

# ARTICLES

## ENFORCING CIVIL RIGHTS OBLIGATIONS THROUGH THE FALSE CLAIMS ACT

*Stephen F. Hayes\**

*In August 2009, Westchester County, New York entered into a consent decree to settle a lawsuit brought against it pursuant to the federal False Claims Act. Serving as a qui tam relator on behalf of the United States government, a non-profit alleged that Westchester had falsely certified that it had complied with its obligations to affirmatively further fair housing in order to receive over \$50 million in federal housing funds. According to the relators, Westchester had failed to undertake basic fair housing requirements such as considering race-based impediments to housing choice. The litigation was the first to employ the FCA as a method to enforce a locality's obligation to affirmatively further fair housing and thus represents an innovative model for litigation aimed at reforming major social institutions. This Article situates the Westchester case in ongoing debates about the legitimacy and efficacy of institutional reform litigation and concludes that the public-private partnership model offered by the FCA addresses some common criticisms of litigation as a method of institutional change.*

I.	INTRODUCTION .....	30
II.	THE FALSE CLAIMS ACT AND FEDERAL HOUSING GRANTS.....	31
	A. The Qui Tam Provision of the False Claims Act.....	31
	1. A Brief History and Renewed Interest.....	31
	2. Elements of a Qui Tam Case.....	33
	B. Affirmatively Furthering Fair Housing .....	36
	1. Statutory and Regulatory Background.....	36
	2. The Problem of Weak Enforcement.....	38
III.	A CASE STUDY: UNITED STATES EX REL. ANTI-DISCRIMINATION CENTER V. WESTCHESTER .....	40

---

\*J.D., May 2010, Columbia Law School. Thanks to Gillian Metzger, Olati Johnson, Diane Houk, Justin Steil, and Devi Rao for comments and suggestions. Thanks to Priscilla Orta-Wenner and Sheila Adams for their wonderful editorial assistance

A.	The Litigation.....	40
B.	Subsequent Events .....	42
IV.	INSTITUTIONAL REFORM LITIGATION .....	44
A.	The Early Promise and Doctrinal Limits .....	45
B.	The Case for Institutional Reform Litigation.....	46
C.	Criticisms of Institutional Reform Litigation .....	48
V.	TESTING THE WESTCHESTER MODEL.....	50
A.	Is the FCA Model Responsive to Institutional Reform Critiques?.....	50
1.	FCA Violation as Contractual Breach.....	50
2.	Consent Decrees and Injunctive Relief.....	54
3.	Infringing on Executive Prerogatives.....	56
B.	Will the FCA Model Sufficiently Protect Civil Rights? .....	58
VI.	CONCLUSION.....	60

## I. INTRODUCTION

Litigation aimed at reforming social institutions has changed substantially since the Supreme Court first ordered district courts to oversee school desegregation.<sup>1</sup> Scholars have questioned the efficacy and legitimacy of litigation as a method of social change, and courts have fashioned doctrines limiting the availability of the sorts of injunctive relief ordered in *Brown v. Board of Education* and its progeny. As a result, modern courts are less likely to design and enforce sweeping equitable relief compelling action from institutions like housing authorities, school boards, or prisons. These changes do not mean, however, that plaintiffs no longer seek structural reform through litigation. Rather, advocates have responded by adjusting the forms of these suits, including pursuing innovative causes of action and seeking narrowly-tailored remedies.<sup>2</sup>

This Article discusses a recent lawsuit against Westchester County, New York as an example of an inventive method of initiating institutional reform. A private party, on behalf of the government, brought suit under the qui tam provision of the False

---

<sup>1</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>2</sup> For more detailed discussions of how advocates have tailored these lawsuits, see, e.g., John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1411 (2007) (discussing recent qualitative changes in the nature of institutional reform lawsuits); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 721 (1993) (noting procedural innovations in corrections reform litigation).

Claims Act (FCA),<sup>3</sup> challenging Westchester’s failure to honor its agreement that it would further civil rights conditions in exchange for federal housing funds. Situating this case study within debates about expansive judicial relief, this Article argues that the public-private partnership model of qui tam provisions is responsive to critiques of institutional reform litigation. This discussion is especially relevant in light of the fact that Congress recently targeted the FCA as a method of monitoring federal spending—the federal “bailout” and the healthcare reform act both amended the FCA to facilitate qui tam lawsuits.<sup>4</sup>

Part Two discusses both the qui tam provision of the FCA and the civil rights requirement to further fair housing, with which Westchester agreed to comply as a condition of receiving federal housing grants.<sup>5</sup> This Part also identifies the lack of enforcement of housing laws as a contributing factor to continuing racial segregation. Part Three discusses how the private litigant in the Westchester case utilized the qui tam provision of the FCA to remedy the County’s civil rights violations. Part Four outlines the principal arguments that have been advanced for and against institutional reform litigation. Finally, Part Five situates the Westchester case study in these debates and argues that the qui tam model is responsive to some of the more prominent critiques.

## II. THE FALSE CLAIMS ACT AND FEDERAL HOUSING GRANTS

### A. The Qui Tam Provision of the False Claims Act

#### 1. A Brief History and Renewed Interest

Qui tam provisions allow a private party to bring a civil action in the name of the government. The person who pursues the action—the relator—receives a portion of any amount recovered on the government’s behalf. Although variants of these provisions date back to thirteenth century England,<sup>6</sup> and early American Congresses

---

<sup>3</sup> 31 U.S.C.A. §§ 3729-3733 (West 2010).

<sup>4</sup> Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (amending False Claims Act, 31 U.S.C. §§ 3729-3733); Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119, at § 10104(j)(2) (2010).

<sup>5</sup> 42 U.S.C. § 5304(b)(2) (2006).

<sup>6</sup> See Kary Klismet, *Quo Vadis, “Qui Tam?” The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v.*

enacted several qui tam statutes,<sup>7</sup> the qui tam provision of the FCA has generated the most contemporary litigation.<sup>8</sup>

Congress enacted the FCA during the Civil War to curb frauds perpetrated by war profiteers against the Union Army.<sup>9</sup> The FCA was designed as a whistleblower statute to encourage private parties to alert the government when a federal contractor was providing shoddy arms, such as artillery shells filled with sawdust.<sup>10</sup> As enacted, the FCA broadly applied to any person or entity that submitted a false claim for payment involving the use of federal revenue.<sup>11</sup> Over the next several decades, abuses by relators led to judicial limitations, ultimately resulting in restrictive amendments in 1946 that effectively precluded any viable use of the Act for the next forty years.<sup>12</sup>

Following public exposure of excessive prices paid by the Department of Defense to contractors, Congress amended the FCA in 1986 to make it significantly easier and financially more attractive for private relators to bring claims under the qui tam provision.<sup>13</sup> Unsurprisingly, qui tam actions increased dramatically: Only thirty-two qui tam suits were filed in 1987, and they resulted in no recoveries. Since 1986, however, the federal government has recovered more than \$22 billion from qui tam actions, including a

---

United States *ex rel. Stevens*, 87 IOWA L. REV. 283, 287-88 (2001) (describing history of qui tam actions).

<sup>7</sup> See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553 (2000) (listing early qui tam provisions).

<sup>8</sup> *Id.* at 555 (noting substantial amount of litigation in the past twenty years driven by the False Claims Act).

<sup>9</sup> *Id.* (describing history of enactment).

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

<sup>11</sup> See Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 90 (1997).

<sup>12</sup> See Beck, *supra* note 7, at 561. This Article provides only a brief sketch of the FCA here because other authors have detailed the fascinating history of the Act in other pieces. For more thorough discussions of the FCA, see *id.* at 555-61 (providing a detailed discussion of the history of the FCA); CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 2:3 (2010) (providing overview of history of the qui tam provision of the FCA and collecting sources); see also *Vt. Agency Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774-77 (2000) (discussing the history of qui tam actions in England and the American Colonies).

<sup>13</sup> See Beck, *supra* note 7, at 561-62.

total of at least \$1 billion per year recovered in eight of the last ten years.<sup>14</sup>

More recently, two major pieces of legislation have amended the FCA to facilitate enforcement of fraud associated with federal expenditures. First, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA) as companion legislation to facilitate enforcement of the Emergency Economic Stabilization Act of 2008—the federal “bailout.”<sup>15</sup> In addition to streamlining several procedural mechanisms to incentivize FCA claims, FERA abrogated a Supreme Court decision and a D.C. Circuit decision that each read the qui tam provisions narrowly.<sup>16</sup> Second, as discussed below, the Patient Protection and Affordable Care Act (PPACA)—the recent health care overhaul—amended the FCA in several ways to encourage relator claims.<sup>17</sup> In addition to these amendments, several bills that would expand the FCA remain in various stages of the legislative process.<sup>18</sup> In short, Congress has revitalized the FCA as a robust tool to combat fraud against the government.

## 2. Elements of a Qui Tam Case

To establish liability under the FCA, a relator must establish that (1) a false claim or false statement (2) was submitted to the United States for payment (3) with the knowledge that the claim or

---

<sup>14</sup> See Christopher C. Burris et al., *Converging Events Signal a Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations*, 56 FED. LAW. 59, 59-60 (2009).

<sup>15</sup> Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (amending False Claims Act, 31 U.S.C. §§ 3729-3733 (2006)).

