⁸⁸ Additionally, the mandate that housing providers must “provide non-discriminatory housing in a way that neither favors nor disadvantages the free exercise of religion”⁸⁹ may favor the drafting of neutral rules.

The implementation of neutral rules protects restrictive covenants on religious symbols because the FHA favors neutral rules. An association may impose a covenant on objects placed on residential property without mentioning religious symbols. Although the law would apply to religious symbols, the neutrality would preserve the law and restrain the freedom of religion. The Religious Symbol Bill could look past seemingly neutral covenants and void discriminatory restrictions.

V. THE RELIGIOUS SYMBOL BILL AS A GAP-FILLER

The solution to the shortcomings of New York’s current legislation and the Fair Housing Act is the Religious Symbol Bill. While the Religious Symbol Bill does not revolutionize discrimination regulations, the bill will more efficiently facilitate current principles of religious freedom. The proposed legislation resolves the issues of limited statutory scope, administrative exhaustion, proof problems, and discriminatory neutral rules.

First, the Religious Symbol Bill does not limit the scope of protection. Likewise, the current New York legislation does not restrict its statutory reach,⁹⁰ but the FHA severely limits the scope of protection.⁹¹ The Religious Symbol Bill applies universally to all property covenants.⁹² The broad reach of the bill will ensure greater religious protection by reaching more individuals.

Next, under the Religious Symbol Bill, the proof required to void the covenant by showing discrimination is minimal. The plaintiff needs to show that there is a restrictive covenant that prohibits the display of religious symbols.⁹³ The claimant does not

88. Carmella, *supra* note 27 (citing *Elsaesser v. City of Hamilton*, 573 N.E.2d 733 (Ohio App. 1990)).

89. Jones, *supra* note 60, at 1406.

90. NY Gen. Oblig. § 5-331 (Consol. 1963).

91. Fair Housing Act, 42 U.S.C. §3601 (1968).

92. S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011).

93. “Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the freedom of religious expression including the display of tem-

need to show specific evidence of discrimination or discriminatory intent, but, rather, the claimant must merely show that such a restrictive covenant barring religious symbols exists. This scheme provides strict liability for restrictive covenants that limit the display of religious symbols.

Additionally, the Religious Symbol Bill also circumvents the neutral rule standard by regarding all covenants banning such symbols as void regardless of facial neutrality. Under this bill, even if the restrictive covenant seems neutral, the covenant is void as it pertains to religious symbols. Thus, plaintiffs will not need to overcome the neutral rule standard with a great amount of evidence, as under the current New York legislation and the FHA.

However, certain additions and clarifications to the Religious Symbol Bill would produce more effective legislation. First, the bill could affirmatively avoid the proof problem by specifying exactly what evidence would be necessary to invalidate a restrictive covenant. Secondly, the plan should account for actual nuisances that do not reasonably promote religious freedom. The bill could accomplish this by adding a clause that the religious symbol must be associated with or encouraged by an established religion. Even if the bill was passed without these changes, the judiciary is likely to work out these minor issues.

V. CONCLUSION

The current legislation, both federal and state, does not adequately void covenants against religious symbols. Therefore, the Religious Symbol Bill is vital to protecting the religious freedom of property owners. The most effective way to preserve this right is to enact this legislation. If the New York legislature continues to push this bill aside, they will miss the opportunity to offer greater religious protections.

porary or seasonal symbols with religious or heritage significance by the owner, lessee or occupant of the real property, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding." *Id.*