

ARTICLES

THE LAST PLANK: RETHINKING PUBLIC AND PRIVATE POWER TO ADVANCE FAIR HOUSING

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INTRODUCTION

The persistence of housing discrimination more than forty years after the passage of the federal Fair Housing Act (FHA) of 1968¹ is among the most intractable civil rights puzzle. For the most part, this puzzle is not doctrinal: the Supreme Court has interpreted the FHA only a handful of times over the last two decades—a marked contrast to frequent doctrinal contestations over the statutory scope and constitutionality of federal laws governing employment discrimination and voting rights.² Instead, the central puzzle is the inefficacy of the FHA’s enforcement regime given that, in formal terms, the regime is the strongest of any civil rights statute.³ Repeated studies document high levels of racial discrimination particularly in the rental market, and particularly against African Americans and people with dark skin.⁴ If the fundamental question of the current post-civil rights era

* Associate Professor of Law, Columbia Law School. For helpful conversations and for suggestions on earlier versions of this paper, I am grateful to Michelle Adams, Richard Briffault, David Engstrom, Katherine Franke, Gillian Metzger, Nathaniel Persily, John Witt, Susan Sturm, and participants at faculty workshops at Columbia Law School. All errors and omissions are my own. I am also thankful to Jennifer Greene, Diarra Guthrie, Joshua Hochman, Tarek Ismail, Jessica Leinwand, Temilola Sobowale, and Jennifer Wertkin of the Columbia Law Library for wonderful research assistance.

1 Fair Housing Act, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601 *et seq.* (2006)).

2 The Supreme Court has decided only four cases interpreting the FHA since 1988, most recently in *Meyer v. Holley*, 537 U.S. 280 (2003). By contrast, over that same time period the Court has entertained more than thirty cases interpreting provisions of Title VII of the 1964 Civil Rights Act. *See, e.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009) (holding that the city of New Haven’s decision to reject firefighters’ promotion test results to avoid disparate impact liability violated Title VII of the Civil Rights Act of 1964).

3 *See* text accompanying notes 79–83 *infra* (describing strengthening of the FHA in 1988).

4 *See* WILLIAM APGAR, RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY 23 (2004), available at <http://www.jchs.harvard.edu/publications/markets/w04-11.pdf> (noting existence of housing discrimination in the rental market); MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I

is why racial inequality persists despite federal civil rights laws and positive changes in popular attitudes and norms around race,⁵ the case of housing discrimination is both simpler and more complex than in other areas of civil rights law. The question in housing is not simply the emergence of more subtle, nuanced forms of “second-generation” discrimination.⁶ Instead, what is striking about housing has been the stickiness of quite ordinary forms of discrimination: refusals to rent, sell or make properties available to blacks on the same basis as whites.⁷ Data on housing discrimination reveals some improvement since the passage of the FHA, but rental discrimination and steering have endured at high levels.⁸

These dismal statistics lead fair housing commentators to question the essential power and value of the FHA’s enforcement system, and of law’s capacity to remedy housing discrimination. Commentators contrast the marked failure of the FHA with the relative success of the 1964 Civil Rights Act (the FHA’s watershed statutory predecessor)⁹ in eradicating intentional discrimination in public accommodations and employment.¹⁰ The FHA, according to one prominent commentator,

HDS 2000, at i–iv (2002), available at http://www.huduser.org/publications/pdf/phaseI_report.pdf (finding that African Americans and Hispanics face discrimination when they search for rental housing in metropolitan markets nationwide); see also Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 506–07 (2007) (noting that housing, unlike employment, still suffers from “first generation” problems of “blatant racial discrimination”).

5 See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 3 (1987) (reflecting on how racial inequalities still persist and suggesting potential remedies for them); RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 170–71 (2005) (documenting disillusion by many civil rights advocates and commentators with civil rights laws and institutions, and arguing that civil rights are a “limited mechanism” for social justice).

6 See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–63 (2001) (providing a framework for addressing “second generation” employment discrimination: workplace structures and interactions that, over time, exclude nondominant groups); see also Schwemm, *supra* note 4, at 506–07 (describing housing as still dominated by “first generation” questions).

7 See *infra* text accompanying notes 40–44.

8 See *infra* note 42 and accompanying text.

9 See STEVEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 4 (1995) (describing the 1964 Civil Rights Act as a “watershed” moment in American history). See generally WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7 (2010) (describing the 1964 Civil Rights Act as a “superstatute”: a law which over time instantiates public values and establishes new constitutional norms).

10 See Schwemm, *supra* note 4, at 459–60. (“The continuing high degree of noncompliance with the FHA stands in sharp contrast to the experience in other areas of American life governed by federal civil rights laws.”); see also Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 905 (2005) (noting the particularly “intractable” nature of housing discrimination).

has proven to be a “failed treatment,” defying the primary assumption of the civil rights enforcement model that litigation will deter discrimination.¹¹ Commentators despair that housing is in essential ways “different from other civil rights issues”¹²: the one area of civil rights in which the possibility of change “is viewed as most remote.”¹³

This Article contends that this despair may rest on overly narrow conceptions of the FHA’s enforcement power. The governing approach to improving FHA enforcement involves strengthening the capacity of the federal administrative regime to prosecute and resolve claims and of the private bar to conduct fair housing litigation. Improving public and private capacity to resolve discrimination claims was the theory driving Congress’s Fair Housing Amendments Act of 1988,¹⁴ and close observers of the system’s post-1988 failures have argued for a range of additional statutory and policy changes to improve this enforcement scheme.¹⁵

The FHA, however, also provides an additional mechanism for promoting fair housing, focused not on the resolution of individual discrimination claims, but which requires federal agencies to use their powers “affirmatively to further” fair housing (AFFH).¹⁶ This provision provides a potentially important route for achieving the statute’s goals of promoting residential choice and integration.¹⁷ My

11 Schwemm, *supra* note 4, at 456.

12 Rubinowitz & Alsheik, *supra* note 10, at 907.

13 John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998); *see also* Charles M. Lamb, *Equal Housing Opportunity*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 148, 148 (Charles S. Bullock III & Charles M. Lamb eds., 1984) (describing housing as the civil rights area most resistant to change); PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 219 (2003) (arguing that court efforts to integrate housing have “borne little fruit”).

14 *See* Fair Housing Amendments Act (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601 *et seq.* (2006)); *see also infra* text accompanying notes 68–70.

15 *See, e.g.*, Michael H. Schill, *Implementing the Federal Fair Housing Act: The Adjudication of Complaints*, in FRAGILE RIGHTS WITHIN CITIES 143, 168–69 (John Goering ed., 2007) (arguing that HUD’s administrative enforcement scheme should place greater focus on pattern and practice cases); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1458 (1998) (suggesting that treble damages should be awarded in successful housing discrimination cases to create stronger incentives for private litigation and deter bad actors).

16 The FHA requires the Secretary of HUD and executive departments and agencies to administer their “programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing].” Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2006). This duty also extends to federal grantees. *Id.* at § 5309(b).

17 As much as congressional intent can be discerned, support for these purposes is found in the text of the Act. *See, e.g.*, Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968) (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”). Support is also found in the legislative

contention is not that the FHA's antidiscrimination enforcement regime is unimportant or unsalvageable, but that individualized enforcement is too limited a mechanism to achieve fair housing. Limited, I want to suggest, because of the practical impediments that plague fair housing's enforcement regime. But also because civil rights gains—including the apparent gains in employment—powerfully depend on the ability of private groups to harness a broad range of federal powers. The “affirmatively to further” provisions of the FHA give power to federal agencies to promote antidiscrimination and integration requirements, and thus extensively shape the markets that sustain discrimination as well as segregation.

This Article's central aim is to connect AFFH to contemporary discussions about the FHA's efficacy. An opening, I suggest, is provided by the recently settled case *United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County*¹⁸ in which a federal court interpreted AFFH to require the county to increase the supply of affordable housing in particular towns so as to promote racial integration, affirmatively market housing to minority communities, and to remove a range of impediments to providing minorities access to housing. Already being deemed a landmark case by fair housing advocates and federal officials,¹⁹ the case presents one route to unleashing the power of the AFFH—through use of the False Claims Act—and has prompted the federal government to initiate efforts to reform its regulations to enforce AFFH more expansively.²⁰ This case is important, I argue, not only for its specific doctrinal in-

history. See, e.g., 114 CONG. REC. 3422 (1968) (documenting Senator Mondale's statement that the goal of the FHA was to promote “an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves”); 114 CONG. REC. 9591 (1968) (documenting Congressman Ryan's statement that the FHA would advance “the aim of an integrated society”); 114 CONG. REC. 9559 (1968) (recording Congressman Celler's statement that the Act would help eliminate segregated housing and ghettos). The Supreme Court has recognized the FHA's goal of racial integration. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Senator Mondale as supporting the claim that Title VIII was intended to replace segregated ghettos with integrated communities).

¹⁸ 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

¹⁹ See Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES, Aug. 11, 2009, at A1, available at <http://www.nytimes.com/2009/08/11/nyregion/11settle.html> (quoting HUD official as saying, “[u]ntil now we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire”); see also Michael Allen, *No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs*, 78 PLAN. COMM'RS J. 16, 16 (2010) (describing the Westchester litigation as “ground-breaking”); *Westchester County Fair Housing Update*, OAK PARK REGIONAL HOUSING CENTER (Feb. 27, 2010), <http://www.oprhc.org/2010/02/westchester-county-fair-housing-case-update> (describing landmark nature of the settlement).

²⁰ See *infra* text accompanying notes 170, 189.

novations but because it centers on deploying federal administrative power—including the coercive power of conditioned spending—to advance housing choice and integration.

This Article proceeds in four parts. Part I argues that housing has a set of enduring features that challenge the fundamental assumptions of antidiscrimination enforcement. These challenges include the difficulty of identifying victims of housing discrimination and the decentralized nature of the housing market, which render it hard to generate sufficient penalties to alter the behavior of housing market players. Part II connects these practical problems to the design and function of fair housing's federal statutory enforcement regime. As the last of the great civil rights laws of the 1960s—the “last plank” of the civil rights movement²¹—the FHA of 1968 had weak state enforcement mechanisms typical of other civil rights laws, but also unusually weak private enforcement mechanisms.²² By many accounts, even after the significant reforms of the 1988 Amendments, these problems have endured.²³ Yet, this Part argues that these challenges suggest a more fundamental problem with fair housing's enforcement structure. The dominant enforcement framework in fair housing—the FHA's emphasis on complaint-driven enforcement to combat discrimination in private markets—is necessarily limited given the practical challenges in bringing claims, the political challenges in building capacity to strengthen the enforcement regime, and the profound connection between structural segregation and private market discrimination.

Part III presents the *Westchester* case as a promising attempt to strengthen the other less prominent plank of the FHA's regulatory regime, one that centers not on individualized antidiscrimination enforcement, but on harnessing state and local funding recipients to promote integration in their programs, and combat barriers to housing choice. This Part examines the contours of the decision enforcing the FHA's “affirmatively to further” provisions using the False Claims Act, and situates the case within a broader effort in courts and administrative agencies to give meaning to the AFFH provisions.

Part IV examines the implications of the *Westchester* case for rethinking how the current federal fair housing enforcement regime employs both public and private power. I argue that the strategy to

21 See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 3 (2004); see also Lamb, *supra* note 13, at 148 (describing housing as the “last major frontier in civil rights”).

22 See *infra* text and accompanying notes 64–66 or 75–85.

23 See *infra* text and accompanying notes 87.

enforce AFFH announces a public-private machinery centered not just on individual, antidiscrimination enforcement, but on harnessing a broad range of federal administrative tools including conditioned spending and formal and informal regulation to engage states and localities to promote fair housing. “Harnessing,” I argue, because these strategies encompass not just court enforcement, but advocacy at the federal, state and local levels. Finally, I show that emphasis on the interconnectedness of the public and private aspects of the fair housing problem has power to elevate the visibility of fair housing and—by bringing in the state’s role—to reframe contestations that often now center on questions of individual attitudes and choice.

I. HOUSING’S ENDURING CHALLENGES

A central theme in contemporary civil rights commentary is the disjuncture between the robust equal rights principles announced in federal civil rights laws, and the enduring nature of racial inequality.²⁴ This theme seems especially dominant in fair housing. Fair housing commentators lament the failures of the federal Fair Housing Act of 1968²⁵ to make a greater dent in combating housing discrimination or to better promote integrated housing, despite the considerable strengthening of the Act in 1988.²⁶ And, commentators argue, the FHA has proven to be a less successful mechanism for remedying housing discrimination than Title VII of the Civil Rights Act of 1964 has in addressing employment discrimination.²⁷

As this Part shows, it is less than clear whether the civil rights gains in employment are greater than those in housing. What seems more likely is that fair housing enforcement poses a set of practical and political challenges for a complaint-driven civil rights enforcement model of which Title VII stands as the paradigm.²⁸

This Part opens by presenting the data on the persistence of discrimination in private housing markets. This Part then explores a set

²⁴ See *supra* note 5.

²⁵ Fair Housing Act, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601 *et seq.* (2006)).

²⁶ See, e.g., Schwemm, *supra* note 4, at 455–56 (arguing that despite the supposed “cure” of the 1988 amendments to the FHA, something new must be done).

²⁷ *Id.* at 459–60 (noting that “[t]he continuing high degree of noncompliance with FHA stands in sharp contrast to” Title VII of the Civil Rights Act of 1964); Lamb, *supra* note 13, at 148 (identifying the same).

