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## Fixing up Fair Housing Laws: Are We Ready for Reform

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# FIXING UP FAIR HOUSING LAWS: ARE WE READY FOR REFORM?

DAVID A. THOMAS\*

"I fear that the Senate is on the verge of voting to sacrifice upon the altar of politics one of the most precious rights of all Americans—their freedom to control the use and disposition of their privately owned property."

Senator Sam J. Ervin, Jr.<sup>1</sup>

I. INTRODUCTION .....	8
A. <i>Foundational Weakness in the Federal Fair Housing Act</i> .....	8
B. <i>Organization of Article</i> .....	10
II. WAS THE ENACTMENT OF THE FAIR HOUSING ACT	
CONSTITUTIONAL? .....	11
A. <i>Constitutional Authority Cited in the Language of the Act</i> .....	12
B. <i>References to Constitutional Authority in the FHA</i>	
<i>Legislative History</i> .....	12
1. <i>Congressional Reports</i> .....	12
2. <i>Congressional Debates</i> .....	13
3. <i>Open-Housing Proponents' Written Responses to the</i>	
<i>Constitutionality Issue</i> .....	19
a. <i>"Fair Housing Act of 1967: Summary of</i>	
<i>Constitutional Bases"</i> .....	19
b. <i>Department of Justice Memorandum</i> .....	21
4. <i>Summary of Senators' Opposing Positions on the</i>	
<i>Constitutionality of the FHA</i> .....	23
C. <i>Court Decisions on Constitutionality Since Enactment of</i>	
<i>the Fair Housing Act</i> .....	26
1. <i>Jones v. Alfred H. Mayer Co.</i> .....	26
2. <i>United States v. Hunter</i> .....	27
3. <i>United States v. Real Estate Development Corp.</i> .....	28
4. <i>United States v. Youritan Construction Co.</i> .....	28
5. <i>Williams v. Matthews Co.</i> .....	28
6. <i>United States v. L &amp; H Land Corp.</i> .....	28
7. <i>Meadows v. Edgewood Management Corp.</i> .....	29
8. <i>Morgan v. Parcener's Ltd.</i> .....	29
9. <i>United States v. City of Parma</i> .....	29
D. <i>Commentary on the Case Law Regarding Constitutional</i>	
<i>Authority for FHA</i> .....	31

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1. 114 CONG. REC. 4683 (1968).

E. <i>Analysis of the Constitutionality of the FHA Enactment</i> .....	32
1. <i>Thirteenth Amendment</i> .....	33
2. <i>Fourteenth Amendment</i> .....	35
3. <i>Commerce Clause</i> .....	39
III. ARE SOME PROVISIONS OF THE FAIR HOUSING ACT POSSIBLY UNCONSTITUTIONAL IN THEIR APPLICATION? .....	42
A. <i>Takings Conflicts</i> .....	42
B. <i>Free Speech Conflicts</i> .....	44
C. <i>Religious Exercise Conflicts</i> .....	47
IV. SUMMARY OF FHA CONSTITUTIONALITY ISSUES AND A PROPOSED CORRECTION .....	47
A. <i>Summary of FHA Constitutionality Issues</i> .....	47
B. <i>A Proposed Minimalist Corrective to the Federal FHA</i> .....	49
V. A NEW APPROACH TO HOUSING FAIRNESS: USE OF COMMON LAW PROPERTY LAW RULES TO ACHIEVE HOUSING FREE OF PRIVATE DISCRIMINATION .....	50
A. <i>Reliance on State Rather Than Federal Law</i> .....	50
B. <i>Concentration on the Most Serious Problem: Racial Discrimination</i> .....	53
C. <i>Housing Discrimination Can Be Attacked Using Existing State Property Law Rules</i> .....	53
1. <i>Advantages and Disadvantages of Traditional State Servitude Laws</i> .....	53
2. <i>Remedial State Legislation for Servitudes</i> .....	55
3. <i>A Modest Proposal: How Housing Discrimination Can Be Attacked Using State Property Law Rules on Servitudes</i> .....	56
VI. CONCLUSION .....	59
A. <i>Summary</i> .....	59
B. <i>Evaluative Conclusion</i> .....	60
I. INTRODUCTION	
A. <i>Foundational Weakness in the Federal Fair Housing Act</i>	

In the midst of 1968's titanic congressional contest over new civil rights legislation, powerful southern Democratic senators, such as Senator Ervin of North Carolina, fought in futility to balance their party's politics, their constituents' wishes, and their constitutional conservatism. In no area of civil rights reform was this dilemma more intense than in housing rights reform. The housing reform law,

generally known as the federal Fair Housing Act (FHA), was enacted as Title VIII of the Civil Rights Act of 1968.<sup>2</sup> The FHA, as enacted, provided for a broad prohibition against discriminatory activity in the sale or rental of housing units, where discrimination is based on race, color, national origin, or religion.<sup>3</sup> In 1974, Congress expanded the list of prohibited discrimination categories to include “sex”<sup>4</sup> and in 1988 further expanded the list to include “handicap” and “familial status.”<sup>5</sup> That the senators’ dilemma was never resolved is manifested in the continuing criticisms of the FHA as both repressive<sup>6</sup> and ineffective.<sup>7</sup>

In this Article the author describes some fundamental and foundational weaknesses in the FHA, weaknesses that leave it vulnerable to continuing criticism, widespread disrespect and violation, and even eventual extinguishment. However, it is not the author’s ultimate purpose to discredit the FHA or turn back the societal clock to racial conditions of the 1960s. The author refrained from writing this Article until he felt he could propose a different and better way to achieve an authentic, open-housing regime within the framework of the American legal system. The most important purpose of this Article is to describe and advocate this different legal framework for open housing, a proposal that upholds rights of property and rests on legislative and judicial integrity. If this proposal seems presently superfluous, it should be kept in mind that the FHA’s constitutional validity has not been carefully scrutinized in the courts and not at all by the Supreme Court. As ideologies shift among the Justices and lack of previous precedent or review weakens the potential force of *stare decisis*, a different and more legitimate method of achieving open housing may be desirable. Thus, it is hoped that this Article will be viewed as a positive effort to strengthen and preserve gains toward the goal of an open society, and not as an attack on past achievements.

Nevertheless, in this Article the author must first portray the need for a different legal approach to open housing by showing the FHA’s vulnerabilities. This Article raises the possibility that in trying to do too much the FHA does nothing very well. Is the FHA the wrong tool wielded by the wrong hands for the wrong reasons? Are important provisions of the FHA arguably unconstitutional both in inception and in application? Do many Americans of good will continue to ignore or resist FHA’s commands in areas where it least comports with common sense and compelling

2. Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994 & Supp. V 1999)).

3. Fair Housing Act, Pub. L. No. 90-284, tit. VIII § 804(a), 82 Stat. 83 (1968).

4. Fair Housing Act, Pub. L. No. 93-383, tit. VIII § 808(b)(1), 88 Stat. 729 (1974).

5. Fair Housing Act, Pub. L. No. 100-430, tit. VIII § 6(a)-(b), 102 Stat. 1620-22 (1988).

6. See, e.g., Mary Caroline Lee, Note, *The Conflict Between “Fair Housing” and Free Speech*, 4 WM. & MARY BILL RTS. J. 1223 (1996) (concluding that there remains a potentially chilling effect on the housing opponents’ First Amendment rights and proposing recommendations to safeguard those rights).

7. See, e.g., John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) (“Among the modern civil rights laws, fair housing law persists as the least effective.”).

social need?<sup>8</sup> Should the FHA be the lever to open society generally, attacking not only racism but almost every other private prejudice?

One who reads the text of the FHA for the first time may be struck by what an odd and awkward example of legislation it is. The statement of policy<sup>9</sup> and recitation of definitions<sup>10</sup> which introduce the legislation are followed by a list of effective dates and exemptions.<sup>11</sup> Because of this arrangement, one is confronted with a complex set of exemptions before the substantive commands<sup>12</sup> of the FHA are described. Nowhere in the FHA are its restraints and prohibitions addressed to specific parties; prohibitions of conduct are presumably applicable to any person or entity capable of committing such conduct. In fact, this is suggested by the definition of "Respondent" as "the person or other entity accused in a complaint of an unfair housing practice."<sup>13</sup>

The substance of the FHA may be succinctly described. It purports to prohibit any type of activity in connection with the sale or rental of real property that is tainted by an intent to discriminate on the basis of "race, color, religion, sex, familial status, or national origin."<sup>14</sup> A particularly broad restraint is in § 3604(c) prohibiting any statement, notice, or advertisement expressing an intent to discriminate,<sup>15</sup> and from which restraint no party is exempt.<sup>16</sup> Exemptions from other provisions are generally extended to owners of fewer than four housing units.<sup>17</sup>

### *B. Organization of Article*

In Part II of this Article the author examines the constitutional foundations of the original FHA by reviewing and comparing the issues raised in the congressional debates and in post-enactment litigation regarding whether Congress had constitutional authority to enact the private conduct provisions of this legislation. The constitutionality concerns addressed in this Article deal with the purely private conduct provisions of the original FHA. The proclaimed policy of the FHA is to provide for fair housing "within constitutional limitations";<sup>18</sup> however, even while suggesting the existence of constitutional limitations, the FHA does not attempt to identify or define them. In Part II the author investigates whether those limitations on congressional authority in this area have come into clearer view since 1968.

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8. See Robert G. Schwemm, *The Limits of Litigation Under the Fair Housing Act of 1968*, in *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 43 (Robert G. Schwemm ed., 1989); James A. Kushner, *The Role of the Federal Government*, *id.* at 48.

9. 42 U.S.C. § 3601 (1994).

10. *Id.* § 3602.

11. *Id.* § 3603.

12. *Id.* § 3604.

13. *Id.* § 3602(n)(1).

14. *Id.* § 3604(a).

15. 42 U.S.C. § 3604(c) (1994).

16. *Id.* § 3603(b).

17. *Id.*

18. *Id.* § 3601.

In Part II the author concludes that FHA opponents' complaints of unconstitutionality regarding federal authority to regulate this type of private conduct were probably well-founded, even though implicitly rejected by passage of the legislation. The provisions of the FHA, as well as the FHA debates in the Senate—which conducted the only significant discussion on this legislation—did not address the issues concerning constitutional limitations. In addition, the U.S. Supreme Court has never directly decided these issues, and the lower federal court decisions on these issues have been inconsistent, contradictory, and incomplete.

In Part III, the focus shifts from possible constitutional limitations on the authority to enact private conduct provisions of the FHA, to an examination of whether the application of such FHA provisions may actually or arguably cross constitutional limitations. Again in Part III the author concludes that several types of extensive, private conduct regulation attempted by the FHA likely violate constitutional restraints, especially First Amendment restraints.

In Part IV the author summarizes the conclusions drawn from Parts II and III, indicates the particular parts of the FHA that may be most vulnerable to challenge, and suggests a minimal corrective amendment. Part V sets forth proposals for a legal regime that will enable this nation to achieve open and nondiscriminatory housing by means of established legal principles consistent with the U.S. Constitution and with common law property rights. In Part VI the author summarizes and evaluates the conclusions reached.

## II. WAS THE ENACTMENT OF THE FAIR HOUSING ACT CONSTITUTIONAL?

Addressing the question above may seem like an exercise in futility, because judicial challenges to FHA constitutionality so far have all been unsuccessful. Still, review and reappraisal of debates over the Act's constitutionality are remarkably instructive.<sup>19</sup> This part of the Article will show that the senators who were the most outspoken opponents of the FHA raised only sporadic and tepid protests over the FHA's constitutionality, therefore mounting no concerted challenge. This is manifest: (1) in the absence of any language in the Act itself that purports to lay a constitutional foundation for the Act, and (2) in the Senate debate references to constitutionality that are scattered, nonspecific, and infrequent. Thus, Congress gave no definitive attention to the matter of "constitutional limitations" that appears in the FHA's proclamation of public policy.<sup>20</sup> Of the few federal courts that have dealt with this issue, most have completely ignored the constitutional justifications raised in the congressional debates and other items of legislative history and have

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19. As the civil rights movement was gaining momentum, only small voices were heard in defense of traditional constitutional interpretations that would be submerged in civil rights legislation. *See, e.g.*, OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT (Alfred Avins ed., 1963) (collecting articles that discuss the interrelationship of the Constitution and existing anti-discrimination laws).

20. "It is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (1994) (emphasis added).

fashioned their own constitutional analyses along completely different lines.<sup>21</sup> Significantly, the courts' decisions proclaimed constitutional authority only for the particular provisions at issue in the cases before them, even if their conclusions extended no constitutional authority to other provisions of the FHA.<sup>22</sup> This is most evident in the decisions that find the FHA's constitutional authority exclusively in the Thirteenth Amendment, which—at best—can sustain FHA prohibitions only against discriminatory practices directed at African Americans.<sup>23</sup>

### A. *Constitutional Authority Cited in the Language of the Act*

It is common to find in federal legislation some language suggesting or stating the constitutional provisions from which drafters purport to draw their authority to legislate.<sup>24</sup> This is premised on the elementary learning that the federal legislative power is limited to those powers assigned to the federal government under the U.S. Constitution, with all other powers reserved to the states and the people.<sup>25</sup>

By contrast, one finds in the language of the FHA only one, small, question-begging nod to a constitutional restraint: "It is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States."<sup>26</sup> No other provision of the FHA addresses what the constitutional limitations might be or in what way the providing of "fair housing throughout the United States" falls within federal legislative power. Perhaps this absence of constitutional rationale in the statutory language should not be surprising considering how little attention was accorded constitutionality during the debates on the FHA.<sup>27</sup>

### B. *References to Constitutional Authority in the FHA Legislative History*

#### 1. *Congressional Reports*

The only official item of legislative history for the FHA is a Senate Report that addressed solely the other civil rights provisions in the legislation containing the FHA. The discussion of constitutional issues in that report was directed almost

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21. See *infra* Part II.C.

22. See *infra* Part II.C.

23. See *infra* Part II.C.

24. For instance, in Title I of the legislation containing the Fair Housing Act (Title VIII) a prohibition against rioting is directed against one who "travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television . . ." 18 U.S.C. § 2101 (1994).

25. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 404 (1819); U.S. CONST. amend. X.

26. 42 U.S.C. § 3601 (1994) (emphasis added). The phrase "within constitutional limitations" was not in the original wording of this legislation when it was introduced in the Senate on February 6, 1968. See 114 CONG. REC. 2270 (1968).

27. See *infra* Part II.B.2.

entirely to the provisions imposing federal criminal penalties on persons convicted of interstate riot activities.<sup>28</sup>

## 2. *Congressional Debates*

As a matter of legislative history, the *Congressional Record* report of floor debates on the FHA indicates that opponents of the FHA were concerned about the constitutionality of provisions governing private conduct, but apparently found little audience for their voices of protest. However, proponents did not ignore the protests, but actually presented a prepared response. Following is a summary of the discussions of FHA constitutionality raised on the Senate floor.

