



Journal of
Affordable Housing
& Community Development Law

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2019

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**FORUM ON AFFORDABLE HOUSING
AND COMMUNITY DEVELOPMENT LAW**

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From the Editor-in-Chief

Tim Iglesias

Welcome to the post-Annual Meeting issue of the *Journal*! We've got an exciting set of offerings to enrich your summer reading.

In case you missed the Forum's Annual Meeting this past May, our tireless conference organizers Michael Hopkins of Bocarsly Emden and Kathie Soroka of Nixon Peabody have written a brief summary. Kelly Rushin Lewis of Jones Walker offers her first column as the new Forum Chair. Brad Rader and Spencer Chretien, both of HUD, wrote our Heard from HUD column, "Opportunity Finds a Home at HUD," which details HUD's leadership in implementing the new and quite complex Opportunity Zones program.

Because of the bounty of recent literature on residential segregation, our reading room bookshelf was bursting. So we splurged on book reviews in this issue; well-qualified reviewers examine three important new publications. Richard Rothstein of the Haas Institute and Stephen Menendian of the Haas Institute for a Fair and Inclusive Society, both at the University of California at Berkeley, contribute a detailed description and evaluation of *Moving Toward Integration: The Past and Future of Fair Housing* (Harvard 2018) by Richard Sander, Yana Kucheva, and Jonathan Zasloff. While this book strongly supports racial integration, it makes numerous controversial claims, including that the 1968 Fair Housing Act was swiftly and vigorously enforced by the federal Department of Justice. While the reviewers find significant limitations in the book, they nonetheless judge that it makes significant contributions to the literature. Stacy Seicshnaydre of Tulane Law School reviews *Facing Segregation: Housing Policy Solutions for a Stronger Society* (Oxford 2019) by Molly Metzger and Henry Webber. This book examines the causes and consequences of segregation but also critically examines proposed policy prescriptions. Professor Seicshnaydre finds several features of this book to be exceptional, noteworthy, and, indeed, inspiring. Brian Knudsen of the Poverty and Race Research Action Council reviews *Segregation by Design: Local Politics and Inequality in American Cities* (Cambridge University Press 2018) by Jessica Trounstine. Combining historical study with qualitative and quantitative social science methods, this book hones in on the particular role of local government policy—especially around land-use, zoning, and control of public services—in creating and perpetuating racially and economically segregated living patterns. Our reviewer finds that this book makes several fundamental contributions, by,

Tim Iglesias is Professor of Law at the University of San Francisco School of Law. He is co-author of the Legal Guide to Affordable Housing Development Law (ABA 2011) and numerous articles. He welcomes comments from readers at iglesias@usfca.edu.

for example, focusing race-conscious scholarship upon subnational governmental processes in American cities.

The *Journal* is pleased to publish its third AALS Community Economic Development Symposium series. The 2019 theme was Building Bridges: Examining Race and Privilege in Community Economic Development. Priya Baskaran of West Virginia University College of Law, Renee Hatcher of John Marshall Law School, and Lynnise Phillips Pantin of Columbia Law School introduce the symposium and the three essays, each with helpfully descriptive titles: "Building Bridges and Breaking Down Walls: Taking Integration Seriously in CED Practice" by Anika Singh Lemar of Yale Law School; "Connecting Community Control of Infrastructure and Economic Development with Race and Privilege" by Edward De Barbieri of Albany Law School; and "Calling for a Community Economic Development Code of Ethics" by Michèle Alexandre of Stetson College of Law, Patience Crowder of Sturm College of Law, and Audrey McFarlane of the University of Baltimore School of Law. As demonstrated by the introduction and the essays, the symposium participants engaged the most difficult issues head on. A rich and illuminating conversation ensued, which revealed new and promising approaches, but also exposed limitations in our current approach to CED work.

Spencer Bailey, a law student at Washington University School of Law-St. Louis, is the winner of the Forum's 2019 Law Student Legal Writing Competition. The *Journal* is happy to publish his excellent article, "Winning the Battle and the War Against Housing Discrimination: Post-Acquisition Discrimination Claims Under the Fair Housing Act After Inclusive Communities." Mr. Bailey first provides a careful and thorough review of the conflicts regarding whether certain provisions of the Fair Housing Act cover post-acquisition claims. Then, after excavating the four interpretive techniques that the Inclusive Communities court applied to the FHA, he applies them to the post-acquisition claims controversy regarding Section 3604(b) (which prohibits discrimination in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith). He concludes that a straightforward application of the interpretive framework used in *Inclusive Communities* will find that § 3604(b) covers post-acquisition claims.

Two articles comment on the state of the LIHTC program. First, Lauren Loney and Heather Way, both of the University of Texas School of Law, contribute "Strategies and Tools for Preserving Low Income Housing Tax Credit Properties." Recognizing that thousands of LIHTC units are exiting the program and converting to market-rate rents at a time when affordable housing is increasingly scarce, this article examines federal and state policies that are fueling the loss of LIHTC properties and offers solutions that federal, state, and local governments, as well as other preservation stakeholders, could implement to preserve these affordable units. And second, Rachel Blake of Regional Housing Legal Services and Karlo Ng of the National Housing Law Project give us "No Credit for Treasury:

Implementing the Violence Against Women Act in the Low Income Housing Tax Credit Program.” This article highlights key findings and best practices that emerged from two national surveys on implementing VAWA’s housing protections and remedies in the LIHTC program more effectively.

In “Avoiding Mis-Givings: Recycling Community-Created Land Values for Affordability, Sustainability and Equity,” Rick Rybeck, Director of Just Economics, explains what he calls “the infrastructure conundrum” in which local governments create infrastructure to facilitate and support development, causing increases in land prices and rents near the infrastructure, which provides a windfall gain to owners of well-served sites, an incentive for land speculation, and other negative consequences. Framing the benefits to land owners as “givings,” he urges local governments to employ land value return and recycling strategies by shifting taxes off of building values and onto land values. He argues that these policies have been effective in numerous localities and that they can promote more affordable, sustainable and equitable development.

This is the last issue for which I will serve as Editor-in-Chief. It has truly been an honor and a privilege to serve in this role. And it’s been a joy working with the Forum’s Governing Committee, *Journal* authors, Dawn Holiday, my Managing Editors (Wendy Smith and Julie Furgerson), and especially my wonderful Editorial Board: Laurie Hauber, Emily Blumberg, Sara Silverstein Ferrara, and Brandon Weiss, I will be eternally grateful to them for their generous, professional, and kind assistance. After four years of excellent contributions, Brandon is leaving the Editorial Board. Matt Rossman a Professor of Law at Case Western Reserve, where he coordinates and co-teaches the Community Development Clinic and much more (see his bio at <https://law.case.edu/Our-School/Faculty-Staff/Meet-Our-Faculty/Faculty-Detail/id/824>), will be joining as a new Associate Editor. Finally, I want to introduce and welcome the new Editor-in-Chief, Stephen Miller. Stephen is a Professor of Law and Associate Dean for Faculty Development at the University of Idaho College of Law in Boise. He brings an expertise in land use law and policy as well as community and economic development law. He is a highly respected and productive scholar, who is well-connected to both other law professors and to community development practitioners. Finally, Stephen has a longstanding connection to the *Journal*: in the Summer of 2004, as an intern for former Forum Chair Roger Clay, he helped organize a day-long conference and papers that were later published in the *Journal*. I’m confident I am leaving the *Journal* in excellent hands. And I’ll be staying on as Senior Editor to ensure a smooth transition.



From the Chair

Kelly Rushin

Nearly fifteen years ago I attended my first Annual Meeting of the ABA Forum, and I haven't missed one since then. So it is a great honor to be Chair of the Forum, and I start my year with much enthusiasm as we have a lot going on both externally and internally that I would like to share with our readers.

Internally, as you may have heard at our Annual Meeting in May, the Governing Committee recently finalized our new strategic plan. This was quite an endeavor, but well worthwhile. For the coming year, our task is to give life to that plan. One of the primary focuses is restructuring our Governing Committee (GC) to make it more effective and more inclusive. Pursuant to some of these changes, the goal is to build a "track" for our members to have clear paths to get more involved at whatever level they wish and, in doing so, build a pipeline for future leadership. As I mentioned, I have been coming to Forum meetings for years. In 2010 or so, I asked a friend and colleague who was on the GC how to be more involved. She assisted in getting me on the teleconference committee, and from there I worked on planning the D.C. conference to the GC and now to today. The problem though is that the path to doing that was never clear, and I worry that many of our members would like to participate at a more meaningful level but aren't sure how to do so. Part of the goal of our new structure will be to make that clear and accessible to all those who are interested. We have such a wonderful and vibrant group that I encourage you all to explore those options when they arise.

Another component of the strategic plan is to further build our brand as the Forum. To me, it's indisputable that the Forum consistently provides the most substantive, technical learning available anywhere. Yet we all hear folks say something to the effect that I go to this or that conference instead because clients are there. While that is certainly understandable, our meetings should be a "can't miss" event for those in our industry. As I write this, I am leaving the National Council of State Housing Agencies' conference. It is a great meeting, but I see several notable firms with MULTIPLE lawyers in attendance, many of whom I do NOT see at our meetings. The answer is, again, the clients are here. While that is certainly understandable, isn't part



Kelly Rushin

Kelly Rushin Lewis (krushin@joneswalker.com) is head of the firm's Housing Industry Team and is a partner in the Real Estate Practice Group at Jones Walker LLP at its Birmingham, Alabama, office.

of the beauty of the Forum meetings that lawyers get a chance to discuss the tough legal issues, changes in law, how we are addressing issues, etc., in a deep way together? We all have limited time and limited resources, but our goal and part of our plan for the Forum is to become a “must do” for all lawyers in our industry. There is plenty of networking to be had in our group. And the knowledge and tools you can acquire by being a part of it will only serve to make you a better lawyer and should help us all individually grow our expertise and thereby our brand.

I would be remiss if I didn't mention the ongoing struggles our parent ABA is having financially. While the Forum is very financially sound, a significant portion of our revenue is remitted to the ABA so we share in their pain. In May of this year, the Forum's budget from ABA was cut significantly. We participated in the appeals process, but that appeal was denied (ironically on the basis that we do not need their support!). Given this outcome, the participation by members and the growth of our membership base are more critical than ever so that we can continue the good work that has been done in the past.

Above I mentioned the quality programming that the Forum is known for providing. This May's conference is an excellent example of such programming. From great technical panels like capital accounts and income averaging to a panel on cost containment, there was an excellent breadth of content. The plenaries, which are always challenging to put together, were especially engaging covering not only legislation that impacts our industry but also the burgeoning topic of the intersection of healthcare and housing. The last few years of the conference have successfully brought meaningful policy discussions to our members, so we hope to continue that trend as well as further develop practice management panels. The start of the conference, with the sessions at HUD and with the IRS, also represents important components of our programming, because they provide a unique conversation and much needed dialogue between our bar and those in government. Both are truly a one-of-a-kind opportunity for engagement with government officials that only the Forum provides.

Before we convene in D.C. again next year, I am excited to announce our annual “Bootcamp” will be this fall in Denver starting October 17th. This is now our seventh year of providing this one-of-a-kind training. This “deep dive” on substantive topics continues to be very popular and is another example of education rarely only provided by the Forum. The addition of the more advanced track a few years ago makes it a conference that is useful to lawyers of various experience levels. As we have done in the past, we will also take some time to visit some local projects in the area to see the tools being used there to build quality affordable housing.

In between meetings, we are working to build a robust schedule of teleconferences on current policy topics and of technical content, so please watch for those to be announced. These teleconferences (which typically provide CLE credit) are discounted for members, and often even free, so they are a great member benefit.

Turning outside the Forum, it is no secret that housing prices continue to rise faster than income levels, making the work we all do and the programs that support it more essential than ever. The good news is Congress has given us some new tools such as income averaging and opportunity zones. Like all new programs, those tools come with many unanswered questions. Being a member of the Forum though is most helpful in this context. Our culture of sharing and collaboration is the only way to learn how to implement these new provisions effectively.

I will close by saying that I and the GC welcome any feedback you have, and we would be thrilled to receive any comments or suggestions you have for the Bootcamp or the May conference. We appreciate your involvement in the Forum and look forward to serving you this coming year.





FORUM ANNUAL MEETING UPDATE

Michael Hopkins and Kathie Soroka

The Forum on Affordable Housing and Community Development Law's Annual Meeting was held May 22–24, 2019, in Washington, D.C. This year's conference started with a warm welcome from HUD General Counsel Paul Compton. The Friday plenary highlighted cross-cutting policy ideas on the critical intersection between housing and healthcare. The Thursday plenary provided an aspirational discussion by industry leaders on new ideas to address the country's affordable housing crisis. Wednesday's HUD session addressed statutory authorities and program limitations with representatives from HUD's Office of Residential Care Facilities, HUD Office of General Counsel, the private bar, and lenders and offered a roundtable discussion of FHA multifamily closing issues, opportunities and new developments. The Tax Credit Practice Committee welcomed representatives from the IRS and Treasury back to the conference to discuss the Qualified Opportunity Zone incentive and recently released guidance related to Low-Income Housing Tax Credits, Historic Tax Credits, and Tax Reform related issues. Attendees enjoyed catching up with old friends and building new relationships at our Wednesday Speed Networking Event and Thursday Night Reception. We'd like to thank the panel moderators and speakers for providing excellent panel content across the entire field of affordable housing, community development, and related tax laws. We also want to thank our generous sponsors for their support and hosting the receptions. We look forward to seeing everyone again at next year's Annual Conference, which will be held May 20–22, 2020, in Washington, D.C., and encourage active participation with the Forum during the year.

The Michael S. Scher Award was presented at the Annual Conference to John J. Ammann, who was selected by the Forum's Nominating Committee as an attorney who exemplifies the spirit and commitment that our colleague **Michael Scher** demonstrated in the field of affordable housing and community development law. It was an honor to have John and his daughter and friends attend the Annual Conference luncheon to receive the award, and, in further recognition of John's exemplary career in Affordable Housing, we have requested that the *Journal* print the engraved dedication on the award. Congratulations John!

Michael S. Scher Award

**For Outstanding Service and Commitment to Affordable Housing and
Community Development Law**

presented to

John J. Ammann

John J. Ammann, throughout more than thirty years as a legal educator, lawyer, mentor, and advocate, has made a difference in the lives of his students, his clients, and his colleagues. John began his law career in 1984 upon his graduation from law school, clerking for both the Missouri Court of Appeals and the Illinois Court of Appeals. From 1988 to 1994, he worked as a senior staff attorney for the Land of Lincoln Legal Assistance Foundation. In 1994, John joined the faculty of the St. Louis University (SLU) School of Law. At SLU, John has directed various clinics touching on affordable housing and community development issues and has been honored on three occasions as Faculty Member of the Year. He is SLU Law's McDonnell Professor of Justice in American Society.

In addition, John has made numerous outstanding contributions to the Forum. John is a past member of the Governing Committee of the Forum on Affordable Housing and Community Development Law, and served as Editor of the Forum's *Journal* from 2003 to 2005. His ABA contributions also included membership on the ABA Commission on Homelessness and Poverty.

As a legal educator, John has supervised students in representation of the homeless in minor criminal proceedings and in major civil rights litigation. He and his students provide legal counsel to Habitat for Humanity and other nonprofit housing providers. In addition, John has served as co-counsel on successful litigation on behalf of Medicaid recipients, fostered and adopted children, including children with disabilities. In addition to the teaching recognition from SLU students, John received the Governor of Missouri's Award for Teaching Excellence. He serves on several nonprofit boards, including Habitat for Humanity St. Louis and Legal Services of Eastern Missouri. He has influenced hundreds of students through his knowledge, guidance, and personal leadership.

John's efforts in St. Louis and in Missouri have led to legal victories for the sick, the vulnerable, the poor, the homeless, the battle-scarred, the blind, and the elderly, enhancing their quality of life in invaluable measure and ensuring that they are not forgotten by their communities. Perhaps most importantly, John has instilled the passion to advocate for those without a voice to generations of students who have gone on to lead careers of their own in affordable housing and public interest law.

Past recipients of the *Michael Scher Award* include:

- 2006 William ("Bill") Kelly (inaugural recipient)
- 2007 Robert N. Ungerleider
- 2008 Chuck Edson
- 2009 Roger Clay
- 2010 Betty Park
- 2011 Alexander Polikoff
- 2012 Art Hessel
- 2013 Paul Casey
- 2014 Gordon Cavanaugh
- 2015 Jonathan Klein
- 2016 Paul Handleman
- 2018 Bob Kenison



LETTERS TO REGULATORS

Glenn A. Graff
Applegate and Thorne-Thomsen

Forrest David Milder
Nixon Peabody LLP

Brad Tomtishen
Tomtishen Aoun PLLC

Susan Wilson
Enterprise Housing Credits Investments, LLC

The 2017 Tax Act (often referred to as the “Tax Reform and Jobs Act” or PL 115-97) created a tax incentive for investments by Qualified Opportunity Funds (“QOFs”) in Qualified Opportunity Zones (“QOZs”). These tax benefits can be used for virtually any type of investment and can be “twinned” with other tax incentives, such as the Low-Income Housing Tax Credit (“LIHTC”), the New Markets Tax Credit (“NMTC”), and the Historic Tax Credit (“HTC”).

QOZs are a new tax incentive for taxpayers who own appreciated assets. If a taxpayer sells such an asset and invests an amount equal to the resulting capital gain in a QOF that undertakes business activities in certain low-income areas in accordance with the applicable requirements, the taxpayer can delay payment of the tax liability normally associated with the capital gain. And the taxpayer may also eliminate tax on a subsequent sale of the QOF investment, if it holds the investment for at least ten years. The purpose of the QOZ tax benefits is to incentivize investment and increase the economic growth in such low-income areas. While there are very few restrictions on what categories of businesses can be invested in, there are detailed rules that need careful review to make sure that any particular business will qualify.

The Qualified Opportunity Zone provisions are contained in Internal Revenue Code Sections 1400Z-1 (Designation of Qualified Opportunity Zones) and 1400Z-2 (Special Rule for Capital Gains Invested in Opportunity Zones). On October 29, 2018, the Treasury Department (“Treasury”) issued its first set of proposed regulations (“Tranche 1 Regs”) on Section 1400Z-2. On May 1, 2019, Treasury issued a second set of proposed regulations (“Tranche 2 Regulations”). In total, the Tranche 1 and Tranche 2

Regulations (collectively, the “Proposed Regulations”) and their explanation amount to over 240 pages. The authors commend Treasury on the hard work which has gone into issuing substantial amounts on guidance on an incentive that was created so recently, December 2017.

The American Bar Association’s Forum on Affordable Housing and Community Development (the “Forum”) consists of practitioners focused on affordable housing and community development. Members of Forum’s Tax Credit and Equity Financing Committee (the “Committee”) observed a number of difficulties in combining the QOZ incentive and existing tax incentives in a synergistic way to increase affordable housing and community development. To help align the QOZ incentive with efforts at improving low-income housing and communities, the Committee drafted a comment letter in response to the Tranche 2 Regulations. This letter (“July 2019 Letter”) was approved by the Forum Governing Committee and was submitted on behalf of the Forum to the Department of Treasury on July 1, 2019.

Individual members of the Committee previously submitted two comment letters to Treasury on the QOZ incentive in general and on the Tranche 1 Regulations. Those letters were published in the *Journal*, Vol. 28, No. 1 on pages 1–21. The letters published in Volume 28 include an overview of the QOZ incentive, and we refer readers to that article for background on the QOZ incentive. The July 2019 Letter below lists a number of recommendations that will allow the QOZ incentive to better interact with the special needs of low-income housing and community development.



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July 1, 2019

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Attention: Erika C. Reigle of the Office of Associate Chief Counsel (Income Tax and Accounting), Kyle C. Griffin of the Office of Associate Chief Counsel (Income Tax and Accounting)

Michael Novoy, U.S. Department of the Treasury,

Michael.Novoy@Treasury.gov

and uploaded to the Federal Rulemaking Portal at

<https://www.regulations.gov/document?D=IRS-2019-0022-0001>

Re: Guidance Regarding Investing in Qualified Opportunity Funds (Reg-120186-18)

Dear Ms. Reigle, Mr. Griffin and Mr. Novoy:

Enclosed please find comments with respect to the proposed regulations regarding investments in qualified opportunity funds under Section 1400Z-2. These comments are submitted on behalf of the Forum of Affordable Housing and Community Development Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly should not be construed as representing the position of the Association.

Erika C. Reigle
Kyle C. Griffin
Michael Novey
July 1, 2019
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The Forum would be pleased to discuss these comments with you or your staff.

Sincerely,



George Weidenfeller
Chair, Forum of Affordable Housing and Community Development Law
Washington, DC

Enclosure

**COMMENTS TO SECOND TRANCHE OF
QUALIFIED OPPORTUNITY ZONE REGULATIONS¹**

- I. OVERVIEW**
- II. QUALIFIED OPPORTUNITY ZONE BUSINESS**
 - A. Clarification Regarding Grace Period to Qualify and Expected Working Capital
- III. QUALIFIED OPPORTUNITY ZONE BUSINESS PROPERTY**
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- IV. RECOGNITION OF GAIN IN 2026**
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 - A. Treatment of Debt in Basis Step-up
 - B. Inclusion Event Does Not Preclude Basis Step-up
 - C. Consistency for Sales of QOF/Qualified Partnership Interest/Project
- VI. ELIGIBLE CAPITAL GAINS**
 - A. Section 1231 Gains
 - B. QOF Investments by Consolidated Groups

¹ We have used various acronyms in this letter for technical terms defined in Sections 1400Z-1 and 1400Z-2. To ensure clarity, we include a glossary of these terms:

QOF refers to a “qualified opportunity fund” as defined in Section 1400Z-2(d)(1).

QOZB refers to “qualified opportunity zone business” as defined in Section 1400Z-2(d)(3).

QOZP refers to “qualified opportunity zone property” as defined in Section 1400Z-2(d)(2)(A).

QOZBP refers to “qualified opportunity zone business property” as defined in Section 1400Z-2(d)(2)(D).

Opportunity Zone or **OZ** refers to a “qualified opportunity zone” as defined in Section 1400Z-1(a).

I. OVERVIEW

These comments (the “Comments”) are submitted on behalf of the American Bar Association Forum on Affordable Housing and Community Development Law (the “Forum”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association. The Comments were prepared by Forum’s Tax Credit and Equity Financing Committee and the primary authors were Glenn Graff, Forrest Milder, and Brad Tomtishen. The Comments were reviewed by B. Susan Wilson and the following Forum Governing Committee members and liaisons: Schuyler Armstrong, Althea J.K. Broughton, Patience Crowder, Jill Goldstein, Michael Hopkins, Hilary Jaffe, Tim Iglesias, Margaret Jung, Kelly Rushin Lewis, Amy McClain, Sarah Molseed, Sarah Perez, Dan Rosen, and George Weidenfeller.

As practitioners focused on affordable housing and community development, we observe a number of difficulties in combining Opportunity Zone incentives and existing tax incentives in a synergistic way to increase affordable housing and community development. There is an opportunity to reduce those difficulties through the proposals set forth in this letter, but there is also a risk that without an increased focus on coordination of tax incentives, the OZ incentives may have a net negative effect on low-income residents and their existing communities.

Socially motivated projects intended to benefit the low-income people that live in existing Opportunity Zones often have limited or no long-term upside. For example, projects that employ low-income housing tax credits (“LIHTC”) generally require occupancy by persons having incomes below 60% of the area median income and rents that are 30% of such income levels and that such restrictions last for 30 years or more. Income and rent restrictions can also encumber many other community development focused projects using HUD and other federal and state programs. As a result, such projects have very little potential for appreciation after a 10-year investment or may actually lose value. Thus, one of the major benefits of the OZ regime – the ability to increase basis to fair market value after a 10-year holding period – does not provide a significant benefit for most LIHTC investments.

Moreover, that incentive is important to economic investments, such as market rate apartments and hotels, and has resulted in increases in land costs in Opportunity Zones. LIHTC investments are particularly hurt by increases in land costs because affordable housing investors give up the potential economic gains in exchange for tax benefits. In addition, there are no tax benefits associated with land. Land costs cannot be depreciated and are not eligible for tax credits. Thus, increases in land costs are deadweight costs in determining the viability of a LIHTC project.

As discussed herein, other factors are inherent in affordable housing transactions that may not be as important for other transactions. We discuss these issues in detail herein, but a few examples follow.

- i. One of the tax benefits to investments in Opportunity Zones is the potential reduction in tax due in 2026 on deferred capital gains. The statute provides that the deferred gain to be recognized can be reduced to the extent the fair market value of the QOF investment is less than the deferred gain. This would seem to be a key incentive for LIHTC investments as the value of these investments may decrease over time as tax benefits are realized and are not offset by appreciation due to requirements to maintain affordable rents. However, the special rule created in the Proposed Regulations for investments in partnerships and S corporations largely eliminates the potential benefit for LIHTC investments, which are typically structured through partnerships. **We propose an alternative rule.**
- ii. Housing is a long-term investment, but one that needs periodic rehabilitation. That means there are important questions relating to “original use” and “substantial improvement” that more regularly occur. Transactions involving property owned prior to 2018 and transfers between potentially related parties are common and do not implicate any of the tax policy concerns that inspire limits on “churning” transactions. **We request clarification on several of these questions.**
- iii. Another issue is that a majority of investors in affordable housing projects are banks. Banks face regulatory restrictions on investments for their own account and capital gain transactions are not recurring events. Moreover, banks often invest in affordable housing and community development through community development subsidiaries and those entities may not be the entities that realize capital gains. **We propose rules for determining which entity can undertake the investment of capital gain realized by a consolidated group that we believe make sense overall, but are especially important to affordable housing.**

We ask that you consider these issues that are unique, or at least more critical, to affordable housing in finalizing the regulations. We believe that they are critical to the goal of the Opportunity Zone incentives to improve low-income communities for the benefit of existing low-income residents.

II. QUALIFIED OPPORTUNITY ZONE BUSINESS

A. Clarification Regarding Grace Period to Qualify

and Expected Working Capital

Section 1400Z-2(d)(3) provides that a QOZB means a trade or business in which substantially all of the tangible property owned and leased by the taxpayer is QOZBP. The Proposed Regulations provide that substantially all means 70% of tangible property.

However, we recommend that there be some grace period in which a business can meet the substantially all test and the active conduct of a trade or business test. Section 1400Z-2(d)(2)(B)(i)(III) and (C)(ii) provide that to qualify as QOZP, the stock or a partnership interest must be in a corporation or partnership that is a QOZB at the time of acquisition or “such (corporation or partnership) was being organized for purposes of being a qualified opportunity zone business”. Whether an existing business is expanding or a new business is constructing assets in preparation for beginning a new business, there will be an initial period in which the requirements for a QOZB are not met.

The Proposed Regulations provide a safe harbor for the use of working capital within a 31-month period and Proposed Regulation Section 1.1400Z-2(d)-1(d)(5)(vii) provides that the tangible property being constructed with such working capital will not fail to be QOZBP because the expenditure of the working capital is not yet complete. We request clarification that the tangible property to be constructed during the 31-month period can be counted toward the 70% test.

The second tranche of the Proposed Regulations expand the working capital safe harbor to address successive 31-month periods. We would similarly request that the property to be constructed can continue be counted during serial or overlapping 31-month periods and that the active conduct of a trade or business requirement would also be satisfied.

Finally, we also request clarification, that in the above 70% computations, one looks to the cost of the building to be constructed or the business to be started and that the interim 70% computations are not limited to the amount of working capital actually received. For example, assume that a QOZB purchases land from a related party for \$3,000,000 and pursuant to a written plan, expects to expend an additional \$7,000,000 to construct an apartment building within 31 months. Assume that the QOZB received an initial capital contribution from a QOF for \$6,000,000 and reasonably expects to receive a bank loan or additional equity in 18 months for an additional \$4,000,000 when the initial equity has been consumed by construction costs. The QOZB designates the entire \$10,000,000 as working capital. For purposes of any 70% QOZB substantially all computations during the 31-month period, the QOZB should be treated as owning the \$7,000,000 building and thus has \$10,000,000 of assets of which \$7,000,000 are QOZB. As a result, the 70% test would be satisfied during each testing date during the 31-month period.

III. QUALIFIED OPPORTUNITY ZONE BUSINESS PROPERTY

A. Satisfaction of the Original Use Test for LIHTC Projects

One of the most important objectives of the legislation is to create affordable housing opportunities for residents in Opportunity Zones. However, the Opportunity Zone requirement that an existing property must be substantially improved can frustrate this type of investment.

Section 1400Z-2 requires that the original use of QOZBP must commence with the QOF/QOZB or, in the case of an existing property, that the QOF/QOZB undertake a “substantial improvement” of the property. For this purpose, a property is substantially improved if the improvement costs incurred within a 30-month period after acquisition exceed the adjusted basis of the property at the time of acquisition.

In the case of affordable housing, Section 42 of the Code has provided a lower percentage of basis rehabilitation requirement since 1989. In 2008, the standard was set at the greater of 20 percent of basis, or \$6,000 per unit, adjusted for inflation, over a 24-month period. This standard was set at an appropriate level to encourage the rehabilitation of existing buildings to provide affordable housing. In comparison, the QOZ requirement is so much higher than the Section 42 requirement that there is very little potential for pairing of QOF and Section 42 tax credit investment in the case of existing buildings. Thus, the QOZ incentive is not serving one of its most important functions.

Treasury could address this problem by providing that if a property qualifies for the Section 42 low income housing tax credit, that use will be considered the “original use” of the property, so that the Section 1400Z-2 substantial improvement test will not apply. We note that there is already precedent for this interpretation; the proposed regulations provide a similar definition for property that has been vacant for five years, even though it is plainly “used” in the common meaning of the word. If the IRS applied the original use definition to Section 42 property, then rehabilitation would still be required, but the Section 42 requirement (20%, or \$6,000 per unit, adjusted for inflation) would apply, keeping the required expenditures to the levels thought appropriate for affordable housing. This would significantly and appropriately enable the two incentives to work together to produce a very desirable outcome.

B. Election to Aggregate Assets for Satisfying the Substantial Improvement Test

The Proposed Regulations test the substantial improvement requirement for used property on an asset-by-asset basis. They do not permit aggregation of related assets in order to meet the test. This hinders the ability to claim OZ benefits in various circumstances. We note that this does not seem consistent with the statutory language; it

calls for expenditures “with respect to” the used property, which we believe is consistent with a broader range of eligible expenditures.

For example, a single owner may own used buildings and land on the same parcel in the same Opportunity Zone, and have a plan to rehabilitate the buildings to be suitable residential property, while also repaving parking lots and sidewalks and building a new playground and a new community building. These new additions seem to be “with respect to” the existing buildings and, in the case of a LIHTC project, would be includible in the eligible basis of the buildings in determining the amount of tax credit with respect to each building. However, the rule for the Opportunity Zone in the current version of the Proposed Regulations would require that the rehabilitation of each building meet the substantial improvement requirement on an individual basis, significantly impairing the availability of funds for the overall project. This would frustrate what would otherwise be a beneficial application of the Opportunity Zone legislation and deter its use.

Meeting the substantial improvement requirement for some businesses may be cumbersome as well. Where a business has multiple assets, and some do not require substantial rehabilitation, but others do, it is difficult to know how the substantial improvement test will be applied. Businesses should be able to couple major improvements on some assets, with little or no improvement to others.

Moreover, applying the substantial improvement requirement on an asset-by-asset basis may raise difficult questions of proof that would require burdensome record keeping. For example, a taxpayer that acquires a residential rental project that it intends to rehabilitate likely does not obtain a building-by-building appraisal or construction contract. Even in a multiple building project where buildings were built within the same timeframe, there will be differences in the condition of buildings.

Example: Example, a partnership which desires to meet the requirements to be a QOZB acquires land and an operating apartment building for \$10,000,000 and acquires the adjacent lot for \$500,000. The partnership plans to spend \$3,000,000 on improving the apartment building and spend another \$7,000,000 on the adjacent lot where the following will be constructed: a smaller apartment building with a coffee shop, a playground, and a building that will include new laundry facilities and a community center.

We recommend that the IRS adopt a regulation that would consider the substantial improvement test to be passed where the owner had (i) a written development plan which met the substantial improvement requirement on an aggregate basis (including both rehabilitation of the used buildings and the cost of new construction); (ii) the expenditures were for contiguous properties that include the used properties; and (iii) the written plan was approved by a local government agency responsible for authorizing development activities.

C. Treatment of Improvements as Separate Property for Qualification as QOZBP

Section 1400Z-2(d)(2)(D) provides several requirements that must be met for property to be QOZBP, including that (i) the property must be acquired after December 31, 2017, by purchase (as defined in Section 179(d)(2)), and (ii) the original use of the property must commence with the QOF or the QOF must substantially improve the property.

We request that Treasury clarify that improvements to existing property are separately tested as QOZBP so that an improvement to existing property could be QOZBP even though the existing property was acquired prior to 2018, or was acquired from a related party.

Example: A building is acquired from a related party for \$300,000 and rehabilitated at a cost of \$700,000. The acquired building cannot be QOZBP, but the \$700,000 improvement is a separate property that can qualify as QOZBP.

D. Self-constructed Property and the Treatment of Related Party Fees

As noted above, Section 1400Z-2(d)(2)(D) provides a requirement that QOZBP must be acquired by purchase (as defined in Section 179(d)(2)). We believe it is clearly the intent of the statute that self-constructed property satisfy this requirement, but a clarification that self-constructed property is deemed as acquired by purchase would be helpful.

Further, under the requirements of Section 179(d)(2), property acquired is not acquired by purchase if it is acquired from a related party. Section 1400Z-2(d)(2)(D)(iii) modifies the related party test of Section 179(d)(2) by substituting 20% for 50% in each place it occurs.

It is common in the case of self-constructed property that related parties perform services and receive fees for activities such as development services, construction management, or even architectural services. Such fees are then capitalized into the basis of the assets being constructed.

We request that Treasury clarify that reasonable fees for services paid to a related party that are capitalized into the basis of tangible property do not constitute an acquisition of any portion of that tangible property from a related party and do not cause that property to fail to qualify as QOZBP.

This clarification is particularly important for LIHTC transactions, as each project includes a significant fee for development services that is limited to a reasonable amount

by each state allocating agency. The development services are typically performed by an affiliate of the general partner or manager of the entity that owns the LIHTC project, which may perform additional services with respect to construction. Treatment of such payments as disqualifying even a portion of the LIHTC project from treatment as QOZBP would preclude QOFs from investing in many, if not most, LIHTC projects.

IV. RECOGNITION OF GAIN IN 2026

B. Measurement of Gain Recognized in 2026 Under Special Partnership/Sub S Rule

While focusing primarily on investments that appreciate in value, Section 1400Z-2 also was crafted with an eye towards the fact that investments in distressed communities come with higher risk. The general rule is to have gain recognition on December 31, 2026, for capital gains income that was deferred when an investment is made in a QOF, less the taxpayer's basis in the investment.² However, Section 1400Z-2(b)(2)(A) provides a rule that where a QOF investment has lost value, then the gain recognized would be the lower of the deferred capital gain or the fair market value of the QOF interest, less the taxpayer's basis in the investment. The rule drafted by Congress inherently says that for the risky QOZ investments, when some investments do not appreciate, the taxpayer will not be hit twice in 2026: once with taxes owed on the deferred gain and a second time on loss in economic value. Instead, the recognition of deferred capital gain will be lowered to reflect any reduction in fair market value of the QOF investment.

In drafting the Proposed Regulations, we understand Treasury's concern that an untoward result could occur if a partnership/S-corporation QOF (or its subsidiary QOZB) borrowed funds and distributed those funds to its member taxpayers. The concern is the taxpayers would then claim a reduced QOF value on December 31, 2026 due to the debt and recognize less of the deferred capital gain. As a result, Proposed Regulation Section 1.1400Z-2(b)-1(e)(4) removes the statutory reference to fair market value and instead provides that for partnership or S-corporation QOFs gain recognition based on the lesser of (1) the deferred capital gain less the 10% or 15% basis increases, or (2) the gain that would be recognized on a fully taxable disposition of the qualifying investment.³

We believe that the special rule in the Proposed Regulations has an inadvertent negative effect on investments in affordable housing and that an

² Proposed Regulation Section 1.1400Z-2(b)-1(e)(3) clarifies that such basis is only the 10% and 5% basis increases allowed under Section 1400Z-2(b)(2)(B).

³ The Proposed Regulation also include special percentage rules that would apply to pre-December 31, 2026 partial dispositions of a QOF interest. Such percentage rules do not impact the change being recommended.

alternative rule that more closely tracks the statute will address the concern raised by Treasury while eliminating the adverse effect.

The impact of the special rule is that gain recognized can be higher if there is debt involved at the QOF/QOZB level. Because debt is a common funding source for real estate projects, and even operating businesses, this approach creates a higher tax on business that may have prudently borrowed funds to increase the investment in the Opportunity Zone, but experienced a reduction in the economic value of that investment. This is an especially onerous result for socially motivated investments in Opportunity Zones where the appreciation possibilities are much lower and the possibility of lost capital is higher.

This can be illustrated by investments in LIHTC transactions. Because of statutorily required 30-year limits on rents that can be charged, such projects have limited prospects for appreciation and often may have lost value in the early years. An investment in a LIHTC project in 2019 may have lost value by the end 2026.

Example: A LIHTC project cost \$20 million to build and was funded with a \$6 million investment from the QOF on January 1, 2022, and \$14 million of nonrecourse debt requiring interest only payments. Through 2026, \$3.333 million in losses were allocated to the QOF and, at the end of 2026, an investor would pay \$3 million in cash for the interest in the partnership held by the QOF. Under the special rule in the Proposed Regulations, the investor in the QOF would pay taxes based on the lesser of the deferred gain of \$6 million or the gain on the sale of its interest in the QOF, which is \$3.33 million (\$3 million of value plus \$14 million share of debt less basis of \$14 million).

Effectively, in determining the amount of deferred gain subject to tax in 2026, the investor must take the market value of its QOF interest and add back the losses it had taken through 2026, even though those losses matched a true decrease in the value of its investment. This is the exact result that would follow if the investor had instead received \$3.333 million of cash distribution from the proceeds of a loan.⁴ However, in the latter case, the diminution of value is caused by value being distributed up to owners of the QOF, whereas in the example, the loss is caused by real economic loss in value from the project the QOF invested in.

The current Proposed Regulation approach which bases deferred gain recognition based on the tax result from a disposition of the QOF interest rather than the fair market value of the QOF removes much of the benefit of the Opportunity Zone from investments, like LIHTC projects, where there is likely to be a true reduction in the economic value of the investment.

⁴ We note that such a result would not be an inclusion event because the owners of the QOF would have had basis from the debt in a sufficient amount to allow the distribution.

We recommend that the Proposed Regulations be modified to provide that gain recognized in 2026 is (i) the lesser of (A) the deferred gain, or (B) the fair market value of the interest in the QOF, which will be equal to its market value at the end of 2026, increased by any distributions to members of the QOF made over the term of the investment, less (ii) in either case, any 10% or 5% basis increases that may apply. This approach will address the issue where the QOF investment has a lower value at the end of 2026 because the investors have received distributions in respect of their interest, but will not penalize investors that have realized a true economic loss in the value of their QOF investment. We also believe it is more in keeping with the language of the statute than the special rule in the Proposed Regulations, which substitutes and entirely separate calculation of gain for the statutory formula.

V. 10-YEAR FAIR MARKET VALUE BASIS ELECTION

A. Treatment of Debt in Basis Step-up

Proposed Regulation §1.1400Z-2-d(1)(b)(2) provides the following:

(2) Special election rules for QOF Partnerships and QOF S Corporations—

(i) Dispositions of qualifying QOF partnership interests. If a QOF partner's basis in a qualifying QOF partnership interest is adjusted under section 1400Z-2(c), then **the basis of the partnership interest is adjusted to an amount equal to the fair market value of the interest, including debt**, and immediately prior to the sale or exchange, the basis of the QOF partnership assets are also adjusted, such adjustment is calculated in a manner similar to a section 743(b) adjustment had the transferor partner purchased its interest in the QOF partnership for cash equal to fair market value immediately prior to the sale or exchange assuming that a valid section 754 election had been in place. This paragraph (b)(2)(i) applies without regard to the amount of deferred gain that was included under section 1400Z-2(b)(1), or the timing of that inclusion.

Gross Value Computation. Unfortunately, there may be an interpretation that the election to step-up is to the value net of debt and not the gross unencumbered value of the property. For example, assume a QOF owns a property with a \$100 gross value, subject to \$70 of debt, and a \$40 basis. The taxpayer now sells the QOF interest for \$100, consisting of \$30 of cash and \$70 of debt taken subject to. If the step-up is to gross value, then the taxpayer has \$100 of proceeds, and a \$100 basis, and no tax is owed. If the step-

up is to just \$30 (i.e., \$100 gross value, less \$70 of debt), then the taxpayer will not even make the election, since the "actual" basis (\$40) is more than the Section 1400Z-2 stepped-up basis (\$30), and the taxpayer will recognize \$60 of gain (i.e., \$100 of proceeds less \$40 of basis). The net result is plainly contrary to the intention of the statute, and to everything that has been written and said about the tax consequences of a QOF investment that is disposed of after ten or more years. In fact, the Proposed Regulations confirm that debt is "included" in the valuation of the QOF interest, which prevents a negative capital account from being "recaptured."

We know that Treasury and IRS representatives confirmed that the gross treatment is the proper treatment at a meeting of the American Bar Association in May 2019. **However, to assure that there is no confusion, we urge the IRS to include an example in the regulations like the one above to show application of the gross value computation.**

Nonrecourse Debt in Excess of Value. We also note an additional situation that occurs in some cases, where the value of an underlying asset may be below the amount of nonrecourse debt encumbering the property. This is not uncommon for certain LIHTC transactions, particularly those financed with tax-exempt bonds. As noted above, LIHTC projects often have limited economic or market value, principally due to the required 30-year (or longer) low-income restrictions on the property. However, investors may have exit tax liability because nonrecourse debt exceeds tax basis. To avoid an unfortunate tax result for projects that lose value, in such a situation the basis step-up should be up to the amount of the nonrecourse indebtedness. This would be consistent with Section 7701(g) which provides that when property is sold, its fair market value is no less than the nonrecourse debt encumbering the property. This could be exemplified by using the above example, but assuming that there is \$120 of debt on the property. In a transfer by an LIHTC Investor of its interest in a QOF, the transferee (likely the lender) would pay \$0 in cash and assume the \$120 of debt. The LIHTC investor's amount received would be the \$120 of debt assumed. If the LIHTC investor's basis in the QOF were stepped up to the \$120 of debt, then there is no gain on the transaction. Without the requested clarification, the result would be the LIHTC investor owing tax upon exiting even though it received no sales proceeds. It would seem an undesirable consequence if investors in profitable QOFs avoided tax after a 10-year period, but investors in unprofitable QOFs had to pay taxes when ending their investments after the same period.

Example – Debt Exceeds FMV

- In 2019 Investors A and B invested a total of \$600K for all the interests in QOF Partnership

- QOF invested \$600K for a 99% interest in QOZB Partnership in 2019
- QOZB borrowed \$1.5M and bought land and built a building for \$2.1M
- Assume FMV of QOZB asset is \$1M in 2029.
- Assume there is \$1.5M of Nonrecourse Debt in 2029
- Neg. \$500K Value of QOF (\$1M FMV Assets - \$1.5M debt)

Analysis - Ignoring any lack of marketability and control discounts, upon election, the QOF must be adjusted to \$1.5M (the amount of nonrecourse debt taken subject to) even though such amount exceeds the unencumbered value of the QOZB asset. This is the result necessary to be consistent with Section 7701(g).

Result - With a stepped-up basis of \$1.5M, if the QOF interest is disposed of for \$0 of cash, the investor would be deemed to have proceeds equal to the \$1.5M of the debt the investor is relieved of. **\$1.5M deemed proceeds - \$1.5M basis = \$0 gain.** The result achieves the Congressional intent of no tax being due upon a sale after 10 years.

B. Inclusion Event Does Not Preclude Basis Step-up

Proposed Regulation Section 1.1400Z-2(c)-1 provides that the 10-year basis step-up is available “without regard to the amount of deferred gain that was included under Section 1400Z-2(b)(1), or the timing of that inclusion.” We request clarification of the interaction of this rule with the inclusion event provisions of Proposed Regulation 1.1400Z-2(b)-1.

Proposed Regulation 1.1400Z-2(b)-1 defines a number of inclusion events that will trigger deferred gain prior to December 31, 2026. The types of inclusions events are varies, some related to distributions in excess of basis, some are related to transfers of the QOF interest as well as other situations.

We are specifically concerned with situations where a partnership QOF (either directly or through a subsidiary partnership QOZB) may have positive cash flow, but due to depreciation it may not have any taxable income. The QOF or QOZB will often need to distribute such cash flow in order to not violate the 5% Non-Qualified Financial Property requirements or the rule that 90% of a QOF’s assets must be QOZP. While such distributions may trigger an inclusion event, we believe that the investor in a QOF should

continue to be allowed to step-up the basis of its interest to fair market value after 10 years.

We believe that there are other situations where it is also important to clarify that an inclusion event will not prevent a 10-year step-up. **We suggest the regulations clarify this point in general.**

C. Consistency for Sales of QOF/Qualified Partnership Interest/Project

Pursuant to the Proposed Regulation, once an investor has held a QOF Partnership interest for 10 years or more, if the QOF sells QOZP and the sale generates capital gain, the taxpayer can elect to exclude the capital gain that shows up on the K-1 the investor gets from the QOF. Allowing the QOF to sell QOZP tax free after the ten-year period has elapsed greatly furthers a goal of the OZ incentive by substantially facilitating liquidity.

However, the current regulations create disparate tax results depending on how QOF investments are ended. If the QOF interest is outright sold, then all taxes are avoided. If the QOF sells its assets and liquidates, an election can be made to avoid capital gains, but not ordinary income like depreciation recapture. Furthermore, if a QOZB sells an asset and distributes the funds up to the QOF and then the QOF distributes funds to its members, the members will still incur taxable income from the sale of the QOZB's assets, whether that gain is capital or ordinary.

There are legitimate reasons why the sale of a QOF interest may not be the best economic choice. For QOFs that own multiple assets, whether such assets are interest in subsidiary QOZBs or tangible property themselves, they may have different buyers for different assets. Buyers may not want all the assets or may not want the potential liability that comes from buying a QOF interest rather than buying real estate or business assets owned by a QOF or QOZB.

We recommend that an election be available to avoid tax on a K-1 for sales of assets by either a QOF or QOZB, whether such income is capital or ordinary in nature. Such election would not be available for sales that generate ordinary income from the sale of property in the ordinary course of a trade or business. An alternative option could be to adopt the foregoing rule, but only in the case where there is plan to liquidate the QOF within three years from the end of the tax year in which the first such sale occurs.

VII. ELIGIBLE CAPITAL GAINS

We discuss below two issues related to determination of eligible capital gains that are likely important for many investors, but are critical to finding investors that can

benefit both from the OZ benefits and other tax incentives available in affordable housing and community development.

A. Section 1231 Gains

The proposed regulations provide that Section 1231 gains can be invested in a QOF if, and to the extent that, an investor has net gains from the disposition of Section 1231 property at the end of the tax year. Accordingly, losses from the sale of other Section 1231 property, if any, reduce the net amount of gain eligible for favorable treatment.

By not allowing an investor to invest the gross amount of particular gains, this netting rule treats Section 1231 items less favorably than other capital gains and losses. As a result of the netting requirement, investors may now be persuaded to consider alternative investment strategies — such as utilizing Section 1031 treatment for Section 1231 realized gains while claiming ordinary deductions for the losses. This would result in an unfortunate redirection of gain proceeds away from Opportunity Zone investments.

In addition, the proposed regulations further provide that, if an investor has Section 1231 net gains, they then have 180 days from the end of the year to invest the net gain. By delaying the start of the 180-day period until the end of the tax year, this rule will artificially stall investments for most investors even if no Section 1231 losses are expected.

We recognize the difficulty that arises from the usual computation of Section 1231 gains because the net result may not be known until the end of the tax year, when the investor can look back and determine what other Section 1231 transactions (if any) have occurred. Indeed, the taxpayer may have an ordinary loss rather than a capital gain, depending on other Section 1231 transactions. This difficulty would be eliminated if the netting rule were abandoned. Essentially, a gain deferred pursuant to Section 1400Z-2 would not be included in the year end computation of Section 1231 gain or loss.

In practice, requiring the 180-day period to commence on December 31 will not facilitate Opportunity Zone investment. Once a taxpayer sells trade or business assets, it can be very discouraging to tell them to wait for what might be several months before they can reinvest. Moreover, waiting to reinvest on a 2019 transaction may result in the investor losing the benefit of the 7-year hold step-up, since December 31, 2019, would be the only day that an investor with net 1231 gains in 2019 could invest and still obtain the 5% tax avoidance allowed for investments held for 7 years as of December 31, 2026.

We recommend that the investment eligible for favorable treatment be based on the gross gain arising from each Section 1231 transaction, so as to afford Section 1231 gains the same access to Opportunity Zone investments as other capital gains.

If netting is retained, we recommend that the 180-day period can be elected to commence with the day of sale, with the investor responsible for the lookback, to determine if later Section 1231 transactions caused the investor's investment to exceed its Section 1231 gains for the year. Such a rule would be similar to the grandfathering that the IRS recently provided in the FAQs for taxpayers who had 2018 Section 1231 gains. In addition, any recapture of Section 1231 gains as ordinary income from the 5-year lookback should be recognized when the original deferred gain is recognized.

Finally, we request that confirmation of the treatment of flow-through entities which have Section 1231 gains be included in the final regulations. We prefer that the netting rule be abandoned, but, if netting applies, the treatment of flow-through entities is uncertain because the netting that determines whether there has been a Section 1231 gain is ordinarily done at the individual (or other investor) taxpayer level. We note that the first round of regulations provides pass-through entities and their partners a choice in investment periods, while the second round of regulations provides the special rule for Section 1231 property. Much of the gains that we might see in pass-through entities are likely to be from the sale of assets used in a trade or business, so that Section 1231 would otherwise apply to these sales, but pass-through entities are not taxpayers who can compute net Section 1231 gains. This issue affects many real estate partnerships as well as S corporations and their shareholders, and it does not appear to be specifically addressed by the new regulations. Conflicting information from Treasury officials has been reported on this issue as well.

B. QOF Investments by Consolidated Groups

Proposed Regulation Section 1.1400Z-2(g)-1(c) requires that for entities that file a consolidated return, the corporate entity that has a capital gain has to be the same entity that invests in the QOF. While not intended to impact the affordable housing industry, this rule is having a significant impact on traditional LIHTC investors that also want to use the OZ incentive and make more projects viable in Opportunity Zones.

The largest investors in LIHTC transactions tend to be banks. Many banks organize their LIHTC investments in a single corporate subsidiary which is a community development corporation ("CDC"). See <https://www.occ.gov/topics/community-affairs/publications/fact-sheets/pub-fact-sheet-bank-owned-cdcs-sep-2011.pdf> for a discussion of the use of CDCs. However, bank capital gains generally come from other areas of the bank. For a bank that has such a capital gain, the Proposed Regulation prevents the bank from deferring the capital gain in a non-CDC corporate affiliate by having the CDC arm of the bank make the investment in the QOF. This then removes the incentive for banks to have their CDCs invested in Opportunity Zones.

We recommend that the rules allow consolidated groups to have one affiliate invest in a QOF and defer the recognition of capital gains for a different

consolidated affiliate. This is consistent with the Congressional desire to incentivize entities with capital gains to invest in Opportunity Zones. The fact that a corporate group chooses to optimize its corporate structure through the use of subsidiaries and CDCs should not result in consolidated groups being unable to access OZ benefits.

This is also consistent with the general treatment of capital gains within a consolidated group. See, for example, Treasury Regulation § 1.1502-22, Consolidated Capital Gain and Loss, which provides that “[t]he determinations under Section 1222 . . . are not made separately. Instead, consolidated amounts are determined for the group as a whole.”

We note that this position in no way implicates the decision in the Proposed Regulations to prohibit consolidation of a QOF into a consolidated group. We are not asking that the QOF be considered part of the consolidated group, but that one member of the consolidated group, such as a CDC, be able to invest a capital gain realized by another member of the consolidated group in a QOF.

We do not envision that this change would create administrative burdens, because, as noted above, consolidated groups generally make capital gain determinations on a group wide basis. However, if there are difficulties that we do not foresee, then we would suggest at least creating an exception for investments made by CDC subsidiaries of consolidated groups.



HEARD FROM HUD

Opportunity Finds a Home at HUD

Brad E. Rader and Spencer J. Chretien

Included in the 2017 Tax Cuts and Jobs Act¹ was an incentive for those with unrealized capital gains to invest in economically distressed areas. The law provided for the designation of certain low-income census tracts as Opportunity Zones. The chief executive of each state and territory nominated the tracts, and the U.S. Department of the Treasury (“Treasury”) certified the Opportunity Zone designations.

The benefits of investing in Opportunity Zones through Qualified Opportunity Funds (“QOF”) are various and powerful. Investors can defer paying capital gains tax for QOF investments held through the end of 2026. For investments held five years, there is a step-up in basis of 10%. For those held seven years, this step-up rises to a total of 15%. Finally, capital gains taxes on the appreciation of QOF investments are eliminated entirely if the investment is held for ten years.

The scale of the Opportunity Zones initiative is unprecedented. There are 8,764 Opportunity Zones throughout the United States, collectively home to more than thirty-one million Americans. They are urban, suburban, and rural and include people of diverse demographic backgrounds. What these 8,764 areas have in common is their economic distress. In Opportunity Zones, unemployment rates are 1.6 times higher than in the average United States census tract; the average poverty rate is more than 32%, nearly double the 17% average across the country; the homeownership rate is approximately 15% lower than the national average; and life expectancy is three years shorter. The need for investment is real, and the opportunities for investment are significant.

These facts led to strong bipartisan support for the idea of Opportunity Zones, with Senator Tim Scott (R-SC) and Senator Cory Booker (D-NJ) taking the lead in pushing for their establishment in federal law. By connecting those in need of help to those in a position to help, Opportunity Zones provide a framework that helps strengthen the fabric of our nation.

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1. 2017 Tax Cuts and Jobs Act, § 13823, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

The federal government continues to support the Opportunity Zone communities beyond solely the relevant tax incentives afforded to investors. On December 12, 2018, President Donald J. Trump signed Executive Order 13853, which created the White House Opportunity and Revitalization Council (“WHORC” or “Council”).²

The WHORC is composed of representatives from seventeen federal agencies and federal-state partnerships, and it is chaired by the Secretary of the U.S. Department of Housing and Urban Development (“HUD”), Secretary Ben Carson. Its mission is to lead efforts across federal agencies to revitalize urban and economically distressed communities. The WHORC engages with state, local, territorial, and tribal governments; works with community leaders, nonprofit and faith-based organizations, investors, and other stakeholders to develop strategies to attract private capital for revitalization; and targets, streamlines, and coordinates existing federal programs to make a difference for underserved areas.

Five workstreams comprise the WHORC’s mission: (1) Economic Development, (2) Entrepreneurship, (3) Safe Neighborhoods, (4) Education and Workforce Development, and (5) Measurement. These workstreams focus on administrative reforms and work to target, streamline, and coordinate federal resources and to leverage private capital to accomplish their revitalization goals. The Measurement workstream develops and implements robust analysis tools to gauge the effectiveness of the Opportunity Zone tax incentive and the WHORC actions.

The WHORC leapt into action in April 2019, as President Trump led the first meeting of the WHORC at the White House and announced Scott Turner as its Executive Director. Two weeks later, the White House hosted an Opportunity Zones summit, which included hundreds of state and local officials, private sector representatives, and nonprofit leaders. Secretary Carson and Treasury Secretary Steven Mnuchin delivered remarks that stressed the transformative potential of Opportunity Zones and the commitment of their respective Departments to making the incentive work for all involved. President Trump spoke of his desire for “all Americans to share in our great economic renewal” and emphasized the work of the Council as vital to this goal. Attendees engaged in smaller-group discussions following the remarks, exchanging ideas and information about the promise of Opportunity Zones in their local communities.

At HUD, we have acted to align our existing programs and resources with Opportunity Zones. Our program offices have made various proposals. To that end, Secretary Carson announced on February 21, 2019,³ that the Federal Housing Administration (“FHA”) would significantly expand

2. Exec. Order No. 13853 (2018), <https://www.whitehouse.gov/presidential-actions/executive-order-establishing-white-house-opportunity-revitalization-council>.

3. Press Release, HUD Public Affairs, FHA Expands Pilot Program to Accelerate Financing of Low-Income Housing Tax Credit Projects (Feb. 21, 2019), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_014.

HUD's Low-Income Housing Tax Credit ("LIHTC") Pilot Program ("New Pilot") to include new construction and substantial rehabilitation of multifamily projects insured under Sections 221(d)(4) and 220 of the National Housing Act, as amended (the "Act").⁴ HUD originally developed the tax credit program to streamline FHA mortgage insurance applications for projects with equity from the LIHTC program by, among other things, creating a separate processing track for projects insured under Section 223(f) of the Act.⁵ The New Pilot program established expedited and standard review tracks for eligible projects, which were designed to increase the speed and efficiency of processing mortgage insurance applications for low-risk LIHTC transactions with a maximum loan amount of \$25 million. The goal of the New Pilot program is to issue firm commitments within thirty calendar days under the expedited processing track and sixty calendar days under the standard processing track.

Under Housing Notice 2019-03, HUD classified three eligible types of projects for the New Pilot program: (1) New construction 9% LIHTC transactions with at least 90% of the units restricted to LIHTC rents; (2) Substantial rehabilitation transactions with 4% or 9% LIHTC and Project-Based Section 8 Housing Assistance Payment contracts covering at least 90% of the units; and (3) Substantial Rehabilitation projects with 4% or 9% LIHTC, without Section 8 assistance, being re-syndicated with LIHTC/Tax-Exempt Bonds. It should be noted that not all LIHTC transactions are eligible for the New Pilot program.⁶

The streamlined review process in the New Pilot program has successfully aligned the LIHTC program requirements with the new construction or substantial rehabilitation of affordable multifamily housing projects and effectively encouraged investment in low-income communities located in Opportunity Zones. For example, HUD has designated specialized senior underwriters in the New Pilot program who have been trained on the Opportunity Zones program and corresponding transactions. The reduction in processing timeframes has been essential for Opportunity Zone Funds and investors to take full advantage of the tax benefits obtainable in the Opportunity Zones program.