²⁸ See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3 (2010) (stating that employment discrimination lawsuits reflect a legislative choice “to rely upon private litigation in statutory implementation”); *id.* at 117–19 (detailing legislative history behind the emergence of Title VII’s enforcement scheme).

of practical problems in addressing fair housing through individual complaints, which more broadly have led commentators to question the efficacy of the civil rights enforcement model in tackling housing discrimination.

A. Persistence of Racial Discrimination

Racial discrimination is a key feature of the American housing market with only modest improvements over the decades since the enactment of the FHA of 1968. Measuring racial discrimination in housing is complex methodologically, but a leading method involves estimating rates of discrimination based on tests pairing white and minority individuals seeking to buy or rent homes.²⁹ The most comprehensive tests of U.S. metropolitan markets reveal that blacks and Latinos seeking housing encounter discrimination nearly a quarter of the time.³⁰

No doubt, even this consistently high rate of racial discrimination reflects some progress. The most comprehensive audit of housing discrimination, conducted by the Department of Housing and Urban Development (HUD) in 2000, found an approximately 25% decline in overall discrimination for blacks and Hispanics between 1988 and 2000.³¹ Yet steering—the realtor practice of directing housing seekers to particular neighborhoods based on race³²—increased over that

²⁹ See, e.g., JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 20 (1995) (detailing audit and testing methodology).

³⁰ See MARGERY AUSTIN TURNER ET AL., *supra* note 4, at i-iv (reporting results from a national paired-testing Housing Discrimination Study conducted in 2000 by HUD); *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study (HDS)*, HUD.GOV (Mar. 30, 2005), <http://www.huduser.org/publications/hsgfin/hds.html> (results of study that measured rates of discrimination in housing markets). As an example, a twelve city testing project carried out in 2003 found that, in 20% of the real estate tests, African American or Latino testers were denied service by real estate agents or provided limited service; falsely told that a unit was not available; quoted a higher amount; or directed to housing in neighborhoods with higher minority concentration. See NATIONAL FAIR HOUSING ALLIANCE (NFHA), DR. KING'S DREAM DENIED: FORTY YEARS OF FAILED FEDERAL ENFORCEMENT 28–29 (2008) (discussing audit study conducted by the NFHA in 2003).

³¹ See Margery Austin Turner et al., *Housing Discrimination in Metropolitan America*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 39, 47–49 (providing evidence of discrimination declines in rental and sales markets); Julia Reade, *Testing for Housing Discrimination: Findings from a HUD Study of Real Estate Agents*, COMMUNITIES. & BANKING, Spring 2003, at 10, 11 available at <http://www.bos.frb.org/commdev/c&b/2003/spring/testing.pdf> (finding significant improvements over an earlier study).

³² See George Galster, *Racial Steering by Real Estate Agents: Mechanisms and Motives*, 19 REV. OF BLACK POL. ECON. 39, 39–40 (1990) (defining racial steering as “behaviors by a real estate agent vis-à-vis a client that tend to direct the client toward particular neighborhoods and/or away from others”).

same time period.³³ Moreover, in rental markets—where one-third of the nation’s households and half of minority households reside³⁴—rates of racial discrimination have remained consistently high over the past three decades, with blacks experiencing discrimination nearly twenty-two percent of the time.³⁵ Indeed, a recent analysis of the data led housing expert Robert Schwemm to conclude that rental discrimination is “uniquely intractable.”³⁶

It is this persistent level of racial discrimination in housing that leads commentators to compare housing unfavorably with employment. The housing market is characterized by higher rates of discrimination than in employment, the testing data appears to suggest, and is still largely plagued with issues of explicit bias and exclusion reminiscent of the pre-civil rights era.³⁷ That housing discrimination is often executed in a friendly manner, “with a handshake and a smile,” is particular baffling: discriminating landlords and real-estate agents often direct black testers to places where they can find housing, kindly offering to help them.³⁸

In truth, however, the level of housing discrimination and the mechanisms that sustain it are difficult to compare to other civil rights areas, for the simple (and ironic) reason that discrimination may be better documented in housing than in other areas of public and private life. Estimates of the extent of housing discrimination come from periodic testing or audit studies.³⁹ Researchers and public

³³ See Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 393–94 (2004) (noting that between 1989 and 2000, gross incidence of steering based on neighborhood racial composition increased by 10%); George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS’N. 251, 260 (2005) (noting the difficulty of making intertemporal comparisons based on the data, but finding statistically significant increases in segregation steering in black/white tests). The NFHA study showed that where African Americans were actually shown units, the rate of racial steering was about 87%. See NATIONAL FAIR HOUSING ALLIANCE, *supra* note 30, at 29.

³⁴ See APGAR, *supra* note 4, at 23 (providing statistics on rental housing).

³⁵ The instance of housing discrimination against blacks fell from 26% in 1989 to 22% in 2000. See Turner et al., *supra* note 31, at 39, 47–48.

³⁶ Schwemm, *supra* note 4, at 460.

³⁷ See *id.*, at 506–07 (contending that in housing, unlike in employment, “blatant discrimination remains widespread”).

³⁸ See, e.g., Victoria A. Roberts, *With a Handshake and a Smile: The Fight to Eliminate Housing Discrimination*, 73 MICH. B.J. 276, 276–77 (1994) (noting that “because housing discrimination is often practiced with a ‘handshake and a smile,’ there is tremendous difficulty in proving discrimination”).

³⁹ These studies are called “tests” when done directly for enforcement purposes and “audit” studies when used for research as well as enforcement. See YINGER, *supra* note 29, at 20 (describing origin and use of fair housing audits). In an audit, pairs of minorities and whites seek housing from real estate agents or landlords, the purpose of which is to de-

interest groups have relied extensively on testing to measure housing discrimination in private markets since the early 1970s,⁴⁰ and since 1977 HUD has conducted periodic, comprehensive audits assessing discrimination in various U.S. housing markets.⁴¹ By contrast wide-scale testing is nonexistent in employment, consumer markets or other areas.⁴² Indeed, when in recent years social scientists began doing small paired testing initiatives in employment at the hiring stage, they found marked and consistent levels of racial discrimination.⁴³

termine levels of discrimination against minorities. *See id.* Audit teammates are made to seem comparable on all characteristics except minority status. *See id.* at 23–25. Teammates are matched on the characteristics of sex, age, and appearance; assigned similar economic and family characteristics (with a slightly higher income assigned to the minority homeseeker); trained to behave comparably; and, visits are timed close together. *See id.* at 23–25 (describing the four tools of audit design, “matching, assignment, training, and timing”).

40 Researchers conducted small-scale audits in California in 1955 and 1971 and a larger audit study in Detroit from 1974 to 1975. *See id.* at 20–21. By the 1970s, fair housing testing was a central tool in the enforcement arsenal of fair housing groups. *See id.* (describing the development of fair housing auditing process).

41 HUD gave its imprimatur to the audit strategy in 1977, hiring researchers to conduct a comprehensive series of tests known as the Housing Market Practices Survey (HMPS). *See id.* at 20. The 1977 HMPS involved more than three thousand audits in forty metropolitan areas to determine levels of discrimination against blacks, in sales and rental markets, as well as a small pilot test of discrimination against Latinos in Dallas. *Id.* Researchers under contract from HUD uncovered substantial discrimination against blacks. *Id.* A subsequent study in Dallas found high-levels of discrimination against Latinos, particularly those with dark skin. *Id.* In 1989, HUD began its second major national study, including both blacks and Latinos. *See* Turner et al., *supra* note 31, at 40. From 2000 to 2003, HUD conducted its most recent study. *Id.*

42 *See* Devah Pager, *Is Racial Discrimination A Thing of the Past?*, AAPSS.ORG (Jan. 11, 2007), <http://aapss.org/index.cfm?catID=11> (“Unlike the arena of housing discrimination, in which dozens of federally sponsored testing studies have taken place, the use of the audit methodology for both research and litigation in the area of employment discrimination has thus far remained negligible.”). Ian Ayres has conducted compelling tests in a variety of consumer markets. *See generally* IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 397 (2001) (“Government should more systemically test for disparate treatment across a wide variety of markets.”).

43 *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 3 (MIT Dep’t of Econ., Working Paper No. 03-22, 2003) (finding that candidates with white identified names were more than 50% likely to get a positive response from an employer than similarly qualified employers with “black” names); Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination*, 609 ANNALS AM. ACAD. 104, 114 (2007), available at http://www.princeton.edu/~pager/annals_pager.pdf (surveying audit studies and concluding that “race has large effects on employment opportunities, with a black job seeker anywhere between 50 and 500 percent less likely to be considered by employers as an equally qualified white job applicant”); Devah Pager & Bruce Western, *Discrimination in Low-Wage Labor Markets: Evidence From an Experimental Audit Study in New York City* 2 (2005) (submission to the Population Association of America Annual Meetings), available at

Still, while the testing data does little to prove that housing is worse than other areas, it does reveal the extent and persistence of housing discrimination. Data on racial segregation in housing—an indirect measure of housing discrimination⁴⁴—similarly reveals only modest declines in segregation.⁴⁵ Data at the neighborhood level reveals an increase in integrated neighborhoods, though most of that increase is the result of the sharing of neighborhoods by whites, Hispanic and nonblack minorities.⁴⁶ The empirical data on segregation reveals the enduring nature of black-white separation in housing; blacks remain highly segregated from whites and more segregated than other groups.⁴⁷ It also suggests the singularity of housing in the degree of separation, and the role this separation plays in driving segregation in other sectors such as in education.⁴⁸

<http://paa2005.princeton.edu/download.aspx?submissionId=50874> (finding whites consistently favored over blacks and Latinos in low-wage job markets).

44 Studies have shown that housing discrimination perpetuates residential segregation. See, e.g., George Galster, *More Than Skin Deep: The Effect of Discrimination on the Extent and Pattern of Racial Residential Segregation in the United States*, in HOUSING DESEGREGATION AND FEDERAL POLICY 119, 133 (John M. Goering ed., 1986) (finding that housing discrimination was “likely responsible for a significant portion of the extent and pattern of racial segregation observed in metropolitan areas where it was present”).

45 This study involves a spatial measure of segregation known as dissimilarity and isolation, which measures “the percentage of a group’s population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall.” John Iceland, *Racial and Ethnic Segregation and the Role of Socioeconomic Status, 1980–2000*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 107, 109.

46 See Ingrid Gould Ellen, *How Integrated Did We Become During the 1990s?*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 123, 131.

47 See Iceland, *supra* note 45, at 117.

48 Many researchers understand residential segregation as the linchpin for understanding a range of contemporary racial disparities, including the problem of persistent poverty which is particularly acute for African Americans (the group most likely to live in neighborhoods of high-poverty concentration). Much research suggests that neighborhoods of concentrated poverty can hamper social mobility and economic advancement, compounding the effects of individual poverty status. Neighborhoods of intense racial segregation and poverty concentration tend to have lower quality schools and are isolated from valuable employment opportunities as well as other resources that facilitate mobility. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 149–53 (1993) (discussing the connection between residential segregation and socioeconomic status); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 19–24 (1996) (considering the problems of “poor, segregated neighborhoods in which a substantial majority of the individual adults are either unemployed or have dropped out of the labor force altogether”); Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 164, 164 (John Charles Boger & Gary Orfield eds., 2005) (noting that “segregated neighborhoods often create segregated schools,” while ultimately illustrating the interactive effect between school and neighborhood segregation).

B. The Challenges of Individual Enforcement

Remedying what the literature describes as persistent and widespread housing discrimination poses challenges to the canonical civil rights enforcement regime, which depends largely on individuals to bring complaints, and courts—and in the case of housing, administrative agencies—to award damages and injunctive relief against discriminatory actors.⁴⁹ The FHA outlaws a range of discriminatory practices including refusals to rent, sell and/or otherwise make a unit unavailable,⁵⁰ and allows individuals to bring litigation in court and seek a broad range of remedies.⁵¹ As a result of the 1988 Amendments in particular, the FHA also provides expedited administrative complaint procedures, allowing aggrieved persons to file complaints with HUD, and granting HUD authority to award damages, injunctive relief and civil penalties in meritorious cases.⁵²

The basic premise of the regime is that through threat of enforcement and penalties, property owners and real estate agents will lessen discriminatory behavior.⁵³ While it may be too much to say that

⁴⁹ See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence From the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1 (2009) (discussing litigation enforcement models under Title VII); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 783–84 (2011) (discussing congressionally created incentives to sue as a mechanism for furthering statutory goals).

⁵⁰ The FHA makes it unlawful 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, familial status, or national origin.” 42 U.S.C. § 3604(a) (2006). The Act also bans discrimination in the terms, conditions or privileges of the sale or rental of a dwelling (§ 3604(c), (f)(2)), and a range of discriminatory practices including discriminatory provision of services and facilities (§ 3604(b)), discriminatory advertising (§ 3604(d)), blockbusting (§ 3604(e)), and discriminatory financing (§ 3605).

⁵¹ See 42 U.S.C. § 3613 (2006) (authorizing aggrieved persons to bring suits in federal or state court without filing an administrative complaint).

