

LAND, JUSTICE AND A PLACE TO CALL HOME

Jan Breidenbach

In America, land is magic.
And it always has been.
Success is owning it with a house.
Wealth is owning a lot of it, without a house.
(Peter Wolf. *Land in America: Its Value, Use & Control*, 81)

ABSTRACT

This paper explores the historical roots of our national housing delivery system, finding it based in the practices of the New England settlers who identified owning land as a “civil right”. The paper contends that our American ideology of homeownership and exclusionary land use practices stem from this “right” of private ownership. The paper further contends that our practice of housing finance, building codes and zoning has been a tool to exclude by race and income those deemed “not worthy” of these rights. The last section offers a brief outline of our present affordable housing programs—identifying characteristics of each that offer a counter-narrative to the preeminence of the private market and its exclusionary land uses. The paper closes with the argument that climate change mitigation (specifically in California) is the historical moment that can abrogate the damage inflicted by our present housing delivery system and its exclusionary land uses.

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I. INTRODUCTION: SHELTER FROM THE STORM

In 2015, Los Angeles was the least affordable housing market in the United States.¹ The cause of this crisis is simple: there is not enough available housing at an affordable rent for over half of the County's population.² The gap between need and access is not new; it has, however, grown wider over the past 40 years, concomitant with a rising income disparity, leaving today a growing proportion of households with heavy cost burdens.³

The crisis can be examined through a number of lenses: rents compared to income, available units compared to income, sub-analyses regarding housing type, location and size. The National Low-Income Housing Coalition (NLIHC) recently compared the number of affordable *and* available housing units to the number of households at different levels of area median income (AMI)⁴ at the national, state metro levels.⁵ Below, Figure 1 shows the overall regional deficit of available and affordable units compared to population/income for the entire Los Angeles-Long Beach-Anaheim-Metro area. The chart shows: A) the deficit in units; B) number of available units; and C) the percent of households in income category with "severe" cost burdens (paying over 50% of income for shelter), giving a full picture of the crisis. To put this data in context, Figure 2 reports the 2013 annual income for households in Los Angeles County and City by percent of AMI.

When housing is too expensive, families double and triple up, crowding several families

¹ MAC TAYLOR, LEGIS. ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (2015), available at <http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf/>.

² Andrew Khouri, *Shortage of Affordable Housing Is Dire in L.A. County, Advocates Say*, L.A. TIMES, May 28, 2014, www.latimes.com/business/realestate/la-fi-re-affordable-housing-20140528-story.html.

³ ROSALIE RAY ET AL., UNIV. OF CAL., L.A. LUSKIN SCHOOL OF PUBLIC AFFAIRS, IMPACTS OF THE WIDENING DIVIDE: LOS ANGELES AT THE FOREFRONT OF THE RENT BURDEN CRISIS (2014), available at <http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/2014-08WPrev.pdf>.

⁴ Area Median Income is determined by county each year by the U.S. Department of Housing & Urban Development (HUD). The common figure used is the AMI for a four-person household.

⁵ Nat'l Low Income Hous. Coal., *Housing Spotlight*, 5 (2015).

into small one or two-bedroom apartments.⁶ In 2014, the Los Angeles Times conducted a national survey of overcrowding by zip code. The findings showed that Los Angeles and Orange Counties had three times more crowded households than the next most crowded, New York (134 compared to 41).⁷ While there are affordable housing programs intended to alleviate this crisis, they are woefully inadequate. Less than 3% of all housing units in Los Angeles are

FIGURE 1: AFFORDABLE AND AVAILABLE HOUSING UNITS PER 100 HOUSEHOLDS IN LOS ANGELES METRO AREA BY AREA MEDIAN INCOME									
Deficit of Affordable & Available Units		Affordable & Available Units per 100 HHs By AMI Income Categories				% Within Each income Category with Severe Housing Cost Burden, by AMI Income Categories			
At or below 15% AMI	At or below 30% AMI	At or below 15%	At or below 30%	At or below 50%	At or below 80%	At or below 15%	At or below 30%	At or below 50%	At or below 80%
(147,323)	(370,860)	9	18	23	56	94%	82%	59%	23%

Source: National Low Income Housing Coalition (2015) using 2013 ACS PUMS. Note: THE American Community Survey only includes households who are housed, thus excluding the homeless. Accessed at www.nlihc.org.

FIGURE 2. 2013 FAMILY OF FOUR ANNUAL INCOME AT 80%, 50%, 30% AND 15% AMI				
LA COUNTY MEDIAN INCOME: \$55,909, FAMILY OF 4				
LA CITY MEDIAN INCOME: \$49,497, FAMILY OF 4				
	Deeply low-income* < 15% AMI	Extremely low-income < 30% AMI	Very low-income < 50% AMI	Low-income < 80% AMI
Los Angeles County	\$8,386	\$16,773	\$27,955	\$55,909
Los Angeles City	\$7,425	\$14,849	\$24,974	\$39,600

* Deeply Low-Income (DLI) is a category identified by National Low-Income Housing Coalition. It is not an official U.S. Census category. Source: U.S. Census, Quickfacts, www.quickfacts.census.gov/qfd/states/06/06037.html.

⁶ ECONOMETRICA ET AL., DEP'T. OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RESEARCH, MEASURING OVERCROWDING IN HOUSING (2007); see also Emily Reyes & Ryan Meneze, *L.A. and Orange Counties Are an Epicenter of Overcrowded Housing*, L.A. TIMES, Mar. 7, 2014), at www.latimes.com/local/la-me-crowding-20140308-story.html#page=1.

⁷ Nat'l Low Income Hous. Coal., *Housing Spotlight*, *supra* note 5.

subsidized for low-income households.⁸ Another 16% of all units are rent controlled, which over time protects low-income tenants who remain in their homes, but is not an affordable housing program, per se.⁹ This article returns to Los Angeles in the last section, but before that, explores the deeply embedded roots of housing in the United States.

A. Looking Back to Look Forward

Humans have a physical and, some would argue, psychological, need for shelter, just as we do for food. How any society provides shelter is a measure of the moral values and definitions of justice embedded in the national character. As legal historian Leonard Friedman notes:

The precise mode of concern with bad housing at any given time reflects social attitudes toward the poor, toward city life, and toward the interdependence of social classes. The social costs of the slums to the comfortable, if they did not increase absolutely, became more glaring as cities grew and filled with landless, largely foreign-born, poor people.¹⁰

The United States has a housing “delivery system” that only tangentially recognizes this universal need. Instead of a system that lifts up housing security as the basis for national policy, housing in the U.S. is provided through a private and pernicious marketplace where land and housing sell at the highest price, where there are winners and losers. Winners in this marketplace can live where they wish, the rest live where they must. The hold that this market belief-set has over our legal system and public policies is deep and abiding.¹¹ We have, indeed, a convoluted

⁸ Author calculations from affordable housing databases, compared to U.S. Census.

⁹ DANIEL FLAMING & PATRICK BURNS, RENTAL HOUSING 2011: THE STATE OF RENTAL HOUSING IN THE CITY OF LOS ANGELES (Econ. Roundtable 2012).

¹⁰ LEONARD M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 6 (Rand McNally & Co. 1962).

¹¹ Three years after the 2008 crash, a national poll found that a majority of Americans still believed that homeownership is an important part of the American Dream. The perfidy of the banking and real estate industries was blamed for the crisis, but the ideal of owning a home did not abate. See David Streitfeld & Megan Thee-Brenan, *Despite Fears, Owning Home Retains Allure, Poll Shows*, N.Y. TIMES, June 29, 2011, http://www.nytimes.com/2011/06/30/business/30poll.html?_r=0.

system of shelter distribution that purports to meet our need for physical security and intimate space while obfuscating the economic and environmental injustices that result from it. Given the importance of shelter as not only protection against life's storms but also generator of life's benefits, this distribution system can only be seen as unjust. It is an injustice with deep roots that go back to the very beginning of our nation.

This paper contends that strategies and campaigns responding to the housing crisis should be grounded in an understanding of our profound national bias towards privately owned single-family property *and* the rights that inhere to this ownership. The paper argues that this bias was well established before our nation's birth, was codified in the country's founding documents and has survived through the myriad of political and cultural changes from our beginning to today. Further, ingrained in our conception of individual property rights is an immanent antipathy towards the property-less, i.e., renters. The primacy of ownership and its animus towards renters, combined with historical race and class bias, are seen in the exclusionary policies and practices of our housing finance system, land use and zoning codes.