<sup>16</sup> See *id.*; see also Burris, *supra* note 14, at 59-62 (describing amendments). The legislation was responsive to *Allison Engine Co. Inc. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (holding FCA did not establish liability for false claims made to government contractors and grantees, as opposed to claims made directly to the government), as well as *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (requiring that false claim be presented directly to federal government as opposed to a government grantee). According to the Senate Report, these amendments were aimed at uncovering “corporate and mortgage frauds that have contributed to the recent economic collapse” and protecting the massive outflow of federal funds expended in response to the economic crises. S. Rep. No. 111-10, at 1 (2009).

<sup>17</sup> Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119, at § 10104(j)(2) (2010). See *infra* notes 30-33 (discussing amendments).

<sup>18</sup> See Burris, *supra* note 14, at 62 (discussing pending legislation).

statement in support of the claim was false or fraudulent.<sup>19</sup> The “knowledge” prong does not require specific intent to defraud; a showing that a defendant “reckless[ly] disregard[ed] the truth or falsity of the information” can be sufficient.<sup>20</sup> Likewise, the term “claim” means simply “any request or demand, whether under a contract or otherwise, for money or property.”<sup>21</sup>

In addition to establishing these underlying elements, a relator must follow several procedural steps to accommodate government involvement in an FCA suit. She must serve a copy of the complaint and disclose all material evidence to the government. The complaint is not immediately served on the defendant and remains sealed for at least sixty days.<sup>22</sup> The government can elect to either take over the action entirely or decline to participate, in which case the relator can continue with the case.<sup>23</sup> If the government pursues the action, the private relator can continue as a party.<sup>24</sup> The government has the power to dismiss the suit, but not until the relator has an opportunity for a hearing on the motion.<sup>25</sup> Regardless of objections from the relator, the government can settle the action as long as the court determines that the settlement is fair.<sup>26</sup> Finally, upon a showing by the government, the court can limit participation by the private party in various other ways.<sup>27</sup>

The FCA also contains numerous pitfalls for an unwary relator which are designed to limit frivolous suits based on widely-known information. Notably, a relator cannot bring suit based on a “publicly disclosed” fraud.<sup>28</sup> Specifically, any transaction disclosed in a criminal, civil, or administrative hearing, or from the news media is not actionable.<sup>29</sup> Until recently, this “public disclosure bar” had been one of the most difficult barriers for relators to overcome. The PPACA, however, lowered this bar considerably: Whereas the

---

<sup>19</sup> 31 U.S.C.A. § 3729(a)(1) (West 2010) (reaching, *inter alia*, any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”).

<sup>20</sup> *Id.* § 3729(b)(1)(A) & (B).

<sup>21</sup> *Id.* § 3729(b)(2).

<sup>22</sup> *Id.* § 3730(b)(2).

<sup>23</sup> *Id.* § 3730(b)(4).

<sup>24</sup> *Id.* § 3730(c)(1).

<sup>25</sup> *Id.* § 3730(c)(2)(A).

<sup>26</sup> *Id.* § 3730(c)(2)(B).

<sup>27</sup> *Id.* § 3730(c)(2)(C).

<sup>28</sup> *Id.* § 3730(e)(4)(A).

<sup>29</sup> *Id.*

provision was previously labeled “jurisdictional,” thereby *requiring* a court to dismiss claims based on publicly disclosed information, the government now has the power to oppose dismissal.<sup>30</sup> Likewise, the PPACA reversed a recent Supreme Court decision holding that disclosures in state or local government reports or proceedings barred actions; now only disclosures in federal proceedings qualify as “publicly disclosed.”<sup>31</sup> Finally, even if material has been disclosed publicly, there is an exception for parties that are “original source[s]” of information.<sup>32</sup> The PPACA broadened this exception by substituting a requirement that relators have “direct” knowledge of the facts underlying the allegations with language allowing for suits based on “knowledge that is independent of and materially adds to the publicly disclosed allegations.”<sup>33</sup> Presumably, the FCA no longer requires that relators have first-hand knowledge of information as long as they acquired information independently of public disclosures.

If a relator is successful, damages can be substantial. A person who presents a fraudulent claim to the United States is liable for civil penalties of between \$5,500 and \$11,000 for each claim, as well as treble the damages sustained by the government.<sup>34</sup> The relator can receive anywhere from fifteen to thirty percent of the proceeds of the action or settlement, as well as attorneys’ fees and costs.<sup>35</sup>

The client agencies in the vast majority of FCA actions have been the Department of Health and Human Services (HHS) and the Department of Defense (DOD).<sup>36</sup> Common actions charge a health

---

<sup>30</sup> Robert T. Rhoad & Matthew T. Fornataro, *Whistling While They Work: Limiting Exposure in the Face of the PPACA’s Invitation to Employee Whistleblower Lawsuits*, 22 HEALTH LAW. 19 (2010) (describing amendment to FCA).

<sup>31</sup> See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010) (interpreting the FCA as the text stood before PPACA amendments).

<sup>32</sup> 31 U.S.C.A. § 3730(e)(4)(A) & (B).

<sup>33</sup> Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119, at § 10104(j)(2) (2010) (amending the False Claims Act, 31 U.S.C.A. § 3730).

<sup>34</sup> 31 U.S.C.A. § 3729(a)(1). The statutory penalties may be adjusted for inflation. See 28 C.F.R. § 85.3 (2010) (raising penalties from range of \$5,000 to \$10,000 to range of \$5,500 to \$11,000).

<sup>35</sup> 31 U.S.C.A. § 3730(d).

<sup>36</sup> See CIVIL DIV., U.S. DEP’T OF JUSTICE, FRAUD STATISTICS—OVERVIEW (Oct. 1, 1986 – Sept. 30, 2008), available at <http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm> (During the period of 1986 to 2008, 3,306 new qui tam actions were filed with HHS as

care provider with presenting a claim to Medicare for reimbursement of services that were never performed, were not performed adequately, or were performed in violation of an applicable regulatory or statutory provision.<sup>37</sup> Likewise, FCA cases still target military contractors who provide inadequate goods or fail to test properly products sold to the DOD.<sup>38</sup> These sorts of cases are intuitively fraudulent because a party seeks reimbursement for a service never performed or for faulty goods.

The Westchester lawsuit addressed a different kind of case: As a condition attached to receiving federal funds, Westchester agreed to comply with federal civil rights provisions. The next section discusses the underlying civil rights requirement attached to the housing grants provided to Westchester.

## B. Affirmatively Furthering Fair Housing

### 1. Statutory and Regulatory Background

In 1968, Congress passed the Fair Housing Act.<sup>39</sup> This Act contained two provisions directing the federal government “affirmatively to further fair housing” (AFFH). Section 3608(e)(5) requires the Secretary of the United States Department of Housing and Urban Development (HUD) to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of [the Fair Housing Act].”<sup>40</sup> Section 3608(d) imposes the obligation to affirmatively further fair housing on other federal departments and agencies.<sup>41</sup>

Likewise, and importantly for the purposes of this Article, compliance with AFFH obligations is a condition for grantees to

---

the client agency, and 1,202 new qui tam actions were filed with the DOD as the client agency. All other new qui tam matters combined totaled only 1,691).

<sup>37</sup> See, e.g., *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235 (3d Cir. 2004) (finding kick-back scheme perpetrated by Medicare participants actionable under FCA); *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) (alleging false reimbursement requests to government for services performed on inaccurately calibrated equipment); *United States ex rel. Roy v. Anthony*, 914 F. Supp. 1504 (S.D. Ohio 1994) (alleging services never performed); see also *ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER 4* (2001) (listing common types of qui tam actions).

<sup>38</sup> See, e.g., *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937 (7th Cir. 1996) (contractor allegedly failed to test equipment properly).

<sup>39</sup> 42 U.S.C. §§ 3601-31 (2006).

<sup>40</sup> *Id.* § 3608(e)(5).

<sup>41</sup> *Id.* § 3608(d).



receive Community Development Block Grants (CDBGs), which help states and local governments fund housing and community development projects in low-income neighborhoods.<sup>42</sup> Specifically, a grantee must certify that “the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C.A. § 2000a *et seq.*] and the Fair Housing Act [42 U.S.C.A. § 3601 *et seq.*], and the grantee will affirmatively further fair housing.”<sup>43</sup>

The meaning of the phrase “affirmatively to further fair housing” is famously ambiguous,<sup>44</sup> and for such a seemingly broad mandate, the legislative history accompanying the relevant statutes is surprisingly sparse and uninformative.<sup>45</sup> A series of cases in the 1970s read the AFFH provision as requiring, at a minimum, that HUD and grant recipients do more than simply refrain from discriminating, or purposely aiding discrimination by others.<sup>46</sup> HUD and localities also must create housing opportunities in low-poverty, majority-white neighborhoods in order to promote racial integration.<sup>47</sup> The regulations implementing the AFFH provision in the CDBG program now require grantees to: (1) conduct an analysis to identify impediments to fair housing choice, typically referred to as an “AI”; (2) take appropriate actions to overcome any impediments identified; and (3) maintain records reflecting the analysis and actions taken.<sup>48</sup> Beyond these requirements, HUD has created a Fair Housing Planning Guide to assist grantees to fulfill the CDBG fair housing requirements.<sup>49</sup> Finally, representatives from HUD have indicated that the agency is revising its federal grant regulations to provide “more concrete, specific information

---

<sup>42</sup> *Id.* § 5304(b)(2).

