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COMMENT

THE FAIR HOUSING AMENDMENTS ACT OF 1988: A CRITICAL ANALYSIS OF "FAMILIAL STATUS"

In 1988, President Reagan signed into law the Fair Housing Amendments Act of 1988.¹ This amendment to Title VIII was highly touted for providing greater enforcement of Title VIII actions and for extending the Title's protection to handicapped persons and families with children. One significant provision of the Act prohibits all adults-only apartment and condominium complexes.

This Comment will focus on the provisions of the Fair Housing Amendments Act providing Title VIII protection to families with children. Despite their laudable objectives, these provisions seem to be an improper, if not deleterious, means to fair housing for families with children. This defect lies in the fact that the Act is a legal solution to what is basically an economic problem. The Act regulates the housing market without addressing the economic issues which underlie, if not wholly comprise, the housing problem which families with children face. Thus it significantly restricts the freedom of those it regulates without commensurately aiding those it intends to protect. Indeed, the Act might even have the effect of exacerbating the economic problem families with children face in the housing market.

In analyzing the scope and effects of the Fair Housing Amendments Act, this Comment first examines the housing problem families with children suffer. It then summarizes the means by which the Act addresses this problem.

In Part III, this Comment analyzes the constitutional authority for the Act. At one time Title VIII found its authority in the thirteenth amendment. The Fair Housing Amendments Act seems now to have taken Title VIII beyond the scope of the thirteenth amendment; thus, constitutional authority will have to originate elsewhere. The commerce clause seems the most likely candidate.

Finally, the Comment examines the practical problems with the Fair Housing Amendments Act. Because the Act is a legal solution to an essentially economic problem, it may not fully or effectively address the needs of families

1. H.R. Res. 1158, 100th Congress, 2d Sess., 134 CONG. REC. H6491-6497 (daily ed. Aug. 8, 1988) [hereinafter H.R. Res. 1158].

with children. The Act also has the effect of restricting individuals' housing choices where such regulation may be unnecessary.

I. THE PROBLEM: FAMILIES WITH CHILDREN IN THE RENTAL MARKETPLACE

Although the Fair Housing Amendments Act regulates all housing, its most significant effect will be on the rental housing marketplace. That is where most discrimination against families with children occurs, as is evidenced by the proliferation of adults-only apartments and condominiums. Thus, this Comment focusses on the economic problems families with children face in the rental housing market.

Although the market for renters has become tight, the problem for families with children is particularly bad. The ratio of median rents to median income for all renters has been steadily increasing since 1970. In 1970, the ratio of median rents to median income was 20%.² In 1983 the ratio increased to 29%.³ This increase is particularly burdensome for lower income groups increasingly forced into the rental market because of the rising costs of home ownership;⁴ as rents increase faster than income, a greater portion of that group's income will have to go into housing.⁵

These general problems are especially burdensome for families with children in that they tend to be poorer and more dependent on the rental market for housing. Of all female-headed families in 1979, 53% rented housing.⁶ Seventy percent of that group were in poverty.⁷ Female-headed families earn the lowest median income of all family types and the second lowest of all household groups.⁸ A survey conducted in New Jersey in 1987 shows how these factors affect such families. The study found that the rent paid in New Jersey for a family of four was 132% of what that family would receive in AFDC funds.⁹ Thus, the economic problems which beset all renters pose

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ANNUAL HOUSING SURVEY, CURRENT HOUSING REPORTS, Series H-150-83 (1983) [hereinafter CURRENT HOUSING REPORTS].

3. *Id.* The range over the most recently calculated 13 years: 1970: 20%; 1975: 23%; 1978: 25%; 1980: 27%. *Id.*; DIVISION OF HOUSING & DEMOGRAPHIC ANALYSIS, OFFICE OF POLICY DEVELOPMENT & RESEARCH, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, 1982 NATIONAL HOUSING PRODUCTION REPORT 48 (1983).

4. *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 372-73 (1987) (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law) [hereinafter *Hearings*].

5. *Id.* at 373.

6. *Id.* at 514 (statement of American Planning Ass'n, Report on Housing Discrimination Against Families with Children).

7. *Id.*

8. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-60, No. 132 (1983) [hereinafter CURRENT POP. REPORTS].

9. *Hearings, supra* note 4, at 169 (statement of David S. Hederman, Executive Director, Child Welfare League of America).

special difficulties for the lower-income female-headed families with children.

The fact that the rental market disfavors families with children exacerbates this economic problem. It is generally more difficult for families with children to find rental housing.¹⁰ One aspect of this problem is that rental housing is not available to meet these families' needs. Whereas the median number of rooms per rental unit for a family with children is 5 and the median number of bedrooms 2.5,¹¹ the median size of all apartments in 1983 was 3.7 rooms, the majority of which were one-bedroom units.¹² Apartments that could physically accommodate the average family with children are scarce. From 1983 to 1986, vacancy rates for family-sized units (5 or more rooms per unit) were consistently lower than vacancy rates for smaller units (3 or fewer rooms per unit).¹³

No relief lies ahead because it is unlikely investors will build rental units to meet families' needs. This is due mainly to the fact that the average size of the American household is decreasing. In 1986, the average household size was 2.7 persons.¹⁴ By 2000 researchers project that the average household size will decrease to 2.5 persons.¹⁵ Large families with children are becoming, and will become, a smaller percentage of the rental market.

There is little construction of larger rental units because they are a relatively poor investment. Constructing such units for a relatively small market with generally lower income (and thus requiring lower rents) results in a longer capital recovery period and accordingly makes the investment financially unattractive.¹⁶ Landlords and rental-housing builders prefer to focus on smaller-household renters who comprise a majority of the rental market and are a better investment.¹⁷

10. OFFICE OF POLICY DEVELOPMENT & RESEARCH, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY 51-53 (1980) [hereinafter RESTRICTIVE RENTAL PRACTICES]; see also Note, *Exclusion of Families with Children from Housing*, 18 MICH. J.L. REF. 1121, 1122 (1985).

11. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 16.

12. CURRENT HOUSING REPORTS, *supra* note 2. Of 1983 rental units, 71.2% had one bedroom and 23.7% had three bedrooms. *Id.*

13. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 69 (107th ed., 1986) [hereinafter STATISTICAL ABSTRACT]. The vacancy rate in 1986 for units of 3 rooms or fewer was 10.2%, an increase of 41.7% over the vacancy rate in 1983; for units of 5 rooms 5.3%, a 20.5% increase over 1983; for units of 6 rooms 3.3%, a 12.1% decrease. *Id.*

14. *Hearings*, *supra* note 4, at 374 (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law).

15. *Id.* at 382.

16. See, e.g., *Hearings*, *supra* note 4, at 596 (statement of Scott L. Slesinger, Executive Vice-President, Nat'l Apartment Ass'n).

17. *Id.* at 374-75, 514 (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law). As the median size of the renting household decreases, this problem will worsen. *Id.* at 374.

The other aspect of the problems families with children face in the rental market is their general exclusion from available rental units. A commonly cited national survey indicates that up to 25.5% of rental units exclude outright families with children and 50% of rental units restrict in some way such families' occupancy.¹⁸ Newer rental units which do accept these families usually charge higher rent.¹⁹ The number of rental units with such exclusionary policies has been increasing since 1974.²⁰ Because many families with children that rent are women and/or black or hispanic, many believe these policies might as well be racially motivated.²¹

It is apparent, then, that families with children are suffering in the rental housing market. Already burdened by their low economic status, these families are against a market that is generally hostile to their interests. This predicament seems unlikely to ease in the future. Indeed, it is likely to worsen unless some action is taken. For that action Congress has chosen to enact the Fair Housing Amendments Acts of 1988.

II. THE SOLUTION: THE FAIR HOUSING AMENDMENTS ACT OF 1988

The Fair Housing Amendments Act of 1988 amends the Fair Housing Act of 1968.²² Under the Act, the new protected class designated as "familial status"²³ includes any individual under eighteen years of age (domiciled with a parent or legal guardian), a pregnant woman, and any person in the process of gaining legal custody over any individual under eighteen years of age.²⁴ The familial status provision is designed to cover only families with children, not all married individuals.²⁵

The Act extends the protections under 42 U.S.C. §§ 3604 and 3606 to this class, prohibiting, on the basis of familial status: the refusal to rent or

18. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 24. These numbers are disputed. *See id.* They are offered here to show how the rental problem for families with children has been perceived.

19. *Id.* at 40, 44.

20. *Id.* at 46.

21. *See, e.g.*, H.R. REP. NO. 711, 100th Cong., 2d Sess., at 21 (1988) [hereinafter H.R. REP. NO. 711]; *Hearings, supra* note 4, at 390-91 (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law); *id.* at 518 (Report on Housing Discrimination against Families with Children, American Planning Ass'n); U.S. COMM'N ON CIVIL RIGHTS, A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 129 (1983); Note, *Why Johnny Can't Rent - An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1836-37 (1981).

22. Title II of the Civil Rights Act, 42 U.S.C. §§ 3601-31 (1968). Only the provisions concerning "familial status," H.R. Res. 1158, §§ 5(b), 6(b)(1)-(2), 6(c), 6(d), at H6492-93, will be considered in this Comment. The Act also includes provisions concerning handicapped persons, *id.* §§ 5(b), 6, 15, at H6492-93, and a new enforcement mechanism, *id.* §§ 7, 8, at H6493-97.

23. *Id.* § 5(b), 134 CONG. REC. H6492.

24. *Id.*

sell a dwelling;²⁶ discrimination in terms, conditions, or privileges of a sale or rental;²⁷ steering;²⁸ discriminatory advertisement of a sale or rental of a dwelling;²⁹ misrepresenting that a dwelling is unavailable for inspection, rental, or sale;³⁰ blockbusting;³¹ and discrimination by persons providing home loans³² or persons selling, brokering, or appraising residential realty.³³

26. 42 U.S.C. § 3604(a) (1977). This includes imposing a different sale or rental price, using different criteria for qualification or acceptance, any promotion that implies housing is available only to a particular type of person, and evictions based on the tenant's guests. 53 Fed. Reg. 45,024 (1988) (to be codified at 24 C.F.R. § 100.60b) (proposed Nov. 7, 1988).

27. 42 U.S.C. § 3604(b). This includes using different policies as to rent, deposits, terms of payment, or closing; denying or limiting general incentives, benefits, or privileges in the transaction; limiting maintenance or repair provision; delaying the communication of an offer to buy or rent; and limiting the use of privileges, services, or facilities of the unit. 53 Fed. Reg. 45,025 (to be codified at 24 C.F.R. § 100.65b).

28. 42 U.S.C. § 3604(b). Defined as "restricting or attempting to restrict the choices of a person by word or conduct . . . or to perpetuate segregated housing patterns." 53 Fed. Reg. 45,025 (to be codified at 24 C.F.R. § 100.70c). This includes steering persons to communities of their types; discouraging inspection or purchase of a unit because of the characteristics of the community; "exaggerating drawbacks or failing to inform . . . of desirable features"; warning a person of community tensions against persons of his or her kind; assigning persons to particular areas of a building or community. *Id.* This provision also applies to employers in the realty business by prohibiting any employment policies which encourage discrimination; directing prospective buyers to more run-down units; disciplining employees for not discriminating; employing procedures to isolate certain applications for rejection; refusing to deal with brokers or agents because of their non-discriminatory practice; and unduly denying or delaying applications. *Id.* (to be codified at 24 C.F.R. § 100.70d).

