

# ARTICLE

## THE SECRET HISTORY OF THE FAIR HOUSING ACT

JONATHAN ZASLOFF\*

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*The dominant scholarly consensus holds that the Fair Housing Act of 1968 was “toothless” and devoid of enforcement; in the words of the pre-eminent scholars of U.S. housing segregation, it was “intentionally designed so that it would not and could not work.” This Article demonstrates that this consensus is wrong, and that in fact the Fair Housing Act contained ample enforcement mechanisms. Moreover, it reveals the “secret history” of the Fair Housing Act, namely, that it passed in 1968 not through congressional perfidy, but rather through a classic political deal between President Lyndon Johnson and Senate Republican Leader Everett Dirksen, in which a weakened Dirksen agreed to support fair housing to preserve his leadership position and very probably his Senate seat. These conclusions force us to fundamentally reconsider the history of housing discrimination and segregation in the United States since the passage of the Act, and rethink how housing integration might be achieved in the future.*

### I. INTRODUCTION

More than four decades after Congress first enacted it, the Fair Housing Act (“FHA”), or Title VIII, remains the poor stepchild of federal civil rights legislation. A Yale Law School conference held in 1988 to mark the twentieth

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\* Professor of Law, UCLA School of Law. B.A., Yale University, 1987; J.D., Yale Law School, 1993; Ph.D., Harvard University, 2000. For helpful comments and suggestions, I am particularly indebted to Rick Sander and Carol Rose.

eth anniversary of the law revealed a broad consensus of academics and practitioners concluding that the Act was a “failure” that “has not met the high expectations its supporters had for it.”<sup>1</sup> More recently, researchers have pointed out that Black communities across the country remained isolated from the rest of society throughout the 1970s, and that segregation remains an intractable problem.<sup>2</sup> Some have gone so far as to suggest that the Fair Housing Act actually impeded the housing rights movement by sending the premature message that the problem had been solved.<sup>3</sup> Other writers have called the Act empty and underfunded to the point of being “toothless.”<sup>4</sup>

What’s more, everyone knows the culprit: Congress itself. Facing an anti-civil rights backlash in the wake of urban riots in 1966 and 1967, legislators resisted doing anything about housing segregation, and only relented in the wake of Martin Luther King’s assassination.<sup>5</sup> Even then, their product was tepid and weak. Senate Republican Leader Everett Dirksen, who had provided Lyndon Johnson (“LBJ”) with the critical votes to break Southern filibusters against the Civil Rights Act of 1964 and the Voting Rights Act, agreed to the Fair Housing Act only if it could not be enforced. Dirksen insisted on removing administrative enforcement from the bill, and also stripped the Department of Housing and Urban Development (“HUD”), the agency most prominently responsible for enforcement, of the power to bring its own lawsuits.

The critics allege that for Dirksen and the other Fair Housing Act authors, this result was not a bug, but a feature. Douglas Massey and Nancy Denton, authors of the standard and celebrated text on American housing segregation, assert that “residential segregation followed directly from inherent weaknesses that were built into the act as [the] price of passage. Although the country had its fair housing law, *it was intentionally designed*

<sup>1</sup> Guido Calabresi, *Preface* to ROBERT G. SCHWEMM, *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 7, 7 (Robert G. Schwemm ed., 1989).

<sup>2</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 195 (1993).

<sup>3</sup> See Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 37 (2001) (“It may even be opined that the Fair Housing Act presents a smoke screen behind which lawmakers can hide, pretending the consequences of our racism are being dealt with, while in truth the separation of races remains unchallenged.”); cf. CAMILLE ZUBRINSKY CHARLES, *WON’T YOU BE MY NEIGHBOR?: RACE, CLASS, AND RESIDENCE IN LOS ANGELES* 39 (2006) (“In addition to ending legal housing market discrimination, the Fair Housing Act marked the end of public discussion of residential segregation . . .”).

<sup>4</sup> CLAY RISEN, *A NATION ON FIRE: AMERICA IN THE WAKE OF THE KING ASSASSINATION* 215 (2009).

<sup>5</sup> See, e.g., CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* 87 (2006) (“Most observers agree that King’s death was critically important in gathering sufficient support for the 1968 fair housing legislation.”); JOHN GOERING, *Introduction and Overview* to *FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS* 1, 9 (John Goering ed., 2007) (arguing that the Fair Housing Act did not transfer sufficient authority to the federal government partially “because a motivation for the law’s enactment was major urban riots following the murder of Martin Luther King on April 4, 1968.” (citation omitted)).

so that it would not and could not work.”<sup>6</sup> Nothing was left, so the story goes, but private litigation. As Mara Sidney argues, “[t]he price blacks paid for legislation prohibiting housing discrimination was the burden of enforcing it themselves.”<sup>7</sup> The most comprehensive modern account of civil rights activism in the North agrees, concluding that the FHA was “largely a symbolic gesture” because Congress simply “defanged it.”<sup>8</sup>

The thesis of intentional failure, however, cannot account for the most basic aspects of the FHA itself. It cannot explain the origins of the FHA, because it rests on an assumption that is demonstrably false. As this Article will demonstrate, while the Fair Housing Act lacked some of the enforcement mechanisms contained in Title VII of the 1964 Civil Rights Act, it contained ample authority for vigorous prosecution from the very beginning—authority that received quick blessing and augmentation from federal courts. There was no reason for its drafters to expect it to be a hollow victory, and as the record shows, they did not do so.

But that, then, reopens the question: how did the Act become law in the first place? The critics are at least correct in pointing to Everett Dirksen as central to the story. But the Senate Minority Leader’s actual reasons for supporting fair housing were far different from what the standard story suggests. There was indeed a deal between Dirksen and President Lyndon Johnson. That deal, however, was concluded on Johnson’s terms, not Dirksen’s. Uncovering the structure of that deal, and seeing the actual power of the original Fair Housing Act, forces us to rethink the history, trajectory, and nature of fair housing in the United States.

This Article proceeds as follows:

Part II demonstrates that far from being a “defanged” or “toothless” law, the Fair Housing Act contained powerful enforcement provisions that could be used in severely reducing housing discrimination. Such a demonstration, because it explodes the historiographical consensus about the law, then requires an explanation of how the law passed in the first place.

Part III considers what might be called the political “pre-history” of the Fair Housing Act, showing how even at the height of the Great Society, President Johnson failed to persuade Congress to outlaw housing discrimination as it had employment and public accommodations discrimination. This failure stemmed in no small part from Dirksen’s steadfast opposition to it, and raises the question of how antidiscrimination law could pass in 1968, when Johnson and liberalism were in a comparatively weakened condition.

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<sup>6</sup> MASSEY & DENTON, *supra* note 2, at 195 (emphasis added); see also CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960, at 47–50 (2005).

<sup>7</sup> Mara S. Sidney, *Images of Race, Class, and Markets: Rethinking the Origin of U.S. Fair Housing Policy*, 13 J. POL’Y HIST. 181, 204 (2001).

<sup>8</sup> See THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 423 (2008) (“[T]he Fair Housing Act . . . was largely a symbolic gesture. While it forbade discrimination in housing by race, creed, national origin, or sex, there was one hitch. To win Republican support, the bill’s authors had defanged it. Title VIII left it to private individuals or advocacy groups to file suit against housing discrimination.”).

Parts IV and V analyze the political position of Dirksen during the 1967–68 session, and reveals his weakness both in Washington and back home in Illinois. He not only stood in danger of losing the leadership of the Republican caucus, but he also risked losing his Senate seat altogether in what promised to be an uphill 1968 re-election campaign.

Part VI examines the intricate deal-making in the Senate that generated the eventual text of the Fair Housing Act. It demonstrates that the Senate had deadlocked over the Act, unable to move forward because of a Southern filibuster, but unable to table the legislation because of fierce resistance from Senate liberals. It then sets forth the details of the deal reached by LBJ and Dirksen; I suggest that the President arranged for Dirksen to have a weak opponent in the 1968 general election in exchange for support of fair housing. Dirksen also supported the measure in order to maintain control of the GOP caucus. Finally, the Article presents reasons why Chicago Mayor Richard J. Daley, who was not normally thought of as a fair housing advocate, and who controlled the Democratic nomination process, would go along with this deal.

Part VII analyzes the process of gathering the additional votes for the fair housing compromise. Dirksen's support put victory within reach, but it did not achieve it: additional Republican and Democratic senators were needed to break the filibuster, and they responded to different incentives to finally vote "yes."

I conclude by showing how the secret history of the Fair Housing Act forces us to reconsider the history of housing discrimination and residential segregation in the United States. At the very least, the scholarly consensus on the Act's failure must be fundamentally re-examined.

## II. ENFORCEMENT IN THE CIVIL RIGHTS ACT OF 1968

The FHA's critics were certainly right that it lacked some types of enforcement power. Most prominently, HUD could neither bring legal actions itself against discriminators nor resolve disputes through an internal administrative process; on its own, HUD could only engage in "conference, conciliation, and persuasion."<sup>9</sup> Jimmy Carter's HUD Secretary, Patricia Roberts Harris, complained that it reduced her Department to "asking the discovered lawbreaker whether he wants to discuss the matter."<sup>10</sup>

To leave it at that, however, badly misstates the original FHA's provisions. When all else fails, read the statute. As codified in 1968, Section 813 provided that:

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<sup>9</sup> 42 U.S.C. § 3610(a) (1970).

<sup>10</sup> *Fair Housing Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 30 (1978) (statement of Patricia Roberts Harris, Sec'y, U.S. Dep't of Housing and Urban Dev.) (emphasis omitted).

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

In other words, although HUD supposedly was the lead agency in implementing the FHA, the Act gave the Department of Justice (“DOJ”) the power to enforce it. Scholars have dismissed this authority, suggesting that it hamstrung DOJ in enforcement. Massey and Denton are typical: in their assessment of DOJ’s authority, they ignore the pattern and practice language, and assert without evidence that “discrimination against an individual black person was hardly ever held to be a matter of general public importance.”<sup>11</sup> Other scholars, after misstating the law, also claim that DOJ authority “opened the way to frustration and interdepartmental conflict and misunderstanding,”<sup>12</sup> or insist that in most cases DOJ was “helpless”<sup>13</sup> to enforce the Act without providing any evidence for this conclusion.

The subsequent interpretation of the section belies the myth of DOJ impotence. As soon as they considered the issue, courts held the Attorney General’s determination of “general public importance” unreviewable, giving DOJ any authority it wanted in bringing fair housing actions.<sup>14</sup> Courts also proved unremittingly hostile to jurisdictional defenses based on the “pattern and practice” language, holding essentially that more than one instance of discrimination could constitute such a pattern or practice whether the various individuals knew about the other instances or not.<sup>15</sup> These holdings were neither difficult nor activist; they stemmed from both the language and purpose of the Act, and from previous decisions upholding broad administrative authority to construe statutes.<sup>16</sup> Not surprisingly, four years after the

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<sup>11</sup> MASSEY & DENTON, *supra* note 2, at 196.

<sup>12</sup> GEORGE R. METCALF, *FAIR HOUSING COMES OF AGE* 18 (1988) (suggesting that DOJ could only act if HUD referred a case to it, a provision that appears nowhere in the 1968 Act).

<sup>13</sup> CHARLES M. LAMB, *HOUSING SEGREGATION IN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 50 (2005) (stating that the “general public importance” language is constricting, ignoring precedents that allow the Attorney General unreviewable discretion in interpreting this provision).

<sup>14</sup> *See* *United States v. Northside Realty Assocs.*, 474 F.2d 1164 (5th Cir. 1973); *see also* *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971).

<sup>15</sup> *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973).