<sup>43</sup> *Id.*

<sup>44</sup> See Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 194-95 (2011).

<sup>45</sup> See Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 371-72 (2007) (discussing meaning of, and legislative history accompanying, AFFH provision).

<sup>46</sup> For an overview of the most relevant cases, see Roisman, *supra* note 45, at 363-68.

<sup>47</sup> See Johnson, *supra* note 44, at 194-95.

<sup>48</sup> 24 C.F.R. §§ 91.225 & 570.601 (2010).

<sup>49</sup> U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE (1996), available at <http://www.disasterhousing.gov/offices/fheo/images/fhpg.pdf>.

about how to develop a meaningful plan for affirmatively furthering fair housing.”<sup>50</sup>

## 2. The Problem of Weak Enforcement

Despite these fair housing laws, communities throughout the United States are still highly segregated by race.<sup>51</sup> The causes of community segregation are myriad, but at a minimum exclusionary zoning and other local land use decisions have contributed to segregated neighborhoods.<sup>52</sup> Policymakers and scholars tend to agree that, although enforcement of housing laws should be a primary tool to combat these problems, enforcement has been weak and inconsistent.<sup>53</sup> HUD’s enforcement departments are “chronically understaffed, under-funded, and marginalized within the HUD structure” and because the DOJ has not played a major part in enforcing housing violations, “federal enforcement has been inconsistent and soft.”<sup>54</sup>

Specifically with respect to the AFFH provisions, HUD “has not been successful in bringing the affirmatively furthering

---

<sup>50</sup> Written Statement of John D. Trasviña, HUD Assistant Sec’y for Fair Hous. & Equal Opportunity, Before the House Subcommittee on Hous. & Cmty. Opportunity (Jan. 20, 2010), *available at* [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/trasvina\\_-\\_hud.pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/trasvina_-_hud.pdf).

<sup>51</sup> *See, e.g.,* James Robert Breymaier, *The Need to Prioritize the Affirmative Furthering of Fair Housing: A Case Statement*, 57 CLEV. ST. L. REV. 245, 246 (2009). The American Communities Project offers an impressive collection of statistics on segregation. *See* AMERICAN COMMUNITIES PROJECT, U.S. CENSUS BUREAU, METROPOLITAN RACIAL AND ETHNIC CHANGE—CENSUS 2000, *available at* <http://mumford1.dyndns.org/cen2000/data.html>.

<sup>52</sup> NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 10 (Dec. 2008), *available at* [http://www.civilrights.org/publications/reports/fairhousing/future\\_of\\_fair\\_housing\\_report.pdf](http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf). Likewise, private actions such as real estate broker “steering,” and discrimination in loan products continue to exist. *Id.*

<sup>53</sup> *See id.* at 13-18 (noting weak enforcement by HUD, and discussing delayed investigations, missed opportunities for systemic investigations, and inconsistencies between HUD and regional offices); Steven Plitt & Daniel Maldonado, *Prohibiting De Facto Insurance Redlining: Will Hurricane Katrina Draw a Discriminatory Redline in the Gulf Coast Sands Prohibiting Access to Home Ownership?*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 199, 211-13 (2008) (discussing weak enforcement mechanisms provided to HUD); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1037-38 (1998) (noting that HUD enforcement has been weak).

<sup>54</sup> Breymaier, *supra* note 51, at 247.

obligation to life.”<sup>55</sup> According to a recent commission co-chaired by two former HUD Secretaries, HUD has “failed to adequately monitor or enforce [AFFH rules] among federal grantees.”<sup>56</sup> Specifically, even though grantees must certify that they are affirmatively furthering fair housing, “HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory action or fail to affirmatively further fair housing.”<sup>57</sup> As a result, “less than 10 percent of the approximately 1,100 CDBG entitlement jurisdictions in the country actually have programs that really address fair housing concerns in their communities.”<sup>58</sup> Accordingly, despite the success of some celebrated cases,<sup>59</sup> HUD and CDBG grantees consistently fail to satisfy their statutory mandates to affirmatively further fair housing.<sup>60</sup> The next Part discusses an innovative approach taken by a private advocacy group to fill this enforcement gap using the FCA.<sup>61</sup>

---

<sup>55</sup> NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 52, at 37.

<sup>56</sup> *Id.* at 38.

<sup>57</sup> *Id.* at 44.

<sup>58</sup> *Id.* at 45.

<sup>59</sup> *See Hills v. Gautreaux*, 425 U.S. 284 (1976); *NAACP, Boston Chapter v. Sec’y of HUD*, 817 F.2d 149, 154 (1st Cir. 1987); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005).

<sup>60</sup> In September 2010, the Government Accountability Office issued a report detailing an investigation of compliance by state and local governments with their obligations to AFFH. The report estimated that twenty-nine percent of all AIs are outdated, and that “the vast majority also lack time frames for implementing identified recommendations or the signatures of top elected officials, both of which are necessary to establish clear accountability to carrying out the AFFH intent.” U.S. GOV’T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 31 (Sept. 2010), *available at* <http://www.gao.gov/new.items/d10905.pdf>.

<sup>61</sup> For a discussion of the possibility of enforcing AFFH provisions through private rights of action, see Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through* 42 U.S.C. § 1983, 110 COLUM. L. REV. 2135 (2010).

### III. A CASE STUDY: *UNITED STATES EX REL. ANTI-DISCRIMINATION CENTER V. WESTCHESTER*

#### A. The Litigation

In 2006, a nonprofit called the Anti-Discrimination Center of Metro New York, Inc. (ADC) brought suit as an FCA qui tam relator for the United States of America against Westchester County, New York (“Westchester” or “the County”).<sup>62</sup> Westchester is comprised of forty-five municipal entities outside of New York City.<sup>63</sup> Over the course of six years, the County applied to HUD for federal funding, including CDBGs.<sup>64</sup> In order to receive these funds, Westchester certified to HUD that the County, and the associated municipal entities, would “affirmatively further fair housing.”<sup>65</sup>

Westchester is racially segregated, and during the litigation, an expert for Westchester “acknowledge[d] the existence of racial ‘concentration’ in parts of the County.”<sup>66</sup> As noted above, the statutory and regulatory framework detailing the certification process required Westchester to “analyze the impact of race on housing opportunities and choice in its jurisdiction.”<sup>67</sup> Despite these requirements, the County did not deem itself or any of its municipalities to be failing to AFFH, and it did not withhold any funds from participating municipalities for failing to AFFH.<sup>68</sup>

With this background in mind, ADC’s claims as a relator under the FCA were fairly obvious: Westchester knowingly made false certifications that it would AFFH.<sup>69</sup> ADC supported these claims by pointing to documents responsive to New York’s Freedom of Information Law, as well as to acknowledgments that

---

<sup>62</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009).

<sup>63</sup> *Land Use and Development*, WESTCHESTER CNTY., N.Y., [http://planning.westchestergov.com/index.php?option=com\\_content&view=article&id=834&Itemid=1461](http://planning.westchestergov.com/index.php?option=com_content&view=article&id=834&Itemid=1461) (last visited September 25, 2010).

<sup>64</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 551.

<sup>65</sup> *Id.* (quoting 42 U.S.C. § 5304(b)(2) (2006)).

<sup>66</sup> *Id.* at 559 (“According to the 2000 census, over half of the municipalities in the Consortium had African-American populations of 3% or less.”).

<sup>67</sup> *Id.* at 552.

<sup>68</sup> *Id.* at 559.

<sup>69</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 495 F. Supp. 2d 375, 377 (S.D.N.Y. 2007).

County employees made to ADC that their “demographic analysis for the purpose of identifying impediments to fair housing did not encompass race, but only examined housing needs based on income.”<sup>70</sup> Therefore, the County refused to identify or analyze community resistance to integration based on race as was required by a proper report under the CDBG statutory and regulatory framework.<sup>71</sup> The Government initially declined to take over the action, and ADC served its complaint on Westchester.<sup>72</sup>

In 2007, the district court made its first major decision in the case.<sup>73</sup> After consideration of the statutory and regulatory framework, in combination with HUD’s Fair Housing Planning Guide, the court rejected Westchester’s argument that it had no duty to consider race or racial discrimination when identifying impediments to fair housing choice.<sup>74</sup> Two years later, after the parties completed discovery, the court turned to the remaining issues on cross-motions for summary judgment.<sup>75</sup> As noted above, liability requires a plaintiff to show (1) a false claim or false statement (2) was submitted to the United States for payment (3) with the knowledge that the claim or statement in support of the claim was false or fraudulent. As to the falsity prong, the court recognized that federal law required Westchester to analyze whether race impeded fair housing and to make a record of that analysis.<sup>76</sup> The certifications were false because the County did neither.<sup>77</sup> The knowledge element was a closer case. On the one hand, the County was aware of the HUD Planning Guide and other training materials, and internal County memoranda indicated that Westchester employees were informed that the AFFH obligations required them to analyze race.<sup>78</sup> However, the court declined to grant summary judgment in favor of ADC because the County voluntarily submitted to HUD more information about its housing analysis than required by HUD regulations—an odd act if the County knew them to be false—permitting the inference that it did not act with

---

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 378. That framework is discussed *supra* notes 39-43 and accompanying text.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 375.

