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Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978

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ABSTRACT	70
INTRODUCTION	70
I. TRENDS IN DISCRIMINATION, 1968-1977	73
A. Before the Fair Housing Act	73
B. The Result of a Decade	74
II. THE ARGUMENT FROM ATTITUDES	76
III. ENFORCEMENT AND ITS FRAMEWORK	78
A. DOJ Moves Ahead	80
B. Case Study: DOJ in Los Angeles	82
IV. THE TRANSFORMATION OF AMERICAN REALTORS	84
A. The Ideology of Forced Housing	84
B. The Shock of the New	86
C. DOJ Moves Against Realtors.....	90
D. Rewriting the Realtors' Code of Ethics.....	94
E. Establishing the Affirmative Marketing Agreement.....	95
F. Effects on the Ground	99
G. 1979 USCCR Report	105
V. THEORETICAL IMPLICATIONS	107
A. Why Realtors Obeyed The Law	107
B. Transforming Social Meaning	109
C. On the Convergence Thesis.....	110
CONCLUSION	112

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“In the south, they don’t mind how close you get as long as you don’t get too big. In the north, they don’t mind how big you get as long as you don’t get too close.”

Dick Gregory, 1967

“Sue the bastards.”

National Neighbors’ fair housing slogan, 1970

ABSTRACT

Despite the historical consensus that the Fair Housing Act was ineffective and toothless, the first decade after the Act’s passage saw sharply reduced rates of discrimination. After demonstrating that such a significant drop could not have been the result of overall changing racial attitudes, this Article attempts to show that it resulted from the enforcement of the Act itself – especially the vigorous efforts of the Department of Justice. Not only did DOJ successfully sue hundreds of landlords and developers across the country (including the heretofore unknown New Yorker Donald J. Trump), but it focused its efforts on America’s real estate agents – a linchpin of the system of housing discrimination. These actions succeeded: this Article presents evidence from the realtors themselves and from fair housing advocates – who did not figure to be overly optimistic – that substantial changes in behavior resulted from aggressive litigation by federal civil rights law enforcement. The efforts were not a universal success, for by the end of the 1970’s discrimination rates remained far too high. And they did not alter patterns of segregation. But they represented a significant policy success. The Article concludes how the story of successful civil rights enforcement generates important theoretical implications in the psychology of law, theories of social norms, and the celebrated “Convergence Thesis” of American civil rights law.

INTRODUCTION

On the eve of the Fair Housing Act’s passage in 1968, discrimination in residential housing was routine and commonplace. Blacks could not purchase homes in white neighborhoods or rent apartments in white buildings. Realtors would not show properties to Black fami-

lies, white homeowners would not sell to Blacks, and of course Blacks could not get financing for such purchases.¹

Less than a decade later, the situation had dramatically improved. A good, although not comprehensive, measure can be found in discrimination rates for housing availability, i.e. whether a searcher is told that a unit is available.² In the Housing and Urban Development survey, Blacks encountered net discrimination³ 27% of the time for rentals, and 15% for sales.⁴ This was, of course, still far too high, especially because discrimination rates are cumulative: if, say, 25% of encounters yield discrimination, by the time someone goes to three different rental agents, she has a three in four chance of facing dis-

1. I emphasize housing discrimination against African-Americans as opposed to other groups because: (1) those studies and surveys that existed in 1968 all focused on white/black disparities; and (2) the common view among historians is that housing discrimination against Latinos, while significant and debilitating, was less severe than the discrimination against African Americans. See LILIA FERNANDEZ, *BROWN IN THE WINDY CITY: MEXICANS AND PUERTO RICANS IN POSTWAR CHICAGO* 146–47, 152 (2012).

2. Housing availability might be the most damaging and prominent form of discrimination, but it is not the only one. For example, rental or sales agents might be less courteous, or not make available important financing options, which would clearly constitute discrimination, but would not represent a refusal to show a house or apartment. A further discussion of the 1977 HMPs findings can be found in *infra* Part I.

3. “Net” discrimination refers to the amount of negative encounters minus the amount of positive encounters. For example, if black testers encounter worse treatment fifty percent of time, but *better* treatment twenty-five percent of time, the “net” discrimination rate is twenty-five percent. The highest quality research uses this method because of the randomness in so many aspects of a housing search and the vagaries of the search process. There might be many reasons for disparate treatment, not simply invidious discrimination, and few researchers would believe that positive treatment of blacks and other minorities suggests that agents are unduly favoring them. For a succinct methodological discussion, see U.S. DEP’T OF HOUS. AND URBAN DEV., *HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES*, at xii (2012). A sidebar, “Understanding the Numbers,” said:

Not every instance of white-favored treatment should be interpreted as systematic discrimination. In some tests, random factors may contribute to observed differences in treatment; in other tests, minorities may experience more favorable treatment than their white partners for systematic reasons. Therefore, we report the share of tests in which the white was favored over the minority, the share in which the minority was favored over the white, and the difference between the two. This difference—or net measure—provides a conservative, lower-bound estimate of systematic discrimination against minority homeseekers, because it not only subtracts random differences from the gross measure of white-favored treatment, but may also subtract some differences that reflect systematic reverse discrimination. Gross measures of discrimination receive less emphasis in this report than in past national studies because analysis over the past 25 years strongly suggests that they reflect a lot of random differences in treatment, and that net measures more accurately reflect the systematic disadvantages faced by minority homeseekers.

4. HARRIET NEWBURGER, U.S. DEP’T OF HOUS. AND URBAN DEV., *RECENT EVIDENCE ON DISCRIMINATION IN HOUSING* 7–8 (1984). I offer a somewhat more conservative interpretation of the Housing Market Practices Survey’s findings in Part I.B., but do not differ significantly with Newburger’s assessment.

crimination. Nevertheless, it represented a steep decline from the previous decade.⁵

How did this happen? This Article argues that the enforcement of the Fair Housing Act and the Civil Rights Act of 1866 serves as a major part of the answer. In particular, the interaction of the enforcement of these laws and the ecology of the American real estate industry led to a striking success of the last major legislation of the Civil Rights Movement.

Such a conclusion directly challenges the regnant scholarly consensus, which usually derides the Fair Housing Act as tepid, toothless, and ineffective. The leading text on housing discrimination states that the FHA was crafted that it “would not and could not work.”⁶ Virtually every other significant study echoes this sentiment.⁷

This Article proceeds as follows. First, I set forth the trends in housing discrimination during the first decade of the Fair Housing Act’s existence, focusing on the Department of Housing and Urban Development’s (“HUD”) 1977-79 Housing Market Practices Study. Examining the data reveals deep drops in discrimination levels – a fact elided by the standard account. Second, I consider one standard explanation for these drops, viz. that popular attitudes toward housing discrimination dropped similarly during the decade. The data shows a decline in prejudiced attitudes, but not nearly so deep as the drops in discrimination itself; indeed, it appears to show the continuation of a standard decline in prejudice that had been occurring for several decades. In Part III, I examine the role of the Department of Justice in combating housing discrimination, and aim to show that early on, it developed an aggressive and sophisticated litigation program that took on some of the most powerful actors in the U.S. real estate indus-

5. See Part I for a discussion of what is known about discrimination rates on the eve of the Fair Housing Act.

6. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 195 (1993).

7. See, e.g., CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 47–50 (2005); ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s* 208 (1984) (a pioneering standard work about the decline of liberalism in the 1960s, on the 1968 Act: “A great victory for civil rights it was not. Without an enforcement agency to issue cease and desist orders . . . the act was little more than a gesture toward the principle of fair housing.”); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 423 (2008) (“[T]he Fair Housing Act . . . was largely a symbolic gesture. While it forbade discrimination in housing by race, creed, national origin, or sex, there was one hitch. To win Republican support, the bill’s authors had defanged it. Title VIII left it to private individuals or advocacy groups to file suit against housing discrimination.”). See generally GEORGE R. METCALF, *FAIR HOUSING COMES OF AGE* (1988).

try. In Part IV – the longest Part – I focus on the role played by America’s realtors, who played a pivotal role in the ecology of housing provision and had vehemently resisted fair housing laws. I attempt to demonstrate that while they hardly loved fair housing, they came to accept it under pressure from regulatory agencies. In Part V, I consider the broader theoretical implications of these findings, showing how they tend to confirm Tom Tyler’s argument on why people obey the law, and demonstrate a good example of Lawrence Lessig’s thesis on the regulation of social meaning. They tend to undermine, however, Derrick Bell’s interest-convergence thesis of the development of anti-discrimination law.

By 1979, discrimination existed in numbers completely unacceptable in any society, and – importantly – the trend did not mean an end, or even a large dent, in *segregation* – a closely related but quite different phenomenon. But we should not overlook a striking – and hidden – policy success.

I. TRENDS IN DISCRIMINATION, 1968-1977

A. Before the Fair Housing Act

Because systematic paired testing for discrimination only began in the 1970’s, we lack precise knowledge of discrimination rates. But virtually all commentators, contemporary and subsequent, agree that it was rampant; in the words of the Kerner Commission, it was “pervasive.”⁸ “By the late 1960’s, Detroit’s suburban residents, realtors, and officials had helped ensure that most neighborhoods remained off-limits to black people.”⁹ Robert Self sees a purposeful strategy of “containment” across the country in Oakland, California, and environs.¹⁰ During the debate on the Fair Housing Act in 1968, Congressman John B. Anderson of Illinois, whose crucial vote in the Rules Committee paved the way for full House consideration, recounted the story of a Black schoolteacher in Rockford, Illinois who “answered some 100 ads in vain seeking a home or an apartment and who in each and every case was turned away.”¹¹

8. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF THE REPORT 13 (1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

9. DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 384 (2007).

10. ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 264–65 (2003).

11. 90 CONG. REC. 9551 (1968) (statement of Rep. Anderson); see also OHIO CIVIL RIGHTS COMM’N, DISCRIMINATION IN HOUSING IN OHIO 21, 48 (1963) (finding “outright refusal to show

And this was *outside* the South: in the land of Jim Crow, the problem figured to be even more extreme. In August 1967, Senator Walter Mondale's Senate Subcommittee on Housing and Urban Affairs held hearings on that year's fair housing bill, and heard testimony from Navy Lieutenant Carlos Campbell, an African-American fighter pilot detailed for service at the Defense Intelligence Agency at the Pentagon.¹² That meant Campbell had to find housing in northern Virginia, and no one would rent to him within a 25 mile radius around the Pentagon: "I continuously ran into a brick wall of sheer unadulterated prejudice. I might as well have been dressed in dungarees as in my dress blues—complete with gold stripes and wings."¹³

B. The Result of a Decade

Within less than ten years, the situation had changed rapidly. In 1977, HUD commissioned the "Housing Market Practices Survey," which endeavored to determine the extent of continuing discrimination.¹⁴ Over the next year, HUD's research team conducted more than 3,200 paired-test audits – by far the most comprehensive and methodologically sophisticated operation up until that time. And HUD's contractor – the National Committee against Discrimination in Housing – did not figure to be a soft touch when it came to making findings.

Discussing "discrimination rates" is a very complex topic, because discrimination can occur at so many times during the housing search process: there is the initial contact, the interview with a realtor or landlord, the showing of an apartment or house, the information re-

minority group members, especially Negroes, homes situated in 'all-white' areas . . . The major conclusion to be drawn is inescapable. There exists throughout Ohio a consistent pattern whereby Negroes, and other minority groups, are denied free choice in housing . . . Patterns of exclusion, discrimination and segregation have become institutionalized and constitute a major component of the practices of the housing and real estate business, broadly defined to include real estate brokers and salesmen, landlords, builders, and developers, mortgage lending institutions, and governmental housing agencies.").

12. Walter Mondale, who as a Senator co-sponsored the bill that eventually became the Fair Housing Act, recalled that "the guy looked like he came directly out of central casting." Interview with Walter Mondale, Sen. in Minneapolis, Minn. (July 3, 2010).

13. *Fair Housing Act of 1967: Hearing before the Subcomm. on Hous. and Urban Affairs of the Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong. 200 (1967) (statement of Lt. Carlos C. Campbell, USNR). Campbell testified that he eventually found a place to live by renting a room in an Army Colonel's house; he had to send his wife and infant son back to Chicago.