<sup>16</sup> *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

FHA came into effect, the Supreme Court unanimously held that it had to be interpreted broadly.<sup>17</sup> If the FHA's authors—all of whom were skilled lawyers—wanted to constrain DOJ's enforcement, their desires remained very far from the statute's text.

In any event, the statute contained the potential for significant enforcement from HUD even in the absence of direct litigation. Nothing in the statute prevented HUD from engaging in systematic and aggressive paired testing programs, which could have revealed the worst offenders and essentially teed up prosecutions for either DOJ or private litigators. Instead, HUD decided to turn itself into a claims-processing organization<sup>18</sup> rather than an enforcement agency. The reasons for this choice remain obscure: the leading histories of HUD enforcement do not discuss enforcement strategy concerning discrimination at all.<sup>19</sup> But to lay blame for it on the statute is clearly misplaced.

Furthermore, the Act required all government agencies to administer their programs in such a way as to “affirmatively . . . further the policies” of fair housing and to “cooperate” with HUD “to further such purposes.”<sup>20</sup> Such language provided HUD with a clear opportunity to promulgate regulations not only concerning the meaning and definition of the Act, which could have made private litigation easier, but most importantly to enforce the Act through financial institution regulations. In the late 1960s and early 1970s, the vast majority of federal home mortgages were insured or reinsured by federal agencies such as the Federal Housing Administration, the Veterans' Administration, and the Federal Home Loan Bank Board. Federal agencies such as the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation monitored and oversaw virtually every U.S. financial institution. *None* of these agencies issued fair housing regulations or conditioned their assistance upon compliance with the Act.<sup>21</sup> What's more, there is no indication of HUD even attempting to get them to do so. This failure, whatever its cause, cannot be laid at the feet of Congress.

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<sup>17</sup> See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–12 (1972) (noting that “the language of the Act is broad and inclusive,” generating the need for a “generous construction” of its terms); see also *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (reaffirming this reading of both the Fair Housing Act and *Trafficante*).

<sup>18</sup> See BONASTIA, *supra* note 5, at 57.

<sup>19</sup> This might seem to be a strange statement, given the attention that has been paid to HUD strategy during the Nixon Administration. But these histories focus on attempts to place federal housing projects in suburbs and on the federal effort to construct more subsidized housing, not on enforcing the FHA's ban on discrimination. See, e.g., R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING* 110–16 (3d ed. 2012); LAMB, *supra* note 13, at 56–107; BONASTIA, *supra* note 5, at 91–120. Massey and Denton simply repeat criticisms of the Act's enforcement provisions. See MASSEY & DENTON, *supra* note 2, at 195–200.

<sup>20</sup> 42 U.S.C. §§ 3608(c),(d) (1970).

<sup>21</sup> See U.S. COMM'N C.R., *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: VOLUME II: TO PROVIDE . . . FOR FAIR HOUSING*, at 134–219, 353–55 (1974) (detailing the failure of these financial regulatory agencies to take the most minimal steps to promote fair housing).

Is it realistic to expect that HUD could have arrived at such a strategy? Absolutely: the Equal Employment Opportunity Commission (“EEOC”) was pursuing enforcement in this manner at the exact same time. As Robert C. Lieberman has demonstrated, the EEOC, confronted with a similar lack of authority to issue cease-and-desist orders or bring its own lawsuits, adopted a strategy of mobilizing “private power in bureaucratic processes on behalf of public regulatory goals” as a source of endogenous institutional change.<sup>22</sup> The EEOC developed its own interpretations of Title VII, coordinated with civil rights groups in bringing cases, and served as a central clearinghouse of information, allowing private actors to put teeth in the law through judicial interpretation.<sup>23</sup> EEOC actions allowed Title VII to become “the basis for a strong, arguably effective, state-initiated program of antidiscrimination enforcement.”<sup>24</sup> HUD had an excellent model to work from; it simply failed to use it.

Direct HUD authority to issue cease-and-desist orders clearly would have helped. Scholars have long recognized that bureaucratic structure matters, and that what groups lose on substantive law they can regain through the emasculation of enforcement.<sup>25</sup> Title VIII serves as one area where centralized and vigorous enforcement can be of particular value, because individual victims are less likely to be aware of discrimination than their counterparts in the employment arena. Employment discrimination plaintiffs often come to that position in the wake of a firing or failed promotion and thus know a good deal about the context of a defendant’s behavior.<sup>26</sup> With housing discrimination, simple failure to rent, or sell, or even show a property, are far less likely to be discovered because there is no similarly disruptive trigger event. Finally, as a purely legal matter, any agency would prefer to enforce its mandate through an internal process subject to deferential judicial review rather than litigate the matter before a court in the first instance.

But all this hardly means that Title VIII was toothless, or defanged, or merely symbolic, or ineffective, or created to fail, or any other typical negative assessment. It simply means that, like countless other regulatory statutes, the FHA was not an ideal vehicle and contained flaws. That cannot explain alleged policy failure.

Title VIII’s enforcement power, however, presents us with a problem: how did it get through Congress in the first place? The dominant explanation

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<sup>22</sup> Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement 3* (Mar. 18, 2005) (unpublished manuscript), [http://web1.millercenter.org/apd/colloquia/pdf/col\\_2005\\_0318\\_lieberman.pdf](http://web1.millercenter.org/apd/colloquia/pdf/col_2005_0318_lieberman.pdf) [<http://perma.cc/W4RX-43D2>].

<sup>23</sup> *See generally id.*

<sup>24</sup> *Id.* at 2.

<sup>25</sup> The classic exposition of this point is found in Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267–329 (John E. Chubb & Paul E. Peterson eds., 1989).

<sup>26</sup> *See* John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983, 984 (1991) (“[T]oday the vast majority of all litigation suits challenge discrimination in discharge.”).

collapses after recalling basic facts, but at least it is an explanation. What can replace it? Answering that question requires a look four years before the Act passed.

### III. CONGRESS AND THE CIVIL RIGHTS ACT OF 1966

Lyndon Johnson's landslide victory in the 1964 election brought massive Democratic majorities to the 89th Congress. For the first time since 1938, Democrats enjoyed greater than two-to-one majorities in both the House and the Senate.<sup>27</sup> Equally massive civil rights victories appeared on the horizon. After all, if LBJ could get the Civil Rights Act of 1964 enacted before the election, then what could he accomplish with even greater majorities indebted to him?

The 1965 congressional session justified these expectations. Not only did Congress enact Johnson's Great Society programs such as Medicare and Medicaid, by July it had also passed the Voting Rights Act.<sup>28</sup> But that victory marked the apogee of Johnson's power. Just a few days after Johnson signed the Voting Rights Act, Watts exploded in riots;<sup>29</sup> Cleveland,<sup>30</sup> San Francisco,<sup>31</sup> and Chicago<sup>32</sup> erupted the next summer. And Johnson's July 1965 decision to send thousands of American troops to Vietnam soon became a military quagmire and a political disaster.<sup>33</sup>

So when the President pushed for his proposed Civil Rights Act of 1966, which centered on fair housing, he was unable to shock and awe legislators as he had the year before. In any event, fair housing was different from other civil rights issues. White northerners could look down their noses at segregated lunch counters and widespread disenfranchisement. But fair housing quite literally hit them where they lived; with the housing issue, the

<sup>27</sup> See, e.g., ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973*, at 184 (1998) (“[V]oters gave [Johnson] the largest majorities in Congress since FDR’s victory in 1936—a Senate with 68 Democrats and 32 Republicans, two more than before, and a House favoring the Democrats by a 295 to 140 margin, a gain of 37 seats.”).

<sup>28</sup> 42 U.S.C. §§ 1973–1973aa-6 (2012).

<sup>29</sup> General background on the Watts riot and a description of its legislative impact can be found in JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* 228–30 (2015).

<sup>30</sup> The Cleveland riots in July 1966 centered on the largely African-American Hough district. For details, see *Hough*, CLEVELAND HISTORICAL, <http://clevelandhistorical.org/items/show/7#.Viuvhq6rSu5> [<http://perma.cc/P2BN-QEPL>].

<sup>31</sup> San Francisco’s riots occurred in late September and early October when a white police officer shot a seventeen-year-old African-American. *The Hunters Point Riot*, FOUND SF, [http://foundsf.org/index.php?title=The\\_Hunters\\_Point\\_Riot](http://foundsf.org/index.php?title=The_Hunters_Point_Riot) [<http://perma.cc/8VGY-CM26>].

<sup>32</sup> The precipitating cause of the Chicago riots was the backlash to Martin Luther King Jr.’s campaign for “Open Housing” in the city. See ZELIZER, *supra* note 29, at 240–41.

<sup>33</sup> Johnson’s younger daughter Luci told historian Robert Dallek that “[her] daddy committed political suicide for that war in Vietnam. And since politics was his life, it was like committing actual suicide.” DALLEK, *supra* note 27, at 601. Dallek’s own assessment of the political and foreign policy disaster of Vietnam can be found in *id.* at 626–27. See also GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 741 (2008) (detailing political costs of the war throughout 1967).

Southern civil rights movement came North, and it was not received with hospitality. Democratic members of Congress found their core white ethnic constituencies deserting them, and George Wallace found himself unexpectedly popular in Northern suburbs.

The Northern politics of fair housing meant that Johnson's civil rights coalition fell apart in the Senate. Although Democrats held an overwhelming sixty-seven to thirty-three advantage in the upper house,<sup>34</sup> this number obscured more than it revealed because the Senate of the 1960s actually contained three parties: Northern Democrats, Southern Democrats, and Republicans. Civil rights forces could only break a Southern filibuster with Republican votes, and in 1964, Senate Republican Leader Everett Dirksen's decision to support the Civil Rights Act was the only thing that saved it from defeat.<sup>35</sup> Fair housing, however, seemed to turn Dirksen into an old-fashioned Southern Bourbon; the Illinois Senator branded it as an unconstitutional expansion of federal power over the states. "If you can tell me what in interstate commerce is involved about selling a house fixed on soil or what federal jurisdiction there is," he said, "I'll eat the chimney on the house."<sup>36</sup> Not surprisingly, attempts at cloture failed, and the Civil Rights Act of 1966 died with the end of the 89th Congress.

Then came the 1966 midterms. Just two years after the Johnson landslide, Democrats lost forty-seven seats in the House, and three seats in the Senate. Most significantly from a civil rights perspective, one of the unseated incumbents was Illinois's Paul Douglas, who had led the civil rights forces in the upper house for the better part of two decades. Part of the cause of Douglas's defeat was his loss of white ethnic support in Chicago, in no small part due to civil rights in general and open housing in particular.<sup>37</sup> Douglas was the first Democratic Senate candidate in decades to lose Cook County. The Great Society seemed dead, and with it, any progress on fair housing.<sup>38</sup>

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<sup>34</sup> The Democratic advantage had been sixty-eight to thirty-two until April 30, 1966, when Michigan Democrat Patrick V. McNamara died and was replaced by Republican Robert P. Griffin.

<sup>35</sup> See George Packer, *The Empty Chamber*, NEW YORKER (Aug. 9, 2010), <http://www.newyorker.com/magazine/2010/08/09/the-empty-chamber> [<http://perma.cc/9XYN-5NUG>] (noting that the Civil Rights Act of 1964 was "written largely out of [Dirksen's] office.").

<sup>36</sup> ZELIZER, *supra* note 29, at 236.

<sup>37</sup> See RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 126, 164–65 (2008).

<sup>38</sup> See MICHAEL FOLEY, THE NEW SENATE: LIBERAL INFLUENCE ON A CONSERVATIVE INSTITUTION, 1959–1972, at 196 (1980) ("With Johnson's subsequent preoccupation with Vietnam and the public's increased disenchantment with the civil rights issue, open housing appeared to be a lost cause by 1968.").

