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Affirmatively Resisting

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AFFIRMATIVELY RESISTING

EZRA ROSSER*

ABSTRACT

This Article argues that administrative processes, in particular rule-making's notice-and-comment requirement, enable local institutions to fight back against federal deregulatory efforts. Federalism all the way down means that state and local officials can dissent from within when challenging federal action. Drawing upon the ways in which localities, states, public housing authorities, and fair housing nonprofits resisted the Trump Administration's efforts to roll back federal fair housing enforcement, this Article shows how uncooperative federalism works in practice.

Despite the fact that the 1968 Fair Housing Act requires that the federal government affirmatively further fair housing (AFFH), the requirement was largely ignored until the Obama Administration promulgated a new AFFH rule in 2015 that pushed state and local governments to take desegregation seriously. Not surprisingly, the Trump Administration sought to undermine this new rule. But what was surprising was the vigorous resistance the Trump Administration faced from state and local governments seeking to preserve the 2015 rule. Though theories of uncooperative federalism and of administrative federalism abound, there are relatively few examples of how uncooperative federalism facilitates and channels resistance all the way down. State and local government bodies, including sub-local entities such as public housing authorities, leveraged their insider status in order to push back against the Trump Administration's deregulatory move.

Given the increased polarization of the country and the reach of cooperative federalism to all levels of government, such affirmative resistance has broad implications when it comes to federal policymaking and federal-state-local relations. Federalism extends points of resistance downward from federal agencies to states and local government bodies. Ultimately, when it comes to the future of fair housing and the significance of internal resistance to federal backsliding on federal obligations associated with agency oversight of federal-state and federal-local programs, there are reasons for both pessimism and cautious

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optimism. Uncooperative federalism creates space for state and local governments to defend policies, to insist that federal agencies live up to their statutory obligations, and to resist federal backsliding.

| | | |
|------|---------------------------------------------------------------------|-----|
| | INTRODUCTION | 124 |
| I. | CONTESTED COMMITMENTS | 131 |
| | A. <i>Passage of the Fair Housing Act of 1968</i> | 134 |
| | B. <i>Affirmatively Furthering Fair Housing 1968-2015</i> | 138 |
| | C. <i>The 2015 Affirmatively Furthering Fair Housing Rule</i> | 141 |
| | D. <i>The Trump Administration's Attack on Fair Housing</i> | 144 |
| II. | UNCOOPERATIVE FEDERALISM IN ACTION | 150 |
| | A. <i>State and Local Governments</i> | 152 |
| | B. <i>Local Housing Authorities</i> | 161 |
| | C. <i>Advocacy Organizations and Housing Nonprofits</i> | 166 |
| III. | THE STATUS QUO STALEMATE | 171 |
| | A. <i>Justifiable Pessimism</i> | 173 |
| | B. <i>Cautious Optimism</i> | 177 |
| IV. | INSIDER RESISTANCE AND COOPERATIVE FEDERALISM | 179 |
| | CONCLUSION | 184 |

INTRODUCTION

Cooperative federalism's reliance on state and local institutions to implement national priorities creates space for state and local resistance.¹ The modern presidency's strong control over administrative agencies, what has been called "presidential administration,"² often depends on local institutions implementing the administration's priorities. A new administration can announce a new rule or policy, but changes in direction invite conversation, and at times contestation, with state and local partners. Rather than being passive actors within federalism's structure, state and local government bodies can use their unique positionality to fight back against proposed changes from within the system.³ In this way, cooperative federalism morphs into

1. Professor Gillian Metzger defines "cooperative federalism" as "instances in which state and local governments undertake primary responsibility for implementing federal programs or enforcing federal law under the supervision and oversight of federal agencies." Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1852 (2015). For an in-depth exploration of how federalism operates in practice in one sphere, see Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018).

2. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

3. See Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1088 (2018) ("What the literature lacks is a systematic, realistic discussion of states as plural bodies, including the kinds of state coordination that federal law demands and how those demands both create noncompliance with federal rights and shape administration of those rights.").

uncooperative federalism,⁴ with resistance sites emerging at every level, all the way down.⁵ Though the tools of such resistance risk being dismissed as overly technocratic, administrative law provides government bodies and civic society organizations built-in mechanisms (such as notice-and-comment rulemaking) through which to channel their opposition.

This is not the first article to highlight the significance of uncooperative federalism. Others have shown how state and local governments have resisted federal mandates in a variety of policy arenas, from immigration enforcement to health care reform.⁶ Indeed, ever since Professors Jessica Bulman-Pozen and Heather Gerken coined the term, “uncooperative federalism,” it has become an area of rising scholarly importance.⁷ As this Article shows, uncooperative federalism is not limited to federal-state relations. Cities and other local government institutions, such as housing authorities, often challenge, in ways both direct and indirect, changes in federal policy. Though such challenges risk adversely affecting local relationships with federal grant-making agencies, politics and larger policy commitments can lead lower-level governance institutions to push back against federal efforts to change important policies that are locally significant.

Though administrative scholars interested in questions of federalism tend to focus on the federal side of the relationship, processes that mediate the federal government’s relationships with lower-level government entities are increasingly garnering academic attention.⁸ Though the inner workings of federal agencies are important, local compliance with and/or resistance to federal mandates can play a pivotal role in furthering or limiting the reach of presidential administration. Implementation of federal initiatives often depends upon processes and rules tied to block grants, which introduces a certain level

4. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (providing a theoretical account of uncooperative federalism).

5. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33-44 (2010).

6. See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079-80 (2014) (giving as examples state resistance to federal marriage laws, environmental regulation, funding for Planned Parenthood, and federal immigration law); Bulman-Pozen & Gerken, *supra* note 4, at 1271-80 (discussing state resistance to the Patriot Act, to federal environmental policy, and to welfare policy); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHL-KENT L. REV. 13 (2016) (exploring state and local resistance to federal immigration policy); Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471 (2020) (discussing state resistance to the Affordable Care Act); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019) (highlighting state lawsuits against the federal government for financial injuries suffered by states).

7. See Bulman-Pozen & Gerken, *supra* note 4, at 1256.

8. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (building out a theory of federal-local relationships within federalism).

of squeakiness or friction. State and local grantees, for example, predictably chafe at additional reporting burdens and manipulate cost-sharing rules for their benefit.⁹ The story of fiscal federalism, to the extent it attempts to coopt state and local government institutions in furtherance of federal objectives,¹⁰ is incomplete unless attention is also paid to such federal-state-local tensions. The gap between federal control and local implementation provides cooperative federalism's insiders—state and local government institutions—a way to engage in resistance efforts that are both dispersed and operate all the way down along multiple fronts.¹¹

Questions of administrative federalism invite a theoretical, bird's-eye view, but carry the risk that the place and role of local actors will get lost.¹² This Article explores what uncooperative federalism looks like in practice, focusing on the conflicts surrounding the Trump Administration's efforts to gut an Obama-era fair housing rule. The 2015 Affirmatively Furthering Fair Housing (AFFH) rule attempted to put teeth on the requirement that the federal government "affirmatively further fair housing," a requirement that had sat dormant since it was included in the 1968 Fair Housing Act (FHA).¹³ The 2015 AFFH rule was an effort by the Obama Administration to bring the FHA's desegregation promise back to life after decades of being treated as a mere box-checking exercise by the Department of Housing and Urban Development (HUD). The attempt to finally enforce the AFFH requirement did not last long. The 2015 AFFH rule was the product of

9. See generally DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS* (2016) (detailing how states manipulate cooperative federalism funding formulas to overstate state contributions to welfare programs and divert money from the poor).

10. For a brief history of the rise of cooperative federalism that emphasizes federal grant making, see Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1285-89 (2013).

11. See Heather K. Gerken, Lecture, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1350 (2013) ("As policymaking insiders, [state and local government entities] can resist federal policy from within rather than challenge it from without.").

12. See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 955 (2014) ("[T]alk of state-agency interaction rarely attends to how it functions. Despite widespread attention to institutional design in other areas of the administrative state, and despite rising interest in questions of who properly speaks for the states in other contexts, there is scant study of the structure and operation of administrative federalism.").

13. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 175 (2011) (arguing that the affirmatively furthering requirement was "ignored" and that "[l]ocal governments regularly failed to act according to the AFFH mandate, and HUD rarely responded with disapproval, much less forceful action"); John Bliss, *Rebellious Lawyers for Fair Housing: The Lost Scientific Model of the Early NAACP*, 2021 WIS. L. REV. 1433, 1483 (noting that the 2015 AFFH rule "was hailed by some observers as the first 'major effort to strengthen civil rights around housing' since the Fair Housing Act" (quoting Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES: THEUPSHOT (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> [<https://perma.cc/9JRT-TSMS>])).

administrative rulemaking and not Congressional action, making it particularly vulnerable to shifting political winds in Washington, D.C.¹⁴ Through a series of moves following his election, President Trump attacked the 2015 AFFH rule. HUD dropped the requirement that local grantees engage in the sort of iterative and demanding reporting that had been required under the Obama-era rule.¹⁵ Localities were free to revert to a largely superficial process that asked little of the locality or of HUD when it came to fair housing.

While President Trump's decision to undo the Obama Administration's signature housing and desegregation policy achievement is not particularly surprising,¹⁶ what is surprising is how state

14. See Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. 1, 39-48 (2020).

15. See *infra* Section I.D (detailing the ways the Trump Administration weakened the 2015 rule).

16. The Trump Administration's attack on the 2015 AFFH rule coincided with rising popular awareness of the untenable nature of the country's racial status quo. After Michael Brown, an eighteen-year-old African-American man, was killed by Darren Wilson, a white police officer, in Ferguson, Missouri, on August 9, 2014, the Department of Justice under President Obama conducted an extensive investigation of the incident and the surrounding circumstances. While the incident report complicated the story racial justice advocates had been telling, the second report sharply criticized the City of Ferguson's reliance on fines and fees to fund the municipal government. See U.S. DEPT OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICE DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/3T8R-J98T>]; C.R. DIV., U.S. DEPT OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [<https://perma.cc/24YN-7JZP>].

Subsequent scholarship highlighted the racial divisions in the greater St. Louis area, connecting the over-policing experienced by Ferguson residents with past and present housing market discrimination. See generally Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053 (2015); Richard Rothstein, *The Making of Ferguson*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 165 (2015); George Lipsitz, *Living Downstream: The Fair Housing Act at Fifty*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 266, 272-76 (Gregory D. Squires ed., 2018).

President Trump fanned the flames of racial strife throughout his presidency. See *infra* note 33 (collecting sources describing President Trump's racism); see also Benjamin C. Ruisch & Melissa J. Ferguson, *Changes in Americans' Prejudices During the Presidency of Donald Trump*, 6 NATURE HUM. BEHAV. 656 (2022) (examining the effect of President Trump's rhetoric and finding racial and religious prejudice increased significantly among Trump supporters following his rise). But it was the killing of George Floyd, an African-American man, by a white Minneapolis police officer, Derek Chauvin, on May 25, 2020, that led to Black Lives Matter protests throughout the country. Floyd's death, after Chauvin knelt on his neck for nine and a half minutes, was part of a pattern of police violence towards African Americans, a pattern which included the killing of Breonna Taylor by Louisville, Kentucky officers who raided her apartment in the middle of the night on March 13, 2020. Police reform naturally occupied center stage on the Black Lives Matter platform, but awareness of other forms of racial inequities also increased in the wake of the death of Michael Brown. Among a spate of quality academic works focused on race that came out in the last decade, Richard Rothstein's *The Color of Law*, in particular, opened up space to criticize the way land use rules and practices contribute to racial segregation and inequality. RICHARD

and local governments and public housing authorities reacted. Rather than embrace Trump's deregulatory move, state and local governments, as well as many public housing authorities, continued to act as if the more demanding 2015 rule was still in place.¹⁷ The decision to engage in the time-consuming and expensive process envisioned by the 2015 rule was both a repudiation of the Trump Administration's changes and an affirmative statement in support of a thicker conception of the FHA's affirmatively furthering mandate. Although cooperative federalism often takes the form of complaints against federal oversight based on the value of local control and independence, those localities that continued to follow the 2015 approach were effectively leaning into federal oversight. And they were doing so even though the federal government was trying to ghost itself from effective supervision of local AFFH efforts.

Such behavior at first seems puzzling, especially from an administrative efficiency perspective.¹⁸ This Article explores the stances taken by state and local governments, public housing authorities, and fair housing organizations. Though continued reliance on the 2015 rule is surprising, it is part of a larger resistance movement by those troubled by the federal government's efforts to walk back the first meaningful attempt to enforce the AFFH requirement in nearly fifty years. Resistance took the form of everything from detailed public comments

ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); see also Justin P. Steil et al., *Fair Housing: Promises, Protests, and Prospects for Racial Equity in Housing*, in *FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS* 3, 10, 35 (Justin P. Steil et al. eds., 2021) (arguing that the Black Lives Movement gives "renewed urgency" to the AFFH rule).

17. Partisan politics, in particular differences between "blue" and "red" states, as well as differences at the local level, undoubtedly played a role in how public housing authorities responded to the Trump Administration, but it is beyond the scope of this Article to fully explore those differences.

18. Notably, when the 2015 AFFH rule was being considered and when it was rescinded, cities complained through the comment process about the 2015 rule's high compliance costs. See, e.g., Richard E. Wankel, Town of Islip Hous. Auth., Comment Letter on HUD's Proposed AFFH Assessment Tool 4 (Oct. 19, 2016), https://downloads.regulations.gov/HUD-2016-0103-0023/attachment_1.pdf [<https://perma.cc/2K3W-UKVQ>] ("We are very concerned with the length, complexity, and content of the Assessments of Fair Housing (AFH) tool for Public Housing Authorities published by the department on September 20th. The assessment imposes unreasonable burdens on agencies with little or no promise of real impacts on the levels of housing segregation in our communities."); Jennifer L. Eby, Douglas Cnty., Colo., Comment Letter on Advanced Notice of Proposed Rulemaking for Affirmatively Furthering Fair Housing 1 (Oct. 15, 2018) [hereinafter Eby Letter], https://downloads.regulations.gov/HUD-2018-0060-0562/attachment_1.pdf [<https://perma.cc/76MS-ZGEH>] ("Rescinding the Affirmatively Furthering Fair Housing (AFFH) regulations and Assessment of Fair Housing (AFH) reporting tool is the first step in eliminating the unfunded mandate and is critical to decrease the administrative burden on grantees."); see also Timothy M. Smyth, Michael Allen & Marisa Schnaith, *The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 231, 254 (2015) (reporting that "[m]any recipients, particularly smaller grantees and PHAs," were concerned about the costs associated with the 2015 rule).

submitted as part of the administrative rulemaking process to litigation seeking to knock out the Trump Administration's proposed alternative fair housing rule on procedural grounds. Given the dependence of many of these local government bodies and communities on federal grants, such defiance is notably courageous.

Conflict surrounding the status of the 2015 rule shows what uncooperative federalism looks like in practice and how administrative procedures provide insiders multiple sites of resistance.¹⁹ Though rule-making battles involving federal agencies are typically seen as matters of federal administrative law, federalism brings those fights downward. Or perhaps, more accurately, reliance on cooperative federalism allows local actors the ability to push dissenting views upward. Resistance by the fair housing community to the Trump Administration involved both outsiders and insiders. Outsiders—nonprofits and advocacy groups—had little choice but to use litigation and traditional lobbying. But insiders—in this case, state and local governments as well as public housing authorities and other sub-local government institutions—could resist using the very tools of government that were contested.²⁰ They could “dissent by deciding.”²¹ Unlike outsiders, institutions empowered to govern at the local level can resist from within, implementing policy in a way that, directly or indirectly, contravenes federal guidance.²² Though the federal-state relationship is sometimes likened to a master-servant relationship, it is worth recognizing “the power of the servant” in this ongoing relationship.²³

Given the rising power of the President and the concomitant threat to the country's democratic norms, it is not surprising that “presidential administration” has preoccupied constitutional law scholars for decades. What this Article adds is a way to understand how local actors can leverage gaps between executive power and local implementation to entrench particular agency rules against efforts by a new administration to change them. Uncooperative federalism provides state

19. In part because “[t]he [governance] platform alone matters,” insiders are differently situated than outside dissenters when challenging particular rules. See Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1979 (2014).

20. See Gerken, *supra* note 5, at 14 (“In this system, minorities exercise ‘voice’ in an exceedingly muscular form. Their insider status enables them not just to speak, but to act—to administer national policy as they see fit, even to resist its implementation.”). As Professor Adam Shinar observes, “official resistance is a complex phenomenon that can and does occur in every institution . . . [and] [r]esistance, then, is inherent to public institutions.” Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 604 (2013).

21. Bulman-Pozen & Gerken, *supra* note 4, at 1294; see also Gerken, *supra* note 5, at 60-61 (discussing dissenting by deciding). For extended treatment of this idea, see Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

22. See Gerken, *supra* note 11, at 1362; Bulman-Pozen & Gerken, *supra* note 4, at 1294.

23. See Gerken, *supra* note 5, at 33-44; see also Bulman-Pozen & Gerken, *supra* note 4, at 1265-71; Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1704 (2017).

and local government institutions with tools to protect (or at least preserve for a future administration) rules and policies that would otherwise seem easy fodder for a strong President intent on their destruction. As with all such tools, state and local resistance can be a lever for good or for ill and this Article avoids broad pronouncements on whether the good outweighs the bad.²⁴ But a thick account of federalism includes recognition of the role that resistance through local rule entrenchment and preservation plays in blunting the force of presidential administration.

Even when federal agencies are clear about the direction they want local partners and grantees to move, there is enough play in the system for pushback. The state and local governments, public housing authorities, and nonprofit organizations discussed in this Article relied on a variety of mechanisms—public comments, state and local legislation, voluntary compliance with dead rules, and litigation—to push the federal government to enforce the FHA's AFFH requirement. Rather than serving as a form of vertical integration with the federal government coopting state and local governments, reliance on block grants and cooperative federalism to achieve federal objectives can serve to disaggregate federalism. Federalism ensures that administrative law matters everywhere; state and local government bodies as well as advocacy groups can challenge agency rulemaking across multiple levels and along multiple fronts. The country may be in the middle of the era of presidential administration, but uncooperative federalism creates space for state and local government bodies to resist changes to federal policies or rules from the inside.

This Article proceeds in four parts. Part I gives the history of the AFFH requirement and the Trump Administration's efforts to undermine fair housing. Part II brings to the foreground the ways that state and local governments, public housing authorities, and the fair housing community resisted the Trump Administration, drawing primarily upon public comments submitted in response to Trump's proposed rule changes. Part III takes a broader view of such resistance, noting the ways in which Trump won as well as reasons for both optimism and pessimism regarding the future of the AFFH requirement. Part IV argues that resistance to the 2015 rule should inform scholars' understanding of the nature of federalism, especially when it comes to policies and moments in which relationships all the way down are marked by conflict rather than cooperation.

24. See Seifter, *supra* note 12, at 956-57 (arguing that while legal scholars tend to emphasize the value of state and local involvement in federal policymaking, "state interest groups impose costs on the administrative process, not just benefits").

I. CONTESTED COMMITMENTS

Administrative agencies do more than simply translate the Constitution into matters of federal policy; they also engage in administrative constitutionalism.²⁵ While popular constitutionalism, which includes everything from protest movements to elections, receives more attention, the idea behind administrative constitutionalism is that many decisions that shape the country are made by administrative agencies.²⁶ The modern state relies upon agency rulemaking, policies, and practices to give content to constitutional norms and to build out the norms themselves.²⁷ Administrative rulemaking can even “serve as a zone of constitutional experimentation.”²⁸ Moreover, agency rulemaking requirements can “help curb quick and frequent agency vacillation,” providing some continuity across administrations.²⁹

Though it can involve rulemaking and administrative procedures, matters that often escape attention by the general public, administrative constitutionalism can involve battles over how fundamental principles relate to rule changes or agency practices. Elections provide one way through which the public can change the direction of the state, but interventions within agency decisionmaking processes also matter. As seen in reactions to the Trump Administration’s efforts to reverse course on fair housing, state and local governments, independent government entities, and advocacy organizations are deeply engaged in the project of administrative constitutionalism. Whether objections are characterized as dissents or merely disagreements, administrative agencies must navigate forms of state and local resistance to changes in policy or federal oversight.

In July 2020, as part of his reelection campaign, President Trump proclaimed by tweet, “I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood[.]”³⁰ Though it is not hard to find examples of Trump’s racism,

25. See generally Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783 (2019); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699 (2019).

26. Ross II, *supra* note 25, at 1784-91.

27. See generally Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

28. Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 169 (2017).

29. Bethany A. Davis Noll, “Tired of Winning”: *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 371 (2021).

30. Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM), <https://www.thetrumparchive.com/?searchbox=%22%5C%22suburban+lifestyle%22> [https://perma.cc/F97D-XZ5B]; see also Glen Thrush, *Trump Attacks a Suburban Housing Program. Critics See a Play for White Votes*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/01/us/politics/trump-obama-housing-discrimination.html> [https://perma.cc/MKZ8-UEJZ] (connecting the tweet with Trump’s reelection campaign).

starting with his announcement that he was running for President³¹ and continuing through his response to the Charlottesville white supremacy protests,³² his July 2020 tweet was nevertheless notable.³³ As a *Rolling Stone* headline for an article discussing the tweet declared, “Trump Is Happy to Inform Suburban Voters That He Is Still a Racist.”³⁴ Senator Chris Murphy of Connecticut responded to Trump’s tweet by observing, “[I]t’s not even a dog whistle anymore. Our President is now a proud, vocal segregationist.”³⁵

Behind the tweet itself was the Trump Administration’s decision to repeal the 2015 Affirmatively Furthering Fair Housing (AFFH) rule, which was finalized at the tail end of Obama’s presidency.³⁶ In declaring the 2015 AFFH rule dead, the Department of Housing and Urban Development (HUD), under Trump appointee and HUD Secretary Ben Carson, Sr., “skipped the notice-and-comment process altogether.”³⁷ The 2015 AFFH rule attempted to reinvigorate the 1968 Fair Housing Act’s (FHA) requirement that the HUD Secretary “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” antidiscrimination and antisegregation

31. See Katie Reilly, *Here Are All the Times Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), <https://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/YP56-C59T>] (discussing how then-candidate Trump accused immigrants of “bringing crime” and being “rapists”).

