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# INSURANCE REDLINING & THE FAIR HOUSING ACT: THE LOST OPPORTUNITY OF *MACKEY v.* *NATIONWIDE INSURANCE* *COMPANIES*

Redlining has been defined as "credit discrimination based upon the characteristics of the neighborhood surrounding the borrower's dwelling."<sup>1</sup> Its

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1. Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1258 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980). There seems to be no end to the competing definitions of redlining. "A neighborhood becomes redlined when a lending institution *presumes* the area is no longer economically stable because of age, racial composition or other characteristics." Note, *Redlining: Remedies for Victims of Urban Disinvestment*, 5 FORDHAM URB. L.J. 83, 83-84 (1976) (footnote omitted) (emphasis added). It is this presumption that makes redlining so devastating, since the presumption soon becomes a self-fulfilling prophecy. See *infra* note 108.

While the essence of redlining is geographical discrimination in home loans, most definitions of redlining fall into two general categories. Racial redlining refers to policies or practices by which lending institutions discriminate in the granting of, or in the setting of terms for home loans based upon the perceived racial characteristics (determined by present or projected occupants) of the neighborhood in which the borrower wishes to live. Economic redlining refers to policies and practices of lenders that consider certain geographical areas as zones of excessive economic risk, regardless of the characteristics of the individual borrower or the property involved.

Note, *Urban Housing Finance and the Redlining Controversy*, 25 CLEV. ST. L. REV. 110, 110 n.1 (1976). "[R]edlining . . . [occurs where] entire blocks or neighborhoods are simply declared off limits for lending, either by having a line drawn around them, or by custom and practice." Searing, *Discrimination in Home Financing*, 48 NOTRE DAME LAW. 1113, 1113 (1973).

It would be a serious mistake, however, to believe that redlining only affects ghetto areas. By rejecting insurable risks simply because they are near "undesirable" areas, redlining spreads urban decay and abandonment. Urban decay is spread because

[l]enders do not necessarily reserve redlining treatment for slum areas alone. Disfavored areas may be well-maintained blue collar or middle income neighborhoods characterized by aging but well-built housing stock. Frequently, these areas consist of racially integrated, white ethnic, or black populations and border poorer communities. Such neighborhoods have been referred to as the 'building blocks of American cities.' As such, their preservation is essential to the continuing vitality of entire urban centers, particularly 'at a time when an energy shortage, [an] increase in housing costs, and a shift in values [are] leading many Americans to reconsider [these] older, established communities as attractive places to live.'

Note, *Attacking the Urban Redlining Problem*, 56 B.U.L. REV. 989, 990 (1976) (footnotes omitted).

The term redlining was first used to describe the insurance company practice of marking in red on maps those geographical areas of a particular city in which homeowner's insurance should not be sold. During the past few years, the term has been

effects are both devastating and well-documented.<sup>2</sup> Although the forms of redlining have become more subtle, they have not been eliminated. Indeed, the elimination of discriminatory redlining has been called vital if the prospects of America's urban core, and those who live there, are to improve.<sup>3</sup>

The Fair Housing Act provides a wide ranging ban on a host of discrimi-

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more frequently used to describe similar practices by financial institutions. The Federal Home Loan Bank Board has defined redlining as 'an arbitrary area discrimination practiced by financial institutions because of deterioration of neighborhoods, without any consideration of the underwriting standards which comprise the basic foundation on which a loan application is considered and/or appraised, compliance with which will determine whether or not a loan is approved or denied.'

The most obvious example of redlining by banking institutions is the outright refusal to make loans to an applicant because of the location of the property regardless of the applicant's financial status and irrespective of the physical condition of the property in question.

Hood & Weed, *Redlining Revisited: A Neighborhood Development Bank as a Proposed Solution*, 11 URB. LAW. 139, 141 (1979) (footnotes omitted).

The following definition is adopted in this article whenever the term redlining is employed: "Redlining shall refer to those lending practices that constitute arbitrary denials of financing based on geographic location, racial or ethnic considerations, or any consideration which is not justified on the basis of legitimate, demonstrable economic criteria. . . ." Ryan, *Redlining*, 1977 ANN. SURV. AM. L. 57, 57 n.1 (citing Mich. Governor's Task Force on Redlining, Interim Report 2 (1976)). This definition shall apply whether mortgage or insurance redlining is being discussed. Even if there are statistical criteria for denying insurance on a territorial basis, public policy concerns would outweigh these reasons and advise against denial of insurance on such a basis.

2. "The unavailability of insurance coverage stemming from redlining has contributed to the deterioration of American urban centers and has effectively frustrated attempts at urban revitalization." Comment, *Application of Title VIII to Insurance Redlining*, 75 NW. U.L. REV. 472, 472 (1980) (footnote omitted). The effects of this practice have serious repercussions for this nation's cities.

That this behavior is commonplace in an industry which provides a service as vital as property insurance has devastating implications for the housing opportunities of minorities. Disinvestment and building abandonment in redlined areas is accelerated by skyrocketing maintenance and operating costs. Families with the means to do so flee redlined areas, leaving behind the higher insurance costs and the stigma of the residual market. Hard-pressed owners who have foregone property insurance coverage lack the capacity to rebuild after a fire. White flight, which accompanies disinvestment, almost invariably leads to accelerated racial and economic segregation.

Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 35 (1980).

Insurance companies usually deny use of any factors associated with a geographic area and claim only objective, reliable criteria are employed in the underwriting process. See DeWolfe, Squires & DeWolfe, *Civil Rights Implications of Insurance Redlining*, 29 DE PAUL L. REV. 315, 316-17 (1980). For an excellent refutation of this contention, see Note, *Property Insurance and the American Ghetto: A Study in Social Irresponsibility*, 44 S. CAL. L. REV. 218, 233-36 (1971) (the author claims that race is the true factor that insurance companies use to set rates and terms or to deny the insurance altogether).

3. Badain, *supra* note 2, at 68. See also *infra* note 10.

natory practices in the housing and real estate industry.<sup>4</sup> It was passed by Congress at the exhortation of President Johnson.<sup>5</sup> In enacting the legislation, Congress made its first attempt to correct the widespread segregation in housing that existed at the time. Through the Fair Housing Act, Congress strove to fashion special legal weapons in the fight against many real estate practices that forced blacks and other minorities to live apart from the rest of society, often in ghettos of misery and squalor.<sup>6</sup>

Section 3604(a) of the Act makes it illegal to refuse to sell or rent or otherwise to make housing unavailable based on a person's race.<sup>7</sup> This provision has been interpreted by the courts to prohibit various practices that, while

4. 42 U.S.C. §§ 3601-3631 (1982). The Act prohibits a variety of discriminatory actions on its face and by judicial construction. See *infra* notes 72-76, 141-57 and accompanying text.

5. Lamb, *Congress, the Courts and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1116-27 (1982). In this article, Lamb makes the point that President Johnson is widely neglected in being credited with passage of title VIII, as well as the entire Civil Rights Act of 1968. *Id.* at 1116-27. Indeed, Lamb claims that without President Johnson's active support, the entire Act most likely would not have passed Congress. For a summary of behind-the-scenes machinations in the Senate, see Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

6. See President's Message to Congress Recommending a Program for Cities and Metropolitan Areas, 1966-1 PUB. PAPERS (January 26, 1966) (Johnson states that racial discrimination lies at the center of the cities' housing problem).

Crowded miles of inadequate dwellings—poorly maintained and frequently overpriced—is the lot of most Negro Americans in many of our cities. Their avenue of escape to a more attractive neighborhood is often closed, because of their color.

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

*Id.* at 89.

7. 42 U.S.C. § 3604(a) (1982) provides:

[I]t shall be unlawful—

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

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

(c) To 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, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

not specifically named within the Act, tend to result in making housing unavailable to minorities.<sup>8</sup>

Insurance redlining is the discriminatory refusal to issue homeowner's insurance irrespective of the property in question and the qualifications of the applicant.<sup>9</sup> Insurance redlining effectively denies the availability of home mortgages, because most lenders would never loan money without insured property as security.<sup>10</sup> Mortgage redlining plainly makes housing unavailable and is specifically prohibited by the Fair Housing Act.<sup>11</sup> Whether the related practice of insurance redlining makes housing unavailable within the meaning of section 3604(a), and thus is impliedly prohibited by the Fair Housing Act, is a subject of much recent judicial activity.<sup>12</sup>

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8. See *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 296 (1982) (prohibiting adoption of exclusionary ordinances by a municipality); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (prohibiting zoning ordinance that barred construction of any new multiple-family dwellings); *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977) (prohibiting assignment of lower appraisal values to homes in racially integrated neighborhoods), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976) (prohibiting mortgage redlining); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (prohibiting steering of a prospective buyer into or away from an area because of race); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975) (prohibiting the rejection by a noncommercial orphanage of minority orphans). See also *infra* notes 136-50 and accompanying text.

9. *Badain*, *supra* note 2, at 4. "In its traditional definition, 'redlining' is the outright refusal of an insurance company or lending institution to provide services *solely* on the basis of a property's geographical location." *Id.* (emphasis in original).

10. *Dunn v. Midwestern Indem. Mid-Am. Fire & Casualty Co.*, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979). The importance of insurance is difficult to overemphasize. In point of fact, "[i]nsurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not—and cannot make loans." *Id.* at 1109 (quoting Report by the President's National Advisory Panel on Insurance, *Meeting the Insurance Crisis of Our Cities* (1968)).

11. See *Laufman*, 408 F. Supp. at 493. Section 3605 of the Fair Housing Act provides:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

42 U.S.C. § 3605 (1982).

12. See, e.g., *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984).

A related issue involves the McCarran-Ferguson Act.<sup>13</sup> This Act was passed by Congress in response to the Supreme Court's decision holding insurance to be commerce.<sup>14</sup> The effect of the Act was to leave to the states the regulation of insurance and related activities.<sup>15</sup> Under the Act, the federal government may regulate insurance only to the extent that the states have not.<sup>16</sup> The Act exempts the insurance industry from any federal law or act of Congress if it would "impair, invalidate, or supersede" any existing state law.<sup>17</sup> Consequently, any examination of whether the Fair Housing Act prohibits insurance redlining must necessarily first involve a determination whether the McCarran-Ferguson exemption applies.