IV. THE 90TH SENATE AND THE PRECARIOUS LEADERSHIP  
OF EVERETT DIRKSEN

But a funny thing happened on the way to the conservative ascendancy: the Senate actually became more liberal, the Republican Caucus decidedly so.<sup>39</sup> Douglas was replaced by Charles Percy, the former Bell & Howell “whiz kid” CEO who was a moderate on most issues and quietly supported some fair housing legislation.<sup>40</sup> The second new Republican was Oregon’s Mark Hatfield, who as a state legislator had written Oregon’s first civil rights legislation and strongly supported fair housing.<sup>41</sup> In Massachusetts, Republican Edward Brooke became the first African-American elected to the Senate since Reconstruction, and he placed comprehensive fair housing legislation at the center of his agenda.<sup>42</sup> The third Republican pickup in 1966 came from Tennessee, where incumbent Democrat Ross Bass lost in the primary and the state elected Howard H. Baker, Jr., another pro-civil rights Republican who later became Senate Majority Leader. Baker figured to be strongly supportive of Dirksen for one obvious reason: he was Dirksen’s son-in-law.

Once the 90th Congress began, however, it became clear that Dirksen was having trouble commanding his troops. Three years earlier, the Supreme Court had ruled that the Constitution required legislative districts to be apportioned according to the “one person, one vote” principle.<sup>43</sup> Rural interests, such as Northern Republicans and Southern Democrats, were outraged, and chief among them was Dirksen himself.<sup>44</sup> The House of Representatives

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<sup>39</sup> Walter Mondale recalled that despite the midterm losses, “We had a pretty good Senate.” Interview with Walter Mondale, former United States Vice President and Senator, in Minneapolis, Minn. (July 15, 2009). Indeed, Paul Douglas was the only incumbent defeated in the 1966 Senate midterms.

<sup>40</sup> It is difficult to pithily summarize Percy’s view on fair housing during this period. Running unsuccessfully for Illinois Governor in 1964, Percy had opposed fair housing. He then strongly supported it, but during the 1966 campaign, he hedged, supporting it for all but single-family residences. Paul Douglas and Richard Daley accused Percy of trying to have it both ways, telling African-Americans he supported fair housing, but leafletting white ethnic neighborhoods claiming to oppose it. In light of his strong support for it in 1968, and his commitment to it in later years, it seems fair to say that he supported it but persistently flipflopped for political advantage when he first ran for office. A good description of the role of race in Percy’s Senatorial campaign can be found in ROGER BILES, *CRUSADING LIBERAL: PAUL H. DOUGLAS OF ILLINOIS* 195 (2002); PERLSTEIN, *supra* note 37, at 150–51, 164–65.

<sup>41</sup> See Adam Clymer, *Mark O. Hatfield, Republican Champion of Liberal Causes, Dies at 89*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/08/us/politics/08hatfield.html> [<http://perma.cc/CDD5-4NJR>].

<sup>42</sup> Since Brooke succeeded Boston Brahmin Republican Leverett Saltonstall, who favored civil rights, his entrance into the Senate did not swell the pro-civil rights numbers in the GOP caucus, but it did bring new energy and commitment to the issue, especially because Saltonstall had a “patrician aversion to disputes or controversy that made him ‘shrink from quarrel[ing].’” ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 337 (2002) (quoting Lyndon Johnson, as relayed by his assistants).

<sup>43</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

<sup>44</sup> He warned that “the forces of our national life are not brought to bear on public questions solely in proportion to the weight of numbers.” To find otherwise would mean that “six

overwhelmingly passed a bill “interpreting” the Supreme Court’s ruling as allowing up to a thirty-five percent differential between House districts, and Dirksen, along with arch-segregationist Judiciary Committee Chair James Eastland, arranged for quick passage in the Senate. But for the first time in his career, Dirksen found himself upended by his own caucus, with Howard Baker taking the lead. Baker and Edward Kennedy held up the bill, prepared minority reports, and persuaded their colleagues to stop it. The final vote was fifty-five to twenty-two, and an embarrassed Dirksen did not even show up to watch his project go down in flames.<sup>45</sup>

By the end of 1967, Dirksen’s stock was falling further. His health was failing, and he had spent much of the 90th Congress not in the Senate but rather at Walter Reed Hospital, a victim of the three-pack-a-day smoking habit that gave him emphysema and would kill him in September 1969. Maryland Republican Senator Charles Mathias recalled that such long absences prevented Dirksen from having the “eyeball to eyeball confrontations” that effective leadership required.<sup>46</sup>

If anything, this all understated Dirksen’s trouble among the GOP ranks. The Minority Leader was hardly an ideological politician: as Baker wrote nearly three decades after his father-in-law’s death, “virtually every idea he held, he held tentatively.”<sup>47</sup> But he felt very strongly about Vietnam, the issue that divided the country more than any other. Dirksen was the hawk’s hawk, a fierce Cold Warrior and a strong supporter of military action in Indochina until his death. As a young congressman, Dirksen had first gained national stature by publicly breaking with GOP isolationism three months before Pearl Harbor, making him the House equivalent of Arthur Vandenberg.<sup>48</sup> The central theme of his successful 1950 Senate campaign against then-Majority Leader Scott Lucas was tying Lucas to the so-called

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million citizens of the Chicago area would hold sway in the Illinois Legislature without consideration of the problems of their four million fellows who are scattered in 100 other counties.” Alex McBride, *Reynolds v. Sims (1964)*, PBS: THE SUPREME COURT (Dec. 2006), [http://www.pbs.org/wnet/supremecourt/rights/landmark\\_reynolds.html](http://www.pbs.org/wnet/supremecourt/rights/landmark_reynolds.html) [http://perma.cc/WQC3-4D2J].

<sup>45</sup> A good description of the battle can be found in ADAM CLYMER, EDWARD M. KENNEDY: A BIOGRAPHY 92–95 (1999).

<sup>46</sup> BYRON C. HULSEY, EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS 229 (2000).

<sup>47</sup> Howard H. Baker, Jr., *Foreword* to EVERETT MCKINLEY DIRKSEN, THE EDUCATION OF A SENATOR, at viii (1998).

<sup>48</sup> Arthur H. Vandenberg served as a Republican Senator from Michigan from 1928 until his death in 1951. He is known for converting from isolationism to internationalism and helping to lead the Republican Party in the same direction. As chairman of the Senate Foreign Relations Committee from 1947 to 1949, he played a key role in enacting the Marshall Plan and supporting the Truman Doctrine. *See generally* James A. Gazell, *Arthur H. Vandenberg, Internationalism, and the United Nations*, 88 POL. SCI. Q. 375, 375–94 (1973); Thomas Michael Hill, *Senator Arthur H. Vandenberg, The Politics of Bipartisanship, and the Origins of Anti-Soviet Consensus, 1941-1946*, 138 WORLD AFF. 219, 219–41 (1975–76); LAWRENCE S. KAPLAN, THE CONVERSION OF SENATOR ARTHUR H. VANDENBERG: FROM ISOLATION TO INTERNATIONAL ENGAGEMENT (2015).

“cowardly” policies of Secretary of State Dean Acheson.<sup>49</sup> And Dirksen consistently pushed Johnson rightward on Vietnam: he squashed attempts to debate Indochina policy in Congress, and even attempted to resuscitate and strengthen the Subversive Activities Control Board.<sup>50</sup>

Throughout 1967, as the war dragged on and became increasingly unpopular with the electorate, Dirksen faced increasing pressure from within the caucus and the party in general to distance himself from the President. Many in the GOP pushed for Dirksen to accept a co-chair for the upcoming Republican National Convention in order to get a platform that attacked Johnson more strongly on his Vietnam policy.<sup>51</sup> January 1968 represented a public opinion watershed, as the Tet Offensive seriously eroded public support. Dirksen stuck with the President, but was having serious trouble covering his left flank.

#### V. EVERETT DIRKSEN IN 1967–68: PROBLEMS AT HOME

Back home in Illinois, things were getting worse. Dirksen’s Senate seat was up that year, and the Democrats had three attractive and well-known candidates to oppose him: state Treasurer Adlai Stevenson III, scion of Illinois’s leading political family; Office of Economic Opportunity (“OEO”) head Sargent Shriver, a confidante of Johnson’s and brother-in-law of the Kennedy brothers; and state Senator Paul Simon, who hailed from downstate and thus could cut into traditional Republican strength there. Dirksen’s inside-the-Beltway status hardly ensured his re-election: he had attracted less than fifty-three percent of the vote in his previous race,<sup>52</sup> and his declining health and support for an unpopular war made him even more vulnerable.

Thus, the mind of Everett Dirksen in late 1967 and early 1968 was hardly focused on the future of civil rights. Even if it had been, no one—not even Dirksen himself—could have predicted where he would come out. He had supported civil rights and he had opposed civil rights, and there was

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<sup>49</sup> See, e.g., HULSEY, *supra* note 46, at 26–27 (“Like Richard Nixon in his 1950 anticommunist campaign again Helen Gahagan Douglas, Dirksen pointed to subversion within to explain America’s foreign policy setbacks . . . [and] engaged in his share of public red-baiting (he said that Lucas had ‘cuddled communists’).” Hulsey observes that Joseph McCarthy came to Illinois to campaign for Dirksen. *Id.* at 27. It was Nixon, running as the Republican Vice Presidential candidate in 1952, who coined the phrase “Dean Acheson’s College of Cowardly Communist Containment.” See Alden Whitman, *Architect of Postwar Policy, Acheson Advocated Containment of the Soviet Union*, N.Y. TIMES (Oct. 13, 1971), <https://www.nytimes.com/books/98/08/23/specials/acheson-obit.html> [<https://perma.cc/35E7-7BLG>].

<sup>50</sup> See HULSEY, *supra* note 46, at 238–42, 250.

<sup>51</sup> See Russell Freeburg, *Dirksen Still 1st Choice for Platform Job*, CHI. TRIB., Feb. 20, 1968, at A1–3; *G.O.P. Plans 12 Men on Its ‘Union’ Show*, CHI. TRIB. (Jan. 17, 1968), <http://archives.chicagotribune.com/1968/01/17/page/12/article/g-o-p-plans-12-men-on-its-union-show> [<http://perma.cc/DM35-JJBT>] (“Some Republican leaders feel [Dirksen’s friendship with President Johnson] is curtailing his criticism of the administration.”).

<sup>52</sup> For the final results, see *IL US Senate*, OUR CAMPAIGNS, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=19457> [<http://perma.cc/X8YU-DLAW>].

little reason to believe that he would maintain a strict ideological line.<sup>53</sup> But he was very focused on the future of Everett Dirksen. And that future seemed to point to supporting fair housing.

If Dirksen needed persuasion, he needed to look no further than his junior colleague, Senator Charles Percy. It surely was not lost on Dirksen that Percy had triumphed in 1966 with the substantial help of downtown Chicago business interests, most of whom backed fair housing as a way of promoting Chicago's image. Dirksen did not care much for his junior colleague, but he recognized the importance of assembling the Percy coalition for himself, even promoting his junior colleague as a favorite-son candidate for President as early as 1967.<sup>54</sup>

Those familiar with the 1966 elections might immediately object, for Percy's victory over Senator Paul Douglas, the champion of civil rights, rested in no small part on a white backlash *against* fair housing: how would supporting it in 1968 have helped Dirksen? Most importantly, it would have helped attract Black votes to the GOP side. Four decades after Richard Nixon pursued the "Southern strategy" as a means of building the Republican Party, it seems counterintuitive to imagine a Republican politician trying to attract African-American votes. But in early 1968, such a strategy made sense. Until the early 1960s, it was anything but clear which party was stronger on civil rights, and when Barry Goldwater ran on opposition to the Civil Rights Act in 1964, he was crushed by the biggest landslide in American history: Goldwater carried only his home state of Arizona and the five most virulently segregationist states in the deep South.<sup>55</sup> This result hardly made other Republicans eager to adopt a Southern strategy.