⁵² See 42 U.S.C. § 3610 (2006) (authorizing aggrieved persons to file a complaint with HUD). The Act requires HUD to refer complaints to state or local agencies with “substantially equivalent” fair housing laws. *Id.* The administrative procedure allows aggrieved persons to seek an administrative hearing with HUD, and allows either the aggrieved person or the defendant to elect instead federal court in which case the Department of Justice represents the complainant. *Id.* at § 3612. The Act also provides a third enforcement mechanism which authorizes the Attorney General to bring a federal suit in “pattern or practice” cases or where a complaint raises an issue of “general public importance.” *Id.* at § 3614.

⁵³ This was the essential premise of the 1988 Amendments detailed in Part III. See H.R. REP. NO. 100-711, at 16 (1958), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2177 (declaring that the 1968 Act lacked an effective enforcement mechanism); see also Schill, *supra* note 15, at 168–69 (“The Fair Housing Amendments Act was adopted by Congress in 1988 primarily to provide an effective and efficient way for people who felt that they had been unlawfully discriminated against to vindicate their rights.”). That greater litigation will induce com-

housing discrimination is impervious to these enforcement attempts, systemic difficulties attend this enforcement approach.

First is the pervasive disconnect between the extent of housing discrimination as reported by audit studies and the number of housing discrimination complaints.⁵⁴ By all estimates, only a small number of potential victims of housing discrimination make use of the enforcement system. Potential complainants might not know they have been victims of discrimination.⁵⁵ More troublingly, even those who believe they have been victimized by discrimination are unlikely to take legal or administrative action because they fear the time and money needed to resolve claims, and lack faith that the resolution will prove favorable.⁵⁶ A related explanation may be that, particularly in the rental market, individuals have little investment in a specific choice of housing: if they eventually find some housing, they will have little incentive to complain. With regard both to the FHA's administrative enforcement system and private court actions, few housing cases are brought and few are successful relative to the high levels of market discrimination.⁵⁷

pliance often is a key assumption in congressional choices to encourage greater private litigation. See Lemos, *supra* note 49, at 794–95 (discussing this assumption, but arguing that the premises that underlie it are questionable).

54 See Margery Austin Turner & Carla Herbig, *Closing Doors on Americans' Housing Choices*, URBAN INSTITUTE (Sept. 18, 2005), available at www.urban.org/url.cfm?ID=900853 (noting that housing discrimination is often “so subtle that victims don’t even recognize it”); John Goering, *An Overview of Key Issues in the Field of Fair Housing Research*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, 19, 32–33 (discussing the gap between the frequency of housing discrimination and complaints about it).

55 See Goering, *supra* note 54, at 28 (noting the varying degrees of knowledge Americans have about housing discrimination prohibitions).

56 This is based on housing surveys of those who have been victimized by housing discrimination. See, e.g., MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS (2002) at 27–28, available at <http://www.huduser.org/publications/fairhsg/hmwk.html> (finding that 83% of those surveyed said they would “do nothing about” the discrimination, while only 16% said they would take action); Goering, *supra* note 54, at 33 (reporting that only 5% of people who experienced housing discrimination indicated they would file a complaint with an agency or attorney). This data comes from two national cross-sectional surveys, sponsored by HUD in 2001 and 2005 to discover the fair housing attitudes of the American public. For the most part individuals knew where to turn for help, but were likely deterred by often erroneous conceptions about the costs of filing a legal or administrative complaint and the perceived length of time for resolving such complaints. *Id.*

57 See Schill, *supra* note 15, at 169 (finding that between 1989 and 2003 very few cases filed with HUD received favorable findings on their merits for plaintiff, and that for cases settled by HUD, and adjudicated either by HUD's Administrative Law Judges or by the DOJ, damages were low relative to private litigation). Note that this disconnect between the prevalence of discrimination and the rate of filing exists in employment as well, but the overall high levels of Title VII litigation make claims of underenforcement less resonant. Compare Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media*

Second, the current system struggles to generate remedies sufficient to force antidiscrimination reform by the real estate industry. The fragmented nature of the real estate market, with its multitude of real estate agents, individual homeowners, and small property managers,⁵⁸ means that thwarting discrimination requires a significant threat of complaints and substantial penalties for discrimination.⁵⁹ But the fair housing enforcement system generates neither.⁶⁰ As noted above, complaints are low, and, as several studies reveal, damages in housing cases are on average too inconsistent and generally too low to alter the behavior of potential discriminators.⁶¹

In short, if the central assumption of a federal antidiscrimination enforcement regime is that redressing complaints will remedy market discrimination, this assumption is challenged by the structure of housing markets, and the difficulties in incentivizing individuals to bring complaints.

and Public Perceptions of Discrimination Litigation, 15 STAN. L. & POL'Y REV. 237, 241 (2004) (noting that one third of those who reported unfair treatment in employment took no action, and "only 3% reported suing their employer"), with Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 114–16 (2009) (showing that 23,722 employment discrimination cases were terminated in federal court in 1998 and that 70% of those cases raised Title VII claims).

- 58 See, e.g., WILLIAM APGAR & SHEKAR NARASIMHAN, ENHANCING ACCESS TO CAPITAL FOR SMALL UNSUBSIDIZED MULTIFAMILY RENTAL PROPERTIES 3 (2007), available at http://www.jchs.harvard.edu/publications/rental/revisiting_rental_symposium/papers/rr07-8_apgar.pdf (noting that majority of unsubsidized rental housing consists of structures with under fifty units); APGAR, *supra* note 4, at 26 (noting that "[f]or many property owners, operating rental housing is a part time business"). Some of the industry fragmentation may be changing, particularly with regard to rental housing. Larger apartment management companies form an increasing share of the rental market. See *id.* at 22 ("[N]early 2.7 million new multifamily rental units were built between 1992 and 2001."). It remains to be seen how these changes will affect private market discrimination. Larger builders often have formalized mechanisms for advertising vacancies and receiving applications which might leave less discretion to individual property managers to discriminate on the basis of race, ethnicity or other factors. In addition, as the share of large property owners increases, the rental market industry may be more sensitive to damage remedies in litigation.
- 59 See Schill, *supra* note 15, at 169 ("If penalties are low, then enforcement efforts must be intensive so that most lawbreakers will be identified and punished. Alternatively, if intensive identification and prosecution of violators of the law is infeasible, then deterrence would require high penalties for those relatively few who are caught.")
- 60 See *id.* (noting that "very few meritorious cases are actually brought (when measured against baseline estimates of the amount of discrimination in the housing market) and the average penalty is exceedingly low").
- 61 See *id.* (noting that damages are modest in settled cases, as well as cases adjudicated by HUD ALJs and in federal court).

II. THE LIMITS OF INDIVIDUAL ENFORCEMENT

Reformers have long perceived these problems in fair housing.⁶² The key question is why the problems identified in Part I continue to exist despite the considerable strengthening of the enforcement regime in 1988. On one level this too is not difficult to answer: as a matter of both design and practical function neither the Act's private enforcement apparatus nor its administrative enforcement mechanisms are sufficiently robust or efficacious. The solution then should be to strengthen the capacity of the enforcement apparatus by increasing damages and penalties, for instance, or deploying more testing. Yet, as I argue below, the persistent problems in the enforcement regime push us to ask whether the individualized antidiscrimination enforcement regime of fair housing will ever be sufficient. First, because the dominant enforcement conception depends heavily on requiring private individuals to self-identify as victims of discrimination and bring complaints.⁶³ Second—and more fundamentally—because framing the problem of housing merely in terms of discrimination is too narrow. This framing leaves out the state as a market player and participant in creating the conditions of segregation which powerfully interact with private discrimination. In addition, in an area without large institutional players, insufficiently heeding to state actors misses opportunities to engage a set of entities—federal, state, and local government actors—that have power to shape housing patterns and promote fair housing.

This Part first explores the disjuncture between the formal strength of the regime and the reality of its weakness. It then argues for moving beyond an individualized, antidiscrimination conception of the problem to better promote both housing choice and integration.

A. *A Question of Design*

On a formal level, the FHA's enforcement regime is quite strong—its individual enforcement remedies are comparable to employment in allowing compensatory and punitive damages and injunctive relief. The FHA also has an administrative enforcement re-

⁶² See, e.g., YINGER, *supra* note 29, 188–90 (noting weaknesses in the initial FHA).

⁶³ Not all aspects of the FHA's enforcement system require individuals to file complaints. See 42 U.S.C. § 3614 (2006) (allowing HUD to initiate complaints). But as a practical matter, individual complaints remain the prime mechanism for enforcement.

gime that is stronger than in employment, one specifically intended to surmount the barriers in bringing complaints.

This current framework represents an evolution in the FHA. At its inception, the FHA was quite weak, even as compared to other civil rights statutes. When Congress, in the wake of uprisings following the assassination of Martin Luther King, enacted the FHA of 1968,⁶⁴ it was no secret that the Act's enforcement measures were lacking.⁶⁵ The Act instantiated the first federal prohibition against housing discrimination on the basis of race, color, religion and national origin, outlawing such discrimination in sales, rentals and a variety of other real estate practices.⁶⁶ Though the Act announced the ambitious goal of achieving "fair housing throughout the United States"⁶⁷ both the public and the private enforcement mechanisms were weak.

This thin remedial structure was by design. Weak *public* enforcement was the central compromise that permitted passage of civil rights legislation in the 1960s. In the 1950s and 1960s, as Congress debated civil rights legislation, the civil rights leadership initially sought to create government agencies with broad authority to enforce civil rights laws.⁶⁸ Early versions of the Civil Rights Act of 1957 proposed a single agency that would enforce civil rights laws by conducting litigation in education, employment and public accommodations, but Congress declined to adopt such an approach. When Congress considered the bill that would become Title VII of the Civil Rights Act of 1964, civil rights advocates again promoted an employment/labor agency with broad authority to enforce employment discrimination laws, not primarily through court litigation but through

64 As one commentator has noted, after the uprisings following the death of Martin Luther King, "moods" in Washington—where many congressional members had resisted the FHA—"changed overnight." See GEORGE R. METCALF, *FAIR HOUSING COMES OF AGE* 85 (1988). The political pressures were such that the House and Senate did not conference the bill. *Id.* President Johnson signed it on April 9, 1968, just five days after Martin Luther King's death. *Id.*

65 See YINGER, *supra* note 29, at 189 (describing compromises necessary for passing the FHA).

66 See Fair Housing Act, Pub. L. No. 90-284, §§ 804-06, 82 Stat. 73, 83-84 (1968).

67 *Id.* § 801, 82 Stat. at 81.

68 The political science literature has well documented the general weakness of the "American state's capacity to protect civil rights." Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 *STUD. AM. POL. DEV.* 138, 138 (2002). While civil rights advocates initially favored civil rights legislation that granted the executive a strong role in enforcement, such attempts were consistently defeated by Southerners and opponents of civil rights. See *id.* at 141, 143 ("The congressional compromise over antidiscrimination policy, then, was a product of both the institutional structure of American politics and policymaking and the distinctive pattern of agreement and controversy surrounding civil rights in the 1960s.").

the use of federal administrative power. Key congressional players resisted these proposals, claiming that enlarged federal agencies would encroach on state authority.⁶⁹ In the end, the 1964 Act was passed only after a series of legislative compromises that would weaken agency enforcement power.⁷⁰ The compromise that would eventually emerge in Title VII allowed a private enforcement scheme.⁷¹

The same pattern of compromise is evident with regard to public enforcement in Title VIII. The original versions of the bill that would become the FHA of 1968 empowered the Department of Housing and Urban Development (HUD) to investigate discriminatory complaints, hold evidentiary hearings and issue enforcement orders. After several filibusters, Congress eventually stripped HUD of its power to hold hearings or to seek enforcement, allowing it only powers to conciliate claims it found meritorious.⁷² The FHA allowed HUD to refer cases to the Department of Justice (DOJ) for litigation, but only pattern or practice cases, or where the discrimination raised an issue of "general public importance."⁷³ The DOJ's power was limited to requesting injunctive relief, and thus it was not allowed to seek compensatory or punitive damages.⁷⁴

Significantly, the private enforcement scheme in housing was also weak by design, arguably weaker than in Title VII.⁷⁵ Aggrieved individuals could file FHA claims in state or federal court, but Title VII subjected these suits to a short, 180-day statute of limitations.⁷⁶ While allowing actual damages, courts were given very limited power to

69 See FARHANG, *supra* note 28, at 106–09, 113–14 (describing the weakening of the EEOC's enforcement powers).

70 See Lieberman, *supra* note 68, at 141–43 (discussing congressional compromises that limited EEOC enforcement power).

71 See FARHANG, *supra* note 28, 112–14 (explaining the emergence of private enforcement as a compromise and the weakening of EEOC's power); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 147–49 (1990) (describing compromises that famously broke the record filibuster of the 1964 legislation).

72 The FHA required HUD to investigate, pursue, or dismiss complaints of housing discrimination within thirty days of filing. If HUD found a complaint meritorious, it had no power to bring its own suits; it could only conduct a "conference, conciliation, and persuasion." Fair Housing Act, Pub. L. No. 90-284, § 810(a), 82 Stat. 73, 85 (1968). Republican Senator Everett Dirksen of Illinois, a key Republican gatekeeper, was chief in insisting on restrictive enforcement to gain his support. See METCALF, *supra* note 64, at 18.

73 See § 813(a), 82 Stat. 73, 88 (1968).

74 See *id.*

75 While Title VII did not initially permit recovery of compensatory or punitive damages, it did allow attorney's fees and the appointment of counsel. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259–62.