Sections II – III outline the major turning points in this history, illustrating how beliefs regarding property formulated in the New England colonies were filtered through the new nation's constitution and accommodated in the growing cities of the 19th century through the introduction of building and zoning codes, as well as the introduction of racially restrictive covenants. Sections IV – V discuss the legitimation of racial exclusion in the 1930's New Deal policies that established our mortgage finance system and lifted up the single family home as the pinnacle of American property privilege; it finishes with a brief outline of the well-known impacts of race and income segregation. Section VI presents an overview and analysis of the major models of affordable housing in operation today—including local land use and zoning

policies—and parses out how each responds to the historical bias of ingrained property rights, private homeownership as the preferred delivery system, and the practices of land use exclusion. The paper closes with the contention that climate change mitigation requires that we challenge the dominance of our private housing market and the reach of our exclusionary land uses and zoning practices.

II. COLONIAL ROOTS

The rights accrued to landholders in the earliest colonial settlements of the late 16th and 17th centuries are the basis of our ideal of property rights even today. Legal historian James W. Ely argues that the earliest settlers came as much for land as to freely practice their religion.¹² Planning historian Donald Krueckeberg expands this insight in his discussion of the early settlers' evolving ideas toward land.¹³ The new property rights were developed as a fusion of vestigial remnants of the feudalism settlers left behind with new ideas of rights and freedoms that were taking hold in the transition to early capitalism.¹⁴ The core among this set of rights was the absolute primacy of private ownership.

Although the early villages and towns established some land as communal, (e.g., to build a church) all other land was granted to individuals as a “headright.”¹⁵ As historian Sam Bass

¹² JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (Oxford Univ. Press 1998).

¹³ DONALD A. KRUECKEBERG, *The Difficult Character of Property: To Whom Do Things Belong?*, 61 J. OF THE AM. PLAN. ASS'N (1998); *see also* HARVEY M. JACOBS, *Fighting Over Land: America's Legacy . . . America's Future?*, 65 J. OF THE AM. PLAN. ASS'N 143 (1999). Harvey argues that the settlers believed that one owned land through using it, which provided the rationale “for taking land from America's native inhabitants, who were not using it in the European sense of active agricultural and forest management”; *see also* MARGARET E. WOODS, *THE STORY OF HOUSING 14-15* (Gertrude S. Fish ed., McMillan Publ'g Co., Inc. 1979) [hereinafter *COLONIAL HOUSING, TOWNS AND CITIES*].

¹⁴ RICHARD E. FOGLESONG, *PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920'S* 52-55 (Princeton Univ. Press 1998) (Fogelsong argues that the feudal practices brought to the New England colonies were unique in that the settlements grew as an amalgam of smaller parcels of land, as opposed to the Mid-Atlantic and Southern colonies, where large land grants were a gift from the King, usually to favored subjects).

¹⁵ ELY, *supra* note 11.

Warner notes, in America, owning land would eventually require fees or taxes, but no one had the right.

[T]o dictate to whom he [the landowner] might or might not sell his land, who might inherit his property, or whom his son or daughter might marry. Such considerations nourished the first settlers' vision of *land as a civil right*, a right *against* the long-standing obligations of a crumbling feudal society...[land] meant freedom for even the poorest farm family to win autonomy, freedom to profit from rising values (*italics added*).¹⁶

Land was citizenship without any burden of fealty or obligation; it became the basis of laws, customs and practices that not only conferred new rights and freedoms unknown in Europe but also laid the groundwork of land as a speculative commodity, bought and sold at the desire of the owner.¹⁷ Indeed, these property rights were so important in the establishment of a new social order that they became the “guardian of every other right”, feeding the fires of enthusiasm for a highly individualistic view of land and property, an enthusiasm that meshed with the growing individualist capitalism.¹⁸

The absence of any encumbrance on one's land was further interpreted as the ability to control, to some extent, the actions of others. In the settlements and early townships, the (male) property owners collectively determined who could, and could not, join the township and, if necessary, could require individuals to leave – a process known as “warning out.”¹⁹ This license to exclude newcomers is better understood in context. Early settlements could support only so many households; there was a ‘right size’ of the community. New arrivals would have to

¹⁶ SAM BASS WARNER, JR., *THE URBAN WILDERNESS: A HISTORY OF THE AMERICAN CITY* 16 (Univ. of Cal. Press 1995).

¹⁷ *See also* JAMES HOWARD KUNTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 25-26 (Touchstone Book, Simon & Schuster 1993).

¹⁸ Ely, *supra*, note 11.

¹⁹ LAWRENCE J. VALE, *FROM THE PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS* 24-25 (Harv. Univ. Press 2000). Warning out existed as law in most New England colonies into the 18th Century. *See generally* SIDNEY PLOTKIN, *KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL* (Univ. of Cal. Press 1987) [hereinafter CHAPTER 1: A FENCELESS AMERICA]. We may think of warning out as a very early precursor to the American homeowner's conviction that a “deed to the house is a deed to the neighborhood”

establish their own settlements. According to Lawrence Vale, warning out was also a “residency requirement” designed to exclude those with a different religion or who showed any likelihood of dependency.²⁰ The social (and later, legal) underpinning of this right was another carry-over from feudalism, particularly the English Poor Laws of the 16th century that dictated who had the right to call upon townships for assistance (orphans, widows and the incompetent) and even more pointedly, who could not (vagrants and those who appeared unwilling to work).²¹ The worthy were cared for, the unworthy banished. Although the inherited DNA of this exclusionary practice is most evident in our punitive social welfare system, the residuum of warning out survives not only as overt discrimination against low-income and minority populations, but also in our land uses, zoning and building codes that continue to exclude whole populations, often at the behest of homeowners.

The colonial private property paradigm has percolated down to us through important economic and political shifts. Property rights as the basis of citizenship were not only codified in the founding documents of the nation but also became racialized when entwined with the right to human property brought to the table by the slave-owning constituency of the new republic.²²

A. Constitutional Citizens

After the Revolutionary War, the former Crown lands were ceded to the new nation and filtered through the new government. There were two major debates: 1) whether or not non-landholders could—or should—be given suffrage as full citizens, and if not; 2) whether land should be granted to all (male-headed) households in order to confer citizenship and its privileges. Planning historian Allan Heskin describes these debates as the contradiction of class and privilege, tied to the still-vibrant beliefs regarding the role and privilege of a landed

²⁰ VALE, *supra* note 18, at 27.

²¹ *Id.* at 24.

²² Woods, *supra* note 13.

aristocracy vis-à-vis property-less commoners.²³ Thomas Jefferson believed the conservatism inherent to land ownership would ground “citizens in long-term property relations . . . thereby investing them in the stability of the state.”²⁴ Land would democratize the new nation of individual “freeholders” and prevent a monopoly of land ownership by a de facto, if not de jure, aristocracy.²⁵ Thomas Paine went further, insisting that since, “Man did not make the earth . . . he had no right to locate as his property on any part of it; neither did the Creator open a land-office, from whence the first title deeds should issue.”²⁶ On the other hand, opposition to popular landholding was fierce. John Monroe characterized the debates as “between propertied and unpropertied interests, with the need to protect the primacy of property *over whatever rights unpropertied people might have*” (emphasis added). John Adams concurred, arguing that, “very few men who have no property have any judgment of their own.”²⁷ While the new republic ultimately rejected Jefferson’s proposal and did not provide plots for individuals as a birthright, it did embark on a one-hundred year effort to place the open land of the country into private hands, starting with the ceded lands from the War, and then the lands acquired and conquered throughout the 19th century, always with little in the way of regulation.^{28, 29}

III. CODES, COVENANTS AND EARLY ZONING

By the mid-to-late 19th century, the industrial revolution was underway, transforming the nation’s economic geography and built environment. Former farmers, immigrants and freed

²³ ALLAN D. HESKIN, *TENANTS AND THE AMERICAN DREAM: IDEOLOGY AND THE TENANT MOVEMENT* (Praeger Special Studies 1983) [hereinafter CHAPTER 1: HISTORY OF MOVEMENT AND AN IDEOLOGY].

²⁴ Mark Sturges, *Enclosing the Commons: Thomas Jefferson, Agrarian Independence and Early American Land Use Policy*, 119 THE VA. MAG. OF HIST. & BIOGRAPHY 1774, 1774-89 (2011).

²⁵ HESKIN, *supra* note 23, at 5, 6.

²⁶ AUDREY WILLIAMSON, *THOMAS PAINE: HIS LIFE, WORK AND TIMES* 243 (Allen and Unwin 1973).

²⁷ HESKIN, *supra* note 23, at 7.

²⁸ PETER WOLF, *LAND IN AMERICA: ITS VALUE, USE AND CONTROL* 81 (New York Pantheon Books 1981).