32. Jane Coaston, *Trump’s New Defense of His Charlottesville Comments Is Incredibly False*, VOX (Apr. 26, 2019, 2:30 PM), <https://www.vox.com/2019/4/26/18517980/trump-unite-the-right-racism-defense-charlottesville> [<https://perma.cc/3Z6C-PPFF>] (noting that President Trump argued that there were “very fine people on both sides” of the white supremacy protest).

33. It is beyond the scope of this Article to bring out the full nature of Trump’s racism and that of some of his supporters, but others have made the case well. See, e.g., German Lopez, *Donald Trump’s Long History of Racism, from the 1970s to 2020*, VOX (Aug. 13, 2020, 7:00 PM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> [<https://perma.cc/YN9W-M6E5>] (giving examples chronologically); David Remnick, *Daily Comment, A Racist in the White House*, NEW YORKER (July 15, 2019), <https://www.newyorker.com/news/daily-comment/a-racist-in-the-white-house-donald-trump-tweets-ocasio-cortez-tlaib-omar-pressley> [<https://perma.cc/Z59T-FKZH>] (making the case that Trump is racist); Helen Ubiñas, *Opinion, President Trump Is a Racist. That’s the Whole Story—and the Truth*, PHILA. INQUIRER (July 22, 2020), <https://www.inquirer.com/opinion/president-trump-racist-immigrants-women-black-lives-matter-protesters-helen-ubinas-20200722.html> [<https://perma.cc/6GTC-ZZCN>] (connecting Trump’s racism with the racism of those who support him).

34. Tessa Stuart, *Trump Is Happy to Inform Suburban Voters That He Is Still a Racist*, ROLLING STONE (July 29, 2020, 5:27 PM), <https://www.rollingstone.com/politics/politics-news/trump-suburban-voters-suburban-fair-housing-act-1032625/> [<https://perma.cc/MMW2-NAYY>]; see also Annie Karni et al., *Trump Plays on Racist Fears of Terrorized Suburbs to Court White Voters*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/07/29/us/politics/trump-suburbs-housing-white-voters.html> [<https://perma.cc/7334-QKUS>].

35. Chris Murphy (@ChrisMurphyCT), TWITTER (July 29, 2020, 1:11 PM), <https://twitter.com/ChrisMurphyCT/status/1288522455359856640> [<https://perma.cc/N6W7-3TBY>].

36. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

37. Abraham, *supra* note 14, at 46.

policies.³⁸ That mandate—to affirmatively further desegregation—has been on the books since the FHA’s passage in the weeks following Martin Luther King Jr.’s assassination. But for decades its role was fairly limited. The 2015 AFFH rule was the most significant attempt in nearly half a century to put teeth on the requirement that HUD and HUD grantees “affirmatively further” antidiscrimination and desegregation efforts through rulemaking. For the Trump Administration, the 2015 rule was an anathema, “a vehicle to force states and localities to change zoning and other land use laws,” that was expensive and interfered with local autonomy.³⁹

This Part tells the story of the AFFH requirement, beginning with passage of the FHA in 1968 and continuing through the Trump Administration’s attempt to gut the 2015 AFFH rule.⁴⁰ The 2015 AFFH rule was arguably President Obama’s most significant race-focused policy change.⁴¹ Though it took the form of a bureaucratic

38. 42 U.S.C. § 3608(d)(5) (1968).

39. Preserving Community and Neighborhood Choice, 85 Fed. Reg. at 47,899.

40. Through both legislative action and court opinions, the FHA’s reach has been extended beyond race, but this Article focuses primarily on race-related segregation and integration issues. Not only is the AFFH requirement most closely tied to matters of race, but Trump’s efforts to kill the AFFH requirement may have been driven primarily by racial politics. See Karni et al., *supra* note 34. For more on FHA’s relevance beyond race, see, e.g., Michael Allen & Jamie Crook, *More than Just Race: Proliferation of Protected Groups and the Increasing Influence of the Act*, in THE FIGHT FOR FAIR HOUSING, *supra* note 16, at 57, 58-69 (discussing discrimination on the basis of religion, sex, family status, and disability); Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683 (2021) (arguing for a robust approach to tackling sex discrimination under the FHA).

41. President Obama’s legacy on matters related to race is complicated. Symbolically, of course, his election was a watershed moment, but many progressives fault the nation’s first African-American President for failing to do more to address racial inequality. For coverage of President Obama’s approach to race issues while President, see, e.g., Michael Eric Dyson, *Whose President Was He?*, POLITICO MAG. (Jan./Feb. 2016), <https://www.politico.com/magazine/story/2016/01/barack-obama-race-relations-213493/> [<https://perma.cc/Q65N-BZMX>]; see also Keeanga-Yamahatta Taylor, *Barack Obama’s Original Sin: America’s Post-Racial Illusion*, GUARDIAN, (Jan. 13, 2017, 4:00 AM), <https://www.theguardian.com/us-news/2017/jan/13/barack-obama-legacy-racism-criminal-justice-system> [<https://perma.cc/E7XG-XV73>] (offering a more pointed retrospective).

As his beer summit between Harvard Professor Henry Louis Gates and Cambridge police officer James Crowley illustrates, President Obama often played the role of racial-reconciler-in-chief and was routinely attacked whenever he attempted to push the country’s conversation on race forward. See, e.g., David Marchese, Talk, *Henry Louis Gates Jr. on What Really Happened at Obama’s ‘Beer Summit’*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/interactive/2020/02/03/magazine/henry-louis-gates-jr-interview.html> [<https://perma.cc/4UP5-L8SD>]; Hans A. von Spakovsky, Commentary, *Obama’s Legacy Is a Weaker and More Divided America*, HERITAGE FOUND. (Jan. 19, 2017), <https://www.heritage.org/political-process/commentary/obamas-legacy-weaker-and-more-divided-america> [<https://perma.cc/TJ5U-44KR>] (offering a conservative criticism of President Obama for worsening racial divisions). The few times when he stepped out of his carefully constructed box, such as when he said that “[w]hen Trayvon Martin was first shot, I said that this could have been my son,” the right had a field day. See Mark Memmott, *Obama: ‘Trayvon Martin Could Have Been Me 35 Years Ago’*, NAT’L PUB. RADIO (July 19, 2013, 2:04 PM), <https://www.npr.org/sections/thetwo-way/2013/07/19/203660128/obama-trayvon-martin-could-have-been-me-35-years-ago> [<https://perma.cc/FQG5-BNVH>]; *Conservatives Blast Obama as a Race-Baiter For Trayvon*

requirement upon HUD grantees, it would be a mistake to characterize the 2015 rule as merely a de minimis reporting mechanism. Instead, by imposing on localities an obligation to conduct in-depth analyses of the nature of spatial segregation and barriers to integration in their area, the 2015 AFFH rule aimed to resuscitate the FHA's neglected "affirmatively further" requirement. The story of the AFFH requirement, including the Trump Administration's efforts to kill the 2015 rule, highlights the country's fragmented and often stumbling progress when it comes to fair housing.

A. *Passage of the Fair Housing Act of 1968*

The FHA of 1968 is one of the most significant legislative victories of the civil rights era and one of the most contested.⁴² In 1966, Martin Luther King Jr. and his wife, Coretta Scott King, moved into an apartment in the Lawndale neighborhood of Chicago in order to bring attention to poor housing conditions and racial segregation.⁴³ King and the Southern Christian Leadership Conference hoped that the Chicago Freedom Movement would help open up housing opportunities—including real estate services, loan financing, and neighborhood access—to African Americans.⁴⁴ On August 5, 1966, 700 white counter-protestors threw "bricks, bottles, and rocks" at King as he prepared "to lead a march to a realtor's office to demand properties be sold to everyone regardless of their race."⁴⁵ King himself fell to the ground after being struck in the head by a rock hurled at him.⁴⁶ Afterwards, King told reporters, "I've been in many demonstrations all across the South, but I can say that I have never seen—even in Mississippi and Alabama—mobs as hostile and as hate-filled as I've seen here in Chicago."⁴⁷

Comments, SEATTLE MEDIUM (July 30, 2013), <https://seattlemedium.com/conservatives-blast-obama-as-a-race-baiter-for-trayvon-comments/> [<https://perma.cc/CX3F-R2BQ>] (collecting critical commentary from conservatives).

42. See Gregory D. Squires, *Fair Housing Yesterday, Today, and Tomorrow*, in *THE FIGHT FOR FAIR HOUSING*, *supra* note 16, at 1, 1 (calling the FHA "[t]he nation's most significant fair housing civil rights law").

43. Wade Henderson, *Foreword: The Legacy of a Movement*, in *THE FIGHT FOR FAIR HOUSING*, *supra* note 16, at xviii, xviii.

44. *The Chicago Freedom Movement*, NAT'L LOW INCOME HOUS. COAL. (Oct. 23, 2018), <https://nlihc.org/resource/chicago-freedom-movement> [<https://perma.cc/R3DF-3JLU>]; *THE CHICAGO FREEDOM MOVEMENT: MARTIN LUTHER KING JR. AND CIVIL RIGHTS ACTIVISM IN THE NORTH* (Mary Lou Finley et al. eds., 2016).

45. Olivia B. Waxman, *The Surprising Story Behind This Shocking Photo of Martin Luther King Jr. Under Attack*, TIME (Jan. 16, 2020, 2:43 PM), <https://time.com/5096937/martin-luther-king-jr-picture-chicago/> [<https://perma.cc/R5YR-TAG4>].

46. Ron Grossman, *Commentary, 50 Years Ago: MLK's March in Marquette Park Turned Violent, Exposed Hate*, CHI. TRIB. (July 28, 2016, 1:06 PM), <https://www.chicagotribune.com/opinion/commentary/ct-mlk-king-marquette-park-1966-flashback-perspec-0731-md-20160726-story.html> [<https://perma.cc/7MDV-3R4V>].

47. *Id.*

Northern whites were not prepared to give up the racial privilege associated with housing segregation; consequently, passage of civil rights legislation tackling housing languished.⁴⁸ Arguably, some of the ground that such legislation would cover was already law under the Civil Rights Act of 1866, which provided, “All 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.”⁴⁹ Despite the promising language of the Civil Rights Act, in practice, African Americans were locked out of white neighborhoods and denied access to credit on the same terms as whites.⁵⁰ As the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, famously noted in its report, released on leap day, February 29, 1968, “Our nation is moving toward two societies, one black, one white—separate and unequal.”⁵¹ The Kerner Commission report became a bestseller and helped pave the way for the FHA.⁵²

Passage of the FHA was by no means a sure thing in 1968.⁵³ Senator Walter Mondale of Minnesota introduced the bill that would become the FHA, but opponents responded by attempting a filibuster.⁵⁴ Compromises, such as the Mrs. Murphy exception, which limited the applicability of the FHA to commercial realtors, helped make the FHA more palatable to legislators and the general public.⁵⁵ But even so, it arguably took the assassination of King and the protests that followed

48. Notably, “passage of legislation to address housing segregation proved to be among the most difficult tasks undertaken by the civil rights movement.” Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 574 (2015).

49. 42 U.S.C. § 1982.

50. For recent explorations of the history and consequences of residential segregation, see SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021); PAIGE GLOTZER, *HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890-1960* (2020).

51. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) [hereinafter KERNER COMMISSION REPORT].

52. Myron Orfield & Will Stancil, *Neo-Segregation in Minnesota*, 40 LAW & INEQ. 1, 14 (2022); Mycah Hazel, *The Kerner Commission's Last Living Member Says We Still Need to Talk About Racism*, NAT'L PUB. RADIO (Sept. 27, 2021, 2:18 PM) <https://www.npr.org/2021/09/26/1040791834/the-kerner-commissions-last-living-member-we-still-need-to-talk-about-racism> [https://perma.cc/93JJ-PTJP].

53. For a brief legislative history of the FHA, see Rigel C. Oliveri, *The Legislative Battle for the Fair Housing Act (1966-1968)*, in THE FIGHT FOR FAIR HOUSING, *supra* note 16, at 28, 28-39.

54. Francesca Russello Ammon & Wendell E. Pritchett, *The Long History of Unfair Housing*, in PERSPECTIVES ON FAIR HOUSING 9, 37 (Vincent J. Reina, Wendell E. Pritchett & Susan M. Wachter eds., 2021). For a brief history of the bill that would become the FHA by the bill's main sponsor, see Walter F. Mondale, *Afterword: Ending Segregation: The Fair Housing Act's Unfinished Business*, in THE FIGHT FOR FAIR HOUSING, *supra* note 16, at 291, 291-92.

55. Ammon & Pritchett, *supra* note 54, at 36.

for Congress to decide to make the FHA law.⁵⁶ President Johnson “viewed the Act as a fitting memorial” to King and signed the FHA into law on April 11, 1968, exactly one week after King was assassinated.⁵⁷ Although King is perhaps most remembered for his fights against de jure discrimination—starting with the Montgomery bus boycott—by what would be the end period of his life, King’s focus was as much on de facto forms of discrimination and segregation. King’s push for housing desegregation and improved residential conditions in Chicago echoed a note, “[w]e cannot be satisfied as long as the Negro’s basic mobility is from a smaller ghetto to a larger one,” expressed as part of the soaring *I Have a Dream* speech King delivered at the Lincoln Memorial in 1963.⁵⁸

The FHA has two mandates. First, there is the antidiscrimination push, which aimed to end many, but not all, forms of discrimination in the housing market. This first prong involves a negative right, a right to be free from discrimination, and is supported by a rich body of law, as well as public and private enforcement.⁵⁹ Government bodies were required to follow the FHA’s antidiscrimination mandate, and private entities were empowered to serve as private attorneys general when it came to enforcement.⁶⁰ The FHA, thus, helped create and support the fair housing bar—lawyers and law firms dedicated to making real the

56. See *id.* at 38; see also *Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 530 (2015) (“Congress responded [to the assassination of King and the riots that followed] by adopting the Kerner Commission’s recommendation and passing the Fair Housing Act.”); EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES* 91 (2018) (“Despite the Senate’s work, opposition in the House made 1968 seem no different from previous years with respect to the prospects for full passage of equal housing legislation. However, Dr. King’s assassination . . . and the subsequent rioting in cities across the country jolted the House into action.” (footnote omitted)). But see Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247 (2016) (presenting an alternative history that rejects the standard account tying passage to the King assassination and instead attributes passage of the FHA to political deals between President Johnson, Senator Everett Dirksen, and Mayor of Chicago Richard J. Daley); RICHARD H. SANDER ET AL., *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 135 (2018) (calling it a “widespread legend” that the FHA was passed in response to the King assassination).

57. *History of Fair Housing*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [<https://perma.cc/WW4B-J2H8>] (last visited Dec. 31, 2022).

58. Martin Luther King Jr., *I Have a Dream*, Address at the March on Washington (Aug. 28, 1963) (transcript and audio available at <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [<https://perma.cc/X493-E3ZW>]).

59. Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in *THE FIGHT FOR FAIR HOUSING*, *supra* note 16, at 189, 189-90 (highlighting institutional efforts focused on the first prong).

60. For more on private enforcement of the FHA, see Carole V. Harker, *The Fair Housing Act: Standing for the Private Attorney General*, 12 SANTA CLARA LAW. 562, 564 (1972); CONG. RSCH. SERV., 95-710, *THE FAIR HOUSING ACT (FHA): A LEGAL OVERVIEW* 17 (2016).

antidiscrimination promises of the FHA.⁶¹ The antidiscrimination prong of the FHA has had some success: explicit forms of outright discrimination are down and access to housing finance has improved.⁶² The work is by no means complete. One commentator describes the antidiscrimination push as a classic example of a glass half full, glass half empty problem.⁶³ Whites continue to prefer predominantly white neighborhoods and residential integration remains an elusive goal.⁶⁴ Though there are diverse communities and there have been periods of progress, racially defined residential space remains the norm rather than an exception and progress on desegregation remains slow.⁶⁵ Still, despite these problems, when one takes the long view, comparing

61. As Professor Robert Schwemm observes, after noting the allowance for costs and attorney's fees under the FHA:

[B]y design, enforcement of the Fair Housing Act is primarily dependent on private litigation. . . . The vast majority of reported cases dealing with the Fair Housing Act have been brought by private plaintiffs, not by the federal government. . . . This means that privately-initiated litigation has been responsible for most of the major decisions concerning the meaning of the Fair Housing Act.

Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 378 (1988). *But see* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 359-61 (3d ed. 2015) (highlighting the limited nature of the FHA's antidiscrimination enforcement measures).

62. Paul A. Jargowsky et al., *The Fair Housing Act at 50: Successes, Failures, and Future Directions*, 29 HOUS. POL'Y DEBATE 694, 701 (2019). Although a partial aside from the focus of this Article, in 1973, the Justice Department sued both Donald Trump and his father, Fred Trump, for discriminating against African Americans in their management of a sprawling rental real estate business in New York City. *See* Jonathan Mahler & Steve Eder, 'No Vacancies' for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html> [<https://perma.cc/WE2Z-6CRJ>]; Morris Kaplan, *Major Landlord Accused of Antiblack Bias in City*, N.Y. TIMES, Oct. 16, 1973, at 1, <https://www.nytimes.com/1973/10/16/archives/major-landlord-accused-of-antiblack-bias-in-city-us-accuses-major.html> [<https://perma.cc/5R7H-J5JJ>].

63. Squires, *supra* note 42, at 1, 1-13.

64. *See* Sam Fullwood III, *The Costs of Segregation and the Benefits of the Fair Housing Act*, in THE FIGHT FOR FAIR HOUSING, *supra* note 16, at 40, 52 ("The audacious promise of the Fair Housing Act of 1968 was that it would, in reasonable time, significantly reduce or eliminate residential segregation in America. Clearly, that has not happened. For the most part, the stubborn refusal of white Americans to embrace integration fully lies as a root cause for the persistence of segregation."); *see also* Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 149, 163-69 (2015) (discussing white preferences for white neighborhoods); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 167-201 (2004) (same). For a contrarian argument about the role white preferences play, *see* SANDER ET AL., *supra* note 56, at 207-10, 226-28.

65. *See* Massey, *supra* note 48, at 581-85; *see also* Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2192 (2013) ("Although commentators debate the exact degree of segregation in the United States today, the consensus is that the United States remains a mostly segregated nation.").

the state of outright discrimination in the housing market in 1968 with explicit forms of discrimination today, the antidiscrimination prong of the FHA has been a qualified success.⁶⁶

With its second prong, the FHA mandated that the federal government affirmatively further fair housing. What this means, in terms of its reach and policy consequences, is not inherently clear from the text of the FHA. The FHA imposed the AFFH requirement not only on HUD specifically, but also on the federal government as a whole.⁶⁷ As noted by then-Judge Stephen Breyer in a 1987 case before the First Circuit, the AFFH requirement means that HUD must “do more than simply refrain from discriminating.”⁶⁸ For a long time, however, though there was statutory support available, there was little appetite to do more.⁶⁹

B. Affirmatively Furthering Fair Housing 1968-2015

Unfortunately, since the FHA was passed, the AFFH requirement has been treated more as an aspiration than as a meaningful requirement.⁷⁰ George Romney, Mitt Romney’s father, pushed to have the federal government more aggressively pursue desegregation during his period as HUD Secretary between 1969 and 1973, but President Nixon beat back that effort.⁷¹ Since then, the AFFH requirement lay largely

66. As Professor Olatunde Johnson observes, “more progress has been made on the anti-discrimination front than in advancing integration.” Olatunde C.A. Johnson, “*Social Engineering*”: Notes on the Law and Political Economy of Integration, 40 CARDOZO L. REV. 1149, 1149 (2019).

67. 42 U.S.C. § 3608(d); see also Noah M. Kazis, *Fair Housing, Unfair Housing*, 99 WASH. U. L. REV. ONLINE 1, 4 (2021) (noting that the AFFH requirement applies to “all executive agencies, as well as any state or local government accepting federal housing funds”).

68. NAACP v. Sec’y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987). For more on the case law surrounding the AFFH requirement, see Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2142-44 (2010).

69. See Zasloff, *supra* note 56, at 252 (arguing that the FHA “contained the potential for significant enforcement from HUD” but HUD declined to engage in such enforcement); Elizabeth Julian, *The Fair Housing Act at Fifty: Time for a Change*, 40 CARDOZO L. REV. 1133, 1134 (2019) (“[T]he fifty-year failure to fulfill the promise of the Act was not because the statute was substantively inadequate to the task, but rather because of the political inadequacies of the country, and the political and structural inadequacies of HUD.”).

70. See Katherine M. O’Regan & Ken Zimmerman, *The Potential of the Fair Housing Act’s Affirmative Mandate and HUD’s AFFH Rule*, 21 CITYSCAPE 87, 88 (2019) (noting that “[e]fforts to implement the AFFH provisions have met a host of political, programmatic, and other roadblocks that prevented significant advances”); see also King, *supra* note 65, at 2185 (highlighting the “scant enforcement” of the AFFH requirement); Steil et al., *supra* note 16, at 4 (observing that the affirmative mandate “essentially withered on the vine”).

71. See O’Regan & Zimmerman, *supra* note 70, at 89 (“HUD Secretary George Romney used the AFFH requirement as the basis for withholding water, sewer, and parkland grants from jurisdictions with exclusionary practices, including exclusionary zoning ordinances.”); see also Nestor M. Davidson & Eduardo M. Peñalver, *The Fair Housing Act’s Original Sin: Administrative Discretion and the Persistence of Segregation*, in PERSPECTIVES ON FAIR HOUSING, *supra* note 54, at 132, 136-37 (discussing Romney’s push and Nixon’s response);

dormant until the Obama Administration.⁷² HUD's inattention to the FHA's second prong finds some excuse (but a poor one at that) in its potential reach; if the federal government were to take desegregation seriously, it would upend not only the nature of countless grant programs that localities rely upon but would also rewrite the relationship between the federal government and local governments.⁷³ Aggressively pursuing desegregation as a matter of federal policy would be tremendously disruptive and, from Nixon's term forward, presidential administrations have not been interested in using the AFFH requirement to root out geographic and structural inequalities.⁷⁴

In 1974, the Nixon Administration rolled out the Community Development Block Grant (CDBG) program, a consolidated funding package for localities which included a nondiscrimination requirement but "conspicuously did not include any reference to the Fair Housing Act."⁷⁵ Congress corrected for this in 1983 by conditioning awards under the CDBG program upon proof that recipients were, in fact, meeting the AFFH requirement.⁷⁶ But HUD implementation was lackluster. Under regulations issued in 1988 and 1995, grantees could meet the AFFH requirement simply by submitting rather generic compliance statements to HUD.⁷⁷

Until the regulations were revised in 2015, HUD grantees were obligated to conduct an "Analysis of Impediments to Fair Housing" and

SANDER ET AL., *supra* note 56, at 154-55 (same); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 96-131 (2019) (providing an in-depth history of the same).

