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CONGRESS, THE COURTS, AND CIVIL RIGHTS:
THE FAIR HOUSING ACT OF 1968 REVISITED

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I. INTRODUCTION

A CCORDING TO STATISTICS compiled by the Bureau of
the Census for 1978, a majority of the black households in the
United States do not own their own homes,1 while more than two-
thirds of white households do.2 Of the black households which
rent their homes, almost a third report signs of rats or mice.3
Twenty percent of the black households which rent have open
cracks or holes in their interior walls,4 and have abandoned build-
ings on their streets.5 Almost seven percent of all black house-
holds—both renters and homeowners—lack plumbing facilities.6
More than eight percent of black households which rent have holes

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1. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, ANNUAL HOUSING
SURVEY: 1978 Part B, at 12 (1981). The exact percentage is 44%. Id.

2. Id. Sixty-eight percent of all white households own their own homes.

3. Id. at 12. This percentage is 32.69%. Id. On the other hand, only
13% of white households which rent their homes reported signs of rats or
mice. Id. at 3.

4. Id. at 14. The exact percentage is 20.64%. Id. On the other hand,
only 9.59% of white households which rent report similar cracks or holes. Id.
at 5.

5. Id. at 12. The exact percentage is 20.38%. Id. Only 4.49% of white
households which rent report abandoned buildings on their streets. Id. at 3.

6. Id. at 11. The exact percentage is 6.99%. Id. The corresponding
percentage for all white households is 1.8%. Id. at 2.
in their floors, and more than five percent have exposed wiring in their homes.

Such housing conditions should not be countenanced in a democratic society that professes to be responsive to the most fundamental needs of its people. Yet they persist primarily because of housing discrimination and segregation. The United States Congress and the federal courts have sought to fight discrimination and segregation in the housing market through Title VIII of the Civil Rights Act of 1968 (Title VIII), commonly referred to as the Fair Housing Act of 1968. This article will analyze that Act. Part II of the article examines the legislative history of the Fair Housing Act and, contrary to conventional thinking, argues that the Act would not have been forthcoming without the initiative and leadership of President Lyndon B. Johnson. Part III critically analyzes the provisions of Title VIII and makes recommendations for change. Part IV assesses how the federal courts have interpreted two of the most important provisions of Title VIII, those relating to blockbusting and racial steering.

II. THE LEGISLATIVE HISTORY OF TITLE VIII: PRESIDENTIAL LEADERSHIP AND CONGRESSIONAL INDIFFERENCE

Since the late 1950’s, the United States Congress has had too few liberal critics of its role in promoting civil rights. For ex-

7. Id. at 14. The exact figure is 8.53%. Id. The corresponding percentage for white households which rent is 2.78%. Id. at 5.

8. Id. at 13. The exact figure is 5.39%. Id. On the other hand, 3.84% of white households which rent report exposed wiring. Id. at 4.


11. See notes 14-73 and accompanying text infra.

12. See notes 74-169 and accompanying text infra.

13. See notes 172-295 and accompanying text infra.

ample, Gary Orfield, a well-known authority on both civil rights and Congress,\textsuperscript{15} acknowledges that Congress was a "graveyard for civil rights during the eight decades between 1875 and 1957."\textsuperscript{16} However, he maintains that the congressional initiative in passing the Civil Rights Acts of 1957\textsuperscript{17} and 1964\textsuperscript{18} was instrumental to those enactments, and that Congress even went significantly beyond President John F. Kennedy's proposals to strengthen the 1964 Act.\textsuperscript{19}

Some commentators disagree with Orfield's view that Congress has exercised a leadership role in promoting civil rights.\textsuperscript{20} More troubling, however, is Orfield's argument that Congress has been a proponent of laws to guarantee fair housing.\textsuperscript{21} For example, Orfield asserts that, two years prior to the passage of the Fair Housing Act of 1968, "there was a majority in each house in favor of fair-housing legislation" even though open housing was "an idea still considered suspect by much of the public."\textsuperscript{22} According to Orfield:


16. \textit{CONGRESSIONAL POWER, supra note 15, at 63.}


19. \textit{CONGRESSIONAL POWER, supra note 15, at 64-65.}


21. For the views of other critics of Orfield's views, see generally Mitchell, \textit{supra note 14}; \textit{The Federal Fair Housing Requirements, supra note 14.}

Congress took the initiative on civil rights in 1968—an initiative it would hold throughout the next several years . . . . Against the advice of . . . President [Johnson,] the Justice Department, and virtually all knowledgeable observers, a small group of Senate civil rights leaders began to fight to enact a broad federal fair-housing law as an amendment to the House [1968 Civil Rights] bill. With the support of the Democratic leadership and the active work of young Republican progressives, civil rights forces finally won an arduous battle that involved no less than four successive cloture votes. The President played no significant role in the process . . . .\(^23\)

This portrayal of congressional leadership in fair housing is misleading. To be sure, many liberal congressmen from both political parties have periodically voiced substantial concern over housing discrimination. Nonetheless, Congress, as an institution, is a highly unlikely body to provide the type of leadership and direction necessary to overcome discriminatory housing practices and residential segregation. Congress lacks the centralized nature of the executive branch. Its diverse membership prevents it from speaking with one voice on any issue, and its size slows the decision-making process considerably. The potential for congressional leadership in the area of housing desegregation is further undermined by the susceptibility of representatives and senators to pressures from constituents and special interest groups opposed to open housing. Such pressures resulted in the congressional failure to pass the Fair Housing Amendment Acts of 1979 and 1980,\(^24\) and in the patent inadequacies in the Home Mortgage Disclosure Act of

\(^{23}\)\textit{CONGRESSIONAL POWER}, \textit{supra} note 15, at 69-70. In another of his works, Orfield similarly singled out Congress' role in the Fair Housing Act breakthrough, again neglecting to give any credit to President Johnson. \textit{See MUST WE BUS?}, \textit{supra} note 15, at 85.

\(^{24}\) The Fair Housing Amendments Acts of 1979 and 1980 would have substantially increased the fair housing enforcement powers of the Department of Housing and Urban Development, would have considerably enlarged the circumstances in which the Department of Justice could initiate litigation under Title VIII, and would have widened and made more flexible the remedies available to aggrieved persons. \textit{See generally Fair Housing Amendments Act of 1979: Hearings on S. 506 Before the Senate Subcomm. on the Constitution of the Comm. of the Judiciary, 96th Cong., 1st Sess. (1979) [hereinafter cited as Senate Hearings].} For the story of the final defeat of this bill, the most important piece of civil rights legislation of the 1970's, see Tolchin, \textit{Bill to Strengthen Fair Housing Act Killed as Senate Cloture Vote Fails}, \textit{N.Y. Times}, Dec. 10, 1980, at B8, col. 3.
1975 and the Housing and Community Development Act of 1974.

Until an anxious President Johnson and a largely reluctant Congress joined forces to pass Title VIII of the Civil Rights Act of 1968, the federal government had rarely taken noteworthy steps toward the goal of achieving equal housing opportunity. Because of lingering resistance to housing desegregation, the federal government has never supplanted state or local authority with regard to fair housing as it has in the field of voting rights. For a review of the supplanting of state and local power in the area of voting rights, see C. Hamilton, supra note 14, at 70-87. H. Rodgers & C. Bullock, supra note 20, at 15-49, 157. As President Carter's first Secretary for Housing and Urban Development, Patricia Harris, stated:

"[I]n the last 10 years we have had experience with areas of elimination of discrimination, for example, voting rights discrimination, where we have had clear enforcement powers and where success has been clear. We have had to compare with that the title VIII authority where there is no enforcement power. And we see an enormous difference."

Senate Hearings, supra note 24, at 36 (remarks of Secretary Harris).

Prior to the passage of Title VIII, the only recourse for persons discriminated against in the housing market was costly and time-consuming private litigation. Other federal laws and constitutional provisions that could have been utilized by the federal government to fight housing discrimination were long ignored. Two of the oldest are the fourteenth amendment and the Civil Rights Act of 1866. The fourteenth amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1. For decades, these provisions were not construed to support the concept of fair housing. And while the Civil Rights Act
of congressional resistance, however, Title VIII was substantially weakened before it ever reached President Johnson's desk for signing. Title VIII was "the result of political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination." 29 As former Senator Birch Bayh noted, "the political realities of [1968 lead to a] compromise . . . forced upon the proponents of the Title VIII bill setting up the present enforcement procedure—a result of which was that the law could not be enforced." 30 Title VIII experienced a "tangled history," in which "compromise . . . did away with the administrative cease and desist powers" of the Department of Housing and Urban Development (HUD) which, among other things, were imperative to effective enforcement of the law. 31 The congressional bargaining of 1968 crippled the enforcement of Title VIII by providing HUD with only powers of "conference, conciliation, and persuasion" in resolving housing discrimination complaints. 32

Comprehensive legislation to fight housing discrimination was not introduced in Congress until 1966, 33 and it was President Johnson who assumed the leadership role that resulted in the law's enactment. 34 Indeed, Johnson was the first president to urge a national fair housing statute during the twentieth century. 35 In his State of the Union message of January 8, 1964, Johnson pledged his administration to the goal of eliminating housing discrimination and asked Congress to pass related legislation. 36 On January 27,
1964, Johnson once more spoke out publicly in favor of fair housing. This was long before a congressional majority had ever seriously considered the idea, for no hearings had yet been scheduled or convened on the subject.

Congress did not budge, but the President was persistent. In his January 12, 1966, State of the Union message, he recommended that Congress “take additional steps to insure equal justice for all of our people . . . by outlawing discrimination in the sale and rental of housing.” Two weeks later, in his message to Congress on a program for cities and metropolitan areas, Johnson stated:

The programs I have proposed—in rebuilding large areas of our cities, and in metropolitan planning—are essential for the rebirth of urban America.

Yet at the center of the cities’ housing problem lies racial discrimination. Crowded miles of inadequate dwellings—poorly maintained and frequently over-priced—is the lot of most Negro Americans in many of our cities. Their avenue of escape to a more attractive neighborhood is often closed because of their color.

The Negro suffers from this, as do his children. So does the community at large. Where housing is poor, schools are generally poor. Unemployment is widespread. Family life is threatened. The community’s welfare burden is steadily magnified. These are the links in the chain of racial discrimination.

This Administration is working to break that chain—through aid to education, medical care, community action programs, job retraining, and the maintenance of a vigorous economy.

The time has come when we should break one of its strongest links—the often subtle, but always effective force of housing discrimination. The impacted racial ghetto will become a thing of the past only when the Negro American can move his family wherever he can afford to do so.

every color. As far as the writ of Federal law will run, we must abolish not some, but all racial discrimination. For this is not merely an economic issue, or a social, political or international issue. It is a moral issue, and it must be met by the passage this session of the bill now pending in the House.

Id.

37. Id. at 234.
38. 1966-1 id. at 3. See also id. at 5.
I shall, therefore, present to the Congress at an early date legislation to bar racial discrimination in the sale or rental of housing.\(^{39}\)

On April 28, 1966, in a special civil rights message to Congress, the President also emphasized that the legislative branch should “declare a national policy against racial discrimination in the sale or rental of housing, and . . . create effective remedies against discrimination in every part of America.” \(^{40}\) When the House finally passed a weak version of the fair housing law on August 9, 1966, President Johnson issued a statement approving the House’s action.\(^{41}\) But Johnson was disappointed. “This provision is not,” he stressed, “as comprehensive as that we had sought.” \(^{42}\) He added: “Our attention turns now to the Senate, and we join in the hope and expectation that final action on the Civil Rights Act of 1966 will follow without unnecessary delay.” \(^{43}\)

However, in 1966, fair housing legislation “could scarcely get off the ground in the Senate.” \(^{44}\) The vast majority of senators apparently subscribed to the view that the federal government should not interfere with property rights and that every individual has the right to do whatever he pleases with his private property.\(^{45}\)

\(^{39}\) Id. at 89.