In the Senate on January 24, 1968, the bill being debated carried only an incidental open-housing provision, subjecting then existing state fair housing laws to federal criminal enforcement.<sup>29</sup> Sounding a main theme of opposition to this provision and perhaps to open-housing laws generally, Senator Sparkman criticized the proposal as “legislation that allows the Federal Government to usurp powers and rights and privileges of the State courts and local courts and take them away from the people in the communities and States” and as “bad law.”<sup>30</sup> He criticized a 1962 executive order requiring open housing in government-financed (Veterans Administration and Federal Housing Administration) housing projects as unconstitutional, first, because it usurped the authority of Congress,<sup>31</sup> and second, because it interfered with private property rights:

[A]ttempts to dictate the conditions under which a person can sell or rent his own property, both in the conventional market and in federally assisted programs, leads only to inefficiency, misunderstanding, interminable administrative problems, and accomplishes very little other than a deprivation of important property rights in the conventional field to which every landowner is entitled.<sup>32</sup>

On February 5, 1968, Senator Kennedy argued that the federal government should act on fair housing, because Federal Housing Administration financing policies for twenty years after World War II helped create patterns of segregation, and that federal power is needed to undo this harm.<sup>33</sup> Moreover, he argued that state and local governments are unwilling to alter this pattern.<sup>34</sup> He also discussed other reasons for federal government action:

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28. S. REP. NO. 90-721 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1837 (commenting only on the parts of the bill concerning interference with civil rights activities).

29. 114 CONG. REC. 918-19 (1968).

30. *Id.* at 919.

31. *Id.* at 912-20.

32. *Id.* at 920.

33. *Id.* at 2085.

34. *Id.*

[I]solation in housing creates clear-cut and debilitating effects on commerce.

With mobility in living growing each year, a national pattern of racial isolation impedes and distorts commerce in vital areas.

Moreover, the spreading tensions which racial isolation spawns can foster a welter of problems—ranging from civil disorder to public housing policy to education—which will require Federal assistance.

And perhaps fundamentally, we require a Federal open-housing law because the promise of racial equality has consistently stemmed from the Federal Government.

....

A Federal open-housing law is only the start of a vigorous Federal housing policy—but it is a necessary step, and it should be taken this session.<sup>35</sup>

On February 6, 1968, Senator Mondale introduced an amendment to the Civil Rights Act that included the current fair housing act provisions.<sup>36</sup> He then inserted into the record a summary of the amendment's provisions, questions and answers describing the provisions, and a summary of the constitutional arguments which, in his opinion, established beyond doubt the constitutionality of the Fair Housing Act.<sup>37</sup> For example, question nine of the Questions and Answers stated:

*9. Does the Congress have the constitutional power to prohibit discrimination in housing?*

Yes. Supreme Court decisions clearly state that Congress has this power both under the Fourteenth Amendment and the Commerce Clause. A summary of these decisions has been prepared and is available.<sup>38</sup>

Following the Questions and Answers, this summary appears in the *Congressional Record* as a document entitled "Fair Housing Act of 1967, Summary of Constitutional Bases."<sup>39</sup> The content of this document is described, compared, and analyzed below.<sup>40</sup> Senator Mondale then addressed the issues covered in August 1967 committee hearings addressing open-housing legislation.<sup>41</sup> He reported that "the hearings destroyed the constitutional issue. In the period from the time fair

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35. 114 CONG. REC. 2085-86 (1968).

36. *Id.* at 2270-72.

37. *Id.* at 2272-74.

38. *Id.* at 2273.

39. *Id.*

40. *See infra* Part II.B.3.a.

41. 114 CONG. REC. 2274-75 (1968).

housing was first introduced and the time when we will consider it in voting, the U.S. Supreme Court has issued many rulings that clearly develop, without any doubt, the validity of this proposal on constitutional grounds.”<sup>42</sup>

On February 7, 1968, Senator Tydings argued for the constitutionality of open-housing laws generally, and for the Mondale amendment specifically,<sup>43</sup> and inserted into the *Congressional Record* a brief on this issue prepared by the Department of Justice.<sup>44</sup> The brief’s arguments for open-housing constitutionality are presented and analyzed below.<sup>45</sup> Senator Tydings then delivered his most extensive plea for the necessity of an open-housing law:

Mr. [Senate] President, the presence of residential ghettos—in effect, restricted areas in which all members of a minority group are forced to reside no matter where they desire or can afford to live—brings gravely damaging social consequences to our country, particularly in our urban areas.

I strongly believe that a man’s religion, national origin, or race has no bearing on his worth as a human being or his desirability as a neighbor. Yet, as I have said, purposeful exclusion from residential neighborhoods particularly on grounds of race, is the rule rather than the exception in many parts of our country. Such exclusion unjustly denies many Americans the freedom to gain access on equal terms with other Americans to good housing and good schools for their children, and proximity to good jobs. Such exclusion unjustly denies many Americans of an equal opportunity to better their lives.

Some people assert that, as a matter of principle, some Americans should be free to treat other Americans unjustly. I do not believe this. I am not in favor of giving any person or group preferential treatment in seeking housing. I believe that landlords and property owners should be free to demand proper qualifications of prospective tenants or home buyers, such as adequate income, good credit record, proper family size to insure against overcrowding, and so forth. But I firmly believe that sellers and landlords must deal with everyone fairly and equally, by not excluding anyone from residences solely because of race, religion, or national creed.

I believe that this principle of equal treatment is fundamental to the American way of life.<sup>46</sup>

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42. *Id.* at 2275.

43. *Id.* at 2530-34.

44. *Id.* at 2534-37.

45. *See infra* Part II.B.3.b.

46. 114 CONG. REC. 2537 (1968).

At this time Senator Ervin entered into an exchange with Senator Tydings, arguing that under the proposed amendment that: “[I]f [a seller] has two prospective buyers, of two different races, one of them belonging to his race and one to the other race, he is forbidden to prefer the man of his own race.”<sup>47</sup> Senator Tydings agreed with the result, proclaiming “[t]he effect of the law is to make certain that the sale is not based on racial discrimination.”<sup>48</sup>

On February 8, 1968, Senator Thurmond delivered a lengthy rebuttal to the claims of constitutionality for the FHA.<sup>49</sup> He rejected any notion that the Fourteenth Amendment provisions could regulate purely private conduct.<sup>50</sup> As for congressional power based on the Commerce Clause, he declared:

Admittedly, the [C]ommerce [C]lause has been cited as authority for far-reaching legislative enactments in recent years. If it does indeed authorize Congress to regulate private action dealing with the sale or rental of real property situated wholly within the borders of one State, then there is no field of endeavor which Congress cannot control under the authority granted in this clause. There is no question in my mind but that such an elastic view exceeds the power intended to be granted Congress by the [F]ramers of the Constitution. Had they intended otherwise, the framers of the Constitution certainly would not have gone to the time and trouble of delineating certain specific grants of power to Congress. . . .

. . . .

Under no theory of either the [C]ommerce [C]lause or the Fourteenth Amendment do I find constitutional authority to deprive any individual of his basic, inherent right to hold, use, and enjoy private property.<sup>51</sup>

On February 27, 1968, Senator Eastland spoke against the open-housing amendment,<sup>52</sup> pointing to proponents’ declarations that open housing was merely the first step in an effort to rearrange all United States housing, mostly to eliminate urban ghettos.<sup>53</sup> He argued that the Fourteenth Amendment does not empower Congress to enact legislation that restricts purely private conduct such as sale or rental of housing.<sup>54</sup>

The next day, on February 28, 1968, Senator Dirksen, who had previously opposed the fair housing provisions, suddenly offered a substitute version of the

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47. *Id.*

48. *Id.*

49. *Id.* at 2717-18.

50. *Id.*

51. *Id.* at 2718.

52. 114 CONG. REC. 4295-98 (1968).

53. *Id.* at 4296.

54. *Id.*

civil rights bill, which included the fair housing provisions, and then moved to close debate before amendments to the substitute could be offered.<sup>55</sup> Senator Ervin criticized the proposed substitute for prohibiting any person, black or white, from selling or renting their property to persons of their own race or religion against a demand from one of another race or religion to sell or rent.<sup>56</sup> He declared: “The right of private property, which includes the right to sell one’s privately owned property or to lease one’s privately owned property to whomever he pleases, is, in my judgment, one of the most sacred rights of an American citizen.”<sup>57</sup>

On February 29, 1968, Senator Ervin delivered an extensive argument against the constitutionality of the open-housing provisions, the points of which argument are summarized as follows:

- A. Under the Constitution the federal government has power to regulate interstate commerce and states have “power to regulate the ownership and use of privately owned property within their borders. In the absence of State regulation to the contrary, every owner of privately owned property has the right to sell or rent such property to any person selected by himself.”<sup>58</sup>
- B. Constitutional principles retain their original meaning until changed by amendment; to prevent change by usurpation or nullification, federal officials are bound by oath to support the Constitution.<sup>59</sup>
- C. Both explicitly and implicitly the Constitution protects individual rights against “tyranny at the hands of the Federal government”.<sup>60</sup>
  1. Americans have the right to have their “rights and responsibilities under Federal law defined by certain and uniform laws applying to all [persons] in like circumstances”,<sup>61</sup>
  2. Americans have the right to have their “personal dealings with other individuals regulated by [their] own desires or by the laws of the State . . . rather than by the laws or regulations of a centralized Federal Government”,<sup>62</sup>
  3. “Every American has the right to acquire, own, use, and dispose of property in all ways permitted by State laws without interference from the Federal Government”,<sup>63</sup>

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55. *Id.* at 4570-76. Amendments could not be offered at the time because a printed version of the substitute bill would not be available until the next morning, by which time, under the Dirksen cloture motion, opportunity for debate would be past. *Id.* at 4576.

56. *Id.* at 4576.

57. *Id.*

58. 114 CONG. REC. 4684 (1968).

59. *Id.*

60. *Id.*

61. *Id.* at 4684.

62. *Id.*

63. *Id.*

4. "Every American has the right to rent or sell his property, in person or through agents, to any persons selected by him, if State laws so permit, without interference from the Federal Government";<sup>64</sup>
  5. "Every American has the right to think and speak his honest thoughts concerning all things under the sun";<sup>65</sup>
  6. "No American shall be deprived of life, liberty, or property without due process of law."<sup>66</sup>
- D. Persons who favor this law are "men of good intentions, who are willing to do constitutional evil because they believe good will result from it."<sup>67</sup> They would deprive all Americans of rights in order to confer an illusory notion of equality on certain classes of citizens. There is no need of further legislation to confer equal rights. Economic or social equality cannot be conferred by law. The proposed legislation does not confer equality, but instead confers on its beneficiaries greater rights than have ever before been recognized in our country.<sup>68</sup>

He concluded this part of his argument on this point:

I repudiate these arguments [of the open housing proponents] as unwise. Americans must choose between equality coerced by law and the freedom of the individual. She cannot have both. As for me, I choose freedom of the individual as the more precious of the incompatible things.

. . . .

This proposal undertakes to confer upon the Federal Government the ultimate power to regulate and control private dealings between private individuals in respect to privately owned property of a residential nature. There is not a syllable in the Constitution that gives the Federal Government the power to govern transactions between individuals in respect to privately owned property or to regulate the title to real estate. This proposal strikes at a very basic liberty of all Americans, because, as John Adams said: "Property must be made secure or liberty cannot exist."<sup>69</sup>

- E. The prohibitions against statements or advertising violate the First Amendment requiring Congress to make no law abridging the freedom of speech.<sup>70</sup>

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64. 114 CONG. REC. 4684 (1968).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 4684-85.

69. *Id.* at 4685.

70. 114 CONG. REC. 4685 (1968).

- F. Congress is prohibited by the Fifth Amendment from depriving any person of property without due process of law.<sup>71</sup>

On March 11, 1968, Senator Stennis spoke against the open-housing provisions, expressing apprehension over the expansion of federal power at the expense of individual rights, and especially the power that would be assumed and enlarged by the Department of Housing and Urban Development.<sup>72</sup> Senator Thurmond also spoke against the bill's invasion of private property rights as without constitutional foundation.<sup>73</sup>

Shortly thereafter, the bill was adopted by a vote of 71-20.<sup>74</sup>

As will become more clear in the next section, the battle over constitutionality was fought principally over the Fourteenth Amendment and the Commerce Clause. While these positions were outlined and promoted during the floor debates, the legal details were left to previously generated reports that were simply entered into the record. It is uncertain how much influence these reports had on the views of the Senators, especially since views seemed more conspicuously affected by the serious urban civil disturbances erupting at that time.<sup>75</sup>

### 3. *Open-Housing Proponents' Written Responses to the Constitutionality Issue*

#### a. *"Fair Housing Act of 1967: Summary of Constitutional Bases"*

In this anonymously-authored document,<sup>76</sup> the following points were argued to support the constitutionality of a federal open-housing law:

- A. Congress has the power to enforce the equal protection provisions of the Fourteenth Amendment, including the power to enact:

[A] law to remove obstacles in the way of persons' securing the equal benefits of government—benefits which a State could not discriminatorily deny them without violating the Clause itself. *Katzenbach v. Morgan*, 384 U.S. 641. A law prohibiting discrimination in housing on account of race, color, religion or national origin is such a law because discrimination in housing

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71. *Id.* at 4686.

72. *Id.* at 5986-87.

73. *Id.* at 5988-89.

74. *Id.* at 5992.

75. *See, e.g.*, 114 Cong. Rec. 2085-86 (1968) (presenting Senator Kennedy's concerns with "spreading tensions" associated with racial isolation).

76. Entered into the *Congressional Record* by Senator Mondale on February 6, 1968. 114 CONG. REC. 2272-74 (1968).

forces its victims to live in segregated areas, or “ghettoes,” and the benefits of government are less available in ghettoes.<sup>77</sup>

- B. The congressional power to enact laws enforcing the equal protection provisions of the Fourteenth Amendment extends to prohibiting acts of private discrimination.<sup>78</sup> The power to enact enforcing laws is based on Section 5 of the Fourteenth Amendment itself.<sup>79</sup> This power to enact legislation is further enhanced by the Necessary and Proper Clause of the Constitution, which “grants Congress the power ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States.’”<sup>80</sup> The Necessary and Proper Clause is broad enough to include laws effecting private conduct.<sup>81</sup>
- C. Discrimination in housing affects interstate commerce in the following ways:
  1. Confinement of minority groups to ghettoes restricts the number of new homes built and reduces the amount of building materials and financing which move across state lines.<sup>82</sup>
  2. Housing discrimination reduces the likelihood that minorities will move across state lines to find better employment.<sup>83</sup>

Congress may protect interstate commerce from such adverse effects, even if its principal motive arises out of some other moral reason.<sup>84</sup> “And it does not matter that the effects against which Congress legislates may be minor or that, taken individually, they are insignificant. The constitutional basis is present so long as the effects on commerce, taken as a whole, are present in measurable amounts.”<sup>85</sup>

77. *Id.* at 2273.

78. *Id.*

79. *Id.* “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [the Fourteenth Amendment].” U.S. CONST. amend. XIV, § 5.

80. 114 CONG. REC. 2273 (1968) (quoting U.S. CONST. art. I, § 8, cl. 18).

81. *Id.* (citing, without discussion, *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819); *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966); *United States v. Guest*, 383 U.S. 745, 762, 782-84 (1966)).

82. *Id.* at 2274.

83. *Id.*

84. *Id.* (citing, without discussion, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Labor Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

85. *Id.* 114 Cong. Rec. 2274 (1968) (citing “*Wickard v. Filburn*, 317 U.S. 111, 125 (Agricultural Adjustment Act of 1933 applied to a farmer who sowed only 23 acres of wheat and sold none of it in interstate commerce, because it nevertheless affected how much other wheat would be shipped in interstate commerce.) *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (Fair Labor Standards Act applied to a newspaper whose circulation of 9000 copies included only 45 copies mailed to another state.)”).