<sup>74</sup> *Id.* at 387.

<sup>75</sup> United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 668 F. Supp. 2d 548, 560 (S.D.N.Y. 2009).

<sup>76</sup> *Id.* at 560-65.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 567-68.

the knowledge that the claim or statement in support of the claim was false or fraudulent.<sup>79</sup>

Despite this final point, the court's order was a major win for ADC: The court granted summary judgment in favor of ADC on almost every major issue, and ADC could proceed to trial on the remaining knowledge element. This victory caught the attention of the federal government. On August 10, 2009, the United States simultaneously intervened in the FCA action<sup>80</sup> and filed a settlement with Westchester.<sup>81</sup> The County agreed to spend \$51.6 million to develop affordable housing, with at least eighty-four percent of total units built in municipalities where African American residents constituted three percent or less of the population and Hispanic residents made up less than seven percent.<sup>82</sup> Moreover, the County agreed to take action against resistant municipalities where needed in order to fulfill AFFH obligations.<sup>83</sup> The government selected a court appointed monitor to observe and analyze the County's progress.<sup>84</sup> Finally, ADC received \$2.5 million as expenses, attorneys' fees, and costs.<sup>85</sup>

## B. Subsequent Events

The settlement immediately sparked controversy. *The New York Times* covered the resolution favorably, labeling it a "landmark desegregation agreement."<sup>86</sup> The Deputy Secretary of HUD, Ron Sims, identified the settlement as "consistent with the President's desire to see a fully integrated society . . . . Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."<sup>87</sup> In contrast, an editorial in *The Wall Street Journal* lamented that "social engineers [who] want to force the issue [of

---

<sup>79</sup> *Id.*

<sup>80</sup> Complaint-in-Intervention of the United States of America, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009).

<sup>81</sup> Stipulation and Order of Settlement and Dismissal, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y. Inc. v. Westchester Cnty., No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009).

<sup>82</sup> *Id.* at 6-11.

<sup>83</sup> *Id.* at 19-27.

<sup>84</sup> *Id.* at 11-19.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES, Aug. 10, 2009, at N.Y./Region.

<sup>87</sup> Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. TIMES, Aug. 22, 2009, at Week in Review.

housing integration] risk creating more problems than they solve.”<sup>88</sup> In a separate piece, *The Wall Street Journal* speculated that the settlement “could have ramifications far beyond” Westchester because “some 1,225 cities, counties, and state governments have accepted [CDBGs] since the program began 35 years ago.”<sup>89</sup>

The Westchester County Board of Legislators approved the settlement in late September.<sup>90</sup> Whether the County will adequately implement the settlement remains to be seen. In a letter to the editor of *The Yonkers Tribune* a few days after the settlement announcement, a candidate for Westchester County Executive named Rob Astorino argued that the real issue in the settlement was “home rule, the right of Westchester towns and villages to determine local policy.”<sup>91</sup> Rob Astorino was elected Westchester County Executive three months later,<sup>92</sup> suggesting public support for political resistance to implementation efforts.

Since the agreement, however, the appointed Monitor has played a major role in facilitating creation of an Implementation Plan (IP) and mediating between the County, HUD, and ADC. The Monitor met with the County Executive and other County officials, as well as with the General Counsel and assistant secretaries of HUD.<sup>93</sup> The Monitor also selected a Housing Advisor approved by HUD and the County to work as an expert in the implementation

---

<sup>88</sup> Review & Outlook, *Color-Coding the Suburbs: The Social Engineers Come to Scarsdale*, WALL ST. J., Aug. 14, 2009, at Review & Outlook.

<sup>89</sup> Nick Timiraos, *Westchester Settlement: Removing ZIP Code as Quality of Life Factor*, WALL ST. J. BLOGS (Aug. 11, 2009 12:59 PM), <http://blogs.wsj.com/developments/2009/08/11/westchester-settlement-removing-zip-code-as-quality-of-life-factor/?keywords=westchester+county+settlement>.

<sup>90</sup> Joshua Brustein, *Westchester Board Approves a Housing-Integration Pact*, N.Y. TIMES, Sept. 22, 2009, at N.Y./Region.

<sup>91</sup> Rob Astorino, Letter to the Editor, *Big Brother About to Descend on Westchester*, YONKERS TRIBUNE, Aug. 12, 2009.

<sup>92</sup> *Meet the County Executive*, WESTCHESTER CNTY., N.Y., [http://www3.westchestergov.com/index.php?option=com\\_content&view=article&id=2561&Itemid=300260](http://www3.westchestergov.com/index.php?option=com_content&view=article&id=2561&Itemid=300260) (last visited Dec. 1, 2010) (“Westchester County Executive Rob Astorino was elected in November 2009 after running a successful campaign to streamline county government and bring tax relief to homeowners and businesses. His message resonated with voters across Westchester as he was elected with 58 percent of the vote.”).

<sup>93</sup> Amended Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of August 10, 2009 Through February 10, 2010, at 3, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., No. 06 Civ. 2860 (S.D.N.Y. Feb. 11, 2010) [hereinafter Amended Monitor’s Report], available at <http://www.antibiaslaw.com/sites/default/files/files/0328-1.pdf>.

and sought funding to work with environmental and local land use experts from the Furman Center for Real Estate and Urban Policy at New York University.<sup>94</sup>

The County submitted its first IP in January of 2010. After receiving comments from the ADC and HUD, however, the Monitor rejected the plan because it lacked “any concrete short-, medium- or long-term strategies” for implementation, and it was “not transparent as to who within County government [would] be responsible for the various tasks” necessary to implement the plan.<sup>95</sup> On March 16, 2010, HUD issued a press release stating a newer revised IP was still deficient: “We have seen two versions of the implementation plan and, while the County has worked to improve it, there is still work to be done to set a clear strategy for promoting diverse, inclusive communities.”<sup>96</sup> On July 7, 2010, the Monitor rejected the second IP, citing many of the same problems apparent in the first proposal.<sup>97</sup> On August 9, 2010, Westchester submitted a third iteration of the IP.<sup>98</sup> As of October 2010, the Monitor had not addressed the adequacy of the latest revised plan. In short, despite cooperation between the Monitor, ADC, and HUD, the extent to which Westchester will comply with its AFFH obligations remains to be seen.

#### IV. INSTITUTIONAL REFORM LITIGATION

The Westchester case was the first use of the FCA to enforce a local government’s obligation to affirmatively further fair housing, and therefore it represents an innovative model to remedy

---

<sup>94</sup> *Id.* at 3-4.

<sup>95</sup> *Id.* at 6-10; *see also* Amended Monitor’s Report, *supra* note 93, at 6, 7 (discussing deficiencies with implementation plan).

<sup>96</sup> Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Statement on the Revised Implementation Plan of Westchester County, New York (Mar. 16, 2010), *available at* [http://portal.hud.gov/portal/page/portal/HUD/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-051](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-051).

<sup>97</sup> Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of February 11, 2010 through July 6, 2010, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty, N.Y., No. 06 Civ. 2860 (S.D.N.Y. July 7, 2010), *available at* [http://www.antibiaslaw.com/sites/default/files/files/Monitor\\_July\\_Report.pdf](http://www.antibiaslaw.com/sites/default/files/files/Monitor_July_Report.pdf).

<sup>98</sup> WESTCHESTER COUNTY, WESTCHESTER COUNTY FAIR AND AFFORDABLE HOUSING IMPLEMENTATION PLAN (Aug. 9, 2010), *available at* [http://www.antibiaslaw.com/sites/default/files/files/Implementation\\_Plan\\_2010\\_08\\_09.pdf](http://www.antibiaslaw.com/sites/default/files/files/Implementation_Plan_2010_08_09.pdf).



the civil rights violations of a major local institution.<sup>99</sup> This Part situates the Westchester litigation in ongoing academic debates about the current state of institutional reform litigation.

#### A. The Early Promise and Doctrinal Limits

Institutional reform litigation loosely refers to lawsuits where parties seek to significantly restructure public institutions. Following *Brown v. Board of Education*, plaintiffs brought a wave of actions challenging systematic constitutional violations by school boards, prisons, mental hospitals, and housing authorities.<sup>100</sup> Courts responded by devising elaborate and detailed injunctive remedies.<sup>101</sup>

In 1976, Abram Chayes famously provided an analytic description of this new form of litigation.<sup>102</sup> Chayes argued that these lawsuits exhibited characteristics that differed from the “defining features” of traditional civil adjudication.<sup>103</sup> What Chayes called “public law litigation” involved many parties rather than merely being a “contest between two individuals,” the remedies sought prospective rather than retrospective remedies, and judges,

---

<sup>99</sup> The Westchester case is innovative but not unique. In one earlier case, a District Court granted summary judgment in favor of the government based on similar FCA claims alleging a locality ignored conditional spending requirements attached to housing grants. *See United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419 (E.D.N.Y. 1995). It is not clear why the government’s success in this case did not inspire more of these claims. Perhaps private parties did not view *Island Park* as a viable institutional reform model because the government, rather than a private relator, initially filed and directed the entire FCA action. Relators have brought other FCA actions enforcing smaller-scale civil rights violations, generally in combination with employment retaliation claims against private defendants. *See, e.g., United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008) (rejecting FCA action based on claim that university falsely certified it was “minority institution” eligible for DOD grants); *Green v. City of St. Louis, Mo.*, 507 F.3d 662 (8th Cir. 2007) (rejecting claim based on improper certification of minority business); *Coleman v. Hernandez*, 490 F. Supp. 2d 278 (D. Conn. 2007) (upholding *qui tam* action against landlord for improperly charging tenant additional expenses above what HUD program allowed).