14. See RONALD E. WIENK ET AL., U.S. DEP'T OF HOUS. AND URBAN DEV., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY 1 (1979) [hereinafter HMPS REPORT].

quested of the applicant, the information given to the applicant, terms for rental or purchase, and many others. This makes it difficult to give a precise bottom-line number, but examining HMPS data yields a pretty clear result: discrimination remained significant and pervasive, but had dropped enormously from pre-FHA levels.

For rentals, the HMPS broke the process down into four main categories:

(1) *Housing Availability* – whether the agent said that an apartment was available; whether the applicant was told that a first-choice was unavailable; whether other apartments were volunteered; whether someone was put on a waiting list, etc. This was the most important and fundamental factor, for as the HMPS commented, “[i]f a rental agent told one auditor that no apartments were available but told the other auditor that something was available, it matters little whether both auditors received the same treatment for each of the other items.”¹⁵

(2) *Courtesy* – this was fairly self-explanatory, and involved issues such as wait times, offer of literature or “drinks, cigarettes, etc.”, informal chatting, asking to be seated, invited to call back, length of interview, etc.¹⁶

(3) *Terms and Conditions* – also self-explanatory, involving the monthly rent, lease requirements, security deposit, whether an application fee was required, and the length of the credit check.¹⁷

(4) *Information Requested and Volunteered* – whether the agent requested income, employment, references, phone number, or address, or whether the agent volunteered information regarding lease requirements, security deposit, the existence of a waiting list, the application procedure, or a credit check.¹⁸

The HMPS found some very telling overall numbers. For Housing Availability, by far the most important number,¹⁹ the bottom line number nationwide was 27%; for courtesy, it was 12%, for Terms and Conditions it was -2%, and for Information Requested and Volunteered it was 6%. One could not simply add these numbers because

15. *Id.* at 7.

16. *Id.* at 65, 68.

17. *Id.* at 77–78.

18. *Id.* at 85–86, 94–95.

19. When HUD wanted to dramatize to the general public how housing discrimination worked, they usually used lack of availability rather than any other measure. See, e.g., The Leadership Conference, “Accents” (*Fair Housing PSA*), YouTube (Mar. 3, 2008), <https://www.youtube.com/watch?v=84k2iM30vbY>.

Statistically significant relationships appear to exist between the overall index of housing availability and all other indices except for terms and conditions. That is, if blacks were treated less favorably with respect to apartment availability, they also tended to be treated less courteously, to be volunteered less information, and to have more information requested of them than was true for their white teammates.²⁰

It is, then, somewhat misleading to state with great confidence an overall bottom-line number. Taking into account the overlaps, general housing discrimination nationwide very conservatively could be estimated at lower than one-third.²¹

That was far too high for any nation that prided itself on equal opportunity, but in comparison to the rampant discrimination of less than a decade earlier, it was quite an extraordinary accomplishment. A clear majority of the time a Black family wanted to rent an apartment, it would not face discrimination of any kind.

II. THE ARGUMENT FROM ATTITUDES

So how did it happen? To the extent that there is an explanation about the decline in discrimination rates through the 1970's, it is that attitudes changed sharply. But the data does not show this. White attitudes toward housing discrimination demonstrated relatively continuous trends from the 40's through the late 60's, gradually revealing greater tolerance to integrated neighborhoods and opposition to outright discrimination.²² Similar trends persisted from 1968 through the end of the 1970's. Three organizations—Gallup, the National Opinion Research Center ("NORC") and the Institute for Social Research ("ISR") polled questions about segregation and open housing throughout the period.²³ All showed that white attitudes became

20. HMPS REPORT, *supra* note 14, at 13.

21. *Id.* at 20. Breaking out discrimination rates in rental markets by metropolitan area, which shows a range of fifty-seven percent (Detroit) to fourteen percent (Milwaukee) in large markets. In small markets, "black auditors encountered far less discrimination . . . on average, than in large [markets], for each of the categories of treatment reported. In fact, as measured by the indices of courtesy and service, black auditors were systematically favored in small metropolitan areas." *Id.* at 20.

22. See Thomas F. Pettigrew, *Attitudes on Race and Housing: A Social-Psychological View*, in SEGREGATION IN RESIDENTIAL AREAS: PAPERS ON RACIAL AND SOCIOECONOMIC FACTORS IN CHOICE OF HOUSING 21, 33 (Amos H. Hawley & Vincent P. Rock eds., 1973).

23. NORC asked a four-part question concerning respondents attitudes toward segregation, as well as a question asking whether respondents would support an open housing law. ISR asked whether respondents opposed segregation. NORC and Gallup also asked more pointed questions. NORC framed the question this way:

more accepting of integration and non-discrimination during the 1970's – but only gradually and at rates consistent with changes for the previous three decades, making it impossible that the severe drops in discrimination rates derived from attitudes.

Although the patterns of responses vary, they all undermine the thesis that discrimination rates dropped because of sharply dropping prejudice among whites. The sharpest increase in anti-segregation sentiment comes in the NORC survey, showing opposition to segregation rising from 40% to 60% between 1968 and 1972, and *strong* opposition to segregation doubling in that time from 20% to 40%. But between 1972 and 1978, this opposition waned, dropping from 60% to 50% in opposition and from 40% to 25% in strong opposition.²⁴ In other words, during the critical period of FHA enforcement, Americans became *more*, not less, accepting of segregation. If anything, the FHA appears to have jolted people briefly into thinking was segregation wrong, but then returning more closely to the pre-FHA upward slope afterwards. This cannot account for the far more spectacular decreases in discrimination during that time.²⁵

Similarly, in the Gallup survey, 60% of white Americans in 1968 said that they would not move “if black people came to live next door” – a positive result belying the notion that discrimination rates simply reflected attitudes.²⁶ By 1977, the year of the Housing Market Practices Survey, a little more than 80% said the same thing – an even

Here are some opinions other people have expressed in connection with (Negro/black)– white relations. Which statement on the card comes closest to how you, yourself, feel? White people have a right to keep (Negroes/blacks/African Americans) out of their neighborhoods if they want to, and (Negroes/blacks/African Americans) should respect that right. . . . Agree strongly, Agree slightly, Disagree slightly, or Disagree strongly?

ISR asked:

Which of the statements would you agree with: White people have a right to keep (Negroes/black people) out of their neighborhoods if they want to, or, (Negroes/black people) have a right to live wherever they can afford to, just like anybody else? [Framed as:] 1. Keep blacks out 2. Blacks have rights.

General segregation question from ISR: “Are you in favor of desegregation, strict segregation, or something in between?”

Gallup: “If black people came to live next door, would you move? Would you move if black people came to live in great numbers in your neighborhood?”

HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 106–08, 121 (1997).

24. *Id.* at 135.

25. *Id.* at 113, 134–36. The rest of the surveys essentially continue the mild upward slope from the pre-FHA era. The ISR “oppose segregation” number in 1963 is at 65%; in 1968, 72%; in 1972, 79%; 1976, 86% - essentially, a straight line. *Id.* at 135.

26. *Id.* at 148.

more positive result.²⁷ But hardly one that could serve as the cause of discrimination rates dropping from nearly-universal to less than one-third.

On the eve of the passage of the FHA, actual discrimination in housing was routine. Thus, if attitudes drove discriminatory behavior, an observer would expect that discrimination rates would change, but would gradually decline over the period. The data repudiates such an expectation. If we are looking for a cause of discrimination rate drops, we will have to look elsewhere.

III. ENFORCEMENT AND ITS FRAMEWORK

We are left, then, with the obvious. For the first time in U.S. history, strong federal law banned housing discrimination, most prominently the Fair Housing Act, and in the wake of the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,²⁸ the Civil Rights Act of 1866.²⁹

But were these laws enforced? The scholarly consensus answers this question resoundingly in the negative, focusing primarily on the United States Department of Housing and Urban Development ("HUD").³⁰ Such a focus makes sense if one looks at the Fair Housing Act's formal language, which indeed vests "[t]he authority and responsibility for administering this Act . . . in the Secretary of Housing and Urban Development."³¹ And if one does focus on HUD, the story is basically accurate. HUD could not bring its own lawsuits, and inside the Department, the program bureaus resisted fair housing directives from the well-meaning but overmatched³² HUD Secretary,

27. *Id.*

28. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that § 42 U.S.C. 1982 bars all racial discrimination in the sale or rental of property).

29. 42 U.S.C. § 1982 (1866). This section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Jones* held that this provision prohibits private as well as public housing discrimination. *Jones*, 392 U.S. at 409, 413 (1968).

30. See generally CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006); LAMB, *supra* note 7; MASSEY & DENTON, *supra* note 6; METCALF, *supra* note 7.

31. 42 U.S.C. § 3608(a) (1968).

32. During the 1968 Presidential campaign, Mitt Romney, then Michigan Governor, said that he had been "brainwashed" by military officials into believing that the United States was winning the war in Vietnam. The statement help sink his chances: Senator Eugene McCarthy acidly remarked that in Romney's case, "a light rinse would have been sufficient." See Tom McNichol, *Mitt Romney Keeps Saying the Wrong Thing . . . Just Like His Dad*, ATLANTIC (Feb. 28, 2012), <http://www.theatlantic.com/politics/archive/2012/02/mitt-romney-keeps-saying-the->

George Romney. As the west coast director of the National Committee to End Discrimination in Housing put it, HUD bureaus had spent decades *creating* segregation through discriminatory siting and funding practices: “It was something like giving a cat responsibility for guarding a plate of cream.”³³

But HUD did not actually have primary responsibility for the public enforcement of Title VIII – a crucial fact missed in every other treatment of the Act’s history. The Fair Housing Act gave that responsibility to the Justice Department, which could bring, on its own initiative, either lawsuits alleging a pattern and practice of discrimination, or cases raising an issue “of general public importance.”³⁴ Soon after the Act went into effect, courts quickly gave wide discretion to the Department to define “pattern and practice” and held that “general public importance” could mean just about anything the Attorney General wanted it to mean.³⁵ Courts also ruled that DOJ and private litigants could bring cases together – a powerful holding because including a private litigant meant that DOJ could effectively sue for monetary damages instead of just injunctive relief.

Would the Nixon White House allow enforcement of civil rights legislation? In the case of Title VIII, the answer is yes, for reasons having less to do with altruism and more to do with politics. Residential desegregation became a highly sensitive political issue during Nixon’s first term, especially after Romney developed “Operation Breakthrough,” which aimed to place integrated HUD projects in all-white suburbs.³⁶ The HUD Secretary attempted to cut off all federal funds to municipalities that refused to accept HUD projects; when the President, normally indifferent to domestic policy matters, saw a memo describing the effort, he immediately scrawled on it, “Stop this

wrong-thing-just-like-his-dad/253751/. Whatever Romney’s raw intelligence, his political instincts were poor. Ohio Governor James Rhodes famously said of him that “watching George Romney run for the Presidency was like watching a duck try to make love to a football.” See MICHAEL A. COHEN, *AMERICAN MAELSTROM: THE 1968 ELECTION AND THE POLITICS OF DIVISION* 185 (2016). The author has often heard that Rhodes did not use the phrase “make love to.”

33. *Hearings on Federal Governments Role in the Achievement of Equal Opportunity in Housing Before the Civil Rights Oversight Subcomm. (Subcomm. No. 4) of the Comm. on the Judiciary*, H.R. 113 (1971, 1972) (statement of Aileen Hernandez).

34. 42 U.S.C. § 3613(e) (1968).

35. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 125 n.14 (5th Cir. 1973) (granting broad discretion to the Attorney General to determine “cases of public importance”); *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 227 n.1 (5th Cir. 1971).

36. DEAN J. KOTLOWSKI, *NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 52, 54–55 (2001).

one.”³⁷ Finally, in 1971, the President pledged “‘vigorous enforcement’ of the Fair Housing Act,” he also insisted that “[w]e will not seek to impose economic integration upon an existing local jurisdiction,” although “we will not countenance any use of economic measures as a subterfuge for racial discrimination.” Nixon liked its emphasis on court enforcement. “Excellent statement,” he noted. “We shall lose on it politically – but the law and justice of the issue require it.”³⁸

Nixon had developed self-pity to a high art:³⁹ in fact, the compromise was excellent politics. The administration could assure skittish and often bigoted suburban whites that they could keep HUD projects out of their neighborhoods, but it could also assure the media and moderates that it still headed the Party of Lincoln. There is little evidence that top Nixon officials *encouraged* fair housing enforcement, but they basically left the Civil Rights Division alone.⁴⁰

A. DOJ Moves Ahead

That was good enough for the DOJ, for it could simply continue what it had been doing from the beginning.⁴¹ As soon as the Fair Housing Act became law in 1968, the DOJ put together an aggressive

37. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>. It should go without saying that I reject the conclusions of Hannah-Jones’ article.