76 See § 812(a), 82 Stat. 73, 88 (1968).

award costs, attorney's fees, and punitive damages, thus creating disincentives for private attorneys to bring suit.⁷⁷

That this weak enforcement apparatus would produce limited fair housing enforcement cannot be surprising. Indeed, strengthening the FHA's enforcement capacity became the central occupation of fair housing reformers over the next two decades,⁷⁸ culminating eventually in the amendments in 1988.⁷⁹ These amendments lengthened the statute of limitations for private complaints, and allowed attorney's fees and punitive damages in private suits.⁸⁰ The public enforcement capacity that would emerge through these amendments is now stronger than that of the EEOC. Significantly, the legislative changes of 1988 sought to lower the barriers of formal court litigation, and create a system that surmounted the problem that victims of discrimination are often unlikely to complain. The amendments created a new administrative enforcement system to lower the burden and costs for victims of discrimination, by constructing a system that would allow victims to pursue claims before administrative law judges.⁸¹

B. *Functional Reality*

One of the chief disappointments in fair housing is that the enhanced public enforcement capacity that was the chief goal of the 1988 Act has not produced greater results. The administrative complaint system has historically been plagued by staffing problems and delays⁸² remains vastly underutilized compared to reported inci-

77 See *id.* § 812(c), 82 Stat. at 88 (capping punitive damages initially at \$1000); 114 CONG. REC. 5514–15 (1968) (documenting statement of Senator Robert C. Byrd proposing to limit the awarding of attorney's fees where the plaintiff is financially able to assume them). Senator Robert C. Byrd of West Virginia, who was opposed to the FHA, submitted the amendment and it passed on a voice veto with little discussion. See *id.* It is not clear that the Act's chief sponsors fully understood the implications of this change. See METCALF, *supra* note 64, at 5 (noting that attorney's fees limitations reduced the number of private attorneys willing to take cases).

78 See METCALF, *supra* note 64, at 22 (detailing advocacy and legislative efforts, beginning in the mid-1970s, to strengthen the Act).

79 See Fair Housing Amendments Act (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601 *et seq.* (2006)).

80 The FHAA lengthened the statute of limitations to two years for private suits and to one year for complaints to HUD. See *id.* § 8, 102 Stat. at 1625, 1633 (1988).

81 See *id.* § 8, 102 Stat. at 1629–33. See also YINGER, *supra* note 29, at 190, 192.

82 See U.S. COMM'N ON C.R., THE FAIR HOUSING AMENDMENTS OF 1988: THE ENFORCEMENT PROCESS (1994) (analyzing the first four years of HUD enforcement and finding that HUD procedures were deficient); GENERAL ACCOUNTING OFFICE, FAIR HOUSING: OPPORTUNITIES TO IMPROVE HUD'S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS 46–49 (2004) (finding a significant increase in the number of investigations

dences of discrimination, and penalties awarded by HUD's Administrative Law Judges (ALJ) remain low compared to those awarded in private lawsuits.⁸³ Cases filed in court by HUD and by the DOJ increased after the 1988 Act, but by some analyses, this has made little dent in the rates of discrimination.⁸⁴

These data rightly lead to questioning the design and implementation of the FHA's current public enforcement scheme. Government enforcement, some have suggested, should be directed to more strategic resolution of cases, such as taking pattern and practice cases rather than relying on complaint-driven litigation.⁸⁵ Congress should transfer authority for fair housing enforcement outside of HUD to a separate agency dedicated to fair housing enforcement.⁸⁶ Even then some might argue that administrative enforcement may never prove equal to the task: government enforcement is by its nature inefficient and bureaucratic, and political incentives reward a cautious approach to enforcement, with resolution of noncontroversial cases rather than high-profile ones.⁸⁷

What is striking, however, is that the *private* system for enforcing the Act has been persistently weak. In the American civil rights regulatory system, as both a matter of legislative design and practical operation, private litigation often compensates for weak state power.⁸⁸

completed by HUD in 2001, but noting that HUD remain plagued with staffing problems, and that many of HUD staff lacked the necessary skills to conduct investigations).

83 See Schill, *supra* note 15, at 169–71 (showing low rates of usage of the HUD ALJ process).

84 See Schwemm, *supra* note 4, at 467, 471–72 (noting the increase in cases and little difference in rental discrimination).

85 See, e.g., Schill *supra* note 15, at 169 (suggesting that HUD and the DOJ “might better turn their attention to systemic investigations and prosecutions of discrimination in the housing market”).

86 See, e.g., John Goering, *The Effectiveness of Fair Housing Programs and Policy Options*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 253, 271 (arguing that a “new independent commission focused on fair housing rights and remedies” would “end HUD’s complicated, conflicted role as housing provider, mortgage guarantor, and legal arbiter of what housing treatment is fair and equal”).

87 See Selmi, *supra* note 15, at 1438–41, 1451 (discussing the reasons why government is largely incapable of robust civil rights enforcement). Myriam E. Gilles has in a different context argued that centralized administrative enforcement schemes insufficiently harness the expertise, energy and resources of private citizens. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (2000).

88 See FARHANG, *supra* note 28, at 214 (concluding that “[p]rivate enforcement regimes are a critically important instrument that American state actors use to achieve their objectives in the process of policy implementation”); Caroline R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1094 (2007) (observing that civil rights enforcement relies heavily on private suits, since federal enforcement agencies have limited resources);

Yet in housing, case studies suggest that this has not been the story. In the years before the 1988 amendments to the FHA there was little FHA private litigation and drastically less compared to Title VII.⁸⁹ By some accounts despite these amendments, the private infrastructure for enforcement of fair housing remains weak.⁹⁰ Federal resources for housing enforcement declined through much of the late 1990s and early 2000s and are historically insufficient to meet the enforcement need.⁹¹ National civil rights groups like the NAACP Legal Defense Educational Fund (LDF), which pioneered litigation to address employment discrimination and pursue racial integration in education, were extensively involved in pre-FHA litigation, but have not been major players in enforcing the FHA. And private fair housing groups that conduct fair housing litigation and testing at the state and local levels are historically underfunded and unstable.⁹²

The reasons for the weakness of the private bar are complex. The incentives for bringing actions may remain too low: additional damage and penalty enhancements would then seem necessary to invigorate fair housing enforcement.⁹³ And initial regulatory compromises made in the FHA may continue to have consequences for the power of *private* fair housing groups to bring discrimination claims and shape housing policy.⁹⁴ On this point, political scientist Mara Sidney has argued that fair housing policy—both as it was shaped by national policy and implemented by fair housing groups—encourages low-profile work on individual cases, divorced from questions of afford-

Lemos, *supra* note 49, at 788 (noting that private enforcement can “supplement public efforts, picking up the slack where agency resources run out”).

89 See SCHWEMM, *supra* note 2, at 1–2 (stating that in the years before the 1988 Amendments, fair housing failed to “develop into a major area of law like employment discrimination and school desegregation”); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 381 (1988) (comparing private FHA litigation in the twenty year period between 1968 and 1988 with Title VII litigation).

90 See Mara S. Sidney, *National Fair Housing Policy and Its (Perverse) Effects on Local Advocacy*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 205–07 (discussing changes in the FHA, and noting that the fair housing infrastructure nevertheless remains weak at the state level).

91 Stephen L. Ross & George C. Galster, *Fair Housing Enforcement and Changes in Discrimination between 1989 and 2000*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 15, at 177, 195–96 (noting that “the general effectiveness of fair housing agencies . . . will be strengthened if they receive a more stable base of funding”).

92 See Sidney, *supra* note 90, at 206 (noting that HUD can change its funding allocations on a yearly basis).

93 See Selmi, *supra* note 15, at 1454 (suggesting that awarding treble damages akin to those in antitrust cases would increase the attractiveness of civil rights cases).

94 See Sidney, *supra* note 90, at 203 (arguing that “fair housing policies, rooted in their framing and funding statutes, have produced organizations that are predictably unstable [and] fragmented”).

ble housing, or promoting racial integration through affirmative measures.⁹⁵

More broadly, fair housing may be less salient an issue and more political contested. Commentators have chronicled African-American “fatigue” with the FHA’s integrationist goals, casting it as a function of integration gains in other areas (schools, workplace) that leave especially middle-class blacks looking for an escape from dealing with race in society.⁹⁶ Housing is often framed within a rhetoric of individual choice: the idea of one’s housing as a private, intimate space, and, for minorities facing a discriminatory world, a place of refuge remains a powerful norm.⁹⁷ While hard to empirically document, this political texture may influence the demand structure for strengthening housing’s enforcement regime.

To be sure, some empirical assessments provide more reason for optimism about private enforcement capacity. Several researchers have noted significant declines in discrimination in particular jurisdictions following both the 1988 Act and HUD-created programs that provided funding to fair housing groups for a range of enforcement activities.⁹⁸ These data suggest that more public and private funding for enforcement activities would increase deterrence, and provide an effective route to combating discrimination. Additional case studies

95 See *id.* at 210–11 (arguing that policy choices can emphasize individual case processing to the detriment of either broader or locally driven visions of fair housing).

96 See, e.g., CASHIN, *supra* note 21, at 9 (describing “integration exhaustion”—African American reluctance to move into neighborhoods “without a significant black presence”); Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 269–71 (2006) (discussing integrationist and nationalist tensions in black politics). Empirical data, however, belie these accounts, showing support for integration among African Americans. See Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY, RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 45, 72–73 (Xavier de Souza Briggs ed., 2005) (finding increased preferences for integrated living among all racial and ethnic groups).

97 See CASHIN, *supra* note 21, at 18–19 (describing the view of some blacks that “being an integration pioneer can be wearing on the soul [and] that being in a warm welcoming community that understands you implicitly is inherently attractive and achievable in a way that the fantasy of residential integration is not”); SCHUCK, *supra* note 13, at 209 (discussing contribution of “benign” clustering in ethnic enclaves as a contributing factor to racial isolation). As I discuss below, however, these personal preferences are not fixed, but powerfully shaped by existing conditions of segregation. See *infra* note 103 and accompanying text.

98 See Ross & Galster, *supra* note 91, at 178–79 (describing changes in fair housing law and policy since 1987); *id.* at 195 (finding a correlation between higher amounts of monetary awards secured during the 1990s and declines in discrimination against black home seekers); see also *id.* (conceding no absolute certainty of causation, but stating that “[t]he magnitude of our estimates suggests that enforcement effectiveness contributed substantially to the decline in discrimination”).

would give us a richer sense of the limitations and potential of the private housing bar, including the role that private lawyers not connected with traditional fair housing groups have begun to play over the last two decades.

Even so, the persistent problems within the system, and the political barriers to generating more extensive change should lead us to examine the limitations of the antidiscrimination frame in achieving the FHA's twin goals of nondiscrimination and integration.

C. *Shifting the Enforcement Frame*

What I suggest in this section is that individualized, complaint-driven enforcement not only has the practical challenges documented in Part I, but is also too narrow a conception of the fair housing problem given the deep connection between public actors and private markets, and the role of both in shaping individual choice.

For one, a discrimination regime focused on private actors in the real estate industry leaves out the state as a market player in generating segregation, and as a potential institutional lever in addressing problems of discrimination and segregation. While the causes of private market discrimination are multiple and often difficult to untangle, much data reveals a deep connection between private markets and public action. Private market discrimination is explained by a range of factors including the personal prejudices and bias of participants in the real estate industry, the prejudices and preferences of white customers, and the economic incentives to industry players that flow from honoring these prejudices.⁹⁹ Yet, studies also suggest that discrimination in housing remains pervasive not simply because of prejudice and attitudes, but because racial segregation provides the conditions that sustain those prejudices. For instance, whites avoid neighborhoods with high black populations because of negative conceptions of such neighborhoods, including fear of crime associated

⁹⁹ See George C. Galster, *The Ecology of Racial Discrimination in Housing: An Exploratory Model*, 23 URB. AFF. Q. 84, 87 (1987) (theorizing that housing market agents "are motivated fundamentally by their personal prejudice[s] against minority households"); Jan Ondrich et al., *Do Landlords Discriminate? The Incidence and Causes of Racial Discrimination in Rental Housing Markets*, 8 J. HOUS. ECON. 185, 185 (1999) (forwarding that landlords discriminate in response to both their personal prejudices and prejudices of white clients); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881, 881 (1986) (finding that housing agents "cater to the racial prejudice" of white customers); John Yinger, *Prejudice and Discrimination in the Urban Housing Market*, in CURRENT ISSUES IN URBAN ECONOMICS 430, 430 (Peter Mieszkowski & Mahlon Straszheim eds., 1979) (discussing price discrimination and exclusion against blacks).

with black neighborhoods,¹⁰⁰ and negative perceptions of the quality of high-minority schools.¹⁰¹ Segregation creates the opportunity for real-estate agents to discriminate, and in particular allows steering.¹⁰² Segregation in housing is also “race-making” in a range of complex ways; it sustains a cycle of distance that can reinforce prejudice and negative attitudes that fuel discriminatory behavior.¹⁰³

This segregation in turn is maintained not only by private market discrimination,¹⁰⁴ but also by the discriminatory actions of federal, state and local governments. Federal loan practices, public housing programs, and federally-funded urban renewal programs played a large and well-documented role in producing current patterns of segregation.¹⁰⁵ And, even as federal funds for subsidized housing programs have diminished in more recent years, a range of federally funded programs—including federal public housing programs, community development block grant programs, the federal Low-

100 See Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 749 (2001) (finding a positive association between the percentage of young black men in a neighborhood and perceptions of the neighborhood crime level even after controlling for crime rates and other neighborhood characteristics); see also William H. Frey & Dowell Myers, *Neighborhood Based Segregation in Single-Race and Multi-Race America: A Census 2000 Study of Cities and Metropolitan Areas* 5 (Fannie Mae Found., Working Paper, 2002), available at <http://www.census.gov/hhes/whi/FreyWPFinal.pdf> (noting that the multiple causes of housing segregation include “disparate economic resources across groups, preferences to reside with same-group neighbors, community zoning laws that discourage economic integration, and the long history of discriminatory practices on the part of lending institutions, realtors, insurers and rental agents”).