\(^{40}\) Id. at 462.

\(^{41}\) See 1966-2 id. at 814-15.

\(^{42}\) Id. at 814.

\(^{43}\) Id. at 815.

\(^{44}\) 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1629 (B. Schwartz ed. 1970) [hereinafter cited as STATUTORY HISTORY]. Clearly, there was no Senate majority in favor of fair housing legislation in 1966. See notes 45-46 and accompanying text infra.

\(^{45}\) On the premium placed on private property by the participants in the congressional debates, see CONGRESSIONAL QUARTERLY SERVICE, 2 CONGRESS AND THE NATION: 1965-1968, at 378 (1969) [hereinafter cited as CONGRESS AND THE NATION]. Indeed, this idea is still in vogue with many congressmen. For example, in 1979, Senator Orrin G. Hatch, a Republican from Utah, stated that legislation updating Title VIII would lead to further “federal oppression,” and “inordinate controls” by the federal government, “interfering with property rights” and “abrogating the rights of our society.” Senate Hearings, supra note 24, at 39 (remarks of Sen. Hatch). Similarly, Senator Alan K. Simpson, a Republican from Wyoming, expressed concern over narrowing the exemptions allowed under Title VIII, stating that “with such ‘conformity,’ I think we are heading into some real problems with regard to private ownership of private property.” Id. at 43 (remarks of Sen. Simpson). The point is that these notions persist, despite the fact that because of discrimination in the rental and sale of housing, many minorities are forced to live in housing characterized by overcrowded, disproportionately expensive, deteriorating, substandard conditions, in neighborhoods that have high crime rates and poor public services. See Lamb, supra note 9, at 388-91. See also notes 1-8 and accompanying text supra.
The Senate failed to pass the proposed 1966 legislation. The following year, congressional advocates of fair housing, led by Congressman Emanuel Celler, a Democrat from New York, were willing to settle for any statute that was "politically feasible." Johnson was clearly upset with the Senate's refusal to pass the 1966 fair housing proposal. On February 15, 1967, the President presented, in detail, an outline of his legislative proposal to Congress, and urged once more that the majority overcome its entrenched opposition to housing desegregation. The proposed Civil Rights Act of 1967 contained a watered-down, "politically feasible" fair housing provision. Once more it passed in the House of Representatives, primarily because it was so weak that opponents of housing desegregation viewed it as meaningless. Debate on the Senate floor, however, was prolonged for over a month by southern Democrats, who condemned fair housing as...
"forced housing." 52 Senator Everett Dirksen, a Republican from Illinois and the Senate minority leader, joined the southern Democrats in their opposition. 53 The bill ultimately died a slow death in the Senate, as its predecessor had in 1966, without ever being voted on. 54

In his civil rights message to Congress of January 24, 1968, President Johnson pressed once more for legislation aimed at fair housing. He stressed:

[C]onstruction of new homes is not enough—unless every family is free to purchase or rent them. Every American who wishes to buy a home, and can afford it, should be free to do so.

Segregation in housing compounds the Nation's social and economic problems. When those who have the means to move out of the central city are denied the chance to do so, the result is a compression of population in the center. In that crowded ghetto, human tragedies—and crime—increase and multiply. Unemployment and educational problems are compounded—because isolation in the central city prevents minority groups from reaching schools and available jobs in other areas.

A fair housing law is not a cure-all for the Nation's urban problems. But ending discrimination in the sale or rental of housing is essential for social justice and social progress. 55

This time the Senate responded positively. Senator Dirksen's role was especially critical in increasing the gradual momentum in the Senate in favor of fair housing legislation. In February, 1968, Dirksen switched his opposition to open housing and bargained a

52. Senate liberals, including Senators Walter F. Mondale and Robert F. Kennedy, fought for a stronger fair housing bill, but their efforts were easily defeated. See 2 STATUTORY HISTORY, supra note 44, at 1630. See also Hearings on S. 1328, S. 2114, & S. 2280 Before the Subcomm. on Constitutional Rights of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967). See generally Dubofsky, supra note 46, at 150-52; Mitchell, supra note 14, at 122-26.

53. 2 STATUTORY HISTORY, supra note 44, at 1630.

54. CONGRESS AND THE NATION, supra note 45, at 378. However, Senate majority leader Mike Mansfield, a Democrat from Montana, placed the bill which had passed the House at the head of the Senate's agenda, to be dealt with immediately after the Christmas recess. Id.

55. 1969-1 PUBLIC PAPERS, supra note 36, at 61.
compromise proposal with the Democratic leadership.\textsuperscript{56} This compromise bill was ultimately what became known as the Civil Rights Act of 1968. Despite the continued opposition of several southern senators, the bill contained a fair housing provision that was substantially stronger than anything that Congress had seriously considered in prior decades. Normal hearings on Title VIII were avoided in 1968 since it was an amendment added during the Senate floor debate over a committee-reported bill to provide federal penalties for violence or intimidation in the South against those attempting to secure the legal rights already guaranteed, at least on paper, by the Civil Rights Act of 1964\textsuperscript{57} and the Voting Rights Act of 1965.\textsuperscript{58} Now, with the support of the Senate Democratic and Republican leadership, a successful cloture vote cut short what surely would have been a prolonged and bitter southern filibuster.\textsuperscript{59} While forty-three amendments were proposed to dilute Title VIII further, most of them were voted down in regular order.\textsuperscript{60} Floor debate ended on March 11, 1968, with an unpredicted wide vote of 71 to 26 in favor of the entire Civil Rights Act of 1968.\textsuperscript{61}

The Act was then forwarded to the House, where a great ground swell of conservative hostility, led by Gerald R. Ford, had been growing as the Senate's measure proceeded through floor de-

\textsuperscript{56} 2 Statutory History, \textit{supra} note 44, at 1630. For Dirksen's own explanation for his change of mind on open housing, see \textit{id.} at 1682-85. In part, he explained:

It will be an exercise in futility for anyone to dig up the speech I made in September, 1966, with respect to fair housing, in which I took the firm, steadfast position that I thought fair housing was in the domain of the State because it was essentially an enforcement problem. . . . One would be a strange creature indeed in this world of mutation if in the face of reality he did not change his mind. . . . I do not want to worsen . . . the restive condition in the United States. . . . There are young men of all colors and creeds and origins who are this night fighting 12,000 miles or more away from home. They will return. They will have families. . . . Unless there is fair housing . . . I do not know what the measure of their unappreciation would be for the ingratitude of their fellow citizens.


\textsuperscript{59} 2 Statutory History, \textit{supra} note 44, at 1630.

\textsuperscript{60} \textit{id.} at 1631. See also \textit{Congress and the Nation}, \textit{supra} note 45, at 379-80.

\textsuperscript{61} 114 Cong. Rec. 5992 (1968).
bate. Yet the murder of Dr. Martin Luther King, Jr. on April 4, 1968 turned the tide against the resistance. As President John F. Kennedy's assassination had spurred the passage of the Civil Rights Act of 1964, so did Dr. King's death spur the passage of the Civil Rights Act of 1968. On the day of King's funeral, the House Rules Committee reported the 1968 Act out for floor passage, adding credibility to the notion that "[o]nly crisis can normally greatly speed the incremental process" of Congress' passage of far-reaching civil rights legislation. As one commentator has noted, Dr. King's assassination and the subsequent rioting "led to the irresistible pressure for speedy passage of the Senate-voted bill." The Rules Committee limited House debate on the proposal to only one hour and dictated that the House either accept or reject the Dirksen compromise with no floor amendments. Speaker John McCormack, a Democrat from Massachusetts, scurried through the House chamber pressing for approval of the Senate bill, while Congressman Celler urged approval in the major speech given favoring the bill. The final vote, 250 to 172, was not as close as many had expected. Congressional liberals, responding to Johnson's leadership, had won a surprising victory.

The legislative history of the Civil Rights Act of 1968, and particularly the history of the passage of Title VIII, demonstrates the unique combination of political circumstances which forced Congress to approve the legislation. It was President Johnson, not a congressional majority, who initially recognized and emphasized the necessity for passing Title VIII. As Clarence Mitchell has

62. CONGRESS AND THE NATION, supra note 45, at 382.
63. 2 Statutory History, supra note 44, at 1631.
64. See Comment, supra note 20, at 830-31.
65. H. Rodgers & C. Bullock, supra note 20, at 212.
66. 2 Statutory History, supra note 44, at 1630. On the same day that the House debated the bill, the National Guard was attempting to quell rioting only blocks away from Capitol Hill. Dubofsky, supra note 46, at 160. It was also during the summer of 1968 that the Supreme Court announced its decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In Jones, the Court ruled that all forms of racial discrimination in public and private housing were illegal under 42 U.S.C. § 1982 (1976). 392 U.S. at 420-22. For the pertinent text of § 1982, see note 28 supra. Thus, within a short time of each other, the Congress and the Court fired "two major salvos" against housing discrimination. See Smedley, A Comparative Analysis of Title VIII and Section 1982, 22 Vand. L. Rev. 459 (1969).
67. 2 Statutory History, supra note 44, at 1632; Dubofsky, supra note 46, at 160.
68. 2 Statutory History, supra note 44, at 1632.
69. Id.
70. See notes 33-55 and accompanying text supra.
written, most congressmen "felt that the political risks were too
great. In effect, they were overruled when the President called for
passage of a civil rights bill that would include a fair housing
title." Moreover, had it not been for Dirksen's "switch in time"
on the Senate side, and the assassination of Dr. King during the
House's action on the bill, it is unlikely that Title VIII would
ever have survived the congressional opposition. Most of the credit
for the realization of Title VIII thus lies with Johnson. Dirksen's
change of heart, the activism of a handful of congressional liberals,
and the riots that stunned the nation after King's murder were
of secondary importance. In the final analysis, the United States
ended up with a fair housing law that was quite weak in terms of
enforcement powers given to the Department of Housing and
Urban Development. It was, however, significantly stronger than
the "politically feasible" compromise that many congressmen had
been willing to accept only a few months earlier.

III. TITLE VIII: ITS FRAILTIES AND RECOMMENDATIONS
FOR ITS REFORM

Congress' general policy declaration in Title VIII is couched
in extremely broad language proclaiming fair housing to be the
law of the land. Section 801 of Title VIII provides: "It is the
policy of the United States to provide, within constitutional limita-
tions, for fair housing throughout the United States." Title VIII,
as amended, goes on to prohibit discrimination on the basis of race,
color, religion, sex, or national origin in the sale or rental of private
or public housing. However, despite these commendable stan-
dards, a careful reading of the remainder of the Act reveals important
inadequacies.

71. Mitchell, supra note 14, at 122.
72. See text accompanying notes 117-33 infra. The shrinkage of HUD's
enforcement powers was largely a compromise to placate Senator Dirksen. See
Dubofsky, supra note 46, at 157.
73. See text accompanying note 47 supra.
75. Id.
76. Id. § 804, 42 U.S.C. § 3604 (1976). Naturally, before Title VIII was
amended to protect women, an obvious criticism was that its provisions were
sexually biased. Similarly, the handicapped were not protected under the
original legislation. Not until 1979 did HUD issue regulations ensuring access
by the handicapped to federally-assisted housing. See Senate Hearings, supra
note 24, at 191.
77. For general discussions of Title VIII, some of which touch upon its
weaknesses, see generally U.S. Commission on Civil Rights, The Federal Fair
Housing Enforcement Effort (1979) [hereinafter cited as The Federal Fair
In section 802, which contains the definitions of the terms used in the Act, Congress made no attempt to define with precision what constitutes “fair housing,” an “unfair housing practice,” or an “aggrieved person.” These omissions permit federal agencies to construe their affirmative responsibilities to promote equal housing opportunity narrowly. The Department of Housing and Urban Development, the Veterans Administration, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Federal Home Loan Bank Board all have generally been ineffective in enforcing Title VIII. Precise definitions by Congress would have forced these agencies to fight more subtle forms of housing discrimination.