HUD also introduced measures to spur FHA-insured multifamily loan activity in Opportunity Zones. On May 9, 2019, FHA announced Housing

4. HUD, Notice H 2019-03 (Feb. 21, 2019), <https://www.hud.gov/sites/dfiles/OCHCO/documents/LIHTCPilotNotice022119.pdf>.

5. HUD, Notice H 2012-01 (Feb. 3, 2012), <https://www.hud.gov/sites/documents/12-01HSGN.PDF>.

6. The following projects are not eligible for either the Expedited Approval Process or Standard Approval Process: (1) 4% LIHTC, new construction projects; (2) RAD projects; (3) Projects involving Historic or New Markets Tax Credits; Projects involving adaptive re-use of non-residential structures; (4) Projects involving significant demolition; (5) Projects involving gut rehabilitation; and (6) Projects involving inexperienced development team members.

Notice 2019-07,⁷ which effectively reduces the FHA mortgage insurance application fee for Opportunity Zone projects to be insured under Sections 221(d)(4), 220, and 223(f) of the Act. This reduction represents substantial savings for applicants and provides a framework for improved underwriting process procedures.⁸

The application fee for “broadly affordable” housing transactions (as defined in Housing Notice 2019-07) located in Opportunity Zones is now reduced from the current rate of \$3.00 to \$1.00 per thousand dollars of the requested loan amount. For market rate and “affordable” housing transactions (as defined in Housing Notice 2019-07) located in Opportunity Zones, the fee is now reduced to \$2.00 per thousand dollars of the requested loan amount.⁹

Similar to the New Pilot program, HUD has designated specialized senior underwriters in each region to process eligible FHA mortgage insurance applications for properties in Opportunity Zones. This step has been welcomed by lenders, as it ensures expert and expedient review of eligible applications. Certain LIHTC applications have also benefited from the accelerated processing tracks via the New Pilot program.

In conjunction with the reduced application fee, additional financial incentives remain available for owners to develop more affordable rental housing and to make projects more sustainable. Since 2016,¹⁰ HUD has lowered the FHA multifamily mortgage insurance premium (“MIP”) for new projects that qualify as “broadly affordable” or “affordable.” “Affordable housing” transactions continue to receive an up-front and annual MIP reduction to 35 basis points, and “broadly affordable” housing transactions continue to receive an up-front and annual MIP reduction to 25 basis points. Market rate transactions that meet certain “green” and energy-efficient standards remain eligible for up-front and annual MIP reductions to 25 basis points. With so many potential extra loan proceeds, the reduced MIP rates continue to entice multifamily development in Opportunity Zones.

HUD has also targeted Opportunity Zones in the deployment of programs that grantees and subrecipients may use to leverage financing derived from Opportunity Zone investment. HUD has provided guidance and instructions to grantees and participating jurisdictions to encourage

7. Press Release, HUD Public Affairs, FHA Offers Incentives for Property Owners Who Invest in Opportunity Zones (May 9, 2019), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_058.

8. HUD, Notice H2019-07 (May 9, 2019), <https://www.hud.gov/sites/dfiles/OCHCO/documents/2019-07hsgn.pdf>.

9. *Id.*

10. Changes in Certain Multifamily Mortgage Insurance Premiums and Regulator Waiver for the 542(c) Risk-Sharing Program, 81 Fed. Reg. 18473 (proposed Mar. 31, 2016) (to be codified at 24 C.F.R. pt. 266), <https://www.govinfo.gov/content/pkg/FR-2016-03-31/pdf/2016-07405.pdf>.

and prioritize the use of Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Housing Trust Fund (HTF), Emergency Solutions Grants (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) funds for eligible activities in Opportunity Zones when developing their FY2019 Consolidated Plans.¹¹ In addition, HUD has established preference points in certain competitive grant programs¹² to promote competition and prioritize neighborhoods located within Opportunity Zones.

As the chair of the WHORC, Secretary Carson has a unique role to play in coordinating Opportunity Zone efforts among different federal agencies. And across the government, agencies are heeding this call. For example, the U.S. Department of Agriculture has added priority points to its Rural Business Development Grants for applicants with projects located in Opportunity Zones. The U.S. Department of Education has issued a notice proposing additional incentives for charter school developers that partner with QOFs, especially for the purpose of acquiring or constructing school facilities. The U.S. Department of Health and Human Services has provided preference to projects that further youth participation in sports and are located in Opportunity Zones. The U.S. Department of Justice has established Opportunity Zones as a priority consideration area for funding to tackle the opioid crisis. And the U.S. Environmental Protection Agency has provided a potential tiebreaker in its grants process to Opportunity Zone projects involving environmental cleanups. These are but a few of the actions taken by the WHORC's member agencies.

The WHORC is also engaging in public-facing activity and bringing the hope of Opportunity Zones to all corners of our country. WHORC Executive Director Scott Turner travels nearly every week to at least one Opportunity Zone location, and often to multiple locations. During each visit, he holds roundtable discussions with state and local elected officials, nonprofit and faith leaders, investors, and other private sector representatives. These meetings have been extraordinarily productive and have attracted significant attention from local stakeholders. In addition to the roundtables, Mr. Turner often visits the site of an Opportunity Zone project in the city. This experience affords him a firsthand look at the progress being made across America. Meanwhile, our program offices will be holding roundtables with stakeholders, both to hear from them directly and

11. HUD Notice CPD 2019-01, Guidance on Submitting Consolidated Plans and Annual Action Plans for Fiscal Year (FY) 2019 (Feb. 13, 2019), <https://files.hudexchange.info/resources/documents/Notice-CPD-1901-Guidance-on-Submitting-Consolidated-Plans-Annual-Action-Plans-for-FY-2019.pdf>.

12. Choice Neighborhoods Planning Grants Program (FY19 NOFA); Indian Housing Block Grant (IHBG) Program—Competitive Grants (FY19 NOFA); Veterans Housing Rehabilitation and Modification Pilot Program (FY19 NOFA); HUD's FY18 and FY19 HOPE VI Main Street Grant Program; and Rural Capacity for Community and Affordable Housing Grants (FY18 NOFA).

to provide a glance at the Opportunity Zone work we are doing at HUD headquarters.

Opportunity Zones are still relatively new, but, in 2019, both HUD and industry stakeholders had historical guidance based on past programs such as New Markets Tax Credits, Enterprise Zones, and Promise Zones to make decisions around regulatory and programmatic considerations. The proposed regulations and guidance from the Internal Revenue Service have brought much-needed clarity for potential Opportunity Zone investors to identify projects and structure transactions that fit into HUD's existing programs. The measured success of Opportunity Zones will not, however, be determined in an administrative vacuum. As evidenced by HUD's Request for Information published in the Federal Register in mid-April,¹³ input from, and collaboration with, affected stakeholders will continue to be essential elements as HUD identifies actions to streamline processes, align existing programs, and reduce regulatory and administrative barriers to encourage beneficial investment in our urban and economically distressed communities.

13. Review of HUD Policy in Opportunity Zones, 84 Fed. Reg. 16,031 (Apr. 17, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-04-17/pdf/2019-07682.pdf>.



FROM THE READING ROOM

Putting Integration on the Agenda

Stephen Menendian and Richard Rothstein

Moving Toward Integration: The Past and Future of Fair Housing
Richard H. Sander, Yana A. Kucheva & Jonathan M. Zasloff
Harvard University Press (2018)
587 pages. \$39.95

Introduction

Moving Toward Integration, the Past and Future of Fair Housing, by Richard H. Sander, Yana A. Kucheva, and Jonathan M. Zasloff¹ (we refer hereinafter to the book as “SKZ”), begins with a powerful indictment of the harm that racial residential segregation continues to inflict. It asserts that housing segregation is the “giant answer” to the question of why on social and economic measures such as school achievement, income, wealth, homicide rates, and out-of-wedlock births, African American outcomes lag those of whites.² We would add other measures as well: for example, shorter African American life expectancies and higher rates of cardiovascular disease that arise, in part, from life in more polluted and stressful neighborhoods; the black-white wealth gap, one of the most powerful contributors to social and economic racial inequality, attributable in significant part to the exclusion of African American homeowners from neighborhoods where housing equity appreciation far exceeded inflation; and even our dangerous political polarization, which largely tracks racial lines.

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1. Richard Henry Sander is a professor of law at the UCLA School of Law; Jonathan Zasloff is a professor of law at the UCLA School of Law; and Yana Kucheva is an Assistant Professor in the Sociology Department of The City College of New York.

2. RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION, THE PAST AND FUTURE OF FAIR HOUSING 1* (2018) [hereinafter SKZ].

At a time when the problem of race is once more in the mainstream of our national discourse and the consequences of racial inequality are increasingly manifest, it remains an uncomfortable and generally unacknowledged truth that no matter what we do or how much we try, it is unlikely that we will ever address extreme racial inequality in an extremely segregated society. No matter how many policy interventions we stage or how much effort we give or resources we dedicate to addressing the student achievement gap, health disparities, the inequities of our criminal justice system, or any other problem where racial inequality is salient, our efforts are likely to have limited effect as long as extreme racial segregation persists. But even beyond the direct role that racial segregation plays in shaping life outcomes, how can we ever develop the common national identity that is essential to the preservation of our democracy if so many African Americans and whites live so far from one another that we cannot empathize with each other or have an appreciation of each other's life experiences?

SKZ's unqualified enthusiasm and insistence on the need for housing integration are a more courageous position than may be readily apparent. Many African Americans are suspicious of arguments for residential integration.³ The skepticism has in recent years been reinforced by well-educated middle class African Americans who have now successfully (though not entirely or perfectly) integrated professional and corporate workplaces. There, they frequently encounter "micro-aggressions" and reasonably desire refuge after work in predominantly black communities where neighbors will not find them a curiosity, police will not wonder if they are local residents and surveil them, and perhaps most important, their children will not be bullied or patronized by white classmates. For lower-class African Americans, there is a well-founded fear that the loss of a culturally homogenous environment—churches, street life, hairdressers—will not find sufficient compensation in more highly resourced environments, but will instead result only in exile to less-friendly and even more inadequately resourced and underserved places.

These are legitimate concerns, and, while SKZ makes no mention of the costs of integration to African Americans, the authors provide a service by

3. This is not a new phenomenon. There have always been African Americans that were skeptical of—or opposed to—integration. See *THE HAVERFORD DISCUSSIONS: A BLACK INTEGRATIONIST MANIFESTO FOR RACIAL JUSTICE* (Michael Lackey ed., 2013). (The Haverford Group was a cohort of leading black intellectuals concerned about the emergence of a new generation of black activists ambivalent about, or oppositional toward, the project of racial integration.) But there was a wider consensus among middle class African Americans not only that integration was necessary to achieve the social and economic benefits associated with residence in integrated neighborhoods, but also the commitment to the ideal of integration as a path towards mutual understanding and racial harmony. See *DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 88–90* (1998) (summarizing black preferences for integrated neighborhoods based upon survey research).

reminding us that any calculation of the desirability of housing integration must weigh the short-term costs against its benefits to middle class and lower-income black families, as well as to whites and to American society generally. SKZ reminds us of an aphorism that was once commonplace and is now too infrequently repeated: separate can never be equal.

Despite its sweep and scope, SKZ lacks a main, overarching thesis or argument such as is found in *The New Jim Crow*.⁴ SKZ is primarily a historical account—bolstered by the tools of social science—of the evolution of racial residential segregation over time. This account is divided into four parts, each covering a significant period. Part I focuses on 1865 to 1968; Part II covers 1968 to 1980; Part III examines 1975 to 2000; and Part IV surfaces trends in the twenty-first century, including the Great Recession and the so-called “Great Inversion,” signaling the return of white families and young professionals from the suburbs to the urban core.⁵

SKZ uses restricted census data to describe evolving levels of segregation across the nation since the early twentieth century,⁶ developing some novel, original, and sometimes contrarian perspectives along the way. For example, SKZ contests usual beliefs regarding mild pre-war integration in the North; claims that the Supreme Court’s 1948 *Shelley v. Kramer* decision prohibiting court enforcement of restrictive covenants spurred a fairly rapid opening of white neighborhoods adjoining black ones; concludes that “reverse redlining” has not been a serious problem; and, most importantly, insists that the 1968 Fair Housing Act (FaHA)⁷ was swiftly and vigorously enforced by the federal government—by the Justice Department, not by the Department of Housing and Urban Development (HUD). Some subtle racial steering continued, but SKZ asserts that African Americans could, although with a bit more effort than whites, move to any neighborhood they chose (and could afford) after 1968.

SKZ, like many other analyses of segregation,⁸ divides the explanations of segregation into two broad categories: structural, resulting from “racial differences in income, age, and other ‘objective’ demographic factors,”⁹ and explicitly racial or ethnic factors, such as housing discrimination, neighborhood preferences, and race-explicit policy. This question becomes

4. As a tacit acknowledgment of this, SKZ offers “twelve underlying themes” that reflect either key points developed through the book or ideas that recur. SKZ, *supra* note 2, at 5–13.

5. ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* (2012).

6. The authors applied for and received special access to more granular census data and benefit from this access to conduct their analysis. *See id.* at xvi–xvii.

7. SKZ calls the Fair Housing Act “FaHA” to distinguish it from the FHA that designates the Federal Housing Administration. We have not seen this terminology employed before, but it is clever and should become conventional, because the use of “FHA” to describe both the law and the agency is frequently confusing.

8. *See* MASSEY & DENTON, *supra* note 3, at 83–114.

9. *Id.* at 243.

especially pressing when it becomes clear that SKZ takes a skeptical view of the role of racial discrimination as a major causal force in explaining contemporary patterns of racial segregation. Given SKZ's unusually sanguine view of the decline in private and government discrimination since the mid-twentieth century and skepticism about the role that present-day discrimination plays in sustaining segregated residential patterns, it becomes incumbent upon the authors to ask why, fifty years after the Fair Housing Act was enacted, residential segregation persists nationwide in such pronounced form. As deep as Sander and his co-authors dive into the historical forces that produced a segregated nation, the precise causes of racial residential segregation—especially contemporary segregation—remain astonishingly elusive. By the end of the book, the authors essentially throw up their hands, asserting that “no model yet devised can precisely predict paths from 1990 through the mid-2010s [of segregation levels and trends].”¹⁰ Little wonder the authors call for more and better research on this question.¹¹

Nonetheless, they seem to lean toward one explanation that they term a form of “market failure”: while most blacks and whites would prefer to live in integrated settings, segregation persists in the most historically segregated metropolitan areas because the concentration of African Americans in poorly resourced neighborhoods has resulted in much greater black than white demand for housing in the previously white neighborhoods that surround urban black ones.¹² This, they say, has only to a small degree been the result of bigoted “white flight” (they give it a more benign term—“white avoidance”) but rather has been the inevitable supply-versus-demand consequence of black buyers outbidding whites for housing in these places. Because of this demand imbalance, even in the context of normal housing turnover without voluntary “white flight,” the black proportion of an integrated neighborhood has inexorably grown, leading eventually to its “resegregation” (from almost all white to almost all black).

In this account, resegregation accelerated because whites and blacks define differently the integration they each wish for. Whites deem a neighborhood desirably integrated as long as they remain a heavy majority, whereas blacks seek an integration where the racial proportions are more

10. *Id.* at 413.

11. See *id.* at 435–38.

12. Although sensitive to intra-metropolitan dynamics (see, for example, Table 20.1), SKZ's primary focus is understanding segregation at the Metropolitan Statistical Area (MSA) level. Thus, SKZ measures, analyzes, and compares MSAs' overall level of segregation against others or changes within them over time. SKZ is especially interested in understanding the changing level of segregation within a metropolitan area over time (such as between 1970 and 1980), or why the level of segregation in one MSA is significantly lower than that of another. In our references to geographical units within this review, we generally refer to a census tract as “neighborhood” or “community,” a municipality as a “city,” and “metro” or “metropolitan area” as an MSA or major urban area and surrounding environs.

equal. When whites lose their overwhelming majority, they tend to leave voluntarily, although they would have wanted to stay if racial proportions stabilized at their preferred levels.¹³ This is a more nuanced conception of “white flight” than the term typically connotes.¹⁴ But SKZ says that the demand imbalance is a far more important factor than racial preference differences in causing the transformation of previously white-segregated areas into newly segregated black ones. It was not obvious to us into which of the conventional categories (structural or “ethnic residual”) their description of “market failure with some white avoidance” falls.¹⁵

Regardless of which category the “market failure” phenomenon falls, we find the use of the term problematic.¹⁶ As SKZ demonstrates (e.g., “public housing . . . was increasingly concentrated in black or ‘changing’ neighborhoods after 1950”;¹⁷ “regulatory barriers and land use regulations artificially raise the cost of housing” with a disparate impact on African Americans¹⁸), racial residential segregation is as much, if not more, a policy failure as a market failure. It is policy that created it and sustains it. This is not a mere semantic criticism; it goes to the heart of what to do about segregation. If market forces are primarily to blame, then the incentives and subsidies of the kind that SKZ propose may suffice to achieve a more integrated nation by redirecting those forces. But if government policy created, sustains, and perpetuates racial residential segregation, then a more coercive constitutional or statutory remedy may be justified and necessary, such as prohibiting exclusionary (aka snob) zoning or mandating inclusionary zoning.¹⁹

SKZ distinguishes among less segregated metropolises, where it asserts that the demand imbalance was not as determinative. In the mid-twentieth century, when African Americans in major Northern cities moved out of existing areas of urban racial concentration, they mostly moved into neighborhoods adjoining the ghetto, resulting in the demand imbalance that we just described. Although SKZ does not use the term, these people were African Americans whom historians describe as having come to the North

13. Thomas Schelling in 1969 first posited and popularized the argument that resegregation is due primarily to racial differences in the preferred share of other race neighbors. Schelling was so identified with this claim that, in part because of it, he was awarded the Nobel Prize in Economics. See Thomas C. Schelling, *Models of Segregation*, 59 AM. ECON. REV. 488–93 (1969).

14. “White flight” is a term that describes the movement of white families out of large urban municipalities into smaller, suburban jurisdictions, often to escape integration mandates through racial busing. See MASSEY & DENTON, *supra* note 3, at 45.

15. Although there is some ambiguity, we assume that they classify this under the “ethnic residual” element, described *infra*.

16. For use of the term, see, for example, SKZ, *supra* note 2, at 13, 209, 301.

17. *Id.* at 91.

18. *Id.* at 442.

19. SKZ proposes variants of both of these ideas with proposals for “reducing regulatory barriers to multifamily housing” and “quantifiable fair share guidelines.” *Id.* at 440.

and Midwest in the "First Great Migration." But when African Americans later migrated in the "Second Great Migration" to Western and Southwestern metropolises like San Diego and San Antonio, they were more likely to settle throughout the community, not in the few neighborhoods adjacent to the black segregated ones where, in the industrial North and Midwest, African Americans previously lived. In the areas where black migration was more recent, not only did African Americans fail to overwhelm a few inner-ring suburbs adjacent to historic ghettos and avoid the demand imbalance that provokes white departure, but white residents of the outer-ring communities became gradually familiar with and comfortable with black neighbors and did not depart as integration gradually evolved. In SKZ's view, the challenge of "moving toward integration," therefore, is to make the more segregated metropolises more like the less segregated ones, by dispersing more widely the movement of black families out of segregated communities. The attenuation of white hostility in the less segregated metropolitan statistical area suggests that white resistance would be minimal if policy were successful in desegregating the metros that are more heavily segregated.

Despite the absence of an overarching argument, SKZ is propelled by an ambitious program for reducing the level of racial segregation.²⁰ In Part V, SKZ concludes with a carefully thought-out twelve-point plan of policy recommendations, including imagining the hard work that would be necessary to cost-out the policies and win their adoption. Some of the recommendations are quite radical. Its priority recommendation is race-conscious "mobility grants," subsidies (cash grants or interest rate reductions) to African Americans who move as renters or homeowners to predominantly white neighborhoods and to whites who move as renters or homeowners to predominantly black neighborhoods. Because SKZ worries most about the tendency of integrating neighborhoods to re-segregate, the value of the mobility grants would gradually decline as a neighborhood integrates, tending to stabilize the neighborhood's racial proportions. SKZ acknowledges that such a policy would face legal challenge but avers it is "the most efficient way of achieving integration."²¹ In truth, however radical and innovative as this proposal is, given the vast wealth gap to which segregation heavily contributed, mobility grants are unlikely to be adequate to move a sufficiently large number of African Americans to communities from which they were historically excluded and that are now unaffordable to them unless the mobility grants were far greater than SKZ suggests.

SKZ also recommends filing disparate impact claims under the Fair Housing Act that challenge facially race-neutral zoning ordinances that function to exclude African Americans from affluent neighborhoods. Other

20. As the authors explain, "Our book is organized historically, and gradually builds up lessons that lead to our policy analysis in Part V." *Id.* at 5.

21. *Id.* at 424.

high-priority policies recommended by SKZ include counseling families about opportunities in other-race neighborhoods, reforms in the Section 8 program to create opportunities for voucher holders to obtain apartments outside low-income neighborhoods, zoning reform that removes restrictions on multi-family construction in (typically white) neighborhoods of single-family homes, and a “fair share” program that would require exclusive communities to desegregate.

SKZ’s proposals are designed to be complementary, solving unaddressed problems, and should be implemented in tandem. For example, to address the concern that new housing in gentrifying neighborhoods would accelerate displacement, the authors propose the creation of neighborhood housing trust funds, not to build new housing but to “preserve affordability . . . by purchasing neighborhood housing stock.”²² In a particularly savvy turn, they argue that this program, along with tax-increment financing in these neighborhoods, would “change[] the psychology of gentrification: incumbent residents would have a reason to welcome and seek out gentrification rather than oppose it” because they would improve services and amenities without threatening their displacement.²³ Each of these policies, and others they mention, are important and should be placed on local and national agendas.

I. Measuring Segregation

Clearly, SKZ cannot describe whether racial segregation has declined, increased, or stagnated without selecting a measure for segregation upon which to base its analysis. Our most serious critique of SKZ concerns the choice of “indices of dissimilarity” as that tool. The Dissimilarity Index indicates the share of a particular group, such as African Americans, who would have to move out of their existing (segregated) neighborhood in order for the share of that group in that neighborhood to reflect that group’s in the metropolitan area as a whole. Thus, if a metropolitan area was 15% black, and the typical African American lived in a neighborhood that was 100% black, the index of dissimilarity would be .85, because 85% of African Americans would have to move out of the black neighborhood for the metropolitan area to become fully integrated. A community with a dissimilarity index value of 85 is very highly segregated. In contrast, if the metropolitan area were 15% black but the typical African American lived in a neighborhood that was 20% black, the index of dissimilarity would be

22. *Id.* at 432.

23. *Id.* In recent years, tax-increment financing has been a tool frequently used (and abused) to accelerate uncontrolled gentrification and displacement. However, using it to generate funds for the support of neighborhood housing trust funds could have a salutary effect.

.25 (only 25% of African Americans would have to move²⁴), a low level of segregation. If the metropolitan area consisted only of blacks and whites, it would also be the case, in the first example, that 85% of whites would have to move to the black neighborhood to achieve the same integrative result and, in the second example, that 25% of whites would have to move.

The authors enjoy access to restricted census data and thus are able to overcome some aspects of the “modifiable areal unit problem” in segregation studies,²⁵ by calculating dissimilarity scores with greater precision than is usually possible with publicly available data. Using restricted data, the authors are able to illustrate at a finer level of detail where black-white segregation has increased or decreased, and by what degree, than many other segregation researchers. They use these data to develop several contrarian narratives, including, most centrally to their arguments, a delineation between metropolitan areas in the United States that experienced “large declines” in segregation from 1970 to 1980 and those that experienced “small” or “moderate” declines.²⁶

The authors base several subsequent arguments on this distinction, including claims about differences in outcomes between metropolitan areas that fall into the former versus the latter categories. Unfortunately, SKZ’s characterization of this delineation, and perhaps the significance attributed to it, does not survive scrutiny. While there do appear to be non-trivial differences in the degree of decline in the black/white dissimilarity index values in American cities between 1970 and 1980, the relative size of those differences is not as dramatic as the authors suggest. Recall that the

24. Population Studies Center, University of Michigan, Racial Residential Segregation Measurement Project, <http://enceladus.isr.umich.edu/race/calculate.html> (last visited July 10, 2019).

25. This problem is actually several related problems pertaining to the fact that units of geography such as census tracts change boundaries over time, that different sized geographies are difficult to compare, and that the level of geography employed can produce different results. In general, larger geographies appear less segregated because they are more diverse. But the more detail that is visible, the more segregated an area can appear. See *SOCIAL-SPATIAL SEGREGATION: CONCEPTS, PROCESSES AND OUTCOMES*, chs. 7, 10, 13, 17 (Christopher Lloyd, Ian Shuttleworth & David Wong eds., 2014). The authors in *SOCIAL-SPATIAL SEGREGATION* creatively address this problem by using alternative indices or by standardizing their analysis by population density or size. See also MASSEY & DENTON, *supra* note 3, at 31 (“Blocks are substantially smaller than wards, and the degree of segregation that can be measured tends to increase as the geographic size of the unit falls.”). SKZ acknowledges one strain of this problem with respect to the dissimilarity index. See SKZ, *supra* note 2, at 522 n.15 (noting that “the Index of dissimilarity becomes progressively more inaccurate and misleading as either the overall population of the area analyzed, the number of geographic units, or the relative size of either of the compared groups becomes smaller”).

26. See SKZ, *supra* note 2, at 174 tbl.7.3. Another contrarian narrative that SKZ develops, based largely on the work of other researchers, is that the post-bellum North was not nearly as integrated as many assume. *Id.* at 38.

dissimilarity index is scaled from zero to one (0–1) (or zero to one hundred (0–100)). Generally speaking, any dissimilarity score above .60 is considered “highly segregated,” and anything between .30–.60 is “moderately” segregated.²⁷ The metropolitan areas that they categorize as having “large” declines in dissimilarity had index declines ranging from .171 to .1561. In contrast, the areas that they categorize as having “small” or “moderate” declines in dissimilarity had declines ranging from .112 to .007. The overall levels of segregation are only marginally lower in the former than the latter.

To put this in perspective, consider an example from the authors’ own dataset. Using Table 7.3 as a baseline, the average level of black/white dissimilarity in 1980 in metros with what the authors describe as having undergone “large” declines from 1970 to 1980 was .748. In comparison, the average level of black/white dissimilarity in the metros where the authors described “small” or “moderate” declines was .865. While the difference between .748 and .865 may be statistically significant, it is hardly significant in the larger scheme of segregation. Both numbers describe a very high level of segregation. That even .748 represents an unacceptable degree of segregation is implicitly acknowledged by the authors’ ultimate recommendation in later chapters regarding the target for national policy: a .60 dissimilarity index score (or lower).

The authors mischaracterize the extent of desegregation, and thereby mislead readers. For instance, on the page opposite Table 7.3, a section begins with the header “Where Integration Happened.” Even taking the case of San Diego, the metro in the table where the largest decline occurred, the observed black/white dissimilarity score was still .697 as of 1980, representing a situation in which 70% of either blacks or whites would have to move to achieve perfect integration. That cannot accurately be characterized as “integration.”

The authors repeat this exaggerated claim throughout. For example, they assert, on the basis of these data, that “stable integration on a metropolitan wide scale clearly is possible.”²⁸ While we wish that statement were true, it cannot be supported on the basis of the evidence presented. Based upon SKZ’s own data, those cities were, without exception, highly segregated in 1980,²⁹ and many remain so today.

This is not to deny that dissimilarity scores have fallen in a number of cities or that differential rates of decline exist. Indeed, they have fallen even further in most cities since 1980. But that only underscores an even

27. See MASSEY & DENTON, *supra* note 3, at 20 (“A simple rule of thumb in interpreting these indices is that values under 30 are low, those between 30 and 60 are moderate, and anything above 60 is high.”).

28. SKZ, *supra* note 2, at 199. *But see id.* at 211 (“In chapter 7, we showed that in some metropolitan areas, integration became widespread in the 1970s.”). That’s clearly not demonstrated.

29. *See id.* at 174 tbl.7.3.

more fundamental problem with this book: the almost total overreliance on dissimilarity scores to measure segregation. The authors repeatedly express concern about good social science and assert that “measurement matters,”³⁰ yet the failure to discuss, let alone investigate or analyze, alternative measures of segregation is a major gap.³¹ Dissimilarity scores have well-known limitations.

Dissimilarity index scores—which only examine two racial groups at a time—are especially problematic in diverse areas with multiple racial or ethnic groups present in significant proportions, which the metropolitan areas with the so-called “large declines” disproportionately are. The fact of declining black-white dissimilarity scores may mask increasing white-Hispanic dissimilarity scores. Thus, even though black-white segregation may be declining as measured by dissimilarity scores, that does not mean that the *overall* level of segregation in any particular area has in fact declined.

To appreciate how misleading a binary measure such as the dissimilarity index can be in such an area, consider the first example we offered above, illustrating how a dissimilarity index number would be calculated in a community³² that was 85% white and 15% black, and where the typical black lives in a 100% black neighborhood (and consequently, the typical white lives in a 100% white neighborhood). Imagine that the community gains a population of Latinos so that it becomes 70% white, 10% black, and 20% Latino, and all the Latinos settle in previously black neighborhoods. In that case, the typical African American would now live in a neighborhood that was 33% black and 67% Latino. The biracial (black-white) index of dissimilarity for blacks would fall from .85 to .69 $((.33-.10)/.33)$, without a single African American gaining a white neighbor. We would not consider this “moving toward integration,” and, we suspect, neither would SKZ’s authors, but this is the conclusion that their choice of dissimilarity to measure segregation requires.

Since many of the cities that they say experienced more rapid desegregation are cities where Latino populations may have been growing more rapidly, and, settling disproportionately in previously heavily black neighborhoods, SKZ’s distinction between more and less rapidly desegregating cities may simply be an artifact of the index it chose to use. An index of dissimilarity that necessarily compares only two subgroups (in this case blacks and whites) when other subgroups may be present, cannot track

30. See, e.g., *id.* at 250.

31. There is only a brief mention of exposure scores, and an equally brief section in Chapter 17 looking at entropy index scores (borrowing the scales created by a team of researchers at Mixed Metro); the authors rely entirely on the dissimilarity index to examine the question of segregation.

32. Dissimilarity generally requires a larger geographic area, but, it could be a city, a county, or an MSA. “Community” is a stand-in here for any generally defined or definable geography.

how the exposure of blacks and whites to each other has evolved, and this is the topic about which SKZ is concerned.

Another deficiency of dissimilarity as a measure of integration is that it reports on metro-wide averages; how many blacks (or other groups) would have to move to create an even distribution throughout the entire metropolitan community. But because middle class or more affluent African American have been more able to move to diverse neighborhoods than families with lower incomes, the average between the two groups may show a dissimilarity index decline, while many, if not most, black families continue to live in highly segregated, low-income places. Thus, the dissimilarity score may obscure the typical or average case.

Other indices would have been better suited for some of SKZ's purposes, and we are puzzled about why the authors did not employ them, or at least explain why they chose not to employ them. The most obvious is an exposure index, which examines the white proportion of the neighborhood in which the typical African American lives (or, conversely, the isolation index, which indicates the proportion of black residents of the neighborhood in which the typical African American lives).³³ Looking at the neighborhood demographics of the typical member of a particular racial group, the exposure and isolation index illustrate how segregated our nation's neighborhoods remain, although fewer neighborhoods are strictly homogenous. The authors make only brief mention of exposure scores, but do not base any conclusions about trends in desegregation on them. By focusing on the average case, an exposure (or isolation) index would indicate how pronounced or severe segregation remains even if a limited number of blacks managed to integrate previously all-white neighborhoods. A community's dissimilarity score could decline although few African Americans had greater exposure to whites, and vice-versa. In fact, this is what occurred. Even as dissimilarity scores fell nationally since 1970, black-white and white-black exposure index values have barely budged. The average African American lived in a neighborhood with 32% white residents in 1980, and 35% in 2010. Similarly, the average white person lived in a neighborhood with 5% black neighbors in 1980, but just 8% in 2010.

In addition to the exposure/isolation index, a black location quotient could have been used to focus in on the problem of black segregation. The location quotient examines under- and over-representation in an area and can be modified for any number of races.³⁴ It is a relatively simple and intuitive representation of how much more segregated a person's

33. Both isolation and exposure measure the same phenomenon.

34. Lawrence A. Brown & Su-Yuel Chung, *Spatial Segregation, Segregation Indices and the Geographical Perspective*, 12(2) POPULATION, SPACE & PLACE 125-43 (2006), <https://doi.org/10.1002/psp.403>.

neighborhood (census tract) is relative to the larger overall geographic area, such as a metropolitan area or a county.³⁵

Yet another index, more recently developed, is the divergence index.³⁶ It measures the difference between a neighborhood or community's racial composition, relative to a larger geography, such as a metropolitan area or region. The more that a neighborhood diverges from regional demographics, the higher the divergence score.³⁷ The divergence index provides a holistic measure of segregation at virtually any level of geography desired. Divergence scores may rise even as dissimilarity scores fall, suggesting nuances to the story of segregation that merit investigation as part of any comprehensive study.³⁸

Even with a narrow focus on black-white segregation, there are novel measures that would have supported—or suggested different contours to—key points developed by SKZ. Trevon Logan and John Parman's fascinating "Neighbor-based Segregation" index draws out interesting regional and subregional patterns that have been obscured by traditional metrics.³⁹ We have little doubt that engagement with at least some of these new or alternative measures would have bolstered some of the findings in SKZ.

Given the large and growing number of indices used to measure or assess segregation, and the often nuanced differences between them—each revealing a different facet of a complex phenomenon—the virtually total reliance on the index of dissimilarity to the exclusion of all other measures is a notable weakness in SKZ. At a minimum, SKZ should have offered

35. If the authors of SKZ had problems with the statistical underpinnings of the location quotient, they might have applied Local Moran's I or some variant of the location quotient. See, e.g., Natalia Vorotyntseva, *Measuring Segregation Patterns and Change: A Co-Location Quotient Approach* (May 3, 2016) (Ph.D. dissertation, University of Conn.), available at <https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=7330&context=dissertations>. The point is not to suggest which alternative measures they might have used, but to note that the absence of explanation on why they rely so heavily on the dissimilarity index was a puzzling and troubling omission.

36. Elizabeth Roberto, *The Divergence Index: A Decomposable Measure of Segregation and Inequality* (Working Paper, 2015), available at <https://arxiv.org/pdf/1508.01167.pdf>.

37. Although the divergence index looks at multiple groups simultaneously, for purposes of examining just black-white segregation, the authors of SKZ could have looked at tracts with high divergence scores that also have unusually large or low numbers of African Americans. And divergence scores can also be calculated at larger geographies, such as metropolitan areas. See Stephen Menendian & Samir Gambhir, *Haas Institute, Racial Segregation in the San Francisco Bay Area, Part 3* (May 28, 2019), <https://haasinstitute.berkeley.edu/racial-segregation-san-francisco-bay-area-part-3>; see also <https://haasinstitute.berkeley.edu/bay-segregation-map> (providing interactive map that toggles between six different measures of segregation, and the different information they impart).

38. *Id.* For example, we found that, in the nine-county San Francisco Bay Area, although dissimilarity scores fell from 1970 to 2010, divergence index scores rose in seven of the nine counties during the same period.

39. See Trevon D. Logan & John M. Parman, *The National Rise in Residential Segregation*, 77 J. ECON. HIST. 127 (2017).

some commentary on what measures were considered and an explanation of why alternative measures were not employed. SKZ's silence on the relative merits of various alternative measures of segregation, especially since many of the most provocative arguments developed in the book rely so heavily on the relative changes in dissimilarity, is a conspicuous and troubling omission.

II. SKZ's Structural Segregation Experiment

Much of SKZ is a chronological review of key moments, periods, or historical junctures that shaped racial residential segregation (or integration) in the United States. Its most interesting and novel investigation into the causes of segregation attempts to answer the knotty question of exactly how much of contemporary segregation is sustained by structural factors like exclusionary zoning or demographic factors that correlate to race, rather than by racial discrimination or differential neighborhood preferences, which they term the "ethnic residual."

The authors take pains to demonstrate—or at least argue (and not without evidence)—that discriminatory attitudes and, in fact, incidences of housing discrimination, have fallen sharply since the enactment of the Fair Housing Act. Most prominently, the authors graphically display attitudinal trend lines from the General Social Survey (GSS), a longitudinal survey of thousands of Americans that tracks attitudes on race, asking a battery of questions.⁴⁰ For example, SKZ uses these survey data to report that although 60% of white respondents in 1973 opposed laws banning interracial marriage, by 2002 this number had risen to 90%.⁴¹ It also shows that in 1973, only 33% of white Americans supported laws that prevented racial discrimination in housing, compared to 72% in 2016.⁴² Some of this apparent progress may be superficial, or influenced by survey respondents' tendency to give socially acceptable answers. Even if credible, changes in attitudes are unlikely to be the only explanation, and the evolving standard of social acceptability is itself a noteworthy and positive development.

Less prominently, but no less important to its argument, SKZ cites a 2008 meta-study by economist Stephen Ross,⁴³ and another study by three economists published in 1999, all suggesting that racial discrimination declined, even as segregation was maintained. SKZ uses the latter study to suggest that market forces sustain segregation even as racial discrimination

40. NORCC AT THE UNIVERSITY OF CHICAGO, GENERAL SOCIAL SURVEY, Figs. 7.3, 23.1, <http://gss.norc.org>.

41. *Id.* at 461.

42. *Id.*

43. SKZ, *supra* note 2, at 8 n.8.

declined.⁴⁴ All told, the authors of SKZ take a fairly restrictive view of the evidence developed from paired audit testing and other testing.⁴⁵

If housing discrimination is not the main explanatory factor of contemporary patterns of residential racial segregation, then what is? The authors present and critique several theories, and, although they do not fully answer the question, they at least investigate the matter by devising a clever experiment.⁴⁶

Using their restricted (and more refined and granular) census data, the authors create 1,152 bins, representing unique combinations of six housing and demographic characteristics.⁴⁷ Every combination of these characteristics creates a certain unique housing unit profile (or a “bin”) that is based on socioeconomic characteristics, housing tenure and type, and family size. None of these characteristics are race or ethnicity per se, and therefore are ostensibly “race neutral,” even though they are assumed to correlate with racial demographics. Using these predefined “bins,” the authors can then analyze any metropolitan area in terms of the combinations of these structural characteristics.

The experimental part of this inquiry arises when the authors randomly assign each actual household in a metro area to a new unit of housing in the bin with the same socioeconomic, housing tenure, and family size characteristics as the household itself. Having done this “random distribution,” the authors can then recalculate the dissimilarity index for the metro region at any point in time. This, according to them, provides the measure of “structural segregation.” As they explain:

If structural segregation were the dominant cause of residential segregation, then our simulated index of dissimilarity would be close to the actual, observed levels of segregation. This would occur if, for example,

44. See *id.* at 194.

45. *Id.* at 162–65 (summary of paired audit testing), 264 (fair lending studies), 297 (rental test studies).

46. *Id.* at 243–50 (describing experiment). This chapter builds on, but in key respects is substantially different from, a 2017 study between two of the authors of SKZ. Yana Kucheva & Richard Sander, *Structural Versus Ethnic Dimensions of Housing Segregation*, 40 J. URB. AFF. 329, 348 (2018), DOI: 10.1080/07352166.2017.1360730; see also SKZ, *supra* note 2, at 8 n.8 (citing Stephen L. Ross, *Understanding Racial Segregation: What Is Known About the Effect of Housing Discrimination*, ECONOMICS WORKING PAPERS (2008), n.14 (citing David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad*, 112 Q. J. ECON. 827 (1997)). We believe that that article is more careful in describing the differences between the “structural” factors and the “ethnic residual.” But the significant experimental differences and scope of inquiry make it difficult for us to rely on the definitions in the article in understanding what they mean in SKZ.

47. The number 1,152 is the product of $6 \times 3 \times 2 \times 4 \times 4 \times 2$, with each number being the number of options for each of 6 categories of housing and demographic characteristics: Household income (6 categories), household size (3), whether the household includes children (2), education level of household head (4), age of household head (4), owns or rents (2).

neighborhoods were heavily stratified by income *and* if the vast majority of black households had lower incomes than nearly all white households. If that were the case, then eliminating all *housing* discrimination would have little effect on housing segregation.

The results were perhaps counterintuitive to those of us who believe that structural forces play a significant role in sustaining racial segregation and generating racial inequality, irrespective of how much explicit or covert discrimination exists. The authors found that, across the nation's twenty-five largest metros, structural segregation not only declined over time, but was relatively small. Specifically, they found that structural segregation explained about a quarter of racial residential segregation, with the so-called "ethnic residual" explaining the remaining three quarters of the phenomenon. The authors found, for example, that in 2000 the black-white dissimilarity index score for Houston was 0.661 (a moderately high level of segregation), but that the structural portion was only 0.177. This left an ethnic residual of 0.484 (See Table 10.2⁴⁸).

Despite the cleverness of this experiment, the inferences drawn by it are misleading at best. The experimental conclusions depend on the difference between observed patterns and what occurred through a "random distribution." However, actual patterns of racial residential segregation could never be close to randomly distributed. The legacy of historical racism created a readily observed pattern out of which people move, even in the absence of significant racial discrimination, and therefore created a path dependence for the evolution of racial segregation.

In virtually every major American city, demographic maps reveal historical patterns of segregation that are racially contiguous, evolving only gradually over the decades, but retaining, in large parts, their initial shape and footprint. As the authors repeatedly acknowledge throughout the text, black "pioneers" tended to move into adjacent neighborhoods, and their search scope for new housing was often delimited by network relationships and patterns.⁴⁹ Therefore, measuring the results of the experiment, which randomly distributed households, against the observed patterns is not likely to give us an accurate assessment of how much contemporary racial residential segregation is actually a result of, and sustained by, structural forces versus the "ethnic residual." The structural patterns that have emerged overlay historical legacies of discrimination and segregation, and cannot be so easily disentangled from them.

The authors acknowledge that other factors, perhaps unobserved or unobservable because of data limitations, could "further increase . . . measured structural segregation," and so caution against viewing their

48. SKZ, *supra* note 2, at 249 tbl.10.2.

49. See, e.g., SKZ, *supra* note 2, at 401 (noting that "incumbent blacks have many ties to their existing, usually segregated locations, and because most intra-metropolitan moves involve only short distances").

aggregate measure (.208 in 2000) as a “maximum value.”⁵⁰ They nonetheless assert that it is “probably not very far below the maximum.” Far from being the “near maximum,” we take their calculations as closer to the floor than the ceiling, considering the forces that sustain racial segregation today. At most, SKZ is technically correct about the relative ratio of structural segregation and the ethnic residual that explains resulting dissimilarity scores. But we already knew that racial discrimination played a large role in creating patterns of racial residential segregation in the first place. The relatively larger ethnic residual is more suggestive of the path dependence of racial segregation than the relative unimportance of structural forces. The experiment is misleading at best, and fatally flawed at worst, as an assessment of the role of structural forces in sustaining and perpetuating segregation today.

This experimental flaw mars much of the analysis that flows through the rest of the book and helps explain why the authors struggle to explain the causes of contemporary segregation. SKZ makes passing reference to Maria Krysan and Kyle Crowder’s research on the ++housing search process; if it had examined their work more closely on the role that social networks and background information sets play in this process,⁵¹ as well as other research on the effects of jurisdictional fragmentation, SKZ may have been able to identify additional structural elements that could help explain these patterns. For example, there is research indicating that metropolitan areas with greater jurisdictional fragmentation have higher levels of income segregation⁵² and lower levels of upward mobility.⁵³ This is a structural feature that likely contributes to the perpetuation of racial segregation. There are already well established measures of jurisdictional fragmentation that SKZ might have used to more deeply investigate and assess the structural role in the perpetuation of segregation.

III. Reverse Redlining

A contrarian argument developed by SKZ concerns “reverse redlining.” The term “redlining” refers to denial of credit or insurance to residents of non-white neighborhoods. It derives from maps drawn by a federal agency, the Home Owners Loan Corporation (HOLC), during the 1930s to indicate neighborhoods where borrowers were presumed more likely

50. *Id.* at 246–47.

51. MARISA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* (2017).

52. Rebecca Hendrick & Yu Shi, *Macro-Level Determinants of Local Government Interaction: How Metropolitan Regions in the United States Compare*, 51 *URB. AFF. REV.* 414–38 (2015).

53. Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 36 (NBER Working Paper No. 19843, 2014).

to default on mortgages that the agency proposed to refinance.⁵⁴ Neighborhoods were shaded red on these maps if residents were poor, ethnic immigrants, or African American, regardless of their actual propensity to default. The redlining term was popularized by a sociologist in the 1960s to describe this broader denial of services or credit.⁵⁵ It would seem implausible that such maps were drawn for no purpose, but the SKZ authors assert that “neither the maps’ design nor purpose was driven by racial considerations.”⁵⁶ They examined 1930s credit data and conclude that they “don’t know” if discrimination against borrowers in such neighborhoods was “mild or substantial.” They quote with approval a scholar who found that in Philadelphia from 1940 to 1960 “race did not significantly predict where mortgages were made” and whose work “contradicts the notion that systematic redlining practices pervaded the lending community.”⁵⁷ This fits SKZ’s contrarian narrative. Later in the book, the authors temper this just a bit: “Redlining was common, but as far back as the 1930s blacks in the ghetto had significant access to conventional credit.”⁵⁸

“Reverse redlining” refers to a more recent phenomenon in the period leading to the Great Recession of 2008. Lenders targeted these same neighborhoods or communities with predatory credit instruments such as exploitative and deceptive subprime refinance loans—for example, loans with initial low teaser rates followed by excessively high rates a few years later, or high prepayment penalties to prevent borrowers from escaping the products once they realized what they had been tricked into signing. Not all subprime loans are exploitative: it is a legitimate business practice to charge a higher interest rate to borrowers who are at higher risk of default. But frequently, subprime marketing to black and Hispanic homeowners targeted borrowers who, based upon non-racial objective lending criteria, should have fully qualified for conventional loan terms and lower interest rates.

But SKZ insists that reverse redlining did not exist: “There is . . . little empirical support for the claim that conventional lenders systematically pushed minority customers into defective mortgage products through

54. The HOLC did not issue mortgages to new homeowners but only to existing homeowners at risk of foreclosure. The HOLC replaced these homeowners’ existing mortgages, which typically required interest-only payments with no equity accumulation, and required full repayment at the end of a short term (typically five to seven years), with a longer term mortgage whose amortization provision left the mortgagee with unencumbered ownership and no debt at the end of that term.

55. WILLIAM NORTON, MARGARET WALTON-ROBERTS, *CULTURAL GEOGRAPHY: ENVIRONMENTS, LANDSCAPES, IDENTITIES, INEQUALITIES* (3d ed. 2012) (citing Northwestern University sociologist John McKnight); see also *The Glass Half Full*, INST. POL’Y RES., Summer 2003, at 8 (describing McKnight’s work).

56. SKZ, *supra* note 2, at 100.

57. *Id.* at 254, 254–55.

58. *Id.* at 389.

reverse redlining.⁵⁹ Yet the existence of such predatory practices has been well documented, for example by affidavits for and settlements of lawsuits alleging such discriminatory practices.⁶⁰ Not only is SKZ's presentation of the evidence incomplete and somewhat one-sided, but its analysis is somewhat incoherent.

The authors acknowledge that "the evidence is strong that African-Americans (and Hispanics) often ended up with subprime or predatory loans."⁶¹ But they suggest that this was not discriminatory because African Americans simply lacked access to the traditional or ordinary credit institutions that whites enjoyed. (If the practices were not discriminatory, why does SKZ describe the loans as "predatory"?) SKZ concludes that "a series of small differences, rooted in the fundamentally 'underbanked' character of minority, segregated neighborhoods, produces large cumulative effects of market segmentation."⁶²

This "solution" to the paradox slices the matter ever too finely. Lack of access to credit is an important component of reverse redlining, which is not just about denying credit—it is also about the absence of traditional institutions or services that provide conventional credit, and the unregulated actions of unscrupulous lenders to fill that gap by lending on exploitative terms that would not be offered were the borrowers white, or that should not have been offered to anyone.⁶³ Thus, only the authors' overly

59. *Id.* at 385.

60. *See, e.g.,* Relman Dane & Colfax, Case Profiles: *Saint-Jean v. Emigrant Mortg. Co.*, No. 11 CV 2122 (SJ) (E.D.N.Y.), <https://www.relmanlaw.com/cases-emigrant> (last visited July 11, 2019); *see also* Relman Dane & Colfax, Case Profiles: *Mayor & City Council of Baltimore v. Wells Fargo Bank and City of Memphis v. Wells Fargo Bank*, <https://www.relmanlaw.com/cases-36> (last visited July 11, 2019); ACLU, *Adkins, et al. vs. Morgan Stanley—Complaint*, <https://www.aclu.org/legal-document/adkins-et-al-vs-morgan-stanley-complaint?redirect=racial-justice/adkins-et-al-vs-morgan-stanley-0> (last visited July 11, 2019).

61. SKZ, *supra* note 2, at 385.

62. *Id.* at 388. As readers, we are puzzled about how this explanation fits into other aspects of the SKZ account. SKZ, it will be recalled, found in their "experiment" that racial segregation was one part structural and three parts the "ethnic residual." Is market segmentation part of the structural or part of the racial residual explanation? So far as we can tell, SKZ does not say.

63. Perhaps the most egregious practice was bank payments by banks and mortgage companies of bonuses ("yield spread premiums," or YSPs) to mortgage brokers to reward the selling to unsuspecting homeowners of mortgages with interest rates that were higher than those recommended by the banks for borrowers with identical characteristics. The practice was finally outlawed by the Dodd-Frank legislation of 2010, but the legislation provided no recourse for borrowers who had been victimized before law was passed, many of whom then defaulted, creating a foreclosure epidemic that depressed home values in the neighborhoods where vacant properties were located. "YSPs are present in 85 to 90 percent of subprime mortgages. . . . Fannie Mae estimates that fully 50 percent of those who were sold ruinous subprime mortgages would have qualified for prime-rate loans." Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8–19, <https://democracyjournal.org/magazine/5/unsafe-at-any-rate>. A suit by the City of Memphis

parsimonious definition of “redlining” allows their argument to make sense. In fact, one of the policy proposals that SKZ offers at the book’s end, the creation of more community development banks, effectively acknowledges the existence of a dual credit market.⁶⁴

IV. The Shelley Argument

One of SKZ’s contrarian arguments concerns *Shelley v. Kraemer*,⁶⁵ the 1948 Supreme Court decision holding racially restrictive covenants unenforceable. SKZ argues that *Shelley* did more to open all-white neighborhoods to African Americans than is generally appreciated. Drawing on a 2014 article by two SKZ authors,⁶⁶ SKZ finds that African Americans were able to move into neighborhoods covered by racially restrictive covenants on a “fairly large scale” in the 1949–50 year after *Shelley* was decided, compared to such movement during the prior decade.⁶⁷ SKZ attributes this change to *Shelley* itself.

The significance ascribed to *Shelley* is provocative, but not entirely persuasive because additional contemporaneous factors arose around the same time. This was the period of white suburbanization, where white families moved out of urban districts and into newly constructed suburban housing by the millions.⁶⁸ Thus, the changing patterns of residential life may have had as much of a role in increasing the housing supply in previously restricted neighborhoods as the enforcement of a judicial opinion.

The authors try to account for this possibility by examining population growth, showing that the neighborhoods that blacks were moving into were gaining population despite white suburbanization. But even controlling for this variable cannot establish what the authors seek to prove, due to another parallel development: the baby boom.⁶⁹ SKZ’s data are consistent with an increase in housing vacancies that blacks might have accessed,

against Wells Fargo Bank was supported by affidavits of bank employees stating that they referred to subprime loans as “ghetto loans” and were instructed by bank supervisors to target their solicitation to heavily African-American zip codes, because residents there “weren’t savvy enough” to know they were being exploited. Elderly African Americans were considered by bank employees to be particularly good prospects for being pressured to take out high-cost loans. Relman, Dane & Colfax PLLC. Case Profiles. Mayor & City Council of Baltimore v. Wells Fargo Bank and City of Memphis v. Wells Fargo Bank (2012), <https://www.relmanlaw.com/cases-36>. A copy of the complaint in this case is available upon request from the authors.

64. SKZ, *supra* note 2, at 433.

65. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

66. Richard H. Sander & Yana Kucheva, *The Misunderstood Consequences of Shelley v. Kraemer*, 48 Soc. Sci. Res. 212 (2014).

67. SKZ, *supra* note 2, at 77.

68. See, e.g., KENNETH T. JACKSON, *CRAVGRASS FRONTIER* (1985).

69. The rate of live births surged in the late 1940s, and the birth rate rose from 20 births per 1000 people in 1945 to 27 per 1000 in 1947. See https://www.cdc.gov/nchs/data/statab/natfinal2003.annvol1_01.pdf.

even as the white population was growing due to an increase in family size, without a corresponding increase in the number of white households in those neighborhoods. Relative per-unit white demand could have dropped significantly in many of these neighborhoods, easing the way for black migrants despite the presence of restrictive covenants, while those neighborhoods still experienced overall population growth.

And even if the argument were true that *Shelley* played a larger role than is generally appreciated, SKZ acknowledges that overall levels of segregation did not appreciably fall after the *Shelley* decision. Thus, whatever micro-level of integration may have occurred and however border neighborhoods may have transitioned as a result of *Shelley*, these developments were hardly enough to disrupt the overall pattern of persistent and entrenched racial residential segregation.

SKZ's claim that *Shelley* had an almost instantaneous effect is also implausible in view of what we generally know about the role of racially restrictive covenants and their evolution. The *Shelley* decision itself was not as discontinuous with the past as SKZ implies. Prior to 1948, the restrictive covenant regime surrounding black neighborhoods was already falling apart. SKZ refer to this indirectly by noting that, because of the greater demand of blacks than whites for housing (the housing available to blacks was in such shorter supply), African-American homebuyers were often willing to pay more for homes of similar quality than whites were willing to pay. This resulted in many white homeowners who desired to sell for whatever non-racial reason (better job opportunities, wanting a larger home for a growing family, etc.) having an incentive to sell to African Americans rather than to whites, because a higher price could be charged. As a result, in 1948, many "white" neighborhoods surrounding black ones were already integrating or on their way to transitioning to heavily black neighborhoods, notwithstanding their coverage by deed restrictions. *Shelley* was not entirely typical of restrictive covenant litigation in the 1940s. Many courts refused to enforce restrictive covenants, not on constitutional grounds but because the neighborhood from which white homeowners were seeking the eviction of an African-American homebuyer already had enough black residents to make the covenant's general restriction unenforceable.⁷⁰

70. In 1945, D. O. McGovney described recent cases in several states (California, Kansas, Maryland, and Missouri) in which courts found that the racial covenants in question were constitutional but could not be enforced on equitable grounds inasmuch as the purpose of the covenants—to preserve property values from falling because Negroes lived in the neighborhood—no longer applied because Negroes already lived in the neighborhood. In 1942, a similar case was decided by the U.S. Court of Appeals for the District of Columbia. D. O. McGovney, *Agreements, Covenants, or Conditions in Deeds Is Unconstitutional*, 33 CAL. L. REV. 5 (1945). Courts found other technicalities as well to justify refusal to enforce a covenant prior to the *Shelley* decision. Lorraine Hansberry's play, *A Raisin in the Sun*, was inspired in part by a case that her father successfully took to the

Following *Shelley*, the Federal Housing Administration continued to subsidize all-white developments covered by restrictive covenants, although it acknowledged that they could no longer be enforced in court. Two weeks after the Court announced its decision, the FHA commissioner stated that the *Shelley* decision would “in no way affect the programs of this agency.”⁷¹ Six months later when Thurgood Marshall, then director of the NAACP Legal Defense Fund, protested that the FHA was continuing to insure mortgages on new homes in Levittown, New York, that had racial deed restrictions, the commissioner responded: “I find nothing in [*Shelley*] to indicate that [the government] is authorized to withdraw its normal protection and benefits from persons who have executed but do not seek judicial enforcement of such covenants.”⁷² Another year passed before the FHA announced it would no longer insure mortgages on racially restricted homes, but then gave builders two and a half months’ advance notice to enable them to add new racial restrictions before the policy went into effect. Possibly, these openly defiant policies of the FHA were mere posturing, and homeowners and builders suddenly became more willing to sell to African Americans once *Shelley* was announced, but such a conclusion should be examined skeptically. Few controversial Supreme Court opinions have an immediate impact on popular opinion. It may not always take a long time for society to adjust, but instant compliance is rare.

And *Shelley* itself only ended court enforcement of racial covenants that provided for the *eviction* of black homeowners from properties that they purchased in violation of the restriction. Following the ruling, many developers wrote (or rewrote) covenants to provide not for court-ordered evictions, but court-enforced assessments of burdensome penalties against homeowners who sold to African Americans in violation of a covenant. At least two state courts rejected challenges to the practice (Missouri, the state from which *Shelley* itself arose, and Oklahoma), and it was followed elsewhere as well. For example, the FHA-financed development of Westlake, California (described in the Malvina Reynolds song about “little boxes on the hillside . . . made of ticky tacky”), had a covenant recorded a year *after* the *Shelley* decision that required any homeowner who sold to a non-Caucasian to pay a penalty of \$2,000 (subsequently adjusted for inflation)

U.S. Supreme Court in the late 1930s. The Court ruled that Mr. Hansberry could not be evicted from a home he purchased in violation of a neighborhood covenant because only a majority of neighborhood property owners had signed the agreement and the seller of the home to the Hansberrys was not one of them. *HANSBERRY V. LEE*, 311 U.S. 32 (1940).

71. Arnold R. Hirsch. *Choosing Segregation. Federal Housing Policy Between Shelley and Brown*, in JOHN F. BAUMAN, ROGER BILES & KRISTIN M. SZYLVIAN. *FROM TENEMENTS TO THE TAYLOR HOMES. IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH CENTURY AMERICA* 206, 211 (2000).

72. Marshall 1949, 8.

to each of his eight closest neighbors.⁷³ The total exceeded the entire value of the property itself. Court enforcement of such penalties was prohibited by the Supreme Court in 1953 (*Barrows v. Jackson*).⁷⁴ It might have been worthwhile for the SKZ authors to test whether their data showed a similar acceleration of integration in 1954–55 following the *Barrows* opinion, compared to the previous five or ten years.

Post-*Shelley* (and *Barrows*), white resistance to black neighbors did not suddenly abate in the way SKZ suggests, although we would not allege that no abatement occurred. Even after *Brown v. Board of Education* in 1954, the general counsel of the Housing and Home Finance Agency (the umbrella organization to which the Federal Housing Administration was then subordinate) advised federal housing officials that the desegregation ruling did not apply to housing and that those housing officials should feel free to continue to deny support for subdivisions that would admit African Americans. Were it not for these continued policies, it would have been superfluous for President John Kennedy to issue a 1962 executive order that federal support for housing segregation must henceforth cease.