<sup>100</sup> Scholars often mark *Brown v. Board of Education*, 349 U.S. 294 (1955), as the first modern institutional reform case. *See, e.g.,* Jeffries & Rutherglen, *supra* note 2, at 1408; David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018 (2004); ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* 25 (2003) [hereinafter SANDLER & SCHOENBROD, *DEMOCRACY*].

<sup>101</sup> Jeffries & Rutherglen, *supra* note 2, at 1409.

<sup>102</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>103</sup> *Id.* at 1282-83.

rather than parties, became the dominant organizing and guiding figures.<sup>104</sup> Although Chayes ultimately approved of this new judicial role, he warned this style of litigation raised serious legitimacy concerns.<sup>105</sup>

Following criticism of the legitimacy and efficacy of these lawsuits, the Supreme Court began to curb institutional reform litigation. Cases such as *Milliken v. Bradley*,<sup>106</sup> in which interdistrict busing was rejected as a remedial measure, signaled that the Court was beginning to disfavor expansive court remedies.<sup>107</sup> Likewise, in cases like *City of Los Angeles v. Lyons*,<sup>108</sup> the Court fashioned a doctrine of standing limiting the availability of injunctive relief.<sup>109</sup> As discussed below, despite these doctrinal changes institutional reform litigation continues to exist, albeit in varying forms.<sup>110</sup>

## B. The Case for Institutional Reform Litigation

A common theme underlies most arguments advanced in favor of institutional reform litigation: Courts can be effective reformers of social institutions because they are uniquely situated to act where elected bodies are “politically unwilling or structurally unable to proceed.”<sup>111</sup> Because they are removed from electoral pressures, courts can defend unpopular causes and remedy violations of rights.<sup>112</sup> Politically and economically weak groups are systematically excluded from the political process, whereas influence

---

<sup>104</sup> *Id.* at 1283.

<sup>105</sup> *Id.* at 1313-16.

<sup>106</sup> 418 U.S. 717 (1974).

<sup>107</sup> Jeffries & Rutherglen, *supra* note 2, at 1409 (citing *Milliken*, 418 U.S. at 744).

<sup>108</sup> 461 U.S. 95 (1983).

<sup>109</sup> Jeffries & Rutherglen, *supra* note 2, at 1410 (citing generally *Lyons*, 461 U.S. 95). For more discussion of doctrines limiting the ability of advocates to bring structural reform suits and of advocates responses to those limitations, see, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 869-74 (2007) (addressing challenges to institutional reform and transformation of suits); Myriam Gilles, *An Autopsy of the Structural Reform Injunction*, 58 U. MIAMI L. REV. 143, 163-68 (2003) (discussing procedural barriers to liberal structural reform suits); John Valery White, *Foreword: Is Civil Rights Law Dead?*, 63 LA. L. REV. 609 (2003) (addressing generally the current state of civil rights law).

<sup>110</sup> Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018-19 (2004) (“There is no indication of a reduction in the volume or importance of Chayesian judicial activity.”).

<sup>111</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE* 22 (2d ed. 2008).

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

in the judiciary (ideally) depends only on the strength of argument.<sup>113</sup> Finally, courts are catalysts for change, “indicat[ing] publicly that the status quo is illegitimate and cannot continue.”<sup>114</sup>

Supporters of institutional reform litigation also argue that critics overstate the constrained nature of courts. The judicial process can be an effective forum for gathering and assessing information.<sup>115</sup> The adversarial process—combined with procedural mechanisms like discovery—facilitates informed decision-making. Courts also have developed mechanisms to help them monitor and enforce orders: Special masters can gather information and draft remedial decrees, and monitoring commissions allow courts to follow the implementation process.<sup>116</sup>

Finally, a school of “experimentalist” scholars contend that institutional reform litigation has changed significantly from the broad structural injunctions that marked early civil rights cases.<sup>117</sup> These scholars argue that recent cases are more focused, and consent decrees commonly identify “goals defendants are expected to achieve and specify standards and procedures for measurement of performance.”<sup>118</sup> The notion of a judge single-handedly making complicated policy determinations is also inaccurate. Contemporary institutional reform litigation is rarely resolved through “command and control” mechanisms dictated by a judge but instead centers around a negotiated process involving multiple stakeholders.<sup>119</sup> Under this view, judges are not faced with creating complicated remedies themselves. Rather, the role of the court is to structure an environment for affected actors to “collaboratively derive standards, procedures for revising them, and mechanisms of accountability for those subject to them.”<sup>120</sup> As discussed below, some scholars

---

<sup>113</sup> *Id.* at 23-24.

<sup>114</sup> Sabel & Simon, *supra* note 110, at 1056.

<sup>115</sup> ROSENBERG, *supra* note 111, at 24.

<sup>116</sup> *Id.* at 26-27.

<sup>117</sup> For an introduction to the experimentalist model of judicial intervention, see Sabel & Simon, *supra* note 110, at 1056; *see also* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 416 n.185 (2007) (collecting literature on experimentalist regimes); William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 KY. L.J. 789, 806 (2010) (providing an overview of experimentalist school reform model).

<sup>118</sup> Jeffries & Rutherglen, *supra* note 2, at 1411.

<sup>119</sup> Sabel & Simon, *supra* note 110, at 1018-19; Zaring, *supra* note 100, at 1022-37 (contrasting unilateralist model with multilateralist model of institutional reform litigation).

<sup>120</sup> Sabel & Simon, *supra* note 110, at 1089.

question the accuracy and efficacy of this experimentalist model,<sup>121</sup> but at a minimum the forms of these lawsuits have evolved significantly since the early days of institutional reform litigation.

### C. Criticisms of Institutional Reform Litigation

A simple narrative highlights common criticisms of institutional reform litigation: Courts generally will not be effective producers of significant social reform because judicial institutions are ill-suited to develop and implement remedies sufficient to vindicate the underlying rights.<sup>122</sup>

A common critique lodged against institutional reform litigation is that it seeks to effectuate lofty, and often poorly defined, rights. These rights have traditionally been constitutional—a difficult strategy because many social reform goals are not easily framed as constitutional violations.<sup>123</sup> Relatedly, courts are limited in their ability, or willingness, to recognize novel extensions of existing rights.<sup>124</sup> When courts do grasp the nettle, they articulate aspirational goals—for instance, dismantling segregated schools “root and branch.”<sup>125</sup> Professors Ross Sandler and David Schoenbrod term these lofty goals “soft rights”: Unlike traditional rights, which courts enforce to the hilt, these rights are enforced “only to the extent [the parties or the judge] thinks it makes sense to do so in view of society’s competing priorities”<sup>126</sup> Nor is this problem resolved by the fact that most contemporary cases focus on statutory and regulatory violations rather than constitutional ones.<sup>127</sup> Critics argue that the rights and obligations expressed in statutes like the Clean Air Act (CAA) and the Americans with Disabilities Act

---

<sup>121</sup> See discussion *infra* for text accompanying notes 173-174.

<sup>122</sup> ROSENBERG, *supra* note 111, at 10.

<sup>123</sup> *Id.* at 11.

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

<sup>125</sup> *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 438 (1968); see also SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 100, at 102 (describing phenomenon).

<sup>126</sup> SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 100, at 103; Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 933 (2004-2005) [hereinafter Sandler & Schoenbrod, *Supreme Court*] (providing example of congressional command that local governments achieve adoption for foster care children within fifteen months).

<sup>127</sup> Sandler & Schoenbrod, *Supreme Court*, *supra* note 126, at 926.

(ADA) are no less aspirational than the constitutional violations litigated in the past.<sup>128</sup>

Skeptics also make the point that courts are constrained in their ability to develop and enforce complicated injunctive relief and consent orders to remedy these rights. Courts are well-equipped to decide traditional tort or contract actions because these suits require a limited intervention. Public law liability, on the other hand, involves technical policy determinations with long-term impacts, and courts lack the expertise and specialization to adequately formulate these policies.<sup>129</sup> As Judge Frank M. Johnson stated, “[j]udges are trained in the law. They are not penologists, psychiatrists, public administrators, or educators.”<sup>130</sup>

Institutional reform supporters respond that judges are not required to develop policy in a vacuum. Resolution of cases often happens through consent decrees, where litigants, experts, and monitors engage in a form of “supervised political bargaining.”<sup>131</sup> Sandler and Schoenbrod, however, argue that these “controlling groups” of lawyers create more problems than they solve.<sup>132</sup> First, plaintiffs’ attorneys may advance their vision of the public interest at the expense of their clients.<sup>133</sup> Second, because they are generally not named parties and have few incentives to get involved, the federal agencies designated to manage many of the programs at issue rarely play major roles in the litigation.<sup>134</sup> Finally, institutional reform litigation subverts democratic principles by redirecting power from elected political bodies to the courts or a controlling group of lawyers.<sup>135</sup> In short, critics maintain that institutional reform

---

<sup>128</sup> SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 100, at 103-09 (arguing state obligation to make public programs and facilities accessible is an aspirational goal).