72. See Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/R6Y6-PKTF>] (describing the efforts made by Romney and the lack of effort by administrations ever since); Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 115 (2015) (noting that "HUD did little to enforce § 3608 [AFFH] prior to the Obama administration").

73. See Kazis, *supra* note 67, at 3 ("The Fair Housing Act's affirmative mandate to end segregation is a potentially transformative provision of law, targeted at one of the country's most intractable civil rights problems.").

74. For a brief history of federal AFFH efforts, see Bostic & Acolin, *supra* note 59, at 195-97. The same can apply with respect to lagging federal enforcement when it comes more generally to rights and policies that would desegregate other areas defined by racial privilege and exclusion. See, e.g., Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018) (focusing on the federal role in not tackling educational segregation after *Brown v. Board*); Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65 (2022) (highlighting the ways federal funding subsidized segregation).

75. Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL'Y DEBATE 736, 737 (2019).

76. *Id.*

77. See *id.*; see also Smyth et al., *supra* note 18, at 236-38 (discussing the requirements HUD introduced in 1995 and 1996 following a 1994 Executive Order).

to certify on their annual funding submission that they were AFFH.⁷⁸ The requirements sound tough:

Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.⁷⁹

But in practice, the Analysis of Impediments to Fair Housing (AI) reporting requirement was treated as little more than a box-checking exercise.⁸⁰ Grantees met the requirement simply by certifying to the existence of an AI without actually having to submit their AI on a regular basis to HUD.⁸¹ An internal HUD study of the AI process found a host of problems, including grantees unable to present an AI study when asked to do so, AIs significantly out of date, and incomplete reports with limited public participation.⁸² A 2010 Government Accountability Office (GAO) audit identified similar issues with the AI program and concluded, “While HUD regulations have required the preparation of AIs for many years, whether they serve as an effective tool for grantees that receive federal funds through the CDBG and other programs to identify and address impediments to fair housing within their jurisdictions is unclear.”⁸³ The GAO audit faulted HUD for the limited requirements attached to AI reporting and for lax oversight of grantee compliance with AFFH obligations.⁸⁴ Overall, “HUD rarely reviewed the AIs and there were essentially no consequences for inadequate or even nonexistent filings.”⁸⁵ These reports, coupled with the Westchester litigation, discussed in more detail in Section II.C,

78. POL’Y DEV. DIV., U.S. DEP’T OF HOUS. & URB. DEV., ANALYSIS OF IMPEDIMENTS STUDY 3 (2009) [hereinafter ANALYSIS OF IMPEDIMENTS STUDY].

79. *Id.*

80. See Maysa Hassan Daoud, *America’s Continued Fair Housing Crisis and the Ignored Solution: The Affirmatively Furthering Fair Housing Rule*, 64 ST. LOUIS U. L.J. 685, 687 (2020) (describing attempts to enforce the AFFH requirement prior to the 2015 AFFH rule as doing “the bare minimum”).

81. King, *supra* note 65, at 2191.

82. ANALYSIS OF IMPEDIMENTS STUDY, *supra* note 78, at 15-16.

83. U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 31 (2010).

84. *Id.* at 31-32.

85. Steil & Kelly, *supra* note 75, at 738.

showing that HUD grantees could be liable for submitting false statements regarding their compliance with the AFFH requirement,⁸⁶ set the stage for HUD to revisit the FHA's second prong.⁸⁷

C. *The 2015 Affirmatively Furthering Fair Housing Rule*

The 2015 AFFH rule sought to correct the problems in previous reporting programs and push localities to take their AFFH obligations seriously. In keeping with his “no drama” approach, President Obama may have hoped to make progress on desegregation not through a contentious and potentially damaging legislative fight but by tweaking HUD regulations.⁸⁸ Pushing the AFFH rule through agency rulemaking rather than legislative action meant that changes to AFFH implementation rules could be done largely under the radar,⁸⁹ however, it also meant that any changes made would be more vulnerable to changing political winds.⁹⁰ In 2013, HUD published a proposed AFFH rule, which it stated was “drafted in response to [the] 2010 GAO report and numerous requests from stakeholders, advocates, and HUD program participants seeking clear guidance and technical assistance.”⁹¹ Though some public comments on the proposed rule highlighted the compliance costs the rule imposed on local jurisdictions,⁹² HUD finalized the rule in 2015.

86. See *infra* notes 230-241 and accompanying text (discussing lawsuits against Westchester County); see also Johnson, *supra* note 66, at 1163 (“The Westchester litigation revealed the inadequacies of the existing rule purporting to implement the FHA’s AFFH requirement, and led to the 2015 redrafting and strengthening of the rule.”); Emerson, *supra* note 28, at 173 (noting that the Westchester litigation “sparked renewed scholarly attention to the affirmatively-further provision”).

87. O’Regan & Zimmerman, *supra* note 70, at 90 (observing that under Obama, “HUD aspired to revisit how best to define the respective roles of the Federal government and state and local actors in operationalizing the AFFH mandate”).

88. See Kagan, *supra* note 2, at 2312 (“The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as the head of the federal bureaucracy. . . . [A]s compared with legislative stasis, administrative action looks decidedly appealing.”).

89. For general overviews of the rulemaking process, both in theory and in practice, see JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (6th ed. 2018); Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 476-79 (2011).

90. See Davidson & Peñalver, *supra* note 71, at 136-37 (highlighting the problem of agency discretion in the implementation of the FHA’s AFFH requirement); see also Abraham, *supra* note 14 (highlighting the 2015 AFFH rule’s vulnerability and advocating a statutory fix to make the rule permanent).

91. News Release, U.S. Dep’t. of Hous. & Urb. Dev., HUD Publishes New Proposed Rule on Affirmatively Furthering Fair Housing (July 19, 2013), <https://archives.hud.gov/news/2013/pr13-110.cfm> [https://perma.cc/89UW-JX3A].

92. See Lawyer’s Committee for Civil Rights Under Law, Review of Selected Critical Comments on HUD’s Proposed AFFH Rule, http://www.prrac.org/pdf/Summary_of_AFFH_Critical_Comments.pdf [https://perma.cc/AHK2-43HS] (last visited

The 2015 AFFH rule envisioned an iterative process of cooperative engagement between HUD and local jurisdictions. Enforced through a detailed reporting requirement, while still leaving local jurisdictions significant interpretive leeway, the 2015 AFFH rule hoped to create the space for increased public engagement and for a back-and-forth process.⁹³ Recognizing the expense involved in collecting data and building tools to delve into data, HUD undertook to “supply data to state and local governments and public housing agencies (‘PHAs’) across the country . . . with a range of uniform data on integration and segregation, housing needs, and indicia of economic opportunity” as part of the AFFH process.⁹⁴ Though best practices for use of such data would only emerge over time, providing “detailed data publicly on all jurisdictions and their surrounding regions” promised to facilitate federal-local collaboration.⁹⁵ It also could empower and inform community advocacy.⁹⁶ By providing the relevant data, HUD’s information tools would create a “shared baseline” for discussions about particular localities as well as across localities.⁹⁷ HUD data tools also would lessen the local cost of meeting the 2015 AFFH rule’s requirements, as Nestor Davidson observes: “If local governments, public housing authorities, and nonprofit housing providers do not have the resources to invest in analytics—and most do not—then the federal government can step in and do so at scale.”⁹⁸

In order to satisfy the 2015 AFFH rule, HUD grantees were expected to engage in a community participation process and then submit an Assessment of Fair Housing (AFH) that laid out the region or locality’s AFFH goals, as well as their progress in meeting past goals.⁹⁹ Localities were to use the HUD-provided Assessment of Fair Housing Tool to answer a standard set of questions about fair housing in their area.¹⁰⁰ Although the 2015 AFFH rule was shut down before it fully got

Dec. 31, 2022) (summarizing critical comments submitted in response to publication of the proposed AFFH rule in 2013, most of which highlighted increased compliance costs); Steil et al., *supra* note 16, at 30 (reporting on public comments critical of the costs of the 2015 rule).

93. See O’Regan & Zimmerman, *supra* note 70, at 93; see also Michael Allen, *HUD’s New AFFH Rule: The Importance of the Ground Game*, in *THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY* 220, 221 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019) (noting that the 2015 rule’s “overall tenor is one of collaboration rather than enforcement”).

94. Nestor M. Davidson, *Affordable Housing Law and Policy in an Era of Big Data*, 44 *FORDHAM URB. L.J.* 277, 288 (2017).

95. O’Regan & Zimmerman, *supra* note 70, at 92.

96. See Bostic & Acolin, *supra* note 59, at 200.

97. See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 *HOUS. POL’Y DEBATE* 85, 88 (2019).

98. Davidson, *supra* note 94, at 296.

99. See Steil & Kelly, *supra* note 97, at 87; see also Bostic & Acolin, *supra* note 59, at 198 (providing a summary of the AFH requirements); Steil et al., *supra* note 16, at 5-6 (same).

100. For more on the Assessment Tool, as well as the obligations on localities when completing their AFH reports, see Steil & Kelly, *supra* note 75, at 739.

up to speed, research by Justin Steil and Nicholas Kelly shows that the move from AI to AFH reporting resulted in localities adopting more goals related to AFFH and committing to more particularized and measurable goals.¹⁰¹ The 2015 rule pushed localities to “shift from AI with nebulous goals to AFH with more concrete objectives.”¹⁰² Such findings are noteworthy and welcome, especially in light of the AFFH’s reliance “on localities undertaking rigorous analysis and creating meaningful goals to meet the fair housing requirements, and then honestly evaluating progress toward those goals. . . . In other words, the AFFH Rule depends on most localities genuinely embracing the spirit of the rule and following its stipulations.”¹⁰³ By refusing to accept thirty-five percent of initial AFH submissions, HUD made clear that a new day had dawned; box-checking was no longer the name of the game.¹⁰⁴ AFH reports were sent back to grantees for being “substantially incomplete” or because they “did not comply with civil rights laws,” and grantees were expected to revise and resubmit.¹⁰⁵ As Steil and Kelly concluded, HUD “engaged in a careful and thorough review of the AFHs . . . [and] employed a collaborative strategy to remedy” submissions that were initially out of compliance.¹⁰⁶ Overall, the 2015 AFFH rule worked and seemed to demonstrate how administrative law could reinvigorate a long-dormant part of the FHA.¹⁰⁷

101. Steil & Kelly, *supra* note 97, at 93-99.

102. *Id.* at 95.

103. Steil & Kelly, *supra* note 75, at 740.

104. *Id.* at 742.

105. *Id.* at 743. For a more detailed analysis of the reasons given by HUD for refusing to accept particular AFH submissions, see *id.* at 742-46.

106. *Id.* at 747-49.

107. See Douglas S. Massey & Jacob S. Rugh, *The Intersections of Race and Class: Zoning, Affordable Housing, and Segregation in U.S. Metropolitan Areas*, in *THE FIGHT FOR FAIR HOUSING*, *supra* note 16, at 261 (arguing that the 2015 rule “opens up new channels for the promotion of fair and affordable housing policies to help desegregate metropolitan America”). The 2015 rule “worked” but it is important to not overstate the impact of a single procedural rule, even one a long time coming. As Professor Blake Emerson notes, the 2015 rule was “both expansive in its reach, but flexible in its prescriptive force.” Emerson, *supra* note 28, at 176; see also Nicholas F. Kelly et al., *The Promise Fulfilled?: Taking Stock of Assessments of Fair Housing*, in *FURTHERING FAIR HOUSING*, *supra* note 16, at 97 (describing the AFFH rule as “a form of meta-regulation that requires municipalities to develop a locally-tailored plan . . . [and] allows municipalities significant leeway in shaping their plans”); Kazis, *supra* note 67, at 3 (“The [2015 AFFH] rule was, in fact, modest and accommodating of local preferences, perhaps to a fault: it is not clear that a single unit of housing was built anywhere as a direct result of the rule.”).

D. *The Trump Administration's Attack on Fair Housing*

Donald Trump's election as the 45th President of the United States in 2016 shocked the political establishment,¹⁰⁸ but fair housing advocates recognized the dangers of a Trump presidency immediately.¹⁰⁹ Those in the fair housing community knew that President Trump, having run as an openly racist candidate, was unlikely to push the cause of desegregation.¹¹⁰ The best that could be hoped for was that Trump's limited attention span would spare the FHA from direct attacks.

President Trump tapped neurosurgeon and former presidential candidate Ben Carson as HUD Secretary, and Carson sailed through his Senate confirmation, fifty-eight in favor versus forty-one opposed.¹¹¹ This despite the fact that when he was being considered for Secretary of Health and Human Services (HHS), a friend and spokesperson for Carson told the press, "Dr. Carson feels he has no government experience, he's never run a federal agency."¹¹² While lack of relevant experience was a possible barrier to accepting the HHS role, it did not stop Carson from accepting the HUD leadership position even though "[t]here is little in Carson's background that suggests that he has any ideas about urban planning or fighting poverty."¹¹³ As reported

108. See Sàikrishna Bangalore Prakash, *The Age of the Winning Executive: The Case of Donald J. Trump*, 134 HARV. L. REV. F. 141, 141 (2020) (noting "the shock, disbelief, and horror" felt by the intelligentsia following Trump's improbable victory).

109. See, e.g., Jason Reece, *The Landlord vs. the Fair Housing Lawyer: Race and Planning in the 2016 Election*, PLANETIZEN (Oct. 12, 2016, 5:00 AM), <https://www.planetizen.com/node/89096/landlord-vs-fair-housing-lawyer-race-and-planning-2016-election> [<https://perma.cc/EZZ4-7UNK>]; Renee M. Williams, *Affirmatively Further Fair Housing: California's Response to a Changing Federal Landscape*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 387, 387 (2019) ("Advocates—quite presciently, it turns out—expressed concern about whether HUD would continue its work of ensuring that HUD funding recipients complied with their duty to affirmatively further fair housing.").

110. See Jenée Desmond-Harris, *Trump's Win Is a Reminder of the Incredible, Unbeatable Power of Racism*, VOX (Nov. 9, 2016, 3:20 PM), <https://www.vox.com/policy-and-politics/2016/11/9/13571676/trump-win-racism-power> [<https://perma.cc/M5W7-5C7G>] (providing evidence of Trump's racism and acknowledgment of his racism by his critics and by some of his supporters); Alana Semuels, *The Future of Housing Segregation Under Trump*, ATLANTIC (Nov. 29, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-future-of-desegregation-under-trump/509018/> [<https://perma.cc/C5XX-84AJ>] (noting that Trump has "expressed disdain for many of Obama's housing policies, especially those trying to reduce segregation").

111. See Brendan Williams, *Burning Down the House? Ben Carson and U.S. Housing Policy*, 49 SW. L. REV. 122, 126 (2020); Jessica Taylor, *Trump Taps Ben Carson for Secretary of Housing And Urban Development*, NAT'L PUB. RADIO (Dec. 5, 2016, 6:25 AM), <https://www.npr.org/2016/12/05/503150852/trump-taps-ben-carson-for-secretary-of-housing-and-urban-development> [<https://perma.cc/FL77-PXXJ>].

112. Ben Kamisar, *Carson Not Interested in Serving in Trump Administration*, HILL (Nov. 15, 2016, 10:30 AM), <https://thehill.com/policy/healthcare/306045-carson-turned-down-offer-to-serve-in-trump-administration-report/> [<https://perma.cc/M2ZT-87JA>].

113. Alex Shephard, *Ben Carson Will Run HUD, Which Has a \$50 Billion Budget and 8,000 Employees. What Could Go Wrong?*, NEW REPUBLIC (Dec. 5, 2016), <https://newrepublic.com/article/139141/ben-carson-will-run-hud-50-billion-budget-8000-employees-go-wrong> [<https://perma.cc/5GFM-5JCJ>].

by *ProPublica*, “to many HUD employees, the selection of so ill-qualified a leader felt like an insult.”¹¹⁴ Once in power, Carson reportedly showed little interest in running the agency: “Carson himself was barely to be seen—he never made the walk-through of the building customary of past new secretaries.”¹¹⁵ When he was in the building, he surrounded himself with visiting family members and closed his office door to others in the agency.¹¹⁶ Not surprisingly, resignations gutted the top and career ranks of an already understaffed department, a brain drain that left HUD without the sort of institutional knowledge necessary for the agency to run smoothly.¹¹⁷ At least one person who stayed claimed to have faced retaliation after raising concerns about overspending, among other matters.¹¹⁸

Secretary Carson came to HUD with a firm belief in the pull-yourself-up-by-your-bootstraps version of the American dream that informed his views on fair housing.¹¹⁹ A prolific author, Carson’s first autobiography, *Gifted Hands: The Ben Carson Story*, told the story of Carson’s rise from inner-city Detroit to star neurosurgeon.¹²⁰ Extrapolating from his own experiences, Carson, in a 2017 radio interview, said that “poverty to a large extent is also a state of mind,” adding that “[y]ou take somebody with the wrong mind-set, you can give them everything in the world (and) they’ll work their way right back down to

114. Alec MacGillis, *Is Anybody Home at HUD?*, PROPUBLICA, (Aug. 22, 2017, 8:00 AM), <https://www.propublica.org/article/is-anybody-home-at-hud-secretary-ben-carson> [<https://perma.cc/6BNS-T39S>].

115. *Id.*

116. Ben Terris, *Ben Carson, or the Tale of the Disappearing Cabinet Secretary*, WASH. POST (Feb. 6, 2018, 7:00 AM), https://www.washingtonpost.com/lifestyle/style/ben-carson-or-the-tale-of-the-disappearing-cabinet-secretary/2018/02/05/74c46de8-04ff-11e8-b48c-b07fea957bd5_story.html [<https://perma.cc/36AT-J3TL>].

117. Glenn Thrush, *Biden’s First Task at Housing Agency: Rebuilding Trump-Depleted Ranks*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/06/18/us/politics/biden-housing-agency-trump.html> [<https://perma.cc/Q866-STPF>]. This problem was not unique to HUD. “Under Trump, mid- and lower-level career staffing in most agencies ha[d] been terribly compromised, more hallowed out than ever before.” Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 112 (2021).

118. See Lorraine Woellert, *HUD Civil Servant Claims Retaliation After Red-Flagging Carson’s Decorating*, POLITICO (Feb. 27, 2018, 6:32 PM), <https://www.politico.com/story/2018/02/27/carson-decorating-whistleblower-claims-retaliation-369785> [<https://perma.cc/LXC3-YGWG>]; see also Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 649 (2019) (observing that “presidential backlash in response to [civil service] resistance does not necessarily mean that the resistance was in violation of law”).

119. See Ezra Rosser, *Getting to Know the Poor*, 14 YALE HUM. RTS. & DEV. L.J. 66, 75-76 (2011) (connecting Horatio Alger’s fictional accounts of upward mobility through hard work with conservative anti-poor rhetoric).

120. See generally BEN CARSON WITH CECIL MURPHEY, *GIFTED HANDS: THE BEN CARSON STORY* (1996).

the bottom.”¹²¹ Carson expressed something similar after touring public housing in Ohio, arguing against providing residents with “a comfortable setting that would make somebody want to say: ‘I’ll just stay here. They will take care of me.’”¹²² While these are familiar conservative talking points, ordinarily these are not the positions of poverty experts, nor administrators tasked with running major federal antipoverty programs.

In terms of concrete outcomes, Carson’s legacy at HUD is defined by his disinterest in fighting deep budget cuts when they were proposed by the Trump Administration, which is a good topic for another article, and by his role presiding over the repeal of the 2015 AFFH rule.¹²³ In 2015, as part of his presidential campaign, Carson wrote an op-ed attacking the AFFH rule, alleging it “would fundamentally change the nature of some communities from primarily single-family to largely apartment-based areas by encouraging municipalities to strike down housing ordinances that have no overtly (or even intended) discriminatory purpose—including race-neutral zoning restrictions . . . all in the name of promoting diversity.”¹²⁴ Doubling down on the use of strong rhetoric, Carson concluded, “[G]overnment-engineered attempts to legislate racial equality create consequences that often make matters worse. . . . [B]ased on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous.”¹²⁵ As HUD Secretary, Carson coauthored an op-ed with President Trump in which they similarly described the 2015 AFFH rule as a “radical social-engineering project

121. Pam Fessler, *Housing Secretary Ben Carson Says Poverty Is a ‘State of Mind’*, NAT’L PUB. RADIO (May 25, 2017, 3:50 PM), <https://www.npr.org/2017/05/25/530068988/ben-carson-says-poverty-is-a-state-of-mind> [https://perma.cc/X76W-DV4K].

122. Yamiche Alcindor, *Don’t Make Housing for the Poor Too Cozy, Carson Warns*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/politics/ben-carson-hud-poverty-plans.html> [https://perma.cc/CBT2-4HDB].

123. See, e.g., Pam Fessler, *Bipartisan Disapproval Over Trump Administration’s Housing Program Cuts*, NAT’L PUB. RADIO (Apr. 3, 2019, 6:33 PM), <https://www.npr.org/2019/04/03/709529287/bipartisan-disapproval-over-trump-administrations-housing-program-cuts> [https://perma.cc/97QR-97AR]; Jeff Andrews, *How Ben Carson Tried to Destroy Fair and Affordable Housing: The Neurosurgeon Took a Scalpel to HUD*, CURBED (Aug. 17, 2020, 1:57 PM), <https://archive.curbed.com/2020/8/17/21372168/ben-carson-hud-housing-trump> [https://perma.cc/LEF3-3M4C]. For a look back at Carson’s term as HUD Secretary, see Clare Trapasso, *The Ben Carson Years at HUD: Did He Make a Difference?*, REALTOR (Jan. 19, 2021), <https://www.realtor.com/news/trends/ben-carson-hud-legacy/> [https://perma.cc/C8CH-CRMZ].