²⁹ See generally THE HOMESTEAD ACT of 1862, U.S. GOV’T ARCHIVES. As testament to the goal of privatizing public land, Congress passed the Homestead Act in 1862 (and later, two more acts) that eventually opened up about 10% of all U.S. land. To encourage homesteading, the U.S. allowed women, immigrants and freed slaves to purchase plots, people who otherwise were denied property ownership. In the end, only 50% of the homesteaders were successful, most wound up in the hands of the railroads, with the homesteaders as tenants or squatters.

slaves crowded into the growing cities looking for work in the new capitalist factories. As the cities grew to accommodate the newcomers, the ideology of land ownership birthed in an agrarian society adapted to the new needs of an urban one.³⁰ Home and shelter became housing and housing as a whole became part of a new *urban* real estate market. Land would not only be a productive commodity, but also a *consumption* commodity; in addition to use value, land now had an income value.³¹

The urban real estate market necessitated new architecture to house the burgeoning working class: mansions were subdivided, boarding houses were introduced, and an innovative new structure appeared—the apartment building.³² At their introduction, these new residential structures were known as “tenant houses” without any pejorative meaning. But as they were built quickly and poorly,³³ including as many rooms as possible to maximize income and profit, they eventually became “tenements” with the negative connotations of poverty, disease and crime, reflecting the class and race divisions of the city.³⁴ Tenements and slums expanded and, in cities like New York, Chicago and San Francisco, were spatially close to the wealthier neighborhoods. Disease could travel the few blocks between rich and poor; fires could burn up blocks at a time. Poverty could not hide and “housing reform” was born.

There were two strains of reformers although their actions and goals often overlapped. On the one hand were those concerned about the tenants themselves and how living in tenements “lowered morals and led to such evils as intemperance and prostitution.” These were the

³⁰ PLOTKIN, *supra* note 19, at 19, 52.

³¹ *See generally id.* at 15-20; KRUECKEBERG, *supra* note 13, at 305; FOGLESONG, *supra* note 14, at 52.

³² Alexander von Hoffman, *The Origins of American Housing Reform* (Joint Ctr. for Housing Studies, Harv. Univ., Working Paper W98-2, 1998).

³³ *See generally* ROBERT B. FAIRBANKS, FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN 20TH CENTURY AMERICA (Pa. State Univ. 2000) [hereinafter FROM BETTER DWELLINGS TO BETTER NEIGHBORHOODS].

³⁴ *Id.* at 24. One of the tenement types was the “dumbbell.” Erected on a 25 x 100 foot lot, these were five, six and seven story buildings with fourteen rooms on each floor, meant to accommodate four families.

forebears of what we now think of as social workers. On the other hand were those more concerned with the *threat* of so many in poverty, but more specifically by their antipathy towards multifamily housing itself (even if inhabited by the wealthy) which they saw as a manifestation of the evils of urbanization.³⁵ To the first group, the poor were in dire conditions, worthy of assistance and help; to the second group, slum dwellers were the “unworthy poor”, without a valid warrant for community care. The ideas converged in a single-minded determination to promote better buildings, including model tenements, building renovation and regulation. The proposal for building codes was the most successful. The first city building codes were implemented in New York and included requirements for private bathrooms, stringent fire-safety measures, more windows, lighting for dark halls and waterproofing of cellar floors.³⁶

As cities grew, multifamily architecture won the day. Tensions between the rich and poor, however, did not recede, and the city became, as Roy Lubove describes, “a world characterized by physical proximity and social distance, divided by class, race and nationality.”³⁷ Building codes might burden the construction of tenements, and even prevent some from going up, but they alone would not separate the city by class, race or nationality. Serious isolation required zoning.

A. Early Zoning

United States imported zoning from Europe, specifically Germany, in the early 1900’s.³⁸ When it arrived, it was adapted to the primacy of individual private property rights and racist antipathy towards Blacks and immigrants. European zoning generally isolates unwanted or

³⁵ Kenneth Baar, *The National Movement to Halt the Spread of Multifamily Housing*, 58 J. OF THE AM. PLAN. ASS’N 1890, 1890-1926 (1992).

³⁶ FAIRBANKS, *supra* note 33, at 28.

³⁷ ROY LUBOVE, *THE URBAN COMMUNITY: HOUSING & PLANNING IN THE PROGRESSIVE ERA* 247 (Prentice Hall 1967).

³⁸ See generally Sonia Hirt, *The Devil Is in the Definitions: Contrasting American & German Approaches to Zoning*, 73 J. OF THE AM. PLAN. ASS’N (2007).

noxious uses, thus allowing anything else outside these restricted zones. American zoning, however, is often depicted as a sectional pyramid, with industrial on the bottom, narrowing up through commercial, multi-family residential and finally, at the top, single family residential. In U.S. zoning practices, land uses can move down, but not up; i.e., any use that is not single-family is excluded from the top tier, even though single-family residential is permitted in multifamily and commercial zones.³⁹

Los Angeles entered the brave new world of zoning in 1904, with an ordinance restricting Chinese laundries near residences—although the intent was to restrict the Chinese themselves as they lived at the businesses.⁴⁰ The City passed its first municipal division of land by uses in 1909 by establishing six industrial districts regulating slaughterhouses, cemeteries and undertaking. The following year, the City declared *all land* outside these industrial areas to be a residential district and banned any trade, business or occupation in them.⁴¹ New York implemented the first comprehensive zoning law in 1916; again, with the rule that in “districts where residential uses were permitted, business and industry were excluded.”⁴² While few would want a major factory next door, this hard-and-fast exclusion equates a coffee shop with a car dealership and has been the subject of many debates and court cases.⁴³ Early zoning ordinances did not simply separate uses; they explicitly separated neighborhoods by race.⁴⁴ Baltimore was the first to establish racial zoning in 1910, followed by dozens of cities, mostly, but not exclusively, in the south. Racially motivated zoning, however, faced a major setback

³⁹ *Id.*

⁴⁰ Kathy Kolnick, *Order Before Zoning: Land Use Regulation in Los Angeles 1880-1915* (2008) (unpublished Dissertation, Univ. of S. Cal.).

⁴¹ *Id.* at 37 – 38.

⁴² *See generally* SEMOUR I. TOLL, *ZONED AMERICAN* 198 (1969).

⁴³ SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* (Cornell Univ. Press 2014).

⁴⁴ CHARLES SILVER, *IN THE SHADOWS: URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY* (June Manning Thomas & Marsha Ritzdorf eds., SAGE Publications 1997) [hereinafter *THE RACIAL ORIGINS OF ZONING IN AMERICAN CITIES*].

when in 1917, strictly racial zones were declared unconstitutional in *Buchanan v. Warley*, 245 U.S. 60 (1917). A setback it was, but there were other tools at hand.

B. Restrictive Covenants

Racially segregated neighborhoods were also created and maintained through the signing of private restrictive covenants. Outside the purview of zoning and land use, these contracts were signed between sellers and buyers, prohibiting the selling or renting of the covenanted home to Blacks, Mexicans, Jews, Asians and other groups deemed to be undesirable neighbors.

A typical covenant might include the following:

[H]ereafter no part of said property or any portion thereof shall be...occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property...against occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian race.⁴⁵

By the 1920s, the National Association of Real Estate Brokers (NAREB) actively promoted these covenants, expanding their use and popularity. The practice of using racial covenants became so socially acceptable that in 1937, “a leading magazine of nationwide circulation awarded 10 communities a ‘shield of honor’ for an umbrella of restrictions against the ‘wrong kind of people.’” Los Angeles and Chicago were in the forefront when it came to implementing restrictive covenants. According to the U.S. Commission on Fair Housing in 1940, 80% of properties in each city had racial covenants barring black families.⁴⁶ Using 1940 U.S. Census data, we can extrapolate that there were over 290,000 covenanted homes in Los Angeles.⁴⁷

⁴⁵ BOS. FAIR HOUS. CTR., HISTORICAL SHIFT FROM EXPLICIT TO IMPLICIT POLICIES AFFECTING HOUSING SEGREGATION, available at www.bostonfairhousing.org/timeline/1920s1948-Restrictive-Covenants.html.

⁴⁶ U.S. COMM’N ON CIVIL RIGHTS CLEARINGHOUSE, UNDERSTANDING FAIR HOUSING (1973), available at <https://www.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>.

⁴⁷ U.S. CENSUS 1940, TABLE 4. URBAN & RURAL-NONFARM FAMILIES BY SIZE, AND BY MARITAL STATUS AND SEX OF HEAD, BY NUMBER OF CHILDREN UNDER 21 YEARS OLD, BY FAMILY WAGE OR SALARY INCOME AND RECEIPT OF OTHER INCOMES IN 1939. TENURE AND RENT FOR METROPOLITAN DISTRICTS OF 1,000,000 OR MORE 50.