In section 803(b), Congress exempted two major types of housing from the reach of Title VIII: 1) single family dwellings which are rented or sold without the use of a real estate broker by a person owning or receiving income from up to three such dwellings, as long as the property is not advertised as unavailable to the classes protected by the Act; and 2) housing facilities for up to four families within which the owner also resides, the so-called “Mrs. Murphy’s boarding house” provision. The first exemption constitutes a significant avenue for the perpetuation of housing discrimination. Individuals may still be discriminated against, and “it makes little difference to victims of discrimination whether the perpetrators of such discrimination own fewer than three single family houses or more than that number.”

78. See Senate Hearings, supra note 24, at 94, 148-49 (testimony of President Johnson’s HUD Secretary, Robert C. Weaver). See also id. at 24 (testimony of President Carter’s HUD Secretary, Patricia Harris); id. at 70-71 (testimony of President Carter’s Assistant Attorney General for Civil Rights, Drew S. Days).

79. Lamb, supra note 9, at 409-13, 416-21.


82. Senate Hearings, supra note 24, at 147 (testimony of Robert C. Weaver, HUD Secretary under President Johnson).
“Mrs. Murphy's” exemption, which also tends to perpetuate discrimination in housing, has been justified as tolerable on the basis that “the degree of intimacy involved in a three- or two-family-unit house is quite different from that of a room in an apartment or a room in a house of a single-family unit.” This is not to say, of course, that we should condone discrimination by persons who have boarders living in their homes. Rather, the premium placed by homeowners on control over their own homes, and on the persons to whom they desire to rent, would make it politically unwise or even impossible to attempt to eliminate this exemption. The political cost would probably be increased opposition to fair housing generally.

Three major forms of housing discrimination are specifically focused on in Title VIII. These are discrimination in the sale or rental of housing, in the financing of housing, and in the performance of brokerage services.

Section 804 deals with discrimination in the sale or rental of housing. Under this section, when a bona fide offer is made to purchase or to rent, the owner cannot refuse the offer outright, refuse to negotiate, or otherwise deny a dwelling to any person on the grounds of race, color, religion, sex, or national origin. Nor may an owner discriminate “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services, or facilities in connection therewith.” These two provisions out-law the practice known as “steering.” Moreover, an owner cannot make any printed notices or advertisements indicating discriminatory preferences or limitations in the sale or rental of housing. It is also illegal under section 804 falsely to tell or to mislead a person into believing that housing is not available to be inspected, rented, or sold. Finally, “blockbusting” is prohibited. Blockbusting occurs when an owner attempts, for profit,

83. Id. at 99 (testimony of Robert C. Weaver, HUD Secretary under President Johnson). Secretary Weaver nevertheless opposed the “Mrs. Murphy's” exemption. Id.
86. Id. § 806, 42 U.S.C. § 3606 (1976).
87. Id. § 804(a), 42 U.S.C. § 3604(a) (1976).
88. Id. § 804(b), 42 U.S.C. § 3604(b) (1976).
89. For a discussion of the courts' construction of the anti-steering provisions of the Act, see notes 205-95 and accompanying text infra.
91. Id. § 804(d), 42 U.S.C. § 3604(d) (1976).
“to induce or attempt to induce any person to sell or rent any dwelling by representation regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.”  

Section 805 of Title VIII relates to discriminatory practices in the financing of housing. It declares it to be illegal for any lending institution which makes real estate loans to discriminate against a member of one of Title VIII’s protected classes seeking a loan for the purpose of “purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate . . . in the fixing of the amount of interest rate, duration, or other terms or conditions of such a loan or other financial assistance.”  

Section 806 addresses discrimination by real estate brokers. It stipulates that there shall be no discrimination on the basis of race, color, sex, religion, or national origin, which denies any person “access to or membership or participation in any multiple-listing service, real estate brokers’ organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation.”  

This provision is an absolutely essential part of Title VIII. For example, in 1970, two years after the passage of Title VIII, the St. Louis Metropolitan Real Estate Board had only about a dozen black real estate agents out of a total membership of some 4,400. One would expect that blockbusting, steering, and other discriminatory practices would become more infrequent with the growth in numbers of minority real estate agents. Presumably, minority agents would be offended by these practices and might challenge them privately or even publicly.  

92. Id. § 804(e), 42 U.S.C. § 3604(e) (1976). For a discussion of the courts’ construction of the anti-blockbusting provisions of the Act, see notes 172-204 and accompanying text infra.  


95. U.S. COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 16-19 (1974) [hereinafter cited as EQUAL OPPORTUNITY IN SUBURBIA].  

96. Section 807 of Title VIII contains a straightforward exemption for religious and private nonprofit organizations. Under § 807, such organizations which provide housing for noncommercial purposes may give preference to persons who are their members, provided that they do not restrict Title VIII’s protected classes from membership. Fair Housing Act of 1968 § 807, 42 U.S.C. § 3607 (1976). The exemption for religious organizations is clearly more justifiable than the exemption for private clubs. See The Federal Fair Housing Requirements, supra note 14, at 758-59.
The weakest links in Title VIII are sections 808 and 810, which deal with administration and enforcement. Unlike the field of equal employment opportunity, Congress did not create a new enforcement agency for fair housing similar to the Equal Employment Opportunity Commission. Instead, section 808 of Title VIII stipulates that the Secretary of Housing and Urban Development is ultimately responsible for administering Title VIII and that the Secretary may delegate his Title VIII duties to other HUD officials to conduct investigations, conciliations, and appeals regarding complaints of housing discrimination. The responsibility to enforce Title VIII has subsequently been delegated to the Assistant Secretary for Fair Housing and Equal Opportunity. Title VIII has consequently not received the emphasis at HUD that it should have. Moreover, HUD's civil rights field staff, which monitors the enforcement of Title VIII, is not directly answerable to the Assistant Secretary. Instead, staff members report to HUD field officials, who are primarily concerned with general housing programs rather than civil rights. Congress should have stated that the person delegated the chief responsibility at HUD for fair housing must be primarily concerned with the enforcement of Title VIII, and should have required that HUD civil rights specialists in the field answer directly to that individual rather than to housing generalists.

Section 808 also names HUD as the coordinating or leading agency for promoting fair housing, indicating that other federal agencies "shall cooperate with the Secretary" of HUD "to further the purposes" of Title VIII. This coordination and leadership

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99. See notes 100-33 and accompanying text infra. Section 809 requires the Secretary of HUD to undertake "educational and conciliatory activities" which will further the understanding and implementation of Title VIII by the housing industry, state and local governmental officials, and other interested parties. Fair Housing Act of 1968 § 809, 42 U.S.C. § 3609 (1976).
101. Id. § 808(b), 42 U.S.C. § 3608(b) (1976).
102. See id. § 808(b), 42 U.S.C. § 3608(b) (1976).
103. The Federal Fair Housing Enforcement Effort, supra note 77, at 12 & 231.
104. Id.
105. Fair Housing Act of 1968 § 808(c), 42 U.S.C. § 3608(c) (1976). Section 808 continues by explaining the functions for which the Secretary of HUD is responsible, including conducting, publishing, and disseminating studies concerning housing discrimination, rendering assistance to federal, state, and local agencies, and administering Title VIII. Id. § 808(e), 42 U.S.C. § 3608(e) (1976). For a discussion of the importance of the coordination of federal efforts, see Lamb, Administrative Coordination in Civil Rights Enforcement: A Regional Approach, 31 Vand. L. Rev. 855, 857-61 (1978).
role has not been effectively carried out by HUD. By 1971, three years after the passage of Title VIII, HUD had taken few steps to bring about coordination.\textsuperscript{106} After eight years of token coordination between HUD and other federal agencies having fair housing duties, in 1979 the U.S. Commission on Civil Rights released an extensive report detailing HUD's successes and failures as coordinator of the federal fair housing enforcement effort.\textsuperscript{107} The Commission observed that while HUD had succeeded in establishing the Federal Equal Housing Opportunity Council, the Council was a low HUD priority and had been inept at coordinating the country's federal fair housing enforcement activities.\textsuperscript{108} The major project of the Council has been the promulgation of an Interagency Fair Housing Agreement to insure that minority federal employees working throughout the country are not discriminated against, but of the fifty-two Council member agencies, only eight have entered into the agreement.\textsuperscript{109} Moreover, the Commission complained that the Council “had not attempted to seek interagency solutions to the problems of exclusionary zoning, discrimination by the real estate industry, or the need for interagency sharing of compliance information.”\textsuperscript{110} As things stood in 1979, then, not very much fair housing coordination had occurred, and such problems as redundancy of effort, inconsistent compliance standards, and the failure to share civil rights data among agencies continued.

More serious inadequacies in Title VIII are revealed, however, by an examination of HUD's fair housing enforcement powers under section 810. This section limits HUD's powers of investigation to cases in which a complaint has been filed by a “person aggrieved” by a discriminatory housing practice.\textsuperscript{111} Even if a community is notorious for a variety of exclusionary and discriminatory practices, HUD cannot commence enforcement activities unless those practices are spelled out in such a complaint.\textsuperscript{112} Moreover, under Title VIII, third parties not directly affected by discrimina-

\begin{footnotes}
\item[107] See id.
\item[108] The Federal Fair Housing Enforcement Effort, supra note 77, at 329-33.
\item[109] Id.
\item[110] Id.
\item[112] See note 111 supra and authorities cited therein.
\end{footnotes}
This precludes civil rights interest groups from fully mobilizing their resources to help fight housing discrimination or to stimulate HUD's enforcement mechanism into action. Finally, section 810 gives HUD a mere thirty days after receiving a complaint to investigate allegations of discrimination. Senator Charles Mathias, among others, has deplored the thirty day time limitation of Title VIII. As he observed, the Fair Housing Act "limits [HUD's] processing time with the result that remedies are only available for a very fleeting period of time." Thus, for effective enforcement it is necessary for Congress to extend HUD's maximum period for investigation.

More crucial is the fact that if the Secretary of Housing and Urban Development decides to pursue a complaint, the Secretary can do so only by "informal methods of conference, conciliation, and persuasion." This single phrase has been most damaging to effective enforcement by HUD. Because HUD is limited in its enforcement efforts to "conference, conciliation, and persuasion," and is able to investigate allegations of discrimination only after a complaint has been filed, the Department has largely taken a case-by-case approach to fighting discrimination which has had a very limited impact. Conciliation powers must be backed up with a credible form of legal coercion to be effective. Intransigence is so great to civil rights generally, and to open housing in particular, that complete reliance on conciliation is an ineffective means of enforcement. If either party to a complaint decides to be uncompromising, "conciliation is doomed to be a futile, frustrating waste of time and money."

Additionally, under section 810, HUD is not authorized to initiate law suits in federal district court in instances in which

113. THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT, supra note 77, at 230.

114. Fair Housing Act of 1968 § 810(a), 42 U.S.C. § 3610(a) (1976). The time constraints imposed upon HUD are further aggravated by the fact that any complaint will often be first referred to a state agency for action. See notes 126-33 and accompanying text supra. Finally, under § 810(b), a housing discrimination complaint must be filed in writing within 180 days of the alleged act, explaining what occurred, and the respondent must file with HUD an answer to the allegation. Fair Housing Act of 1968 § 810(b), 42 U.S.C. § 3610(b) (1976).

115. See Senate Hearings, supra note 24, at 47 (remarks of Sen. Mathias).

116. Id. See also id. at 56 (HUD Secretary Harris explaining why it often takes HUD longer than 30 days to conciliate a fair housing complaint).


