It's a fairly standard advertisement. But for years, many scholars and lawyers have thought it constitutes illegal sex discrimination under the Fair Housing Act. In *Fair Housing Council v. roommate.com*, a recent opinion by Alex Kozinski and joined by Stephen Reinhardt (so there's your first surprise), the 9th Circuit has said that such ads are permissible.

I realize that this isn't strictly an environmental question, but the case is interesting for the creative moves it makes on statutory interpretation, and in any event, I'm assuming that lots of Legal Planet readers either teach Property or deal with property law in their practices, so it might of interest to our readers.

The problem actually serves as a hypothetical in the Dukeminier casebook: is it a violation to advertise for a "female roommate"? Students frequently rebel against the standard answer: yes. So did the 9th Circuit, and here is its chain of reasoning:

1) The FHA forbids discrimination "with respect to the sale or rental of a dwelling"; so what is a "dwelling"?
2) The opinion says that the FHA "stops at the apartment door", essentially meaning that a "dwelling" means any individual's unit, be it one room of an apartment, or even one chunk of a bunk bed. Thus, if you say you only want a female roommate, that's not discriminating with respect to a "dwelling" because she might be in another room or another part of the bunk.
3) Is this forced? Yes, the Court concedes. But:
4) There is no way that Congress could have intended anything else. The Court noted that the language was adopted in 1968: "Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s."

And moreover:
5) We know that the judiciary should construe statutes to avoid constitutional implications, and
6) Citing (*inter alia*) *Lawrence v. Texas*, the opinion says that forcing, say, women and men to share living quarters would risk running afoul of the right to "initimate association" (although it doesn't cite my colleague Ken Karst's seminal piece on the matter.) So
7) They will adopt this construction of the statute to avoid constitutional problems, and thus one can discriminate.

In short: so much for textualism (yet again!). And from that well-known left-wing judicial activist, Alex Kozinski. More seriously, this was a Court that was trying to do what judges

should do: construe statutes in such a way as to avoid absurdities and maintain important policies enacted by the Legislature. It resisted the formalist temptation to look at plain language divorced from context. We can only wish that, say, the California Supreme Court in the redevelopment case had done the same.

Pop quiz: What if someone then advertises for a white roommate, or a Christian roommate? That is still illegal. But do you know why?

Ponder this over the weekend. And have a good one.