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## Challenging Fair Housing Revisionism

Myron Orfield

William Stancil

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# CHALLENGING FAIR HOUSING REVISIONISM

MYRON ORFIELD & WILLIAM STANCIL\*\*

INTRODUCTION .....	32
II. FAIR HOUSING REVISIONISM IN THE ACADEMY AND WHITE HOUSE.....	36
III. INTEGRATION AND THE FAIR HOUSING ACT DEBATE .....	47
A. <i>The Struggle to Integrate Federally Subsidized         Housing 1949-59</i> .....	47
B. <i>The Organized Push for a Federal Fair Housing Act 1960-66</i>	48
C. <i>The Fair Housing Act in Congress, 1966-68</i> .....	54
CONCLUSION .....	64

## INTRODUCTION

The Fair Housing Act<sup>1</sup> was the third great civil rights act of the 1960s, and the most ambitious. While the Civil Rights Act of 1964 sought to end racial discrimination in a variety of contexts,<sup>2</sup> and the Civil Rights Act of 1965 sought to protect the right to vote,<sup>3</sup> the 1968 Fair Housing Act targeted the very physical

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\*\* Myron Orfield is the Earl R. Larson Professor of Civil Rights & Civil Liberties Law and Director of the Institute on Metropolitan Opportunity, University of Minnesota Law School. William Stancil is a research fellow at the Institute on Metropolitan Opportunity. I would like to thank Florence Wagman Roisman, Robert Schwemm, Betsy Julian, John Powell, Stacey Seicshnaydre, Rigel Oliveri, Charles Lamb, Heather Abraham, Michael Allen, Alexander Polikoff, Douglas Massey, and Greg Squires for the comments on an earlier draft of this article. This article was shaped by years of discussion and debate that I observed, and participated in, when I served as a consultant to HUD's office for Fair Housing and Equal Opportunity helping to develop President Obama's fair housing rules. The article also benefited greatly from countless of conversations during a four-decade long relationship with Vice President Walter Mondale, the co-author of the Federal Fair Housing Act of 1968.

<sup>1</sup> See Civil Rights Act of 1968, Pub. L.90-282, 82 Stat. 73, 42 U.S.C. § 3601.

<sup>2</sup> See Civil Rights Act of 1964, Pub. L.88-353, 78 Stat. 241, 42 U.S.C. § 2000e.

<sup>3</sup> See Voting Rights Act of 1965, Pub. L.89-110, 79 Stat. 437, 52 U.S.C. § 10100.

structure of American society. Then and now, Americans lived in an environment defined by geographic residential segregation.<sup>4</sup> Then and now, nonwhite Americans, and particularly black Americans, were often confined to economically depressed, isolated neighborhoods.<sup>5</sup> This confinement was accomplished through a variety of segregative public and private acts.<sup>6</sup> Its result was the growth of a tiered society, in which some members were forced to live in places absent economic or educational opportunity, where they could be easily targeted by predatory political or economic forces. This was the problem the Fair Housing Act was meant to address, the ultimate goal of its most sweeping provisions, that recipients of federal funds must “affirmatively further Fair Housing,” an effort to unite, what the Kerner Commission termed “the two America’s” that “were separate and unequal.”<sup>7</sup>

Running alongside the well-established judicial interpretation, however, has been an alternative theory of the meaning of the Fair Housing Act. To these fair housing revisionists, the Fair Housing Act was never intended to directly target segregation in cities or require government agencies to affirmatively advance integration in their policies.<sup>8</sup> Instead, they argue, the Act was only ever intended to address individual acts of discrimination, typically taking place during private market sales.<sup>9</sup>

Under the established view, the Fair Housing Act requires the federal government to ensure that local governments receiving federal monies enact policies that affirmatively pursue racial integration. In the revisionist view, this requirement is ahistorical and counterproductive.<sup>10</sup> In the established view, the Fair Housing Act requires that most subsidized housing should be sited in affluent areas with high opportunity in order to reduce residential segregation. In the revisionist view, affordable housing can be sited anywhere, even if doing so mirrors some of the most notoriously segregative policies of past decades.<sup>11</sup> In the established view, the many discriminatory behaviors prohibited by the act include

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<sup>4</sup> See generally DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID; SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See generally discussion *infra* Kerner Commission. THE NATIONAL COMMITTEE OF CIVIL DISORDERS, REPORT (1967).

<sup>8</sup> See discussion *infra* comparing the position of William Bradford Reynolds, Assistant Attorney for Civil Rights in the Reagan Justice Department, the Trump Administration position on the Affirmatively Furthering Fair Housing Rule, and Edward Goetz, *The One Way Street of Interrogation* (2018).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

disparate impact violations and the “perpetuation of segregation.”<sup>12</sup> In the revisionist view, the Fair Housing Act is unconcerned with whether integration is barred, as long as entities in the housing market do not commit discrete acts of discrimination against individual consumers.<sup>13</sup>

The appeal of fair housing revisionism is clear: it effectively guts the Fair Housing Act, transforming it from one of the most significant legislative reforms in American history into a modest anti-discrimination measure. The revisionist Act is not a landmark law intended to advance a particular vision of an integrated society, but a minor, largely redundant law, intended to shield nonwhite Americans and other groups from mistreatment. This shrunken act would have little or nothing to say about how the federal government should guide local governments as they make decisions about land use, affordable housing placement, or white suburban enclaves. To those whose careers are built around local government land use, affordable housing construction, or protecting white suburban enclaves, the revisionist view offers an easy rationale to ignore otherwise-significant fair housing obligations.

Of course, skepticism of fair housing has existed long before the law’s passage, beginning with southern segregationists.<sup>14</sup> But since 1968, broader interpretations have mostly prevailed.<sup>15</sup> Every federal court to address the issue has interpreted the law as including a broad integration mandate, relying on several noteworthy pieces of legislative history, as well as the political context in which the law was enacted.<sup>16</sup> The same is true of most scholars, executive branch officials, and even among political conservatives.<sup>17</sup> The first and perhaps the most aggressive defender of the law’s broad mandate was none other than Republican George Romney, the first Housing and Urban Development (HUD) secretary to enter office while the Fair Housing Act was in force. Despite serving under Richard Nixon, whose presidential politics were heavily built around the defense

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See generally discussion *infra* Section III on the Senate floor debate on the Fair Housing Act of 1968.

<sup>15</sup> See discussion *infra* Section II on Obama’s disparate impact and affirmatively furthering fair housing rules and its discussion of federal court cases.

<sup>16</sup> *Id.*

<sup>17</sup> While William Bradford Reynolds made statements in the press arguing that the Fair Housing Act did not require integration, he never made this argument formally before the federal courts. Indeed, only the Trump Administration and Professor Goetz have ever formally advanced this argument. Even the student comment often cited by Professor Goetz (written by law student who would go on to work at the Bush Justice Department), does not go as far as Trump and Goetz but merely suggests this as an alternative reading of the law. See generally Michael R. Tein, Comment, *Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463 (1992).

of white residential enclaves,<sup>18</sup> Romney understood that the act required him to integrate American communities and pursued that goal throughout his tenure at HUD--often at odds with, or even unbeknownst to, President Nixon. In 2015, Justice Anthony Kennedy, hardly a liberal, offered a strong defense of the law's integrative intent in the case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.<sup>19</sup>

But in recent years, the revisionist narrative about the Fair Housing Act has taken on a more alarming character, for several reasons. First, the consistent promotion of these theories by some academics has given them unwarranted credibility in the academy, especially in the public policy field.<sup>20</sup> Of particular note, a widely recognized affordable housing scholar has published a book-length version of the revisionist case, arguing that integration has been unduly prioritized by fair housing advocates.<sup>21</sup> These arguments are beginning to be made by some non-profit low-income housing developers in state and federal courts and more recently quite clearly before the United States Supreme Court.<sup>22</sup> But worse still, during the Trump administration, these revisionist theories have found sudden root in the federal government official position on the meaning of the Fair Housing Act.

Although housing scholarship is often conducted from a left-of-center perspective, and the Trump administration is anything but, a bizarre cross-pollination of ideologies seems to have occurred. In July 2020, Trump's HUD eliminated what is known as the Affirmatively Furthering Fair Housing rule--the

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<sup>18</sup> See generally CHARLES LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS (2005).

<sup>19</sup> 135 U.S. 2507 (2015).

<sup>20</sup> As a frequent professional witness and paid policy advisor, Professor Goetz works for defendants in fair housing cases or community development entities that oppose the implementation of integrative remedies. See *Noel v. City of New York*, No. 15-CV-5236-LTS-KHP, 2018 WL 6786238 (S.D.N.Y. Dec. 12, 2018) (supporting a neighborhood residency preference for low-income housing); *Henry Horner Mother's Guild v. Chicago Hous. Auth.*, 824 F. Supp. 808 (N.D. Ill. 1993) (disputing benefits of mixed income housing and relocation of public housing residence).

<sup>21</sup> See Goetz, *supra* note 8, at 1.