*b. Department of Justice Memorandum*

This memorandum,<sup>86</sup> much more thoroughly argued and documented than the summary just discussed, makes the following points supporting the constitutionality of a federal open-housing law:

- A. Federal or state open-housing laws are not unconstitutional for impairing the obligations of contract, depriving persons of liberty or property without due process of law, taking property without just compensation, or otherwise infringing private rights.<sup>87</sup> Private persons may not invoke judicial power in enforcing a racially restrictive covenant in a deed.<sup>88</sup> State courts have upheld state open-housing laws.<sup>89</sup> Discrimination by restaurants, hotels, theaters, and other similar businesses has been forbidden.<sup>90</sup>
- B. Congressional power to enact an open-housing law rests in the Fourteenth Amendment and in the Commerce Clause.<sup>91</sup>
  - 1. Under the Fourteenth Amendment, Congress may enact laws to enforce the provisions of the amendment.<sup>92</sup> In the Reconstruction period Congress imposed criminal penalties on persons who violated others' constitutional rights.<sup>93</sup> Congress may enact legislation intended to remove obstacles in the way of persons securing the equal benefits of government,<sup>94</sup> and to correct the evil effects of past unconstitutionally discriminatory government action (referring to activities and policies of state and federal governments leading to segregated housing).<sup>95</sup> Thus, if the negative effects of state-sponsored rights denials of the past are extant in the present, then Congress may act to correct those effects.<sup>96</sup> Prominent examples of such denials are racially restrictive zoning regulations and judicial enforcement of racially restrictive private real covenants.<sup>97</sup> Also, the Federal Housing Administration routinely required racially restrictive covenants in the transactions it supported, resulting in extensive deliberate segregation in federal and state public housing until the middle decades of the twentieth century.<sup>98</sup> Much of this deliberately segregative activity occurred during the period when great numbers of African Americans migrated from the

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86. Entered into the *Congressional Record* by Senator Tydings on February 7, 1968. 114 CONG. REC. 2534-37 (1968).

87. *Id.* at 2534.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. 114 CONG. REC. 2534 (1968).

93. *Id.*

94. *Id.* at 2534-35.

95. *Id.* at 2535.

96. *Id.*

97. *Id.*

98. 114 CONG. REC. 2535 (1968).

South.<sup>99</sup> Deliberate segregation in other areas of life, such as schooling and military service, contributed to segregated housing patterns.<sup>100</sup> In 1967 the U.S. Supreme Court upheld a California Supreme Court decision invalidating a state law affirming the right of private landowners to discriminate in the sale or rental of housing; the provision was viewed as a form of state encouragement of discrimination.<sup>101</sup>

In enforcing the Equal Protection Clause of the Fourteenth Amendment, the courts are limited to regulating so-called "state action."<sup>102</sup> However, when Congress enforces the Equal Protection Clause, it is empowered by the Necessary and Proper Clause.<sup>103</sup> This has been interpreted as enabling Congress to use all means that are appropriate and consistent with the letter and spirit of the Constitution, and not prohibited, to enforce objectives within the scope of the Constitution.<sup>104</sup> The purpose of the open-housing law is to remove discrimination that encloses minorities in ghettos, where they have less than equal access to benefits of government and other rewards of life.<sup>105</sup> Courts have held that prohibiting private acts of discrimination does not unconstitutionally impair rights of contract, deprive persons of liberty or property without due process of law, take property without just compensation, or otherwise infringe constitutional rights.<sup>106</sup>

A narrower view of congressional enforcement power under the Fourteenth Amendment is given in the Civil Rights Cases of 1883, and although these cases have never been expressly overruled, they have been criticized, especially by Justice Brennan in dissenting opinions.<sup>107</sup> A majority of Justices in separate and unrelated opinions have stated their view that Congress may pass legislation to prevent interference with Fourteenth Amendment rights, even if no state action is involved.<sup>108</sup>

2. Housing is a significant element of interstate commerce, considering the amounts of building materials crossing state lines, the interstate financing transactions, and the fact that every year one family in thirty moves to a different state.<sup>109</sup> Discrimination in housing adversely affects interstate commerce in reducing the number of new homes that are built and the amount of interstate movement of materials and financing.<sup>110</sup>

99. *Id.* Between 1910 and 1960, the percentage of African Americans living outside the South increased from ten percent to forty percent. *Id.*

100. *Id.*

101. *Id.*; see *Reitman v. Mulkey*, 387 U.S. 369 (1967).

102. 114 CONG. REC. 2535 (1968).

103. *Id.*

104. *Id.* at 2535-36 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

105. *Id.* at 2536.

106. *Id.* (citing no authority for this proposition).

107. *Id.*

108. 114 CONG. REC. 2536 (1968).

109. *Id.*

110. *Id.*

Interstate movement of minority families and efficient allocation of their labor is discouraged.<sup>111</sup>

The Commerce Clause grants Congress plenary power to protect interstate commerce from adverse effects such as these. The power is not restricted to goods or persons in transit. It extends to all activities which affect interstate commerce, even if the goods or persons engaged in the activities are not then, or may never be, traveling in commerce. The power exists even when the effects upon which it is based are minor, or when taken individually, they would be insignificant. It is sufficient if the effects, taken as a whole, are present in measurable amounts. And it does not matter that when Congress exercises its power under the Commerce Clause, its motives are not solely to protect commerce. It can as validly act for moral reasons.<sup>112</sup>

#### 4. *Summary of Senators' Opposing Positions on the Constitutionality of the FHA*

By way of summary for this section, the charts below show brief descriptions of the senators' arguments and counter-arguments on various aspects of open-housing law constitutionality.

Issue A: Does an open-housing law deprive owners of an important property right?	
<b>Opponents of Open-Housing Law:</b> A private landowner's right to rent or sell the property is an important right which may not be taken by the government without due process of law and without just compensation.	<b>Proponents of Open-Housing Law:</b> Private discrimination in sale or rental of housing has the effect of denying equal access to good homes, good schools, and good jobs. Private owners should be required to deal fairly and equally with all persons.

111. *Id.*

112. *Id.* at 2536-37 (citing *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178 (1946); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Labor Bd. v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 34-36 (1937)).

<b>Issue B:</b> Does an open-housing law force preference or discrimination in favor of others not of one's own race?	
<b>Opponents of Open-Housing Law:</b> By being prohibited from transacting with a person of one's own race, one may be forced into preferring a different person, also on the basis of race.	<b>Proponents of Open-Housing Law:</b> The apparent preference based on race may indeed occur, but in fact, the transaction is not based on discrimination.

<b>Issue C:</b> May Congress enact an open-housing law based on the power to regulate interstate commerce?	
<b>Opponents of Open-Housing Law:</b> If the power over interstate commerce is so broad, then all activities may be regulated; the Framers did not intend such a broad power, or else they would not have given specific grants of power to Congress. States have the power to regulate private property within their borders.	<b>Proponents of Open-Housing Law:</b> Discrimination in the sale or rental of housing affects interstate commerce by confining minorities to ghettos and reducing the amount of new housing construction, thus adversely affecting the flow of building materials and financing in interstate commerce. Minorities will be less likely to move across state lines seeking new employment. Congress may protect interstate commerce from adverse effects, even if the principal motive for the regulation arises out of some other moral reason. Regulations affecting local, individual activities are acceptable and are constitutional as long as the effects of such activities on interstate commerce, taken as a whole, are present in measurable amounts.

**Issue D:**

May Congress enact an open-housing law based on the powers granted in the Fourteenth Amendment?

**Opponents of Open-Housing Law:**

The Fourteenth Amendment imposes restrictions on state action and gives Congress the power to enforce the Amendment's provisions. This does not reach purely private conduct. This view of congressional power under the Fourteenth Amendment has been declared by the Supreme Court and never overturned.

**Proponents of Open-Housing Law:**

Congress's power to enforce equal protection provisions of the Fourteenth Amendment includes the power to remove obstacles in the way of persons securing equal benefits of government, including prohibiting acts of private discrimination. The power to enforce the Fourteenth Amendment is enhanced by the power to make all laws necessary and proper for executing powers vested by the Constitution in the federal government, including objectives within the scope of the Constitution. This may include laws affecting private conduct. Congress may also enact legislation out of a desire to correct the evil effects of past unconstitutionally discriminatory government action. Justices in separate, individual opinions in separate cases have stated their view that Congress may pass legislation to prevent interference with Fourteenth Amendment rights, even if no state action is involved.

**Issue E:**

Does prohibiting private acts of discrimination unconstitutionally impair rights of contract, deprive persons of property without due process of law, or take property without just compensation?

**Opponents of Open-Housing Law:**

Restricting rights of preference in the sale or rental of housing is a deprivation of rights that impairs contract rights, deprives one of property rights without due process of law, and takes property without just compensation.

**Proponents of Open-Housing Law:**

Court decisions have affirmed that prohibiting private acts of discrimination does not impair contract rights, deprive one of property rights without due process of law, or take property without just compensation.

C. *Court Decisions on Constitutionality Since Enactment of the Fair Housing Act*

Remarkably, there is as yet no authoritative federal judicial pronouncement on the constitutionality of the FHA provisions regulating purely private conduct. Moreover, in the few cases that have appeared so far, all of them from lower federal courts, judges have apparently given no attention to the constitutional arguments raised in the legislative history of the FHA, but have instead applied their own independent analysis to the issue or have invoked as precedents prior decisions produced by such independent analysis.<sup>113</sup> The result is a unanimous judicial preference for citing the Thirteenth Amendment as the source of constitutional authority, even though this source on its face can authorize only those FHA provisions relating to discrimination against African Americans.<sup>114</sup> In this section, these cases are reviewed, summarized, and analyzed with an attempt to identify what consensus there may be in this jurisprudence.

I. *Jones v. Alfred H. Mayer Co.*

The events of *Jones v. Alfred H. Mayer Co.*<sup>115</sup> predated passage of the FHA, so the complaint against the defendants for a race-based refusal to sell a residence to plaintiffs was based on the Civil Rights Act of 1866 (now codified as 42 U.S.C. § 1982).<sup>116</sup> However, applying this provision in this case presented the same issue as raised by the FHA, that is, whether Congress could regulate purely private conduct in the sale or rental of housing.<sup>117</sup> The *Jones* court first held that the language of § 1982 was broad enough in wording and intent to cover private conduct.<sup>118</sup> Then the Court held that Congress has power under the Thirteenth Amendment “to eradicate conditions that prevent Negroes from buying and renting property because of their race and color.”<sup>119</sup> This is based on congressional power to enforce the Thirteenth Amendment by appropriate legislation, including the power to enact laws governing private conduct.<sup>120</sup> While the Thirteenth Amendment

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113. This judicial “course correction” is probably a direct result of the decision in *Jones v. Alfred H. Mayer Co.*, announced a few weeks after approval of the FHA, which provided a rationale for applying the Thirteenth Amendment to regulated private conduct. 392 U.S. 409, 438-44 (1968). See *infra* Part II.C.1., for a discussion about the *Jones v. Alfred H. Mayer Co.* decision.

114. One case that adjudicated a claim under the familial status provisions introduced into the FHA in the 1988 amendments analyzed constitutionality under the Fourteenth Amendment, but held that the Fourteenth Amendment provided protection only against state action, not conduct by private parties. *United States v. Weiss*, 847 F. Supp. 819, 828-29 (D. Nev. 1994).

115. 392 U.S. 409 (1968).

116. *Id.* at 412; see 42 U.S.C. § 1982 (1994) (“All citizens of the United States shall have 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.”).

117. *Jones*, 392 U.S. at 412-13.

118. *Id.* at 437.

119. *Id.* at 438.

120. *Id.* (citing *Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883)).

on its own authority, without further legislation, abolished slavery, the Amendment's enabling clause authorized Congress to pass all laws necessary to abolish all "badges and incidents of slavery in the United States."<sup>121</sup> The *Jones* court cited remarks of Senator Trumbull of Illinois, a chief proponent of the Thirteenth Amendment, explaining that the enabling act was intended to be the means by which we may "destroy all these discriminations in civil rights against the black man."<sup>122</sup> In a strong dissent, Justice Harlan showed convincingly that all proponents of § 1982, including Senator Trumbull, assumed the Act would apply only to state action, not to individual action.<sup>123</sup>

## 2. United States v. Hunter

The U.S. Attorney General sued a local newspaper for carrying advertisements allegedly in violation of the FHA.<sup>124</sup> The defendant challenged the constitutionality of the FHA as so applied.<sup>125</sup> The trial court did not comment on the constitutional basis of the FHA,<sup>126</sup> but this court declared that the FHA "is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery."<sup>127</sup> The court found support for this declaration in *United States v. Mintzes*,<sup>128</sup> a 1969 FHA case in the District of Maryland.<sup>129</sup> *Mintzes* relied on the holding of *Jones*<sup>130</sup> for its view of Thirteenth Amendment authority.<sup>131</sup> *Jones* had ruled that barring even private racial discrimination was a valid exercise of congressional power under the Thirteenth Amendment.<sup>132</sup> However, the *Mintzes* opinion states the FHA is sustainable under the Thirteenth Amendment if its provisions are a rational means of effectuating the stated policy of the legislation, which is "to provide, within constitutional limitations, for fair housing within the United States."<sup>133</sup> The *Mintzes* court also cited *Brown v. State Realty Co.*,<sup>134</sup> which it termed the only other reported case on that point.<sup>135</sup> The *Brown* decision, also cited by the circuit court in *Hunter*,<sup>136</sup> rejected the Fourteenth Amendment and the

121. *Id.* at 439 (emphasis omitted) (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

122. *Id.* at 440 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 322 (1865-66)).

123. *Jones*, 392 U.S. at 449-80.

124. *United States v. Hunter*, 459 F.2d 205, 209 (4th Cir. 1972). The Attorney General based the violation on § 3604(c) of the FHA, which combats the use of printed materials or advertisements to discriminate in the sale or rental of homes. See 42 U.S.C. § 3604(c) (1994).

125. *Hunter*, 459 F.2d at 209.

126. See *United States v. Hunter*, 324 F. Supp. 529, 532-35 (D. Md. 1971).

127. *Hunter*, 459 F.2d at 214.

128. 304 F. Supp. 1305 (D. Md. 1969).

129. *Hunter*, 459 F.2d at 214.

130. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

131. *Mintzes*, 304 F. Supp. at 1313.

132. *Jones*, 392 U.S. at 413.

133. *Mintzes*, 304 F. Supp. at 1313 (quoting 42 U.S.C. § 3601 (1994)).

134. 304 F. Supp. 1236 (N.D. Ga. 1969).

135. *Mintzes*, 304 F. Supp. at 1313.

136. *Hunter*, 459 F.2d at 214.

Commerce Clause as sources of constitutional authority for the FHA, but, based on *Jones*, accepted the Thirteenth Amendment as validating this exercise of congressional power.<sup>137</sup>

3. *United States v. Real Estate Development Corp.*

In this action by the Attorney General alleging racial discrimination at two apartment buildings, the court stated, "Title VIII [Fair Housing] of the Civil Rights Act of 1968 . . . is an appropriate and constitutionally permissible exercise of Congressional power under the Thirteenth Amendment to bar all racial discrimination, private as well as public, in the sale and rental of real property."<sup>138</sup>

4. *United States v. Youritan Construction Co.*

In an action granting an injunction against discriminatory conduct by an apartment owner, the court asserted, "Title VIII [Fair Housing] of the Civil Rights Act of 1968 . . . is an appropriate and constitutionally permissible exercise of Congressional power under the Thirteenth Amendment to bar all racial discrimination, private as well as public, in the sale and rental of real property."<sup>139</sup>

5. *Williams v. Matthews Co.*

Individual plaintiffs brought a complaint under both the FHA and the 1866 Civil Right Act against subdivision developers, alleging discrimination in the defendants' practice of selling subdivision lots only to approved builders.<sup>140</sup> The court addressed constitutional authority in the following sentence: "Like the 1866 Civil Rights Act, the Fair Housing Title is an exercise of congressional power under the [T]hirteenth [A]mendment to eliminate the badges and incidents of slavery."<sup>141</sup>

6. *United States v. L & H Land Corp.*

In an action against a housing owner for telling black persons that they were not permitted on the premises, the court introduced its opinion by stating, "The Fair Housing Act of 1968 . . . is an appropriate and constitutionally permissible exercise

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137. *Brown*, 304 F. Supp. at 1239-40.