Moreover, unlike Douglas, Dirksen ran no risk of being outflanked on the issue. Lyndon Johnson's civil rights program meant that no Northern Democratic challenger would oppose fair housing. Put more theoretically, a conservative Republican such as Dirksen only needed to appeal to the median voter. This is precisely what Percy had done. Dirksen could not have failed to realize that whereas Percy had lost when he opposed fair housing in his 1964 gubernatorial campaign, he won a Senate seat in 1966 when he hedged on the issue and supported it for all but single-family homes. Less

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<sup>53</sup> Just a few months beforehand, Dirksen had supported Project Good Neighbor, a massive fair-housing educational campaign that blanketed Chicago with advertisements detailing the deleterious consequences of housing discrimination. Chicago's principal Black newspaper, *The Defender*, described Good Neighbor as "a serious attempt at converging the kind of influence [sic] that would pierce the ominous clouds of antipathy that envelop fair housing" and lauded Dirksen for supporting it. See *Open Housing*, CHI. DAILY DEFENDER, May 17, 1967, at 15; see also JAMES R. RALPH, JR., NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT 219 (2005) (describing Project Good Neighbor).

<sup>54</sup> See Edward L. Schapsmeier, *Douglas and Dirksen of Illinois: The Pragmatist and the Professor as Contemporaries in the United States Senate*, 83 ILL. HIST. J. 74, 82 (1990).

<sup>55</sup> These were Louisiana, Mississippi, Alabama, Georgia, and South Carolina. See *Election of 1964*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1964> [http://perma.cc/PSY7-EXPU].

than a year later, Percy had gone all in and supported a complete ban on residential discrimination.

If Blacks could return to the party of Lincoln, then this would undermine Democratic support in the North. Both Johnson and Dirksen knew this, and had discussed it: in 1965, as an attempt to attract Dirksen's support for the Voting Rights Act, the President told the Minority Leader, "if you get Black votes in Illinois, there is no way that anyone can defeat you."<sup>56</sup>

## VI. MAKING A DEAL

### A. *The Senate Takes Up Civil Rights*

In his January State of the Union message, President Johnson made a pitch for fair housing.<sup>57</sup> But the strategy of civil rights forces was more cautious: Majority Leader Mike Mansfield announced that in January the Senate would first take up H.R. 2516, a House-passed minimal civil rights bill essentially focusing on protection of civil rights workers in the South and strengthening the Equal Employment Opportunity Commission. This hardly implied that the White House was giving up on fair housing. Rather, it hoped to secure the more modest provisions, anticipating fiercer opposition on the housing effort.

The second session of the 90th Senate opened on January 17th, and as Mansfield had promised, H.R. 2516 was first on the agenda. Even these modest efforts, though, ran into a unified wall of Southern filibustering led by Sam Ervin of North Carolina.<sup>58</sup> The obstruction led the upper house's civil rights advocates to introduce S. 1358, a strong fair housing amendment co-sponsored by Minnesota Democrat Walter Mondale and Massachusetts Republican Edward Brooke. Their thinking was straightforward: if Southerners were going to filibuster a weak bill, liberals might as well put forth a strong one and try to circumvent the filibuster with votes from Northern Republi-

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<sup>56</sup> Telephone Interview with Joseph A. Califano, former Presidential Special Assistant for Domestic Affairs (May 18, 2010). Califano at the time was serving as Johnson's special assistant for domestic affairs.

<sup>57</sup> *Lyndon B. Johnson (January 17, 1968)*, INFOPLEASE, <http://www.infoplease.com/t/hist/state-of-the-union/181.html> [<http://perma.cc/J459-UA55>].

<sup>58</sup> Ervin never explicitly announced a filibuster, but rather introduced an amendment eviscerating the relatively mild H.R. 2516. A Mondale staff member subsequently explained:

On Jan. 25, 1968, Senator Sam Ervin introduced an amendment which would take out the language in H.R. 2516 referring to crimes committed "because of race, color, religion, or national origin." Ervin argued that his amendment would make H.R. 2516 apply to all crimes and bring equal justice for all. In truth, Ervin and the Southerners wanted to emasculate the bill of all civil rights connotation, leaving language so vague and generally of the status quo as to mean nothing.

Jean Eberhardt Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 151 (1969).

cans.<sup>59</sup> After nearly a month of Southern stonewalling, on February 16 Mondale and Brooke proposed their fair housing amendment to the pending civil rights bill.<sup>60</sup>

Southerners were not about to let the Mondale-Brooke amendment carry, and succeeded in blocking cloture four days later, with fifty-five votes in favor of proceeding to vote against thirty-seven opposed.<sup>61</sup> It surprised no one that Mondale and Brooke's amendment to the civil rights bill failed to gain cloture; after all, they filibustered the earlier bill, and fair housing made the bill less attractive, not more. Blocked from moving forward with other Senate business, Senate Majority Leader Mansfield and Dirksen moved the next day to table the legislation, the standard retreat from a filibuster: a motion to table cannot be filibustered because it is not debatable. But much to their surprise, the Senate resoundingly rejected the motion, thirty-four to fifty-eight. There was more support for fair housing than either leader had thought, but it should not have been surprising. After all, the 1966 bill had garnered Senate majorities, just not enough to gain cloture. Since then, the Senate had not moved rightward, so fair housing would figure to have had strong support.

But there was one big difference: the leftward shift in the Republican caucus. This shift was particularly ominous for Dirksen. Eighteen months earlier, only twelve of thirty-three Republican senators had voted to cut off debate; now, the caucus was evenly split at eighteen-to-eighteen. A few days later, staunch conservative Norris Cotton of New Hampshire shifted his vote to support cloture, now putting Dirksen in the minority of his own delegation, and talks emerged of a Senate Republican revolt.<sup>62</sup> Dirksen was in enough trouble already with his liberal flank on Vietnam. Now he could use a deal.

He was not alone. Johnson, too, wanted to get civil rights legislation through, and he had been stymied for years on fair housing. "We never gave up on anything," recalls Joseph Califano, LBJ's chief assistant for domestic

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<sup>59</sup> Mondale interview, *supra* note 39.

<sup>60</sup> 114 CONG. REC. S3235-53 (1968).

<sup>61</sup> At the time, Senate Rules required two-thirds of members present and voting to invoke cloture. See RICHARD S. BETH, CONG. RESEARCH SERV., RL32878, CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENT 6 (2013).

<sup>62</sup> See John Herbers, *Dirksen Explains Rights Shift: 'Time and Reality' Make You Older and Wiser*, N.Y. TIMES (Feb. 28, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9504E6DD143BE73ABC4051DFB4668383679EDE> [<http://perma.cc/39NT-2S8R>]. Although this pressure serves as a critical piece of explaining Dirksen's and the Senate's behavior, it is not sufficient. Herbers mentioned several "moderate" Republicans who supposedly were pushing Dirksen on a compromise, but he includes in this list Robert Griffin of Michigan and Clifford Hansen of Wyoming—both of whom eventually voted against cloture. Herbers also reported that pro-civil rights Republicans thought at the end of February that they had enough votes even without Dirksen—an inaccurate assessment. So while there was internal caucus pressure on Dirksen, and it caused him to seek some sort of compromise, it did not and could not seal the deal.

policy, although they could have been excused if they had done so.<sup>63</sup> But by February 1968, Johnson's incentive to make a deal was greater than ever. The Tet Offensive belied his predictions of imminent victory in Vietnam, and he was facing imminent revolt from his own party—not only from Senator Eugene McCarthy, but more ominously, from the hated Bobby Kennedy. His usual method for achieving domestic political victories—Great Society spending programs—was facing intense resistance from conservative Democrats such as House Ways and Means Committee Chair Wilbur Mills, as well as from growing inflationary pressures. Somehow, the President needed to shore up his left flank without spending money or backing off in Vietnam. Johnson was deeply committed to civil rights and just as deeply committed to the future of Lyndon Johnson: in 1968, the fair housing issue seemed to bring the two together. A new civil rights act would certainly help.

B. “Don’t Ask Me What I Had To Give Him”

But how could that be done? It would require giving something to Dirksen, and Johnson could certainly help with that. Johnson would, however, need to look to his friend Richard J. Daley, the Mayor of Chicago.

In the early twenty-first century, millions of Democratic primary voters chose their candidate. In 1968, one man chose: Daley. At the time, Illinois law allowed the Cook County Democratic organization to choose the party's candidates, and Daley ran that organization, especially for federal races. Picking a weaker candidate in the race against Dirksen would fit the bill perfectly for the Senate Minority Leader.

Just the right man was available: Illinois state Attorney General William A. Clark. Clark was a colorless party functionary who seems to have turned Sam Rayburn's political injunction—“to get along, go along”<sup>64</sup>—into something of a fine art. After eight years as Attorney General, during one of the most tumultuous times in American history, Clark seems to have left no trace on the office.<sup>65</sup> Eventually, he would become the state's Chief Justice, where in sixteen years on the state's high bench he failed to author a single noteworthy opinion.<sup>66</sup> Clark was unlikely to mount a strong campaign or get lots of votes, but was a perfectly respectable choice—in other words, he was

<sup>63</sup> Califano interview, *supra* note 56.

<sup>64</sup> UPI's obituary of Rayburn cited the phrase as his standard advice to freshman legislators. See *Rayburn Is Dead: Served 17 Years as House Speaker*, N.Y. TIMES (Nov. 17, 1961), <http://www.nytimes.com/learning/general/onthisday/bday/0106.html> [http://perma.cc/N3Q2-79MX].

<sup>65</sup> Indeed, he seems to have gone out of his way to be out of the way, refusing to bring complaints against fraudulent business practices unless “the facts are very clear that there has been a definite violation” of consumer laws, even though that would be a relatively popular and painless way to enforce such laws. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1105, 1128 (1967). Clark also insisted that he would only prosecute such violations if they were “persistent.” *Id.* at 1129.

<sup>66</sup> He lacks even a Wikipedia entry: a search of major scholarly databases for the terms “William G. Clark” and “Illinois” in any part of an article in any journal yields not a single

the ideal candidate to take on Dirksen, if the Democrats were attempting to do a favor for the Senate Minority Leader.

As late as February 20, Dirksen was still insisting that a fair housing title was unnecessary, because he was “certain that it can be achieved by the states. I will take nothing on the federal level.”<sup>67</sup> On the floor of the Senate, he again used the federalism argument, and recounted the warning given to him by a former Senator from Illinois, James Hamilton Lewis: “I’ll not live to see it, but you will live to see the day when State lines will be for the convenience of tourists and possibly for Rand McNally.”<sup>68</sup> But the Democrats still had not slated their candidates for November, a delay that the *Tribune* noted was unusually slow.<sup>69</sup> And negotiations were occurring in the Senate: on February 23, White House aides suggested that Dirksen might back a deal on fair housing and asked the President to call him.<sup>70</sup> Three days later, Dirksen surprisingly announced that he was open to a compromise, although he would not specify what that compromise might be.<sup>71</sup> The very next day, Daley announced that neither Simon, Shriver, nor Stevenson would challenge Dirksen for the Senate seat. Instead, the Democrats’ standardbearer would be Attorney General Clark: “Democrats Fail to Pick Adlai,” the *Chicago Tribune*’s front-page subhead pointedly noted.<sup>72</sup> Twenty-four hours later, Dirksen introduced his fair housing proposal, and voted for cloture on March 1.