<sup>22</sup> See Reply Brief of Respondents, *Frazier Revitalization Inc. in Support of Petition for Writ of Certiorari* at 9-11, *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.* 135 U.S. 2507 (2015) (No. 13-1371). See also Amicus Curiae Brief on Behalf of Local Initiatives Support Corporation, *In re Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan*, (N.J. Super. Ct. App. Div. 2003) (No. A-10-02T2).

centerpiece of the law's integrationist aims.<sup>23</sup> In doing so, it relied heavily on arguments advanced by the law's left-wing critics.<sup>24</sup>

This article shows that the revisionist view of the Fair Housing Act is inconsistent with the legislative language, intent and purpose of the Act, with the administration of the Act starting with its first contemporaneous implementation, with admissions and settlements made by HUD over decades, and the authoritative interpretation by the Supreme Court and all other courts thus far. The remainder of this article addresses these unwelcome developments. Simply put, the revisionist view of the Act does not fit at all with the historical context leading up to its passage. Contrary to the claims of fair housing revisionists, integration was always a core purpose of the Act and well-acknowledged by its proponents and supporters, both in Congress and in the broader civil rights community. Indeed, this focus on real integration is precisely what distinguished the Fair Housing Act from previous efforts to combat housing segregation.

This is not an academic debate, but one of deep importance for American cities. Even if the Trump administration's changes are likely to be overturned in the Biden administration, those changes have re-raised fundamental questions about American civil rights law. The primary question is simple: Are policies that increase racial segregation compatible with the requirements of the Fair Housing Act? And the answer is unequivocal that they are not.

## II. FAIR HOUSING REVISIONISM IN THE ACADEMY AND WHITE HOUSE

Although the Fair Housing Act has been law for over half a century, its advocates have spent much of that time trying to defend it. Early resistance to the law, however, typically took the form of non-enforcement and non-compliance.<sup>25</sup> Its bolder provisions were often muddied, stymied with endless court battles, or simply ignored.<sup>26</sup> The law's significance was downplayed for decades.

Despite those struggles, two powerful weapons against racial segregation emerged from the Act. The first was § 3604 (a) of the law, which prohibited a refusal "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."<sup>27</sup>

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<sup>23</sup> See Trump, *supra* note 8, at 1 (discussion of the Trump Administration's position on Obama's Affirmatively Furthering Fair Housing Rule).

<sup>24</sup> *Id.*

<sup>25</sup> See Massey and Denton, *supra* note 4, at 1; Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011 (1998)

<sup>26</sup> *Id.*

<sup>27</sup> 42 U.S.C. § 3604(a).

The phrase “otherwise make unavailable” has long been interpreted to create a broad prohibition against discriminatory housing transactions or acts of almost any description.<sup>28</sup> Most importantly, because the passage of the Fair Housing Act was deeply rooted in a larger debate about racial segregation, this “otherwise make unavailable” language has been held to a disparate impact cause of action against policies that reinforce segregation and a “perpetuation of segregation” cause of action, which allows plaintiffs to bring suit against policymakers who enacted certain policies with a segregative effect.<sup>29</sup>

The second was a phrase contained in § 3608 (d) and (e).<sup>30</sup> Both provisions require federal agencies, and the HUD Secretary specifically, “affirmatively to further the purposes of this subchapter.”<sup>31</sup> Because the overarching aim of the law was perceived as the formation of a racially integrated society, these provisions effectively created a mandate for federal agencies to *proactively* integrate. In addition, § 3608 (e)(5) requires HUD to specifically “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”<sup>32</sup> Since most HUD development programs are conducted in collaboration with state and local governments, this provision seems to require HUD to impute its integration mandate on those subordinate jurisdictions.

While both of these legal interpretations were well-established by the 21st century, their particulars (and sometimes, their enforcement) were largely left to the courts. As a result, there was no single clear, standardized set of integration obligations that jurisdictions were expected to follow, frustrating clear implementation of the Act.

Barack Obama sought to change that and restore the Act to its rightful place in the civil rights legal pantheon. In one of his first acts as president, Obama ordered HUD to create an administrative rule that preserved the disparate impact cause of action under the Fair Housing Act.<sup>33</sup> This made clear that the Fair Housing Act reaches further than overt, individual acts of discrimination to include practices that also have a disparate impact on housing availability. It also clarified

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<sup>28</sup> See Texas Dep’t of Hous. & Cmty. Aff. V. Inclusive Cmty. Project, 576 U.S. 519, 534–35 (2015); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

<sup>29</sup> See Obama’s Disparate Impact Rule discussion *infra* Section II; Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988)

<sup>30</sup> 42 U.S.C. § 3608(d)–(e) (2007).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Implementation of the Fair Housing Act’s Discriminatory Effects Standard Selected provisions and commentary, 78 Fed. Reg. 11,460, 11,461 (February 15, 2013); 24 C.F.R. § 100 (2013.)

beyond doubt that racial integration is a central aim of the Fair Housing Act – in other words, implementing § 3604 (a). He simultaneously directed the drafting of a second fair housing rule, the Affirmatively Furthering Fair Housing rule, which would command recipients of federal funds to use “their massive leverage to create a racially integrated society” – in other words, implementing § 3608.<sup>34</sup> The Obama Justice Department clearly announced the president’s position on the integrative purpose of fair housing law:

The Fair Housing Act’s language prohibiting discrimination in housing is “broad and inclusive;” the purpose of its reach is to replace segregated neighborhoods with “truly integrated and balanced living patterns.” The intent of the Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.<sup>35</sup>

In 2013, the Obama administration implemented his disparate impact rule, codifying elements of § 3604 (a).<sup>36</sup> That rule defined housing discrimination as a practice that “creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>37</sup> The commentary to the rule declared that “the Fair Housing Act’s language prohibiting discrimination in housing is broad and inclusive; the purpose of its reach is to replace [segregated neighborhoods] with truly integrated and balanced living patterns.”<sup>38</sup> The commentary stated that the intent of the Congress in passing the Fair Housing Act was to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States. The commentary continued:

The legislative history of the act informs HUD’s interpretation. The Fair Housing Act was enacted after a report by the National Advisory Commission on Civil Disorders, which Pres. Johnson had convened in response to major riots taking place throughout the country, warned that “[our] nation is moving toward two societies, one black, one white – is separate and unequal.” The Act’s lead sponsor, Sen. Walter Mondale, explained the Senate debates that the broad purpose of the act was to replace segregated neighborhoods with “truly integrated and

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<sup>34</sup> See *NAACP Bos. Chapter v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149 (1st Cir. 1987).

<sup>35</sup> H.R. Res. 1095, 110th Cong. 2d Sess. (2008); 154 CONG. REC. H2280-01 (Apr. 15, 2008).

<sup>36</sup> 24 C.F.R. § 100 (2013).

<sup>37</sup> Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2013).

<sup>38</sup> *Trafficante v. Metro Life Ins.*, 409 U.S. 205, 211 (1972).



balanced living patterns.” Sen. Mondale recognized that segregation was caused not only by “overt racial discrimination” but also by “[o]ld habits” which become quote “frozen rules,” and he pointed to one facially neutral practice – is the receipt the “refusal by suburbs and other communities to accept low-income housing.” He further explained some of the ways in which federal, state, and local policies had formally operated to require segregation and argued that “Congress should now pass a fair housing act to undo the effects of these past” discriminatory actions...

As discussed in the preambles to both the proposed rule and this final rule, the elimination of segregation is central to why the Fair Housing Act was enacted. HUD therefore declines to remove from the rule’s definition of “discriminatory effects” “creating, perpetuating, or increasing segregated housing patterns.” The Fair Housing Act was enacted to replace segregated neighborhoods with “truly integrated and balanced living patterns.” It was structured to address discriminatory housing practices that affect “the whole community” as well as particular segments of the community, with the goal of advancing equal opportunity in housing and also to “achieve racial integration for the benefit of all people of the United States.” Accordingly, the Act prohibits two kinds of unjustified discriminatory effects: (1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns. This directly addresses the purposes of the act to replace segregated neighborhoods with “truly integrated and balanced living patterns.” For example, the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all white communities and thus it aided attempts to promote integration.<sup>39</sup>

The Obama administration’s viewpoint, as expressed in this passage, represented the consensus of the federal courts and the leading fair housing scholars on the meaning and purpose of the Fair Housing Act. Despite that consensus, however, it was necessary for the Obama administration to lay out these concepts clearly and deliberately in a regulation, because over two decades earlier in the Reagan administration, a concerted anti-integration campaign had begun in earnest.<sup>40</sup> That effort was spear-headed by William Bradford Reynolds at the

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<sup>39</sup> 24 C.F.R. § 100 (2013).

<sup>40</sup> *Id.*

Justice Department, and Clarence Thomas as head of the Equal Employment Opportunity Commission. Together, they moved to decimate affirmative action and declare that voluntary integration programs in schools and housing, absent proof of intentional discrimination, were illegal racial balancing that was disallowed by the civil rights act itself.<sup>41</sup>

Reynolds and Thomas declared that neither Title VI nor the Fair Housing Act required integration.<sup>42</sup> Reynold baldly denied the integrationist objectives of the law:

The Federal fair housing law does not require integration, and the government should not be in the business of trying to bring about integration. Congress intended only to prohibit racial bias renting or selling housing, and as long as people are not denied free housing choice, I don't think any government ought to be about the business to reorder society or neighborhoods to achieve some degree of proportionality.<sup>43</sup>

By 2009, with Thomas then a U.S. Supreme Court justice, and only Justice Kennedy's swing vote upholding the legitimacy of the civil rights movement's long-term goal of ending segregation in schools and housing, Obama knew he had to act quickly to protect the integration imperatives of federal law.