Efforts to ban covenants through legislation were not fruitful, so in 1915, the NAACP initiated a national strategy to litigate covenants. Thousands of cases were filed, including hundreds in California. In 1947 alone, Los Angeles had 22 cases in progress, all being litigated by civil rights attorney Loren Miller⁴⁸ who, as co-counsel with Thurgood Marshall, argued the U.S. Supreme Court case, *Shelley v. Kraemer*, 334 U.S. 1 (1948) that ruled racial covenants did not, in fact, violate constitutional rights, but did constitute state action without due process.⁴⁹

C. Zoning Today

The *Buchanan v. Warley* decision not only banned racial zoning but also put local governments in limbo regarding zoning as a whole—it was unclear if zoning was an acceptable regulation of private property, if it was, then whose property rights were going to trump whose?⁵⁰ The answer came in 1926 when the Supreme Court ruled in *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) that the village of Euclid, Ohio, had the right to rezone 63 industrial acres owned by Amber Realty to residential. The Court ruled that comprehensive zoning to promote the general health, safety and welfare was a legitimate activity of local government under its police powers. This decision not only freed cities to zone, it *codified the right of single-family residences to exclude all other uses, including multifamily housing*.⁵¹ Private ownership would rule, tenants excluded. The antipathy towards those enjoined from homeownership was quite glaring; an abiding hostility that cemented the single-family home as the privileged form of tenure.

⁴⁸ JACKIE LEAVITT, IN THE SHADOWS: URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY (June Manning & Marsha Ritzdorf eds., SAGE Publications 1997) [hereinafter CHAPTER 10. CHARLOTTA BASS, THE CALIFORNIA EAGLE, AND BLACK SETTLEMENT IN LOS ANGELES]

⁴⁹ SILVER, *supra* note 44, at 24; *see also* Christopher Ramos, *The Educational Legacy of Racially Restrictive Covenants: Their Long Term Impact on Mexican Americans*, [4 (49)] THE SCHOLAR 149-184 (2001).

⁵⁰ HIRT, *supra* note 43, at 7.

⁵¹ JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 80 (Pearson, Prentice Hall 8th ed. 2009). Although there are now a number of variations, most zoning ordinances are examples of “Euclidean zoning”, i.e., separation by use only. The case was so influential that another major zoning case was not heard for over 50 years.

There were broader implications from *Euclid* as well. According to Michael Wolf, the exclusionary principles incorporated in *Euclid v. Ambler* informed federal and state policies regarding housing, taxation, highway construction, banking, real estate and insurance, and became the philosophical underpinnings of major development policies such as urban renewal and, more recently, school busing.⁵² Although there are now many flexible variations, the basic zoning ordinances of most town and cities are examples of “Euclidian zoning”, i.e., separation by use only.

IV. FEDERAL FINANCE AND SEGREGATION

Three years after *Euclid*, the stock market crashed, triggering the Great Depression. Skyrocketing unemployment led to foreclosures across the nation, banks failed and savings were lost. The crisis was so dire that only a federal response would be effective. After 150 years of privatization and hands off policies regarding property ownership, the federal government shifted to intervention mode. Over an eight-year period, New Deal housing policies up-ended the financing of the single-family home market in the United States and ushered in a massive paradigm change in homeownership by purchasing defaulted loans and encouraging home construction through loan guarantees and capital investment.⁵³ Until the early 1930s, buying a home required at least a 50% down payment, with the entire balance due as a balloon payment usually within 5–10 years.⁵⁴ The New Deal up-ended this by introducing the 30-year, amortized mortgage loan with fixed-rate interest. This not only spurred lending and construction, these policies vastly expanded the number of homeowners in the United States, fostered and underpinned the expansion of suburbia (and its attendant consumption), codified racial

⁵² MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER*, 142 (Univ. of Kansas Press 2008).

⁵³ DAN IMMERGLUCK, *FORECLOSED: HIGH RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET* (Cornell Univ. Press 2009) [hereinafter CHAPTER 1. U.S. MORTGAGE MARKET DEVELOPMENT AND FEDERAL POLICY TO THE EARLY 1990S].

⁵⁴ *Id.*

segregation patterns and ultimately contributed to a series of financial crises in the succeeding 70 years.⁵⁵

The major programs launched by the federal government during the Great Depression included: 1) Home Owners Loan Corporation (HOLC, 1932); 2) The Federal Home Loan Bank (FHLB, 1933); 3) the Federal Housing Administration (FHA, 1934); and 4) the Federal National Mortgage Association (FANNIE MAE, 1938). The HOLC provided principal write-downs for homeowners with mortgages they could no longer afford. These were what we now refer to as “underwater” mortgages, where the amount owed is greater than the property’s worth.⁵⁶ The Federal Home Loan Bank (FHLB) provided immediate capital to thrifts (savings & loans) to boost their on-hand capital above what they held in savings deposits; it continues to serve this function today.⁵⁷ The FHA provided loan guarantees to mortgage companies that lent according to guidelines set out by the agency. Lastly, FANNIE MAE was established with the task of purchasing loans made by mortgage companies in order to provide more available capital to these lenders.⁵⁸

With these interventions, the New Deal cemented the ideal of single family, detached housing as the apotheosis of “home”. These programs essentially financed what we now call suburban sprawl, even as they facilitated an expansion in the rate of homeownership from 40% in 1930 to 64% in 1960.⁵⁹ These profound changes allowed millions of families over the succeeding five decades to purchase homes that could provide more economic security and an escape from the worst of city life—while at the same time establishing what would become the

⁵⁵ MICHAEL E. STONE, A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA (Rachel Bratt, Michael E. Stone & Chester Hartman eds., Temple Univ. Press 2006) [hereinafter CHAPTER 4. THE PERNICIOUS PROBLEMS OF HOUSING FINANCE].

⁵⁶ *Id.* at 96-97.

⁵⁷ *Id.* at 83.

⁵⁸ *Id.* at 84.

⁵⁹ IMMERGLUCK, *supra* note 53, at 18-19.

worst of suburban life. Further, this growth opened the door to the mobility and consumption that became the basis of the U.S. consumer economy, albeit a white consumer economy.⁶⁰

While these programs fundamentally transformed the American mortgage finance system, first the HOLC and then the FHA, bowed to dominant racial attitudes and categorically separated neighborhoods by race and ethnicity, thus maintaining housing exclusion.⁶¹ The FHA administrative guidelines codified strict rules on which types of neighborhoods would receive loan guarantees and which would not. Color-coded maps were drawn to identify four types of communities with letter grades, the descriptions are below, Figure 3.⁶²

⁶⁰ DOLORES HAYDEN, *BUILDING SUBURBIA: GREENFIELDS AND URBAN GROWTH, 1820–2000* at 18, 147-51, 175-76, 224-25 (Vintage Books 2000). Hayden argues that the history of post WWII suburbia was, at the same time, the birth of the U.S. consumer society. By 1959, Americans consumed “three-quarters of all the appliances and gadgets produced in the world.”

⁶¹ IMMERGLUCK, *supra* note 52, at 30. Although many have argued that the HOLC introduced racially based lending categories, Immergluck contends that this was not the case. However, see footnote, 60, below, that cites documents showing the HOLC did, in fact, discriminate on the basis of race.

⁶² R. Marciano, D. Goldberg, C. Hou, *T-Races: a Testbed for the Redlining Archives of California's Exclusionary Spaces*, <http://salt.umd.edu/T-RACES>. This website includes redlining maps of California cities, including Los Angeles. In contradiction to Immergluck's findings, T-RACES found HOLC documents from San Diego archives, including HOLC “Confidential Residential Security Maps” for all US cities that were prepared with assistance from “competent local real estate brokers and mortgage lenders believed to represent a fair and composite opinion of the best qualified local people” (HOLC DIVISION OF RESEARCH AND STATISTICS WITH COOPERATION OF THE APPRAISAL DEPARTMENT, SAN DIEGO, OCTOBER 20, 1936). See also ERIC AVILA, *POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES* 35 (Univ. of Cal. Press 2004). Avila writes that Jewish neighborhoods in L.A. were assigned a “C” rating, while Watts and Boyle Heights were assigned a “D”. Boyle Heights received its rating because it was “literally honeycombed with diverse and subversive racial elements.”

FIGURE 3. FHA UNDERWRITING MANUAL SECTION 309, SECTION 310 1935		
LETTER CATEGORY	COLOR	DESCRIPTION
A First Grade	GREEN	Neighborhoods are “not yet fully built up...are the well planned sections of the city, almost synonymous with the areas where good mortgage lenders with available funds are willing to make maximum loans”. They are <i>homogeneous</i> . “Hot spots”
B Second Grade	BLUE	Neighborhoods are developed, but “like a 1935 automobile-still good, but not what the people are buying today who can afford a new one”.
C Third Grade	YELLOW	Neighborhoods are “characterized “...by age, obsolescence and change of style, including, “expiring restrictions or lack of them; infiltration of a lower grade population’ presence of influences which increase sales resistance...as well as lacking homogeneity”.
D Fourth Grade	RED	Neighborhoods “...are characterized by detrimental influences...undesirable population or infiltration of inharmonious of it”.