124. Ben S. Carson, Opinion, *Ben Carson: Obama’s Housing Rules Try to Accomplish What Busing Could Not*, WASH. TIMES (July 23, 2015), <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/> [https://perma.cc/6K2H-4KBN].

125. *Id.*

that would have transformed the suburbs from the top down.”¹²⁶ Turning the rhetorical dial up once more, Carson and Trump claimed that consideration of greater density in the suburbs proves that “[t]he left wants to take that American dream away from you.”¹²⁷

The Trump Administration’s efforts to repeal the 2015 AFFH rule were “part of a broad assault on civil rights protections in housing”¹²⁸ and came in a form more closely resembling stumbling progress than decisive action. In January 2018, HUD issued a notice “extending the deadline for submission of an Assessment of Fair Housing (AFH)” by grantees until November 2020.¹²⁹ The notice rolled back the clock, requiring localities to submit an AI—the mechanism that both HUD and the GAO had found to be flawed—instead of an AFH.¹³⁰ In May 2018, HUD withdrew the AFH Assessment Tool, essentially removing the data and data platform from use by localities seeking to report on fair housing challenges and goals using the framework envisioned by the drafters of the 2015 AFFH rule.¹³¹ Heather Abraham called that Assessment Tool “the wind to the Rule’s sail,” and described withdrawal of the tool as “ideological and arguably disingenuous.”¹³² Finally, in August 2018, HUD began a notice-and-comment process to repeal the 2015 rule through an Advance Notice of Proposed Rulemaking.¹³³ The Advance Notice explained that changes to the 2015 rule were necessary, among other reasons, to “[m]inimize regulatory burden while more effectively aiding program participants to plan for fulfilling their obligation to affirmatively further the purposes and policies of the Fair Housing Act.”¹³⁴ The writing was on the wall, but HUD offered few details about what it was planning.

Advocates finally got a chance to see the Trump Administration’s fair housing plans in January 2020, when HUD released its proposed

126. Donald J. Trump & Ben Carson, Opinion, *We’ll Protect America’s Suburbs*, WALL ST. J. (Aug. 16, 2020, 4:02 PM), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133> [<https://perma.cc/2LDT-CL7G>].

127. *Id.*

128. Steil et al., *supra* note 16, at 35.

129. Notice, Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683, 683 (Jan. 5, 2018); *see also* Abraham, *supra* note 14, at 39 (highlighting the delay accomplished by the deadline extension).

130. Katherine O’Regan, *Assessing Fair Housing: HUD’s Delay and the Dilemma This Poses for Jurisdictions*, JOINT CTR. FOR HOUS. STUD. OF HARV. U. BLOG, (Mar. 2, 2018), <https://www.jchs.harvard.edu/blog/assessing-fair-housing-huds-delay-and-the-dilemma-this-poses-for-jurisdictions> [<https://perma.cc/AA88-9T24>].

131. *See* Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713, 40,714 (proposed Aug. 16, 2018) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

132. Abraham, *supra* note 14, at 41.

133. *See* Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. at 40,713.

134. *Id.*

change to the AFFH rule.¹³⁵ It represented a significant departure from the 2015 AFFH rule and arguably from the FHA itself. HUD claimed that the change was necessary because “the current regulations are overly burdensome to both HUD and grantees and are ineffective in helping program participants meet their reporting obligations for multiple reasons.”¹³⁶ According to HUD, the excessive burdens placed on grantees under the 2015 rule included “[t]he sheer volume of data and variety of expertise required under the 2015 rule” and the costs of duplicative public participation requirements.¹³⁷ HUD also argued that the 2015 rule was prohibitively expensive for the agency to administer, claiming that the rule would require “538 full-time employees to conduct reviews of the AFHs submitted in 2019.”¹³⁸

The goal of AFFH shifted under the Trump Administration from tackling discrimination and segregation to promoting affordable housing and decreasing barriers to new construction. As the Proposed Rule noted, “HUD intends this regulation to promote and provide incentives for innovations in the areas of affordable housing supply, access to housing, and improved housing conditions.”¹³⁹ In another context, these might be laudable goals, but fighting discrimination is not the same as promoting affordable housing, and the 2020 Proposed Rule was strangely divorced from the desegregation-tied requirements of the FHA. Part II of this Article, which draws heavily upon public comments to the January 2020 proposed AFFH rule, explores in greater detail the many problems with the HUD’s new, minimalistic approach to the FHA’s second prong. But criticism of the January 2020 Proposed Rule was not limited to those submitting public comments. As HUD explained later in the preamble to its new rule, the “[P]roposed [R]ule took steps to reduce federal control of local housing decisions and lessen the burden of data requirements imposed on local governments. However, when the President reviewed the [P]roposed [R]ule, he expressed concern that the HUD approach did not go far enough on

135. See *Affirmatively Furthering Fair Housing*, 85 Fed. Reg. 2041 (proposed Jan. 14, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903, 905).

136. *Id.* at 2042.

137. *Id.* But for one city’s more nuanced view of the how reporting costs related to the larger AFFH goal, see Michael F. Glavin, *City of Somerville, Mass., Comment Letter on Affirmatively Furthering Fair Housing 1-2* (Oct. 15, 2018), https://downloads.regulations.gov/HUD-2018-0060-0609/attachment_1.pdf [<https://perma.cc/J53J-ACM6>] (“Overall, the City of Somerville discourages adoption of any measures that would compromise or otherwise undermine the intent of HUD’s 2015 AFFH rule. Any time a municipality is required to submit a report, issues of reporting requirement burdens are likely to arise, often legitimately. At the same time, issues involving residential patterns that can directly affect quality of economic opportunity—and ultimately the quality of life for millions of people—must be accorded paramount importance. The Fair Housing Act of 1968 and HUD’s 2015 AFFH rule sought to end housing discrimination and its pernicious effects. Our hope is that HUD remains committed to this goal.”).

138. *Affirmatively Furthering Fair Housing*, 85 Fed. Reg. at 2043.

139. *Id.* at 2043.

either prong.”¹⁴⁰ HUD’s solution to such feedback from a boss famous for the catchphrase “you’re fired”¹⁴¹ was to scrap the notice-and-comment process entirely. Rather than complete the process begun with the January 2020 announcement of a Proposed Rule, in August 2020, in the midst of Trump’s reelection campaign, HUD simply announced a new rule.¹⁴²

The so-called “Preserving Community and Neighborhood Choice” (PCNC) rule explicitly repealed the 2015 AFFH rule. It went back in time, returning “to the original understanding of what the AFFH certification was for the first eleven years of its existence: AFFH certifications will be deemed sufficient provided grantees took affirmative steps to further fair housing policy during the relevant period.”¹⁴³ In abandoning all pretense of following the Administrative Procedure Act (APA), “the fundamental charter of the modern administrative state,”¹⁴⁴ HUD was engaging in a form of Hail Mary rulemaking that was unlikely to stick long term.¹⁴⁵ But even so, the new rule sent a

140. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47901 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

141. Even Trump’s catchphrase was somewhat misleading. See Marc Fisher, *On TV, Trump Loved to Say ‘You’re Fired.’ In Real Life, He Leaves the Dirty Work to Others*, WASH. POST (Mar. 15, 2018, 6:00 AM), https://www.washingtonpost.com/politics/on-tv-trump-loved-to-say-youre-fired-in-real-life-he-leaves-the-dirty-work-to-others/2018/03/14/0e85d25e-27a7-11e8-b79d-f3d931db7f68_story.html [<https://perma.cc/H9CG-GHV5>].

142. See Anne Flaherty, *Trump Officially Dismantles Obama Fair Housing Rule He’s Never Enforced*, ABC NEWS (July 23, 2020, 1:59 PM), <https://abcnews.go.com/Politics/trump-officially-dismantle-obama-fair-housing-rule-enforced/story?id=71942284> [<https://perma.cc/DMC9-9Z5P>] (discussing the timing of the repeal of the 2015 rule and noting that “the plan by the Department of Housing and Urban Development seemed aimed at stoking racial tensions in an election year”); NAT’L FAIR HOUS. ALL., HUD ABANDONS ITS MANDATE TO DISMANTLE SEGREGATION AND SYSTEMIC DISCRIMINATION (2020), <https://nationalfairhousing.org/wp-content/uploads/2020/08/Overview-of-HUDs-New-AFFH-Rule-Final-8.4.20.pdf> [<https://perma.cc/BZ8R-ZHQM>] (criticizing the new rule and arguing that politics drove its adoption).

143. Preserving Community and Neighborhood Choice, 85 Fed. Reg. at 47,900.

144. Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 106 (2021).

145. As the American Bar Association noted, “HUD is engaging in an end-run around the normal rulemaking process by adopting the PCNC rule in an executive fiat devoid of public comment.” AM. BAR ASS’N, REPORT ACCOMPANYING RESOLUTION 112, at 1 (2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/112-midyear-2021.pdf> [<https://perma.cc/M9N8-9JV5>]. HUD was not alone in trying to bypass the ordinary rulemaking requirements; one study found that “agencies under the Trump Administration repeatedly flouted procedural rules, such as notice-and-comment requirements.” Davis Noll, *supra* note 29, at 358. For a comprehensive guide to rulemaking under the APA, see LUBBERS, *supra* note 89; see also Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 604-17 (2018) (providing an overview and defense of rulemaking’s notice-and-comment process). The APA partially protects against such Hail Mary rulemaking because it “curtail[s] the sway of administrative officials by subjecting their most important lawmaking mechanisms—rulemakings and (especially) adjudications—to stringent procedural requirements.” Kagan, *supra* note 2, at 2262; see also CONG. RSCH. SERV., R42612, MIDNIGHT RULEMAKING: BACKGROUND AND OPTIONS FOR CONG. 2 (2016) (observing that late in the game rulemaking can lead to lower

powerful message that the Trump Administration (and future Trump Administrations if he were to win reelection) intended to limit the reach of the FHA. When it came to efforts to desegregate housing and correct for past and present forms of discrimination, the federal government was signaling through the PCNC rule that it was going to, once again, adopt a hands-off approach. Localities would be able to return to mere box-checking.

II. UNCOOPERATIVE FEDERALISM IN ACTION

Faced with a President determined to turn back the regulatory clock and an agency undermining its statutory obligations under the FHA, state and local government bodies fought back, trying to defend the 2015 AFFH rule. They did so in ways that took advantage of their insider position. They submitted detailed public comments attesting to the value of the 2015 rule as a matter of good governance and asserting that the efforts to undermine the rule violated the statutory requirements of the FHA. They also, to return to the language offered by constitutional law scholars, engaged in dissent by deciding, which “blends elements of self-governance and self-expression.”¹⁴⁶ By submitting reports that voluntarily went above and beyond, following the more stringent requirements of the 2015 rule even after HUD had relaxed the reporting requirements, state and local governments exercised their power as cooperative federalism partners to push back against HUD’s change in direction. Taking resistance a step further, select cities and states passed legislation that converted elements of the 2015 rule into mandatory local law.¹⁴⁷ Such resistance by insiders found support in the work of race, housing, and community-focused nonprofit advocacy groups who likewise saw value in pushing the federal government to engage in meaningful AFFH enforcement.

As other scholars have highlighted in other contexts, resistance by insiders is often different, in approach and in the leverage brought to bear, than outsider resistance to government action.¹⁴⁸ Federal reliance on block grant programs as a means of extending federal influence downward and implementing federal policies locally is a pervasive aspect of modern governance. Sometimes these programs work smoothly, living up to the hopes of cooperative federalism.¹⁴⁹ But often

quality regulations and inadequate review of such rules). *But see* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV’T & ADMIN. L. 285 (2013) (defending midnight rulemaking against claims that such rulemaking results in lower quality rules).

146. Gerken, *supra* note 5, at 64.

147. *See infra* Section II.A.

148. *See generally* Gerken, *supra* note 11.

149. *See* Gerken, *supra* note 5, at 20 (describing the “[c]heerier elements of federal-state interactions—the ways in which joint regulation promotes mutual learning, healthy competition, and useful redundancy”).

tensions abound across multiple levels and relationships. Though simple models of federalism imagine only a federal-state relationship, in practice, many funding and regulatory programs are based on direct federal-local relationships.¹⁵⁰ Such a direct relationship means that cities, and even semi-independent government entities such as housing authorities, can engage in resistance as insiders. Whether resistance takes the form of public comments or filing reports that are at odds with the model pushed by the central administrative agency, local partners have multiple levers with which to push back against policy or rule changes coming out of Washington. Local grantees may be dependent on federal funding, but that dependence does not prevent tension from converting cooperative into uncooperative federalism.

Part II explores the ways state and local institutions made use of both federalism and administrative procedural requirements to oppose the Trump Administration. The grant-based structure of federal housing policy—its reliance on cooperative federalism—created space for state and local governments, local housing authorities, advocacy organizations, and housing nonprofits to resist the Trump Administration's efforts to gut the FHA's requirement that the federal government "affirmatively further" fair housing. Even though the 2015 AFFH rule was still in its infancy, the fair housing community, including local government bodies, could see its potential to reinvigorate the FHA's second mandate. Through public comments and forms of defiance—including the submission of 2015 AFFH rule-compliant reports even though such detailed reporting was no longer required—local government bodies attempted to defend the fair housing gains made during the Obama Administration.¹⁵¹ The actions of the Trump Administration arguably amounted to a form of what Professor David Noll labeled "administrative sabotage;"¹⁵² from that perspective, state and local resistance might also be characterized as an effort to defend HUD's traditional mission and role. When the grantor, the federal government, wrongly attempts to undermine fair housing, state and local entities may feel an obligation to attempt to paddle in the opposite direction in order to safeguard the larger mission. Nongovernmental

150. See Davidson, *supra* note 8, at 968 ("Cooperative intergovernmental regimes have long involved not only federal-state interaction but also direct federal-local relations.")

151. Though this Article explores the phenomenon in more depth than previous work, it is not the first article to highlight the significance of localities continuing to follow the spirit of the 2015 rule even though HUD had backed away from the rule. See Johnson, *supra* note 66, at 1167-70; Megan Haberle, *Furthering Fair Housing: Lessons for the Road Ahead*, in *FURTHERING FAIR HOUSING*, *supra* note 16, at 210, 223. Of course, the fact that HUD did not review such filings for compliance with the 2015 rule means that it is an open question whether jurisdictions fully followed the rule or not.

152. See David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 758 (2022).

advocacy organizations and housing nonprofits similarly spoke out in defense of the 2015 rule and sued the Trump Administration for failure to follow established administrative procedures.¹⁵³

This Part unearths the many ways that insiders and outsiders fought back against the Trump Administration's efforts to undermine fair housing enforcement. It relies heavily on comments submitted in response to the January 2020 Proposed Rule. As noted previously, the final rule was promulgated in August 2020 by declaration, bypassing the APA's notice-and-comment process, which means that the most recent opportunity for official dissent was through the public comment process associated with the January 2020 Proposed Rule. This Part takes the public comments on the January 2020 Proposed Rule seriously, in part because, as will be shown below, the government bodies and advocacy organizations that submitted dissenting views took the notice-and-comment process quite seriously. Ultimately, this case study hopes to shed light on the promise and limits of uncooperative federalism-based resistance.

A. State and Local Governments

Many state and local governments used the notice-and-comment process to voice their strong opposition to the Trump Administration's attempt to backpedal on the promise of the 2015 AFFH rule. Each submission varied, but the common themes were, first, that "the [P]roposed [R]ule conflates and elevates affordable housing above all other fair housing objectives," as a submission from the City of Austin, Texas observed.¹⁵⁴ And, second, as the City of Dallas, Texas argued, "the [P]roposed [R]ule [to] affirmatively further fair housing rolls back the progress that was initiated in the 2015 rule and will weaken the resolve to attack issues of housing segregation and poverty."¹⁵⁵

Perhaps the strongest dissent came in the form of a joint submission by the Attorneys General of twenty-one states plus the District of Columbia, who submitted an eighty-six-page brief.¹⁵⁶ The Attorneys General sharply criticized the proposed change:

As feared, the Proposed Rule dismantles the 2015 [r]ule. The Proposed Rule, if adopted, would drastically scale back HUD's oversight in

153. See *infra* Section II.C.

154. City of Austin, Tex., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1063/attachment_1.pdf [<https://perma.cc/9NEX-LJBE>].

155. City of Dallas, Tex., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing (Mar. 18, 2020) [hereinafter City of Dallas Letter], https://downloads.regulations.gov/HUD-2020-0011-1114/attachment_1.pdf [<https://perma.cc/WG4A-5ZD4>].

156. See Attorneys General of the States of California, New York, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island,

identifying and addressing barriers to fair housing and redirect resources to issues outside the realm of fair housing. Crucially, the Proposed Rule is silent about combatting segregation and promoting integration, which are at the heart of any effort to further fair housing. Because the Proposed Rule would undermine efforts to promote fair housing in our communities and ignore HUD's statutory mandate to affirmatively further fair housing, its adoption would be both contrary to the purpose of the FHA and arbitrary and capricious.¹⁵⁷

The brief of the Attorneys General noted that “[u]nder the 2015 [r]ule, HUD holds program participants accountable for failing to meaningfully address how their housing development plans will reduce patterns of segregation specific to their communities and expand access to opportunity.”¹⁵⁸ The Proposed Rule, the brief argued, “would systematically gut the 2015 [r]ule and replace it with a cursory process that would not assist program participants in meeting their AFFH obligation.”¹⁵⁹ Incredibly, for a rule ostensibly about AFFH, the Proposed Rule “entirely omits any reference to addressing segregation or promoting integration, and does not require program participants to consider whether their actions redress, or contribute to, residential segregation.”¹⁶⁰ Given President Trump's racism and Secretary Carson's seeming dislike of focusing on race, it is perhaps not surprising that “the Proposed Rule inexplicably does not discuss race” except in passing.¹⁶¹ For a rule supposedly about operationalizing the FHA, however, inattention to race is deeply problematic.

Arguably, the main goal of the Proposed Rule was to shift the focus of AFFH enforcement from segregation to housing affordability. Yet, as the Attorneys General brief points out, doing so is an inappropriate break from AFFH's statutory underpinnings: “By ranking program participants' fair housing efforts predominately on the supply of housing, the Proposed Rule would conflate housing choice with fair housing. HUD's proposed ranking is primarily concerned with developing housing, rather than focusing on fair housing as FHA requires.”¹⁶² The Attorneys General argued the following in their joint comment: “Developing affordable housing and promoting safe and healthy housing

Vermont, Virginia, and Washington, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing (Mar. 16, 2020) [hereinafter Attorneys General, Mar. 16, 2020 Comment], https://downloads.regulations.gov/HUD-2020-0011-1474/attachment_1.pdf [https://perma.cc/JZ3L-SCW6].

157. *Id.* at 1-2.

158. *Id.* at 10.

159. *Id.* at 12.

160. *Id.*; see also *id.* at 33 (“Critically, the proposed definition does not include any reference to addressing segregation and fostering integration.”).

161. *Id.* at 12.

162. *Id.* at 42; see also *id.* at 31 (“Several of the Proposed Rule's provisions are contrary to clear Congressional intent and frustrate the policy to affirmatively further fair housing that Congress sought to implement in passing the FHA.”).

conditions are important goals, but they are not the focus of the FHA which is to promote ‘truly integrated and balanced living patterns.’ Thus, HUD’s Proposed Rule is fundamentally misguided.”¹⁶³ The Proposed Rule’s focus on barriers to affordability and choice in housing conflates the FHA’s first prong, nondiscrimination, with the FHA’s more demanding AFFH prong.¹⁶⁴ To quote from the Attorneys General brief, “The history of government-sanctioned segregation and the ongoing use of policies and practices that promote segregation and hinder integration are the reasons AFFH obligations are targeted not at simply building more housing, but *where* that building occurs.”¹⁶⁵ The states feared that if the Trump Administration’s Proposed Rule replaced the 2015 rule, it would end up “encouraging program participants to divert their resources towards non-fair housing issues,” in direct contradiction to the FHA’s AFFH requirement.¹⁶⁶

The final concern raised in the Attorneys General brief is that the Proposed Rule amounted to an abandonment of meaningful oversight by HUD. The brief argued that “the Proposed Rule would render HUD nearly powerless to hold program participants accountable for failing to address goals or obstacles to affirmatively furthering fair housing.”¹⁶⁷ The brief further argued that “[b]y taking a program participant’s stated efforts to affirmatively further fair housing at face value, HUD would effectively abdicate its obligation under the FHA to ensure that its programs are, in fact, furthering fair housing.”¹⁶⁸ Put simply, the Trump Administration’s Proposed Rule “would gut the provisions of the 2015 [r]ule that provides HUD with meaningful oversight of program participants’ efforts to further fair housing.”¹⁶⁹ Rather than an iterative process where submissions could be rejected, “the Proposed Rule would replace the 2015 [r]ule’s strong AFH process with a cursory certification process.”¹⁷⁰

Cities and city leaders from across the country expressed many of the same concerns about the Proposed Rule as had the states that joined the Attorneys General brief. Albuquerque’s Chief Administrative Officer noted that “the proposed changes appear to essentially gut the purpose of AFFH,” contrary to the city’s goal of “ensuring fair and

163. *Id.* at 16 (footnote omitted).

164. *See id.* at 32 (“The Proposed Rule’s definition of AFFH conflicts with both Congressional intent and decades of established case law holding that affirmatively furthering fair housing means more than freedom from discrimination.”).

165. *Id.* at 43.

166. *Id.* at 35.

167. *Id.* at 40.

168. *Id.*; *see also id.* at 16 (“[T]he Proposed Rule would provide no meaningful enforcement of program participants’ efforts to affirmatively further fair housing.”).

169. *Id.* at 33.

170. *Id.* at 13.

equal housing opportunities for all.”¹⁷¹ Other cities had similar views of the changes. Los Angeles, for example, urged HUD “to not ignore the legacy of segregation that persists throughout so many of our City’s communities and to not relax federal requirements which protect those who are most impacted in racially and ethnically concentrated areas of poverty.”¹⁷² New York City went even further, calling on HUD “to withdraw the Proposed Rule in its entirety because it is unlawful.”¹⁷³ Cities and counties protested that the Proposed Rule’s focus on housing affordability failed to address the AFFH requirement.¹⁷⁴ The City

171. Sarita Nair, City of Albuquerque, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1377/attachment_1.pdf [<https://perma.cc/82E5-X2X4>]; *see also* Laurel Robinson, West Palm Beach Hous. Auth., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020) [hereinafter Robinson Letter], https://downloads.regulations.gov/HUD-2020-0011-1507/attachment_1.pdf [<https://perma.cc/X3NM-FUWM>] (“Unfortunately this [P]roposed [R]ule, as written, strikes at the heart of one of the fundamental bulwarks of equality in this nation.”).