In *Mackey v. Nationwide Insurance Companies*,<sup>18</sup> the United States Court of Appeals for the Fourth Circuit held that insurance redlining was not prohibited under the Fair Housing Act.<sup>19</sup> Mackey was a black insurance agent terminated by defendant.<sup>20</sup> He brought an action alleging that Nationwide had discriminated against him by redlining certain predominantly black neighborhoods, thereby preventing him from making insurance sales.<sup>21</sup>

Nationwide's motion for failure to state a claim upon which relief could be granted was allowed by the district judge.<sup>22</sup> The lower court found that the McCarran-Ferguson Act shielded the alleged redlining practices from challenges under the Sherman Act, the Fair Housing Act, and the Civil Rights

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13. 15 U.S.C. §§ 1011-1015 (1982).

14. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *infra* notes 30-40 and accompanying text.

15. Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 554-56 (1958).

16. Section 1012 provides in part:

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 U.S.C. §§ 1-7 (1982)], and the Act of October 15, 1914, as amended, known as the Clayton Act [15 U.S.C. §§ 12-27 (1982)], and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. §§ 41-45 (1982)], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012 (1982).

17. *Id.*

18. 724 F.2d 419 (4th Cir. 1984).

19. *Id.* at 423.

20. *Id.* at 420.

21. *Id.*

22. *Id.*; see FED. R. CIV. P. 12(b)(6).

Acts of 1866 and 1871.<sup>23</sup>

The Fourth Circuit permitted an immediate appeal pursuant to Federal Rule of Civil Procedure 54(b).<sup>24</sup> While not adopting all of the reasoning of the district judge, the court nonetheless determined that the claim was not one upon which relief could be granted.<sup>25</sup> Specifically, it found that the McCarran-Ferguson Act barred the application of the Sherman Act.<sup>26</sup> The court allowed the adjudication of the claims under both the Fair Housing Act and the Civil Rights Acts<sup>27</sup> but, upon analysis of those claims, found that there were no violations. Accordingly, the court upheld the lower court's dismissal.<sup>28</sup>

This Note will examine briefly the background and purpose of both the McCarran-Ferguson Act and the Fair Housing Act. It will then analyze the only case in which insurance redlining was found to violate the Fair Housing Act, *Dunn v. Midwestern Indemnity*.<sup>29</sup> The court's reasoning, use of legislative history, and method of statutory construction in *Mackey* will be examined and contrasted with *Dunn*. An assessment of the impact of *Mackey* will conclude the article.

### I. THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act was passed in response to the Supreme Court decision of *United States v. South-Eastern Underwriters Association*.<sup>30</sup> Previously, it was generally held that insurance was not commerce and, therefore, could not be subject to federal regulation.<sup>31</sup> As the insurance industry grew in scale and complexity, however, it became clear that the industry inevitably would be treated for what it was—commercial enterprise.<sup>32</sup>

23. *Mackey*, 724 F.2d at 420.

24. *Id.*

25. *Id.* The court stated: "While we do not adopt all of the reasoning of the district judge, we affirm the dismissal of these claims for, as to each, there is a substantial ground supporting the conclusion that the claim is not one upon which relief can be granted." *Id.*

26. *Id.* at 421.

27. *Id.*

28. *Id.* at 425.

29. 472 F. Supp. 1106 (S.D. Ohio 1979), *appeal dismissed*, No. 84-8377 (6th Cir. Nov. 9, 1984) (The Sixth Circuit Court of Appeals dismissed the appeal in *Dunn* for failure to file within the requisite 10 day period as required by 28 U.S.C. § 1292(b)(1982). The appeal was filed 7 days late.)

30. 322 U.S. 533 (1944).

31. Kimball & Boyce, *supra* note 15, at 553. See also *South-Eastern Underwriters Association*, 322 U.S. at 578. This concept originated in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

32. Kimball & Boyce, *supra* note 15, at 553. This result should have surprised no one since

[t]he federal power under the commerce clause expanded during the 1930's, [and] it became increasingly clear that in due time the complex national insurance business

*South-Eastern Underwriters* was an action brought for violation of the Sherman Antitrust Act.<sup>33</sup> In that case, the Supreme Court acknowledged the commercial nature of the insurance industry.<sup>34</sup> Insurance thus became subject to all applicable federal laws resulting in what has been described as a virtual panic among insurance executives and various state government officials.<sup>35</sup>

Consequently, Congress enacted protective legislation in its next session exempting the insurance industry from existing applicable federal laws.<sup>36</sup> However, insurance remained subject to federal law "to the extent that such business [was] not regulated by State law."<sup>37</sup> Thus, by the provisions of the McCarran-Ferguson Act, no federal law could apply to insurance companies if it would "impair, invalidate, or supersede" existing state law.<sup>38</sup>

The purpose of the McCarran-Ferguson Act was to allow the states to continue in their traditional role as regulators of insurance and to increase their active enforcement of their laws.<sup>39</sup> The industry, however, had devel-

would be declared subject to federal control under the commerce clause. At an earlier date, when state regulation was a reality while federal regulation was in abeyance, insurance men often called for federal regulation of insurance. Insurance companies sought relief 'from the aggressive acts of hostile [state] legislatures.' But as federal regulation neared reality desire was replaced by pervasive fear.

*Id.* (footnotes omitted).

33. 322 U.S. at 534.

34. *Id.* at 553.

35. See, e.g., Editorial, *The Nat. Underwriter, Life Ins. ed.*, June 9, 1944, at 1, where it is asserted that

Insurance D Day fell just a few hours before Eisenhower's D Day. . . . [T]he mental commotion of insurance men was pitiable, as their attention was torn between invasion headlines and their efforts to apprehend the consequences of the epochal, adverse U.S. Supreme Court decision. . . . Decisions upon which the whole system of state supervision of insurance has been founded and under which the business has operated apparently are juridical museum pieces.

*Id.* Not all hyperbole was limited to those interested in the insurance business. See Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937, 988 (1944). After realizing that Justice Black's majority opinion in *South-Eastern Underwriters* was based upon the supposition that most people would consider insurance a type of trade or commerce, Powell exclaims:

It is a little less than shocking to have a Justice of the Supreme Court invoke the mere supposition of common knowledge among lesser breeds without the law as worthy of consideration against the conclusion of a district court which preferred to respect its obligation to be faithful to superior controlling precedents rather than to traduce them by resort to vaguely indicated ancient locutions and to unspecified contemporary supposed common knowledge of supposed most persons.

*Id.*

36. Kimball & Boyce, *supra* note 15, at 554.

37. 15 U.S.C. § 1012(b) (1982).

38. *Id.*

39. Kimball & Boyce, *supra* note 15, at 571. The speed with which the bill was passed testifies to the sense of urgency felt by Congress.



oped close ties to state regulators by the time the Act was enacted,<sup>40</sup> raising questions as to the effectiveness of state regulation.

As long as a state has enacted laws purporting to regulate insurance, actions cannot be brought in that state under federal law. Whether the state's laws are enforced is not an issue into which the courts will inquire.<sup>41</sup> One

The bill was introduced in the Senate on January 18, 1945. The President signed it less than two months later. This hasty action attests to the sense of urgency that was felt. Brevity of consideration made difficult the clear isolation of the issues involved, and a wide variety of expressions are to be found in the Congressional Record as to the intent of the Congress. The basic purposes of the bill were to preserve to the states the power to regulate but to compel them to regulate more adequately.

*Id.* There is much room for doubt as to whether these purposes have been achieved. *See infra* note 41.

40. Badain, *supra* note 2, at 19. This relationship has been termed a "classic case of incest." *Hearing on the Operation of Urban Property Protection and Reinsurance Program Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 1st Sess. 349 (1965) (statement of Rep. William Moqrhead).* In a similar fashion, it has been said that "there is a revolving door between the insurance industry and the office of the chief state insurance regulatory officer." DeWolfe, Squires & DeWolfe, *Civil Rights Implications of Insurance Redlining*, 29 DE PAUL L. REV. 315, 325 (1980). *See also infra* note 41.

41. The leading case on this point is *Ohio AFL-CIO v. The Ins. Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972) (where an action was brought alleging that the state regulation of insurance was a "sham" and a "mere pretense"). The United States Court of Appeals for the Sixth Circuit refused to examine whether state statutes were being adequately enforced. It held simply that for the McCarran-Ferguson exemption to apply, all that needed to be shown was that the state had "generally authorized or permitted certain standards of conduct." 451 F.2d at 1182 (citing *California League of Indep. Ins. Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959)). The court stated flatly:

We find no support for the appellants' argument that the court in this case should inquire into the question as to whether the statutes of Ohio have been effectively enforced in accordance with their terms. . . . [T]here is nothing in the language of the McCarran Act or in its legislative history to support the thesis that the Act does not apply when the state's scheme of regulation has not been effectively enforced.

*Id.* at 1184. This ignores, of course, the fact that the task of inquiring into whether the statutes are being adequately enforced is no more difficult than any number of problems courts must regularly solve. *See Kimball & Boyce, supra* note 15, at 567.

In his dissent from denial of certiorari, Justice Douglas cogently stated:

A governmental regulatory agency which in contradiction of a statutory direction, only rarely exercises its examinatory powers; which has never exercised its power of review of rate increases; and which does not even employ the personnel which would be necessary to exercise the power would *prima facie* seem to be no more than a 'mere pretense' of regulation. Perhaps a full hearing would show otherwise. But enough has been tendered to make the trial court's dismissal of the complaint improper and makes this petition a clear grant.

*Ohio AFL-CIO*, 409 U.S. at 918 (Douglas, J., dissenting).