SOURCE: Testbed for the Redlining Archives of California’s Exclusionary Spaces, Residential Security Map. Accessed at <http://salt.unc.edu/T-RACES/colormap.html>.

While the most onerous, federal implementation of racial isolation through housing finance systems did not stop with its intervention into the housing finance market. It was national policy to provide funding for sewer systems in newly established suburban towns, but not to upgrade existing sewer systems in older cities, to offer tax incentives and deductions to encourage more suburban housing but not to assist renters with their housing needs; and, of course, building the interstate system that allowed movement between the suburbs and the nation’s cities where, until the 1970s, the jobs were.⁶³ For minorities in the cities, the federal intervention that most impacted them was Urban Renewal—which displaced them for private and public construction.⁶⁴ And, while the new finance system has offered security of tenure for millions of households over the years since World War II (the FHA financing model was

⁶³ THOMAS HANCHETT, FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN 20TH CENTURY AMERICA 169-93 (John F. Bauman ed., Pa. State Univ. 2001) [hereinafter THE OTHER “SUBSIDIZED HOUSING”: FEDERAL AID TO SUBURBANIZATION].

⁶⁴ RAYMOND A. MOHL, FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN 20TH CENTURY AMERICA 227-28 (John F. Bauman, Roger Biles & Kristin M. Szylvian eds., Pa. State Univ. 2001) [hereinafter PLANNED DESTRUCTION: THE INTERSTATES AND CENTRAL CITY HOUSING].

incorporated into the Servicemen's Readjustment Act of 1944 (the "G.I. Bill"), it did not, in fact, end the speculative nature of housing real estate. Instead, as Michael Stone has noted: the new American mortgage system "offered the illusion of ownership with the reality of debt".⁶⁵ Nor did it constrain the speculative nature of single family real estate, as the nation would find out first during the Savings & Loan crisis of the mid-1980s and the much more serious crash of 2008.⁶⁶ True to form, renters remained shut out without any financial support for their housing.

A. Civil Rights and Fair Housing

Between 1954 and 1968, the United States went through a vast transformation regarding legal segregation. The civil rights movement organized and won significant victories, including the Supreme Court Case,⁶⁷ and the Fair Housing Act⁶⁸ (FHA) (42 U.S.C.A. §§ 3601-3631, April 11, 1968). The FHA discontinued its redlining policies in 1962, although the effects continue through today.⁶⁹ These policy changes resulted in great strides, but did not eradicate racial isolation or its impacts. In the past four decades, the advances made in outlawing racial segregation are now being undermined by increased income segregation, the concentration of poverty and a resurgence of exclusionary zoning that provides municipal ballast to this type of separation. Given the income disparity between whites and minorities in the United States, these insidious forms of spatial separation threaten to undo some of the gains made in integration.⁷⁰

⁶⁵ STONE, *supra* note 55, at 83.

⁶⁶ See generally DAVID L. MASON, FROM BUILDINGS & LOANS TO BAIL-OUTS: A HISTORY OF THE AMERICAN SAVINGS & LOAN INDUSTRY, 1831-1995 (Cambridge Univ. Press 2004) [hereinafter CHAPTER 8. DEREGULATION AND DISASTER, 1979 – 1988]. See also STONE, *supra* note 55; IMMERSLUCK, *supra* note 53.

⁶⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954)

⁶⁸ Fair Housing Act (FHA), 42 U.S.C.A. §§ 3601-3631 (1968).

⁶⁹ See Carolyn Bond & Robert Williams, *Residential Segregation and the Transformation of Home Mortgage Lending*, 86 SOC. FORCES 671 (2007); see also Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 118, 188-226 (2005).

⁷⁰ PETER DREIER, JOHN MELLEKNOPF & TODD SWANSTROM, PLACE MATTERS: METROPOLITICS FOR THE 21ST CENTURY (Univ. of Kan. Press, 2d. ed. 2013).

Restrictive covenants are illegal, redlining is illegal (although not completely eradicated). With the more overt tools banned by progressive court cases and legislation, zoning has re-emerged as a tool to separate homeowners from renters, whites from minorities and the rich from the poor. While legally racially neutral, zoning policies discriminate with practices such as minimum lot and building sizes, square footage minimums, height limits and set-back requirements; as well as restricting limits on household size and imposing definitions of “family” that make it all but impossible to erect multifamily housing in many neighborhoods. Each of these types of local zoning policies are exclusionary in that they generally *reduce density* which increases prices and rents, create spatial obstacles to accessible and affordable housing for low-income families and are generally resistant to fair housing challenges. Specific to low-income households, jurisdictions often use zoning to regulate the amount of affordable (subsidized) housing that can be developed or relegate it to marginalized areas.⁷¹ Because urban land is scarce, when local governments do not make land specifically available for affordable housing, they *de facto* exclude it.⁷² Last, but certainly not least, cities engage in what Yale Rubin calls “expulsive zoning”. This is the practice of introducing disruptive uses into Black and minority neighborhoods that undermines quality of life and damages communities. “What began as a means of improving the blighted physical environment . . . was transformed into a device for protecting property values and excluding the undesirable.”⁷³ This is the zoning underbelly of

⁷¹ Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing*, 28 J. POL’Y. ANALYSIS & MGMT. (2009).

⁷² *See So. Burlington County NAACP v. Township of Mount Laurel*, 456, A.2d 390,418-422 (N.J. 1983).

⁷³ YALE RUBIN, *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 105 (Charles M. Haar & Jerold S. Kayden eds., Am. Planning 1989) [hereinafter CHAPTER 4. EXPULSIVE ZONING: THE INEQUITABLE LEGACY OF EUCLID].

environmental racism: in Los Angeles much of this type of zoning has included siting industrial next to residential and building freeways through low-income neighborhoods.⁷⁴

V. RACE AND INCOME SEGREGATION

Recognizing that income and race are tightly correlated, a number of studies in recent years have examined changes in spatial segregation by income over the past four decades. In 2010, the aptly-named US2010 Project published a major report on the growth of residential income separation between 1970 and 2009. Using data from the American Community Survey (ACS) for the period 2005-2009, the authors compared income segregation levels among all families in all U.S. metropolitan areas with at least 500,000 residents, as well as income segregation by race (White, Black and Hispanic). Their overall findings showed that income differences by neighborhood have “grown substantially” since 1970. The proportion of middle-income (including “high middle income” and “low middle income”) families living in middle-income neighborhoods in 1970 was 75%, by 2007 it was 44%.⁷⁵ Further, when the researchers looked for the extremes; i.e., the highest proportion of poor or affluent families living in poor or affluent neighborhoods and the largest changes in income separation, they reported that the California metro areas of Los Angeles-Long Beach-Glendale, Fresno, Oakland-Fremont-Hayward, and San Diego-Carlsbad-San Marcos were in the top 20 of one or both of the categories. Additional studies have found the same dispiriting results. Recently, the Pew Research Center formulated an income segregation index (the Residential Income Segregation Index or RISI) and analyzed the 30 largest metro areas’ segregation changes from 1980 to 2010.

⁷⁴ Jan Breidenbach & Jesus Herrera, *Learning in the Struggle: Reframing Economic and Environmental Justice*, 2013 J. OF SUSTAINABILITY EDUC., May 2013, available at http://www.jsedimensions.org/wordpress/content/learning-in-the-struggle-reframing-economic-environmental-justice_2013_05/; see also The Times Editorial Bd., *How Was Exide Allowed to Pollute for so Long and Endanger so Many People?*, L.A. TIMES (Mar. 13, 2015), <http://www.latimes.com/opinion/editorials/la-ed-exide-to-close-vernon-plant-20150313-story.html> (for a recent example of the devastation caused by expulsive zoning).

⁷⁵ SEAN F. REARDON & KENDRA BISCHOFF, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME 11 (U.S.2010 Projects 2011).

Again, Los Angeles, San Francisco, San Diego, Riverside and Sacramento had the highest indices of change.⁷⁶

Social science researchers have pulled back the veil of spatial isolation by race and income, exposing impacts both wide and deep. The past practices of FHA mortgage redlining can still be seen today in the lower rates of home ownership, home appreciation, and household wealth formation by Blacks and other minorities.⁷⁷ Segregated neighborhoods are often far from job centers that offer better wages⁷⁸ and potential employers sometimes stigmatize residents of high-poverty neighborhoods. Segregation also reduces general trust that, in turn, results in less social capital and community engagement.⁷⁹ Less social capital in turn hurts job prospects because “neighborhoods [often] provide networks of crucial information about jobs. More than half of all jobs are found through friends and relatives, not through want ads.”⁸⁰ Ultimately, the lack of jobs further exacerbates poverty, which correlates with higher crime and gang activity, less police presence, and proportionately more males who end up incarcerated.⁸¹

While the majority of transit riders are low-income and minority, transit systems often do not serve them well with less service hours and fewer direct routes.⁸² Segregation results in

⁷⁶ *Id.*; see also PEW RESEARCH CENTER, THE RISE OF RESIDENTIAL SEGREGATION BY INCOME 22 (Pew Research Ctr. 2012).