138. *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 781 (N.D. Miss. 1972) (citing *Hunter*, 459 F.2d at 214; *Mintzes*, 304 F. Supp. at 1313; *Brown*, 304 F. Supp. at 1240).

139. *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) (citing *Hunter*, 459 F.2d at 214; *Real Estate Dev. Co.*, 347 F. Supp. at 781; *Mintzes*, 304 F. Supp. at 1313; *Brown*, 304 F. Supp. at 1240).

140. *Williams v. Matthews Co.*, 499 F.2d 819, 822 (8th Cir. 1974).

141. *Id.* at 825 (citing *Hunter*, 459 F.2d at 214; *Jones*, 392 U.S. at 439).

of Congressional power under the Thirteenth Amendment to bar all racial discrimination, private as well as public, in the rental and sale of real property.”<sup>142</sup>

#### 7. Meadows v. Edgewood Management Corp.

In rejecting a claim by apartment managers that they had been dismissed for refusing to engage in discriminatory rental practices, the court declared, “Title VIII [FHA] of the Civil Rights Act of 1968 . . . is a valid exercise of congressional power under the [T]hirteenth [A]mendment to eliminate badges and incidents of slavery.”<sup>143</sup> The same court had earlier stated in another FHA case, “The Fair Housing Act of 1968 is a constitutional exercise of Congressional power under the Thirteenth Amendment to bar discrimination in housing.”<sup>144</sup>

#### 8. Morgan v. Parcener’s Ltd.

In an action brought by a married couple against a defendant who refused to rent to them, the court declared: “The Fair Housing Act . . . is a valid exercise of congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery.”<sup>145</sup>

#### 9. United States v. City of Parma

The U.S. Attorney General filed an action against the city of Parma, Ohio, the largest suburb of Cleveland, accusing it of engaging in a number of acts having the purpose and effect of maintaining a segregated community.<sup>146</sup> The city argued that applying the FHA to governmental activities of municipalities is unconstitutional,<sup>147</sup> because the U.S. Supreme Court, in *National League of Cities v. Usery*,<sup>148</sup> held that the Tenth Amendment prevents Congress from using its Commerce Clause power to directly displace states’ freedom to direct traditional governmental functions.<sup>149</sup> This court held that the FHA as applied to municipal governmental activities is based on constitutional authority,<sup>150</sup> a holding not directly relevant to the inquiry of this Article; however, the dicta on which the court rationalized this holding is relevant. To reach its conclusion, the court reasoned that the FHA was not enacted

142. *United States v. L & H Land Corp.*, 407 F. Supp. 576, 579 (S.D. Fla. 1976) (citing *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 119-21 (5th Cir. 1973); *Hunter*, 459 F.2d at 214)).

143. *Meadows v. Edgewood Mgmt. Corp.*, 432 F. Supp. 334, 335 (W.D. Va. 1977) (citing *Hunter*, 459 F.2d at 214).

144. *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 548 (W.D. Va. 1975) (citing *Hunter*, 459 F.2d at 214).

145. *Morgan v. Parcener’s Ltd.*, 493 F. Supp. 180, 182 (W.D. Okla. 1978) (citing *Williams*, 499 F.2d at 819; *Hunter*, 459 F.2d at 214).

146. *United States v. City of Parma*, 661 F.2d 562, 564-65 (6th Cir. 1981).

147. *Id.* at 573.

148. 426 U.S. 833 (1976).

149. *City of Parma*, 661 F.2d at 573. See *Nat’l League of Cities*, 426 U.S. at 852.

150. *City of Parma*, 661 F.2d at 573.

pursuant to the Commerce Clause, but was instead based on the authority of Section 2 of the Thirteenth Amendment,<sup>151</sup> which declares: "Congress shall have power to enforce this article by appropriate legislation."<sup>152</sup> The *City of Parma* court cited *United States v. City of Black Jack*,<sup>153</sup> as authority for this assertion.<sup>154</sup> The *City of Black Jack* court declared that the FHA "was passed pursuant to the congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery."<sup>155</sup> The *City of Black Jack* court supported its statement with a quote from the U.S. Supreme Court in *Jones v. Alfred H. Mayer Co.* construing the Civil Rights Act of 1866: "[W]hen racial discrimination herds men into ghetto[es] and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."<sup>156</sup>

The *City of Parma* court also cited *United States v. Bob Lawrence Realty, Inc.*<sup>157</sup> as supporting authority.<sup>158</sup> That case in turn also relied on the *Jones* rationale to support the notion that the Thirteenth Amendment gives Congress the power to regulate private conduct that is racially discriminatory.<sup>159</sup> The Supreme Court in *Jones* stated that Congress' power to enforce the Thirteenth Amendment by appropriate legislation includes the power to enact laws operating upon the acts of individuals, whether or not sanctioned by state legislation.<sup>160</sup> The Thirteenth Amendment's enforcement clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'"<sup>161</sup> The *Bob Lawrence* court thus concluded that it should "give great deference, as indeed it must, to the congressional determination that [provisions of the Fair Housing Act] will effectuate the purpose of the Thirteenth Amendment by aiding in the elimination of the 'badges and incidents of slavery in the United States.'"<sup>162</sup> The defendant in that case had "failed to present any argument that impugns the reasonableness of the congressional determination."<sup>163</sup> The *Bob Lawrence* court also held that the Thirteenth Amendment gave Congress the power to regulate as commercial speech the various forms of expression prohibited by the FHA.<sup>164</sup>

The Sixth Circuit judges denied a rehearing of the *Parma* decision,<sup>165</sup> despite a dissent from the denial that pointed out several significant errors in the court's

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151. *Id.*

152. U.S. CONST. amend. XIII, § 2.

153. 508 F.2d 1179 (8th Cir. 1974).

154. *City of Parma*, 661 F.2d at 573.

155. *City of Black Jack*, 508 F.2d at 1184.

156. *Id.* (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43).

157. 474 F.2d 115 (5th Cir. 1973).

158. *City of Parma*, 661 F.2d at 573.

159. *Bob Lawrence*, 474 F.2d at 120.

160. *Jones*, 392 U.S. at 437-39.

161. *Id.* at 439 (emphasis omitted) (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

162. *Bob Lawrence*, 474 F.2d at 120 (quoting *Jones*, 392 U.S. at 439).

163. *Id.* at 121.

164. *Id.* at 121-22.

165. *United States v. City of Parma*, 669 F.2d 1100 (6th Cir. 1981).

recitation of facts and authorities.<sup>166</sup> The U.S. Supreme Court denied petition for writ of certiorari<sup>167</sup> and petition for rehearing.<sup>168</sup>

*D. Commentary on the Case Law Regarding Constitutional Authority for FHA*

If, as pronounced in *Jones v. Alfred H. Mayer Co.*, the Thirteenth Amendment authorizes Congress to legislate against private conduct through the 1866 Civil Rights Act,<sup>169</sup> then it probably authorizes Congress to legislate against similar private conduct through the Fair Housing Act. It does not purport to give authority for Congress to legislate against private discrimination on bases other than race or against races other than African Americans,<sup>170</sup> thus leaving large portions of the FHA without any obvious source of authority in the Constitution. Moreover, the court's view that either the Thirteenth Amendment or the 1866 Civil Rights Act was intended to reach private conduct is highly questionable. While the *Jones* decision may be the current law on this topic, it is probably not good history.

The court's conclusion in *United States v. Hunter* that the FHA's constitutionality is based on the Thirteenth Amendment ultimately derives from the U.S. Supreme Court's decision in *Jones*. Relying on the decision of one of its own lower courts, *Hunter* also appears to accept the notion that the Thirteenth Amendment is the only source of constitutional authority for the FHA.<sup>171</sup>

The court's conclusion in *United States v. City of Parma* that the constitutionality of the FHA rests on the Thirteenth Amendment is based on a 1974 Eighth Circuit decision and a 1973 Fifth Circuit decision.<sup>172</sup> Both of these decisions in turn relied on the U.S. Supreme Court's 1968 decision in *Jones*<sup>173</sup> holding that Congress had power to enforce the Thirteenth Amendment's prohibition of slavery by enacting laws that proscribe even private conduct, which conduct may be viewed as badges and incidents of slavery.<sup>174</sup> The Fifth Circuit court acted in deference to what it called the congressional determination that the FHA would aid in fulfilling the purpose of the Thirteenth Amendment.<sup>175</sup> Here it may be noted that Congress made no such determination, either in committee hearings, floor debates, or in the text of the FHA itself,<sup>176</sup> in all of the references to issues of FHA constitutionality,

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166. *Id.* at 1100-04 (Weick, C.J., dissenting).

167. *City of Parma v. United States*, 456 U.S. 926 (1982).

168. *City of Parma v. United States*, 456 U.S. 1012 (1982).

169. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968).

170. *See* U.S. CONST. amend. XIII.

171. *See* *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972).

172. *United States v. City of Parma*, 661 F.2d 562, 573 (6th Cir. 1981).

173. *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120 (5th Cir. 1973).

174. *Jones*, 392 U.S. 409, 439-44.

175. *Bob Lawrence*, 474 F.2d at 120.

176. *See supra* Part II.B.

the Thirteenth Amendment was not mentioned.<sup>177</sup> If the Thirteenth Amendment is indeed the constitutional basis for the FHA, then it validly applies only to discrimination against those who, or whose progenitors, were formerly held in servitude.

In an odd twist, both the Thirteenth Amendment and Fourteenth Amendment have been rejected as sources of constitutional authority for the 1988 familial status amendments to the FHA,<sup>178</sup> and three cases have accepted the Commerce Clause as the source of authority for these amendments.<sup>179</sup> This raises the possibilities that different provisions of the FHA have different sources of constitutional authority, that the authority is not what Congress thought it was, and that courts are forced to find the answer to this question by way of afterthought and without congressional guidance.

### *E. Analysis of the Constitutionality of the FHA Enactment*

The standard learning on FHA constitutionality is captured in this summary by a strong open- housing advocate:

In the field of civil rights and specifically housing discrimination, the Congress has vast powers emanating from the [T]hirteenth and [F]ourteenth amendments and, as well, the [C]ommerce [C]lause. While the [T]hirteenth amendment may extend to the private market, its coverage is limited to racial discrimination, and although the [F]ourteenth amendment reaches other victims of discrimination, its reach is to government-involved conduct or private activity that interferes with governmentally created services and facilities; however, the [C]ommerce [C]lause is not so restrictive.<sup>180</sup>

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177. This type of reasoning is not unusual in the civil rights constitutionality area, as was once remarked in the early 1960s:

Tracing the origins of the claimed power to pass antidiscrimination legislation is like playing "This Is the House that Jack Built." A Colorado case relies on a Massachusetts case, which in turn relies on a California case, which rel[ies] on two New Jersey cases which rely on a law review article and a U.S. Civil Rights Commission Report which in turn rely on nothing at all except sheer speculation.

Donald N. Clausen & Richard T. Buck, *The Constitutionality of Antidiscrimination Legislation in Housing in Illinois*, in *OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT* 112, 119-120 (Alfred Avins ed., 1963) (footnotes omitted).

178. *United States v. Weiss*, 847 F. Supp. 819, 828-29 (D. Nev. 1994).

179. *Morgan v. Sec'y of Hous. & Urban Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1033-34 (11th Cir. 1992); *Weiss*, 847 F. Supp. at 829.

180. JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* 31 (2d ed. 1995) (footnotes omitted).

This patchwork justification for FHA constitutionality is mostly speculative, since courts have uniformly relied on only the Thirteenth Amendment, and none of the so-called sources of constitutional authority is a complete justification for the full range of FHA provisions.

### 1. *Thirteenth Amendment*

The Thirteenth Amendment was completely ignored in the Senate debates and briefs arguing the constitutionality of FHA private conduct provisions.<sup>181</sup> This is perhaps best explained by the fact that at that time nothing in Thirteenth Amendment jurisprudence suggested it could give constitutional credence to the FHA. The Thirteenth Amendment in general prohibits slavery and enables Congress to enforce the prohibition by appropriate legislation:

*Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.<sup>182</sup>

Before 1968, the Thirteenth Amendment had never been considered as a source of congressional authority to regulate private conduct motivated by racial discrimination. Because the language of the amendment itself, without legislative reinforcement, suffices to prohibit slavery and involuntary servitude, it has long been held that the enabling clause in Section 2 empowered Congress to do more.<sup>183</sup> Specifically, “that clause clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’”<sup>184</sup> Although racial discrimination is considered a badge or incident of slavery, until 1968 purely private racial discrimination was not considered within the sweep of the Thirteenth Amendment enabling clause. The participants in the Amendment’s legislative history and subsequent interpretive cases all consistently considered the enabling clause as directed exclusively to state action.<sup>185</sup>

That all changed in June 1968, five months after passage of the FHA, when the U.S. Supreme Court in *Jones v. Alfred H. Mayer Co.* held that the Thirteenth Amendment enabling clause could be used by Congress to reach purely private conduct.<sup>186</sup> In 1965, the plaintiffs in *Jones* challenged racially discriminatory private

181. *See supra* Part II.B.

182. U.S. CONST. amend. XIII.

183. *See Civil Rights Cases*, 109 U.S. 3, 20 (1883).

184. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (quoting *Civil Rights Cases*, 109 U.S. at 20) (emphasis omitted).

185. Full and persuasive documentation for this conclusion is in Justice Harlan’s dissent in *Jones*, 392 U.S. at 449-80.

186. *Id.* at 438-39.

conduct using 42 U.S.C. § 1982, a provision enacted in 1866 guaranteeing to all citizens the same right to hold real property as is enjoyed by white citizens.<sup>187</sup> The Court made a disingenuous attempt to reconcile its decision with legislative history and precedent, but in the end it simply held on its own authority that the enabling clause of the Thirteenth Amendment authorized Congress to regulate purely private conduct.<sup>188</sup>

Announced so soon after passage of the FHA, the *Jones* decision probably seemed custom-fitted to answer constitutional challenges of the FHA; not surprisingly, as described above, every published judicial opinion thereafter addressing constitutionality of the original FHA provisions, has relied on this Thirteenth Amendment analysis,<sup>189</sup> even though it clearly was not in the contemplation of members of Congress who voted for the FHA.<sup>190</sup>

What is surprising is how vulnerable the Thirteenth Amendment argument is to challenge. The U.S. Supreme Court probably has the power to extend the reach of the Amendment's enabling clause to cover private conduct, but doing so violates the legislative intent of Congress, and long-established precedent—and with no effective reconciliation of the contradiction—may limit the Court's moral and persuasive authority on this issue. Future justices of a different view would have little difficulty finding grounds to reject this position.

A type of creeping obsolescence may be built into this position in any event, since equating discrimination with a badge or incident of servitude loses credibility with the passage of time from the formal ending of slavery itself. Private discrimination probably has a life of its own without any identifiable connection to the victim's former status or heritage of servitude. Other constitutional bases for challenging discrimination, such as due process or equal protection, are stronger and more rational, although they are limited to challenges against state action.<sup>191</sup>

Most surprising of all is the exclusive judicial reliance on the Thirteenth Amendment as authority for the original provisions of the FHA,<sup>192</sup> when the Amendment can relate only to discrimination against African Americans.<sup>193</sup> This raises the possibility that courts would seek other sources of constitutional authority if actions were brought for other types of discrimination. It also suggests that the other types of discrimination are minor, perhaps trivial, problems compared to discrimination against African Americans. All of this seems to be an odd and

187. *Id.* at 412, 422; *see also* 42 U.S.C. § 1986 (1994).