This observation echoes the remarks of commentators who point to statutes currently in force in many states, but rarely, if ever, enforced. Without more, unenforced statutes allow insurance companies the greatest leeway possible. Indeed, "[r]eal regulation is only partially the result of improved statutes. It depends, too, on the channeling of pressures, especially

effect of this indifference is to shield insurance companies from antidiscrimination laws.<sup>42</sup> Yet there have been cases in which the McCarran-Ferguson Act was not invoked, even though the state had enacted various regulatory laws.<sup>43</sup>

The major case allowing antidiscrimination laws to reach the insurance industry is *Ben v. GMAC*.<sup>44</sup> *Ben* involved an action alleging violations of both the Truth-in-Lending Act and the Civil Rights Acts. While the United States District Court for the District of Colorado held that McCarran-Ferguson barred the Truth-in-Lending claim,<sup>45</sup> it allowed the adjudication of the alleged civil rights violation.<sup>46</sup> The court reasoned that Congress' intent in enacting McCarran-Ferguson did not include denial of access to federal courts for a violation of one's constitutional rights.<sup>47</sup> Even if Congress in-

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through municipal politics, in such a way as to compete effectively with the highly organized insurance industry. It also depends on the vigor and the attitudes of incumbent commissioners." Kimball & Boyce, *supra* note 15, at 561.

Had *Dunn* not been dismissed as untimely filed, but been properly certified to the same circuit court of appeal that decided *Ohio AFL-CIO*, there was speculation that the court would "have a further opportunity to determine whether any greater standard of regulation will be required for civil rights issues than for issues of trade and commerce." Jordan, *Property and Fair Housing*, 18 FORUM 223, 244 (1983). It seems likely that at some point a case involving similar redlining issues as existed in *Dunn* will be heard by the Sixth Circuit. The Court of Appeals will thus have an opportunity to affirm the reasoning in *Dunn*, as well as to reject the results of the Fourth Circuit Court in *Mackey*.

The insurance industry may yet find itself regulated by the federal government even in the area of trade and commerce, to say nothing of the more probable area of civil rights. The lack of enforcement by states may backfire and at least one commentator has opined:

Unless state regulation is sufficiently stringent to prevent the development of substantial and organized consumer pressures, an attitude favorable to federal intervention may develop, or federal agencies may have excuse to expand the scope of their operations into the insurance field. It is at least possible that the Department of Justice might successfully assert federal power under existing law, where state regulation is nominal.

Kimball & Boyce, *supra* note 15, at 570.

42. See, e.g., *Peters v. Wayne State Univ.*, 691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983) (holding an insurer is not bound by title VII because it furnishes services to a title VII employer).

43. See, e.g., *Spirt v. Teacher's Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982) (holding the McCarran-Ferguson Act does not prevent application of title VII to sex segregated mortality tables in the computation of fixed annuity benefits); *Women in City Gov't v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981) (holding the McCarran-Ferguson Act does not prohibit application of title VII to sex differentiated actuarial tables); *Equal Employment Opportunity Comm'n v. Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981) (holding the McCarran-Ferguson Act inapplicable in an action alleging an unlawful discriminatory denial of pregnancy related disability benefits).

44. 374 F. Supp. 1199 (D. Colo. 1974).

45. *Id.* at 1201.

46. *Id.* at 1202.

47. *Id.*

tended to effect such a result, the court stated, "It is highly questionable that Congress had the power under the Constitution to do so."<sup>48</sup>

In *Ben*, the district court reviewed the legislative history of the McCarran-Ferguson Act and concluded that the Act's power was to exempt insurance from antitrust laws and nothing more.<sup>49</sup> The court reasoned that, otherwise, access to the federal courts as a judicial forum would be foreclosed.<sup>50</sup> This would be unacceptable, in the court's opinion, because federal courts are the primary and most powerful forum for vindicating the rights given by the Constitution, laws, and treaties of the United States.<sup>51</sup>

*Spirit v. Teachers Insurance and Annuity Association*<sup>52</sup> is the leading sex-based discrimination case allowing insurance matters to come within the scope of federal laws.<sup>53</sup> Finding a violation of title VII involving the use of sex-segregated mortality tables in the computation of fixed annuity benefits,<sup>54</sup> the United States Court of Appeals for the Second Circuit held that Congress had no intention "of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as the 'business of insurance.'"<sup>55</sup>

In a similar case, *Women in City Government United v. City of New York*,<sup>56</sup> the United States District Court for the Southern District of New York held the McCarran-Ferguson Act did not preclude the application of title VII to an alleged violation involving the use of a sex-differentiated actu-

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A brief review of the background and history of the McCarran Act and the Civil Rights Act will demonstrate that Congress, in enacting the McCarran Act had no intent to deny access to the Federal Courts for redress of violations of a person's civil rights guaranteed by the Federal Constitution.

*Id.*

48. *Id.* at 1203.

49. The court noted:

Congress reacted [to *South-Eastern Underwriters*] with a prompt enactment of the McCarran Act, the effect of which was to permit continued regulation by the several states of the business of insurance to the end that such business was exempt from the federal anti-trust law to the extent that such business was regulated by state law.

*Id.* at 1202.

50. *Id.* at 1203. Moreover, if the federal forum were closed because of McCarran-Ferguson, it would represent a singular withdrawal of protection for the benefit of one industry. DeWolfe, Squires & DeWolfe, *supra* note 40, at 327.

51. *Ben*, 374 F. Supp. at 1202-03 (quoting *Zwickler v. Koota*, 389 U.S. 241, 245-48 (1967), citing F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 65 (1927)).

52. 691 F.2d 1054 (2d Cir. 1982), *cert. denied*, 105 S. Ct. 247 (1984).

53. *Jordan*, *supra* note 41, at 238-43.

54. *Spirit*, 691 F.2d at 1062-63.

55. *Id.* at 1065.

56. 515 F. Supp. 295 (S.D.N.Y. 1981).

arial table.<sup>57</sup> *Women in City Government* saw the McCarran-Ferguson exemption primarily in terms of commerce and stressed that "Congress did not intend the McCarran-Ferguson Act as a limitation of its power to enact civil rights legislation that might incidentally affect the business of insurance."<sup>58</sup>

These cases point the way to limiting the otherwise blanket immunity of the McCarran-Ferguson Act. Their rationales appear firm, but it remains to be seen if this trend will continue or if courts will remain willing to shield insurance companies from antidiscrimination laws.<sup>59</sup>

## II. THE FAIR HOUSING ACT

The Fair Housing Act was enacted as title VIII of the Civil Rights Act of 1968<sup>60</sup> and was promulgated under the authority of the thirteenth amendment.<sup>61</sup> The Act forbids racial discrimination in the sale and rental of housing or in associated services.<sup>62</sup> Discrimination in the financing of home sales or rentals is also barred.<sup>63</sup>

The Act attempted to alleviate the many inequities in housing in this country.<sup>64</sup> Passed in the wake of the assassination of Dr. Martin Luther King, Jr., the Act was seen as a tool in eliminating the segregated housing patterns then in existence.<sup>65</sup> Whether the Act that finally emerged from Congress was capable of such a task is open to question.<sup>66</sup> Certainly there remains much to be done to improve housing today.<sup>67</sup>

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57. *Id.* at 306.

58. *Id.* at 303 (footnote omitted). Other commentators agree with this rationale, arguing that applying the McCarran-Ferguson exemption to the business of insurance *qua* business of insurance would allow for peaceful coexistence of the Act with civil rights laws. DeWolfe, Squires & DeWolfe, *supra* note 40, at 328.

59. See *supra* note 42. However, in *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983), the Supreme Court decisively stated that title VII prohibits employers from allowing insurance companies participating in deferred compensation plans to use sex based annuity tables.

60. Fair Housing Act of 1968, Pub. L. No. 90-284, title VIII, §§ 801-19, 82 Stat. 81-89 (codified as amended at 42 U.S.C. §§ 3601-3631 (1982)).

61. *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

62. 42 U.S.C. §§ 3604(a)-3604(b) (1982).

63. *Id.* §§ 3605, 3606.

64. Dubofsky, *supra* note 5, at 153-54. See also *infra* note 67 for a current assessment of housing conditions in the United States.

65. See 114 CONG. REC. 3421-22 (1968) (remarks of Sen. Mondale).

66. See *infra* notes 77-87 and accompanying text.

67. Lamb, *supra* note 5, at 1115-16. Current housing conditions for minorities in America remain shocking.

According to statistics compiled by the Bureau of the Census for 1978, a majority of the black households in the United States do not own their own homes, while more than two-thirds of white households do. Of the black households which rent

The legislative history of the housing bill reveals that it resulted not so much from planned political deliberation as from the time of crisis in which it was passed.<sup>68</sup> Congress had been extremely hostile to any sort of fair housing initiative.<sup>69</sup> President Johnson, however, was strongly committed to the enactment of laws providing for fair and decent housing for all people.<sup>70</sup> With President Johnson's strong support, Senate liberals were able to achieve a substantial civil rights victory with the passage of title VIII.<sup>71</sup>

The Fair Housing Act was actually a Senate amendment to a House civil rights bill. The prefatory language of the Act states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>72</sup> Title VIII prohibits discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of private or public housing.<sup>73</sup> The Act specifically focuses upon discrimination involving the sale or rental of housing,<sup>74</sup> the financing of housing,<sup>75</sup> and the extension of brokerage services.<sup>76</sup>

The Act has weak enforcement provisions, however, which represent the political price paid in getting the measure through the Senate.<sup>77</sup> The Act places ultimate administrative responsibility in the Secretary of Housing and Urban Development (HUD).<sup>78</sup> Unfortunately, the Secretary may only pursue a complaint by "informal methods of conference, conciliation and per-

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their homes, almost a third report signs of rats or mice. Twenty percent of the black households which rent have open cracks or holes in their interior walls, and have abandoned buildings on their streets. Almost seven percent of all black households—both renters and homeowners—lack plumbing facilities. More than eight percent of black households which rent have holes in their floors, and more than five percent have exposed wiring in their homes.

*Id.* (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ANNUAL HOUSING SURVEY: 1978 pt. B, at 11-14 (1981) (footnotes omitted)).

68. The Act has been called the "result of a political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination." Note, *Discrimination in Employment and Housing: Private Enforcement of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 835 (1969) (footnote omitted). The compromise that resulted in the Act's weak enforcement provisions has come to be regretted. See *Fair Housing Amendments Act of 1979, Hearings on S. 506 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 96th Cong., 1st Sess., 1-4 (1979) (statement of Hon. Birch Bayh, subcomm. chairman) [hereinafter cited as *Senate Hearings*].

