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Federal housing regulations reveal how the government has embedded racist policies in the administrative state.

America's summer of racial reckoning has led to increased attention on proposals to provide reparations to Black Americans.

Reparations discussions typically concern securing compensation for slavery. The

racial harm caused by the administrative state is generally less of a focus, even though racial exclusions and discrimination in 20th-century administrative programs helped shape contemporary disparities in housing, wealth, and opportunity that endure today. A provision of federal housing law provides a window into the roots of racial harm enacted through administrative state programs, as well as the limits of administrative law as a tool for repairing this harm.

The Fair Housing Act prohibits discrimination in the provision of housing and requires that the federal government and its grantees "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the Act. In 2015, the Obama Administration issued the Affirmatively Furthering Fair Housing (AFFH) rule that requires state and local grantees to take a set of specific steps to assess and address barriers to fair housing within their communities.

The affirmatively furthering provision of the Fair Housing Act and the 2015 rule were likely obscure to all but fair housing specialists until July 2020, when the U.S. Department of Housing and Urban Development (HUD) abruptly withdrew the 2015 rule, and President Donald J. Trump started tweeting about this action. "Your housing prices will go up based on the market, and crime will go down. I have rescinded the Obama-Biden AFFH Rule. Enjoy!" It is perhaps too generous to cast these tweets as a "dog whistle," rather than an audible racist appeal to "all of the people living their Suburban Lifestyle Dream."

The focus on AFFH is also consistent with an explicit goal of the Trump Administration to address the perceived excesses of the administrative state by encouraging repeals of what it deems to be costly and unnecessary regulations. When President Trump assumed office in 2017, AFFH became an immediate target, and in 2018 HUD suspended the AFFH regulation, claiming that its requirements were unclear and burdensome for grantees. Led by HUD Secretary Ben Carson, who once characterized the 2015 rule as "social-engineering," HUD launched a notice-and-comment process to revise and weaken the rule, before opting in July 2020 for a total rescission.

But the history of AFFH did not start in 2015. Nor did race-conscious federal

regulation of housing, lending, and neighborhoods.

AFFH was the U.S. Congress's attempt in 1968 to use the federal administrative state to correct the federal administrative state's role in shaping racial segregation. The current discourse over its repeal obscures that history. Furthermore, casting AFFH as too intrusive tracks the history of AFFH: attempts to enforce the rule are deemed too strong, leaving a regulatory apparatus too weak to address the racial devastation that the administrative state helped cause.

To understand AFFH requires understanding first the federal administrative state's role in catalyzing and helping to maintain an infrastructure of racial segregation in access to housing in the 20th century. This infrastructure included the New Deal-created Federal Housing Administration (FHA) refusing to insure mortgages in or near Black neighborhoods—a practice known as "redlining"—alongside the FHA's subsidization of home loans to build exclusively white, suburban neighborhoods. Federally funded segregated public housing intensified racial and poverty concentration, and federally funded highways made whites-only suburbs possible.

This infrastructure involved federal urban renewal programs that decimated Black communities without adequate compensation in the name of revitalization. The federal government did not invent housing segregation—rather, state and local governments, private developers, realtors, banks, and homeowners are key players in the story. But federal policy and funding played a significant role in cementing that structure.

The current attempt to frame AFFH as intruding on a non-discriminatory baseline, in which the state is absent, depends on obscuring this history. When Douglas Massey and Nancy Denton recounted this history in the now-classic *American Apartheid: Segregation and the Making of the Underclass* in 1993, they described segregation—its origins and its persistence—as the "forgotten factor" in explaining continuing racial and socio-economic disparities. And nearly 25 years later, Richard Rothstein's *The Color of Law* showed the "forgotten" legal infrastructure that maintains segregation through the operation of federal rules and subsidies.

This forgetting or obscuring is perhaps not unique to housing; it may be how we grapple with our racial history more generally. James Baldwin famously once wrot

that white America was "trapped in a history which they do not understand." The same kind of forgetting and obscuring also occurs in discussions surrounding New Deal and other government programs that progressives tend to support. Indeed, commentators contentiously debate the extent of the federal role and how much to blame New Deal programs for housing segregation.

But part of the forgetting of the federal role in housing segregation may be distinctive to how we understand the administrative state and to how administrative bureaucracy operates. The federal role in housing administration, which includes funding, subsidizing, and insuring, is obscured in deference to local prerogatives. This deference to local policies hides the federal role relative to those of state, local, and market actors. In this way, the obscuring of the administrative state's role in housing segregation may operate as a convergence of our propensity to erase our history of racial discrimination more generally and a version of the "submerged state" that Suzanne Mettler has described in the context of social welfare programs, in which Americans are blind to the impact of federal programs in the subsidization of their lives.

Yet not everyone was blind to the history. Civil rights reformers advocated to include the AFFH provision in the Fair Housing Act in 1968, recognizing the federal contribution to segregation. AFFH's congressional supporters defined this fair housing duty as requiring the federal government to promote non-discrimination and integration through its administration—including policy design, spending, and rulemaking—of all federally funded programs. The 2015 rule was the strongest attempt to specify requirements that grant recipients assess the barriers to integrated and open housing in their communities and take steps to address these barriers.

In the past, I have celebrated AFFH's statutory obligation as a federal attempt at remedying its role in creating racial inequity. And indeed AFFH is a remarkable legislative feat: a rare acknowledgement in American law of complicity for racial inequity and the creation of an affirmative duty on federal actors to take steps to make amends.

But today, as the strongest effort to enforce the rule is repealed, AFFH's built-in limitations have become more apparent. The remedy AFFH contemplates is forwar

looking, placing requirements on federal spending. The provision also makes the federal administrative state the main enforcer of its guarantees. The federal government's efforts to enforce the provision through spending cut-offs or by imposing more precise constraints on federal grantees have been spotty at best. Indeed, most gains in enforcement have occurred after private suits against the federal government and public housing authorities—including most recently the *qui tam* lawsuit against Westchester County, New York for fraudulently certifying that it was meeting AFFH's regulatory and statutory requirements. The Westchester case led to the 2015 rule, which in turn led to HUD's increased oversight of fair housing plans and adoption of concrete changes by some jurisdictions.

Yet it is hard to imagine that the 2015 administrative requirements—which a leading fair housing lawyer described as "long on 'carrots' but painfully short on 'sticks'" —alone can constitute a remedy.

This reality might suggest abandoning the AFFH regime entirely—not for the reasons suggested by the current Administration, but because AFFH is necessarily too weak to repair the harm of housing discrimination.

But in my view, the AFFH framework should not be abandoned. The federal government will always spend, insure, and subsidize. Without affirmative civil rights constraints, this spending can compound racial inequalities. The AFFH rule should be stronger, with more specific requirements that address the continuing barriers to housing equity, as some commentators have suggested. And yet, the Trump Administration's most recent attacks make plain that AFFH can no longer be seen as a remedy for housing inequities and segregation caused by the administrative state.

Federal housing policy will need additional and specific repair. The racial harms of the administrative state in housing should be part of any serious discussion of reparations, and the remedy should involve monetary grants or grants of land previously denied to Black Americans. The details of course will still need to be sorted, but scholars and advocates have begun developing concrete policy proposals along these lines. Strengthening the AFFH rule is only the beginning.

This essay is part of a series entitled *Racism, Regulation, and the Administrative State*.

Tagged: Affirmatively Furthering Fair Housing, Department of Housing and Urban Development, deregulation, Discrimination, Fair Housing Act