For decades, there had been virtually no effective federal enforcement of the Fair Housing Act, particular against the government's continually segregative placement of affordable housing.<sup>44</sup> When the Obama administration suddenly began more aggressively implementing fair housing law, some constituencies, burdened by the newly enforced rules, resisted.<sup>45</sup> One such group was the affordable housing industry.

The role of affordable housing development in creating segregation has been understood for decades and was a core rationale for the creation of the Fair Housing Act in the first place, as will be explored in greater detail below. However,

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<sup>41</sup> See generally Drew S. Days, III, *Turning Back the Clock, The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

<sup>42</sup> *Id.* While Reynolds made these remarks in newspapers, he never made them through formal arguments as extreme as those from the Trump Administration and Professor Goetz.

<sup>43</sup> Anna Mariano, *Rights Chief Limits Fair Housing Law Questioned*, WASH. POST, July 11, 1984 (quoting William Bradford Reynolds, Assistant Attorney General for Civil Rights during Reagan Administration, 1980-1988.).

<sup>44</sup> *Hearing Before the Commission on Fair Housing and Equal Opportunity*, 110th Cong. (2008) (testimony of Robert Achtenberg, former Assistant Secretary for Fair Housing and Equal Opportunity).

<sup>45</sup> See discussion *infra* Section II of Obama's disparate impact and affirmatively furthering fair housing rules.

affordable housing construction, especially when conducted by private developers, often escapes the notice of the public as a civil rights issue. Unlike white, suburban, conservative enclaves, affordable developers do not fit many people's mental image of a civil rights opponent. Affordable developers are usually based in cities; they usually support Democratic or progressive political causes; they house low-income families, who are also often families of color.<sup>46</sup>

But affordable housing development is an industry with a clear interest in maintaining the segregated status quo. This is because it is heavily reliant on government subsidies, and those subsidies are easiest to access if they are allowed to build in low-income areas with limited political resistance, without major changes to their standard operating procedures. As a result, new fair housing rules that require some affordable housing in white or affluent neighborhoods and thus prevent all affordable development to occur in poorer neighborhoods, as well as add new requirements and hurdles for development, are potentially threatening to affordable housing developers who prefer to build in segregated neighborhoods that have less community opposition and more potential funding streams.<sup>47</sup>

In recent years, the figure most aggressively arguing the anti-integration perspective of these developers has been Professor Edward Goetz. Goetz is a long-time scholar of housing and affordable housing at the University of Minnesota and the head of the University's Center for Urban and Regional Affairs. The Center works closely with a number of local community developers in the Twin Cities and receives a substantial amount of funding from those developers and government agencies who have developed housing in a segregated manner and who are often defendants in fair housing cases. Professor Goetz has long been a critic of civil rights programs that would spread affordable housing to more affluent areas, terming this approach "dispersal" and arguing, contrary to the views of most social scientists, that its benefits were limited and that racially segregated communities could thrive.<sup>48</sup> But in recent years, as fair housing enforcement stepped up at the federal level, Professor Goetz increasingly took aim at the *legal* case for integration in the Fair Housing Act.<sup>49</sup>

In 2018, Goetz published a book, *The One-Way Street of Integration*, attacking the notion that integration was intended to be a core legal purpose of the Fair Housing Act.<sup>50</sup> The book makes a series of sweeping claims that attack the

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<sup>46</sup> See Myron Orfield, et al, *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUS. POL. DEB. 574 (2015).

<sup>47</sup> See *id.*

<sup>48</sup> Edward Goetz, *Poverty Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL. DEB. 608 (2015). See EDWARD GOETZ, *THE ONE-WAY STREET OF INTEGRATION* (2018).

<sup>49</sup> See GOETZ, *THE ONE-WAY STREET OF INTEGRATION*.

<sup>50</sup> *Id.*

established law and challenge what has become an academic consensus concerning the benefits of racial integration.<sup>51</sup> Goetz's basic argument is that affirmative integration is a *post hoc* addition to fair housing law, never intended by the 1960s authors of the civil rights laws and essentially read into existence by activist courts.<sup>52</sup> Instead, in his view, the purpose of the Fair Housing Act is *anti-discrimination*—in other words, outlawing discrete, individual acts of prejudice but imposing no larger vision of society.<sup>53</sup>

Goetz sustains this argument by examining – at least loosely – the statutory text and the congressional record. With regards to the former, he points out, in an argument remarkably like William Bradford Reynolds, that the word “integration” never appears in the law:

The text [of the Fair Housing Act] and the congressional records bear out the contention that integration has been read into the acts by the courts. The words integration and segregation for example never appear in Title VIII; nor is there any direct statement of policy or intent stating that Congress intended to achieve racial integration... The language of the act itself is unambiguously focused on eliminating discrimination in the private housing market and prescribing the penalties and procedures adhering to such discrimination. The integration goal is entirely unspecified in the act.<sup>54</sup>

He argues that “[t]here is widespread agreement that the Act “has two overriding objectives: the elimination of discrimination in housing and the achievement of integration.”<sup>55</sup> He continues:

The only goal explicitly identified in the language of the bill is the equal access goal -- that is, the elimination of discrimination. The goal of integration, in contrast, has been read into the act, repeatedly, by the courts. The act never explicitly specifies the

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<sup>51</sup> *Id.*; DOUGLASS MASSEY AND NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF AN UNDERCLASS* (Harv. U. Press. 1998). *See generally*, Raj Chetty, Nathaniel Hendren, LF Latz, *The Effects of Exposure to Better Neighborhoods on Children, New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (Apr. 2016); Raj Chetty, *et. al.*, *Where is the Land of Opportunity? The Geography of Intergeneration Mobility in the United States*, 129 Q. J. OF ECON. 1553, (2014).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> EDWARD GOETZ, *THE ONE-WAY STREET OF INTEGRATION* 98 (2018). While Goetz seems to assert this as a formal legal argument, Reynolds only made such claims in press interviews. None of the briefs submitted by the Reagan Justice Department went as far as Goetz. Indeed, only the Trump administration went this far.

<sup>55</sup> *Id.*

broader social goals of ending segregation or even of promoting integration.<sup>56</sup>

Goetz also makes broad claims about congressional intent. He asserts that the “record of legislative debate on the bill is not extensive,” and that, “[i]n fact, there is little in the congressional debates that can be used in retrospect to divine the intent of Congress.”<sup>57</sup>

However, Goetz does identify one statement that he seems to believe acts as something of a smoking gun in favor of his case. He asserts that Walter Mondale – the Fair Housing Act’s coauthor, whose quotation about “balanced and integrated living patterns” has been used to sustain the law’s integration mandate – actually revealed, in the midst of the congressional debate, that the law was never intended to serve any purpose but antidiscrimination. In Goetz’s words:

... Mondale made additional statements about the bill that seem to contradict the notion that it was about anything other than enhancing choice on the part of disadvantaged populations. In reference to Title VIII, Mondale said, “Obviously [the act] is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing. . . . Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.”<sup>58</sup>

Ordinarily, alternative revisionist interpretations of the Fair Housing Act offered by non-lawyers would merit little attention, given the uniformity of legal consensus on the other side of the debate. Unfortunately, recent developments have made it necessary to more directly refute these revisionist analyses of the Fair Housing Act.

It is unsurprising that the Trump administration was opposed to expansive readings of the Fair Housing Act. Trump’s HUD Secretary, Ben Carson, had previously denounced the Affirmatively Furthering Fair Housing rule as a form of social engineering,<sup>59</sup> and the administration was not known for its attentive concern to civil rights issues.

Nonetheless, the administration struggled to eliminate Obama’s housing rules. This was partly a result of clumsy and incompetent attempts to navigate the

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<sup>56</sup> *Id.* at 92.

<sup>57</sup> *Id.* at 91.

<sup>58</sup> *Id.* at 94.

<sup>59</sup> *Ben Carson’s Warped View of Housing*, N.Y. TIMES (Dec. 19, 2016) <https://www.nytimes.com/2016/12/19/opinion/ben-carsons-warped-view-of-housing.html>.

procedural requirements of federal rulemaking,<sup>60</sup> and partly because, perhaps unexpectedly, many industry and stakeholder groups lobbied in favor of retaining the rules.<sup>61</sup> But the administration did eventually achieve its goal at least. It replaced Obama's Disparate Impact rule<sup>62</sup> with a version that would make it far more difficult to prove that a particular act was discriminatory.<sup>63</sup> And in 2020, the Trump administration abruptly eliminated Obama's Affirmatively Furthering Fair Housing rule in its entirety. Trump asserted the Obama rule would "destroy the suburbs."<sup>64</sup>

Whatever its true motives, the rationales adopted by Trump for eliminating this civil rights rule echoed, almost perfectly, some of the arguments advanced by Professor Goetz and other revisionist academics. For instance, Trump's rule documentation mirrors Goetz's claim that the case for an integration mandate relies on selective quotations of the record, and the true intent of the law is, at best, ambiguous:

The courts making the broadest claims of the AFFH requirement rely on selective quotations from the legislative history. Those decisions rely on legislative history about the FHA aiming to achieve "truly integrated and balanced living patterns" and ending patterns of segregation. The problem is that the same legislative history makes clear that these were long-term goals to be achieved through the narrow means of eliminating overt housing discrimination (e.g., restrictive covenants). As the court in NAACP observed, "the law's supporters saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed." They believed that "[d]iscrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation."