69. Lamb, *supra* note 5, at 1116-27.

70. *Id.*

71. *Id.* at 1126.

72. 42 U.S.C. § 3601 (1982).

73. *Id.* §§ 3604(a)-3604(e).

74. *Id.* § 3604.

75. *Id.* § 3605.

76. *Id.* § 3606.

77. Lamb, *supra* note 5, at 1120. See also Dubofsky, *supra* note 5, at 156-57.

78. 42 U.S.C. § 3608 (1982).

suasion."<sup>79</sup> Consequently, any action taken by HUD occurs on a case-by-case basis, a generally ineffective approach.<sup>80</sup>

Moreover, HUD may not initiate lawsuits nor request a federal court to issue an injunction or restraining order.<sup>81</sup> All it may do is refer cases to the Justice Department, if the case involves "a pattern or practice" of discrimination.<sup>82</sup> Additionally, if a state has established a local agency that provides rights and remedies that are substantially the same as those provided by the Fair Housing Act, then HUD must refer its complaints to the local agency.<sup>83</sup> There the complaints often are neglected.<sup>84</sup> For this and other reasons, the Fair Housing Act has been called "a law without teeth,"<sup>85</sup> "an empty promise,"<sup>86</sup> and a "paper tiger."<sup>87</sup>

Even so, the Act has brought some advances. The Act has been construed broadly to prohibit many discriminatory practices not specifically mentioned in its language.<sup>88</sup> Further, the opportunity to strengthen the enforcement provisions of the Act remains part of this nation's unfinished civil rights agenda.<sup>89</sup> Attempts to amend the Act for this purpose have failed thus far.<sup>90</sup> Although a great deal remains to be done to improve housing,<sup>91</sup> the Act reflects, at a minimum, national awareness of the problem and an effort to solve it.

### III. INSURANCE REDLINING

#### A. *The Hidden Impact of Insurance Redlining*

At first glance, redlining may not appear significantly harmful.<sup>92</sup> A brief

79. *Id.* § 3601(a).

80. See generally *Senate Hearings*, *supra* note 68, at 188-99 (remarks of William J. Taylor, Chairman, Compliance and Enforcement Committee, Leadership Conference on Civil Rights).

81. Lamb, *supra* note 5, at 1133-34.

82. See 42 U.S.C. §§ 3611(g), 3613 (1982); see also *Senate Hearings* *supra* note 68, at 23.

83. 42 U.S.C. § 3610(d) (1982). Indeed, one author actually recommends that attorneys be watchful for state laws equivalent to federal laws, the clear inference being that action on the state level is slower, less effective, and more advantageous to defendant insurance companies. Jordan, *supra* note 41, at 226-28.

84. Lamb, *supra* note 5, at 1134-37.

85. *Senate Hearings*, *supra* note 68, at 21.

86. *Id.* at 4.

87. *Id.* at 23.

88. See *supra* note 8, *infra* notes 136-50 and accompanying text.

89. *Senate Hearings*, *supra* note 68, at 188-89 (statement of William J. Taylor).

90. See H.R. 3504, 95th Cong., 2d Sess. (1978); H.R. 2540, 96th Cong., 1st Sess. (1979); H.R. 5200, 96th Cong., 2d Sess. (1980).

91. See *supra* note 67.

92. Memorandum of Amici Curiae National Committee Against Discrimination in Housing, Montgomery County Fair Housing Center, Housing Opportunities Made Equal of Richmond, Virginia, Inc., Baltimore Neighborhoods, Inc., and Housing Advocates, Inc., in support

examination of the role insurance underwriting plays in housing and real estate, however, reveals its true effect.<sup>93</sup>

Insurance underwriting is the process by which companies determine whether to accept or to reject an application for insurance coverage.<sup>94</sup> Insurance companies, by their very nature, seek to accept "good" risks while excluding or limiting "bad" risks.<sup>95</sup> In this way, a company hopes to maximize its profits. There is nothing inherently suspect about this, provided that the reasons for refusals are legitimate.<sup>96</sup> This has been called "fair discrimination".<sup>97</sup> "Unfair discrimination" describes the practice of assigning risks to property that do not correctly reflect the property's particular loss potential.<sup>98</sup> In some respects, all insurance underwriting is "unfair" in that basic underwriting considerations reflect generalizations rather than true statistical evidence of risk.<sup>99</sup> Redlining is a form of "unfair discrimination"

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of appellant's petition for rehearing en banc at 20, *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984) [hereinafter cited as *Memorandum*].

93. See generally Badain, *supra* note 2, at 4-19. See also DeWolfe, Squires & DeWolfe, *supra* note 40, at 316-21.

94. Badain, *supra* note 2, at 12-19.

95. *Id.*

96. See Jennings, *Redlining—Now Insurers Are Guilty of It, Too*, 8 REAL ESTATE L.J. 323, 330 (1980). In this article, the author sketches various practices that have been outlawed by the Fair Housing Act. These practices include blockbusting, steering, refusals to sell, illegal zoning, illegal city construction projects, illegal lending practices and violations by appraisers. Yet, the author concludes: "A refusal to sell for tax reasons is legitimate. . . . A refusal to insure because of high arson or burglary rates is legitimate. But these legitimate reasons must control, and any conclusions about neighborhood makeup must remain dormant. We still have the right of refusal for the right reason." *Id.*

97. Badain, *supra* note 2, at 15 n.76.

98. *Id.*

99. The arbitrariness of property insurance underwriting standards is illustrated in the following exchange between Senator Metzenbaum and William Gibson, Vice President and Associate General Counsel of the Continental Insurance Company, quoted in *Rights & Remedies of Insurance Policyholders: Hearings Before the Subcomm. on Citizens and Shareholders Rights & Remedies of the Senate Judiciary Comm.*, 95th Cong., 2d Sess., pt. 1, at 83 (1978). The Senator read an excerpt from The Continental Insurance Companies Personal Lines Underwriters' Manual:

'The following occupations should, in our opinion, be included among those that will, as a group produce higher than average frequency of loss ratio: advertising agencies, painters, antique dealers, professional athletes, radio and television stations, waiters and waitresses, fashion designers.' Why would a painter or a waitress or an antique dealer or a fashion designer pose any unusual risk as a homeowner? Do they break more things or what? Do they have more things stolen or do they bring their homes down?

*Id.* Gibson answered, quoting from the manual's preamble:

'While we admittedly cannot readily document our opinions on this and many other points, we are nevertheless, convinced without the slightest reservation that when considered as a group rather than individuals, persons engaged in some occupations have a greater frequency of loss under homeowners policies than persons

based solely upon the characteristics of a particular area.<sup>100</sup>

Property insurance is an absolute prerequisite for credit, which in turn is necessary for property ownership and maintenance.<sup>101</sup> The denial of insurance, therefore, effectively precludes the maintenance and improvement of property. Further, the denial of insurance through redlining precludes the maintenance of entire neighborhoods.<sup>102</sup> For the most part, these neighborhoods represent old urban areas.<sup>103</sup> Sometimes the redlined area is in a state of economic decline;<sup>104</sup> sometimes the racial or ethnic composition of the neighborhood is changing.<sup>105</sup> In any event, redlining of the neighborhood almost certainly guarantees that economic decline will follow.<sup>106</sup> Redlining has therefore been characterized as a "self-fulfilling prophecy."<sup>107</sup>

The process of inner city deterioration is a complex one. Insurance redlining contributes to and accelerates the deterioration process.<sup>108</sup> The effect of

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engaged in some other occupations.' This is again the collective opinion of people who are attempting to find a way to make a profit in a highly competitive business.

*Id.*

Other insurance manuals have explicit instructions to practice geographical redlining. One underwriting manual trumpeted: "[D]eteriorating neighborhoods automatically provide claim problems due to vandalism, poor housekeeping, and inadequate maintenance . . . . Avoid new business and reunderwrite renewal business which is being surrounded by neighborhoods of this type." PRESIDENT'S NAT'L ADVISORY PANEL ON INS. IN RIOT-AFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES 1, 29 (1968) [hereinafter cited as Hughes Panel].

100. For a discussion of the definition of "redlining," see *supra* note 1.

101. See Badain, *supra* note 2, at 1.

102. See generally *id.* at 1-12.

103. ILL., IND., MICH., MINN., OHIO AND WIS. ADVISORY COMMITTEES TO THE U.S. COMMISSION OF CIVIL RIGHTS, INSURANCE REDLINING: FACT NOT FICTION 1 (1979) [hereinafter cited as FACT NOT FICTION].

104. DeWolfe, Squires & DeWolfe, *supra* note 40, at 317.

105. FACT NOT FICTION, *supra* note 103, at 10.

106. DeWolfe, Squires & DeWolfe, *supra* note 40, at 318.

107. Badain, *supra* note 2, at 6. See also Comment, *supra* note 2, at 486.

108. Badain, *supra* note 2, at 5.

Redlining did not begin in the mid-1960s, nor is it the sole invention of a malevolent insurance industry. Rather, the roots of the problem are traceable to an assortment of federal housing, transportation and procurement policies in the post-war era, which have encouraged the decentralization of the American population at the expense of its older cities. Property insurers, anxious to reach the growing market of suburban, upwardly mobile families in newly-constructed homes, developed the homeowners' package in the mid-1950's. The package offered built-in economies through a single indivisible premium which covered a multitude of perils (*e.g.*, fire, burglary, theft and personal liability), but was tendered only to the most desirable residential risks.