38. LAMB, *supra* note 7, at 141.

39. The thirty-seventh President’s ability to feel sorry for himself was legendary. See, e.g., DAVID GREENBERG, *NIXON’S SHADOW: THE HISTORY OF AN IMAGE* 247–48 (2003); Ronald Steel, ‘I Had to Win’, N.Y. TIMES (Apr. 26, 1987), <http://www.nytimes.com/books/98/11/22/specials/ambrose-nixon.html> (Nixon was “perpetually out to get people, and . . . had an enormous amount of self-pity - it caused him almost physical agony to be criticized.”).

40. See, e.g., Interview by Jonathan Zasloff with Jerris Leonard (Oct. 31, 1977). In the rather lengthy interview with Leonard, school desegregation and busing are by far the most important issue, and to some extent voting rights. Leonard served as Assistant Attorney General for Civil Rights until 1971. Fair housing does not appear once in the entire interview, suggesting that it simply was not an issue at the highest or even middle levels of the administration. Leonard freely admitted that he sometimes had to block what he saw as over-aggressive enforcement in school busing cases and had battles with Leon Panetta, then the civil rights chief at the Department of Health, Education, and Welfare, over the scope of enforcement. So it seems reasonable to conclude that had he had any battles with the Housing and Credit Bureau over fair housing, he would have discussed it.

41. The head of the Civil Rights Division’s Housing and Credit Bureau said that he never felt pressure from the White House to back off of Title VIII enforcement. Interview by Jonathan Zasloff with Frank Schwelb, Civil Rights Attorney, U.S. Department of Justice (Dec. 3, 2010). In the 1979 USCCR report, referenced *infra*, Schwelb expressed bitterness over some interference, most notably then-Solicitor General Robert H. Bork’s decision to appeal the Seventh Circuit’s decision in the now-landmark case of *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974), *aff’d* *Hills v. Gautreaux*, 425 U.S. 284 (1976), which the United States government

litigating team led by Frank Schwelb, a Civil Rights Division lawyer who escaped the Nazis from his native country Czechoslovakia at age 8. In 1969, Nixon's first assistant attorney general for civil rights, Jerri Leonard – whose claim to fame as a Wisconsin state legislator had been the authorship of the state's fair housing law – reorganized the department from regional to substantive specialty bureaus.⁴² Fourteen attorneys were placed at Schwelb's command, and his Housing and Credit Bureau was soon bringing roughly thirty-five cases a year, generating praise from unlikely quarters. William R. Morris, the NAACP's Director of Housing Programs, testified that the lawyers at the DOJ "have shown a lot of initiative."⁴³ In 1970, the U.S. Civil Rights Commission, which in its report lambasted virtually every federal agency for malfeasance in enforcing the FHA, praised the DOJ for its actions.⁴⁴

The DOJ faced a daunting challenge, given the massive size and decentralized nature of the nation's housing market. Thus, the Civil Rights Division focused on institutional change and targeted the biggest developers, apartment referral services, and real estate trade associations to change their default positions.⁴⁵ It often meant bringing suit even if the Division could initially find only one act of deliberate discrimination. Scholars have viewed the FHA's language restricting DOJ authority to "pattern and practice suits" as limiting its scope,⁴⁶ but no court ever threw a suit out on the grounds that this was a misinterpretation of the law, and the Division never felt constrained in terms of jurisdiction.⁴⁷

lost by a vote of a unanimous Supreme Court. It is fair to say that such instances were relatively few and far between.

42. William Grieder & Peter Milius, *Rights Lawyers Press Protest: Unit Reshuffled*, WASH. POST, Sept. 25, 1969. The "protest" referred to in the Post article concerned opposition from within DOJ concerning policy on school desegregation; Title VIII flew below the political radar.

43. *Hearings Before the Civil Rights Oversight Subcomm. (Subcomm. No. 4) of the Comm. on the Judiciary on Federal Government's Role in the Achievement of Equal Opportunity in Housing*, 92nd Cong. 113 (1971, 1972) (statement of William R. Morris).

44. See UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 540 (1970) ("The Department of Justice is one of the few Federal agencies with fair housing responsibilities that has attempted to carry them out vigorously and aggressively Despite staff restrictions, the Housing Section has undertaken an aggressive program of litigation under Title VIII. It has instituted sensible priorities to govern its activities and has attempted to bring wide publicity to the lawsuits it institutes to inform as many people as possible of their rights under Title VIII and to make it known that the law is being enforced.").

45. Interview by Jonathan Zasloff with Schwelb, *supra* note 41.

46. LAMB, *supra* note 7, at 50; MASSEY & DENTON, *supra* note 6, at 196; SUGRUE, *supra* note 7.

47. Interview by Jonathan Zasloff with Schwelb, *supra* note 41.

The Bureau thus decided to focus on the largest housing developers and landlords as well as major apartment referral services. Within the first twenty-four months of the Act's full existence, the DOJ brought cases against Samuel Lefrak, the biggest landlord in New York City, as well as a hitherto unknown developer named Donald J. Trump. But it was not confined to New York City; it also pursued Ben Weingart, one of the biggest landlords in Los Angeles.

B. Case Study: DOJ in Los Angeles

The first Fair Housing Act lawsuit brought by the Department of Justice in Los Angeles appears to have been an action filed March 10, 1970, against Weingart, a prominent businessman whose companies owned some 283 apartment buildings.⁴⁸ The front-page story in the *Los Angeles Times* quoted U.S. Attorney Matt Byrne calling it the largest Fair Housing Act lawsuit filed by the government so far in the western United States, and one of the biggest in the entire country.⁴⁹ It accused Weingart and his companies of violating the Act through a pattern of making rental units unavailable to black apartment-seekers, and of publishing statements indicating race-based preferences.⁵⁰ Not only did officials target a major landlord with units all over Los Angeles, but they chose for their first local lawsuit a well-known figure, described by the *Times* as being "prominent in real estate investment, development and construction here for many years."⁵¹ It was no coincidence that federal officials sought out such a high-profile figure for their first target in Los Angeles.

The government entered into a consent decree with Weingart's company, Consolidated Hotels, Inc., in the summer of 1970.⁵² Once again the story made the front-page of the *Times*, this time with a focus on the "novel" relief ordered as part of the settlement, which affected about 8,000 apartment units in Los Angeles.⁵³ Consolidated Hotels, Inc. was enjoined from discriminating on the basis of race, and ordered to notify fair housing groups each week of any vacancies in buildings with less than fifteen percent black occupancy.⁵⁴ Further,

48. See Gene Blake, *Hotel Magnate Charged with Bias in Rentals*, L.A. TIMES, Mar. 13, 1970, at A1.

49. *Id.*

50. *Id.*

51. *Id.* at 2.

52. See *Consent Decree Reached in L.A. Rental Bias Suit*, L.A. TIMES, July 30, 1970, at A1.

53. *Id.*

54. *Id.*

the company had to advertise in black newspapers, include racial minorities in any ads that depicted people, and step up nondiscrimination training efforts for employees.⁵⁵ U.S. Attorney General John Mitchell announced the resolution in Washington, and Schwelb promised “significant additional litigation in the Los Angeles area.”⁵⁶

Indeed, the DOJ brought at least two more Fair Housing Act cases in Los Angeles in 1970, one of which also seemed designed to have a sweeping impact. In August the government sued a rental agency with eight offices in the Los Angeles area, contending that it had unlawfully refused to inform apartment-seekers about vacancies on account of their race.⁵⁷ The potentially massive scope of the case was revealed when federal officials suggested that hundreds of landlords who used the agency might have also violated the Fair Housing Act by giving discriminatory instructions about what kinds of tenants they would be willing to accept.⁵⁸ The DOJ sought to use its new enforcement powers specifically enumerated in the Fair Housing Act, asking a judge for permission to inspect the rental agency’s records – which supposedly included special codes for landlords’ racial restrictions – and to take depositions.⁵⁹ A third case from 1970 targeted the owners and manager of four Los Angeles buildings with 65 units, alleging discriminatory rental practices.⁶⁰

The DOJ brought another substantial case the following year, filing a lawsuit that ended with a consent decree between the government and the president of the Apartment Association of Los Angeles County.⁶¹ The case originated with a complaint from the Hollywood-Wilshire Fair Housing Council, and the consent decree barring future discrimination covered forty buildings in the Los Angeles area with more than 1,400 units.⁶² The DOJ entered into a consent decree in July 1973 with Westside Building Company and Santa Monica Construction, a pair of affiliated construction and management firms that owned and operated more than 300 units.⁶³ The companies were enjoined from discriminating and ordered to institute an educational

55. *Id.*

56. *Id.*

57. *See Bias Suit Filed Against Rental Firm by U.S.*, L.A. TIMES, Aug. 25, 1970, at A3.

58. *Id.*

59. *Id.*

60. *2 Landlords Face Bias Suit*, L.A. TIMES, Oct. 1, 1970, at C4.

61. *Agreement in Rental Bias Case Reached*, L.A. TIMES, Aug. 24, 1971, at B4.

62. *Id.*

63. *United States v. Westside Bldg. Co.*, 382 F. Supp. 148, 148 (C.D. Cal. 1973).

program for employees, add a non-discrimination statement to rental forms and advertisements, and notify a local fair housing agency representative of existing and expected vacancies.⁶⁴

Although we cannot know for sure, these actions against large-scale landlords with hundreds and even thousands of units across the city must have had a dramatic impact on Los Angeles' real estate community. By targeting prominent property owners and finding cases that implicated the practices of hundreds of landlords, the government seemed to get off to a strong start in enforcing the Fair Housing Act in Southern California.

IV. THE TRANSFORMATION OF AMERICAN REALTORS

But hitting big landlords and developers was not good enough. The real estate system contained one other key pressure point. The chief obstructor of fair housing throughout the 1960's was the powerful southern bloc in the Senate, which managed to sustain a filibuster on housing even after it collapsed for the rest of civil rights legislation. But the southerners had a powerful ally, with a vast constituency throughout the north, west, and midwest: America's realty boards. As William Taylor of the Center for National Policy Review told the House Judiciary Subcommittee on Civil and Constitutional Rights: "We don't think you can get at the dual housing market without getting at the brokers."⁶⁵ A contemporaneous scholarly study concluded that "the most influential element among the discriminating forces seems to be the white real estate broker or salesman."⁶⁶

A. The Ideology of Forced Housing

Realtors were and are a quintessentially American species: small businessmen who make their living through drumming up clients, making connections throughout towns and cities, fiercely independent, reliant on personal connections for their business, and seeing

64. *Id.* at 149-50.

65. *Hearing Before the Subcomm. on Constitution and Civil Justice of the H. Comm. on the Judiciary*, at 131 (1971).

66. JOE T. DARDEN, *AFRO-AMERICANS IN PITTSBURGH: THE RESIDENTIAL SEGREGATION OF A PEOPLE* 46-47 (1973); *see also* Lynn W. Eley, *Introduction*, in *THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASE-STUDIES* 7 (Lynn W. Eley & Thomas W. Cass-tevens eds., 1968) ("Real-estate brokers have been the group most stubbornly opposed to fair-housing laws.").

themselves as pillars of their local communities (because it is helpful to get clients).⁶⁷ And they hated fair housing.