After *Shelley*, police protected, even promoted, mob violence against African-American homebuyers in white neighborhoods into the 1950s and beyond. In 1952, an African-American family bought a home in a federally financed subdivision not far from Berkeley, California, and a mob of over 300 angry whites threw rocks through the windows, burned a cross on the lawn, and threatened the family's children; the state attorney general eventually ordered the local police to provide protection to the black family, not to the mob, and, after another month, the police finally did so. In 1954, a black family bought a suburban Louisville, Kentucky, home that was dynamited and firebombed by a police-protected mob; the white man who sold the home was convicted of sedition for having incited the violence by selling to an African American. In 1957, two months of mob violence greeted an African-American family's purchase of a home in Levittown, Pennsylvania. Not only did police officers encourage it, a police sergeant was demoted for attempting to restrain the mob.⁷⁵ Although the frequency of such incidents diminished as time passed, what cannot show up in a dataset is the threat that such violence communicated to other potential black movers who were intimidated by mob and state action from exercising the right *Shelley* purportedly granted them.

SKZ cites the growing number of states and localities that passed fair housing laws in the period after *Shelley*, while acknowledging that a far greater number openly refused to enact or remained hostile to such laws.

73. Henry Doelger Builder, Inc., Declaration of Restrictions of Henry Doelger Builder, Inc., Recorder's Office, San Mateo County, Vol. 1797, p. 685 (1950).

74. *Barrows v. Jackson*, 346 U.S. 249 (1953).

75. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 139–40 (describing a federally-financed subdivision not far from Berkeley, CA); *id.* at 148–50 (Louisville, KY); *id.* at 141–42 (Levittown, PA).

In 1963, for example, the California legislature adopted a fair housing law. But the following year, a statewide voter referendum cancelled it by a 65% margin, amending the state constitution to protect the right to discriminate by race. The California Supreme Court then, in turn, nullified the referendum result in a ruling that was subsequently upheld in 1967 by the U.S. Supreme Court (*Reitman v. Mulkey*).⁷⁶ SKZ is certainly correct that, on balance, support for non-discriminatory housing grew post-*Shelley* (as it began from a very low base), but whether this balance was sufficiently strong to remove most actual barriers to integration, leaving market forces the chief cause of ongoing segregation is, in our view, questionable though not impossible.

V. The Role of Government

SKZ asserts that government's responsibility for racial segregation is "perhaps the most rancorous discourse in the fair housing realm." It singles out for criticism one of the co-authors of this review, noting that in his "book, *The Color of Law*, Richard Rothstein claimed that government efforts to promote racial segregation were the driving force behind the ghettoization of African Americans." SKZ disputes this claim, asserting that it "relies heavily on highly selective anecdotes and broad assertions."⁷⁷ In addition, SKZ takes issue with the emphasis on the role of *federal* government policy in contributing to racial residential segregation, since, as SKZ notes, "by 1930, black segregation was firmly established throughout urban America."⁷⁸

This review is not the place to engage in a nuanced disputation with the SKZ authors regarding *The Color of Law's* account of government's responsibility for segregation. We nonetheless offer two counterpoints for consideration. First, although SKZ is undoubtedly correct that black urban segregation was already an undeniable fact by 1930, ample evidence indicates that federal policy amplified and extended this trend. National dissimilarity index scores suggest that black-white segregation peaked somewhere between 1950 and 1970, depending on the source and cities measured. For example, Douglas Massey and Nancy Denton found that for thirty large American cities, black-white dissimilarity averages peaked in 1960, at .92.⁷⁹ Furthermore, they found that black spatial isolation doubled between 1930 and 1970 in Northern cities.⁸⁰ In 1970, blacks were more likely to live with other blacks than with whites. That was not the case

76. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

77. SKZ, *supra* note 2, at 83.

78. *Id.* at 84.

79. MASSEY & DENTON, *supra* note 3, at 47, tbl. 2.3. Specifically, they found that dissimilarity scores peaked in the South in 1950 and in the North in 1960.

80. *Id.* at 48 tbl.2.4 (noting that spatial isolation could double while dissimilarity scores remain stable illustrates yet another reason to be skeptical of overreliance on the index of dissimilarity).

in 1930, no matter how evidenced black segregation was. Federal policy played an important role in the deepening of racial residential segregation.

Second, any historical account, except for mere statistical reports, relies on selective anecdotes and broad assertions. Good historical writing is distinguished by the representativeness of the anecdotes that it selects to highlight and by the broad assertions that it develops to summarize the representative anecdotes.

Whether, even if the anecdotes were representative of government actions, these actions may be characterized as a “driving force” behind residential segregation is a more difficult question. Perhaps *The Color of Law* was not clear enough on this point. In any case, the “driving force” argument of Rothstein’s work is a constitutional one. Certainly, government action to promote segregation rested on a powerful bigoted consensus among the white population, a consensus that originated in the failure to confront the legacies of slavery that left emancipated slaves in a subordinate class, especially after the end of Reconstruction. Government reflected this bigotry by implementing policies of segregation that were politically popular, and these policies further reinforced the racial stereotypes to which policy was responding.

But white bigotry cannot be simply contrasted with government policy in an effort to determine which was “the driving force,” because private discrimination and government policy do not have equivalent constitutional status. The Fifth, Fourteenth, and even, as Rothstein’s book claims, the Thirteenth Amendments to the Constitution require government to override private discrimination, not to embrace, or even acquiesce, to it. For example, as SKZ and *The Color of Law* both describe, the National Association of Realtors had a code of ethics that prohibited brokers or their agents from selling homes to African Americans in white neighborhoods. Was this private activity? Not once state government real estate licensing agencies embraced this code and enforced it. If state agencies had declined to license brokers who adhered to this code, or even lifted the licenses of brokers who did so, the entire history of racial steering would have been different. In embracing this code, state licensing agencies violated their Fourteenth Amendment responsibilities. In this way, government policy sanctioned, condoned, and helped extend and amplify local residential segregation.

Likewise, William Levitt, developer of the Levittowns, stated that he would never willingly sell a home to an African American. He claimed that if he built an integrated subdivision, no white family would purchase a home from him. Thus, it is tempting to say that it was superfluous for government policy to prohibit him from selling to black families. Yet the Federal Housing Administration was required by the Fifth Amendment to condition its bank guarantees on a commitment by Levitt to sell homes on a non-discriminatory basis. Had the FHA followed its constitutional obligation, Levitt would have had to accede because no bank would lend him the necessary funds without a federal guarantee. Some whites might

have refused to move to an integrated development, but not all would have done so—in the early 1950s, some residents of Levittown (NY) even formed a “Committee to End Segregation in Levittown.” Further, the housing shortage for returning war veterans was so enormous that for every bigoted white who might have declined the opportunity to live in Levittown, many others were in line to take its place. It is in this sense that government policy was the “driving force” behind segregation.

But it was not simply that federal policy institutionalized local norms or private practices or that state licensing authorities acquiesced in the development of residential segregation. The federal role was more proactive, which helped cement and extend the segregationist regime. Local segregationist ideologies were met and amplified through their federal counterparts. Without the federal role, it is unlikely that segregation would have taken such deep root or extended itself quite as far.

SKZ’s insistence on downplaying the government’s role is curious because their priority recommendation for future policy is a race-conscious subsidy for African Americans to move to white neighborhoods, and for whites to move to black ones. The authors acknowledge that contemporary Supreme Court doctrine would probably make such a policy “vulnerable to legal challenge,” even if it became politically desirable. They are likely correct, depending on how such a program was designed and implemented. But it is unlikely that even a future more progressive Supreme Court would allow such a policy unless the Court was persuaded that the policy constituted legislative remedial action responding to past government violations, not merely a market malfunction. Acknowledgment of government responsibility, therefore, is vital to the SKZ scheme.

VI. The Importance of Replication

Most readers, as we suggested above, must take the statistics of SKZ on faith, having neither access to its restricted dataset nor the skills to critically evaluate or replicate its analysis. This undertaking would not be a problem if SKZ were aimed only at other professionals who did have such access and abilities. But the combination of SKZ’s statistics with its ambitious policy recommendations suggests that they have a different policy-oriented audience in mind. And this audience must be cautious of the analysis presented in SKZ for several reasons.

SKZ’s proposals and several key arguments share striking similarities with a law review article that Richard Sander, the first-named SKZ author, wrote in 1988 when still a graduate student.⁸¹ The market failure argument, the claim that the FaHA and federal court decisions swiftly accomplished their purposes, even specific policy recommendations like the call for mobility grants—subsidies for African Americans moving to white neighborhoods—appeared first in the 1988 article. We are not critical of the

81. Richard H. Sander, *Individual Rights and Demographic Realities. The Problem of Fair Housing*, 82 Nw.U. L. Rev. 874 (1988).

fact that Sander's views are unchanged over thirty years. Certainly, few scholars would initiate a multiyear data-dive and research project like SKZ without having an idea of what they will find, and we would not have expected Sander and his colleagues to initiate the research leading to SKZ without a hypothesis they hoped to test.

But it is important for readers of any scholarly work to be aware of the authors' preconceptions or expectations (in academic discourse, a shorthand term for these is authors' "priors") because there is always a danger that the hoped-for result may have influenced the selection of evidence or choice of analytic tools. We do not suggest that this happened here, but only that it is a possibility that readers should be expected to consider. Yet, we can find no reference to the 1988 article in SKZ.⁸² The closest that it comes to such a hint is a statement that the book "had its origins" in a report Sander read as a graduate student in 1985, describing the success of a program to support black housing voucher recipients who located in white neighborhoods.⁸³ Sander suggests that the absence of resistance by whites to their new black neighbors led him to suspect that white resistance was not a significant explanation of continued segregation. That acknowledgment hardly reveals the extent to which, in 1988, the theories developed in SKZ were already present.

Moreover, Sander's statistical work in the past has not been without controversy. In response to a Supreme Court amicus brief he authored, similarly based on statistical analysis (the brief was critical of affirmative action in the University of Texas admission policies), eleven nationally prominent legal statisticians filed an opposing brief critical of his methods.⁸⁴ They stated that Sander's work

fails to satisfy the basic standards of good empirical social-science research. Sander's failure to set up proper controls to test his hypothesis and his reliance on a number of contradictory assumptions lead him to draw unwarranted causal inferences. At a minimum, these basic research flaws call into question the conclusions of that research.⁸⁵

82. The 1988 article itself has a footnote (n.193) indicating that a comparison of segregation in Chicago and San Antonio—a theme of SKZ—will be found in Sander's forthcoming doctoral dissertation. We assume that the themes and ideas in SKZ also draw out of this common source, but have not consulted the dissertation to confirm this suspicion.

83. The program was implemented as part of a settlement agreement in *Hills v. Gautreaux*, 425 U.S. 284 (1976). For a discussion of the program's outcomes, see, for example, LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

84. The eleven were a distinguished group, including, for example, Harvard statistics professors Donald R. Rubin and Gary King. Rubin developed the modern approach to thinking about causality and causal inference in statistics. They may not be correct about Sander, but they can claim the right to be taken seriously in such matters.

85. Brief of Empirical Scholars as Amicus Curiae Supporting Respondents at 27–28, *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013), 2012 WL 3418837, available at <http://www.utexas.edu/vp/irla/Documents/ACR%20Empirical%20Scholars.pdf>. Another economist

Sander, in turn, showed that other statisticians supported him. We do not propose to mediate this dispute regarding what the statistics tell us about the value of affirmative action, and we do not at all suggest that because Sander's previous statistical work in support of a counterintuitive conclusion—that affirmative action harms African Americans—has not been widely accepted, the provocations and various arguments found within SKZ must be based on flawed statistical analysis. Our only point here is that SKZ has not been in print long enough for other experts to access its restricted dataset and report on efforts to replicate its findings.

Given the heavy reliance on both a restricted dataset and the dissimilarity index, for any researchers' claims on any topic based on sophisticated statistical analysis, we would urge a degree of caution until other experts have reported on efforts to replicate or evaluate it, and until there is something approaching a professional consensus regarding whether the statistical evidence and SKZ's analysis are reliable and can be established with alternative measures of segregation as well. That does not mean that we think the proposals or policy program offered by SKZ is lacking in merit either. Quite the contrary. But given the number of contrarian or novel claims, some of the more provocative arguments bear further scrutiny before being accepted as established fact in the field of segregation studies.

VII. Sander's Other Scholarship and Advocacy Undermines SKZ's Case for Integration Policies

As readers may infer from the previous section, Richard Sander occupies an unusual and almost unique place in scholarly discussions of racial inequality. On the one hand, he has for long been an advocate of residential integration, the subject of SKZ. As a citizen and activist, he has participated in, even led, pro-integration and fair housing groups. On the other hand, as we alluded to above, he has been a prominent critic of affirmative action in higher education, having written extensively to advance a "mismatch hypothesis," the claim that if African-American students were not given an admission preference to the most competitive law schools and instead had attended lower-ranked schools where academic expectations were lower, they would be more likely to graduate and pass the bar.⁸⁶

who has been critical of Sander's mismatch theory is Jesse Rothstein, son of one of the co-authors of this article. The father, however, is in no way involved in any of the son's work, including the son's authorship of the critical paper, Jesse Rothstein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008), and the son is not at all involved in the father's work. SKZ fails to distinguish the two, as they appear as one entry in the SKZ index.

86. E.g., Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV.: 367 (2004); RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (2012). One of us (Rothstein), in a review of Randall Kennedy's *For Discrimination* (2013), praised Kennedy's view that even if Sander's statistics were valid, African Americans in particular and the nation overall would not be better off

Yet, while on its face, this argument presents itself as in the interests of African Americans themselves, in pursuing his claim Sander has supported the most prominent and dangerous advocates of rolling back the civil rights gains of the twentieth century. He submitted amicus briefs in support of the legal attack against affirmative action at the University of Texas (*Fisher v. University of Texas*) and at Harvard (*Students for Fair Admissions*, currently being litigated). These cases have been initiated and litigated by Edward Blum's "Project on Fair Representation"⁸⁷ and frame affirmative action not, like Sander, as a program that harms African Americans but as one that discriminates against whites or Asians. The Blum attack on affirmative action in education is part of a broader campaign that Blum leads against civil rights generally. For example, he organized and represented the plaintiff in *Shelby v. Holder* that successfully persuaded the Supreme Court to eviscerate the Voting Rights Act by overturning the preclearance requirements for voting rule changes in communities that have historically suppressed African-American votes.⁸⁸

We do not here make an argument of guilt by association. We raise it for a different reason. Sander has not only taken the lead in authorship of SKZ; he has also followed the book's publication by organizing a group of scholars to promote the book's policy recommendations—he calls this effort an "integration moonshot initiative" (which we strongly applaud). It may not be logically inconsistent to claim that affirmative action in education harms black students, while an even more radical form of affirmative action in housing is necessary both to meet the housing needs and desires of African Americans and to satisfy whites' desires for integrated living. Yet while these positions may not be logically inconsistent, they are certainly politically so. As Sander supports Edward Blum's campaign to chip away at the civil rights victories of the twentieth century, he helps to establish political as well as legal precedents that cannot help but undermine his proposals to expand opportunities for African Americans in integrated housing. Sander thus contributes to a new constitutional framework summarized in Chief Justice John Roberts's assertion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis

if we produced more black lawyers who graduate from less competitive schools to do wills and divorces at the cost of fewer who graduate from more competitive schools and wind up in in corporate suites, on the bench, and in other positions of leadership. Kennedy refers to Charles Hamilton Houston, Thurgood Marshall's mentor and Howard University Law School dean who deliberately reduced the number of Howard University Law School graduates to make admission to the school more competitive, believing that his policy would result in elite graduates who would be "capable of reforming the American racial order." FOR DISCRIMINATION, *supra*, at 128–34; Richard Rothstein, THE COLORBLIND BIND, AM. PROSPECT (June 22, 2014), <http://prospect.org/article/race-or-class-future-affirmative-action-college-campus>.

87. Project on Fair Representation, <https://www.projectonfairrepresentation.org>.

88. *Shelby County v. Holder*, 570 U.S. 529 (2013)

of race.⁸⁹ Yet in his 1988 article (mentioned above) that previewed some of the conclusions of SKZ, graduate student Sander favorably cited Justice Harry Blackmun to support the necessity of affirmative action in housing: Sander praised Blackmun's view: "In order to get beyond racism, we must first take account of race."⁹⁰

Is it logically inconsistent to say that we must ignore race in education, but take explicit account of it in housing? Perhaps not, for example, if one believed that housing and education are and have been completely independent sectors. However, most scholars and the United States Supreme Court itself understand that housing and education are mutually reinforcing and interdependent sectors. But, if not logically inconsistent, it certainly is politically and constitutionally so. SKZ is not only a scholarly book but an opening salvo of Sander's campaign to advance the book's policy recommendations. His support for "race-blind" policies in education certainly undermines his advocacy of race-conscious policies in housing.

At times, SKZ stretches to be needlessly contrarian about conventional (and accurate) understandings of the history and evolution of segregation, sometimes taking gratuitous swipes at other respected scholars and commentators. One such instance occurs in the discussion over the enactment of the Fair Housing Act, and subsequent enforcement. Contrary to the conventional narrative that the Fair Housing Act was weak by design until strengthened with amendments in 1988, and weakly enforced,⁹¹ SKZ claims that Justice Department immediately enforced it with vigor.⁹² SKZ asserts that Matthew Desmond, the highly regarded author of *Evicted*, wrote "nonsense" when he repeated the conventional view that only the assassination of Martin Luther King, Jr., and the subsequent riots that it provoked created the political pressure that forced Congress to adopt the Fair Housing Act. Desmond, not SKZ, is correct. SKZ supports its "nonsense" charge by noting that the Senate filibuster against the Act was broken a month before King was killed.⁹³ Yet SKZ ignores that even after cloture was invoked in the Senate, the Fair Housing Act languished in the House Rules Committee with the likelihood that it would die there; only the riots following King's assassination created sufficient public anguish to force the bill out. As Sander wrote in his 1988 article, "The House approved the Senate version in the tense days following the assassination of Martin Luther King, Jr.," and further reported that the worry was "widespread"

89. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

90. Sander, *supra* note 81, at 914.

91. See, e.g., MASSEY & DENTON, *supra* note 3, at 195–200.

92. SKZ, *supra* note 2, at 145–51.

93. Even the vote to invoke cloture offers little support for the SKZ analysis. The vote (by a margin of one) was obtained not because support for non-discrimination in housing was widespread, but only after President Lyndon Johnson bribed a senator from Alaska to switch his vote with a promise to fund a public housing project that the senator had been seeking.

among liberal Republicans that they would be accused of “rewarding rioters” by voting for fair housing.⁹⁴ Regardless of who is right, this sort of sniping seems unnecessarily gratuitous, distracts from the flow of the narrative, and undermines the persuasive force of the text by alienating sympathetic readers.⁹⁵

Conclusion

SKZ joins a welcome spate of books published in the last year or so that tackle the enduring problem of racial segregation.⁹⁶ There is much to commend in SKZ, both for its substantive account as well its effort to recenter the problem of segregation on the political agenda. SKZ may stand as one of the best chronological examinations of the problem of racial residential segregation in the United States, from the late nineteenth century to the present. While many books delve into the causes or consequences of segregation, no other book examines the issue so comprehensively, or offers such a carefully thought-out and ambitious program of government policy to tackle it.

Yet as we noted, this book is not without flaws. In an effort to develop contrarian narratives, at times the authors overreach. Moreover, the nearly exclusive reliance on dissimilarity scores at a time when the quality and quantity of alternative measures of segregation has blossomed is especially puzzling. Had SKZ applied alternative sets of metrics to develop or bolster its arguments or to investigate different facets to the story of the evolution of segregation, its arguments would have been more persuasive and its analysis more powerful.

94. Sander, *supra* note 81, at 880, 920 n.361.

95. For example, SKZ devotes two pages to criticizing Douglas Massey for making “sweeping generalizations,” and not “undertak[ing] anything like a ‘scientific’ investigation” for Congressional testimony, not for his scholarly work. SKZ, *supra* note 2, at 290–91. Such a critique of Massey’s scholarly work is fair game, but to criticize his congressional testimony on this ground seems unnecessarily churlish to us. And we note that Massey (in *American Apartheid*) lends strength to his analysis of the persistence of segregation by using not only a dissimilarity index but an exposure/isolation index as well.

96. See, e.g., JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* (2018); ALEX SCHAFRAN *THE ROAD TO RESEGREGATION: NORTHERN CALIFORNIA AND THE FAILURE OF POLITICS* (2018); MARIA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* (2017).

Facing Segregation: Lighting the Way to a Stronger Democracy

Stacy Seicshmaydre

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With so many excellent compilations coinciding with or commemorating the fiftieth anniversary of the Fair Housing Act, *Facing Segregation* is a compelling volume. The editors' goal is to "contribute to making the United States a country where people live together in neighborhoods that are racially and economically diverse . . . [because] segregation affects us all, individually and collectively, . . . undermin[ing] the shared goals of economic prosperity, democracy, and equality of opportunity." There is a déjà vu quality to so many of these works, decade after decade, documenting, decrying, and demanding a coordinated response to racial residential segregation, to little avail. Despite the ritualistic handwringing to which we have grown accustomed, several features of this book strike me as exceptional, noteworthy, and, indeed, inspiring.

First, many of the traditional works have sought to persuade the reader that racial residential segregation is the unfinished business of the civil rights movement and the reason for racial inequity across virtually all metrics. This book reflects progress to the extent it seems to assume widespread agreement on the myriad harms of segregation. Though it makes a case for policy interventions, in particular that segregation harms everyone economically and shreds the fabric of our democracy, it primarily focuses on "how" not "whether" to address this reality. In so doing, it does not fixate on racial disparities without simultaneously maintaining focus on their root causes; indeed, the policy prescriptions throughout the book are explicitly directed at segregation as the underlying mover of racial inequality.¹

Second, the book illustrates a fundamental truth that helps disrupt the diversionary debates within progressive communities over policy priorities. Nearly every housing program or policy intervention can be used either to maintain the status quo of segregation or to counteract it. Whether

1. As this review goes to print, I feel compelled to note that the consensus for addressing racial segregation, already fragile and faltering, is further threatened by corrosive social and political discourse on race and the growing influence at the federal level of viewpoints that do not acknowledge segregation as a current phenomenon deserving of any intervention by government.

a program remediates racial isolation or perpetuates it depends on how the program is designed and implemented and on its explicit ends. It is not enough to know the source of financing, who owns the land, whether the program is tenant-based or project-based, whether it improves the neighborhood or enables residents to move, whether it is in the city or suburbs, whether it is publicly or privately managed, and whether it is mixed-income or 100% affordable occupancy. Nearly every program has the potential to counteract segregation. Most do not. The authors show us how a wide array of tenant-based and place-based programs can be better implemented and aimed toward dismantling segregation. This disciplined focus throughout the policy prescriptions is a welcome contribution to the literature.

Third, and relatedly, the authors take as a given the role of public-private partnerships in “facing segregation” and the need to incentivize, temper, and channel the market, not blow it up. For all its indifference to the plight of disadvantaged people and places, the market is not going anywhere. These assumptions may not represent the paradigm shift that some people are seeking, but if there are underutilized or misdirected policy implements already in the toolbox, the authors are lighting the way in how to use them for remedial ends.

What follows is a review that tracks the editors’ structure. First, I discuss a series of essays addressing the causes and consequences of segregation. Then, I summarize essays addressing proposed policy prescriptions. I organize the proposed policy reforms into three major categories: comprehensive regulatory reform; public-private partnerships; and regimes and paradigms.

Part I: Facing Causes and Consequences

Even though the book assumes consensus on the existence of segregation as a ravaging force harming people and places, it does dedicate the first part to providing the most current manifestations and insights on why residential segregation is so enduring.

In Chapter 1, eponymously titled “Segregation,” Metzger and Webber explain the nuances of segregation and its modern characteristics. Though segregation has declined modestly in some metropolitan areas, it has increased in others, and there remains a high degree of absolute segregation regardless of the trends in any particular area. “By 2010, a third of all African Americans in US cities lived in communities that were hyper segregated by race (Massey 2015).” Beyond black-white segregation, Hispanic and Asian segregation increased between 1970 and 2010. In all events, “[e]conomic segregation, not only the concentration of poverty but also—and particularly—the self-segregation of affluent households, continues to be high and is rising (Reardon and Bischoff 2011; Reeves 2017).”

The authors make a pivotal “interest convergence” case against segregation as an economically destructive force for all. Over the past fifty years, the nation has become more diverse, but income and wealth are

more concentrated. The top ten percent earn fifty percent of the nation's income and control more than seventy percent of the nation's assets. "The more segregated the region, the lower the level of intergenerational social mobility." Against that backdrop, the chapter provides evidence to support the logical consequence: segregation harms the economy and stifles economic growth, particularly over the long-term; conversely, "greater levels of regional equality and integration foster stronger and more sustained growth." Subsequent chapters build on this theme: for example, Chapter 4 details the societal costs of racial health disparities in the hundreds of billions of dollars, with one estimate as high as 1.24 trillion dollars during a four-year period in the first decade of the century. I agree that any effort to summon the political will necessary to face segregation depends on the ability to increase consciousness regarding the shared economic benefits of integration.

Further, increasingly polarized voting districts breed extremism, leading to impaired democratic processes. Evidence suggests that dismantling homogenous living patterns can create the kind of "diverse and dynamic epistemic communities" best able to solve complex problems (Benner and Pastor, 2015). The editors emphasize that Americans still overwhelmingly share the underlying value that everyone should have an equal opportunity to succeed. It should logically follow, therefore, that tackling segregation would help Americans collectively achieve their shared aspirations for economically thriving, democratically vibrant, and opportunity-rich neighborhoods and regions.

In Chapter 2, *De Facto Segregation: A National Myth*, Richard Rothstein echoes his previous work detailing the history of segregation and calling for a transformational response.² He seeks to counteract the myth that both historical and present-day racial residential segregation is a product of private whims and prejudices, or even private-market discrimination happening under isolated and idiosyncratic circumstances. Rothstein, in this chapter, and indeed in numerous substantial works, demonstrates that "federal, state, and local governments were leading actors, inextricably involved with and frequently directing racially motivated housing policy." The practices permeate public housing programs, federal mortgage lending policy fueling white suburbanization, racial zoning, restrictive covenants, urban renewal and federal highway programs, discriminatory provision of municipal services, and more. He urges remedial action for the irrefutable and unconstitutional residential race policy but acknowledges that a comprehensive educational campaign must precede and build support for a sweeping remedy, beginning in schools. He recommends compensatory subsidies for moves to white suburban and gentrifying urban neighborhoods at the discounted prices black families would have paid

2. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (reviewed in 26 *J. Affordable Housing & Community Dev. L.* 5 (2017)).

if allowed to purchase in earlier decades. He also recommends a national inclusionary zoning requirement and equitable public transportation policy. At bottom, he seeks “to preserve the distinction between good social and economic policy intended to enhance equality and mobility, and remedial policy intended to undo the vestiges of de jure segregation of African Americans.” Though this historical summary may be familiar to some readers, it is always foundational, jarring, and relevant to any conversation about creating a path forward from residential segregation.

In Chapter 3, *The Siting Dilemma*, Lance Freeman describes the complicated history of black community support (in some quarters) for siting government-sponsored affordable housing in segregated neighborhoods, typically as a way of maximizing the efficiency of resources spent on constructing improved units for black residents. This history is intended to address a narrative Freeman contends is “incomplete,” even as he acknowledges the harms of racial isolation and the commanding role that whites played in deciding where blacks could—and couldn’t—live. Still, the fact that some black voices acquiesced in and others vociferously demanded construction of government-subsidized housing units in black neighborhoods does not carry the weight that Freeman suggests. The false choice presented to blacks since the inception of subsidized housing programs: accept units on segregated terms, or give up the units, is not a dilemma of the black community’s making. The sober “choice” in favor of decent housing to replace dilapidated units hardly establishes a black role in the creation of the ghetto. In contrast, whites had choices not available to black residents of subsidized housing, initially in all-white public housing projects in more white areas, later in subsidized single-family homes in all-white suburbs, and more recently as voucher holders in lower poverty neighborhoods.

Freeman is right to suggest that the siting dilemma, created primarily by forces outside the black community, continues to hang over siting decisions in the current era. But in attempting to complete the narrative, he omits certain elements. For example, though blacks welcomed subsidized opportunities to build black institutions and businesses in the New Deal era, these same investments were destroyed during later phases of urban renewal and the federal highway program. Though the chapter features the voices of black developers and politicians who bristled in later decades under site and neighborhood standards restricting further subsidized development in black neighborhoods, there are other voices we don’t hear, that is, the voices of parents contending with lead poisoning, childhood asthma, and gun violence. And though the NAACP’s opposition to segregation in the early years is noted, Dr. Martin Luther King Jr.’s steadfast pro-integration views are not. Of course, the point of the chapter is to highlight the “ambivalence” in the black community towards segregated public housing and to suggest that its views are just as complex and non-monolithic as any other residential community. And Freeman is absolutely right to point out that “[i]ntegrationists won half of their battle.” Gaining

restrictions on construction of affordable housing in segregated neighborhoods turned out to be much easier than opening up white neighborhoods for affordable housing. As noted in a subsequent chapter, only .05% of housing built in St. Louis during the post-war period was available for purchase by African-Americans. But, as also noted in subsequent chapters, housing (as opposed to other) investments in distressed neighborhoods where housing supply exceeds demand can actually exacerbate blighted conditions.³ In this context, therefore, the public housing “siting dilemma” is not so much fueled by black “ambivalence” as by exclusionary policies and discrimination. The housing “choices” black households have made, and continue to make, are constrained in innumerable ways.

In Chapter 4, *The Enduring Significance of Segregation*, Jason Purnell illuminates another dimension of segregation: “The cumulative disadvantage of multigenerational poverty and the social isolation of decades of residential segregation exact an economic toll and assault the body, producing poor health outcomes.” In particular, he notes an eighteen-year life expectancy disparity between two segregated counties in the St. Louis metropolitan area, one white and one black, with further significant overlap in the metro between race, income, and mortality rates for cardiovascular disease and cancer.

Primarily, this chapter provides additional insights on the role of social psychology in intergroup relations as a means of understanding how individuals and groups perpetuate segregation. Intergroup behavior is both competitive and ethnocentric. Group membership is a crucial aspect of identity, and there is a strong drive to identify one’s group as distinctive and superior to other groups. “Discrimination . . . is more about protecting resources and advantages for the in-group than it is about harming the out-group.” Groups will pursue their own goals rather than the common good absent intervention to create conditions for cooperation, such as the creation of “superordinate” goals.

In light of this intergroup relations research, programs aiming to promote intergroup contact must acknowledge and ameliorate the anxiety it produces. “Mere contact alone, evidence suggests, is woefully inadequate to the task of achieving intergroup harmony.” For positive attitude change to result, research suggests four conditions must be satisfied. Group members must: “(1) meet as equals; (2) share common (or superordinate) goals; (3) cooperate in reaching goals; and (4) have the support of authorities, laws, and norms (Allport 1954; Pettigrew and Tropp 2006).” This means “it may be optimal to simultaneously maintain subgroup distinctiveness and superordinate group membership.” Applying this research to strategies for supporting moves by people of color to high-opportunity neighborhoods,

3. New York City, listed in the chapter as a location where subsidized housing investments might ease blight, is exceptional in this regard. Later chapters in this volume reveal that public housing investment is not generally regarded as a blight-eliminating tool, particularly where housing supply exceeds demand.

the author suggests developing attachment to the new community so as to form a new individual and shared group identity, while at the same time maintaining connections to long-held groups and affiliations.

Given the nature of ethnocentric and competitive intergroup relations, this chapter ironically gives pause to highlighting race in any large-scale policy agenda to combat residential racial segregation and inequality of opportunity. Social science reveals what we are up against—the real or perceived zero-sum belief that all remedies assisting blacks will hurt whites. The author acknowledges the current consciousness and activism focusing on racial identity, but suggests the alternative, superordinate approach of “build[ing] a multiracial class agenda that promotes the life chances of all poor Americans” There is appeal to this strategy, though class-based programs can perpetuate segregation unless they are explicitly aimed at dismantling it for the benefit of all. Further, while civil rights laws require that racial groups demonstrate unique and discriminatory harms, I agree that public policy interventions in the political sphere must demonstrate broader societal benefits in order to break the impasse on segregation.

Part II: The Policy Agenda

Comprehensive regulatory reform

Unlike the later chapters recommending modifications of existing programs and policies to better harness the market and align them with the assumed goal of redressing segregation, Chapter 5 describes an overarching regulatory mechanism holding great promise for addressing segregation throughout the multi-billion-dollar federal housing and community development apparatus.

In Chapter 5, *Affirmatively Furthering Fair Housing and the Inclusive Communities Project Case*, Philip Tegeler describes how in 2015 both the Supreme Court case recognizing disparate impact as an available theory under the Fair Housing Act (FHA) and the U.S. Department of Housing and Urban Development’s Affirmatively Furthering Fair Housing (AFFH) Rule “brought the Fair Housing Act back to its roots as an anti-segregation tool.”

The chapter notes the well-established absence of clear metrics and accountability standards in the previous Analysis of Impediments to Fair Housing process implementing the AFFH requirement. Because compliance with AFFH had become “an empty bureaucratic ritual,” the Obama administration engaged in an eight-year process of developing and implementing a comprehensive rule interpreting AFFH. To make up for the negligible to lackluster implementation of the “pro-integration” provision historically, the new Rule requires a data-driven examination of racial and economic segregation and disparities. It also requires a robust community engagement effort leading to the development of concrete goals and strategies to inform community development and public housing agency plans across thousands of jurisdictions and public housing agencies receiving HUD funds.

The chapter discusses how HUD's new rule "echoes the ICP case with its focus on the structural forces that drive segregation" but reflects an evolving understanding of the federal role in addressing segregation as a driver of persistent racial and economic disparities. For example, the AFFH rule and its reporting tool emphasize structural disparities in access to resources across racial and ethnic groups; they also highlight the factors that cause these disparities such as access to financial services, lack of public investment, displacement due to economic pressures, and the location of environmental health hazards and proficient schools.

The AFFH rule acknowledges housing as a platform for access to opportunity in other areas. It operationalizes a planning response to this fundamental fair housing principle by "requiring an explicit analysis of access to opportunity by geographic area" and providing analytical tools for assessing disparities in access to education, transportation, the labor market, and environmental health. The AFFH rule explicitly requires jurisdictions to identify and remediate racially concentrated areas of poverty, which signals HUD's acknowledgment of the role of segregation in creating these areas, perpetuating them, and exacerbating the conditions within them.

Low-income jurisdictions and housing-industry groups were initially concerned that the rule would prevent development of low-income housing in high-poverty, segregated areas. Rather than pursuing an either-or strategy, the AFFH Rule adopted a "balanced approach." This approach calls for investment inside *and* outside of racially segregated areas, encouraging investments in segregated areas that would preserve or rehabilitate existing low-income housing units, rather than construct them. The fact remains that HUD has little ability to affect "community asset" investments needed in distressed neighborhoods, and overinvestment in segregated housing would preclude choice and disrupt the "balance" HUD seeks. "Defining what 'balance' means in specific local contexts, and using the AFFH rule to leverage nonhousing resources for struggling communities," will be part of the challenge for advocates if the new rule is ultimately implemented.

The chapter helpfully situates the new AFFH rule as part of a larger trend away from a passive reliance on private enforcement activities towards a more proactive role for federal administrators in ensuring compliance. This framework has a far greater potential to promote integration and address exclusionary impacts of local policies and decisions, but the author properly notes it is hampered by dependence "on the willingness of the federal agency to actually enforce its own directives." The latest move by the current administration to suspend and later withdraw the AFFH rule powerfully illustrates this limitation.⁴

4. See Notice: Withdrawal, 83 Fed. Reg. 23,928 (May 23, 2018); Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018); Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments, 83 Fed. Reg. 23,927 (May 23, 2018). HUD has

Policy reform in the public-private sphere

The next four chapters describe existing policy regimes, programs, or financing tools, how they are currently operating, and how they could be fine-tuned to explicitly address racial residential segregation and the resulting inequality of opportunity.

In Chapter 6, *Enabling More Families with Housing Vouchers to Access Higher-Opportunity Neighborhoods*, Barbara Sard brings her considerable expertise to bear in examining the Housing Choice Voucher (HCV) program. This program serves over two million low-income households by subsidizing their rents in the private market. State and local housing agencies administer the program, and HUD oversees it. Nearly half of the households using vouchers include minor children. Although the program performs better than other rental-assistance programs at providing options outside of distressed or extreme poverty neighborhoods (where forty percent or more of residents are poor), it does not reach its potential for expanding access to safe neighborhoods with good schools. Most people do not question the desire for choice when discussing markets for middle- and upper-income housing consumers, and Sard persuasively makes the case for why housing choice for low-income consumers is important in a program with “choice” in the title. “An expanding body of evidence suggests that children benefit from living in safe, low-poverty neighborhoods with good schools.”⁵ The chapter’s empirical basis for combating segregation does not distract from the primary focus of examining how to do it.

Some constraints identified in granting voucher households more choices include lack of awareness of opportunities, lack of assistance in identifying landlords willing to accept vouchers outside of high-poverty places, rental caps set at the metropolitan level rather than zip code level, weak federal incentives for public housing agencies to set policies that expand choices, and limited supply of moderately priced rental units in low-poverty neighborhoods.⁶ Sard proposes policy interventions that could be implemented “without congressional action or more federal funding.” These include creating performance incentives rewarding public housing agencies for achieving higher opportunity location outcomes; modifying policies that discourage families from choosing lower-poverty

also indicated its intention to undertake a wholesale amendment of the AFFH rule, which signals the probable reversion towards a failed passive approach to tackling segregation. See *Affirmatively Furthering Fair Housing: Streamlining and Enhancements* (Advanced notice of proposed rulemaking), 83 Fed. Reg. 40,713 (Aug. 16, 2018).

5. Sard states: “[T]he unfortunate reality is that we know relatively little about what types of interventions are effective on a substantial scale at transforming extremely poor, disadvantaged neighborhoods.”

6. Despite the constraint of limited supply, Sard does cite evidence that “the supply of rental units in most metropolitan areas is sufficient to enable a much larger share of families to use their vouchers in areas that would likely be better for children.” *FACING SEGREGATION*, at 94.

neighborhoods; minimizing jurisdictional barriers to relocation; and assisting families in choosing high-opportunity areas.

Regarding public housing agency incentives, HUD can give additional weight to locational outcomes in its performance reviews, reallocating administrative fees as part of this incentive, and measure performance based on items likely to attract and retain landlords, such as prompt payment of rent and expeditious inspections.⁷ Regarding HUD policies at odds with high-opportunity moves, Sard notes it can set more locally based payment standards to counteract the way metropolitan rent standards drive vouchers to higher poverty areas,⁸ expand search times beyond the usual sixty days when doing so would further fair housing, and ensure agencies expand their landlord lists to include options outside of segregated high-poverty areas. Regarding jurisdictional impediments, HUD could reduce balkanization of program administration by encouraging agencies within a metro area to form consortia with a single voucher-funding contract and revise fee structures to eliminate split payments for moves across jurisdictional boundaries. Regarding assistance to families to expand housing choice, leveraging support from private and public sources appears necessary to achieve the kind of intensive assistance required, particularly for regional mobility counseling programs. Additional assistance entails state and local policy changes in low poverty areas prohibiting voucher discrimination, incentivizing landlords to accept vouchers (e.g., tax abatements), and facilitating the development of tax credit units (e.g., dropping local approval requirements). Sard's housing voucher proposals are meticulous, yet feasible. Her singular focus on improving the lives of children by increasing their families' housing choices is unassailable.

In Chapter 7, *The Community Reinvestment Act [CRA] as a Catalyst for Integration and an Antidote to Concentrated Poverty*, John Taylor and Josh Silver explore "how improved examination procedures can make the CRA more effective in promoting integration within gentrifying and distressed neighborhoods." The CRA "creates an affirmative obligation for the market, through banks," to create jobs in and serve the credit needs of low and moderate income (LMI) communities. It also directs private-sector financing to businesses and home mortgages for LMI borrowers. CRA has

7. If HUD resumes implementation of a comprehensive AFFH rule, this can complement public housing agency planning for more effective direction of federal voucher resources towards social mobility and opportunity. Public housing agencies are subject to the requirement that they affirmatively further the purposes of the Fair Housing Act, and the final HUD AFFH rule discusses affirmative uses of the voucher program to address segregation, such as through regional mobility strategies.

8. As of this writing, the small area payment standard approach appears to be going forward in twenty-four metro areas despite an effort by HUD's current administrators to suspend the approach. See *Guidance on Recent Changes in Fair Market Rent (FMR), Payment Standard, and Rent Reasonableness Requirements in the Housing Choice Voucher Program*, Notice PIH 2018-01 (HA) (Jan. 17, 2018), <https://www.hud.gov/sites/dfiles/PIH/documents/PIH-2018-01.pdf>.

resulted in investments in small business and community development loans in the hundreds of billions of dollars, but the nature and scale of these investments “have not been sufficient to effect a significant reduction in the number of impoverished neighborhoods.” The authors are right to suggest that this may be because CRA was not originally intended to promote desegregation. They correctly recommend that “[b]anks should incorporate the goal of maintaining integration as an explicit part of their CRA strategy.” CRA examiners within bank regulatory agencies should view “pro-integrative bank financing in gentrifying and distressed neighborhoods as responsive to needs and eligible for favorable CRA consideration.”

The authors note an increase in concentrated poverty, including in suburban neighborhoods, as well as an increase in gentrification in the fifty largest metropolitan areas of the country. The authors advocate the approach of managing gentrification and fighting segregation (as opposed to fighting gentrification and managing segregation), using the CRA to minimize displacement and other costs while maximizing the benefits of gentrification.

Federal agencies conduct CRA performance evaluations that rate banks on loans, investments, and services in LMI neighborhoods, conducting the most comprehensive exams of banks with assets over \$1 billion. Regulators have begun to consider desegregation as part of CRA compliance by developing a question-and-answer (Q & A) document noting mixed-income housing and activities in gentrifying neighborhoods. However, a survey of CRA exams conducted by the National Community Reinvestment Coalition notes rare or minimal mention of mixed-income housing projects in neighborhoods with concentrated poverty or “responsive, innovative, and complex financing projects” in gentrifying neighborhoods. “If CRA examiners were intent on promoting integration in gentrifying neighborhoods or distressed ones, they would provide more robust descriptions of pro-integrative housing projects.”

Though “[f]inancing projects in LMI neighborhoods is the surest means to gain favorable CRA consideration,” the authors recommend that regulators examine performance context and more explicitly indicate in the Q & A document that activities desegregating neighborhoods are innovative and responsive to community needs, which is relevant to the assessment. In general, an assessment of neighborhood housing markets can help ensure that private lending activity is properly tailored to promoting long-term neighborhood stability and equity for LMI individuals. For example, neighborhoods with high vacancy rates where housing supply exceeds demand are more suited for large-scale economic development projects. Rather than incentivizing developments providing housing solely for LMI families in distressed areas, the authors suggest a mixed-income housing approach, where mixed-income is defined as providing forty percent of units for LMI families. In markets where demand exceeds supply and there are few abandoned and vacant homes, the CRA could favor scattered-site rehabilitation and preservation of affordable housing,

rather than mixed-income housing serving non-LMI households. The Q & A document does favorably consider activities undertaken as part of a planning process, but it could be rephrased to remove disincentives for desegregation. The authors instead recommend collaboration between banks and community groups in developing fair housing plans that promote integration.⁹ Ultimately, they urge that CRA exams should provide a greater level of detail about investments that further fair housing and promote integration; this would send a clear signal identifying promising practices for all stakeholders. To the authors' credit, a more targeted use of CRA to dismantle segregation seems long overdue.

In Chapter 8, *Promoting Poverty Deconcentration and Racial Desegregation through Mixed-Income Development*, Mark Joseph examines mixed-income development as a strategy for poverty deconcentration and racial desegregation. The benefits of mixed-income development include catalyzing private sector investment in urban revitalization efforts, constructing subsidized units in a physically attractive and well-designed environment, and increasing safety and stability in public housing communities. Yet Joseph notes that residents may continue to experience marginalization and alienation (race and class stigma) within the new developments, leading to what he describes as "incorporated exclusion." Mixed-income housing by itself does not guarantee inclusion, choice, or upward social and economic mobility. Or, stated another way, "poverty deconcentration is not the same as true integration."

Compared to tenant-based voucher programs, the place-based strategy of replacing segregated public housing with mixed-income housing provides a more controlled process of desegregation by drawing high-income families onto the original public housing site. Some units are set aside for public housing residents, some are offered to moderate-income households, and some are rented at market rates. To the extent that the redevelopment is of high quality, residents will benefit from the transformed site and any neighborhood investments that follow. On the other hand, mixed-income development is "considerably more expensive" than relocation through housing vouchers, as it entails political, market, financial, collaborative, and operational complexity. Of even greater concern, it provides on-site housing to only a fraction of the residents that were displaced through the demolition of the public housing units, both because the mixed-income housing footprint is smaller and available to a subset of residents and because new managers often employ stringent screening and return criteria. Though the rhetoric justifying public housing redevelopment focuses on improving the lives of long-neglected and isolated

9. If HUD resumes a robust AFFH process in the future, the authors recommend marrying it to other efforts of local jurisdictions and community groups that leverage federal CRA policy to encourage banks to make loans in a pro-integrative manner. The authors recommend that community groups review CRA exams to determine whether banks are promoting integration.

residents, the city clearly stands to benefit “by reclaiming the inner core for upscale, market-rate development.”

Despite the drawbacks and complexity associated with mixed-income development, Joseph recommends that this approach “should be pursued with even more vigor, commitment and skill as one of multiple policy approaches to poverty deconcentration and racial desegregation.” He recommends implementing strategies to ensure financial sustainability of the complex as a mixed-income site; technical assistance and consultation that is context-specific, achieving consensus on social and market goals among an array of public-private partners; and approaching development unit mix and design in a way that facilitates greater inclusion. With respect to low-income residents particularly, the chapter recommends high-quality relocation alternatives and incentivizing higher rates of return, with “protections against overly stringent or arbitrary screening procedures and a clear and transparent process for appeals.” The author also recommends high-intensity case management, investments supporting upward mobility, community building and effective neighboring initiatives, and more inclusion of residents in governance and decision-making. This chapter provides detailed suggestions across a range of categories, but, ultimately, “[m]ixed-income housing should be seen as a necessary but insufficient platform upon which other self-sufficiency efforts must be built.”

As further illustrated in chapters 7 and 9, mixed-income housing is not a panacea, but a tool that can expand opportunity when used with precision in the right places, in the right way, and in conjunction with other programs ensuring opportunity for all.

In Chapter 10, *Financing Affordability: Tax Increment Financing [TIF] and the Potential for Concentrated Reinvestment*, Sarah Coffin discusses how TIFs are seen as tools for attracting economic development deemed necessary for revitalization efforts without burdening taxpayers or creating windfalls for developers. Compared with tax abatements, which subsidize property owners without requiring property investments, TIFs ensure improvements in a particular location with the hope of stimulating new investments, jobs, property values, and the tax base.

Here is how TIFs work: A municipality designates an area for TIF and holds the area’s property taxes at a baseline valuation. Any appreciation in property taxes over and above the baseline during the project period (usually twenty to thirty years) is assigned to the project as “payments-in-lieu-of-taxes” or PILOTS, which are used to pay for approved project costs. The municipality can then issue bonds to generate funds to pay for the project’s infrastructure costs; the municipality pays off the bonds by recapturing the tax revenue above the baseline when the project is completed.

TIFs raise equity-oriented questions: whether TIFs generate a net gain for the region as a whole, whether investment would occur without them, whether diversion of tax revenues away from other entities impairs the delivery of needed services, whether there is sufficient accountability when a project fails to deliver promised benefits, and whether there is sufficient

planning to ensure that economic growth is equitable. Despite shrinking federal revenues and widening resource gaps across municipalities in the delivery of basic services, “TIF now funds sports stadiums, golf courses, shopping malls, and mixed-use commercial retail and office projects—projects typically not focused on equity concerns.”

Coffin criticizes cramped definitions of “economic development” that focus on preserving property values and retail tax base, thus lacking an equity focus and ceding the priority-setting in municipal development plans to the private market. “Municipalities require a diversity of economic development approaches that will lead to diverse and inclusive development, which in turn will lead to robust job opportunities for residents *and* strengthen the revenue base to support community growth into the future.” If the focus is on outcomes supporting inclusion, then TIF can be used in service of inclusion rather than economic development for its own sake.

The chapter helpfully recommends several means of ensuring that TIF is used to support inclusion, citing numerous examples at the state and local level. For example, states and municipalities can embed affordability within TIF projects. Inclusionary zoning requirements, such as requiring a twenty percent affordable housing set-aside as a condition of TIF support, can be targeted to gentrifying areas, used as infill within commercial centers, or promoted within community development plans. Recommended state-level reforms include the following: “requir[ing] TIF projects to include performance targets for more and better quality affordable housing in areas of opportunity;” revenue sharing among entities affected by TIF projects so they can maintain a consistent level of service quality; and making more and better data available to the public. Recommended local reforms include affordable housing performance requirements coupled with developer incentives and bonuses. These inclusionary programs allow projects to “maintain acceptable profit margins in exchange for more and better affordable housing units per the targeted area.” Echoing the chapters that discuss public housing agency management of housing vouchers, community engagement with banks to enhance CRA compliance, and the regulatory apparatus interpreting the AFFH requirement, the author notes that a community-centered comprehensive planning process is crucial prior to project launch.

Equity Regimes and Paradigms

Chapters 9 and 11 provide guiding principles and values for framing all other initiatives that are aimed at “facing segregation.”

In Chapter 9, *Market-Savvy Housing and Community Development Policy: Grappling with the Equity-Efficiency Trade-Off*, Todd Swanstrom recommends market-savvy policies that balance supply and demand and promote a mix of housing types and incomes. He recommends place-based investments in weak markets such as comprehensive community initiatives, people-based investments in strong markets in the form of permanently affordable housing,

and both people- and place-based investments in middle market neighborhoods in the form of homeownership assistance and visible improvements of neighborhood assets. This approach of building on strengths to create more neighborhoods with strong markets provides “opportunities to multiply public investments to the benefit of those most in need [and] ‘sticky’ capital that can be taxed or regulated without fear that it will flee.”

Swanstrom compares the current approach of housing and community development policy to a system of misguided resource rationing, where we avoid tough choices by defaulting to assumptions about what would be appropriate interventions in a strong-market metro. This approach directs resources to the most distressed neighborhoods while underinvesting in healthy neighborhoods “threatened by blight and contagious abandonment.” He likens this to a system of healthcare rationing that defaults to “huge investments in end-of-life care at the expense of primary care and disease prevention.” The avoidance of a more strategic allocation of resources stems from the notion that equality and efficiency are incompatible: “policies can focus resources on the neighborhoods and households that have the greatest needs but offer little possibility of leveraging private investment, or they can focus them on areas and households that have the fewest needs but greatest potential to leverage private investment.” He attempts to reconcile these objectives by recommending different strategies for different types of neighborhood housing submarkets—weak, middle, and strong.

Housing markets are social; in a declining, weak market “reinforcing causal loops can drive prices down further until the market can no longer sustain itself.” Decline can occur rapidly and can be difficult to reverse. In strong markets, the same reinforcing causal loops drive prices up and create geographically confined housing bubbles. This chapter recommends focusing housing and community development resources on healthy, “middle market” neighborhoods to inoculate them against the processes of contagious abandonment and decline. This strategy does not focus affordable housing resources on low-income families in places most in need. Rather, it is designed to boost market confidence by supporting homeownership for stable families in basically healthy, undervalued neighborhoods. The author argues that not engaging in this kind of strategic, submarket-specific approach risks consigning every neighborhood to decline.

Swanstrom does not recommend neglecting weak markets entirely; investments there can capitalize on the most valuable asset, that is, vacant land, such as through urban agriculture and storm water retention. But to him, housing subsidies make less sense in the most distressed neighborhoods. The possibility of recovery may be slim and creating new supply in places where it exceeds demand may further weaken the market by exacerbating vacancies, abandonment, and disinvestment. “Only after the market has been re-established should new housing be built . . . [because] [h]ousing policy, by itself, is rarely an effective instrument for boosting housing demand in such neighborhoods.” Reinvestment requires “a

comprehensive approach with enough power to stop or reverse the reinforcing causal loops that undermine market confidence." Cities cannot "pull out" of weak markets, but it is "wildly unrealistic to expect all weak market neighborhoods to come back."

How does the author's middle market approach address segregation? To the extent that middle market investments can help black households preserve and expand wealth, they can support integration and equity for the sizeable number of black households living in middle market areas. Supporting the neediest families in weak submarkets, who are disproportionately African American, does not require investing in distressed neighborhoods with little chance of recovery. Indeed, Swanstrom suggests that equity is served by "encouraging" them to move to high-opportunity areas. I feel compelled to note the reality, though, that needy families require more than encouragement to make opportunity moves. Investing in middle market neighborhoods may help expand the number of stable, integrated neighborhoods, but without financial and programmatic support, low-income residents will not be able to utilize the mobility option prescribed for them in this chapter.

But strong markets also have a role to play. Swanstrom acknowledges that "[w]ith demand so far ahead of supply in strong markets, governments can require developers to create affordable housing without killing the market." Even in weak regions, strong submarkets can remove regulatory barriers to affordable housing. Urban areas with rebounding census tracts can bend market strength toward creation of racially and economically diverse communities that extend market strength into weaker market neighborhoods. Partnerships with land trusts can ensure long-term affordability. Taxing districts designed to span strong and weak markets can support infrastructure improvements in weaker areas.

Swanstrom's approach of prioritizing middle market areas may have a "trickle down" quality to it, but its stated goal of "increas[ing] the number of stable, integrated communities that provide individuals with platforms to succeed in life" is laudable, so long as the most vulnerable households in weak submarkets are directly assisted by the other tools discussed in this volume.

In Chapter 11, *Beyond Education Triage*, William F. Tate IV argues "[r]egional brain regimes are needed to address the intergenerational problems of low academic achievement and educational attainment in urban America." Neuroscientists and other researchers studying the influence of poverty on brain development have tied poverty to disparities including school readiness and academic performance. "Constructive progress requires a new societal priority: protecting and nurturing the brain from conception to late adolescence."

Tate likens current education policy to a battlefield triage strategy, neglecting the most and least needy while focusing assistance on students most likely to show short-term improvements from concerted high

stakes test instruction. Schools are pressured to adopt “quick-fix reform” approaches, with many turning to charter schools despite mixed evidence on academic performance and their homogenizing effect on racial diversity.

Unlike other authors in this volume who are more optimistic about transforming the segregated landscape on which we enact our policies, Tate assumes that “[m]etropolitan regions in the United States are segregated, and for purposes of educational policy, there is no reason to develop school-reform strategies assuming that this part of the ecology will change in the near term.” This is so despite the fact that “[a] preponderance of social science evidence indicates that racially diverse schools are positively associated with achievement in math, reading, and science, as well as with school completion, critical thinking and academic engagement of pupils across racial groups.” To counteract what he describes as the deprivation of pivotal family resources accruing across multiple generations, Tate proposes concrete, evidence-based strategies to deal with the short-term assumption of continued segregation.

Tate defines a regime as “public-private partnerships organized to attain a common goal.” He compellingly describes the predominant experience of urban communities as directing their significant financial, land, and political assets towards building segregation, industrial, and sports regimes, rather than brain regimes. He urges research-intensive urban universities to serve as the necessary catalytic agents for moving from the segregation regime to the brain regime, generating and synthesizing knowledge across disparate fields, “with an aim to inform policy and practice.”

Conclusion

This book’s accumulated wisdom exhorting us to “face segregation” harkens to Dr. Xavier de Souza Briggs’s observation in 2005: “[A]fter thirty years of modest experimenting with wider housing choice, it appears that the nation primarily lacks the will, not the way, to reduce persistent segregation by race and class.”¹⁰ The editors echo Briggs’s sentiment: “Public policy implementation requires political will.” Nevertheless, they make a valuable contribution by surveying the most current and promising public policy solutions for facing segregation. Perhaps looming threats of losing what ground we have gained to create neighborhood equity will provide the needed spark for informed action.

10. Xavier de Souza Briggs, *Introduction* to *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 1, 6 (Xavier de Souza Briggs ed., 2005).

Causes and Consequences of Segregation

Brian Knudsen

Segregation by Design: Local Politics and Inequality in American Cities

By Jessica Trounstine

Cambridge University Press 2018

282 pages. \$99.99 (cloth); \$29.99 (paper)

Political scientist Jessica Trounstine, a leading scholar of American local government politics, has written a remarkable new book sure to become a must-read for academics, attorneys, practitioners, activists, and citizens seeking to understand the causes and consequences of urban residential segregation over the past century. Combining historical study with qualitative and quantitative social science methods, her book hones in on the particular role of local government policy—especially around land-use, zoning, and control of public services—in creating and perpetuating racially and economically segregated living patterns that persist to the present. White property owners and land-oriented businesses, the book contends, use their disproportionate social power and access to local government institutions to push these bodies to pursue segregative land use, planning, and development policies to protect white’s property values and exclusive control over public goods. The book’s chapters carefully and systematically analyze different pieces of this overall story, which in combination help the reader make sense of contemporary “unequal access to public benefits and polarization in local and national politics.”¹

Segregation by Design makes several fundamental contributions that are necessary to highlight. First, Trounstine herself argues that her account of the local governmental origins of race and class segregation in American cities “suggest[s] a reconceptualization of the fundamental drivers of local politics.”² Unlike the dominant theories of urban politics—pluralism, structural forces, and regimes—Trounstine’s book considers the “fundamental role of race and class in determining local political phenomena.” By grappling with the “institutionalized power of the white property-owning community,”³ we come away with a better grasp of factors influencing local political battles as well as with an enhanced sense of the forces shaping segregation and inequality. Further, the author clearly intends for the book to contribute to and build upon a new wave of race-conscious

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1. JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 205 (2018) [hereinafter *SEGREGATION BY DESIGN*].

2. *Id.* at 208.

3. *Id.* at 210.

scholarship and activism. Following authors such as Richard Rothstein, Ta-Nehisi Coates, Jeff Chang, Keeanga-Yamahtta Taylor, Michelle Alexander, and Asad Haider,⁴ Trounstein's book demands that we grapple with past racial injustices as well as the way that race continues to inform our fraught contemporary moment. As Coates writes in *The Case for Reparations*, an "America that asks what it owes its most vulnerable citizens is improved and humane." *Segregation by Design* makes a novel contribution by focusing race-conscious scholarship upon sub-national governmental processes in American cities, something rarely elsewhere done.