Insurance is one industry whose profitability depends on 'adverse selection'—*i.e.*, selling to the lowest-risk customers. This both reduces costs and maximizes profitability within a company's legal allowable surplus-to-premiums written capacity. *Perceiving* central city business to be riskier, insurance companies joined the exodus



redlining is to stop any further investment in the area redlined.<sup>109</sup> With no sources of financing for growth, repair or sale of housing, stagnation sets in because attempts to improve the community are precluded by a lack of funding.<sup>110</sup> This process is called disinvestment<sup>111</sup> and is closely related, although not identical to, redlining.<sup>112</sup> The net effect of redlining and disinvestment is the spread of ghettos one block at a time.<sup>113</sup>

### B. *The Inadequate Federal Response to Insurance Redlining*

In the wake of widespread rioting during the late 1960's, the President's National Advisory Panel on Insurance Availability (the Panel or the Hughes Panel) was charged with examining "the causes and effects of inner-city insurance unavailability and [devising] a solution to this dilemma."<sup>114</sup> The Panel found that riots were only one factor in the problem of insurance un-

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of the affluent and the middle class from the inner city to America's suburbs while gradually terminating or restricting the books of business of urban agents. The result of the suburban out-migration was an ever-increasing unavailability of property insurance in the central city, reaching crisis proportions in some areas and precipitating a cycle of deterioration and housing abandonment. High premiums compelled inner city residents and landlords to buy only very limited coverage. Inadequate coverage forced premiums on available policies even higher. In addition, the unavailability of property insurance forced lending institutions to curtail mortgage activity in certain neighborhoods.

Once started, this cycle of disinvestment fed upon itself:

As insurance became increasingly difficult to obtain or . . . afford . . . , vacated properties remained vacant since willing buyers could not obtain loans for want of insurance to serve such loans; properties urgently in need of repair . . . declined further as credit for such purposes could not be obtained in the absence of insurance availability.

*Id.* at 5-6 (quoting FEDERAL INS. ADMINISTRATION, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, FULL INSURANCE AVAILABILITY 24 (1974) (footnotes omitted) (emphasis added)).

109. *See supra* notes 2, 108. *See also* Hughes Panel, *supra* note 99, at 1.

110. *See supra* notes 10, 108.

111. Jennings, *Preemption and State Anti-redlining Regulations: The Need for Clarification*, 11 FORDHAM URB. L.J. 225, 227 n.6 (1980).

The distinction between 'redlining' and 'disinvestment' is a fine one. Redlining refers specifically to the practice of denying mortgage funds to a particular region such as an inner city residential area. Disinvestment, however, embodies the collection of funds in one neighborhood through savings deposits and then investing those funds in a different locale, i.e., using the savings of local urban residents to make loans for homes in the suburbs or in another state. The sun belt—Florida, Georgia and Texas—was built in part from funds disinvested from northern urban centers.

*Id.* (citations omitted).

112. *Id.*

113. Badain, *supra* note 2, at 34-37. The author lays the blame for the decline of neighborhoods squarely at the feet of insurers, among others. *Id.* at 36.

114. *Id.* at 2. *See also* Hughes Panel, *supra* note 99, at 35-40.

availability and documented “[w]idespread refusals to insure . . . even where there had been no riots and where none were threatened. These were based primarily upon neighborhood characteristics, most significantly racial composition, without regard to the merits of the particular risk.”<sup>115</sup>

The Panel concluded that the industry had exaggerated its urban loss and incorporated that exaggeration in underwriting manuals.<sup>116</sup> The Panel also anticipated “white flight,” predicting that those left behind would have less reason to insure, and called for affordable insurance.<sup>117</sup> It proposed that the government offer noncancellable, low-cost riot insurance to companies participating in “Fair Access to Insurance Requirements” (FAIR) plans.<sup>118</sup> Since the Panel had found the main cause of insurance unavailability to be fear of catastrophic losses due to rioting, it felt that a government guarantee would allow insurance companies to continue to provide basic property insurance.<sup>119</sup>

Congress reacted favorably by adopting the Urban Property Protection and Reinsurance Act of 1968 (UPPRA).<sup>120</sup> This contained the basic operating structure for state FAIR plans. It was widely believed the FAIR plans would make insurance available to all “insurable risks.”<sup>121</sup> Regrettably, this did not come to pass.<sup>122</sup> The single most devastating factor upon the effectiveness of FAIR was the higher rate it offered as compared to the voluntary market.<sup>123</sup> Denied coverage in the voluntary market for whatever reasons, rejected applicants found themselves paying appreciably higher premiums for less coverage.<sup>124</sup> Some of the plan’s rates were over three times those of the voluntary market<sup>125</sup> with the result that “risks often were ‘written-out’

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115. Badain, *supra* note 2, at 6 (footnote omitted).

116. *Id.*

117. Hughes Panel, *supra* note 99, at 8.

118. *Id.* at 7-8.

119. *Id.* at 2-7.

120. Pub. L. No. 90-448, title XI, 82 Stat. 555 (codified as amended at 12 U.S.C. §§ 1749bbb to 1749bbb-21 (1982)) (subsection (11) of § 1749bbb-3 was repealed by Pub. L. No. 97-35, title III, § 342(b)(3), 95 Stat. 420). The riot reinsurance program terminated on November 30, 1983. Pub. L. 98-181, § 452(b)(1), 97 Stat. 1230, 12 U.S.C.A. § 1749bbb(b)(1) (West Supp. 1984). However, approximately half the states have maintained the FAIR plans. Telephone interview between Robert Hunter, Director of the National Insurance Consumer Organization and Leah Wortham, Assistant Professor of Law, Catholic University School of Law (Feb. 22, 1985).

121. Badain, *supra* note 2, at 8. “The FAIR plan may be described as servicing the residual market, *i.e.*, those risks not covered by the voluntary market.” *Id.* at 7 n.30.

122. *Id.* at 8-9.

123. *Id.* at 9.

124. *Id.* This higher cost effectively prevents many applicants from obtaining insurance and contributes to the overall failure of the FAIR plans. See Comment, *supra* note 2, at 489-91.

125. Badain, *supra* note 2, at 9.

by the voluntary market and then 'rated-out' by FAIR plans."<sup>126</sup> This combination of inadequate service and even higher prices was devastating for communities.<sup>127</sup>

The argument has been made that the "free market" will accommodate applicants who have been discriminated against because other firms will step in and take up the unsatisfied demand.<sup>128</sup> Given low consumer elasticity and high vulnerability, this argument is specious at best.<sup>129</sup> Experience has shown that those denied voluntary coverage and unable to afford the exorbitant FAIR rates forego insurance coverage altogether,<sup>130</sup> thereby creating yet another self-fulfilled prophecy.

States provide no substantial help in this regard, as UPPRA left the federal government with precious little power of review over the state FAIR plans.<sup>131</sup> State approaches to redlining are fraught with inadequacies.<sup>132</sup> Most states simply have not enacted antiredlining legislation.<sup>133</sup> Political pressure by the insurance industry is substantial and effective.<sup>134</sup>

Insurance redlining has serious consequences for this nation's urban core. Its damaging effects can hardly be overstated. Though well-intentioned, UPPRA and FAIR have failed to remedy the serious shortage of insurance available to inner-city residents.<sup>135</sup>

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126. *Id.* The effect is the same as an outright refusal to write the policy. *See* Comment, *supra* note 2, at 487. It is doubtful that the unsuccessful applicant takes any comfort from the fact that coverage is unavailable because it is unaffordable, rather than unobtainable at all. Excessive cost is a significant factor in insurance unavailability. *See id.*

127. Badain, *supra* note 2, at 11.

128. *Id.* at 37.

129. *Id.* Moreover, the very fact that one is relegated to a state FAIR plan has negative implications, and the availability of the FAIR plans is certainly no guarantee that economic decline due to redlining will subside. DeWolfe, Squires & DeWolfe, *supra* note 40, at 351. Indeed, it may be a signal for disinvestment by others. *Id.*

130. Badain, *supra* note 2, at 11-12.

131. *Id.* at 22.

132. *Id.* at 23-34.

133. *Id.* at 28.

134. The lack of state enforcement activity can be explained to a large degree by the political calculus of the field. Insurance companies are a powerful lobby, with considerable weight in the [state insurance] departments. In contrast, it is often difficult for community groups to mobilize in this field. Few consumers are aware of their rights and remedies. Cancellations, nonrenewals, refusals to write, and the charging of excessive rates are individualized discriminatory practices. Although the summary effect of discrimination is to write-out or rate-out entire segments of urban populations, the process toward that end is carried out on a one-to-one relationship between consumer and company.

*Id.* at 30-31 (footnotes omitted).

135. *See* Note, *supra* note 2, at 237, where the author states that legislation is needed in order to bring the insurance industry within the scope of the law.

IV. *DUNN V. MIDWESTERN INDEMNITY*

In *Dunn v. Midwestern Indemnity Midamerican Fire and Casualty Company*,<sup>136</sup> black homeowners brought an action against insurers for terminating their homeowner's insurance policy.<sup>137</sup> Plaintiffs alleged that the decision to terminate the portfolio of Borchers Insurance Company, through which they had purchased the policy, was based upon the portfolio's inclusion of a large number of black homeowners or people residing in black neighborhoods.<sup>138</sup> The United States District Court for the Southern District of Ohio in *Dunn* considered only the question whether the homeowners stated a claim for which relief could be granted under the Fair Housing Act.<sup>139</sup> In holding that a claim could be brought, the court became the first federal court to decide so.<sup>140</sup>

A. *The Fair Housing Act Construed as Prohibiting the Practice of Insurance Redlining*

The *Dunn* court afforded a "generous construction" to the Fair Housing Act.<sup>141</sup> Section 3604(a), the court noted, made it unlawful to refuse to sell or rent, "or otherwise [to] make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."<sup>142</sup> The court looked to the manner in which other courts had construed the pertinent phrase "and otherwise make unavailable." It found many decisions barring various practices that, like insurance redlining, were not specifically mentioned by the Act.<sup>143</sup> Among those practices found by other courts to be impliedly prohibited by the Fair Housing Act were: mortgage redlining;<sup>144</sup> the rejection by a noncommercial orphanage of minority orphans;<sup>145</sup> the adoption of exclusionary ordinances by a municipality;<sup>146</sup> the assignment of lower appraisal values to homes in racially integrated neighborhoods;<sup>147</sup> a zoning ordinance prohibiting construction of any new multiple-family dwell-

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136. 472 F. Supp. 1106 (S.D. Ohio 1979).

137. *Id.* at 1107.

138. *Id.*

139. *Id.*

140. Jordan, *supra* note 41, at 231.

141. *Dunn*, 472 F. Supp. at 1108.

