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Michael Steven Bylsma

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NOTES

IS THE U.S. COMMITTED TO FAIR HOUSING?
ENFORCEMENT OF THE FAIR HOUSING ACT REMAINS A CRUCIAL PROBLEM

With the enactment of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), Congress ordered an end to the pervasive problem of discrimination in housing. Thus, a century after the Civil War, Congress declared equal housing opportunity for all to be national policy. Yet, in the eleven years during which the Fair Housing Act has been in effect, discrimination in housing has not abated substantially. Instead, housing

1. Pub. L. No. 90-284, 82 Stat. 73 (codified at 42 U.S.C. §§ 3601-3631 (1976)). [The terms "Fair Housing Act," "The Act," and "Title VIII" will be used interchangeably throughout this Note.] In 1967, it was estimated that 80% of the black population of metropolitan areas in the U.S. lived in central cities, while most new housing was constructed in the suburbs. Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 36 (1967) [hereinafter cited as 1967 Hearings]. By 1976, almost 5.6 million of the 21.2 million blacks in metropolitan areas lived outside the central cities — an increase of 36.6% since 1970. CONGRESSIONAL QUARTERLY, URBAN AMERICA: POLICIES AND PROBLEMS 8 (1978). See OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEV., RECENT SUBURBANIZATION OF BLACKS: HOW MUCH, WHO, AND WHERE? (Feb. 1979). But the increase in the suburban black population does not necessarily indicate an increase in the number of integrated communities. For a detailed discussion of minority migration and urban residential segregation, see UNITED STATES COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 119-36 (1975) [hereinafter cited as TWENTY YEARS]. In 1968, William J. Levitt, the nation's largest homebuilder, stated that in the absence of a legal prohibition, discrimination was good business: "Integration has certainly not hurt us [the housing industry] . . . [but] any homebuilder who chooses to operate on an open occupancy basis, where it is not customary or required by law, runs the grave risk of losing business to his competitor who chooses to discriminate." 114 CONG. REC. 3421 (1968) (remarks of Sen. Mondale quoting William J. Levitt). See also Dubofsky, Fair Housing: A Legislative History and a Perspective, 8 WASHBURN L.J. 149 (1969); Note, The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act, 1969 DUKE L.J. 733.

2. The preamble to Title VIII states: "It is the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States." 42 U.S.C. § 3601 (1976).

3. The blatant forms of discriminatory housing practices such as "whites only" advertising have abated, however. See Proposed Amendments to the Fair Housing Act: Hearings on H.R. 3504 and H.R. 7787 Before the Subcomm. on Civil and Const. Rights of the House
discrimination remains a critical national problem. A recent HUD-sponsored study found that in the current housing market, a black homeseeker who visits four different real estate agents has a seventy-five percent chance of encountering discrimination when attempting to find rental housing and a sixty-two percent chance of encountering discrimination when attempting to buy housing.4

Responsibility for discrimination in housing is shared by real estate and insurance companies, banks, governmental units, and individuals. Through various discriminatory techniques, of which racial steering now is considered preeminent,5 these groups have seriously limited housing opportunity. The greatest problem underlying the current housing situation, however, is a weak fair housing law which has been ineffectual in its objective to eliminate housing discrimination.

Historically, the federal government has been involved in efforts to prevent discrimination in housing only for a short time. Unfortunately, the government's earliest programs dealing with housing were "carried out under policies which . . . were aggressively discriminatory . . . ."6 Later, during the 1950's, the government retreated from official policies that openly advocated housing discrimination.7 Nevertheless, the first significant step taken by the government against discrimination in federally assisted housing was in 1962 with President Kennedy's Executive Order on

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4. \textit{Division of Evaluation, Office of Policy Dev. and Research, U.S. Dep't of Housing and Urban Dev., Housing Market Practices Survey} (1978) (prepared by the National Committee Against Discrimination in Housing) [hereinafter cited as NCDH Survey]. Overall, the study found that blacks were discriminated against in 30% of the rental transactions and in 22% of the sales transactions which were monitored. See note 75 infra.

5. \textit{Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 174 (1979)} (statement of Robert C. Weaver) [hereinafter cited as 1979 Hearings]. "Racial steering" refers to a practice whereby a real estate broker directs the buyer, on the basis of race, toward a particular house or neighborhood because of its racial composition or fails to inform a buyer of suitable housing in other neighborhoods. For a thorough evaluation of racial steering as it relates to Title VIII, see Note, \textit{Racial Steering: The Real Estate Broker and Title VIII}, 85 \textit{Yale L. J.} 808 (1976) (Title VIII's colorblind standard requiring real estate brokers to treat customers equally without regard to race prohibits virtually all racial steering). See also Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1973) (any attempt by real estate brokers to influence prospective buyers on a racial basis violates § 804(a) of Title VIII).


7. \textit{See M. Sloane, supra note 6, at 139.}
Equal Opportunity in Housing.\(^8\) Executive Order 11,063 had a very limited impact on housing discrimination, however, since it covered only about one percent of the nation's housing stock at the time of its promulgation.\(^9\)

The second important effort by the government to eliminate discrimination in federally assisted housing was the enactment of Title VI of the Civil Rights Act of 1964.\(^10\) Like Executive Order 11,063, the impact of Title VI on housing discrimination has been limited because it applies to only one-half of one percent of the nation's housing.\(^11\)

In contrast to the government's early history of discriminatory housing policies and its subsequent, but inadequate, efforts to remedy the problem, the enactment of Title VIII of the Civil Rights Act of 1968\(^12\) represents the most important and far-reaching stand by the government against housing discrimination to date. Unlike Executive Order 11,063 and Title VI, which prohibit housing discrimination in federally assisted programs, Title VIII was enacted to cover the private market.\(^13\) Title VIII may be enforced in one of three ways. The Secretary of the Department of Housing and Urban Development (HUD) may investigate complaints and resolve them through "conference, conciliation, and persuasion."\(^14\) Enforcement authority also is assigned to the Department of Justice and permits the Attorney General to litigate private housing discrimination cases only where there is a "pattern or practice" of discrimination or where the complaint presents issues of general public importance.\(^15\) Finally, an individual complainant may expend his or her own resources and time and act as "private


\(^9\) M. Sloane, supra note 6, at 143.


\(^11\) See notes 46-51 and accompanying text infra.

\(^12\) 42 U.S.C. §§ 3601-3631 (1976).


\(^14\) 42 U.S.C. § 3610(a) (1976). In 1977, HUD received more than 3,000 complaints under this section but successfully conciliated only 300. United States Comm'n on Civil Rights, The Federal Fair Housing Enforcement Effort 29, 30-32 (1979) [hereinafter cited as Enforcement Effort]. See notes 76-78 and accompanying text infra.

attorney general”16 in pursuing a remedy through the courts.17

Enforcement authority under Title VIII has been, and continues to be, grossly inadequate to meet the objective of equal housing opportunity. Thus, the important housing component to the 1960’s Civil Rights legislation has proven to be “largely an empty promise.”18 HUD’s efforts to enforce Title VIII have, for the most part, been unsuccessful since HUD has virtually no enforcement powers under the Act.19 Likewise, enforcement efforts by the Department of Justice have been limited since the Attorney General may pursue only pattern or practice suits or suits of general public importance and is precluded from suing on behalf of individuals.20 Thus, the third alternative, suits by individuals, has become the primary means of securing remedies for victims of discriminatory housing practices. Yet, private suits are an inadequate, expensive, and time-consuming means of achieving the objectives of equal opportunity in housing. Indeed, by the time a suit is successful, the plaintiff’s best remedy — the housing originally sought — is usually no longer available.21

While the courts have construed provisions of Title VIII favorably toward victims of discrimination, private civil actions alone have not significantly furthered the objectives of the Act. Recently, Congress has responded to the inherent enforcement weaknesses in Title VIII by proposing amendments to the Act.22 These amendments, now pending, would

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grant HUD cease and desist authority as well as expand the scope of prohibited discriminatory activities. This Note traces the development of fair housing in the United States through the actions of the federal government and the courts and concludes that the realization of equal opportunity in housing will be achieved only by improved enforcement of Title VIII — specifically through the adoption of amendments to the Act granting HUD administrative enforcement authority.