⁷⁷ DREIER ET AL., *supra* note 70, at 57.

⁷⁸ LISA PLATT BOUSTAN, OXFORD HANDBOOK OF URBAN ECONOMICS AND PLANNING (Nancy Brooks & G.J. Knaap eds., Oxford Univ. Press 2011) [hereinafter CHAPTER 14. RACIAL RESIDENTIAL SEGREGATION IN AMERICAN CITIES]; see also NIKI DICKEERSON VON LOCKETTE, RUTGERS UNIV. SCHOOL OF MGMT. AND LABOR RELATIONS, RESIDENTIAL SEGREGATION: THE CONFLUENCE OF TWO SYSTEMS OF INEQUALITY, *available at* file:///C:/Users/khs/Downloads/A1822_RuSMLR_Research%20Brief-9-DIGITAL.pdf.

⁷⁹ RACHEL GARSHICK KLEIT, SEGREGATION: THE RISING COSTS FOR AMERICA 237-260 (James H. Carr & Nandinee K. Kutty eds., Routledge 2008) [hereinafter NEIGHBORHOOD SEGREGATION, PERSONAL NETWORKS, AND ACCESS TO SOCIAL RESOURCES].

⁸⁰ DREIER ET AL., *supra* note 70, Donald A. Krueckeberg, *The Difficult Character of Property: To Whom Do Things Belong?*, 61 J. OF THE AM. PLAN. ASS'N (1998); .

⁸¹ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2012).

⁸² Marc Brenman, *Transportation Inequality in the United States: A Historical Overview*, 34 HUM. RTS. MAG. OF THE AM. B. ASS'N (2007) *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol34_2007/summer2007/hr_summer07_brenma.html; see also THOMAS W. SANCHEZ ET AL., CTR. FOR CMTY. CHANGE & THE CIVIL RIGHTS

disparate health outcomes—often due to poor housing—and access to health care.⁸³ And, among the most important impacts of racial and income segregation is the lack of access to quality education that undermines the intent of *Brown vs. Topeka Board of Education* and results in the lower academic achievement in urban schools.⁸⁴ Further, income segregation intensifies the spatial advantage of higher-income families and the spatial disadvantages of lower-income families in important ways such as access to social institutions, green space and access to full-service grocery stores and healthy food.⁸⁵ The absence of amenities and opportunities in neighborhoods of concentrated poverty reduces *both* absolute and relative mobility, defined as the ability to move up or down the economic ladder within a lifetime or from one generation to the next.⁸⁶ Lastly, spatially restricted low-income neighborhoods are disproportionately exposed to pollution from ambient and stationary sources that are often the result of decades of discriminatory land use and expulsive zoning.⁸⁷ These disadvantages are not intrinsic to residents or, for that matter, to any specific neighborhood. They are the result of lack of

PROJECT, HARVARD UNIV., MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES (2003).

⁸³ THOMAS A. LAVEIST ET AL., JOINT CTR. FOR POLITICAL & ECON. STUDIES, SEGREGATED SPACES, RISKY PLACES: THE EFFECTS OF RACIAL SEGREGATION ON HEALTH INEQUALITIES (2011); *see also* REBEKAH LEVINE COLEY ET AL., MACARTHUR FOUNDATION, POOR QUALITY HOUSING IS TIED TO CHILDREN'S EMOTIONAL AND BEHAVIORAL PROBLEMS (2013); CNTY. OF L.A. DEP'T OF PUBLIC HEALTH, SOCIAL DETERMINANTS OF HEALTH: HOUSING & HEALTH IN LOS ANGELES COUNTY (2015).

⁸⁴ RICHARD ROTHSTEIN, ECON. POLICY INST., BROWN V. BOARD AT 60: WHY HAVE WE BEEN SO DISAPPOINTED? WHAT HAVE WE LEARNED (2014); *see also* Richard Rothstein, *Why Our Schools Are Segregated*, [10(8)] FACES OF POVERTY 50-55 (2013); Richard Rothstein, *Misteaching History of Racial Segregation*, 2013 SCH. ADMIN. (2013) (December Issue); NAT'L COAL. ON SCHOOL DIVERSITY, LINKING HOUSING AND SCHOOL INTEGRATION POLICY: WHAT FEDERAL, STATE AND LOCAL GOVERNMENTS CAN DO (2015); JONATHAN ROTHWELL, THE BROOKINGS INST., HOUSING COSTS, ZONING AND ACCESS TO HIGH-SCORING SCHOOLS (2012).

⁸⁵ Jennifer Wolch, John P. Wilson & Jed Fehrenbach, *Parks and Park Funding in Los Angeles: An Equity-Mapping Analysis*, 26 URB. GEOGRAPHER 4-35 (2005); *see also* REBECCA FLOURNOY & SARAH TREUHAFT, POLICY LINK, HEALTHY FOOD, HEALTHY COMMUNITIES: IMPROVING ACCESS AND OPPORTUNITIES THROUGH FOOD RETAILING (2005).

⁸⁶ JULIA B. ISAACS, BROOKINGS INSTITUTION & THE PEW CHARITABLE TRUSTS, ECONOMIC MOBILITY IN AMERICA: GETTING AHEAD OR LOSING GROUND? (2008). Absolute mobility occurs when an economy is growing and all citizens improve their economic standing. Relative mobility occurs when an economy grows more slowly and individuals have to move up (or down) compared to others.

⁸⁷ Breidenbach & Herrera, *supra* note 74.

investment by both public and private capital, along with assumptions about poor people based on stereotypes and supported by historical beliefs demeaning the propertyless.

VI. LAND, JUSTICE AND A PLACE TO CALL HOME

With market forces against them, low-income households have to “make do”. The opening of this article highlighted the crisis in Los Angeles with data on the dearth of affordable and available housing and the proportion of households paying high percentages of their income for shelter. This is the reality for many; for the fortunate few there are federal, state and local programs that provide some affordable housing outside market prices. This last section looks at the major affordable housing delivery models operating today, contextualizing them within the political constraints at the time they were established, and then querying how each program either undermines *or* underpins our nation’s housing delivery system. The goal here is to lift up the pre-figurative potential of each model, i.e., what characteristics of this model offer at least a partial counter-narrative to our present housing delivery system and presage a different model centered on housing as a social good rather than a speculative commodity? Does the program remove housing from the market? Does it increase income and racial integration? The section concludes with a short presentation of California’s new land use policies regarding climate change mitigation and contends that these new policies cannot achieve their goals absent action that ultimately constrains the private market and furthers integration, and that affordable housing is the key to these goals.

A. Affordable Housing Models

There are three major affordable housing models operating at the federal, state and local levels; each was established in response to the need as it was understood at the time, and within the constraints of what was politically acceptable and feasible. These three major programs are

Public Housing, public/private production programs, and direct-tenant assistance through vouchers (Housing Choice Vouchers or “Section 8”).

i. Public Housing

Public housing is the oldest subsidized housing program in the United States. First proposed as part of the 1934 National Industrial Recovery Act (NIRA), it was to be a comprehensive program of public works that “include construction, reconstruction, alteration of low-cost housing and slum-clearance projects.”⁸⁸ This proposal was, some suggest, the most radical of the New Deal housing market interventions, much more radical even than the sweeping transformation of our mortgage finance system. What was radical was the assumption that the federal government had a *responsibility* to provide housing outside the traditional marketplace. The NIRA authorized the federal government to purchase land through eminent domain, and build housing for low and moderate-income families shut out of both the rental and ownership market. Fairly quickly, however, a lawsuit was filed in Kentucky, attempting to stop the program as being unconstitutional. Ultimately, the Supreme Court agreed as the law allowed the federal government to purchase the land for the housing through eminent domain; the Court ruled that providing housing for families meant it was not “devoted to a public use.”⁸⁹ Congress authorized a different version in 1937, creating local public housing authorities (PHAs) to be responsible for the siting, construction and management of the housing.⁹⁰ The program began well enough, but was suspended during World War II and revamped into the War Housing Program.

⁸⁸ GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 89-92 (Univ. of Chi. Press 1996).

⁸⁹ *Id.*

⁹⁰ ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 125- 127 (Routledge 2d. ed. 2010); *see also* DON PARSONS, MAKING A BETTER WORLD: PUBLIC HOUSING, THE RED SCARE, AND THE DIRECTION OF MODERN LOS ANGELES (Univ. of Minn. Press 2005) (for a discussion of public housing in Los Angeles).