29. 42 U.S.C. § 3604(c). This includes "written or oral notices or statements . . . applications, flyers, brochures, deeds, signs, banners, posters, or billboards . . . photographs, illustrations, or symbols"; expressions of preference made to agents, brokers, employees, or prospective buyers or renters; discriminatory choice of media for advertisement; and refusing to publish particular ads, or charging different rates therefor. 53 Fed. Reg. 45,026 (to be codified at 24 C.F.R. § 100.75b, c).

30. 42 U.S.C. § 3604(d). This includes indicating the presence of restrictive covenants and enforcing unlawful restrictive covenants. 53 Fed. Reg. 45,026 (to be codified at 24 C.F.R. § 100.80b).

31. Defined as inducing or attempting to induce "any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person" of the class. 42 U.S.C. § 3604(e). This includes threats of lower property values, increased crime or neighborhood problems, or a decline in the quality of the neighborhood; and excessive uninvited solicitations for listings. 53 Fed. Reg. 45,026 (to be codified at 24 C.F.R. § 100.85c).

32. This includes loans for acquisition, construction, improvement, or repair of a dwelling, and loans secured by a residence. H.R. Res. 1158, § 6(c), 134 CONG. REC. H6492-93.

33. *Id.* To the extent the amendment extends to the secondary mortgage market, it does not prohibit purchasers of mortgage loans from considering familial status relating to "the financial security of the transaction of the protection against

The Act does not supersede or prohibit "reasonable local, State, or Federal" maximum occupancy regulations, so long as they do "not operate to discriminate" against any of the protected classes.³⁴ The Act excepts from its scope certain types of rentals: rentals by certain religious organizations and clubs to members exclusively, where the organization does not commercially rent the dwelling; the sale or rental of rooms in single-family houses; and the rental of rooms in a single building where the landlord lives in one of the rooms.³⁵

The Act also excludes from its scope "housing for older persons."³⁶ To qualify as "housing for older persons," the housing must meet one of three criteria. First, the housing may be funded by the state or federal government and the Secretary of HUD determines the housing is "designed and operated to assist elderly persons."³⁷ Second, the housing may be intended for and solely occupied by persons permanently living in the community who are 62 years old or older.³⁸ Third, the housing may be intended and operated for the occupancy of at least one person 55 years old or older in each unit.³⁹ Under this third criterion, the housing must provide significant services and facilities designed to meet the needs of older persons,⁴⁰ at least 80% of the

default or diminution in value of the security." The terms or consideration of financing may consider obligations arising from child support in determining the qualifications of the applicant for a mortgage. H.R. REP. NO. 711, at 30-31.

34. H.R. Res. 1158, § 6(d), 134 CONG. REC. H6493; H.R. REP. NO. 711, at 31. It is unclear from the Act, the House Report, or the proposed implementation rules whether the provisions allow landlords to maintain occupancy limitations on a non-discriminatory basis.

35. 53 Fed. Reg. 45,023-24 (to be codified at 24 C.F.R. § 100.10).

36. H.R. Res. 1158, § 6(d), 134 CONG. REC. H6493.

37. *Id.* 53 Fed. Reg. 45,031 (1988) (to be codified at 24 C.F.R. § 100.302) (proposed Nov. 7, 1988).

38. H.R. Res. 1158, § 6(d), 134 CONG. REC. H6493; H.R. REP. NO. 711, at 32; 53 Fed. Reg. 45,031 (to be codified at 24 C.F.R. § 100.303). This is exclusive of temporary visitors and "necessary resident employees such as medical staff or maintenance personnel." H.R. REP. NO. 711, at 32.

39. H.R. Res. 1158 § 6(d), 134 CONG. REC. H6493; 53 Fed. Reg. 45,031 (to be codified at 24 C.F.R. § 100.300).

40. "Such facilities and services include congregate dining facilities, social and recreational programs, emergency and preventive health care or programs, continuing education, welfare, information and counseling, recreational, homemaker, outside maintenance and referral services, transportation to facilities, access to social services, and services designed to encourage and assist recipients to use the services and facilities available to them." H.R. REP. NO. 711, at 32; 53 Fed. Reg. 45,031 (to be codified at 24 C.F.R. § 100.304b1). The housing must address the "functional and safety needs" of older persons, including "hand rails along steps and interior hallways to reduce the risk of falls, grab bars in bathrooms, routes that allow the use of wheelchairs, canes and walkers, lever-type doors, and single-lever faucets." H.R. REP. NO. 711, at 32.

An owner may gain exemption from these requirements upon proving impracticality - "independent and objective evidence" that providing such facilities would deprive

units must be occupied by at least one person 55 years old or older, and the manager or owner must publish and adhere to policies and procedures demonstrating an intent to provide housing for such persons.⁴¹

The "housing for older persons" criteria section provides a grace period by allowing two exceptions. Housing may still qualify as housing for older persons even though, as of September 13, 1988, persons reside therein who do not meet the age requirements, so long as new occupants do meet the age requirements.⁴² And housing may qualify as housing for older persons despite unoccupied units, so long as such units are reserved for persons of the requisite age.⁴³

III. CONSTITUTIONAL ANALYSIS

Heretofore, Title VIII, which the Fair Housing Act amended, found its constitutional authority in the thirteenth amendment. But the class which the Fair Housing Act protects seems to carry Title VIII beyond the scope of the thirteenth amendment. Possible alternative bases of constitutional authority for Title VIII, and specifically the amending Act, lie in the fourteenth amendment and the commerce clause of article I, section 8. Because the state action requirement limits fourteenth amendment jurisdiction, it seems that the commerce clause will be the most likely authority for the Act.