Second, segregation is once again a topic of study and intellectual discussion after a period of dormancy, including in several well-received journalistic⁵ and historical⁶ accounts. *Segregation by Design* is a welcome addition to this new wave, and is unique in several ways. Most notably, this book stands out in terms of its social scientific rigor. After zeroing in on her thesis—local governments cause segregation at the behest of white homeowners—the author employs data-driven empirical methods to systematically test her propositions in a variety of ways. For instance, she looks at factors explaining the adoption of zoning and land-use controls in early twentieth-century cities, and then finds subsequent links between these policies and higher race- and class-based segregation within cities. Further, her data also permit an examination of the racial disparities in public good provision due to segregation, and she discerns relationships between segregation and political polarization at the city and national level. The book is a diligent analysis of this important topic. Moreover, Trounstein plausibly contends that her account of the causes of segregation departs from existing ones that pin segregation singularly on either racist attitudes or socioeconomics. As elaborated below, the book instead holds that segregative policies and racial inequality "are driven fundamentally by whites' economic and political self-interest, which interact with and produce racist beliefs."⁷

Third, the book's careful analysis of the dangers of localism make it well suited to contribute to an emergent conversation in the civil rights, fair housing and urban politics arenas regarding the appropriate governmental level(s) at which to achieve progressive change. Questions concerning the size, centralization and diversity of governmental jurisdictions are not

4. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); TA-NEHISI COATES, *THE CASE FOR REPARATIONS*, ATLANTIC (JUNE 2014); JEFF CHANG, *WE GON' BE ALRIGHT: NOTES ON RACE AND RESEGREGATION* (2016); KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); ASAD HAIDER, *MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP* (2018).

5. Coates, *supra* note 4.

6. ROTHSTEIN, *supra* note 4.

7. SEGREGATION BY DESIGN, *supra* note 1, at 207.

new. For instance, James Madison presciently foreshadowed contemporary metropolitan issues when he argued that “plans of oppression” are more likely as the number of citizens in a jurisdiction decrease.⁸ By contrast, Tocqueville maintained in *Democracy in America* that localism and decentralization were fundamental to the health of democracy: power kept close to the people engages citizen interest in public affairs and results in more responsive and effective governance. These apparent conflicts between civic engagement and proximity to power on the one hand and local oppression and marginalization of minorities on the other have informed centuries-long debates regarding the merits of centralized or fragmented government. Or, as Roderick Hills might ask, “[Are] local governments . . . less like Athens and more like Mount Laurel[?]”⁹ Bringing it to the present, urbanist Richard Florida¹⁰ and legal scholars Heather Gerkin¹¹ and Richard Schragger¹² each have recently called for what Gerkin calls a “new progressive federalism”: the embrace of governance at the local level as well as the relative empowerment of local governments within the nation’s federal structure. By contrast, Simone Tulumello¹³ advocates for more

8. JAMES MADISON, FEDERALIST No. 10 (1787), available at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>.

9. Roderick M. Hills Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000).

10. RICHARD FLORIDA, *THE URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT* 213 (2017):

It is time for American mayors and community leaders to press for a similar devolution of power that will enable them to better steward and govern their own communities and address their own unique sets of problems as they see fit. Such a strategy recognizes both the advantages that come from local innovation and problem solving and the substantial variation in local capabilities and needs.

11. Heather K. Gerkin, *A NEW PROGRESSIVE FEDERALISM*, 24 *DEMOCRACY: A JOURNAL OF IDEAS* (Spring 2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism> (last visited May 5, 2019):

But it is a mistake to equate federalism’s past with its future. State and local governments have become sites of empowerment for racial minorities and dissenters, the groups that progressives believe have the most to fear from decentralization. In fact, racial minorities can wield more electoral power at the local level than they do at the national. And while minorities cannot dictate policy outcomes at the national level, they can rule at the state and local level.

12. Richard C. Schragger, *CITY VERSUS STATE*, *BOSTON REV.* (Feb. 14, 2018), <http://bostonreview.net/forum/cities-hill/richard-c-schragger-city-versus-state> (last visited May 5, 2019).

13. Simone Tulumello, *WHAT’S WRONG WITH THE NEW LOCALISM: A RESPONSE TO RICHARD FLORIDA AND BRUCE KATZ*, *PROGRESSIVE CITY* (Aug. 15, 2018), <https://www.progressivecity.net/single-post/2018/08/15/WHAT%E2%80%99S-WRONG-WITH-THE-NEW-LOCALISM-A-RESPONSE-TO-RICHARD-FLORIDA-AND-BRUCE-KATZ> (last visited May 5, 2019).

centralization and wealth redistribution (perhaps through a national coalition of cities) as opposed to devolution. And, in a recent study, Kate Walz and Patricia Fron¹⁴ call attention to how “hyperlocal control can maintain residential segregation” via Chicago council members’ “aldermanic prerogative” to block family affordable housing developments. Sorting out the complexities of this debate falls outside the remit of one book, but Trounstine’s consistent findings appear more in line with the criticisms of localism than with arguments in its favor. As will be described in more detail below, the entire thrust of the book illustrates empirically how local governments have been employed for a century in ways that have created some of our society’s most fundamental injustices. For instance, Trounstine shows that spatial and political balkanization go together in segregated cities. Local control is no panacea in such places since cooperation across groups is made difficult and as a result public services are underprovided. Further, her data show that pursuit of liberal policies in central cities is associated with more segregation across cities within metro areas. The policy practicalities of her work are multifaceted and touched upon later but are consistent with Thomas Silverstein’s admonition that the “civil rights movement simply cannot embrace local control without conditions.”¹⁵

Local Government Creates Segregation, a Theory

The book, as its title suggests, is premised on the idea that segregation is not “organic or inevitable,” but an intentional outcome “pursued through the political process” and “offering spoils to those with political power.”¹⁶ Trounstine undertakes a systematic historical and empirical analysis of one important design component giving rise to segregation, namely the role played by local government.

Why *local* government? As the author argues, local governments are those that undertake policies that affect property values. Through zoning, land-use, and development decisions, local governments shape what “gets built, what doesn’t get built, and where the building happens.”¹⁷ They also control the public services that are provided as well as their distribution. The history of residential segregation in the United States as described here

14. Kate Walz & Patricia Fron, *THE COLOR OF POWER: HOW LOCAL CONTROL OVER THE SITING OF AFFORDABLE HOUSING SHAPES AMERICA*, CLEARINGHOUSE COMMUNITY 1 (Oct. 2018). In a passage highly resonant of Trounstine, the authors describe the consequences of “aldermanic prerogative” in zoning and planning decisions:

Local governments such as Chicago that cede to the NIMBY demands of white communities face major consequences. Concentrated decision-making power among those with political capital while low-income black and brown residents have little say in where and how they live creates a vastly unjust society beyond housing.

15. Thomas Silverstein, *COMBATING STATE PREEMPTION WITHOUT FALLING INTO THE LOCAL CONTROL TRAP*, 26 *Poverty & Race* 1 (Oct.–Dec. 2017).

16. *SEGREGATION BY DESIGN*, *supra* note 1, at 23.

17. *Id.* at 23.

is one where property owners—who for discriminatory historical reasons have always been disproportionately white—and land-oriented businesses have for a century dominated local political processes in order to enhance the value of their property and ensure exclusive access to vital public goods. In this telling, infrastructure investments are made (or not made), nuisances (or amenities) are located in certain neighborhoods, cities are zoned for more (or less) multifamily housing, and services like police and education are funded (or not funded), all with an eye toward protecting white property values. As a result, Trounstine argues that through these policies “local governments create and recreate segregation along race and class lines”¹⁸ and also generate unequal access to public goods. “White advancement,” she writes, “was built on the backs of people of color.”¹⁹ Also incorporated into this picture are analyses of how white property owners respond to threats to their control over local government policy, namely by increasing the scale of segregation from isolated neighborhoods to isolated cities (i.e., suburbanization). The consequences of these local political battles continue to the present, Trounstine concludes, in racially (and class-based) disparate access to public goods as well as political polarization.

One important strength of *Segregation by Design* is the care the author devotes to counterposing the above conceptual framework against extant competing theories of segregation and then explaining why her approach is superior. Trounstine situates the book’s focus on local government against the predominant explanations of segregation that are based on individual choice. For instance, one common theory holds that segregation is due to individual racist prejudice and (especially white) preferences for same-race neighbors. A second theoretical perspective holds that segregation comes as a result of black-white socioeconomic differences and varying ability to pay for housing and transportation. Trounstine has two quite plausible replies as to why the conceptual model she offers is preferable over and above these existing theories. First, she rightly points out that the “backdrop to individual choice is the type and value of housing that is available—factors that are determined by governments.”²⁰ In addition, governments serve as an enforcement mechanism for the achievement of collective goals, here understood to be the maintenance of white property-owner home values and wealth. *Local* governments, through their ability to regulate land use and make decisions about service provision, can generate and enforce segregation and ward off any individual deviation from the collective goal.

The above calls attention to the ways that race and racism are (and are not) employed in Trounstine’s explanatory theory of segregation. As noted, segregation is *not* traced in the book solely to individual-level racial

18. *Id.* at 205.

19. *Id.* at 12.

20. *Id.* at 28.

prejudice or animus (i.e., racism). Instead she offers a conception of local politics driven by whites' political-economic considerations (i.e., property values and public goods), with race "animating the choices of [white] residents and political actors." Citing Ibram Kendi, Trounstine holds that racist ideas follow from discriminatory policies and are used to "redirect the blame for racial disparities away from those policies and onto Black people."²¹ The author's decision to foreground race in terms of its interactions with political-economic determinants seems reasonable and generally consistent with the broader theory. However, by proceeding in this way the book comes to a confusing place on *racism* that it never manages to satisfactorily resolve. For instance, far from merely proceeding from local policies, existing racist attitudes necessarily must have informed white's perceptions about how proximity to nonwhites affected property values. If racist beliefs are outcomes, then what explains *these* beliefs? While Trounstine does briefly call attention to the "racist, classist understanding of property values and who deserves public benefits,"²² she essentially takes such racist understandings of property values for granted. She is right to emphasize the political power of white property owners, but the book could have better elaborated how race *and* racism enter the story.

Major Findings

Following the first two chapters which lay out her conceptual theory of segregation, chapters 3 through 9 each contain a separate analytical piece of the author's account concerning the role of local government policy in creating segregation. Trounstine is a skilled empiricist, and ably brings together novel datasets and statistical methods to submit her core hypotheses to test. The presence and rigor of these quantitative analyses differentiate the book from much of the more recent—and less scholarly—writing on segregation. However, it is the author's commitment to *mixed methods* that truly sets the work apart. Each chapter also includes rich historical analyses and accounts, which serve to bring the quantitative discussions to life. The effectiveness of this interplay between provision of historical context and serious data analysis points the way to what social science should be.

Trounstine draws from multiple sources to assemble a fascinating dataset encompassing many cities over decades, and combining information on segregation, spending on city services, and the adoption of zoning regulations.²³ The analyses in chapters 4, 5, and 8 especially deserve mention. In

21. IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 9 (2016).

22. *SEGREGATION BY DESIGN*, *supra* note 1, at 30.

23. She further notes:

The data that I have collected measure segregation both within and across cities, account for both race and class divisions, and cover city expenditures on a wide range of services during the entire twentieth century. This required the encoding of archival data, the generation of new spatial data using GIS, and the compilation of thousands

chapter 4 she empirically demonstrates that early twentieth century cities with more public good expenditures and property tax revenues were more likely to implement zoning regulations. In such places, local officials had a greater incentive to use zoning to “protect the existing distribution of public goods and the total tax revenue.”²⁴ The author’s regressions also indicate that cities that were the earliest adopters of zoning (between 1900 and 1930) grew more segregated over the next fifty years.

After providing quantitative evidence that local governments “institutionalized prejudicial behavior and promoted segregation through the use of zoning ordinances”²⁵ to protect the property tax revenue of white homeowners, in chapter 5 she studies the relationships between segregation and inequality in public goods provision from 1900 to 1940. Because it is easier to deny public goods to neighborhoods than to households, Trounstine here predicts that as “segregation geography shifted, so too did public goods inequalities.”²⁶ In the most compelling and innovative analysis in the book, the author analyzes the link between racial and renter segregation and sewer and water extensions in four cities from 1900 to 1940. First, she uses historical maps of the Baltimore, Boston, Chicago, and Philadelphia sewer systems to create ward-level counts of sewer segments by decade and joins these counts to demographic data from the Census for these early years of the century. Regressions employing these novel data show, for instance, that “majority black wards see no additional investment in their sewer systems in highly segregated cities.”²⁷ Separate analyses using Census data also indicate that these trends persist into more recent decades as well. In the words of David Torres-Rouff, these extraordinary findings suggest that, through their policies, local governments “produced a city that physically imposed inequality on its citizens.”²⁸

Finally, chapter 8 illustrates shifts in whites’ policy strategies in the face of mid-century erosion of their power to dominate city policy and public goods distribution. In the postwar period, demographic shifts, social movements, federal policy interventions, and elections of black mayors changed the balance of power in many cities. White homeowners could no longer reliably dictate the policy maneuverings of their local governments to protect their economic interests. Trounstine empirically shows how in reaction whites shifted the spatial scale of segregation, or in other

of digitized observations from the United States Census. The comprehensiveness of the data allows for a more complete picture of the patterns of segregation over time and allows for an analysis of the factors that give rise to this variation.

Id. at 44.

24. *Id.* at 86.

25. *Id.* at 97.

26. *Id.* at 98.

27. *Id.* at 108.

28. DAVID TORRES-ROUFF, BEFORE L.A.: RACE, SPACE, AND MUNICIPAL POWER IN LOS ANGELES, 1781–1894, at 227 (2013).

words they traded “homogeneous neighborhoods within cities for new homogeneous cities instead.”²⁹ This chapter makes clear that the magnitude of white homeowners’ commitment to preserving property values through segregation was so great that it pushed forward the process of suburbanization.

While chapters 7 and 9 nicely link segregation to political polarization both within and across cities, chapter 6’s relationship to the rest of the book is hard to discern. Most of the chapter is devoted to the influence of urban renewal spending on segregation in the middle decades of last century. Unfortunately, this chapter’s contribution to the book’s overall narrative theme is not made clear, whereas the other chapters all build on one another in a careful sequential order.

Another criticism pertains to the issue of causality. While every chapter’s analysis is carefully and rigorously undertaken, each is nevertheless separate from one another. Furthermore, it is clear that the reader is invited to draw a through-line from the statistical analyses in the earlier chapters to those coming later, so as to weave everything together into a seamless continuous story. The author should have been more explicit about the presence or lack of causal connection between the analyses undertaken in different chapters so readers can decide for themselves as to the plausibility of the book’s overarching narrative. Nevertheless, the findings present powerful evidence as to the historical role that local governments have played in fostering racially disparate access to public goods that persist to this day.

Considerations for Policymakers

In the final chapter, Trounstine touches upon several policy levers that she suggests may help undo the “devil of segregation.”³⁰ Federal and state governments, it is contended, can help compel desegregation on various fronts, as long as such efforts interact with local institutions like school boundaries.³¹ On this score, the author writes that “desegregating neighborhoods and schools is likely to require stripping, to some degree, local control.”³² She also notes that state governments may also be a preferred avenue for reducing inequalities, insofar as some state constitutions guarantee provision of public goods and positive rights including provision of public schooling and health care, preservation of the natural environment, and care for the poor and aged.

However, there are also a number of promising policy alternatives that Trounstine does not mention that can give low-income families with

29. This is of course the process of suburbanization. See *SEGREGATION BY DESIGN*, *supra* note 1, at 185.

30. *Id.* at 212.

31. See also Megan Haberle & Philip Tegeler, *COORDINATED ACTION ON SCHOOL AND HOUSING INTEGRATION: THE ROLE OF STATE GOVERNMENTS*, 53 U. Rich. L. Rev. 949 (2019).

32. *SEGREGATION BY DESIGN*, *supra* note 1, at 213.

children access to segregated, higher- opportunity neighborhoods. For instance, public housing authorities can make sure that program rents are set high enough so that prospective Housing Choice Voucher families can afford units in lower poverty neighborhoods. Many housing authorities around the country have done this, including by adopting Small Area Fair Market Rents.³³ Furthermore, housing authorities can conduct outreach to recruit landlords into the Housing Choice Voucher program, with a special focus on those renting units in higher opportunity areas. *Housing mobility programs* can help low-income families get information about where lower poverty neighborhoods are in their metro area.³⁴ Municipalities can pass source of income ordinances that prohibit housing discrimination on the basis of the source of one's income. Finally, the federal Affirmatively Furthering Fair Housing rule exists to ensure that localities around the country are expanding housing choice, redressing segregation and discrimination, and promoting opportunity within neighborhoods. Although the rule was suspended by the Trump Administration, some states and municipalities are going ahead with their Assessments of Fair Housing.

As important as such policies are, *Segregation by Design's* primary contribution is in the systematic way that it pushes forward our understanding of the causes and consequences of segregation in the twentieth and twenty-first centuries. As Trounstine writes (quoting Abrams³⁵), "[W]hen democratically elected local governments developed policies promoting segregation, they became 'instruments of oppression against minorities.'"³⁶

33. U.S. DEP'T OF HOUSING & URBAN DEV., SMALL AREA FAIR MARKET RENTS (2019), available at <https://www.hudexchange.info/programs/public-housing/small-area-fair-market-rents>.

34. See, e.g., BALTIMORE REGIONAL HOUSING PARTNERSHIP, BALTIMORE HOUSING MOBILITY PROGRAM (2019), available at <http://www.brhp.org>.

35. CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY IN HOUSING PREJUDICE 207 (1955).

36. SEGREGATION BY DESIGN, *supra* note 1, at 74.



SYMPOSIUM: BUILDING BRIDGES: EXAMINING RACE AND PRIVILEGE IN COMMUNITY ECONOMIC DEVELOPMENT



Introductory Overview

Priya Baskaran, Renee Hatcher, and Lynnise E. Phillips Pantin

The country has been in economic recovery since the Great Recession in 2007. Home prices have since stabilized after the mortgage and foreclosure crisis that followed the Recession. In late 2017, the federal government passed the Tax Cuts and Jobs Act, leading to a surge in corporate earnings. As of the time of this writing, major stock indicators are at all-time highs, and interest rates are low. But corporate indicators and interest rates do not paint the entire picture. Most of the economic recovery is in affluent, predominately white parts of the country, while distressed areas inhabited by people of color have been overlooked. While economic change may have come to certain neighborhoods, what has also changed are the racial demographics, increased housing prices, and access to health foods, along with the exodus of long-term residents. Wages are stagnant despite near zero unemployment, public schools are more segregated than ever, and the racial wealth gap widens.¹ Patrick Sharkey calls this juxtaposition an “uneasy peace.”² At the start of the new year, law professors gathered at the 2019 Association of American Law Schools (“AALS”) Annual Meeting in New Orleans, Louisiana, to discuss this “uneasy peace” and find solutions to address the systematic racial disparities that are barriers to achieving economic justice.

During the 2019 AALS Annual Meeting, we proposed a discussion group: “Building Bridges: Examining Race and Privilege in Community Economic Development.”³ The goal was to identify how community economic development (“CED”) law school courses, both experiential and

1. See Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 St. Louis L.J. 419 (2018).

2. PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE AND THE NEW WAR ON VIOLENCE* (2018).

3. Formal participants included Michéle Alexandre, Priya Baskaran, Susan D. Bennett, Sheryll D. Cashin, Patience A. Crowder, Scott L. Cummings, Edward W. De Barbieri, Renee Hatcher, Audrey G. McFarlane, Camille K. Pannu, Lynnise E. Phillips Pantin, Joseph Pileri, Anika Singh Lemar, and Dana A. Thompson.

doctrinal, as well as CED practice generally, serve to build bridges across racial and socioeconomic boundaries.

When we proposed the session, we did so in response to the freighted political and economic environment in the United States.⁴ As lawyers, scholars, and educators working with economically disenfranchised communities in various regions,⁵ we felt that addressing the issues of race, poverty, and economic development remained vitally important. No amount of granular economic or market analysis or detailed dissections of national party politics can overshadow the everyday struggles of our clients in Chicago, Harlem, and Appalachia. We also recognize the rare opportunity to discuss this topic in depth with other legal academics, as AALS creates an important forum for the open and free exchange of ideas, stories, and experiences among scholars.

CED is inherently interdisciplinary in nature, and AALS draws experts from a variety of substantive fields ranging from environmental justice to municipal finance. Scholars and professors actively engaged in representing vulnerable communities, whether through clinical teaching or pro-bono service, also had the opportunity to engage with policy experts and empirical researchers. We wanted to use this timely venue to discuss the future of CED and how we—as lawyers, scholars, and educators—could work to best represent communities. Moreover, we knew the discussion must center on opportunities to support movements and build bridges across race and socioeconomic divides.

The discussion group featured presentations by clinicians, non-clinicians, and CED scholars on their current research and thinking. The group then transitioned into a larger discussion tackling the following challenging questions:

- How does community economic development serve to build bridges in local communities, across social-economic and racial boundaries?
- How does race and privilege affect who benefits from community economic development initiatives?
- How does the racial wealth gap disadvantage minority entrepreneurs?

4. See Priya Baskaran, *The Economic Justice Imperative for Lawyers in “Trump Country,”* 7 TENN. J. OF RACE, GENDER & SOC. JUST. 161, 163–64 (2018).

5. Professor Renee Hatcher directs the Community Enterprise and Solidarity Economy Clinic at John Marshall Law School-Chicago and serves community-based businesses and organizations in Chicago, Illinois, with a focus on solidarity economy initiatives; Professor Lynnise Pantin directs the Entrepreneurship and Community Development Clinic at Columbia Law School, which provides free transactional legal services to low- and moderate-income entrepreneurs and community-based organizations in the neighborhoods surrounding the university on legal issues relating to new and emerging businesses; and Professor Priya Baskaran directs the Entrepreneurship and Innovation Law Clinic at West Virginia University College of Law, where she provides transactional legal services to rural populations.

- What are the factors of assessment and measurement for successful CED initiatives?

This discussion reviewed the ways in which CED can both exacerbate and alleviate racial and socio-economic inequality. Although the discussion proved incredibly rich and illuminating, it highlighted pressing limitations in our current approach to CED work.

First, there is a tension in the current, dominant mode of community economic development work, which is often heavily connected to a market-based approach. Market-based CED “seeks to restructure underperforming markets in low-wealth urban locales by providing economic incentives and other means of tangible support to attract and retain private businesses and corporations.”⁶ In critiquing the market-based approach, participants described various ways in which CED has strayed from its grassroots origins to the benefit of large developers and other corporate interests. For example, Empowerment Zones⁷ have driven large-scale development that does not necessarily benefit disenfranchised communities but can serve as agents of displacement or simply create additional disparities between newer residents and long-standing community members. Increasingly, CED scholars and practitioners are working to reclaim the dominant narrative, seeking opportunities to proactively support community-led initiatives.⁸ Discussants keenly noted the need to better integrate our work with community-led power building efforts and social movements, through greater collaboration with local activists and community-based organizations.

However, the group also conceded the challenges of engaging in this work. At the outset, communities are in various stages of mobilization. For example, communities in certain major cities and coastal states have been actively organizing for decades. These communities have won significant victories, upending development plans that would have led to mass displacement and caused other types of devastation to their neighborhoods.⁹ In contrast, some participants work in communities that are

6. Renee Hatcher, *Towards a Solidarity Economy Approach to Community Economic Development*, 63 *How. L.J.* (forthcoming Fall 2019); see also Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399, 414–16 (2001).

7. See Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 *SAN DIEGO L. REV.* 295, 318–19 (1999).

8. See Gowri Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 *BERKELEY J. EMP. & LAB. L.* 65, 101 (2013). See generally Renee Hatcher, *Solidarity Economy Lawyering*, 8 *TENN. J. RACE, GENDER & SOC. JUST.* 23 (2019).

9. In November 2018, Amazon announced that it would but its second headquarters in Long Island City, NY. In February 2019 Amazon withdrew from the deal, citing major public backlash. See Amazon, <https://blog.aboutamazon.com/company-news/update-on-plans-for-new-york-city-headquarters> (last visited May 30, 2019).

pre-mobilization. For example, some rural communities continue to face unique challenges to leveraging collective action due to geographic and resource constraints.¹⁰ How can we as lawyers, advocates, and educators work to represent communities with differing capacities and at various stages of organizing? Furthermore, the recent developments in national and state electoral politics threatens the progressive gains that social movements and community organizations have achieved. For example, since 2017, billions of federal dollars have been proposed to be slashed from the U.S. Department of Housing and Urban Development affordable housing programs, which can mean the difference between homelessness and basic housing security.¹¹ Immigrant and communities of color continue to bear the brunt of economic development policies, resulting in disproportionate displacement, neighborhood disinvestment, and sometimes criminal detainment. Discussants emphasized the need to prioritize and support these communities in CED efforts and shift the power dynamics of local economic development efforts.

In looking ahead, discussants raised a number of questions facing CED lawyers and scholars. How can CED practitioners and scholars assess the effectiveness of various CED approaches? What are the underlying principles of progressive CED initiatives? What role does race continue to play in community control efforts? To what extent has CED scholarship failed to address the impending climate crisis? How do we grapple with varying levels of support from our institutions, recognizing that public universities and private institutions may place different constraints on faculty? How do we create a space for continued dialogue and support between scholars and practitioners dedicated to community economic empowerment? The following selected reflection pieces written by participants from the 2019 AALS session offer further insight into the changing CED landscape, reiterating the importance of continuing this pivotal discussion.

10. Baskaran, *supra* note 4, at 176.

11. Jeff Andrews, *Trump Administration Proposes Dramatic Cuts to Public Housing-Again*, CURBED (Mar. 11, 2019), <https://www.curbed.com/search?q=Trump+Administration+Proposes+Dramatic+Cuts+to+Public+Housing+Again> (last visited May 30, 2019).

Building Bridges and Breaking Down Walls: Taking Integration Seriously in CED Practice

Anika Singh Lemar

What ought to be the role of fair housing advocacy in community economic development practice? If community economic development is the pursuit of resources and high-quality housing accessible to low-income people, does it matter whether those people live in segregated neighborhoods? Is integration an imperative or a distraction?

In his recent book, *The One-Way Street of Integration*, Edward Goetz pits integration and community economic development against one another.¹ He first argues that there are irreconcilable tensions between the goals of fair housing and redeveloping low-income neighborhoods, which he terms “enrichment.”² Next, he argues that the latter goal ought to take precedence. Focusing the book on a critique of fair housing strategies, he does not delve into any sort of explanation of how that enrichment ought to take place.

Goetz assumes throughout the book that both fair housing advocacy and enrichment require significant subsidy. In fact, it is the struggle for a fixed amount of subsidy that, at least in part, puts the two goals at odds. Subsidy is limited, and the newest available community development subsidy is not substantially linked to enrichment.³

It is not an accident that neighborhoods disproportionately populated by people of color are underresourced as compared to disproportionately white neighborhoods. As local governments increasingly invested in infrastructure—from sewers to schools—over the twentieth century, they used segregation as a mechanism to ensure that investment disproportionately

1. EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION* (2018).

2. *Id.* at 28.

3. In my own city, the first reported Opportunity Zone project is a national fast food chain. *Opportunity (Zone) Beckons*, NEW HAVEN INDEPENDENT (Apr. 10, 2019), https://www.newhavenindependent.org/index.php/archives/entry/opportunity_zones. The first Opportunity Zone development in Texas is a self-storage facility. *San Antonio Lands Texas' First 'Opportunity Zone' Investment Under Trump Tax Bill*, SAN ANTONIO EXPRESS-NEWS (Jan. 8, 2019), <https://www.expressnews.com/business/local/article/San-Antonio-lands-Texas-first-opportunity-13517242.php>. These are not enrichment projects. While some small number of impact investors may use the program for enrichment, it is likely that their numbers will pale in comparison to those investing in additional fast-food outlets and self-storage facilities.

benefited white people.⁴ Jessica Trounstein carefully documents the ways that cities purposefully manipulated where black people lived so that they could limit expenditures to white neighborhoods.⁵ Similarly, Richard Rothstein tells the history, too often forgotten, of government-sponsored housing segregation, right up until the passage of the Fair Housing Act in 1968.⁶ Again, that government-sponsored segregation made it possible to allocate significantly more resources to white neighborhoods than to black neighborhoods.

Government action continues to segregate neighborhoods today.⁷ Not surprisingly, the neighborhoods designed to be poor and disenfranchised are also overburdened and underresourced. As a result they rely on paltry federal subsidies in order to fund enrichment projects. Conversely, neighborhoods integrated by class are less reliant on subsidy. Local resources are available to improve parks, woo grocery stores and employers, connect volunteers to local need, and staff non-profit organizations. Fair housing and enrichment are not divergent paths that require us to choose one and toss the other. They are related goals, and they can work in concert.⁸ In fact, even in our enrichment work, we must be attuned to fair housing so as to ensure that enrichment does not result in resegregation and displacement.

Community economic development advocates ought not have this debate in a vacuum. Education advocates face the same dilemma. Historically, communities of color sought to advance school integration not only as a moral imperative but also as a path to resource acquisition. Prior to *Brown v. Board of Education*, schools were, of course, both separate and unequal.⁹ Integration was the only pathway to enrichment.

School integration was (and remains) a hard and long-fought struggle. In a 1978 lecture published in the *Harvard Law Review*, “Brown v. Board

4. JESSICA TROUNSTEIN, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* (2018).

5. *Id.*

6. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

7. See, e.g., Jaqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, CONN. MIRROR AND PRO PUBLICA (May 22, 2019); Devin Edwards, *Still Separate, Still Unequal: How Exclusionary Zoning Sustains Inequity in Education*, GEO. PUB. POL'Y REV. (May 15, 2019) (collecting sources).

8. As Sheryll Cashin puts it, “I have come to the conclusion that cultivating race and class integration, especially of the institutions that define social mobility—like schools, universities, and the workplace—and building coalitions of enlightened self-interest across boundaries of homogeneity are the only route to creating the kind of fully democratic society we imagine our very diverse country to be . . . our separatism results in stratospheric costs and rampant inequality.” SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 291–92 (2004).

9. See RUCKER C. JOHNSON, *CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS* 24 (2019). They, of course, remain so today. UNITED STATES SPENDS \$23 BILLION MORE ON WHITE DISTRICTS THAN NONWHITE ONES, EDUC. WEEK (MAR. 5, 2019).

of Education and the Dilemma of Interest-Convergence Theory,” Derrick Bell explained the limited willingness of mid-twentieth century American courts to tackle de jure segregation in public schools.¹⁰ He posited “interest convergence theory,” which he defined as the following: “[t]he interest of Blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”¹¹ Bell described the Supreme Court’s handling of *Brown v. Board of Education*, in particular, as a response not to moral mandates and basic fairness but instead to the self-interest of white majorities.

Bell ended his lecture by arguing that the moment of interest convergence had passed; desegregation was no longer in the interests of the empowered majority. He suggested that advocates move on to focus on other advocacy goals that did not depend on desegregation. He argued, for example, that advocates consider applying their energies to improving educational outcomes in schools that are majority-black without relying on desegregation strategies. Citing limited resources and a moral imperative to improve the opportunities available to low-income communities of color, Bell, like Goetz, advocated enrichment, not integration.

Some education advocates have taken Bell’s advice and have turned away from the goal of desegregation to the goal of educational reform. Epitomizing this turn is a once-influential research paper, since discredited, celebrating schools in which ninety percent of students are poor, ninety percent of students are of color, and ninety percent of students are reading at goal.¹² Proponents of 90-90-90 schools did not worry whether schools were integrated. Today, charter school advocates, in particular, insist that schools need not be integrated—by race or by class—to provide a high quality education.

But education scholars have demonstrated that integration and enrichment are not competing goals. In fact, they are necessary corollaries. The most notable reductions in the achievement gap came as a result of massive court-ordered desegregation efforts.¹³ And when courts turned their back on those efforts, the gap returned.¹⁴ Rucker Johnson digs into the question of why integration works: “[A]s soon as desegregation plans were enacted,

10. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

11. *Id.*

12. DOUGLAS REEVES, *HIGH PERFORMANCE IN HIGH POVERTY SCHOOLS: 90/90/90 AND BEYOND* (2003), https://www.researchgate.net/publication/228772648_High_performance_in_high_poverty_schools_909090_and_beyond; Justin Baeder, *The 90/90/90 Schools Myth*, *Educ. Week* (May 30, 2011), https://blogs.edweek.org/edweek/on_performance/2011/05/909090_schools_revisited.html. One of the researchers who debunked Reeves’s work was, notably, Richard Rothstein. Rothstein’s interest in housing segregation, which resulted in his writing *The Color of Law*, was piqued by his work on education inequality.

13. JOHNSON, *supra* note 9, at 62–63.

14. *Id.*

there were not only substantial reductions in racial segregation, among both students and teachers, but also sharp increases in per-pupil spending (by an average of 22.5 percent) and significant reductions in the average class size experienced by black children."¹⁵ In short, resource provision and integration are inextricably linked.¹⁶

Segregated societies do not build ladders to economic opportunity. In a segregated society, where so much infrastructure is built locally, empowered majorities can maintain control and possession of the resources—schools, parks, libraries, transportation networks—necessary to live a full life. Community economic development is the effort to build ladders to opportunity for everyone. But is it possible to build those ladders, at scale, in neighborhoods from which people with political and financial resources flee? Goetz argues that “the systematic forms of oppression visited upon black communities are rendered invisible when the focus is on how many people of color are clustered together.”¹⁷ Trounstein, Rothstein, and Johnson show us that it would be significantly more accurate to say that the systematic forms of oppression visited upon black communities are *made possible by the fact* that people of color are clustered together. Residential segregation makes it possible to build the transportation networks, parks, libraries, and employment patterns. Transportation networks, parks, libraries, and employment centers, along with high-quality schools, are all fundamental to community economic development. Residential segregation makes it possible to build these resources in white neighborhoods, but not in other neighborhoods. Racial segregation facilitates the unequal distribution of opportunity infrastructure. For those of us concerned about building ladders to opportunity, racial desegregation must remain a fundamental goal. Building those ladders requires the dedication of resources by empowered majorities.

Cribbing from Bell, “The interest of [the disempowered] in achieving [high quality education, parks, libraries, transportation networks, etc.] will be accommodated only when it converges with the interests of [the powerful].” If so, interest convergence is a powerful descriptor as well as a call to treat integration as a powerful imperative.¹⁸ It requires us to commit ourselves to desegregation as a fundamental goal and as a necessary

15. *Id.* at 58.

16. New York City Councilman Richie Torres put it bluntly as reported in a 2016 story in the *New York Times Magazine*: “It could be that the political establishment is willfully blind to the impact of racial segregation and has led themselves to believe that we can close the achievement gap without desegregating our school system. At worst it’s a lie; at best it’s a delusion.” He continued, “The scandal is not that we are failing to achieve diversity. The scandal is we are not even trying.” Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES, June 9, 2016 (*Magazine*) (quoting Torres).

17. GOETZ, *supra* note 1, at 61.

18. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010).

precondition to effective community economic development.¹⁹ Enrichment and fair housing are inextricably linked.²⁰ So long as schools and neighborhoods are segregated, there is no convergence of interests. Middle- and upper-class families will invest in their own children's education, neglecting schools that serve children who are largely poor and members of racial minorities. And well-resourced neighborhoods and towns will do the same for all locally provided economic development infrastructure, from parks to libraries to transportation networks to safe attainable housing. Our task is not to choose one or the other. Our charge is to do both, and to make sure the goals work in service of one another.

19. Justin Driver critiques the use of interest convergence theory to develop "a strategic method for producing social and political change" because, in part, it "motivates some legal commentators to propose remedial ideas that are of dubious value." Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 Nw. U. L. REV. 149, 155, 190–192 (2011). As an example, he cites David Singleton's argument that well-off suburban school districts ought to share resources with low-income urban school districts because it is in their interest to avoid the miseducation of a criminal underclass. If the only viable strategies to advance racial justice are those that are not only palatable but also beneficial to white people then, yes, those strategies are likely to be thin. Treating integration as a means to interest convergence is, by contrast, an effort to ensure that those strategies are thick.

20. I am hardly the first to say this. The idea is prevalent enough to have its own Twitter hashtag, #housingsegregationineverything, coined by Gene Demby, lead blogger for National Public Radio's Code Switch.



Connecting Community Control of Infrastructure and Economic Development with Race and Privilege

Edward W. De Barbieri

Movement organizations, such as the Movement for Black Lives, and others, have advocated for community control both of law enforcement as well as government programs in part as a response to instances of police violence and brutality.¹ Such groups have also called for economic justice reforms, including support for worker organizing centers, support and development of cooperative and social economy networks, and more.² Community control of local development often manifests in the creation or expansion of transportation infrastructure and economic development subsidies.

This brief essay will address the connection between community control of local development and race and privilege within the context of community economic development. It will focus first on transportation infrastructure, and second on economic development programs. Transportation infrastructure and economic development often are discussed together. My hope in addressing each here is that current efforts to regain community control of transportation infrastructure planning and economic development have obvious connections to race and privilege. Before examining how race and privilege impact efforts to achieve community control of transportation infrastructure and economic development, I will discuss several methodological tools to aid in this investigation.

How Scholars Should Approach Efforts for Community Control

A recent paper by Jocelyn Simonson and Sabeel Rahman addresses popular movements for community control over local services, like the police, infrastructure, and schools.³ Simonson and Rahman identify three dimensions with which to analyze ways that groups can shift power and contest local

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1. THE MOVEMENT FOR BLACK LIVES, COMMUNITY CONTROL, <https://policy.m4bl.org/community-control> [https://perma.cc/H3BG-67MK].

2. THE MOVEMENT FOR BLACK LIVES, ECONOMIC JUSTICE, <https://policy.m4bl.org/economic-justice/> [https://perma.cc/Y5EP-LYYQ].

3. K. Sabeel Rahman & Jocelyn Simonson, *Institutionalizing Local Power: Social Movements and the Push for Community Control*, __ CALIF. L. REV. __ (forthcoming).

governance. The three dimensions are the nature of authority, the composition of the governing body, and the moment of authority.⁴ Simonson and Rahman point out, using examples of policing and economic development, that local institutions that claim to encourage participation often in fact limit true engagement and impede structural change. The implications of this observation may lead one to view participation from the perspective of power-orientation focusing on the ability of historically disempowered groups to directly contest drivers of structural inequality.

Simonson and Rahman's work, and prior writing,⁵ is relevant in a conversation about race and privilege in community economic development (CED). When considering change mechanisms to address inequality, focus may best be placed on strategies to address ways that groups historically marginalized based on race or class are excluded from opportunity. Such a strategy may require both change from within, and perhaps what Simonson calls an agonistic change approach that contests power.⁶

Residents, especially in urban areas, have the interest, and ability, to weigh in on decisions that affect their lives, including on matters of local development.⁷ Yet, few avenues are available for local residents to voice their support or opposition to development before a project is planned. And worse, frequently neighbors use participation to create physical barriers like fences, or prohibit neighborhood improvements like sidewalks,⁸ and implement legal barriers like zoning restrictions⁹ to exclude.

Efforts to increase economic activity among marginalized groups should include a focus on power-shifting. Scholars ought not simply describe and analyze the contours of programs to, for example, spread democratic ownership of worker cooperative businesses. Scholars have a responsibility to examine the nature of and extent to which such regulatory frameworks improve opportunity for individuals and families, as well as the power of traditionally excluded groups.

4. *Id.*

5. See e.g. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017); K. Sabeel Rahman, *The New Utilities*, 39 *CARDOZO L. REV.* 1621 (2018); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. CAL. INTERDISC. L.J.* 315 (2018); Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 *COLUM. L. REV.* (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 *NW. U. L. REV.* 1609 (2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 *HARV. L. REV.* 2173 (2014); Jocelyn Simonson, *Copwatching* 104 *CALIF. L. REV.* 391 (2016).

6. Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 *HARV. L. REV.* 2173 (2014).

7. Edward W. De Barbieri, *Urban Anticipatory Governance*, 46 *FLA. ST. UNIV. L. REV.* 75 (2019).

8. See, e.g., Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 *YALE L. J.* 1836 (2015).

9. Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 *N.C. L. REV.* 293 (2019).

Anika Singh Lemar's essay *Access to Justice Requires Access to Opportunity Infrastructure* in these pages is instructive.¹⁰ CED scholars, in particular, ought to consider how access to opportunity does, or does not, result from CED strategies. With guidance from scholars like Simonson, Rahman, and Lemar, we can evaluate whether and to what extent certain initiatives achieve the goal of expanding power and opportunity.

Race and Privilege in Community Control of Transportation Infrastructure Planning

The development and expansion of transportation infrastructure is politically charged. Law plays important, and often unacknowledged, roles in creating the conditions for automobile dominance.¹¹ Greg Shill highlights how arbitrary and unenforced speed limits, land use policies favoring suburban single family home construction, and other regulatory laws subsidize driving of automobiles.¹² These are perhaps less obvious ways that law and lawmakers shape transportation infrastructure planning. There are more overt examples too.

In June 2015, in Baltimore, the governor of Maryland cancelled a proposed transit rail line running through the neighborhood where Freddie Gray, a twenty-five year-old African American man was arrested, and subsequently died in police custody.¹³ The Red Line service was focused on transporting residents within the city, rather than bringing suburban residents into and away from the city center.¹⁴ The Maryland governor announced significant funding for additional road construction that focused on the Maryland suburbs serving the Washington, D.C., area.¹⁵

How should the goals of community control of transportation infrastructure be assessed? I offer a number of possible questions to ask when considering the efficacy of community control. By raising these questions

10. Anika Singh Lemar, *Access to Justice Requires Access to Opportunity Infrastructure*, 27 J. AFF. HSG. & CMT'Y DEV. L. 487 (2019).

11. Greg Shill, *Should the Law Subsidize Driving?*, __ N.Y.U. L. REV. __ (forthcoming).

12. *Id.*

13. Balt. Reg'l Initiative Developing Genuine Equality, Inc. v. State of Maryland, U.S. Dep't of Transp., Office of Civil Rights, <https://www.naacpldf.org/wp-content/uploads/Baltimore-Red-Line-Complaint.pdf> [<https://perma.cc/Z6NY-J3KJ>] (“[The Red Line] would have run about 10 blocks south of the Gilmor Homes, where 25-year-old Freddie Gray was arrested.”).

14. Alon Levy, *How You Can Tell Larry Hogan's Decision to Kill the Red Line Was Racially Discriminatory*, STREETS BLOG USA (Apr. 21, 2017), <https://usa.streetsblog.org/2017/04/21/how-you-can-tell-larry-hogans-decision-to-kill-the-red-line-was-racial-discrimination> [<https://perma.cc/4H7L-47LM>].

15. Michael Dresser, *Hogan Shifts Money to Roads, but Not Everyone's a Winner*, BALTIMORE SUN (July 18, 2015), <https://www.baltimoresun.com/news/maryland/bs-md-hogan-highways-20150718-story.html> [<https://perma.cc/F8SJ-M67X>].

here, I hope to answer some of these questions in future work and encourage others to consider them as well. They include:

- How does transportation infrastructure planning support community and individual flourishing?
- How is convenience for some balanced against burdens (financial, environmental, epidemiological, societal, educational, etc.) borne by others?
- How is transportation infrastructure planning growing the power of historically marginalized groups?

Race and Privilege in Community Control of Economic Development

Community control of economic development is also politically charged. Place-based tax incentives for economic development profess benefits to low-income communities—in reality, however, such incentive programs often further gentrification, rather than aid in achieving anti-poverty goals.¹⁶ States and cities that frequently are generous with tax subsidies to private companies for economic development remain stagnant with respect to other public investments, such as education spending.¹⁷

Observers are rightly skeptical of refashioned policies, such as the federal Opportunity Zone incentive program. Michelle Layser has argued that such tax incentives are unlikely to actually benefit poor communities.¹⁸ Moving from broad policy to specifics is useful in analyzing how opportunity is created or limited through economic development.

One program ripe for analysis is New York City's Worker Cooperative Business Development Initiative.¹⁹ Now in its sixth year, the program funded through the NYC Small Business Services department provides financial support to eleven not-for-profit groups that support worker cooperative development. The findings from the current reports discuss broad metrics: numbers of cooperatives formed or maintained, jobs created or maintained, etc. However, it is unclear exactly how individuals and groups

16. Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, __ WISC. L. REV. __ (forthcoming).

17. Edward W. De Barbieri, *Lawmakers as Jobs Buyers*, 88 FORDHAM L. REV. __ (2019).

18. Michelle D. Layser, *Tax Incentives Target Poor Neighborhoods but Leave Communities Behind*, CRAIN'S CHI. BUS. (Apr. 15, 2019), <https://www.chicagobusiness.com/opinion/tax-incentives-target-poor-neighborhoods-leave-communities-behind> [https://perma.cc/Y9BK-T789].

19. Hat tip to Anika Singh Lemar for suggesting this program as one ripe for investigation and study.

have expanded their opportunity. Such an investigation may involve asking the following questions:

- Have worker co-op owners been able to send their children to schools or obtain levels of higher education that they otherwise would not have been able to achieve without co-op ownership?
- Have worker co-op owners been able to purchase homes at a greater rate since the initiative?
- Are savings or investment accounts up?
- Have they amassed more wealth?
- Has power shifted for this group? And how do we measure that?

Conclusion

By discussing the connection between efforts to win community control of transportation infrastructure and economic development and race and privilege, I have hoped to raise questions that stimulate further investigation. Both the law of transportation infrastructure planning and subsidization of economic development activity are ripe for scholarly and practical investigation. As the federal Opportunity Zone program is rolled out, it is incumbent on CED scholars to evaluate whether and to what extent such strategies are actually achieving the goals articulated by groups advocating for expanded local control.



Calling for a Community Economic Development Code of Ethics

*Michèle Alexandre, Patience A. Crowder,
and Audrey McFarlane*

On January 5, 2019, a group of legal scholars convened a Discussion Group at the AALS 2019 Annual Meeting to examine “race and privilege in Community Economic Development (CED)” with the goal of identifying how CED practice, in general, and experiential and doctrinal law school courses incorporating CED themes, more specifically, “serve to build bridges across racial and socioeconomic boundaries.” Comprised of both clinicians and non-clinicians, this group of scholars was asked to present elements of their individual research that spoke to this and related questions. Many insights were revealed and tested during this discussion. This essay reflects on a notion during the discussion around which there seemed to be consensus and enthusiastic support: that the sustainability of CED practice, as social movement, academic discipline, and legal service could be enhanced by articulating new guiding principles or a code of ethics to ground CED practice in normative principles applicable to communities across the country. The authors of this essay seek to memorialize that discussion and offer a roadmap for the creation of these principles/code of conduct by surfacing and exploring three specific questions: (1) Why does this endeavor seem crucial?; (2) How should CED practitioners create and formalize this statement of principles or code of ethics?; and (3) What would be appropriate CED outcomes in light of the adoption of this statement of principles/code of ethics?

I. Why Does the Adoption of a Code of Ethics Seem Crucially Important to the Viability of CED Practice?

Roger Clay and Susan Jones authored what has become one of the most cited to definitions of CED by stating “[t]here is no standard definition of [CED].”¹ They go on to explain that while CED “has been described as a strategy that includes a wide range of economic activities and programs for developing low-income communities such as affordable housing and small business development,”² CED is also “a field that performs a significant function in our society” but for which “we do not have much information regarding the important aspects of how it functions.”³ Significant take-aways from their work include an understanding of the evolution of

1. See Roger A. Clay, Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18-SPG J. AFFORDABLE HOUS. & CMTY. DEV. L. 257 (2009).

2. *Id.*

3. *Id.* at 258.

CED from 1960s grassroots organizing around securing community participation in local revitalization projects, to the funding of development projects by private foundations and the federal government, to community organizing efforts around specific antipoverty efforts, to encountering changes in funding practices that shifted the role from the federal to state governments, along with the establishment of policies purporting to support people who could “pull themselves up by their own bootstraps” through market-based economic development practices.⁴ CED, therefore, is a concept that has been in practice in this country for over fifty years. Why, then, is the growing wealth gap so persistent in American society? Why are rates of residential and school segregation retrenching to historic highs? The creation of a CED Code of Ethics will not erase these injustices overnight, but we think there are a few important reasons that the existence of the CED Code of Ethics can help generate sustainable CED outcomes to counter these and other inequitable realities.

1. *A Code of Ethics would provide baseline guidelines for what forms of economic incentives and related conduct constitute CED practice, including explicit statements about the intransigence of racism in American economic policies.* While the history of the origins of CED is seldom disputed, there is no (and probably will never be) a succinct definition of CED as a practice. A Code of Ethics, however, would cement the underlying guiding principles of CED that would be common to all CED projects, no matter the local community in which they are situated. This is important for both (a) introducing CED to new practitioners, and (b) preserving the overall mission and values of CED to prevent other disciplines from masquerading as CED when, in fact, a local community will only experience the economic benefit of a proposed activity indirectly (if at all).⁵
2. *A Code of Ethics would serve as the baseline guiding principles against which CED practitioners can recalibrate to prevent an original project objective from being co-opted.*⁶ Another way to consider this option is to state that a Code of Ethics could serve as an evaluative tool that communities can use to advocate for what is clearly CED and to rally against proposed economic activities that *are not* CED.⁷ Technological advances have created a world that could barely be imagined when CED efforts first began in the 1960s. A Code of Ethics would contain principles promoting equity frameworks as tools for launching CED initiatives.

4. *See id.*

5. A concrete example of this might be distinguishing between “community economic development” and “economic development” as disciplines at work in local communities.

6. Scott Cummings made this observation.

7. Michèle Alexandre made this observation.

II. How Should CED practitioners Create and Formalize a Code of Ethics?

Many professions operate under some form of ethical code, including lawyers, accountants, doctors, social workers, and economic development practitioners.⁸ These codes serve to unite their members under a common mission and set of values. While CED is, by definition, a practice designed to produce strategies for enhancing the economic health of local communities, as deliberated in the Discussion Group, CED is also an interdisciplinary academic discipline with theories and concepts that are transferable as replicable models of local development across the country. CED is not limited to the services that CED lawyers contribute. A Code of Ethics would therefore reflect these realities and could not be created without all of these voices. That can only happen at gatherings such as this recent Discussion Group, but these gatherings must reflect the diverse range of interests comprising CED projects, such as lawyers, clients, community organizers, residents, and other community stakeholders. It must also grapple with the ways in which structural racism shapes these realities that make CED necessary in the first place. While these discussions have to occur in local communities throughout the country, they should do so in a way that is tethered to this broader concept of foundational principles to ensure that the discussions lead to the overarching goal of creating a Code of Ethics. While beyond the scope of this short reflection, the practical logistics for what this would take are not insurmountable.

III. What Would Be Appropriate CED Outcomes in Light of the Adoption of a CED Code of Ethics?

The outcomes sought for CED are presently defined by the problems that limit CED's effectiveness. For example, fair critiques of CED include infrastructures and systems that fail to facilitate or support CED or work against mechanisms for accountability. CED is often hampered by failure to establish ongoing, community-based organizations. This essay is not suggesting that CED lacks fundamental concepts or is a bankrupt strategy. It is still a movement with tremendous potential, and, when implemented true to its origins, capable of phenomenal neighborhood change. A Code of Ethics would be the next step in the evolution of CED by providing important and needed frameworks and standards to both ensure accountability for CED failures and guaranty qualitative assessment of CED practices and outcomes. This is how you build a discipline, and our communities are counting on us.

8. See, e.g., INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL, ETHICS CODE (2015), <https://www.iedconline.org/web-pages/inside-iedc/iedc-code-of-ethics>.





2019 LAW STUDENT LEGAL WRITING COMPETITION AWARD

Winning the Battle and the War Against Housing Discrimination: Post-Acquisition Discrimination Claims Under the Fair Housing Act

Spencer Bailey

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I. Introduction

Marsha Wetzel is an elderly lesbian woman who lives in Illinois.¹ Shortly after moving into a retirement home just outside of Chicago, Ms. Wetzel was inundated by physical and verbal abuse.² This harassment came from the homophobic residents that live in the same retirement facility as she does.³ The shocking content and level of violence in the physical and verbal attacks showed that the abuse was motivated by extreme animus towards Ms. Wetzel because of her sexual orientation.⁴ On multiple occasions, she reported the abuse to the facility's management, seeking reprieve, but to no avail.⁵ Instead, the facilities staff responded by "limit[ing] her use of facilities" and began developing reasons to evict her.⁶ Eventually, Ms. Wetzel obtained legal assistance and filed suit against the retirement facility, claiming violations of the Fair Housing Act (FHA), but the district court granted the defendant's motion to dismiss, in part because the harassment occurred *after* Ms. Wetzel had moved in and she had never been evicted.⁷ The district court's dismissal was reversed on appeal to the Seventh Circuit.⁸ The defendants appealed to the U.S. Supreme Court, asking the Court to resolve the circuit split over whether claims of discrimination that occur *after* a person has "acquired" housing are cognizable under the FHA ("post-acquisition claims"), but shortly afterwards the parties voluntarily dismissed the appeal.⁹

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, prohibits discrimination in the housing market because of protected characteristics.¹⁰ However, a disagreement exists among the

1. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

2. *Id.* at 859.

3. *Id.*

4. Complaint at 6, 8, 11, 16, *Wetzel v. Glen St. Andrew Living Cmty.*, 2017 WL 201376 (N.D. Ill. 2017). The alleged examples of physical and verbal abuse include a male resident calling the plaintiff multiple homophobic slurs, making threats of extreme violence, and reveling in the Pulse nightclub massacre in Orlando. *Id.* The complaint also alleged that a fellow female resident said, "[Y]ou look like a man," "[H]omosexuals will burn in hell," and other similar statements. *Id.* This same female resident is alleged to have also "rammed her wheelchair into the table where Marsha was sitting in the dining hall," causing the table to be "knocked on top of Marsha and kitchen staff had to help remove it." *Id.* Further, an unknown assailant attacked Marsha from behind and she "heard them say 'homo' as she was knocked forward over the front of her scooter" and suffered a head injury. *Id.*

5. *Wetzel*, 901 F.3d at 859.

6. *Id.*

7. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, No. 16 C 7598, 2017 U.S. Dist. LEXIS 6437, at *3 (N.D. Ill. Jan. 18, 2017), *rev'd*, 901 F.3d 856 (7th Cir. 2018).

8. *Wetzel*, 901 F.3d at 859.

9. *Glen St. Andrew Living Cmty., LLC v. Wetzel*, No. 18-626, 2019 WL 848273, at *1 (U.S. Feb. 22, 2019). Presumably the parties settled.

10. 42 U.S.C. §§ 3601–3716.

federal courts concerning how far the FHA's protection extends temporally.¹¹ This disagreement has been framed as a split over whether post-acquisition discrimination is prohibited by the FHA and, if so, under what statutory sections can such claims be brought.¹² This article proposes an approach to interpreting the FHA that finds post-acquisition claims actionable under the FHA by using the interpretive methodology established by the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (hereinafter "*Inclusive Communities*").¹³

This article proceeds by first explaining the historical events and social conditions that gave rise to the FHA. A discussion of the most relevant sections of the FHA regarding post-acquisition discrimination claims follows. The article then considers what insight legislative history can provide regarding the proper interpretation of the FHA and what the legislative history lacks. An introduction to the Supreme Court's historical approach to interpreting the FHA follows. Next, the series of judicial decisions confronting and developing the post-acquisition question will be discussed with an analysis of recent caselaw. An overview of *Inclusive Communities* and an in-depth analysis of the interpretive framework used in that case follows. Finally, this article concludes with a proposal on how the FHA should be interpreted regarding post-acquisition claims using the *Inclusive Communities* interpretive methodology.

II. Pre-Fair Housing Act History

Shortly after the end of the Civil War and the ratification of the Thirteenth Amendment, Congress passed the Civil Rights Act of 1866, declaring that all citizens, "of every race and color, without regard to any previous condition of slavery or involuntary servitude," have the same rights as those "enjoyed by white citizens," including the right to "inherit, purchase, lease, sell, hold, and convey real and personal property."¹⁴ This Act was passed pursuant to the Thirteenth Amendment, which had given Congress the "power to pass all laws necessary and proper for abolishing all badges

11. See, e.g., *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) (concluding that the "FHA reaches post-acquisition discrimination"); *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005) (concluding that the FHA does not encompass post-acquisition discrimination claims short of "actual or constructive eviction"); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004) (reaching similar conclusion); *United States v. Koch*, 352 F. Supp. 2d 970, 975 (D. Neb. Dec. 22, 2004) (rejecting *Halprin's* holding on post-acquisition claims); see also *Bloch v. Frischholz*, 533 F.3d 562 (7th Cir. 2008) [hereinafter "*Bloch I*"]; *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc) [hereinafter "*Bloch II*"].

12. See *infra* Part IV; see *supra* note 11.

13. 135 S. Ct. 2507 (2015).

14. Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (1866). The Act also grants citizens the right to "make and enforce contracts, to sue, be parties, and give evidence . . ." *Id.*; see also 42 U.S.C. § 1982.

and incidents of slavery” in the United States.¹⁵ Despite this clear language and intent, it was not until over 100 years later, and after the passage of the FHA, that the Supreme Court recognized that non-governmental racial discrimination in housing between private parties was a “badge” and “relic” of slavery.¹⁶ Thus, in the century between ratification of the Thirteenth Amendment in 1865 and the passage of the Fair Housing Act in 1968, housing discrimination against African Americans was rampant and reinforced by governmental and private action.¹⁷ This government action institutionalizing racial segregation in housing was found on every level of government.¹⁸ Zoning laws that mandated residential racial segregation were not declared unconstitutional until 1917, over fifty years after slavery was abolished.¹⁹ Once zoning laws could no longer be explicitly used to maintain segregation, racially restrictive covenants²⁰ rose in popularity and became the widespread method of preserving segregation in neighborhoods and throughout towns and cities.²¹ It was not until 1948 in *Shelley v. Kraemer* that the Supreme Court held that court enforcement of racial covenants violated the Fourteenth Amendment.²²

The movement for racial equality slowly started to build momentum in the courts throughout the 1950s.²³ Then, in his 1960 campaign for president, John F. Kennedy declared his support for fair housing when

15. Civil Rights Cases, 109 U.S. 3, 20 (1883).

16. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–43 (1968). The issue before the Court was whether 42 U.S.C. § 1982 prohibited purely private discrimination, “encompass[ing] every racially motivated refusal to sell or rent.” *Id.* at 421–22. The Court concluded that when “racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.” Therefore, § 1982, prohibiting such conduct between private parties, was valid under the Thirteenth Amendment. *Id.* at 442–43.

17. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39–48 (2017) (exhaustively detailing the federal, state, and local policies creating racially segregated housing conditions throughout the United States).

18. *Id.*; see also *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT* (Gregory D. Squires ed., 2017).

19. See *Buchanan v. Warley*, 245 U.S. 60, 70, 82 (1917).

20. Racially restrictive covenants were legally binding agreements between two private individuals to restrict, based on race, who could occupy a specific dwelling. See *infra* note 22 and accompanying text.

21. See ROTHSTEIN, *supra* note 17, at 78.

22. 334 U.S. 1 (1948).