101 See Frankenberg, *supra* note 48, at 164 (“[R]acial composition, percentage of poor students, and academic quality—all send important signals to parents and home owners.”); Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 180–81 (2002) (finding, based on a study of school choice among high status parents, that a school’s racial composition serves as a proxy for school quality); Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, in SEGREGATION: THE RISING COSTS FOR AMERICA 125, 128 (James H. Carr & Nandinee K. Kutty eds., 2008) (noting a connection between school segregation and racial steering).

102 See Galster and Godfrey, *supra* note 33, at 253, 260 (defining “segregation steering” and providing evidence from black/white tests that show increases in such steering between 1989 and 2000).

103 See David R. James, *The Racial Ghetto as a Race-making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC’Y INQUIRY 407, 413 (1994) (reviewing MASSEY & DENTON, *supra* note 48) (arguing that “[t]oday, racially segregated neighborhoods are the most important social situations maintaining racial identities and racial prejudices”); see also Quillian & Pager, *supra* note 100, at 720–23, 748–49 (noting white avoidance of African-American neighbors because of associations between African Americans and crime).

104 See *supra* note 44.

105 See, e.g., MASSEY & DENTON, *supra* note 48, at 41–57 (documenting federal government contribution to contemporary segregation).

Income Housing Tax Credit Program (LIHTC), and federally-funded voucher programs—remain powerful contributors to the shape of metropolitan housing markets.¹⁰⁶ Federal, state and local governments have influence in determining in what communities to place publicly funded housing, thus determining whether these programs serve to perpetuate racial segregation or promote racial integration.¹⁰⁷

Importantly, this relationship between discrimination and segregation is likely cyclical and symbiotic. In other words, it would be too simple to say that structural segregation causes market discrimination. Rather, analyses suggest an interaction between private discrimination and individual choices on the one hand and structural segregation on the other.¹⁰⁸ The implication of this data for my argument is that because market discrimination is connected in complex ways

¹⁰⁶ The federally funded HOPE VI program for instance was created by Congress in 1992 to replace one hundred thousand units of “severely distressed” public housing and replace it with a combination of new, mixed-income housing and rental vouchers. See Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, 112 Stat. 2518, 2521; Susan J. Popkin & Mary K. Cunningham, *Beyond the Projects: Lessons from Public Housing Transformation in Chicago*, in THE GEOGRAPHY OF OPPORTUNITY, *supra* note 96, at 176, 177–78. The Low-Income Housing Tax Credit Program (LIHTC), created in 1986, is the largest single source of funding for the development of low-income rental housing. See I.R.C. § 42 (2006); *Low-Income Housing Tax Credits*, HUDUSER.ORG, <http://www.huduser.org/datasets/lihtc.html> (last updated Feb. 16, 2010) (noting that Congress created the LIHTC program in 1986). The program provides about \$5 billion annually in tax credits and has resulted in the building of about 1.8 million units between 1987 and 2007. See *id.* The IRS—the federal agency with authority over the program—has so far failed to promulgate civil rights guidelines for the program. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1750–51 (2005) (noting the lack of “specific regulatory guidance” on fair housing requirements for the tax credit program); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 (1998) (noting that “the Treasury and state and local agencies have failed to impose meaningful bars to discrimination”).

¹⁰⁷ For instance, several empirical studies of the LIHTC reveal that in certain states the housing “mirrors existing conditions of racial and economic segregation.” Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in THE GEOGRAPHY OF OPPORTUNITY, *supra* note 96, at 197, 202. The studies also reveal that in several communities the program is succeeding in promoting racial and economic integration. See JILL KHADDURI ET AL., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED NEIGHBORHOODS? 2 (2006), available at http://www.prrac.org/pdf/LIGHTC_report_2006.pdf.

¹⁰⁸ See George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, 24 URB. AFF. Q. 87, 103 (1988) (finding that the size of the black population may “generate either greater white perceptions of ‘threat’ and/or greater ‘self-segregation’ tendencies by blacks”). To be sure, more empirical information would be useful in understanding the full dimensions of that interaction.

with public action, addressing this discrimination will require intervention on multiple fronts.

In addition, framing the issue of fair housing in terms of private market discrimination undersells the political salience and contemporary relevance of the fair housing issue. Since few understand themselves as victims of housing discrimination, the fair housing issue may appear less pressing, and the work of advocates and the private bar given less prominence. Separating the work of individualized fair housing enforcement from advocacy to address the role of state actors through public programs may contribute to this problem. Groups that seek to promote and address questions such as access to affordable housing and community revitalization by some assessments garner greater political traction and resonance within minority communities.¹⁰⁹ By contrast, much of the traditional fair housing enforcement structure and, importantly, private bar activity has focused on individualized antidiscrimination cases.¹¹⁰ These enforcement efforts are important and potentially effective, but one consequence is that groups receiving such funding have historically paid less attention to the role of state actors in perpetuating discrimination and exclusion in housing, or to form coalitions with groups who work on issues of affordable housing.¹¹¹

In short, complaint-driven antidiscrimination enforcement not only has a set of practical difficulties, it risks leaving out central institutional players—state actors—who contribute to interrelated problems of discrimination and segregation, and who could serve as an important lever for addressing fair housing problems.

109 See Sidney, *supra* note 90, at 206–07 (noting lack of prominence of fair housing issue); *id.* at 210, 213 (arguing that fair housing groups have failed in many respects to form coalitions with groups that emphasize affordable housing).

110 See *id.* at 210 (discussing fair housing organizations' focus on individual case processing to the exclusion of issues such as affordable housing and regional equity). Ironically, according to this account, federal funding may have directed the work in this way. The funding programs created to incentivize fair housing enforcement encourage a focus on discrimination in the private market, and—though the important work of testing plays a significant role in some of the work of these organizations—much of this work is driven by individual complaints. See *id.* at 212–13.

111 See *id.* at 203 (arguing that fair housing's statutory and funding policies “artificially steer[] fair housing advocacy away from issues associated with such core realities as racial segregation and the production and location of affordable housing”).

III. UNITED STATES EX REL V. WESTCHESTER AND HARNESSING PUBLIC POWER

One way of understanding *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester*, then, is as an intervention beyond individualized antidiscrimination enforcement. The case stands as a creative unleashing of the underplayed aspect of the FHA's enforcement regime—one that centers on engaging public players through conditioned spending, regulatory oversight, and information sharing to address the institutional arrangements that shape discrimination and segregation. The case points to vigorous and creative private bar activity—which has gained steam in recent years¹¹²—to give meaning to the provisions of the FHA that require federal agencies and grantees to administer their housing and urban development programs in a “manner affirmatively to further the purposes of th[e FHA].”¹¹³ This Part briefly summarizes the case and the larger effort that surrounds it, and ultimately in Part IV shows the opening the case provides for rethinking how to mobilize public and private power to advance fair housing.

A. *United States ex rel. v. Westchester*

The *Westchester* case arises out of an effort by the Antidiscrimination Center of Metro New York (ADC) to increase opportunities for minorities to live in predominantly white, middle-class communities in Westchester County, a county in southern New York. ADC brought their suit against Westchester County¹¹⁴ in the Southern District of New York in April 2006.¹¹⁵ For reasons that I explain more fully below,¹¹⁶ the claim was brought under the False Claims Act (FCA),¹¹⁷ a Civil War era statute often used today to pursue claims on behalf of the Department of Defense and Department of Health and Human Services against government contractors alleged to have defrauded

112 See *infra* notes 155–61 and accompanying text.

113 See 42 U.S.C §§ 3608(d), (e)(5), 5309(b) (2006) (directing the Secretary of HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter”).

114 Westchester County is a municipal corporation consisting of forty-five separate municipalities. See Complaint at 4, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 552 (S.D.N.Y. 2009) (No. 06 Civ. 2860) [hereinafter Complaint]. The suit here implicated only the towns and villages in Westchester, and not the five larger cities. See Roberts, *supra* note 19.

115 Complaint, *supra* note 114, at 1.

116 See *infra* text accompanying notes 150–51.

117 31 U.S.C. §§ 3729–33 (2006); Complaint, *supra* note 114 at 2.

the government.¹¹⁸ The FCA includes a whistle-blowing *qui tam* provision that allows a third party to bring suit against alleged defrauders of the federal government and to then claim a portion of the damages.¹¹⁹ The false claim alleged by the ADC was that Westchester County, in taking \$45 million in federal grants for housing development between 2000 and 2006,¹²⁰ falsely certified that it would do so consistently with the FHA, including specifically that it would “affirmatively further fair housing.”¹²¹

The group’s claim was that Westchester had failed to comply with HUD regulations enforcing AFFH. At first glance, these regulations seem largely procedural in their requirements, but the group—through this litigation—succeeded in giving them substantive content. The regulations require HUD grantees to analyze the “impediments” to fair housing choice in their communities (AI), to take actions to overcome these impediments, and to keep records and analyses of the relevant actions.¹²² HUD submitted this information in 2000 and 2004, but, the ADC alleged, Westchester’s AI failed to discuss racial segregation or discrimination in its communities, or any actions it had taken to correct this discrimination.¹²³ The result of these false claims, the relators alleged, was to perpetuate segregation throughout the county: creating predominantly white villages and towns and predominantly black and Latino cities.¹²⁴

118 See FRAUD STATISTICS—OVERVIEW, U.S. DEP’T OF JUSTICE, (2008), <http://www.taf.org/FCA-stats-DoJ-2008.pdf> (last updated Nov. 19, 2008) (showing *qui tam* claims brought on behalf of the Department of Defense and the Department of Health and Human Services).

119 See 31 U.S.C. § 3730(b)–(d) (2006) (stating that “[a] person may bring a civil action for a violation of section 3729 [of the FCA] for the person and for the United States government,” and they may collect a reasonable amount of damages if the government does not proceed with the action).

120 The Community Development Block Grant (CDBG) program provides funding to states and localities for a range of community development activities including housing. See Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301–21 (2006). Between 2000 and 2006, Westchester received \$45 million, most of which was from the Community Development Block Grant program (CDBG). See Complaint, *supra* note 114, at 1–2.

121 See 42 U.S.C. § 5304 (2006) (requiring that federal grants “will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing”).

122 See 24 C.F.R. §§ 91.225, 570.601 (2006).

123 The relators alleged that “on each occasion that Westchester . . . requested or demanded payment from the federal government based on having supposedly complied with the Fair Housing Act, the Community Development Act, and with its certification-based obligations, it committed a separate violation of the False Claims Act.” Complaint, at 14.

124 The ADC relied on the analysis of statistician Andrew Beveridge, a professor at Queens College. Beveridge’s analysis showed that racial isolation was increasing for blacks, and

After a period of litigation, the ADC achieved a historic settlement in the case. This occurred first because the district court judge assigned to the case, Denise Cote, granted ADC partial summary judgment on the bulk of its AFFH claims.¹²⁵ According to Judge Cote, Westchester had failed to conduct a proper analysis of impediments or to demonstrate any actions it had taken to address discrimination and segregation in the county.¹²⁶ Thus, the judge held that Westchester had made false or fraudulent claims in violation of the FCA.¹²⁷

The judge deferred for trial the question of whether Westchester had *knowingly* undertaken this false or fraudulent action—an additional requirement for liability under the FCA.¹²⁸ But a trial would never happen. Soon after Judge Cote's summary judgment ruling, the newly installed Obama Administration became involved in negotiating a settlement in the case.¹²⁹ In August 2009, the federal government—the putative plaintiffs in the case—formally intervened in the case to help broker a settlement.¹³⁰ The settlement, which was eventually approved by the county government,¹³¹ requires Westchester to pay \$30 million to the federal government to settle the FCA claims,¹³² \$21.6 million of which would be placed in Westchester's HUD account for developing integrated housing in the county.¹³³ The agreement also requires Westchester to set aside \$30 million dol-

that this isolation existed regardless of the income level of blacks. *See* Initial Expert Report of Andrew Beveridge at ¶¶ 27, 38 *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860).

125 *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 550.

126 Focusing primarily on Westchester's 2000 and 2004 AIs, Judge Cote concluded that Westchester had "utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race," and never performed a survey of local laws and policy, despite the County's full knowledge that it was required to do so. *Id.* at 563. Judge Cote also rejected Westchester County's argument that it had properly used income as a surrogate for race in submitting its AIs in 2000 and 2004, noting that income and race were distinct concepts. *Id.* at 564–65.

127 *Id.* at 567.

128 *Id.* at 568.

129 *See* Roberts, *supra* note 19 (noting that HUD helped broker the current settlement).

130 *See* Complaint-In-Intervention of the United States of America, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860).