The United States Supreme Court has yet to decide the constitutionality of Title VIII.⁴⁴ But federal courts, at the district and circuit levels, have consistently found the constitutionality of Title VIII in the thirteenth amend-

low and moderate income persons of needed housing, and necessity - that housing for such persons is not otherwise available in the community. 134 CONG. REC. H6498 (daily ed. Aug. 8, 1988) (statement of Rep. Edwards, one of the Bill's chief sponsors). The factors included in this analysis are whether the owner attempted to provide the services; the cost of the services; the units' rent or sales price; the income range of the residents; the demand for such housing in the area; the range of housing choices in the area; the availability of other comparably-priced housing in the area; and the vacancy rate at the complex. 53 Fed. Reg. 45,031 (to be codified at 24 C.F.R. § 100.304b2).

41. H.R. Res. 1158, § 6(d), 134 CONG. REC. H6493. As to the owner's policy, the factors considered are the manner in which the housing is described, the nature of any advertisements, "age verification procedures", provisions in the lease, and the existence and enforcement of any written rules and regulations. 53 Fed. Reg. 45,031 (to be codified at 24 C.F.R. §100.304c2).

42. H.R. Res. 1158 § 6(d), 134 CONG. REC. H6493. This exception was designed to prevent current residents from being evicted in an effort to conform with this section. 134 CONG. REC. 6499-6500 (daily ed. Aug. 8, 1988) (statement by Rep. Fish).

43. H.R. Res. 1158, § 6(d), 134 CONG. REC. H6493.

44. Title VIII did come before the Court in *Curtis v. Loether*, 415 U.S. 189 (1974), but only on the issue of seventh amendment limitations on Title VIII enforcement procedures, 42 U.S.C. § 3612.

ment.⁴⁵ The thirteenth amendment provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation."⁴⁶ Under the thirteenth amendment Congress has the power to enact any law "necessary and proper for abolishing all badges and incidents of slavery."⁴⁷ Courts have consistently determined that the thirteenth amendment only protects against racial discrimination.⁴⁸ Because the Fair Housing Amendments Act extends Title VIII protection beyond racial discrimination, it seems apparent that it has no constitutional authority under the thirteenth amendment.

Courts have considered two other bases of constitutional authority for Title VIII: section 5 of the fourteenth amendment⁴⁹ and the commerce clause.⁵⁰

45. See, e.g., *United States v. City of Parma*, 661 F.2d 562, 573 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. City of Blackjack*, 508 F.2d 1179, 1184 (8th Cir. 1974); *D.C. Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120-21 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *Smith v. Woodhollow Apartments*, 463 F. Supp. 16, 18-19 (W.D. Okla. 1978); *Morgan v. Parcener's Ltd.*, 493 F. Supp. 180, 182 (W.D. Okla. 1978); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 579 (S.D. Fla. 1976); *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 548 (W.D. Va. 1975); *United States v. Youritas Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 781 (N.D. Miss. 1972); *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1240 (N.D. Ga. 1969); *United States v. Mintzes*, 304 F. Supp. 1305, 1312-13 (D. Md. 1969).

46. U.S. CONST. amend. XIII.

47. *Contra Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968); *Civil Rights Cases*, 109 U.S. 3, 20-21 (1883).

48. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431, 437 (1973); *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *Sullivan v. Hunting Park, Inc.*, 396 U.S. 229, 235-36 (1969); *Hodges v. United States*, 203 U.S. 1, 10-11 (1906); see also *McDonald v. Santa Fe Transport Co.*, 427 U.S. 273, 287-88 (1976) (white plaintiffs as a racial class cognizant under the thirteenth amendment); *Seidel v. Chicago Savings & Loan Ass'n*, 544 F. Supp. 508, 509 (N.D. Ill. 1982) ("age and sex discrimination fall outside the scope of . . . the Thirteenth Amendment"); *Rogers v. L'Enfant Plaza Hotel*, 526 F. Supp. 523, 533 (D.C. 1981) (only discrimination on race and color cognizable); *Baer v. Baer*, 450 F. Supp. 481, 493 (N.D. Cal. 1978) (claim of religious discrimination, only racial minorities are protected); *WRMA Broadcasting Co. v. Hawthorne*, 365 F. Supp. 577, 581-82 (M.D. Ala. 1973) (white plaintiffs as a cognizable racial class); *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268, 297-301 (E.D. Penn. 1972) (black plaintiffs).

49. U.S. CONST. amend. XIV, § 5.

50. U.S. CONST. art. I, § 8. Both of these were suggested to two federal district courts in *Brown*, 304 F. Supp. at 1239-40 (both rejected in favor of the thirteenth amendment) and *Mintzes*, 304 F. Supp. at 1312 (both rejected in favor of the thirteenth amendment).

The fourteenth amendment argument originates from Justice Brennan's dissent in *United States v. Guest*.⁵¹ There the Supreme Court considered an action brought under 18 U.S.C. § 241 against a conspiracy to deprive Negroes of the use of state facilities. Brennan argued that section 5 of the fourteenth amendment was a "positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."⁵² Brennan reached this understanding of the fourteenth amendment by arguing that the language of amendment XIV, section 5 was "virtually the same" as that in amendment XV, section 2.⁵³ Thus, because the Court had earlier declared that amendment XV, section 2 was not limited to state actions,⁵⁴ so too then amendment XIV, section 5 was not so limited.⁵⁵ Rather, Congress was limited under these amendments only to the extent that the legislation be legitimate means to an end within the scope of the Constitution.⁵⁶

Under this expansive reading of the fourteenth amendment, Congress would seem to be fully within its power to enact legislation such as the Fair Housing Amendments Act. The Supreme Court would only need determine that the Act was "reasonably necessary to protect a right created by and arising under"⁵⁷ the fourteenth amendment (equal access to housing). Unfortunately, Brennan's interpretation of the fourteenth amendment has consistently been rejected, in favor of the "established doctrine [that the amendment] 'speaks to the State or to those acting under the color of its authority.'" ⁵⁸ Thus, the Fair Housing Amendments Act must derive its authority from the commerce clause of United States Constitution article I, section 8.