Even if the deal has been lost to subsequent scholarship, it was clear enough to contemporary observers. *New York Times* columnist Tom Wicker immediately saw what was happening. Wicker noted wryly that “Dirksen’s support for civil rights just might cause President Johnson and his ally, Mayor Richard Daley of Chicago, to lose interest in a strong opponent for Dirksen.”<sup>73</sup> Wicker also noted Dirksen’s slipping support in the GOP caucus, concluding that the Senate Minority Leader “can read the handwriting on the

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article or reference giving Clark anything more than a peripheral role in any matter discussed. A search of the *Chicago Tribune* up until 1968 similarly reveals nothing newsworthy.

<sup>67</sup> Philip Dodd, *Keep Rights Bill Alive Tho [sic] Cloture Fails*, CHI. TRIB., Feb. 21, 1968, at D3.

<sup>68</sup> 114 CONG. REC. 3423 (1968).

<sup>69</sup> See George Tagge, *Well-Worn Dirksen Hat Goes in Ring*, CHI. TRIB., (Feb. 18, 1968), <http://archives.chicagotribune.com/1968/02/18/page/1/article/well-worn-dirksen-hat-goes-in-ring> [<http://perma.cc/E6NX-QYM4>] (“Democratic slate makers are taking their time in hand-picking Dirksen’s opponent.”).

<sup>70</sup> Memorandum from Larry Temple, White House Aide, to President Lyndon B. Johnson (Feb. 23, 1968), LBJ Presidential Library, University of Texas at Austin.

<sup>71</sup> Philip Dodd, *Bars Rights Bill Debate Curb*, CHI. TRIB. (Feb. 27, 1968), <http://archives.chicagotribune.com/1968/02/27/page/11/article/bars-rights-bill-debate-curb> [<http://perma.cc/KP3V-UUMW>].

<sup>72</sup> George Tagge, *Shapiro, Clark Top Slate*, CHI. TRIB. (Feb. 28, 1968), <http://archives.chicagotribune.com/1968/02/28/page/1/article/shapiro-clark-top-slate> [<http://perma.cc/H8W5-2GQK>].

<sup>73</sup> Tom Wicker, *In the Nation: Lost in the Soft-Soap*, N.Y. TIMES (Feb. 27, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9E0CEEDC1138E134BC4F51DFB4668383679EDE> [<http://perma.cc/A5DH-DSZ9>].

wall.”<sup>74</sup> Ethel Payne of the *Chicago Defender* observed that the strongest senatorial candidates were somehow overlooked, and commented, “The wires between Chicago and the White House were crackling. Once again the sacrificial fires were burning and when the smoke cleared, the charred hopes of Stevenson and Shriver were left on the altar.”<sup>75</sup>

Clarence Mitchell, the lobbyist for the National Association for the Advancement of Colored People who was sometimes known as the “101st Senator” because of his extraordinary access to both the Senate and the White House, suspected as much. He recalled:

It’s my belief that [Dirksen] might have had trouble getting re-elected in Illinois if there had been a strong Democratic fight against him. I don’t think it was strong. Of course, there could be challenges to that assessment. But that is my belief, and it was based on conversations with the President and my assessment of the Illinois situation.<sup>76</sup>

Similar accounts emerge from those close to the President. After speaking with Dirksen late in February, Johnson told his aides, “We are going to get the Civil Rights bill! Dirksen is going to come out in support . . . and don’t ask me what I had to give him.”<sup>77</sup>

### C. *The Specifics of the Deal*

But what was the compromise? As noted above, Dirksen had long been on record as opposing fair housing, in terms uncommonly vituperative for him. But Dirksen had emphasized a particular problem: people in small homes renting out rooms, a problem he referred to as “Mrs. Murphy’s boarding house.” If that was the problem, it was a relatively small one. In fact, White House aides and the Senate Civil Rights Caucus had already been

<sup>74</sup> *Id.*

<sup>75</sup> Ethel Payne, *Dirksen’s Rights Position Pressured By White House*, CHI. DEFENDER, Mar. 4, 1968, at 2.

<sup>76</sup> DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS* 693 (1990).

<sup>77</sup> NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA* 390 (2005). Kotz gets this quote from White House aide Jim Gaither. Gaither surmised that some sort of political deal occurred, and speculated that it involved either putting Dirksen loyalists on federal regulatory commissions, or ensuring that the *national* Democratic Party would not give Dirksen’s opponent any support. As this Article suggests, it was in fact the Illinois State Democratic Party that gave Dirksen the most help by slating his weakest opponent.

The theory of commission appointments fails to gain much purchase. I investigated all of Johnson’s appointments from February 1968 to the end of his Presidency for the following bodies: Securities and Exchange Commission, Interstate Commerce Commission, Federal Trade Commission, Federal Communications Commission, National Labor Relations Board, Atomic Energy Commission, and Civil Aeronautics Board. He made few appointments during the period, all of them were Democrats, and none were from Illinois. If that was the deal Dirksen struck, he was double-crossed.

putting something together that they thought Dirksen could back, and it was what eventually appeared: all residences in the United States were covered except Mrs. Murphy's boarding house, and single-family homes sold by the owner without a broker. Dirksen was told that it was a "compromise" authored by liberal Republican Jacob Javits of New York, thus bolstering its GOP credentials.<sup>78</sup>

The origins of Dirksen's other issue, that of allowing HUD to make cease-and-desist orders, is straightforward. "Dirksen didn't want new bureaucracies," Mondale recalled.<sup>79</sup> Here at least, he was consistent: Dirksen did nothing in 1968 that he had not done four years earlier; indeed, his actions were a simple replay of the earlier civil rights struggle. The original draft of what would become the Civil Rights Act of 1964 gave the EEOC the power to issue cease-and-desist orders and to sue employers in its own capacity; Dirksen's price for breaking the Southern filibuster was removing these provisions and giving exclusive authority to DOJ.

To be sure, the Senate Minority Leader had a particular gripe against the Equal Employment Opportunity Commission, headed then by Clifford Alexander. From the beginning of Alexander's tenure, businessmen had been complaining to Dirksen about what they saw as harassment from the EEOC in general and Alexander in particular. Dirksen promised to "get somebody fired" because of these complaints,<sup>80</sup> and Richard Nixon did not reappoint Alexander after becoming President. Given Dirksen's antipathy toward the EEOC, it stands to reason that he did not want to create a similar agency to handle housing discrimination.<sup>81</sup>

Although current scholars decry Dirksen's provisions, at the time, civil rights advocates had a different view. After Dirksen's amendment passed,

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<sup>78</sup> Temple gave the President talking points for Dirksen: "If the President calls, [Attorney General] Ramsey [Clark] hopes he will not mention any details of the legislation because he doesn't want Dirksen to know where the compromise came from." See Temple, *supra* note 70.

<sup>79</sup> Mondale interview, *supra* note 39.

<sup>80</sup> *Controversial Nominations 1969-1972*, CQPRESS, [http://www.cqpress.com/incontext/SupremeCourt/controversial\\_nominations.htm](http://www.cqpress.com/incontext/SupremeCourt/controversial_nominations.htm) [<http://perma.cc/E6XK-UCZE>] ("At a Senate Judiciary subcommittee hearing [on] March 27, called by Sen. Edward M. Kennedy (D Mass.) to examine the equal employment policies of the administration, Dirksen charged Alexander with harassment of government contractors in enforcing equal employment regulations. Dirksen told Alexander he would 'go to the highest authority in the government to get somebody fired' if what he called 'punitive harassment' by EEOC did not stop. The next day White House Press Secretary Ronald Ziegler announced that Alexander would be replaced as EEOC chairman, but Ziegler denied that the decision had been influenced by Dirksen. Alexander announced April 9 that he was resigning as chairman May 1 but would serve out the rest of his five-year board term, which was to expire July 1, 1972. (Alexander Aug. 14 resigned as a member of the EEOC [sic]).")

<sup>81</sup> Doesn't this mean that the standard story is correct, because Dirksen did in fact want to take some enforcement power out of the Act? Not at all. It is one thing to say that the Act lacked some enforcement mechanisms; it is quite another to say that it was toothless and inherently ineffective. Moreover, if we look at the intentions of the man who wrote the provision, it is perfectly plausible for someone to worry about federal agencies going "out of control" while at the same time wishing to have an effective Act. There may be a tension between these two beliefs, but holding one does not imply that one cannot hold the other.

the Leadership Conference on Civil Rights sent out an alert to its membership, urging them to call their representatives and senators to support the bill. After January 1, 1969, the circular noted, the Fair Housing Act would forbid discrimination in all but three percent of U.S. home sales. That was overly optimistic: after the compromise was enacted, other reports estimated coverage at eighty percent of U.S. home sales.

#### D. *The Mayor*

Why would Daley agree to this? Surely he would want a Democrat to triumph. Or would he? If one thing defined the political career of Richard J. Daley, it was the desire for power. He did not insist on ideological purity, but like most urban bosses, he demanded loyalty to his organization and thus to himself. The title of his principal biography—*American Pharaoh*—expresses his worldview quite well.

None of the three leading Democratic Senate candidates figured to give it to him. Paul Simon hailed from downstate; he eventually triumphed that fall in the lieutenant governor's race by emphasizing his independence. Stevenson and Shriver were trickier.

Daley's and Stevenson's relationship was "complex."<sup>82</sup> Although the Mayor had slated him as the Democratic candidate for state Treasurer in 1966, where he won in an otherwise abysmal Democratic year, Daley never liked him personally.<sup>83</sup> More importantly, his loyalty was always suspect: he refused to unconditionally back Johnson's Vietnam policy, for example.<sup>84</sup> Although his last name would certainly help machine candidates in downballot races, that same name would give him national ambitions—and thus reasons to distance himself from the machine. Besides, Stevenson was thirty-seven years old. He could wait.

Shriver and Daley had a good relationship. Shriver had deep Chicago connections, had earlier served as chair of the city's Board of Education, and of course was a Kennedy-in-law. Shriver's main political interaction with Daley came when LBJ put the former in charge of the War on Poverty. Shriver, together with most of the administration, embraced the Community Action program, which took federal funds out of city halls and mandated the

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<sup>82</sup> ADAM COHEN & ELIZABETH TAYLOR, *AMERICAN PHAROAH: MAYOR RICHARD J. DALEY: HIS BATTLE FOR CHICAGO AND THE NATION* 495 (2000).

<sup>83</sup> MIKE ROYKO, *BOSS: RICHARD J. DALEY OF CHICAGO* 201 (2d ed. 1976).

<sup>84</sup> See Steve Neal, *Stevenson, Daley Feud Breaks Out*, CHI. TRIB. (Aug. 27, 1986), [http://articles.chicagotribune.com/1986-08-27/news/8603030984\\_1\\_mayor-richard-j-daley-daley-aide-mayoral-election](http://articles.chicagotribune.com/1986-08-27/news/8603030984_1_mayor-richard-j-daley-daley-aide-mayoral-election) [<http://perma.cc/R3QB-3T58>] ("Mayor Daley . . . rebuffed the younger Stevenson's first bid for governor, in 1968, but offered Stevenson the party's nomination for the U.S. Senate against Republican incumbent Everett Dirksen on condition that Stevenson would modify his criticism of President Lyndon B. Johnson's Vietnam policy. Stevenson, though, declined and was dumped from the slate. But a year later, after Dirksen's death, Daley slated Stevenson as the Democratic nominee for the U.S. Senate.").