I. Historical Antecedents To Title VIII: The Relationship Between Government and Fair Housing

A. Early Federal Programs

Under the Civil Rights Act of 1866, all citizens of the United States are guaranteed "the same right, in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."23 Until the 1968 Supreme Court decision in Jones v. Alfred H. Mayer Co.,24 however, this statute laid virtually dormant.25 For many years, discriminatory housing practices flourished and, until recently, were actively promoted by the policies of the federal and state governments.26 In Jones v. Alfred H. Mayer Co., the Court declared that Congress intended the Civil Rights Act of 1866 “to prohibit all discrimination against Negroes in the sale or rental of property — discrimination by private owners as well as discrimination by public authorities.”27 While the Civil Rights Act of 1866 as enacted guaranteed black citizens a private right against housing discrimination, the federal government never officially supported this right, preferring instead to maintain its “laissez-faire” relationship to the housing market until the 1930’s.

24. 392 U.S. 409 (1968). In Jones, the Supreme Court upheld a complainant’s right to sue under § 1982 for racial discrimination based on defendant’s refusal to sell plaintiff a home even though the same action could have been brought under the recently enacted Title VIII. The Court pointed to the “vast differences” which allowed the statutes to stand as independent rights. Id. at 417. Unlike Title VIII, § 1982 does not prohibit discrimination on the basis of religion or national origin, nor does it refer to discrimination in advertising, financing, or in the provision of services in connection with the sale or rental of housing. Id. at 413. Thus, in contrast to § 1982 which is a privately enforced general statute, Title VIII is a “detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.” Id. at 417.
25. Twenty Years, supra note 1, at 2.
26. See notes 34-42 and accompanying text infra. Various state and local ordinances supported discriminatory zoning practices, some of which were in effect long after they were declared unconstitutional in Buchanan v. Warley, 245 U.S. 60 (1917). See United States Comm’n on Civil Rights, Understanding Fair Housing 4 (1973).
27. 392 U.S. at 421-22. The Court stated: “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.” Id. at 442-43.
Prior to the 1930's, housing transactions occurred within a housing market that was almost totally unregulated by the federal government.\textsuperscript{28} When the government entered the housing market during the New Deal, it created the Federal Housing Administration (FHA),\textsuperscript{29} the Federal Home Loan Bank Board (FHLBB),\textsuperscript{30} and the Homeowners’ Loan Corporation,\textsuperscript{31} which were designed to assist in housing finance. Later, in 1944, Congress created the Veteran’s Administration loan guarantee program\textsuperscript{32} which was similar in function to the FHA mortgage insurance program.\textsuperscript{33} While these programs enabled millions of people to purchase homes, they also fostered greater racial housing segregation since they were carried out under “aggressively discriminatory” policies.\textsuperscript{34}

The Federal Housing Administration revolutionized the housing and home finance industries, making housing available to great numbers of people through the introduction of the standard low down payment and thirty-year amortized mortgage.\textsuperscript{35} These benefits were seldom available to

\textsuperscript{28} M. Sloane, supra note 6, at 132.


\textsuperscript{31} Homeowners’ Loan Act of 1933, 48 Stat. 128 (1933) (current version at 12 U.S.C. §§ 1461-1470 (1976)).


\textsuperscript{33} M. Sloane, supra note 6, at 132.

\textsuperscript{34} Id. The FHA and VA programs, to a great degree, facilitated the suburban housing boom that began in the 1930’s. Id. at 136-37.

\textsuperscript{35} Id. at 133-34. Home ownership blossomed under the liberalized financing introduced by FHA. By 1970, over three out of five housing units were owner-occupied. Id. at 135. However, only moderate and middle-income families primarily benefitted under FHA
black homebuyers, however, since most FHA investments were in white neighborhoods.\textsuperscript{36} Furthermore, FHA had a policy against allowing "the infiltration of . . . inharmonious racial groups" into neighborhoods because "a change in social or racial occupancy generally contributes to instability and a decline in values."\textsuperscript{37} FHA policy also encouraged its mortgage insures to file restrictive covenants to prohibit "the occupancy of properties except by the race for which they are intended."\textsuperscript{38}

In 1948, the Supreme Court, in \textit{Shelley v. Kraemer}, declared that racially restrictive covenants on property were not constitutionally enforceable.\textsuperscript{39} Two years after the \textit{Shelley} decision, the FHA and VA reversed their policies and no longer insured mortgages which were recorded with restrictive covenants.\textsuperscript{40} Thus, the discriminatory policies of these agencies were in force throughout the first five years after World War II, during which time over 900,000 units of FHA-insured housing were produced.\textsuperscript{41} Indeed, of the total FHA-insured housing constructed during the post-war building boom, it is estimated that less than two percent was made available to minority purchasers.\textsuperscript{42}

\section*{B. Origins of the Federal Fair Housing Law}

In 1962, with President Kennedy's Executive Order on Equal Opportunity in Housing, the federal government took its first major stand in favor of fair housing. Executive Order 11,063 represented President Kennedy's attempt to eliminate housing discrimination with "a stroke of the pen."\textsuperscript{43} The Order, however, fell far short of that promise since it applied only to

\textsuperscript{36} Nearly all of the FHA- and VA-produced housing was located in the suburbs and occupied by whites. M. Sloane, \textit{supra} note 6, at 134-35.

\textsuperscript{37} \textit{Federal Housing Administration, Underwriting Manual} §§ 935, 937 (1938).

\textsuperscript{38} \textit{Id.} § 980(3)(g). The Veteran's Administration also had a policy which encouraged racial covenants. \textit{See Twenty Years, supra} note 1, at 40. In addition, the FHLBB and the Homeowner's Loan Corporation also advocated racially segregated neighborhoods. M. Sloane, \textit{supra} note 6, at 134-35.

\textsuperscript{39} 334 U.S. 1 (1948). The \textit{Shelley} decision represented a departure from prior decisions. Earlier, in Corrigan v. Buckley, 271 U.S. 323 (1926), the Court held that the fifth, thirteenth, or fourteenth amendments did not prohibit private racially restrictive covenants since they were private, rather than state, actions. In 1972, the United States Court of Appeals for the District of Columbia held that the act of recording a racially restrictive covenant in itself constituted a Title VIII violation. Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972).

\textsuperscript{40} M. Sloane, \textit{supra} note 6, at 135.

\textsuperscript{41} \textit{Twenty Years, supra} note 1, at 40.

\textsuperscript{42} \textit{Id.} at 4t. \textit{See generally} M. Sloane, \textit{supra} note 6, at 139-42.

\textsuperscript{43} M. Sloane, \textit{supra} note 6, at 142.
public housing, housing provided on urban renewal land, and housing financed through FHA and VA programs. Indeed, the scope of Executive Order 11,063, at the time of its promulgation, was limited to only one percent of the nation’s housing. Furthermore, compliance with the order was never realized since sanctions were “rarely imposed.”