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<sup>60</sup> Katy O'Donnell, *Court stops launch of HUD rule that makes it harder to prove discrimination*, POLITICO (Oct. 26, 2020), <https://www.politico.com/news/2020/10/26/court-stops-hud-rule-discrimination-432592>.

<sup>61</sup> *Civil Rights Groups Commend Top Mortgage Lenders for Urging HUD to Reconsider Disparate Impact Rule*, NAT'L FAIR HOUSING ALL., July 15, 2020, <https://nationalfairhousing.org/civil-rights-groups-commend-top%E2%80%AFmortgage-lenders-industry-leaders-for-urging-hud-to-reconsider%E2%80%AFdisparate-impact%E2%80%AFrule/>

<sup>62</sup> 20 C.F.R. § 100 (Sept. 24, 2020).

<sup>63</sup> *Id.*

<sup>64</sup> Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (August 7, 2020); 24 C.F.R. § 5, 91, 570, 574, 576, 903 (2020); *Trump says low-income housing will 'destroy' the suburbs*, WASH. POST (Aug. 12, 2020, 7:27 PM), [https://washingtonpost.com/video/politics/trump-says-low-income-housing-will-destroy-the-suburbs/2020/08/12/c8c1d58d-8c73-4f26-abdd-5819d70857ef\\_video.html](https://washingtonpost.com/video/politics/trump-says-low-income-housing-will-destroy-the-suburbs/2020/08/12/c8c1d58d-8c73-4f26-abdd-5819d70857ef_video.html).

HUD does not subscribe to broader interpretations of AFFH to the extent precedent for them may exist. The case law is clear that “HUD maintains discretion in determining how the agency will fulfill its AFFH obligation.” Thus, NAACP and its sister cases were all interpreting an ambiguous phrase that the agency would otherwise have some discretion to define. Indeed, those cases were decided years before HUD had formulated a definition by rule.<sup>65</sup>

Trump’s HUD uses this alleged ambiguity to decline to support a broad interpretation of the law. It also twice cites the Mondale quote that ostensibly reveals the antidiscrimination purpose of the law:

It is imperative to note that the long-standing debate seeking to define “Fair Housing” has spanned the political spectrum. Senator Mondale, the chief sponsor of the Fair Housing Act (FHA), unambiguously acknowledged the limited scope of the concept of fair housing. He “made absolutely clear that Title VIII’s policy to ‘provide . . . for fair housing’ means ‘the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.’” Senator Mondale thus defined fair housing as simply housing that is free of discrimination. In this definition, housing is “fair” if anyone who can afford it faces no discrimination-based barriers to purchasing it.<sup>66</sup>

Later, the same rulemaking document continues:

Any broader construction of the AFFH obligation is difficult to square with the sponsor Senator Mondale’s unambiguous pronouncement that the FHA’s policy to “provide . . . for fair housing” means “the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.”<sup>67</sup>

In short, revisionist arguments about the Fair Housing Act are gaining currency, and as recently 2021, have been used to eliminate fundamental civil rights requirements affecting housing and segregation nationwide.<sup>68</sup> As the Trump administration notes, these ideas now “span the political spectrum.”<sup>69</sup> Given the danger that they represent to civil rights, it is imperative they be refuted.

Take, for instance, the quotation in which Mondale seems to refute that the law is intended for any purpose but integration. This quotation becomes much

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<sup>65</sup> Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (August 7, 2020); 24 C.F.R. § 5, 91, 570, 574, 576, 903 (2020).

<sup>66</sup> *Id.* at 47901.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 47908.

<sup>69</sup> *Id.*

more mundane in context. Mondale was not giving a sweeping description of the law's purpose but responding to an overheated concern of a skeptic of the law. Specifically, he was responding to Republican senator George Murphy of California, who had briefly argued in the record that the phrase "provide for fair housing" could potentially obligate the United States to provide housing for its entire population:

Mr. Murphy: I have one other question with regard to the Dirksen amendment, on my time. I have reference to the last two lines on page 6. Would the Senator from Minnesota do me the great favor of reading the last two lines, where it says provide for fair housing throughout the United States?

Mr. Mondale: The statement to which the Senator from California makes reference reads as follows: It is the policy of the United States to provide for fair housing throughout the United States.

Obviously, this is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale and rental of housing, for the housing described under the circumstances provided by the Dirksen substitute.

Mr. Murphy: There is not the possibility of misconception of what the word provide means?

Mr. Mondale: Not at all

Mr. Murphy: Based on my experience in the short space of three years that I have been here, I would think there would be a great chance that word "provide" could mean almost anything, including "give."

Mr. Mondale: This is a declaration of purpose. The phrase to be construed includes the words "to provide for" I see no possibility of confusion on that point at all.

Mr. Murphy: If the Senator will forgive me, it says "to provide fair housing." Does that mean give the housing, to make it available?

Mr. Mondale: Without doubt, it means to provide for what is provided in the bill. It means elimination of discrimination in the sale and rental of housing. That is all it could possibly mean.<sup>70</sup>

In other words, Mondale was not elucidating the purpose of the law at length. He was batting away a barely-coherent question about the meaning of the term

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<sup>70</sup> 114 CONG. REC. 4971, 4975 (March 4, 1968).



“provide,” attempting to reassure another senator that his bill would not smuggle a vast universal public housing requirement into law. This is hardly sufficient evidence to refute the historical and legislative record indicating that integration was a central purpose of the act.

This example reveals a more general difficulty interpreting the legislative history of the Fair Housing Act: during 1960s debates over various fair housing measures, congressional opponents frequently suggested that they would compel large changes to the private housing market, or even its complete elimination. The law’s congressional defenders, including Mondale, as well as second co-author Edward Brooke, responded to these complaints by reassuring Congress that they intended no such thing. In a modern context, however, these comments have been occasionally repurposed to argue that Mondale, Brooke, and others were disclaiming any integrative intent at all.

But such a claim is not remotely sustained by the historical or congressional record. It is not just Mondale’s famous claim that the Fair Housing Act is intended to create “truly balanced and integrated living patterns” that supports the law’s integrative intent. The congressional debate over the Fair Housing Act is unambiguous: the Act’s ultimate purpose is integration. The next section explores that debate.

### III. INTEGRATION AND THE FAIR HOUSING ACT DEBATE

#### A. *The Struggle to Integrate Federally Subsidized Housing 1949-59*

By the time of the Fair Housing Act’s passage, there were already a number of anti-discrimination protections on the books in U.S. federal law. However, civil rights advocates understood that greater protections were needed to defeat segregation and produce true integration. One recommendation, offered by advocates, was to incorporate HUD into an integrative program by requiring it to take “affirmative” action to achieve fair housing goals. Although this language was not frequently discussed in the immediate runup to the 1968 law, it was included in earlier iterations of the law and discussed explicitly at that time in Congress.

Even before the Fair Housing Act, there had been numerous federal efforts to eliminate racial discrimination that would affect the sale and rental of housing, either broadly or in a particular activity or market sector. The earliest of these, the Civil Rights Act of 1866, prohibited private housing discrimination.<sup>71</sup> While for many decades the law was assumed to have no effect – the infamous 1883 Civil Rights Cases decided that the Fourteenth Amendment only gave Congress the authority to regulate state or government – by the mid-60s this understanding had

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<sup>71</sup> See, 42 U.S.C. § 1982 (2021); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

shifted. The Civil Rights Act of 1964, and the subsequent Supreme Court decision of *Heart of Atlanta Motel v. United States*, grounded Congress's ability to regulate private discrimination in its Commerce Clause powers.<sup>72</sup> The validity of the 1866 Act was discussed in the debate over the 1968 Act.<sup>73</sup> Indeed, the Supreme Court held that the 1866 Act barred racial housing discrimination shortly after the Fair Housing Act's passage.<sup>74</sup>

In 1944, Gunnar Myrdal's landmark study *the American Dilemma* reported that federal housing policy served to strengthen and widen rather than mitigate residential segregation.<sup>75</sup> The Truman Committee on Civil Rights Report cited FHA officials expressly defending segregation after the Supreme Court decisions in *Shelley v. Kraemer* and *Hurd v. Hodge*.<sup>76</sup> The NAACP supported Bricker-Cain proposed a ban on segregation in the 1949 Housing Act.<sup>77</sup> But it failed. The US Commission on Civil Rights concluded in 1959 that urban renewal was "accentuating or creating clear-cut racial separation."<sup>78</sup>

### B. *The Organized Push for a Federal Fair Housing Act 1960-66*

President Kennedy, seeking black electoral support, promised to desegregate federally supported housing with a stroke of the pen. In November 1962, six years before the Act's passage, President Kennedy issued an executive order to eliminate segregation in federally-supported housing. Kennedy's order declared that

<sup>72</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). In a separate case in 1966, the Supreme Court also expanded the reach of the Fourteenth Amendment to deprivations of rights conducted by private actors with even minimal state participation. *United States v. Guest*, 383 U.S. 745 (1966).