172. Rushmore D. Cervantes, City of L.A., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 9 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1313/attachment_1.pdf [<https://perma.cc/4T29-26PD>].

173. City of N.Y., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020) [hereinafter City of N.Y. Letter], https://downloads.regulations.gov/HUD-2020-0011-1221/attachment_1.pdf [<https://perma.cc/PNP9-SJ83>].

174. *See, e.g.*, Jessica Deegan, Minn. Hous. Fin. Agency, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1-2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1010/attachment_1.pdf [<https://perma.cc/EC5C-D9YA>] (“Our major criticism of the [P]roposed [R]ule—and the reason that we cannot support the implementation of the rule as written—is that it is not a fair housing rule. The text of the rule fails to mention racial or ethnic disparities in housing, does not address segregation patterns, and does not mention direct discrimination. Instead, the [P]roposed [R]ule focuses on ways to increase the supply of affordable housing through deregulation. While Minnesota Housing believes that increasing the number of affordable housing units is essential to making sure every Minnesotan has a home, the Affirmatively Furthering Fair Housing rule is not the right vehicle to address this goal.”); Jacob Frey & Lisa Bender, City of Minneapolis, Minn., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 12, 2020), https://downloads.regulations.gov/HUD-2020-0011-1241/attachment_1.pdf [<https://perma.cc/AV4R-LP3X>] (“While we appreciate that HUD’s proposed AFFH rule allows cities to identify local housing needs, we are concerned that the rule encourages cities to increase supply and decrease regulation without regard to improving fair housing outcomes. Increasing the supply of affordable housing alone will not make discriminatory effects, whether by intent or through omission, go away. Segregation results from a variety of market and public policy practices, such as steering, redlining, or refusing to rent to families with rental subsidies. The Fair Housing Assessments required under the 2015 AFFH rule created a process for identifying these types of discriminatory practices.”); Michael Stinziano, Franklin Cnty. Auditor, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020) [hereinafter Stinziano Letter], https://downloads.regulations.gov/HUD-2020-0011-0993/attachment_1.pdf [<https://perma.cc/KH9D-YD8A>] (“[T]he proposed rule change would prioritize increasing overall housing supply instead of rectifying residential discrimination and segregation. Simply increasing the supply of housing will not necessarily result in housing that is affordable to low- to moderate-income residents.”); *see also* Kristin Faust, Ill. Hous. Dev. Auth., Comment on Proposed Rule: Affirmatively Furthering Fair Housing 1-2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1486/attachment_1.pdf [<https://perma.cc/Y2MT-4ZLA>] (“Merely increasing the supply of housing, without equal concern to affordability for low-income households, is not sufficient to both promote fair housing choice, and end the historical patterns of discrimination experienced

of Chicago argued that “AFFH should retain a definition that goes beyond ‘choice,’ and explicitly names remedying historic patterns of segregation as an intent of the Fair Housing Act.”¹⁷⁵ The Auditor’s Office of Franklin County, Ohio, likewise noted that the Proposed Rule’s definitional change, which involved elevating “choice” and neglecting both discrimination and segregation in AFFH, “strips away the foundational framework of the 2015 rule.”¹⁷⁶ State and local governments saw through the race-neutral language of the Proposed Rule and realized what was at stake.

What can be seen in the Attorneys General brief, as well as the detailed public comments submitted by other state and local governments, is a commitment to preserve objections for the record and a belief in the value of such dissenting efforts. Though the City of Chicago, for example, was right when characterizing the Trump Administration’s Proposed Rule as an attempt to “dilute the federal government’s commitment” to fair housing,¹⁷⁷ the City was also likely

across Illinois, with its shortage of affordable rental homes equaling about 36 affordable and available homes per 100 renter households.”).

175. Daniel Lurie, City of Chi., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020) [hereinafter Lurie Letter], https://downloads.regulations.gov/HUD-2020-0011-1189/attachment_1.pdf [<https://perma.cc/4TXS-CEBT>]; see also Terri M. Lee, City of Atlanta, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020) [hereinafter Lee Letter], https://downloads.regulations.gov/HUD-2020-0011-1136/attachment_1.pdf [<https://perma.cc/S2W9-DEQQ>] (“In order to advance fair housing, segregation and discrimination must be named. We cannot build ourselves into an environment of fair housing. Increasing the supply of affordable housing is not enough.”); Roberta L. Rubin, Commonwealth of Mass. Dep’t of Hous. & Cmty. Dev., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 6 (Mar. 16, 2020) [hereinafter Rubin Letter], https://downloads.regulations.gov/HUD-2020-0011-1135/attachment_1.pdf [<https://perma.cc/U5WZ-UU2G>] (“We urge HUD to maintain a definition of AFFH that is in keeping with the legislative history of the Act and jurisprudence interpreting the Act . . .”).

176. Stinziano Letter, *supra* note 174, at 2; see also Johanna Shreve, Washington, D.C., Off. of the Tenant Advoc., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1489/attachment_1.pdf [<https://perma.cc/K7XV-YNQM>] (“First and foremost, OTA opposes the proposed change in the definition of ‘affirmatively furthering fair housing.’ The proposed change eliminates from the definition any reference to ‘segregated living patterns’ or ‘racially and ethnically concentrated areas of poverty.’ The new definition, ‘advancing fair housing choice within the program participant’s control,’ does not charge jurisdictions with taking meaningful actions to reverse or eliminate segregation or concentration of poverty, both of which exist across the United States as well as within the District of Columbia.”); Barbara J. Parker & James R. Williams, City Att’y for the City of Oakland and the Cnty. Couns. for the Cnty. of Santa Clara, Comment Letter on Advanced Notice of Proposed Rulemaking for Affirmatively Furthering Fair Housing 3 (Oct. 15, 2018), https://downloads.regulations.gov/HUD-2018-0060-0583/attachment_1.pdf [<https://perma.cc/7N36-3WPA>] (“The 2015 AFFH final rule ultimately provided greater clarity and accountability to jurisdictions, and committed HUD’s resources to supporting local efforts in the form of high-quality data, assessment tools, and HUD collaboration. It defined affirmatively furthering fair housing explicitly, rather than leaving it to localities to determine what compliance might look like.” (footnotes omitted)).

177. Lurie Letter, *supra* note 175, at 1.

not so naïve to think their comments would lead the Trump Administration to back down. Nevertheless, governments submitted detailed critiques of the Proposed Rule through the notice-and-comment process. If rulemaking comments were aired in major media outlets, such critiques might be dismissed as mere political posturing for the media, but that is not likely a large factor in this case. Instead, state and local government criticism of the Proposed Rule seems driven by genuine concern about the federal government stepping back from its FHA obligations. Though it can be hard to answer “how local governments can and should participate in resistance movements,”¹⁷⁸ these submissions form a collective form of local dissent.¹⁷⁹

But why should state and local governments care if the federal government decides to take a more hands-off approach when it comes to local fair housing efforts? Is it not in the best interests of state and local governments to not be accountable on fair housing matters when interacting with the federal grantor? Some housing authorities and local governments certainly appreciated that the Trump Administration lowered the standards.¹⁸⁰ However, in its submission, the Massachusetts Department of Housing and Community Development answered this question in the negative, explaining that “continuing Federal oversight is needed to assure that, at a minimum, jurisdictions are not misguided by local goals to perpetuate segregation in a manner that, at a minimum, fails to AFFH, and that may also result in unlawful discrimination under the Act.”¹⁸¹ In cooperative federalism, state and local governments often need the federal government to be an active partner.¹⁸² As the New York State Department of Health’s submission

178. Daniel Farbman, “An Outrage Upon Our Feelings”: *The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2104 (2021).

179. They also arguably were strategically submitted to help with subsequent litigation. The Author thanks Noah Kazis for this observation.

180. See, e.g., Jon Gutzmann & Al Hester, Saint Paul Pub. Hous. Agency, Comment Letter on Proposed AFFH Assessment Tool for Public Housing Agencies 1 (Oct. 20, 2016), https://downloads.regulations.gov/HUD-2016-0103-0038/attachment_1.pdf [<https://perma.cc/WKG6-U2QL>] (“Despite some helpful changes the Department has made in the current version, we believe that the proposed AFFH Assessment Tool still places unreasonable burdens on agencies that have little or no control over levels of housing segregation in our communities.”); Robinson Letter, *supra* note 171, at 1 (“[T]he 2015 rule imposed unworkable, expensive and ultimately unusable results. The AFFH assessment ‘tool’ provided by HUD had to be abandoned (despite valiant efforts by some jurisdictions) as an abject failure. I commend HUD on its decision to remove this well intended but unmanageable process.”); Eby Letter, *supra* note 18, at 4 (“Douglas County, Colorado applauds the repeal of the AFFH regulations as these grant funds provide vital services that help our vulnerable residents succeed. We respectfully request HUD returns to a simplified AFFH process that will not add an unwarranted administrative burden, squelching the autonomy that makes our program responsive, unique and successful.”).

181. Rubin Letter, *supra* note 175, at 9-10.

182. As the City of Winston-Salem noted about the conditions that led to the passage of the FHA, “[e]liminating those conditions is a shared responsibility and should not fall solely on the shoulders of recipients of HUD funding.” Marla Y. Newman, City of Winston-Salem,

observed, the Proposed Rule's "weak standards risk returning jurisdictions to an era of ineffective assessments of fair housing and, consequently, more prevalent housing discrimination."¹⁸³ Lurking below the surface of this plea for federal oversight is fear of a race to the bottom among jurisdictions when it comes to fair housing and awareness of the possible spillover effects on jurisdictions that do try to make progress on fair housing if they are acting without federal monitoring to spur on their neighbors.¹⁸⁴ Excessive deference to local decisionmaking "opens a path for perpetuation of segregation and/or avoidance of fair housing for protected classes rather than affirmatively furthering it."¹⁸⁵

Despite the fact that the AFFH requirement started out as a component of a controversial bill, the FHA, and sat dormant for much of the past fifty years, some state and local governments recognized the need to resist the Trump Administration's efforts to undermine the requirement. The rulemaking process the Obama Administration followed in advance of finalizing the 2015 AFFH rule seems to have succeeded in making some state and local government bodies take an ownership view of the federal rule.¹⁸⁶ Even though "presidential administration is brittle . . . [and] the next president can usually—and fairly

Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1110/attachment_1.pdf [<https://perma.cc/AC2W-AHVS>]; see also Andrew Loften et al., King Cnty. Hous. Auth., Seattle Hous. Auth., & Tacoma Hous. Auth., Joint Response Letter to AFFH HUD Rule Change 2 (July 27, 2020) [hereinafter Loften et al. Letter], https://www.tacomahousing.org/wp-content/uploads/2021/03/hud_rule_change_letter_-_affirmatively_furthering_fair_housing_0.pdf [<https://perma.cc/BXL2-W6HA>] ("To say, as you have in issuing this new rule, that such work should be left to the local communities patently abdicates HUD's fundamental responsibility to prevent discrimination in housing. We need accountability at every level, not the elimination of it.").

183. Howard A. Zucker, N.Y. State Dep't of Health, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1006/attachment_1.pdf [<https://perma.cc/43BU-XDU8>].

184. See Cherelle L. Parker, City Council of Phila., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1394/attachment_1.pdf [<https://perma.cc/8VTA-7B2Z>] ("The change in approach suggested by the [P]roposed [R]ule is not consistent with the purpose or spirit of the Fair Housing Act. Instead of providing guidance and oversight to ensure that blatant and systemic housing discrimination as well as segregation is addressed through AFFH, HUD is recommending more localized experimentation and individualized determinations. This haphazard approach would lead to a scattered array of efforts unlikely to effectively tackle the myriad issues underlying decades of discrimination in housing (among other areas of American society).").

A local government unit, acting in isolation, faces significant hurdles when it comes to AFFH. Segregation, for example, is a problem that crosses jurisdictional boundaries. Not only would a committed local government likely find their efforts undone by externalities associated with the actions of neighboring jurisdictions less intent on correcting racial divisions, but lax federal enforcement could also make their investments in the sort of in-depth AFFH analysis built into the 2015 rule seem foolish.

185. Rubin Letter, *supra* note 175, at 8.

186. For a detailed history of the development of the 2015 AFFH rule, including an account of internal HUD processes and how the agency responded to comments on the draft

effortlessly—undo the work done by their predecessor” as a formal matter,¹⁸⁷ in practice, the process leading up to the 2015 rule helped create buy-in among institutional actors.¹⁸⁸ State and local governments saw the need for fair housing oversight by the federal government and decided that it was worth using the notice-and-comment process as a mechanism to push back against HUD’s efforts to repeal the 2015 AFFH rule.¹⁸⁹

Some states and cities went even further. Connecticut and California passed their own AFFH rules in an effort to safeguard implementation of the policy at the state level in the face of clear federal backstepping by the Trump Administration.¹⁹⁰ The City of Toledo, Ohio, did the same; Marie Flannery, President and CEO of The Fair Housing Center, which spearheaded the legislation adopted by the city, explained, “When our federal government attempts to destroy core civil rights protections that have been in place for half a century, it’s up to our local communities to take a stand.”¹⁹¹ The Los Angeles Board of

version of the rule, see Raphael Bostic et al., *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, in *FURTHERING FAIR HOUSING*, *supra* note 16, at 74, 74-92.

187. Emerson & Michaels, *supra* note 117, at 428. *But see* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018) (discussing rules that cannot be easily changed).

188. See Bostic et al., *supra* note 186, at 77 (describing the process as “consensus building of the highest order”).

189. Raising issues in comments can also help with subsequent litigation, providing an additional reason for such governments to provide extensive comments. *See generally* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109 (2018).

190. See 2021 Conn. Acts 21-29 (Reg. Sess.); Assemb. B. 686, 2018 Leg., Reg. Sess. (Cal. 2018) (codified in part at 2022 Cal. Stat. § 8899.50); *see also* Chanell Fletcher, *Dismantling the Walls of Segregation: AB 686*, CLIMATE PLAN (Nov. 11, 2017), https://www.climateplan.org/dismantling_the_walls_of_segregation_ab_686 [<https://perma.cc/92WR-K8MU>] (noting the efforts made by A.B. 686 to support the important role stringent and affirmative housing policies play in dismantling segregation in light of changing federal attitudes during the Trump Administration). For more on California’s AFFH legislation, *see generally* Williams, *supra* note 109. California was not the only state legislative branch to push back against the Trump Administration’s attack on the 2015 rule. *See* S. Res. 76, 219th Leg., Reg. Sess. (N.J. 2020) (“This House expresses its opposition to and disapproval of the United States Department of Housing and Urban Development’s proposed rulemaking revising its Affirmatively Furthering Fair Housing rule adopted in 2015.”).

Housing is not the only space where this was happened—school desegregation began as a federally imposed effort, but some school districts recognize the value of desegregation and have introduced their own desegregation plans. Such local efforts do not always succeed. In 2007, the Supreme Court struck down Seattle and Louisville’s desegregation policies. *See* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). For more on such efforts and the constitutional challenge, *see* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107 (2009).

191. *City of Toledo Affirms Its Commitment to Fair Housing and Preserves Core Civil Rights Protections Gutted by HUD*, FAIR HOUS. CTR., <https://www.toledofhc.org/city-of-toledo-affirms-its-commitment-to-fair-housing-and-preserves-core-civil-rights-protections-gutted-by-hud/> [<https://perma.cc/EW3M-YSFY>] (last visited Dec. 31, 2022); *see also* Erika Riley, *Despite Repeal of Fair Housing Rule, Local Organizations Committed to*

Supervisors took a similar stand: “If the Trump Administration wants to turn the clock back to the era where the government was actively resisting efforts to integrate our communities, the County can still act to embrace our responsibility under the Fair Housing Act to affirmatively further fair housing.”¹⁹² Though no longer required to do so, New York City “finished the [AFFH] assessment anyway—then built an entire policy platform around the results.”¹⁹³ Vicki Been, a longtime N.Y.U. law professor and New York City’s deputy mayor for housing and economic development under Mayor Bill de Blasio, explained, “We’re not going to stick our heads in the sand the way that this [A]dministration is doing.”¹⁹⁴

The Obama Administration’s 2015 rule created forward momentum that states and localities took up when the Trump Administration reversed course at the federal level. Thus began an iterative process. State and local AFFH requirements do not simply reproduce the Obama-era rule; instead, they tinker with the rule. Such changes reflect both local politics and the unique challenges facing a particular state or locality, but they also suggest that state and local governments see value in formalizing aspects of the 2015 rule despite—or more accurately, perhaps, because of—HUD’s efforts to turn back the clock.

Continuing Fair Housing Practices, FREDERICK NEWS-POST (Aug. 20, 2020), https://www.fredericknewspost.com/news/economy_and_business/real_estate_and_development/despite-repeal-of-fair-housing-rule-local-organizations-committed-to-continuing-fair-housing-practices/article_559e197d-1667-5028-9081-42eb84ada63b.html [<https://perma.cc/58KM-ZX2M>] (“Despite the repeal of an Obama-era fair housing rule, local authorities in the city of Frederick and Frederick County are planning to continue their commitment to providing fair housing in the community.”).

192. *County Affirms Commitment to Fair Housing*, SUPERVISORKUEHL (Apr. 27, 2018), <https://supervisorkuehl.com/county-affirms-commitment-to-fair-housing/> [<https://perma.cc/T3KJ-T7EN>] (highlighting actions the Los Angeles County Board of Supervisors took in response to “President Trump’s actions to undermine efforts to desegregate our communities”). Boston did something similar, incorporating the AFFH requirement into its zoning regulations. See Press Release, City of Boston Mayor’s Off., Boston to Become First Major City in the Nation to Include Fair Housing Requirements in Zoning Code (Dec. 9, 2020), <https://www.boston.gov/news/boston-become-first-major-city-nation-include-fair-housing-requirements-zoning-code> [<https://perma.cc/3RLZ-K6S3>]; Megan Haberle, *The Making of Boston’s AFFH Ordinance—A Brief Oral History*, 30 POVERTY & RACE J. 3, 10-12 (2021).

193. Kriston Capps, *As Trump Ditches a Fair Housing Rule, New York City Doubles Down*, BLOOMBERG (Jan. 8, 2020, 3:53 PM), <https://www.bloomberg.com/news/articles/2020-01-08/hud-s-fair-housing-rule-change-doesn-t-play-in-nyc> [<https://perma.cc/2UV3-T337>].

194. *Id.*; see also City of N.Y. Letter, *supra* note 173, at 1 (“During the City’s two-year process of developing *Where We Live NYC*, HUD delayed and eventually suspended the AFFH assessment tool for local governments. However, the City relied upon the guidance HUD provided in the final 2015 AFFH rule, the AFFH assessment tool, and AFFH guidebook. These resources were more helpful than previous guidance and contributed to a shift in City operations toward a more nuanced and comprehensive approach to fair housing planning, incorporating the breadth of New Yorkers’ lived experiences in their communities, including their access to well-paying jobs, public transit, financial resources, and integrated classrooms. HUD’s removal of the 2015 AFFH rule and associated tools without a strong replacement is detrimental to fair housing progress throughout the country.”).

B. Local Housing Authorities

Comments on proposed rules are one thing, but what about resistance by government actors with skin in the game, with something to lose? Would public housing authorities completing reports connected to federal grant funding defend the 2015 AFFH requirements even if the Trump Administration preferred they resort to a mere box-checking exercise? It turns out the answer to these questions is yes.

Though HUD suspended the requirement that grantees submit an assessment of fair housing (AFH) as envisioned by the 2015 rule, it did not completely close the door. In part out of awareness that public housing authorities (PHAs) had spent time and money learning to work with HUD's assessment tool and facilitating public participation under the 2015 framework, HUD allowed local housing authorities to submit AFH-compliant AI reports.¹⁹⁵ HUD essentially was trying to have it both ways: let grantees know that they could easily meet their AFFH reporting obligations under the new regime while not being accused of unfairly changing the rules of the game midstream. Not only could local housing authorities submit de minimis AI reports, but the Trump Administration opted to not even give feedback on AFH submissions.¹⁹⁶ Despite the fact that during the Obama Administration AFH submissions by design led to an iterative process aimed at strengthening local commitment to fair housing,¹⁹⁷ HUD during the Trump Administration did not prohibit AFH-compliant submissions, but it would not engage in meaningful oversight.

The fair housing lights at HUD headquarters may have been off, yet many local housing authorities pretended as if the 2015 AFFH rule was still in place. They submitted comments attesting to their commitment to the spirit of the 2015 rule that was on the chopping block and backed up those comments with reports that embraced a rule they were no longer required to follow.¹⁹⁸ Considering that the reports were submitted as part of the ongoing HUD grant funding process, on which every local housing authority depends, the choice to resist the Trump Administration in this way was courageous. Even though such courage risks being dismissed as merely performative or neglected because

195. ALA. DEP'T ECON. & CMTY. AFFS., 2020 STATE OF ALABAMA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 2 (2020), <https://adeca.alabama.gov/wp-content/uploads/2020-Analysis-of-Impediments-to-Fair-Housing-Choice.pdf> [<https://perma.cc/3S2Y-HXBT>] (providing the history of the Trump Administration's changes to grantee reporting requirements and noting "HUD went on to say that the AFFH databases and the AFFH Assessment Tool guide would remain available for the AI; and, encouraged jurisdictions to use them, if so desired").

196. Abraham, *supra* note 14, at 39.

197. *Id.* at 37.

198. See *infra* footnotes 199-212 and accompanying text; see also Shinar, *supra* note 20, at 629 (explaining that "[o]utside intrusion in the form of . . . a new regulatory policy might meet resistance because it conflicts with the institution's identity, ideology, its sense of purpose, and its view of its own expertise in the field").

it found expression through bureaucratic paperwork, it is worth recognizing the risks these local housing authorities were taking in publicly defending the 2015 rule in this way.