The second major effort by the federal government to promote equal opportunity in housing was the enactment of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin against persons who are eligible to participate in any program receiving federal assistance. In application, the scope of Title VI, as it affects housing programs, has also been limited. No housing provided with FHA or VA mortgage insurance is included, nor does Title VI apply to housing provided by federally insured lending institutions. As a result, only one-half of one percent of the nation’s housing is covered by Title VI’s ban on discrimination. Moreover, under Title VI, beneficiaries of federal housing assistance programs may be denied further support if they discriminate. Yet, government termination of funds, perhaps the most effective sanction against discrimination, has rarely been imposed under Title VI. Title VI has had an impact, however, in promoting integration in public housing, tenant selection, and site selection policies.

44. See note 8 supra. Executive Order No. 11,063 applied only to housing provided under federal aid agreements signed after Nov. 20, 1962, and therefore most postwar FHA- and VA-financed housing was not included. M. SLOANE, supra note 6, at 143.

45. M. SLOANE, supra note 6, at 143. For example, litigation was never pursued with regard to builders or owners of housing who were under agreement or contract before Nov. 20, 1962, even if a complaint charging racial discrimination was made against them. TWENTY YEARS, supra note 1, at 67.


47. See ENFORCEMENT EFFORT, supra note 14, at 37-40.

48. M. SLOANE, supra note 6, at 143.


50. TO PROVIDE . . . FOR FAIR HOUSING, supra note 30, at 52-70. As of 1974, HUD had never terminated the funds of an ongoing project for noncompliance with Title VI. HUD’s reluctance to impose this sanction may be due to its preference for achieving compliance by voluntary agreement. Id. at 65. Furthermore, the fear of a political backlash resulting from terminating the funding of a city that operates its programs in violation of Title VI has been a major factor in HUD’s reluctance to utilize this sanction. Interview with Sterling Tucker, HUD Assistant Sec’y for Fair Housing and Equal Opportunity (Dec. 4, 1979).

C. Fair Housing Becomes National Policy Under Title VIII

After a period of long and intensive deliberation, Congress enacted Title VIII of the Civil Rights Act. The Act resulted in part from the strong concern felt by members of Congress that segregated housing patterns might have generated the racial unrest of the period. Moreover, many members of Congress believed that no significant progress in the civil rights area, particularly in education and employment, could be made without enacting an open housing law.

In comparison to the two earlier governmental attempts to prohibit discrimination in housing, Title VIII was the most comprehensive. Under Title VIII, it is unlawful to discriminate against any person on the basis of race, color, religion, sex, or national origin with regard to the negotiation, terms, or conditions of a sale or lease of a dwelling after receiving a bona fide offer; the advertisement of such property by indicating a discriminatory preference; or the representation to any person for discriminatory purposes that an otherwise available dwelling is not available. The Act applies to all dwellings, but as a result of the two exempted categories,


53. 1967 Hearings, supra note 1, at 98 (remarks of Roy Wilkins). The assassination of Dr. Martin Luther King, Jr., created the impetus to propel the Civil Rights bill through the House of Representatives. See Dubofsky, supra note 1, at 160.

54. See Note, supra note 1, at 736. In addition, studies indicating that the quality of education in de facto segregated inner-city schools was extremely poor supported the congressional belief that integration was necessary. See, e.g., United States Comm'n on Civil Rights, Report on Racial Isolation in the Public Schools 18-20, 114 (1967); 1967 Hearings, supra note 1, at 161 (remarks of Louis Pollak).

55. See Note, supra note 1, at 737. Several witnesses testified regarding the relationship between the isolation of blacks in the central-cities and the increase in employment opportunities in the suburbs. See, e.g., 1967 Hearings, supra note 1, at 103, 218-20, 221.

56. During Senate debates on Title VIII, Senator Hart remarked: "We must break the ghetto wall if success in any of these related areas [of civil rights] is to be possible." 113 Cong. Rec. 3395 (1967).

57. The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. §§ 5301-5317 (1976)), amended §§ 804, 805, 806, and 901 of Title VIII to prohibit discrimination on the basis of sex. This Note, however, deals with Title VIII primarily as it relates to racial minorities.

58. 42 U.S.C. § 3604(a)-(d) (1976). Section 3604(e) prohibits actual or attempted "blockbusting" for profit. "Blockbusting" occurs when blacks move into a predominantly white neighborhood. The term refers to the attempt by real estate brokers to exploit this situation by making constant, uninvited solicitations of white families for listings to sell their houses. For a description of this process, see United States v. Mitchell, 335 F. Supp. 1004, 1005 (N.D. Ga. 1971).

59. The first exclusion exempts a single family dwelling which is sold or rented by its owner if the owner has title or an interest in no more than three single-family homes at one time, provided that the owner does not employ a real estate agent or engage in discrimina-
only eighty percent of all of the nation’s housing is included. Furthermore, Title VIII specifically prohibits real estate brokers from engaging in any discriminatory act and prohibits discrimination in the availability, terms, or conditions of financing of housing.

Under one of the three alternative enforcement procedures of Title VIII, any person who has been or believes he or she will be injured by a discriminatory housing practice may file, within 180 days, a written complaint with HUD pursuant to section 810 of the statute. Within thirty days after receipt of the complaint, HUD must conduct an investigation. If either state or local laws provide substantially equivalent rights and remedies to the aggrieved party, the Secretary must refer the complaint to the state or local agency for conciliation. If the state does not commence

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60. M. SLOANE, supra note 6, at 144.
62. Id. § 3605.
63. Id. § 3610(a). Section 810 provides in part:
   (a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereinafter “person aggrieved”) may file a complaint with the Secretary [of HUD] . . . . Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection(c) . . . , the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. . . .

64. See note 63 supra.
65. 42 U.S.C. § 3610(c) (1976). HUD has recognized the following jurisdictions as providing substantially equivalent rights and remedies: Alaska, Colorado, Connecticut, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, Wisconsin, and the District of Columbia. 24 C.F.R. § 115.11 (1979). “Substantial equivalency” is based upon the following criteria: (1) the state or local law must provide for an administrative enforcement body to receive and process complaints; (2) the administrative enforcement body must have authority to investigate allegations of complainants and have the power to conciliate complaint matters; (3) the state or local law may not place any excessive burdens on the complainant which might discourage the filing of complaints; (4) the state or local law must be sufficiently comprehensive in its prohibitions so as to be an effective instrument in carrying out the purposes and intent of Title VIII; and (5) the state or local law must not contain exemptions that are substantially less than the coverage of Title VIII. Id. § 115.3.
proceedings within thirty days or if, in the Secretary's judgment, it is not acting with reasonable promptness, then the Secretary may reenter the case. Under Title VIII, HUD's enforcement power is limited to the authority to seek an end to the discriminatory practice through "conference, conciliation, and persuasion." HUB may not issue cease and desist orders. If the Secretary is unable to secure voluntary compliance with the law within thirty days of either the filing of the complaint or of HUD's reentry into the case, the aggrieved party may file an appropriate civil action.

Under the second alternative, an injured individual may file suit directly in federal court pursuant to section 812 of the Act, without first having filed a complaint with HUD or with a state or local agency. Relief is limited to an injunction, actual damages, a maximum of $1,000 in punitive damages, and court costs. In addition, reasonable attorney's fees may be granted to a prevailing plaintiff who is not able to afford attorney fees.