188. *Jones*, 392 U.S. at 423-44.

189. *See supra* Part II.C.

190. *See supra* Part II.B.

191. *See Brown v. State Realty Co.*, 304 F. Supp. 1236, 1239-40 (1969).

192. Other sources of constitutionality have been invoked for discrimination categories added later by amendment. *See, e.g.*, *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 200-17 (5th Cir. 2000) (citing the Commerce Clause as constitutional authority for the Fair Housing Amendments Act).

193. *See* U.S. CONST. amend. XIII. Once the *Jones* court invoked the Thirteenth Amendment as the source of FHA constitutional authority, analysis ceased and federal courts simply recited the point as an established conclusion. *See, e.g.*, *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100-01 (2d Cir. 1988) (discussing Congress's power under the Thirteenth Amendment to act in eradicating racial discrimination).

unacceptable way to address the constitutionality of legislation that introduced a remarkable, far-reaching, and unprecedented regulation of private property rights.

In summary, the Thirteenth Amendment is neither sufficient nor acceptable as the source of constitutional authority for the original provisions of the FHA proscribing purely private conduct for the following reasons:

- A. Prohibiting discrimination under the Thirteenth Amendment because the discrimination is supposedly a badge or incident of slavery is no longer realistic or rational. Other sources of authority to reach discrimination are available.
- B. Extending the Thirteenth Amendment's enabling clause to reach private conduct is a judicial fiction created in 1968, contrary to the intent of the Amendment's drafters and to all prior judicial interpretations.
- C. The Thirteenth Amendment is at best only uncertain authority to reach discrimination against African Americans and is no authority at all for prohibiting other kinds of discrimination.
- D. The Thirteenth Amendment was not considered by Congress as its authority for enacting the FHA, so its invocation by the courts is another judicial fiction; this judicial approach represents at once both an inappropriate usurpation of legislative authority and a failure to exercise judicial power to scrutinize legislation for proper constitutional authority.

## 2. *Fourteenth Amendment*

No reported court decision has cited the Fourteenth Amendment as constitutional authority for the private conduct prohibitions of the FHA. Perhaps the most obvious reason for this lack of attention is the fact that the Amendment on its face applies only to state action, as is manifest in the language of Section 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>194</sup>

Undeterred by this barrier, proponents of the FHA in the Senate offered the theory that the Fourteenth Amendment's enabling clause extends the Amendment's reach into private conduct:<sup>195</sup> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>196</sup> This notion is reinforced, they argued, by the Necessary and Proper Clause, applicable to the entire Constitution<sup>197</sup>: "The Congress shall have Power . . . [t]o make all Laws which

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194. U.S. CONST. amend. XIV, § 1.

195. See *supra* Part II.B.3.

196. U.S. CONST. amend. XIV, § 5.

197. See *supra* Part II.B.3.

shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>198</sup>

Senators who promoted the FHA considered the Fourteenth Amendment’s Equal Protection Clause, as enforced through the Amendment’s enabling clause, as the main source of constitutional authority for the FHA.<sup>199</sup> This viewpoint, as explained in the documents inserted into the *Congressional Record* during the Senate debate, needs to be examined more closely.

The principal case cited for this point of view, *Katzenbach v. Morgan*,<sup>200</sup> is of dubious relevance to the FHA. In that case the Supreme Court struck down a state English literacy requirement for voting as violating the 1965 Voting Rights Act;<sup>201</sup> the Act exemplified Congress’s enabling powers to carry out the Fourteenth Amendment’s Equal Protection Clause.<sup>202</sup> The state argued that the enabling legislation directed at prohibiting specific state practices would be appropriate only if a court had previously decided that the targeted practice was forbidden by the Equal Protection Clause.<sup>203</sup> In rejecting this novel notion that enabling legislation must be conditioned on prior judicial findings, the *Katzenbach* Court held that the Fourteenth Amendment enabling clause granted “to Congress . . . the same broad powers expressed in the Necessary and Proper Clause.”<sup>204</sup> The leading description of the reach of the Necessary and Proper Clause was stated by Chief Justice John Marshall: “Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”<sup>205</sup>

A similar description of the Fourteenth Amendment’s enabling clause was given by the U.S. Supreme Court in 1879, just 12 years after the Amendment was adopted:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>206</sup>

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198. U.S. CONST. art. I, § 8.

199. See *supra* Part II.B.3.

200. 384 U.S. 641 (1966).

201. *Id.* at 646-47.

202. *Id.* at 646.

203. *Id.* at 648.

204. *Id.* at 650.

205. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

206. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).

The *Katzenbach* Court declared that the “*McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment,”<sup>207</sup> or, in the words of the *Katzenbach* Court, the enabling clause authorizes “Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>208</sup> The Court emphasized “that Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment.”<sup>209</sup>

This Amendment on its face applies only to “state action.” The *Katzenbach* Court adopted the view that the enabling clause authorized legislation that would secure equal protection of the laws “against State denial or invasion.”<sup>210</sup> The issues in *Katzenbach* were not concerned with regulating private conduct. Neither *Katzenbach* nor any other judicial precedent cited by the FHA proponents purported to authorize any legislation regulating purely private conduct under the Fourteenth Amendment. Indeed, one authority inserted by proponents into the debate record categorically reaffirms that at least some state involvement, or threshold level of state action, is required for regulating legislation to come within the reach of the Equal Protection Clause.<sup>211</sup>

Today, advocates of open housing simply recite the categorical conclusion that the Fourteenth Amendment may reach private conduct:

Congress, as a means to enforce the [A]mendment, may choose to eliminate the state action requirement where private parties are interfering with rights protected by the [F]ourteenth [A]mendment such as access to public facilities or with the exercise of fundamental rights. Private conduct may also be regulated where uniform enforcement is critical to effective enforcement or where discrimination in the private market is so pervasive that it constitutes an effective bar to the discriminated class’[] exercising protected [F]ourteenth [A]mendment rights.<sup>212</sup>

FHA proponents in fact advanced a novel interpretation of the Fourteenth Amendment’s enabling clause in order to justify regulation of purely private conduct. Even though this new interpretation lacked the judicial precedent claimed for it, it should still be examined. According to this view, Congress has the power to enact a law

to remove obstacles in the way of persons’ securing the equal benefits of government—benefits which a State could not

207. *Katzenbach*, 384 U.S. at 651.

208. *Id.*

209. *Id.* at 651 n.10.

210. *Id.* at 650 (quoting *Ex parte Virginia*, 100 U.S. at 346).

211. See 114 CONG. REC. 2273 (1968) (citing *United States v. Guest*, 383 U.S. 745, 755 (1966)).

212. KUSHNER, *supra* note 180, at 27 (footnotes omitted).

discriminatorily deny them without violating the Clause itself. A law prohibiting discrimination in housing on account of race, color, religion or national origin is such a law because discrimination in housing forces its victims to live in segregated areas, or “ghettoes,” and the benefits of government are less available in ghettoes.<sup>213</sup>

To state this interpretation in more direct terms, a state’s failure to prohibit private conduct that may inhibit a person’s access to governmental benefits is a denial of equal protection of the laws. This is an opinion that deserves respect. The approach is not irrational on its face.<sup>214</sup> It is likely motivated by honorable intentions, and may be thought to be a necessary measure in the face of persistent and widespread private discriminatory conduct. On the other hand, it is a point of view lacking the support of the Constitution, either from the language of the Constitution or from judicial interpretations of that language.<sup>215</sup> Moreover, if this approach is adopted as the standard for interpreting the Fourteenth Amendment’s enabling clause, it will effectively remove *all* restraints on Congress’s power to regulate private conduct. This would seem to be well beyond the “letter and spirit of the [C]onstitution” that informed Marshall’s view of the enabling clause’s reach.<sup>216</sup> It is also a view that seems characterized by an attitude that the Constitution is merely an obstacle to be overcome in progressing toward a laudable social goal, rather than a guide to good governmental practices that, with patience and wisdom, can achieve the same ends.

Among the restraints that this approach could remove from Congress’s power to regulate private conduct is the restraint that the power to prohibit does not necessarily infer the power to require affirmatively. An early critic of “affirmative action” pointed out the strained rationale by which the civil rights decisions moved from prohibiting segregation to requiring integration,<sup>217</sup> under the view of the

213. 114 CONG. REC. 2273 (1968) (citations omitted).

214. Some may question the factual premises of FHA proponents who advanced this view; whether private discriminatory conduct actually “forces” its victims to live in ghettoes, or whether living in so-called ghettoes causes reduced access to government benefits, or whether unequal access (as distinguished from unequal right of access) to government benefits amounts to a constitutional denial of equal protection of the laws. All are propositions that could be vigorously debated, however, for the purpose of this discussion, the validity of these propositions is accepted.

215. See *Chapman v. Higbee Co.*, 256 F.3d 416, 420-21 (6th Cir. 2001) (holding that the federal civil rights statute granting to all persons full and equal benefit of the laws does not protect against private discrimination, only against state action).

216. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

217. See Lino A. Graglia, *The “Remedy” Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 569, 569 (1988). FHA proponents openly proclaim that their objective is to not only eliminate discrimination but also to create an open, fully integrated society. See Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1053 (1998); Calmore, *supra* note 7, at 1070-71; Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977, 1009-10 (1998).

Fourteenth Amendment discussed in this section, no judicial doctrine would inhibit that same process from occurring in housing.

Therefore, the Fourteenth Amendment offers no support for the provisions of the FHA that purport to regulate purely private conduct.

### 3. *Commerce Clause*

FHA proponents also found constitutional support for the legislation in the Commerce Clause: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ."<sup>218</sup> Again, no court has yet adopted this theory of constitutional authority for the FHA, so the best and only statement of the theory available for examination is that found in the record of the Senate debates,<sup>219</sup> including the written statements inserted into the record.<sup>220</sup>

According to these statements, several factual and legal arguments support enactment of the FHA's private conduct restrictions as falling within Congress's power to regulate commerce among the states. These may be summarized as follows:

#### *Factual Arguments*

- A. Housing is a significant element of interstate commerce, considering the amounts of building materials crossing state lines, the interstate financing transactions, and the fact that every year one family in thirty moves to a different state.<sup>221</sup>
- B. Discrimination in housing adversely affects interstate commerce by reducing the number of new homes that are built and the amount of interstate movement of materials and financing. Interstate movement of minority families and efficient allocation of their labor is discouraged by discrimination.<sup>222</sup>

#### *Legal Arguments*

- A. The Commerce Clause grants Congress plenary power to protect interstate commerce from adverse effects such as those described above.<sup>223</sup> The power is not restricted just to goods or persons in transit; it extends to any and all activities which affect interstate commerce, even if the goods or persons engaged in the activities are not then, or may never be, traveling in commerce.<sup>224</sup>

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218. U.S. CONST. art. I, § 8.

219. *See supra* Part II.B.

220. *See supra* Part II.B.3.

221. 114 CONG. REC. 2536 (1968).

222. *Id.*

223. *Id.*

224. *Id.* at 2536-37.

- B. The congressional power to regulate interstate commerce exists even when the adverse effects to be regulated are minor, or if taken individually, the effects would be insignificant; it is sufficient if the effects, taken as a whole, are present in measurable amounts.<sup>225</sup>
- C. It does not matter that when Congress exercises its power under the Commerce Clause its motives are not solely to protect commerce; it can as validly act for moral reasons.<sup>226</sup>

With respect to the factual elements of this argument, the facts themselves are generally not in dispute. Nor is it disputable that the housing sector of the economy is truly interstate in scope, so that matters affecting housing or affected by housing are arguably matters of interstate commerce. What may be subject to question is whether the invocation of the Commerce Clause as a source of regulatory power for Congress should be based on such an industry-wide perspective, or whether Congress's power is defined by the specific conduct targeted for regulation. This inquiry leads to the legal arguments summarized above.

The first of those legal arguments is that Congress may act to protect interstate commerce from the adverse effects introduced by private discriminatory conduct in the sale or rental of housing. The goods or persons which are the object of the regulation need not be in transit or traveling in commerce.<sup>227</sup> Cited in support for these propositions is, among other cases, *Katzenbach v. McClung*,<sup>228</sup> in which Congress's power to ban racial discrimination from restaurants was challenged.<sup>229</sup> The U.S. Supreme Court concluded that Congress, in exercising its power over interstate commerce, could validly ban racial discrimination in restaurants "which serve food a substantial portion of which has moved in commerce."<sup>230</sup> This power can be asserted even over individual establishments whose involvement in interstate commerce would be considered insignificant, because those activities may typify the activities of many other similar establishments, which together might bring far-reaching harm to interstate commerce.<sup>231</sup>

In a companion case, *Heart of Atlanta Motel, Inc. v. United States*,<sup>232</sup> the Court upheld Congress's interstate commerce power to ban discrimination in public accommodations, emphasizing that even local accommodations could be regulated if their cumulative activities might have a substantial and harmful effect on interstate commerce.<sup>233</sup> Moreover, the valid exercise of the commerce power

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225. *Id.* at 2537.

226. *Id.*

227. *See supra* notes 223-24 and accompanying text.

228. 379 U.S. 294 (1964).

229. *Id.* at 295.

230. *Id.* at 298, 304-05.

231. *See id.* at 300-01.

232. 379 U.S. 241 (1964).

233. *Id.* at 258.

precluded a countering claim under the Fifth Amendment that the defendant had been deprived of liberty or property without just compensation.<sup>234</sup>

The *Heart of Atlanta* Court further declared that interstate commerce can be regulated by statutes which also have a moral purpose: "That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."<sup>235</sup>

In neither of these cases nor in similar cases did the Supreme Court require that Congress make any findings about the effects of the targeted activities on interstate commerce, in order to validate the regulation. Instead, if the courts have been able themselves to make the findings they might have required of Congress, establishing such a connection between the regulated activity and interstate commerce, then it can be said, even by way of afterthought, that such regulation was within Congress's commerce power.<sup>236</sup>

The favorable impact of these rulings on the constitutionality of the FHA private conduct restrictions may have been considerably weakened in the 1995 case of *United States v. Lopez*.<sup>237</sup> When Congress attempted to impose criminal penalties for possession of a firearm within 1,000 feet of a school, the U.S. Supreme Court held the legislation to be beyond the commerce power.<sup>238</sup> The Court rejected arguments showing the impact of violent crime on interstate commerce, because those arguments would justify federal regulation of all violent crime and any activities that related to the economic productivity of citizens, including marriage and divorce.<sup>239</sup> The criminal regulation was distinguished from the regulation of activities connected with a commercial transaction, and it was not an essential part of a larger regulation of economic activity "in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>240</sup> The Court also noted the absence of congressional findings demonstrating the connection between the legislation and interstate commerce, although such findings had not been previously required, and asserted that such findings would assist the Court in "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce."<sup>241</sup> After the *Lopez* case first arose, Congress quickly amended the firearms law to include the requested findings about connections to interstate commerce, but the Supreme Court was not impressed with this post-hoc attempt to validate the law.<sup>242</sup>

234. *Id.*

235. *Id.* at 257.

236. Cf. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1176-77 (2001) (noting that there is "reason to doubt that the Court assumes Congress to be a reliable factfinder").

237. 514 U.S. 549 (1995).

238. *Id.* at 551.

239. *Id.* at 563-64.

240. *Id.* at 561.

241. *Id.* at 562-63.

242. See *id.* at 563 n.4; see also Devins, *supra* note 236, at 1195-96 (citing the quickly added amendment as an example of Congress not taking factfinding seriously on federalism issues).