Perhaps more accurately, they hated what they called “forced housing”: organized real estate interests refused to call the proposal “fair housing” at all. The opposition of the National Association of Real Estate Boards (NAREB), the Realtors’ trade group, appeared to be essentially ideological. John Williamson, the Realtors’ executive vice president during the 1960’s, recalled a government agency doing “continuity-of-government” work, i.e. how to keep public order going in the event of a nuclear war – it “presupposed the death of 20 million, 30 million people, and all the big centers of population destroyed.” So the agency envisioned an “executive reserve that would run the country,” and among other things it would control the prices of housing, everything from cost control to rent control.” The agency asked NAREB to designate someone for the executive reserve:

I’ll always remember how [NAREB President] Morgan Fitch responded. His exact words were: ‘Even in the event of a nuclear attack, even in the event of the destruction of all our great population centers and the deaths of 20 millions to 30 million people, even then, I will not concede the right to control a man’s property.’ What he said was absolutely consistent with the position he held all of his life and I’ll grant him that. The executive committee just went along with his analysis and accepted it.⁶⁸

Throughout the 1960’s and up to the passage of the FHA, NAREB’s newsletter and statements of its leaders were filled with invective about the impending disaster that “forced housing” would bring. Realtors in California spearheaded Proposition 14, which repealed the state’s 1963 fair housing law.⁶⁹ They generated thousands

67. *See generally* JEFFREY M. HORNSTEIN, *A NATION OF REALTORS: A CULTURAL HISTORY OF THE TWENTIETH-CENTURY AMERICAN MIDDLE CLASS* (2005). Indeed, George F. Babbitt, the eponymous hero of Sinclair Lewis’ famous novel, is a realtor.

68. History of the National Association of Realtors 15 (unpublished manuscript) (on file with NAR library, Chicago, IL).

69. The best historical accounts of the passage of the Rumford Fair Housing Act, and its eventual overturning by the California Real Estate Association’s Proposition 14, are found in BILL BOYARSKY, *BIG DADDY: JESSE UNRUH AND THE ART OF POWER POLITICS* 90–09 (2008); ETHAN RARICK, *CALIFORNIA RISING: THE LIFE AND TIMES OF PAT BROWN* 288–90 (2005). Although the voters of California repealed the Rumford Act in 1964 by more than two-million votes, the United States Supreme Court struck down the repeal, holding that repealing a civil rights statute by initiative is state action and violates the Equal Protection Clause of the Fourteenth Amendment. *See generally* *Reitman v. Mulkey*, 387 U.S. 369 (1967).

of letters to Congress opposing the FHA in 1966, when it ran aground on a southern filibuster backed by Republican votes.⁷⁰

B. The Shock of the New

And then, suddenly, in April 1968, fair housing became federal law. This came as a shock to the realtors. As late as January, their newsletter did not foresee a fair housing bill on the horizon. And in any event, Everett Dirksen – one of their most reliable allies on Capitol Hill – had been saying for years that fair housing was unconstitutional: “if you can tell me what in interstate commerce is involved about selling a house fixed on soil or what federal jurisdiction there is,” he said, “I’ll eat the chimney on the house.”⁷¹ But in 1968, Dirksen suddenly changed his position, and even though in March, once again the realtors delivered thousands of letters of Congress, they had been caught flat-footed and unable to stop the passage of the Fair Housing Act.

The Realtors’ surprise was not only political: it was ideological. For decades, NAREB’s motto had been “liberty under the law.” Its self-image centered on the idea of the solid, sober, law-abiding businessman,⁷² bound by a code of ethics that stressed adherence to the law. Politicians could smoothly turn positions on a dime, but thousands of realtors would have a harder time of it. The last use of the phrase “forced housing” occurred NAREB’s April 22, 1968, newsletter, which devoted its first three pages to printing Title VIII in full. Its editorial, “Living With Law,” snidely referenced Martin Luther King’s practice of civil disobedience, rejected it, and said that “[t]his Association holds that laws are to be observed. Failure to observe laws applicable to our business violates the code of ethics.” Whether or not NAREB’s position was correct, national policy has been declared.

70. See Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. LEG. 247, 255 (2016) (describing failure of federal fair housing legislation in 1966).

71. JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* 236 (2015).

72. In contrast to students, professors and hippies who were destroying the country. NAREB’s editorial of April 14, 1969 provides a typical example:

[The] vast majority of the people are thoroughly fed up with the antics of the shaggy-haired, slovenly, unkempt, and foul-mouthed mobs of pseudo-collegians who have been making themselves so conspicuous with the help of much of the news media. The wanton destruction of property that they have committed is enough to condemn them. But the despoiling of their minds in their efforts to appear intelligential [sic] is more serious to the future of the nation.

The Supreme Court's decision in *Jones v. Mayer*,⁷³ handed down just a few weeks after the FHA's passage, administered another gut punch to NAREB's position. *Jones* declared that the Civil Rights Act of 1866, heretofore thought of only as barring formal discriminatory legislation, applied to all private sales and rental of property. NAREB's newsletter ran five separate editorials on the decision, which focused on two points: (1) the decision as well as the FHA, were the law of the land and disobedience was futile; and (2) realtors needed to take proactive steps to avoid lawsuits.

Even before LBJ signed the bill (although after it cleared Congress), realtors were well aware of it and began covering their tracks. Two days prior to the signing ceremony, the Los Angeles Realty Board revised its annual handbook, excised its section on getting rid of "undesirable tenants" because of fear of FHA liability.⁷⁴

The philosophical challenge posed by the Fair Housing Act coincided with a changing of the guard at NAREB—a departure from an ideologically driven core to a practical and transactional orientation.⁷⁵ The idea of realtors making contributions deeply offended the old guard. As Williamson recalled, Morgan Fitch, who had fought the idea of government housing after a nuclear war, "was so upset. He was very emotional about it. It was demeaning, Fitch believed, even to suggest that Realtors had to give people in politics money to get a fair hearing."⁷⁶ Fitch had a point, but Washington had changed – and so did the Realtors. NAREB began focusing on

[B]read and butter issues. By that I mean getting down to business figuring out what role we could play in using government to help realtors and property owners sell houses. We stopped viewing the

73. *Jones*, 392 U.S. at 409, 413 (1968).

74. Public Relations Committee Report, Apr. 9, 1968, Los Angeles Realty Board Papers, Special Collections, UCLA. The discussion does not explicitly mention the FHA: instead, after observing a moment of silence in memory of Martin Luther King, Jr., "the Committee . . . discussed the many legal problems and possible future court decisions and new laws." The Committee excised this portion of the Handbook "because future court decisions and laws that may be enacted after the Book is published might present a liability to the Board." The only relevant difference from the previous year, when no one expressed problems with the Handbook, was the FHA.

75. Williamson recalled: "Throughout my twenty years with the Realtors [1951-73], the emphasis was constantly on issues like rent control, public housing – all ideological issues. When the association finally realized that we had used up so many years on these things, and finally saw that the old guard had really kept it at a standstill for too long, it also had to make some fundamental changes." History of National Association of Realtors, *supra* note 68, at 18.

76. *Id.* at 17.

government from the outside and moved to be a force that shaped the policies of government itself.⁷⁷

The Realtors began aggressively supporting government housing subsidies and searching for ways to use them⁷⁸ instead of seeing everything through an antigovernment lens.

The new pragmatism at the top of NAREB helped realtors accommodate themselves to fair housing. After all, fair housing did not figure to hurt the realty business – if anything, just the opposite. Williamson recalled, “Secretary Bob Weaver of HUD called me about an hour after the President had signed the Civil Rights Act of 1968. ‘Congratulations, Jack,’ he said. ‘I’ve just returned from the White House where the President by the stroke of a pen has increased your market by 35[%].’”⁷⁹ That was a significant overstatement, but the overall point made sense: hard-headed businessmen had little reason to hate fair housing, especially if noncompliance made them susceptible to lawsuits.

Indeed, the California Real Estate Association (“CREA”), the most prominent and powerful real estate group in the state and the driving force behind Proposition 14, opted to publicly embrace the new law. The group spent \$50,000 to have Universal Studios produce a half-hour documentary entitled “A House to Live In” touting realtors’ commitment to open housing.⁸⁰ In advance of a preview screening at the CREA’s statewide gathering in the fall of 1968 – the first such conclave since passage of the Fair Housing Act – association president Robert W. Karpe said the film was “intended to make clear to the general public that realtors will give equal service to everyone, no matter what his ethnic background.”⁸¹ However, lest anyone think that the new approach was an admission of past bad behavior, Karpe added that the film documents the fact that realtors are barred from discriminating by their code of ethics, “and have been successfully following that policy since 1963.”⁸²

77. *Id.*

78. *Id.* at 18.

79. *Id.* at 13–14.

80. Robert S. Fairbanks, *CREA Calls Off Fight on Open Housing*, L.A. TIMES, Dec. 15, 1968, at B4; 3,000 to Attend CREA Parley, L.A. TIMES, Sept. 22, 1968, at M1.

81. 3,000 to Attend CREA Parley, *supra* note 80, at M1, 15.

82. *Id.* at 15. Karpe’s reference to 1963 was to the year that the Rumford Act was initially passed by the California Legislature, even though it was repealed by the voters in 1964, and then reinstated by the United States Supreme Court in 1967. I have found no evidence either from the California Real Estate Association or from the National Association of Realtors that realtors

By late 1968, the FHA prompted the CREA to end its long-running effort to repeal the Rumford Act. After Proposition 13 had been struck by the courts, the CREA had supported several bills to repeal the California fair housing law through the legislature.⁸³ Only twelve months earlier, the State Senate actually voted to repeal the Rumford Act in 1967. However, after the Senate broke the southern filibuster on fair housing, Gov. Ronald Reagan shifted his position from supporting the CREA's position to indicating that he would veto the repeal.⁸⁴ Finally, in December of that year, CREA officials announced that they would no longer seek to repeal or modify the Rumford Act because passage of the federal fair housing law made it clear that the legislature would not pass such a bill.⁸⁵

Back on the ground in Los Angeles, fair housing activists and sympathetic local government officials seized the momentum provided by the new federal law by immediately launching new outreach campaigns. Soon Los Angeles County joined in, launching a public relations campaign aimed at increasing white acceptance of integrated housing. The County Commission on Human Relations marshaled \$250,000 in private donations to fund 200 billboards across the city, thousands of bumper stickers, signs on 4,000 roving telephone company trucks, radio and television messages and newspaper ads—all carrying slogans such as “Is Your Neighborhood All-White or All-American?”⁸⁶ Herbert Carter, the executive director of the human relations panel, said that even with the passage of the Fair Housing Act, “we’re going to have to change the attitudes of the great middle-class, white Los Angeles.”⁸⁷ Such a campaign had been recommended

passed any ethics provisions in 1963 banning discrimination. Realtors, did, of course, pledge in their ethics codes to follow the law and all relevant regulations.

83. Fairbanks, *supra* note 80.

84. See Ken Fanucchi, *Rumford Vote Pleases Realtors, Jars Negroes*, L.A. TIMES, Apr. 17, 1967, at SF8; Tom Goff, *Reagan Shift on Rumford Repeal Halts Legislation*, L.A. TIMES, Apr. 4, 1968, at 3. Extreme right-wing Senator John Schmitz, a longtime prominent member of the John Birch Society, continued to introduce repeals, but they went nowhere. See *Bill to Repeal Rumford Act Clings to Life*, L.A. TIMES, Apr. 25, 1968, at B2. Schmitz was expelled from the John Birch Society for extremism and was on the far right even by the standards of ultraconservative Orange County. See Matt Coker, *John G. Schmitz, In His Own Words*, OC Weekly (Jan. 18, 2001, 12:00 AM), <http://www.ocweekly.com/2001-01-25/columns/john-g-schmitz-in-his-own-words/>.

85. See Fairbanks, *supra* note 80.

86. Jack Jones, *Drive to Boost Acceptance of Open Housing by Whites Starts*, L.A. TIMES, Nov. 19, 1968, at SF0 [hereinafter Jack Jones, *Drive to Boost*].

87. *Id.* The campaign did not get off to a perfect start: an error placed 10 “Is Your Neighborhood All-White” billboards in South Central Los Angeles, which should have gotten signs reading “Good Neighbors Come in All Colors.” *Id.*; Art Seidenbaum, *Wrapping White, black and Brown in Red, White, Blue*, L.A. TIMES, Mar. 5, 1969, at E9.

as far back as 1965 during the aftermath of the Watts riot, but it took recent developments including passage of the Fair Housing Act to provide the spark to realize the project. “Maybe the time wasn’t right then,” said Meyer Price Stern of the Human Relations Commission. “Now, we feel the time is ripe.”⁸⁸

In late August, the *Times* checked in on local fair housing organizations and found that in the wake of the publicity surrounding the Fair Housing Act and the *Jones v. Mayer* decision, complaints had doubled from an average of two to four per day.⁸⁹ The head of one group, Ola Pacifico of the Centinela Bay Human Relations Committee, said the developments out of D.C. had already given advocates greater leverage in helping black families find housing. “There has been a gradual change in real estate people,” she said. “[T]hey’re ready to sell if a little pressure is applied, they’re scared of the new law.”⁹⁰ Joining in the efforts was the California Real Estate Association (CREA), which now had a dedicated fair housing specialist, who described the organization’s new procedure for handling discrimination complaints that could lead to the suspension of offending realtors or even entire local realty boards.⁹¹ Between July 1969 and December 1970, the Housing Opportunities Center of Greater Los Angeles, or its affiliates “filed more than 70 discrimination lawsuits . . . none has been lost.”⁹²

In short, a few months after *Jones* and the passage of the FHA, the nation’s realtors felt betrayed and angry, but had a commitment to obeying the law and little financial reason to disobey it. In addition, at the top of NAREB and leading organizations such as CREA, new leadership was anxious to make a break with the patterns of the past. Into this scenario stepped the Department of Justice.