23. For example, the Supreme Court rejected the “separate but equal” doctrine in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and in 1956 affirmed a federal district court ruling that laws mandating racial segregation on transit buses in Montgomery, Alabama, were unconstitutional. *Browder v. Gayle*, 142 F. Supp. 707, 710 (M.D. Ala.), *aff’d sub nom. Owen v. Browder*, 352 U.S. 903 (1956).

he promised to ban discrimination in federally assisted housing.²⁴ After Lyndon B. Johnson became president following Kennedy's assassination, Johnson attempted but failed to pass legislation banning housing discrimination in 1966.²⁵ A year later, President Johnson established a presidential commission to investigate the "origins of the recent major civil disorders in our cities."²⁶ The commission soon released a report²⁷ that unequivocally "identified racial segregation in housing as one of the greatest threats facing American society."²⁸ The commission recommended "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin."²⁹ A few months later, Dr. Martin Luther King, Jr. was assassinated.³⁰ President Lyndon Johnson sharply perceived the shifting political and social environment surrounding these two events and saw his opportunity to push a fair housing law through Congress.³¹

III. The Fair Housing Act

Considering these events, the FHA was enacted by Congress during a period of "turmoil, conflict, and often conflagration in cities across the nation,"³² less than a week after Dr. King was killed, and with "riots raging

24. ERIC FONER, *GIVE ME LIBERTY! AN AMERICAN HISTORY* 964 (3d ed. 2012). Kennedy's executive order was an attempt "to end the financing of residential segregation by federal agencies." ROTHSTEIN, *supra* note 17, at 177.

25. H.R. 14765, 89th Cong. (1966); S. 3296, 89th Cong. (1966).

26. Exec. Order No. 11365, 3 C.F.R. § 674 (1966–1970). The commission was officially known as the President's National Advisory Committee on Civil Disorders. *Id.*

27. PRESIDENT'S NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 263 (1968) [hereinafter "Kerner Commission"].

28. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 27 (2008). The Commission further found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight" and that racial discrimination prevented black families from moving into better homes and integrated neighborhoods. See Kerner Commission, *supra* note 27, at 13. The report concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.* at 1.

29. See Kerner Commission, *supra* note 27, at 263.

30. Earl Caldwell, *Martin Luther King Is Slain in Memphis; A White Is Suspected; Johnson Urges Calm*, N.Y. TIMES, Apr. 5, 1968, <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0404.html#article>.

31. Historians have noted that because he was a former Senate majority leader, Johnson "understood the mood, the atmosphere in which he was always operating in relation to Congress," and thus Dr. King's "assassination gave [Johnson] an entering wedge, which allowed the 1968 [fair housing] law. It was an opportunity to get that passed. He had a masterful sense of timing." DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King, Jr. Was Killed*, WASH. POST, Apr. 11, 2018.

32. See FIGHT FOR FAIR HOUSING, *supra* note 18, at 1.

just blocks from the Capitol.”³³ President Johnson quickly signed the bill into law.³⁴

Due to the rushed passage of the FHA, very little legislative history exists.³⁵ The final version of the bill was never before a congressional committee, and no committee reports defining the terms or provisions exist.³⁶ Most relevant to this article, the legislative history has no clear discussion as to whether the FHA has any temporal limits regarding protection throughout occupancy or otherwise applies to post-acquisition discrimination claims.³⁷ Nevertheless, whatever limited insight the sparse legislative history might have on the post-acquisition question, the text of the statute is where we begin our analysis of the FHA.³⁸

A. Text of the Fair Housing Act

Three primary sections of the FHA deal with substantive rights—§§ 3604, 3605, and 3606—and a fourth section, § 3617, prohibits interfering with the rights protected by §§ 3604–06.³⁹ Sections 3605–06 are considered less relevant to the question of post-acquisition claims,⁴⁰ and so this article will focus on §§ 3604 and 3617.

1. 42 U.S.C. § 3604

This section is the most important operative provision of the FHA.⁴¹ It consists of six subsections, two of which are relevant to the circuit split over post-acquisition claims.⁴² Those two subsections are § 3604(a) and § 3604(b). Subsection (a) states that it is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person

33. See Oliveri, *supra* note 28, at 27.

34. See Brown, *supra* note 31.

35. See Oliveri, *supra* note 28, at 27.

36. *Id.* Professor Oliveri also notes that committee hearings do exist on the earlier versions of the fair housing bills and that various floor debates on the final version occurred. However, “[n]one of these reflect a particularly reliable form of legislative history, and . . . none provides much insight into the FHA’s substantive terms.” *Id.*

37. *Id.*

38. See LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2014); Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“[T]he starting point for interpreting a statute is the language of the statute itself.”).

39. 42 U.S.C. §§ 304–306.

40. See Oliveri, *supra* note 28, at 3 n.11. Professor Oliveri points out that, although § 3605 and § 3606 may sometimes be relevant in post-acquisition scenarios, “on the whole neither of these sections figures very prominently in this debate” regarding post-acquisition claims. *Id.* Section 3605 covers discrimination in real estate transactions and § 3606 covers brokerage services. *Id.*

41. *Id.* at 3.

42. *Id.*

because of [a protected characteristic].”⁴³ Subsection (b) states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of [a protected characteristic].”⁴⁴ We will address each subsection individually.

a. § 3604(a)

The “refuse to sell or rent” and “refuse to negotiate” language is relatively straightforward in what conduct it prohibits. The ambiguity of this provision resides in the broad language “otherwise make unavailable or deny, a dwelling.” Outright refusal to sell or rent a house to someone is clearly covered by the first two clauses. Therefore, the “otherwise make unavailable or deny” catch-all language must apply to more exceptional situations.⁴⁵ Some examples are where the tenant or homeowner has obtained housing, but the discriminatory actions cause him or her to lose it, such as through a discriminatory eviction⁴⁶ or by making the home physically uninhabitable and therefore “unavailable.”⁴⁷

However, that is not all. This broad language of “otherwise make unavailable” has been construed to prohibit discriminatory conduct like racial steering and discriminatory zoning, discriminatory provision of municipal services, and mortgage or insurance redlining.⁴⁸ Furthermore, the Supreme Court has held that this “catchall phrase” supports a finding that the FHA covers “disparate impact” claims as well.⁴⁹ Despite these decisions, many courts have taken a narrow interpretation of “availability,”⁵⁰ limiting the language to concern only pre-acquisition “access”⁵¹ or the ability of individuals to “physically possess dwellings” and not any degree of

43. 42 U.S.C. § 3604.

44. *Id.* § 3604(b).

45. Otherwise one section would render the other superfluous. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 609 (1998) (“Statutory interpretations that render superfluous other provisions in the same enactment are strongly disfavored.”) (internal quotations omitted).

46. See Oliveri, *supra* note 28, at 4.

47. See Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n, 388 F.3d 327, 329 (7th Cir. 2004) (Judge Posner helpfully noting that “[i]f you burn down someone’s house you make it ‘unavailable’ to him.”).

48. See Southend Neighborhood Improv. Ass’n v. City of St. Clair, 743 F.2d 1207, 1209 n. 3 (7th Cir. 1984) (citing cases); see also Oliveri, *supra* note 28, at 4 nn.13–16 (same).

49. See *Inclusive Communities*, 135 S. Ct. 2507, 2511 (2015). See *infra* note 214 for an explanation of disparate impact claims.

50. See Bloch v. Frischholz, 587 F.3d 771, 776 (7th Cir. 2009) (en banc) (“Availability of housing is at the heart of § 3604(a).”); Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 719 (D.C. Cir. 1991) (“By their plain terms subsections (a) and (f)(1) reach only discrimination that adversely affects the availability of housing.”).

51. See Halprin, 388 F.3d at 329 (“The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but access to housing.”) (emphasis in original).

genuine racial integration and inclusion, as imagined by the statute's drafters and supporters.⁵² How these judicial interpretations have impacted the scope of the FHA is examined in Part IV of this article.

b. § 3604(b)

Subsection (b) raises many more questions of interpretation. Although it is relatively short, its broad language makes it "the most versatile" provision of the FHA and has been applied to at least seven different discrimination scenarios.⁵³ On its face, it clearly does not deal with situations where individuals are denied housing outright,⁵⁴ but instead it covers situations where the procedural aspects of conducting a sale or rental (i.e., the "terms, conditions, or privileges") are different because of a protected characteristic.⁵⁵ In other words, the dwelling may technically be "available" but only on different terms. Whether the FHA prohibits discriminatory "services or facilities" that extend *beyond* the initial sale or signing of the rental agreement is at the core of the post-acquisition circuit split.⁵⁶ Unfortunately, the legislative history is completely silent on how to interpret § 3604(b).⁵⁷

Some post-acquisition situations where § 3604(b) would arguably apply would be where rent is discriminatorily increased on a tenant or lease rules are applied by a landlord in a discriminatory fashion because of a tenant's protected characteristic.⁵⁸ However, because § 3604(b) is unclear whether the "services or facilities in connection therewith" language is pointing to the "sale or rental" language or whether it means "in connection" with "a dwelling," such situations are not clearly covered.⁵⁹ On the one hand, as this article will discuss in further detail, if the "services or facilities" language is only pointing to the "sale or rental" language, then once the dwelling has been sold or the rental lease signed, this provision no longer provides any protection.⁶⁰ On the other hand, if the "services or facilities" need only be "connected" to the dwelling itself, then protection extends

52. See Mary Pennisi, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After Modesto*, 37 *FORDHAM URB. L.J.* 1083, 1136 (2010).

53. See Oliveri, *supra* note 28, at 5, listing the seven scenarios as: "(1) proposed terms of sale or rental; (2) services or facilities connected to the initial sale or rental; (3) terms and conditions of housing after rental or sale; (4) maintenance or services connected to a dwelling; (5) privileges of a dwelling; (6) harassment; and (7) provision of municipal services."

54. That would make it duplicative of § 3604(a). See *supra* note 45.

55. See 24 C.F.R. § 100.65(b) (disparate treatment in rental charges, security deposits, and the terms of a lease would violate § 3604(b)).

56. See *infra* Part IV.

57. See Oliveri, *supra* note 28, at 27.

58. *Id.* at 6 & n.30 (citing cases).

59. *Id.* at 19.

60. *Cox*, 430 F.3d at 745–46; see *infra* Part IV(B).

beyond the initial sale or rental phase and includes any time period where the dwelling is occupied.⁶¹

2. 42 U.S.C. § 3617

The third and final provision of the FHA that is relevant to post-acquisition claims is § 3617, which states:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [sections 3603–06].⁶²

Three types of conduct can violate this section: (1) retaliation against someone because they exercised their fair housing rights; (2) interfering with someone's attempt to exercise or enjoy their fair housing rights; and (3) retaliating against someone for aiding someone else in exercising or enjoying their fair housing rights.⁶³ However, some courts have determined that § 3617 does not provide a basis for liability without an underlying or "predicate" violation of §§ 3603–3606.⁶⁴ The implication of that interpretation is that if § 3604 does not cover post-acquisition claims, then § 3617 cannot either.⁶⁵ This question is discussed in detail in Part IV and V of this article.

B. Legislative History of the Fair Housing Act

Despite the extremely limited legislative history that exists concerning the specific bill that became the FHA,⁶⁶ what we do have is not entirely unhelpful.⁶⁷ Several examples drawn from the legislative history and prior versions of the statutory text strongly indicate that the original proponents

61. *Modesto*, 583 F.3d at 713–14.

62. 42 U.S.C. § 3617.

63. See Oliveri, *supra* note 28, at 12; *Stackhouse v. DeSitter*, 620 F. Supp. 208, 210–11 (N.D. Ill. 1985).

64. See Oliveri, *supra* note 28, at 12; see *infra* Part IV(B).

65. See Oliveri, *supra* note 28, at 12 (“[B]ecause of § 3617’s reference to rights ‘granted or protected by’ the substantive provisions of the FHA, some courts have determined that it cannot provide a stand-alone basis for liability and instead requires a proven violation of one of the substantive provisions.”).

66. See *supra* notes 35–36 and accompanying text.

67. Some commentators’ assessments have concluded that the legislative history can be viewed both in favor of and against a broad reading of the FHA. See Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189, 226–30 (1998); see also Pennisi, *supra* note 52, at 1134 (commenting that “[b]oth sides piece together isolated sections of the legislative history to support their *a priori* conflicting but equally legitimate conceptions of housing access” and the FHA).

and drafters of the FHA intended to pass a law that protected individuals after they acquired housing.⁶⁸

In 1966, the Johnson Administration drafted a fair housing bill to be considered by Congress.⁶⁹ Before the final version was passed two years later, a total of five different versions came before Congress.⁷⁰ As noted above, only a few provisions of the FHA are relevant to the post-acquisition question.⁷¹ Notably, the language of two of the most relevant provisions, § 3604(a) and (b), “remained virtually unchanged” from the first to the final version that was enacted.⁷² After the Johnson Administration’s initial bill failed to pass,⁷³ Senator Walter Mondale became the principal sponsor in the Senate of the fair housing legislation,⁷⁴ and in 1967 he proposed a fair housing bill⁷⁵ that contained the exact same language that became § 3604(a) and (b).⁷⁶

The Johnson Administration’s initial bill was seemingly modeled after Title VII,⁷⁷ and, like Title VII, it specified in the introductory language of § 3604 the kinds of defendants who would be subject to the fair housing bill.⁷⁸ Among the kinds of defendants listed, “manager[s]” and those who have “the authority to . . . manage” dwellings were included, implying protection from managers during occupancy.⁷⁹ This list of defendants was ultimately deleted in favor of an approach where *any* person (not just housing professionals) could be a defendant.⁸⁰ However, because the drafters of this list also drafted the current language of § 3604(a) and (b), this is significant evidence that the drafters understood the law to cover claims arising after the sale or rental and during occupancy while the property is being “managed.”⁸¹

Furthermore, the Johnson Administration’s first proposed bill contained a policy statement that said: “It is the policy of the United States to prevent, and the right of every person to be protected against discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, *use and occupancy* of housing throughout the

68. See Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 757–62 (2008).

69. S. 3296 and H.R. 14765, 89th Cong. (1966).

70. See Schwemm, *supra* note 68, at 758.

71. See *supra* Part III(A)(1)–(4).

72. See Schwemm, *supra* note 68, at 758.

73. *Id.*

74. 114 CONG. REC. 3422 (1968).

75. S. 1358 90th CONG. 1967.

76. See Schwemm, *supra* note 68, at 760.

77. *Id.* at 760 n.267 (noting that Title VII is limited to employers, employment agencies, labor organizations, and training programs).

78. 112 CONG. REC. 9397 (1966).

79. See Schwemm, *supra* note 68, at 761 nn.268–69.

80. *Id.* at 761 n.269.

81. *Id.*

Nation.”⁸² The words “use and occupancy” clearly demonstrate protection that extends beyond the purchase or rental phase and covers individuals who are using and occupying their homes.⁸³ However, this language was ultimately changed to “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁸⁴ Arguably, the final language that was passed—providing for “fair housing”—was not a substantive change as much as a simplification of the same concepts contained within the first proposed policy statement.⁸⁵ If this is so, then the drafters must have intended to pass a law that protects “use and occupancy” as well as nondiscriminatory access to housing.

C. Interpretation of the Fair Housing Act

The Supreme Court has had numerous occasions to interpret the Fair Housing Act.⁸⁶ In the Court’s first FHA decision, a unanimous court wrote that the FHA’s language is “broad and inclusive” and implements “a policy that Congress considered to be of the highest priority.”⁸⁷ Therefore, the statute should be given “a generous construction.”⁸⁸ The Court has further acknowledged that the FHA has a “broad remedial intent”⁸⁹ and that it was “enacted to eradicate discriminatory practices within a sector of our Nation’s economy,” similar to other civil rights laws.⁹⁰ The statute, like other antidiscrimination laws, should be broadly interpreted to “further the purpose and design of the statute.”⁹¹ Within a few years after the passage of the FHA, lower courts also acknowledged the breadth of the statute.⁹² Judge Wilkey on the D.C. Circuit noted that “Congress was aware that the measure would have a very broad reach, and indeed the legisla-

82. 112 CONG. REC. 9396 (1966) (emphasis added).

83. See Schwemm, *supra* note 68, at 761–62.

84. 42 U.S.C. 3601.

85. See Oliveri, *supra* 28, at 28. *But see* Schwemm, *supra* note 68, at 762 (arguing that “whatever interpretive meaning this [initial] version may have had, it] was ultimately diluted” by the fact that the enacted version’s language is different).

86. See generally Robert G. Schwemm, GUIDES TO CONGRESSIONAL INTENT AND STATUTORY CONSTRUCTION: HOUSING DISCRIMINATION LAW AND LITIGATION ch. 7 (citing cases).

87. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–11 (1972) (unanimous).

88. *Id.* at 212 (1972); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (reaffirming that the FHA is entitled to a “generous construction”).

89. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

90. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (referencing Title VII and the Age Discrimination in Employment Act which prohibit discrimination in employment).

91. *Id.* at 2517–18.

92. *Revoek v. Cowpet Bay W. Condo. Ass’n*, 853 F.3d 96, 104–05 (3d Cir. 2017); *Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1223 (11th Cir. 2016); *Guider v. Bauer*, 865 F. Supp. 492, 495 (N.D. Ill. 1994); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 210 (N.D. Ill. 1985). Professor Schwemm also notes that many “early trial court opinions went so far as to say that the language of the Fair Housing Act’s substantive prohibitions is ‘as broad as Congress could have made it.’” See Schwemm, *supra* note 86, § 7:2 n.6.

tion was seen as an attempt to alter the whole character of the housing market."⁹³

Broadly speaking, the FHA has often been interpreted by relying on Title VII jurisprudence.⁹⁴ This approach was reaffirmed recently in *Inclusive Communities* where the Court wrote that cases interpreting Title VII "provide essential background and instruction" for interpreting the FHA.⁹⁵ Part VI(A) of this article takes a more detailed analysis of *Inclusive Communities'* approach to interpreting the FHA.

Throughout FHA jurisprudence, the federal courts have relied on "four guiding principles"⁹⁶ for interpreting the FHA, two of which are that the FHA should be construed broadly and that Title VII gives essential guidance in construing the statute. The remaining two principles are that the statute should be interpreted with reference to the congressional goal of racial integration in housing⁹⁷ and that interpretations and regulations promulgated by the Department of Housing and Urban Development (HUD) are entitled to significant weight and deference.⁹⁸ These four guiding principles are essential to answering the question of whether post-acquisition discrimination claims are actionable under the FHA.

IV. Current Case Law on Post-Acquisition Discrimination Claims

The circuit split over post-acquisition claims primarily involves several court of appeals decisions across three circuits.⁹⁹ The first circuit case¹⁰⁰ to put the post-acquisition question in dispute was *Halprin v. Prairie Single Family Homes of Dearborn Park Association*.¹⁰¹ Prior to *Halprin*, most courts either implicitly accepted that post-acquisition claims were covered by the FHA

93. *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

94. See Schwemm, *supra* note 68, at 720. For a list of cases interpreting the FHA by referring to Title VII precedents, see Schwemm, *supra* note 86, § 7:4 nn.4-5.

95. *Inclusive Communities*, 135 S. Ct. at 2516-18.

96. Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106 n.87 (2015).

97. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 205 (1972); Schwemm, *supra* note 86.

98. See Schwemm, *supra* note 86.

99. See *supra* note 11.

100. Specifically, *Halprin* is the first case to discuss the FHA as having a temporal limitation concerning pre- and post-acquisition claims. See *infra* note 101. A prior case in the Seventh Circuit came close to this concept in dicta but did not extend the rationale to § 3604(b) or § 3716 the way *Halprin* does and seemingly allowed for post-acquisition claims in limited circumstances. See *Southend Neighborhood Improv. Ass'n v. City of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984).

101. 388 F.3d 327 (7th Cir. 2004).

or explicitly held in the affirmative that such conduct was prohibited by the statute.¹⁰² Then *Halprin* launched a dramatic reversal of the status quo.¹⁰³

A. *Halprin v. Prairie Single Family Homes of Dearborn Park Association*¹⁰⁴
The *Halprin* case involved a Jewish couple and anti-Semitic harassment that they endured at the hands of their neighborhood homeowners' association board president.¹⁰⁵ The harassment was clearly motivated by anti-Semitic animus.¹⁰⁶ The Halprins sued, alleging violations of FHA §§ 3604 and 3617.¹⁰⁷ But when the defendants moved to dismiss, the trial court granted their motion because the alleged conduct happened *after* the Halprins bought their home.¹⁰⁸

Judge Posner, writing for the Seventh Circuit on the plaintiffs' appeal, stated that the FHA "contains no hint either in its language or its legislative history of a concern with anything but *access* to housing."¹⁰⁹ Because the Halprins were "complaining not about being prevented from acquiring property but about being harassed by other property owners" most of their FHA claims were dismissed.¹¹⁰

Halprin made clear that the FHA's concern is "with activities, such as redlining, that prevent people from acquiring property."¹¹¹ The court did note that "[a]s a purely semantic matter the statutory language might be stretched far enough to reach a case of 'constructive eviction,'" because forcing someone out of their home makes it "unavailable" to them and one aspect of buying or renting a home "might conceivably be thought to include the privilege of inhabiting the premises."¹¹² With that limited and extreme scenario exception, *Halprin* concluded that the FHA offers no protection for an individual after she obtains housing.¹¹³

102. Jessica D. Zietz, Note, *On Second Thought: Post-Acquisition Housing Discrimination in Light of Bloch v. Frischholz*, 66 U. MIAMI L. REV. 495, 505–06 (2012) (citing to multiple district court cases).

103. See Oliveri, *supra* note 28, at 33 (commenting that a strict adherence to *Halprin* "would eviscerate nearly forty years of fair housing jurisprudence, particularly in the landlord-tenant context and would invalidate the results of hundreds of cases").

104. 388 F.3d 327 (7th Cir. 2004).

105. See *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 208 F. Supp. 2d 896, 898 (N.D. Ill. 2002), *aff'd in part, rev'd in part*, 388 F.3d 327 (7th Cir. 2004).

106. See Zietz, *supra* note 102, at 506–07.

107. *Halprin*, 208 F. Supp. 2d at 900.

108. *Id.* at 901 ("Because plaintiffs already owned their home and none of plaintiffs' allegations involve the sale or rental of housing . . . plaintiffs fail to state a claim as a matter of law . . .").

109. *Halprin*, 388 F.3d at 329.

110. *Id.*

111. *Id.* at 328.

112. *Id.* at 329. Judge Posner's example was that "if you burn down someone's house you make it 'unavailable' to him." *Id.*

113. *Id.* ("Behind the [Fair Housing] Act lay the widespread practice of refusing to sell or rent homes in desirable residential areas to members of minority groups. Since

The Halprins' only surviving FHA claim was under § 3617.¹¹⁴ However, Judge Posner made it clear that this claim remained standing only because of HUD regulation 24 C.F.R. § 100.400(c)(2).¹¹⁵ Further, he all but held that this regulation was invalid, but, because the defendants had not challenged the regulation's validity in district court, they had "forfeited" this issue, and the lower court's dismissal of their § 3617 claim had to be reversed.¹¹⁶ As commentators have already noted, Judge Posner was clearly signaling that future defendants need only challenge the HUD regulation's validity and then could succeed in having a plaintiff's § 3617 post-acquisition claim dismissed.¹¹⁷ This is exactly what happened a year later in a district court case in Texas where a resident's § 3617 claim was dismissed and the court claimed it was adopting "the Seventh Circuit view that 24 C.F.R. § 100.400(c)(2) is invalid."¹¹⁸

The problems with *Halprin* have been thoroughly discussed elsewhere.¹¹⁹ However, later cases in the Seventh Circuit have limited the breadth of *Halprin's* language regarding post-acquisition claims and, to some extent, explicitly overruled parts of its holding.¹²⁰ However, *Halprin* remains significant because it set the stage for a circuit split over post-acquisition claims and informed the reasoning of the Fifth Circuit in *Cox v. City of Dallas, Texas*, decided shortly after *Halprin*.¹²¹

B. *Cox v. City of Dallas, Texas*¹²²

The *Cox* case involved plaintiffs alleging that the city of Dallas violated the FHA and related regulations by consistently failing to stop the operation

the focus was on their exclusion, the problem of how they were treated when they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking.").

114. *Id.* at 330.

115. *Id.* at 330–31.

116. *Id.* at 330.

117. See Schwemm, *supra* note 68, at 728.

118. *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. CIV.A. H-05-3197, 2005 WL 2669480, at *4 n.4 (S.D. Tex. Oct. 19, 2005).

119. See Oliveri, *supra* note 28, at 18 n.93. Professor Oliveri extensively critiques and ultimately rejects *Halprin*. *Id.* For example, she describes Judge Posner's reasoning as "bewildering" because it "focus[ed] on an obviously inapplicable portion of the statute, upon which the plaintiffs themselves did not even rely" and he made dispositive conclusions "without any explanation or further analysis." *Id.* She also argues that Judge Posner "added a clumsy and ultimately unworkable element to the analysis that failed to account for the different relational contexts that most courts seem to understand implicitly." *Id.* at 50; see also *United States v. Koch*, 352 F. Supp. 2d 970, 975 (D. Neb. 2004) (criticizing and rejecting *Halprin's* holding).

120. See *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc) (overruling *Halprin's* holding on § 3617); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 867 (7th Cir. 2018) (narrowing *Halprin's* language).

121. *Cox*, 430 F.3d at 741.

122. 430 F.3d 734 (5th Cir. 2005) cert. denied, 547 U.S. 1130 (2006).

of an illegal dump in a predominantly African American neighborhood.¹²³ The district court granted summary judgment to the defendant city on the FHA claims, and the Fifth Circuit affirmed.¹²⁴ The plaintiffs had argued that the illegal dump in their neighborhood had decreased the value of their property and hindered their ability to sell their homes¹²⁵ and that the city discriminated in the provision of a service (i.e., the enforcement of zoning laws) because of the racial makeup of the neighborhood.¹²⁶ The district court's opinion spoke directly to both points, stating that the FHA "does not protect intangible interests in already-owned property such as habitability or value"¹²⁷ and that the enforcement of zoning laws against an illegal dump is not a "service" connected to the sale or rental of a dwelling as required by the FHA.¹²⁸

On appeal, the Fifth Circuit first addressed the § 3604(a) claim. The court began its analysis by relying on the principle that although the "otherwise make unavailable or deny" phrase in § 3604(a) "seems all encompassing, its scope is not limitless."¹²⁹ From there, the court quickly explained that "decreased home values" does not make the houses "unavailable" under the FHA.¹³⁰ The court quoted at length the *Halprin* decision and decisions from other courts¹³¹ and concluded that "the simple language of § 3604(a) does not apply to current homeowners whose complaint is that the value or 'habitability' of their houses has decreased because such a complaint is not about 'availability.'"¹³² While an actual or constructive eviction would give rise to an FHA claim, any claim that the habitability of a home has decreased "due to discrimination in the delivery of protective city services"¹³³ cannot be maintained under § 3604(a) if the habitability issue "fall[s] short of constructive eviction."¹³⁴

Second, the court addressed the § 3604(b) claim that the city discriminated against the plaintiffs "in the provision of a service." The court dismissed this claim, stating that "§ 3604(b) is inapplicable here because the

123. *Id.* at 736.

124. *Id.*

125. *Id.* at 740.

126. *Id.* at 745.

127. *Cox v. City of Dallas*, 2004 U.S. Dist. LEXIS 18968, at *6 (N.D. Tex. Sept. 22, 2004) (internal citations and quotations omitted).

128. *Id.* at *7

129. *Cox*, 430 F.3d at 740 (quoting *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996) (construing § 3604(f)).

130. *Id.*

131. Besides *Halprin*, the court relied on *Southend*, 743 F.2d 1207 (7th Cir. 1984), *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999), *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002), and *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714 (D.C. Cir. 1991).

132. *Cox*, 430 F.3d at 741.

133. *Id.* at 743.

134. *Id.* at 742 n.21.

service was not 'connected' to the sale or rental of a dwelling as the statute requires."¹³⁵ The court addressed the ambiguity over the "in connection therewith" language¹³⁶ and concluded that the services or facilities must be connected to the "sale or rental" because "[t]his reading is grammatically superior and supported by the decisions of many courts."¹³⁷ Further, to hold otherwise would "push[] the FHA into a general anti-discrimination pose," and this interpretation would be contrary to "the focus of congressional concern," which was to create "a housing statute . . . [that] targets only housing" and does not target general discrimination that may indirectly decrease property values.¹³⁸

The conclusion of *Cox* is that, under § 3604(a), "availability" simply means the ability to obtain housing and under § 3604(b), discriminatory conduct is only prohibited up through the initial sale or rental and not thereafter. *Cox* strengthened the position that *Halprin* established, giving momentum to this interpretation of the FHA that was then cut short when the Seventh Circuit readdressed the post-acquisition question in *Bloch v. Frischholz*.¹³⁹

C. *Bloch v. Frischholz*¹⁴⁰

The *Bloch* case involved a Jewish family who, pursuant to their religious beliefs, affixed a small religious symbol called a mezuzah¹⁴¹ to the exterior doorpost of their condominium home.¹⁴² For years no one objected to this practice.¹⁴³ Then, in 2004, the Condominium Association of Shoreline Towers, where they lived, reinterpreted the "hallway rules"¹⁴⁴ to include a prohibition against all signs and symbols outside the front doors of the condo units.¹⁴⁵ The Blochs had their mezuzah removed, and, after they replaced it, the new one was also taken down by the Condominium Association.¹⁴⁶ The Bloch family ultimately sued the Condominium Association for religiously motivated harassment in violation of the FHA.¹⁴⁷ They lost in district court

135. *Id.* at 745.

136. *Id.* at 745–46. *See supra* Part III(A)(3).

137. *Id.* at 745.

138. *Id.* at 746.

139. 533 F.3d 562 (7th Cir. 2008) [hereinafter *Bloch I*].

140. *Id.*

141. A mezuzah is "a small piece of parchment rolled up and placed into a small wooden, plastic, or metal casing . . . no more than six inches long, one inch deep, and one inch wide." *Bloch I*, 533 F.3d at 566 (Wood, J., dissenting).

142. *Bloch I*, 533 F.3d at 563.

143. *Id.*

144. The relevant "hallway rule" stated that "Mats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors." *Bloch v. Frischholz*, 587 F.3d 771, 773 (7th Cir. 2009) (en banc) [hereinafter *Bloch II*].

145. *Bloch I*, 533 F.3d at 566 (Wood, J., dissenting).

146. *Id.* at 563.

147. *Id.*

because the court granted the defendant's motion for summary judgment, relying on *Halprin's* interpretation of the FHA.¹⁴⁸

On appeal, a 2-1 panel decision from the Seventh Circuit affirmed the district court.¹⁴⁹ Chief Judge Frank Easterbrook, writing over a dissent from Judge Diane Wood, explained that *Halprin* held that the FHA "does not address discrimination after ownership has changed hands," and, therefore, "religiously motivated harassment of owners or tenants does not violate the Fair Housing Act or its regulations."¹⁵⁰

Judge Wood, in her dissent, argued that the Blochs simply raised "a straightforward claim of intentional discrimination"¹⁵¹ and that, even under *Halprin's* "narrow view" of § 3604(a), the hallway rule still "falls squarely within the ambit of § 3604(a), as construed in *Halprin*."¹⁵² This is so because "the inability to place a mezuzah on the doorpost creates a constructive eviction for observant Jewish residents" by forcing observant Jews to choose between obeying Jewish law and living at Shoreline Towers.¹⁵³ In other words, "[p]rohibiting the mezuzah meant the Blochs could only remain in the building by living in violation of Jewish law."¹⁵⁴ Furthermore, this kind of prohibition "operates exactly as a redlining rule does with respect to the ability of the owner to sell to observant Jews."¹⁵⁵ Ultimately, the dissent's analogy to redlining prevailed in theory when the panel's decision was reversed on rehearing before the entire Seventh Circuit.¹⁵⁶

In *Bloch II*, the en banc court examined § 3604(a) and acknowledged that "*Halprin* left little room for a post-acquisition discrimination claim."¹⁵⁷ Nevertheless, the court explains that *Halprin* did leave room for § 3604(a) to cover a case of post-acquisition "constructive eviction," and the court agreed that § 3604(a) may cover situations that are "somewhat like a

148. *Bloch v. Frischoltz*, No. 05 C 5379, at 1 (N.D. Ill. Aug. 7, 2006) (unpublished); see Scott N. Gilbert, *You Can Move in But You Can't Stay: To Protect Occupancy Rights After Halprin, The Fair Housing Act Needs to Be Amended to Prohibit Post-Acquisition Discrimination*, 42 J. MARSHALL L. REV. 751, 751 n.1 (2009).

149. *Bloch II*, 587 F.3d at 565.

150. *Bloch I*, 533 F.3d at 563.

151. *Id.* at 566 (Wood, J., dissenting).

152. *Id.* at 570. The dissenting opinion also would have found that the Blochs could sue under § 3604(b) partly because HUD's regulations have "adopted a broader approach" and this regulation is entitled to deference under *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Id.* at 570–71 (Wood, J., dissenting).

153. *Bloch I*, 533 F.3d at 570 (Wood, J., dissenting).

154. See Gilbert, *supra* note 148, at 751.

155. *Bloch I*, 533 F.3d at 570 (Wood, J., dissenting).

156. *Bloch v. Frischholz*, 587 F.3d 771, 778–79 (7th Cir. 2009) (en banc). The en banc court acknowledged the dissent's argument that the hallway rule operated like redlining and agreed that this would violate § 3604(a). *Id.* However, because the Blochs never raised this argument in district court, they could not proceed under this theory. *Id.*

157. *Id.* at 776.

constructive eviction."¹⁵⁸ Constructive eviction claims generally require a plaintiff to vacate or otherwise lose possession of their dwelling; otherwise, the dwelling is not truly "unavailable."¹⁵⁹ The Blochs never moved out, so the court determined that no reasonable jury could "conclude that the defendants' conduct rendered Shoreline Towers 'unavailable' to the Blochs, which is what § 3604(a) requires."¹⁶⁰

Under § 3604(b), however, the *Bloch II* court distinguished the present case from *Halprin* based on the "contractual connection between the Blochs and the [Condominium Association] Board."¹⁶¹ Because this contractual relationship was "a 'condition' of the Blochs' purchase" and the "Board's power to restrict unit owners' rights flows from the terms of the sale,"¹⁶² this contractual relationship was sufficient to bring the case within § 3604(b)'s language prohibiting discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling."¹⁶³ As one commentator put it, this approach appears to be a "painstaking effort to refashion the Blochs' post-acquisition claim into a pre-acquisition claim."¹⁶⁴ Alternatively, the *Bloch II* court may have recognized the degree of control the Condominium Association had over the Blochs and implicitly likened this to a landlord-tenant relationship.¹⁶⁵

Concerning § 3617, the court explicitly overruled *Halprin*¹⁶⁶ and held that a violation of § 3617 can exist without a predicate violation of §§ 3603–3606.¹⁶⁷ Therefore, § 3617 prohibits discrimination that occurs post-acquisition.¹⁶⁸

The result of the *Halprin-Bloch I & II* series of cases is that concerning § 3604(a) within the Seventh Circuit, there is no cause of action for

158. *Id.*

159. *Id.* at 777–78. For the "constructive eviction" analogy to succeed, a plaintiff must move out within "a reasonable time" or else they waive their claim for constructive eviction. *Id.* at 778. But because the constructive eviction analogy is "imperfect," the court refrained from determining whether "a plaintiff must, in every case, vacate the premises to have a § 3604(a) claim." *Id.* at 778.

160. *Id.* at 778.

161. *Id.* at 780.

162. *Id.*

163. 42 U.S.C. § 3604(b); *Bloch v. Frischholz*, 587 F.3d 771, 780 (7th Cir. 2009) (en banc).

164. See Pennisi, *supra* note 52, at 1086.

165. See Oliveri, *supra* note 28, at 52. Professor Oliveri details the extensive control a condo association has over a property owner and argues that this relationship is "much more analogous to landlords than to home-sellers." *Id.* at 52–54.

166. *Bloch II*, 587 F.3d at 782 ("We recognize this interpretation effectively overrules *Halprin* as far as § 3617 is concerned.")

167. *Id.* at 781–82. ("To hold otherwise would make § 3617 entirely duplicative of the other FHA provisions; though its language is unique in the FHA, § 3617 would have no independent meaning . . . Coercion, intimidation, threats, or interference with or on account of a person's exercise of his or her §§ 3603–3606 rights can be distinct from outright violations of §§ 3603–3606.")

168. *Id.* at 782 ("[Section] 3617 reaches . . . post-acquisition conduct.")

post-acquisition discrimination that falls short of the plaintiff losing their housing (i.e., actual or constructive eviction). Under § 3604(b), a post-acquisition claim can only survive if the plaintiff can tie the discriminatory conduct to “any of the terms, conditions, or privileges that accompanied or were related to the plaintiff’s purchase of their property.”¹⁶⁹ However, the court’s view of what it means for a term, condition, or privilege to be sufficiently connected to the purchase of the property excludes some privileges that one might expect to be included. For example, the court did not recognize a “privilege of quiet enjoyment” that other courts have found in § 3604(b) because this “privilege” is granted upon purchasing property.¹⁷⁰ This takes us to the Ninth Circuit decision that created the circuit split,¹⁷¹ partly because it recognized the privilege of quiet enjoyment.

D. The Committee Concerning Community Improvement v. City of Modesto¹⁷²

The *Modesto* case involved residents from predominantly Latino neighborhoods alleging discrimination in the provision of inadequate municipal services because of race, ethnicity, ancestry, color, or national origin.¹⁷³ The district court dismissed the plaintiffs’ FHA claims because it held that the FHA did not cover post-acquisition claims.¹⁷⁴ On appeal, the Ninth Circuit held that the district court erred.¹⁷⁵ The court addressed *Halprin* and *Bloch I*¹⁷⁶ and, despite those contrary decisions, concluded that the FHA *does* prohibit post-acquisition discrimination.¹⁷⁷

In its holding, the court only addressed § 3604(b).¹⁷⁸ Looking at the statutory language, the court concluded that “[t]he inclusion of the word ‘privileges’ implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling.”¹⁷⁹ The court explicitly rejected the interpretation of § 3604(b) proffered by the defendants and originally established in *Cox*.¹⁸⁰ The defendants argued that the “in connection therewith” language points to “services or facilities provided at the moment of acquisition,”

169. *Id.* at 780.

170. See Zietz, *supra* note 102, at 519–20.

171. Joseph William Singer, *Circuit Split Over Whether Fair Housing Act Regulates Post-Acquisition Discrimination*, PROPERTY LAW DEVELOPMENTS BLOG (Nov. 14, 2009), <https://scholar.harvard.edu/jsinger/circuit-split-over-whether-fair-housing-act-regulates-post-acquisition-discrimination>.

172. 583 F.3d 690 (9th Cir. 2009).

173. *Id.* at 699, 711.

174. *Id.* at 711.

175. *Id.* at 713.

176. The rehearing of *Bloch I* had not yet occurred, although it had been granted.

177. *Modesto*, 583 F.3d at 713.

178. *Id.* at 712 n.13 (noting that § 3617 was inapplicable).

179. *Id.* at 713.

180. *Id.*; *Cox*, 430 F.3d at 745.

but the court noted that this is not a “necessary reading” of the statute.¹⁸¹ Instead, the court preferred a more “natural reading” considering that there are “few ‘services or facilities’ provided at the moment of sale, but there are many ‘services or facilities’ provided to the dwelling associated with the occupancy of the dwelling.”¹⁸² Thus, the “in connection therewith” language is pointing to the dwelling itself and not the sale or rental phase only.¹⁸³ While the *Modesto* court may have a reasonable claim that its interpretation of § 3604(b) is more “natural,”¹⁸⁴ neither *Modesto*’s nor *Cox*’s interpretation can “be defended on the basis of correct grammar” because “either option is ‘wrong’ grammatically.”¹⁸⁵

Furthermore, the court held that the HUD regulations clearly support an interpretation of the FHA that covers post-acquisition claims.¹⁸⁶ Lastly, the court implicitly rejected the “constructive eviction” limitation placed on § 3604(b) by *Halprin*, *Bloch*, and *Cox* and held that some discriminatory conduct that does not “amount[] to constructive eviction” may still “constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling” and therefore violates the FHA.¹⁸⁷ The result of *Modesto* is a sweeping rejection of the limitations to post-acquisition claims that the Seventh and Fifth Circuits had placed on § 3604(b), arguably prompting the Seventh Circuit to reevaluate its position in the next case.

E. *Wetzel v. Glen St. Andrew Living Community, LLC*¹⁸⁸

The facts of *Wetzel* were introduced in Part I. The primary legal issue in *Wetzel* is about whether a defendant-landlord can be held liable when other tenants are harassing the plaintiff-tenant because of a protected characteristic and the landlord has actual notice of this and fails to take reasonable, corrective action.¹⁸⁹ The defendants argued that a landlord could not be held liable and alternatively argued that *Wetzel*’s harassment claim should be dismissed because the FHA does not cover post-acquisition claims.¹⁹⁰ The *Wetzel* court addressed both arguments, and a significant portion of the opinion sheds light on the post-acquisition question.¹⁹¹

181. *Modesto*, 583 F.3d at 713.

182. *Id.*

183. *Id.*

184. *Id.*

185. See Schwemm, *supra* note 68, at 769–71 (diagramming § 3604(b) and concluding that a grammatically correct reading “does not yield a helpful interpretation of § 3604(b) . . . which clearly was intended by Congress to add new types of prohibited discrimination to the earlier prohibitions against ‘terms, conditions, or privileges’ discrimination.”).

186. *Modesto*, 583 F.3d at 713–14 (quoting 24 C.F.R. § 100.65).

187. *Id.* at 714.

188. 901 F.3d 856 (7th Cir. 2018).

189. *Id.* at 862–63.

190. *Id.*

191. *Id.* at 861–62, 866–67.

Where *Bloch II* seemingly limited post-acquisition claims under § 3604(b) to situations “somewhat like a constructive eviction” or where an ongoing contractual relationship is inherent in the purchase or rental, the *Wetzel* case pulls the door wide open to alternative situations.¹⁹² The court explained that although the defendants “read[] *Bloch* as identifying the exclusive set of post-acquisition claims that would be possible under section 3604(b) . . . we said no such thing.”¹⁹³ Rather, the court explained that *Bloch II* was merely discussing the possible options available in that particular case.¹⁹⁴ The court then relied on the Ninth Circuit’s reading of § 3604(b) in *Modesto* to hold that § 3604(b) covers discrimination in “services or facilities” that relate to occupancy (i.e., post-acquisition).¹⁹⁵

This holding is an extraordinary reversal of how *Bloch II* was largely understood.¹⁹⁶ It is also noteworthy that the court acknowledged that “[o]ur treatment of this argument [concerning § 3604(b)] might have little effect on the outcome of this case, because *Wetzel*’s harassment claim invokes . . . section 3617” as well.¹⁹⁷ Because § 3617 covers post-acquisition claims in the Seventh Circuit,¹⁹⁸ it was not essential to this case whether § 3604(b) does because *Wetzel* could proceed under § 3716 regardless.¹⁹⁹

The result of *Wetzel* is that the Seventh Circuit has unexpectedly²⁰⁰ embraced *Modesto*’s view that § 3604(b) “encompasses conduct that follows acquisition”²⁰¹ and is not limited at all by *Bloch II*’s “two possibilities” language referring to constructive eviction or a contractual relationship connected to the sale or rental.²⁰² This leaves *Cox* standing alone in maintaining the circuit split over whether post-acquisition claims are cognizable under § 3604(b).

192. *Id.* at 866.

193. *Id.*

194. *Id.*

195. *Id.* at 867.

196. See generally Zietz, *supra* note 102. *Wetzel* further splits § 3617 to contain different types of claims such as “retaliation” claims and “interference” claims and these two have different elements of a prima facie case. *Wetzel*, 901 F.3d at 868.

197. *Wetzel*, 901 F.3d at 866.

198. *Id.* (“[A] claim alleging a post-acquisition pattern of harassment can proceed under section 3617 even if there is no route for relief under section 3604.”).

199. *Id.*

200. Though perhaps it was not entirely unexpected. The author of *Wetzel* is Judge Wood, the sole dissenting judge in *Bloch I*. *Bloch v. Frischholz*, 533 F.3d 562, 566 (7th Cir. 2008). The implication here may be that *Wetzel* was an opportunity for Judge Wood and those judges on the Seventh Circuit who share her understanding of the FHA to confine *Bloch* with a narrow reading and ultimately align the Seventh Circuit with the Ninth Circuit’s position in allowing a large variety of post-acquisition claims under the FHA.

201. *Wetzel*, 901 F.3d at 867.

202. *Id.* at 866.

V. Current Status of the Circuit Split

It would be useful at this point to clarify and synthesize where the circuit courts currently sit regarding post-acquisition discrimination claims under §§ 3604(a), (b), and 3617. First, most courts that have addressed the issue have held that § 3617 covers post-acquisition claims.²⁰³ Although *Halprin* threw this status quo into question, *Bloch II* explicitly overruled *Halprin* on this point,²⁰⁴ and *Wetzel* reaffirmed.²⁰⁵ *Cox* did not address § 3617. The one remaining route for a court to find that § 3617 does not cover post-acquisition claims is if a court requires a § 3604 violation as a predicate to a § 3617 claim and also holds that no subsection of § 3604 covers post-acquisition claims.²⁰⁶ This relatively rare view of § 3617 seems to be obviously wrong.²⁰⁷ Undoubtedly, Congress was aware of the well-documented hostile and violent reactions many African Americans would face while attempting to exercise their fair housing rights by moving into an “available” home in a white neighborhood.²⁰⁸ Section 3617 clearly was intended to also protect those who were threatened or intimidated for having *successfully* moved into those available homes on nondiscriminatory terms, whether or not the threats or intimidation caused them to lose the dwelling.²⁰⁹

Importantly, neither *Modesto* nor *Wetzel* directly addressed § 3604(a). Moreover, the prevailing construction of § 3604(a) in *Bloch II* and *Cox* may, in fact, be the most appropriate interpretation.²¹⁰ Thus, the true circuit split appears to be over whether § 3604(b) covers post-acquisition claims that fall short of losing a home. The Seventh and Ninth Circuit generally respond in the affirmative,²¹¹ whereas the Fifth Circuit in *Cox* categorically

203. *Revoek v. Cowpet Bay W. Condo. Ass’n*, 853 F.3d 96, 112 (3d Cir. 2017) (“A [§ 3617] claim may arise before or, as here, after a plaintiff acquires housing.”); *Gourlay v. Forest Lakes Civic Ass’n*, 276 F. Supp. 2d 1222, 1235 (M.D. Fla. 2003) (“Section 3617 regulates discriminatory conduct before, during, or after a sale or rental of a dwelling.”).

204. *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc) [hereinafter *Bloch II*].

205. *Wetzel*, 901 F.3d at 866.

206. See *Oliveri*, *supra* note 28, at 12. See *supra* Part IV(A).

207. By the plain language of § 3617, this provision protects against interference, coercion, intimidation, or threats for having exercised or enjoyed § 3604 rights. It does not say “for having § 3604 rights violated.” See *Bloch II*, 587 F.3d at 781–82. (“[I]f a landlord rents to a white tenant but then threatens to evict him upon learning that he is married to a black woman, the landlord has plainly violated § 3617, whether he actually evicts the tenant or not.”).

208. See Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 252 nn.363, 367, 253 n.372 (2006).

209. For example, § 3617 has been used in cases of racially motivated fire-bombings against existing homeowners. *Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. 111. 1989); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 n.6 (N.D. Ill. 1985).

210. See *Schwemm*, *supra* note 68, at 731 (conceding that “the statutory language may justify an interpretation of § 3604(a) that is limited to the acquisition of housing.”).

211. See *supra* Part IV(C)–(E). Unfortunately, the strength of the language in *Wetzel* aligning with *Modesto* is uncertain because reaching that issue was unnecessary for the

says no.²¹² This disagreement over § 3604(b) can be resolved by using the interpretive methodology employed in *Inclusive Communities*.

VI. *Inclusive Communities*²¹³

The central question in *Inclusive Communities* was straightforward: “whether disparate-impact claims are cognizable under the Fair Housing Act.”²¹⁴ The resulting 5-4 decision in *Inclusive Communities*, written by Justice Kennedy, held that the FHA does cover disparate impact claims.²¹⁵ Although post-acquisition claims are generally not claims of disparate impact, the route the Supreme Court took to interpret § 3604 is the aspect of *Inclusion Communities* most relevant to this article.

A. *Interpretive Framework in Inclusive Communities*

Justice Kennedy’s opinion in *Inclusive Communities* “sets out an analytical approach for deciding some of the FHA’s key unresolved issues.”²¹⁶ Based on the following analysis, the Court’s analytical framework can be identified as consisting of four interpretive techniques applied to the FHA: 1) generally, the FHA is given a “generous construction”; 2) the statute is interpreted in close reference to the congressional goal of racial integration; 3) looking to Title VII jurisprudence for guidance; and 4) applying an “implicit ratification” of existing judicial construction during the 1988 FHA amendments.

Although *Inclusive Communities* upheld but limited the FHA’s reach with respect to disparate impact claims, throughout the Court’s analysis it described the objectives of the FHA with expansive language.²¹⁷ Early

court’s holding and is therefore considered dicta. See generally Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006) (defining “dicta” as not authoritative).

212. See *supra* Part IV(B).

213. 135 S. Ct. 2507 (2015).

214. *Inclusive Communities*, 135 S. Ct. at 2513. The disparate-impact theory of liability includes liability for “practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities” compared to disparate-treatment cases understood as “intentional discrimination.” *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

215. *Id.* A detailed discussion of the Court’s ruling on the disparate impact question is beyond the scope of this article.

216. See Schwemm, *supra* note 68, at 126.

217. Commentators were divided over celebrating the Court’s broad interpretation of the FHA or criticizing it for narrowing disparate impact claims. See Schwemm, *supra* note 96, at 110, 119–20 (describing the opinion as providing “a ringing endorsement of the importance of the FHA in reducing racial isolation in the United States.”); Adam Lip-tak, *Justices Back Broad Interpretation of Housing Law*, N.Y. TIMES (June 25, 2015), <https://www.nytimes.com/2015/06/26/us/justices-back-broad-interpretation-of-housing-law.html> (describing the opinion as “endors[ing] a broad interpretation” of the FHA); Garrett Epps, *The U.S. Supreme Court Barely Saves the Fair Housing Act*, THE ATLANTIC (June 25, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-supreme-court-barely-saves-the-fair-housing-act/396902> (commenting that the Court narrowed the

on in the opinion, Justice Kennedy mapped out the history of residential segregation and the social conditions giving rise to the FHA.²¹⁸ He noted that the “vestiges” of racial residential segregation “remain today” and are “intertwined with the country’s economic and social life.”²¹⁹ Due to the rise of suburbs, segregated ghetto-like neighborhoods formed where “minority families [were] concentrated in the center of the Nation’s cities.”²²⁰ Practices like steering, racially restrictive covenants, and redlining sought to “encourage and maintain the separation of the races.”²²¹ The Court noted that the Kerner Commission had concluded that “residential segregation and unequal housing and economic conditions in the inner cities” were drivers of “considerable social unrest.”²²² In the opinion’s penultimate paragraph, Justice Kennedy circled back to these themes and noted that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation” and the FHA “must play an important part in avoiding the Kerner Commission’s grim prophecy” of a nation with “two societies, one black, one white.”²²³ Thus, the “Court acknowledge[d] the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”²²⁴ By describing the deeply rooted problems of discrimination and “social unrest” that Congress was concerned about, the majority outlined its underlying justification for giving the FHA an expansive construction to help accomplish the statute’s underlying objective through disparate impact claims.²²⁵ This approach applied two longstanding principles used in interpreting the FHA:²²⁶ 1) *Trafficante’s* instruction that the FHA is “broad and inclusive,” implementing “a policy that Congress considered to be of the highest priority,”²²⁷ and therefore should be given “a

FHA “in crucial ways” and was ultimately “no ringing victory for civil rights”); John Paul Schnapper-Casteras, *Symposium: Fair Housing After Ferguson*, SCOTUSBLOG (Jun. 25, 2015, 11:19 PM), <http://www.scotusblog.com/2015/06/symposium-fair-housing-after-ferguson> (describing the opinion as “a wholehearted endorsement of fair housing and the work of civil rights, going forward”); see also David A. Logan, *Still Standing After All These Years: Five Decades of Litigation Under the Fair Housing Act and the Supreme Court Still Can’t Say for Sure Who Is Protected*, 23 ROGER WILLIAMS U. L. REV. 169, 199 (2018) (“The Court sharply constricted the use of ‘disparate impact’ by imposing a ‘robust causality requirement.’”).

218. *Inclusive Communities*, 135 S. Ct. at 2515–17.

219. *Id.* at 2515. See *supra* Part II.

220. *Inclusive Communities*, 135 S. Ct. at 2515.

221. *Id.*

222. *Id.* at 2516.

223. *Id.*; see Kerner Commission, *supra* note 27.

224. *Inclusive Communities*, 135 S. Ct. at 2525–26.

225. See Schwemm, *supra* note 68, at 110.

226. *Id.* at 120 (*Inclusive Communities* “reinforces many themes from older Supreme Court decisions that had broadly interpreted the FHA”).

227. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–11 (1972).

generous construction,”²²⁸ and 2) it interprets the FHA in close reference to the congressional goal of achieving racial integration in housing.²²⁹

In addition to placing the FHA within its historical social context and describing the broad congressional goal behind the statute, the Court also found it “necessary to consider two other antidiscrimination statutes that preceded [the FHA],”²³⁰ specifically Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA).²³¹ The Court explained that Title VII and ADEA jurisprudence “provide essential background and instruction” for understanding FHA claims.²³² This is because all three statutes have a similar purpose: “to eradicate discriminatory practices within a sector of our Nation’s economy.”²³³ Therefore, where similar language from Title VII or the ADEA is “equivalent in function and purpose” to language in the FHA, they should be given similar constructions.²³⁴

Lastly, alongside using Title VII and the ADEA as guides, the Court also employed a “notable interpretive technique” that is called “implicit ratification.”²³⁵ The basic idea is that when Congress chooses to amend a statute, it does so with an understanding of how the courts and administrative agencies have interpreted the statute thus far.²³⁶ Therefore, the decision to leave portions of the statute untouched is “convincing support for the conclusion that Congress accepted and ratified” the prior judicial and administrative interpretations.²³⁷ The obvious implication is that if the courts or administrative agencies had, in the eyes of Congress, been improperly interpreting the statutory text, Congress would have acted to amend and clarify the language while in the process of amending the statute.²³⁸ Similarly, the Court determined that the 1988 FHA amendments included language that “assume[d] the existence of disparate-impact

228. *Id.* at 212.

229. *Inclusive Communities*, 135 S. Ct. at 2525–26.

230. *Id.* at 2516.

231. *Id.*

232. *Id.* at 2518.

233. *Id.* at 2521.

234. *Id.* at 2519; see *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) (“[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”).

235. See Schwemm, *supra* note 86.

236. *Id.*

237. *Inclusive Communities*, 135 S. Ct. at 2519–20.

238. In the case of *Inclusive Communities*, nine courts of appeals had interpreted the FHA to cover disparate-impact claims and “Congress was aware of this unanimous precedent” when it chose to amend the FHA in 1988. *Id.* at 2519. While enacting the 1988 amendments to the FHA, Congress “made a considered judgment to retain the relevant statutory text” that the courts had previously interpreted to encompass disparate impact claims. *Id.*

claims,” thus strengthening the Court’s view that the 1988 Congress ratified the prior judicial decisions.²³⁹ These four techniques for interpreting the FHA create a useful framework for interpreting other ambiguous statutory language in the FHA.

B. Application of Interpretive Framework to Post-Acquisition Claims

Applying *Inclusive Communities’* interpretive framework to § 3604(b) provides an answer to the question of post-acquisition claims based on a sound, judicially-approved statutory interpretation of the FHA.

1. “A Generous Construction”

Section 3604(b) states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of [a protected characteristic].”²⁴⁰ To understand this language as “broad and inclusive” and to give it a “generous construction,” we must conclude that the language “in connection therewith” points to “a dwelling” and that discriminatory “services and facilities” do not need to be tied to the “sale or rental.” This is because the alternative interpretation *narrows* the provision substantially. It significantly limits the language’s scope temporally and categorically, excluding a vast array of conduct and scenarios that occur after a tenant or homeowner moves in. Because of the versatile, unpredictable, and ever-evolving nature of discrimination, “it would be practically impossible for a statute to specifically describe and prohibit” exact forms of discrimination.²⁴¹ For this reason, the Supreme Court has instructed that remedial civil rights statutes are to be interpreted generously.²⁴² Because both readings are plausible, the language is ambiguous. But if the touchstone of interpreting remedial civil rights statutes is a “generous construction,” then the ambiguity should be resolved in favor of the broader interpretation.

Furthermore, if this provision was meant to only protect against discriminatory services and facilities while purchasing a home or signing a lease, then a more rational way to draft the provision would be the following: It is unlawful to discriminate against any person in the terms, conditions, privileges, services, or facilities of a sale or rental of a dwelling because of [a protected characteristic]. Of course, Congress did not draft § 3604(b) in this manner.²⁴³

239. *Id.* at 2520.

240. 42 U.S.C. § 3604(b).

241. See Oliveri, *supra* note 28, at 62.

242. *Id.*

243. Perhaps the drafters wanted to emphasize discrimination *in the provision* of services and facilities. However, this can still reasonably imply an ongoing action of “providing” services and facilities to residents.

2. Congressional Goal of Integration

To interpret § 3604(b) in close reference to the congressional goal of achieving racial integration in housing would be to also find that the statutory language extends protection beyond the sale or rental. To interpret it otherwise would mean that historically marginalized residents “win the battle (to purchase or rent housing) but lose the war (to live in their new home free from invidious discrimination).”²⁴⁴ Congressional concern extended beyond the mere inability to purchase or rent a home; it included “segregation *and* unequal housing and economic conditions.”²⁴⁵ Indeed, Congress was concerned with *not only* “availability” *but also* “neighborhoods marked by substandard housing and general urban blight.”²⁴⁶ The provision of inadequate and discriminatory “services and facilities” to a dwelling after acquisition would clearly contribute to “unequal housing and economic conditions” and create “substandard housing” conditions for individuals in a protected class.²⁴⁷ Imagine a neighborhood with homes that are “available” to a minority group, but, once members of that protected class “acquire” housing in that neighborhood, the municipality starts to provide inferior services to that neighborhood. Such discriminatory actions would clearly contribute to a decline in housing conditions. By interpreting § 3604(b) to allow such conduct, it would fail to achieve Congress’s goal of replacing ghettos, blighted areas, and substandard housing with racially integrated neighborhoods.²⁴⁸ Therefore, § 3604(b) should be interpreted in a manner that achieves these goals by prohibiting post-acquisition discrimination.

3. Comparison to Title VII

By comparing § 3604(b) to similar language found in Title VII, we can conclude that the statute’s protection should extend beyond acquisition in the same manner that Title VII’s protection extends beyond acquisition of a job. Title VII made it unlawful for an employer to discriminate in “compensation, terms, conditions, or privileges of employment, because of such

244. *Bloch v. Frischholz*, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting).

245. *Inclusive Communities*, 135 S. Ct. at 2516. *See supra* Part II.

246. *Inclusive Communities*, 135 S. Ct. at 2516.