131 The Westchester Board of Legislators approved the Settlement by a 12–5 vote on September 23, 2009. *See* Joshua Brunstein, *Westchester Board Approves a Housing-Integration Pact*, N.Y. TIMES, Sept. 23, 2009, at A29.

132 *See* Stipulation and Order of Settlement and Dismissal at ¶ 3, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 1:06-cv-2860-DLC) [hereinafter Settlement Agreement].

133 *Id.*

lars of its own budget to fund housing development projects that further fair housing.¹³⁴ In specific terms, the settlement requires that Westchester County build or acquire 750 affordable housing units in communities with low minority populations.¹³⁵ While the settlement proposes no racial requirements for occupancy of the units, it requires the County to “affirmatively market” the units to nonwhite populations in the county.¹³⁶

Consistent with the settlement agreement, the judge also appointed a Monitor, paid for by the County, to oversee implementation of the settlement.¹³⁷ A condition of the settlement is that the County submit an implementation plan outlining timetables, specific benchmarks, and including a “model ordinance” to be submitted to the municipalities in the County in an effort to promote fair housing.¹³⁸ The Monitor twice rejected the County’s proposed implementation plan for failure to include sufficiently specific information, eventually approving key aspects of the County’s implementation plan in October 2010.¹³⁹

B. A Different Enforcement Story

As the Westchester plan is implemented, it will no doubt raise a host of doctrinal and institutional reform questions, including the scope of local government power. In particular, Westchester’s power to compel fair housing reform by the towns and villages within the

134 See *id.* at ¶¶ 5–6. Under the settlement, Westchester is also responsible for \$2.5 million in attorney’s fees to ADC. See *id.* at ¶ 4.

135 See *id.* at ¶ 7. The settlement requires the county to build most of the housing in communities in which African Americans are less than 3% of the population and Latinos are less than 7%. A maximum of sixty of the 750 units may be in areas that are up to 7% African American and up to 10% Latino. See *id.* at ¶ 7(b), (c). A maximum of sixty out of the 750 mandated affordable AFFH units could be built in areas that are no more than 14% African American and up to 16% Latino. See *id.* at ¶ 7(c). These latter units could only be built after 175 of the 630 units in the municipalities with the heaviest white populations have been built. See *id.*

136 See *id.* at ¶ 33(e).

137 See *id.* at ¶¶ 9–11, 17.

138 See *id.* at ¶ 25(a). The settlement agreement requires that the county submit the initial implementation plan within 120 days of the agreement. See *id.* at ¶ 18.

139 After rejecting the first two implementation plans as lacking, the Monitor approved the third subject to some revisions. See Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal For the Period of July 7, 2010 Through October 25, 2010, at 5–6, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y. Inc. v. Westchester Cnty., N.Y., 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 1:06-cv-2860-DLC) (approving “certain aspects of the August 2010 [implementation plan]” but continuing “to work with the County and outside experts on other components”).

county will likely become a central issue in the case.¹⁴⁰ Yet, what is significant about the case is that it presents an approach to fair housing enforcement that is markedly different from the standard enforcement story provided in Parts I and II. It is different in its focus on state actors (as market players and leverage points for change). It is also different in its conceptualization of the fair housing problem—as involving questions of access to affordable housing, nondiscrimination, and structural integration. Enforcement in the context of AFFH has required private groups to press courts, federal agencies, and state and local actors to define the provisions as placing a substantive duty on government entities that receive federal funds to address barriers to fair housing and to promote integration.

The *Westchester* case is not the first attempt by private groups to give meaning to the AFFH. Though not well-defined in the legislative history,¹⁴¹ the AFFH provision arose in the context of broad recognition by members of Congress of the federal government's contribution to creating residential segregation.¹⁴² Proponents sought the provision to encourage the federal government to more aggressively combat discrimination in private markets and in federally funded

¹⁴⁰ As part of the settlement, the County acknowledged that “it is appropriate for the County to take legal action to compel compliance if municipalities hinder or impede the County in its performance of such duties, including the furtherance of [the settlement].” See Settlement Agreement, *supra* note 132, at 2. Accordingly, the settlement requires Westchester County to use “all available means as appropriate to address such action or inaction, including but not limited to pursuing legal action . . . as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.” See *id.* at ¶ 7(j).

¹⁴¹ Similar language first appeared in the Civil Rights Bill introduced by President Lyndon B. Johnson in 1966, and was retained when—after a long struggle—Congress eventually enacted the FHA in 1968. But the term is not defined in the statute or committee report. For an account of the legislative history, see Florence W. Roisman, *Affirmatively Furthering Fair Housing In Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 338–39 (2007).

¹⁴² See *id.* at 333, 374–76, 389. Several members spoke extensively of the need to right the federal government's historic involvement in creating residential segregation, and several witnesses and reports before Congress detailed the federal government's role. For instance, President Johnson's Attorney Generals Nicholas Katzenbach and Ramsey Clark testified to the federal role in creating existing patterns of housing discrimination, in particular by encouraging and requiring restrictive racial covenants in federal insurance programs. See, e.g., *Civil Rights: Hearings on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2846, S. 2923, and S. 3170 Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 89th Cong. 88 (1966) [hereinafter 1966 Senate Hearings] (statement of Hon. Nicholas de B. Katzenbach, Attorney Gen. of the United States); *Civil Rights Act of 1967: Hearings on S. 1026 et al. before the Subcomm. on Constitutional Rights of the H. Jud. Comm.*, 90th Cong. 6, 72 (1967) [hereinafter “1967 House Hearings”] (statement of Ramsey Clark, Att'y General of the United States).

housing and loan programs,¹⁴³ as well as affirmatively promote integration through these federal programs.¹⁴⁴

The executive branch proved unwilling or ineffective at enforcing the AFFH provisions in the late 1960s and 1970s,¹⁴⁵ but a handful of fair housing groups seized on the provision to challenge contemporary and historic federal and state-level decisions that served to promote and reinforce racial segregation. These lower courts cases, which involved public housing desegregation and urban renewal projects, gave important teeth to AFFH, holding that it required the federal government to take affirmative steps to remedy past discrimination,¹⁴⁶ and to promote racial integration in selecting sites for affordable housing.¹⁴⁷ These cases prompted HUD to issue its first set

143 In House Judiciary Hearings in May 1966 concerning an earlier version of the bill that resulted in the FHA of 1968, Congressman Emanuel Celler asked HUD Secretary Robert Weaver about the AFFH language. See 1966 House Hearings, *supra* note 142, at 1367 (statement of Hon. Emanuel Celler, Chairman, H. Comm. on the Judiciary). The Secretary responded that this provision would give the government power to exclude discriminatory banks from federal funded programs, and favor housing projects that promote integration. See *id.* at 1367 (statement of Robert Weaver, Sec'y, Dep't of Hous. and Urb. Dev.).

144 See Roisman, *supra* note 141, at 389 (arguing that “confinement of African-Americans to the cities, and the necessity of enabling them to move to the suburbs, was the central problem that the ‘affirmatively further’ language was intended to solve”).

145 Led by HUD Secretary George Romney, the Nixon administration initially sought to integrate the suburbs and predominantly-white communities through subsidies and other initiatives in its homeownership and subsidized housing programs. But ultimately, the efforts did not go very far as the administration lacked the political will to push the issues of integration in the face of resistance from suburban communities. See CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS 102–06 (2006) (discussing HUD’s integration efforts).

146 See Roisman, *supra* note 141, at 364–65 (describing cases finding that HUD could be required to remedy public housing segregation). In *Hills v. Gautreaux* (initiated in 1966 before the FHA), the Seventh Circuit found the Chicago Housing Authority (CHA) and HUD liable under Title VI for creating segregation through discriminatory site selection and other practices, and ordered HUD to forge a metropolitan-wide remedy for segregation. See *Gautreaux v. Chicago Hous. Auth.*, 503 F. 2d 930, 931, 938–39 (7th Cir. 1974), *rev’d sub nom.* *Hills v. Gautreaux*, 425 U.S. 284 (1976). When the Supreme Court affirmed the metropolitan remedy several years later after the passage of the FHA, HUD cited this approach as “consistent with” the duty of HUD to affirmatively further fair housing. See *Gautreaux*, 425 U.S. at 301–02. For accounts of the *Gautreaux* litigation, see generally ALEXANDER POLIKOFF, WAITING FOR GAUTREUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006), and see also SCHUCK, *supra* note 13, at 227.

147 In *Shannon v. HUD*, the Third Circuit found HUD liable for constructing low-income subsidized housing in an area with already high concentrations of poor minorities, finding that doing so would violate HUD’s duty to affirmatively further fair housing in “non-ghetto areas.” 436 F.2d 809, 816, 819–20 (3rd Cir. 1970). In *NAACP v. HUD*, the First Circuit held that the duty to affirmatively further fair housing required more than nondiscrimination; HUD was to “use its grant programs to assist in ending discrimination and segregation to the point where the supply of genuinely open housing increases.” *NAACP*,

of regulations defining AFFH, which mandated that subsidized housing programs not compound minority concentration unless necessary to meet an overriding housing need.¹⁴⁸

Yet the provision received relatively little court attention outside the context of these few cases. This inattention has started to change in recent years as fair housing advocates have brought litigation to require state and local grantees to promote integration in other federally funded programs.¹⁴⁹ These initial litigation efforts were not wholly successful. One problem has been that changes in the law of implied rights of action have made judicial enforcement of AFFH less than clear. Following the Supreme Court's 2002 decision in *Gonzaga v. Doe*,¹⁵⁰ some courts have held that the AFFH is not privately enforceable through an implied right of action theory or using 42 U.S.C. § 1983.¹⁵¹ *Westchester's* doctrinal innovation then is to use the *qui tam* FCA claim in a manner that circumvents the *Gonzaga v. Doe* problem.

A second problem has been that courts are not fully resolved on the question of whether AFFH stands for a strong antisegregation right that can apply to all federal programs. In the *Westchester* case,

Boston Chapter v. Sec'y of HUD, 817 F.2d 149, 155 (1st Cir. 1987). According to the First Circuit, this required HUD to consider the effect of its housing programs on the "socio-economic composition of the surrounding area" and required HUD to use its "immense leverage . . . to provide adequate desegregated housing." *Id.* at 156 (internal citations omitted).

148 See, e.g., 24 C.F.R. § 941.202 (c)–(h) (2006) (discussing racial composition requirements for public housing sites); Orfield, *supra* note 106, at 1772–73 (describing regulatory codifications of *Shannon* and *Gautreaux*).

149 In New Jersey, plaintiffs sought to apply *Shannon's* requirement to remedy segregation in the LIHTC program. The state appellate court agreed that the state had an enforceable AFFH duty, but—deferring to local housing authorities—found this duty had been satisfied. Effectively, the court held that while affirmatively to further might require the locality to consider segregative effects, the requirement was not so robust as to mandate a particular course of action in response. See *In Re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 5–6, 26 (N.J. Super. App. Div. 2004) [hereinafter *Adoption*] (rejecting challenge to discrimination in the administration of federal Low Income Housing Tax Credit program, finding that housing authority satisfied its 'affirmatively to further' duty); see also *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 36 Conn. L. Rptr. No. 11 422, 424 (Conn. Super. Ct. 2004) (finding no private right of action to enforce AFFH or its implementing regulations).

150 See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the Court held 7–2 that provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) were not privately enforceable under 42 U.S.C. § 1983 because the relevant FERPA provision lacked rights-creating language. *Id.* at 275, 290.

151 See, e.g., *Asylum Hill*, 36 Conn. L. Rptr. No. 11 at 427–28 (declining to find implied private right of action). On the other hand, in March 2008, a court allowed a similar case to enforce AFFH to go forward. See *Inclusive Comm. Project, Inc. v. Tex. Dept. of Hous. & Comm. Affairs*, No. 308CV-546-3, 2008 WL 5191935, at *1 (N.D. Tex. Dec. 11, 2008) (denying motion to dismiss on standing grounds).

the federal program at issue—the Community Development Block Grant program—included relatively detailed requirements on the types of fair housing analyses and actions required to satisfy AFFH, which likely smoothed the way for the court’s holding.¹⁵² By contrast other federal housing programs lack such guidance.¹⁵³ Yet, while it is unclear how future courts will respond to claims under the FCA—the case puts the state and local grantees regulated by HUD on notice to take more concrete and substantive action to enforce AFFH.¹⁵⁴

Moreover, the AFFH enforcement story has not been limited to courts. Even before the *Westchester* case, nonlitigation advocacy at the state and local advocacy aimed to encourage state and local grantees to comply with AFFH by promoting integration in their federally funded programs and by addressing both public and private barriers to fair housing in their communities. As a result, some states that receive federal funds have now adopted explicit requirements to promote integration in the important federal low-income housing tax credit program.¹⁵⁵

At the federal administrative level, fair housing groups in recent years have encouraged federal agencies to clarify AFFH requirements applicable to federal grantees, and to better police whether federal grantees are promoting housing choice and integration in their programs.¹⁵⁶ For instance, groups have sought, with some success, to get the federal government to issue detailed requirements about their

¹⁵² See *supra* text accompanying notes 121–22.

¹⁵³ For instance, one of fair housing’s most important programs—the Low-Income Housing Tax Credit Program which is the largest federal program to create rental housing—lacks any civil rights regulatory guidance. See Orfield, *supra* note 106, at 1750 (noting lack of such guidance for the LIHTC program).