Finally, as the third alternative enforcement mechanism under Title VIII, section 813 of the Act authorizes the Justice Department to initiate, or on referral by HUD, to proceed with a civil action against any person who has engaged in a pattern or practice of discriminatory housing activities and against anyone who is responsible for denying a group of per-

66. 42 U.S.C. § 3610(c) (1976). A recent study of state agencies with statutes providing remedies similar to Title VIII revealed a pattern of delay in investigations and an inability to provide timely relief to victims of discrimination. CENTER FOR NATIONAL POLICY REVIEW, STATE AGENCIES AND THEIR ROLE IN FEDERAL CIVIL RIGHTS ENFORCEMENT (1977) [hereinafter cited as STATE AGENCIES].

67. 42 U.S.C. § 3610(a) (1976). The Fair Housing Act places primary responsibility on HUD for enforcing the prohibition on discrimination in housing. Id. § 3608(a). Along with its obligations of conference, conciliation, and persuasion in response to complaints of housing discrimination, HUD also has a duty under Title VIII to administer all of its programs in a manner which "affirmatively" promotes the policy of equal housing opportunity. Id. § 3608(d)(5). HUD's affirmative actions, however — focusing primarily on FHA single-family mortgage insurance programs — have lagged behind the duties imposed on it by Title VIII. See Rubinowitz & Trosman, Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs, 74 Nw. U.L. Rev. 491 (1979). See also notes 23-42 and accompanying text supra.

68. Id. § 3610(d).

69. Id. § 3612(a). Section 812 provides in part: "(a) The rights granted by §§ 3603, 3604, 3605, and 3606 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State and local courts of general jurisdiction." Id.

70. 42 U.S.C. § 3612(c) (1976).

71. Id. Recently, in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Supreme Court held that legal fees may be granted to prevailing defendants in Title VII cases only when the "plaintiff's action was frivolous, unreasonable or without foundation . . . ." Id. at 421.

72. 42 U.S.C. § 3613 (1976). Courts have interpreted "pattern or practice" liberally to
sons their rights under Title VIII when such denial raises an issue of general public importance. The Attorney General is not now authorized to remedy individual complaints of discrimination and is not specifically authorized to intervene in private Title VIII litigation.

II. WHY DISCRIMINATION IN HOUSING PERSISTS: THE TITLE VIII ENFORCEMENT PROBLEM

A. Title VIII: Statutory Enforcement Mechanisms Strained

Although practically all forms of housing discrimination have been prohibited by law for eleven years, numerous and widespread instances of racial discrimination in the sale and rental of housing have been recently documented. Under the sponsorship of HUD, a nationwide study of housing practices has been completed which found that a black person who visits four real estate agents in an attempt to buy a home has a sixty-two percent chance of being discriminated against and that in a search for rental housing, the likelihood of discrimination reaches seventy-five percent. The principal explanation for the persistence of discrimination in the housing market lies within the enforcement provisions of Title VIII. Two of the three avenues of enforcement under the Act — investigation and conciliation by HUD, and Department of Justice litigation — have proven to be grossly inadequate to redress individual victims of discrimination and to eliminate broader institutional patterns of discrimination. The third method, private suits, has been extremely successful in obtaining liberal judicial construction of Title VIII provisions. However, reliance on individual suits to enforce compliance with Title VIII results in relief being available only to those complainants with the time and financial resources to pursue a private action.

allow, for example, suits based on a single course of dealings between a realtor and black homebuyers. See, e.g., United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 939 (1974). Since neither the text nor legislative history of Title VIII defines "pattern or practice," courts have referred to the legislative history of Title VII, which says that a "pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." United States v. Mitchell, 327 F. Supp. 476, 482 (N.D. Ga. 1971) (quoting 110 CONG. REC. 14,270 (June 18, 1964) (remarks of Sen. Humphrey)). See Schwemm, Discriminatory Effect and the Fair Housing Act, 54 NOTRE DAME LAW. 199, 222-23 (1978).

Section 813 has been held to require that a specific violation must have had a measurable public impact before the Attorney General is authorized to enforce private civil rights. See United States v. Hunter, 459 F.2d 205, 217 (4th Cir. 1972).

ENFORCEMENT EFFORT, supra note 14, at 230.

NCDH SURVEY, supra note 4. The survey used pairs of "testers," black and white, who posed as seeking either housing to rent or buy. These testers answered newspaper advertisements in over 40 metropolitan areas. During the study, contact was made with over 3,000 rental agents. For a definition of "testing," see note 95 infra.
Fair Housing Enforcement

Through conference, conciliation, and persuasion, HUD has been able to resolve complaints of discriminatory practices in only approximately fifty percent of the cases in which it has found evidence of discrimination. In resolving a Title VIII complaint, HUD’s objectives are to obtain either substitute housing or monetary damages for the complainant. In a recent report to Congress, the General Accounting Office (GAO) reviewed 332 Title VIII complaints received in three HUD regions. Of these complaints, HUD’s investigation uncovered clear evidence of discrimination in fifty-seven cases, but it successfully conciliated thirty-six. Furthermore, the GAO study found that delays in investigation by HUD or delays caused by untimely or unsatisfactory resolution of complaints referred to state and local governments have severely hindered the chances for successful conciliation of discriminatory practices.

Especially significant in HUD conciliation efforts is the fact that any agreement reached between the aggrieved party and the Title VIII violator is purely voluntary. Title VIII grants HUD no authority to compel conciliation. Furthermore, unless the complainant is represented by counsel at the conciliation, a respondent is likely to abandon conciliation efforts before an agreement is reached, or refuse to cooperate altogether.

Similarly, the Department of Justice also has had limited success in enforcing the provisions of the Fair Housing Act. Pursuant to section 813, the Department of Justice may bring suit only when the Attorney General believes there is a “pattern or practice” of discrimination or when a “group of persons” has been denied equal housing opportunity and such denial raises an issue of general public importance. Finally, limited resources prevent the Department of Justice from bringing the number of suits necessary to reach violators of Title VIII in any significant way. As of August, 1978, the Justice Department had initiated a total of 300 pattern or practice suits or suits raising issues of public importance. Of these 300

76. GAO Report, supra note 19.
77. Id. at 21. Of 36 resolved complaints, HUD obtained housing in one case, monetary damages in 17, and housing and monetary damages in 3. Of the remainder of the 332 complaints, HUD was unable to resolve 247 for lack of clear evidence and 21 cases in which it had clear evidence; HUD had concurred in actions taken by state or local agencies in 18 complaints and either had taken no action on or had lost the files for the remaining 10. Id.
78. Id. at 23-25. See State Agencies, supra note 66.
79. Former Secretary of HUD, Patricia R. Harris, testified that: “where the victim of discrimination meets with the HUD conciliator and with the respondent, and it is evident that the complainant is unrepresented by counsel, conciliation often collapses. There is no credible threat of ‘consequences’ should the respondent refuse to cooperate.” 1978 Hearings, supra note 3, at 30.
81. Enforcement Effort, supra note 14, at 232.
suits, most were settled by consent decrees. Indeed, several courts have defined the role of the Justice Department under Title VIII to be the pursuit of preventive relief and therefore have refused to award individual damages. Thus, insufficient resources for Justice Department litigation, coupled with HUD's inadequate enforcement authority, have limited the progress toward equal housing opportunity.