247. *See Pennisi*, *supra* note 52, at 1087 (arguing that “housing ‘access’ can be conceptualized as either achieving genuine ongoing integration and discrimination-free housing or enabling protected classes to merely take and maintain physical possession of dwellings.”). To understand the congressional intent behind the FHA to be merely concerned with the ability to *obtain* a dwelling and not with true “discrimination-free housing” would be to ignore vast portions of the legislative history. *See supra* Part III(B).

248. “[T]he reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972); 114 CONG. REC. 9959 (1968) (statement of Rep. Cellar, Chairman of the House Judiciary Committee) (calling for elimination of “the blight of segregated housing patterns”); *see Schwemm*, *supra* note 68, at 795.

individual's [protected characteristic]."²⁴⁹ Moreover, it is settled law that "this part of Title VII is intended to cover discrimination against *existing* employees," not just applicants.²⁵⁰ Because the "terms, conditions, or privileges" language is identical to § 3604(b), the two should be given similar construction.²⁵¹

In *Meritor Savings Bank, FSB v. Vinson*,²⁵² the Supreme Court held that harassment in the workplace (i.e., after acquiring the job) can "alter the terms and conditions of a person's employment" and create a "hostile [work] environment."²⁵³ Courts then used the reasoning behind this hostile environment theory to find that discrimination that creates a hostile *housing* environment violates the FHA.²⁵⁴

Importantly, in Title VII harassment cases, plaintiffs need not allege that they actually or constructively lost their job.²⁵⁵ Thus, with Title VII's guidance, neither should a plaintiff in an FHA case need allege that they actually or constructively lost their dwelling. Except that is precisely what is required by *Cox*.²⁵⁶ Therefore, because Title VII jurisprudence interprets a prohibition against discrimination in "terms, conditions, or privileges" as allowing for post-acquisition claims in the employment context, the exact same language in the FHA should allow for post-acquisition claims in the housing context.²⁵⁷

4. Implicit Ratification by the 1988 FHA Amendments

As was the case concerning the theory of disparate impact, there were judicial decisions concerning whether § 3604(b) covered post-acquisition claims prior to the 1988 FHA amendments (hereinafter "FHAA"). For example, the Seventh Circuit had ruled in the 1984 case of *Southend v. St. Clair County*²⁵⁸ that § 3604(b) "applies to services generally provided by governmental units such as police and fire protection or garbage collection" and thus post-acquisition claims regarding those services were

249. 42 U.S.C. § 2000e-2(a)(1).

250. See Oliveri, *supra* note 28, at 25 (emphasis added).

251. *Inclusive Communities*, 135 S. Ct. at 2518.

252. 477 U.S. 57 (1986).

253. See Oliveri, *supra* note 28, at 24 n.129.

254. *Id.* at 8–9 nn. 44–45 (citing cases).

255. *Id.* at 24 n.129 ("The whole point of the Court's recognition of the hostile environment form of sexual harassment was that plaintiffs need *not* argue that the harassment resulted in a 'tangible loss' of job or economic benefits.") (citing *Meritor Savings Bank*, 477 U.S. at 64).

256. See *supra* Part IV(B).

257. Short, *supra* note 208, at 243 (arguing that "[f]rom the face of virtually identical statutory language, it is difficult to justify a post-hiring dimension to Title VII while also rejecting a post-acquisition scope for the FHA").

258. 743 F.2d 1207 (7th Cir. 1984).

presumably cognizable.²⁵⁹ However, unlike the disparate impact theory that had been unanimously upheld by nine courts of appeals prior to 1988, the judicial decisions that addressed the post-acquisition theory before 1988 were few and usually did not provide a focused analysis of the post-acquisition question.²⁶⁰ Although the implicit ratification theory as applied to the situation in *Inclusive Communities* is much stronger than as applied to § 3604(b), it still weighs in favor of reading § 3604 (b) as covering post-acquisition claims, even if only slightly.²⁶¹

Of course, there is an open question of how many judicial decisions are necessary to put Congress on “notice” of the prevailing interpretation so that failure to change the statutory language after “opening up”²⁶² the statute for amendment can be viewed as implicitly ratifying those judicial interpretations of the text.²⁶³ In one case, a single court of appeals decision cited by many district courts was held sufficient to support the implicit ratification theory.²⁶⁴

More importantly, the statutory text and legislative history of the FHAA strongly imply that the 1988 Congress understood the 1968 FHA to cover post-acquisition claims.²⁶⁵ The FHAA’s substantive purpose was to outlaw discrimination because of familial status or disability, among other smaller

259. *Id.* However, the Fourth Circuit took a similarly limited view of “services” in § 3604(b) stating that the plaintiff’s contention that hazard insurance was a service “in connection with a dwelling” was “a strained interpretation of the word” and that § 3604(b) only “encompasses such things as garbage collection and other services of the kind usually provided by municipalities.” *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984).

260. For example, in 1980 a district court in the Seventh Circuit ruled against the defendant’s argument that § 3604(b) was only concerned with “availability” and plaintiff’s claims of getting “differential treatment” in “services and facilities” because of race were not cognizable under § 3604(b). *Concerned Tenants Ass’n v. Indian Trails Apts.*, 496 F. Supp. 522 (N.D. Ill. 1980). The district court stated that this “tortured interpretation of the application of § 3604(b) is ludicrous and runs counter to the plain and unequivocal language of the statute” and therefore “there need be no argument when the statutory language is so clear.” *Id.* at 525. With that point made, the district court unfortunately made no further analysis. *Id.*

261. See Schwemm, *supra* note 68, at 743 (suggesting that in light of *Southend* and similar cases, “the FHAA may be taken to have tacitly approved those interpretations.”) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”)). *Id.* at 743–44.

262. *Id.* at 743.

263. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–98 (1979) (holding it appropriate to assume that Congress was aware of lower court decisions interpreting a statute and that Congress intended this same interpretation in a similarly worded statute where one court of appeals decision existed alongside roughly a dozen district court opinions relying on that decision).

264. *Id.*

265. See *infra* notes 274–77 and accompanying text.

changes.²⁶⁶ One amendment expanded protection for residents seeking loans for “improving, repairing, or maintaining” dwellings, which clearly implicates *existing* tenants and homeowners.²⁶⁷ In outlawing disability discrimination, Congress added two new provisions to § 3604.²⁶⁸ These sections explicitly protect “a person residing in . . . [a] dwelling” and therefore protect current disabled residents.²⁶⁹

Notably, § 3604(f)(2), which is the disability counterpart to § 3604(b), states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities *in connection with such dwelling*, because of a [disability].”²⁷⁰ The 1988 Congress chose to use the language “in connection with such dwelling” instead of § 3604(b)’s more ambiguous “in connection therewith” language. It seems unlikely that this difference in language was intended by Congress to provide different or greater protection to individuals with a disability under subsection (f)(2) than provided to, say, racial minorities under subsection (b). This is especially so because absolutely no mention of this intention appears in the lengthy legislative history of the FHAA.²⁷¹

Furthermore, a congressional report on subsection (f)(2) explains that it prohibits discrimination in “access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of the premises, benefits and privileges made available to other tenants, residents, and owners.”²⁷² The statutory language and legislative history of § 3604(f)(2) clearly establishes that this subsection protects current residents as well as home-seekers, and judicial decisions interpreting the FHAA have agreed.²⁷³ Furthermore, HUD and many courts have held that the practices prohibited by § 3604(f)(2) are identical to the practices prohibited by § 3604(b), despite the slightly different language.²⁷⁴ Additionally, the 1988 Congress apparently understood the “services or facilities” language of § 3604(f)(2) to encompass post-acquisition services and facilities, thus indicating that

266. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619. The FHAA also “strengthened the FHA’s enforcement system, brought § 3617 claims under this enforcement system, and directed HUD to issue regulations interpreting the amended FHA.” See Schwemm, *supra* note 68, at 742.

267. 42 U.S.C. § 3605(b)(1)(A). This language “undercut[s] the[] view that the FHA is generally unconcerned with discrimination against residents who have already acquired their homes.” See Schwemm, *supra* note 68, at 743.

268. 42 U.S.C. §§ 3604(f)(1), 3604(f)(2).

269. 42 U.S.C. § 3604(f)(1)(B).

270. 42 U.S.C. § 3604(f)(2).

271. See Schwemm, *supra* note 68, at 745.

272. H.R. REP. NO. 100-711, at 23–24.

273. See Schwemm, *supra* note 68, at 745 n.201 (citing cases).

274. *Id.* at 747, 751 (“HUD’s belief that § 3604(b)’s coverage is co-equal with § 3604(f)(2)’s is reflected in the fact that its regulation interpreting § 3604(b) also deals with the handicap prohibitions of § 3604(f)(2).”).

the 1988 Congress understood the exact same language in § 3604(b) to mean the same thing when it “reenacted” § 3604 in its entirety.²⁷⁵

VII. Conclusion

The FHA’s goal of making a person’s race or other protected characteristic irrelevant to their housing opportunities and conditions has not been achieved.²⁷⁶ In 2012, HUD released a report that used paired testers to study housing discrimination based on race.²⁷⁷ The study showed that, in renting and purchasing homes, equally qualified African Americans were routinely told about and shown significantly fewer homes that were on the market compared to whites.²⁷⁸ Fifty years after the passage of the FHA, Congress’s goal of integrated communities has not been achieved.²⁷⁹ Widespread residential segregation remains the norm throughout the nation.²⁸⁰ The Supreme Court in *Inclusive Communities* recognized this fact when it stated that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation” and that the FHA “must play an important part” and a “continuing role in moving the Nation toward a more integrated society.”²⁸¹

If the Supreme Court ever has the opportunity to decide the post-acquisition question, a straightforward application of the interpretive framework used in *Inclusive Communities*, supported by decades of FHA jurisprudence, should find that § 3604(b) of the FHA covers post-acquisition claims. More important than resolving the circuit split, such a ruling would ensure that protected classes win the battle *and* the war

275. H.R. REP. NO. 100-711, at 23–24.

276. See *infra* notes 277–81.

277. U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (2013) [hereinafter “HUD 2012 Report”]. Testing is “the best means of uncovering illegal behavior by homeowners, landlords and real estate agents.” Nikole Hannah-Jones, *Housing Crisis: Widespread Discrimination; Little Taste for Enforcement*, PROPUBLICA (June 11, 2013 4:56 PM), <https://www.propublica.org/article/housing-crisis-widespread-discrimination-little-taste-for-enforcement>. Testing involves using two similar and equally qualified individuals where one is white, and one is a member of a minority group and they record their individual treatment by identical landlords, real estate agents, and homeowners. *Id.*

278. *Id.* at xi. In rentals, African Americans were told about 11.4% fewer homes than whites, and in buying, African Americans were told about 17% fewer homes and were shown 17.7% fewer homes than whites. *Id.*

279. *Segregation in America*, ECONOMIST (Apr. 4, 2018), <https://www.economist.com/graphic-detail/2018/04/04/segregation-in-america>.

280. *Id.*; see also Aaron Williams & Armand Emamdjomeh, *America Is More Diverse Than Ever—But Still Segregated*, WASH. POST (updated May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?noredirect=on&utm_term=.1da5f839cf4e.

281. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015).

against housing discrimination by allowing them to obtain and occupy discrimination-free housing.²⁸² It would strengthen the FHA as a tool used by homeowners, tenants, and housing advocates to fight discrimination, ensuring equal housing opportunities for all, regardless of race, color, religion, sex, familial status, national origin, or disability.

282. *Bloch v. Frischholz*, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting).



ARTICLES

Strategies and Tools for Preserving Low Income Housing Tax Credit Properties

Lauren Loney and Heather Way

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Introduction

The Low-Income Housing Tax Credit (LIHTC) program is the largest affordable rental housing program in the United States, creating over three million units since the program was created in 1986.¹ The program excels at serving low-income households with a range of needs and incomes. While the program primarily serves low-income households with incomes

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1. HUDUser, Office of Policy Development and Research (PD&R), Low-Income Housing Tax Credits, <https://www.huduser.gov/portal/datasets/lihtc.html> (May 24, 2019).

of thirty to sixty percent of the Area Median Income (AMI), close to half of LIHTC households are extremely low-income, with incomes below thirty percent of AMI.² And at a time when the U.S. political climate is highly polarized, the LIHTC program enjoys strong bipartisan support at both the federal and state levels.³

While the LIHTC program continues to make critical contributions towards meeting the nation's affordable housing needs, thousands of LIHTC units are exiting the program and converting to market-rate rents, at a time when more than a third of all renter households in the United States are rent-burdened.⁴ As of 2015, close to 50,000 LIHTC units had exited the program nationwide, and the status of an additional 200,000 LIHTC units is unknown because of inconsistent state oversight.⁵ Without intervention, thousands more units are likely to disappear from our nation's affordable housing supply in the coming decade.⁶

This article discusses federal and state policies that are fueling the loss of LIHTC properties and offers solutions that federal, state, and local governments, as well as other preservation stakeholders, could implement to advance the preservation of these affordable homes. In Part I, we briefly describe the LIHTC program and the affordability terms for LIHTC properties under federal law. Part II highlights the policy and programmatic reasons for why many LIHTC properties around the country are converting to market-rate rental properties. In Part III, we present national best practices that cities and states around the country are utilizing to ensure the preservation of LIHTC properties. Part IV focuses on efforts to limit the

2. LIHTC properties that support these extremely low-income families generally work in tandem with other forms of subsidies, such as housing choice vouchers. MICHAEL K. HOLLAR, UNDERSTANDING WHOM THE LIHTC PROGRAM SERVES: TENANTS IN LIHTC UNITS AS OF DEC. 31, 2012, at 28 (Dec. 2014), <https://www.huduser.gov/portal/publications/pdf/2012-LIHTC-Tenant-Data-Report-508.pdf>; see also NYU FURMAN CENTER, THE EFFECTS OF THE LOW-INCOME HOUSING TAX CREDIT (LIHTC) (May 2017), http://furmancenter.org/files/NYUFurmanCenter_LIHTC_May2017.pdf.

3. *Id.* The Consolidated Appropriations Act of 2018 included a 12.5% increase in LIHTC allocations for the next four years. Corianne Scally, Amanda Gold & Nicole DuBois, *How the Tax Cuts and Jobs Act Puts Affordable Housing at Risk*, URBAN WIRE (July 12, 2018), <https://www.urban.org/urban-wire/how-tax-cuts-and-jobs-act-puts-affordable-housing-production-risk>.

4. PEW CHARITABLE TRUSTS, AMERICAN FAMILIES FACE A GROWING RENT BURDEN 4 (Apr. 2018), https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf.

5. CORIANNE PAYTON SCALLY, ET AL., THE LOW-INCOME HOUSING TAX CREDIT: PAST ACHIEVEMENTS, FUTURE CHALLENGES at VI (July 2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf.

6. HUD, OFFICE OF POLICY DEVELOPMENT & RESEARCH, WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROP. AT YEAR 15 AND BEYOND?, at 38 (2012), https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf [hereinafter HUD].

qualified contract process, one of the major barriers to preserving LIHTC properties. Finally, Part V closes with a case study from Texas of barriers to preserving LIHTC properties, as well as a discussion of recent advocacy efforts to remove those barriers.

I. Overview of the Low-Income Housing Tax Credit Program and Affordability Terms

The LIHTC program was created as part of the Tax Reform Act of 1986⁷ to provide tax credits for private entities when they construct or rehabilitate affordable housing properties. The Internal Revenue Service (IRS) allocates the tax credits to states each year based on population size, and then each state awards the credits to LIHTC projects pursuant to the state's Qualified Allocation Plan (QAP). In fiscal year 2019, the IRS allocated just over \$9 billion in tax credits to the states.⁸

There are two types of tax credits: 9% and 4% credits. Nine percent credits, which come with a higher subsidy (seventy percent of the eligible costs to renovate or build low-income units in a project⁹), are allocated through a competitive process and are typically awarded to new construction and substantial rehabilitation projects. Four percent credits, which provide a smaller subsidy (thirty percent of the eligible costs to renovate or build low-income units in a project), are currently non-competitive and typically coupled with other federal subsidies, such as tax-exempt bonds.¹⁰ Tax credits are claimed annually over a ten-year period beginning on the date a project is placed in service (typically the date of the certificate of occupancy).¹¹

The QAP establishes the project criteria that states consider during the application process for both 9% and 4% projects.¹² QAPs can include baseline criteria that all LIHTC applicants must meet to be awarded credits, as well as points to incentivize certain standards, such as green energy features and longer affordability terms. The points are used to rank applications, with the highest scoring applicants typically receiving the credits. Since 4% projects have been noncompetitive to date, incentivized standards typically do not apply to these projects, except in certain states, such

7. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42).

8. Email from Laura Abernathy, State and Local Policy Director, National Housing Trust, to Lauren Loney (Apr. 4, 2019, 1:58 p.m. CST) (on file with authors); *see also* NATIONAL LOW INCOME HOUSING COALITION, 2018 ADVOCATES' GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 5–14, https://nlihc.org/sites/default/files/AG-2018/Ch05-S09_LIHTC_2018.pdf.

9. These project costs are referred to as the “qualified basis” in the Internal Revenue Code. 26 U.S.C. § 42(a)(2) (2019).

10. 26 U.S.C. § 42(b) (2019).

11. The property owner can, alternatively, elect to have the credit period begin on the year following the date the property was placed in service. 26 U.S.C. § 42(f)(1)(B)(2019).

12. 26 U.S.C. §§ 42(m)(B) & (C) (2019).

as Colorado, where 4% applications must earn a certain number of points as a threshold requirement to qualify for the credits.¹³

The federal rules require each state's QAP to address ten different criteria related to the following: location and housing needs in the proposed location, populations served, information about the project sponsor, and property characteristics.¹⁴ Beyond these ten criteria, states have extensive leeway in administering the QAPs, including whether to require or incentivize preservation (see Part III for a discussion of best practices around such requirements and incentives).

For properties allocated tax credits prior to 1990, the properties were required to remain affordable for only fifteen years.¹⁵ These properties are now well beyond their fifteen-year affordability period. Many of the properties that have exited the program are located in lower-income neighborhoods so the rents remain affordable—although, without additional capital investments, these properties are at great risk of physically deteriorating.¹⁶

The 1989 amendments to the LIHTC statute¹⁷ required that properties allocated tax credits in 1990 or later remain affordable for thirty years, except for properties exiting through the qualified contract process (see Part II) or going through foreclosure.¹⁸ The first fifteen years of the project are called the "compliance period."¹⁹ During this time period, the IRS can recapture tax credits if the agency finds that a development is noncompliant with LIHTC rent restrictions, maintenance requirements, or other program requirements.²⁰ The "extended use period" begins on the first day of the compliance period and ends fifteen years after the end of the compliance period (or at the end of a longer period specified by the state hous-

13. In Colorado, 4% tax credit applicants must earn a minimum of eighty points as a threshold requirement. COLO. HOUS. & FIN. AUTH., *LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 2019*, at 39 (Dec. 31, 2018), https://www.chfainfo.com/arh/lihtc/LIHC_Documents/2019_QAP.pdf.

14. 26 U.S.C. § 42 (m)(1)(C) (2019).

15. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42).

16. NATIONAL LOW INCOME HOUSING COALITION & PUBLIC AND AFFORDABLE HOUSING RESEARCH CORP., *BALANCING PRIORITIES: PRESERVATION AND NEIGHBORHOOD OPPORTUNITY IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BEYOND YEAR 30*, at 4 (Oct. 2018), <https://nlihc.org/sites/default/files/Balancing-Priorities.pdf>.

17. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2190, (1989) (codified as amended at 26 U.S.C. § 42).

18. 26 U.S.C. § 42(h)(6)(E) (2019). Advocates have also flagged early exits via planned foreclosures as an issue stymying the preservation of LIHTC properties and needing to be addressed. *See, e.g.*, Letter from National Housing Law Project, et al., to Laurie Brimmer, Internal Revenue Service (July 31, 2017), <https://www.nhlp.org/wp-content/uploads/2018/04/IRS-Comments-2017.pdf>.

19. 26 U.S.C. § 42(i)(1) (2019).

20. *Id.* § 42(j). In practice, the extended use period is commonly referred to as the fifteen-year period following the end of the fifteen-year compliance period.

ing agency).²¹ Following the fifteen-year compliance period, the property's owner no longer has to report to the IRS, and the responsibility for monitoring and enforcing compliance shifts to the state allocating agency for the remainder of the extended use period.²² As discussed further in Part III, twenty-six states require or incentivize affordability terms beyond thirty years.²³

The 1989 amendments also added a provision allowing LIHTC property owners to offer a Right of First Refusal (ROFR) to the tenants, a resident management corporation of the building, qualified nonprofit entities, or government agencies to purchase the property after the close of the fifteen-year compliance period before an owner can sell the property or go through the qualified contract process.²⁴ States, in turn, can require or incentivize LIHTC applicants to offer a ROFR in accordance with these standards. The ROFR must be offered at a "price which is not less than the minimum purchase price."²⁵ "Minimum purchase price" is defined as the sum of outstanding debt secured by the building (other than debt incurred within the five-year period ending on the date of sale) plus all applicable state, federal, and local taxes attributed to the sale.²⁶ As discussed below in Part II, there are three primary ways in which a ROFR can be provided to an eligible entity.

In 2020, properties that were placed in service after the 1989 amendments will begin reaching the end of their thirty-year affordability restrictions.²⁷ Except in states that adopted longer affordability terms, the year 2020 thus marks the beginning of a new wave of LIHTC properties converting to market rate rents. Over the next five years alone, 1,331 LIHTC properties—with more 52,000 units—are eligible to exit the LIHTC program when their affordability restrictions expire.²⁸ Moreover, as discussed next in Part II, many properties placed in service after 1989 are able to exit the LIHTC program even before reaching the end of their thirty-year affordability term.

21. *Id.* § 42(h)(6)(D).

22. *Id.*

23. Laura Abernathy, *LIHTC Compliance After the Compliance Period: Once the Credits Are Gone* at 16, American Bar Association's Affordable Housing and Community Development Law Annual Conference (May 24, 2017), https://www.americanbar.org/content/dam/aba/images/affordable_housing/conferences/2017/annual/an17-tab29-doc1.pdf.

24. 26 U.S.C. § 42(i)(7) (2019).

25. *Id.*

26. *Id.* at § 42(i)(7)(B).

27. HUD, *supra* note 6, at 67.

28. *Id.*

II. Policy and Programmatic Barriers to Preserving LIHTC Properties

A. The Qualified Contract Process

Properties that have not reached the end of their thirty-year affordability term have a legal avenue to exit the LIHTC program after just fifteen years through a process called the qualified contract process, absent more restrictive state limits. These early exits are most likely in neighborhoods that have high land prices or that are experiencing gentrification pressures, where market-rate rents can be far above the restricted rental rates required by the LIHTC program.²⁹ In these communities, property owners have a significant economic incentive to exit the LIHTC program and convert to market-rate rents using the qualified contract process.³⁰

The qualified contract process was added under the 1989 amendments to the LIHTC statute, allowing properties allocated tax credits in 1990 or later to exit the program after only fifteen years in service.³¹ After the fourteenth year of the compliance period, LIHTC property owners interested in exiting the program can submit a request to their state allocating agency to procure a qualified contract.³² The allocating agency then has one year to find a qualified buyer who will purchase the property at the qualified contract price and continue to operate the property as an affordable LIHTC property through the expiration of the extended use period.³³ If the agency is unsuccessful in securing a preservation buyer, the owner may exit the LIHTC program, and affordable rents are phased out over a three-year period called the “decontrol period,” as low-income tenants leave the property and are replaced by market-rate tenants.³⁴ Although the basic elements of the qualified contract process are outlined in the federal law, the IRS has only finalized rules for the contract price,³⁵ not the process, and so states have substantial leeway in designing their own qualified contract processes.³⁶

The primary reason that the qualified contract process is a barrier to preservation is the formula for the qualified contract price, which is set by

29. *Id.* at 4.

30. *Id.*

31. *Id.*

32. 26 U.S.C. § 42(h)(6)(E)(i)(II) (2019).

33. *Id.* § 42(h)(6)(I).

34. *Id.* §42(h)(6)(E)(ii). While landlords cannot refuse to renew a tenant’s lease without good cause (e.g., failure to pay rent or engaging in criminal conduct) during this time, as low-income tenants choose to move out of the property the landlord may replace them with market-rate tenants. At the end of the three-year period, tenants lose the “good cause” protection (meaning the landlord can choose to not renew the lease even without good cause) and the landlord can raise the rent to market rate.

35. *Id.* § 42(h)(6)(F) (2019).

36. *Id.*; see also HUD, *supra* note 6, at 39.

federal law and IRS regulations.³⁷ The formula combines the fair market value of the non-low-income portion of the building and the price for the low-income portion of the building. The non-low-income portion of the building also takes into account the fair market value of the land underneath the entire building.³⁸ The low-income portion is an amount not less than the applicable fraction of existing debt for the building, adjusted investor equity, and other capital contributions, less project cash distributions.³⁹ The investor equity is increased by an annual-cost-of-living adjustment. State housing agencies have no authority to adopt a fair market cap on the pricing formula.⁴⁰ This formula frequently leads to a sales price that is significantly higher than the fair market value, making it very difficult to have a successful preservation purchase.

Twenty-two of the twenty-six LIHTC properties that the Texas Department of Housing and Community Affairs (TDHCA) has marketed for sale through the qualified contract process since it began tracking these sales in 2010 have been listed at a price higher than the property's fair market value.⁴¹ For instance, the Windsor Pointe Townhomes, a 192-unit complex in College Station, Texas, exited the LIHTC program in 2015 after being listed for a qualified contract price of almost \$16 million, even though the property's fair market value was just over \$10 million.⁴² This was a particularly troubling conversion as long-time, low-income tenants were displaced from one of the most affordable complexes in the city, enabling the developer to convert the property to luxury student townhomes.⁴³ Largely as a result of this pricing discrepancy, Texas has never seen a successful qualified contract sale to a preservation buyer.⁴⁴

Additional preservation barriers with the qualified contract process include inadequate efforts by state allocating agencies to notify and locate qualified buyers. Federal law does not require state agencies to affirmatively search for qualified buyers or provide notice to tenants when a property owner requests a qualified contract. The IRS only requires agencies to make the request available to the "general public, based on reasonable efforts."⁴⁵

37. 26 U.S.C. § 42(h)(6)(F) (2019), 77 Fed. Reg. 26,175 (May 3, 2012).

38. *Id.*

39. *Id.*

40. *Id.*

41. Information obtained from a Public Information Request to the Texas Department of Housing & Community Affairs (received Apr. 12, 2019) (on file with authors) [hereinafter Public Information Request].

42. *Id.*

43. Clay Falls, *Residents Priced out of College Station Apartment Complex*, KBTX-TV3 (Apr. 6, 2016, 6:56 PM), <http://www.kbtx.com/content/news/Residents-looking-for-new-homes-after-being-priced-out-of-College-Station-apartment-complex-374819971.html>.

44. Public Information Request, *supra* note 41.

45. 26 C.F.R. § 1.42-18(d)(2) (2019).

In Texas, for example, although the state housing agency requires property owners to notify tenants of qualified contract requests, the agency makes no affirmative efforts to find a preservation buyer during the qualified contract period beyond posting the property for sale on its website and sending one email notice to a listserv made up of individuals and groups that have asked to be included on the listserv. The agency does not provide direct notice to the local housing department or housing authority when a property is going through the qualified contract process. Additionally, the agency does not market properties for sale during the qualified contract period to national nonprofit affordable housing developers that may have a higher capacity to complete a preservation deal.

Between 2014 and 2016, there were close to four hundred requests for qualified contracts across the country.⁴⁶ While no database contains all the outcomes of these requests, national preservation experts say that any successful qualified contract sale would be an anomaly given the formula for the qualified contract price.⁴⁷ They estimate that these qualified contract requests likely resulted in the loss of more than 32,000 LIHTC units.⁴⁸

Oregon is the only state where national preservation experts are seeing successful qualified contract sales. Of the seven qualified contract requests that the state's housing agency has received to date, six have resulted in successful qualified contract sales, meaning that those properties will remain affordable through the expiration of their extended use periods—and likely beyond, because the buyers must be nonprofits or other mission-driven organizations committed to affordable housing preservation.⁴⁹ According to Oregon Housing and Community Services, this pattern is largely due to the agency's policy requiring the property owner to hire an agency-approved broker to market the property and to have extensive experience marketing LIHTC properties.⁵⁰

Recognizing that the qualified contract process has a negative impact on LIHTC property preservation, many states have banned or restricted the use of qualified contracts. According to the most recent data from the National Housing Trust, nineteen states either incentivize or require LIHTC applicants to waive their right to a qualified contract for at least

46. National Housing Trust, Qualified Contracts (QCs) in the Housing Credit Program (2018) (on file with authors).

47. Telephone interview with Laura Abernathy, State and Local Policy Director, and Ellen Hoffman, Federal Policy Director, National Housing Trust (Apr. 3, 2019).

48. *Id.* This number only reflects the number of units that have likely left the LIHTC program. It does not consider whether these units have remained affordable for other reasons, such as if market-rate rents are similar to the LIHTC restricted rents in some instances.

49. Email from Kimber Sexton, Asset Manager, Oregon Housing & Community Services to Lauren Loney, Legal Fellow, University of Texas School of Law (Mar. 29, 2019, 9:58 AM) (on file with authors).

50. *Id.*

fifteen years following the expiration of the compliance period.⁵¹ In states that have not curtailed the use of qualified contracts, the availability of the qualified contract process after fifteen years is considered one of the biggest threats for preserving LIHTC properties, especially those located in high-cost and gentrifying neighborhoods.⁵²

Many national groups, including National Housing Trust, National Housing Law Project, and National Low Income Housing Coalition, have called for federal legislation abolishing the qualified contract process for new LIHTC projects and, for current projects, changing the qualified contract price calculation to reflect fair market value.⁵³ In addition to these federal legislative efforts, these groups, among others, submitted comments to the IRS in 2017 regarding necessary reforms to the qualified contract process.⁵⁴ The commenters requested that the IRS issue guidance on how to “reduce unnecessary qualified contract transactions and to preserve much needed affordable housing.”⁵⁵ They also requested that the IRS clarify what information state agencies must consider when deciding whether to accept a qualified contract request and that LIHTC owners be required to notify tenants when they make a qualified contract request. In addition, the coalition asked the IRS to penalize LIHTC owners who request a qualified contract when the owners apply for future tax credits.⁵⁶

B. Rights of First Refusal

A Right of First Refusal (ROFR), when available, is often the only opportunity to preserve a LIHTC property that would otherwise easily exit the LIHTC program early through the qualified contract process. There are three primary ways in which ROFRs are provided to preservation-oriented nonprofit housing developers and other qualified entities.

First, a ROFR can be included in the partnership agreement when an eligible entity (such as a nonprofit housing organization or housing authority) owns an interest in the LIHTC development. In these instances, the ROFR is provided to the eligible entity designated in the partnership agreement, and the terms of the ROFR depend on what is negotiated by

51. National Housing Trust, *supra* note 46.

52. Laura Abernathy, Qualified Contracts Threaten Affordable Housing Preservation (June 25, 2018), <http://www.nationalhousingtrust.org/news-article/qualified-contracts-threaten-affordable-housing-preservation>; Letter from National Housing Trust, et al., to Stockton Williams, Executive Director, National Council of State Housing Agencies (Apr. 23, 2018), <https://www.ncsha.org/wp-content/uploads/2018/05/Joint-QC-Letter-to-NCSHA-4-23-2018.pdf>.

53. *See, e.g.*, Letter from National Housing Trust et al., *supra* note 52; *see also* Letter from National Housing Law Project et al., to Laurie Brimmer, Internal Revenue Service (July 31, 2017), <https://www.nhlp.org/wp-content/uploads/2018/04/IRS-Comments-2017.pdf>.

54. Letter from National Housing Law Project et al., *supra* note 53.

55. *Id.*

56. *Id.*

the development's partners. The ROFR is typically triggered at the end of the fifteenth year of the compliance period. The Virginia Housing Development Authority, and possibly other state housing agencies, incentivize the inclusion of a ROFR or a purchase option in the partnership agreement through the state's nonprofit set-aside, by providing bonus points in the state's Qualified Allocation Plan to applicants that not only include a qualified nonprofit entity or local housing authority as a co-owner but also extend a ROFR to such entities.⁵⁷

States may provide for additional requirements governing this ROFR process. For example, the Virginia Housing Development Authority's QAP provides that the purchase price in a ROFR cannot exceed the outstanding debt and the exit taxes of the for-profit entity.⁵⁸

A second way in which ROFRs can be provided is through the property's Land Use Restriction Agreement (LURA) with the state. A ROFR provided through a LURA can be extended to other eligible entities (e.g., qualified nonprofit entities and local housing authorities) should any eligible entity named in the partnership agreement decide to not exercise the right to purchase the property. This approach is used in Texas, which our research suggests is the only state using this approach. In Texas, a developer of a 9% tax credit property can elect to provide a separate ROFR to the general population of nonprofit and other qualified entities in exchange for additional points available in the state's QAP.⁵⁹ Under the state's current regulations governing these ROFRs, if the LIHTC development owner does not secure a qualified entity to purchase the property, the Texas Department of Housing and Community Affairs will post the property for sale to other qualified entities according to its procedures.⁶⁰ The exact procedures—including the ROFR period, sales price, and types of entities eligible to purchase the property—vary depending based on when the LURA was executed and the policies in place at that time.

The final way a ROFR can be provided is through a state or local statutory requirement. These ROFR requirements typically apply to all government subsidized housing and not just LIHTC properties. Statutory ROFRs typically require the owner to give the relevant governmental agency, tenants, or their designees an opportunity to purchase the property if the property is going to be sold. The ROFR is often accompanied with a purchase option that is triggered whenever the owner seeks to exit the applicable subsidized housing program or the affordability term is expiring. See

57. Virginia Housing Development Authority, The Plan of the Virginia Housing Development Authority for the Allocation of Low-Income Housing Tax Credits 20 (2019), <https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2019-QAP-Final.pdf>.

58. *Id.*

59. 10 Tex. Admin. Code §10.407 (2019).

60. *Id.*

Part III for an overview of cities and states that require a statutory ROFR or purchase option.

Despite the promise that ROFRs offer for preservation, in many parts of the country ROFRs have not prevented owners from taking advantage of the qualified contract process and exiting out of the program. One reason that ROFRs have not consistently resulted in preservation deals is because the federal law governing ROFRs requires the purchase price to be “not less than” the “Minimum Purchase Price.”⁶¹ While the Minimum Purchase Price is typically favorable to eligible buyers (“qualified entities”), federal law allows the purchase price to be set at higher levels, which can bar successful preservation deals.⁶²

For example, until the Texas Legislature mandated that the ROFR offer price be the Minimum Purchase Price,⁶³ the Texas housing agency allowed the ROFR price to be determined by fair market value or by a purchase and sale agreement with a third-party buyer, both of which could far exceed the Minimum Purchase Price.⁶⁴ In one recent case where a property in Austin exited the LIHTC program, the ROFR price in the LURA was set at thirty-one million dollars, far exceeding what a preservation entity could ever afford to purchase the property and maintain the affordable rents.⁶⁵ Several properties in Texas that were subject to these higher ROFR price calculations have gone through the ROFR process without being purchased by a qualified entity.

Short ROFR periods further hinder preservation by restricting qualified buyers’ ability to secure funding to purchase a property through a ROFR. Some ROFRs are as short as ninety days.

Even if a ROFR provides for a reasonable purchase price and adequate time period to exercise the ROFR, housing nonprofits and other qualified buyers at a local level often lack the capacity needed to preserve LIHTC properties through a ROFR.⁶⁶ Acquiring and financing LIHTC properties for preservation is complex, and many local housing organizations need access to capacity building and technical assistance to be successful with a preservation deal. In particular, tenant associations—which are qualified entities for ROFR purchases—face significant capacity barriers. Other than places like Washington, D.C., which operates a robust tenant purchase

61. 26 U.S.C. § 42 (i)(7)(B) (2019).

62. *Id.* § 42(i)(7)(A).

63. Tex. H.B. 3576, 84th Leg., R.S. (2015).

64. 10 TEX. ADMIN. CODE § 10.407(b) (2015).

65. Texas Dep’t of Housing & Community Affairs, Real Estate Purchase & Sale Agreement (July 23, 2018), http://www.tdhca.state.tx.us/property-for-sale/docs/ROFR-Paradise%20Oaks/94132PSA_Redacted.pdf.

66. Edwin Melendez et al., *Year Fifteen and Preservation of Tax-Credit Housing for Low-Income Households: An Assessment of Risk*, 23 Hous. Stud. 67, 68 (2008).

program, few resources are in place to help tenant groups develop this capacity.⁶⁷

C. Additional Preservation Barriers

A significant programmatic barrier to LIHTC preservation is that few states, and even fewer local governmental entities, have a comprehensive preservation strategy for preserving LIHTC and other subsidized affordable housing.⁶⁸ There is also little effort by state housing agencies and cities to track LIHTC properties that are at risk of converting to market-rate apartments, including those due to early exits through the qualified contract process. State agencies often maintain a database of active LIHTC properties, but may not include information related to preservation risk, such as when the compliance and extended use periods expire, the availability of a ROFR or qualified contract, and whether the property is owned by an entity that is more likely to exit the LIHTC program. This failure to track which LIHTC properties are at risk of exiting the program limits opportunities for state and local governmental entities and preservation organizations to intervene early and secure a preservation buyer before a property owner decides to sell a property or apply for a qualified contract.⁶⁹

III. LIHTC Preservation Strategies and Policies

In addition to federal reforms, much can be done at the state and local levels to improve the preservation of LIHTC properties. In this section, we discuss the following best practices for state and local LIHTC preservation efforts:

1. Create a preservation database of Low-Income Housing Tax Credit properties;
2. Prioritize properties for preservation;
3. Organize a preservation stakeholder group;
4. Create a local preservation department;
5. Adopt robust notice requirements for properties exiting the LIHTC program;
6. Require longer affordability periods;
7. Increase state and local funding for financing preservation efforts; and

67. HEATHER WAY ET AL., UPROOTED: RESIDENTIAL DISPLACEMENT IN AUSTIN'S GENTRIFYING NEIGHBORHOODS AND WHAT CAN BE DONE ABOUT IT, App. 4, at 157 (2018), <https://sites.utexas.edu/gentrificationproject>.

68. Telephone interview with Laura Abernathy & Ellen Hoffman, *supra* note 47.

69. ED GRAMLICH ET AL., THE PRESERVATION GUIDE FEDERAL HOUSING & HOMELESSNESS PLANS: POTENTIAL TOOLS IN THE AFFORDABLE HOUSING PRESERVATION TOOLBOX 2 (Apr. 2010), <https://nlihc.org/sites/default/files/Preservation-Guide2010.pdf>.

8. Create strong purchase right policies for qualified entities.

Ideally these tools would be developed as part of a comprehensive affordable rental housing preservation strategy tailored to addressing local needs and barriers. A comprehensive preservation strategy—which can be created at a state, regional, or local level—can be targeted towards just LIHTC properties or can incorporate other types of federally subsidized or non-subsidized multifamily housing. Exemplary strategies, such as the strategic plan created in Colorado,⁷⁰ are typically developed by diverse stakeholder groups and utilize a diverse portfolio of preservation policies and tools.

1. Create a Preservation Database of Low-Income Housing Tax Credit Properties

An effective preservation strategy must start with good data. Stakeholders must have a basic understanding of the local LIHTC inventory, which properties are most at risk of exiting the LIHTC program, and which properties make the best candidates for preservation.⁷¹ As the National Housing Trust notes, “Without sufficient data to understand which properties are most at risk, it’s impossible to target resources effectively or be prepared to act when a property is threatened.”⁷²

Important data to incorporate in a preservation database include: (1) the location of the property; (2) the types and terms of the affordability restrictions on the property (e.g., the date the property is eligible to exit via the qualified contract process, and whether there are any city affordability restrictions on the property); (3) whether a ROFR exists and, if so, the terms of the ROFR if they differ in that state (e.g., length of notice period and price formula); (4) the type of owners (public, for-profit, or nonprofit); (5) the property’s compliance history, including property inspection history; (6) the median rents and incomes in the property’s census tract and whether they are changing; and (7) any changes in demographics and housing market activity that indicate whether the area is undergoing displacement pressures from gentrification.

While a very useful national preservation database has been developed to help provide communities with information to preserve federally-assisted housing, including LIHTC properties,⁷³ this database does not incorporate local housing conditions or variations in state administration

70. Colorado Housing Preservation Network, Housing Preservation Network Strategic Plan 2016–2017 (on file with authors).

71. GRAMLICH ET AL., *supra* note 69, at 33.

72. National Housing Trust, Data Collection and Analysis, <https://www.nationalhousingtrust.org/data-collection-and-analysis> (last visited Apr. 12, 2019); NATIONAL LOW INCOME HOUSING COALITION, THE PRESERVATION GUIDE 33 (Apr. 2010), <https://nlihc.org/sites/default/files/Preservation-Guide2010.pdf>.

73. NATIONAL HOUSING PRESERVATION DATABASE, ABOUT THE DATABASE (last visited Apr. 21, 2019), <https://preservationdatabase.org/about-the-database>.

of the LIHTC program that impact preservation, such as the qualified contract and ROFR processes. For example, in Texas, assessing a property's risk for exiting the LIHTC program requires reading through the land use restriction agreement (LURA) for each property to determine the property's affordability term, the existence of a ROFR, and the formula for the ROFR price, which can differ across properties, even those built in the same year.

There are many great examples across the United States of local, regional, and statewide affordable housing preservation databases tailored to local conditions. These databases are typically focused on a broader scope of properties than just LIHTC properties. The following are considered to be among the best preservation databases in the country.

a. The Colorado Housing Preservation Network

The Colorado Housing Preservation Network's (HPN) database was created in 2016 and is spearheaded by the Colorado Housing and Finance Authority. As of March 2018, HPN's database contained information for 1,300 affordable properties and 90,000 units, including approximately 55,000 units with affordability restrictions in place.⁷⁴ The remaining 35,000 affordable units were "naturally affordable" at market rates. The database includes: (1) the type of affordability restrictions in place, if any, (2) the expiration date of the affordability restrictions, (3) the name of the owner, (4) area median income levels, and (5) number of bedrooms.⁷⁵

b. DC Preservation Catalog (Washington, D.C.)

The DC Preservation Catalog is a database of subsidized affordable housing properties in the District of Columbia maintained by two nonprofits: the Urban Institutes' Neighborhood Info DC and the Coalition for Non-profit Housing and Economic Development.⁷⁶ The database tracks not only properties with expiring subsidies but also those in disrepair and in need of rehabilitation. The database draws from government data as well as on-the-ground knowledge shared by participating members who are familiar with specific properties. The database tracks property names, addresses, owner information, types of subsidies and expiration dates, failing physical inspection scores, and the number of rent-restricted units. It also rates properties based on their risk of exiting the LIHTC program. The DC Preservation Catalog is searchable via a map which allows users to narrow their search by location or by whether a property is at a higher risk of converting to market rate in the next twelve months.

74. Telephone Interview with Beth Truby, Preservation Program Manager, Housing Preservation Network (Mar. 28, 2018).

75. *Id.*

76. NEIGHBORHOODINFO DC, DC PRESERVATION CATALOG ONLINE (Jan. 30, 2019), <https://www.neighborhoodinfodc.org/dcpreservationcatalog>.

2. Prioritize Properties for Preservation

An effective preservation strategy also prioritizes certain properties to target for preservation, identifying properties with characteristics that make them good candidates for preservation.⁷⁷ Not all properties will be strong candidates for devoting precious preservation resources. For example, some properties will be too expensive to preserve because of the high qualified contract prices or the high market valuation of the property. Other properties may be lower priority preservation candidates because they are in poor physical condition, making them too expensive to rehabilitate, or are located in an area with concentrated poverty with poor access to high-quality schools, jobs, grocery stores, and other amenities.⁷⁸ Fair housing considerations, such as the obligation to affirmatively further fair housing, may compel cities and states to prioritize precious preservation resources in desegregated communities with enhanced access to opportunities.

The information from a preservation database—along with a host of additional data—is an integral part of prioritizing properties. Whether a property is a good candidate for preservation can vary substantially between communities and will depend on both property and neighborhood characteristics, as well as local policy priorities.

For example, HPN in Colorado has a detailed three-tier priority matrix for preservation, which considers risk factors and access to opportunity considerations.⁷⁹ The matrix's risk factors include the property's physical condition and financial viability, the history of public investment in the property, the percent of high priority populations served at the property (e.g., extremely low income, family, senior, etc.), and the size of the property. HPN also considers various "opportunity" factors to determine whether a particular preservation purchase would present a unique opportunity to purchase a project at a below-market price.⁸⁰

In Massachusetts, the Community Economic Development Assistance Corporation (CEDAC) has a three-tier "Prioritization Matrix for Preservation Projects" for its affordable housing inventory, including LIHTC properties.⁸¹ CEDAC considers risk of loss due to market conversion, physical condition, financial viability, and "market condition opportunity." Market condition opportunity assesses the economic benefit of purchasing the property and converting it to market rates. CEDAC prioritizes larger properties for preservation.⁸²

77. NATIONAL LOW INCOME HOUSING COALITION & PUBLIC AFFORDABLE HOUSING RESIDENTS COALITION, *supra* note 16, at 4.

78. *Id.*

79. Colorado Housing Preservation Network, Colorado Housing Preservation Network's Priority Matrix for Preservation Properties (on file with authors).

80. *Id.*

81. Roger Herzog & Bill Brauner, State Housing Preservation Priorities (June 22, 2009), http://www.prezcat.org/sites/default/files/MA%20Preservation%20Matrix_0.pdf.

82. *Id.*

3. Organize a Preservation Stakeholder Group

A preservation stakeholder group with the express purpose of facilitating the preservation of affordable housing is another core component of successful preservation strategies. Preservation groups can be local, regional, or statewide in focus. The structure and makeup of preservation groups take many forms depending on the political will of state and local government entities; the substantive goals of the group; and the existing relationships between nonprofit developers, for-profit developers, and tenant advocacy groups. Some preservation groups include for-profit housing developers and finance organizations, while others do not.

Preservation stakeholder groups play a variety of roles in preservation efforts, including creating and hosting preservation databases; reaching out to property owners regarding the owner's plans for the property at the end of the compliance period; coordinating the efforts of government, nonprofit, and for-profit developers making preservation purchases; advocating for effective preservation policies and priorities; and assisting with capacity-building efforts aimed at helping tenants and nonprofit housing organizations take advantage of purchase rights.

CEDAC has been a leader in creative affordable housing preservation efforts. CEDAC includes a wide variety of stakeholders and convenes two working groups that are particularly important to affordable housing preservation in Massachusetts.⁸³ The Interagency Working Group (Mass IWG) includes senior staff from the state's Department of Housing and Community Development, the City of Boston, the Massachusetts Housing Investment Corporation, and HUD.⁸⁴ CEDAC also hosts the Preservation Advisory Committee (PAC), which is comprised of a wide variety of public and private stakeholders, including developers and nonprofit advocacy groups.⁸⁵ PAC convenes quarterly to discuss big-picture preservation policy considerations and to assign tasks to the Mass IWG, when necessary. CEDAC was integral in passing Massachusetts's important statewide preservation law, 40T, which has helped preserve thousands of affordable units since its adoption in 2009.⁸⁶

The Preservation Compact is a group of preservation stakeholders focused on preserving affordable multifamily properties in Cook County, Illinois, where Chicago is located. Preservation Compact's partners include financial organizations, state and local housing authorities, planning commissions, nonprofit advocacy organizations and developers, for-profit

83. Telephone Interview with Bill Brauner, Director of Housing Preservation and Policy, Community Economic Development Assistance Corporation (Apr. 9, 2018).

84. *Id.*

85. *Id.*

86. EMILY ACHTENBERG, CHAPTER 40T AT 5: A RETROSPECTIVE ASSESSMENT OF MASSACHUSETTS' EXPIRING USE PRESERVATION LAW (May 1, 2015), <https://cedac.org/wp-content/uploads/2016/06/Chapter-40T-at-5-6.2.15-1.pdf>.

developers, HUD, and universities.⁸⁷ The Preservation Compact is active in a wide variety of preservation efforts, including policy advocacy and the development and implementation of preservation strategies. Preservation Compact has a Leadership Committee and working groups for each of its activities,⁸⁸ along with an Interagency Council and Interagency Working Group, which bring together representatives from local, state, and federal governmental agencies, as well as grassroots and other nonprofit organizations by invitation, to focus on direct interventions in at-risk properties.⁸⁹ Since 2008, the Compact has helped preserve more than fifty government-subsidized properties—6,200 affordable rental units—through its efforts to connect tenants and property owners to preservation resources, including identifying preservation buyers.⁹⁰

4. Create a Local Preservation Department

Several cities around the country have created special departments, programs, and staff positions dedicated to multifamily housing preservation.⁹¹ Providing resources dedicated specifically to preservation helps ensure that preservation is not lost among the many other responsibilities of city housing departments. For example, the District of Columbia recently created an Affordable Housing Preservation Unit led by an Affordable Housing Preservation Officer.⁹² The preservation unit and officer position were recommended by Mayor Bowser's Housing Preservation Strike Force as one of six key strategies for improving affordable housing preservation efforts in the District of Columbia.⁹³ The preservation unit is responsible for preserving both non-subsidized and subsidized affordable housing units in the District, including conducting outreach to property owners,

87. Preservation Compact, "Partner Organizations," available at <https://www.preservationcompact.org/about-us/partner-organizations/>.

88. Information based on phone interview with Stacie Young, Preservation Compact, on April 16, 2018.

89. *Id.*

90. THE PRESERVATION COMPACT, INTERAGENCY COUNCIL CELEBRATES 10 YEARS AND 6,200 AFFORDABLE UNITS PRESERVED (n.d.), available at <http://www.preservationcompact.org/wp-content/uploads/Interagency-10-Yr.-PR.pdf> (last visited June 18, 2019).

91. See, e.g., NEW YORK CITY DEP'T OF HOUS. PRES. & DEV., HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN, http://www1.nyc.gov/assets/hpd/downloads/pdf/housing_plan.pdf; L.A. Hous. & Cmty. Inv. Dep't, Preserving and Monitoring At-Risk Housing (2019), <https://hcidla.lacity.org/Preserving-and-Monitoring-At-Risk-Housing>.

92. Office of the Mayor, Mayor Bowser Appoints Ana Lopez Van Balen as the District's First Affordable Housing Preservation Officer (Mar. 5, 2018), <https://mayor.dc.gov/release/mayor-bowser-appoints-ana-lopez-van-balen-district%E2%80%99s-first-affordable-housing-preservation>.

93. D.C. HOUSING PRESERVATION STRIKE FORCE, FINAL REPORT: SIX RECOMMENDATIONS FOR ADDRESSING AFFORDABLE HOUSING PRESERVATION, 2016, at 4 (Nov. 9, 2016), <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Strike%20Force%20Report%20Final%202011-9.pdf>.

negotiating preservation deals, and providing financing and technical assistance.⁹⁴

5. Adopt Robust Notice Requirements for Properties Exiting the LIHTC Program

When a property seeks to exit the LIHTC program, states and local governments can require the property owner to give adequate advanced notice that reaches all interested stakeholders. Stakeholders that may be interested in purchasing a LIHTC property need sufficient time to procure financing or collaborate with other partners to coordinate a preservation purchase. The notice process should also provide potential preservation buyers with enough information about the property to arrange a preservation deal.

As a best practice, Massachusetts's preservation law "40T" has particularly robust notice provisions, requiring LIHTC property owners to provide three notices prior to exiting the LIHTC program. The notice must be provided to all tenants in person or via first-class mail, as well as to any applicable tenant organization, the city, and the state housing department.⁹⁵ The preservation law requires the following notices: (1) a notice two years prior to the end of the affordability restrictions (regardless of whether the owner is actually going to terminate affordability restrictions);⁹⁶ (2) a one-year notice prior to the end of the affordability restrictions if the owner is planning on terminating the affordability restrictions or allowing a termination of the restrictions to occur;⁹⁷ and (3) a notice of intent to sell prior to the sale of the property, after which the Massachusetts Department of Housing and Community Development has the option for ninety days of submitting an offer to purchase the property.⁹⁸

Other cities and states with robust notice requirements include New York City, where LIHTC owners must provide twelve months' notice to tenants and the New York Department of Housing Preservation prior to taking "any action that will result in the conversion of assisted rental housing."⁹⁹ California has a similar requirement: All owners of federally-assisted affordable housing properties, including LIHTC developments, must give at least twelve months' notice of the expiration or intent to opt out of the affordability restrictions.¹⁰⁰ The notice must be provided to ten-

94. *Id.* at 19.

95. MASS. GEN. LAWS ch. 40T § 2(a) (2019).

96. *Id.*

97. *Id.*

98. *Id.* § 3(a)–(c). The preservation law contains several exemptions from the notice of intent to sell requirement including foreclosure sales, a proposed sale of a property which has affordability restrictions not expiring for at least fifteen years, and a sale in which the proposed purchaser is required to continue the affordability restrictions.

99. N.Y.C. Admin. Code § 26-802(a) (2019).

100. CAL. GOV'T CODE §6583.10, available at <http://www.hcd.ca.gov/policy-research/preserving-existing-affordable-housing.shtml>.

ants as well as the mayor, local public housing authority, and state housing department.¹⁰¹

6. Require Longer Affordability Periods

Long-term affordability restrictions are a critical tool for creating a stable LIHTC inventory. As discussed above, the federal LIHTC program requires only thirty years of affordability and, absent state or municipal intervention, owners can request a qualified contract to exit the program after only fifteen years of service. Many states and municipalities have concluded that thirty years of affordability is insufficient, particularly given the millions of dollars in subsidies that each LIHTC property typically receives. Twenty-six states either require or incentivize LIHTC applicants to commit to affordability terms longer than the thirty years.¹⁰²

As examples, Wyoming and Delaware provide point incentives in their QAPs for applicants who commit to affordability terms of sixty-five and sixty years, respectively.¹⁰³ California requires all LIHTC properties to commit to fifty-five years of affordability.¹⁰⁴ And Massachusetts, Michigan, and Vermont all require ninety-nine years of affordability.¹⁰⁵

Cities also play a key role in securing longer affordability terms in LIHTC properties. Cities that provide financing to LIHTC applicants can leverage this money to require longer affordability terms. If a property exits from federal and state affordability terms via a qualified contract, the city's affordability term continues, ensuring longer-term affordability of the property.

For example, the City of Austin's Rental Housing Development Assistance program requires a minimum of forty years' affordability for LIHTC properties that receive funds from the city.¹⁰⁶ Boston requires LIHTC properties receiving city subsidies to have a ninety-nine-year affordability term.¹⁰⁷ Boston has noted that, although there was some push back by for-profit developers when the city first implemented this "perpetual affordability" requirement, intense competition for LIHTC credits was ultimately enough leverage for developers to agree to the provision.¹⁰⁸ The City is

101. *Id.*

102. *Id.*

103. Abernathy, *supra* note 23.

104. California Tax Credit Allocation Committee, *Compliance Online Reference Manual* (Jan. 2017), <http://www.treasurer.ca.gov/ctcac/compliance/manual/manual.pdf>.

105. Abernathy, *supra* note 23.

106. AUSTIN HOUS. FIN. CORP., RENTAL HOUSING DEVELOPMENT ASSISTANCE (RHDA) PROGRAM 9 (Jan. 12, 2013), http://www.austintexas.gov/sites/default/files/files/Housing/Application_Center/RHDA/FY_12-13/rhda_fy1213_guidelines_attachments_2013.pdf.

107. CHERYL CORT, LONG-TERM HOUSING AFFORDABILITY FOR THE DISTRICT OF COLUMBIA 7–8 (Feb. 2017), https://www.smartergrowth.net/wp-content/uploads/2017/03/LongTermAffordability_FINAL_web.pdf.

108. *Id.*

substantially involved throughout the life of these properties and makes sure to provide sufficient underwriting.¹⁰⁹ Denver amended its preservation ordinance in October 2018, changing the affordability term from twenty to sixty years for all affordable housing developments that receive city subsidies.¹¹⁰

7. Increase State and Local Funding for Financing Preservation Efforts

While funding for the preservation of LIHTC properties often comes from a new allocation of tax credits, through a process called “resyndication,” the most successful and impactful preservation programs also utilize state and local government funding. These funds are used to directly support the costs of acquiring and making improvements to LIHTC properties—as well as for related programmatic needs, such as capacity-building efforts for tenant groups and nonprofits working to preserve subsidized properties. The following examples feature some of the ways cities are dedicating their financial resources towards preserving LIHTC and other subsidized multifamily rental properties.

a. Washington, D.C.

For the past three years, Washington, D.C., has allocated more than \$100 million each year in funding for D.C.’s Housing Production Trust Fund (HPTF), with the bulk of the funding used for multifamily housing preservation and production.¹¹¹ Between 2001 and 2017, the fund helped preserve and produce more than 11,500 affordable units.¹¹²

The District of Columbia also recently created a Housing Preservation Fund, which raises public and private funds to provide short-term bridge acquisition and pre-development financing for preservation projects. The District seeded the revolving loan fund with a \$10 million contribution, with the hope of growing the fund to \$30 million.¹¹³ This initiative was another key strategy proposed by the District’s Housing Preservation Strike Force.¹¹⁴

The District funds nonprofit groups that assist tenants with purchasing their affordable rental housing by facilitating tenant organizing as well as technical assistance with sales negotiations. The District’s Office of the Tenant Advocate, which received three million dollars in funding from the

109. *Id.*

110. City of Denver, Council Bill No. CB18-1089, amending Denver Municipal Code §27-50(a) (effective Feb. 1, 2019), <https://denver.legistar.com/LegislationDetail.aspx?ID=3686496&GUID=42D691FE-E699-440A-AA22-ED2E7D85D7B9>.

111. D.C. Dep’t of Hous. & Cmty. Dev., Housing Production Trust Fund, <https://dhcd.dc.gov/page/housing-production-trust-fund>.

112. *Id.*

113. D.C. Dep’t of Hous. & Cmty. Dev., Public-Private Affordable Housing Preservation Fund, <https://dhcd.dc.gov/page/public-private-affordable-housing-preservation-fund>.