In 1990 the U.S. Supreme Court altered another Commerce Clause rule by declaring that a regulation within the commerce power that also affects property interests may trigger rights in the property owner to just compensation for a taking under the Fifth Amendment.<sup>243</sup> This reversed a position adopted twenty-six years earlier in *Heart of Atlanta*.<sup>244</sup>

Whether the precedential authority is strong or weak, that issue should not deter examination of the more important inquiry: Does this enormous expansion of federal power make sense? As finally conceded by the Supreme Court in *Lopez*, these cases essentially allow Congress to regulate any activity related to citizens' economic productivity.<sup>245</sup> Even allowing for the vastly increased economic interdependence that has arisen since the late eighteenth century, which could conceivably justify an expanded federal regulatory power, would not the genius of the Constitution still demand some restraint on the central government? At the moment, the more extreme interpretations of the Commerce Clause impose no limit on Congress's power to regulate citizens' lives, including the power to sharply curtail a property owner's right to dispose of the property.

Easily overlooked in this entire discussion is the self-evident fact that non-race-based discrimination in the sale or rental of housing is too rare to have any discernible impact on interstate commerce, even under the most exaggerated view of that term.

### III. ARE SOME PROVISIONS OF THE FAIR HOUSING ACT POSSIBLY UNCONSTITUTIONAL IN THEIR APPLICATION?

The preceding discussion addresses the question of whether portions of the FHA are unconstitutional on their face, or in other words, whether Congress lacked constitutional authority to enact those provisions. Regardless of how that question is resolved, or even if it is resolved in favor of constitutionality, the FHA might still be unconstitutional when applied in individual cases. The discussion of this issue, as with the preceding discussion, focuses on provisions of the FHA that deal with private conduct.

#### A. *Takings Conflicts*

The limitation of the right to dispose of one's property has traditionally been treated as a "police power" regulation, which is not subject to the "just compensation" requirement, rather than as a "taking," for which compensation is constitutionally required.<sup>246</sup> The concept of state police power does not appear in

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243. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 4-5 (1990).

244. 379 U.S. 241, 258 (1964).

245. See *Lopez*, 514 U.S. at 567.

246. See U.S. CONST. amend. V.

the Constitution but was recognized by early American courts and legal scholars.<sup>247</sup> The flavor of their writings is captured in two attempts at defining police power. The first attempt, made by James Kent, provided that:

The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens . . . on the general or rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.<sup>248</sup>

Thomas Cooley, in the second attempt, defined police power by stating:

The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.<sup>249</sup>

In recent years the pressure exerted by governments at all levels on various private property rights has grown, resulting in frequent complaints that some regulations go beyond the bounds of police power.<sup>250</sup> When that happens, then it is said that the governmental entity has actually taken a private property interest by means of a too vigorous regulation, and that this “taking” should generate a Fifth Amendment right to just compensation for the property owner. An enormous jurisprudence and body of legal literature has sprung up, seeking to rationalize “takings”; the very mass of these printed works defies summary and evaluation.<sup>251</sup>

However, in 1990 the U.S. Supreme Court in *Preseault v. Interstate Commerce Commission*<sup>252</sup> added another element to the debate by declaring that a federal regulation permissible under the commerce power, but which also affects property interests, may trigger rights in the property owner to just compensation for a taking

247. See David A. Thomas, *Sources of Government Police Power*, in 8 THOMPSON ON REAL PROPERTY: THOMAS ED. 380-87 (David A. Thomas ed., 1994).

248. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 534 (John M. Gould ed., 14th ed. 1896).

249. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 630 (2d ed. 1871).

250. See generally Robert S. Payne, *The Current State of Regulatory Takings in Supreme Court Jurisprudence: A Look at City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 11 VILL. ENVTL. L.J. 349, 390-91 (2000) (describing current trends in “Takings” jurisprudence).

251. For perhaps the most perceptive and accessible summary analysis of current takings jurisprudence, see *id.* at 381-91.

252. 494 U.S. 1 (1990).

under the Fifth Amendment.<sup>253</sup> This reversed a position adopted twenty-six years earlier in *Heart of Atlanta Motel, Inc. v. United States*.<sup>254</sup> If the plain language of the *Preseault* decision were to be applied in an FHA case, a taking could easily result, especially where the prohibited discrimination did not correspond to any compelling social problem on which a significant state interest rested.

### B. Free Speech Conflicts

The FHA prohibitions that raise free speech issues are extremely broad:

[I]t shall be unlawful—

....  
(c) [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.<sup>255</sup>

One can imagine innumerable scenarios in which the literal application of these provisions would create obvious and significant infringements on personal free speech rights. For instance, a private person, under these provisions, is prohibited from making any statement that indicates an intention to make a discriminatory preference in the sale or rental of housing—for example, to prefer a buyer sharing the seller's religion or national origin—even if such intention is never carried out. The broad excesses of these provisions have never been meaningfully challenged in the courts. However, the provisions have been tested and approved in a very narrow application—the liability of newspapers for publishing discriminatory advertisements.

In *Ragin v. New York Times Co.*,<sup>256</sup> the newspaper was accused of expressing racial preference in publishing its customers' advertisements for housing by having used almost exclusively white models ever since the FHA was passed in 1968.<sup>257</sup> Among other defenses, the newspaper averred that holding it liable would violate the First Amendment.<sup>258</sup> However, the court characterized the newspaper's activities as commercial speech, which is accorded less constitutional protection.<sup>259</sup> Moreover, the commercial speech related to an illegal activity, namely, unlawful discrimination in the sale or rental of housing.<sup>260</sup> The newspaper protested that its

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253. *Id.* at 4-5.

254. 379 U.S. 241, 258 (1964).

255. 42 U.S.C. § 3604(c) (1994).

256. 923 F.2d 995 (2d Cir. 1991).

257. *Id.* at 998.

258. *Id.* at 1002.

259. *Id.*

260. *Id.* at 1002-03.

activity was the legal activity of the sale or rental of housing, and that it was made illegal only by the statute whose constitutionality was in question.<sup>261</sup> The court rejected this argument against circularity with another circularity:

Such circularity would exist only if there were doubt about Congress's power to prohibit speech that directly furthers discriminatory sales or rentals of housing. The Times understandably shrinks from such a bold and fruitless challenge to the Fair Housing Act. Given that Congress's power to prohibit such speech is unquestioned, reliance upon the statute to determine the illegality of ads with a racial message is not circular but inexorable.<sup>262</sup>

Unfortunately, the court failed to perceive that it was indeed being invited to examine Congress's power to prohibit such speech, and instead—and in place of any analysis—substituted its own strong statement of bias. Therefore, this case stands for the proposition that the FHA advertising prohibitions do not violate First Amendment rights, but that position is taken utterly without any reasoning or analysis.

A more responsible attempt at analyzing this question appeared in the previously discussed case of *United States v. Hunter*.<sup>263</sup> The plaintiff in this case also attacked the newspaper publication of discriminatory advertisements for the sale or rental of housing, and the newspaper argued that the prohibition violated freedom of the press under the First Amendment.<sup>264</sup> The *Hunter* court also denied constitutional protection for what it characterized as purely commercial advertising, thus tacitly approving Congress's act making some of those activities illegal; however, the court noted, without analysis of constitutionality, that the FHA also bars private publication of discriminatory advertisements.<sup>265</sup>

Thus, the *Hunter* court upheld the FHA's restrictions on freedom of the press, because those freedoms as they relate to commercial advertising are not entitled to full First Amendment protection.<sup>266</sup> The *Hunter* court did not address the question of whether those prohibitions were constitutional when applied in any other context. It should be recalled, as discussed in an earlier section of this Article,<sup>267</sup> that the *Hunter* court asserted that Congress's power to enact the FHA is based on the Thirteenth Amendment,<sup>268</sup> which can provide a constitutional justification for the FHA only as it relates to discrimination against African Americans.<sup>269</sup> Therefore,

261. *Id.* at 1002.

262. *Ragin*, 923 F.2d at 1003.

263. 459 F.2d 205 (4th Cir. 1972). For a discussion of this case, see *supra* Part II.C.2.

264. *Hunter*, 459 F.2d at 209.

265. *Id.* at 212-13.

266. *Id.* at 211.

267. See *supra* Part II.C.2.

268. *Hunter*, 459 F.2d at 214.

269. See *supra* Part II.D.

if the *Hunter* court were to confront discriminatory practices in the sale or rental of housing based on any other form of discrimination, it would have to either find some other constitutional source for congressional power to prohibit those practices or concede that those prohibitions were unconstitutional.<sup>270</sup> If such non-African American discrimination is indeed beyond Congress's power to prohibit, then the various restrictions on First Amendment expression are also beyond Congress's power.

Courts' reluctance to candidly analyze the FHA restrictions of expression is surprising, given the unique nature and breadth of those restrictions. Violations of the FHA are declared to be unlawful,<sup>271</sup> and the relief that can be granted against violators consists of injunctions and compensatory and punitive damages,<sup>272</sup> all civil rather than criminal penalties. Except in the context of "hate" speech, and attempts to violently overthrow the government (both of which are criminal activities),<sup>273</sup> the FHA is unique in prohibiting and penalizing the mere expressions of intent to violate the law, even if the violations do not actually occur. Some forms of expression, such as flag-burning, have been upheld even in the face of existing criminal prohibitions.<sup>274</sup>

In other areas of property law, such as expressing intent to trespass on a neighbor's land, or expressing intent to create a private nuisance, or expressing intent to not return a security deposit for an invalid reason, no such restrictions exist or could conceivably be considered constitutional. Why such restrictions in the housing context should be considered valid, and exempt from scrutiny, is beyond explanation. Even if one considers the heightened concern over racial matters to be sufficient justification, that does nothing to justify these free speech restrictions as applied to all of the other forms of discrimination prohibited under the FHA.<sup>275</sup> If the expression restrictions are considered justifiable because the expressions deter persons from pursuing their rights to rent or buy, then the scope of the restrictions should be evaluated against the severity of the problem. Moreover, even if one were

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270. Even proponents of the FHA concede that the constitutionality of the FHA from a free speech perspective remains an open question:

By its terms, [the FHA] does ban certain types of speech . . . . For now, it is sufficient to note that the issue of whether discriminatory statements may be defended on First Amendment grounds remains a lively one. The two circuits that have addressed this issue have rejected the freedom of speech defense, but they did so in the early 1970s on the ground that the defendants' speech, being merely commercial, was not entitled to much First Amendment protection. These precedents may be suspect today in light of recent Supreme Court decisions heightening the degree of First Amendment protection accorded commercial speech, including one that protected home selling techniques.

ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 37-38 (1983) (footnotes omitted).

271. 42 U.S.C. § 3604 (1994).

272. 42 U.S.C. §§ 3612(k), 3613(c), 3614(d) (1994).

273. See UTAH CODE ANN. § 76-3-203.3 (1999).

274. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

275. See *Lee*, *supra* note 6, at 1223 (discussing HUD investigations which target neighborhood and community organizations challenging the placement of public housing in certain areas).

to apply the mildest form of scrutiny to validate state regulation of private conduct, the so-called rational basis test, one would be hard-pressed to find in those other forms of prohibited discrimination such serious and widespread social disorders as to justify such sweeping speech restrictions.

### C. *Religious Exercise Conflicts*

The FHA currently permits religious organizations to prefer their own members' occupancy in dwellings owned by the organizations, but makes no other concessions to free exercise of religion.<sup>276</sup> Thus, an owner who wishes to prefer a member of the owner's faith as a renter or purchaser, or wishes to deny renting or selling to someone whose conduct offends the owner's religious standards, may be found in violation of the FHA, even if those preferences are simply expressed but not carried out.<sup>277</sup> Whether an exemption for religious preferences may be approved has been tested most often in state courts in the context of state laws prohibiting discrimination on the basis of marital status. Courts have given mixed reactions to whether a landlord can refuse to rent to an unmarried couple because of the landlord's religious belief that such cohabitation is sinful.<sup>278</sup>

No published writing has reviewed the extent of religious discrimination in the sale and rental of housing or suggested that religious discrimination has any significance at all in the housing sector of the economy. The somewhat Draconian restrictions the FHA places on free exercise, as well as on the other lesser forms of discrimination, are perhaps best explained by the FHA's proponents' hopes that the FHA would be a major step in the forcible cleansing of our society of all of its major ills, with private prejudice and discrimination at the top of the list.<sup>279</sup> This may also explain why the FHA makes no distinction between the various types of prohibited discrimination, which under our current jurisprudence are subject to different levels of scrutiny in assessing their constitutionality.

## IV. SUMMARY OF FHA CONSTITUTIONALITY ISSUES AND A PROPOSED CORRECTION

### A. *Summary of FHA Constitutionality Issues*

Questioning the constitutionality of the FHA's private conduct provisions can be difficult for some people. For them—the Senate in 1968, the court in *Ragin v.*

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276. 42 U.S.C. § 3607 (1994).

277. *See id.* (applying only to religious organizations).

278. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (vacating district court opinion as not ripe for review because the landlord's action was commenced before enforcement proceedings began; this opinion expressed hostility to the landlord's position); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 243 (Mass. 1994) (remanding the case to determine if landlord's religious belief creates an exception to liability); *Donahue v. Fair Emp. & Hous. Comm'n.*, 2 Cal. Rptr. 2d 32, 46 (Ct. App. 1991) (exempting the landlord from liability because refusal to rent was based on sincerely held religious belief).

279. *See supra* note 46 and accompanying text.

*New York Times Co.*,<sup>280</sup> and perhaps the majority of Americans—it is unthinkable that Congress would not have the power to proscribe racial discrimination and other, similar forms of negative social behavior. Perhaps that is why these issues have never been squarely confronted. And if not confronting these issues has been acceptable since 1968, why raise them now?

Perhaps the best reason for raising the constitutionality question now, is that any departures from constitutional restraints, regardless of how innocuous or acceptable at the time, lower the bar to similar departures at different times and in perhaps less acceptable ways. Thus, if the federal government can prohibit and punish the type of private conduct targeted in the FHA, then any other type of private conduct on someone's social agenda is similarly vulnerable. Indeed, these kinds of excesses are immediately discernible in the FHA itself, which prohibits whole areas of private conduct (e.g., gender, religion, national origin) which in the housing sector have never been large social problems and for which no shred of constitutional justification exists. No doubt can exist that the federal government has authority to govern any of these activities if facilitated by "state action"; in all of these matters, at the very least, the Equal Protection Clause of the Fourteenth Amendment commands such protection.

Below is a summary of the points on which the original private conduct portions of the FHA may be vulnerable to constitutional challenge:

- A. The Act itself contains no statement of Congress's constitutional authority for such legislation, only a statement of policy that it is intended to function within constitutional limitations.<sup>281</sup>
- B. Constitutionality issues were raised briefly in Senate debates preceding passage of the Act, but were not included in committee reports or other legislative history. Opposing positions were noted for the record, without any consensus or majority position being adopted, except inferentially by passage of the FHA itself.<sup>282</sup>
- C. The constitutional authority cited by FHA proponents during the debates has been completely ignored by the courts.<sup>283</sup> Never having been considered by the courts, that theory of authority has never been subjected to adversarial advocacy and judicial analysis. When examined today, it is seen that that theory rests on an extreme and partially discredited notion of Commerce Clause power.<sup>284</sup>
- D. The few federal courts that have examined the constitutionality of the FHA have justified it on Congress's power under the Thirteenth Amendment, also by flawed reasoning.<sup>285</sup> This power was applied to private conduct only because

280. 923 F.2d 995 (2d Cir. 1991). For a discussion of this case, see *supra* Part III.B.