C. DOJ Moves Against Realtors

The Civil Rights Division moved quickly. Six months after the FHA became applicable to private home sales, DOJ brought suit West Suburban [Chicago] Board of Realtors for FHA violations, including steering, denying access to MLS, telling them units were not available

88. *Jones*, *supra* note 86.

89. Tony Shultz, *High Court Ruling Eases Housing Situation for Minority Residents*, L.A. TIMES, Aug. 25, 1968, at CS2.

90. *Id.*

91. *Id.*

92. *FH Congress Organized: So. Calif. Group Result of Change In L.A. Program*, TRENDS IN HOUSING, First Quarter 1971, at 6.

when they were, and forcing financial disclosures not required of whites.⁹³ The suit received front page coverage in both the NAREB newsletter and the *Chicago Tribune*.

Importantly, the civil rights division had an unlikely ally: DOJ's antitrust division, which for its own part was actively pursuing a series of lawsuits against local real estate boards for blocking access to multiple listing services and setting forth fee schedules.⁹⁴

Growth of these antitrust suits "ultimately led to a complete rethinking of where NAREB was and where it wanted to be." Jack Pontius, who took over from Conser as NAREB's newsletter editor in 1970, conceded that "many of the suits were prompted because of an underlying current of the minority issue." In the early 1970's, "the entire mood of the times was different than it is today [1984]. There was civil rights. There was antitrust. There was suspicion divided between industry and government." For the Realtors, the issues were—with good reason—linked,⁹⁵ and it scared them.

NAREB's official yet unpublished history expressed the prevailing mood:

For the first time in history, the National Association found itself the target of a concerted attack by no less powerful an opponent than the federal government. Dispelled finally and forever was the comfortable notion prevalent among local boards of REALTORS that they did not need any help to fight their battles.⁹⁶

Scrambling, NAREB established an equal opportunity committee, with members from some of the most prominent local real estate boards. In an especially telling turnabout, the committee invited the

93. See *U.S. Again Accuses West Suburban Realtors of Racial Bias*, CHI. TRIB., Sept. 28, 1972, at B7 (referencing original July 14, 1969 lawsuit).

94. See, e.g., *United States v. Multiple Listing Service*, No. 72-68, 1973 WL 811, at *1-2 (D. Or. June 29, 1973); *United States v. Greater Pittsburgh Bd. of Realtors*, No. 72-499, 1973 WL 794, at *1-2 (W.D. Pa. May 21, 1973); *United States v. Long Island Bd. of Realtors*, No. 70 Civ. 1418, 1972 WL 584, at *1-2 (E.D.N.Y. Aug. 1, 1972); *United States v. Memphis Bd. of Realtors*, No. 72-218, 1972 WL 581, at *1-2 (W. D. Tenn. July 27, 1972); *United States v. Prince George's Cty. Bd. of Realtors*, No. 21545, 1970 WL 546, at *1-2 (D. Md. Dec. 28, 1970) (all of these cases represented consent decrees entered into by local realty boards).

95. Such a link made good legal sense, as an agreement between realtors, or between realtors and sellers or purchasers, could amount to a "conspiracy in restraint of trade" under antitrust laws. In 1971, fair housing advocates in Washington State brought such a suit under state antitrust laws, and settled it under a consent decree after the trial judge rejected defendants' contention that antitrust laws do not apply to discriminatory behavior. See *Wash. State Suit*, TRENDS IN HOUSING, First Quarter 1971, at 5. The argument that antitrust laws could cause liability for housing discrimination had already attracted academic support. See Norman Dorsen, *Critique of Racial Discrimination in Private Housing*, 52 CAL. L. REV. 50, 53-55 (1964).

96. "History of the National Association of Realtors," unpublished manuscript, NATIONAL ASSOCIATION OF REALTORS ARCHIVES, (on file with author).

attendance of the leadership of the National Association of Real Estate Brokers, also known as NAREB,⁹⁷ the leading organization of Black real estate agents, whose members were (and still are) known as “realists” instead of “realtors.” The equal opportunity committee started work on affirmative practices for local realtors to comply with fair housing laws – and thereby avoid lawsuits.

And those lawsuits were coming. DOJ soon put “new emphasis on ‘steering’ practices of realty rental and sales organizations.”⁹⁸ Alexander Ross, the deputy chief of housing services at the Civil Rights Division, delivered a speech to the national meeting of ASK, an international homes sales network that operated as an affiliate of Baltimore’s Donald E. Grempler realty firm, and turned over to the group a 14-page memorandum of DOJ’s “don’ts” to the audience.⁹⁹ Ross emphasized that DOJ would inspect internal realtor records, their patterns of advertising, how much realtors told prospective buyers about financing, and even data on the nature of personal service.¹⁰⁰ To show it meant business, a few days later, DOJ filed suit against Grempler, who said that he was a target “because we are the largest broker and because we do have the computers” to provide Justice with detailed compliance data. “We’re not the last broker in Baltimore that they’ll be going to,” Grempler warned, and suggested that other realtors get on board with the consent decree that he signed.¹⁰¹ A week after the suit was filed, U.S. Attorney George Beall announced that his office had received several more complaints and more suits could be expected shortly.¹⁰²

In 1973, NAREB – now known as the National Association of Realtors, or NAR – invited the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, to give the keynote address at the annual convention of its State and Urban Boards Program.

Pottinger did not assuage their fears. In the speech, he announced a new DOJ policy of finding individual litigants to file along with DOJ itself, in order to get maximum money damages. Pottinger

97. In part for this reason, the National Association of Real Estate Boards changed its name in the early 1970’s to the National Association of Realtors (NAR). See Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. SOC. JUST. 1, 7 (2013).

98. Carleton Jones, *Clearing the Air on Open Housing*, BALT. SUN, June 25, 1972, at 101.

99. *Id.*

100. *Id.*

101. James D. Dilts, *U.S. Charges Bias to Grempler Realty*, BALT. SUN, July 26, 1972, at C24, C8.

102. Fred Barbash, *More Bias Suits Predicted Here*, BALT. SUN, Aug. 2, 1972, at C24.

observed that “there are often dozens, and on occasion, hundreds of victims, many of whom are not aware that they received discriminatory treatment from the defendant.” And in case the realtors thought perhaps he was talking about landlords and developers, Pottinger disabused them:

I regret to tell you that a significant number of incidents have come to our attention involving realtors and their associates who have preyed on racial fears while concentrating their solicitation for listings in racially transitioned neighborhoods and have contributed to resegregation by steering blacks into and whites away from such neighborhoods.

These practices must cease. . . . We intend to concentrate our enforcement activities on these violations and will support the efforts of state licensing agencies to use license revocation as an enforcement tool. . . . We have brought what we call ‘steering’ cases in Baltimore, Cleveland, Chicago, Atlanta, New Orleans, Dallas, Detroit, Toledo, St. Louis and Houston among others, and will continue to do where litigation is necessary to put an end to violations.¹⁰³

By the time Pottinger spoke, the Housing and Credit Bureau had nearly doubled in size, to twenty-five lawyers, seven paralegals, with FBI agents also available for investigations.¹⁰⁴ NAR’s leadership got the hint. A few months later, NAR’s General Counsel, William D. North, published a pamphlet entitled “Realtors and the Law,” and sent it to the Association’s membership around the country. On the first page, he warned,

Already we have seen a proliferation of civil rights suits against real estate brokers by the Civil Rights Division of the Department of Justice; an estimated sixty-three suits in 1973. We have seen increased activity by enforcement section [sic] of the Department of Housing and Urban Development. And we have observed a significant increase in the number of private civil rights suits, include a recent massive class actions suit against all real estate brokers in a major metropolitan area on behalf of all buyers and sellers or residential housing in that area.

[T]he effort to control the real estate broker goes even further. As revealed in the terms of proposed consent decrees and demands for

103. Morton Mintz, *U.S. Suits Seen As Aiding Equal Housing*, WASH. POST, Nov. 11, 1973, at A2; see also Moses J. Newson, *Pottinger Warns Realtors: Fair Housing Law Will Be Enforced*, BALT. AFRO-AMER., Nov. 17, 1973, at 1–2.

104. See Newson, *supra* note 103, at 2; see also Interview by Jonathan Zasloff with Schwelb interview, *supra* note 41.

relief in suits filed by the Department of Justice, the government is demanding the right to require real estate brokers to advertise in specified minority medias and to determine the amount of money and the amount of advertising which shall be devoted to such media.¹⁰⁵

D. Rewriting the Realtors' Code of Ethics

Faced with the prospect of DOJ lawsuits, and committed, at least publicly, to "law and order," Realtors attempted to clean up their image, and to some extent, their practices. Nowhere was this seen more clearly than in the Realtors' "Code of Ethics," which formed a key section of the group's self-conception.

At the time of the FHA's passage, Realtors' Codes of Ethics practically demanded discrimination. The original Article 34 of the Code promulgated in 1928 read: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood."¹⁰⁶

By the late 1940's, in light of *Shelley v. Kraemer*,¹⁰⁷ several members of NAR's Committee on Professional Standards became nervous about the explicit language in the Code.¹⁰⁸ Thus, the Realtors made fairly direct attempts to preserve the intent while also excising smoking guns from the actual language. In 1950, NAR overhauled the entire Code, and in doing so, replaced the old Article 34 with a new Article 33: "A Realtor should not be instrumental in introducing into a neighborhood a character of property or use which will clearly be detrimental to property values in that neighborhood." Some realtors insisted that they were not at fault for any racial strife, with one commenting that "the fault lies with unscrupulous white real estate agents, not Realtors." But the overall intent was clear: "When approached for a ruling on Article 34," Mr. McLellan is to ask the question,

105. WILLIAM D. NORTH, *Civil Rights in Housing: A Legal Update*, in THE LAW: HOW IT AFFECTS REALTORS AND BOARD MEMBERS 20, 20-21 (1974).

106. NAT'L ASS'N OF REAL ESTATE BOARDS, CODE OF ETHICS 7 (1924).

107. *Shelley v. Kramer*, 334 U.S. 1, 22-23 (1948) (holding that the Equal Protection Clause forbids enforcement of racially restrictive covenants despite state action requirement).

108. Letter from Committee of Professional Standards Service (Dec. 1947) (on file with author). Mr. Ray Nichols of Oakland brings up Article 34 of the Code, "which deals with racial discrimination." He mentions that this is relevant in light of *Shelley*. November 17, 1949 Meeting: "Correspondence from the Christian Friends of Racial Equality was read and considered. This matter is tabled by the Committee."

“Whom do you want living next to you. Read Article 34 and answer the question yourself.”¹⁰⁹ Such hedging persisted through 1962, the last time the Code of Ethics was reviewed prior to the enactment of the FHA.¹¹⁰

However, by 1974, the year of the first post-FHA revision, the realtors realized that they could no longer get away with such subterfuge. The entire article was excised and replaced with a new Article 10: “The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.”¹¹¹ Any realtor belonging to NAR had to sign it.

E. Establishing the Affirmative Marketing Agreement

The threat from DOJ also sent the Realtors back to the more-pliable HUD. HUD and NAR concluded their nationwide “Affirmative Marketing Agreement” in 1975. It was often vague and somewhat tepid. Given the decentralized nature of NAR, it also did not bind individual realty boards or real estate agencies. But it was light-years ahead of what had been the norm only seven-years prior.

If nothing else, the publicity was extensive. NAR sent copies of the Agreement to 1,696 member boards across the country, with a cover letter and an explanatory booklet urging endorsement of the Agreement through local HUD office.