The response to local housing authority resistance to Trump could have taken an ugly turn. While some grant funding is allocated by formula, local housing authorities also chase money associated with greater HUD discretion. Pushing back against the new direction of the agency could open grantees to transparent (funding barriers) or subtle (requests for additional information, slow walking applications, or secondary reviews) forms of retaliation for those who reveal themselves not to be team players. Though one might suggest that the Trump reelection campaign was doomed and that local housing authorities were right to anticipate that the 2015 AFFH rule would make a comeback after a political course correction, such optimistic reads of the country's politics during the Trump Administration suffers from a heavy dose of hindsight bias.

Rather than acting strategically, local housing authorities largely acted on principle when they followed the more demanding requirements of the 2015 rule, adopting them voluntarily as the basis for their AI submissions. Announcements of the choice can sound dry. Atlanta and Fulton County's joint AI submission "follow[ed] the requirements in HUD's *Fair Housing Planning Guide* but [was] also compliant with the regulations and assessment tool established in HUD's 2015 final rule."¹⁹⁹ Similarly, Washington, D.C.'s submission used the "template that HUD developed in 2015 to complete its Analysis of Impediments."²⁰⁰ Massachusetts did the same: "The AI report is grounded in HUD's definition of Fair Housing Issues; the structure is modeled after HUD's outline of the Fair Housing Assessment Tool from its 2015 Affirmatively Furthering Fair Housing Final Rule."²⁰¹ Houston, Texas, noted about their report, "Even though this is an AI, many of the tables and maps from the AFH were included in this document to

199. CITY OF ATLANTA & FULTON CNTY., 2020 JOINT ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 6 (2020); see also Lee Letter, *supra* note 175, at 2 ("As the City of Atlanta is committed to abiding by the letter and spirit of the Fair Housing Act and making data-informed policy decisions, we submit that HUD should uphold and implement the 2015 AFFH Rule.").

200. See *Washington, D.C. Fair Housing Analysis (2019)*, POVERTY & RACE RSCH. ACTION COUNCIL, <https://www.prrac.org/washington-dc-fair-housing-analysis-2019/> [<https://perma.cc/774H-RMKN>] (last visited Dec. 31, 2022); see also CITY OF TAMPA ET AL., TAMPA-HILLSBOROUGH COUNTY REGIONAL ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 2, (2018-2022), <https://www.hillsboroughcounty.org/library/hillsborough/media-center/documents/affordable-housing/projects-plans-and-report-notices/10-21-20-analysis-impediments-to-fair-housing.pdf> [<https://perma.cc/42LW-MR5U>] ("The program participants involved in the preparation of this document opted to use the HUD AFH Assessment Tool (AFH format) to conduct this AI.").

201. MASS. DEP'T OF HOUS. & CMTY. DEV., 2019 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 5 (2019).

illustrate the City's intent and best efforts to further fair housing."²⁰² But behind such straightforward descriptions hides the hard choice to push back against HUD's central office.

Housing authorities provided HUD a variety of justifications for continuing to follow the 2015 rule, or parts of it, despite not being required to do so. The City of Austin, Texas, Travis County, and The Housing Authority of the City of Austin explained that despite the suspension of the AFH requirement, they "made a commitment to continue the robust community engagement that was a focus of the AFH," viewing "this as critical to identifying barriers faced by the most vulnerable residents."²⁰³ Community engagement was highlighted in the AI report submitted for the broader Baltimore region: "While following [the 2015 AFH] template is no longer required, our region has a long history of working together to identify and address impediments to fair housing. The participants thought it was important to build upon that history by enhancing the community engagement process and continuing to examine our impediments collaboratively."²⁰⁴ Denver, Boulder, and Aurora, Colorado, chose a blended approach, in part based on appreciation of the value of public participation: "This regional study contains aspects of both the AI and AFH format. Most importantly, it preserves the significant focus on public input that was part of the AFH effort."²⁰⁵

Housing authorities also cited money and time previously expended as reasons they voluntarily submitted reports based on the 2015 rule.²⁰⁶ Boston decided to submit a 2015 rule-compliant AFFH report out of recognition of the "dedication and work [that] went into the development of several [AFFH] drafts," adding that the city's report "captures important narratives and data that are critical for achieving fair

202. CITY OF HOUSTON HOUS. & CMTY. DEV. DEPT, 2020 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 9 (2020), https://houstontx.gov/housing/plans-reports/impediments/AI_2020-032922.pdf [<https://perma.cc/9QD7-4XYT>].

203. City of Austin et al., Comment Letter on Advanced Notice of Proposed Rulemaking for Affirmatively Furthering Fair Housing 1 (Oct. 15, 2018), https://downloads.regulations.gov/HUD-2018-0060-0497/attachment_1.pdf [<https://perma.cc/RHR6-2TJ8>].

204. CITY OF ANNAPOLIS ET AL., 2020 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE IN THE BALTIMORE REGION 1 (2020); *see also* Janet Abrahams & Michael Braverman, Baltimore City Dep't of Hous. & Cmty. Dev. & the Hous. Auth. Of Baltimore City, Comment Letter on Advanced Notice of Proposed Rulemaking for Affirmatively Furthering Fair Housing (Oct. 15, 2018), https://downloads.regulations.gov/HUD-2018-0060-0507/attachment_1.pdf [<https://perma.cc/LKQ6-PKNJ>] ("We are committed to AFFH, not just because it is the law, but because we believe it is our obligation as housing providers and funders to do what we can to further fair housing.").

205. *About*, DENVER AURORA BOULDER AFH, <http://denver-aurora-boulderafh.com/about/> [<https://perma.cc/DK96-3F4T>] (last visited Dec. 31, 2022).

206. *See* Shinar, *supra* note 20, at 626 (arguing that official resistance to change is more likely in the case of institutional practices with high fixed costs).

housing for protected classes, and all residents of Boston.”²⁰⁷ Similarly, “[b]ased on the fact that the City of Dallas was already under contract and that the study would assist the City of Dallas and other jurisdictions in the duty to affirmatively further fair housing, staff recommended and the Dallas City Council approved the completion of the study.”²⁰⁸ The City of Dallas also cautioned in a comment on the Proposed Rule that “elimination of [the 2015 AFFH] requirement no doubt will lead to many jurisdictions returning to a time where they could be in denial about housing issues for those residents who are at the lower end of the socio-economic strata.”²⁰⁹

Besides filing detailed reports geared more towards the 2015 rule than the stripped-down AI reporting the Trump Administration championed, housing authorities also joined state and city governments in using the notice-and-comment process to resist the Administration’s attack on fair housing. The Housing Authority of Cook County, Illinois, which includes much of the Chicago region, urged “HUD to retract the current Proposed Rule and immediately resume implementation of the 2015 rule and dedicate the necessary department resources for effective implementation and enforcement of the 2015 rule.”²¹⁰ The housing authority argued, “The 2015 AFFH rule was the first significant step toward ending segregation and fostering equitable community investment since the FHA passed in 1968.”²¹¹ The Portland Housing Bureau similarly argued that the “proposed changes to the AFFH Rule . . . work to forestall and impede, rather than to further, the dissolution of segregation and discrimination across the nation.”²¹²

207. CITY OF BOS., ASSESSMENT OF FAIR HOUSING: AFFIRMATIVELY FURTHERING FAIR HOUSING IN BOSTON, MASSACHUSETTS: PROCESS, FINDINGS AND GOALS 1 (2019), <http://charleshamiltonhouston.org/wp-content/uploads/2020/05/June-2019-Plan-2.21.20.pdf> [<https://perma.cc/K59Z-N7QH>].

208. CITY OF DALLAS, NORTH TEXAS REGIONAL HOUSING ASSESSMENT 1 (2018).

209. City of Dallas Letter, *supra* note 155, at 1.

210. Richard Monocchio, Hous. Auth. of Cook Cnty., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1 (Mar. 9, 2020), https://downloads.regulations.gov/HUD-2020-0011-0657/attachment_1.pdf [<https://perma.cc/R8PZ-WWCY>].

211. *Id.*; see also Sunia Zaterman & Stephen I. Holmquist, Council of Large Pub. Hous. Auths. & Reno & Cavanaugh, PLLC, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1166/attachment_1.pdf [<https://perma.cc/BQ5W-K9NT>] (“We are concerned that the AFFH Proposed Rule shifts the focus from actions that affirmatively further fair housing to actions that simply address the economics of housing supply.”).

212. Shannon Callahan, Portland Hous. Bureau, Comment Letter on Advanced Notice of Proposed Rulemaking for Affirmatively Furthering Fair Housing 1 (Oct. 2, 2018), https://downloads.regulations.gov/HUD-2018-0060-0459/attachment_1.pdf [<https://perma.cc/VP4S-MSMT>]; see also Ted Wheeler & Shannon Callahan, City of Portland, Or., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1265/attachment_1.pdf [<https://perma.cc/D6MR-9M9B>] (“We do not believe that HUD has given a sufficient amount of time to determine if the 2015 [r]ule is advancing the goals of the Fair Housing Act and request that HUD maintain the current regulations.”).

Forced by the Trump Administration—because HUD issued its 2020 rule without complying with the notice-and-comment procedures—to work outside of the ordinary process, some housing authorities pushed back on HUD’s last-minute attempt to bypass the requirements of the Administrative Procedure Act. The joint response of King County Housing Authority, Seattle Housing Authority, and Tacoma Housing Authority is worth quoting at length:

As leaders of public housing authorities, we are extremely distressed that on July 23 HUD released a new “Preserving Community and Neighborhood Choice” final rule that will terminate the 2015 Affirmatively Furthering Fair Housing rule and roll back the 1994 Analysis of Impediments to Fair Housing. We disagree with the provisions of the new rule and with the repeal of rules that have provided critical tools for dismantling historic discrimination in housing, and we do not accept HUD’s rationale for not conducting the customary notice and comment period for such rulemaking.²¹³

These three large housing authorities went on to highlight the poor timing of HUD’s announcement: “To announce the termination of a federal program that has helped address decades of racial discrimination and lack of access to equity for people of color at a time of an outpouring of antiracism in America is ill-timed at best.”²¹⁴ Whether ill-timed or deliberately timed, there is no denying that Trump used repeal of the AFFH rule as an excuse to try to increase racial tension through inflammatory political tweets.²¹⁵

Ultimately, many housing authorities responded courageously to the Trump Administration’s efforts to undermine the federal commitment to fair housing. Exploiting the gap between the federal agency tasked with oversight and local grant recipients tasked with implementation,²¹⁶ housing authorities put forward an alternative understanding of urban development. Though the Trump Administration’s determination to repeal the 2015 rule meant that resistance would accomplish little during Trump’s term in office, housing authorities nevertheless decided it was worth publicly registering their dissenting

213. Loften et al. Letter, *supra* note 182, at 1.

214. *Id.*

215. As Professor Olatunde C.A. Johnson observes, “It is perhaps too generous to cast [the tweets President Trump wrote in 2020 following the withdrawal of the 2015 rule] as a ‘dog whistle,’ rather than an audible racist appeal” Olatunde C.A. Johnson, Opinion, *AFFH and the Challenge of Reparations in the Administrative State*, REGULATORY REVIEW (Oct. 26, 2020), <https://www.theregreview.org/2020/10/26/johnson-affh-challenge-reparations-administrative-state/> [https://perma.cc/9MZ9-E53T].

216. See Gerken, *supra* note 11, at 1363 (“Central decisionmakers must give some discretion to lower-level decisionmakers to interpret and implement the majority’s decrees And in the gap between the policy and its administration often lies a sizeable amount of discretion for those on the periphery, the opportunity to regulate as they see fit”).

views. As with all forms of dissent,²¹⁷ the significance of this form of resistance within the umbrella of the cooperative federalism relationship is debatable.²¹⁸ But it is worth recognizing bureaucratic courage, even, or especially, when it comes in the form of local government-level partners pushing back against retrogressive policy changes at the federal level.

C. Advocacy Organizations and Housing Nonprofits

The push for fair housing is not solely, or even largely, the province of state and local governments and local housing authorities. Advocacy organizations and housing nonprofits arguably form the center of the fair housing movement, pushing for meaningful desegregation, sometimes working alongside and sometimes working in opposition to government leaders and institutions. Not surprisingly, the fair housing community opposed the Trump Administration's efforts to repeal the 2015 rule and a broad array of organizations, from the National Association for the Advancement of Colored People (NAACP) to the Center on Budget and Policy Priorities, submitted public comments in an effort to defend the 2015 rule.²¹⁹ But public comments were only part of the fair housing community's strategy. The National Fair Housing Alliance, together with two Texas nonprofits, sued the Trump Administration for violating the Administrative Procedure Act (APA) by failing to implement the 2015 rule.

The fair housing community complaint alleged that HUD violated the APA when it suspended implementation of the 2015 rule without having gone through the required notice-and-comment procedure.²²⁰

217. For a classic article on the value of dissenting opinions, see Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

218. Housing authorities are in some ways outside of federalism's traditional framing, which focuses on sovereign entities; as "special purpose institutions," housing authorities occupy a murky middle ground between sovereign government bodies and purely administrative organizations, but they can nevertheless "exercise voice inside the system." Gerken, *supra* note 5, at 27.

219. See, e.g., Lisa Cylar Barrett & Hamida Labi, NAACP Legal Def. & Educ. Fund, Inc., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 11 (Mar. 16, 2020) [hereinafter Barrett & Labi Letter], <https://www.naacpldf.org/wp-content/uploads/AFFH-Comment-Letter-FINAL.pdf> [https://perma.cc/B5LD-SRX5]; Ctr. on Budget & Pol'y Priorities, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1170/attachment_1.pdf [https://perma.cc/GD3P-KVGM]; see also Press Release, Nat'l Fair Hous. All., Thousands Submit Comments to HUD Opposing Its Attack on Fair Housing (Mar. 19, 2020), <https://nationalfairhousing.org/thousands-submit-comments-to-hud-opposing-its-attack-on-fair-housing/> [https://perma.cc/WE35-4TC3] (highlighting the volume of individual and organizational comments submitted in response to the proposed rule change).

220. Complaint at 49-50, Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018) (No. 18-cv-01076). Note, the University of Michigan has posted the major case filings as well as court orders associated with the case on its Civil Rights Litigation Clearinghouse website. See *Case: National Fair Housing Alliance v. Carson*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=16572> [https://perma.cc/LU08-K3MC] (last

Given that, in general, “the Trump Administration did not follow basic principles governing agency rulemaking” during Trump’s four-year term,²²¹ there was cause for hope that such a challenge would be successful. The lawsuit—filed by a powerhouse team of lawyers from the public interest firm Relman, Dane & Colfax, the Lawyers’ Committee for Civil Rights Under Law, the Poverty & Race Research Action Council, the American Civil Liberties Union, the NAACP, the Public Citizen Litigation Group, as well as attorneys representing the named plaintiffs—also alleged that HUD’s actions were “arbitrary, capricious, an abuse of discretion[,] or not otherwise in accordance with law” under the APA.²²² The plaintiffs sought an injunction requiring HUD rescind the suspension and implement the 2015 rule.²²³

The complaint highlighted HUD’s failure to enforce the FHA’s AFFH requirement. “The agency has permitted more than 1,200 grantees—mostly local and state government entities—to collectively accept billions of dollars in federal housing funds annually,” the complaint argued, “without requiring them to take meaningful steps to address racial segregation and other fair housing problems that have long plagued their communities.”²²⁴ As this Article noted previously in Section I.A, until the 2015 rule, “HUD engaged in little enforcement” of the AFFH requirement, “permitting its grantees to virtually ignore it.”²²⁵ The suspension of the 2015 rule “left local governments once more without regulatory supervision . . . a situation that had already proven to result in rampant non-compliance.”²²⁶ The complaint flipped HUD’s excuse for the suspension—that too many AFHs submitted by localities failed—on its head, noting that “HUD is *supposed* to reject inadequate AFHs . . . [and] HUD’s enforcement of the Rule was working exactly as intended.”²²⁷ Ultimately, the fair housing community’s original and amended complaints were brilliant in all respects—crafting a story, use of authority, phrasing, and moral certainty—save one; they failed to convince the district court.

visited Dec. 31, 2022). For a brief overview of the litigation, see Abraham, *supra* note 14, at 42 n.159.

221. Davis Noll, *supra* note 29, at 369.

222. Complaint, *supra* note 220, at 50 (citing 5 U.S.C. § 706(2)(A)).

223. *Id.* at 54.

224. *See id.* at 2; *see also id.* at 9 (“HUD sends billions of dollars in federal funds each year to state and local jurisdictions, and those communities regularly certify both that they do not discriminate and that they are taking affirmative steps to further fair housing. But until recently, the agency has largely neglected to require those communities to do anything meaningful to fulfill those promises.”).

225. *See id.* at 3; *see also id.* at 13 (calling the AI process “virtually toothless”).

226. *Id.* at 5.

227. *See id.* at 6; *see also id.* at 34 (“[W]hat HUD characterizes as a failure—that [seventeen] submissions were initially rejected—is in fact a success, because those jurisdictions were properly required to improve their inadequate AFHs.”).

Based partly on the idea that parts of the 2015 AFFH rule, particularly the definition section, survived the moves by the Trump Administration, the court found that “the revived AI process is not the same process operating prior to the AFFH rule.”²²⁸ This matters because it undermined the plaintiffs’ argument that “they have been deprived of any benefit conferred by this regulation.”²²⁹ The court also used the continued viability of portions of the 2015 rule to reject the idea that withdrawal of the assessment tool “amount[ed] to a wholesale withdrawal or suspension of the AFFH Rule.”²³⁰ Though the court acknowledged the existence of APA obligations, the court held that “HUD was not obligated to keep in place a system that, in the agency’s view, drained its financial and personnel resources while it simultaneously expended resources working to remedy the defects” in the assessment tool.²³¹ Ultimately, the court found the plaintiffs did not have standing.²³²

Anytime civil rights organizations lose a case, it is tempting to think they were barking up the wrong tree, seeking redress from the wrong body, but the fair housing community had reason to think a lawsuit could work. In 2006, the Anti-Discrimination Center sued Westchester County, New York, claiming that the county had wrongly received federal grant money after knowingly submitting false certifications of the county’s compliance with the FHA’s AFFH requirement.²³³ The U.S. District Court for the Southern District of New York, after reviewing the county’s AI submissions, found that the county had focused on affordable housing and “did not appropriately analyze race-based housing discrimination as required by the obligation to AFFH.”²³⁴ Overall, the court held that the county’s “certifications to HUD that it would AFFH were false.”²³⁵ The court based its holding on the idea that “AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the [c]ounty to conduct an AI, take appropriate actions in response, and to

228. *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 35 (D.D.C. 2018). After being asked to reconsider, the court noted that not only was the definition changed as a result of the 2015 rule, but grantees were also still subject to increased public participation and record keeping requirements. *Nat’l Fair Hous. All. v. Carson*, 397 F. Supp. 3d 1, 10 (D.D.C. 2019).

229. *Carson*, 330 F. Supp. 3d. at 46.

230. *Id.* at 56.

231. *Id.* at 60. For a more expansive read of the reach of the APA in these circumstances, see Brief of the States of Maryland et al. as Amici Curiae in Support of Plaintiffs’ Renewed Motion for Preliminary Injunction and for Summary Judgment at 12-14, *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018) (No. 18-cv-01076).

232. *Carson*, 330 F. Supp. 3d. at 39-53.

233. For a summary of the case, see *Anti-Discrimination Center v. Westchester County*, RELMAN COLFAX, <https://www.relmanlaw.com/cases-westchester> [<https://perma.cc/NZ4Z-YQ6Y>] (last visited Dec. 31, 2022) [hereinafter RELMAN COLFAX]; Smyth et al., *supra* note 18, at 239-41.

234. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 564 (S.D.N.Y. 2009).

235. *Id.* at 565.

document its analysis and actions.”²³⁶ For the court, it was largely immaterial that HUD reviewed the county’s submissions; what mattered was the violation of the False Claims Act by the county.²³⁷

In 2009, following their loss before the district court, Westchester signed a consent decree with HUD after HUD delayed releasing block grant money to the county because of the county’s failure to affirmatively further fair housing.²³⁸ The case, along with the internal HUD report and external GAO report that identified problems in the AI process, helped lay the groundwork for the Obama Administration’s work on the 2015 AFFH rule.²³⁹ Westchester had to pay \$7.5 million to the False Claim Act plaintiff, and promised to spend \$52 million on affordable housing in wealthy white areas of the county and change elements of the county’s housing policy.²⁴⁰ But from 2010 until 2017, HUD rejected the county’s AI submissions. The U.S. Court of Appeals for the Second Circuit in April 2017 found that the county was “engaging in total obstructionism” when it came to meeting its obligations under the consent decree.²⁴¹ A few months later, in a move many saw as political, HUD accepted Westchester’s 2017 AI, allowing the county to emerge from under the consent decree.²⁴² The person responsible for

236. *Id.* at 569.

237. *See id.* at 570 (“[T]he assertion that certain HUD bureaucrats reviewed the County’s submissions and continued to grant the County funding cannot somehow make the false AFFH certifications immaterial . . .”).

238. *See New Developments in Westchester County AFFH Court Settlement*, NAT’L LOW INCOME HOUS. COAL. (May 1, 2017), <https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement> [<https://perma.cc/MME7-U8E9>].

239. Elizabeth Julian, *The Duty to Affirmatively Further Fair Housing: A Legal as Well as Policy Imperative*, in *A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY* 268, 270-72 (Christopher Herbert et al. eds., 2018).

240. *See* RELMAN COLFAX, *supra* note 233; Jack Lienke, *Sustainable Segregation? Assessing the Environmental Impact of the Westchester Fair Housing Settlement*, 19 N.Y.U. ENV’T L.J. 591, 602-04 (2012) (detailing the settlement).

241. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 689 F. App’x 71, 75 (2d Cir. 2017); *see also Court of Appeals Rules Westchester “Engaging in Total Obstruction,”* NAT’L LOW INCOME HOUS. COAL. (May 8, 2017), <https://nlihc.org/resource/court-appeals-rules-westchester-engaging-total-obstruction> [<https://perma.cc/KTH8-7PB8>]. For media coverage of the county’s efforts to skirt the demands of the consent decree, *see* Nikole Hannah-Jones, *Soft on Segregation: How the Feds Failed to Integrate Westchester County*, PROPUBLICA (Nov. 2, 2012, 3:37 PM), <https://www.propublica.org/article/soft-on-segregation-how-the-feds-failed-to-integrate-westchester-county> [<https://perma.cc/SZ56-QEJC>].