142. *Id.*

143. *Id.* See *supra* note 8.

144. *Dunn*, 472 F. Supp. at 1108 (citing *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976)).

145. *Id.* (citing *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975)).

146. *Id.* (citing *United States v. City of Parma* 661 F.2d 562 (6th Cir. 1981)).

147. *Id.* (citing *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977)).

ings;<sup>148</sup> and the steering of a prospective buyer into or away from an area because of race.<sup>149</sup> The *Dunn* court observed that other courts had found the language of section 3604(a) was "as broad as Congress could have made it."<sup>150</sup>

The court in *Dunn* also gave great weight to the interpretation of the Act by the Department of Housing and Urban Development.<sup>151</sup> HUD had concluded that insurance redlining makes mortgage money unavailable and hence renders dwellings unavailable as effectively as denial on other grounds.<sup>152</sup> The legislative history of the Act was found by the court to support HUD's interpretation.<sup>153</sup> While cognizant of the omission of any reference to insurance redlining during the legislative proceedings, the court emphasized that the overriding purpose of the Act was to eliminate segregation in housing.<sup>154</sup> Of particular importance in *Dunn's* analysis was the Act's goal of eliminating any practice "which might prevent a person economically able to do so from purchasing a house regardless of his race."<sup>155</sup> Because one must have property insurance to purchase a house, the court concluded, a discriminatory refusal of that insurance would prevent a person, who was otherwise economically able, from obtaining housing.<sup>156</sup> Insurance redlining was therefore held to be encompassed by the broad language of section 3604(a), as well as by the overall legislative design.<sup>157</sup>

For support in making its causal connection between financing and housing, the court relied on *Laufman v. Oakley Building & Loan Company*.<sup>158</sup> In *Laufman*, the United States District Court for the Southern District of Ohio found that denial of financial assistance in connection with the purchase of a house made that dwelling "unavailable."<sup>159</sup> If that denial results from racial considerations, the *Laufman* court concluded, section

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148. *Id.* (citing *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974)).

149. *Id.* (citing *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977)).

150. *Id.* (quoting *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975)).

151. *Id.* at 1109.

152. *Id.* (citing Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Assistant Secretary for Equal Opportunity (Aug. 15, 1978)).

153. *Id.*

154. *Id.*

155. *Id.* (quoting H.R. 3504, 95th Cong., 1st Sess. § 804 (1977)).

156. "Since insurance is a precondition to adequate housing, a discriminatory denial of insurance would prevent a person economically able to do so from buying a house." *Id.*

157. "Consequently, although insurance redlining is not expressly proscribed by the Act, it is encompassed by both the broad language of § 3604(a) and the legislative design of the Act which seeks to eliminate discrimination within the housing field." *Id.*

158. 408 F. Supp. 489 (S.D. Ohio 1976).

159. *Id.* at 493.

3604(a) is violated.<sup>160</sup>

*Laufman* was an action alleging violation of the Civil Rights Acts of 1964 and 1968 brought by homeowners against a building and loan association.<sup>161</sup> The plaintiffs claimed they were victims of redlining and that such practice is prohibited by the Fair Housing Act.<sup>162</sup> In denying the defendant's motion for summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure, the district court held that redlining constituted a basis for a cause of action under *both* section 3604 and section 3605.<sup>163</sup>

The *Laufman* court noted that the high costs of housing require most people to seek financial assistance when purchasing a home.<sup>164</sup> When denial of this assistance is based on racial considerations, the court held, section 3604(a) is violated.<sup>165</sup>

*Laufman* relied, in part, on the interpretation by HUD that the Fair Housing Act prohibits redlining.<sup>166</sup> The court noted that the Federal Home Loan Bank Board (FHLBB) had come to the same conclusion and had issued detailed regulatory provisions to prevent redlining.<sup>167</sup> The court in *Laufman* bolstered its use of agency interpretation by citing the Supreme Court's opinion in *Trafficante v. Metropolitan Life Insurance*<sup>168</sup> that HUD's interpretation is "entitled to great weight" in construing the language of the Act.<sup>169</sup>

In *Dunn*, the defendant Midwestern argued that a proposed congressional amendment to the Fair Housing Act, specifically prohibiting insurance redlining, indicated that section 3604(a) as originally enacted did not encompass the practice.<sup>170</sup> The court rebuked this argument by stating that the amendment was put forth by its sponsors as a clarification of existing law and not as a new prohibition.<sup>171</sup> To buttress this contention, the court cited

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160. *Id.*

161. *Id.* at 491-92.

162. *Id.*

163. *Id.* at 491.

164. *Id.* at 493.

165. *Id.*

166. *Id.* at 494.

167. *Id.* The court cited, *inter alia*, 12 C.F.R. § 531.8(c)(6) (1976) which stated, in pertinent part: "The racial composition of the neighborhood where the loan is to be made is always an improper underwriting consideration." *Id.* at 495.

168. 409 U.S. 205, 210 (1972).

169. *Laufman*, 408 F. Supp. at 494. The *Laufman* court went on to say that "this deference is particularly appropriate where, as here, the administrative practice in question involves a contemporary construction of the statute by the officers charged with the responsibility of setting its machinery in motion and of making its parts work smoothly and efficiently." *Id.* at 495 (quoting *Board of Educ. v. HEW*, 396 F. Supp. 203, 236 (S.D. Ohio 1975)).

170. 472 F. Supp. at 1109-10 (citing H.R. 3504, 95th Cong., 2d Sess. (1978)).

171. *Id.* at 1110.

comments by then Secretary of Housing and Urban Development Patricia Harris, who stated that the proposed amendment was merely a codification of existing case law.<sup>172</sup> Since the *Dunn* court held that insurance redlining violates section 3604(a), it did not reach the issue whether section 3604(b) prevents discrimination by a third party once the sale has been completed.<sup>173</sup> It noted, however, that the relevant phrase of section 3604(b) had also been broadly construed.<sup>174</sup>

As to the alleged violation of section 3605, the court found that Midwestern was not engaged in the requisite making of commercial real estate loans.<sup>175</sup> Accordingly, the court barred the claim. The court allowed *Dunn's* section 3617 claim, however, because it had already found section 3604(a), encompassing section 3617, to have been violated.<sup>176</sup>

### *B. The McCarran-Ferguson Act Construed as Inapplicable to Insurance Redlining Actions*

In determining that the McCarran-Ferguson exemption did not apply, the court in *Dunn* briefly sketched the histories of the exemption, UPPRA, and FAIR.<sup>177</sup> It stated that UPPRA was enacted to shield insurance companies from huge losses due to riots or other civil disorders.<sup>178</sup> It also noted that UPPRA contained the basic operating structure of the state FAIR plan.<sup>179</sup>

FAIR, the court found, allowed insurance companies to "dump" their ghetto area policies.<sup>180</sup> This resulted in two separate insurance markets: a "normal" market, served by private insurers, and a market consisting of the

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172. *Id.* The court quoted Secretary Harris as stating:

I find the clarifying amendments in H.R. 3504 on insurance and lender redlining practices helpful and necessary. While there are strong indications that such conduct is reached by the existing law, the more explicitly the statute addresses these issues, the more certain we can be that potential violators are fully aware of the conduct prohibited. In addition, victims of such conduct could more easily secure redress in the courts if the law clears away present doubts as to the extent of its coverage.

*Id.*

173. *Id.*

174. *Id.*

175. *Id.* The court noted:

While § 3605 has application to an 'insurance company,' it is clear that the statute has reference to institutions engaged 'in the making of commercial real estate loans.' Even a broad construction of this section cannot alter its unambiguous meaning. Thus § 3605 does not contemplate proscription of insurance redlining by an insurance company not engaged 'in the making of commercial real estate loans.'

*Id.*

176. *Id.* at 1111.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

urban inner core, served by FAIR.<sup>181</sup> With discriminatory denial of access to the normal insurance market and the relegation of minorities to the state FAIR plans, a pervasive pattern of segregated housing developed and continued.<sup>182</sup> The elimination of this pattern was found in *Dunn* to be the special province of the Fair Housing Act.<sup>183</sup> Hence, the court found it “clear” that neither the McCarran-Ferguson Act, UPPRA, nor FAIR addressed, nor were intended to address, insurance redlining.<sup>184</sup> As a result, the court declared that the McCarran-Ferguson exemption did not apply and denied Midwestern’s 12(b)(6) motion to dismiss.<sup>185</sup>

#### V. *MACKEY V. NATIONWIDE INSURANCE COMPANIES*

In *Mackey v. Nationwide Insurance Companies*, a black insurance agent alleged he was discriminated against as a result of defendant’s redlining of certain black neighborhoods.<sup>186</sup> The United States Court of Appeals for the Fourth Circuit declined to extend the reach of the Fair Housing Act to insurance redlining.<sup>187</sup> Construing the statutory language and interpreting the legislative history of the Act, the court found no evidence that Congress intended to prohibit insurance redlining through the Fair Housing Act.<sup>188</sup> At the same time, *Mackey* joined the growing number of cases holding, for various reasons, that the McCarran-Ferguson Act also did not apply.<sup>189</sup>

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181. *Id.* (citing Barker, *The High Cost of Property Insurance in HUD Urban Core Housing Development*, 671 INS. L.J. 711 (1979)).

182. *Id.* at 1111-12.

183. *Id.* at 1112.

184. *Id.* While the court is essentially correct, the issues become confused in the court’s discussion. UPPRA and FAIR were established to attack the problem of insurance unavailability resulting from *geographic* redlining, while only title VIII goes to the problem of *racial* redlining. See Comment, *supra* note 2, at 477.

When the court declares that UPPRA and FAIR were not intended to address redlining, it is clearly wrong. The court saves its argument, however, through its definition of redlining: “the restriction of insurance based on the racial composition of the neighborhood, apart from any consideration of risk.” *Dunn*, 472 F. Supp. at 1107 n.3. Under this definition, only title VIII, and not UPPRA or FAIR, addresses the insurance redlining problem. Comment, *supra* note 2, at 477 n.42. *But see* Jordan, *supra* note 41, at 235 (The author attempts to make the difficult argument that UPPRA and FAIR were meant to combat redlining. A close reading of this argument, however, reveals a blurring of the important distinction between insurance redlining and general insurance unavailability.).