<sup>129</sup> ROSENBERG, *supra* note 111, at 16; Sabel & Simon, *supra* note 110, at 1017 (articulating criticisms).

<sup>130</sup> Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981).

<sup>131</sup> Jeffries & Rutherglen, *supra* note 2, at 1409.

<sup>132</sup> SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 100, at 118-19.

<sup>133</sup> *Id.* at 124-25.

<sup>134</sup> *Id.* at 135-38 (arguing plaintiffs, defendants, and federal officials are generally happy when federal agencies are not involved).

<sup>135</sup> Sabel & Simon, *supra* note 110, at 1090 (articulating the argument regarding subverting control from the democratic process to the courts); Sandler & Schoenbrod, *Supreme Court*, *supra* note 126, at 916 (articulating the argument with respect to a “controlling group” of lawyers).

litigation represents an unwarranted and ineffective cooption of policymaking from political representatives to courts and lawyers.<sup>136</sup>

## V. TESTING THE WESTCHESTER MODEL

FCA actions are responsive to many of the criticisms leveled at institutional reform litigation. As discussed below, the form of an FCA suit resembles a breach of contract action, something courts are well-suited to adjudicate. It is true that violations of federal spending conditions are more complicated than ordinary contractual breaches because the congressional spending power implicates accountability and federalism concerns. But FCA actions should not run afoul of the Supreme Court's directive that spending conditions be unambiguous. Therefore, the fact that defendants buy into obligations underlying FCA suits by accepting federal grants mitigates accountability and federalism concerns associated with traditional institutional reform suits. Moreover, federal agencies are likely to become involved in FCA suits, thereby addressing doubts that private parties and courts lack the expertise to effectively remedy violations. Although FCA suits might infringe on executive prerogatives, certain procedural mechanisms in *qui tam* actions mediate these worries as well.

This Part concludes with some thoughts on the potential of FCA suits to effectively reform social institutions. On the one hand, civil rights advocates surrender power over crafting remedies in an FCA suit, and scholars dispute the efficacy of the experimentalist model of institutional reform. But features of FCA suits, such as agency expertise and the possibility for federal funding of settlement implementation, suggest these lawsuits have the potential to be effective nonetheless.

### A. Is the FCA Model Responsive to Institutional Reform Critiques?

#### 1. FCA Violation as Contractual Breach

A primary criticism of institutional reform litigation posits that efforts to enforce aspirational "soft rights" are misguided. For instance, Sander & Schoenbrod contend that courts really cannot be expected to ensure air would be "made fully healthy" by the end of

---

<sup>136</sup> Empirical evidence exists supporting both views of the effectiveness of institutional reform litigation. See ROSENBERG, *supra* note 111, at 27-36 (discussing empirical studies).

the 1970s, as the CAA required.<sup>137</sup> Rather, when faced with violations of aspirational rights, courts must decide “how far . . . [to] push government to pursue a soft right, and that decision will necessarily balance the soft right against government’s competing priorities.”<sup>138</sup> Because this judicial balancing is policy-laden, it implicates federalism and accountability concerns. An aspirational federal statute allows Congress to take credit for addressing a complex problem, while hoisting implementation costs on local actors. Moreover, the least democratic branch is charged with delineating the contours of the broad right.

The hybrid nature of an FCA action responds to this criticism. First, localities buy into requirements by accepting federal grants, thereby mediating Congress’s ability to pass on obligations to unwilling local actors. Second, an FCA relator does not ask a court to remedy a violation of an underlying civil right. Rather, the relator’s claim more closely resembles a traditional contract action than an institutional reform suit. The relator identifies an agreement for federal funds between a locality and the federal government and points out a knowing violation of that agreement.

The narrative presented in the previous paragraph, however, oversimplifies the contractual nature of federal conditional grants. Conditional grants, of course, are not *merely* contracts between the federal government and localities because the exchange of funds between these governmental entities raises federalism concerns. Therefore, adequately addressing problems of enforcing breaches of these conditions through the FCA requires a fuller discussion of Congress’s authority to create conditional grants under its spending power.

The Supreme Court has articulated three direct limitations on the spending power: (1) conditions on grants must be made in pursuit of the “general welfare,” (2) conditions must be related to the federal interest in the particular program, and (3) there is some point at which “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”<sup>139</sup> These constraints, however, do little to limit conditional spending.<sup>140</sup>

---

<sup>137</sup> SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 100, at 103.

<sup>138</sup> *Id.*

<sup>139</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987) (internal quotations omitted).

<sup>140</sup> Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (“None of these direct limitations on the spending power has had any real bite in the cases.”); Brian Galle, *Getting*

Instead, the Court has indirectly constrained the ability to enforce funding conditions by applying the “clear statement” canon of statutory construction: Conditions are only enforceable to the extent they provide “clear notice regarding the liability at issue.”<sup>141</sup> The Court justifies the use of this canon by invoking an analogy to notice in contract law: “[L]egislation enacted pursuant to the spending power is much in the nature of a contract,’ and therefore, to be bound by ‘federally imposed conditions,’ recipients of federal funds must accept them ‘voluntarily and knowingly.’”<sup>142</sup>

Scholars dispute whether the contract analogy adequately justifies the clear statement rule,<sup>143</sup> but for the purposes of this Article, it is sufficient to note that FCA suits do not offend the notice principle because the FCA requirement that a defendant “knowingly” commit fraud should ensure that defendants have clear notice of their obligations before liability will attach.<sup>144</sup> The district court in *Westchester* held that the relevant regulatory and statutory background combined with HUD guidance materials were sufficiently clear to create liability, and there existed a triable issue of fact as to whether the County was on notice of its AFFH obligations.<sup>145</sup> An accurate analysis of FCA liability based on a violation of conditional spending requirements, therefore, should track whether the underlying program provides sufficiently clear notice to recipients. On this reading, the FCA does not undermine the notice concerns driving the clear statement rule, as the statute addresses whether the grantee is aware of its obligations.<sup>146</sup>

---

*Spending: How to Replace Clear Statement Rules With Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 162 (2004) [hereinafter Galle, *Spending*] (“No modern court of appeals has ever held that an expenditure did not advance the general welfare, or that a state was coerced into accepting the conditions attached to a federal grant. Only very rarely have courts found that a condition was not reasonably related to the spending it accompanied.”).

<sup>141</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>142</sup> *Murphy*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17).

<sup>143</sup> See Galle, *Spending*, *supra* note 140, at 166-74 (arguing contract principles do not justify clear notice); see also Bagenstos, *supra* note 140, at 393-407 (same).

<sup>144</sup> 31 U.S.C.A. § 3729(a)(1)(A) & (B) (West 2010).

<sup>145</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 561-68 (S.D.N.Y. 2009).

<sup>146</sup> The existence of FCA damages, however, might cast a shadow over a court’s determination of whether an underlying statute provides clear notice of liability. For instance, in the recent case of *Arlington Central School*



Aside from the notice issue, an FCA action based on a violation of a spending condition might be problematic for another reason. Federal spending might be so significant that local officials are coerced into accepting money, regardless of whether conditions undercut their own interests or other federalism principles, such as ensuring a diversity of local policies.<sup>147</sup> The clear statement rule, then, limits the instances in which these values will be sacrificed on account of localities' acceptance of federal money.<sup>148</sup>

This insight illuminates a comparison of FCA actions to traditional institutional reform suits. One critique of institutional reform litigation is that local legislatures often have little flexibility in responding to constitutional violations. Communities have scarce resources, and correcting violations of aspirational rights requires policy decisions about how those resources are best allocated. FCA actions are more palatable than traditional institutional reform suits because they are based on “contractual” violations where localities bought into obligations underlying their FCA liability; those obligations, in turn, were subject to negotiation between political bodies. Accordingly, localities could have refused the federal money and could refuse future grants. But the federalism concerns that inform the clear statement rule—namely, that localities can be coerced into accepting funds—suggest these options might be illusory.

Identifying when federal grants are coercive enough to undermine federalism principles such as favoring locally tailored policies requires an account of why and when local decision-makers accept conditional funds. After investigating this question,

---

*District Board of Education v. Murphy*, the Court concluded that an act's fee-shifting provision—entitling prevailing parents to recover “reasonable attorneys' fees as part of the costs” in proceedings to enforce the statute—did not put states on notice that they would be liable to pay those parents' expert fees. 548 U.S. 291, 300-03 (2006). Cases addressing the enforceability of spending conditions are matters of statutory construction, but when a condition is found enforceable, a knowing breach of that condition might also entail treble damages and statutory penalties under the FCA. See 31 U.S.C.A. § 3729(a)(1). It would not be surprising if a court's awareness of this increased liability mitigated a willingness to find a condition enforceable.

<sup>147</sup> Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 879 (2008) [hereinafter Galle, *Federal Grants*]. See also *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (“Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power.”).

<sup>148</sup> See Galle, *Spending*, *supra* note 140, at 183-85 (discussing federalism justifications for clear statement rule).