242. *See* Letter from Jay Golden, Reg’l Dir., Dep’t Hous. Urb. Dev., to Kevin J. Plunkett, Deputy Cnty. Exec., Westchester Cnty. (July 14, 2017), http://nlihc.org/sites/default/files/HUDresponse_7.14.17.pdf [<https://perma.cc/C2QT-MCWH>]; *see also* ANTI-DISCRIMINATION CTR., *CHEATING ON EVERY LEVEL: ANATOMY OF THE DEMISE OF A CIVIL RIGHTS CONSENT DECREE* (rev. ed. 2014), http://www.antibiaslaw.com/sites/default/files/Cheating_On_Every_Level.pdf [<https://perma.cc/SJZ5-KU4A>]; Henry Grabar, *Under Trump Party Planner, HUD Abruptly Ends Obama’s Battle Against Segregation in Westchester*, SLATE (July 14, 2017, 5:14 PM), <https://slate.com/business/2017/07/under-trump-party-planner-hud-ends-obama-s-battle-against-segregation-in-westchester.html> [<https://perma.cc/3HAY-UFTY>]; Joaquin Sapien, *‘The 100th Nail in the Coffin’ for Integration in Westchester*

signing off on Westchester's submission was Lynne Patton, "an event planner and a former vice president of the Eric Trump Foundation," tapped by President Trump to lead HUD's New York/New Jersey regional office.²⁴³ The case and its aftermath demonstrated the promise and limits of Fair Housing Act-based impact litigation in the affordable housing space.²⁴⁴ Westchester, in the long run, came out on top and HUD reverted to its default norm of fair housing non-enforcement. At the same time, the 2015 AFFH rule is the "regulatory legacy" of the Westchester litigation.²⁴⁵

It is worth noting that besides lawsuits, advocacy organizations and housing nonprofits also used the notice-and-comment process to resist the Trump Administration's efforts to repeal the 2015 rule. The charges leveled against the Trump Administration's version of the AFFH rule by advocacy organizations and housing nonprofits tracked closely the concerns raised by state and local governments and local housing authorities. The fair housing community attacked the Proposed Rule for reverting to earlier failed reporting models, for shifting the focus to housing affordability,²⁴⁶ and for abandoning meaningful fair housing enforcement.²⁴⁷ Though the failed APA-based lawsuit

County, PROPUBLICA (Aug. 1, 2017, 10:20 AM), <https://www.propublica.org/article/the-100th-nail-in-the-coffin-for-integration-in-westchester-county> [<https://perma.cc/U6V4-PHRL>].

243. Sarah Maslin Nir, *For Westchester, 11th Time Is Charm in Fight Over Fair Housing*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/westchester-fair-housing-hud-trump.html> [<https://perma.cc/X6JB-B97B>].

244. As Professor Stewart Sterk observes, "FHA litigation by developers or nonprofit groups creates few incentives for recalcitrant local governments to cooperate The longer the local government resists the FHA claim, the longer it will be before affordable housing is built and local taxpayers bear the cost of providing services to new residents." Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1644 (2021).

245. Johnson, *supra* note 66, at 1163.

246. See, e.g., Barrett & Labi Letter, *supra* note 219, at 11 ("HUD's proposal to redefine AFFH in a way that solely focuses on housing choice—and not at all on addressing racial disparities in housing—is a blatant and egregious attempt to undermine the premise of the Fair Housing Act. This rule change represents an absolute regression in fair housing practices."); Robert Hickey, Habitat for Human. Int'l, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 4 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1425/attachment_1.pdf [<https://perma.cc/DUR9-789K>] ("Nearly all the presumed barriers to fair housing choice in the Proposed Rule relate to housing supply generally. While overcoming these barriers may be in some cases necessary for improving fair housing choice, they are not sufficient. Few relate to the lack of *affordable* homes accessible to households regardless of race, color, national origin, religion, sex, or disability. Fewer still relate to the *location* of affordable and accessible homes."); John Paul Shaffer, Building Memphis, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1253/attachment_1.pdf [<https://perma.cc/J6U8-N7KX>] ("This revised definition forfeits the government's responsibility to address racial inequality in housing. The [P]roposed [R]ule would completely undermine the primary focus of the AFFH, which is to address deeply entrenched residential segregation.").

247. See, e.g., Marie Claire Tran-Leung, Shriver Ctr. on Poverty L., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 7 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1339/attachment_1.pdf [<https://perma.cc/>]

against the Trump Administration was the most concrete response offered by the fair housing community, advocacy organizations and non-profits dedicated time and resources to the notice-and-comment process even though they presumably expected the Trump Administration to gut the 2015 rule, despite their pleas to the contrary. As the next Part discusses, there are reasons for both optimism and pessimism when considering the effectiveness of resistance and the future of fair housing.

III. THE STATUS QUO STALEMATE

President Biden was sworn into office on January 20, 2021, and, before a week had gone by, he issued a memorandum directing the HUD Secretary to examine the effects of Trump's repeal efforts.²⁴⁸ The January 26, 2021, memorandum argued:

The Federal Government must recognize and acknowledge its role in systematically declining to invest in communities of color and preventing residents of those communities from accessing the same services and resources as their white counterparts. The effects of these policy decisions continue to be felt today, as racial inequality still permeates land-use patterns in most U.S. cities and virtually all aspects of housing markets.²⁴⁹

Then, on June 10, 2021, HUD repealed the Trump Administration's Hail Mary Preserving Community and Neighborhood Choice rule and

BHL2-WE9Y] (“[T]he proposed 2020 AFFH Rule takes a hands-off approach, giving grantees far too much latitude to determining the scope of their analysis and giving them a pass for fair housing barriers that are supposedly out of their control.”); Kathleen King & Zach Tilly, Children’s Def. Fund, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1328/attachment_1.pdf [<https://perma.cc/888X-PGKM>] (“The 2015 AFFH rule was a critical step in addressing historic and ongoing discrimination and housing disparities; unfortunately, the current Proposed Rule guts the 2015 rule and replaces it with one that ignores the legacy of segregation and practically eliminates any accountability for recipients of HUD funds.”); Patricia Fron, Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 1-2 (Mar. 16, 2020), https://downloads.regulations.gov/HUD-2020-0011-1496/attachment_1.pdf [<https://perma.cc/FDU3-ULUP>] (“The current [P]roposed [R]ule provides local governments and [PHAs] a virtual blank slate, a ‘free pass’ to ignore our legacy of segregation and the systems that uphold it today. Because the new rule drastically reduces reporting requirements for entitlement jurisdictions and removes requirements for PHAs entirely, the obligation to remedy historic wrongs is removed, leaving our communities . . . susceptible to the unassessed and unaddressed systemic forces that create grave inequities based on race and national origin.”); Kevin Stein, Cal. Reinvestment Coal., Comment Letter on Proposed Rule for Affirmatively Furthering Fair Housing 2 (posted on Mar. 19, 2020), https://downloads.regulations.gov/HUD-2020-0011-1304/attachment_1.pdf [<https://perma.cc/JF2N-5RWQ>] (“The proposal contains no meaningful enforcement of the AFFH obligation and would allow jurisdictions uninterested in AFFH to continue ignoring their legal obligation without consequence.”).

248. Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021).

249. *Id.*

reinstated parts of the 2015 AFFH rule.²⁵⁰ Depending on one's perspective, Biden had either corrected things or done the same as Trump: undermined the actions of the previous administration by declaration.²⁵¹ From a fair housing perspective though, restoration of the 2015 rule is an indication that the federal government once again intends to take seriously the FHA's AFFH mandate.

What is to be made of the battles over the AFFH rule during the Trump Administration and what does fair housing-based resistance reveal about the ability of institutions to respond to problematic presidential demands? Taking a step back from a narrow focus on housing policy, the fight of the 2015 AFFH rule barely makes a ripple compared to the turmoil of the Trump presidency. Through rhetoric, unpredictable policy choices, and crass indifference to established governance norms, the four-year Trump circus kept the President, and Presidential tweets, at the top of the news cycle and tested the strength of the republic.²⁵² By the end of his term, serious questions were being asked about whether the governance structure of the country could survive Trump's ongoing assaults on democracy.²⁵³ After four years of erratic behavior by the President, fair housing policy battles seem like minor skirmishes.

Yet fights over the AFFH rule pull back the curtain on important sites of contestation within cooperative federalism that risk being overlooked. The modern welfare state depends heavily on local government institutions implementing federal policy.²⁵⁴ Block grants, conditioned on compliance with federal regulations, provide leverage to

250. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

251. The challenge with such criticism, of either Trump or Biden, is that some such reversals arguably are a natural consequence of electoral politics. See Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1178-79 (2020) ("Why should the decisions of a particular president survive his administration? . . . [I]f elections matter, if representative democracy means something for the presidency, then a new president must be able to revisit, refine, or repudiate some of the decisions of his predecessors."). Biden's immediate reversal of Trump's last minute Hail Mary, Biden's "crack-of-dawn response to midnight regulation," fits a larger pattern of immediate reversals by incoming Presidents whenever there has been a switch in the party in charge. See O'Connell, *supra* note 89, at 473; see also Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 46 (2019) (highlighting the Trump Administration's "attempts to unwind much of Obama-era policy").

252. See, e.g., Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, in THE AMERICAN PRESIDENCY UNDER TRUMP (forthcoming 2021) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747046 [<https://perma.cc/8D9Q-S347>] (noting that the Trump Presidency was "a blur of shattered norms and unprecedented behaviors").

253. See, e.g., Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 10-11 (2021) (noting that even "continuity in government" was threatened by President Trump's "repeatedly and flagrantly" breaching of the "norms of fair dealing and cooperation" that are supposed to follow an election).

254. See generally HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY (Ezra Rosser ed., 2019).

push federal priorities to the local level. Ramping up or scaling back the level of review can mean the difference between grantees taking a federal mandate seriously or not. But this story is incomplete, as can be seen in the ways in which local governments and housing authorities sought to keep in place the heightened standards of the 2015 rule. Cooperative federalism is not a unidirectional set of edicts but a conversation in which grant recipients can make demands of the federal government. Though uncooperative federalism can take the form of complaints about excessive federal demands, local governments and other stakeholders at times push in the opposite direction, asking that the federal government live up to legislative requirements rather than let them slip. Part III explores what resistance to the Trump Administration's efforts to repeal the 2015 AFFH rule reveals about American politics and about the future of fair housing. Looking back on the battles over the 2015 rule, there is cause for both pessimism and cautious optimism; state, local, and civil society resistance was neither entirely a success nor a failure. But the fact the 2015 rule was defended as strongly as it was suggests, at the very least, that FHA's AFFH mandate likely will play more of a role shaping policy and urban development in the next half century than it did over its first fifty years.²⁵⁵

A. *Justifiable Pessimism*

The Trump Administration's success in repealing the 2015 AFFH rule despite resistance from rule proponents arguably reflects the ineffectiveness of institutional efforts to counterbalance a populist President, as well as the nation's weak commitment to fair housing. Candidate Trump's appeal rested in part on being an atypical politician, one who was unfiltered and who pushed a worldview laced with sexism, racism, and xenophobia.²⁵⁶ Though Hillary Clinton famously dismissed

255. See Julian, *supra* note 69, at 1146 ("For almost fifty years, HUD has avoided meeting its responsibility to affirmatively further fair housing. It would be appropriate if that provision of the FHA at long last assumes its primacy in all of HUD's programs and activities.").

256. A selection from a recent article written by a Canadian academic reminds readers of the horrors of the Trump candidacy and is worth quoting at length:

Donald Trump became the 45th President of the United States despite the long-list of disturbing scandals that characterized his 2016 presidential election campaign. Trump launched his political campaign with a speech that was nothing other than racism and xenophobia towards Mexicans. From then onwards, almost everything Candidate Trump said or did entailed elements of racism, xenophobia, Islamophobia, and sexism. He even openly mocked a disabled reporter and also attacked a Gold Star family—Khizr and Ghazala Khan. He made several sexist remarks towards Secretary Hillary Clinton; Megyn Kelly, former host of Fox News; Elizabeth Warren, the Senator of Massachusetts; Justice Ruth Bader Ginsburg, a Supreme Court [Justice]; and Carly Fiorina, a fellow Republican presidential nominee.

Paul Banahene Adjei, *Race to the Bottom: Obama's Presidency, Trump's Election Victory, and the Perceived Insidious Greed of Whiteness*, 25 RACE, GENDER, & CLASS 43, 45 (2018).

many of Trump's supporters as deplorables,²⁵⁷ as President, Trump leaned into a divisive form of politics built around the idea that the United States should return to a better past. That this nostalgic take on the country's history glosses over the systematic exclusion, along race and gender lines, of vast swaths of the population from full participation in the nation's political economy was part of the point. "Make America Great Again" draws upon both nostalgia and the othering of non-whites for its power, something that was well understood by everyone from political commentators to white nationalists.²⁵⁸ Segments of white America, suffering from stagnating wages and believing that affirmative action related social programs allowed minorities to "cut the line," embraced Trump's racism and his antiestablishment approach.²⁵⁹ Afraid of angering pro-Trump voters and happy with the President's tax reform bill and judicial nominees, mainstream Republican politicians largely gave Trump and his supporters a pass for racist or antidemocratic actions.²⁶⁰ A populist demagogue who fanned the flames of racial hatred captured one of the two major political parties in the country and the political establishment ultimately was not up to the task of defending the country's formal and informal democratic institutions from such capture.

257. Katie Reilly, *Read Hillary Clinton's 'Basket of Deplorables' Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016, 12:27 PM), <https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/> [<https://perma.cc/Q9UM-S8JU>].

258. See John Fea, Opinion, *White Evangelicals Fear the Future and Yearn for the Past. Of Course Trump Is Their Hero.*, USA TODAY (July 8, 2018, 6:00 AM), <https://www.usatoday.com/story/opinion/2018/07/08/evangelicals-support-donald-trump-out-fear-nostalgia-column/748967002/> [<https://perma.cc/M6A2-VPWA>] (arguing that the Trump campaign presented the perfect mix of demagoguery, populism, and faux-nostalgic rhetoric to build rapport and support among his base of white conservatives); see also Robert C. Rowland, *The Populist and Nationalist Roots of Trump's Rhetoric*, 22 RHETORIC PUB. AFFS. 343 (2019). For an overview of attempts by political commentators to explain Trump's popularity, see Adjei, *supra* note 256, at 46-56. Though the connection between Trump and white nationalists increased during his presidency, especially in the wake of President Trump's remarks following a white supremacy rally in Charlottesville, even before becoming President, white nationalists were drawn to Trump during his campaign. J.M. Berger, *How White Nationalists Learned to Love Donald Trump*, POLITICO MAG. (Oct. 25, 2016), <https://www.politico.com/magazine/story/2016/10/donald-trump-2016-white-nationalists-alt-right-214388/> [<https://perma.cc/W84A-3XL8>].

259. See ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 221-30 (2016).

260. See, e.g., Paul Krugman, Opinion, *The Banality of Democratic Collapse*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/opinion/republicans-donald-trump-loyalty.html> [<https://perma.cc/H747-H33T>]; Elie Mystal, *Republicans Won't Convict Trump—Because They Won't Convict Themselves*, NATION (Feb. 12, 2021), <https://www.thenation.com/article/politics/republicans-impeachment-cowards/> [<https://perma.cc/3PRT-ZDYM>]; Lucy Diavolo, *Republicans Like Betsy DeVos and Ted Cruz Are Cowards for Empowering Trump*, TEEN VOGUE (Jan. 8, 2021), <https://www.teenvogue.com/story/republicans-cowards-betsy-devos-ted-cruz-empowering-trump> [<https://perma.cc/CWG7-WLJE>]; Peter Wehner, *The Unbearable Weakness of Trump's Minions*, ATLANTIC (Dec. 31, 2020); <https://www.theatlantic.com/ideas/archive/2020/12/cowards-are-destroying-the-gop/617534/> [<https://perma.cc/4JFZ-6R2C>]; see also Rodríguez, *supra* note 253, at 72 (observing the common critique that Trump was "unrestrained either by his own character or by Congress").

Within HUD's Washington, D.C. office, located just south of the National Mall and east of the Martin Luther King Jr. Memorial, resistance was largely ineffectual. True, Ben Carson faced unwelcome media attention after a whistleblower reported that HUD spent \$31,000 on a new dining room set for the Secretary's office.²⁶¹ But resistance, if that is the right word, primarily took the form of individual resignations which made it harder for HUD to administer its programs but did not stop political appointees from gutting the AFFH rule. While resistance from within arguably would have been futile, it is notably hard to find public stories of courageous public servants working at HUD's central office who stood up to the Administration. Instead, the Trump Administration appears to have won a war of attrition against career staff.²⁶² Having suspended enforcement of the AFFH rule early in Trump's term, HUD's leadership team, ultimately, simply declared by fiat the repeal of the 2015 rule. A federal court's restrictive reading of standing requirements needed to challenge agency inaction abetted HUD's repeal efforts and highlighted the limited reach of the public's right to an APA-compliant rulemaking procedure. The top-down institutional players—career staff working in HUD's headquarters and Article III judges—could not, or would not, save the 2015 rule.

Machinations by state and local governments, local housing authorities, and advocacy organizations and housing nonprofits likewise failed to save the 2015 AFFH rule. Though state and local governments, working both independently and collaboratively, put together powerful arguments in favor of the 2015 rule that called on the federal government to live up to the demands of the FHA's AFFH requirement, the Trump Administration chose to ignore those detailed comments. Instead, HUD danced around: suspending the 2015 rule and the associated assessment tool, proposing an alternative rule through the notice-and-comment process, and later revoking the alternative rule in favor of a rule that HUD simply announced by declaration. Other stakeholders had to continually adjust as the floor shifted below them, making it hard to mount a successful defense. Ultimately, Trump succeeded in kicking the fair housing can down the road, protecting the "Suburban Lifestyle Dream" from fair housing-related

261. Glenn Thrush, *Ben Carson's HUD Spends \$31,000 on Dining Set for His Office*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/us/ben-carson-hud-furniture.html> [https://perma.cc/2XDL-LC4G].

262. As a history of the 2015 AFFH rule observes about staffing during the Trump Administration, "Many of the key career staff involved throughout AFFH rule making and implementation became discouraged, and some left the agency altogether." Bostic et al., *supra* note 186, at 84. Attacks on agency staff and deliberate understaffing arguably was part of President Trump's efforts to shrink the federal government and undermine the administrative state. See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 594-609 (2021) (detailing how a President can make agencies less effective through staffing decisions).

demands for the four years he was in office.²⁶³ What progress cities and housing authorities made on fair housing was the result of voluntary efforts as well as state and local legislation in select areas, not federal supervision.

Taking a broader perspective, a pessimistic take on the AFFH battles suggests that state and local government bodies, as well as fair housing community organizations, were not equipped to resist a President intent on breaking things. Despite the fact that Trump and his appointees came to office with much less government experience than prior administrations,²⁶⁴ the country did not know how to protect long-standing norms and laws that are supposed to check the executive branch. Stakeholders, boxed out by the standing requirement, failed to hold the Administration accountable to the APA. True, the foundations supporting the AFFH rule were vulnerable because the 2015 rule was a HUD rule change related to implementation of the FHA rather than being supported by new legislation.²⁶⁵ But the vulnerability of the AFFH rule reflects a larger problem revealed by the Trump Administration's success attacking fair housing: congressional gridlock arguably elevates the significance of executive agency rulemaking, inviting more frequent swings of the policy pendulum.

Put in terms of administrative constitutionalism, the Trump experience suggests that each new administration can quickly act to reverse governance advances that flesh out the significance of constitutional guarantees and/or of long-standing but dormant parts of past civil or political rights legislation. If federal agencies and cooperative federalism's local government partners are unable to moderate change and protect advances, executive power has few internal checks.²⁶⁶ As

263. See Donald J. Trump, *supra* note 30.

264. See Adam Edelman, *Trump Railed Against the 'Deep State,' but He Also Built His Own. Biden Is Trying to Dismantle It.*, NBC NEWS (Feb. 28, 2021, 9:07 AM), <https://www.nbcnews.com/politics/politics-news/trump-railed-against-deep-state-he-also-built-his-own-n1258385> [<https://perma.cc/7NHP-NVTJ>] (discussing how, even after President Trump's departure from office, political appointees with "with no relevant experience" continued to work in the government as a result of Trump's practice of hiring inexperienced individuals loyal to him); see also Michael Dimock & John Gramlich, *How America Changed During Donald Trump's Presidency*, PEW RSCH. CTR. (Jan. 29, 2021), <https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/> [<https://perma.cc/V59V-LGCS>] (reflecting on President Trump's unique lack of governmental or military experience prior to serving as the President of the United States and the similar lack of experience among his appointed officials). On the other hand, perhaps reflective of the lack of experience within the Trump Administration, Trump-era policy had an abysmal win-loss record compared to prior administrations. See *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. INST. FOR POL'Y INTEGRITY, <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/FQ6D-CACA>] (last visited Dec. 31, 2022) (tracking the Trump Administration's record before the courts).

265. See generally Abraham, *supra* note 14 (arguing for a legislative fix).

266. See Freeman & Jacobs, *supra* note 262, at 665 (concluding that structural deregulation can only be checked politically).

Professor Daniel Farber argues, “Bureaucracy may be too prone to inertia, but inertia can also be a needed check on arbitrary or ill-considered actions.”²⁶⁷ President Trump, by suspending and then repealing the AFFH rule early in its rollout, arguably prevented the filing of data-driven and public participation-heavy AFH-compliant reports from becoming part of the country’s unwritten constitutional framework. That he was able to do so through snarky tweets and faced minimal public opposition outside of the fair housing community is a reminder of the country’s continued hesitation when it comes to supporting meaningful enforcement of the FHA. But Trump did more than just attack a single rule, he actively worked to sabotage HUD and other agencies. And, at least when it came to HUD under Secretary Carson, there are few signs that the federal bureaucracy offered much by way of resistance.²⁶⁸

B. Cautious Optimism

Just as some degree of pessimism regarding unchecked executive authority is justified in light of the fate of the 2015 AFFH rule during the Trump Administration, there is also room for cautious optimism when it comes to the future of fair housing. The 2015 AFFH rule addressed a need felt by some states and localities for additional federal oversight of local fair housing efforts. Public comments pushed the federal government to act on its cooperative federalism obligations under the FHA. Though the Trump Administration was promising less demanding reporting, select local jurisdictions and housing authorities saw value in both protesting the proposed changes and in voluntarily submitting reports based on the 2015 rule.²⁶⁹ Resistance by state and local governments, local housing authorities, and advocacy

267. Daniel A. Farber, *Presidential Administration Under Trump* 37 (Aug. 8, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591 [<https://perma.cc/WB89-PNKT>].