Courts have never applied the commerce clause to any type of housing discrimination statute. The case most closely analogous in fact to the action regulated by the Fair Housing Amendments Act is *Heart of Atlanta Motel, Inc. v. United States*.⁵⁹ There appellant challenged the constitutionality of 28 U.S.C. § 2201 (Title II of the Civil Rights Act of 1964) which prohibited, *inter alia*, discrimination against race in public accommodations affecting commerce. The Supreme Court, through Justice Clark, upheld the statute as a constitutional exercise of Congress' power to regulate interstate commerce,

51. 383 U.S. 745 (1966).

52. *Id.* at 784.

53. *Id.* at 783.

54. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1965).

55. *Guest*, 383 U.S. at 783-84.

56. *Id.* (citing *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Brennan bolstered his argument by pointing out that the Court's approval in *Katzenbach*, 383 U.S. at 345-46, of *Ex parte Virginia*, 100 U.S. 339 (1879), approved this standard for all of the Civil War amendments. *Guest*, 383 U.S. at 784.

57. *Guest*, 383 U.S. at 782 (Brennan, J., dissenting).

58. *Id.* See *Guest*, 383 U.S. at 782; *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1239-40 (N.D. Ga. 1969).

59. 379 U.S. 241 (1964).

noting that the motel advertised out of state and that 75% of its guests were from out of state.⁶⁰ The Court stated that "the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest," which includes the interstate travel of citizens.⁶¹ The Court explained that racial discrimination in public accommodations burdened interstate commerce by hindering the interstate mobility of the populace; such discrimination making transient accommodations unavailable discouraged certain persons from interstate travel.⁶²

The Fair Housing Act could find its authority under this interpretation of the commerce clause. Given the mobility of the national populace, it is certainly arguable that a proliferation of apartments excluding families with children would prevent such families from seeking new housing around the country; the prospect of discriminatory treatment would likely prevent such families' interstate travel, and thereby affect interstate commerce.

This reasoning would seem to apply regardless of how local particular housing was. As Justice Douglas stated in his concurring opinion in *Heart of Atlanta*, "we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow."⁶³ Thus, if discrimination in housing against families with children were to occur in a sufficient number of instances, it would seem to inhibit the families' ability and desire to travel interstate. Interstate travel being a form of interstate commerce, this discrimination could have a substantial effect on interstate commerce, and thus would be fit for Congressional regulation.

IV. THE PROBLEM WITH THE SOLUTION

Despite its constitutionality and laudable goals, the Fair Housing Amendments Act suffers two defects. First, the problem families with children face

60. *Id.* at 249-51.

61. *Id.* at 255-56.

62. *Id.* at 252-53.

63. *Heart of Atlanta*, 379 U.S. at 275. See also *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Court upheld congressional regulation under 7 U.S.C. § 1335 (1988) of wheat harvested solely for personal consumption. There the Court argued that the global wheat surplus necessitated congressional harvest controls to maintain domestic wheat prices. *Id.* at 125-27. To allow farmers to grow uncontrolled amounts of wheat for personal consumption, the Court argued, would decrease demand for wheat on the national market, which would undercut the very purpose for the price supports. Thus, because such consumption had such a substantial economic effect on national (and hence interstate) wheat commerce, it could be regulated by Congress under the commerce clause. *Id.*

in the rental market is essentially economic, yet the Act addresses this problem with a legal solution that does not directly alleviate this economic problem. Thus, the Act might not substantially improve the housing problem for families with children and might exacerbate that problem. Second, the Act unfairly limits certain renters' housing choices where such regulation might be unnecessary.

The housing problem families with children face stems from two economic factors: families with children are increasingly unable to afford rental housing and housing for families with children does not attract investment. Generally, median rents have been increasing faster than renters' median income.⁶⁴ This has been particularly hard on female-headed families (arguably the focus of the legislation).⁶⁵ While median rent generally has increased 88.6% (1976-1983)⁶⁶ median income for female-headed families has increased only 51.8% (1977-1983).⁶⁷ In addition, average female-headed families earned only \$11,789 in 1983 — the lowest of surveyed family groups and second lowest of all surveyed groups.⁶⁸ Paying a median rent (in 1983) of \$315 per month,⁶⁹ one third of a female-headed family's income goes to rent. Besides showing the great economic predicament of female-headed families, these statistics indicate that it is likely most persons with familial status cannot afford most available housing. These individuals enter the rental-housing market with a significantly low ability to pay rents.

The second factor is that investment in rental housing generally, and rental housing for families specifically, has become unattractive. The elements that make investment in rental-housing generally unattractive are: the 1986 change in federal tax laws eliminating many tax incentives for landlords;⁷⁰ reduction of federal support of rental housing;⁷¹ higher construction costs;⁷²

64. See *supra* notes 2-3.

65. See *supra* notes 6-7.

66. See CURRENT POP. REPORTS, *supra* note 8; Sternlieb & Hughes, *Changes in the Rental Market: The Uncertain Future of Rental Housing*, 8 POL'Y STUD. J. 248, 256 (1979).

67. See CURRENT HOUSING REPORTS, *supra* note 2; Sternlieb & Hughes, *supra* note 66, at 255.

68. See CURRENT POP. REPORTS, *supra* note 8; Sternlieb & Hughes, *supra* note 66, at 256.

69. CURRENT HOUSING REPORTS, *supra* note 2.

70. See *Hearings*, *supra* note 4, at 595 (statement of Scott L. Slesinger, Executive Vice-President, Nat'l Apartment Ass'n); Note, *Why Johnny Can't Rent - An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1831-32 (1981).