“maximum feasible participation” of the poor in planning programs.<sup>85</sup> Daley and most other big-city mayors were horrified at the possibility of federal money undermining their authority. But whereas Shriver put the screws on every other mayor, and insisted on their applying the principle of maximum feasible participation principle, he protected Daley, allowing the Chicago Mayor to maintain control in City Hall and even firing the regional director who complained about Chicago’s management of the program.<sup>86</sup>

If Johnson wanted Shriver to stand aside in order to get fair housing, however, then Daley hardly figured to push him. And Johnson was making sure that Shriver would be well out of Dirksen’s way. On February 27—the day after Dirksen announced himself open to a compromise, and just hours after the Illinois Democratic slate was announced—the White House leaked word that Shriver would become U.S. Ambassador to France.<sup>87</sup> The *New York Times* reported that Shriver had received the offer—which, like so many of LBJ’s offers, was quite difficult to refuse<sup>88</sup>—two weeks earlier, but he told OEO staffers that morning.<sup>89</sup> And with the deal announced, Shriver couldn’t very well go back on it. As with so much else with Johnson’s leadership on legislative matters, the timing was precise.<sup>90</sup> When the formal announcement came on March 22,<sup>91</sup> eleven days after the Fair Housing Act cleared the Senate, it came as no surprise.<sup>92</sup>

Surely, however, it seems fantastical to see Daley doing all of this in order to promote fair housing. If the collective recollection of the man first brings to mind his police thuggishly beating antiwar protestors at the 1968

<sup>85</sup> Lillian B. Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 385 ANNALS AM. ACAD. POL. & SOC. SCI. 14–29 (1969). See generally DANIEL PATRICK MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* (1969).

<sup>86</sup> See COHEN & TAYLOR, *supra* note 82, at 343–44 (“[D]espite its obvious domination by City Hall and the machine, Shriver hailed Chicago’s [Community Action Program] as ‘the model CAP in the country.’”).

<sup>87</sup> *Rumor Has Shriver as Envoy to France*, N.Y. TIMES (Feb. 28, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9D04E6DD143BE73ABC4051DFB4668383679EDE> [<http://perma.cc/3WRK-5BY5>].

<sup>88</sup> See CARO, *supra* note 42, at 589–90 (2002) (describing the Johnson “treatment” of persuasion).

<sup>89</sup> *Rumor Has Shriver as Envoy to France*, *supra* note 87.

<sup>90</sup> See CARO, *supra* note 42, at 593–94 (noting that as Senate Majority Leader, Johnson would schedule the timing and pacing of votes to ensure majorities, even on controversial legislation).

<sup>91</sup> Joseph A. Loftus, *Shriver Is Named Envoy to France*, N.Y. TIMES, (Mar. 23, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9F0CE3DD143BE73ABC4B51DFB5668383679EDE> [<http://perma.cc/6NX4-EN64>].

<sup>92</sup> The *New York Times* reported ten days earlier that Shriver’s appointment “can logically be expected soon.” C.L. Sulzberger, *Foreign Affairs: A New Look in Paris*, N.Y. TIMES (Mar. 13, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9D05EEDF1638E134BC4B52DFB5668383679EDE> [<http://perma.cc/TX5B-DZ8V>].

Democratic Convention, it also includes his fierce battles with Martin Luther King, Jr. in 1966 over the latter's Open Housing campaign.<sup>93</sup>

But it does not include Daley's leadership in enacting Chicago's city-wide fair housing ordinance in 1963. When that ordinance, which forbade racial discrimination in housing, passed the City Council in September of that year, the *Chicago Defender* put a half-page photo of the mayor on its front page, over the caption "Heroes of the Battle."<sup>94</sup> Daley's "favorable disposition toward the bill was a big factor in its passage and he held firm for it despite a wave of white demonstrators who converged on City Hall by the thousands."<sup>95</sup>

So what happened? The prime explanation for his behavior on fair housing derives from power, not race itself. On many issues, even sensitive ones like fair housing, Daley was anything but a reactionary, and he spent a good bit of his time and political capital attempting to integrate "friendly" Black leaders into his machine. But he would countenance absolutely no dissent from his decisions, and would do all he could to crush anyone or any organization that threatened his power base.<sup>96</sup> The Chicago Freedom Movement did—subverting the machine was one of its principal goals.<sup>97</sup> He thus had little problem with supporting the Fair Housing Act and helping a friendly President; neither would do any damage to his machine, and both might help.

Indeed, the nature of the Fair Housing Act figured to help Daley politically in a number of ways. Most importantly, it did not prohibit discrimination in the sales of single-family housing unless brokers were involved.<sup>98</sup> For the vast majority of American single-family homes, this was a distinction

<sup>93</sup> For general background regarding Daley's battles with Martin Luther King in 1966 regarding the latter's Open Housing campaign, see generally TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965-1968* (2006); COHEN & TAYLOR, *supra* note 82.

<sup>94</sup> *Heroes of the Battle*, CHI. DEFENDER, Sept. 12, 1963, at 1.

<sup>95</sup> *Id.*

<sup>96</sup> See generally, e.g., ROYKO, *supra* note 83, at 20 (describing how Daley shut down dissent at the City Council: "he will declare them to be out of order, threaten to have the sergeant at arms force them into their seats and invoke *Robert's Rules of Order* [and] all else failing . . . he will . . . make a gesture known only to the man in the booth who operates the sound system that controls the microphones on each alderman's desk. The man in the booth will touch a switch and the offending critic's microphone will go dead and stay dead until he sinks into his chair and closes his mouth."); *id.* at 148 (describing the operation of the federal antipoverty program under Daley: "Chicago's program was dominated by City Hall. Not a penny of federal money could come into Chicago without clearing through Daley. Independent agencies had to submit to the Hall's rule. The slightest hint of militancy was enough to bar a group from being funded.").

<sup>97</sup> See STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND CONFLICT IN AMERICAN NEIGHBORHOODS 183-84* (2000).

<sup>98</sup> See Fair Housing Act, Pub. L. No. 90-284, § 803(b)(1)(A), 82 Stat. 81 (1968) (codified at 42 U.S.C. § 3603(b)(1)(A)) (exempting dwellings "sold or rented . . . without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities of services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person").

without a difference. But for Daley, it meant a great deal. The Mayor always preferred “to blame the lack of fair housing in Chicago on the real estate industry rather than city government,”<sup>99</sup> and his 1963 Chicago fair housing ordinance only applied when brokers were involved. The Fair Housing Act’s scope essentially ratified the political argument he had been making for more than a decade. In any event, the tight-knit white ethnic communities that formed the heart of the Chicago machine did not use real estate brokers, so the Act would not endanger those neighborhoods.

Perhaps more subtly, it allowed Daley to slough off responsibility for fair housing onto the federal government, assisting him in maintaining machine coalitions in local and state elections. In addition, if it helped Johnson—still widely expected to be the Democratic presidential nominee—then it helped Daley: likely Republican candidate Richard Nixon would have little desire to help big-city Democratic machines.

Califano remembers little about breaking the 1968 filibuster on fair housing. But it is clear to him that at the end of the day, the Mayor was a loyal Democrat. “If we had asked him to do that,” he says, “he would have done it.”<sup>100</sup> The evidence here suggests that he did.

### *E. Was There Even a Deal?*

But how strongly does it suggest it? The case for a Johnson-Dirksen deal is highly plausible, but not airtight. It rests on circumstantial evidence, timing, and political logic. But there are no direct witnesses, and barring an extraordinarily successful séance, there will not be any.

The theory, like all theories, contains weaknesses. Most importantly, Daley’s slating record revealed little interest in gaining Illinois’s U.S. Senate seats for the Democrats. In 1968, he tapped a colorless party functionary—but he had done that in 1956 and 1962 against Dirksen, and he would do so again in 1972 against Charles Percy. Slating Clark by itself, then, is hardly a smoking gun. But it is also true that the very next time Daley had an opportunity to slate a Senate candidate, in 1970, he chose Adlai Stevenson.

In any event, the deal theory relies on more than merely the Clark choice. Most important is the chronology. The Senate was at an impasse for virtually all of January and February. Dirksen had already loudly rejected fair housing on both policy and constitutional grounds. For dozens of civil rights bills, that was a recipe for a successful filibuster.<sup>101</sup> Then, in late February, Dirksen started negotiating privately with the White House; a few

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<sup>99</sup> COHEN & TAYLOR, *supra* note 82, at 401.

<sup>100</sup> Califano interview, *supra* note 56.

<sup>101</sup> See, e.g., ZELIZER, *supra* note 29, at 236. Referring to the 1966 attempt to pass fair housing legislation, Zelizer notes: “His opposition was a huge problem because, as Bryce Harlow, a veteran political adviser and lobbyist explained, ‘the entire apparatus can be summed up in one word—Dirksen.’” *Id.*

days later a vague compromise was announced; Daley chose Clark; and Dirksen voted for cloture on the new bill.

To be sure, pressure from within the Republican Caucus played a key role. But that pressure by itself did not seem to change Dirksen's mind; if it had, then a deal could have been reached earlier. Moreover, the degree of internal GOP division remains vague: the *New York Times* reported that Dirksen was getting pressure to reach a deal, but two of the Senators it highlighted as pushing for a compromise eventually voted *against* cloture, making it unlikely that they would have overthrown Dirksen for doing the same.<sup>102</sup> And finally, for what it's worth, Dirksen's floor speech supporting the Fair Housing Act explicitly denied pressure from the caucus.<sup>103</sup> He was much more coy, however, when reporters suggested that the White House had helped to assure a weak challenger in exchange for the compromise. He could only respond: "God, I'm glad somebody's comfortable with me."<sup>104</sup>

In the end, of course, it cannot be known for sure. Perhaps internal Republican pressure was sufficient. Perhaps the reporters who heard the lines crackling between Chicago and D.C. were misled. Perhaps a legislative victory that seemed so impossible was in fact overdetermined. The evidence presented here, however, indicates at least a reasonable probability<sup>105</sup> that Johnson, Dirksen, and Daley, who after all had been dealing with each other for the better part of two decades, found a solution that served all of their political needs and created the Fair Housing Act.

Emphasizing the political maneuvering hardly implies that nothing else influenced the Minority Leader's position. Senator Mondale's well-publicized 1967 hearings particularly dramatized the plight of African-American servicemen returning home to serve at the Pentagon only to meet rejection from landlords at home;<sup>106</sup> Dirksen referenced the issue in his speech.<sup>107</sup> If nothing else, it provided a public policy excuse on which to hang his vote-

<sup>102</sup> See Herbers, *supra* note 62, at 35.

<sup>103</sup> 114 CONG. REC. 4,574 (1968).

<sup>104</sup> Herbers, *supra* note 62, at 35.

<sup>105</sup> I use this phrase in an attempt to clarify his causal claims. It derives from *Strickland v. Washington*, 466 U.S. 668, 669 (1984), which held that in order to make an ineffective-assistance-of-counsel under the Sixth Amendment, a plaintiff must demonstrate a "reasonable probability" that, but for counsel's error, the outcome would have been different. "Reasonable probability" is sufficient evidence to "undermine confidence in the outcome." I believe that the evidence provided here is sufficient to undermine confidence in any claim that White House promises of an easier election opponent for Dirksen did not occur. A reasonable probability is not a preponderance of the evidence. If social science standards are used, then a reasonable probability would suffice to undermine a two standard deviation confidence interval, and thus could be as little as five percent.

<sup>106</sup> *Fair Housing Act of 1967: Hearing Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 193-202 (1967) (statement of Navy Lt. Carlos Campbell) ("I continually ran into a brick wall of sheer, unadulterated prejudice. I might as well have been dressed in dungarees as in my dress blues which were complete with gold stripes and gold wings."). Mondale recalled, "He looked like he came right out of central casting." Mondale interview, *supra* note 39.

<sup>107</sup> 114 CONG. REC. S4574-75 (daily ed. Feb. 28, 1968).

switch. Some observers felt that Dirksen worried that Republicans would be blamed for subsequent riots if the Civil Rights Act failed.<sup>108</sup>

Finally, there was the man's own ego, outsized even for the World's Greatest Deliberative Body. Mondale recalled that "Phil Hart pulled me aside and suggested that if we offer to name the bill after him, we could get Ev's vote."<sup>109</sup> Dirksen didn't get that, but he got lots of kudos for it,<sup>110</sup> some of which he provided for himself: when he announced on the afternoon of February 27 that "there will be a bill," he made sure to claim full credit for "pulling it out of the fire."<sup>111</sup> Just to underscore the point, he said, "I don't know who in the hell has if I haven't."<sup>112</sup>

## VII. CARRYING THE TROOPS

All of this might have made sense for Dirksen himself, but could Dirksen bring recalcitrant Republicans along with him? Right away, the answer was no: Dirksen's initial switch did not immediately bring cloture, as only son-in-law Baker joined him in voting to end debate.