B. Judicial Advancement of Fair Housing Goals

The Supreme Court has recognized that due to the limitations on enforcement authority of HUD and the Department of Justice under Title VIII, "the main generating force must be private suits in which . . . the complainants act not only in their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" Of the three methods for enforcement of Title VIII, the private suit has proven to be the most successful in that the courts have broadly construed various provisions of the Act in order to facilitate the achievement of its goals. In two major areas, standing to sue and burden

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82. Id. at 231.
84. See, e.g., United States v. Long, 537 F.2d at 1155; United States v. Mitchell, 580 F.2d 789, 792-93 (5th Cir. 1978).
85. The Assistant Attorney General for Civil Rights, Drew Days, has noted the "enormity" of the task of implementing fair housing in the light of the limited authority and resources of the Department of Justice and the lack of enforcement power on the part of HUD." 1978 Hearings, supra note 3, at 37 (statement of Drew S. Days). The government has not appropriated sufficient funds to adequately support fair housing enforcement. In fiscal year 1974, the total Title VIII appropriation for both HUD and the Department of Justice was $6.2 million. In 1979, the projected figure was only $11.2 million for fair housing enforcement by both agencies. The total budget for all fair housing programs reached only $17.4 million. The total budget for enforcement of equal employment laws, on the other hand, is over $300 million. ENFORCEMENT EFFORT, supra note 14, at 232.
87. While the Court in Trafficante decided that the fair housing law which Congress had given "highest priority" should be given a "generous construction" by the courts, 409 U.S. at 212, the general trend is for courts to construe standing provisions narrowly. The "prudential standing rules" were discussed in Warth v. Seldin, 422 U.S. 490 (1975):

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular factual issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions the standing question is founded in concern about the proper — and properly limited — role of the courts in a democratic society.

Id. at 498. See, e.g., Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221-27 (1974).
88. In Trafficante, the Court stated that the objectives of Title VIII are twofold: to end
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of proof, judicial interpretations of Title VIII have assisted private plaintiffs in bringing and in proving charges of housing discrimination.

By far, the greatest strides in Title VIII enforcement have been through court decisions expanding the class of potential plaintiffs who are entitled to sue and obtain relief for discriminatory housing practices. In *Trafficante v. Metropolitan Life Insurance Co.*, two tenants of an apartment complex were held to have standing pursuant to section 810 of the Act to file a complaint with HUD against their landlord. The complaint alleged that the landlord’s discriminatory rental policies had stigmatized the tenants as residents of a “white ghetto” and that they had suffered indirect injury by being deprived of the social, business, and professional benefits that accrue from living in an integrated community. The Court determined that Congress had intended standing for “persons aggrieved” under section 810 of Title VIII to extend “as broadly as is permitted by Article III of the Constitution.” Significantly, the Supreme Court recognized that in order to advance the twin goals of Title VIII, the prohibition of housing discrimination and the promotion of integrated living patterns, standing under section 810 must be broad enough to include those plaintiffs who are injured by a discriminatory housing practice even though they are not its direct objects. After *Trafficante*, however, the limits on standing to sue directly in federal court, under section 812, remained unclear.

With its decision in *Gladstone Realtors v. Village of Bellwood*, the Court apparently has resolved the issue of standing to sue under Title VIII. The *Bellwood* case involved an allegation that a real estate firm had engaged in the illegal activity of racial steering by encouraging black homemakers to look at houses in certain areas of Bellwood while discouraging whites from buying in the same area. The Court held that the village of Bellwood had standing to sue based on the allegation that the steering had caused the village to suffer economic injury. In addition, the individual plaintiffs who had posed as potential homebuyers were discrimination in housing; and to “replace the ghettos with integrated residential patterns.”

409 U.S. at 211 (citing remarks of Sen. Mondale, 114 Cong. Rec. 3422 (1967)).
89. 409 U.S. 205 (1972).
90. Id. at 209.
91. Id. at 211 (citing 114 Cong. Rec. 3422 (1968) (remarks of Sen. Mondale)). Accord, *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (per curiam) (en banc) (Wilkey, J., concurring) (Title VIII was intended to extend beyond discrimination in “actual sales and rentals” and was “seen as an attempt to alter the entire character of the housing market”).
92. 409 U.S. at 219-21.
94. Id. at 110-11.
95. The individual plaintiffs who posed as potential homebuyers were “testers.” “Testing” is a technique used to determine whether discriminatory practices are being used by
entitled to sue on the theory that the racial steering denied them, as residents of the target area, "the social and professional benefits of living in an integrated society." According to Bellwood, complainants under Title VIII may either file a complaint with HUD under section 810 or file suit directly in federal court under section 812. Furthermore, according to the Court, standing under either section is to extend without limitation to complainants who assert either a direct or an indirect injury, provided that the injury is "distinct and palpable" in accordance with the minimum standards under Article III of the Constitution. Bellwood thus expanded Trafficante in holding that "[standing under § 812, like that under § 810, is 'as broad as is permitted by Article III . . . .']" Indeed, in the opinion of the Court, the absence of the language "persons aggrieved" in section 812 does not signify that standing under section 812 should be more limited than under section 810. Rather, the Court found that section 812 on its face could not be read as restricting potential plaintiffs. Thus, after Bellwood, any person who is directly or indirectly injured by a discriminatory housing practice has standing to bring suit in federal court, or, in the alternative, to file a complaint with HUD.

Another area of judicial advancement in fair housing enforcement has been burden of proof. A substantial number of federal courts have held that in order to establish a prima facie case of a violation of Title VIII, a complainant must show only that the action complained of has had a discriminatory effect. Although complainants who bring a charge of hous-comparing the experiences of blacks and whites in seeking to rent or buy the same apartments or houses.

96. 441 U.S. at 111.
97. For the text of § 810, see note 63 supra. The text of § 812 is provided at note 69 supra.
98. 441 U.S. at 102-03.
100. 441 U.S. at 109.
101. Id. at 103.
102. With its decision in Bellwood, the Court overruled the Ninth Circuit's opinion in Topic v. Circle Realty, 532 F.2d 1273, 1275 (9th Cir.), cert. denied, 429 U.S. 859 (1976) (Congress intended to limit direct access to the federal courts under § 812 to "direct objects" of Title VIII violations).
103. Prima facie is a Latin term meaning "on its face." In civil rights litigation, the term is used to denote the use of statistical or other evidence of objective fact which, if established, warrants an inference that discrimination exists. See Note, Applying the Title VII Prima Facie Case to Title VIII Litigation, 11 Harv. C.R.-C.L.L. Rev. 128, 128 n.4 (1976). See also Schwemm, supra note 72, at 243-50 (1978) (statistical proof of discriminatory effect in Fair Housing cases).
104. While the Civil Rights Act was pending, the Senate specifically rejected an amendment which would have required proof of discriminatory intent as a prerequisite to establishing a Title VIII violation. 114 Cong. Rec. 5214, 5221-22 (1968). Moreover, the inquiry
ing discrimination under the fourteenth amendment must prove that the purpose or intent of the challenged practice is discriminatory, under Title VIII, "[e]ffect, and not motivation, is the touchstone . . . ." Once a Title VIII plaintiff has demonstrated that a housing practice has had a discriminatory effect, the burden then shifts to the defendant to justify the housing practice.

In United States v. City of Black Jack, a municipality which had enacted an ordinance prohibiting construction of any multiple-family dwellings was found to have violated Title VIII because the effect of the ordinance would be to preclude almost eighty-five percent of the black population in the metropolitan area from obtaining housing in the ninety-nine percent white town of Black Jack. Upon a finding of discriminatory effect, the court applied a standard normally used in equal protection cases and shifted the burden to the city of Black Jack to justify its ordinance by proving a "compelling" interest. The city's claims of road and traffic control, limitations on the growth of the school system, and maintenance of property values, however, were "substantially" balanced against the limitations placed on housing opportunity in Black Jack.