<sup>73</sup> See, e.g., *The Fair Housing Act of 1967: Committee on Banking and Currency of the U.S. Senate, Hearings Before the Subcommittee on Housing and Urban Affairs*, 90th Cong., First Session on S. 1358, S. 2114, and S. 2280 at 250 (1967). See also *id.* at 229-31, Testimony of Sol Rabkin.

<sup>74</sup> *Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 443-44 (1968).

<sup>75</sup> Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake For. L. Rev. 333, 337 (2007).

<sup>76</sup> *Id.* at 337-338.

<sup>77</sup> *Id.* at 338-39 (citing Elizabeth Julian & Michael M. Daniel, *Separate and Unequal—The Root and Branch of Public Housing Segregation*, 23 Clearinghouse Rev. 666 (1989); Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 Hous. Pol'y Debate 393, 400 (2000) (containing more on HHFA views of *Brown v. Board's* impact on housing and redevelopment programs); See also Jack Greenberg, *Crusaders in the Courts*, 175, 207 (detailing how the NAACP was challenging segregation in public housing nationally).

<sup>78</sup> *Id.* at 339.

excluding Americans from supported housing because of their race, color, creed, or national origin is “unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws”; and that “such discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their unalienable rights to life, liberty, and the pursuit of happiness.”<sup>79</sup> The order directed “[a]ll departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin” in the “sale, leasing, rental, or disposition of residential property and related facilities.”<sup>80</sup>

Implementation of the 1964 Civil Rights Act also created protections against housing discrimination. Title VI of the 1964 Act declares that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in or denied the benefits of, or be subjected to, discrimination under any program or activity.”<sup>81</sup> Rules issued in December of 1964 defined discrimination as “subjecting a person to segregation or separate treatment in any manner related to his receipt of housing, accommodations, facilities, services, financial aid or any benefits under the program or activity.”<sup>82</sup> Federal regulation further extended Title VI to housing. 24 CFR § 1.4, implementing Title VI for HUD, prohibited segregated site selection and segregated occupancy.<sup>83</sup>

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<sup>79</sup> Exec. Order 11,063, 3 C.F.R. § 652 (1959-1963); Equal Opportunity in Housing, 27 Fed. Reg. 11,527 (November 24, 1962); 27 Fed. Reg. 11,802 (November 30, 1962). (defining discriminatory practice in the sale, rental or other disposition of the residential property or related facilities or in the use or occupancy thereof of government financed housing).

<sup>80</sup> *Id.*

<sup>81</sup> 42 U.S.C. 2000d et seq.

<sup>82</sup> Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16,273, 16,280 (December 4, 1964).

<sup>83</sup> 24 C.F.R. § 1.4 (“(1) A recipient under any program or activity to which this part 1 applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny a person any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity;

(ii) Provide any housing, accommodations, facilities, services, financial aid, or other benefits to a person which are different, or are provided in a different manner, from those provided to others under the program or activity;

But it was clear that anti-discrimination was insufficient. HUD itself acknowledged as much in its 1965 Low Rent Housing Manual, which sought to restrict local governments to siting affordable housing in areas that would “afford the greatest opportunity for inclusion of eligible applications for all groups.” The manual also stated that “[a]ny proposal to locate housing only in areas of minority concentration will be prima facie unacceptable.” However, these instructions were directed at local governments, over which HUD exercised limited authority.<sup>84</sup>

Civil rights advocates also knew that federal anti-discrimination efforts preceding 1968 would not be sufficient to create true integration. Martin Luther King, Jr. argued that the federal government had an obligation to engage in activities beyond anti-discrimination rules. He wrote:

There is hardly any area in which executive leadership is needed more than in housing. Here the Negro confronts the most tragic expression of discrimination; he is consigned to ghettos and overcrowded conditions. And here the North is as guilty as the South...

While most [federal] housing programs have antidiscrimination clauses, they have done little to end segregated housing. It is a known fact that the FHA continues to finance private developers who openly proclaim that none of their homes will be sold to Negroes. The urban renewal program has, in many instances, served to accentuate, even initiate, segregated neighborhoods. (Since a large percentage of the people to be relocated are Negroes, they are more likely to be relocated in segregated areas.)

A president seriously concerned about this problem could direct the housing administrator to require all participants in federal housing programs to agree to a policy of “open occupancy.” Such a policy would be enforced by (a) making it mandatory for all violators to be excluded from future participation in federally financed housing programs and (b) by including a provision in each contract giving the government the

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(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity;

(iv) Restrict a person in any way in access to such housing, accommodations, facilities, services, financial aid, or other benefits, or in the enjoyment of any advantage or privilege enjoyed by others in connection with such housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity.”).

<sup>84</sup> HUD 1965 low rent housing manual cited in *Shannon v. HUD* and attached as Plaintiffs exhibit *Ramjel v. City of Lansing* 417 F.2d 321 (6<sup>th</sup> Cir 1969).

right to declare the entire mortgage debt due and payable on breach of the agreement.<sup>85</sup>

King's expansive suggestion that federal officials be directed to proactively promote integration echoes the "affirmatively furthering" provisions of the Fair Housing Act, still several years in the future. But King's ambition did not stop there. He proposed a cabinet-level position to conduct integration work:

To coordinate the widespread activities on the civil-rights front, the president should appoint a Secretary of Integration. The appointee should be of the highest qualifications, free from partisan political obligations, imbued with the conviction that the government of the most powerful nation on the earth cannot lack the capacity to accomplish the rapid and complete solution to the problem of racial inequality.<sup>86</sup>

On May 17, 1962, King appealed for President Kennedy to issue a second emancipation proclamation, to eliminate all racial segregation in schools and housing. The document released by King declared that "segregation is but a new form of slavery—an enslavement of the human spirit rather than the body."<sup>87</sup> The draft proclamation stated that the President would use the "full powers of his office" to eliminate all forms of "statutory imposed segregation and discrimination from and throughout the respective states of this nation" and that "racial segregation in Federally assisted housing is henceforth prohibited."<sup>88</sup>

King's desire for a more proactive federal role in housing integration was reflected in the preferences of the wider civil rights community. The primary vehicle in which the civil rights community worked to shape a bill to end segregation in housing was the National Committee Against Discrimination in Housing (NCDH). All of the major civil rights organizations were cooperative members. Its legal committee included Robert Carter, general counsel of the NAACP, Jack Greenberg of the NAACP Legal Defense Fund, and many of the nation's most significant civil rights scholars and lawyers. Its reports and congressional testimony lie at the heart of the meaning of the evolving fair housing rules under the 1964 Act and even more importantly of the meaning and structure of the 1968 Fair Housing Act.

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<sup>85</sup> Martin Luther King, *The President has the Power*, THE NATION, Feb 4, 1961, reprinted in *Essential Writings and Speeches of Martin Luther King* (Harper 1986 ed. James M. Washington) at 152-59.

<sup>86</sup> *Id.*

<sup>87</sup> Rev. Dr. Martin Luther King, Jr., Appeal from Dr. Martin Luther King, Jr., President of the Southern Christian Leadership Conference, to President John F. Kennedy: For National Rededication to the Principles of the Emancipation Proclamation and for an Executive Order Prohibiting Segregation in the United States at 5-6 (May 17, 1962).

<sup>88</sup> *Id.*

Over time, spurred by the changing focus of the civil rights movement and ongoing civil disturbances in major cities, the National Committee Against Discrimination in HOUSING NCDH began to demand progress on fair housing. It grew increasingly frustrated with slow efforts of the federal government to desegregate the sites and occupancy of federally supported housing.

Housing was increasingly the focus of other civil rights efforts as well. After the Watts riots, King began his doomed fair housing campaign in Chicago, pushing to end inner-city segregation and integrate America's large metropolitan areas. Almost simultaneously, Dorothy Gautreaux, a civil rights organizer and public housing resident who worked closely with King on his Chicago open housing campaign, sued the city housing authority and HUD<sup>89</sup>, arguing that the existing conditions of racial segregation in Chicago public housing violated the U.S. Constitution and 1964 Civil Rights Act. King's Chicago Freedom Movement included efforts to relocate planned HUD low-income housing to less segregated locales, with advocates arguing that such projects would "intensify the ghetto."<sup>90</sup> Negotiating with Mayor Daley, King's representatives demanded an end to the concentration of public housing in poor areas, as well as a guarantee that urban renewal would be conducted in an integrative fashion.<sup>91</sup> When asked if they would withdraw their support of Gautreaux's suit, King refused.

The NCDH worked closely with the King and the Chicago Freedom movement. In April of 1966, the White House asked the NCDH to come up with recommendations for policy to eliminate segregation and redress the federal government's historic role in creating segregation. The bill of particulars that resulted would shape the Fair Housing Act, including § 3608, with its language about "affirmatively furthering." There were 17 recommendations and virtually all of them were incorporated into statute, rules or policy.

In a report "How the Federal Government Builds Ghettos," NCDH centered federal policy decisions in the creation of segregation:

The Department of Housing and Urban Development, from its central office to its regional and local offices, is replete with officials who are out of sympathy with the nondiscrimination policy and objectives of the Administration, and who are unwilling to implement the responsibilities imposed upon them by Executive Order 11063 and Title VI of the Civil Rights Act of 1964....