Professor Brian Galle concludes that local decision-makers are capable of making rational decisions about the interests furthered by accepting or declining conditional funds. He posits that there is no evidence for the proposition that “state decisions to accept funds fail to preserve the values that federalism protects.”<sup>149</sup> A full account of the conditions under which localities accept federal funds is beyond the scope of this Article, but if Galle’s conclusions are correct, the contractual nature of FCA actions may assuage some federalism concerns generally levied at institutional reform litigation.

At the least, recognition that federal spending conditions implicate accountability and federalism principles complicates the claim that FCA actions are analogous to suits enforcing contractual breaches. However, FCA suits should at least loosely track the Supreme Court’s clear statement rule, thereby alleviating notice concerns. Moreover, a strong basis exists to conclude that FCA suits are less threatening to accountability and federalism interests than traditional institutional reform litigation because defendants bought into spending conditions and can choose to opt-out of future federal spending obligations.

## 2. Consent Decrees and Injunctive Relief

Another criticism of traditional institutional reform litigation posits that because judicial institutions lack expertise and monitoring capabilities, they are ill-suited to devise remedies for violations of aspirational rights. FCA suits are responsive to this claim as well. First, the FCA does not provide for injunctive relief. The damages remedy normally available to relators should be less offensive to critics of institutional reform litigation—for example, cases like *Lyons* and *Rizzo* limited injunctive relief, but endorsed money damages.<sup>150</sup>

This limitation on the form of remedy does not end the matter: Even if a court cannot impose injunctive relief, the parties are not precluded from entering a settlement that includes equitable components.<sup>151</sup> Most institutional reform cases that are not

---

<sup>149</sup> Galle, *Federal Grants*, *supra* note 147, at 934-35.

<sup>150</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-12 (1983); *Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976); see also Jeffries & Rutherglen, *supra* note 2, at 1417 (discussing remedies in both *Lyons* and *Rizzo*).

<sup>151</sup> Parties may join an FCA suit with causes of action that provide for injunctive relief. Upon intervening in *Westchester*, the government sought injunctive relief under the Housing and Community Development Act. See *Complaint-in-Intervention of the United States of America, United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*,

dismissed are resolved through consent decrees anyway, and the potential for significant liability under the FCA—treble damages plus statutory penalties—provides defendants with a strong incentive to settle. Therefore, critics of institutional reform could reasonably posit that an FCA action ultimately retains the problems associated with litigation directed by a controlling group of lawyers.

The private attorneys, however, are significantly less powerful in a *qui tam* suit than in a traditional institutional reform action. Recall that the relators must present their claim to the federal government, which can then intervene and take over the suit.<sup>152</sup> For instance, in *Westchester*, the federal government intervened after the private relators were granted summary judgment on several important elements.<sup>153</sup> Most scholars agree that when federal officials engage in structural reform litigation, the remedies they seek are not as problematic as those sought only by private plaintiffs.<sup>154</sup> Court orders obtained by federal officials “involve some degree of political accountability in the decision to sue and to seek structural relief” and can be seen as “an acceptable form of bargaining between governments.”<sup>155</sup>

Moreover, intervention by the federal government implies involvement by the federal agency charged with implementing the underlying program. For instance, HUD played an active role in negotiating the *Westchester* settlement, and it has continued to participate in monitoring and evaluating *Westchester*’s implementation plans.<sup>156</sup> Critics complain that private advocates lack the necessary expertise and sensitivity to the realities of local government to design realistic remedies. These criticisms are less persuasive when directed against the federal agency charged with implementing the relevant program. Agencies arguably have the

---

No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009). It also appears that settlements may contain injunctive elements even when causes of action provide only for damages. *Cf.* Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 525 (1986) (noting courts are not “barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial”).

<sup>152</sup> See *supra* Section II.A.2.

<sup>153</sup> See *supra* notes 80-81.

<sup>154</sup> Jeffries & Rutherglen, *supra* note 2, at 1414; Sabel & Simon, *supra* note 110, at 1091 & n.218; Zaring, *supra* note 100, at 1067-70.

<sup>155</sup> Jeffries & Rutherglen, *supra* note 2, at 1421.

<sup>156</sup> See *supra* Section III.B; see also Press Release, Dep’t of Hous. & Urban Dev., HUD Statement on the Revised Implementation Plan of Westchester County, New York (Mar. 16, 2010), available at [http://portal.hud.gov/portal/page/portal/HUD/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-051](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-051).

“best information about and most sophisticated understanding” of complex policy questions implicated by enforcement issues.<sup>157</sup>

### 3. Infringing on Executive Prerogatives

Even if agency involvement is desirable, it still might be the case that the FCA improperly allows a relator to co-opt the federal government’s enforcement discretion. HUD has chosen not to enforce the AFFH provisions in the CDBG program; the Westchester defendants specifically noted that it submitted its documents to HUD, and HUD continued to grant it funds.<sup>158</sup> This determination was likely a conscious agency decision to allocate resources in a particular manner, a species of agency action generally afforded great deference.<sup>159</sup>

Addressing the extent to which an FCA action infringes on agency policymaking requires pulling apart why agency discretion is so strong in such circumstances. If the underlying concern is that agencies have limited resources, then FCA actions do not infringe significantly on agency power because private actors fund the litigation. In fact, the public-private enforcement partnership is one of the great benefits of FCA actions. The federal government has insufficient resources to adequately uncover fraud, and the *qui tam* provision incentivizes private parties to take the reins in certain cases. Private enforcement offers efficacy gains because private parties are often more apt at detecting violations than are agencies, and they can “correct for agency slack” due to political pressure, laziness, or self-interest.<sup>160</sup>

But agencies are accorded discretion in enforcement for other reasons as well. Maximum enforcement is not necessarily optimal, and private parties may be “insufficiently sensitive to the litigation costs of their suits,” including strains on judicial resources

---

<sup>157</sup> Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 127 (2005).

<sup>158</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 569-70 (S.D.N.Y. Feb. 24, 2009).

<sup>159</sup> *See Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). Of course, an FCA action does not challenge an agency enforcement decision and is therefore not governed by the principle that agency decisions not to take enforcement action are presumptively non-reviewable. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>160</sup> Stephenson, *supra* note 157, at 107-13.

and disruptive impacts on affected communities.<sup>161</sup> Agencies also may be better equipped to target enforcement actions that advance social interests. Accordingly, legislatures often react to complex policy problems by deliberately promulgating broad statutes, leaving to the discretion of expert agencies questions of appropriate enforcement levels.<sup>162</sup> Additionally, private enforcement might upset partnerships between regulators and regulated entities because it can undermine cooperative efforts, and it may impede agency techniques designed to incentivize industry self-regulation.<sup>163</sup>

The FCA model assuages some of these concerns. If the government intervenes, it has the power to dismiss the action.<sup>164</sup> Likewise, the government can settle the action so long as the court determines the settlement is fair.<sup>165</sup> Therefore, the executive retains significant control over the amount and type of FCA suits. One criticism remains: Simply responding to these FCA actions might affect agencies' enforcement agendas.<sup>166</sup> But, some private influence over agency priorities is tolerated in other instances—for example, citizen suits may pose the same problems for agencies, and interested persons may petition for agency rulemaking<sup>167</sup>—suggesting this critique need not be fatal.

Moreover, HUD may be able to preserve control over enforcement of the AFFH provision through regulations or policy statements. Courts have not decided conclusively whether regulations can provide the clarity requisite to make spending conditions enforceable against states and localities.<sup>168</sup> If agency

---

<sup>161</sup> *Id.* at 114-15.

<sup>162</sup> *Id.* at 116.

<sup>163</sup> *Id.* For a discussion of whether the *qui tam* structure of the FCA infringes the Take Care Clause of Article II, see Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 950-56 (2002) (arguing that the executive branch retains sufficient control over relator to satisfy the Take Care Clause under *Morrison v. Olson*, 487 U.S. 654 (1988)); see also *infra* note 185 (addressing constitutional arguments).

<sup>164</sup> 31 U.S.C.A. § 3730(c)(2)(A).

<sup>165</sup> *Id.* § 3730(c)(2)(B).

<sup>166</sup> Stephenson, *supra* note 157, at 118-19.

<sup>167</sup> Administrative Procedure Act, 5 U.S.C. § 553(e) (2006).

<sup>168</sup> Galle, *Federal Grants*, *supra* note 147, at 883. Under the contractual “notice” theory of conditional spending, federal regulations should be relevant. But allowing Congress to enact ambiguous conditions later enforceable by agencies might undermine federalism principles by depriving states of an opportunity to oppose the condition through the political process. See Galle, *Spending*, *supra* note 140, at 164 (noting that disagreements between the majority and dissent reflected these principles in *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)).

actions can provide the necessary clear notice, then agencies like HUD maintain the ability to shape what constitutes a violation of the underlying grant conditions, thereby retaining control over potential FCA suits. This point cuts in two directions. The power to promulgate regulations allows HUD to crystallize grantees' AFFH obligations. At the same time, the potential for FCA liability may disincentivize HUD from promulgating regulations for fear of over-enforcement, thereby increasing the likelihood that AFFH conditions would not provide sufficiently clear notice to be enforceable under the clear statement canon.

In sum, the degree to which FCA actions infringe on executive prerogatives is indeterminate. Statutory provisions in the FCA reserve to executive agencies a significant amount of control over enforcement activities. Likewise, agencies retain the ability to shape what constitutes a violation of the underlying obligations to be enforced through an FCA lawsuit. In contrast, like other private enforcement mechanisms, FCA suits may interfere with an agency's enforcement agenda. Similarly, the potential for FCA liability may threaten over-enforcement to such a degree so as to disincentivize agency action crystallizing obligations of grantees.