268. It is worth acknowledging the possibility that HUD insiders may in the future offer an alternative account, one that details forms of resistance largely hidden from public view. The argument in this Article does not turn on the nature or extent of resistance at the federal level. Indeed, a full account of resistance at the federal level would look beyond actions by HUD staff and would consider a broader set of federal actors. For example, some members of Congress spoke out against the Administration when HUD rescinded the AFFH rule. *See* Press Release, U.S. House Comm. on Fin. Servs., Waters, Nadler and Clay Slam Trump Administration Decision to Terminate Affirmatively Furthering Fair Housing Rule (July 27, 2020), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406802> [<https://perma.cc/F5Y6-H7MJ>]. Though fully fleshing out the nature of federal level resistance by politicians and agency staff is beyond the scope of this Article, the author thanks Professor Jessica Bulman-Pozen for raising this important issue.

269. *See* Johnson, *supra* note 66, at 1168 (noting that “some localities realized that there were benefits to the AFH process” and continued implementing the 2015 rule even though no longer required to do so).

organizations and housing nonprofits to the Trump Administration's efforts to gut the AFFH requirement could be a sign that inaction when it comes to fair housing is no longer an acceptable default position for the federal government.

The United States, spurred on by the Black Lives Matter movement (and the rise of white nationalism), is arguably at an inflection point when it comes to matters of race.²⁷⁰ The continued unwillingness on the part of whites to embrace integration as well as the pernicious present effects of past discrimination ensures that race plays an outsized role in shaping the urban environment. Demographics matter to regions, cities, and neighborhoods, and integration will require the nation grapple with the promise of the FHA. The FHA is about more than just race, and the pace of change when it comes to LGBTQ+ rights only adds to the pressure on jurisdictions to do more when it comes to fair housing.²⁷¹ A hands-off approach by the federal government not only makes it difficult for even well-meaning localities to make progress, but it also amounts to a denial of the federal role envisioned by the FHA.

Even with the Biden Administration bringing back much of the AFFH rule, things are not going to change overnight. It has been more than fifty years since the Kerner Commission first warned of "two Americas" and divisions remain.²⁷² But there is space for muted optimism. The 2015 AFFH rule provides "a platform to build on."²⁷³ Politics based on white resentment enjoyed four years in power under President Trump²⁷⁴ but faces increasingly difficult demographic facts.²⁷⁵ Assuming the United States remains a democracy, politicians on both sides of the aisle are likely to have to pay increasing attention to racial separation and various forms of housing subordination.²⁷⁶ This will not

270. See Joshua S. Sellers, Essay, *Race, Reckoning, Reform, and the Limits of the Law of Democracy*, 169 U. PENN. L. REV. ONLINE 167, 167 (2021) ("It is a moment of racial reckoning. It is not the first, it will not be the last, and it assures no restitution. But it is, nonetheless, a moment.").

271. See generally Kazis, *supra* note 40.

272. See KERNER COMMISSION REPORT, *supra* note 51, at 1 ("Our nation is moving toward two societies, one black, one white—separate and unequal.").

273. Bostic et al., *supra* note 186, at 91.

274. See Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 POL. SCI. & POL. 528 (2018) (finding that racial resentment and anti-immigrant sentiment played significant roles in decisions to vote for Trump).

275. Voter repression (hopefully) can only go so far. See Ronald Brownstein, *Why Republican Voter Restrictions Are a Race Against Time*, CNN (Mar. 23, 2021, 5:19 PM), <https://www.cnn.com/2021/03/23/politics/voting-rights-republicans-bills-demographics/index.html> [<https://perma.cc/S56V-5EJY>] (connecting changing demographics favorable to Democrats with Republican efforts at restricting the vote).

276. But see Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/UUQ5-SAT9>] (discussing voter suppression's effect on African-American and Latino citizens).

be true everywhere. Partisan redistricting is likely to keep some areas fairly homogenous, but it is hard to be a leader in most metropolitan regions and avoid completely questions of integration and desegregation.

Progressive state and local leaders may have failed to get the result—preservation of the 2015 AFFH rule—they wanted during the Trump Administration, but they helped create the conditions necessary for the Biden Administration to “build upon the momentum” of earlier efforts involving the rule.²⁷⁷ Through public comments, AFFH rule-compliant reports, and litigation, state and local government entities, as well as the larger fair housing community, signaled to future administrations that many stakeholders would support more rigorous enforcement of the FHA’s second prong.²⁷⁸

Resistance need not always be splashy. Few would have noticed if a group of state attorneys general did not submit a brief attacking the Trump Administration for repealing the 2015 AFFH rule. But even in the final year of the Trump presidency, the state and local governments, local housing authorities, and the fair housing community kept up the pressure, resisting repeal of the 2015 AFFH rule as best they could. It was an admirable fight by these grant recipients and other stakeholders, and one that contributed to HUD’s current renewed focus on federal fair housing oversight.

IV. INSIDER RESISTANCE AND COOPERATIVE FEDERALISM

Shifting from questions about the future of housing segregation, it is worth considering lessons about the nature of federal-state and federal-local relations that can be drawn from the AFFH fight. Cooperative federalism both facilitated and channeled the ways in which state and local government bodies and nongovernmental organizations resisted the Trump Administration’s efforts to gut the 2015 AFFH rule.²⁷⁹ Process requirements associated with administrative rulemaking provided avenues of dissent, allowing particular states and localities to recognize that their objections were not unique. Notice-and-comment processes, as well as grantee reporting mechanisms, provided both space for objections to be memorialized and official platforms for expressions of dissent. The agency tasked with reviewing such expressions, HUD, thus not only provided the space for such resistance but also made resistance almost routine. Federal structures

277. Haberle, *supra* note 151, at 211.

278. As Professor Gerken observes, uncooperative federalism “help[s] us accommodate partisan competition and tee up national debates. We aren’t forced to debate issues on an impossibly large national scale, but are rehearsing those battles on a smaller scale in an iterative fashion and in a myriad of political contexts.” Gerken, *supra* note 23, at 1719.

279. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 498-99 (2012) (“The federal executive may be checked from within its own domain. The fact that the federal executive’s broad mandate requires co-administration with the states positions the states to challenge federal executive power . . .”).

designed to facilitate the multilayered governance conversations upon which cooperative federalism is built also helped surface uncooperative federalism's governance tensions.

Throughout his term in office, President Trump, together with other Republican politicians, frequently complained that the bureaucracy was working against his Administration.²⁸⁰ The question raised by such complaints was who should be in control, the President or the bureaucracy? This was not a new question. Prior to being elevated to the Supreme Court, then-Professor Elena Kagan wrote an influential article celebrating "presidential administration," the rising power of the President to control agency actions and regulations.²⁸¹ As Kagan's work showed, Presidents have assumed ever greater control over the federal government's complicated apparatus.²⁸² Seen in this light, President Trump's attacks on bureaucrats and career agency employees were simply a call on Washington to respect the presidential prerogative. Yet Kagan's seminal article, even as it extolled the virtues of presidential administration, also acknowledged that "presidential control co-exist[s] and compete[s] with other forms of influence and control over administration, exerted by other actors within and outside the government."²⁸³ President Trump's rhetoric and bullish manner force a reconsideration of both presidential administration's value²⁸⁴ and of the ability of state and local governments to resist a strong executive from within the lattice work of cooperative federalism.

Missing from most writing on administrative law is an appreciation of the ways cooperative federalism pushes presidential administration outward, to spaces well beyond the D.C. beltway.²⁸⁵ An exception to such oversight can be found in Professor Jessica Bulman-Pozen's argument that federalism positions states as sites of continuity and

280. President Trump framed his complaints in terms of the so-called "deep state," a pejorative label for the federal bureaucracy. *See generally* MIKE LOFGREN, *THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT* (2014) (containing an extended discussion of the "deep state" by the author who coined the term); *see also* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655-56 (2018) (defining "the deep state" as "the vast expanse of federal administrative agencies," "the personnel entrusted with the day-to-day operations of those agencies," and "members of civil society who play any number of key, supporting, and contrarian roles when it comes to matters of administrative design, implementation, and oversight").

281. *See generally* Kagan, *supra* note 2.

282. *Id.* at 2248-49.

283. *Id.* at 2250.

284. *See* Kovacs, *supra* note 144, at 104 (describing Elena Kagan's defense of presidential administration, when viewed with the benefit of hindsight, as "an apologia for the United States' continuing slide toward authoritarianism").

285. The meaning of federalism itself is murky: "It seems to be everywhere, but it is hard to pinpoint exactly what it is, what it is for, and if it has been successful." Abbe R. Gluck & Nicole Huberfeld, *The New Health Care Federalism on the Ground*, 15 IND. HEALTH L. REV. 1, 20 (2018).

contestation when it comes to presidential administration.²⁸⁶ Reliance on cooperative federalism is a design feature of many of the most significant presidential policy initiatives, meaning that states can both “extend the reach of presidential administration . . . and limit[] any particular [P]resident’s agenda.”²⁸⁷ On the one hand, Bulman-Pozen observes that “state policies may outlast any [P]resident’s tenure, conferring resilience that federal agency action frequently lacks.”²⁸⁸ On the other, “[i]ncorporating the states into understandings of presidential administration reveals . . . a set of actors who may oppose the [P]resident’s choices.”²⁸⁹ Though cooperative federalism imagines states and the federal government working in tandem, in practice their interests can diverge: “states may withhold their cooperation” from a President pursuing objectives they do not support.²⁹⁰ As the fights over the 2015 AFFH rule show, Bulman-Pozen’s arguments can be taken a step further. Just as states complicate notions of top-down presidential administration,²⁹¹ so too can regions, localities, federal grantees (such as housing authorities), and civic society organizations operating well below the state level. Cooperative federalism extends the reach of administrative law to every level of society and provides local actors with internal administrative levers that can be used to resist federal regulatory changes that conflict with state values.²⁹²

As can be seen in the quality of the public comments submitted in response to the Trump Administration’s efforts to water down the AFFH requirement, administrative processes provide space for deep engagement with the ways federal rules impact local communities. They also can force state and local partners to acknowledge that, on some issues, federal oversight and enforcement can benefit a local community rather than being a burden. The public nature of many of the communications between local government bodies and the federal government, whether through public comments or mandatory grant-related reporting, means that advocacy organizations have an opportunity to judge the expressed commitment of local politicians to fair housing. Administrative processes also give local nonprofits the chance to pressure federal agencies and to share their objections to changes in federal direction with others in the fair housing community. Though

286. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 298 (2019).

287. *Id.* at 271-72.

288. *Id.* at 298.

289. *Id.*

290. *Id.* at 309.

291. See Gerken, *supra* note 23, at 1700 (“[N]either the state nor the federal government presides over its own empire. . . . Overlap and interdependence are the rule, not the exception.”).

292. Livermore & Richardson, *supra* note 251, at 54 (“[S]tates use the flexibility provided by the statutory scheme to deviate from federal policy preferences.”).

federalism is ordinarily thought of as a top-down, federal-to-state relationship, it instead involves both communication that runs all the way down to sub-local government bodies and civil society groups, and communication that flows all the way back up through those same processes.²⁹³

There is a dark side to the all-the-way down/up characteristic of federalism's grant-based federal-state and federal-local relationships. Administrative processes may blunt sharp disagreement about the future of urban space and the relative importance of a federal commitment to fair housing, converting strongly felt dissent into carefully prescribed conversations. State and local government objections become merely conversational talking points in an ongoing relationship with the federal grantee. Since neither states nor localities are well positioned to walk away from underlying federal block grants through which federal priorities are pushed downward, dissent within the relationship risks being diluted, with objections narrowly tailored so as not to threaten the flow of money.²⁹⁴ Local politics or even party loyalty may demand symbolic resistance to particular policy changes at the federal level,²⁹⁵ but realism interjects to ensure fights stay within cooperative federalism's institutional structure. Rather than forcing the federal administrative agency to rethink a policy change, cooperative federalism can dampen state and local resistance into little more than petty political posturing done in full anticipation of defeat.

The place of resistance within cooperative federalism's structure necessarily differs across subject matter and administrative agency. Outright obstructionism or disregard of federal requirements—best exemplified perhaps by state resistance to the extension of civil rights protections to African Americans from the 1950s to the 1980s—lies at one end of the spectrum. Similarly, it seems appropriate to apply the “uncooperative federalism” label to state efforts to thwart federal immigration policy and to derail core components of the Affordable Care Act. But it is harder to definitively categorize contests over the enforcement of the FHA's long-dormant AFFH requirement and similar battles over midlevel federal rules in other areas. On the one hand, resistance and dissent, which can include accusations that a federal

293. See Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and the “New Process Federalism,”* 105 CALIF. L. REV. 1739 (2017) (making a similar point but in an argument about state standing in suits against the federal government); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1997 (2014) (arguing that the state role “within federal legislation is a primary vehicle through which states have influence on major questions of policy”).

294. Just as state and local governments may depend on federal funding, so too the federal government “depends on [states] to administer its programs.” Bulman-Pozen & Gerken, *supra* note 4, at 1266; see also Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361 (2020) (discussing the ways federal funding channels and redirects disagreements on both sides of the relationship).

295. For more on the effect of political loyalties and party affiliation on federalism, see Bulman-Pozen, *supra* note 6.

agency is not fulfilling its statutory obligations, feels highly charged and “uncooperative.” Especially when such dissent leads to contrary legislation at the state or local level, such expressions of dissent can signal ruptures in the relationship between local partners and the federal bureaucracy.

On the other hand, administrative processes may serve to institutionalize and diminish state and local resistance.²⁹⁶ If the federal government controls both the permissible paths for dissent and the reach of state and local resistance, and if central administrative agencies can choose to ignore internalized dissent, uncooperative federalism seems an inaccurate way to characterize what is happening.²⁹⁷ Instead, disagreements that take place largely within the structural space created to capture such objections are less examples of uncooperative federalism and more reflective of the cooperative federalism’s flexibility and resiliency. Federalism’s reliance on state and local government bodies to implement federal priorities would not work unless there were mechanisms for parties to resolve tension.²⁹⁸ Allowance for difficult conversation, even heated disagreement, arguably strengthens rather than weakens cooperative federalism. It also may empower Presidents and their political appointees to be more ambitious when rewriting federal rules or changing federal policy vis-à-vis state and local partners.

While scholarship on uncooperative federalism has focused on the unique power of insider resistance or dissent, the internalization of resistance is not without cost. When it comes to the 2015 AFFH rule, insider resistance may have helped preserve elements of the rule, setting the stage for its partial return following President Trump’s reelection defeat.²⁹⁹ But the Trump Administration was successful in delaying the rollout of the rule and in forcing the fair housing community to focus some of its limited resources on extensive public comments and litigation involving a regulatory fight instead of on more grounded responses to ongoing segregation. Despite the fact that the 2015 rule was the first effort in half a century to add substance and meaning to the

296. See Gerken, *supra* note 11, at 1383 (“Dissent that takes place in the interstices of federal policy will also look quite different from dissent that takes the form of voice. Agency cedes to dissenters [sic] genuine power—the power to make national policy rather than merely complain about it. But it also requires that dissenters pour their complaints into a fairly narrow policymaking space.”).

297. As Professors Jessica Bulman-Pozen and Heather Gerken provocatively ask, “[W]hy would we think that a state could successfully challenge the national government when it is playing the role of servant and ally?” Bulman-Pozen & Gerken, *supra* note 4, at 1265.

298. See Gerken, *supra* note 11, at 1371 (“[I]t’s useful to have institutionalized channels for dissent within federal administrative agencies.”).

299. Writing in another context and using a case study involving climate change regulation, Professor William Buzbee similarly argues that “a federalism hedge—the retention of potential regulatory roles for both federal and state regulators—will create incentives for and help preserve a regulatory web able to stand the vagaries of politics.” William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1057.

AFFH prong of the FHA, resistance by state and local government bodies, as well as by advocacy organizations, was only marginally successful.³⁰⁰ The nation as a whole remains largely unwilling to impose affirmative fair housing obligations on local jurisdictions.

If federal agencies can engage in the sort of Hail Mary rulemaking that happened at the tail end of the Trump Administration's term without suffering rebuke or punishment, disregard of APA process requirements and rulemaking by declaration might increasingly become a tool of presidential administration.³⁰¹ Cooperative federalism—even cooperative federalism that allows for and creates space for tension across levels of government—arguably relies upon interactions that are premised on good faith and a shared commitment to higher ideals, or at least some level of consistency.³⁰² Where good faith is lacking and governance devolves to little more than political posturing, the relationships between the federal government and states and the federal government and local governments, upon which cooperative federalism depends, break down. When it comes to the AFFH rule disputes, the center held. Cooperative federalism proved sufficiently robust, allowing for enough flexibility, local deviation, and even dissent.³⁰³ But the fissures and tensions involved in cooperative federalism's relations are structural and will not just go away simply because of changing political winds.

CONCLUSION

It is neither an exaggeration nor a partisan attack to observe that President Trump fundamentally challenged the country's governance and political norms.³⁰⁴ He tried to undermine not only those democratic

300. As Professor Palma Joy Strand notes, "the popular resonance of the law that is AFFH remains unsettled." Palma Joy Strand, *This Is the House that Law Built: A Systems Story of Racism*, 58 SAN DIEGO L. REV. 811, 840 (2021).

301. Norms and continuity are provided in part by legislatively created requirements tied to the APA, but the Trump Administration also broke what Professor Daphna Renan called the "deliberative-presidency norm," a broader unwritten norm which "requires a considered, fact-informed judgment in certain decisional domains." Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2221 (2018).

302. As Professor Blake Emerson observes, departmental processes, such as those used by HUD in finalizing the 2015 rule, "help to ensure that power is exercised in a regular, consistent, and reasoned fashion." Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REGUL. 90, 94 (2021); see also Gerken, *supra* note 11, at 1373 ("Minorities who exercise agency, then, are acting much like members of the loyal opposition; they share the majority's basic commitments but differ as to how those commitments ought to be carried out. And while they are, in fact, challenging the majority, they are also serving it by ensuring that the polity is thinking through its decisions and taking into account all the relevant concerns.").

303. See Gerken, *supra* note 5, at 9 (highlighting "the integrative role that discord and division can play in a well-functioning democracy").

304. Only one year into Trump's term, David Smith, the Washington Bureau Chief for The Guardian, a leading UK newspaper, wrote to subscribers, "Reporting on the strangest

values that ensured peaceful transitions of power,³⁰⁵ but also basic notions of equality and shared community standards. Resistance to Trump was both inevitable and appropriate. The submission of negative public comments and the decision by grant recipients to follow discontinued reporting requirements are not flashy forms of resistance, but they can nevertheless amount to resistance. By acknowledging such examples of bureaucratic protest and recognizing the value of dissent even when the federal government is not going to listen, it is possible to better understand the nature of the country's troubled commitment to fair housing and of cooperative federalism itself.

This Article pulls together ways in which local and state governments, public housing authorities, and civic organizations resisted efforts to weaken federal fair housing reporting requirements. Fights over the AFFH rule were significant to fair housing advocates and Trump's attack on fair housing was done to score political points, yet there exists the danger that the history elevated by this Article will be treated as of interest only to those who care about housing and segregation. But the lessons from the fight to preserve the 2015 AFFH rule extend further. Channels of communication within the administrative state—between the federal government and actors at the state and local level—create space for state and local government bodies, as well as community organizations all the way down, to resist problematic presidential policy reversals.

This Article highlights four forms of administrative resistance: use of the notice-and-comment process as a form of dissent, pursuit of process-based litigation to challenge a new administration, submission of reports that continue to rely on standards no longer favored by the reviewing agency, and even passage of stringent state-level regulation inspired by the prior federal rule. Resistance can take other forms, of course, but notably, these four forms of resistance are both local and internal. Cooperative federalism's reliance on block grants and local

[P]resident in American history is to witness the awesome, awful spectacle of a 240-year-old democracy and its institutions creaking and bending under a freak storm." Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 433, 434 (2019) (quoting portions of Smith's November 8, 2017 letter).

305. Though the final accounting of the "big lie"—the false narrative that Trump won the 2020 election—is not complete, in part because the former President and members of the Republican Party continue to push the lie, enough is known to conclude that Trump sought and continues to seek to undermine the democratic process. See generally Doug Bock Clark et al., *Building the "Big Lie": Inside the Creation of Trump's Stolen Election Myth*, PROPUBLICA (Apr. 26, 2022, 5:00 AM), <https://www.propublica.org/article/big-lie-trump-stolen-election-inside-creation> [<https://perma.cc/WR35-PYL6>]; David E. Sanger, *Trump's Attempts to Overturn the Election Are Unparalleled in U.S. History*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/11/19/us/politics/trump-election.html> [<https://perma.cc/P49Z-F72K>]; MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION (2021), <https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf> [<https://perma.cc/2JAJ-ZAXU>].

administration to accomplish federal objectives opens up space for local institutions to challenge federal policy changes through largely administrative processes.³⁰⁶ Battles over whether the AFFH requirement will finally be enforced show the role state and local governments can play when it comes to resisting regressive policy changes. This may be the era of presidential administration, and in some contexts cooperative federalism can further the reach of the federal government, but cooperative federalism can also facilitate and channel state and local resistance.³⁰⁷

306. Gerken, *supra* note 11, at 1364 ("Cooperative federalism is thus paired with uncooperative federalism. Cooperative localism is paired with local resistance." (footnote omitted)).

307. See Bulman-Pozen, *supra* note 286, at 307 ("[P]residential reliance on the states is not purely president-aggrandizing; decentralization may be both a strategy for and also an antidote to the concentration of executive power.").