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<sup>89</sup> The plaintiffs initially brought two cases, one against the Chicago housing authority another against HUD, which were later consolidated in *Gautreaux v. Chicago Housing Auth.*, 503 F.2d 930 (7th Cir. 1974).

<sup>90</sup> ADAM COHEN & ELIZABETH TAYLOR, *AMERICAN PHARAOH* 396 (2001).

<sup>91</sup> *Id.* at 404.

The Department of Housing and Urban Development continue to improve the construction of public housing projects on sites and in areas which reinforce and perpetuate segregated living patterns.<sup>92</sup>

The recommendations of King, NCDH, and others had a clear impact on federal policymaking. Civil rights proponents in the federal government began to demonstrate a more robust understanding of the tools available for housing desegregation, particularly those available to HUD, in its capacity as an agency with considerable leverage over state and local governments. A major White House conference on civil rights agreed to a series of proposals to reform civil rights on June 2, 1966. The policies proposed addressed the concerns laid out in the NCDH work. In those proposals, the broad contours of what would eventually become “affirmatively furthering fair housing” are easily seen:

1. The administration should adopt a firm and vigorous policy to utilize all the programs and resources of the Department of Housing and Urban Development and other agencies to promote and implement equal opportunity and desegregation. A Presidential directive to all federal agencies to cooperate with the Department of Housing and Urban Development in planning for wider housing opportunities for minority group families, and establishing appropriate criteria for awarding contracts, loans, and grants is strongly urged.

2. Enforcement under the Executive Order and Title VI of the Civil Rights Act of 1964 must be more affirmative and vigorous. Clear and affirmative guidelines for field offices of the appropriate Federal agencies and frequent checks on their procedures are required if equal housing opportunity is to be a fact. Demonstrations of affirmative action to desegregate should be required by recipients of Federal funds and assistance. Federal assistance within the scope of Title VI should flow only to communities in which freedom of choice to secure a home is written into law.<sup>93</sup>

Policies 1 and 2 capture the heart of the “affirmatively furthering” approach – requiring the utilization of the whole federal toolset, including leverage over subordinate units of government, to pursue housing integration and desegregation. Moreover, far from being the toothless guidelines of the past, these proposals suggest that HUD and other agencies condition federal funding on furtherance of

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<sup>92</sup> NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS* 6 (1967).

<sup>93</sup> RECOMMENDATIONS OF THE WHITE HOUSE CONFERENCE: TO FULFILL THESE RIGHTS 96 (June 1-2, 1966), <http://www2.mnhs.org/library/findaids/00442/pdfa/00442-01894.pdf>.

integration goals, which reflects the most aggressive modern-day interpretations of the “affirmatively furthering” requirement.

These recommendations also make clear that policymakers understood the distinction between, on one hand, affirmative integration programs and policies in the federal government, and on the other, anti-discrimination laws. That is because it independently proposes a comprehensive anti-discrimination law in the subsequent recommendation:

3. A comprehensive Federal anti-discrimination law as broad as the Constitution permits, covering all housing transactions whether or not Federally assisted --- those parts of the housing industry benefitting from government mortgage. . . The primary enforcement device applicable to Federally assisted housing should be the termination of funds and other benefits now and in the future to the enterprises and units of government found in violation of the law.<sup>94</sup>

C. *The Fair Housing Act in Congress, 1966-68*

As proposals began to be transformed into legislation, the impact of recommendations such as these was clearly visible. The first several attempts at passing a national fair housing law contained mandates for HUD to affirmatively further fair housing.

The most notable such attempt was the Civil Rights Act of 1966, doomed by Senate filibuster. The 1966 act contained many of the major fair housing provisions that would pass several years later, including the requirement that the secretary of HUD affirmatively further “the purposes of this law.”<sup>95</sup> Voluminous congressional debate accompanied the 1966 bill. Congressional debate focused heavily on the constitutionality of the proposal, but also included direct discussion of the “affirmatively furthering” provisions. Of particular note is the May 1966 testimony of Robert Weaver, HUD Secretary at the time (and the department’s first black leader). Weaver was interrogated directly about the meaning of the “affirmatively furthering” language. In his response, he describes the fundamental approach to integration that defines the mainstream consensus on the question, and was adopted by HUD in the Obama administration:

The CHAIRMAN. Section 408 says the Secretary of Housing and Urban Development shall-and you get down to (e) on line 22:

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<sup>94</sup> *Id.*

<sup>95</sup> On May 2, 1966, the first fair housing provisions were introduced as Title IV of an omnibus civil rights bill. Section 409 (e) “declared that that the Secretary of Housing and Urban Development shall administer the programs and activities relating to housing in a manner affirmatively to further the policies of this bill.” This language derives directly from the recommendations of the White House conference.



Administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title. What would you do if you find violations?

Secretary WEAVER. I think there are several types of violations that would be involved here. In the first place, insofar as the housing activities which are under the Department of Housing and Urban Development, we would immediately issue, of course, the necessary regulations to be consistent with the word, the spirit, and intent of this act. We would also administer the various programs that fell under our jurisdiction in a way to carry out the purposes and the requirements of this act. We would check, not waiting for complaints to come in, but would check in the general operation to be sure that our activities were consistent with the provisions of the section.

The CHAIRMAN. Be more specific; what else would you do?

Secretary WEAVER. In the event there were several- I think this came out in the Attorney General's testimony. If there were several alternative proposals that came in for a given development, as far as housing is concerned, I think the one that would lend to open occupancy patterns of some permanence and the other would perpetuate the existing patterns, we would certainly give preference to the one that would lend itself to open occupancy patterns. . . .

This is affirmative action. I think it involves, as I said earlier, that we would be sure that our regulations were in conformance with this.<sup>96</sup>

Weaver's approach, of opting for housing policy proposals that produce integration, while disfavoring policies that "perpetuate the existing [segregated] patterns," is a succinct summary of the requirements of the modern Fair Housing Act. Although this principle has been elaborated and formalized in federal rules, the basic requirement to prioritize integration in agency decision making is unmistakable. By contrast, Weaver's answer is incompatible with the idea that the Fair Housing Act is neutral or agnostic on integration.

Other components of the congressional debate around the 1966 law also demonstrate congressional intent to reverse the federal government's historic role as a promoter of segregation, and in its place create agencies that promoted integration. For example, NCDH reports on the federal government's role in creating racial ghettos were submitted into the congressional record by Senator Brooke. The reports' language powerfully condemns the federal government's

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<sup>96</sup> H.R. Rep. No. 1678 at 1367-68, 1385 (1966).

record of ineffective anti-discrimination measures. In one sharp passage, it analogizes the federal government's willingness to use funding as a stick to achieve school integration, with its comparative unwillingness to find similar tools in the realm of housing:

In recent years the federal obligation to guarantee freedom of housing to all citizens has been twice reaffirmed: first by the 1962 Executive Housing Order and then by Congress in 1964. The Executive Order barring discrimination in all federally-assisted housing was a major breakthrough – the fruits of a 10-year campaign launched and piloted by NCDH.

Two years later Congress passed a Civil Rights bill and included the following stipulation under Title IV: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activity receiving Federal financial assistance.

This is the same paragraph the U.S. Office of Education invokes in its affirmative program to desegregate the nation's public schools, especially in the South. Thirty-seven school districts have had Federal funds cut off, and another 185 districts have had funds deferred, because they were violating Title VI. As a result of USOE's relatively firm stand, the proportion of Negro children attending schools with white children in the Deep South jumped this year from 6% to almost 17% -- a small but measurable achievement, especially when one considers that to reach only 6% compliance with the Supreme Court's 1954 desegregation ruling, the South took 12 years!

Nothing remotely resembling this modest success has occurred in housing. Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.<sup>97</sup>

Over and over, NCDH and other advocates emphasize that the fight for fair housing is synonymous with the fight against segregation, and the fight to produce "meaningful integration." On this point the testifiers on the 1966 law were absolutely unambiguous. If anything, they attacked anti-discrimination measures as indicative of the federal government's shaky commitment to the principle of integration:

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<sup>97</sup> NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS 23-24 (1967).

At present, the federal example is murky; it has an Alice-in-Wonderland quality that defies easy summation. On the one hand, the Government is officially committed to fighting segregation on all relevant fronts; on the other, it seems temperamentally committed to doing business as usual – which, given our current social climate, means more segregation. It hires many intergroup relations specialists – HUD has 47 -- but deprives them of the power and prestige to achieve meaningful integration. Similarly, it cranks out hundreds of inter-office memoranda on how best to promote open occupancy, but it fails to develop follow-up procedures tough enough to persuade bureaucrats to take these missives seriously. The federal files are bulging with such memoranda – and our racial ghettos are expanding almost as quickly.