118. Note, supra note 29, at 846.
discrimination is apparent or even blatant.\textsuperscript{119} Nor can HUD request a federal court to issue an injunction or a restraining order to halt various discriminatory practices temporarily.\textsuperscript{120} Instead, HUD must refer cases involving a “pattern or practice of discrimination” to the Department of Justice for possible prosecution.\textsuperscript{121} Since HUD thus has virtually no enforcement powers to speak of, and since the Justice Department often files suit only in a small percentage of the referrals sent to it by HUD, those who discriminate in violation of Title VIII need have little fear of legal sanctions being imposed against them.\textsuperscript{122}

The fact that HUD's enforcement effort is limited to conference, conciliation, and persuasion has been criticized. Congress' failure to empower HUD, the agency charged with administering the law, with stronger enforcement authority has made fair housing enforcement exceedingly difficult.\textsuperscript{123} Senator Bayh commented that Congress made “an empty promise [to] the American people in 1968, inasmuch as the Government, which had promised so much, was empowered only to try to conciliate between the parties. Once that effort is made, the Government withdraws its heretofore helpful arm and leaves the plaintiff to his own devices.”\textsuperscript{124} Former HUD Secretary Harris contended that the difficulty with Title VIII is that it “did not provide the Government with the tools necessary to address [housing] discrimination effectively or to enforce the prohibitions against it,” and that “as the result of extended congressional debate in 1968 in the original civil rights bill, cease-and-desist powers for the Secretary of Housing and Urban Development were deleted from that bill.”\textsuperscript{125} Congress should amend Title VIII to provide HUD with the necessary authority to enforce its fair housing mandate.

\textsuperscript{119} See Fair Housing Act of 1968 § 811 (g), 42 U.S.C. § 3611(g) (1976). \textit{See also Senate Hearings, supra} note 24, at 25, 59-61, 102. This impotence should be compared with the authority granted to the Equal Employment Opportunity Commission to bring suit in federal court to eliminate employment discrimination. \textit{See U.S. Commission on Civil Rights, 5 The Federal Civil Rights Enforcement Effort: To Eliminate Employment Discrimination 474 (1975).}

\textsuperscript{120} See note 119 \textit{supra} and authorities cited therein.

\textsuperscript{121} Id.

\textsuperscript{122} See note 151 \textit{infra}.

\textsuperscript{123} \textit{Senate Hearings, supra} note 24, at 193-94 (testimony of William L. Taylor of the Leadership Conference on Civil Rights).

\textsuperscript{124} Id. at 2.

\textsuperscript{125} Id. at 21-22. \textit{See also id.} at 45-47 (remarks of Sen. Mathias); \textit{id.} at 176 (testimony of Anita Miller, Member of the Federal Home Loan Bank Board).
Section 810 also provides that a complaint filed with HUD must, under certain conditions, first be referred by HUD to state and local civil rights agencies before HUD may take any action with respect to the complaint. This section expresses a congressional preference that governmental action against housing discrimination must first be taken by state and local civil rights agencies prior to federal action. It is anchored in the concept of "cooperative federalism," and the idea that plaintiffs should exhaust their state administrative remedies before turning to the federal government. The referral procedure works in the following manner. If a state or local agency in a particular jurisdiction has powers to fight housing discrimination which are substantially equivalent to those adopted in Title VIII, complaints from within that jurisdiction must be referred to that agency by HUD.

Twenty-two states and the District of Columbia have been recognized by HUD as having fair housing laws that are "substantially equivalent" to Title VIII. After the referral, HUD may take no action on the complaint if, within thirty days, the state or local agency begins proceedings and "carries forward such proceedings with reasonable promptness." Section 810 further provides: "In no event shall the Secretary [of HUD] take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action." There is no evidence indicating that the Secretary of Housing and Urban Development has consistently relied on such "interests of justice" to recall complaints referred to state and local agencies, however. It appears that the "Secretary's referral is virtually permanent: unless the state or local agency does not proceed at all in the matter,

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127. See Senate Hearings, supra note 24, at 57.
130. Senate Hearings, supra note 24, at 37-38. The states are Alaska, Colorado, Connecticut, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wisconsin. Id.
132. Id.
the complaint must await resolution at the hands of state authori-

ties.” 133

The referral provision should be repealed. It prevents the
Secretary of HUD from exercising his discretion in determining
the most appropriate manner to vindicate the rights guaranteed by
Title VIII in each particular case. The Secretary is compelled to
pass a Title VIII complaint along to a state or local civil rights
agency for at least thirty days if the agency meets the substantially
equivalent test. 134 While it is entirely possible that a state or city
may have a strong equal housing opportunity law on the books, in
practice it may not be effectively implemented by state and local
officials. 135 When this occurs, there is no justification for referrals
or for adherence to the requirement of the exhaustion of state
remedies. This consideration is even more compelling because
there is evidence indicating that HUD is not well qualified to
determine whether state laws are in fact “substantially equivalent”
to Title VIII. 136

Furthermore, most state and local agencies have not handled
the housing discrimination complaints referred to them by HUD
in a timely or efficient manner. 137 Indeed, because of state and
local inefficiency, HUD has attempted to retrieve or recall com-
plaints from these agencies in about half of all referral cases. 138
Additionally, too many restrictions have been placed on HUD’s
ability to recall a complaint, before the end of the thirty day re-
ferral period, from state or local agencies which have not satis-
factorily carried out their investigative and conciliatory functions. 139

133. Note, supra note 29, at 839.
134. Senate Hearings, supra note 24, at 24 & 189.
135. Id. at 189.
136. Note, supra note 29, at 842. For example, if state law does not
permit a state court injunction similar to that which the federal courts have
the power to issue, there is no substantial equivalency and HUD should not
refer complaints to those states. Id. at 844.
137. Senate Hearings, supra note 24, at 47-48. For the views of the
Attorney Generals of Ohio, Michigan, and Washington, and the views of the
Iowa Civil Rights Commission, see id. at 45-46.
138. Id. at 48 & 57. The principal reason for this high retrieval rate is
that many state and local civil rights agencies have inadequate budgets and
staffs that are too small to handle their fair housing responsibilities. Id. at
57. As of 1979, Congress had never appropriated funds to state and local
agencies with substantial equivalency status to help resolve this problem, even
though § 816 permits such aid when HUD utilizes their services and receives
fair housing assistance from state and local agencies. Id. at 57. See Fair
139. Senate Hearings, supra note 24, at 48-49, 53.
Former HUD Secretary Harris noted: "The Secretary ought to have the ability to bring back into the Federal process matters referred [to] secur[e] consistency of approach and [to] insur[e] the resolution of the rights of the aggrieved." \(^\text{140}\) She also pointed out: "It is not consistent with the full responsibility lodged in the Secretary to enforce the Fair Housing Act to remove from the Secretary the authority to monitor and if necessary recall a charge which has been referred." \(^\text{141}\)

The referral system adopted by Congress is an unnecessary provision that places too much power in the hands of state and local agencies. American history teaches that reliance on local units of government to promote civil rights is misplaced. This has obviously been true with regard to school desegregation \(^\text{142}\) and voting rights. \(^\text{143}\) There is no reason to believe that state and local agencies will perform more effectively in fighting discrimination in the area of open housing.

Section 811 of Title VIII bestows on HUD the right to examine evidence and copy documentary evidence in its investigation of a fair housing complaint. \(^\text{144}\) The Secretary of HUD may issue subpoenas for evidence if the respondent refuses access to the information. \(^\text{145}\) If there is noncompliance with the subpoena, HUD may bring an action for enforcement in federal district court. \(^\text{146}\) The congressional oversight hearings, however, give no indication that HUD has regularly gained full access to such evidence, or that HUD's subpoena power has been effective in practice.

If the Secretary of HUD or his designated representative determines that a fair housing suit should be filed in district court, Title VIII directs the Attorney General to conduct the litigation. \(^\text{147}\) Moreover, the Attorney General and the Justice Department play

\(^{140}\) Id. at 48.  
\(^{141}\) Id. at 53.  
\(^{143}\) See C. HAMILTON, supra note 14, at 70-87; D. STRONG, NEGROES, BALLOTS AND JUDGES: NATIONAL VOTING RIGHTS LEGISLATION IN THE FEDERAL COURTS 60-89 (1968).  
\(^{145}\) Id.  
\(^{146}\) Id. § 811(e), 42 U.S.C. § 3611(e) (1976).  
\(^{147}\) Id. § 811(g), 42 U.S.C. § 3611(g) (1976).
key roles in the decision to institute a law suit to enforce Title VIII. Section 813 provides in part: "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of [housing discrimination] he may bring a civil action in any appropriate United States district court . . . ." 148 However, the Department of Justice is not directed to initiate suits involving individual acts of housing discrimination that fall short of a "pattern or practice." 149 Nor is explicit authority given to the Justice Department to intervene in private litigation that could potentially have significant implications for the future of fair housing law generally. 150 Moreover, there are inadequacies in the manner in which the Justice Department carries out the functions that are assigned to it under the 1968 Act. In particular, Title VIII's instructions to the Department of Justice permit it too much discretion in deciding whether legal action will be pursued at all by the federal government. The Justice Department, in many instances, has decided not to ask for an injunction or to file a suit, even though HUD has discovered a "pattern or practice" of discrimination in violation of Title VIII. 151 This has led Gary Orfield to conclude, correctly, that during the late 1970's the Department of Justice "initiated no important litigation against suburban housing exclusion." 152 Therefore, with respect to the likelihood of legal action by the Justice Department, the Title VIII standards are not stated as forcefully or as unequivocally as they should be. Since fair housing enforcement is often dependent on a viable threat of litigation by the Department of Justice, and since such a threat is often not forthcoming, Title VIII has had only a limited impact on widespread practices of housing discrimination in the United States. 153


149. See The Federal Fair Housing Enforcement Effort, supra note 77, at 250.

150. See id.

151. See Federal Civil Rights Enforcement Effort, supra note 106, at 147. Two years after the enactment of Title VIII, HUD had referred 33 Title VIII complaints to the Justice Department, which in turn filed law suits in 22 of those cases. Id. In 1979, eleven years after the passage of Title VIII, the Justice Department had filed less than 30 Title VIII law suits per year, and on the average only 3 of those 30 cases had been referred to Justice by HUD. The Federal Fair Housing Enforcement Effort, supra note 77, at 31.


153. See The Federal Fair Housing Enforcement Effort, supra note 77, at 31.
Finally, various omissions in Title VIII suggest that the law should be amended. First, the awarding of attorneys' fees in private suits is restricted by Title VIII to those plaintiffs who are "not financially able" to pay their own attorneys' fees. Title VIII is the only federal civil rights statute that limits the award of lawyers' fees to plaintiffs unable to pay. Thus, this provision has had a "chilling effect on potential private litigants whether they seek to secure their rights for their own sake or for the general public welfare." Second, Title VIII completely ignores various forms of exclusionary zoning which the United States Supreme Court has been unwilling to strike down as unconstitutional. For example, Title VIII does not forbid local zoning ordinances which have a disproportionate impact on minorities, such as ordinances that institute minimum requirements for lot size and square footage. Nor does Title VIII address local prohibitions against the building of apartment complexes or the use of mobile homes. Third, while data regarding the racial and ethnic groups which are receiving benefits from federal housing programs are essential for uncovering housing discrimination, Title VIII does not explicitly require data collection and reporting by federal agencies and departments. Therefore, most federal agencies responsible for the implementation of Title VIII have not even required the persons and institutions that they regulate to collect adequate data regarding fair housing. Even when they have, quantifiable standards for identifying the presence of housing discrimination either have not been issued as regulations, or the regulations that have been issued are so vague as to be of only marginal value. Nor does Title VIII indicate that

155. Senate Hearings, supra note 24, at 70 (testimony of Assistant Attorney General Days).
156. The Federal Fair Housing Enforcement Effort, supra note 77, at 230.
159. The Federal Fair Housing Enforcement Effort, supra note 77, at 230.
160. See To Provide . . . For Fair Housing, supra note 77, at 333, 340, 353-54.
161. Id. See also id. at 331-340, 350-51, 353-54, 357.
“testers” can or should be used to determine whether unfair housing practices exist.\textsuperscript{162}

In short, Title VIII of the Civil Rights Act of 1968 contains a number of weaknesses which many congressmen could easily have foreseen in 1968, but their willingness to compromise with their more conservative colleagues resulted in significant gaps in the major federal fair housing law. Title VIII gives HUD no meaningful enforcement powers and relies too heavily on the Justice Department’s discretion to decide whether to prosecute even the cases in which a pattern or practice of housing discrimination is evident.\textsuperscript{182} Complaints of persons discriminated against in the housing market are handled in twenty-two states and the District of Columbia by civil rights agencies that have “substantial equivalency” status lodged with them by HUD.\textsuperscript{164} This referral procedure should be com-

\textsuperscript{162} See \textit{The Federal Fair Housing Enforcement Effort}, \textit{supra} note 77, at 230. As the United States Commission on Civil Rights has emphasized:

Testing involves comparing the experiences with the same broker, builder, or lender of a majority group and a minority group representative, who purport to have identical characteristics, such as income and family size, and to have identical preferences for housing. If the treatment received by the minority group member differs from that afforded the majority group member, the existence of housing discrimination can often be established. Without specific authorization to do so, both HUD and the Department of Justice have been reluctant to use Federal resources in this manner.