Within a matter of days, however, six Republicans agreed to support cloture: Frank Carlson and James Pearson of Kansas, Winston Prouty of Vermont, Jack Miller of Iowa, Len Jordan of Idaho, and Thruston Morton of Kentucky. Mondale recalled that they were "the Dirksen loyalists."<sup>113</sup> In retrospect, these names should not surprise. Morton and Carlson were retiring, and so they had little worry about electoral consequences. Moderates such as Pearson and Prouty could be brought over without pushing them too hard ideologically.

Civil rights forces had been preparing the ground for this phase over the past several months. Their lobbying went outside Washington and into the

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<sup>108</sup> Dirksen himself claimed in his floor speech that he had switched his position due to fears of social unrest, 114 CONG. REC. S4960 (daily ed. Mar. 4, 1968), a claim that his most recent biographer dismisses as a "sham." HULSEY, *supra* note 46, at 255. Earlier biographers, however, suggest that Dirksen's real fear was that any unrest would hurt the GOP politically. EDWARD L. SCHAPSMIEIER & FREDERICK H. SCHAPSMIEIER, *DIRKSEN OF ILLINOIS: SENATORIAL STATESMAN* 220 (1985). This is no more than speculation, however: the authors do not back it up with concrete evidence.

<sup>109</sup> Mondale interview, *supra* note 39.

<sup>110</sup> See, e.g., Marjorie Hunter, *Accord on Rights Nears in Senate*, N.Y. TIMES (Feb. 27, 1968), <http://query.nytimes.com/gst/abstract.html?res=9C02E0DC1138E134BC4F51DFB4668383679EDE> [<http://perma.cc/7TJT-4697>] (quoting Senate Majority Leader Mike Mansfield: "If we get a bill you can thank [Dirksen] for it.").

<sup>111</sup> Marjorie Hunter, *Dirksen Supports Housing Accord For Rights Bill*, N.Y. TIMES (Feb. 28, 1968), <http://query.nytimes.com/gst/abstract.html?res=9F0DEEDE143BE73ABC4051DFB4668383679EDE> [<http://perma.cc/2S83-VJB8>].

<sup>112</sup> *Id.*

<sup>113</sup> Mondale interview, *supra* note 39. This appears to be the case for Carlson, at least from the public sources. See Robert C. Albright, *Rights Package Passed: Senate Sends Bill to House By 71-20 Vote*, WASH. POST, Mar. 12, 1968, at A1 ("Leaders said later that Senator Carlson and [Alaska Democratic] Senator Bartlett [who had supported cloture in 1966] had assured them they would support closure [sic] if their votes were desperately needed—as they were. 'It was finally time,' Senator Carlson said.").

editorial boardrooms of local newspapers in the home states of wavering Senators. Mondale remembered in particular that the *Des Moines Register* ran an editorial attacking Miller for blocking fair housing: “He didn’t like that at all.”<sup>114</sup>

In the papers of wavering Senators, the substantive provisions of the “Dirksen” compromise appear to loom large. Establishing the Mrs. Murphy exception and allowing homeowners to discriminate if they did not use a broker allowed Senators from conservative jurisdictions to argue that they had not deprived any property owners of rights. Jordan focused on that, noting that after cloture was invoked, the Civil Rights Act passed seventy-one to twenty: “I do not agree that 71 Senators, representing the majority of both political parties, want to destroy property rights of any U.S. citizen,” he told the chair of the Idaho Republican Central Committee.<sup>115</sup> Dirksen himself used similar language in letters to constituents, emphasizing that “we held the fort as far as individual homeowners are concerned.”<sup>116</sup>

Pro-civil rights forces also picked up one more key vote on the Democratic side: Nevada’s Howard Cannon. Cannon had voted for cloture in 1964, but against it in 1966, when the primary issue was fair housing.<sup>117</sup> As late as February 23, White House aides were trying to figure out how to get Cannon to stay away.<sup>118</sup> But Cannon’s home state pressure was pointing in favor of civil rights: a majority of his incoming mail, unlike Jordan’s, favored the bill.<sup>119</sup> And if Cannon was thinking about future electoral prospects, he would need that support: four years earlier, during the Johnson Democratic landslide, he gained re-election over Republican Lieutenant Governor Paul Laxalt by the grand total of forty-eight votes, with overwhelming majorities in Nevada’s small, but crucial, African-American voting bloc.<sup>120</sup> When a couple wrote to commend him for voting for cloture, Cannon made sure to tell his assistant to mark them down as campaign volunteers for 1970.<sup>121</sup>

<sup>114</sup> *Id.*

<sup>115</sup> Letter from Senator Len B. Jordan to H. Lance Oberholtzer (Mar. 15, 1968), Len B. Jordan Papers, Albertsons Library, Boise State University.

<sup>116</sup> Everett Dirksen Constituent Robo, (Mar. 13, 1968), Everett M. Dirksen Papers, Dirksen Congressional Center.

<sup>117</sup> 112 CONG. REC. S23,042–43 (daily ed. Sept. 19, 1966) (Senate cloture vote on H.R. 14765, Civil Rights Act of 1966).

<sup>118</sup> See Temple, *supra* note 70.

<sup>119</sup> My conclusion for this is based on his reading of Box 5, Folder 75, 90th Congress 1967–68, entitled “Civil Rights (cloture)” for Oct. 1967 through April 1968. Howard Cannon Papers, Special Collections, University of Nevada Las Vegas Library.

<sup>120</sup> Cannon’s biographer notes that Cannon survived his campaign against Laxalt due to his strength in Las Vegas: “[C]rucial to that strength was the overwhelming support Cannon received from the African American [sic] community. The twenty Westside precincts went with Cannon by the astounding margin of 3,583 to 183, making his cloture vote five months earlier [for the Civil Rights Act of 1964] the most crucial vote he cast in his entire twenty-four year career.” MICHAEL VERNETTI, *SENATOR HOWARD CANNON OF NEVADA: A BIOGRAPHY* 112–13 (2008).

<sup>121</sup> Letter from Mr. and Mrs. Leonard Ludel to Cannon, & Cannon margin note (Mar. 5, 1968), Box 5, Folder 75, Howard Cannon Papers, Special Collections, University of Nevada

Civil rights supporters also used the failure to table the bill in their favor. Without *some* resolution, the upper house would remain stuck and unable to do anything. Dirksen explained shortly afterwards that in such circumstances, “the Senate could move neither forward nor backward.”<sup>122</sup> Jordan responded to an outraged constituent more explicitly but in similar fashion:

Knotty problems face this Congress and with party conventions coming in August, followed by the distraction of an election campaign, the time is short in which we can give them careful and undivided attention. Eight weeks is too long to spend on one measure, important as it is. The Senate must get on with its business. The times demand it.<sup>123</sup>

Southern Democrats might have been content to shut down the Senate for the rest of the session. Conservative Republicans from states where the bill had little impact, however, were not prepared to sacrifice their priorities on the altar of Jim Crow—and certainly not once their leader had committed to supporting the bill.<sup>124</sup>

So what took so long? Why did the Senate need yet another cloture vote? The papers of the various Senators shed little light, but the best explanation seems to derive from the time it took to coordinate efforts. Mondale

Las Vegas Library. Cannon need not have worried: he was easily re-elected in 1970 and 1976 before being defeated in 1982.

<sup>122</sup> “Civil Rights Issues Again,” Draft National Radio & Television Address (Mar. 4–10, 1968), page 1, Dirksen Papers, Dirksen Congressional Center.

<sup>123</sup> Senator Len B. Jordan form constituent letter (Mar. 8, 1968), Len B. Jordan Papers, Albertsons Library, Boise State University. This also appears to have influenced Carlson. He told an old friend from North Carolina:

We have been on the present Civil Rights Bill since the opening of the session of Congress and I felt that it was necessary that we get it off the calendar and begin taking care of some problems dealing with the domestic and international situations. They are both critical. The only way we could get it off was to vote cloture.

Letter from Frank Carlson to Sim A. DeLapp (Mar. 8, 1968), Frank Carlson Papers, Kansas Historical Society, Topeka, Kansas. DeLapp’s original letter opened, “We have been friends for many years,” Letter from Sim A. DeLapp to Frank Carlson (Mar. 5, 1968), Frank Carlson Papers, and Carlson’s response started “Dear Sim.” As his other constituent letters used “Mr.” or “Mrs.,” and as DeLapp did not come from Kansas, I am assuming that the two men had some sort of personal relationship, although I do not know how far back it went or how close it was. In any event, even if Carlson’s response did not contain the whole truth, it seems to have been more than mere constituent boilerplate.

<sup>124</sup> One might well wonder whether such an explanation proves too much; after all, if shutting down the Senate was good enough to break a filibuster, then why was it a problem? Unlike in present times, where the filibuster has become a matter of course, filibusters were very rare during the 1960s. See Packer, *supra* note 35 (“For decades, [cloture] was rarely used; between 1919 and 1971, there were only forty-nine cloture votes, fewer than one per year.”). Put another way, the filibuster was not a problem during the period—only on legislation involving civil rights. And unlike during the modern period, in which a “silent filibuster” does not interrupt the Senate’s business, filibusters in the 1960s actually shut down the body. Given that a majority of Senators wanted to move forward and refused to table the bill, the choice really lay between cloture and deadlock.

recalls that many Senators, especially including the last-minute switchers, “always voted against cloture, on the idea that small states wanted to protect the filibuster.”<sup>125</sup> Senators from small states worried that the rest of the country would gang up on them, and so they agreed to stick together against cloture.<sup>126</sup> If someone was going to break this understanding and vote for cloture, he had to ensure that such a vote would not unravel the small state coalition. That probably meant a few days of negotiations and political checking.

Certainly this issue weighed heavily on Cannon’s mind: he repeatedly told his constituent correspondents that he was extremely reluctant to support cloture “because of my responsibility to safeguard the rights of small states like ours to free and unlimited debate on issues essential to their survival but perhaps immaterial to larger and more urban-oriented states.”<sup>127</sup> When a prominent Nevada lawyer expressed mild criticism for him not voting for cloture earlier, Cannon protested, “I am the only Nevada senator ever to vote for cloture and have done so twice”; in a subsequent note, the lawyer backed down. Majority Leader Mansfield, who represented Montana, recognized the issue, and privately thanked Cannon for his vote: “A decision of this kind is very difficult for members of the Senate from the less populous States like those we represent.”<sup>128</sup> Cannon responded a few days later: “As a fellow Westerner and Senator from a small state, I appreciate very much your understanding of the special problem which this issue presented to me.”<sup>129</sup>

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<sup>125</sup> Mondale interview, *supra* note 39.