The road to segregation is paved with weak intentions – which is a reasonably accurate description of the Federal establishment today. Its sin is not bigotry (though there are still cases of bald discrimination by Federal officials) but blandness; not a lack of goodwill, but a lack of will.<sup>98</sup>

Similar sentiments were common throughout the congressional discussion of the 1966, 1967, and the 1968 civil rights acts. Testifiers who emphasized racial integration included Attorney General Ramsey Clark, sociologist Kenneth Clark, NAACP head Roy Wilkins, U.S. Commission on Civil Rights head Frankie Freeman, HUD Secretary Robert Weaver, and Algernon Black of the ACLU. Over hundreds of pages of testimony and debate, testifiers repeatedly mentioned the harms of inner-city racial ghettos, the need for proactive federal action to reduce segregation in those places, and the federal government’s historic role in producing such segregation, particularly by siting affordable housing within segregated areas. A number of testifiers also expressed support for a policy that would prevent governments from siting affordable housing in segregated neighborhoods, and stated that they believed the proposed law would do so.<sup>99</sup>

Of course, the most important indicator of the integrative purpose of the Fair Housing Act remains the statements of its Senate authors. In addition to Walter Mondale’s famous statement that the Act was aimed towards the creation of “truly balanced and integrated living patterns,” Senator Edward Brooke, the law’s other chief proponent, frequently asserted its integrative purpose. As a member of the Kerner Commission, he cited that report’s sweeping conclusion that desegregation

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<sup>98</sup> 114 CONG. REC. 2,281 (1968).

<sup>99</sup> See Florence Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333, 360-63, 371-80 (2007).

of urban areas was necessary. Brooke even argued, at one point, that the integrative aim of the law was unmistakably obvious: “Can we state the proposition any more clearly? America's future must lie in the successful integration of all our many minorities, or there will be no future worthy of America.”<sup>100</sup>

Both the Trump Administration and Goetz argue that there is little legislative history to inform the meaning of the Fair Housing Act.<sup>101</sup> This claim is obviously false. All told, in 1967, there were 508 pages of Senate testimony about the new fair housing proposal<sup>102</sup>, and an additional 361 pages of Senate debate in 1968.<sup>103</sup>

With four cloture votes this constitutes one of the longest and most detailed civil rights debates in the history of Congress.<sup>104</sup> Sixteen senators gave major speeches in favor of the bill in 1968: Mondale, Brooke, Dodd<sup>105</sup>, Tydings<sup>106</sup>, Javits<sup>107</sup>, Percy<sup>108</sup>, Hart<sup>109</sup>, Proxmire<sup>110</sup>, Case<sup>111</sup>, Mansfield, Muskie<sup>112</sup>, Gruenig<sup>113</sup>, Dirksen, Kennedy (MA)<sup>114</sup>, and Kennedy (NY)<sup>115</sup>. Each testifier referenced the integrative intent of the bill.

Mondale, Brooke, Case, Proxmire, and Muskie also specifically discussed the bill's goal of eliminating the segregative placement of housing by HUD.

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<sup>100</sup> 114 CONG. REC. 2,525 (1968).

<sup>101</sup> EDWARD GOETZ, *THE ONE-WAY STREET OF INTEGRATION* 97 (Cornell University Press 2018); Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,901 (August 7, 2020).

<sup>102</sup> *The Fair Housing Act of 1967: Committee on Banking and Currency of the U.S. Senate, Hearings Before the Subcommittee on Housing and Urban Affairs*, 90th Cong. (1967).

<sup>103</sup> 114 CONG. REC. 2270-6002 (1968).

<sup>104</sup> See Jean Dubofsky, Fair Housing: A Legislative History, 8 Washburn L.J. 149 (1969)

<sup>105</sup> 114 CONG. REC. 2,528-29 (1968).

<sup>106</sup> *Id.* at 2,529-30.

<sup>107</sup> 114 CONG. REC. 2,703-05 (1968).

<sup>108</sup> 114 CONG. REC. 2,538-41 (1968).

<sup>109</sup> 114 CONG. REC. 2,706-08 (1968).

<sup>110</sup> 114 CONG. REC. 2,984-86 (1968).

<sup>111</sup> 114 CONG. REC. 3,122-23 (1968).

<sup>112</sup> 114 CONG. REC. 3,253 (1968).

<sup>113</sup> 114 CONG. REC. 3,341-42 (1968).

<sup>114</sup> 114 CONG. REC. 2,544 (1968).

<sup>115</sup> 114 CONG. REC. 2,709 (1968).

Mondale asserted the government housing policies promoted segregation and must stop.<sup>116</sup>

“Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively white areas... An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.<sup>117</sup> ... The record of the US government in this period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.<sup>118</sup>

Brooke introduced the entire NCDH report which blames segregated government action as a cause of segregation and made clear that the fair housing bill was designed to stop HUD and other government agencies from building housing in a segregated pattern. Brooke went on:

“... American cities and suburbs suffer from galloping segregation...” and, “that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything. The billions of dollars it spends on housing... are dollars that buy ghettos.”<sup>119</sup>

...What adds to the murk is officialdom’s apparent belief in its own sincerity. Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph - - even as he ok’s public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred.”<sup>120</sup>

“The federal mandate to stop segregation is perfectly clear.” Brooke continued and because the government’s segregated housing policy was continuing under constitutional prohibitions, and under Title VI of the 1964 Civil Act, which both require the proof of intent, the Fair Housing Act was necessary to go further to stop further government segregation.

Senator Case discussed his ongoing battle with HUD in New Jersey to stop building housing in a segregated manner. Case declared; “to our shame the Federal

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<sup>116</sup> 114 CONG. REC. 2,270–79 (1968).

<sup>117</sup> *Id.* at 2,277.

<sup>118</sup> *Id.* at 2,278.

<sup>119</sup> *Id.* at 2280-81.

<sup>120</sup> *Id.* at 2281.

Government has helped build these ghettos...<sup>121</sup> the ghetto system, nurtured both directly and indirectly by Federal power has created racial alienation and tensions so explosive that the crisis in our cities now borders on catastrophe.”<sup>122</sup>

Senator Proxmire spoke at length on how a wider dispersion of HUD housing was a goal of the bill and discussed his own problems with getting affordable housing into Milwaukee’s white suburbs. Proxmire forcefully condemned HUD’s policy of concentrating low-income housing in segregated neighborhoods, calling it a policy “aimed at bribing a generation of Negro militants into docility.”<sup>123</sup> He went on: “The benefits of an open housing policy are numerous. For example, it is doubtful that Negro education can ever be brought on a par with white education when Negroes are concentrated in all black central city schools. Thus, continued residential segregation will perpetuate the transmission of frustration and despair from one generation to the next.”<sup>124</sup> Proxmire argued that open housing will bring the poor close to jobs in the suburbs and reduce unrest and declared that in was unjust and un-American to lock the poor into a ghetto. In the long run, Proxmire concluded “America must move toward dissolving the ghetto simply because no other solution will work.”<sup>125</sup>

Senator Muskie then took the floor to clarify the aim of the bill was integration and not to create a “golden ghetto.”<sup>126</sup> He declared:

... We must not deceive ourselves that a completely revitalized model city area, or “golden ghetto” as it has been called, is the final solution to the plight of the Negro. For no matter how livable a neighborhood is, and no matter what social and educational resources it provides, it will be of no help to the resident whose job has moved elsewhere. It will provide no satisfaction to the Negro who is forced to remain because he cannot find other suitable housing due to his color.<sup>127</sup>

In other words, the vast body of testimony and policy development in the lead-up to the Fair Housing Act made clear that the overarching purpose of the law under consideration was perceived from the very start as a vehicle for integration. Its objective was not to merely eliminate private-market housing discrimination, but to produce true integration in American communities. Moreover, it made clear

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<sup>121</sup> 114 CONG. REC. 3119, 3122 (Feb. 15, 1968).

<sup>122</sup> *Id.* (citing NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS 3 (1967)).

<sup>123</sup> 114 CONG. REC. 2984, 2985 (Feb. 14, 1968).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 114 CONG. REC. 3235, 3253 (daily ed. Feb. 16, 1968) (statement of Sen. Edmund Muskie).

<sup>127</sup> *Id.*

that one of the key perceived shortcomings of existing policy, in the eyes of the bill's supporters, was the long-running tendency of federal agencies to produce greater segregation – a tendency they wanted to invert.

The emphasis of Fair Housing Act supporters on the role of federal agencies also raises a key distinction that fair housing revisionists have missed: the final law's differing approach to private and public actors. In the 1960s, fearmongering over fair housing focused heavily on the idea that integration would compel involuntary sales or rentals of private property – a critique that seems intended to avoid directly targeting the notion of racial integration, and instead rendering the debate over fair housing into a debate about personal liberty and the freedom to dispose of one's own property.<sup>128</sup> In short, congressional critics were not whipping up fears of integrative HUD policies or of efforts by state and local government to promote integration – they were trying to conjure up images of onerous *private* mandates.<sup>129</sup> In turn, it was these fears that the law's authors sought to allay. Indeed, while there is extensive discussion of the law's integrative intent, there is little discussion of what precise policies it would require HUD to “affirmatively” enact – perhaps not surprisingly, given their incentives to portray the legislation as both important and modest.

Nonetheless, as the above testimony shows, the law's drafters were clearly aware of the public-private distinction, and clearly aware of the legacy of public agencies in creating housing segregation.

The Fair Housing Act's anti-discrimination measures are heavily focused on the private market and apply to all entities engaged in housing activity. By contrast, the Act's “affirmatively furthering” provisions, the only component of the Act that requires proactive integration of housing, is focused on government policies and government decision-making.<sup>130</sup> This structure logically follows the dual concerns of the law's drafters and original proponents, who worried both about private-market discrimination *and* the public legacy of segregative building and policymaking.