Much of the Agreement centered on publicity and education: a Board adopting the Agreement would place an ad in a newspaper of

109. May 9, 1950 Meeting.

110. Even in the early 1960s, the Realtors were feeling less and less comfortable with the implications of this Article, renumbered Article V in the revision of 1962. In that year, a Realtor sold a house in an all-white neighborhood to a non-white purchaser. A white neighbor then complained to the relevant Board of Realtors that this action constituted a violation of the ethical provision. The realtor responded, and the Board accepted, the defense that introducing a non-white *occupant* did not violate the Code of Ethics because the Code only guarded against “a character of property or use” that would reduce property values, and that a specific occupant was not a “character” or “use.” See NAT’L ASS’N OF REAL ESTATE BOARDS COMM. ON PROF’L STANDARDS, INTERPRETATIONS OF THE CODE OF ETHICS 38–39 (1963). But it is one thing for Realtors to say that their own professional standards do not require them to separate the races; it is quite another to say that the law should force them to practice non-discrimination. As noted, realtors vehemently opposed all fair housing legislation, and despite this decision, the California Real Estate Association sponsored the state’s Proposition 14, which overturned California’s Rumford Fair Housing Act.

111. NAT’L ASS’N OF REALTORS, CODE OF ETHICS 3 (1974).

general circulation and would try to put an HUD-approved “Publisher’s Notice” in the local press and on television. It would provide educational materials to participating realtors, recruit minority brokers to join local boards, sponsor outreach and training programs, monitor progress and (significantly) pay the administrative costs of doing so. For their part, individual Realtors adopting the Agreement needed to display equal opportunity posters in advertisements, brochures, and all places of business, and inform their clients of legal requirements.

The Agreement’s teeth, such as they were, centered on office procedures and techniques that HUD and NAR argued were designed to prevent discrimination. These procedures were not mandatory, but HUD and NAR noted that the “failure to provide some effective safeguards against racial steering—which these procedures were primarily designed to prevent—could be construed as lack of commitment by the signatory firm in question.”¹¹² And in case anyone missed the point, the Agreement clearly specified that “[i]n no way is any exemption or immunity from compliance with Title VIII or any other fair housing law granted or implied by the Agreement.”¹¹³

Many of the provisions of the Affirmative Marketing Agreements would have been familiar to realtors because they were standard components of consent decrees that DOJ had been pushing since 1969. But of course, Affirmative Marketing Agreements were voluntary and unenforceable. And for many realtors, presumably, that was the point. Nevertheless, only by adhering to an affirmative marketing agreement could a realtor defend itself against a fair housing lawsuit. And for NAR’s leadership, *that* was the point.

NAR President Arthur Veitch explained to San Fernando Valley Realtors in 1976 why the realtors moved to the Affirmative Marketing Agreement. First, DOJ brought antitrust lawsuits against realtors, leading to the creation of the Fourteen Points program guiding the operation of Multiple Listing Services against antitrust actions. The antitrust experience, Veitch said, showed that “the National Association must constantly strive to ensure that industry programs, policy, and practice are consistent with law and the National Association

112. U.S. DEP’T OF HOUS. & URBAN DEV., VOLUNTARY AFFIRMATIVE MARKETING HANDBOOK 3–4 (1979).

113. *Id.* at 3–13.

must anticipate trends in enforcement activities to help avoid costly litigation.”¹¹⁴

Veitch pulled no punches. The Affirmative Marketing Agreement served as a way to avoid DOJ consent decrees: “Realtors, however innocent they may be, desiring to accept a consent decree to avoid ruinous defense costs are finding themselves confronted with terms which are equally, if not more ruinous.” He continued:

All of these developments – the need to anticipate trends in legal enforcement, the oftentimes prohibitive cost of legal defense and increasing use of consent decree which go beyond the requirements of the law caused the National Association to consider the development of the Affirmative Marketing Agreement.¹¹⁵

Veitch’s address was included in the Affirmative Marketing Handbook sent to every realty board in the country. For his part, NAR General Counsel Nolan included in the handbook an essay praising the Affirmative Marketing Agreement as insurance to litigation, and highlighted a case in Detroit where the judge, pointing to the defendant realtor’s signing and adherence to the Agreement threw out fair housing charges.

Not surprisingly, the civil rights community was hardly thrilled with NAR’s Affirmative Marketing Agreement, and they made their objections clear. In March 1976, the House Subcommittee on Civil and Constitutional Rights held a three-day hearing on “Equal Opportunity in Housing,”¹¹⁶ and the lead witness was Robert C. Weaver, one of the most distinguished housing scholars in the nation and the first African American Cabinet member in U.S. history, when he served as the inaugural HUD Secretary, under President Johnson.

Weaver pointed to findings from a HUD region concerning the “areawide agreement” in San Diego.¹¹⁷ The region concluded that the agreement had “no measurable effect or noticeable influence on housing racial segregation[;]” “practices of developers had altered very little in response to affirmative fair marketing[;]” and “HUD’s

114. Veitch’s speech is quoted in NAT’L ASS’N OF REALTORS, *AFFIRMATIVE MARKETING HANDBOOK* (1st ed. 1977).

115. *Id.*

116. *Equal Opportunity in Housing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, Part 1, House of Representatives*, 94th Cong. (1976) [hereinafter *Equal Opportunity Hearing*].

117. *Id.* at 3 (statement of Prof. Robert C. Weaver, Dep’t of Urban Affairs, Hunter Coll., N.Y., President, Nat’l Comm. Against Discrimination in Hous., Inc.).

monitoring, enforcement, and technical aid had been minimal and largely ineffective.”¹¹⁸

These protests were revealing. Despite Subcommittee Chair Don Edwards’ warning against being “lulled into thinking that housing discrimination is virtually a thing of the past,”¹¹⁹ Weaver’s complaints concerned not *discrimination* in the private housing market—which after all accounted for the vast majority of housing in America—but rather *segregation*, and in particular the role that the limited number of HUD programs played in fostering or combatting segregation. His model affirmative marketing plan came from Ohio’s Miami Valley and concerned “the allocation of subsidized housing units in the region”¹²⁰ – an important issue, but not one concerned with discrimination.¹²¹ Conspicuously, although the Subcommittee called six witnesses from HUD, it called none from DOJ.

No one argued that the Affirmative Marketing Agreements were perfect, or even a major step forward in and of themselves. The most enthusiastic reactions came, not surprisingly, from the realtors.¹²² But this very enthusiasm showed how the terms of debate and action had changed in less than a decade. All over the country, realtors were now lining up to claim that they did not discriminate. And the advocates in Washington, DC were beginning to recognize that private

118. *Id.* at 2–3.

119. *Id.* at 1 (statement of Rep. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary).

120. *Id.* at 3 (statement of Prof. Robert C. Weaver, Dep’t of Urban Affairs, Hunter Coll., N.Y., President, Nat’l Comm. Against Discrimination in Hous., Inc.). Weaver devoted the majority of his testimony not to Affirmative Marketing Agreements but rather to implementation of the Housing and Community Development Act of 1974, revealing again how the focus had shifted from discrimination to public programs designed to alleviate segregation – without anyone clearly distinguishing between the two phenomena.

121. Scholars, observers, and advocates were only slowly becoming aware that the problem of segregation was decoupling from that of discrimination. Later in the hearing, the Subcommittee heard testimony from Professor Reynolds Farley, a distinguished demographer, who testified that most blacks could afford housing in white suburbs, and that white attitudes had substantially changed: “[t]he vast majority of whites agree that blacks should be able to live wherever they can afford.” Yet he also argued that integration was prevented by a “web of discrimination,” which he defined as “the real estate practices, the mortgage lending arrangements, the climate of opinion and the like which deter blacks from obtaining the housing for which they are economically qualified.” If this seemed confusing, it was. Shortly after he concluded his testimony, Farley was asked by Representative Robert Drinan (D-MA) whether “there are any specific laws that you feel are need, or any new regulations that should be written or proposed by HUD?” He responded: “I am not familiar with existing laws, and I am unable to give you an opinion whether there should be new and more encompassing laws in that area.” *Equal Opportunity in Housing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, Part 2, House of Representatives, 94th Cong. 103–06 (1976)* (statement of Reynolds Farley, University of Michigan).

122. RANDY HILL, VOLUNTARY EQUAL HOUSING AFFIRMATIVE ACTION 4 (1975).

market discrimination, while hardly a thing of the past, had been significantly reduced: this is why throughout 1976, virtually nothing was discussed concerning discrimination, and the focus turned to broader and complex issues of segregation.¹²³

F. Effects on the Ground

The prospect of litigation and sanctions appears to have had at least some effect with realtors on the ground. Even Chicago, the home of the bitterest open housing battles, began to see a change. Much of this was driven by coordination between DOJ and the Leadership Council for Metropolitan Open Communities. The Leadership Council received a substantial HUD grant to develop a legal action program, and by the end of 1972, it had filed some 202 cases and had at that time over 40 cases pending.¹²⁴ The Leadership Council's legal action together with the DOJ lawsuit against the West Suburban Realtors Association, got the attention of the region's realtors.

In Park Forest, an inner ring southern suburb, local whites in 1970 protested the influx of Blacks into their neighborhoods, in an effort to avoid tipping (it was integrated beforehand). The local realtor's response was telling:

We can't keep track of where people live by race. We could be accused of violation if blacks asked to buy a specific house and we did not show it. Every Realtor is being tested by Blacks. We have no choice. There are law suits against brokers who have refused to show properties to certain people. Some have settled out of court, some are in process. I am not going to lose my license over this. I can't call anybody up or contact them in any way legally and ask them where they are selling to colored.¹²⁵

In 1972, the Chicago Real Estate Board distributed several hundred copies of the Leadership Council's *Guide to Practice Open Housing Under Law* to its members.¹²⁶

123. The 1976 hearings included one survey of realtors' affirmative marketing agreements, from Prince George's County, MD, which found that several firms in the county did not do the required outreach either to minority media, to prospective black employees, or to customers by using the HUD-approved Fair Housing logos. It is fair to say that the survey was not a model of rigor: it comprised only twelve realtors. *Id.* at 2–9.

124. *Leadership Council for Metropolitan Open Communities Records, Part I, 1954–1988*, CHICAGO HISTORY MUSEUM, <http://chsmmedia.org/media/fa/fa/M-L/LCMOC-inv.htm>, (last visited Sept. 7, 2017).

125. BRIAN J.L. BERRY, *THE OPEN HOUSING QUESTION: RACE AND HOUSING IN CHICAGO, 1966–1976* 116 (1979).

126. *Id.*

Just west of Chicago, in Oak Park, the threat of private and DOJ fair housing lawsuits also drove realtors into compromise. “The local real estate industry, at first strongly opposed to ‘forced housing’—the catchword of fair housing opponents—subsided in its opposition when the Federal Civil Rights Act was passed in April 1968, possibly feeling that compliance with a local ordinance might decrease their susceptibility to prosecution under the stricter federal law.”¹²⁷ At times, the FHA looked like the Borg: “The local real estate industry is reasonably cooperative with the integration effort. Many local real estate men seem to have concluded that *containment is futile* and that scattered integration serves their own best business interests’.”¹²⁸

Realtors across the country echoed the attitude of their Chicago colleagues. In early 1970, even before the FHA had fully come online, and before DOJ had sued the major realtors in New York, NCDH surveyed realtors in the Tri-State New York Metropolitan Region, and found that:

Regardless of their personal attitudes. . .most realtors are on the horns of a dilemma: to conform to the law because of the threat of losing their license (and thereby their livelihood) or to lose listings because of refusal to accept restricted offerings. Few brokers expressed concern about adverse findings by human rights commissions or about fines or court orders. But fear of losing their license was cited as a major deterrent to discriminatory practices.¹²⁹

Kale Williams, the Leadership Council’s Executive Director, summed it up toward the end of 1975. Williams told the New York Commission on Human Rights “the procedures for handling [fair housing] cases have now been refined, and the education of the bar and the bench has proceeded to the point where it now can be said, in our jurisdiction, that enforcement of the federal fair housing law is a prompt and effective remedy to racial discrimination in housing.” Williams noted that lawsuits were filed within one or two days of receiving complaints and pressure for damages meant that the procedures were working. Moreover, he noted, the lawsuits were having an effect:

[T]he repeated enforcement of that law begins to have a corrective effect on the real estate industry. A success record of eighty-five

127. *Id.* at 282.

128. *Id.* at 302.