<sup>126</sup> See Charles Ferris: *Staff Director, Senate Democratic Policy Committee (1963–1977)*, UNITED STATES SENATE, [http://www.senate.gov/artandhistory/history/common/generic/Ferris-Charles\\_CivilRightsCloture3.htm](http://www.senate.gov/artandhistory/history/common/generic/Ferris-Charles_CivilRightsCloture3.htm) [<http://perma.cc/KPH8-CWMR>]. Ferris was the Staff Director for the Senate Democratic Policy Committee from 1963 to 1977. He recalled: “Cloture protects the small states. It was like the constitutional compromise of two Senators from each state, the cloture vote was a corollary of the same concept. They had this tremendous sense of standing firm on cloture, because they might need it to protect their own state’s interests. That inhibition had to be overcome. There were some with whom we were unsuccessful. Alan Bible of Nevada never voted for cloture. Howard Cannon did. He did it on the Equal Housing bill of ‘68. I’m not sure if he did it on Voting Rights of ‘65, but I know in ‘68 the big factor with Cannon was that kids were going over to fight in Vietnam and if they came back they should be able to get the same housing as the other guys they fought with side-by-side. If they fought side-by-side over there they could live side-by-side back here. But Nevada never had a Senator that voted for cloture before.” *Id.*

<sup>127</sup> See, e.g., Letter from Senator Howard Cannon to Mrs. Phyllis Berkson (Feb. 28, 1968), Howard Cannon Papers, Special Collections, University of Nevada Las Vegas Library.

<sup>128</sup> Letter from Senate Majority Leader Mike Mansfield to Senator Howard Cannon (Mar. 5, 1968), Howard Cannon Papers, Special Collections, University of Nevada Las Vegas Library.

<sup>129</sup> Letter from Senator Howard Cannon to Senate Majority Leader Mike Mansfield (Mar. 12, 1968), Howard Cannon Papers, Special Collections, University of Nevada Las Vegas Library. It seems unlikely that a silent side deal similar to that for Dirksen was involved with Cannon’s vote. There was one obvious thing that Cannon wanted: a pardon for Las Vegas casino owner Benny Binion, who had been convicted several years earlier on tax evasion charges, but was regarded as something of an upstanding citizen (at least under Las Vegas standards) by the late 1960s. Cannon pulled out all the stops for Binion, but Johnson refused—

Getting to two-thirds also required some last-minute parliamentary maneuvering, particularly proposals to give conservative Republicans further cover. Just after the final compromise was reached, Baker sponsored an amendment to exempt all single-family housing from the Act's purview, a provision that would have eviscerated the bill. It was completely unacceptable to civil rights forces, who expressed outrage at what they originally saw as Dirksen's double-crossing them.<sup>130</sup> But they need not have worried: Baker made it very clear that he would support the final compromise whether his amendment passed or not, hardly an indication of hardball negotiating.<sup>131</sup> And it failed quite badly, getting only forty-three votes.<sup>132</sup> The fate of the Baker provision belies the standard scholarly argument that Congress cared only about passing a cosmetic bill: had that been its concern, then the Baker amendment would have passed.<sup>133</sup> But it did allow Senators facing angry homeowners to say that they had fought for the rights of single-family property owners.

In the end, the Senate reached cloture on March 4, by the thinnest of margins.<sup>134</sup> When Alaska's Bob Bartlett finally voted "aye," giving the mo-

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even after he decided not to run for re-election and after the November 1968 election. See VERNETTI, *supra* note 120, at 127–30. If LBJ could not give Cannon something as relatively easy as a pardon down the road, it seems unlikely that he gave him anything else.

<sup>130</sup> The origins of the Baker amendment remain unclear. Dirksen's biographer suggests that it derived from Dirksen's initial inability to garner the last few votes for cloture, and that it constituted an effort to "win conservative support." HULSEY, *supra* note 46, at 254. Liberal outrage followed, and Hulsey writes, "Seeing that the minority leader had lost his edge, Percy asked presidential candidate Richard Nixon to prevail upon [South Dakota Republican Senator] Karl Mundt for his vote. After securing some last minute modifications, Mundt supported the bill." *Id.* at 254–55. This is true but misleading: Mundt supported the bill when it finally came up for a vote, but remained a firm no on cloture, which was really the issue. As there is no documentary evidence on the matter, it seems more likely to interpret it as a bid to allow wavering Republicans to vote for it, demonstrate to them that the liberals would not cave, and give them cover for their eventual support for the final package.

<sup>131</sup> See Marjorie Hunter, *Dirksen Seeks to Weaken Compromise on Housing*, N.Y. TIMES (Mar. 1, 1968), [<http://perma.cc/9TZY-UF4A>]. ("[Baker's] aide said that if the amendments failed, Senator Baker would support the earlier compromise with the stiffer open housing proposals."). At the same time, Dirksen offered an amendment exempting single-family homes with mortgages insured by the Federal Housing Administration or the Veterans' Administration—a provision that also outraged liberals and which Dirksen quickly withdrew, saying that it appeared to be a misunderstanding. See Marjorie Hunter, *Senate Rejects Closure 3d Time in Rights Debate*, N.Y. TIMES (Mar. 2, 1968), <http://query.nytimes.com/gst/abstract.html?res=9807E1DB1530EF34BC4A53DFB5668383679EDE> [<http://perma.cc/98GD-DPQR>].

<sup>132</sup> This at least is the count on Senator Dirksen's own tally sheet. Civil Rights Legislation—H.R. 2516 and Senator Dirksen's Amendment #554 at 2 (Mar. 11, 1968) Dirksen Papers, Dirksen Congressional Center.

<sup>133</sup> When asked about the standard scholarly argument, the normally affable Mondale turned angry: "If it had been a cosmetic bill, I would have opposed it." Mondale interview, *supra* note 39.

<sup>134</sup> See Marjorie Hunter, *Senate Cuts Off Debate on Rights by Scant Margin*, N.Y. TIMES (Mar. 5, 1968), <http://query.nytimes.com/gst/abstract.html?res=9804E7DC143AEF3BBC4D53DFB5668383679EDE> [<http://perma.cc/FLX7-MJJ6>]. The final vote was 65-32: then-existing Senate rules required two-thirds of Senators present and voting, not of the entire body.

tion to limit debate the requisite sixty-five votes, “the galleries burst into applause.”<sup>135</sup> With cloture invoked, the rest was a formality.

### VIII. CONCLUSION

Understanding the secret history of the Fair Housing Act—which is to say, the genuine history of its origins—requires the radical revision of questions concerning the development of housing discrimination and segregation in the United States. The traditional account holds that the United States remained segregated because of a fatally flawed Act that was designed to fail. We know now that it was not designed to fail, and had several potentially strong enforcement measures.

Given the fact that the Fair Housing Act had strong enforcement potential, we need to know what happened to it. Accounts of fair housing policy in the wake of the Act deal exclusively with HUD and, in particular, the question of where HUD sited its subsidizing housing projects. As seen from the analysis of the Act’s enforcement provisions, such a focus is misplaced. Instead, we first need to determine what occurred within the Justice Department’s Civil Rights Division, which had the real authority over enforcement. Moreover, we need to know more about HUD’s enforcement decisions. As we have seen, HUD had a potentially powerful role in writing regulations, conducting tests, and enforcing the Act’s mandate that all federal agencies “affirmatively further” fair housing. Instead, HUD decided to become a claims-processing organization even though its leaders were genuinely committed to desegregation.<sup>136</sup> Examining why HUD took this route will be a focus of further research.

More broadly, we need to fundamentally rethink the scholarly consensus that the Fair Housing Act failed. Shortly before the Act’s passage, testing surveys routinely found the incidence of discrimination upwards of ninety percent. By 1977, when HUD did its first national test, it found that the incidence had declined to less than fifty percent and sometimes as low as thirty-three percent<sup>137</sup>—still far too high, but a remarkable drop, and one that belies casual assertions of legal and policy failure.

How did it happen? Since we now know that the Act contained within it potentially powerful enforcement provisions, we can attempt to determine its role—if any—in achieving such a remarkable outcome. Perhaps the specter

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<sup>135</sup> Neil MacNeil, *Special Report: How Old Ev Foiled the Filibuster*, LIFE, Mar. 15, 1968, at 32B.

<sup>136</sup> Bonastia’s work reveals that HUD Secretary George Romney and his chief aide, Richard Van Deusen, were genuinely committed to fair housing, but promoted it through attempting to move HUD affordable housing projects into white suburbs—precisely the strategy that would have caused the greatest resistance and been most dangerous politically to the Nixon Administration. The causes of this choice have never been explained. See BONASTIA, *supra* note 5.

<sup>137</sup> See generally MARGERY AUSTIN TURNER, RAYMOND J. STRUYK & JOHN YINGER, HOUSING DISCRIMINATION STUDY: SYNTHESIS (1977).

of DOJ enforcement, and a few high profile cases, were enough to change landlord, seller, and broker behavior. Alternatively (or in addition), we might posit that the *social meaning* of housing discrimination changed in the wake of the Act's passage.<sup>138</sup> Before passage, white sellers, landlords, and brokers faced strong social pressure to discriminate, whether or not they wanted to. The passage of the Fair Housing Act changed the meaning of renting or selling to African-Americans: such actions were no longer treason to the white community, but rather simply law-abiding behavior<sup>139</sup>—particularly important in the turbulent late 1960s and early 1970s. Or perhaps the Act had no effect on the rapid and sharp reduction in discrimination, and it was simply a matter of changing social mores unconnected with legal change.

If this story of the Fair Housing Act's success is true, it raises truly major questions about the future of solving the American dilemma. The FHA's critics are surely right when they observe that the United States remains a deeply *segregated* society. Yet this condition does not necessarily imply that high rates of *discrimination* are the root cause of the problem. Discrimination, of course, could remain the cause: HUD's most recent survey of discrimination rates, for example, revealed that when comparing treatment, Blacks were informed of roughly 11% fewer rental units and 17% fewer available houses than whites; they were shown 4% fewer apartments and 17.7% fewer houses as well.<sup>140</sup> While far lower than the rates during the 1960s, these numbers remain too high, and perhaps high enough to cause widespread segregation.

Such a conclusion, while possible, is hardly required. Conservative scholars argue that high rates of segregation essentially represent self-selection among different ethnic groups and should not necessarily be held as invidious.<sup>141</sup> Although such conclusions are open to serious doubt, they remain plausible. More intriguing, however, remains the possibility that even though all racial groups seek to live in "integrated" communities, small dif-

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<sup>138</sup> See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 965–67 (1995).

<sup>139</sup> This, at least, is Lessig's interpretation. See *id.*

<sup>140</sup> UNITED STATES DEP'T OF HOUSING AND URBAN DEV. OFFICE OF POLICY DEVELOPMENT & RESEARCH, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xi (2013), [http://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](http://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf) [<http://perma.cc/6HBC-DBRB>].

<sup>141</sup> See, e.g., David Armor & William A. V. Clark, *Housing Segregation and School Desegregation*, in DAVID ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 117–53 (1995); see generally William A. V. Clark, *Residential Segregation in American Cities: A Review and Interpretation*, 5 POPULATION RES. & POL'Y REV. 95 (1986); William A. V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991).

ferences in neighborhood composition preferences might yield high levels of segregation.<sup>142</sup>

Determining which of these three accounts—or which combination of them—best explains American segregation has vast policy implications. If it is discrimination, it might call for genuinely new and different approaches to enforcement, which of course would require far more detailed accounts of how enforcement has succeeded or failed in the past. If it is free choice by ethnic groups, then standing pat might be the best answer. And if segregation derives from small preference differences yielding massive results, then it might require an entirely new form of policy response altogether—a response that is central to U.S. urban policy but so far has failed to appear even on the radar screen of policymakers or academics.

In any event, we need to move past the regnant scholarly consensus of the past two decades. The Fair Housing Act was not designed to fail; it was not rendered toothless; it was not defanged. By conventional accounts of measuring discrimination, it was actually a stunning success. More than seven decades after Gunnar Myrdal wrote *An American Dilemma*, we should not think that that dilemma has been overcome. But neither should we fail to recognize the genuine triumphs that the civil rights movement achieved.

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<sup>142</sup> Nobel Laureate Thomas Schelling suggested such a scenario more than three decades ago, but for the most part, his insights have been ignored by current scholars. See THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 129–61 (1978).