71. *Hearings*, *supra* note 4, at 595 (statement of Scott L. Slesinger); Sternlieb & Hughes, *supra* note 66, at 254.

72. See *Hearings*, *supra* note 4, at 595 (statement of Scott L. Slesinger); Sternlieb & Hughes, *supra* note 66, at 254; Note, *supra* note 70, at 1831-32. The price and costs indices for construction have steadily increased from 1983 to 1986 (1983: 6.4% increase; 1984: 11.2% increase; 1985: 13% increase; 1986: 14.9% increase). STATISTICAL ABSTRACT, *supra* note 13, at 678.

legislation controlling rents and enhancing tenants' rights (thereby diminishing the rate of return on investment);⁷³ and a perceived drop in the future rental market.⁷⁴

In addition to these general detractions, providing rental housing for families (especially larger families) is even less attractive. Families with children generally require larger-sized apartment units than non-family renters.⁷⁵ Yet these families generally have lower incomes and form the minority of the renting market.⁷⁶ Thus it is a poor economic investment to build costlier larger-unit apartment complexes for a small portion of the renting market with a relatively low income base.⁷⁷ Where investors will invest, if anywhere, is in less costly smaller-unit complexes for a larger and more affluent market; and such units, because of their size, will generally be unusable by families with children.

From these two economic factors it seems that the best solution to the problem that families with children face would either increase the families' ability to afford rental housing or increase the economic value of building rental housing for families with children, or both. Merely to open the present rental market to families will do no good if they cannot afford most of the newly available units. As landlords build smaller-sized units and older, larger-sized units become retired, the number of adequate-sized apartments for families with children will continue to decrease. By not addressing these issues, the Act leaves much of the problem unresolved.

There is even a possibility the Fair Housing Amendments Act might work to the families' detriment. Because of the greater costs of housing children—based upon children's greater destructiveness⁷⁸ and the possibility that they might drive out other tenants⁷⁹—rental rates might increase at a faster pace or more investors might leave the rental market, perceiving it as a bad investment, correspondingly diminishing rental housing stock and further limiting housing available to families with children.⁸⁰

73. Sternlieb & Hughes, *supra* note 66, at 254; Note, *supra* note 70, at 1831-32.

74. As the national population level decreases in the future (the baby bust), there will be fewer renters, and thus a lower rate of return on investment in apartment construction. Sternlieb & Hughes, *supra* note 66, at 256.

75. See *supra* note 13. Non-family renters generally require 3 to 4 rooms in an apartment (3.5 median, 30.4% want 3 rooms, 31.4% want 4 rooms) and 1 to 2 bedrooms (1.6 median, 45% want 1 bedroom, 38.9% want 2 bedrooms). RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 16.

76. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 16.

77. See *Hearings*, *supra* note 4, at 595 (statement of Scott L. Slesinger, Executive Vice-President, Nat'l Apartment Ass'n). This dynamic increases as families constitute an increasingly smaller percentage of the renter market. *Id.*

78. See RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 41.

79. *Id.*

80. See Note, *supra* note 70, at 1838. At least, the likely effect of the Act would be to provide further reasons for prospective investors to stay out of the housing market.

The second problem with the Fair Housing Amendments Act is that it may diminish the freedom of non-family renters to choose the type of housing they desire without significantly increasing the family renters' freedom to find adequate housing. One aspect of this problem is that the relation between the housing problem for families with children and undue rental discrimination is not clear. Although families with children generally must pay a higher median rent (\$299/month as opposed to \$253/month for non-family renters), if this number is compared to median bedroom number and room-number requirements, families with children actually pay less rent.⁸¹ Holding rental unit size constant, there is no difference in the average rent paid by those with children and those without children.⁸² Holding the size of the household constant, there is also no difference in rent paid.⁸³ Thus the higher rent paid by families with children seems more attributable to the size of the family and apartment, rather than to prejudice against families with children. The absence of any correlation between the quality of the housing and the degree or presence of restrictive or exclusive policies further supports this conclusion.⁸⁴

These facts call into question any attribution of family housing problems to undue rental discrimination. Yet the Act addresses the rental problem as if it were a manifestation of such discrimination.⁸⁵ Thus, the Act imposes restrictions on renters' choices to alleviate a condition (undue rental discrimination) which seems either not necessarily existent or, at the very least, not the cause of familial housing problems.

Another aspect of this problem is that the Fair Housing Amendments Act addresses the housing problem for families with children as if it were uniform throughout the country. In fact, it appears that the problem varies greatly in different areas of the country and to such an extent that it might not even exist in some areas. Yet the Act requires uniformly that all apartment complexes be opened to families with children. Thus it is probable that the Act regulates conduct in areas where such regulation is wholly unnecessary.

Inherent in the analysis of this problem is the assumption that discrimination against families with children is reasonable; that is, if there were no shortage of rental housing, then it would be proper to maintain an apartment complex solely for adults. If there were an adequate amount of good-quality, affordable housing available to families with children, then there would be no reason to prohibit other tenants or landlords to live as they choose and

81. Calculating median rent to median room-number, families with children pay \$59.80/month and those without children pay \$74.41/month. Calculating median rent to median bedroom-number, families with children pay \$124.58/month and those without children pay \$158.13/month. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 16.

82. *Id.* at 49.

83. *Id.*

84. *Id.* at 37.

85. Indeed, it seems the root of the problem is essentially economic, yet Congress has not addressed these economic problems.

maintain living environments tailored to their needs. Certainly families with children would not suffer from exclusion from such apartments because there would be plenty of alternative apartments available. Indeed, those complexes specifically built for rental to families with children would likely be better living environments for children.