After World War II, the national housing crisis caused by pent-up demand after the Depression and war years, led President Harry Truman to goad Congress into another public housing program. The 1949 Housing Act⁹¹ expanded public housing with a plan to build 810,000 public housing units in six years. Interestingly, the same Act established what has become known as Urban Renewal.⁹² However, opposition to public housing was swift and strong. The real estate industry was opposed because it feared competition, and the anti-communist fervor of the 1950s deemed any assistance based on need as “socialism.”⁹³ These conflicts ultimately assured a program that was perniciously underfunded from the very beginning.⁹⁴ While the vast majority of public housing provides safe and affordable housing to this day,⁹⁵ a number of large, urban high-rise projects in New York, Chicago and St. Louis were not only underfunded but also poorly designed and built, often in difficult neighborhoods without community amenities, good schools or jobs. These projects became the face of public housing and while most have been torn down, have provided much fodder for public housing’s enemies.⁹⁶

ii. Privately-built Subsidized Housing

As public housing lost what little favor it once held, the federal government moved to a more nimble approach, providing various forms of public subsidy to private developers—either non-profit or for-profit—to build scattered site projects for specific terms of affordability. Initiated under President John Kennedy, these programs offered different types of subsidy,

⁹¹ The American Housing Act, Title V of P.L. 81-171, 1949.

⁹² Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, [11(2)] HOUSING POL’Y DEBATE 299-326 (2000). The public housing and urban renewal titles of the Act were, in actuality, in complete conflict. Title III proposed to build housing for low-income people; Title I provided funding for local government to tear down housing (if identified as “slums”) without any requirement to replace it.

⁹³ PARSONS, *supra* note 86.

⁹⁴ SCHWARTZ, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ ALEXANDER VON HOFFMAN, FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN 20TH CENTURY AMERICA 180-205 (John F. Bauman, Roger Biles & Kristin M. Szylyvian eds., Pa. State Univ. Press 2001) [hereinafter, WHY THEY BUILT PRUITT IGOE].

including reduced interest rates, loans, and even grants, to be combined with local resources and private lending.⁹⁷ In exchange, the developers agreed to maintain the properties as affordable for set periods, most often 30 years. This housing generated less opposition, partially due to the scattered site approach (there are no large, identifiable projects as with public housing). The greatest concern with these housing programs has been the terms. In the 1970s, 20 – 30 years may have seemed a long time to preserve affordability; in the last two decades it has become much shorter. Market-rate rents have soared beyond what these subsidized rents provide and thousands of owners have chosen not to continue when their contracts expired.⁹⁸

The largest of the public/private partnership programs is the federal Low-Income Housing Tax Credit (LIHTC), established in 1986.⁹⁹ The LIHTC allows private investors to provide equity to affordable housing projects in exchange for 10 years of tax credits. It is, today, the largest affordable housing production program. This program has generated the most political support and has managed to avoid Congressional budget cutting over the past 20 years, partially due to the involvement of major corporations and banks, which are the primary investors.¹⁰⁰

iii. Vouchers

In both public housing and private/public programs, the subsidies are in the buildings themselves and involve both federal (or state) and local governments. Housing Choice Vouchers, however, are a direct subsidy to the tenant. A ‘market-based’ program, it operates through the PHA’s: eligible households receive a ‘voucher’ and then go into the market place and look for a

⁹⁷ SCHWARTZ, *supra* note 90.

⁹⁸ NAT’L HOUS. TRUST, NHT POLICY: FEDERALLY-SUBSIDIZED AFFORDABLE HOUSING (2015), http://nhtinc.org/federal_policy_resources.php.

⁹⁹ NAT’L LOW-INCOME HSG COALITION, ADVOCATES GUIDE 2015, THE LOW-INCOME HOUSING TAX CREDIT, 5-32. (NLIHC. WASHINGTON DC).

¹⁰⁰ *Id.*

landlord who will accept it. Once accepted, the household pays 30% of their income towards the rent (for the first year, afterwards they can pay up to 40% or more under some circumstances) while the Housing Authority pays the rest up to the Fair Market Rent (FMR), a set amount which is determined by periodic surveys. Housing Choice Vouchers can be used for both multifamily and single family homes. In multifamily projects, landlords can accept vouchers for all the units or a limited number, as they choose. Landlords can also choose to leave the program at any time after the first year.¹⁰¹ Vouchers are flexible and can provide mobility; a voucher received in one jurisdiction can be transferred to another. In response to criticism and legal action regarding the concentration of poverty, vouchers have been utilized to allow public housing tenants to move out of dilapidated housing projects and into more mixed-income neighborhoods.¹⁰²

This flexibility assumes that voucher holders can, in fact, live anywhere a landlord will accept them. Sadly, research has found that the majority of voucher holders live in low-income census tracts.¹⁰³ Voucher success is ultimately tied to market fluctuations; voucher holders are more successful in down markets, much less successful when vacancy rates are low and rents are rising. As a result, many Housing Authorities have long waiting lists and do not open these lists on a regular basis.¹⁰⁴

The above are programs established and regulated at the federal level, although there are similar production programs operated by states and localities; vouchers, however are almost exclusively federal.¹⁰⁵ They all have supporters and detractors, but all attempt to right the wrong

¹⁰¹ NAT'L LOW-INCOME HSG COALITION, ADVOCATES GUIDE 2015, HOUSING CHOICE VOUCHERS 4-12 (NLIHC 2015), available at http://nlihc.org/sites/default/files/AG_2015_FINAL.pdf.

¹⁰² DAVID P. VARADY & CAROLE WALKER, CTR. FOR URBAN POLICY RESEARCH, RUTGERS UNIV., NEIGHBORHOOD CHOICES: SECTION 8 HOUSING VOUCHERS AND RESIDENTIAL MOBILITY (2007).

¹⁰³ ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 194-203 (Routledge 2d ed. 2010).

¹⁰⁴ The Los Angeles City Housing Authority waiting list for Housing Choice Vouchers last opened in 2005, the first time since 1993. There are approximately 10,000 households on the waiting list.

¹⁰⁵ Vouchers are authorized in each annual federal budget and have continued to receive funding, even with fierce opposition, because lack of authorization would immediately displace over 2.1 million households. Given the size of

of a speculative housing market. Another important policy that is only implemented at the local level is inclusionary zoning

iv. Inclusionary Zoning

Inclusionary zoning policies stem from a theory of “fair share”; i.e., state or regional policies that require local jurisdictions to accept or produce their “fair share” of low-income housing.¹⁰⁶ Inclusionary housing is a fair share policy implemented under the right of local government to zone as part of its police powers. Under an inclusionary policy, developers of multi-unit projects (multi-family or single family) set aside a certain percentage of the units for low-income households.¹⁰⁷ In exchange, the developer generally receives some benefit that mitigates the cost: increased density, height limits, variances on setbacks, etc. Massachusetts, New Jersey and California are the three states with significant inclusionary housing, along with several counties in Maryland.¹⁰⁸ Over 200 local governments in California have some form of inclusionary zoning,¹⁰⁹ it is required for multi-family development in the Coastal Zone and, until Governor Jerry Brown dismantled redevelopment in 2010, was required as replacement housing in redevelopment project areas.¹¹⁰ Recent research conducted in the Bay Area calculated that throughout California, at last 4500 units per year have been produced through inclusionary

the program, only the federal government can fund it (states and local governments cannot ‘deficit spend’ and therefore would have to cut a similar program. CTR. FOR BUDGET & POLICY PRIORITIES, POLICY BASICS: THE HOUSING CHOICE VOUCHER PROGRAM (2015), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=279> .

¹⁰⁶ William C. Baer, *California’s Fair Share Housing 1967-2004: the Planning Approach*. [7(1)] JOURNAL OF PLANNING HISTORY (2008).

¹⁰⁷ ALAN MALLACH & NICO CALAVITA, LINCOLN INST. OF LAND POLICY, INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION AND LAND VALUE RECAPTURE 15-78 (2010) [hereinafter CHAPTER 2. UNITED STATES: FROM RADICAL INNOVATION TO MAINSTREAM HOUSING POLICY].

¹⁰⁸ *Id.*

¹⁰⁹ NPH/CCRH, AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS (2007).

¹¹⁰ Andrew L. Faber & Berliner Cohen, *Inclusionary Housing Requirements: Still Possible?*, LEAGUE OF CITIES ANN. CONF.—CITY ATTORNEYS’ TRACK (2014).

housing policies.^{111, 112} Given the number of units produced, it is clear that inclusionary zoning is an important tool, lowering the cost of safe, decent and affordable housing. In addition, while it responds to local needs, inclusionary housing produces affordable units with little or no public subsidy, it creates mixed-income neighborhoods, providing families with access to the very community resources missing from areas with concentrated poverty.