185. *Dunn*, 472 F. Supp. at 1112. See FED. R. CIV. P. 12(b)(6).

186. 724 F.2d 419, 420 (4th Cir. 1984).

187. *Id.* at 423-25.

188. *Id.* at 423-24.

189. *Id.* at 421.



A. *The McCarran-Ferguson Act: No Law "Impaired, Invalidated, or Superseded"*

Senior Circuit Judge Haynsworth, writing for the majority in *Mackey*, held that the McCarran-Ferguson Act barred Dunn's claims arising under the Sherman Antitrust Act.<sup>190</sup> The court found that the activity alleged by the plaintiff to violate the Sherman Act clearly fell within the "business of insurance" exemption provided for by the McCarran-Ferguson Act.<sup>191</sup> The court, however, went on to find that the exemption did not apply to Dunn's claims under the Fair Housing Act and Civil Rights Acts because no law of North Carolina would be "impaired, invalidated or superseded" by the application of those Acts.<sup>192</sup> Nationwide challenged this conclusion. It argued application of the Acts would impair North Carolina legislation that prohibits insurance companies from establishing discriminatory rates.<sup>193</sup> The court responded that while the state provision at issue might well prohibit unfair discrimination in the *establishment of rates*, it did nothing to prevent discriminatory practices in the *acceptance of risks*.<sup>194</sup>

The goals of the McCarran-Ferguson Act, *Mackey* declared, were to allow the states to regulate the business of insurance<sup>195</sup> and to provide a limited

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190. *Id.* at 420.

191. *Id.* at 421.

192. *Id.*

193. *Id.* at 421 n.1. Midwest argued that North Carolina General Statutes § 58-131.37 prohibits discrimination in the establishment of rates. Section 58-131.37 provides:

(a) Rates shall not be excessive, inadequate or unfairly discriminatory.

(b) Rates are not excessive if a reasonable degree of price competition exists at the consumer level with respect to the class of business to which they apply. It is presumed that a reasonable degree of price competition exists if there are a number of insurers actively engaged in the class of business and there are rate differentials in that class of business.

(c) If such competition does not exist, rates are excessive if they clearly produce a long-run underwriting profit that is unreasonably high for the class of business.

(d) No rate shall be held to be inadequate unless (i) the rate is unreasonably low for the insurance provided and the continued use of the rate endangers the solvency of the insurer, or unless (ii) the rate is unreasonably low for the insurance provided and the use of the rate by the insurer has, or if continued will have, the effect of destroying competition or creating a monopoly.

(e) A rate is not unfairly discriminatory in relation to another in the same class if it reflects equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expense factors, or like expense factors but different loss exposures, as long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise, or blanket policy.

N.C. GEN. STAT. § 58-131.37 (1982).

194. *Mackey*, 724 F.2d at 421 n.1.

195. *Id.* at 420.

exception to the antitrust laws.<sup>196</sup> The United States Court of Appeals for the Fourth Circuit observed that these goals could be attained without dismissing the redlining claims.<sup>197</sup> Since the court already had determined that the redlining claim could be addressed under the Fair Housing Act,<sup>198</sup> it specifically declined to consider whether the McCarran-Ferguson Act precluded the application of federal civil rights statutes to the insurance industry.<sup>199</sup>

The court affirmed the district court's holding that Mackey had no standing to challenge the alleged redlining practices under the Civil Rights Acts.<sup>200</sup> The court, however, did find Mackey had standing under the Fair Housing Act. It commented that the usual requirements for standing may not prevent actions from being brought under the Act.<sup>201</sup>

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196. *Id.*

197. *Id.* at 421. This view is strongly supported by most commentators. *See generally* Kimball & Boyce, *supra* note 15, at 554-56.

198. *Mackey*, 724 F.2d at 421.

199. *Id.* at 421 n.2.

200. *Id.* at 421. On this point, the court admitted that the agent's loss of commission most likely satisfied the constitutional requirement for standing that one must have suffered some injury and have a personal stake in the outcome. *Id.* Yet the court found "prudential limitations" to outweigh these minimum constitutional requirements. It stated: "The persons best suited to challenge the redlining practice are those owners of homes and buildings who have been the direct victims of the alleged discriminatory practice." *Id.* at 422.

As to Mackey's claim that he was punished for trying to vindicate the § 1981 and § 1982 rights of the home and building owners and was thus within the exception of *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the court noted that in *Sullivan* the standing to sue was premised on the fact that *Sullivan* was the only effective adversary of the unlawful racial discrimination. *Mackey*, 724 F.2d at 422. In the instant case, the court said, "There is no impediment to actions by those blacks who were denied property insurance because of the alleged discriminatory practice. Denying standing to Mackey does not insulate Nationwide from legal accountability for any deprivation of § 1981 and § 1982 rights it may have committed." *Id.* (footnote omitted).

This view of standing has been criticized on the ground that "[r]arely will the insured be in such a position to challenge insurance redlining within the brief limitations period under the Fair Housing Act. Not until the devastation that insurance redlining inevitably causes dries up the well of available markets will most homeowners feel the impact of the practices that victimize them." *Memorandum, supra* note 92, at 20. Further, the *Mackey* interpretation of *Sullivan* has been characterized as "misread." *Id.* at 19.

201. *Mackey*, 724 F.2d at 422-23. The court relied upon *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), where the Supreme Court declared that Congress intended standing under the Fair Housing Act to "extend to the full limits of Article III." *Mackey*, 724 F.2d at 422 (quoting *Gladstone Realtors*, 441 U.S. at 103 n.9). The *Mackey* court relied upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1983), in stating that normal standing barriers do not apply to the Fair Housing Act. *Mackey*, 724 F.2d at 422-23. Since all that Article III requires is a showing of economic harm, the court found that Mackey had satisfied Article III. *Id.* at 423.

*B. The Fair Housing Act: The Past Ought Not Be Prologue*

The Fourth Circuit in *Mackey* construed section 3604(a) of the Fair Housing Act as not reaching the practice of insurance redlining.<sup>202</sup> In so doing, the court relied on several factors providing a series of touchstones for the opinion.<sup>203</sup> A careful examination of these factors in the aggregate suggests that the court fundamentally misread the issues presented in *Mackey*.

The court focused on the Act's "or otherwise make unavailable" clause and ruled that this was simply insufficient to encompass insurance redlining.<sup>204</sup> The court rebuked Mackey's central argument that when property insurance is denied due to discrimination, mortgages become unattainable and housing thus becomes "unavailable" within the meaning of the Fair Housing Act.<sup>205</sup> The court noted that section 3605 specifically prohibits discrimination in housing financing.<sup>206</sup> If section 3604 was meant to be as broad in its prohibition of discriminatory acts as Mackey claimed, the court reasoned, then section 3605 would be superfluous.<sup>207</sup>

Turning to the legislative history of the Fair Housing Act, the court noted that the term "insurance redlining" was never mentioned during the legislative proceedings.<sup>208</sup> The court, however, failed to take notice of the peculiar nature of the Act's legislative history. The major problem is that there is very little legislative history reflected in the Congressional Record.<sup>209</sup> This has been attributed to two factors: (1) the lack of committee reports due to the fact that title VIII was a Senate amendment to a House civil rights bill;<sup>210</sup> and (2) the emotional nature of the debate over title VIII.<sup>211</sup> Further, it has been observed that the broad language of section 3604(a) was pointed out to Congress during one of the few subcommittee hearings.<sup>212</sup> This suggests Congress' awareness and acceptance of the fact that the statute

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202. 724 F.2d at 423.

203. *Id.* at 423-24.

204. *Id.* at 423.

205. *Id.*

206. *Id.*

207. *Id.* This conclusion is difficult to understand since § 3605 only deals with lending institutions. The broad "or otherwise make unavailable" language of § 3604 seems designed to encompass those many practices whose effect would deny dwellings based on racial considerations.

208. *Id.*

209. Comment, *supra* note 2, at 480-81.

210. *Id.* at 481. For an overview of the legislative process that led to the enactment of the Fair Housing Act, see generally Dubofsky, *supra* note 5, at 149-60. See also Lamb, *supra* note 5, at 1116-27.

211. Comment, *supra* note 2, at 481.

212. *Id.* at 482.

could be broadly construed.<sup>213</sup>

The *Mackey* court did not consider this background. Instead, it took a highly unusual approach to the legislative history.<sup>214</sup> The court noted that several subsequent attempts to amend the Fair Housing Act failed to pass Congress.<sup>215</sup> These amendments would have specifically outlawed insurance redlining, among other things.<sup>216</sup> The amendments' failure to pass was seen by the court as evidence that Congress never intended to prohibit insurance redlining.<sup>217</sup> More surprising, the Fourth Circuit relied on the statements of two Congressmen who opposed the amendments for the proposition that insurance redlining was never meant to be prohibited.<sup>218</sup>

The *Mackey* court took this view despite the fact that sponsors claimed the amendments simply clarified existing law.<sup>219</sup> Neither HUD's interpretation of the Act nor the remarks of Secretary Harris appear in *Mackey*. Likewise, testimony by spokesmen for the Justice Department and the United States Commission on Civil Rights to the effect that current law prohibits insurance redlining was ignored by the *Mackey* court.<sup>220</sup> The court's reliance on subsequent members of Congress to divine the intent of the 1968

213. *Id.*

Since neither the sponsors of the legislation nor other subcommittee members attempted to restrict the broad language, even though their attention had been called to the potentially broad construction of the words, one can infer that the sponsors either intended such a broad construction be given to the words used or were unconcerned that such an interpretation could be so attached.

*Id.*

214. See *infra* note 221 and accompanying text.

215. *Mackey*, 472 F.2d at 424. The court seems not to realize that the amendments in fact passed the House of Representatives and only failed in the Senate as a result of a filibuster. For the story of the bill's defeat, see *Bill to Strengthen Fair Housing Act Killed as Senate Cloture Vote Fails*, N.Y. Times, Dec. 10, 1980, at B8, col. 3.