114. D.C. HOUSING PRESERVATION STRIKE FORCE, *supra* note 93, at 20.

District in 2016,¹¹⁵ helps support tenants in exercising their rights of first refusal available under local and federal law. The District also provides robust funding for capacity building of nonprofit housing preservation organizations.¹¹⁶ Thanks to this support, today the District is home to a large number of high capacity nonprofits organizations that are actively engaged in the affordable housing preservation sector.¹¹⁷

b. Portland, Oregon

In 2008, the City of Portland launched the 11 x 13 Campaign to preserve eleven subsidized apartment complexes that were at risk of losing their affordability restrictions by 2013.¹¹⁸ The City and other partners were ultimately able to preserve all seven hundred affordable rental homes in the eleven properties.¹¹⁹ The City dedicated \$22 million in subsidies and loans towards the initiative (primarily through tax increment financing), which leveraged \$100 million in private investments and more than \$120 million in federal assistance.¹²⁰ The apartments must remain affordable for at least sixty years.¹²¹

Portland relies heavily on tax increment financing and general obligation bonds to fund affordable housing preservation and other affordable housing projects. In the North and Northeast areas of Portland, the city has committed to providing more than \$100 million in tax increment financing funds towards reducing the displacement of low-income residents.¹²² In 2016, Portland voters approved \$250 million in general obligation bond funding for affordable housing production and preservation citywide,¹²³ and, in 2018, voters in the three-county Portland region approved a \$653 million affordable housing bond.¹²⁴

115. DC FISCAL POLICY INST., A RESIDENT'S GUIDE TO THE DC BUDGET, APPENDIX: AN IN-DEPTH LOOK AT THE DC BUDGET'S SEVEN APPROPRIATE TITLES (Feb. 22, 2018), <https://www.dcfpi.org/all/residents-guide-dc-budget>.

116. WAY ET AL, *supra* note 67, App.4, at 157.

117. *Id.*

118. PORTLAND HOUSING BUREAU, ELEVEN BY THIRTEEN PRESERVATION CAMPAIGN (Aug. 2013), http://www.preserveoregonhousing.org/11_x_13_Report_Aug.2013.pdf.

119. *Id.*

120. *Id.*

121. *Id.*

122. WAY ET AL, *supra* note 67, App.4, at 183.

123. CITY OF PORTLAND HOUS. BUREAU, AFFORDABLE HOUSING BOND STAKEHOLDER ADVISORY GROUP: SUMMARY OF PURPOSE, ROLE AND RESPONSIBILITIES, <https://www.portlandoregon.gov/phb/article/728791> (last visited Apr. 25, 2019).

124. Elliot Njus, \$653 Million Metro Affordable Housing Bond Passes: Election Results 2019, OREGONIAN/OREGONLIVE (Nov. 7, 2018), https://www.oregonlive.com/politics/2018/11/2018_metro_affordable_housing_bond.html.

c. Denver, Colorado

Denver's Regional Transit-Oriented Development Fund is a \$24 million revolving, below-market loan fund. Through this fund, Denver offers low-cost loans to affordable housing developers and others seeking to purchase and preserve affordable housing near public transit infrastructure. The fund is capitalized with public, private, and philanthropic funds. Loans from the fund are typically for five to seven years, at which time the property is refinanced with other loans or subsidies such as LIHTCs. Since the fund's creation in 2010, Denver has invested \$32.8 million towards the preservation of 1,354 affordable rental homes along with other related projects, leveraging more than \$200 million from project partners.¹²⁵

8. Create Strong Purchase Right Policies for Qualified Entities

States and cities can improve preservation-oriented organizations' ability to preserve LIHTC properties by adopting stronger ROFR and purchase-option policies for qualified nonprofit entities. The strongest policies make both a ROFR and a purchase option available to preservation-minded organizations separate from the partnership agreement in the event that the partnership agreement does not contain a ROFR or purchase option or if the entity designated in the partnership agreement chooses not to exercise its purchase rights.

Unlike a ROFR, which is triggered when an owner chooses to sell the property, a purchase option requires an owner to sell a property to an eligible entity at a previously designated point in time and price, such as when the owner is seeking to exit the LIHTC program through the qualified contract process or at the end of the property's affordability term with the state or city. Citing the shortcomings of the current ROFR provision in federal law, federal legislation filed in 2017 attempted to create a purchase option, rather than a ROFR, at the Minimum Purchase Price for LIHTC properties moving forward.¹²⁶

Regardless of whether a ROFR is included in a partnership agreement or statutory mandate, consideration needs to be given to the purchase price in ROFRs and purchase options in order to maximize the chances that a preservation buyer will be able to purchase the property. For example, to promote maximum preservation through a ROFR, states could prohibit the purchase price from exceeding the Minimum Purchase Price formula contained in the federal LIHTC statute.¹²⁷ Additionally, given the recent,

125. ENTERPRISE, DENVER REGIONAL TRANSIT-ORIENTED DEVELOPMENT (TOD) FUND (2019), <https://www.enterprisecommunity.org/financing-and-development/community-loan-fund/denver-regional-tod-fund> (last visited Apr. 12, 2019).

126. Affordable Housing Credit Improvement Act of 2017, S.B. 548, 115th Cong., § 303 (2017).

127. See discussion in Part II, "Rights of first refusals."

contradictory court decisions in Massachusetts¹²⁸ and Washington,¹²⁹ states and cities should consider specifying in ROFR policies that a bona fide offer is not needed to trigger the ROFR or that the qualified buyers have, instead, a purchase option at the end of the fifteen-year compliance period.

Several states and cities have adopted ROFR or purchase option requirements for subsidized rental housing including LIHTC properties. For example, the Massachusetts Department of Housing and Community Development has a ROFR for the Department or its designee for thirty days after receiving a copy of the executed third party purchase contract.¹³⁰ Prior to executing a purchase contract, an owner must provide the Department with at least ninety days' notice of the owner's intent to sell.¹³¹ An important part of the statute requires the owner to make certain key information available to the Department within ten days of submitting the Notice of Intent to sell, such as monthly operating expenses, physical inspection reports, and rent rolls.¹³²

New York's preservation statute provides tenants and their designees with both a ROFR and purchase option.¹³³ The purchase option is triggered when the LIHTC owner takes any action that would result in the termination of the property's affordability restrictions, while the ROFR is triggered when the owner decides to sell the property.¹³⁴ The ROFR requirement provides tenants or a qualified nonprofit entity (as the tenant's designee) with sixty days to notify the owner and department of their intent to exercise the ROFR, and then another 120 days to submit the offer.¹³⁵

In California, LIHTC owners must provide a purchase option to qualified entities (as set forth in the statute) before terminating "any subsidy contract" or before selling a property that is within five years of the expiration of the property's rental restrictions.¹³⁶ The owner must obtain the list of qualified entities from the California Department of Housing and Community Development and then provide those entities with a one-year notice of opportunity to purchase.¹³⁷ The notice must include information about the property such as itemized monthly operating expenses

128. *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 99 N.E.3d 744, 757 (Mass. 2018).

129. *Senior Hous. Assistance Grp. v. AMTAX Holdings 260, LLC*, 2019 WL 687837 (W.D. Wash. Feb. 19, 2019). The Massachusetts court found that a bona fide offer is not required to trigger a ROFR, but the Washington court came to a completely contradictory conclusion, finding that a bona fide offer is required in order to trigger a ROFR.

130. MASS. GEN. LAWS ch. 40T §4 (2019).

131. *Id.* at §3 (2019).

132. *Id.* at §3(c).

133. N.Y.C. ADMIN. CODE §§26-802 to 806 (2019).

134. *Id.* §§ 26-801(f), -802(a), -806(a) (2019).

135. *Id.* §§ 26-805(a), (c) (2019).

136. CAL. GOV'T CODE § 65863.11(b-j) (2019).

137. *Id.* § 65863.11(g).

and copies of financial and physical inspection reports.¹³⁸ A qualified entity then has 180 days to make a bona fide offer to purchase the property at fair market value.¹³⁹

Absent a city or state statute requiring a ROFR or purchase option, state LIHTC allocating agencies can incentivize applicants to include ROFRs or purchase options by offering additional points in the QAP for the 9% program or, alternatively, requiring these purchase rights as threshold requirements for both the 4% and 9% programs. For example, as mentioned above, Virginia and Texas both provide additional points in the competitive QAP scoring for 9% properties that provide a ROFR to a qualified entity.¹⁴⁰ In Virginia, however, the ROFR incentive is limited to those properties that have a nonprofit as a co-owner in the partnership agreement and only provides a ROFR to that particular entity.¹⁴¹ Texas' ROFR incentive is much broader because all 9% applicants—regardless of whether a qualified entity is a co-owner—can elect to include a ROFR in exchange for points, and that ROFR is available to any qualified entity designated in the statute, with certain types of entities receiving priority.¹⁴²

IV. Limiting the Use of the Qualified Contract Process

As discussed above in Part II, the qualified contract process, as currently structured, is one of the largest barriers to LIHTC preservation. Limiting LIHTC development owners' participation in the qualified contract process is one of the most effective preservation policies available to cities and states. The following are examples of best practices adopted across the country to disallow or disincentivize these early exits. Some of the tools are targeted for future generations of LIHTC properties, while other tools can be applied to impact current LIHTC properties.

A. Require LIHTC Applicants to Waive Their Right to Use the Qualified Contract Process

Several states require LIHTC applicants to waive their right to use the qualified contract process as part of the state's QAP—as either a threshold requirement (that is, applying to all applicants) or in exchange for points in the competitive 9% tax credit application process. Idaho's QAP provides fifteen points for project applicants who commit to providing forty years of

138. *Id.* § 65863.11(h)(3).

139. *Id.* § 65863.11(i).

140. VA. HOUS. DEV. AUTH., THE PLAN OF THE VIRGINIA HOUSING DEVELOPMENT AUTHORITY FOR THE ALLOCATION OF LOW-INCOME HOUSING TAX CREDITS 20 (2019), <https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2019-QAP-Final.pdf>.

141. *Id.*

142. TEX. LOC. GOVT CODE § 2306.6726(b) (2019); 11 TEX. ADMIN. CODE § 11.9(e)(7) (2019).

affordability, including a waiver of the applicant's right to request a qualified contract during that time.¹⁴³

In Colorado, 4% and 9% LIHTC applicants must agree to waive their right to request a qualified contract until the property has been in service for at least twenty and forty years, respectively.¹⁴⁴ Applicants receive additional points if they waive their rights to terminate the extended use period for even longer periods of time.¹⁴⁵

Wyoming provides substantial incentives in its QAP for project applicants who commit to affordability restrictions for up to sixty-five years.¹⁴⁶ Applicants who commit to affordability periods beyond thirty years are required to waive their right to request a qualified contract until the end of the affordability period agreed to in the application.¹⁴⁷

*B. Bar LIHTC Owners Who Request Qualified Contracts
from Future LIHTC Allocations*

A challenge for states adopting policies that bar or disincentive the qualified contract process is that these policies apply only to future properties and not those currently in the state's LIHTC inventory. To get at this issue, the State of North Carolina has adopted a unique approach in its QAPs: Any developer who has requested a qualified contract for a LIHTC property can be disqualified from receiving tax credits.¹⁴⁸ In addition to endorsing the North Carolina approach, the National Council of State Housing Agencies recommends that state housing agencies require purchasers of existing LIHTC properties to waive their rights to request a qualified contract as a condition of approving the transfer of any LIHTC property or any interests in the property.¹⁴⁹

143. IDAHO HOUS. & FIN. AGENCY, LOW-INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN FOR THE STATE OF IDAHO, § 6.5(1) at 30 (Mar. 14, 2019), <https://www.idahohousing.com/documents/2019-approved-qap.pdf>.

144. COLO. HOUS. & FIN. AUTH., LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 2019, at 20 (Dec. 31, 2018), https://www.chfainfo.com/arh/lihtc/LIHC_Documents/2019_QAP.pdf.

145. *Id.* at 42.

146. WYO. CMTY. DEV. AUTH., 2018 AFFORDABLE HOUSING ALLOCATION PLAN 25 (2018), https://nlihc.org/sites/default/files/2018_Allocation_Plan_Final_for_website_091517.pdf.

147. *Id.*

148. N.C. HOUS. FIN. AUTH., THE 2018 LOW-INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN FOR THE STATE OF NORTH CAROLINA, https://www.nchfa.com/sites/default/files/forms_resources/18-QAPFinal.pdf.

149. NATIONAL COUNCIL OF STATE HOUSING AGENCIES, RECOMMENDED PRACTICES IN HOUSING CREDIT ADMINISTRATION 31 (Dec. 2017), <https://drive.google.com/file/d/1zhLyBTtK7qfyWgWfOWjtpd7g-FvEDE-y/view>.

C. Discourage Early Exits Via the Qualified Contract Process

Several state housing finance agencies actively discourage LIHTC owners from requesting a qualified contract and require collaboration to explore preservation alternatives. The Michigan State Housing Development Authority requires owners to meet with the agency's director to discuss options for keeping the property affordable.¹⁵⁰ Similarly, in Minnesota, each applicant is assigned an agency underwriter to discuss alternatives to the qualified contract process.¹⁵¹ The Idaho Housing and Finance Association took a different approach to discouraging qualified contracts, increasing the administrative fee for requesting a qualified contract to \$20,000.¹⁵²

V. Lessons from Texas on LIHTC Preservation

Like many other states, Texas has been seeing a wave of affordable properties exiting the LIHTC program. The biggest current threat to Texas' LIHTC inventory is the qualified contract process. Texas has already lost at least thirty-three LIHTC properties with 5,667 units through the process, and as of March 2019, the qualified contract process has never resulted in a successful preservation purchase in the state.¹⁵³ Under state law, LIHTC properties allocated tax credits prior to 2002 can exit the program via the qualified contract process after just fifteen years of providing affordable housing, unless the property received 9% credits and elected to provide for a longer compliance period in exchange for QAP points.¹⁵⁴ As many as 835 LIHTC properties with close to 80,000 units in the state are currently entitled to go through the qualified contract process.¹⁵⁵

Even though post-2001 LIHTC properties in Texas must be affordable for at least thirty years as a result of state legislative reforms,¹⁵⁶ this period still falls short of the national best practices discussed in Part III. Nine percent

150. MICH. STATE HOUS. DEV. AUTH., *LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED CONTRACT PROCEDURES GUIDE 7* (May 2018), https://www.michigan.gov/documents/mshda/mshda_crh_pr_qualified_contract00_qualified_contracts_procedure_guide_305717_7.pdf.

151. MINN. HOUS. FIN. AGENCY, *HOUSING TAX CREDIT PROGRAM QUALIFIED CONTRACT PROCESS GUIDE 4* (Apr. 2017) (on file with authors).

152. IDAHO HOUS. & FIN. AGENCY, *LOW-INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN FOR THE STATE OF IDAHO* § 17.1, at 52 (Mar. 14, 2019), <https://www.idahohousing.com/documents/2019-approved-qap.pdf>.

153. Public Information Request, *supra* note 41.

154. The Texas Legislature adopted a law in 2001 requiring all subsidized affordable housing to meet a minimum thirty-year affordability term. S.B. 322, 77th R.S. (Tex. 2001) (codified at TEX. GOV'T CODE § 2306.185(c) (2019)). State regulation explicitly bars post-2001 LIHTC properties from requesting a qualified contract until the property has been in service for at least thirty years. 10 Tex. Admin. Code § 10.408(b) (2019).

155. TEX. DEP'T HOUS. & CMTY. AFF., *HTC PROPERTY INVENTORY (XLSX) AS OF FEB. 21, 2019 BOARD MEETING*, <http://www.tdhca.state.tx.us/multifamily/htc/docs/HTCPropertyInventory.xlsx/> (last visited Apr. 23, 2019).

156. TEX. GOV'T CODE § 2306.185(c) (2019).

credit applicants can earn points in the application process for providing a longer affordability term, but the extended term in the last two QAPs has been for only five additional years.¹⁵⁷ TDHCA has removed any incentive to elect an affordability term beyond a total of thirty-five years, and 4% properties have no state incentive to exceed thirty years.

While Texas's right of first refusal policies have advanced the preservation of many properties, these policies do not extend to all properties. As discussed in Part II, through the state's QAP, Texas incentivizes 9% tax credit properties to include a ROFR in the property's LURA that extends to qualified entities beyond just those in the partnership agreement.¹⁵⁸ However, this incentive does not extend to 4% properties, which constitute approximately twenty percent of LIHTC properties in Texas.¹⁵⁹

Even when a LIHTC property has a ROFR in its LURA, Texas has multiple policies that dilute the effectiveness of these ROFRs. To date, ten of the thirty-three properties in Texas that have exited the LIHTC program through the qualified contract process had ROFRs in their LURAs with the state.¹⁶⁰ One issue is the length of the ROFR. Depending on the year of the tax credit allocation, the period in which the ROFR can be utilized may be as short as ninety days, which makes it very difficult for a nonprofit developer to exercise the right in a timely manner.

A second issue is that some of the ROFR prices for older LIHTC properties are based on fair market value, which can be too high for qualified buyers to take advantage of, especially when the property is located in a strong housing market. Even if a ROFR requires that the property be offered for sale at the Minimum Purchase Price, TDHCA allows the property to be sold for greater than the Minimum Purchase Price if a qualified buyer is willing to pay a higher price, which means that nonprofit entities that offer greater amenities or lower rents for tenants can be outbid by other nonprofits offering fewer services or supports for tenants.

TDHCA's notice policies for properties for sale through a ROFR in the LURA or a qualified contract are also weak. TDHCA provides notice about these properties by posting a notice on its website and via a listserv that qualified buyers can sign up for. These notification portals are insufficient at reaching a broad pool of prospective preservation buyers. TDCHA does not take any other action to market the properties or contact potential preservation buyers.

An additional threat to preservation in Texas is the lack of a comprehensive program or strategy for preserving LIHTC properties that are at risk of

157. TEX. DEP'T HOUS. & CMTY. AFF., 2018 QUALIFIED ALLOCATION PLAN 39, <https://www.tdhca.state.tx.us/multifamily/docs/18-QAP.pdf>; TEX. DEP'T HOUS. & CMTY. AFF., 2017 QUALIFIED ALLOCATION PLAN 35, <https://www.tdhca.state.tx.us/multifamily/docs/17-QAP.pdf>.

158. 11 TEX. ADMIN. CODE § 11.9(e)(7) (2019).

159. See *supra* note 142.

160. See *supra* note 41.

exiting the program. Neither the state nor local governments in Texas have adopted a strategy to guide LIHTC property preservation. In addition, neither TDHCA nor any of the cities in Texas track LIHTC properties that are at risk of converting to market-rate apartments. While TDHCA maintains a database of active LIHTC properties, it includes only basic information and is not, by itself, useful for tracking at-risk properties, because it does not keep track of information such as when compliance and extended use periods expire, which properties have ROFRs, or whether a property is owned by an entity that is more likely to seek an early exit from the LIHTC program.

A. Case Studies from Austin's East Riverside Corridor

The East Riverside corridor is a gentrifying, higher-opportunity area located east of Interstate Highway 35, just two to three miles from Austin's Central Business District. The area, which is a major transit corridor for the city, has seen rapid redevelopment in the past several years. The following are two multifamily rental properties along the corridor that highlight the preservation barriers imposed by the qualified contract and ROFR processes.

1. Country Club Creek Apartments

Country Club Creek is a 212-unit LIHTC property that opened in 1996 with an extended use period of thirty years. In 2017, the property owner sought to exit the LIHTC program, after just twenty-one years of affordability, by submitting a request with the state housing agency (TDHCA) for a qualified contract. Country Club Creek had a ninety-day, fair-market-value ROFR in its LURA, which the property owner had to follow before going through the qualified contract process. Through the state's procedures for ROFRs in LURAs, since Country Club Creek did not secure a qualified buyer to purchase the property, Country Club Creek was listed for sale on TDHCA's website at \$22.4 million. TDHCA did not receive any offers to purchase Country Club Creek during the ROFR period.¹⁶¹ However, multiple preservation buyers in Austin have said they were unaware of the opportunity to purchase the property through the ROFR at the time, highlighting problems both with the short ROFR notice period and ineffective marketing of the property by TDHCA.

After the ROFR period expired without a preservation buyer, the property owner requested a qualified contract and TDHCA listed the property for sale at \$26 million—a price well above the fair market value of the property with the affordable housing restrictions in place. At least two preservation organizations investigated purchasing the property during the qualified contract period, but the high price made a preservation purchase unworkable. Ultimately, no preservation buyers stepped forward to

161. Interview by Lauren Loney with Raquel Morales, Asset Management Division, Texas Department of Housing & Community Affairs in Austin, Tex. (Jan. 14, 2018).

purchase the property through the qualified contract process. As a result, the units will be converted to market rate by 2020.

2. Paradise Oaks Apartments

Paradise Oaks is a 248-unit LIHTC property that also opened in 1996 with an extended use period of thirty years. In 2018, the property owner secured a purchase and sale agreement on the property, which triggered the ninety-day ROFR for the property. The ROFR required a fair market value offer, which was determined by the purchase and sale agreement price of \$31 million.¹⁶² TDHCA posted the property for sale on its website at this price. Preservation buyers in Austin were unable to finance a preservation deal at the ROFR price, and the ROFR period expired in November 2018.

Since Paradise Oaks is a pre-2002 property, the new owner will be eligible to apply to TDHCA for a qualified contract following a second ROFR period.¹⁶³ Given the location of this property and the fair market value without the affordability restrictions in place, local housing advocates are worried that Paradise Oaks will go through the second ROFR period and the qualified contract process without a preservation buyer and exit the LIHTC program as early as spring of 2021.

B. Recent LIHTC Preservation Advocacy in Texas

The loss and threatened loss of LIHTC properties along the East Riverside corridor has spurred a series of recent preservation advocacy initiatives in Texas. These initiatives have been centered on four areas: (1) creating an assessment and database of at-risk LIHTC properties; (2) working with the state housing agency to improve its preservation policies and practices; (3) building a preservation coalition; and (4) legislative reforms.

After learning about the loss of Country Club Creek Apartments, we created a database of the LIHTC properties in Austin that are at the highest risk of leaving the LIHTC program. Through this process, we identified seventeen properties as “at-risk” because they met the following three criteria: the property was allocated tax credits prior to 2002 and is thus eligible for the qualified contract process, the property is owned by a for-profit entity (versus non-profit organizations or governmental entities), and the property has no ROFR in its LURA or has a fair market value ROFR in its LURA. This assessment required reviewing each property’s Land Use Restriction Agreement (LURA) because the LURA terms (such as the ROFR pricing and terms) varied so significantly from one project to the next during these years. We have shared the Austin database with the City of Austin’s Department of Neighborhood Housing and Community

162. Texas Dep’t of Housing & Community Affairs, *supra* note 65.

163. Email from Beau Eccles, General Counsel, Texas Department of Housing & Community Affairs, to Lauren Loney (Oct. 17, 2018) (“[I]t is [TDHCA’s] position that an acquiring owner would have to go through the ROFR process, anew, prior to being eligible for a qualified contract.”) (on file with authors).

Development as well as local nonprofit housing organizations that can use this information to prioritize properties for preservation.

We are currently working with city staff from Dallas, Houston, and San Antonio, along with several nonprofit organizations, to extend this database to other parts of the state, but there is no place lined up yet to host the database. Building the database is time intensive, especially given the variations in the relevant LURA provisions. The statewide housing advocacy organization, Texas Housers, has been advocating for state legislation that would require the state to maintain the data.¹⁶⁴

Our exposure to the variations in Texas's LURAs while creating the database helped us advocate on behalf of a local tenant advocacy organization, ¡BASTA!, when its staff discovered in 2018 that a post-2001 LIHTC property was planning on requesting a qualified contract after only fifteen years in service. Even though state law requires all post-2001 LIHTC properties to remain affordable for a minimum of thirty years, we discovered that some LURAs entered into after 2001 allow an early exit from the LIHTC program via a qualified contract after only fifteen years of affordability. After we brought this issue to the attention of TDHCA, the agency said it would enforce the law by barring the qualified contract process for all applicable properties, although the agency will not be amending the incorrect LURAs.¹⁶⁵

We have also worked with TDHCA on changing its rules to better promote the preservation of LIHTC properties. Through TDHCA's rulemaking process in 2018, we submitted comments recommending changes in the ROFR and qualified contract procedures, including more robust notice procedures during ROFR sales periods and clarification on qualified contract eligibility for properties that have committed to affordability periods of longer than thirty years.¹⁶⁶ In response, TDHCA amended its qualified contract eligibility rules to clarify that if a property's LURA "indicates a commitment to an Extended Use Period beyond 30 years," the owner is ineligible to request a qualified contract until the expiration of that period.¹⁶⁷

Another Texas preservation initiative has been the formation of the Texas Affordable Housing Preservation Coalition, which started meeting in 2019 to help shape state and local preservation policies and initiatives. The coalition already has diverse participation from across the state, including city staff from Austin, Houston, and San Antonio; nonprofit developers; affordable housing and tenant advocacy organizations; and several other statewide stakeholders. TDHCA has invited several coalition members to participate in a preservation roundtable for the state's 2020 QAP planning process.

164. See Tex. S.B. 2250, 86th Leg., R.S. (2019) (voted out of the Texas Senate Intergovernmental Relations Committee on April 24, 2019).

165. Email from Beau Eccles, *supra* note 163.

166. Lauren Loney, Comments to the Texas Department of Housing & Community Affairs (Oct. 17, 2018) (on file with authors).

167. 10 TEX. ADMIN. CODE § 10.408(b) (2019).

In regards to promoting LIHTC preservation through state legislation, several preservation bills were filed in the 2019 session of the Texas Legislature. One bill requires applicants for LIHTC credits to waive their right to request a qualified contract through the expiration of the extended use period on all existing LIHTC properties in the applicant's portfolio in order to earn new tax credits.¹⁶⁸ This bill would be the first bill in the country to retroactively prohibit qualified contracts. A second bill changes the ROFR notice period in LURAs for new LIHTC properties from 180 days to 360 days and restricts the ROFR price to the minimum purchase price as defined in I.R.C. Section 42(i)(7).¹⁶⁹ A third bill requires TDHCA to create a preservation strategy for LIHTC properties, including a system for prioritizing properties for preservation and conducting more outreach to qualified buyers.¹⁷⁰ The bill also requires TDHCA to develop a database of LIHTC properties that are at risk of losing their affordable status in the next two and five years.¹⁷¹

Conclusion

Significant challenges exist across the country for preserving LIHTC properties. The biggest current threat to the nation's LIHTC inventory is the qualified contract process, which allows many properties to exit the program after just fifteen years of providing affordable housing. Weak state and local preservation policies also pose a barrier to preservation. LIHTC property owners in gentrifying communities have the strongest incentive to exit the LIHTC program and take advantage of higher market-rate rents.

Despite these challenges, many best practices have been implemented at the state and local levels to curtail qualified contract requests and create successful preservation programs. These preservation tools have already saved tens of thousands of affordable LIHTC units nationwide. State and local policies such as preservation databases and working groups, longer affordability periods, eliminating the use of qualified contracts, and more robust rights of first refusal have been especially impactful in furthering the preservation of LIHTC properties.

Relying on national best practices, preservation advocates in Texas have recently started to push for a range of preservation strategies and tools using a four-pronged approach, with a focus on building a preservation database, improving state agency policies, enacting legislative reforms, and building a preservation coalition. While these efforts are still new, this work can, we hope, serve as a model for advocates in other states with weak LIHTC preservation policies. Without large-scale interventions, thousands of affordable rental units will continue to disappear from our nation's affordable housing supply.

168. S.B. 543, 86th Leg., R.S. (Tex. 2019).

169. S.B. 864, 86th Leg., R.S. (Tex. 2019); H.B. 3272, 86th Leg., R.S. (Tex. 2019).

170. S.B. 2250, 86th Leg., R.S. (Tex. 2019) (voted out of the Texas Senate Intergovernmental Relations Committee on April 24, 2019).

171. *Id.*



Upstanders and Bystanders: The Role of State Housing Finance Agencies in Implementing the Violence Against Women Act in the Low Income Housing Tax Credit Program

Rachel Blake and Karlo Ng

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In 1994, Congress passed the Violence Against Women Act (VAWA) in recognition of the severity of the crimes associated with domestic violence, sexual assault, and stalking. The VAWA 1994 bill was a watershed, marking the first comprehensive federal legislative package designed to end violence against women. Over the years, VAWA has been amended to increase safeguards for survivors. Most recently, in 2013, Congress expanded the scope of VAWA’s housing protections by, in part, covering more federal housing programs, including the Low-Income Housing Tax Credit (LIHTC) program.

LIHTC is one of the primary sources of financing for affordable housing in this country. Ensuring compliance with VAWA in LIHTC housing is critical to ensuring that survivors can access and maintain safe and affordable housing. However, due to lack of federal guidance, VAWA implementation by state housing finance agencies (HFAs) and LIHTC housing providers has been largely inconsistent. Despite the lack of federal guidance, LIHTC housing providers are subject to VAWA’s mandates and face potential liability for non-compliance.

In response to ongoing federal inaction and in an effort to get a better sense of what was happening around the country, in 2016 and 2018, a

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coalition of national and state advocacy organizations worked together to craft and distribute to HFAs two surveys on implementing VAWA's housing protections and remedies in the LIHTC program. The survey results have been supplemented by reviews of critical state LIHTC documents. This article highlights the key findings and best practices for HFAs that emerged from the surveys and related research.

This article describes how LIHTC's unique federal oversight sets it apart from other federal housing programs and has created difficulties for VAWA implementation. Despite the difficulties, we show that HFAs can and should take action now to implement VAWA. We also note that the failure of owners/developers to follow VAWA could create liability. We conclude by sharing HFA best practices identified through our surveys and research.

I. Low-Income Housing Tax Credit

In 1986, Congress created LIHTC, a tax credit administered by the Internal Revenue Service (IRS) of the Treasury Department (Treasury). LIHTC is used to create or rehabilitate affordable housing for lower income individuals and families. Nearly all new affordable housing development is funded by LIHTC,¹ and LIHTC has been used to construct approximately 3.13 million units nationwide, with about 100,000 units annually added to the market.²

LIHTC does not provide direct housing subsidies. Instead, it provides tax incentives, written into the Internal Revenue Code, to encourage developers and investors to create or rehabilitate affordable housing. These tax credits are provided to each state based on population and are distributed to the state's designated tax credit allocating agency or HFA.³ In turn, HFAs distribute the tax credits to developers pursuant to the state's Qualified Allocation Plan (QAP). The federal government provides broad guidance about LIHTC, but the details and priorities, including selection criteria for projects, are created at the state level in the QAP and HFAs administer the tax credit program.

The fact that LIHTC is a tax credit has enabled significant flexibility in the program. As opposed to the centralized way in which certain housing subsidy programs are administered by the U.S. Department of Housing and Urban Development (HUD), HFAs have a significant amount of latitude with regard to how to implement LIHTC at the state level. This

1. EMILY CADIK, ENTERPRISE CMTY. PARTNERS, *THE LOW-INCOME HOUSING TAX CREDIT* (2019), <https://www.enterprisecommunity.org/policy-and-advocacy/policy-priorities/low-income-housing-tax-credits> (last visited June 24, 2019).

2. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. & RES., *LOW-INCOME HOUSING TAX CREDITS* (May 24, 2019), <https://www.huduser.gov/portal/datasets/lihtc.html>.

3. There are two primary types of LIHTC—9% and 4%. The 9% credits are subject to the allocation described above. The 4% credits are subject to bond caps. Both are subject to VAWA.

freedom allows HFAs to craft policies to encourage development that is responsive to local needs. Furthermore, the structure and administration of LIHTC have achieved Congress's goal of leveraging private dollars to create affordable housing. Despite these advantages of the LIHTC program, the failure of Treasury or IRS to issue regulations or guidance for specific tenant protections has led to inconsistent implementation of these safeguards by HFAs and LIHTC housing providers. A key example has been Treasury's failure to implement obligations of LIHTC housing providers under VAWA, which has led to the uneven administration of these duties by HFAs.

II. VAWA in LIHTC

VAWA's housing provisions were originally enacted in 2005 to encourage survivors of domestic violence, dating violence, and stalking, who were receiving housing subsidies, to report and seek help for the abuse committed against them without fear of losing their housing.⁴ The reauthorization of VAWA in 2013 (VAWA 2013) expanded the scope of these protections in critical ways, including by providing an opportunity for survivors to transfer to safe housing and, for the first time, by expressly covering sexual assault survivors.⁵ Importantly, VAWA 2013 extended the statute's coverage to many more federal housing programs, including the LIHTC program.⁶

Under VAWA 2013, the federal agencies administering the federal housing programs covered by the statute must implement VAWA 2013's housing provisions.⁷ VAWA requires each responsible agency to fulfill a number of affirmative obligations outlined by the statute, including, for example,

4. See generally 34 U.S.C.A. § 12491 (West 2019).

5. See generally *id.*

6. See *id.* § 12491(a)(3). The other programs covered by VAWA are *HUD programs*: Public housing; Housing Choice Voucher program (Section 8); Project-based Section 8; Section 202 supportive housing for the elderly; Section 811 supportive housing for persons with disabilities; Section 236 multifamily rental housing; Section 221(d)(3) Below Market Interest Rate housing (BMIR); HOME; Housing Trust Fund; Housing Opportunities for Persons with AIDS (HOPWA); and McKinney-Vento Act programs (including Emergency Solutions Grants and Continuum of Care); *USDA, Office of Rural Development programs*: Section 515 Rural Rental Housing; Section 514 and 516 Farm Labor Housing; Section 533 Housing Preservation Grant Program; and Section 538 Multifamily Rental Housing. For more information about VAWA 2013's housing protections, see our joint report, PROTECTIONS DELAYED: STATE HOUSING FINANCE AGENCY COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT (May 2017), <http://nhlp.org/files/Protections%20Delayed%20-%20HFA%20Compliance%20with%20VAWA.pdf>.

7. 34 U.S.C.A. §§ 12491(g) ("The appropriate agency with respect to each covered housing program shall implement this section, as this section applies to the covered housing program."), 12491(a)(2) ("Appropriate agency. – The term 'appropriate agency' means, with respect to a covered housing program, the Executive department (as defined in section 101 of title 5, United States Code) that carries out the covered housing program.").

creating a model emergency transfer plan to be used by owners and managers of assisted units;⁸ developing a self-certification form for survivors;⁹ and defining a “reasonable time” for tenants who remain after lease bifurcations to find new housing or establish eligibility for another housing program.¹⁰ Therefore, HUD, Department of Agriculture’s Office of Rural Development (RD), and Treasury must develop mechanisms to ensure that the protections afforded by VAWA 2013’s housing provisions are implemented by landlords and owners of the covered housing programs, including LIHTC.

These mechanisms must include, at minimum, guidance and rules promulgated by the federal agencies. Accordingly, HUD and RD have issued VAWA 2013 regulations or guidance. On November 16, 2016, HUD published the agency’s final VAWA rule (Final Rule), implementing the requirements of VAWA 2013 for covered housing programs administered by HUD through regulation.¹¹ LIHTC units that are subsidized by VAWA-covered HUD programs are subject to the Final Rule. For example, providers with LIHTC units that have tenants in the Section 8 Housing Choice Voucher Program, that are subsidized by project-based Section 8, or that are funded by HOME Investment Partnerships Program (HOME) must adhere to the Final Rule’s requirements for the covered units.¹² HUD emphasized in the Final Rule that it is Treasury’s obligation to provide guidance to LIHTC housing providers on the implementation of VAWA 2013.¹³ HUD has also issued guidance notices regarding VAWA implementation.¹⁴ Additionally, RD, which administers the Department of Agriculture’s affordable housing programs covered by VAWA, issued official field guidance implementing VAWA 2013 in 2016 and again in 2017.¹⁵

8. *Id.* § 12491(e).

9. *Id.* § 12491(c)(3)(A).

10. *Id.* § 12491(b)(3)(B)(11).

11. HUD, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. 80,724 (Nov. 16, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-16/pdf/2016-25888.pdf>.

12. VAWA only applies to units that are assisted by the housing programs covered by the VAWA statute and implementing regulations.

13. “[P]roperties funded with Low-Income Housing Credits (LIHTCs) are also subject to VAWA requirements, and housing providers should look to the regulatory agency responsible for LIHTCs—the Department of Treasury—for how to implement VAWA protections in those properties.” Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. at 80,731.

14. *See* HUD, Notice H 2017-05, Violence Against Women Act (VAWA) Reauthorization Act of 2013—Additional Guidance for Multifamily Owners and Management Agents (June 30, 2017), <https://www.hud.gov/sites/documents/17-05HSGN.PDF>; Notice PIH 2017-08 (HA), Violence Against Women Reauthorization Act of 2013 Guidance (May 19, 2017), <https://www.hud.gov/sites/documents/17-08PIHN.PDF>.

15. USDA, RD AN No. 4814 (1944-N) (Jan. 18, 2017), <https://www.rd.usda.gov/files/an4814.pdf>.

By contrast, despite multiple efforts by housing and survivor advocates urging Treasury to implement VAWA,¹⁶ as of August 2019, the agency has failed to issue any VAWA regulations or guidelines, leaving HFAs to decide how—or even whether—to implement VAWA in LIHTC. LIHTC housing providers are still, however, subject to VAWA’s mandates. Failure to adhere to VAWA can lead to liability for LIHTC providers. Furthermore, the nature of this issue and the severity of the consequences demand that HFAs proactively implement VAWA 2013.

III. What HFAs Can Do to Promote VAWA Compliance and Protect Survivors

HFAs have a wide range of steps they can take to implement VAWA 2013. In 2017, the National Council for State Housing Agencies (NCSHA), the national organization that represents HFAs, included VAWA compliance as part of its manual on recommended practices for HFAs.¹⁷ NCSHA’s guidelines include two categories of actions: first, actions that HFAs can take; and second, actions that HFAs can require owners and developers to take. In the first category, NCSHA recommends that HFAs

- include survivors in special housing needs populations;
- clarify that a domestic violence incident does not constitute good cause for eviction;
- notify owners and managers about VAWA rights, including required tenant notices and emergency transfer plans;
- amend extended use agreements to reference VAWA requirements; and
- modify compliance procedures to include VAWA 2013.

In the second category, NCSHA recommends that HFAs require LIHTC owners and developers take certain actions:

- ensure that they will not discriminate in admissions based on an applicant’s status as a VAWA survivor;
- provide notice of VAWA rights to tenants, and ideally utilizing a lease addendum with VAWA protections;

16. See, e.g., NHLP, Letter to the IRS re: Internal Revenue Service Notice 2018-43, Recommendations for 2018–2019 Priority Guidance Plan (June 15, 2018), <https://www.nhlp.org/wp-content/uploads/IRS-Notice-2018-43-VAWA-comments-FINAL.pdf>.

17. NAT’L COUNCIL FOR STATE HOUS. AGENCIES, RECOMMENDED PRACTICES IN HOUSING CREDIT ADMINISTRATION (Dec. 2017), <https://www.ncsha.org/wp-content/uploads/2018/04/NCSHA-Recommended-Practices-in-Housing-Credit-Administration-Updated-Dec-2017.pdf>.

- allow bifurcation of leases “in order to evict or terminate assistance of the perpetrator and continue housing assistance for the victim”;
- develop unit emergency transfer policies; and
- provide training to property management staff on VAWA requirements.¹⁸

IV. HFA Implementation of VAWA Varies Wildly

While HFAs have a variety of tools at their disposal to either incentivize or compel housing providers to comply with the provisions of VAWA 2013, shockingly few have taken the steps needed. Those that have taken steps to implement VAWA 2013 vary significantly in what they have done. In 2016, after observing a lack of movement by HFAs to implement VAWA, the American Civil Liberties Union’s Women’s Rights Project, Mid-Minnesota Legal Aid, National Alliance to End Sexual Violence, National Network to End Domestic Violence, National Housing Law Project, Regional Housing Legal Services, and Sargent Shriver National Center on Poverty Law worked together to craft and distribute a survey on VAWA implementation in LIHTC. The 2016 survey was followed by a 2018 survey and has been supplemented by additional research. This section draws upon all these resources to provide a sense of the number of HFAs taking action in a particular area and to highlight some of the best practices. Following the NCSHA guidance, this section highlights actions that HFAs can take and actions HFAs can require owners and developers to take.

A. Actions HFAs Can Take: Qualified Allocation Plans

One of the most significant tools that an HFA can use to promote VAWA compliance and increase housing opportunities for survivors is the QAP. HFAs utilize the QAP process to establish the criteria to select who will be awarded tax credits. These criteria include those that are appropriate to local conditions and consider projects that serve the lowest income tenants, do so for the longest period of time, are located in “qualified census tracts,” and contribute to a community revitalization plan.¹⁹ Furthermore, federal law requires a QAP to include the following ten selection criteria: (1) tenant populations with special housing needs (special populations); (2) project location; (3) housing needs characteristics; (4) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan; (5) sponsor characteristics; (6) public housing waiting lists; (7) tenant populations of individuals with children; (8) projects intended for eventual tenant ownership; (9) the energy efficiency of the project; and (10) the historic nature of the project.²⁰

18. *Id.*

19. 26 U.S.C.A. § 42(m)(1)(B)(i)-(ii) (West 2019).

20. *Id.* § 42(m)(1)(C).

Several QAPs, such as those from HFAs in Indiana,²⁴ Kentucky,²⁵ Utah,²⁶ and Wyoming,²⁷ include survivors of domestic violence as special populations. This is a fantastic step towards creating opportunities for survivors to access LIHTC housing. Others include both the special population and add some of the requirements from VAWA 2013. For instance, Delaware's QAP not only includes survivors in its definition of special populations, but it also includes language about VAWA in its section on non-discrimination: "All applicants must comply with all applicable provisions of the Violence Against Women Act, including prohibition from discrimination in tenancy on the basis of applicant's history as a victim or threatened victim of a VAWA crime, including denials based on criminal history as the result of such victimization."²⁸ Additionally, Delaware's QAP has a three-part section on VAWA that goes directly to the ability of a survivor to *keep their housing*, which requires all owners and managers to include information stating that victimization is not a good cause reason for eviction and detailing a survivor's right to a lease bifurcation either in the lease itself or in a lease addendum.²⁹

Likely due to the lack of national guidance on implementing VAWA in LIHTC, HFAs that have been proactive in implementing VAWA have done so in different ways. Georgia, Iowa, and Nebraska provide a sampling of the range of implementation strategies. Georgia's QAP indicates that owners must comply with the provisions of VAWA 2013. It also specifies that being a survivor cannot be a reason for denying admissions or constitute good cause for eviction. In addition, the Georgia QAP also requires owners to allow early lease terminations and lease bifurcations and to have an emergency transfer plan.³⁰ Similarly, Iowa's QAP discusses VAWA 2013 applicability to LIHTC and requires tenant notices of VAWA rights and

24. STATE OF INDIANA, 2018–2019 QUALIFIED ALLOCATION PLAN 45, <https://www.in.gov/myihcda/files/2nd%20Draft%202018-2019%20QAP.pdf>.

25. KENTUCKY HOUSING CORP., 2019 SCORING WORKBOOK (2019) (nonprofit supportive tab), <http://www.kyhousing.org/Development/Multifamily/Pages/Applications-Guidelines-Scoring.aspx>.

26. UTAH HOUSING CORP., STATE OF UTAH 2019 FEDERAL AND STATE HOUSING CREDIT PROGRAM ALLOCATION PLAN 165 (Aug. 2018), <https://utahhousingcorp.org/pdf/2019-FINAL-QAP-180726.pdf>.

27. WYOMING COMMUNITY DEVELOPMENT AUTHORITY, 2019 AFFORDABLE HOUSING ALLOCATION PLAN 71, https://www.wyomingcda.com/wp-content/uploads/2018/08/2019-QAP-Approved-by-Gov_.pdf.

28. DELAWARE STATE HOUSING AUTHORITY, STATE OF DELAWARE LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 30 (Jan. 2018), http://www.destatehousing.com/Developers/lihtc/2018/2018_qap.pdf.

29. *Id.* at 35–36.

30. GEORGIA DEP'T OF COMMUNITY AFFAIRS, STATE OF GEORGIA 2019 QUALIFIED ALLOCATION PLAN 29, https://www.dca.ga.gov/sites/default/files/2019_qualified_allocation_plan.pdf.

emergency transfer plans.³¹ Nebraska's QAP requires certification of compliance with VAWA, including providing notice to tenants of their VAWA rights.³² Additionally, Nebraska's QAP section on LIHTC Compliance Monitoring includes an explicit mention of VAWA compliance in its description of the required extended use agreement: "[a]ll development owners must enter into a [Land Use Restrictive Agreement] with [the HFA], binding all parties to comply with Section 42 of the Code, Treasury Regulation § 1.42-5 and any other applicable regulations, such as the Violence Against Women Act of 2013."³³

B. Actions HFAs Can Take: Lease Addendums

HFAs can use lease addendums to require compliance with VAWA 2013. Lease addendums provide tenants with some notice that they could be protected by VAWA 2013. A lease addendum should state that a VAWA violation that leads to an eviction is a violation of the LIHTC requirement for good cause eviction. Eighteen respondents in the 2018 survey reported requiring a VAWA lease addendum (up from 8 in 2016). The overwhelming majority of respondents in both the 2016 and 2018 surveys utilized HUD's multifamily VAWA lease addendum form 91067, which, unfortunately, as of August 2019, has not been updated to reflect VAWA 2013's protections. Pennsylvania has created its own lease addendum that includes language making it clear that VAWA protections apply to LIHTC properties.³⁴

C. Actions HFAs Can Take: Other Notable Tools

Another tool that HFAs have used to promote VAWA enforcement and compliance is informing LIHTC owners and property managers of VAWA 2013's requirements. Both the 2016 survey and the 2018 survey showed nearly 100% of respondents reported that they already had or were planning on providing notice to owners and managers about VAWA 2013 requirements. For instance, following both the enactment of VAWA 2013 and the issuance of HUD's final rule implementing VAWA in 2016, Oregon sent memorandums to LIHTC owners and management agents notifying them of VAWA requirements.³⁵ Oregon's 2017 memorandum notes that owners and agents

31. IOWA FINANCE AUTHORITY, IOWA FINANCE AUTHORITY LOW-INCOME HOUSING TAX CREDIT PROGRAM 4% QUALIFIED ALLOCATION PLAN 20 (Sept. 2018), file:///Users/rach elblake/Desktop/4%25%20QAP%20%20dated%209-5-2018.pdf.

32. NEBRASKA DEPARTMENT OF ECONOMIC DEVELOPMENT, NEBRASKA AFFORDABLE HOUSING ACT QUALIFIED ALLOCATION PLAN (QAP) 2018, at 20, <https://opportunity.nebraska.gov/wp-content/uploads/2018/01/FINAL-2018-NAHTF-QAP.pdf>.

33. *Id.* at 18.

34. PENNSYLVANIA HOUSING FINANCE AGENCY, PENNSYLVANIA LOW INCOME HOUSING TAX CREDIT PROGRAM LEASE ADDENDUM (Apr. 11, 2019), https://www.phfa.org/forms/housing_management/tax_credits/manuals_and_documents/exhibits/lihtc_lease_addendum.pdf.

35. Memorandum from Jennifer Marchand, Multifamily Program Compliance Technical Advisor, Oregon Housing and Community Services, to Owners and Management

must complete an emergency transfer plan and provide emergency transfers by June 14, 2017. Furthermore, Oregon's memorandum elaborates that "to be in compliance with the VAWA Final Rule," owners and agents "must implement VAWA Appendix A (HUD-5380) [HUD VAWA rights notice] and C (HUD-5382) [HUD VAWA self-certification form] or self-created forms using exact information immediately."³⁶

California's HFA offers another example of how to do this. In 2017, California, issued a memorandum to federal and state LIHTC property owners and managers informing them of their VAWA obligations and potential consequences if these responsibilities were not met.³⁷ This California guidance includes a VAWA obligations checklist for housing providers and requires them to use the HUD VAWA lease addendum, Form 91067.³⁸ Similarly, Illinois sent a management bulletin to its LIHTC owners and property managers indicating that they "must now comply with VAWA."³⁹ The Bulletin states that "[i]f it is determined that a violation of VAWA is also a violation of a resident's rights under fair housing law, the incident could trigger a loss or recapture of LIHTC."⁴⁰ Montana's QAP indicates that the persons responsible for qualifying tenants and verifying compliance must attend a fair housing training that includes domestic violence issues, at least once every four years.⁴¹

D. Actions HFAs Can Require Owners and Developers to Take: Monitoring and Compliance Procedures

One option for requiring a LIHTC owner or manager to take VAWA-related action is to include the requirements in the LIHTC compliance manuals. An increasing number of HFAs are including VAWA rights in

Agents (Feb. 6, 2017), <http://www.oregon.gov/ohcs/APMD/PCS/pdf/HUD-VAWA-Final-Rule-Guidance.pdf>; Memorandum from Jennifer Marchand, Lead Compliance Officer and LIHTC Technical Advisor, Oregon Housing and Community Services, to Owners and Management Agents (Jan. 2, 2015), <http://www.oregon.gov/ohcs/APMD/PCS/pdf/VAWA-Memo-1-2-2015.pdf>.

36. Memorandum from Jennifer Marchand, Multifamily Program Compliance Technical Advisor, Oregon Housing and Community Services, to Owners and Management Agents (Feb. 6, 2017), <http://www.oregon.gov/ohcs/APMD/PCS/pdf/HUD-VAWA-Final-Rule-Guidance.pdf>.

37. California Tax Credit Allocation Committee, Low Income Housing Tax Credit ("LIHTC") Violence Against Women Act ("VAWA") and Manager's Unit Guidance (Dec. 22, 2017), <https://www.treasurer.ca.gov/ctcac/compliance/memos/vawa.pdf>.

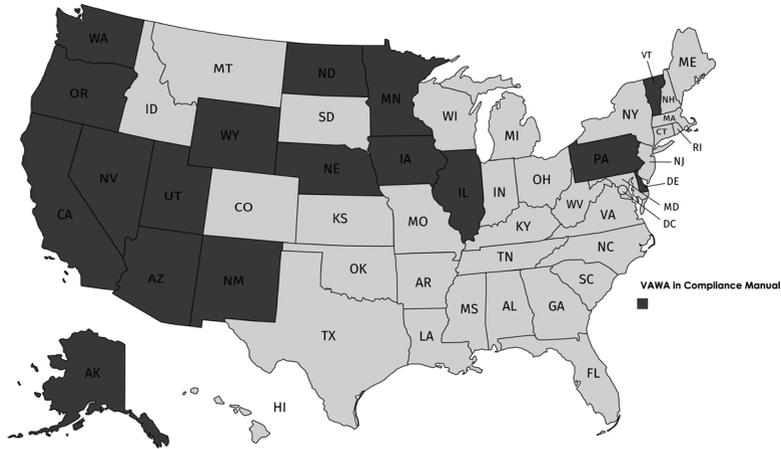
38. *Id.*

39. Illinois Housing Development Authority, Management Bulletin #435 to Owners/Agents of Section 8/236, HOME and Tax Credit developments from Diane Smith, Asst. Director Asset Management Services (Aug. 8, 2013), <https://www.ihda.org/wp-content/uploads/2016/04/MB435VAWA2013MB.pdf>.

40. *Id.*

41. MONTANA BOARD OF HOUSING, HOUSING CREDIT PROGRAM 2019 QUALIFIED ALLOCATION PLAN (QAP) 52 (Mar. 2018), <https://housing.mt.gov/Portals/93/shared/docs/MultifamilyDevelopment/QAP/2019/2019QAPGovAprved2018March15.pdf>.

their compliance manuals. In the 2018 survey, seventeen agencies (up from eleven in 2016) reported changing their compliance procedures to require compliance with VAWA. As shown below, the highest concentrations of HFAs that made these kinds of changes are located in the Midwest and West.



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The 2018 survey asked HFAs to detail how they changed their Compliance Manuals regarding VAWA enforcement or compliance. There was significant variation, with the largest numbers of HFAs making changes to include requiring notice to tenants of VAWA rights, prohibiting discrimination based on status as a survivor, making it clear that an incidence of violence in the property does not constitute good cause for eviction (of the survivor or non-aggressor family members), or addressing transfer procedures and lease bifurcation.

The survey results show a significant gap in HFAs reporting that they require information to be shared (VAWA housing rights and remedies to tenants, not good cause for eviction, transfer procedures) and those that report significant consequences for non-compliance such as disqualifying owners/managers or creating a process for filing a complaint about a VAWA violation.

HFAs that report taking steps to monitor for VAWA compliance take a range of actions. Nine states reported including a statement about VAWA compliance in the annual owner certification form. For example, Rhode Island includes the following question: “Has the project continually operated in compliance with the Violence Against Women Act (VAWA), including

Results of 2018 Survey of HFAs

	YES
Requiring some form of written notice to applicants and tenant of VAWA rights?	94.12%* 16**
Disqualifying owners/managers with a history of violating VAWA?	23.53% 4
Including a prohibition against discriminating against tenants based on their status as a survivor of domestic violence or sexual assault?	88.24% 15
Including language that makes it clear that being a survivor under VAWA is not Good Cause for eviction?	82.35% 14
Discussing transfer procedures under VAWA?	76.47% 13
Discussing lease bifurcation under VAWA?	70.59% 12
Creating a process for filing a complaint about a VAWA violation?	29.41% 5

*Top number: percentage of states replying "yes" to question

**Bottom number: number of states replying "yes" to question

amendments made in connection with the 2013 reauthorization and all related implementing regulations, which provide protections for residents and applicants who are victims of domestic violence, dating violence, sexual assault, and/or stalking?"⁴² Five states reported that they review tenant selection plans for VAWA compliance. Two states indicated that they review the tenant selection plan for policies that support survivors.

V. Conclusion

Despite Treasury's failure to implement VAWA 2013 over six years after the statute's enactment, HFAs are slowly becoming aware of the important role that they play in ensuring VAWA compliance from LIHTC housing providers. NCSHA's leadership on this issue has helped to increase the number of agencies addressing VAWA compliance. However, many HFAs have taken no steps to educate LIHTC owners and managers about VAWA 2013's requirements. Even more have yet to take steps to monitor compliance and enforce the provisions of VAWA 2013. Fortunately, these HFAs can use as models the best practices that have been established by other HFAs implementing VAWA, some of which have been detailed above. Until all HFAs take their responsibilities under VAWA 2013 seriously, survivors across the country will remain at risk of having their rights violated by those who are charged to assist them—a risk that exacerbates their housing instability and further endangers their lives.

42. RIHousing, Owner's Certificate of Continuing Program Compliance 2018 (Aug. 31, 2018), https://www.rihousing.com/filelibrary/OwnerCertificateofContinuingProgramCompliance_11.27.18.pdf.

Avoiding Mis-Givings: Recycling Community-Created Land Values for Affordability, Sustainability, and Equity

Rick Rybeck

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"Givings" are the result of community actions that enhance the value of privately owned land. These "givings" are windfalls to landowners and are the fuel for land speculation. Land speculation produces nothing of value. However, it does create artificial scarcities of developable land (particularly near prime sites with infrastructure amenities) and leads to actual increases in land prices at these locations. This increases the cost of residential and commercial development, reducing housing affordability and employment. High land prices in prime locations push development to cheaper (but more remote and less productive) sites. The resulting urban sprawl requires the duplication of expensive infrastructure facilities in relatively low-density areas. This creates high per capita tax burdens and impairs fiscal sustainability. This article will review these impacts of "givings" and explore the opportunity for land value return and recycling to promote more affordable, sustainable, and equitable development.

I. "Givings" and "Takings"

The Fifth Amendment to the U.S. Constitution limits government taking of private property. Such takings are subject to "due process," must be undertaken for a "public use," and must provide "just compensation"

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to the owner.¹ A computer search for “takings” reveals many references to the Fifth Amendment, numerous statutes, regulations, cases, and commentaries. However, a similar search for “givings” yields much less. Of note is an article, “Givings” by Abraham Bell and Gideon Parchomovsky that discusses “givings” as the mirror image of “takings.”² Indeed, they are “two sides of the same coin.”³ Bell and Parchomovsky stress that “a government that compensates for takings should also assess charges for givings . . . [and] . . . the animating concerns of takings jurisprudence—fairness and efficiency—apply with equal force to givings and demand a givings doctrine.”⁴

Bell and Parchomovsky note that uncompensated takings would be both unfair and inefficient. It would be unfair to “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵ It would be inefficient because, without just compensation, there would be no effort to ensure that the public benefits exceeded the compensatory costs. Similarly, the positive externalities associated with “givings” are unfair because many people (taxpayers) are forced to subsidize benefits that are primarily bestowed on only a few property owners. And positive externalities can also lead to economic inefficiency. Uncompensated givings allow beneficiaries to hoard land that would otherwise have to be employed productively. The analysis below will show that “land hoarding” contributes to urban sprawl, environmental degradation, unemployment, unaffordable housing, infrastructure duplication, and fiscal strain that may ultimately lead to governmental insolvency.⁶

1. The Fifth Amendment to the U.S. Constitution reads, in part, “No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.” <https://constitution.findlaw.com/amendment5.html>.

2. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001), available at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4571&context=yj>.

3. *Id.* at 563.

4. *Id.* at 577–78.

5. *Id.* at 554 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

6. A number of cities have lost population while continuing to expand at the urban fringe, thereby leaving fewer people to pay for more infrastructure. Examples include Detroit, Cleveland, and Buffalo. See ALAN MALLACH, *FACING THE URBAN CHALLENGE: THE FEDERAL GOVERNMENT AND AMERICA'S OLDER DISTRESSED CITIES* 8 (2010); see also Charles Marohn, *The Growth Ponzi Scheme Part 2* (June 16, 2011), <https://www.strongtowns.org/journal/2011/6/14/the-growth-ponzi-scheme-part-2.html>; Leigh Gallagher, *The Suburbs Will Die: One Man's Fight to Save The American Dream*, TIME (July 28, 2014), <http://time.com/3031079/suburbs-will-die-sprawl>. Marohn estimates that property taxes return between four and sixty-five cents for every dollar of future liability incurred. See also WALTER RYBECK, *RE-SOLVING THE ECONOMIC PUZZLE* 146–48 (2011); James A. Kushner, *Affordable Housing in the Time of Global Climate Change*, 42URB. LAW. 207

A. The Infrastructure Conundrum

Typically, local governments use their authority and tax revenues to create infrastructure to facilitate and support development. But if infrastructure is well-designed and well-executed, land prices and rents near the infrastructure rise. This increase represents a windfall gain to owners of well-served sites.⁷ Yet, neither the Constitution nor statutes mandate that private landowners compensate the public sector for such beneficence. State and local property taxes will typically recapture only ten to twenty percent of this benefit, leaving the lion's share to private landowners.⁸

(2010)/43 URB. LAW.179 (2011) (crediting real estate speculation as a significant cause of the 2007 financial meltdown).