281. 42 U.S.C. § 3601 (1994).

282. See *supra* Part II.B.

283. See *supra* Part II.C.

284. See *supra* Part II.B.

285. See *supra* Parts II.C, II.D.

of the 1968 *Jones v. Alfred H. Mayer Co.*<sup>286</sup> decision introducing a new, expanded interpretation of the Thirteenth Amendment's enabling clause, an interpretation based on a completely erroneous view of the legislative history underlying the Thirteenth Amendment.<sup>287</sup> Even if the *Jones* jurisprudence were accepted, it would sustain the FHA only as applied to African Americans.<sup>288</sup> No specific constitutional authority has ever been cited by a federal court for any other aspect of the FHA private conduct provisions.<sup>289</sup>

- E. The FHA eradicates certain private property rights, and current jurisprudence suggests that, even if the FHA is constitutionally permissible, its enforcement could create regulatory takings for which private landowners could be compensated.<sup>290</sup> To raise takings issues is a reminder that the FHA directly infringes upon private property rights, the significance of which has never been analyzed by federal courts.
- F. FHA private conduct provisions restrict First Amendment free speech rights in ways unprecedented in any other federal legislation.<sup>291</sup> Courts that have rejected free speech challenges have not analyzed the issues, but only issued conclusory remarks.<sup>292</sup>
- G. Among other possible conflicts, application of FHA restrictions on private conduct may interfere with First Amendment free exercise of religion rights.<sup>293</sup> So far this issue has arisen mostly in the context of state open-housing laws prohibiting discrimination on the basis of marital status, but it could easily arise under the federal FHA familial status provision, with respect either to unmarried couples or to same sex couples. State court decisions suggest that free exercise rights could render offending portions of open-housing laws unconstitutional.<sup>294</sup>

#### *B. A Proposed Minimalist Corrective to the Federal FHA*

If two persons representing opposing views on the constitutionality of the FHA private conduct provisions were placed in a room with each other and told to work out their differences, an interesting and instructive scenario might take place. First, each protagonist would have to recognize both merit and sincerity in the other point of view. The FHA opponent would have to acknowledge that more open housing and less racial prejudice at the personal level are desirable goals and may seem unattainable without government intervention; however, the opponent would insist that the government efforts to achieve these goals must be attempted within the

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286. 392 U.S. 409 (1968).

287. *See supra* Parts II.C.1, II.D.

288. *See supra* Part II.D.

289. *See supra* Parts II.C, II.D.

290. *See supra* Part III.A.

291. *See supra* Part III.B.

292. *See supra* Part III.B.

293. *See supra* Part III.C.

294. *See supra* Part III.C.

government's legitimate sphere of authority. The FHA proponent would have to concede that the national government is not supposed to be all-powerful and that people can honestly differ on what constitutes an ideal society; the proponent would be eager to pursue these ideals in any lawful way. In time, they could perhaps compose their differences by agreeing to undertake two steps. One step would be to introduce a small amendment into the FHA that would eliminate its objectionable features relating to expanded governmental power or excessive intrusion in private conduct. The other step would be to invoke existing rules of law—indeed, even the common law in the states—to achieve open-housing regimes that are secure from legal attack. The proposed FHA amendment is explained in the following paragraph. The new proposal for achieving open housing within common law principles already effective in states' property laws is explained in Part V of this Article.

If the private conduct provisions of the FHA are both vulnerable to constitutional challenge and represent the most extreme federal governmental interference with private property rights, then the Act could be amended to eliminate those provisions, leaving in place all current FHA language, but declaring that those provisions apply only to state action. Indeed the FHA was intended not only to correct prejudicial private conduct but also discriminatory state action, which in the housing sector was quite widespread during the 1940s, 1950s, and 1960s. Limiting the FHA to state action only, in order to correct constitutional flaws in the FHA, can be achieved simply by adding the phrase "as a matter of state action" to the phrase "it shall be unlawful" in the opening lines of § 3604 of the FHA, the provisions describing most of the prohibited conduct.<sup>295</sup> This would then leave the regulation of private conduct to the states in accordance with their fundamental common law property principles, as explained in Part V of this Article.

#### V. A NEW APPROACH TO HOUSING FAIRNESS: USE OF COMMON LAW PROPERTY LAW RULES TO ACHIEVE HOUSING FREE OF PRIVATE DISCRIMINATION

##### *A. Reliance on State Rather Than Federal Law*

Beginning in the 1950s, states began enacting their own open-housing legislation.<sup>296</sup> This continued after enactment of the federal FHA in 1968, and now 48 states and the District of Columbia have some type of open-housing legislation.<sup>297</sup>

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295. 42 U.S.C. § 3604 (1994).

296. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 3.5 (1992).

297. See ALA. CODE § 24-8-4 (2000); ALASKA STAT. § 18.80.240 (Michie 2000); ARIZ. REV. STAT. ANN. § 41-1491.14 (1956); ARK. CODE ANN. § 16-123-204 (Michie 1987 & Supp. 2001); CAL. CIV. CODE § 51 (West 1982 & Supp. 2001); COLO. REV. STAT. ANN. § 24-34-502 (2000); CONN. GEN. STAT. ANN. § 46a-58' - 46a-64a (1958 & Supp. 2001); DEL. CODE ANN. tit. 6, § 4603 (1999); D.C. CODE ANN. § 1-2515 (1999); FLA. STAT. ANN. § 760.23 (West 1997); GA. CODE ANN. § 8-3-202 (1997); HAW. REV. STAT. ANN. § 515-3 (Michie 2000); IDAHO CODE § 67-5909 (Michie 1949); 775 ILL. COMP. STAT. ANN. 5/3-102 (West 1993); IND. CODE ANN. § 22-9.5-5-1 (Michie 1997); IOWA CODE

As described by one legal scholar:

Although varying in details, state enforcement schemes resemble the federal scheme and each other in several respects. First, all states provide for some administrative mechanism to receive, investigate and possibly resolve discrimination complaints. In most states this includes a commission or some other body to conduct hearings and order appropriate relief. Second, states typically also provide for a private civil action for alleged discriminatory conduct.

State statutes have also expanded protection in several important respects, however. Some state statutes, unlike the Fair Housing Act, extend coverage to all real property and not just residential dwellings. Also, some states have extended protection to more classes than does the federal scheme. Marital status is protected in twenty states, age in nine states, source of income in four states, and sexual orientation in four states and the District of Columbia.<sup>298</sup>

If federal prohibitions of discrimination in housing were limited to instances of “state action,” as proposed in the preceding section,<sup>299</sup> then these state open-housing laws would be the principal, if not only, means of regulating private conduct deemed discriminatory. Indeed, state regulation may be preferable to and more

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ANN. § 216.8 (West 2000); KAN. STAT. ANN. § 44-1016 (2000); KY. REV. STAT. ANN. § 344.360 (Michie 1997); LA. REV. STAT. ANN. § 51:2606 (West Supp. 2001); ME. REV. STAT. ANN. tit. 5, § 4582 (West 1964 & Supp. 2000); MD. CODE ANN. OF 1957 art. 49B § 22 (1998 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996 & Supp. 2001); MICH. COMP. LAWS ANN. § 37.2502 (West 1985 & Supp. 2001); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2001); MO. ANN. STAT. § 213.040 (West 1996 & Supp. 2001); MONT. CODE ANN. § 49-2-305 (1999); NEB. REV. STAT. § 20-318 (1997); NEV. REV. STAT. ANN. § 118.100 (Michie 1998); N.H. REV. STAT. ANN. § 354-A:8 (1995 & Supp. 2000); N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 2001); N.M. STAT. ANN. § 28-1-7 (Michie 1978 & Supp. 2001); N.Y. EXEC. LAW § 296 (McKinney 2001); N.C. GEN. STAT. § 41A-4 (1999); N.D. CENT. CODE § 14-02.4-12 (1997); OHIO REV. CODE ANN. § 4112.02 (Anderson 1998); OKLA. STAT. ANN. tit. 25, § 1452 (West 1987 & Supp. 2001); OR. REV. STAT. § 659.033 (1999); 43 PA. CONS. STAT. ANN. § 953 (West 1991 & Supp. 2001); R.I. GEN. LAWS § 34-37-4 (1995 & Supp. 2000); S.C. CODE ANN. § 31-21-40 (Law. Co-op. 1991); S.D. CODIFIED LAWS § 20-13-20 (Michie 1995); TENN. CODE ANN. § 4-21-601 (1998); TEX. PROP. CODE ANN. § 301.021 (Vernon 1995); UTAH CODE ANN. § 57-21-5 (2000); VT. STAT. ANN. tit. 9, § 4503 (1993); VA. CODE ANN. § 36-96.3 (Michie 1996); WASH. REV. CODE ANN. § 49.60.222 (West 1990 & Supp. 2001); W. VA. CODE ANN. § 5-11-9 (Michie 1999); WIS. STAT. ANN. § 106.04 (West 1997).

298. Mark W. Cordes, *Statutory Modifications of Landlord and Tenant Law*, in 5 THOMPSON ON REAL PROPERTY: THOMAS ED. 305-06 (David A. Thomas ed., 1994 & Supp. 2000) (footnotes omitted). For examples of state statutes that extended coverage to all real property and not just residential dwellings see ALASKA STAT. § 18.80.240 (Michie 2000); CONN. GEN. STAT. ANN. § 46a-58 (1958 & Supp. 2001); HAW. REV. STAT. ANN. § 515-3 (Michie 2000); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2001); N.H. REV. STAT. ANN. § 354-A:8 (1995 & Supp. 2000); OR. REV. STAT. § 659.033 (1999); S.D. CODIFIED LAWS § 20-13-20 (Michie 1995).

299. See *supra* Part IV.B.

secure than federal regulation. Federal regulation of private housing necessarily rests only on the terms of the Commerce Clause and only on relatively recent and novel interpretations of that clause. On the other hand, state police powers to regulate private property have been acknowledged from this nation's inception, and state—rather than federal—regulation of private property rights is still the rule.<sup>300</sup> Thus reliance on state law in the ways suggested in the following paragraphs has the dual benefits of avoiding risks of unconstitutionality and of according full respect to traditional private property rights.

State police power regulations are permissible only if they reasonably further the health, safety, morals, or welfare of the community.<sup>301</sup> And even these settled principles are subject to lively debate and litigation today, as private property owners challenge the extent to which state and local land use regulations may interfere with their private property rights without effecting compensable takings.<sup>302</sup> Furthermore, these takings issues emanate from the fundamental Fifth Amendment rule, applicable to federal and state governments at all levels, that private property shall not “be taken for public use, without just compensation.”<sup>303</sup> So the unquestioned rights of state and local governmental entities to regulate private property through the exercise of state police power are subject to the dual restrictions that the regulations further a public purpose and that the regulating agencies provide just compensation if they regulate too much. Modern takings jurisprudence has worked over both issues, insisting that land-use regulations have a demonstrable relationship, or nexus, to a legitimate state interest or purpose (which must relate to public health, safety, morals, or welfare), and that regulations impacting too heavily on individual property owners must trigger just compensation.<sup>304</sup>

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300. See Thomas, *supra* note 247, at 377-87; cf. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (tracing the connection with and establishment of police power in western political philosophy, the U.S. Constitution, and the Washington Constitution as well as federal and Washington law regarding its role as regulator of private property rights).

301. See generally Thomas, *supra* note 247 at 377-87 (describing the origins of police power). See also Talmadge, *supra* note 300 (tracing the connection with and establishment of police power in western political philosophy, the U.S. Constitution, and the Washington Constitution as well as federal and Washington law regarding its role as regulator of private property rights).

302. Almost all takings cases originate as local land-use regulation disputes, but usually are resolved according to a growing corpus of federal constitutional principles. An excellent summary and analysis of current takings jurisprudence is found in Payne, *supra* note 250, at 381-91. See also *Palazzolo v. Rhode Island*, 150 L. Ed. 2d 592, 603, 606 (2001) (discussing landowners' inverse condemnation action wherein he alleged that the state's denial of his application to fill eighteen acres of coastal wetlands and to construct a beach club constituted a taking for which he was entitled to compensation).

303. U.S. CONST. amend. V.

304. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

*B. Concentration on the Most Serious Problem: Racial Discrimination*

Observers seem to agree that the most serious problem addressed by, and the most significant failure of, the FHA is in the area of race discrimination, mostly against African Americans.<sup>305</sup> Most of the other forms of prohibited discrimination in the original FHA are so minimal as social problems as to seem silly and vacuous, especially in comparison to the infringement of private property rights required to eradicate them. Their inclusion in the FHA can be explained only as an attempt by proponents forcibly to create a truly open society, swept clean of all private prejudices.

If those other forms of prohibited discrimination in the original FHA are indeed lacking in social significance, then one could justly question whether their restriction constitutes a public purpose for state police power purposes. If these other prohibitions were eliminated from open-housing regimes, then an owner would be free to not rent or sell to unmarried cohabitants (for either personal or religious reasons), to designate housing as only for families with children or not, or only for males or females, or to prefer selling or renting to a member of one's own religious congregation (instead of being required to prefer someone from a different faith). All are perfectly sensible, normal, and innocuous exercises of property rights currently prohibited and penalized by the plain language of the FHA.

In proposing an alternative legal regime to achieve open housing, not only should emphasis be shifted from federal law to state law, as described in the preceding section, but the scope of state law should be limited to prohibit simply race discrimination, unless—as described below<sup>306</sup>—a private owner chooses to accept more extensive restrictions for particular land.

If, under federal equal protection law, the most serious problems of race discrimination in housing can be eliminated from the conduct of public and governmental entities, and, under state law, from private conduct, then the most important step toward true open housing will have been achieved.

*C. Housing Discrimination Can Be Attacked Using Existing State Property Law Rules*

*1. Advantages and Disadvantages of Traditional State Servitude Laws*

If a landowner wishes to place restrictions on the use or disposition of the property, the typical legal device for doing so is a type of servitude known as a covenant, often denominated as a real covenant or restrictive covenant.<sup>307</sup> Through

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305. See, e.g., Calmore, *supra* note 217, at 1067 (discussing the weaknesses of the Fair Housing Act and the prevailing existence of segregation in housing); Armstrong, *supra* note 217, at 1053 (same); Sander, *supra* note 217, at 1004-10 (same).

306. See *infra* Part V.C.

307. See John H. Pearson, *Real Covenants: Promises Concerning the Use of Land*, in 7 THOMPSON ON REAL PROPERTY: THOMAS ED. 133 (David A. Thomas ed., Supp. 2000).

use of the real covenant, landowners can govern not only their own relationships as neighboring landowners, but also govern their successors in interest.<sup>308</sup> Before 1948, servitudes in the form of racially restrictive covenants (prohibiting occupancy by non-Caucasians) were often used to restrict the use or disposition of residential real property. In the important 1948 case of *Shelley v. Kraemer*,<sup>309</sup> the U.S. Supreme Court held that judicial enforcement of such racially restrictive covenants constituted a type of “state action” that violated the Equal Protection Clause of the Fourteenth Amendment.<sup>310</sup> Nevertheless, it is clear that for other types of restrictions, real covenants can be used to regulate the occupancy and disposition of real property.