That a preference to live away from families with children is reasonable seems obvious from the fact that the Fair Housing Amendments Act specifically allows senior citizens to exclude all children from their housing complexes.⁸⁶ The reason stated for the exception is that older persons need the "social and psychological benefits" of their own community, and they need to get away from the annoyances that generally come with children.⁸⁷ Certainly the problems children pose for the elderly are similar to the problems they pose for everyone else. Such an allowance for older persons, then, seems an admission that those who wish to live away from children generally have at least some legitimate basis for their desire.⁸⁸

There seems to be factual support to the contention that children tenants are more burdensome than other tenants. Tenants in complexes that accept children report greater neighborhood problems⁸⁹ than tenants in complexes that exclude children.⁹⁰ This correlates to apartment managers' statements indicating that their preferences against children are based on noise complaints or destructiveness.⁹¹ These factors seem a strong indication that a preference against living near children has reasonable grounds.

Because discrimination against children is reasonable, there then should be concern over such discrimination only when there are insufficient or inadequate apartment complexes available to families with children. When families cannot find anywhere else to live, it seems proper to compel other renters to sacrifice some of their pleasure for the families' necessities. But

86. H.R. Res. 1158, § 5(d), 134 CONG. REC. H6493.

87. Note, *Exclusion of Families with Children from Housing*, 18 U. MICH. J.L. REF. 1121, 1131.

88. For opinions recognizing the legitimate disdain for children, see O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d. 790, 800-01, 662 P.2d 427, 434, 191 Cal. Rptr. 320, 327 (1983) (Mock, J., dissenting); Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 745, 640 P.2d 115, 129-30, 180 Cal. Rptr. 496, 511-12 (1982) (Richardson, J., dissenting); see also Bynes v. Toll, 512 F.2d 252 (2d Cir. 1975) (recognizing as legitimate a university policy barring families with children from student dorms).

89. Defined as a combination of noise from neighbors, misbehaving children, litter, vandalism, street noise, rundown neighborhood, and crime. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 41.

90. *Id.* In complexes that exclude children tenants reported medium (45%) to low (45%) degree of neighborhood problems (10% reported a high degree). In complexes that accept children, tenants more often reported a medium degree of problems (56%); 32.1% reported a low degree; 14.3% a high degree). *Id.*

91. *Id.* at 55-57. Fifty-five percent reported noise as the greatest problem, 17% indicated destructiveness, and 4% indicated a basic dislike of children. *Id.*

where there is no such problem, individuals should be allowed to choose freely their own style of living. Prohibiting discrimination against families with children when such discrimination does not deprive families of housing is unfair and improper. It denies one group of individuals their freedom to choose their living environment without benefitting the other group. Because they did not suffer from the discrimination, the families would not benefit from its removal. But individuals without children would suffer from the loss of the benefit of being able to live as they choose. Thus it would be inequitable to prohibit discrimination against families with children where there was not a housing problem for such families.

It is difficult to determine the exact nature of the problem families with children face in finding housing throughout the country insofar as there has been no comprehensive analysis of the problem in different regions of the country. But the spectrum of housing situations in assorted regions indicates that the problem varies greatly, even possibly to the degree of being non-existent in some areas.

One such variation shows that families with children do not tend to concentrate in a particular urban environment, whereas individuals tend to live in large cities.⁹² Given that the vacancy rate is higher in lesser-populated areas,⁹³ there would be less of a housing problem for families with children in rural areas where they comprise a larger part of the renting market and where vacancy rates are generally higher.

Vacancy rates also vary across the country. Although in 1986 the national vacancy rate was 7.3%, the vacancy rate in the Northeast was only 3.9%, in the Midwest 6.9%, in the South 10.1%, and in the West 7.1%.⁹⁴ Vacancy rates can also differ drastically between two cities. In New York City the vacancy rate in 1980 was 3.2%, whereas in Houston the rate was 14.7%.⁹⁵ Certainly these factors indicate that the housing problem can vary drastically over the nation. Adding other factors shows even more variation.

Table I shows this wide variance in housing availability between different cities in the United States.

92. RESTRICTIVE RENTAL PRACTICES, *supra* note 10, at 18. Of families with children, 34% lived in a large city (over 250,000 population), 30% lived in a medium city (50,000-250,000), and 36% in smaller areas. Of individuals without children, 46% lived in large cities, 24% in medium cities, and 31% in smaller areas. *Id.*

93. In 1986 the national vacancy rate was 6.8% in urban areas and 9% in rural areas. STATISTICAL ABSTRACT, *supra* note 13, at 693.

94. *Id.*

95. CURRENT HOUSING REPORTS, *supra* note 2.

TABLE I
COMPARISON OF RENTAL STATISTICS
BY SCSA AND SMSA**

<u>SCSA/SMSA</u>	Pop.	Vac. Rate	Vac. No.	Vac. Type	Median Rent	Highest Rent
<u>Boston</u>	3,448	5.0%				
Boston	2,763	4.8%	23,356	1 BR: 33% 2 BR: 40% 3 BR: 17%	\$192	\$214 (1 BR)
Lowell	233	5.2%	1,416	1 BR: 29% 2 BR: 45% 3 BR: 13%	\$178	\$375 (5BR)
Lawrence	282	7.0%	2,989	1 BR: 25% 2 BR: 47% 3 BR: 16%	\$180	\$224 (4 BR)
<u>Chicago</u>	7,870	6.5%				
Chicago	7,104	6.5%	72,783	1 BR: 34% 2 BR: 38% 3 BR: 13%	\$215	\$230 (2 BR)
Gary	643	7.6%	5,438	1 BR: 31% 2 BR: 48% 3 BR: 12%	\$162	\$219 (5 BR)
<u>Houston</u>	3,101	14.5%				
Houston	2,905	14.7%	72,796	1 BR: 44% 2 BR: 42% 3 BR: 11%	\$269	\$452 (4 BR)
Galveston	196	11.7%	3,272	1 BR: 36% 2 BR: 47% 3 BR: 12%	\$225	\$325 (5 BR)
<u>Los Angeles</u>	11,498	4.6%				
Los Angeles	7,478	3.9%	57,387	1 BR: 42% 2 BR: 34% 3 BR: 8%	\$276	\$500 (4 BR)
Anaheim	1,933	4.6%	13,165	1 BR: 34% 2 BR: 42% 3 BR: 14%	\$364	\$500 (4.5 BR)
<u>Seattle</u>	2,093	6.1%				
Seattle	1,608	5.8%	13,637	1 BR: 33% 2 BR: 42% 3 BR: 11%	\$289	\$423 (4 BR)
Tacoma	486	7.3%	4,943	1 BR: 34% 2 BR: 45% 3 BR: 12%	\$221	\$279 (4 BR)
<u>Misc.</u>						
St. Louis	2,356	7.4%	21,290	1 BR: 40% 2 BR: 41% 3 BR: 12%	\$154	\$175 (3 BR)
Kansas City	1,372	9.4%	16,865	1 BR: 35% 2 BR: 42% 3 BR: 12%	\$166	\$204 (3 BR)
New York	9,120	3.2%	78,985	1 BR: 41% 2 BR: 34% 3 BR: 13%	\$204	\$248 (5 BR)