In a similar case, Arlington Heights v. Metropolitan Housing Development Corp., the ninety-nine percent white village of Arlington Heights denied a rezoning petition which would have allowed the Metropolitan Housing Development Corporation to build a federally subsidized low-to-moderate-income housing development. The effect of the village's refusal under Title VIII has often been analogized to the Title VII "effects" test established by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1970). See 42 U.S.C. § 2000e (1976). According to Griggs, after a plaintiff makes a showing of discriminatory effect, the burden shifts to the defendant to justify the employment practice as a "business necessity." 401 U.S. at 431. See also note 122 infra.

107. Id. at 1186.
108. Under the constitutional concept of prima facie racial discrimination developed in Supreme Court equal protection opinions, a plaintiff has to prove that defendant's conduct was motivated by discriminatory intent. Once a prima facie case is established, the burden shifts to defendant to demonstrate that its conduct promotes a compelling governmental interest. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (housing discrimination); Washington v. Davis, 426 U.S. 229 (1976) (employment discrimination). In several cases brought after passage of Title VIII, courts frequently would ignore Title VIII claims and base their decisions on the equal protection clause. See, e.g., United Farm Workers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971).
109. 508 F.2d at 1187.
to permit construction of the subsidized housing was to preclude a large number of blacks from living in Arlington Heights since forty percent of those eligible to live in the development were black. Furthermore, it was likely that Arlington Heights, whose white population had increased significantly due to a building boom, would have remained almost totally segregated without construction of the subsidized housing. The Supreme Court reversed the case on the grounds that the equal protection claim had not been supported by proof of purposeful discriminatory action and remanded it for consideration of the claims under the Fair Housing Act."

On remand, the Seventh Circuit applied the effects test but "refuse[d] to conclude that every action which produces discriminatory effects is illegal [under Title VIII]." Rather, the court developed four critical factors which should be applied in determining whether evidence of discriminatory effect is sufficient to establish a violation of Title VIII: (1) the strength of the evidence of discriminatory effect; (2) whether some evidence of discriminatory intent exists, although not enough to satisfy the constitutional standard of Washington v. Davis; (3) the defendant's interest in the practice that has a discriminatory effect; and (4) the likelihood that the relief requested will restrain defendant from interfering with other property owners who wish to provide housing for minorities rather than compel defendant affirmatively to provide such housing. The court noted that although the village was acting under a legitimate grant of zoning authority and its refusal to rezone was not the result of intentional racial discrimination, the plaintiffs, by contrast, were seeking to promote the national goal of integrated housing by building in Arlington Heights. In remanding the case, the court of appeals directed the district court to find a violation of Title VIII by discriminatory effect if it could find no other land within Arlington Heights that was properly zoned and suitable for subsidized housing.

In Resident Advisory Board v. Rizzo, the Court of Appeals for the

111. Id. at 271.
112. 558 F.2d 1283, 1290 (7th Cir. 1977).
113. See note 108 supra.
114. 558 F.2d at 1290.
115. Id. at 1293-94.
116. Id. at 1295. The Seventh Circuit interpreted the relevant language of § 804(a), which provides that "it shall be unlawful . . . [t]o make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin," as not requiring proof of discriminatory intent. Id. at 1290. See 42 U.S.C. § 3604(a) (1976). The court noted that the same "because of race" language in § 703(h) of Title VII was held not to require a standard of proof beyond discriminatory effect to establish a prima facie case of employment discrimination. 558 F.2d at 1289 n.6 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971)).
Third Circuit concluded that "discriminatory effect alone will, if proved, establish a Title VIII prima facie case ..." In Rizzo, plaintiffs sought to compel construction of a planned low-income housing development in a predominantly white section of South Philadelphia. The court of appeals held that the urban renewal activities of both the Philadelphia Housing Authority and the Redevelopment Authority of Philadelphia had resulted in denying housing to families because of their race. According to the court, defendants' failure to construct the housing had the effect of discriminating against a disproportionate percentage of black families who were qualified to live there. Furthermore, the court noted that the neighborhood, which had been integrated before the land clearance activity, would remain all-white unless the project was built.

Under the standard enunciated by the court in Rizzo, once a discriminatory effect has been established, a defendant can rebut plaintiff's prima facie case by showing that defendant's actions served a legitimate interest that could not be accomplished by less discriminatory means. In the absence of any asserted justification by either PHA or RDA, the court found it unnecessary to consider what factors, if any, would have overcome plaintiff's prima facie case.

While the courts have varied as to the degree of evidence necessary to rebut a Title VIII prima facie case, it is clear that a plaintiff's burden of proof requires only a showing that the defendant's actions have had a discriminatory effect. By adopting the effects test as the standard of proof in Title VIII cases, the courts have greatly reduced the burden of proving housing discrimination and enhanced the enforcement potential of Title VIII.

Finally, the lower federal courts have also advanced the enforcement potential of Title VIII by broadly construing its specific provisions. Section 804(a) of the Act states that it is against the law to "otherwise make unavailable or deny" a dwelling to any person because of race, color, reli-

118. Id. at 148.
119. Id. at 149-50.
120. Id. at 149.
111. Id.
122. Id. at 149-50. The Third Circuit in Rizzo disagreed with the approach taken by the Eighth Circuit in Black Jack that a "compelling interest" may rebut a Title VIII prima facie case. Id. at 148. According to Rizzo, the compelling interest standard should be used to rebut charges of purposeful discrimination in equal protection cases. The court likewise found that the "business necessity" test used in Title VII employment discrimination cases could not readily be adapted to Title VIII purposes. Id. Thus, the Rizzo court concluded that "[f]or the present, Title VIII criteria must emerge ... on a case-by-case basis." Id. at 149.
region, sex, or national origin. This provision has been interpreted by the lower courts to prohibit, for example, racial steering by real estate brokers, discrimination by municipalities through zoning and land use authority, mortgage redlining, the assignment of lower valuations to homes in racially integrated neighborhoods, and recently, redlining in homeowner’s insurance.

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125. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974). The Supreme Court in James v. Valtierra, 402 U.S. 137 (1971), rejected the argument that economic distinctions in land use are per se racial distinctions in violation of the equal protection clause. In that case, the Court upheld a California requirement calling for a community referendum on any proposal to build low income housing even though no other land use policies were subject to the requirement.
127. United States v. American Inst. of Real Estate Appraisers (AIREA), 442 F. Supp. 1072 (N.D. Ill. 1977). In AIREA, the district court approved and ordered the entry of an agreement between AIREA and the Justice Department, settling a suit which charged that the appraisers’ standard appraisal technique, treating race and national origin as factors which lower the overall valuation of a property, violated the Fair Housing Act. The settlement agreement provided in pertinent part:

(1) It is improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or a property is necessary for maximum value. (2) Racial, religious or ethnic factors are deemed unreliable predictors of value trends or price variance. (3) It is improper to base a conclusion or opinion of value, or a conclusion with respect to neighborhood trends, upon stereotyped or biased presumptions relating to race, color, religion, sex or national origin or upon unsupported presumptions relating to the effective age or remaining life of the property being appraised or the life expectancy of the neighborhood in which it is located.

Id. at 1077. Congress has proposed to prohibit the use of race, color, religion, sex, handicap, or national origin as factors in real estate appraisals. H.R. 5200, 96th Cong., 1st Sess. § 805 (1979). This has met with opposition from the Society of Real Estate Appraisers who contend that such a prohibition would infringe on an appraiser’s first amendment rights. 1979 Hearings, supra note 5, at 308 (statement of Charles L. Osenbaugh). Furthermore, according to the Society of Real Estate Appraisers:

[Sound appraisal practice requires that all relevant factors, including race, religion and ethnic factors, which exist in the marketplace and which impact upon market value, must be considered in a dispassionate, unbiased, nonprejudicial and objective manner by the appraiser in reaching an opinion of value. The exclusion of any relevant factor from consideration may result in an incomplete appraisal and a fictitious or directed “market value.”]