Real covenants have been a wonderfully flexible and useful tool enabling neighboring landowners to govern their relationships with each other and their respective successors in interest according to their individual circumstances.<sup>311</sup> These covenants, which are closely related to servitudes known as easements, arose in the U.S. early in the nineteenth century in response to judicial policies restricting creation of new types of negative easements, that is, rights in one landowner to prohibit certain uses of another landowner’s land.<sup>312</sup> The real covenant arose as a form of an agreement or contract under which landowners promised to observe certain restrictions on the use of their land—thus overcoming the rules against creating new negative easements—but the legal rules that enabled these promises to be enforced against successors in interest were, and continue to be, complex and burdensome.<sup>313</sup> Many jurisdictions, and the first Restatement of Property, recognize one particular restriction on real covenants that restricts their utility in a way directly relevant to a proposal that will be explained in this Article: The party entitled to enforce the covenant must hold land that is benefitted by the covenant.<sup>314</sup> In other words, if a landowner made a promise to another person to observe a certain restriction in the use and disposition of the land, and if the promise did not benefit land held by the promisee, only the promisee could enforce the promise; successors in interest to the promisee could not enforce a promise that did not benefit their land.<sup>315</sup>

Thus, for example, if a public-spirited, idealistic and fair-minded landowner desired that the sale or rental of the land should never be affected by race discrimination, the landowner could implement that desire by entering into a real covenant with a local government entity or public interest group, and that entity or group would have certain rights of enforcement if the covenant were violated.

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308. *Id.* at 133-34.

309. 334 U.S. 1 (1948).

310. *Id.* at 23.

311. Pearson, *supra* note 307, at 133-35.

312. *Id.* at 136-38.

313. *Id.* See generally JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 857-61 (4th ed. 1998) (describing the history of covenants).

314. Pearson, *supra* note 307, at 159; RESTATEMENT OF PROPERTY § 543(2)(a) (1944).

315. See Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067, 1087-90 (1942).

However, if that entity or group owned no land that could be benefitted by observance and enforcement of the non-discrimination promise, covenant rules in that jurisdiction might limit the duration and transferability of the covenant's enforcement rights. A jurisdiction's rules concerning unreasonable restraints against alienation or the rule against perpetuities might also inject elements of uncertainty into land titles encumbered by such servitudes.<sup>316</sup>

Another obstacle appears in the requirement that the covenant originally have been created in connection with a related transaction in the land, usually referred to as "horizontal privity."<sup>317</sup>

If a landowner sought to avoid the intricacies and limitations of real covenants in implementing the desire to make the sale or rental of the land permanently non-discriminatory, the easement device might look more appealing. Yet, as stated above, courts might not be receptive to new types of negative easements, because they are, among other things, encumbrances on title. Moreover, according to traditional easement rules, negative easements must benefit other land, otherwise they are not transferable or inheritable.<sup>318</sup>

## 2. Remedial State Legislation for Servitudes

Where negative easements in gross have been recognized, such as conservation easements, they have been authorized by special legislation.<sup>319</sup> Indeed, typical conservation easement legislation provides a model for the principal proposal in this Article. By such legislation, all of the traditional limitations associated with covenants and easements, and indeed the differences between those servitudes, can be removed in provisions authorizing creations of specialized servitudes for specialized purposes. Other examples in state legislation include historic preservation easements<sup>320</sup> and solar access easements.<sup>321</sup>

The examples of these special legislative servitudes establish: (1) that a new easement could be created for just about any legitimate public purposes, (2) that traditional common law limitations can be removed, and (3) that special incentives

316. These potential problems arise especially in situations where a landowner imposes such servitude restrictions, with forfeiture provisions, in transferring land to another. *See generally* David A. Thomas, *Use of Easements in Preserving Utah Historical Sites*, 2 UTAH BAR J. 31, 32-33 (1974) (noting the possibility that an agreement to repurchase property previously transferred at a predetermined price upon occurrence of a condition subsequent may be an unreasonable restraint on alienability).

317. *See* Pearson, *supra* note 307, at 159; RESTATEMENT OF PROPERTY § 543(2)(a) (1944).

318. *See* John H. Pearson, *The Law of Easements: Rights in the Property of Another*, in 7 THOMPSON ON REAL PROPERTY: THOMAS ED. 395-98 (David A. Thomas ed., 1994). The only types of negative easements recognized in the United States are appurtenant, and not in gross. *See id.* at 395-96, 399-401.

319. *See* Andrew Dana & Michael Ramsey, *Conservation Easements & the Common Law*, 8 STAN. ENVTL. L.J. 2, 17 (1989).

320. For an early example, *see* Thomas, *supra* note 316, at 31.

321. *See* David A. Thomas, *Property Rights in Airspace*, in 7 THOMPSON ON REAL PROPERTY: THOMAS ED. 2-6 (David A. Thomas ed., 1994).

for private landowners to enter into such arrangements can be added. Once such an easement is created and recognized as an interest in land, the possibility arises that a local governmental entity may condemn or take such an interest by exercise of its eminent domain power and upon the payment of just compensation.

*3. A Modest Proposal: How Housing Discrimination Can Be Attacked Using State Property Law Rules on Servitudes*

If the original federal fair housing provisions that apply to private conduct<sup>322</sup> are removed from federal open-housing law—because of their uncertain constitutionality and so they will not be perceived as pre-empting state open-housing law—then state legislatures and courts can craft their own open-housing laws in accordance with traditional property law rules and by extending full respect to private property rights. To accomplish this, I propose that state legislatures enact open-housing easement legislation with the following features:

- A. A private landowner may grant to a qualified governmental entity or public interest group an open-housing easement by which the landowner and all successors in interest are prohibited from discriminating on the basis of race in the sale or rental of the land. The model legislation set forth below expands this concept to an open property easement, prohibiting discrimination in the sale or rental of all real property, whether or not currently in use as residential property.
- B. The open property easement is recognized as an interest in land and as an encumbrance, but does not render a title unmarketable.
- C. The open property easement is not subject to traditional rules about proper subject matter for negative or affirmative easements, for easements appurtenant or in gross, governing duration or perpetuities, or restricting unreasonable restraints on alienation.
- D. The grantors of open property easements may receive consideration by means of money, other land or any other things of value, may obtain a reduced tax valuation of their remaining land, may obtain a tax incentive such as a deduction or credit for a charitable contribution, or may obtain any combination of such forms of consideration.<sup>323</sup>
- E. The holders of open property easements, or their successor in interest, may enforce open-housing easements by means of equitable or legal remedies. Any person aggrieved by failure to enforce an open property easement has a private

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322. This Article has consistently analyzed only the restrictions contained in the original FHA; the prohibited discriminations added by later amendments may stand on a different footing, are supported by no indication of constitutional basis, and are beyond the scope of this Article.

323. Conceivably, some part of condemnation awards could be made available from current levels of public revenue by lower litigation and enforcement costs that could follow from implementation of this open-housing easement approach.

right of action to enforce the open property easement by means of equitable or legal remedies.

- F. Eliminating racial discrimination from the sale or rental of property is declared to be a public purpose, and certain designated governmental entities are authorized to condemn open property easements by exercise of eminent domain power. A condemnation award formula is established, according to which the condemnee is awarded a percentage of the full-assessed value of the encumbered property for tax purposes, plus any increase in that valuation that becomes effective in the five years following the condemnation. The assessed value of the encumbered property for tax purposes is reduced by the amount of any condemnation award.

The proposed legislative language to express these provisions is as follows:

#### PROPOSED MODEL OPEN PROPERTY EASEMENT ACT

**Section 1.** This Act shall be known as the [State] Open Property Easement Act.

**Section 2.** The legislature finds and declares that eliminating racial discrimination from the sale or rental of real property in the State is a public purpose, is in the public interest of the people of the State, and should be promoted by the laws of this State.

**Section 3.** The legislature creates and recognizes as a real property interest an open property easement by which one who holds an interest in real property is prohibited from engaging in racial discrimination in the sale or rental of that interest.

- a. **Creation.** Any holder of an interest in real property in the state may create and convey, and any person or entity entitled to hold interests in real property may accept, an open property easement. An open property easement may be created by express grant, by reservation, by restriction, or by circumstances giving rise to an easement by implication, a prescriptive easement, or an easement by necessity. An open property easement may be condemned by proper exercise of the power of eminent domain.
- b. **Governing Laws.** An open property easement is subject to the laws of this State governing easements generally, subject to the following exceptions:
  - (1) the form of the easement may be affirmative or negative, appurtenant or in gross;
  - (2) the easement may be perpetual in duration and is fully transferable and inheritable;
  - (3) the easement is not subject to the rules of property known as the rule against unreasonable restraints on alienation and the rule against perpetuities;
  - (4) the title to land encumbered by an open property easement is not thereby rendered unmarketable;

- (5) an open property easement may be recorded as an instrument affecting title to land if it meets requirements for recording, except that no recording fee may be charged.

**Section 4. Consideration.** No consideration is required for the creation, grant or transfer of an open property easement to be valid. Consideration, if applicable, may be in the form of money, other land, or other things of value, or any combination of them. Consideration for an open property easement conveyed to a governmental entity with authority to impose taxes on the land may be in the form of money, other land, other things of value, deductions or exemptions from or credits against taxes, reduction in assessed tax valuation of the encumbered property, or any combination of them. Counties and cities are authorized to enact ordinances providing for uniform and fair compensation to be paid to grantors or condemnees of open property easements.

**Section 5. Condemnation by Eminent Domain Power.** Eliminating racial discrimination from the sale or rental of property is declared to be a public purpose. Any governmental entity with eminent domain power over the land encumbered, or to be encumbered by an open property easement, may condemn an open property easement to achieve that purpose. The legislature hereby declares that a just compensation award for an open property easement is equal to [%] of the full fair market value of the property as assessed for taxation purposes, plus any additions to the value assessed over the five tax years following the condemnation. The taxing authority shall also reduce the assessed value of the land for taxation purposes by the amount of the condemnation award.

**Section 6. Enforcement; Remedies.** Holders of open property easements, or their successors in interest, may enforce open property easements by means of equitable or legal remedies. In addition, any person aggrieved by a violation of and failure to enforce an open property easement has a private right of action to recover appropriate damages caused to the plaintiff by the violation and also may obtain enforcement of the open property easement by equitable or legal remedies.

**Section 7.** An open property easement may be in essentially the following form:

[Name of grantor], of [address of grantor], hereby conveys to [name and address of grantee] a servitude known as an open property easement in the property described below. The grantor covenants, for the grantor and grantor's successors and assigns, that the occupant of the property will not practice any form of racial discrimination in the use or disposition of the property. This servitude runs with the land, is binding on the property, and is binding on the grantor's successors and assigns:

[Description of Property]

[Signature of Grantor]

## VI. CONCLUSION

A. *Summary*

This Article has proposed and documented the following points concerning the FHA provisions restricting private conduct:

- A. The FHA declares that it is subject to constitutional limitations.
- B. No language in the FHA indicates the basis of its constitutional authority.
- C. The legislative history of the FHA shows that constitutionality was discussed in Senate debates, but was not mentioned in committee reports.
- D. During the debates, FHA proponents argued that the FHA was constitutional because of federal legislative power implicit in the Fourteenth Amendment and in the Commerce Clause.
- E. Court decisions on FHA constitutionality have not relied on the Commerce Clause or on the Fourteenth Amendment, but rather on the Thirteenth Amendment, mostly because of the *Jones v. Alfred H. Mayer Co.*<sup>324</sup> decision in 1968. No U.S. Supreme Court decision has ruled directly on the constitutionality of the FHA. All of the rationales employed in the other federal courts are seriously flawed; no persuasive basis for FHA constitutionality can be shown. No rationale for constitutionality has ever been suggested that justifies any type of prohibited private discrimination except against African Americans.
- F. In its application, the FHA's constitutionality has been adjudicated only with respect to possible conflicts with freedom of speech. The FHA in those cases has been upheld only because the plaintiffs' speech was deemed to be unprotected commercial speech, a rationale which today is probably no longer valid. In other areas, such as private, noncommercial expression, religious exercise and takings, the FHA appears plainly in violation of the Constitution.
- G. If the FHA is vulnerable to full or partial invalidation, alternative approaches to open housing should be sought. Suggested solutions include amending the FHA and relying more heavily on state law and traditional property law concepts with no risk of unconstitutionality.
- H. FHA vulnerabilities easily can be eliminated by confining its prohibitions to state action, which can be based on the Equal Protection provision of the Fourteenth Amendment.
- I. States, which are the sources of most common and traditional law governing private property rights, already heavily support open-housing measures of various kinds and can be expected to act responsibly.
- J. Some features of servitudes—specifically, of real covenants and easements—may be employed to protect property from unwanted private discrimination without any risk of unconstitutionality and with full respect to

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324. 392 U.S. 409 (1968).

traditional private property rights. To the extent these servitude forms are not completely suitable, corrective legislation to authorize an open-housing easement is proposed, similar to legislation authorizing conservation or historic preservation easements. The rights of property disposition surrendered in such servitudes, either by donation or eminent domain condemnation, should be treated as rights of value for which compensation is appropriate.

### *B. Evaluative Conclusion*

It would be easy to misjudge this Article as a plea to turn back the clock and throw away all of the civil rights gains in housing won since 1968. Such a perception could not be further from the truth. Open-housing advocates question how much progress has occurred since 1968. The case reports show many individual plaintiffs obtaining relief under the FHA, but discrimination and disregard of the FHA still seem to be widespread. Lack of respect for FHA requirements may exist in part because of their excesses.

Some of the FHA private conduct prohibitions have never been significant social problems and seem almost silly when compared with the more serious concerns over racial discrimination, yet they are all lumped together in the FHA. The FHA is an idealistic attempt to cleanse society of all private prejudice in housing matters, an attempt to remake our society in the utopian image espoused by FHA proponents. Much of this, while not unworthy, goes well beyond what the Constitution requires of citizens or permits its government to do. The attempt to employ the full force of a government to require uniform observance of standards of conduct seems appropriate in our criminal law, and may otherwise be seen in the approach taken by some militant Muslim societies. Quite possibly, the FHA's excesses are responsible for its ineffectiveness.

It is common for civil rights legislation to be opposed on the ground that it violates constitutional restrictions on government regulation. For some, the consequences of such violations seem minor compared to the sense of urgency in correcting civil rights abuses. Yet, a danger lurks, for once the constitutional restraints on government power are removed for what may seem a worthy goal, they may not be raised again later for someone else's more questionable notion of a worthy goal. It is always better to seek the worthy goal within the legitimate governmental bounds set by the Constitution.

In 1942, a small farmer in Ohio was penalized under the Agricultural Adjustment Act (AAA) for having sowed twenty-three acres of winter wheat, rather than his allotted 11.1 acres; the grain was ostensibly to be used for feeding his farm animals, for seeding, for his home consumption, and for sale on the local market.<sup>325</sup> The farmer challenged the constitutionality of using the AAA to regulate his wholly intrastate farm activity.<sup>326</sup> In response, the U.S. Supreme Court in *Wickard v.*

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325. *Wickard v. Filburn*, 317 U.S. 111, 114-15 (1942).

326. *Id.*

*Filburn*<sup>327</sup> declared that the Commerce Clause empowered Congress to regulate even individual intrastate activities which, when aggregated with other individuals' similar activities, might eventually affect Congress's attempts to regulate interstate commerce.<sup>328</sup> This revolutionary new view of the Commerce Clause effectively dropped all barriers to congressional power over daily lives, because almost any individual activity with any economic aspect can be represented as eventually affecting interstate commerce. As extreme and essentially untenable as *Wickard* is, it has still been regularly cited in defense of the constitutionality of various questionable extensions of federal power over citizens' lives, including on behalf of the FHA. Similarly, if the FHA remains unchallenged, no aspect of daily living can be free from federal regulation if a sufficiently idealist motivation can be cited. To oppose this danger is not to oppose civil rights or racial reconciliation; it is to decry resort to the easy way or the short cut, rather than seeking to achieve a better society within the proper bounds of our profoundly good frame of government.

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327. 317 U.S. 111 (1942).

328. *Id.* at 124-25.

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