216. See *Senate Hearings*, *supra* note 68, at 1-4.

217. *Mackey*, 472 F.2d at 424. The court explained:

Bills to amend the Act so as to prohibit discriminatory practices in the hazard insurance industry were introduced in the House in 1978, 1979, and 1980. No such amendment has been adopted. Since there is no reference to hazard insurance in the 1968 statute or in its legislative history, the failure of the proposed amendments is supportive of our conclusion that the statute as enacted in 1968 was not intended to reach the hazard industry.

*Id.*

The court clearly misses the nexus between insurance and mortgage loans, and hence, the availability or unavailability of housing itself. One must have insurance *first*, since "[n]o mortgagor would be willing to lend money to a potential home buyer without having his or her interest in the property protected." DeWolfe, Squires & DeWolfe, *supra* note 40, at 336. See also Badain, *supra* note 2, at 42.

218. *Mackey*, 472 F.2d at 424.

219. *Id.*

220. Such testimony is never alluded to by the court. *But see Dunn*, 472 F. Supp. at 1107 n.2.

Congress, especially in light of this conflicting evidence, is clearly of questionable value.<sup>221</sup>

The Fourth Circuit actually invented reasons why Congress may have prohibited mortgage redlining but not insurance redlining,<sup>222</sup> although the result of each is identical.<sup>223</sup> In essence, the court stated that Congress, recognizing the insurance industry's traditional role in classifying risks,<sup>224</sup> may have wanted to leave the industry free to choose acceptable risks and reject excessive ones.<sup>225</sup> That Congress did not give mortgage lenders the same latitude, the court asserted, was no reason to assume that Congress meant to restrict insurance.<sup>226</sup>

This analysis betrays a fundamental misunderstanding on the part of the court in *Mackey*.<sup>227</sup> The court is correct in suggesting that excessive risk is a legitimate basis upon which to refuse either property insurance or a mortgage.<sup>228</sup> This, however, is not redlining. Redlining, by definition, is the discriminatory refusal to insure, wholly apart from considerations of risk.<sup>229</sup>

221. Comment, *supra* note 2, at 484.

[S]tatements by current individual legislators would not be indicative of the intention of the *original* enacting legislature. It is the intention of the enacting legislature which governs the interpretation of the language adopted in 1968, and statements made in a subsequent legislature have little probative value in determining the intent of the legislature which enacted the original legislation.

*Id.* (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1946)).

222. *Mackey*, 724 F.2d at 423.

223. *See supra* note 152 and accompanying text.

224. *Mackey*, 724 F.2d at 423. The court stated:

Moreover, there are different considerations that may have influenced Congress in shaping federal proscriptions of discrimination in financing and in insurance. The insurance industry has traditionally classified risks. If insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks which are perceived to be excessively high, while charging higher premiums on some risks than upon others. It is not suggested that financial institutions do not have greater risks in making mortgage loans in neighborhoods that are deteriorating than in other areas, but the fact that Congress chose to proscribe discrimination in mortgage financing does not suggest that it would have come to a similar conclusion with respect to hazard insurance.

*Id.*

225. *Id.*

226. *Id.*

227. The court's analysis has rightly been called "alarming." *See generally Memorandum, supra* note 92, at 14. The Memorandum accurately pinpoints the misunderstanding of the court when it states, "It is precisely this willingness to assume that homes within black neighborhoods are automatically undesirable as insurance risks that makes insurance redlining the pernicious and self-fulfilling practice that it has become." *Id.* at 15.

228. *See supra* note 96.

229. *See supra* notes 1, 108, 167.

This is precisely why its impact is so devastating.<sup>230</sup> Additionally, redlining has a disproportionate impact on minorities.<sup>231</sup> *Mackey* loses sight of the fact that the purpose of the bill, according to its sponsor Senator Mondale, is to replace the ghettos "by truly integrated and balanced living patterns."<sup>232</sup>

Having theorized that Congress intended to exclude insurance redlining from the Act, the Fourth Circuit in *Mackey* seemed compelled to recognize a different outlet for congressional prohibition of the practice. This is alleged to be accomplished through UPPRA and FAIR.<sup>233</sup> Yet these programs should be considered more as a response to the riots of the late 1960's than as a prohibition of redlining.<sup>234</sup> Indeed, they may even assist in perpetuating racial segregation and urban blight.<sup>235</sup>

*Mackey's* review of the legislative history of the Fair Housing Act suggests a predetermined conclusion that redlining was not within the Act's scope. The court was forced to patch together disparate elements to support that result. Statutory construction based on such a selective and arbitrary review of the legislative history drains the Fair Housing Act of much of its force and effectiveness.

### C. Previous Case Law: Analytical Myopia

*Mackey* unequivocally rejected *Dunn* as a basis for interpreting the Fair Housing Act to prohibit insurance redlining.<sup>236</sup> *Mackey* blithely brushed aside the case upon which *Dunn* rested much of its analytical framework, *Laufman v. Oakley Building & Loan Company*,<sup>237</sup> and declared that *Dunn* itself could hardly be considered an authoritative expression of the current state of the law.<sup>238</sup>

The *Mackey* court ruled that *Laufman's* holding that section 3604(a) impliedly prohibits mortgage redlining was unnecessary to its decision because section 3605 explicitly states such a prohibition.<sup>239</sup> *Mackey* viewed *Lauf-*

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230. See Badain, *supra* note 2, at 4-19. See also DeWolfe, Squires & DeWolfe, *supra* note 40, at 316-21.

231. Badain, *supra* note 2, at 34. Because redlining affects urban areas with high concentrations of minorities, an argument can be made that this impact amounts to de facto discrimination. *Id.* at 34-37.

232. 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale). Redlining frustrates the achievement of this goal. Badain, *supra* note 2, at 68.

233. *Mackey*, 724 F.2d at 424.

234. Badain, *supra* note 2, at 2.

235. *Id.* at 36-37.

236. *Mackey*, 724 F.2d at 424.

237. 408 F. Supp. 489 (S.D. Ohio 1976).

238. *Mackey*, 724 F.2d at 424.

239. *Id.* The court states: "That holding was clearly unnecessary to the court's decision, for the discrimination in financing was clearly within the explicit prohibition of [§ 3605]." *Id.*

*man* as an overly broad and factually distinguishable decision. Because of *Dunn*'s reliance on *Laufman*, the *Mackey* court found *Dunn* unpersuasive.<sup>240</sup>

Here again, however, *Mackey* suffers from analytical myopia. Rather than being an exercise in judicial bootstrapping, *Laufman*'s construction of section 3604(a) was well-founded.<sup>241</sup> Turning aside the repeated requests of the defendants in that case to construe the section narrowly, the *Laufman* court held that the section applied to much more than the mere words in its title—"Discrimination in the sale or rental of housing."<sup>242</sup> The district court in *Laufman* cited several cases in which the section was held to forbid a disparate array of practices.<sup>243</sup> In light of this judicial history, the court rejected the defendant's argument that section 3604 applied solely to discrimination in the sale or rental of housing.<sup>244</sup> In sum, *Mackey* failed to consider that the *Laufman* court "view[ed] sections 3604 and 3605 as being collateral provisions entitled to great weight."<sup>245</sup>

Further, the Fourth Circuit was deaf to the Supreme Court's admonition that the Act be given "a generous construction."<sup>246</sup> Instead, it did precisely the opposite. Both the *Laufman* and *Dunn* courts were cognizant of other constructions courts had given the disputed sections.<sup>247</sup> Both emphasized the wide variety of factual circumstances among those cases, and incorporated the flexibility shown by other courts when construing the Act.<sup>248</sup> The complete failure of the *Mackey* court to acknowledge this flexibility is striking. Indeed, the avoidance of prior case law interpreting the Act undermines the authority of this decision. By failing either to distinguish or dispute

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240. *Id.* "The conclusion in *Laufman* that discrimination in financing is impliedly prohibited by [§ 3604] lends little support to *Dunn*'s holding that discrimination in the provision of insurance is also impliedly included." *Id.*

The court ignores the precedential value of multistep title VIII arguments. See *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978), where the court used a multistep analysis in forbidding the use of racially discriminatory appraisal standards. 442 F. Supp. at 1079. It would seem this decision provides firm precedent for the two-step analysis employed by *Dunn*. See Comment, *supra* note 2, at 478-79.

241. See *supra* notes 158-69 and accompanying text.

242. *Laufman*, 408 F. Supp. at 492.

243. See *id.* at 492-93.

244. "In view of the wide applicability of § 3604, defendants' suggestion that § 3604 should be limited to discrimination in the sale or rental of housing in some narrow sense loses much of its force." *Id.* at 493.

245. *Id.*

246. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972).

247. See *supra* notes 143-50. The conclusion reached in *Dunn* comports with traditional methods of statutory interpretation. See Comment, *supra* note 2, at 484 & n.94. *Mackey* strays far from these accepted norms.

248. See *supra* notes 143-50 and accompanying text.

those cases, *Mackey* is analytically difficult to support. *Mackey* thus stands for a judicial construction vastly out of step, in both temperament and analysis, with the majority of federal courts today.

#### VI. CONCLUSION

In *Mackey v. Nationwide Insurance Companies*, the United States Court of Appeals for the Fourth Circuit greatly restricted the statutory construction of the Fair Housing Act. By refusing to include insurance redlining within the scope of the Act, the court in effect sanctioned the continuing unavailability of housing based on discrimination. The credibility of the *Mackey* court is weakened by its result oriented approach to discovering legislative intent. By refusing to comprehend the true nature of redlining, the court misconstrued the purpose of both the Fair Housing Act and related legislation.

By steadfastly refusing to acknowledge numerous cases broadly construing the Act, and by ignoring the Supreme Court's admonition that the Act warrants a broad construction, the Fourth Circuit in *Mackey* rendered an analytically unsound decision. With a split in the circuits possible,<sup>249</sup> the Supreme Court may yet give the Act its full due by proclaiming that it prohibits insurance redlining. In so doing, the Court would give full expression to congressional intent, and would provide another step in this nation's journey toward truly fair housing.

*John Hugh Gilmore*

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249. See *supra* note 41.