Id. (emphasis in original).
Although the courts have generously construed the major provisions of Title VIII and thereby significantly expanded the enforcement potential of the Act, private litigation is, nevertheless, a very limited enforcement mechanism. Indeed, given the great length of time and expense necessary for litigation, very few complainants are able to enjoy this right. Another inhibiting factor in private Title VIII enforcement has been section 812(c), the provision awarding attorney's fees only to the plaintiff who is both successful and also unable to afford attorney's fees. Thus, the statute discourages nonindigent victims of discrimination from bringing suit. Furthermore, the Act provides that a court may award private litigants "any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages." This low ceiling on punitive damages, coupled with the limitations on attorney's fee awards, provides little incentive for an individual to act as a private attorney general and assist in the enforcement of the Fair Housing Act.

III. A TURNING POINT FOR FAIR HOUSING: THE PROPOSED TITLE VIII AMENDMENTS

It is apparent that Title VIII, as presently constituted, is not equipped to eliminate the discriminatory practices preventing achievement of the goal of equal housing opportunity. Indeed, Title VIII suffers from severe enforcement weaknesses that can be remedied only by amendment. Recently, Congress has focused upon the demonstrated inadequacies of the existing law by proposing amendments to Title VIII which, among other changes, provide more comprehensive and flexible enforcement provisions.

Congressional discussions regarding the amendment of Title VIII enforcement provisions have centered on three alternatives. Foremost among the alternatives is the proposed enforcement procedure, contained in the pending Senate bill S. 506, that provides for the establishment within HUD of a full-scale administrative process for dealing with Title VIII complaints. Under S. 506, after investigation of the charges, the Secretary of HUD would file an administrative complaint upon a finding of probable cause of a Title VIII violation. During the proceedings, the

130. Id.
Secretary could order temporary or preliminary relief pending final resolution of the complaint. At the conclusion of the hearing, the administrative law judge (ALJ) would make findings of fact and conclusions of law, and could order relief, including an order for respondent to cease and desist from engaging in discriminatory housing practices, as well as the imposition of up to $10,000 in civil penalties. The order of an ALJ, however, could be reviewed and modified by the Secretary, and any final order of the agency could be appealed to a court of appeals within sixty days following the Secretary's entry of the order.

Another possible procedure for Title VIII enforcement, contained in the pending House bill H.R. 5200, entails establishing an administrative process within HUD. Under this scheme, the Secretary would investigate charges of housing discrimination and attempt to resolve them informally through conference, conciliation, and persuasion. If efforts at conciliation fail, the Secretary would be authorized to file an administrative complaint and a hearing on record would follow. Review or modification of the order by the Secretary, however, would not be allowed under this procedure. Instead, an appeal to a federal district court would be available within ten days of the order to any party objecting to specific findings of fact or conclusions of law in the order. On appeal, a judge would make a determination of the adequacy of the record and could, if necessary, receive additional evidence. The proposal, however, is silent regarding the standard for review. The standard for review could be the traditional "substantial evidence" test, providing that the judge should uphold an ALJ's findings and conclusions if they are supported by substantial evidence from the record. On the other hand, this proposal may envision allowing the district court to subject the ALJ's determination to a more stringent review and accord it less deference than under the substantial evidence test.

A third alternative enforcement procedure is being considered for amending Title VIII. This proposal would narrowly limit the enforce-
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ment authority of HUD to its present investigation and conciliation duties, leaving the primary means for enforcement with the Justice Department. Significantly, however, this proposal would give the Attorney General the authority to bring suits on behalf of individuals as well as pattern or practice and general public interest suits under the present statute.140

Of the various proposals for Title VIII enforcement, the third alternative, which would authorize the Attorney General to sue on behalf of individuals rather than establish an administrative enforcement mechanism within HUD, is the least promising. The principal objection to this procedure is that federal litigation is a long and tedious process. In one federal district court of California, for example, there is presently a fifteen-month backlog of cases.141 Due to the nature of housing discrimination suits, it is often imperative that they be resolved expeditiously if any meaningful individual relief, such as obtaining the housing that has been wrongfully denied, is to be available. If Title VIII enforcement were to rest solely with the courts, the chances of obtaining this individual remedy would be greatly diminished. Furthermore, it is doubtful that more ordinary, factually simple housing discrimination cases would be pursued if resolution were months away.

Another problem with the proposal to give the Department of Justice the primary role in fair housing enforcement is the lack of Department staff necessary to expand fair housing activities. Under Title VIII as presently constituted, the Department of Justice is the only agency with viable enforcement authority. Yet the Housing Section of the Department's Civil Rights Division consists of less than two dozen lawyers.142 During the ten years in which Title VIII has been in effect, the Housing Section has participated in an average of only thirty-two pattern and practice suits each year.143 Given its limited staff and resources, the Department of Justice144 does not have the capacity to redress individual grievances.145

as an alternative amendment. Interview with Philip Kiko, Legislative Assistant to Rep. F. James Sensenbrenner, Jr. (Nov. 9, 1979).

140. A variation on this procedure would be to amend Title VIII to allow HUD to investigate and conciliate, with the authority to bring a court action, if necessary, to enforce the conciliation agreement. This type of procedure is similar to that granted the Equal Employment Opportunity Commission in resolving Title VII claims. 42 U.S.C. § 2000e-5 (1976).


142. ENFORCEMENT EFFORT, supra note 14, at 60.

143. Id. at 71.

144. For a discussion of the organization and budget of the Housing Section of the Civil Rights Division of the Department of Justice, see ENFORCEMENT EFFORT, supra note 14, at 60-73.

145. Recently, Attorney General Benjamin Civiletti stated that he intends to pursue
The more desirable method for enforcing Title VIII is through an administrative enforcement mechanism within HUD. A crucial factor in the failure of HUD's conciliation efforts has been the lack of authority delegated to HUD to enforce the law. With cease and desist authority vested in HUD, the viable threat of consequences could act as a substantial deterrent to potential Title VIII violators. Furthermore, in contrast to the judicial process, the administrative procedure will provide a forum for more rapid resolution of complaints. Presumably, an administrative mechanism established specifically to hear Title VIII cases could be more expeditious in resolving complaints than the burdened federal courts. In time, Title VIII ALJs would develop an expertise concerning the various discriminatory housing practices. Moreover, there is evidence that the administrative approach encourages early settlement of claims.

Both proposed administrative enforcement schemes would provide either that the Secretary may order temporary or preliminary relief pending final resolution of a complaint or that the Secretary may refer the matter to the Attorney General to bring an action for such relief. Thus, HUD could assure that the housing unit which is the subject of the complaint would be available if the complainant were successful, a remedy that is presently not available under Title VIII. Furthermore, other remedies, including monetary relief, might be available under this administrative system. Arguably, it would be within the authority of the administrative tribunal to award plaintiff such "make-whole" monetary relief as out-of-pocket expenses incurred while wrongfully being denied housing. If a plaintiff has suffered other calculable damages such as mental anguish, however,
the plaintiff's case could either be referred to the Attorney General or brought as a private suit.