¹⁵⁴ See *infra* text accompanying notes 160–62 (discussing HUD enforcement efforts following the *Westchester* case).

¹⁵⁵ Some states have adopted rules that prohibit the construction of tax-credit developments in neighborhoods of high minority and poverty concentration (unless the developments are pursuant to a formal community revitalization plan which can serve to lower race and poverty concentration in distressed communities). See POVERTY RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM 6–7 (2008) (discussing requirements for allocation of tax credits in North Carolina, Texas, Alabama, and New Hampshire); *id.* at 7–8 (discussing the use of scoring proposals to prevent economic and racial segregation). I am familiar with the work of the Poverty Race Research Action Council in part because I sit on their board.

¹⁵⁶ See Tegeler, *supra* note 107, at 202 (describing advocacy efforts at the federal level to bring the “LIHTC program into conformity with the Fair Housing Act”); Letter from Joseph Rich, Lawyers Committee for Civil Rights under Law et al. to Shaun Donovan, U.S. Sec’y of Hous. & Urban Dev. (Mar. 10, 2009), available at http://www.prrac.org/full_text.php?text_id=1217&item_id=11375&newsletter_id=0&header=Current%20Projects (urging HUD to promote fair housing in the LIHTC program).

fair housing duties to state and local grantees receiving funds under the American Recovery and Reinvestment Act of 2009—commonly known as the stimulus.¹⁵⁷ Groups have also filed a petition for rule-making, which awaits resolution, asking the IRS—the agency that oversees the low-income housing tax credit program—to promulgate specific regulations to affirmatively further fair housing in that program.¹⁵⁸

Most sweeping is the current effort spurred in large part by the successes in the *Westchester* case to reformulate the guidelines governing AFFH.¹⁵⁹ While this process is still underway, fair housing and civil rights groups are encouraging HUD to strengthen regulations to provide clearer and more rigorous metrics for advancing fair housing, and to better monitor federal grantees.¹⁶⁰ In the wake of the *Westchester* case, HUD already has exhibited greater interest in enforcing the AFFH provision. Partially in response to a complaint by a fair housing group, HUD has withheld \$1.7 billion in CDBG funds to

157 The funding notice delineated the requirements of grantees receiving funds under the American Recovery and Reinvestment Act's Homeless Prevention and Rapid Re-Housing program, which provides \$1.5 billion for communities to prevent homelessness among at-risk individuals and families, and funds to help those who become homeless transition to stable housing. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, tit. XII, 123 Stat. 115, 221. HUD delineated the types of specific actions that meet that duty, including affirmatively marketing programs to people with disabilities; providing fair housing counseling and referral to fair housing agencies; and recruiting landlords and service providers in a range of communities so as to promote housing choice. See Dep't of Hous. & Urban Dev., Notice of Allocations, Application Procedures, and Requirements for Homelessness Prevention and Rapid Re-Housing Program Grantees under the American Recovery and Reinvestment Act of 2009, Docket No. FR-5307-N-01, available at http://www.hudhre.info/documents/HPRP_Notice_03-19-09.pdf (Mar. 19, 2009) (outlining requirements for funding).

158 See Inclusive Communities Project, Inc. Petition for Rulemaking Involving 26 C.F.R. § 1.42-17 Qualified Allocation Plan 5-6 (proposing rule requiring IRS to ensure LIHTC allocation plans further fair housing).

159 See Notice of Informal Meeting, Affirmatively Furthering Fair Housing and Fair Housing Plans, 74 Fed. Reg. 33,456 (Jul. 13, 2009) (announcing informal meeting to collect public views on proposed rule to implement AFFH); *Hearing on the H.R. 476 Housing Fairness Act of 2009 Before the H. Comm. on Fin. Servs.* (Jan. 20, 2010) (Statement of John D. Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity), at 1-2, available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7752.pdf (describing rulemaking process to better promote integration and social services); Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: "Affirmatively Furthering Fair Housing" Comes of Age*, 43 CLEARINGHOUSE REV. 560, 569 (2010) (noting that the *Westchester* case helped spur current rulemaking).

160 See, e.g., *Reforming HUD's Regulations to Affirmatively Further Fair Housing*, THE OPPORTUNITY AGENDA PUBLIC POL'Y BRIEFS, Mar. 2010, available at http://opportunityagenda.org/files/field_file/2010.03ReformingHUDRegulations.pdf (providing recommendations for a new rule that would strengthen enforcement of AFFH).

Texas for failing to adhere to AFFH requirements.¹⁶¹ In addition, in November 2009, HUD threatened to terminate federal funds to a county grantee, leading the county to alter rules that would have impeded fair housing.¹⁶²

In short these efforts employ a range of different strategies to strengthen the meaning of the AFFH duties that attach to federal funds, and to encourage a more vigorous federal role in securing compliance by federal grantees. In Part IV, I present the implications of this approach for the FHA's dominant model of public and private power, and for generating a new frame in which to advance fair housing.

IV. RETHINKING PUBLIC AND PRIVATE POWER

My suggestion is that while the FHA instantiated an emphasis on individual housing discrimination and weak public and private mechanisms for enforcing that discrimination, the FHA has also provided, through the AFFH provisions, an important mechanism for using federal funds to coerce and incentivize state and local governments to promote fair housing. This has implications for dominant conceptions of how to deploy public and private power to advance fair housing.

As we have seen, the prime model of civil rights enforcement in housing mobilizes public power by creating a private attorney general and an administrative enforcement scheme to address claims of discrimination. Under this scheme private power is mobilized to bring claims in court and in administrative agencies. The AFFH regime has a set of features that are distinct from that model in that it: (1) deploys a different set of federal administrative tools (i.e., regulatory guidance and conditioned spending); and (2) relies on private power to mobilize these tools not simply through private litigation but through formal and informal agency action. As this Part shows, focusing on these aspects of the FHA's enforcement regime sheds a dif-

161 See Rhiannon Meyers, *State Plan for Ike Money Draws 2nd Complaint*, GALVESTON COUNTY DAILY NEWS (Dec. 9, 2009) <http://galvestondailynews.com/story/148454/> (discussing withholding of disaster recovery funding).

162 See Gurian & Allen, *supra* note 159, at 569 (describing HUD's threat as involving \$10 million in federal funds to the Parish); Chris Kirkham, *Council Rescinds Ballot Measure; St. Bernard Backs Off Apartments Vote*, THE TIMES-PICAYUNE, Nov. 4, 2009, http://www.nola.com/politics/index.ssf/2009/11/st_bernard_parish_council_back.html (reporting that HUD threatened to cut-off federal CDBG funding for St. Bernard Parish, Louisiana, due to the racial discriminatory effect of proposed restrictions on multifamily occupancy).

ferent light on housing's enforcement limitations, and suggests an important leverage point for surmounting existing problems.

A. *Broadening the Tools of Public Power*

First, AFFH, which is primarily a directive to federal agencies, mobilizes public power to shape the activities of federal agencies, as well as the requirements on federal grantees. As we have seen, the specific duty of AFFH is open-ended in many ways, and is formed through court and agency action as well as through definition by governments and stakeholders at the state and local levels.¹⁶³ But the significance here is that AFFH allows federal agencies to place a set of duties on grantees.¹⁶⁴ These grantees have tremendous power to shape housing markets through the decisions they make in selecting sites for the development of subsidized housing, and through the steps they take to address public and private barriers to fair housing choice as they develop those programs.¹⁶⁵

Indeed, there is much to suggest that civil rights gains in employment depend on similar uses of federal power.¹⁶⁶ As accounts in the employment context make clear, crucial fair employment gains resulted not simply from individualized, court enforcement but from a broad range of requirements placed on federal grantees.

The central formal powers that the 1964 Civil Rights Act granted to the EEOC were like those granted to HUD, limited. As discussed above, civil rights proponents sought a strong agency to enforce anti-discrimination laws through its own cease-and-desist power.¹⁶⁷ In-

¹⁶³ See *supra* text accompanying notes 149–62.

¹⁶⁴ While the FHA is not a spending clause statute, the AFFH operates much like conditional spending requirements that exist in other civil rights area. See, e.g., 42 U.S.C. § 2000d-1 (2006) (prohibiting discrimination on the basis of race, color or national origin in any “program or activity” receiving federal financial assistance).

¹⁶⁵ See *supra* text accompanying notes 99–107.

¹⁶⁶ This is particularly true of Title VI, which is not discussed here. Many researchers credit Title VI for advances in school desegregation. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 97–100 (1991) (discussing role of Title VI in inducing school districts to desegregate, and showing that courts became more effective in desegregation after the enactment of Title VI); see also JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 114–15 (1978) (arguing that the support of the federal executive through Title VI of the 1964 Civil Rights Act, as well as through DOJ litigation “quicken[ed] the pace of [school] integration” over law reform efforts but noting that because of the executive’s “gradualist approach,” “progress was still slow”).

¹⁶⁷ See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 453 (1966) (discussing legislative proposals for enforcement power of Civil Rights Commission); Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement*, 1–2 (Colum. Univ. Dep’t of Political Science, Working Paper, Jan. 2010) (“As originally con-

stead, the EEOC's power was limited to investigating claims and mediating disputes, and private individuals were required to file charges with the EEOC as a prerequisite to litigation.¹⁶⁸ The EEOC from its inception struggled to process individual cases, immediately facing immense backlogs that persist until today.¹⁶⁹

Yet the EEOC provides an important lesson about the use of administrative power to reshape employment markets. Shortly after the enactment of the Civil Rights Act of 1964, the EEOC launched its strategy of requiring employees to collect information (EEO-1 forms) on the racial, ethnic and gender composition of their employment forces, interpreting Title VII broadly to permit this type of data collection.¹⁷⁰ These and other strategies were in fact explicit responses to a problem similar to the one that arises today in housing: the perceived limitations of the EEOC's ability to process individual complaints.¹⁷¹ This data became a powerful tool in reforming the hiring practices of entire industries and specific firms, and in promoting affirmative action as a corrective.¹⁷² The EEOC used this information to target lagging employers, providing them technical assistance on how to improve their hiring practices.¹⁷³ And, despite its limited formal powers, the EEOC could threaten to launch an investigation or share information with litigating public interest organizations (with whom

ceived by civil rights advocates, the EEOC was to have full regulatory powers, particularly the power to issue binding cease-and-desist orders to employers.”).

168 See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(b), (e)(1), 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e-5(b), (f)(1) (2009)) (providing that private individuals must file a charge with the EEOC and can sue in court only after the EEOC issues them a “right to sue” letter). In 1972, Congress amended Title VII to grant the EEOC authority to sue private employees in its own name, although the EEOC infrequently invokes this power. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

169 See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA* 122 (1996) (quoting Jack Greenberg of the NAACP Legal Defense and Education Fund that the EEOC was “weak, cumbersome probably unworkable,” and describing the early years of the EEOC as “characterized by disorganization”); Lieberman, *supra* note 167, at 16–17 (discussion of the EEOC's backlog of individual complaints).

170 See Lieberman, *supra* note 167, at 27 (describing the EEOC's data collection strategy as a liberal interpretation of its statutory authority under Title VII).

171 See SKRENTNY, *supra* note 169, at 124–25 (noting that by 1969 it was “clear” to EEOC observers that “responding to the complaints of properly abstract citizens was a blueprint for failure”).

172 See GRAHAM, *supra* note 71, at 193–97, 239–43; Lieberman, *supra* note 167, at 27 (noting that the data would serve as a “powerful weapon[]” in taking actions against offending employers). As Graham has documented, the EEOC realized as early as the late 1960s that this information would help promote affirmative action. See GRAHAM, *supra* note 71, at 239.

173 See Lieberman, *supra* note 167, at 27 (stating that the reports and data could “form the basis for ‘technical assistance’ programs”).

the EEOC was actively cooperating), and thus prod employers into adopting affirmative action plans.¹⁷⁴ It also published guidelines on seniority, occupational tests, and other potentially discriminatory practices to influence employers.¹⁷⁵

In housing, this account suggests, a similarly vigorous use of federal power has struggled to emerge, even with the opening provided in AFFH. This is despite the fact that the AFFH seems to provide a more explicit statutory call for the use of federal agency power than in Title VII, a reflection of congressional recognition of the deep connections between federal actors and state and local players, and the need to explicitly engage federal agencies and funding mechanisms in reshaping public markets.¹⁷⁶

B. *Private and Public Forms of Mobilization*

A second feature of the AFFH is the complexity of the interaction between courts and agencies and private and public actors required to give the provision regulatory teeth. This complexity is manifest in the *Westchester* case itself. Styled as a *qui tam* action under the FCA, it requires privately-initiated court litigation to enforce a duty that federal grantees owe to the federal government, but which the federal government has failed to enforce. The case is settled after the federal government decides to intervene to broker a deal—its willingness to do so likely shaped by advocacy pressure.¹⁷⁷

As Part III showed, the FCA claim allows an alternate route to private enforcement through 42 U.S.C. § 1983—the usual route for private enforcement of civil rights statutes.¹⁷⁸ The point here is not to revisit the Supreme Court precedents that make private enforcement of AFFH through an implied right of action or through 42 U.S.C.

174 See *id.* (noting that the threat of investigations or lawsuits could be used to negotiate affirmative action agreements); see also SKRENTNY, *supra* note 169, at 127–39 (describing the development of affirmative action through the use of EEO-1 forms as well as the Department of Labor’s Office of Contract Compliance’s use of Executive Order 11246 to promote affirmative action for federal contractors). As Skrentny and others have shown, these federal agency strategies responded to limitations in the individual enforcement regime similar to those that exist in housing. See *id.* at 124–25.