129. *First Post-FH Law Study: Realty Inquiry Shows FH Change ‘Slow, Reluctant’*, TRENDS IN HOUSING, May 1970, at 5.

percent, the time and trouble of defending a lawsuit, the damages and fees are leading to changes in behavior on the part of the real estate industry. These are not yet adequate, but they are of great significance.¹³⁰

Williams, of course, was biased: he wanted to show success for his agency and urge its replication elsewhere (as indeed he did later in the speech). But he was also someone at the center of the city's civil rights community, who had founded the Leadership Council with Martin Luther King, Jr. in 1966, spearheaded its litigation program, had helped bring the famous *Gautreaux* lawsuits and developed the eponymous program that came out of that case.¹³¹ He was no shill for the realtors. But even he had to acknowledge, in light of the nationwide Affirmative Marketing Agreement, that "the recent policy declarations by the National Association of Realtors represent a major turning point in . . . affirmative efforts to overcome the effect of past discrimination."¹³²

The institutionalization of fair housing law also meant that other regulations incorporated it by reference, and that added teeth. The real estate industry had long been subject to some state oversight, but the 1970s saw a dramatic increase in California, as the state legislature added new laws governing the supervision and control of real estate brokers.¹³³ These moves toward the regulation and professionalization of the industry included a focus on fair housing, with California law being amended to require real estate brokers to familiarize salespeople with 30 detailed separate types of prohibited discriminatory conduct.¹³⁴ A state regulation that became effective in 1981 created

130. Kale Williams, *Bias Marks Chicago Housing*, CHI. DEFENDER, Aug. 23, 1975, at 4.

131. An excellent memoir of the *Gautreaux* case, including portraits of many of the lawyers and activists that worked on it, can be found in ALEXANDER POLIKOFF, *WAITING FOR GAUTREUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* 226–31 (2006).

132. *Id.* The Leadership Council as an organization took a similar position. In its 1974 Practice Guide for lawyers, it stated:

Initially, it was thought there would only be a few cases, but as the remedy became more known, more and more minority homeseekers looked for legal advice and the assistance of the courts. The courts, in turn, came to recognize the need for prompt and effective relief, and recalcitrant defendants were faced with restraining orders against disposing of a housing unit by rental or sale when discrimination was alleged. Plaintiffs were able to get the housing they wanted and began pressing also for damages, costs, and attorney's fees.

LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, *GUIDE TO PRACTICE OPEN HOUSING LAW* 2 (1974).

133. See Brief for Respondent at 14, 18–19, *Meyer v. Holley*, 537 U.S. 280 (2003) (No. 01-1120), 2002 WL 31190162.

134. *Id.* at 20–21; CAL. CODE REGS. tit. 10, § 2780.

new disciplinary procedures for real estate professionals who engaged in such discriminatory behavior.¹³⁵

The California Real Estate Association had tried to implement some institutional fair housing measures in the wake of its massive effort to pass Proposition 14. Aware that its advocacy of the measure had proved extremely divisive and alienating to minorities, the group formed its first Equal Rights Committee in 1965, and with subsequent legal developments including the passage of the Fair Housing Act the organization began formally training real estate agents in fair housing law.¹³⁶ This infrastructure became more meaningful in the 1970s as minority real estate agents were finally admitted into the ranks of the state's professional organizations. The Los Angeles Realty Board elected Lillie R. Evans as its first black director in 1971.¹³⁷ Evans had been a director of the Consolidated Realty Board, a black organization that formed because the Los Angeles board excluded African Americans until 1962. Upon becoming a director of the Los Angeles Realty Board, Evans said racial barriers in the real estate industry were coming down, but "open housing is not really a reality yet."¹³⁸

The Westside was becoming more open to minority residents, but they tended to settle in what were then lower-income areas such as Culver City and Mar Vista.¹³⁹ A *Times* article from 1978 quoted real estate agents as denying that ethnic steering was at work, saying it was simply a matter of economic resources. "This whole racial thing, it's been finished with," said one Brentwood real estate broker.¹⁴⁰ "People have gotten to the point where if they can afford it, they got it" Harris and Rosloff were quoted in the piece as saying that discrimination persisted, though it had become more subtle.¹⁴¹ In the 1980s, the Council formally created an alliance with the Santa Monica and Venice/Marina del Rey boards of realtors after the realty boards entered into an Affirmative Marketing Agreement with HUD. The joint effort involved disseminating information about fair housing laws to

135. CAL. CODE REGS. tit. 10, § 2780.

136. See J. Walter Cobb, *Historical Markers of Housing Discrimination and Segregation in Los Angeles County*, in LOS ANGELES COUNTY COMMUNITY RELATIONS CONFERENCE RECORDS, USC Libraries Archival Collection (1985) (on file with author).

137. See Jean Murphy, *String of Firsts for Realtor: Black Realtor*, L.A. TIMES, Dec. 13, 1971, at 4.

138. *Id.* at 15.

139. See Bob Baker, *Arch Rivals Forge Alliance to Create Community Housing Board*, L.A. TIMES, Dec. 4, 1980, at WS1, 7.

140. *Id.*

141. *Id.*

prospective renters and buyers, but primarily to real estate professionals. “My attitude toward realtors in the past was always ‘sue the bastards,’” Rosloff told the *Times*. “But with this I think we’re beginning to learn about each other.”¹⁴²

What emerges from looking at local reports during the crucial decade is uneven progress, with some areas seeing sharp declines in discrimination and others remaining stubbornly fixed to the status quo. In Westchester County, the *New York Amsterdam News* reported in early 1971 that while “[d]iscrimination still exists, . . . [i]n the past year . . . there has been a marked decline in . . . complaints, because of the cooperative relationship” that the local fair housing organization developed with many local brokers.¹⁴³ The *New York Times* found the same situation, again noting that brokers had changed their minds, partly because the soft housing market made them eager for commissions.¹⁴⁴ The fair housing organization reported that their clients rarely had complaints about treatment from brokers and lauded the local brokers for their cooperation and proactive attitude.¹⁴⁵

Kentucky’s Housing Opportunity Centers surveyed 47 Black families who had integrated white neighborhoods in Louisville and found them “relieved and somewhat surprised to discover that their race was not the obstacle that they might expected it would be.” Some brokers engaged in “an unnecessarily close questioning about the potential buyer’s finances,” some brokers were steering, and one seller had to be threatened with legal action after he had accepted a down payment and then tried to back out, but “the largest [sic] majority had no problems at all with the agent they consulted in obtaining a new home.”¹⁴⁶

Some progress occurred even faster. By the end of 1970, the executive director of Denver’s leading fair housing organization reported that:

We note with interest that we are seldom called upon to perform the function for which the Center initially was conceived. With middle-income minority family moves throughout the metro area having become an everyday occurrence, we note that brokers, owners,

142. *Id.* at WS1.

143. *Help 100 To Find A Home*, N.Y. AMSTERDAM NEWS, Mar. 20, 1971, at 29.

144. Linda Greenhouse, *Suburban Housing for Blacks Eases*, N.Y. TIMES, Jan. 24, 1971, at 55.

145. WESTCHESTER RESIDENTIAL OPPORTUNITIES, INC., 1971 ANNUAL REPORT.

146. HOUSING OPPORTUNITY CENTERS OF THE KENTUCKY COMMISSION ON HUMAN RIGHTS, *A BETTER PLACE TO LIVE* 2, 4 (1978).

neighbors, and mortgage lenders appear to have taken a giant step forward. We rarely see a middle-income family with a housing problem.¹⁴⁷

In other areas – particularly those areas close to large areas of concentrated minority populations, resistance appeared to be the order of the day. An early paired testing study in Akron found twelve out of thirteen real estate firms discriminating in some way.¹⁴⁸ In the East Bay, the all-white city of San Leandro, next to heavily Black Oakland, put up barriers to a single Black family moving in: “San Leandro is not 99.9% white by accident,” noted NCDH co-director Edward Rutledge, whose organization had received HUD money to study discrimination and segregation in the Bay Area.¹⁴⁹ He noted that it was typical for small cities in the region.¹⁵⁰

Slowly, the numbers began to drop, yielding substantial but far from universal discrimination.¹⁵¹ By late 1972 and early 1973, Akron saw discrimination rates in the 60’s, with one audit finding 49% discrimination. On the other side of San Francisco Bay, the Mid-peninsula Citizens for Fair Housing undertook a series of audits, and found discrimination in the mid-range. In 1970, the Mountain View audit yielded 40%; Sunnyvale and Palo Alto in 1971 had 54% and 58% respectively.¹⁵² Long Beach’s Fair Housing Foundation found racially discriminatory practices in 47% of apartment buildings tested.¹⁵³ Baltimore was heavily tested and heavily discriminatory: in 1972 – discrimination occurred forty – fifty-five percent of the time,¹⁵⁴ whereas an alternative claim shows that half of urban developments and two-thirds of suburban developments discriminated, and another alternative claim revealed that forty-nine percent of ninety-eight apartments

147. Report of the Director, Metro Denver Fair Housing Center, 1970.

148. See JULIET SALTMAN, OPEN HOUSING: DYNAMICS OF A SOCIAL MOVEMENT 182–83 (1978).

149. Ralph Craib, *San Leandro Called Racist*, S.F. CHRON., May 14, 1971.

150. *Id.*

151. As noted in Part I.B we must exercise caution in reporting and interpreting discrimination rates from paired-testing studies. A simple bottom-line number can be misleading, especially if we do not know how it is disaggregated, and bottom-line numbers in different surveys can generate apples-to-oranges comparisons. I cite these numbers here for comparisons through time, i.e. discrimination rates have dropped, and also to show that even with great imprecision, discriminations rates from the basically routine, pervasive rates of the pre-FHA era.

152. NCDH Papers, 136/7.

153. Special Report, Fair Housing Foundation of Long Beach, *With All Deliberate Delay?* (June 1971), in HEARING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1032 (Washington, DC 1971).

154. SALTMAN, *supra* note 148, at 94; Juliet Saltman, *Housing Discrimination: Policy Research, Methods and Results*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 186, 191 (1979).

discriminated.¹⁵⁵ But even there, heavy discrimination meant a rate of about half – a sharp decline from just a few years earlier.

This most assuredly did *not* mean that discrimination had vanished or that realtors had given up. In the (then) more-conservative suburb of Evanston, for example, roughly half of the realtors engaged in discriminatory practices, and the Leadership Council found several instances of realtors soliciting restrictive listings. As noted above, the 1977 HDS found discriminatory treatment in fully one-third of tests. But such practices were more and more on the defensive each year, and they represented a very sharp drop from less than a decade before.

G. 1979 USCCR Report

None of this meant that DOJ's enforcement was perfect. In the spring of 1979, the United States Commission on Civil Rights surveyed the overall enforcement of fair housing;¹⁵⁶ unsurprisingly, it was harshly critical of HUD.¹⁵⁷ It was far less critical of DOJ, noting its "impressive qualitative litigation record" leading "consistently . . . successful in its efforts to obtain relief in fair housing cases."¹⁵⁸ But it found ample fault there as well. Most prominently, Commission staff criticized DOJ for 1) not maintaining its own extensive paired-testing program; 2) not making strategic use of data to identify patterns of discrimination to be attacked; and 3) not bringing enough lawsuits.

The first two criticisms had purchase, as Schwelb acknowledged in his response. What few understood at the time was that they reflected the actual success of the FHA's first decade. Landlords, homeowners, and realtors were still systematically discriminating against Blacks and Latinos, but they were fewer and farther between than they had been, and so identifying patterns and low-hanging fruit was more difficult. As Schwelb acknowledged, however, DOJ's fair housing enforcement needed to get more strategic and precise to ferret out more discrimination.¹⁵⁹

As to the third complaint, however, Schwelb was unrepentant. Commission staff argued that DOJ needed to take more cases and

155. Trends in Housing 5 (May, June 1973); Trends in Housing 1 (Aug. 1978)

156. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT (1979).

157. *Id.* at 5–6.

158. *Id.* at 57.