\textit{Id.} For a major study using testers to detect the extent of housing discrimination in America, see \textit{Housing Market Practices Survey}, \textit{supra} note 9. This study was conducted for HUD in 40 major metropolitan areas by the National Committee Against Discrimination in Housing. The study showed that despite the relatively large number of federal statutes, court decisions, and executive orders making housing discrimination illegal, in 29.1\% of all instances in which blacks sought to rent housing, they were the victims of discrimination in some form. \textit{See Senate Hearings, supra} note 24, at 165 (summarizing study’s findings). The comparable figure for discrimination in the sale of homes to blacks was 21.5\%. \textit{See id.} Second, it was found that when a black contacts four different real estate agents, there is a 75\% chance that he will encounter discrimination in rentals and a 62\% chance in sales. \textit{See id.} Third, the study examined the process of steering—a practice whereby real estate agents show property for rent or sale only or primarily in neighborhoods in which the client’s racial group is already dominant. The finding was that steering is “probably the single most widely practiced form of racial discrimination in the [housing] sales market.” \textit{See id.} However, the extent to which steering occurs is not included in the above figures on discrimination. \textit{See id.} Perhaps most significantly, the data on steering indicated “that equal treatment was accorded to whites and blacks in only 30 percent of [the cases] in the rental market and in only 10 percent in the sales market.” \textit{Id.} at 166. In other words, as of 1978, 70\% of all whites and blacks in 40 major American cities were steered into “their own neighborhoods” where rental property was being sought, and in 90\% of all the cases in which their aim was to purchase housing! This is not, needless to say, equal opportunity to housing.

\textsuperscript{163} See notes 147-53 and accompanying text \textit{supra}.

\textsuperscript{164} See notes 126-48 and accompanying text \textit{supra}.
pletely abandoned, for the reasons offered above. Since the remedy for housing discrimination belongs at the federal level, greater enforcement powers must be given to HUD and the Department of Justice. The Fair Housing Amendments bills of 1979 and 1980 were proposed to rectify these problems. William L. Taylor appropriately called these bills "part of the unfinished agenda of civil rights legislation of the 1960's." Indeed, in 1979 and 1980, Congress was finally facing important facets of federal fair housing law that should have been dealt with in 1968. So if, as Orfield argues, Congress took the initiative in 1968, it did an extremely poor job in exercising leadership, and it failed to carry through with its "unfinished agenda" in 1979 and 1980.

IV. JUDICIAL CONSTRUCTION OF THE BLOCKBUSTING AND RACIAL STEERING PROVISIONS OF TITLE VIII

Despite its aforementioned deficiencies, it is incorrect to conclude that Title VIII is a meaningless piece of legislation. Even in light of the political compromises that led to its weaknesses and ambiguities, congressional leaders did have the votes to pass two particularly important provisions. These provisions prohibit blockbusting and racial steering under certain circumstances. This section examines how the federal courts have construed these provisions of Title VIII.

A. Blockbusting

Blockbusting is outlawed by section 804(e) of Title VIII. That section provides that it is unlawful "to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin" for profit. Blockbusting is therefore a term primarily used to

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165. See notes 134-41 and accompanying text supra.
166. See notes 137-43 and accompanying text supra.
167. For a discussion of these bills, see note 24 supra.
168. Senate Hearings, supra note 24, at 188.
169. See notes 20-23 and accompanying text supra.
170. See Fair Housing Act of 1968 § 804(e), 42 U.S.C. § 3604(e) (1976). For a discussion of blockbusting and § 804(e), see notes 172-204 and accompanying text infra.
171. See Fair Housing Act of 1968 §§ 804(a) & (b), 42 U.S.C. §§ 3604(a) & (b) (1976). For a discussion of racial steering and §§ 804(a) & (b), see notes 205-95 and accompanying text infra.
describe the profit-making activities of real estate brokers who attempt to induce or hasten "white flight" from a neighborhood by instilling in white homeowners the fear of an imminent racial turnover in the makeup of their neighborhoods.  

When a minority family is able to penetrate the invisible wall of housing segregation, realtors have used blockbusting to make large profits and to turn the community into one which is soon mostly minority. Blockbusting typically occurs in lower and middle class white areas in which minorities can afford to purchase homes. The real estate agent usually sells a house to a minority family and then passes the word around the neighborhood that a minority family is moving in. Soon thereafter, realtors encourage other whites to sell before their property values precipitously decline. In the classic form of blockbusting, the broker approaches a homeowner in a targeted neighborhood, informs him that minorities are moving in, spins tales of rising crime rates, declining property values, and deteriorating public schools, makes assorted other prophecies of impending doom, and attempts to persuade the homeowner to sell "before it's too late." The broker may attempt to lend credence to his prediction of a "minority invasion" by showing homes in the area only to minority customers, in as highly visible a manner as possible, and by publicizing his increasing activities through the use of "for sale" or "sold" signs.

Blockbusting does not, however, directly deny housing to minorities. Indeed, the practice is premised on the sale to minorities of the departing whites’ homes. Yet blockbusting is inimical to residential integration. Successful blockbusting insures that a neighborhood can be desegregated only temporarily and contributes to what former Senator Walter F. Mondale deplored as "the rapid, block-by-block expansion of the ghetto." Title VIII therefore

173. Blockbusting has been the subject of a considerable amount of commentary. See Glassberg, Legal Control of Blockbusting, 1972 Urb. L. Ann. 145; Note, Blockbusting, 59 Geo. L.J. 170 (1970). Obviously, blockbusting can be extremely lucrative for real estate brokers. Not only does the blockbuster profit from his commissions on the numerous resulting sales, but he may also be able to enhance his profit by following a strategy of buying cheap from panicked whites and selling dear to minorities. See H. Rodgers & C. Bullock, supra note 20, at 144; Comment, The First Amendment: A Blockbuster's Best Friend, 46 UMKC L. Rev. 425, 426-27 (1978) [hereinafter cited as A Blockbuster's Best Friend]; Comment, Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses, 22 De Paul L. Rev. 818, 820-21 (1973).

174. H. Rodgers & C. Bullock, supra note 20, at 144.

175. Id.

176. Id.

contains an explicit anti-blockbusting provision which clearly makes illegal the classic form of blockbusting described above.

Federal courts have ruled that the "for profit" language in section 804(e) does not require that the broker actually receive a profit from a transaction. The profit requirement is met if the broker stands to receive a sales commission or attempts to purchase the property with the expectation of reselling it at a higher price. The blockbuster need not be successful in inducing a sale. However, federal courts have not agreed as to whether section 804(e) prohibits racial representations that are responses to questions from the white homeowner and not initiated by the real estate agent.

A potential blockbuster will attempt to tailor his or her behavior so that it falls outside Title VIII's strict language and literal proscription. Explicit representations as to minority entry will be avoided. The broker may depend upon euphemisms, referring, for example, to the "changing neighborhood" or to "what is going on in the neighborhood," or may approach the white homeowner with minority customers in tow. Indeed, the blockbuster is often able to ply his trade without making any representations at all, explicit or veiled, regarding minority entry into the neighborhood. Once minorities have entered the area, rumors begin to circulate, whites increasingly list their homes for sale, and real estate brokers are attracted to the neighborhood "like flies to a leaking jug of honey." Moreover, because Congress did not expressly forbid door-to-door and telephone contacts by blockbusters, or mass mailings to whites within a particular neighborhood, "[c]onstant solici-

tation of listings goes on by all agents . . . to the point where owners and residents are driven almost to distraction." 186 As one federal judge noted in the leading case of United States v. Mitchell: 187

In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race . . . . On the contrary both sides already know, all too well, what is going on. . . . [T]he direct mention of race in making the sale is superfluous and wholly unnecessary. 188

In Mitchell, the defendants, real estate brokers, argued that some of their salesmen had not made explicit representations as to black entry. 189 The court recognized, however, that a narrow interpretation of section 804(e) would severely hamper its effectiveness in combatting blockbusting. 190 The court therefore went beyond the literal language of Title VIII and assumed arguendo that "Congress surely did not intend that in order to violate the Act a salesman must say, 'For my own profit, I would like to induce you to sell your house by telling you that Negroes are moving into your neighborhood.' " 191 In denying the defendants' motion for summary judgment, the court defined a section 804(e) "representation" as "any act or words that would be likely to convey to a reasonable man, under the circumstances, the idea that members of a particular race . . . are or may be entering his neighborhood," 192 and went so far as to indicate that its definition might encompass mailed solici-

186. Id.
188. 335 F. Supp. at 1006. Of course, if even a few brokers are engaging in the classic form of blockbusting, the mere solicitation of listings by other brokers is relatively likely to be successful, thus hastening the area's racial turnover. In particular, the activities of minority realtors, who confine most of their operations to minority or transitional neighborhoods, often contribute to the racially-charged atmosphere. As one court has noted, once white brokers have initiated the blockbusting process, the minority realtor "follows into the area, and, even when his conduct is within the limits of the law, the effect of his presence, many times, is to speed the racial transition of the area." Zuch v. Hussey, 394 F. Supp. 1028, 1055 & n.12 (E.D. Mich. 1975), aff'd mem. and remanded, 547 F.2d 1168 (6th Cir. 1976).
190. Id. at 479.
191. Id.
192. Id.
tations that made no mention of race. Clearly, then, in an effort to combat the more subtle forms of blockbusting, the *Mitchell* court went beyond what Congress had expressly provided in Title VIII.

In its decision on the merits, the *Mitchell* court did not have to indicate exactly how its test might be applied because it found sufficient evidence of explicit racial representations to establish that the defendant realtors were engaged in a "group pattern or practice" of blockbusting. In *Zuch v. Hussey*, however, another federal district court gave the *Mitchell* definition an extremely broad application. The *Zuch* court declared that the racial atmosphere in one transitional area of Detroit was such that *any* solicitation of listings made for profit and aimed at inducing a sale "would convey to a reasonable man the idea that members of a particular race are or may be entering the area" and thus violate section 804(e). Accordingly, two realtors who had conducted solicitation campaigns that would seemingly fall outside the literal meaning of Title VIII were held to have violated section 804(e). Each realtor was enjoined from all uninvited personal, telephone, or mail solicitations of listings from individual homeowners at their residences.

In neighborhoods in which the atmosphere is "charged with race," the *Zuch* approach could logically be extended to prohibit other broker conduct, such as the use of "for sale" or "sold" signs, which conveys the message that racial transition is underway. Such an interpretation of section 804(e) would, however, appear to run afoul of the decision of the United States Supreme Court in *Lin*

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193. *Id.* at 490-91 & n.2.