175 See GRAHAM, *supra* note 71, at 250–53 (detailing EEOC’s regulatory enforcement of Title VII to challenge seniority, testing, and other practices with a disparate impact); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 60, 73–74 (1972) (describing the development of EEOC guidelines governing disparate impact).

176 See *supra* notes 141–44 and accompanying text.

177 See *Westchester County Fair Housing Update*, *supra* note 19 (describing letter signed by more than fifty state and local fair housing groups to encourage HUD to broker a settlement).

178 See *supra* text accompanying notes 150–51.

§ 1983 difficult.¹⁷⁹ Rather it is to suggest the AFFH does not fit into the standard private attorney general model and that as a practical matter the route to enforcement has meant actions in courts as well as agencies. This limits the ability to rely solely on courts for articulation of these rights, but at the same times courts have provided a powerful place for defining these duties—with *Westchester* providing the latest example.

In the end, what we call AFFH “enforcement” emerges out of: (1) judicial willingness to spell out requirements in privately-initiated litigation;¹⁸⁰ (2) agency clarification and enforcement of rules on grantees;¹⁸¹ (3) private action outside of courts to mobilize such agency action;¹⁸² and (4) state and local grantees’ interest in and capacity to pursue civil rights goals.¹⁸³

Noting these features does not announce the current AFFH enforcement process as an ideal one. Perhaps more vigorous enforcement of the “right” would be achieved better if AFFH and its regulations could be enforced relying on 42 U.S.C. § 1983 or through an implied right of action theory.¹⁸⁴ The important point is that the same mechanisms that give AFFH its power (that it operates as a directive to federal agencies and grantees and not as a grant of litigation power to individuals), also means that enforcement requires more complex forms of public and private mobilization.

C. *Towards Strengthening the FHA’s Last Plank*

Whether this mobilization of private and public power will in the end promote integration and housing choice remains to be seen. At the federal level, commitment to enforcing AFFH is likely to vary de-

179 See generally Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2136 (2010) (arguing that the AFFH provisions should be enforceable in court using 42 U.S.C. § 1983). For a critique of the Supreme Court’s approach to implied rights of action in civil rights cases, see Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195–96 (2003).

180 See *supra* notes 125–28, 147 and accompanying text.

181 See *supra* text accompanying note 122 (describing rules governing current grantees); text accompanying notes 159–60 and accompanying text (noting current rulemaking efforts).

182 See *supra* text accompanying notes 159–60 (noting involvement of groups in current rulemaking).

183 See *supra* text accompanying notes 155 (describing state initiatives to promote integration and further fair housing in low-income housing tax credit program).

184 See Collins, *supra* note 179, at 2136 (arguing that private enforcement through 42 U.S.C. § 1983 would improve enforcement of the provisions).

pending on the President in office,¹⁸⁵ and (given the practical difficulties in bringing court action) even private forms of mobilization might be insufficient to surmount agency inefficacy. Without minimizing these problems, this Part concludes by mapping the promise that renewed emphasis on AFFH nevertheless holds for achieving fair housing and, even, for the beleaguered politics of the movement.

1. *Leveraging Connections*

First, the AFFH approach has implications for advancing fair housing in private and public markets. For one, as we have seen, public decisions interact with private markets. When AFFH receives attention from housing commentators, it is typically around its potential to promote integration in federally funded and subsidized housing programs.¹⁸⁶ Yet, as shown in Part II, public and private markets for housing are connected in important ways.¹⁸⁷ And, publicly funded programs are major participants in the overall housing market.¹⁸⁸ A significant feature of how the *Westchester* court (relying on administrative regulations) interprets AFFH is to require federal actors and grantees to take affirmative steps not only to dismantle publicly created barriers to addressing fair housing, but those that exist in private markets by affirmatively marketing new housing to racial and ethnic minorities, conducting educational outreach on fair housing laws and compliance, and providing mobility counseling and services to promote access to affordable housing.¹⁸⁹ The hope is that using federal funds to encourage integration and housing choice will produce changes in residential patterns generally, and help reduce pri-

185 See generally Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 414–17 (2010) (noting that commitments to enforcing civil rights vary across administrations). Of course, this problem of political variation extends beyond civil rights enforcement. See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 207–21 (1982) (analyzing the effect of presidential administrations on enforcement activities of the National Labor Relations Board, the Securities and Exchange Commission, and the Federal Trade Commission).

186 See, e.g., Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 927–28 (2005) (arguing that HUD fails to affirmatively further fair housing in the LIHTC program).

187 See *supra* notes 99–103 and accompanying text.

188 See *supra* notes 105–07 and accompanying text.

189 See, e.g., Settlement Agreement, *supra* note 132, at 23, 26–27 (describing Westchester's duties under AFFH as requiring not only the creation of affordable housing, but affirmative marketing and removal of source of income and other barriers to housing choice).

vate manifestations of prejudice that fuel steering, discrimination and segregation.¹⁹⁰

Thus, federal, state, and local actors might develop rules that require the siting of affordable housing to encourage integration. Public actors might also encourage integration by providing housing counseling and referrals, and recruiting landlords from a range of neighborhoods to participate in publicly financed programs.¹⁹¹ Engagement of public actors also draws on other facets of public power, including the ability of public actors to gather and analyze empirical data on private market discrimination; to map levels of segregation and racial variations in access to resources such as employment and transportation; and to review and strengthen laws, regulations and administrative policies to better promote housing choice.¹⁹²

For instance, the *Westchester* settlement required the County to “promote, through the County Executive, legislation currently pending before the Board of Legislators to ban ‘source-of-income’ discrimination in housing.”¹⁹³ Discrimination based on source-of-income can pose a barrier to fair housing choice and integration for people receiving funds from federal voucher programs, known as Section 8,¹⁹⁴ which subsidizes rents for qualifying low-income individuals. By some assessments such source of income discrimination is “widespread,” and interacts with racial discrimination to limit housing opportunities for low-income people,¹⁹⁵ and several states and localities have enacted legislative efforts in recent years to address the problem.¹⁹⁶

190 See *supra* note 103 (discussing linkages between structural segregation and private prejudice).

191 These examples draw on HUD’s recent requirements for grantees in several programs recently expanded by the Stimulus Act. See *supra* note 157 (describing funding notice for grantees receiving funds under the Stimulus Act’s Homeless Prevention and Rapid Re-Housing Program).

192 Though framed in precatory terms, HUD’s informal guidance on AFFH encourages these types of practices by state and localities. See U.S. DEP’T HOUS. & URB. DEV., 1 FAIR HOUSING PLANNING GUIDE, 2–7 (defining the analysis of impediments), available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf> (last visited May 11, 2011); *id.* at 3-11 to -14 (providing examples of state analyses of impediments and actions that might be taken to overcome them).

193 Settlement Agreement, *supra* note 132, at ¶ 33(g).

194 See 42 U.S.C. § 1437f (2006) (low-income housing assistance); 24 C.F.R. § 982.201(a)–(b) (2008) (providing income requirements for Section 8 eligibility).

195 See National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing*, CIVILRIGHTS.ORG (Dec. 2008), <http://www.civilrights.org/publications/reports/fairhousing/emerging.html> (finding that discrimination against Section 8 tenants is “more pronounced” for black voucher holders).

196 See POVERTY & RACE RESEARCH ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM, app. at B (Philip Tegeler et al eds., 2005), available at <http://www.prrac.org/pdf/>

Relatedly, the AFFH approach has the potential to respond to the fragmented nature of the real estate industry. If the problem with housing's private enforcement regime is, in part, an inability to target large institutional players who can leverage broader market reform, government actors provide one entry point—much like efforts to target large industry players and particular segments of the employment industry.¹⁹⁷

2. *Revitalizing Politics*

Second, greater emphasis on AFFH has the potential to revitalize the politics of fair housing. Emerging or renewed interest by state and local fair housing groups is already evident in the range of strategies described in Part III that private groups are employing to harness the power of AFFH.¹⁹⁸ In addition to the ADC, the group that brought the *Westchester* case, fair housing groups in New York, Minnesota, and Texas have in recent years used litigation and other advocacy tools as a mechanism for encouraging greater federal enforcement of the provision, as well as prodding states and localities to comply with their obligations under the statute.¹⁹⁹ Fair housing groups across the nation prodded HUD to pursue the *Westchester* settlement,²⁰⁰ and they are active players in the ongoing effort to strengthen HUD's AFFH rules.²⁰¹

To the extent that commentators characterize housing advocacy as focused on individual, antidiscrimination enforcement²⁰² and less on the public, structural dimensions of the fair housing problem, this suggests an important emphasis in the work of fair housing groups.

Source_of_Income_Summary.pdf (last visited May 11, 2011) (listing more than twelve states and thirty-five localities with laws prohibiting discrimination based on source of income).

197 See SKRENTNY, *supra* note 169, at 124–30 (describing those efforts).

198 See *supra* notes 155–58 and accompanying text.

199 See Tegeler, *supra* note 107, at 202 (describing advocacy efforts to enforce AFFH at the federal level).

200 See *supra* text accompanying note 177.

201 See Written Statement of John D. Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity), at 1–2, available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7752.pdf (discussing the involvement of private civil society groups in the ongoing rulemaking process).

202 Mara Sidney, for instance has argued that groups on the whole devote little attention to the “complex task of achieving racial integration through affirmative strategies or to regional inequities in the provision of affordable housing.” Sidney, *supra* note 90, at 210. But Sidney also has extensively documented the work of specific fair housing groups that take a broader lens. See, e.g., *id.* at 219–21 (describing promising fair housing advocacy in Minnesota to address issues of affordable housing, regional equity, and housing choice).

An interest by fair housing groups in promoting fair housing in federally subsidized housing programs also provides a promising set of linkages to advocacy groups concerned about affordable housing. These new linkages provide an opportunity to connect the work of community development groups, which have sought to expand affordable housing within existing minority communities, to civil rights groups interested also in creating opportunities for minorities to live in traditionally low-minority regions. The perceived differences of these two approaches risks generating conflicts,²⁰³ but it also presents opportunities to harmonize the two approaches in ways that advance affordable housing and fair housing goals. For instance, fair housing and urban community development groups have partnered in litigation and advocacy efforts, crafting plans to remove barriers to creating federally funded low-income housing in majority-white suburbs while also creating housing in the city to contribute to community revitalization, and economic and racial integration.²⁰⁴

Finally, an emphasis on the role of public actors in creating segregation and in removing discriminatory housing barriers powerfully shifts away from the narrative of individual preference that typically accompanies fair housing.²⁰⁵ Highlighting the ongoing role of the state in shaping housing choice and constructing residential segregation reveals that the racial boundaries that one may think of as natural are in fact created by state policy, and allows questioning of the seemingly private “choices” that emerge from those boundaries. A focus on how federal, state and local government actors structure the racial makeup of neighborhoods might in this way invite participation from civil rights and civil society groups that have previously shied away from fair housing.

None of this is to suggest that a focus on AFFH is a panacea for achieving fair housing. This will require sustained interest by federal actors and effective forms of mobilization by private civil society groups. Yet, the AFFH approach expands the locations in which to

203 See Orfield, *supra* note 106, at 1784–89 (detailing conflicts between developers of low-income housing and civil rights groups on the one hand, and urban community development organizations who see creating affordable housing as key to revitalizing poor urban communities).

204 See, e.g., Kenneth Zimmerman, *The Low Income Housing Tax Credit Program and Civil Rights Law: Updating the Fight for Residential Integration*, in NATIONAL LOW INCOME HOUSING COALITION, THE NIMBY REPORT 24, 27 (2004) (describing position of amici housing organizations in New Jersey litigation that LIHTC programs must promote suburban housing opportunities as well as contribute to urban revitalization), available at http://www.nlihc.org/detail/article_list.cfm?topic=40.

205 See *supra* text accompanying notes 117–20.

advance fair housing and, one hopes, injects some optimism in a debate often framed by despair.

CONCLUSION

In the end, this Article aims to reframe the debate over the seeming exceptionalism of fair housing by providing a richer understanding of how civil rights regimes utilize public and private power to achieve statutory ends. Civil rights enforcement depends not simply on harnessing private power to create a strong individual enforcement regime, but on private mobilization of a broad range of state powers. As this Article suggests, the case for greater mobilization of state power to advance fair housing is particularly strong given the role of federal spending in driving racial living patterns and the operational limitations of individual enforcement. As this Article has argued, the *Westchester* case both reflects and invites a renewed focus on the AFFH provisions of the FHA. The case deserves attention for successfully exploiting the statutory opening provided in the FHA, which—despite the significant limitations of its individual enforcement regime—provided in AFFH a powerful tool for harnessing federal power. The ultimate significance of this case is that it sits atop a larger strategy by private actors—taking place before courts, agencies, and state and local governments—to prod public actors to advance the nondiscrimination and integration goals of the FHA. The *Westchester* case should prompt additional examinations of how to better deploy AFFH to advance fair housing. In that vein, fair housing commentators will have to pay close attention to the proposed new HUD regulations clarifying the AFFH and to the implementation of the remedy in the *Westchester* case. My aim here is to give AFFH a more prominent place in discussions of fair housing, while acknowledging that a multitude of strategies will be required to achieve fair and integrated housing.