#### B. Will the FCA Model Sufficiently Protect Civil Rights?

If the FCA model mediates some of the critiques levied against institutional reform litigation, do these actions retain the characteristics that make public law litigation a powerful tool? The FCA model preserves the most important feature of institutional reform litigation: politically insulated courts.<sup>169</sup> This characteristic allows courts to champion politically unpopular causes, and courts maintain the ability to act as catalysts for change, "indicat[ing] publicly that the status quo is illegitimate and cannot continue."<sup>170</sup> *Westchester* is a terrific example of this phenomenon. The case attracted significant media attention and the Deputy Secretary of HUD identified the litigation as a model case for future AFFH enforcement.<sup>171</sup>

In contrast, courts' hands are tied with respect to injunctive remedies. Under the public law model, the insulated nature of courts is important not only with respect to identifying violations, but also because courts are uniquely situated to impose necessary

---

<sup>169</sup> See *supra* Part IV.B.

<sup>170</sup> Sabel & Simon, *supra* note 110, at 1056.

<sup>171</sup> See *supra* Part III.B (discussing news releases).

remedies, even at great cost. Money damages are unlikely to adequately remedy most systemic civil rights violations.

Even with the possibility of consent decrees containing equitable relief, the very features that make FCA actions palatable to critics of institutional reform might be limitations from the perspective of structural reform advocates. The potential for federal intervention signals cooption of an advocate's litigation and may result in settlements that are less expansive or insufficiently protective of civil rights. Additionally, FCA procedures facilitate coordination between various stakeholders—private advocates, local decision-makers, and federal agencies—and thereby track many of the collaborative features of the experimentalist model of public litigation.<sup>172</sup> While at first blush these features may seem beneficial, critics who are otherwise in favor of liberal institutional reform litigation have charged that democratic experimentalist scholars may “err on the side of optimistic overstatement,” and accordingly, “experimentalist governance exists primarily in the eyes of its beholders, rather than in the world itself.”<sup>173</sup> These scholars contend that this model understates the complexity of competing interests, and in practice, collaboration in benchmarking and revising goals rarely produces results desired by civil rights advocates.<sup>174</sup>

Evaluating the efficacy of these collaborative schemes requires empirical analyses beyond the scope of this Article. But some evidence does suggest that reform is more likely to be effective in the long-term where there is support from the federal government, and positive incentives are offered to induce compliance.<sup>175</sup> In fact, close to seventy percent of Westchester's total settlement went back into the County's account with HUD, to be returned to Westchester in pursuance of the development of affordable housing.<sup>176</sup> In other words, rather than an unfunded

---

<sup>172</sup> See *supra* Part IV.B (discussing features of experimentalist model).

<sup>173</sup> See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 674-75 (noting criticisms).

<sup>174</sup> See, e.g., Richard Elmore, *Details, Details, Details*, 28 N.Y.U. REV. L. & SOC. CHANGE 315 (2003) (presenting general criticisms of democratic experimentalism); Martha Minow, *School Reform Outside Laboratory Conditions*, 28 N.Y.U. REV. L. & SOC. CHANGE 333 (2003) (same); Mark Tushnet, *A New Constitutionalism for Liberals*, 28 N.Y.U. REV. L. & SOC. CHANGE 357 (2003) (same).

<sup>175</sup> ROSENBERG, *supra* note 111, at 36.

<sup>176</sup> See Stipulation and Order of Settlement and Dismissal para. 2, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009).

order requiring a locality to rearrange its limited budget to remedy a constitutional violation, FCA actions directed at grant recipients can offer the underlying grant as a carrot. Westchester has an obvious incentive to comply with the order—more federal money.

Moreover, FCA actions are not a substitute for traditional lawsuits aimed at remedying constitutional or statutory violations. But as discussed above, doctrinal developments such as restrictive standing requirements have made traditional reform suits harder to win.<sup>177</sup> According to one author, as far as injunctive relief is concerned, meaningful enforcement of civil rights is now left “solely to the government.”<sup>178</sup> Moreover, as noted above, federal enforcement has been seriously lacking.<sup>179</sup> The FCA model injects back into this public enforcement model many of the characteristics that make private enforcement effective: “the eyes, experiences, motivations, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out.”<sup>180</sup> The FCA model provides a mechanism to tap into these private resources despite doctrinal barriers to traditional institutional reform litigation.

## VI. CONCLUSION

The future of FCA litigation looks promising, and this Article suggests that the *qui tam* model can be an effective method of sparking institutional reform. Thousands of grantees accept federal money without adequately abiding by civil rights conditions attached to the grants they receive. There are currently over one thousand jurisdictions participating in the CDBG program, few of which have adequately addressed their fair housing obligations.<sup>181</sup> Congress also conditions federal grants on agreements to promote civil rights norms through various other statutes.<sup>182</sup> Finally,

---

<sup>177</sup> See *supra* notes 107-109 and accompanying text.

<sup>178</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000).

<sup>179</sup> See *supra* Part II.B.2.

<sup>180</sup> Gilles, *supra* note 178, at 1387.

<sup>181</sup> See *supra* note 58 and accompanying text.

<sup>182</sup> Title VI of the Civil Rights Act of 1964 requires that recipients of federal funds refrain from using federal money to discriminate on the basis of race and ethnicity, 42 U.S.C. § 2000d (2006); the Rehabilitation Act of 1973 forbids disability discrimination in federally-funded programs and activities, 29 U.S.C. § 794 (2006); and Title IX of the Education Amendments of 1972 forbids gender discrimination in educational programs that receive federal funds, 20 U.S.C. § 1681 (2006). See Johnson, *supra* note



considering Congress's renewed interest in the FCA, relators should have an easier time bringing FCA claims in the future.

A few issues, however, caution against too rosy a view of future FCA claims. Importantly, while municipalities can be liable under the qui tam provision of the FCA, states cannot be subject to FCA liability.<sup>183</sup> This limitation severely restricts the range of institutional actors potentially subject to reform under the FCA model. Moreover, because of its unique statutory structure, the FCA implicates several constitutional concerns. Other articles tackle these questions in detail,<sup>184</sup> and courts generally have not been receptive to these sorts of challenges.<sup>185</sup> But these constitutional

---

44 (discussing various spending conditions); *see also* Gilles, *supra* note 178 (proposing qui tam amendment to statute authorizing DOJ to seek injunctive remedies against police departments); *see generally* Dayna Bowen Matthew, *A New Strategy to Combat Racial Inequality in American Health Care Delivery*, 9 DEPAUL J. HEALTH CARE L. 793 (2005) (proposing relators bring FCA actions against medical care providers for failure to abide by Title VI requirements).

<sup>183</sup> Compare *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (holding that states are not “persons” subject to qui tam liability under the FCA) with *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 128-29 (2003) (distinguishing *Stevens* and holding that municipalities are subject to qui tam liability under the FCA).

<sup>184</sup> *See* Bucy, *supra* note 163, at 949-56 (discussing arguments); Gilles, *supra* note 178, at 1433-49 (discussing constitutional concerns associated with qui tam actions and other provisions “deputizing” private citizens to enforce public laws).

<sup>185</sup> For instance, empowering private persons to serve as private attorneys general may violate the Take Care Clause by infringing too heavily on executive power. However, because of the substantial power retained by the DOJ in FCA cases, various Circuit Courts of Appeals have found the FCA does not violate this Clause. *See* *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). Additionally, if qui tam relators are considered “officers,” their role in the FCA could infringe on the Appointments Clause. Several Circuits also have rejected this argument, in large part because relators do not have expansive responsibility or power. *Rockwell*, 282 F.3d at 804-05; *Riley*, 252 F.3d at 757-58; *Taxpayers Against Fraud*, 41 F.3d at 1041-42; *Kelly*, 9 F.3d at 757-59. FCA defendants also have advanced arguments, largely unsuccessfully, under the Excessive Fines Clause and under the Due Process Clause. *See, e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003) (recognizing applicability of the Excessive Fines Clause to FCA damages and finding no violation given the specific damages awarded); *Kelly*, 9 F.3d at 759-60 (dismissing defendant's due process argument). Lastly, the Supreme Court recently resolved

issues could become mechanisms that allow courts skeptical of institutional reform litigation to derail future FCA actions. Relatedly, the Court requires clear notice before spending conditions will be enforced against state and local grantees.<sup>186</sup> The court in *Westchester* did not squarely address this issue, but the clear statement rule could dissuade future courts from finding violations of spending conditions enforceable through the FCA.

Finally, after several months of efforts by the Court Monitor, HUD, and ADC, Westchester County has yet to devise an adequate implementation plan. The success or failure of the *Westchester* litigation—including the continued depth and vitality of HUD participation and the degree of judicial involvement eventually required to enforce the settlement decree—will be key data points in assessing the efficacy of the FCA model of institutional reform.

---

standing issues under the FCA, holding that “[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim,” and therefore, the “United States’ injury in fact suffices to confer standing” on relators. *Stevens*, 529 U.S. at 773-74.

<sup>186</sup> See *supra* Part V.A.1.