159. *Id.* at 65.

abandon its internal standard for whether to pursue litigation, viz., “whether a fairminded court could reasonably be expected to rule in favor of the United States on the basis of available evidence.”¹⁶⁰ Although it acknowledged that DOJ had developed an excellent success record, the Section could ease its standards somewhat without jeopardizing its excellent record in the courts” and that doing so would put it in the “vanguard” of pursuing suits concerning exclusionary zoning, sex discrimination, and redlining.¹⁶¹ Schwelb indignantly responded:

While I have no precise count, I believe that we have sued about 800-850 defendants, often many in the same suit. These include cases against large defendants who control tens of thousands of units or other transactions. We have sued one or more of the largest real estate companies in many, if not most, of the major metropolitan areas of the country. We have taken on a State and more than fifteen municipalities and public housing authorities. In the “Appraiser” case, we have taken on four large nationwide organizations. I know of no other Section in this Division, or of any other entity anywhere, that has brought so many cases, many of them very significant, involving patterns and practices of discrimination. Who else has sued more than 800 defendants? It is frankly disillusioning to have such a record, based on very aggressive outreach, summarily dismissed• as “disappointing” without any frame of reference being provided or any constructive comparison being offered.¹⁶²

It is hard not to sympathize with Schwelb here: he had developed one of the most effective civil rights litigation programs in the nation’s history, and his reward was criticism from a body without official responsibility.

Yet one can also see the Commission’s frustration that more had not been accomplished.¹⁶³ Even with incredible progress, between one-in-four and one-in-three encounters between Blacks and the housing market resulted in discrimination, meaning that each African-American over the course of his or her lifetime would suffer from it several times.¹⁶⁴

160. *Id.* at 72.

161. *Id.*

162. *Id.* at 71.

163. *See id.* at 71–73.

164. It is also relevant that at the time that the USCCR report was completed, the HMPS *final* report had not appeared; only a preliminary measure had been published, and that report suggested that discrimination levels were far higher than the final report showed. *See generally Bias in Housing High, HUD Study Shows*, BOSTON GLOBE, Apr. 17, 1978 (stating that the preliminary study showed 75% discrimination rates for rentals and 62% for sales).

Moreover segregation levels remained extremely high, and had only barely descended from a decade earlier. Neither the Commission nor DOJ realized at the time that the problem of segregation had diverged from discrimination.¹⁶⁵ Discrimination might have created segregation, but then it took on a life of its own, baked into the texture of American life. Suburbs excluded affordable housing from their neighborhoods, which also contained the better schools and institutions that led to social mobility. And just as the law required equal treatment of Blacks in employment, the United States deindustrialized, preventing many from following whites to those suburbs that would have them. With the perspective of history, the Commission's chastisement of DOJ at least on the third point seems sincere, well-meaning, and entirely misplaced.

Still, the Justice Department had the hammer of fair housing enforcement, used it, and used it well. Discrimination levels collapsed. Broader structural forces meant the problem was bigger than a nail. But for the vast majority of Blacks by the end of the 1970's, their ability to find a home or an apartment was light years ahead of where it had been just ten years earlier. The persistence and damage of segregation should not obscure a remarkable policy success.

V. THEORETICAL IMPLICATIONS

What might all this mean for the present? The story of the DOJ's attack on housing discrimination in the 1970's reveals two relatively clear points. First, law mattered. Congress passed a statute, a key administrative agency enforced it, and it made a big and positive difference on the ground. Second, although discrimination and segregation are clearly related, reducing one did not necessarily mean reducing the other. Even as early as the end of the 70's, it had become clear that they were different problems.

But aside from these relatively straightforward lessons, there are broader theoretical lessons for scholars and advocates.

A. Why Realtors Obeyed The Law

America's real estate industry, and particularly its realtors, did not become civil rights proponents overnight. Indeed, they did not

165. This was also the case with even the leading scholars of segregation and discrimination. See *Equal Opportunity Hearing*, *supra* note 116 (regarding Reynolds Farley's testimony before the House Subcommittee on Civil Rights).

become civil rights proponents at all. Instead, the hydraulic pressure of DOJ and private lawsuits, the ideological turbulence brought about by the FHA's passage and the *Jones* holding achieved major changes in their behavior within just a few years.

The pressures of lawsuits need little theoretical explanation for deterrence in and of itself. But a skeptic might well wonder how the DOJ and private litigants, all by themselves, could have achieved what they appear to have achieved. The answer is that they did not do these all by themselves. They were necessary, and crucial, but they were not alone.

Tom Tyler's famous work suggests that adherence to law is not simply a matter of deterrence. Nor is it a matter of agreeing with the law itself. Instead, for Tyler, the key variable is *legitimacy*, that is: did those who enacted the law have the right to do so? Was the *process* credible, sound, and done with integrity? If so, people will obey the law even if they might disagree with it.¹⁶⁶

This seems to have been the case with the realtors. They did not particularly like the law, but they accepted its legitimacy. They said as much in 1968. NAREB editorial, writing about the *Jones* decision, commented:

There should be no thought that the case, on either side, was inadequately presented. A careful study of the briefs indicates the most exhaustive study by counsel for both sides. Not only were the applicable Constitutional amendments and the laws passed by the Congress analyzed virtually word by word, but arguments in prior case before the Court were re-argued as to their intent.

Debates in Congress of a century ago were quoted, analyzed, and argued, as were newspaper reports of that day commenting on the debates. There can be no apology for the presentations to the court. They were exhaustive.

Neither can be it be said that the court acted hastily or prejudicially, or peremptorily. The arguments pro and con were exhaustively analyzed and accepted or discarded with reason carefully noted. It would be a mistake to charge the court with inadequate consideration. Rather, a thorough study of the majority (7-to-2) opinion of Mr. Justice Stewart can lead only to the conclusion that it was most ably presented.¹⁶⁷

166. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990).

167. Eugene P. Conser, *Import of Jones v. Mayer - I*, REALTORS' HEADLINES, June 24, 1968, at NAR.

This editorial could serve as the ideal type for Tyler's thesis. Combined with the realtors' traditional, almost talismanic commitment to "liberty under law," and a professional self-conception based upon an adherence to a Code of Ethics that now demanded nondiscrimination, it led to a period of malleability, and then grudging acceptance, for the majority of US realtors.

B. Transforming Social Meaning

Two other factors played important roles. First, as noted above, adherence to nondiscrimination did not disrupt realtors' bottom lines. Weaver may have been overoptimistic to say that realtors' business would increase by 35%, but there is no evidence nondiscrimination hurt it. This is not to suggest that nondiscrimination is a fundamentally "irrational" norm: privileged groups might well wish to enforce it as a way of bolstering their privilege and place in hierarchies.¹⁶⁸ But an individual realtor is looking for buyers and sellers, and the law's allowing her to increase the prospective pool of clients hardly figures to buttress her resistance to it.

Perhaps other realtors, and other community members, might press her to resist nonetheless. This prospect points to the second additional factor in play. Lawrence Lessig has observed that legal changes can produce a change in the "regulation of social meaning."¹⁶⁹ In other words, passage of a law might give a different meaning to an action that it had beforehand. For example, before the outlawing of dueling, refusal to accept a duel might open a person up to charges of cowardice. After outlawing it, refusal to accept could simply represent a desire to maintain social order and carry no stigma.

The enactment of fair housing might well have performed the same function. Before fair housing, many realtors, buyers and sellers may very well have had no problems to transactions involving other races. Poll numbers show small although clear majorities of white Americans having no problems with selling to, buying from, or living next door to Blacks. But before 1968, such people would have been subject to pressure from neighbors, churches, chambers of commerce,

168. See generally EDMUND S. MORGAN, *AMERICAN SLAVERY/AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 328 (1975).

169. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995) (explaining that to understand the place of orthodoxy in law it is important to understand something more about how the orthodox gets made, by whom, and with what techniques, which is to understand something more about the techniques of social construction).

“improvement associations,” and other groups not to sell or do business with Blacks. They might also have been subject to threats.

After 1968, however, they had a ready-made response: “will you pay my legal bills if I am sued?” The south Chicago realtor’s actual response spoke volumes: “I am not going to lose my license over this” – exactly the response that Pottinger had promised in his NAR address.¹⁷⁰ Put another way, *Jones* and the passage of the FHA allowed much of the latent *nondiscrimination* that built up in the country to manifest itself.

Merely because such latent *nondiscrimination* had built up says virtually nothing about whether it would have eventually become the norm. Recent events have demonstrated that the mere fact of even overwhelming public support means little in a political system characterized by a proliferation of veto points.¹⁷¹ Law matters. Fair housing mattered as much as anything.

A final repetition of caveat is in order: 1977 did not see an end to discrimination. It did not see an end to the substantial and real costs that Americans of color bore because of it. And most significantly, it came nowhere close to seeing an end to residential segregation, which continues to have severe negative effects on American society. But it did represent a profound policy success. For that, we can be grateful.

C. On the Convergence Thesis

The Justice Department’s experience with the realtors, and with fair housing enforcement more generally, contains important implications for Derrick Bell’s influence “convergence thesis” of racial equality in the United States. “Measurable improvements in the status of some blacks and predictions of future progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy decisions in this society for the three centuries.”¹⁷² Bell later refined the thesis thus:

170. Newson, *supra* note 104, at 1–2.

171. See, e.g., Louis Jacobson, *Gabby Gifford Says Americans “Overwhelmingly” Support Expanding Background Checks*, POLITIFACT (Apr. 18, 2013), <http://www.politifact.com/truth-o-meter/statements/2013/apr/18/gabrielle-giffords/gabby-giffords-says-americans-overwhelmingly-suppo/> (rating “true” the claim that “Americans ‘overwhelmingly’ support expanded background checks.”).

172. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. 5, 6 (1976).

Translated from judicial activity in racial cases both before and after *Brown*, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.¹⁷³

Although Bell framed his argument as relating to *judicial* activity, there is no reason why it does not apply to legislative or administrative activity. Just the opposite: to the extent that legislatures and agencies are responsive to the public will, they should, according to Bell’s logic, be *less* likely to challenge white privilege.

But the record at least of DOJ during the Fair Housing Act’s first decade suggests that it mounted just that sort of challenge. Its lawyers brought hundreds of cases, and aggressively pursued litigation against the largest and most important defendants. It strategized about pressure points in the ecology of discrimination, and targeted those points. Political appointees in a conservative Republican administration backed up their line attorneys and gave pointed threats to potentially recalcitrant groups. The record of the Justice Department simply does not indicate any concern with “white interests” – instead, the evidence is that DOJ officials had little concern with them. Instead, their focus was on breaking resistance to the Fair Housing Act, whether it came from realtors, large landlords, appraisers, or anyone else.¹⁷⁴

One series of data points, even an important series such as the record of Fair Housing enforcement, cannot fatally wound a thesis. There is virtually no social science thesis that holds in every circumstance in every period. But in the critical period of a central pillar of American civil rights law, the Convergence Thesis falls very short of the mark.

173. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

174. One could argue, of course, that to the extent that DOJ lawyers were interested doing something for “the good of the country,” they were simply attempting to advance a “white interest” because the United States was and remains a majority white nation. 2010 U.S. Census, CENSUS.GOV <https://www.census.gov/2010census/>. However, the Convergence Thesis is more precise than that: it posits differing white and black interests, not without justification, although Justin Driver has effectively critiqued Bell’s notion of a *unified* “white” or “black” interest. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 164–71 (2011) (critiquing many of Professor Derrick Bell’s writings throughout his career on the topic of interest-convergence theory).

CONCLUSION

And indeed, this failure demonstrates a deeper and more important truth about the evolution of fair housing law in the United States, viz. a reason for optimism about the *potential* of achieving greater racial equality. The record of fair housing's crucial decade is one of substantial but imperfect success, driven by fair housing groups at the grass roots and Justice Department lawyers in Washington. Many of these activists and lawyers were Black, and many were white. And they were able to achieve something that even the most optimistic observers less than a decade earlier probably would have thought impossible: a significant and severe decline in discrimination rates.

If the United States will ever rid itself of extreme racial segregation – which is a distinct possibility¹⁷⁵ – it will require cross-racial and multi-institutional action at all levels. The successful attack on housing discrimination in the 1970's drew from community organizing, government pressure, litigation, policy changes, and the whole panoply of advocacy tools available to reformers. It came from many segments of society. The triumph was not unalloyed. It never is. But it made a very big difference in the lives of millions. It even began to change attitudes of those who, like the real estate brokers, had resisted fair housing for decades. That calls for celebration and a commitment to further progress, not complaints of futility that could become a self-fulfilling prophecy.

175. A book forthcoming next year, which I have co-authored with Richard Sander and Yana Kucheva – makes this argument fully.