** Statistics come from CURRENT HOUSING REPORTS, *supra* note 1, and BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1980 CENSUS OF HOUSING vol. 2, METROPOLITAN HOUSING CHARACTERISTICS, SERIES HC 80-2-(1983) [hereinafter METROPOLITAN HOUSING. "SMSA" refers to a Standard Metropolitan Statistical Area, which is defined by the Census bureau as "a metropolitan area . . . of a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus." See METROPOLITAN HOUSING, at Appendix A. The SMSA is named after the nucleus city. "SCSA" refers to a Standard Consolidated Statistical Area, which is an aggregation of "socially and economically interrelated" SMSAs. *Id.* This table lists the SCSA in underline, and then a selection of SMSAs within that SCSA. The last three SMSAs are listed irrespective of any SCSA and thus are listed under "Misc."

Terms: Population is in thousands. "Vac. Rate" refers to median vacancy rate. "Vac. No." refers to the number of units vacant and available for rent. "Vac. Type" lists the percentage of vacant apartments by number of bedrooms (indicated by "BR"). "Highest Rent" indicates the highest rent asked and lists in parentheses the most expensive type apartment unit. Entries indicating "\$500" rent refer to rents of \$500 and higher.

The table lists descriptive factors of a city's or region's housing market: population, vacancy rate, vacant units, characteristics of vacant units, and rent. The table shows not only the possible variation in vacancy rates between two cities in the country (3.2% in New York and 14.7% in Houston), but also the variation between cities in the same urban area (4.8% in Boston and 7% in Lawrence, Mass.).

Some highlights from the table indicate the variety of conditions of the housing markets in various cities. In Boston, the highest rent is for one-bedroom apartments, which are rented mostly by single individuals. But in St. Louis, the highest rent is for three-bedroom units, an apartment needed mostly by a family with children. Thus housing for families with children would seem more sparse in St. Louis. Boston also shows a greater availability of two and three-bedroom apartments, whereas Los Angeles has more one and two-bedroom apartments.

Even cities with similar vacancy rates might have different housing markets. Both Boston and Anaheim have similar vacancy rates (4.8% and 4.6% respectively). But Boston has more available units, and more units per person.⁹⁶ Similarly, while 12% of available units in St. Louis and Kansas City have 3 bedrooms, St. Louis has 1.08 three bedroom units per 1000 persons, whereas Kansas City has 1.48 three-bedroom units per 1000 persons. And even though New York's vacancy rate is less than half of St. Louis's (3.2% and 7.4% respectively), New York has more three-bedroom units per 1000 persons than St. Louis (1.12 and 1.08, respectively).

At the very least these and like statistics show that the questions of the existence and nature of the housing problems for families with children are complex and subtle. It seems these factors also show that there might not be such a housing problem in certain areas of the country. If this is so, then the Fair Housing Amendments Act with no reason will deny many individuals their right to choose freely a style of living. Further, to the extent that there is a housing problem for families with children, the difficulty of defining the problem as well as its variety, counsels that the states individually would be more competent to assess and address the issue.

V. Conclusion

Whether there is a housing problem for families with children, much less the nature of the problem, seems yet to be comprehensively investigated on a national level. Nevertheless, Congress has declared such a problem to exist and has undertaken a remedy via the Fair Housing Amendments Act of 1988. And it seems Congress was within its broad commerce

96. This is a comparison of available units to population. Boston has 8.5 rental units per 1000 persons in its population. Anaheim has 6.8 units per 1000 persons.

regulation powers to do so. But it is uncertain, in fact doubtful, if Congress' solution will solve the problem. Because the problem families with children face stems from economic factors, it seems the best solution should necessarily be an economic one.

The Act also raises the question of the propriety of national legislation for what seem to be local, albeit pervasive, problems. It is arguable that there is not just one evil underlying the family housing problem.⁹⁷ It is also arguable that the family housing problem is not of uniform degree or nature throughout the United States.⁹⁸ Yet the Act addresses the housing problem as if one evil caused it (undue rental discrimination) and were uniform throughout the nation. The Act may alleviate the family housing problem in areas where it is most severe. But it is equally likely to restrict an individual's housing choice in areas where the family housing problem is slight. To what extent is the definite sacrifice of the one individual's freedom worth the putative enhancement of the other's? It seems the most appropriate solution to the national family housing problem is to realize that it is not a national problem, but a series of local problems. And local problems are best handled by local government, which is better attuned to the peculiar needs of its citizens.

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97. *See supra* notes 64-84 and accompanying text.

98. *See supra* notes 86-96 and accompanying text.