196. 394 F. Supp. at 1052. The *Zuch* court was faced with considerable evidence of classic blockbusting by several realtors, coupled with massive uninvited solicitation of listings and blatant racial steering. See *id.* at 1031-46. The court declared that the racial fears of the area's white residents had become so extreme as to reflect an "hysterical community psyche." *Id.* at 1030.

197. *Id.* at 1052-53.

198. *Id.* at 1056. By comparison, the *Mitchell* defendants were enjoined from conducting a greater amount or different kind of solicitation in black or transitional areas than in white neighborhoods. 335 F. Supp. at 1007.
mark Associates, Inc. v. Township of Willingboro. The Court in Linmark struck down as violative of the first amendment a local ordinance that banned such signs. The Linmark decision, however, was partly premised on findings that there had been no "panic selling" in the town in response to the signs. Barrick Realty, Inc. v. City of Gary, in which the Seventh Circuit upheld a similar ordinance, was expressly distinguished by the Linmark Court as involving a record showing that racial transition was underway, although the Supreme Court declined to state whether the court of appeals' decision was correct. Clearly, then, the Zuch interpretation of the statute would come into play only in a factual situation akin to Barrick Realty.

In short, Title VIII has not eliminated the practice of blockbusting. This lingering practice could have been precluded, however, by a more specific and detailed statutory provision by Congress. Since such a provision was not enacted, the lower federal courts have exercised a great deal of latitude in interpreting what activities fall within the parameters of section 804(e). These decisions, rather than the original legislation, are potentially the most effective means of fighting all but the most blatant forms of blockbusting.

B. Racial Steering

According to a 1979 report published by the Department of Housing and Urban Development, racial steering is "probably the single most widely practiced form of racial discrimination in the [housing] sales market." Steering encompasses a variety of practices employed by real estate brokers to direct homeseekers toward or away from particular neighborhoods according to the buyer's race.

Prior to the enactment of Title VIII, steering often took the form of an explicit refusal to show or sell any home in a neighborhood with inhabitants of a different race than the prospective buyers.

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200. Id. at 97.
201. See id. at 95.
202. 491 F.2d 161 (7th Cir. 1974).
203. See 431 U.S. at 95 & n.9.
204. For a discussion of Linmark, the constitutionality of § 804(e), and anti-blockbusting laws in general, see A Blockbuster's Best Friend, supra note 173, at 434-53.
205. Senate Hearings, supra note 24, at 165. See note 9 supra and authorities cited therein.
or misrepresentations as to the availability of homes in that neighborhood, especially when the buyer was a minority and the neighborhood was white. Such overt, racially-premised refusals to deal are relics of an era when a dual housing market was maintained by custom, legal devices, and even physical force. These practices are clear violations of Title VIII's sections 804(a) and 804(b). This is not to say, however, that congressional passage of Title VIII has brought about the demise of steering practices involving refusals to rent or sell. Brokers still can and do insure...

207. See Johnson v. Jerry Pals Real Estate, 485 F.2d 528, 529 (7th Cir. 1973). One favorite tactic of brokers has been to blame the owner for the refusal to deal with a minority buyer, See R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 42 (1964). Another tactic has been to refer the customer to another broker, often a minority broker, who is supposedly better situated to aid the buyer. See United States v. Northside Realty Assocs., Inc., 1 Eq. Opp. Hous. Cas. (P-H) ¶ 13,552, at 13,720 (N.D. Ga. 1971), aff'd and remanded, 474 F.2d 1164 (5th Cir. 1973), cert. denied, 424 U.S. 977 (1976).

208. One sociologist, describing practices of the 1950's and 1960's, has identified a realtors' "exclusion ideology," which is premised on the beliefs that most whites do not want black neighbors, that property values decline when blacks enter a white neighborhood, that residential integration is impossible because integrated neighborhoods inevitably become resegregated, and that whites suffer economically and otherwise if blacks buy or rent property in their neighborhoods. See R. HELPER, supra note 207, at 141. These premises underlie the firmly-held belief that "by not selling . . . to a Negro in a white area . . . the broker protects his business, his reputation, and the standard of his community." Id. at 143. This "exclusion ideology" was encouraged by the Federal Housing Administration which, until 1966, generally refused, on economic grounds, to insure mortgages in black neighborhoods or of black buyers purchasing homes in white neighborhoods. See Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 91st Cong., 2d Sess. 2754 (testimony of HUD Secretary George Romney); A. POLKOFF, HOUSING THE POOR: THE CASE FOR HEROISM 17-18 (1978). See generally, Rubinowitz & Trosman, Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Ownership Programs, 74 NW. U.L. REV. 491, 511-21 (1979).


210. Fair Housing Act of 1968 § 804(a) & (b), 42 U.S.C. § 3604(a) & (b) (1976). Subsections 804(a) and (b) of the Fair Housing Act state:

It shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

Id.

211. See, e.g., United States v. Mitchell, 580 F.2d 789, 790-91 (5th Cir. 1978) (misrepresentations as to the availability of apartments in "white" build-
that sales to minorities occur overwhelmingly in minority or transitional neighborhoods and that sales to whites occur overwhelmingly in white communities without refusing to deal with any customer and without making active misrepresentations.

This result is brought about by two broad types of practices. The first is "active steering," which is advising customers, on the basis of race, where to buy or not to buy homes. The second is "passive steering," which is marketing homes to customers or prospective customers in such a manner that they are surreptitiously channelled, in presumed consonance with their own desires, to areas inhabited by members of their own race.

Active steering most typically involves advising a white customer against purchasing a home in a desegregated area. While that advice may be couched in explicit racial terms, it often involves the use of code phrases that refer to the mixed neighborhood's "high crime rates," "declining property values," or "undesirable elements." Actively steered minority customers are warned to avoid white areas because of the supposed racial hostility of their prospective neighbors. In either case, the virtues of a "racially appropriate" neighborhood are likely to be extolled. By contrast, passive steering most frequently involves the situation in which a broker suggests or offers to show only homes in neighborhoods whose inhabitants are of the same race as the customer, even though available homes in other communities might meet the customer's specifications.

Another common steering tactic, which Congress failed to deal with adequately in Title VIII, is the selective advertising of homes

ings within single apartment complex; blacks allowed to rent apartments only in "black" buildings); Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975) (refusal to sell home in "white" area to blacks; blacks were offered other homes in "black" neighborhood); United States v. Robbins, 1 Eq. Opp. Hous. Cas. (P-H) 13,655 (S.D. Fla. 1974) (agents instructed not to show home on "white" block to blacks); United States v. Long, 1 Eq. Opp. Hous. Cas. (P-H) 13,631 (D.S.C. 1974) (misrepresentations as to availability of apartments in "white" complexes; blacks allowed to rent only in "black" complexes).


213. See Comment, supra note 206, at 810 & n.11, 817-18.

214. See id. at 810 n.10. See also Comment, Real Estate Steering and the Fair Housing Act of 1968, 12 TULSA L.J. 758, 764 & n.32 (1977).

215. See Comment, supra note 206, at 810 n.10.

216. See id. at 817.
in a given neighborhood so as to attract buyers of a particular race. For example, homes in areas undergoing racial transition may be advertised only in minority newspapers.\textsuperscript{217} Even if the customer discovers that the broker has listings in a “racially inappropriate” area, the broker may passively discourage a sale by failing to expose desirable features of the home or neighborhood that would be emphasized to a customer of a different race.\textsuperscript{218} Except in those instances in which the customer has an unusually strong interest in a “racially inappropriate” area or home, the effect of these steering practices is likely to be identical to that produced by simple racially-premised refusals to sell: the perpetuation of residential segregation. The principal difference is that the steered customers are less likely to discover what is actually happening when they are shown homes by real estate agents.\textsuperscript{219}

Congress did not utilize language in Title VIII that unequivocally outlaws racial steering, and the legislative history is silent on the matter. While one commentator has argued that several provisions of section 804 can and should be interpreted to proscribe active or passive steering,\textsuperscript{220} the courts that have decided steering cases have focused on section 804(a).\textsuperscript{221} Unfortunately, however,


\textsuperscript{218} See Bogen & Falcon, supra note 158, at 62-63.

\textsuperscript{219} “Affirmative” or “reverse” steering, the use of steering practices to channel white buyers to integrated areas and black buyers to white areas, might, of course, be employed to reduce residential segregation. Affirmative steering has become attractive to white communities which have found that, in attempting to lessen traditional housing and employment discrimination against blacks, they have become the target of broker practices, such as block-busting and traditional steering, that produce a rapid influx of blacks and threaten resegregation. See \textit{Equal Opportunity in Suburbia}, supra note 95, at 21. Some of these communities, or fair housing groups within them, have established offices that list or show homes without charge, but steer affirmatively, particularly by encouraging blacks to buy in white areas rather than in integrated areas with black populations close to the “tipping point” that would produce accelerating white flight if reached. See id. See also \textit{Note, Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration}, 93 Harv. L. Rev. 938, 945-46 & n.55 (1980). Other communities have attempted to compel realtors to engage in reverse steering. See \textit{Fair Housing Act: Hearings on H.R. 3504 & H.R. 7787 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary}, 95th Cong., 2d Sess. 177-80 (1978) [hereinafter cited as \textit{Fair Housing Act Hearings}]. The legality of these practices has not yet been the subject of litigation.

\textsuperscript{220} See Comment, supra note 206, at 812-18.

\textsuperscript{221} Id.
the case law has failed to clarify the status of steering under Title VIII adequately.

While numerous steering cases have been brought to federal courts, many have been settled by consent decrees, while others have not proceeded past initial skirmishes over standing. Five major Title VIII cases involving these types of racial steering have been decided on the merits, and a violation of Title VIII was found to have occurred in only two of these cases. While these federal court decisions indicate that Congress meant to prohibit at least certain forms of steering, they do not agree on exactly which forms of steering are outlawed. Nor do they agree on how a plaintiff can establish that illegal steering has indeed occurred.

The first of these steering cases to be decided on the merits under Title VIII was *United States v. Saroff.* In *Saroff,* the federal government brought a pattern and practice suit against a Knoxville, Tennessee, broker who had assisted a local housing authority in obtaining homes for blacks displaced by an urban renewal project. As the effort to find homes for the displacees proceeded, a great deal of broker activity, including much uninvited solicitation, took place in previously all-white neighborhoods adjacent to the renewal area. This led to an appreciable increase in sales in those neighborhoods as blacks entered and whites departed. Although much of the case focused on the defendant's alleged blockbusting activities in the area, the government also contended that the defendant had engaged in several specific instances of unlawful racial steering. These included using the

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225. Id. at 356.

226. Id.

227. 377 F. Supp. at 355. Although the court described the government's steering allegations as brought under subsections (a), (b), and (d) of § 804, the government's steering complaint in fact made no mention of § 804(b). See
words "Fair Housing Broker" in an advertisement for a home in the transitional area but not in an advertisement in the same newspaper for a home in a white neighborhood, advising a white tester of a listing in the white neighborhood not given to a black customer who had specifically requested such a listing, telling one white customer that he would not "feel comfortable" in a particular transitional area, telling another individual interested in a particular neighborhood that blacks were "still east" of it, and providing displaced blacks with listings only in or near the transitional areas.228

The United States District Court for the Eastern District of Tennessee dismissed the government's action, and, although its rationale is not entirely clear, it apparently believed that none of the practices described were unlawful.229 The court declared, first, that giving the displacees listings only in transitional areas was "necessitated" by their preferences and by the broker's "traditional focus" on these areas, and emphasized that the housing authority had never requested the broker to provide listings in other areas.230 Second, the court ruled that the listing in a white area was given to the white tester but not to the black customer because of the particular nature of the house in question.231 Third, the court concluded that the other incidents could be interpreted as either not indicative of a desire to steer, or as based on unspecified "legitimate variables."232 The court neither discussed the general status of steering under Title VIII, nor analyzed any particular provision of the statute. The fact that the court was able to find or imagine an innocent explanation for each of the practices in Saroff suggests, however, that it believed that steering practices would violate Title VIII only if clearly accompanied by a malevolent segregative motive.