Under the pending bills, private enforcement also would be substantially strengthened by various provisions which would increase the time during which suit can be brought from six months to up to three years; lift the $1,000 ceiling on punitive damages available to private litigants; make attorney's fees available to any prevailing party in either an administrative or judicial proceeding, regardless of financial status; and allow the Attorney General to intervene in private actions if the case is certified to be of general public importance.\textsuperscript{150}

A review of federal law illustrates the strong precedent for granting federal agencies administrative enforcement and cease and desist powers. Indeed, over eighteen federal departments and agencies possess cease and desist authority\textsuperscript{151} over a variety of categories ranging from animal welfare and plant variety protection to labor relations, trade, and commerce.\textsuperscript{152} Most of the agencies that have been granted cease and desist powers are essentially regulatory agencies. Nevertheless, given federal precedent for delegating cease and desist powers, it would hardly be improper to grant similar authority to HUD to enforce a policy as important as equal housing opportunity.\textsuperscript{153}

One standard argument in favor of the judicial process over an administrative procedure giving an agency responsibility for investigating, prosecuting, and adjudicating claims, is that the latter violates due process rights by vesting all functions within an agency. However, the proposal to give HUD administrative authority would merely incorporate the traditional


\textsuperscript{151} Citations to the federal statutes granting agencies cease and desist powers are compiled in 1979 Hearings, supra note 5, at 212-13.

\textsuperscript{152} In his testimony arguing for granting cease and desist authority to the EEOC, Senator Mondale stated:

The remarkable thing is that, under the present system at the federal level, if we have a commercial dispute surrounding, say, securities, then we get the full range of administrative remedies. If we have a labor dispute — a labor-management dispute on either side — cease-and-desist powers are to be found. . . . We are dealing with basic, fundamental human rights: the right to a job, the right to challenge the denial of employment on the grounds of color. And the only right we have now is that if we do not use the traditional court system, we must be content to come before a Commission which does not have the power to do much more than conciliate.

\textsuperscript{153} But see Wash. Post, Nov. 21, 1979, § A, at 1, col. 1 (recent congressional curtailment of FTC regulatory authority seen as a “high-water mark for an anti-regulatory wave sweeping Congress this year”).
standards employed by other federal agencies with cease and desist powers.\textsuperscript{154} Recently, in \textit{Withrow v. Larkin},\textsuperscript{155} the Supreme Court upheld an administrative procedure against a due process challenge in which both investigative and adjudicative functions were vested in the same agency. Indeed, according to the Court, even when administrative functions are merged within one agency, there is a presumption of honesty and fairness on the part of the decisionmaker.\textsuperscript{156}

The basic difference between the two administrative schemes proposed for Title VIII enforcement lies in their judicial review provisions. Under the proposed Senate bill, S. 506, the HUD Secretary could modify, reject, or remand any order of the ALJ.\textsuperscript{157} After an order is final, a losing party could appeal to a federal court of appeals. These are traditional administrative procedures as described in the Administrative Procedure Act.\textsuperscript{158} The appellate court would be able to overrule any findings or conclusions that are arbitrary and capricious or unsupported by substantial evidence in the case.\textsuperscript{159} On the other hand, if the H.R. 5200 is enacted, findings, conclusions, or orders of an ALJ could not be reviewed or altered by the Secretary. Instead, review could be had on direct appeal to a federal district court, where the judge would make a determination. Questions arise as to the standard and scope of review under this provision. Will the district court be required to accept the administrative order if it is supported by substantial evidence? May the judge be allowed to subject the administrative findings and conclusions to a greater degree of scrutiny and even go beyond the record and accept additional evidence? These questions will, no doubt, ultimately be resolved by Congress, but they reflect the concern about possibly unworkable variations on traditional administrative procedure.\textsuperscript{160}

\textsuperscript{154} See FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968). Congressional authority to delegate adjudicative responsibilities to federal agencies was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46-47 (1937).
\textsuperscript{155} 421 U.S. 35 (1975). See also Ash Grove Cement Co. v. FTC, 577 F.2d 1368 (9th Cir. 1978). HUD administrative procedure would be governed by § 554(d) of the Administrative Procedure Act, relating to separation of functions. 5 U.S.C. § 554(d) (1976).
\textsuperscript{156} 421 U.S. at 54-55.
\textsuperscript{157} Under Title VIII, the Secretary is required to refer complaints to those states or localities that provide rights and remedies substantially equivalent to those in Title VIII. S. 506 and H.R. 5200 provide a similar requirement except that referral to the state agency must be with the consent of the aggrieved party. In addition, "substantial equivalency" would now take into consideration the current practices and past performance, if any, of the agency. See, e.g., H.R. 5200, § 810(a)(3), 96th Cong., 1st Sess., 125 CONG. REC. 7249 (1979).
\textsuperscript{158} 5 U.S.C. § 557(b) (1976).
\textsuperscript{159} Id. § 706(a)(A), (E).
\textsuperscript{160} "You can't set judicial review like you can a thermostat." Telephone interview with Richard Berg, Executive Sec'y, Administrative Conf. of the United States (Nov. 9, 1979).
Certain questions about policymaking also arise in considering the differences between the two administrative schemes. For example, should an ALJ with no agency review make the determination that a landlord who rejects only those black apartment-seekers with poor credit records has violated Title VIII if statistical evidence shows that poor credit ratings are more common among blacks than whites? HUD could decide, as a matter of policy, that facially neutral housing practices which have a disproportionate impact on blacks violate Title VIII. Yet, under the proposal in which the Secretary is not authorized to review ALJ determinations, if an ALJ decides that disproportionate impact alone does not violate Title VIII, HUD's alternative is an appeal to the district court. The preferable approach allows an agency to have final review of its administrative proceedings before they are reviewed by the courts. Nevertheless, the enactment of either administrative scheme would be immeasurably more effective than the presently weak Fair Housing Act.

While the amendments will refine and clarify other provisions and specify the coverage of Title VIII, the strengthened enforcement provisions are the most compelling. With provisions for expanded enforcement authority, the Fair Housing Act could be transformed from a national policy statement favoring equal housing opportunity into an instrument for major change.

IV. CONCLUSION

While equal opportunity in housing has been national policy for eleven years, that goal has not yet been realized: the legislation designed to eliminate housing discrimination has proven to be largely unenforceable. HUD, the department with primary responsibility for enforcing Title VIII, was granted minimal authority to carry out that responsibility. The Department of Justice also suffers from limitations on its enforcement author-

161. In Boyd v. Lefrak Org., 509 F.2d 1110, 1114 (2d Cir.), cert. denied, 423 U.S. 896 (1975), the court of appeals concluded that a landlord “may seek assurances that prospective tenants will be able to meet their rental responsibilities.” Furthermore, the legislative history of Title VIII indicates that it was not intended to guarantee housing to those unable to afford it. See, e.g., 114 Cong. Rec. 3421 (1968) (remarks of Sen. Mondale).


163. Another significant provision in S. 506 and H.R. 5200 is to establish a federal policy prohibiting housing discrimination against handicapped persons. Under H.R. 5200, a handicapped individual may also have the right, within prescribed limits, to retrofit, or modify, a unit in which he or she desires to live. H.R. 5200, § 804(g)(2)(A)(i), 96th Cong., 1st Sess., 125 Cong. Rec. 7249 (1979).
ity as well as lack of resources. Thus, the private suit has emerged as the only meaningful enforcement provision in Title VIII. However, private enforcement is an unreasonably cumbersome method for promoting national policy.

It is clear, therefore, that if discriminatory housing practices are to be curtailed, the principal weakness of Title VIII — specifically, the enforcement provisions — must be amended. The pending Title VIII amendments respond to this weakness with strong and workable administrative methods for resolution of complaints. If enacted, an amended Title VIII may signal that equal opportunity in housing is finally within reach.

Michael Steven Bylsma