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The Passage of the Fair Housing Act of 1968: Stories to Be Told

<http://property.jotwell.com/the-passage-of-the-fair-housing-act-of-1968-stories-to-be-told/>

Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 *Harv. J. on Legis.* 247 (2016).



Shelby D. Green

The enactment of the Fair Housing Act of 1968 (“FHA”) is a story filled with intrigue — coercion, duplicity, and back-room deals. In *The Secret History of the Fair Housing Act*, Professor Jonathan Zasloff provides a riveting account of the maneuvers by the various protagonists in that story.

Some fifty years later, the plots and impacts continue to unfold. Starting with President Lyndon Johnson, who had handily pushed through the Civil Rights Act of 1964, even before his landslide election for his full term, Professor Zasloff shows how it took almost every political arrow in Johnson’s quiver to quash opposition to the FHA.

After the enactment of the Voting Rights Act of 1965, the political mood in Congress and the nation had shifted. Even as the Senate and Republican caucuses became more liberal, national attitudes toward civil rights started to sour, largely in reaction to the urban riots in 1966 and 1967. Some objected that fair housing legislation was an unconstitutional expansion of federal power over the states. Some feared that it would “quite literally hit them where they lived.” (P. 264.)

These worries underlie the persistent, yet questionable claims that Congress designed the FHA to mollify southern legislators and appease those opposed to any broadening of civil rights; that it was enacted only because it was without meaning and largely symbolic, toothless in its enforcement anatomy. Indeed, it has been blamed by some for stalling the cause of fair housing by sending “the premature message that the problems had been solved.” (P. 248.)

Professor Zasloff aims to debunk these claims, instead showing that the FHA has muscle. Even though the Department of Housing and Urban Development (“HUD”) was denied the power to bring civil enforcement suits, the Attorney General could, and the FHA conferred upon HUD the power to regulate financial institutions involved in housing as well as issue regulations on the meaning and definitions of the Act, making private litigation easier. That HUD did not always employ these powers in the furtherance of fair housing, even itself committing acts of intentional discrimination in housing funding, was not because the FHA was lacking.

If nothing else, Professor Zasloff maintains, the legislation served to change the behavior of the would-be racist landlord. It changed the social meaning of housing discrimination; it was no longer disloyalty to the white community to rent or sell to blacks, but simply law-abiding behavior. He backs up this assertion with statistics and demographics showing that housing patterns, while not entirely free of segregation, have nonetheless

improved since enactment.

Professor Zasloff, however, does not remark on what remains a seemingly intractable problem: cases where an intent to discriminate is not apparent, where housing discrimination occurs in different guises, subtle and camouflaged in ostensibly neutral legislative language, governmental policy, and private practices – such as exclusionary zoning, redlining in lending and casualty insurance, and the refusal to accept housing vouchers.

While the circuit courts had been largely in accord on the question of whether the FHA also covers denial of housing opportunities by disparate impact, it took three certiorari petitions, two of which were dismissed after the cases settled, before the Supreme Court affirmed the disparate impact theory in *Texas Dep't of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). In doing so, the Court looked to the legislative history to discern the broad purposes of the FHA — “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601.

As with the Civil Rights Act of 1866, the FHA was passed pursuant to congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery. In construing the former statute in the same year the FHA was enacted, the Supreme Court declared that “[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.” *Jones v. Mayer Co.*, 392 U.S. 409, 442-43 (1968). Still, it was not until 2013 that HUD issued regulations on the disparate impact theory. See *Implementation of the Fair Housing Act's Discriminatory Effects Standard*. 24 C.F.R. § 100.500.

But how much of the delays by HUD and debate about the alternative theory for combatting discrimination by proving disparate impact – adopted by the Court in 2015 as informed by an understanding of the FHA as a broad-purpose statute – might have been avoided if the “secret history” that Professor Zasloff reveals had been known earlier? Might the courts have acted differently if they had studied the seemingly relentless obstructive maneuvers, first aimed at watering down Johnson’s proposed bill, then by blocking a vote altogether through filibuster?

Would knowledge that Senate Minority Leader Everett Dirksen’s deciding vote for cloture was in surrender to Chicago Mayor Richard Daley, who contrived to run a strong opponent against Dirksen for his Senate seat, help us to appreciate the importance of the FHA? Would knowledge of how the two exceptions (“Mrs. Murphy” renting rooms in her boarding house and owners selling their homes without use of a broker) came to be written into the act have informed the post-enactment interpretation of its breadth? In fact, Professor Zasloff recounts, at one point, as a ploy, Senator Howard H. Baker, Jr. proposed an amendment to exempt all single-family homes from the purview of the Act. If passed, that amendment would have rendered the law virtually meaningless. That it failed shows that the Senators were determined to enact legislation that had teeth. In the end, the FHA passed the Senate by seventy-one to twenty.

Even as Professor Zasloff believes that understanding the secret history of the FHA should force us to look for other causes of segregated housing patterns in the United States, it also remains unknown whether the courts would have taken greater liberties in the name of interpretation if they had been aware of the FHA’s contentious origins.

Recognizing the perhaps subtle difference between legislative history (committee reports and comments made at hearings) and the history of the legislation (the back-room maneuverings), the story of the enactment of the FHA is yet illuminating, helping either to orient or to shore up our thinking on the importance of fair housing. The secret history of the FHA should prompt us to acknowledge that any fault in achieving housing fairness does not lie in the Act.

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