None other than Walter Mondale himself called attention to this error in the revisionist scholarship in a 2018 New York Times editorial published on the Fair Housing Act's 50th anniversary. He directly addressed the revisionist point of view:

The act has survived long enough to witness a curious debate over its intent. Some scholars have suggested that its functions

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<sup>128</sup> See Remarks of Strom Thurmond CR 2717-2718, Senator Stennis at 3345-48.

<sup>129</sup> *Id.*

<sup>130</sup> 42 U.S.C. § 3608(d). All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter.

can be divided into “anti-discrimination” and “integration,” with the two goals working at cross purposes. At times, critics suggest the law’s integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation.

To the law’s drafters, these ideas were not in conflict. The law was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift.

Though the overarching aim of the law was to create integrated communities, Congress could not simply direct the whole of America to start integrating. Instead, like all laws, the Fair Housing Act tried to accomplish its goal through a variety of more-detailed provisions, each of which, its authors felt, would facilitate integration.

In private housing markets, where Congress’s authority is indirect, the law does what it can: forbids discrimination and segregation. Prohibitions include discrimination in the sale or rental of housing, racially targeted advertising for housing and discriminatory real estate transactions.

But the act also sought more-direct remedies to the problem of segregation. Congress has nearly unlimited authority to issue commands to the federal bureaucracy. The Fair Housing Act utilizes this power by requiring all executive departments and agencies to administer programs relating to housing in a manner that “affirmatively” furthers fair housing.<sup>131</sup>

The debate described above happened almost entirely prior to the sequence of events that would ultimately propel the passage of the Fair Housing Act – the release of the Kerner Commission report and the assassination of Dr. King. King’s death and the Kerner report both added even greater urgency to the goal of integration, as opposed to nondiscrimination. The Kerner report had identified segregation as the specific cause of urban unrest in America, famously warning of the growth “two societies, one black, one white – separate and unequal.”<sup>132</sup> The focus of the report was not at all on individual acts of discrimination, but on the deleterious effects of the urban confinement of black Americans. Its proposals

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<sup>131</sup> Walter Mondale, *The Civil Rights Law We Ignored*, N.Y. TIMES (April 10, 2018). For a more detailed statement of Mondale on this subject, *see generally*, Walter Mondale, *Afterword* to *The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act*, at 291 (George D. Squires ed., 2017).

<sup>132</sup> U.S. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).



dealt with eliminating racial concentrations and improving conditions within cities. A Fair Housing Act that was neutral on integration would not address the Kerner concerns in the least degree. It made clear that enrichment strategies were not enough and could not by themselves address the harms of segregation.

Similarly, King's final major civil rights campaign had been his fight for Chicago residential integration – an effort that ended in stalemate.<sup>133</sup> This too would be unaddressed by a bill that was merely anti-discriminatory in nature. When King's death produced another wave of urban unrest – the exact violence that the Kerner report had suggested could be prevented with a program of integration – there can be little question about what, exactly, Congress saw as the purpose of its law.

The importance of the Kerner Commission cannot be overstated. In support of the Fair Housing Act, Mondale placed the Kerner Commission report and its recommendation into the Congressional Record on March 1, 1968.<sup>134</sup> He declared that the Fair Housing Act was directly responding to its recommendations as did Senator Brooke who served with Roy Wilkins on the commission.<sup>135</sup>

Kerner concluded that the nation is moving toward two societies, one white and one black, separate and unequal. If that movement is not arrested, it will bring death to the most hopeful of all mankind's attempts at political organizations.<sup>136</sup> The alternative to separation is unity – the extension of the promise of American life to all Americans irrespective of race.<sup>137</sup>

Kerner asserted that any approach of ghetto enrichment that did not involve a major push toward racial residential integration would be a failure. "It would be another way," it declared "of choosing a permanently divided country. ... In a country where the economy, and particularly the resources of employment, are predominantly white, a policy of separation can only relegate the Negro to a permanently inferior status."<sup>138</sup>

The major goal was the creation of a true union—a single society and a single American identity. "Toward that goal [of a single society], we propose... opening up opportunities to those who are restricted by racial segregation and discrimination and eliminating all barriers to their choice of... housing."<sup>139</sup>

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<sup>133</sup> See Adam Cohen, Elizabeth Taylor American Pharoah: Mayor Richard J. Daley, His Battle for Chicago and the Nation (2001).

<sup>134</sup> 114 CONG. REC. 4831, 4834 (daily ed. March 1, 1968) (statement of Sen. Walter Mondale).

<sup>135</sup> *Id.* at 4833-4841.

<sup>136</sup> See U.S. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 132.

<sup>137</sup> See 114 CONG. REC., *supra* note 134, at 4,841.

<sup>138</sup> *Id.* at 4,839.

<sup>139</sup> *Id.* at 4,840.

To accomplish this Kerner asserted that HUD must “reorient federal housing program to place more low and moderate income housing outside of ghetto areas”<sup>140</sup> and “must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation.”<sup>141</sup> If this is not done, the Report declared these programs will continue to concentrate the most impoverished and dependent segments of the population into the central city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.<sup>142</sup>

Virtually all the congressional debate on the bill before and after the report’s release directly responded to the goals of the report.

Shortly after its enactment, the sweeping intent of the Fair Housing law was confirmed by the Supreme Court which had revived the latent power of the Civil Rights Act of 1866. In *Jones v. Alfred Mayer*, the Court considered the question of whether the 1866 Civil Rights Act – which, plaintiffs and the U.S. Justice Department asserted, barred housing discrimination – was good law.<sup>143</sup> The Court’s opinion begins by distinguishing the anti-discrimination rules of the 1866 Act from the recently enacted Fair Housing Act which the court found to be far broader and more inclusive than preexisting civil rights laws which barred individual level housing discrimination.<sup>144</sup> A few years later the Court would define this “broad and inclusive language” by quoting Senator Mondale as “[designed] to replace the ghettos [with] truly integrated and balanced living patterns.”<sup>145</sup>

In other words, the Court recognized what the congressional record makes clear: the drafters of the Fair Housing Act knew that a mere ban on racial discrimination in housing was not sufficient to eliminate segregation and constructed a statute that extended far beyond such a ban in order to create a racially integrated society.

## CONCLUSION

Today there is evidence that the revisionist view of the Fair Housing Act is once again on the retreat, at least at the highest levels of the executive branch. On January 26, 2021 – less than a week after taking office – President Biden released a presidential memorandum on housing discrimination. The document,

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<sup>140</sup> *Id.* at 4,841.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-15 (1968) (internal citations omitted).

<sup>144</sup> *Id.*

<sup>145</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209–11 (1972).

entitled “Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies,” is unambiguous about the role of public agencies in producing segregation. It states bluntly:

Throughout much of the 20th century, the Federal Government systematically supported discrimination and exclusion in housing and mortgage lending. While many of the Federal Government’s housing policies and programs expanded homeownership across the country, many knowingly excluded Black people and other persons of color, and promoted and reinforced housing segregation. Federal policies contributed to mortgage redlining and lending discrimination against persons of color.<sup>146</sup>

Biden’s memorandum directly refutes the revisionist view that the Fair Housing Act is primarily or entirely focused on anti-discrimination. Instead, it cites the act’s § 3608 provisions on “affirmatively furthering” fair housing.<sup>147</sup> These provisions, according to Biden, are “not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.”<sup>148</sup> Biden also ordered his HUD secretary to revisit the Trump administration’s changes to the Disparate Impact rule, and elimination of the Affirmatively Furthering rule.<sup>149</sup> For a time, the pendulum seems to be swinging back in favor of civil rights and integration. On June 10, 2021, the Biden administration put in place an interim rule to restore and perhaps even improve on Obama’s pro-integrative rule. The interim rule fully conformed with the establish precedent discussed above.<sup>150</sup>

Despite this, there remains a risk of allowing revisionist narratives to go unchecked. It was not inevitable that Joe Biden won the presidency, and had the United States been relegated to four more years of his predecessor, it can only be imagined what damage might have been done to fair housing law. There are also threats, even now. The U.S. Supreme Court, currently very conservative, is unlikely to be a friend of the Fair Housing Act or civil rights law for many years to come. False, misleading, artificial, or revisionist narratives are a useful weapon

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<sup>146</sup> Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487, 7,487 (Jan. 26, 2021).

<sup>147</sup> *Id.* at 7,488.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see also Tracy Jan, Trump gutted Obama-eras housing discrimination rules, Biden’s bringing them back, WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/us-policy/2021/04/13/hud-biden-fair-housing-rules/>.

<sup>150</sup> See Restoring Affirmatively Furthering Fair Housing Definitions and Certification, 86 Fed. Reg. 30,779 (June 10, 2021).

in the hands of courts, which could be used to cause great injury to hard-fought civil rights victories. Integration is the most progressive, most transformative, most controversial objective of the Fair Housing Act. Precisely for that reason, there will likely be many future attempts to sideline or detach it from the law altogether. America should never forget that its last great civil rights law was built to confront segregation, the deepest and most totalistic form of racial discrimination that persists today.