Comment, supra note 206, at 818 n.37. In any case, in the portion of its opinion dealing with steering, the court did not discuss the sections nor distinguish between them, but simply concluded that there was insufficient evidence to prove a pattern or practice of steering. See 377 F. Supp. at 365-67.


229. See 377 F. Supp. at 366. The court stated that "the proof fails to show that the citizens of this community were denied any right cognizable under [Title VIII]." Id.

230. Id.

231. Id. The broker had testified that the particular house was not deemed suitable for the black customer because it would not qualify for a federal home loan. Id. at 358. That the listing was given to a white tester who represented her requirements as identical to those of the black customer does not appear to have been considered by the court.

232. Id. at 366.
The defendant brokers did not fare as well in the second case, *Zuch v. Hussey.* In *Zuch*, the United States District Court for the Eastern District of Michigan was faced with massive evidence of blockbusting and active steering engaged in by numerous brokers in racially transitional areas of Detroit. The many steering incidents involved broker advice, couched in explicit racial terms and usually buttressed by references to declining property values or high crime rates, and statements that the white customers, or testers posing as customers, should avoid the integrated areas in which they had expressed an interest. One black customer who expressed an interest in an all-white suburb was advised "that he would not be comfortable living in an area where he would have no black neighbors" and was urged to consider an integrated area.

The *Zuch* court declared that racial steering was outlawed by "that portion of [section 804(a)] which makes it unlawful to 'otherwise make unavailable or deny, a dwelling to any person because of race.'" It defined unlawful steering as "the use of a word or phrase or action by a real estate broker or salesperson which is intended to influence the choice of a prospective property buyer on a racial basis." While this definition appears to require that the broker intend to steer his customers on racial grounds, the court went on to say that race need not be the sole reason for the broker's conduct. The court also declared that "any action by a real estate broker which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful." The court noted that its interpretation was in accord with a previous decision which indicated that Title VIII was intended to prohibit not only blatant discrimination but, more

233. For a discussion of the blockbusting aspects of the *Zuch* case, see notes 195-98 and accompanying text *supra.*
234. See 394 F. Supp. at 1035-44.
235. *Id.*
236. *Id.* at 1041.
237. *Id.* at 1047.
239. See Comment, *supra* note 206, at 820 n.45. One commentator on racial steering has criticized this definition because it "appears to require a showing of intent to influence buyer choice—an element that may either be lacking or very difficult to prove in a case of [passive] steering." See *id.* Later cases have borne out the prescience of this criticism. See notes 268-72 and accompanying text *infra.*
generally, "all practices which have a racially discouraging effect." This apparent inconsistency in the court's opinion regarding an intent requirement was not crucial in Zuch itself, because the evidence of racially explicit affirmative steering, coupled with extensive blockbusting activities, was almost certainly sufficient to establish the brokers' intent to steer. Yet such a construction would obviously loom much larger in cases involving passive steering, such as Saroff, in which the broker's motives are more difficult to establish.

The Zuch defendants attempted to establish that they had offered to show their customers homes in all areas in which listings were available, and argued that, notwithstanding any steering, they had not made any dwellings "unavailable" and thus they fell outside the ambit of section 804(a). The court dismissed this contention. Finding that the defendant's steering activities had violated Title VIII, the court enjoined them from "steering or channeling any prospective purchaser toward . . . any particular dwelling or neighborhood because of race."

The third major steering decision, and the only one other than Zuch to find a violation of Title VIII as outlined by Congress, was United States v. Real Estate One, Inc., a pattern and practice action brought against a large Detroit real estate broker. Quot-


243. The adoption of an "effects test" under Title VIII, similar to that used in employment discrimination cases under Griggs v. Duke Power Co., 401 U.S. 424 (1971), would presumably render racial steering unlawful irrespective of the broker's motives. It is generally recognized that the "effects test" applies to the Fair Housing Act. See Senate Hearings, supra note 24, at 118 n.2.

244. 394 F. Supp. at 1048. That this argument is not implausible has been noted by the commentators. See Comment, supra note 206, at 814-15.

245. 394 F. Supp. at 1048. The court noted:

What the defendants are asking this Court to find, in effect, is that because of the insistence of the plaintiffs, and the reluctant submission of the defendants, there was no steering because the initial efforts of the defendants failed. Such a conclusion is untenable. The fact that the defendants did not succeed in steering the plaintiffs away from the transitional neighborhoods to Detroit is not relevant; the law makes it unlawful even to attempt.


246. 394 F. Supp. at 1056.


248. Id. at 1143. The defendant was formed by the purchase of four separate Detroit brokerages, operated 27 offices, and employed approximately 400 salespersons. Id. at 1146.
ing from Zuch, but carefully excising its language that alluded to the broker’s intent, the United States District Court for the Eastern District of Michigan defined unlawful steering as “the use of any word or phrase or action by a real estate broker or sales person which influences the choice of a prospective buyer on a racial basis or which in any way impedes, delays, or discourages on a racial basis a prospective homebuyer from purchasing housing.” Accordingly, the court held that the defendant’s policy of advertising homes in “changing areas” of Detroit in a black-oriented newspaper violated Title VIII because of its “racial steering effect.” The court so decided even though it found that the defendant had adopted its advertising policy not because of any motive to affect the racial composition of the area, but merely because it had “determined that the best return on its advertising dollar [could] be realized in this way.”

The court in Real Estate One also noted that the defendant’s biracial sales force was not integrated, and that black salespeople were concentrated in offices in or near black or transitional areas. Additionally, it observed that even though the company had abandoned its earlier policy of assigning salespeople to offices on a racial basis and forbidding black salespeople from showing homes in white areas, the previously established segregated pattern still existed because “the company took very little affirmative action, if any, to change it, and . . . most black salespersons, for personal and economic reasons, real or imagined, preferred it.” The court commented that salespeople tend to sell homes near their offices, that all-white offices “attract white buyers and have a tendency to discourage black buyers,” while all-black offices have a tendency to “attract black buyers and discourage white buyers,” and concluded that “probably nothing . . . would facilitate and encourage some gradual and voluntary residential racial integration more than would racially integrated sales offices.” Accordingly, the court held that not only had the defendant’s past assignment policies been unlawful, but also that its failure to take “affirmative

249. See id. at 1144. The court quoted with approval from the government’s proposed conclusions of law, which themselves contained quotations from Zuch. Id.
251. 433 F. Supp. at 1152 (emphasis added).
252. Id.
253. Id. at 1148-49.
254. Id. at 1149.
255. Id. at 1150.
action” to overcome the effects of these policies constituted a “pattern and practice with a discernible steering effect” in violation of Title VIII.\textsuperscript{256} This was true even though the court realized that the pattern of racially-segregated offices resulted “more from the attitudes of [the defendant’s] salespeople, black and white, and from the biases of the community than from anything else.”\textsuperscript{257}

Any hopes that \textit{Real Estate One} might inaugurate an era in which federal courts would interpret Title VIII to prohibit even subtle, passive steering practices without inquiring into the broker’s motives were dashed by the 1979 decision of the United States District Court for the Northern District of Ohio in \textit{United States v. Welles-Bowen Co.}\textsuperscript{258} In \textit{Welles-Bowen}, the government alleged that a Toledo broker had engaged in several acts of racial steering, but the court found that Title VIII had not been violated.\textsuperscript{259} The incidents described by the court in its findings of fact suggest that only relatively subtle steering took place.\textsuperscript{260} The court’s findings indicate primarily that some of the defendant’s salespeople told white testers that certain areas of Toledo should be avoided be-

\textsuperscript{256} Id.

\textsuperscript{257} Id. The opinion describes the practices in one of the defendant’s offices—practices since abandoned—in which listing cards were coded to indicate whether a given listing could be shown to blacks. \textit{Id.} at 1153. If so, the home would be advertised with a special telephone number. \textit{Id.} Customers calling on this “black line” would be referred to black salespeople and steered to black or integrated neighborhoods. \textit{Id.} The opinion also described many incidents in which customers were actively steered or salespeople were instructed by their superiors not to show particular homes to black customers, and detailed an incident in which two of the defendant’s agents yielded to pressure from a group of neighbors of a white landowner and arranged a quick sale to one of the neighbors rather than consummate a sale to a black customer who had paid a deposit on the property. \textit{Id.} at 1154-55. The court noted that the described office practices, essentially the work of a single office manager, had been discontinued and were completely unlikely to recur, and further noted that the other incidents were in direct contravention of “clear, overt” company policy. \textit{Id.} at 1153.


\textsuperscript{259} \textit{Id.} at 15,773. The government also alleged acts of sex discrimination and racial steering in rentals. \textit{Id.} at 15,774. These allegations were dismissed as well, in part on the questionable grounds that it would have been a “vain act” for the defendant to show apartments to customers who did not meet the discriminatory requirements of the owners, and that two steering incidents separated by three years were insufficient to establish a pattern and practice. \textit{Id.} at 15,766. The court also declared that the rental charges had been rendered moot because the defendant withdrew from the rental business when its principal rental agent retired. \textit{Id.} at 15,766.

\textsuperscript{260} \textit{Id.} at 15,778. Many of the described incidents simply failed to suggest any steering. \textit{See id.} at 15,769-71.
cause of "crime problems" and that the black population had reduced some neighborhoods' "rates of appreciation." 261

The clearest steering incident in Welles-Bowen involved a white couple which had just moved to Toledo. The husband's new place of employment, the local art museum, was in an integrated area known as the "Old West End," and the couple specifically stated that they would be interested in older homes in that area, but would not be interested in tract houses.262 The salesperson made negative comments about the integrated neighborhood, referring to it as a "high crime area." 263 She spent several days showing the couple homes in white areas, just as she testified she would "normally" do.264 Dissatisfied with these homes, many of which were suburban tract houses, the couple selected a number of Old West End homes which they discovered by driving through the area and reviewing the broker's multiple listing books.265 At the couple's insistence, the salesperson took them on a tour of the area, but she remarked that blacks were moving in.266 The couple nevertheless purchased a home, listed with the defendant, in the Old West End.267

In its conclusions of law, the Welles-Bowen court declared that racial steering violated Title VIII, and adopted the Zuch definition of steering, which it interpreted as requiring that intent must be established in a steering case.268 The court did not indicate what sort of showing might satisfy the intent requirement. However, it found that any inference of discriminatory intent was negated by the fact that the defendant made its multiple listing books available to its clients,269 stated that the salespeople's statements "concerning the effect on appreciation, resale value, or of personal problems in integrated or mixed neighborhoods, are not evidence of an 'intent' to steer in the absence of any actual steer-

261. Id. at 15,770-71.
262. Id.
263. Id. at 15,768.
264. Id.
265. Id.
266. Id.
267. Id. at 15,768. The court declared that while this incident showed that the salesperson had a "preference to show white clients to white neighborhoods," it amounted to neither actual nor attempted steering. Id. The court's reasoning was apparently based on an insufficient indication of an intent to steer. See id.
268. Id. at 15,772.
269. Id. at 15,773.
ing," 270 and repeated that such indications of "personal preference" were insufficient to establish "intentional or effective racially discriminatory 'steering.'" 271 The court did not make clear what it meant by "actual" or "effective" steering, but neither was deemed to be present in the case, probably because the customers who testified were whites who eventually purchased in an integrated area. The testers, of course, did not purchase anywhere. The court apparently presumed that if the broker intended to steer, it would not ordinarily permit its attempts to fail. 272

Another important steering case to be decided under Title VIII is Village of Bellwood v. Dwayne Realty, 273 in which, as in Saroff and Welles-Bowen, no violation of Title VIII was found to have occurred. Dwayne Realty involved alleged steering in the sale of homes in Bellwood, Illinois, an older suburb of Chicago with both racially integrated and essentially all-white neighborhoods. 274 The plaintiffs introduced evidence of four tests of the defendant's salespeople. Two of these tests, one by a white couple, the other by a black woman, failed to reveal broker conduct that would constitute illegal steering under any interpretation of Title VIII. 275