Returning to our question at the beginning of this section, Figure 4, below, charts these major affordable housing programs and notes whether or not they: a) remove housing from the speculative market; or b) challenge the practice of exclusionary zoning and land use. The programs above constitute our nation's response to the housing needs of our lowest-income households. Each of them responds to some aspect of the overall need; all the models together could constitute a national policy of social housing (the preferred term in Western Europe) if expanded and supported. Yet, they are so inadequate to our crisis that most people know little or nothing about them.

¹¹¹ VINIT MUKHIJA ET AL., DEPT. OF URBAN PLANNING, UNIV. OF CAL., L.A., INCLUSIONARY HOUSING EXPERIENCE IN SOUTHERN CALIFORNIA: AN EVALUATION OF THE PROGRAMS IN LOS ANGELES AND ORANGE COUNTIES (2006).

¹¹² Inclusionary zoning for rental housing was put on hold in 2009, when a Los Angeles-based developer, Geoff Palmer, sued the City of LA, arguing that an inclusionary requirement in one of his projects violated the State's prohibition on rent control and won. Anna Scott, *Lawsuit Ruling Puts Housing Plan in Question*, DOWNTOWN NEWS, (July 31, 2009), http://www.ladowntownnews.com/news/lawsuit-ruling-puts-housing-plan-in-question/article_e70397e6-2f40-59a7-86b9-8c76ff4d2dbd.html. However, in June 2015, the California Supreme Court ruled that an ordinance in the City of San Jose requiring inclusionary units in a homeownership project was constitutional. See *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435 (2015). There is some hope that the State Legislature will utilize this case as the basis for legislation again allowing local jurisdictions to require inclusionary housing.

Figure 4. PREFIGURATIVE CHARACTERISTICS OF AFFORDABLE HOUSING MODELS		
Does the model below	Remove housing from the private market?	Challenge spatial exclusion and segregation?
Inclusionary	No. Unit is still part of a market-based building or housing subdivision (in the case of home-ownership)	Yes. Although policy does not directly challenge exclusionary zoning, the inclusionary requirement may apply in both multifamily and single family residential zones.
Direct Production	Yes, mostly. But, most programs have specific terms (in CA: 55 years). If housing produced as co-op, land trust or Mutual Housing Association, is likely to be in perpetuity as these are owned by the residents	Partially. If funding source provides financing for more expensive land, projects can be built in higher-income neighborhoods, but model does not challenge single-family only zones.
Housing Choice Vouchers	No. Vouchers only work in the private market. The landlord receives full market rent (as determined by HUD survey). Although vouchers are not time-limited, landlords can leave the program any time after first year.	Yes in theory, Any landlord can accept a voucher, including single and multi-family, but only individual voucher holder benefits. Further, mapping shows voucher holders live in low-income areas.

In spite of their limitations, however, the very existence of these models is evidence that our American private housing market is *not* inevitable, even as it has proven remarkably resilient over the years. These models, and more, are of greater importance than ever, as the need to mitigate climate change puts the inadequacy of our housing delivery system to its greatest test; indeed, the challenge is already underway.

B. Climate and Justice

In September 2008, the State Legislature passed the Sustainable Community and Climate Protection Act (SB 375, Steinberg, Chapter 728, Statutes 2008). The first law of its kind, SB 375 is the implementing legislation of the California Global Warming Solutions Act (AB 32, Nuñez, Chapter 488, Statutes 2006). AB 32 committed the people of California to reducing our

greenhouse gas emissions (GHG) back to 1990 levels by 2020.¹¹³ AB 32 includes a number of programs to reduce the State's contribution to GHG, including cap-and-trade, mandating lower gas mileage and committing to alternative energy sources. However, over 35% of California greenhouse gas emissions stem from cars and trucks, reducing our emissions means reducing our vehicle miles traveled (VMT). This cannot be accomplished without counteracting sprawl by changing our land use patterns, increasing density in our urban areas and shifting from cars and trucks to public transit. This is what SB 375 does.

The core of SB 375 is the merging of housing and transportation land use policies. Under the law, regional planning agencies now align long-term transportation planning with long-term projections of household growth and housing need.¹¹⁴ The goal is to incentivize denser development, particularly near transit and transit stations, known in planning as Transit Oriented Districts or TODs. The new planning paradigm of dense residential near transit stations will have a great impact on future development. Figure 5, below, highlights these changes:

FIGURE 5. KEY GOALS FROM THE SUSTAINABLE COMMUNITIES STRATEGY OF THE REGIONAL TRANSPORTATION PLAN, 2012 – 2035. SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS		
Shift in Highway/non-highway Capital Investments:	Shift in Land Allocation for Projected Growth	Shift in Ratio of Single Family Housing to Multi-family Housing
<i>13% of capital investment goes to freeways, rest to transit</i>	<i>Over 50% of all growth in 3% of land area</i>	<i>7:3 ratio of single family to multifamily to 3:7 multifamily to single family</i>

Source: Sustainable Communities Strategy, 2013 – 2035, Chapter 4, Regional Transportation Plan (Southern CA Association of Governments).

¹¹³ CAL. ENVTL. PROT. AGENCY, AIR RES. BD., ASSEMBLY BILL 32 OVERVIEW, *available at* <http://www.arb.ca.gov/cc/ab32/ab32.html>.

¹¹⁴ S. CAL. ASSOC. OF GOV'TS, REGIONAL TRANSPORTATION PLAN, 2012-2035: TOWARDS A SUSTAINABLE FUTURE (2012) [hereinafter SUSTAINABLE COMMUNITIES STRATEGY (SCS)].

Successful implementation of SB 375 will change the planning environment in California but holds within it a potentially serious contradiction. As mixed-used, denser neighborhoods build up around transit stations, land prices increase. National studies are finding that minorities and low-income people—transit’s core ridership—face increased rents, less available housing and, in some cases, displacement.¹¹⁵ For example, in Los Angeles over 75% of core transit riders earn less than \$25/hour, are 80% people of color and are over-represented in the half-mile radii of existing and proposed metro stations.¹¹⁶ Further, in some cases an increase in higher income households has resulted in a reduction in transit ridership, as those with cars generally tend to use them.¹¹⁷

Pushing out core transit riders is not only morally offensive, it is bad public policy. Unless local jurisdictions plan to build and preserve affordable housing in TODs, the emphasis on increased density could, in fact, contravene the intended goal of SB 375.¹¹⁸ The demographics of density, if left to the market, will again fail the poor and powerless—yet this time with much graver consequences. Only activism and advocacy can prevent the loss of existing affordable housing in TODs *and* assure that more is built. Our production programs, tenant-based subsidies, and inclusionary land use practices are the models we have to build on; fighting to keep rent control, contesting unfair evictions, demanding healthy homes also need to

¹¹⁵ STEPHANIE POLLACK ET AL., DUKAKIS CTR. FOR URBAN & REG’L POLICY, NE. UNIV., MAINTAINING DIVERSITY IN AMERICA’S TRANSIT-RICH NEIGHBORHOODS: TOOLS FOR EQUITABLE NEIGHBORHOOD CHANGE (2010); *see also* TOM ADAMS ET AL., NAT’L RES. DEFENSE COUNCIL, COMMUNITIES TACKLE GLOBAL WARMING: A GUIDE TO CALIFORNIA’S SB 375 (2009); URBAN LAND INSTITUTE., SB 375: IMPACT ANALYSIS REP. (2010); MEGAN KIRKEBY & JAMES PAPPAS, CA HOUSING P’SHP, BUILDING AND PRESERVING AFFORDABLE HOUSING NEAR TRANSIT: AFFORDABLE TOD AS GREENHOUSE GAS REDUCTION & EQUITY STRATEGY (2013); KAREN CHAPPLE, CTR. FOR CMTY INNOVATION, UNIV. OF CAL., BERKELEY, MAPPING SUSCEPTIBILITY TO GENTRIFICATION: THE EARLY WARNING TOOLKIT (2009).

¹¹⁶ L.A. HOUS. DEP’T & RECONNECTING AM., RECONNECTING AMERICA, PRESERVATION IN TRANSIT-ORIENTED DISTRICTS: A STUDY ON THE NEED, PRIORITIES AND TOOLS IN PROTECTING ASSISTED AND UNASSISTED HOUSING IN THE CITY OF LOS ANGELES (2012).

¹¹⁷ ALEX KARNER & DEB NIEMEIER, DEP’T OF CIVIL & ENVTL. ENG’G, UNIV. OF CAL., DAVIS, ALTERNATIVE SCENARIOS, AFFORDABLE HOUSING, AND VEHICLE-MILES TRAVELED IN THE BAY AREA (2012).

¹¹⁸ *Id.*

be part of our strategies and tactics. It is our challenge and opportunity to fight for the counter-narrative models we have and to expand them to more closely meet the need. The land use and exclusionary practices carried down through our nation's history are not only outmoded and unjust; they have become a hindrance to our future. Land, justice and a place to call home is no longer a cry to right historical wrongs; it is an imperative if we are to have a common future.