270. Id. at 15,772.
271. Id. at 15,773. The court buttressed its conclusion by stating that "none of the clients were 'talked out of areas.'" Id.
272. Although it purports to focus on intent, this approach is remarkably similar to the argument rejected in Zuch that steering efforts are actionable under Title VIII only if they are ultimately successful. See note 245 supra. Either approach makes it very difficult to establish evidence of steering through the testimony of testers, who cannot be successfully steered because they do not buy. The Welles-Bowen approach appears slightly more liberal in that these difficulties presumably would be overcome by a showing of a blatant, incontrovertible racial motive. Few brokers, however, are likely to behave so egregiously as to make this a practical difference.
274. Id. at 1322. Following the all too familiar pattern, black homeowners had begun to be concentrated in one particular Bellwood neighborhood. See id. Local concern that this pattern was the product of racial steering by real estate brokers led the town to file essentially identical steering suits against several brokers. See Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (upholding standing of Village and resident testers to sue under Title VIII in steering case against other brokers). The town had also attempted to pressure realtors to steer black customers away from areas of heavy black concentration. See Fair Housing Act Hearings, supra note 219, at 182-83 (letter from Bellwood's housing specialist to brokers doing business in the area, submitted by William North, general counsel for the National Association of Realtors).
275. See 482 F. Supp. at 1327-28. Although the white tester couple, "the Elliots," had said that they were steered away from one listing in an integrated area, the broker was able to establish that that home had previously been sold, just as the salesperson had told the couple. Id. at 1328. The black tester was given listings in both white and integrated areas, as was the white couple. Id.
A third test was conducted by another black woman. Although she testified that defendant's office manager had treated her "as if [she] had a disease," that contention was not accepted by the court, and her testimony did not otherwise indicate that she had been steered.

A white man, who, with his wife, had conducted the fourth test, presented the only real evidence of steering. He testified that the defendant's salespersons told him and his wife that since the housing north of one street was integrated, she would only show them homes south of it, "hesitated" when they picked a home from the listing book that was located in a predominantly black neighborhood, and told them that another home they had selected from the book was adjacent to a heavily integrated area and that the couple "would not want to live there." Thereafter, as the salesperson and the couple went through the book, she selected eight additional homes for their consideration. At the couple's request, the salesperson then showed them these eight homes—but not the two homes selected by the couple—three of which were in integrated neighborhoods.

The salesperson testified that she had not told the couple that she would only show them homes south of one street because the area to the north was integrated, and added that she could not have made such a statement since the area to the south of the street also included an integrated neighborhood. She also denied that she had told the couple they would be unhappy living next to an

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276. 482 F. Supp. at 1332-33. The sales manager's version of the incident—which of course indicated that the black tester was shown nothing but the utmost courtesy—was deemed more creditworthy by the court. Id.

277. Id. at 1333-34. This black tester apparently was also given listings in both integrated and white areas. See id. at 1326, 1332.

278. Id. at 1325.

279. Id.

280. Id. at 1325-26.

281. Id. at 1326.
integrated area, and explained that she had not deliberately failed to show the couple the two homes they had selected, but was simply unable to get around to them within the time limit the man had set.\textsuperscript{282}

The court deemed the salesperson's testimony to be more creditworthy than the tester's. It declared that while the salesperson's version of the story was "straightforward" and "made sense,"\textsuperscript{283} the tester's version was "weakened" by its failure to give any "rational explanation" for the "somewhat bizarre" behavior it attributed to the salesperson.\textsuperscript{284} If the \textit{Dwayne Realty} opinion had merely involved the court's resolution of disputed factual matters in favor of the defendant broker, it would not be particularly noteworthy. However, the opinion lends additional weight to the Saroff and Welles-Bowen approaches to steering, and it adopts standards of proof that will make it nearly impossible to establish the existence of illegal steering in future cases.

Although the \textit{Dwayne Realty} court accepted the \textit{Zuch} definition of unlawful steering,\textsuperscript{285} which appears to include an intent requirement,\textsuperscript{286} it seems to leave open the possibility that illegal steering might be established without any showing as to the broker's underlying motives by its declaration that illegal steering "may be established either by proof of purpose or effect."\textsuperscript{287} Not only did the court declare that the evidence before it failed to disclose any segregative effect, but it went on to state that "this is always true whenever a racially discriminatory practice in housing is sought to

\textsuperscript{282} \textit{Id.} at 1325.

\textsuperscript{283} \textit{Id.} at 1332.

\textsuperscript{284} \textit{Id.} at 1331. The court declared that the salespeople earned their living by selling real estate, and had no "personal interest" in keeping whites out of a predominantly black neighborhood. \textit{Id.} at 1331-32. It failed to notice an extremely obvious and plausible explanation for the salesperson's disinclination to show the couple homes in that neighborhood: the couple "acted in ways that would lead [her] to believe they were racially biased." \textit{See id.} at 1325. This explanation is not necessarily vitiated by the fact that the couple was shown homes in other integrated areas, and the saleswoman may well have assumed that prejudiced white customers might be willing to tolerate black neighbors who were not too close or too numerous. Unfortunately, the opinion does not reveal the exact extent of the black population in the various "integrated" neighborhoods. Apparently it does not occur to the court that a prejudiced customer or a steering broker might regard a neighborhood with, say, a 10\% black population much differently than a neighborhood that was 60\% black.

\textsuperscript{285} \textit{See id.} at 1331.

\textsuperscript{286} \textit{See} notes 238-40 and accompanying text \textit{supra}.

\textsuperscript{287} \textit{Id.}, citing \textit{Acevedo v. Nassau County}, 369 F. Supp. 1384 (E.D.N.Y. 1974).
be proved solely by the testimony of testers.”\footnote{288} The court's implicit rationale is that a broker's steering practices can have no effect on a tester's choice of housing because a tester does not buy.\footnote{289}

The \textit{Dwayne Realty} opinion also indicates that even if the plaintiff in a Title VIII steering case produces evidence, procured by testers or otherwise, that might give rise to an inference that the broker had acted with a discriminatory purpose, the broker will likely be able to rebut that inference with ease. The court noted that the broker therein produced as a witness one of its white customers, who had been shown a number of homes in both integrated and all-white neighborhoods, and who eventually purchased a home in an integrated area.\footnote{289} This customer's testimony established that he was on good social terms with his black next door neighbors, and that the salesperson who dealt with him never mentioned race.\footnote{291} Incredibly, the court declared that the testimony of this single witness produced the “telling evidence that disposes of this dispute” and “destroyed the entire claim of the plaintiffs.”\footnote{292} These extreme statements make sense only if the court believed that the broker who intends to steer is inevitably successful.\footnote{293}

The \textit{Saroff}, Welles-Bowen, and \textit{Dwayne Realty} decisions thus appear to suggest that racial steering by real estate brokers violates Title VIII only if such action is tantamount to a refusal to deal

\footnote{288} 482 F. Supp. at 1331. One commentator on racial steering has recognized that this argument may have validity if the broker's conduct is evaluated under § 804(a). See Comment, \textit{supra} note 206, at 814 n.27. But the commentator argues that testers should have no problem if their claims are evaluated under § 804(b). \textit{Id.} at 821 n.48.

\footnote{289} The \textit{Dwayne Realty} court's declaration that tester evidence cannot establish that a broker's practices have a steering effect is in distinct contrast to the approach taken in \textit{Real Estate One}, in which the steering effect of the broker's advertising and office-assignment practices was in essence presumed. See notes 247-57 and accompanying text \textit{supra}. Unfortunately, from the point of view of the potential plaintiff, evidence of the experiences of actual customers, the only readily apparent alternative to tester evidence of effect, is, as a practical matter, no alternative at all. Collection of the relevant data would not only be expensive and time-consuming, but would likely be unreliable due to variables other than the customer's race, such as the customer's income or individual preferences, that might themselves plausibly account for the revealed pattern of housing choice. See Bogen & Falcon, \textit{supra} note 158, at 70-73.

\footnote{290} See 482 F. Supp. at 1334-35.

\footnote{291} \textit{Id.} at 1334.

\footnote{292} \textit{Id.}

\footnote{293} The broker in \textit{Dwayne Realty} also showed that he had sold homes in predominantly white neighborhoods to black and Asian customers, but had never sold a home to a black in the neighborhood of heaviest black concentration. \textit{Id.} at 1334.
with customers who seek homes in “racially inappropriate” areas.\textsuperscript{294} Indeed, these decisions virtually amount to a judicial approval of all but the most blatant and outrageous steering practices. Unless Congress amends subsections (a) and (b) of section 804 of Title VIII, or unless the courts that decide future steering cases return to the more liberal approach reflected in \textit{Zuch} and \textit{Real Estate One}, racial steering’s current position as “the single most widely practiced form of racial discrimination in the [housing] sales market”\textsuperscript{295} is unlikely to be jeopardized.

\section*{V. Conclusion}

One can reach three basic conclusions regarding Title VIII of the Civil Rights Act of 1968. First, Congress did not take the initiative in passing a national statute to fight housing discrimination.\textsuperscript{296} Rather, it was President Johnson who was responsible for finally getting Congress on track toward this essential goal.\textsuperscript{297} Second, because of the inadequacies of Title VIII, and the resulting inability of the executive branch to enforce fair housing,\textsuperscript{298} the law has fallen far short of meeting its stated goal of insuring equal housing opportunity throughout the United States.\textsuperscript{299} Title VIII therefore has been an “empty promise,” a “law without teeth,” and a “paper tiger.”\textsuperscript{300} Third, the federal courts have only rarely gone beyond the literal language of Title VIII in combatting blockbusting\textsuperscript{301} and racial steering.\textsuperscript{302}

\textsuperscript{294} It is likely that the courts’ reluctance to find that subtle steering practices violate Title VIII stems in part from their focus on § 804(a) in evaluating broker conduct. In the future, it is submitted that they should consider the argument of one commentator, who opines that § 804(b) provides a much broader ban on steering and reaches any broker conduct that involves disparate treatment of black and white customers who are otherwise similarly situated. \textit{See Comment, supra} note 206, at 818-21. This commentator clearly envisions that testers provide the most evidence of disparate treatment, and that no showing of broker intent to discriminate should be required. \textit{Id.} at 821 n.48. HUD’s failure to promulgate substantive regulations that deal with racial steering has undoubtedly contributed to the chilly reception that the courts have given to steering complaints.

\textsuperscript{295} \textit{See} note 162 \textit{supra}.

\textsuperscript{296} \textit{See} notes 23-32 and accompanying text \textit{supra}.

\textsuperscript{297} \textit{See} notes 33-55 and accompanying text \textit{supra}.

\textsuperscript{298} \textit{See} Lamb, \textit{supra} note 9, at 405-29.

\textsuperscript{299} \textit{See} notes 74-77 and accompanying text \textit{supra}.

\textsuperscript{300} \textit{Senate Hearings, supra} note 24, at 4, 21, 23.

\textsuperscript{301} For a discussion of the judicial constructions of the anti-blockbusting provisions of Title VIII, see notes 172-204 and accompanying text \textit{supra}.

\textsuperscript{302} For a discussion of the judicial constructions of the anti-steering provisions of Title VIII, see notes 205-95 and accompanying text \textit{supra}.
If the liberal faith in the efficacy of federal governmental action to alleviate racial problems is still valid—and it is the opinion of this author that it is—the Fair Housing Act must be amended by Congress to give the Department of Housing and Urban Development and the Department of Justice far greater enforcement powers, and the federal courts must interpret the law more broadly. Only then will this nation make meaningful progress toward the goal of achieving equal housing opportunity.

303. For a discussion of the enforcement provisions of Title VIII, see notes 111-25 and accompanying text supra.