7. Are increases in land value windfalls or appropriate returns to “real estate investors,” compensating them for investment risks? First, buying and selling land are often referred to as “real estate investment.” But “investment” in an economic sense is foregoing consumption to create goods that are not themselves consumed, but are used to create other goods or services in the future. See *Investment*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Investment_\(macroeconomics\)](https://en.wikipedia.org/wiki/Investment_(macroeconomics)). This definition contrasts “economic investment” in capital goods (housing, machinery, etc) to “financial investment,” which is simply the holding of any asset for the purpose of future appreciation. When land is merely purchased, nothing is created. Therefore, the purchase of land is not “investment” in an economic sense. Second, we have been taught that capitalism rewards risk. Buying land is risky because the value of the land can decrease. So why should people who buy land not be rewarded? Buying lottery tickets and betting on horse races are risky. But these activities are not “investment” because they produce nothing. These activities are merely gambling. The essence of capitalism is not rewarding risk-taking per se, but rewarding productive risk-taking. If somebody builds a building and they fail to recover a profit, society ends up with a building that could be of some use to somebody. But if we hold a lottery, we merely redistribute money from losers to winners, and no new net wealth is created. Thus, it is important to distinguish between two types of behavior—economic investment and gambling. Both entail risk. But gambling creates nothing that was not already there. Buying and selling land in the hopes of making a profit is not “economic investment,” it is “gambling.” And if the gamble succeeds, it is based on appropriating value created by others and not by the “investor.” Thus land speculation is a parasitic activity. George Washington Plunkitt, a Tammany Hall official, spoke about public officials who, knowing where infrastructure expansions would occur, would buy land in advance of these projects and then reap the rewards. He referred to this as “honest graft.” See *George Washington Plunkitt*, PANARCHY (2000–2017), <https://www.panarchy.org/plunkitt/graft.1905.html>. But do land speculators benefit society by preserving vacant land for future development? When a need for more intense use of a site arises, existing buildings are often expanded. If the need for more intense use is significant enough, buildings are torn down and completely rebuilt. Thus, vacant land is not necessary to facilitate future development.

8. The part of the traditional property tax that is applied to publicly created land value will return only a small portion of this windfall. Property tax rates vary from place to place, but typically they range between 1% and 2% of value. See ALAN MALLACH, *THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA* 164 (2018). Assuming a typical property tax rate of 1% to 2% of value paid annually, a net present value (NPV) calculation in a low-inflation environment shows the NPV of these payments as roughly

Very significant consequences arise from this lack of reciprocity. The ability of landowners to appropriate publicly created land values serves as the fuel for land speculation. Land speculation is the purchase of land, not for the purpose of using it, but for the purpose of obtaining a higher sales price in the future.⁹ Buying land and holding it for future appreciation means that less land is available for development today. This artificial scarcity of developable land results in actual price increases—primarily at prime sites near urban infrastructure amenities.¹⁰ As prices of prime sites escalate, more owners of these sites are induced to favor speculation over utilization, driving land prices even higher.

High land prices near infrastructure amenities (like centers of urban transportation networks, transit stations, good schools, parks, etc.) push development to cheaper (but more remote and less productive) sites.¹¹ When these remote areas are occupied, residents and businesses find that they lack necessary infrastructure and demand its extension to these areas.¹² When infrastructure is extended, the cycle repeats with rising land prices choking off development at that location and chasing it even farther away.¹³

between 10% and 20%. Thus, 80% to 90% of publicly created land values end up as wind-fall gains to private landowners.

9. Plunkitt, *supra* note 7. Mr. Plunkitt explains how knowledge of where new infrastructure will be placed allows a public official to buy that land in advance of the project and then reap the rewards later. According to Plunkitt, there's no harm to the public because the price of land would rise as a result of the new infrastructure regardless of who owns it. *Id.*

10. Richard K. Green, *Nine Causes of Sprawl*, ILL. REAL ESTATE LETTER (U. Ill.-Urbana-Champaign), Fall 1999, at 12 (land assembly holdouts).

11. *Id.* at 10 (noting high land prices in city centers pushing development towards cheaper peripheral sites); see also Todd Litman, *Analysis of Public Policies that Unintentionally Encourage Sprawl*, GLOBAL COMMISSION ON THE ECONOMY AND THE CLIMATE 1–3 (Mar. 2015), <https://newclimateeconomy.report/workingpapers/wp-content/uploads/sites/5/2016/04/public-policies-encourage-sprawl-nce-report.pdf> (describing sprawl impairing economic productivity).

12. In the 1990s, America Online (AOL) was expanding rapidly and quickly outgrew three office buildings in Fairfax County, a suburb of Washington, DC. AOL wanted to have all its employees in one place. It could have located its headquarters in the District of Columbia or in any of the close-in suburbs to maximize access to the labor pool by taking advantage of the existing roadway and transit networks. Instead, AOL developed a campus in Loudoun County, more than thirty miles from Washington, DC. Shortly after the move, employees and then AOL complained about the inadequate road network in the area. AOL bought cheap exurban land. The land was cheap because it lacked infrastructure. AOL's call for Loudoun County to improve the roadway network is an example of how private development seeks public infrastructure subsidies. See Michael Laris, *Loudoun, AOL Split Over Slow Growth: Tech Giant's Attack Upsets Supervisors*, WASH. POST, July 29, 2001, at C1.

13. Public sector subsidization of new development is identified as a factor that encourages sprawl. See USEFUL COMMUNITY DEVELOPMENT, <https://www.useful>

The “infrastructure conundrum” describes a situation whereby the infrastructure created to facilitate development inflates land prices, and this chases development away from the infrastructure. Communities run after new development with more infrastructure, but never catch up. The resulting sprawl destroys farmland, increases impervious surfaces that degrade streams and rivers, increases dependency on single-occupant vehicles for travel, thereby increasing energy consumption and pollution along with traffic injuries and deaths.¹⁴ New infrastructure on the urban fringe can pull private investment away from central neighborhoods, which become blighted. Municipal budgets are stretched thin due to the duplication of expensive infrastructure across metropolitan areas where densities are too low to maintain that infrastructure without excessive tax burdens.¹⁵

B. No Good Deed Goes Unpunished

The same economic externalities that lead to the “infrastructure conundrum” also create an environment in which “no good deed goes unpunished.” Communities may attempt to assist distressed neighborhoods through improvements to schools, transportation, public safety, etc. If these efforts are successful, land prices and rents rise, displacing the intended beneficiaries and enriching already affluent landowners, exacerbating income inequality.¹⁶ This “no good deed goes unpunished” environ-

-community-development.org/causes-of-urban-sprawl.html. Rapid suburban development (sprawl) whereby the public sector subsidized new development is credited with fueling the movement toward development impact fees. See Paul A. Tiburzi, *Impact Fees In Maryland*, 17 U. BALT. L. REV. 502 (1988), available at <http://scholarworks.law.ubalt.edu/ublr/vol17/iss3/4>.

14. For more information about the fiscal and environmental costs of sprawl, see Todd Litman, *Understanding Smart Growth Savings: What We Know About Public Infrastructure and Service Cost Savings, and How They Are Misrepresented by Critics*, VICTORIA TRANSP. POL’Y INST. (Apr. 25, 2013), http://www.vtpi.org/sg_save.pdf; see also TRANSP. RES. BD., TRANSIT COOPERATIVE RESEARCH PROGRAM (TCRP) REPORT 74: COSTS OF SPRAWL (2000); REAL ESTATE RES. CORP., THE COSTS OF SPRAWL (1974). These reports show that sprawl can increase the cost of infrastructure by between ten and forty percent. See also Clinton-Gore Administration, *Building Livable Communities* (2000); ROBERT BURCHELL ET AL., FEDERAL TRANSPORTATION ADMINISTRATION, COSTS OF SPRAWL—REVISITED, TRANSIT COOPERATIVE RESEARCH PROGRAM (1997). Compact development also leads to substantial energy savings for both buildings and transportation. See JONATHAN ROSE COS., U.S. EPA, LOCATION EFFICIENCY AND HOUSING TYPE—BOILING IT DOWN TO BTUs (2011), at www.epa.gov/smartgrowth/pdf/location_efficiency_BTU.pdf.

15. This paragraph recapitulates what was said earlier. See Charles Marohn, *The Growth Ponzi Scheme*, STRONG TOWNS (June 2011), <https://www.strongtowns.org/the-growth-ponzi-scheme>.

16. Winston Churchill addressed Parliament in 1909 telling a story about a working class neighborhood where many workers had to pay a bridge toll to get to work. Londoners felt bad about this and asked the government to “free” the bridge. It did so. Shortly thereafter, rents in this neighborhood increased by the amount of the foregone toll. Workers were no better off than before if they used the bridge. They were worse

ment creates frustration. Governments are blamed for lack of investment in low-income neighborhoods *and* for too much investment if these efforts lead to the displacement of low-income households.

The infrastructure conundrum and the unintended consequences of anti-poverty efforts can be remedied, at least in part, by returning community-created land values to the public sector and recycling them for operation and maintenance of public goods and services. This taps an often-overlooked source of revenue, allowing for reductions in taxation of privately created building values. Lower taxes on building values makes buildings cheaper to construct, improve, and maintain.¹⁷ Surprisingly, higher taxes or fees on land values help keep land prices more affordable as well because the price of land is based on the expected benefits of ownership. Increasing taxes on land value reduce the expected benefits of ownership, thereby reducing its price.¹⁸ Thus, shifting taxes off of building

off if they did not use the bridge because their rents went up anyway. *Winston Churchill Said It All Better Than We Can*, LAND VALUE TAXATION CAMPAIGN (Feb. 14, 2010), <http://www.landvaluetax.org/current-affairs-comment/winston-churchill-said-it-all-better-then-we-can.html>. Involuntary displacement is wrenching and traumatic for families. In most of the country, it manifests itself as “demolition by neglect.” This is the predominant form of involuntary displacement in rust-belt cities where factory closings and job losses undermine their economic foundation. This was the predominant form of displacement in Washington, DC, until it became one of the few places in the country to have a robust job market, particularly for high-tech and intellectual workers. Then gentrification took hold, first in white working class neighborhoods in Ward 3 and then moving east. In some neighborhoods (like Shaw), demolition by neglect had removed most of the low-income and working-class Black families before the affluent folks moved in. Although some people think that demolition by neglect and gentrification are totally different, they have a common foundation. That foundation is land speculation. For a discussion of gentrification, see ALAN MALLACH, *THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA* (2018); see also Margaret Reuss & Jerome Paige, *The Process of Neighborhood Revitalization and Its Implications for Public Policy: The Case of Washington, DC.*, (U.D.C., Dep’t of Econ., Working Paper No. 7, 1979).

17. PAUL A. SAMUELSON, *ECONOMICS* 387–88 (9th ed. 1973). A tax on something that is produced becomes a cost of production. (If there is no production, there is no tax.) Anytime the cost of production increases (all other things being the same), the quantity of goods being produced will decline because producers must initially absorb the tax (as consumers are not willing to pay higher prices just because the tax went up), and marginal producers go out of business. Then, because the quantity of goods declines, prices rise.

18. *Id.* at 562–64; see also ADAM SMITH, *THE WEALTH OF NATIONS* 976 (1937). The price of land is based on purchasers’ expectations of the benefits of land ownership. Increasing the tax on land, all other things being the same, causes the expected benefits of landownership to decline, thereby causing prospective purchasers to offer lower prices. Thus, a tax on land is not a cost of production. Land is not produced, and there will be just as much land after the tax is imposed as there was before. A tax on land is a cost of ownership. Increasing the cost of ownership reduces the price.

values and onto land values makes both buildings and land more affordable, without any new expenditures or any revenue losses.

Although it might be best politically to implement this tax shift in a revenue-neutral manner vis-à-vis the traditional property tax, such an implementation is likely to become revenue positive over time because vacant lots and boarded-up buildings will be revitalized with tax-generating residents or businesses. Furthermore, reducing vacant lots and boarded-up buildings can reduce expenditures associated with such properties related to arson and other crimes.

Returning a greater share of land value to the public sector that creates it also ensures greater equity to the extent that those who receive the largest benefits from public goods and services, as reflected in land values, pay in proportion to the benefits received. The most valuable land, near public infrastructure amenities, will pay the most in taxes. As an additional benefit, returning community-created land values encourages development. Because landowners cannot avoid land value return payments, they are motivated to generate income from which to pay them. The greatest incentive for development will occur on high-value sites, typically infill sites near existing public infrastructure amenities.

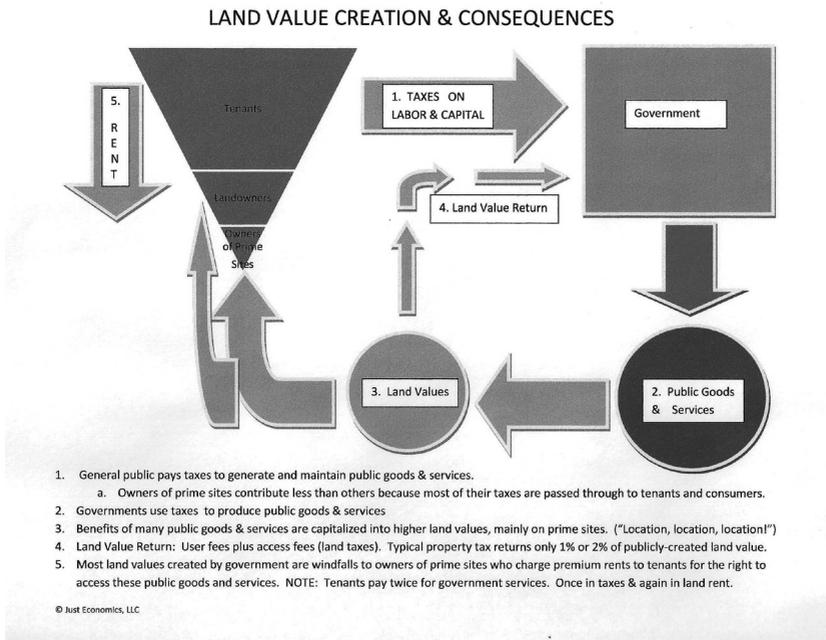
The first graphic illustrates how land values are created and distributed. There are three main points:

- Although most people pay for infrastructure through taxes,¹⁹ increased land values tend to be very concentrated in and around those areas where infrastructure benefits occur. This dynamic redistributes wealth from the general public to the owners of prime sites. Thus, as noted by Nobel-winning economist Joseph Stiglitz, “givings” are contributing to the growing inequality in our society.²⁰

19. Infrastructure is typically paid for through federal, state, and local appropriations. The source of all these appropriations is various taxes. State and municipal bonds are also used to pay for infrastructure. But bonds are NOT a source of funds. They are merely a source of financing. Bonds are loans that are paid off by future taxes. In some cases, impact fees might also help pay for infrastructure. But impact fees are similar to taxes on improvements. They increase the cost of development, thereby reducing the amount of development that occurs and increasing the price of what remains by being passed through to the users.

20. See *US Should Adopt a Land Tax to Combat Inequality*, BLOOMBERG BUS. REP. (Mar. 5, 2015), available at <https://www.iol.co.za/business-report/opinion/us-should-adopt-a-land-tax-to-combat-inequality-1827238>. This article reports on Nobel-winning economist Joseph Stiglitz’s critique of Thomas Piketty’s claim in *Capital in the Twenty First Century* that returns to capital are outpacing returns to labor. Stiglitz suggests that if land and housing are removed from the category of “capital,” the returns to capital have been constant since the 1950s and are somewhat lower than they were at the turn of the twentieth century. Stiglitz suggests that it is important to distinguish between productive capital and land. He also suggests that a tax on land value would diminish inequality without the negative impacts on productivity that characterize many other types of taxes. See

- Some publicly-created land value is returned to the public sector through the property tax. But this typically amounts to only ten to twenty percent of the value created, leaving eighty to ninety percent as a windfall to private landowners.²¹
- Most taxpayers end up paying for infrastructure at least twice. First they pay in taxes. Then, if they want to take advantage of that infrastructure by locating their homes or businesses nearby, they must pay a premium price or rent to the landowner as well.

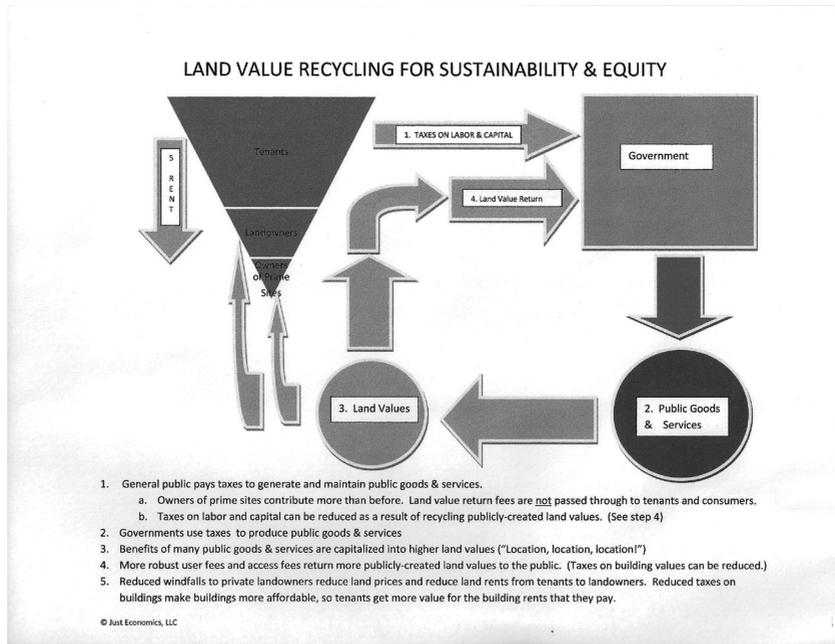


The second graphic illustrates what happens when a more significant share of publicly created land value is returned to the public sector and recycled to operate and maintain the public goods and services that created this value in the first place. As mentioned above, some degree of land value return and recycling (LVRR) exists almost everywhere, embedded within the traditional property tax. But, it is typically very weak. By making LVRR more robust, the profits from land speculation are reduced. This reduces speculative demand for land and helps reduce land price inflation as well. Because LVRR payments cannot be avoided (as it is impossible to

JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY* (2012); JOSEPH STIGLITZ, *REWRITING THE RULES FOR THE AMERICAN ECONOMY* (2016).

21. See *supra* note 8.

move a parcel of land from a high-tax to a low-tax jurisdiction), they actually encourage development of high-value sites to generate income from which to pay these fees. Because the demand for developed space is finite at any given time, expanding the supply of developed space on high-value sites near existing infrastructure helps reduce development pressure at the urban fringe, resulting in more compact development.²²



II. Land Value Return and Recycling in Practice

The property tax applied to buildings is a cost of production that reduces supply and increases building prices. The property tax applied to land is a cost of ownership that has no impact on supply and reduces land prices. Although these divergent impacts of taxation on land and buildings are explained by fundamental economic principles, many people are unaware of this Jekyll and Hyde characteristic of the traditional property tax. Nonetheless, some communities have successfully implemented land value return and recycling policies with demonstrably beneficial outcomes.

22. Joseph DiMasi, *The Effects of Site Value Taxation in an Urban Area: A General Equilibrium Computational Approach*, 40 NAT'L TAX J. 577 (Dec. 1987). Using data from Boston, the distance from the central business district to the outer urban ring of the model contracted by more than half a mile when the current property tax was replaced by a split-rate tax that taxed land values at three times the rate on building values.

One of the earliest examples in the United States was the reconstruction of San Francisco after the devastating earthquake and fire of 1906. Without federal or state disaster assistance, San Francisco was quickly rebuilt as a vibrant and compact city. Prior to the disaster, records show that seventy-five percent of San Francisco's real estate tax base consisted of land value. In other words, either through assessment policy, tax rate policy or both, land was being taxed more heavily than buildings. Therefore, although the quake and fire destroyed many buildings, San Francisco's land (and most of its tax base) remained intact. Tax payments allowed San Francisco to rebuild its infrastructure and motivated landowners to restore income-producing buildings quickly.²³

In 1913, Pittsburgh began to shift its property tax off of building values and onto land values. This shift was phased-in over five years after which the tax rate on buildings was one half the rate on land. This reform was undertaken at the behest of manufacturers who needed access to flat land for factories. Pittsburgh is very hilly, with some flat land along the rivers. But, in the early 1900s, this river-front land was controlled by a few owners who were demanding excessive prices. The higher tax applied to land values made it more difficult for these landowners to hold out for above-market prices. Thus, manufacturers obtained access to land at reasonable prices, transforming Pittsburgh into a vital manufacturing center.²⁴

During the Great Depression, many major cities experienced reductions of twenty-five to fifty-eight percent in property assessments.²⁵ This decrease was the result of a nationwide real estate boom and bust in the late 1920s and compounded by the ensuing depression. But, during this time, Pittsburgh's assessments declined by only eleven percent.²⁶ In part, this happened because Pittsburgh's higher tax on land values discouraged land speculation. Thus Pittsburgh avoided the real estate boom and bust that plagued other cities.

In the 1960s, while jobs (and people) were fleeing the cities for the suburbs, Pittsburgh was an outlier, attracting more jobs than its suburbs.²⁷ During the 1970s, when faced with a budget shortfall, Pittsburgh increased its land tax (in lieu of a proposed increase in wage taxes). As Pittsburgh's

23. Mason Gaffney, *New Life in Old Cities*, ROBERT SCHALKENBACH FOUND. 24–26 (2006), http://www.masongaffney.org/publications/2006_New_Life_in_Old_Cities.pdf. Mason Gaffney is a professor of economics at the University of California, Riverside.

24. Dan Sullivan, *Why Pittsburgh Real Estate Never Crashes: The Tax Reform That Stabilized a City's Economy*, SAVING COMMUNITIES (n.d.), <http://savingcommunities.org/places/us/pa/al/pgh/nevercrashes.html>.

25. Percy R. Williams, *Pittsburgh's Pioneering in Scientific Taxation*, republished as *The Pittsburgh Graded Tax Plan: Its History and Experience*, ROBERT SCHALKENBACH FOUND. n.59 (1963), <http://savingcommunities.org/docs/williams.percy/gradedtax.html>. Williams was Pittsburgh's Chief Assessor 1934–1942.

26. *Id.* n.59.

27. Robert C. Weaver, *The Suburbanization of America: Or the Shrinking of the Cities*, 9 *Civ. Rts. Dig.*, Spring 1977, at 3, 9.

land tax grew to four times and then six times the rate applied to buildings, Pittsburgh experienced Renaissance II, an expansion of new corporate headquarters in its downtown.²⁸ When Pittsburgh's manufacturing industries automated and/or departed for overseas locations, Pittsburgh suffered. But it was more successful than most other rust-belt cities in making the transition to a service-based economy. A 1997 article for the National Tax Journal credits Pittsburgh's unusual property tax system as one reason for this success.²⁹

In the late 1990s, Allegheny County underwent a court-ordered reassessment. The reassessment (which may have been flawed) resulted in large increases in land value assessments in affluent Pittsburgh neighborhoods, triggering complaints and objections. Pittsburgh could not afford to redo the assessments. Local politicians decided that returning to a traditional property tax (same rate applied to buildings and land) would be the easiest way to reduce taxes in the affluent neighborhoods. Most Pittsburgh taxpayers had little awareness about Pittsburgh's "split-rate" property tax. Even fewer were aware that it was instrumental in Pittsburgh's economic success. As a result, there was no organized constituency to demand its preservation, and Pittsburgh abandoned its split-rate property tax in 2001.³⁰

Harrisburg, Pennsylvania, a manufacturing city, a transportation hub and the state capital, suffered from urban flight as did many other cities during the 1960s and 1970s. Making matters worse in 1972, Hurricane Agnes caused the Susquehanna River to flood, damaging Harrisburg's downtown. In the late 1970s, there were over 5,000 vacant and boarded-up properties in Harrisburg. In 1975, Harrisburg adopted the approach of taxing publicly created land values more heavily than privately-created building values. Over the next fifteen years, the number of vacant and boarded-up properties were reduced to a few hundred.³¹ As recently as July, 2018, Harrisburg continues to employ this "split-rate" property tax with a rate of 30.97 mills on land and a rate of 5.16 mills on improvements.³²

28. See *Pittsburgh's Golden Triangle – 1983: Renaissance II*, BROOKLINE CONNECTION (2019), <http://brooklineconnection.com/history/Facts/Point1983.html>.

29. Wallace Oates & Robert M. Schwab, *The Impact of Urban Land Taxation: The Pittsburgh Experience*, 50 NAT'L TAX J. 1 (Mar. 1997).

30. Herbert Barry III, *Irrationally Indiscriminate Tax, Groundswell*, COMMON GROUND, Mar.–Apr. 2001, at 5–7, https://commonground-usa.net/barry-herbert_irrationally-indiscriminate-tax-2001-mar-apr.pdf.

31. NAT'L NEIGHBORHOOD COAL., NEIGHBORHOODS, REGIONS AND SMART GROWTH TOOLKIT: THE SMART GROWTH, BETTER NEIGHBORHOODS ACTION GUIDE (2003); CASE STUDY: TWO-RATE TAX IN HARRISBURG 26 (June 10, 2004), <http://web.archive.org/web/20040610031846/www.neighborhoodcoalition.org/pdfs/content.pdf>.

32. *With Property Tax Hike Threatened, How Does Harrisburg's Tax Rate Compare?*, PENN LIVE (July 11, 2018), https://www.pennlive.com/news/2018/07/with_big_property_tax_hike_loo.html. Harrisburg has been in a precarious financial situation since 2011. This arises not from its unusual property tax regime, but from its investment in a waste-to-energy incinerator that failed (and for which the City of Harrisburg was financially

Of course, when good things happen after the implementation of land value return and recycling, it is reasonable to wonder: "Would this improvement have happened without the reform?" Fortunately, in the mid 1970s, a situation arose that was very close to a "controlled experiment." Outside of Pittsburgh are three steel towns: McKeesport, Duquesne, and Clairton. They all have largely Eastern-European populations with steel-based economies. In the mid-1970s, they each had a closed factory, and each suffered from declining numbers of building permits year after year. McKeesport then adopted land value return and recycling by implementing a split-rate property tax with a lower tax on buildings and a higher tax on land. Shortly afterwards, building permits rose over several consecutive years. Economic theory predicts this result, but would it have happened anyway? In nearby Duquesne and Clairton, the number of building permits continued to decline. Noticing what happened in McKeesport, Duquesne and Clairton soon adopted land value return and recycling. Thereafter, building permits increased in those cities also.³³

McKeesport, Duquesne, and Clairton remain distressed economically. Reforming the property tax did not cause the steel mills to return nor unemployment to disappear. But each of these cities is performing better than it would under the traditional property tax.

III. Legal Issues³⁴

A. Takings

Although land value return and recycling is proposed to address a situation of uncompensated "givings," would there be any grounds for some property owners to claim that higher taxes based upon land value constitute a "taking" under the Fifth Amendment to the U.S. Constitution?

First, where property taxes are levied, they are typically levied against both the value land and the value improvements (buildings), if any. Thus some degree of LVRR is almost ubiquitous now. To the author's knowledge, there has never been a successful challenge against property taxation generally or the taxation of land value specifically, on the basis that such a tax constituted a "taking." Second, in most places where LVRR has been made more robust, it has been accompanied by reduced rates of taxation levied against the value of buildings. All other things being equal, reducing

liable) and from other corruption and fiscal mismanagement issues. See *Harrisburg, Pennsylvania*, WIKIPEDIA, https://en.wikipedia.org/wiki/Harrisburg,_Pennsylvania#21st_century_fiscal_difficulties_and_receivership.

33. STEVEN CORD, *INCENTIVE TAXATION* (Oct. 1995), cited in Rick Rybeck & Walter Rybeck, *Break the Boom & Bust Cycle*, PUB. MGMT. 7, 10 n.6 (Aug. 2012), <https://www.justeconomicsllc.com/pdfs/ICMA-BreakBoom&BustCycle-Aug2012.pdf>.

34. For another examination of legal and administrative issues, see Richard F. Dye & Richard W. England, *Assessing the Theory and Practice of Land Value Taxation*, LINCOLN INST. 23–25 (2010), https://www.lincolninst.edu/sites/default/files/pubfiles/assessing-theory-practice-land-value-taxation-full_0.pdf.

the tax on buildings tends to increase the price of land in such an area.³⁵ So it would be difficult to claim that LVRR constitutes an uncompensated taking when part of the reform actually increases land values.

Third, as mentioned previously, the value of land arises largely from the quality and quantity of public goods and services available at particular locations. Thus, payments based upon land value result in payments that are proportional to the public infrastructure benefits received. Thus payments based on land value are value given for value received. Such payments are more like a “fee” than a “tax.” The distinction is that a fee is a payment directly related to a publicly provided benefit.³⁶ Taxes, on the other hand, are general payments in exchange for general benefits, with little direct connection between the taxes paid and the benefits received. Thus, the strong relationship between land value return payments and public benefits received would undercut any claim of uncompensated “taking.”

B. Uniformity

Some state constitutions and property tax statutes require “uniformity.” This means that all property in the same class must be treated equally. Would taxing land and buildings at different rates violate the uniformity requirement?

Some states separate residential, commercial, and industrial properties into distinct classes of property and apply either different assessment rates or different tax rates to each class.³⁷ These are referred to as “classified” property tax systems. To the best of the author’s knowledge, most classified property tax systems meet a rational basis test for equal treatment of similar property.

In the 1970s and 1980s, several states identified economically distressed areas for the purpose of creating Enterprise Zones. Businesses and properties within these designated “enterprise zones” became eligible for reduced

35. Reducing the tax rate on buildings makes buildings cheaper to construct, improve, and maintain. To the extent that this reform is undertaken, buildings in the area where the improvement tax has been reduced will be more profitable than they had been and more profitable than comparable buildings in places with higher improvement taxes. As a result, if nothing else were done, land prices would increase in this area. Of course, the proposal is to simultaneously increase the tax on land values, which, as stated earlier, creates downward pressure on land prices. Because both changes would happen simultaneously, it is difficult to know what the net change in land prices would be without an in-depth study of local market conditions.

36. TRANSP. RES. BD., *GUIDEBOOK TO FUNDING TRANSPORTATION THROUGH LAND VALUE RETURN AND RECYCLING 60* (Apr. 2018) (NCHRP Report #873), <http://www.trb.org/Main/Blurbs/177574.aspx> [hereinafter TRB GUIDEBOOK].

37. DAPHNE A. KENYON, *REAL PROPERTY TAX CLASSIFICATION IN WASHINGTON, DC* 16 (Oct. 24, 2013), http://docs.wixstatic.com/ugd/ddda66_7e055c0324c7fa709eff78a44065f104.pdf. As of 2012, twenty-seven states employed “classified” property tax systems. *Id.*

levels of taxation, including reduced property tax rates in some cases.³⁸ To the best of the author's knowledge, states that established objective criteria for distressed areas and that linked lower tax rates in these areas to a policy objective for economic revitalization were successful in avoiding any legal nullification of the favorable tax treatment provided within the zones.

Based on common practices utilizing classified property taxes and enterprise zones, a legislative finding based on long-established economic principles that land and buildings are separate classes of property should meet the rational basis test and survive any challenge based on a lack of uniformity. And reducing the tax rate on improvements to make housing more affordable and to increase employment opportunities is likely to be seen as a legitimate public purpose. Since 1913, Pennsylvania has permitted jurisdictions to tax land and buildings at separate rates and no legal challenge has nullified this practice on grounds of uniformity—or any other legal principle.

C. Statutory Prohibition

Some states have statutes which prohibit land and buildings from being taxed at different rates. Maryland represents an interesting example.

In Maryland, the most fundamental law governing property tax assessments and rates is Article 15 of the Declaration of Rights:

Art. 15. . . . [T]he General Assembly shall, by uniform rules, provide for the separate assessment, classification and sub-classification of land, improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform within each class or sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy. . . .³⁹

Article 15 states that "land" and "improvements on land" are (or could be) separate classes of property. It also indicates that "sub-classes" of property can be created. Therefore, while both buildings and land should be assessed at their full fair market value, the Maryland Declaration of Rights appears to permit a split-rate property tax whereby a lower tax rate could be applied to privately created building values and a higher tax rate could be applied to publicly created land values.

Yet, the setting of property tax rates by counties and Baltimore City is further circumscribed by another statute. Maryland Tax-Property Code § 6-302 specifically prohibits Maryland counties (including Baltimore City) from levying more than one rate on all real property, whereas § 6-303 permits levying multiple rates for cities (except Baltimore).⁴⁰ If Baltimore

38. See *Enterprise zone*, WIKIPEDIA, https://en.wikipedia.org/wiki/Urban_enterprise_zone.

39. MD. CONST., art. 15.

40. See MD. CODE ANN. TAX-PROP. § 6-303(c)(1).

City or a county in Maryland wished to implement land value return and recycling, an amendment to § 6-302 eliminating the prohibition would be required.⁴¹ However, cities (except Baltimore) have property taxation powers and are able to tax land and buildings at separate rates.

Some states and counties present more difficult challenges. In 1978, California voters approved Proposition 13. Proposition 13, and similar laws enacted in other jurisdictions since that time, froze (or limited increases in) property assessments and/or rates. These laws often require super-majority votes to amend them or to exceed the limits they established. Approximately forty-two states employ some type of limitation on increases in assessments and/or rates.⁴² These limitations represent the most significant impediment to the implementation of more robust land value return and recycling.

D. Assessments

The property tax assessment process is the foundation for fair and effective property taxation. It is essentially a reporting function to determine the location and amount of real property value. While the technicalities of assessment methodology are beyond the scope of this essay, there are some important things to understand. The market value of a property is not an exact figure, but a range.⁴³ And the two key metrics for assessments are accuracy and fairness. Ultimately, fairness is more important. If all the properties in a jurisdiction are worth between \$190,000 and \$210,000 and they are all assessed at \$95,000 to \$105,000, the assessments are inaccurate, but they are fair because the ratio of market value to assessed value is roughly the same for all properties.

When land value return and recycling is proposed,⁴⁴ it is not uncommon for some to say that this is fine in theory, but, in practice, because most properties contain both land and improvements, it is impossible to apportion the total property value between its land and improvements

41. *Rosecroft Trotting & Pacing v. P.G. County*, 471 A.2d 719 (Md.1984).

42. *TRANSF. RES. BD.*, *supra* note 36, at 59.

43. The market value of a property may be expressed as an exact dollar figure, but it is more accurate to express it as a range of values. In other words, if the same property were put up for auction week after week (assuming no change in population, demand for housing or general economic conditions), the winning bids are unlikely to be identical. However, the winning bids should cluster around each other. So while an assessment might state that a property is worth \$200,000, it might be more appropriate to express the market value as a range between \$190,000 and \$210,000.

44. In 1978, only five jurisdictions in Pennsylvania taxed land and buildings at separate rates. Today, there are about fourteen such jurisdictions. See Zhou Yang, *The Effects of the Two-Rate Property Tax: What Can We Learn from the Pennsylvania Experience?* 12 *tbl.* 1 (Lincoln Inst. Land Pol'y Working Paper, 2014), https://www.lincolninst.edu/sites/default/files/pubfiles/yang_wp14zy1.pdf.

components.⁴⁵ This argument is bogus. Ordinary families shopping for homes will see similar houses selling for vastly different prices in different neighborhoods. They intuitively understand that this difference is related to differences between neighborhoods in terms of access to jobs, good schools, shopping, and transportation facilities and services. In other words, significant differences in the prices of similar homes are a reflection of different land prices. The fact that properties often include both buildings and land may complicate the effort to value land and buildings separately, but it can be done.⁴⁶ Today, assessment departments have access to computer-assisted mass appraisal (CAMA) software that, through multiple regression analysis, can accurately apportion value between land and buildings.⁴⁷

As a reporting function, assessments do not determine how much taxes are due. In other words, a property might be assessed at \$1 million. But, if the tax rate is zero, no tax is due. Thus, the ultimate determinant of taxes is the tax rate that will be applied to assessed values. And the setting of tax rates is a political function reserved for legislators. Because the property tax is unpopular⁴⁸ and because politicians want to shield themselves from

45. The District of Columbia Office of Tax and Revenue made this argument during the deliberations of the District's Tax Revision Commission in 2012. The author was employed by the Commission and heard this argument being made. It was remarkable as DC law mandates separate assessments for both land and building values. See D.C. CODE § 47-821(a). Additionally, the District employs computer-assisted mass appraisal (CAMA) software which has the capability of apportioning total property value among its land and building components. See also Elaine S. Povich, *Can Extra Taxes on Vacant Land Cure City Blight?*, PEW TRUSTS (Mar. 7, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/07/can-extra-taxes-on-vacant-land-cure-city-blight>. Unfortunately, the ability to assess land and building values is regularly undercut by people who should know better. For example, in this article, George McCarthy, president and CEO of the Lincoln Institute of Land Policy, a research group, has said, "You have to estimate the value of the land and the value of improvements separately. Places have a hard enough time estimating the value of the land and property together."

46. Andrew Haughwout, James Orr & David Bedoll, *The Price of Land in the New York Metropolitan Area*, 14 CURRENT ISSUES IN ECON.& FIN. (Federal Reserve Bank of New York), Apr./May 2008, https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci14-3.pdf.

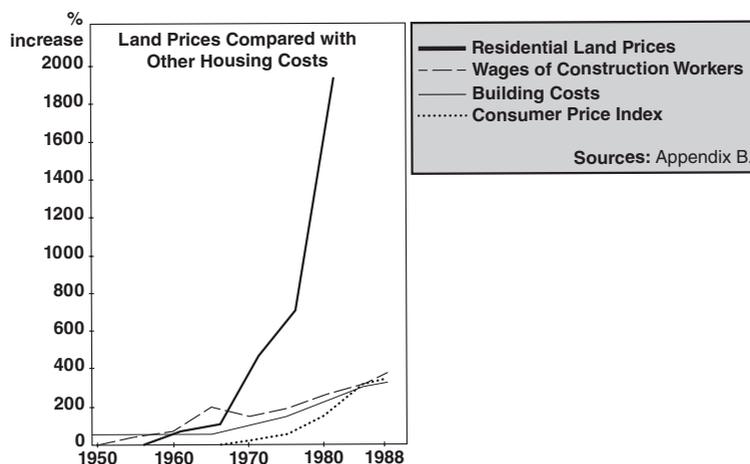
47. For information about assessment methodology and best practices, refer to the International Association of Assessing Officers (IAAO), <https://www.iaao.org>.

48. Property taxes are typically very unpopular. Aside from the fact that nobody likes to pay taxes, property taxes have some characteristics that make them particularly unpopular. First, it is typically paid in one or two lump-sum payments per year. For most employed people, estimated income taxes are deducted from take-home pay every pay period by employers. At the end of the year, taxpayers file income tax documents which typically show that they may owe a small amount or even get a refund. Imagine if we had to pay our total annual income tax in one or two payments? That would be very painful. Another factor that makes property taxes unpopular is that the portion of the tax

the ire of taxpayers, some politicians and some tax policy activists may blame assessors for high tax property tax liabilities instead.

IV. LVRR and Inclusionary Zoning

The preceding discussion may illuminate a key aspect of the country’s affordable housing problem. Housing prices for similar homes can vary drastically from one city to another, or even within the same city from one neighborhood to another. Primarily, this is not because nails, lumber, plumbing, or even labor are that much more expensive in one place than the next. The primary cause for differences in housing prices is in the price of land. Therefore, our “affordable housing” crisis is more aptly described as an “affordable land” crisis.⁴⁹



that falls on privately-created building values appears to be counter-productive. In other words, if property owners improve their property, the community punishes them with a higher tax. As mentioned in note 6 above, the economic impact of the property tax on improvements is equivalent to a one-time sales tax of between ten and twenty percent. That strikes many people as unfair and may render some improvements uneconomical.

Finally, property taxes are unpopular because increases in land value are beyond an owner’s control. If land values increase, owners have not realized this value and do not necessarily have more income from which to pay the tax. Of course, if land values rise faster than inflation, politicians who set tax rates should lower the rates accordingly.

49. WALTER RYBECK, RE-SOLVING THE ECONOMIC PUZZLE 194 (2011).

One recent response to the lack of affordable housing is inclusionary zoning. Inclusionary zoning (“IZ”) is a legal mandate for the production of units to be sold at below-market prices in developments that exceed a specified threshold.⁵⁰ To be effective, IZ requires a hot real estate market. In other words, a spike in housing demand by relatively affluent households in a confined geographical area will lead to rising housing prices and windfall profits for owners of residential property. Some people think that this windfall could be used to cross-subsidize below-market units. Of course, this spike in housing prices is really a spike in land prices. If a housing developer acquires property after the rise in housing prices has occurred but prior to the enactment of an IZ requirement, then the inflated price of housing is baked into the price of the land acquired, and there’s no “excess profit” for the developer.⁵¹ Some IZ ordinances provide zoning density bonuses to offset the negative financial (and potentially confiscatory) impacts of the program.⁵² But, if effective demand for housing is weak, there are no excess profits. Likewise, if effective demand is weak,

50. Obviously, if a developer builds one unit of housing, it cannot include both a market-rate and a below-market-rate unit. Therefore, inclusionary zoning ordinances establish a minimum development size that triggers a requirement to produce “affordable” units. Montgomery County, Maryland’s “Moderately Priced Dwelling Unit” program was started in 1974 and may have been the first “inclusionary zoning” ordinance in the United States. See <https://www.montgomerycountymd.gov/DHCA/housing/singlefamily/mpdu/index.html>. At the time of inception, the requirement applied to developments of fifty or more units. One has to wonder how many forty-nine-unit developments were permitted to avoid the requirements of this program. In more recent times, the threshold has been significantly reduced. See

http://www.montgomeryplanning.org/community/housing/frequently_asked_questions.shtml (noting minimum development size in Montgomery County, Maryland, of twenty units); see also <https://dhcd.dc.gov/service/inclusionary-zoning-affordable-housing-program> (noting development threshold in Washington, D.C., of ten units).

51. Some have argued that the inclusionary zoning (IZ) requirement—by making development more costly—results in lower land prices. See Emily Hamilton, *Is Inclusionary Zoning Creating Less Affordable Housing?*, STRONG TOWNS (Apr. 11, 2018), <https://www.strongtowns.org/journal/2018/4/10/is-inclusionary-zoning-creating-less-affordable-housing>. In other words, a given parcel of land yields less profit from housing development after enactment of IZ requirements, and this outcome might cause developers to offer lower land prices. However, inclusionary zoning requirements typically apply only to developments above a certain threshold. So IZ might trigger smaller developments that are not subject to IZ requirements. Depending on the profit profiles of such development, there might not be any adverse impact on land prices.

52. Benjamin Schneider, *CityLab University: Inclusionary Zoning*, CITYLAB (July 17, 2018), <https://www.citylab.com/equity/2018/07/citylab-university-inclusionary-zoning/565181>. IZ has been challenged as an unconstitutional regulatory taking in some jurisdictions. Most courts have upheld IZ. See, e.g., *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974 (Cal. 2015); see Tim Iglesias, *Inclusionary Zoning Affirmed: California Building Industry Association v. City of San Jose*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 409 (2016).

granting bonus density will not yield an economic return that could be used to compensate developers for providing below-market units. Homes in rust-belt cities are typically much cheaper than elsewhere. But for the unemployed in a rust-belt city, even a cheap home may be unaffordable. In rust-belt cities and other “weak” markets, inclusionary zoning is unlikely to be helpful in addressing problems of housing affordability.⁵³

In contrast, land value return and recycling can be effective in both weak and strong real estate markets. In weak markets (like Harrisburg, McKeesport, Duquesne, and Clairton), it increased development and employment to some extent. In strong markets, like Pittsburgh prior to the demise of the domestic steel industry, it helped keep development (both residential and commercial) more affordable than would otherwise have been the case. Prior to the collapse of the steel industry, Pittsburgh’s housing market was relatively affordable compared to other cities with robust economies.⁵⁴

To the extent that housing is not being developed because landowners are waiting for future appreciation, LVRR will motivate more development activity. This, in turn, could increase the number of below-market rate units to be produced if inclusionary zoning mandates were in place.

V. Penalty Taxes on Vacant, Blighted or Underutilized Property

If the property tax were to be transformed by shifting the tax off of privately created building values and onto publicly created land values, and if this were accomplished in a revenue-neutral manner, then owners whose building value to land value ratio was smaller than average would experience increases in tax liability. Thus, owners of vacant lots, surface parking lots and boarded-up buildings would typically receive the greatest percentage tax increases from such a shift.⁵⁵ And this fits within the overall concept of rewarding those who develop and maintain buildings on high-value land while discouraging those who allow buildings to deteriorate or who allow high-value land to sit idle.

Not surprisingly, some may say that we need not overhaul the tax system for everybody. A more “targeted” approach would simply impose a penalty tax on those who own vacant and/or blighted property.⁵⁶ Indeed,

53. Problems associated with a lack of affordable housing can be related to inadequate supply of housing units, inadequate effective demand, or both. Building more units will not solve housing affordability issues in an area that already contains a surplus of housing units. Likewise, increasing housing vouchers or other income supplements will simply inflate housing prices further if the root problem is an undersupply of units. An effective remedy requires an accurate evaluation of the situation which may vary significantly from one location to another.

54. Sullivan, *supra* note 24.

55. This is basic math. However, to see an example using actual assessment data, see 1992 Tax Burden Comparison, <https://www.justeconomicsllc.com/pdfs/TaxReformScenarioAnalysis.pdf>.

56. Several articles regarding a vacant property tax (Measure W) that was recently approved in Oakland can be found online. See Kathleen Pender, *Oakland’s Vacant-Property*

this approach was pursued in Washington, DC, beginning in 1991.⁵⁷ At first blush, this may seem like a reasonable alternative to a more fundamental tax shift. Unfortunately, this approach is not as simple as it might appear and may be inherently flawed.

For example, buildings must be vacant for at least a short while for people to make orderly transitions from one property to the next. So a legislature must determine how long is too long for a property to be vacant. Whatever the answer may be, it will be somewhat arbitrary. Then, the assessor's office (whose job is to determine the value of land and buildings) must now determine whether properties are occupied or vacant and, if vacant, for how long. This is a complex problem. One difficulty is that as soon as the list is compiled, it becomes obsolete. Some properties that were beneath the threshold will now exceed it. And those that were beyond the threshold, may become occupied. And, mistakes will be made that will anger and frustrate law-abiding residents.⁵⁸

And some property might not be vacant or blighted by fault of the owner. The D.C. Council created some exceptions to the penalty tax.⁵⁹ They included (but are not limited to) the following:

- Properties for sale. The owners should not be penalized or punished simply because nobody wants to buy their property. Indeed, many owners of vacant properties complain that people simply do not want their property. In some cases, if "unwanted" properties were placed on the market for \$1, there would be a line around the block of potential buyers. Thus, it is not always true that "nobody wants to buy" a vacant or boarded-up property. Instead, it might be that nobody wants to buy "at the price the owner is demanding." If a property owner is seeking a sales price that exceeds what the market will bear,

Tax Takes Effect, Sparkling Hope—and Alarm, S.F. CHRON. (Jan. 26, 2019), <https://www.sfchronicle.com/business/network/article/Oakland-s-vacant-property-tax-takes-effect-13563273.php>; *A Special Parcel Tax on Vacant Properties*, SPUR (2019), <https://www.spur.org/voter-guide/oakland-2018-11/measure-w-vacant-property-tax>; *Oakland, California, Measure W, Vacant Property Tax*, BALLOTPEDIA (Nov. 2018), [https://ballotpedia.org/Oakland,_California,_Measure_W,_Vacant_Property_Tax_\(November_2018\)](https://ballotpedia.org/Oakland,_California,_Measure_W,_Vacant_Property_Tax_(November_2018)).

57. KENYON, *supra* note 37.

58. Ellen Czaplewski, a realtor, shared her experience with clients who moved into an historic townhouse. Prior to the purchase, the previous owner was living on the top floor, with minimal belongings. Some city official must have looked into windows on the first floor and, seeing no furnishings or belongings, concluded that the property was vacant. The new owners moved in and noticed that their tax escrow had been drawn down by \$15,000. They inquired and were informed that the draw was to pay the vacant property tax penalty. By law, the penalty tax needed to be paid prior to any appeal. This was a hardship in itself. The District government then, on more than one occasion, misplaced their submitted evidence. *See also Oakland, California, Measure W, supra* note 56.

Thus, even this supposedly "targeted" approach will burden many property owners in an attempt to address a smaller number of vacant and blighted properties.

59. KENYON, *supra* note 37, at 22.

the property will not sell. So if we make an exception for properties that are “for sale,” we simply encourage speculators to stick a for-sale sign on the property and then ask an above-market price. Is it realistic to expect city bureaucrats to scrutinize all properties for sale and to flag those where the asking price is “unrealistic”? Again, how much above-market would be too much? And whatever the answer, it will be somewhat arbitrary.

- Properties affected by fire. Owners who have suffered from a fire should not be penalized or punished as a result. This would be “adding insult to injury.” Land speculators may own land with buildings. But it is the land (and not the buildings) that appreciate in value over time. Buildings, if not maintained, depreciate. Not surprisingly, in Washington, DC, shortly after the vacant property tax was instituted, the rate of suspected arson jumped by about 400%.⁶⁰

Problems associated with administration of the penalty tax on vacant and blighted property have caused the District of Columbia government to amend this law continually since its inception.⁶¹ Needless to say, this “moving target” makes the law difficult to comprehend⁶² and results in collection rates that are very low.⁶³

But perhaps the biggest flaw is that this “penalty tax” fails to understand that property investment (and disinvestment) decisions are often made with long time horizons. The traditional property tax will continue to penalize owners who create, enhance, or maintain value in buildings. It will also continue to reward owners who allow their buildings to deteriorate, until that deterioration crosses some arbitrary level of offensiveness. Then, overnight, some penalty is due. Thus, this is neither effective in promoting compliance nor in fostering a more productive approach to property management and stewardship.

Penalty taxes on vacant and/or blighted property may be well-intentioned. And legislators are surely interested in crafting “sensible” exceptions. But the result will probably be “feel-good” legislation that appears to

60. *Development & Implementation of a Management Reform Plan for the District of Columbia Fire and Emergency Medical Services Department: Task 1: Problem Identification*, TRI DATA CORP. & ARTHUR ANDERSEN, LLP (Oct. 1997).

61. KENYON, *supra* note 37, at 9. Classification and rates applied to vacant land and/or vacant or blighted buildings changed eight times between 1991 and 2012. *See id.*

62. *Id.* at 8 (“According to DC Law 8-150, within the five classes of property there were separate rules for occupied buildings, unoccupied buildings, and vacant land. In effect it was nearly impossible for even a well-educated person to read this statute and understand the property tax classification system, either generally or as applied to a particular property.”).

63. *Id.* at 30. In FY2012, the collection rate for occupied residential and commercial property was about ninety-five percent. But the collection rate for the class of vacant buildings (Class 3) was only sixty percent and for blighted properties (Class 4) was only twenty-nine percent.

address problems associated with vacant and boarded-up properties while failing to do so.

Finally, some who worry that LVRR is too comprehensive might argue that it will lead to overdevelopment. Under typical conditions today, some planning departments might predict that X acres of land at Y floor area ratio (FAR) will be required for land-use Type 1. However, if they zoned only X acres at Y FAR for Type 1 land use, landowners within this zone might hold out for exorbitant prices, thereby depressing Type 1 land use and employment due to high land costs. To avoid this, planning departments concerned about the monopoly power of landowners to extract excessive land prices, might zone more land (X + A acres) and/or more density (Y + B FAR) for a particular land use than is reasonably predicted to be used. The belief is that this “over-zoning” will cause landowners to compete for development, and thereby keep land prices more reasonable. As mentioned previously, landowners may or may not compete. And the over-zoning may result in haphazard or suboptimal land use allocations.

Into this “over-zoned” environment, some might be concerned that the introduction of LVRR might lead to overdevelopment. LVRR, as the differential between building rates and land rates widens, will induce more development. But, regardless of property tax rates, there will not be any more development of Type 1 land use than is demanded by the general economy. So, while over-zoning is a dubious strategy, adoption of LVRR should be accompanied by attempts to reign it in. And, to the extent that any new development is deemed inappropriate (to preserve historic structures, agricultural land or conservation land), then LVRR should be accompanied by historic preservation ordinances, conservation easements, and transferable development rights.⁶⁴

VI. Proposals for Moving LVRR Forward

Regarding implementation, the good news is that almost every community is already implementing land value return and recycling to the extent that a tax (fee) on land values is embedded in the traditional property tax. Thus,

1. No new taxes or fees are required.
2. Incremental change in existing taxes and fees can gradually increase the robustness of beneficial land value return and recycling while reducing the harmful tax penalty on privately created building values.
3. Mechanisms such as exactions and development impact fees can be retained, strengthened, or introduced in areas where infrastructure

64. For a more thorough discussion about whether LVRR would lead to over- or under-development, see RICK RYBECK, *FUNDING LONG-TERM INFRASTRUCTURE NEEDS FOR GROWTH, SUSTAINABILITY & EQUITY*, APPENDIX 4, 43–54 (Sept. 27, 2013) (prepared for the DC Tax Revision Commission), http://docs.wixstatic.com/ugd/ddda66_2817111b198bd64898d8b19e4ac331c.pdf.

capacity is lacking and where development would be inappropriate for environmental and/or fiscal reasons.

The most significant impediments to implementation are:

- First, a general lack of understanding by the general public, public interest advocates and public officials about the Jekyll and Hyde nature of the traditional property tax and about how to remedy it via land value return and recycling. In particular they do not understand how the portion that taxes building values reduces supply (and employment) while raising prices. Nor do they understand how the portion that taxes land values could be helpful in reducing blight and sprawl. Most importantly, many people are unaware that LVRR has been used with considerable success both in the United States and elsewhere around the world.⁶⁵
- Second, statutory limitations on property tax assessments and/or rates that constrain the implementation of land value return and recycling.⁶⁶
- Third, in many jurisdictions, individual property assessments provide the assessed value of the land, the assessed value of improvements, if any, and the total assessment.⁶⁷ However, assessment appeals are sometimes limited to disputes that exceed a certain percentage of the total assessment. In other words, an appeal about the apportionment of value between land and buildings would not be allowed if the petitioner did not contest the total value. After all, given the single tax rate that is typically applied to both land and buildings, such an appeal would not change the property tax liability and therefore not be a productive use of anybody's time or effort.⁶⁸ However, in the event that LVRR was made more robust by reducing the rate applied to improvement values and increasing the rate applied to land values, such an appeal could have material consequences even if the total value was uncontested. Therefore, jurisdictions contemplating the implementation of LVRR should amend the law or regulations governing assessment appeals to allow challenges to the apportionment of value between land and buildings even if the total value is uncontested.
- Fourth, those who talk about "value capture" or "value recapture" often include development impact fees, inclusionary zoning and

65. LAND VALUE TAXATION: THEORY, EVIDENCE, AND PRACTICE 11–47 (Richard F. Dye & Richard W. England eds., 2009).

66. See *supra* text accompanying note 42 (California's Proposition 13 (and similar related statutes)).

67. David Brunori & Jennifer Carr, *Valuing Land and Improvements: State Laws and Local Government*, 25 STATE TAX NOTES, Sept 30, 2002. In particular, see D.C. CODE § 47–821(a) (requiring separate assessment of both land and improvements to land).

68. Wash. Post Co. v. District of Columbia, 596 A.2d 517, 522 (D.C. Ct. App. 1991).

penalty taxes on vacant property in this category, even though the liabilities for these fees are based on the value of privately created improvement value (or lack thereof), rather than on publicly-created land value. Many experts also include tax increment financing (TIF) as “value capture,” although it is more aptly described as “revenue segregation.”⁶⁹ These other mechanisms may be appropriate under certain circumstances, but they have very different incentive effects than LVRR.

These impediments require education leading to legislative reform.⁷⁰

So step one entails an education process—for the general public, public officials and the media. If fundamental economic principles are not understood, effective policy tools are almost impossible, particularly given some of the counterintuitive effects of economic externalities.

Step two might entail a reorientation of our perspective about public infrastructure. Instead of creating it and giving it away (perhaps with minor user charges to some direct beneficiaries), it should be seen as something to be created in exchange for reasonable user fees and access fees. Any inability to collect reasonable access fees should result in a refusal to provide the infrastructure. Where infrastructure is truly needed, the public-sector’s refusal to create it and give it away should result in legislative actions and/or contractual agreements to generate reciprocity—that is, value given for value received.

Once steps one and two have met with some success, research can be performed to identify potential infrastructure beneficiaries and appropriate mechanisms to generate a fair level of land value return and recycling. Such research might entail a study of potential tax shift scenarios that would be gradual enough to avoid creating windfalls and wipeouts while being aggressive enough to reorient landowner behavior regarding the stewardship of land and natural resources along with the creation and stewardship of buildings.

Conclusion

Most communities in the United States fail to obtain a fair return for the land values that they create through the provision of public goods and services. This failure transfers wealth from the general public to affluent

69. Rick Rybeck, *Financing Infrastructure with Value Capture: The Good, the Bad and the Ugly*, STRONG TOWNS (Feb. 21, 2018), <https://www.strongtowns.org/journal/2018/2/20/financing-infrastructure-with-value-capture-the-good-the-bad-the-ugly>.

70. The author and others assisted in the drafting of model legislation for the American Legislative and Issue Campaign Exchange (ALICE) in 2014. ALICE has since been replaced by State Innovation Exchange (SiX). The model legislation did not get transferred to the new website. However, the model authorizing legislation can be found at https://www.justeconomicsllc.com/pdfs/ALICE-SplitRatePropertyTaxAct_14-01-23rev.pdf, and the model implementing ordinance can be found at https://www.justeconomicsllc.com/pdfs/ALICE-SplitRatePropertyTaxOrdinance_14-01-22rev.pdf.

owners of prime real estate, thereby exacerbating inequality. It also induces land speculation which has harmful impacts on housing affordability, employment, infrastructure effectiveness and efficiency, fiscal solvency, and environmental sustainability. Furthermore, this failure makes it much more difficult to improve conditions in distressed neighborhoods and communities without displacing the intended beneficiaries.

Fortunately, some communities are utilizing land value return and recycling to remedy these problems. These communities recognize that *how* we raise funds for infrastructure is just as important as *how much* funding we raise because of the incentives that methods of taxation create.⁷¹ And, by tapping an often overlooked source of public revenue, land value return and recycling can help reduce harmful taxes such as those on privately created building values. In particular, shifting the property tax off of privately created building values and onto publicly created land values can make both buildings and land more affordable, while encouraging more compact land use that has fewer adverse environmental impacts and reduced infrastructure requirements, thereby reducing fiscal strain.

Land value return and recycling is not the only tool necessary for improving housing affordability, job creation and equitable development. However, as is apparent from the “infrastructure conundrum” and “no good deed goes unpunished,” if LVRR is ignored or overlooked, other remedies will be less effective or even counter-productive.

Perhaps this article can begin to move the ball forward in this regard. JAHDCCL readers, whose daily work attempts to prove that the term “economic justice” need not be an oxymoron, might exercise leadership by sharing this information about land value return and recycling as an important tool in promoting affordable housing and job creation along with more sustainable and equitable development.⁷²

71. Water services are typically paid for “by the gallon.” This measure encourages owners to conserve water. And, when they have a leaky faucet, they do not just see water going down the drain; they see their money going down the drain, which encourages them to fix the faucet. We could pay for water services from sales taxes. But would property owners have any incentive to conserve water? Would they be motivated to fix leaky faucets? Would they purchase something they did not want, just to compensate the water authority with sales tax revenue for the water that they are wasting? The answer to these questions is “no,” and it demonstrates that how we pay for infrastructure is very important. In a similar vein, think about the owner of a vacant lot. The owner is not drinking any water there. Should the owner pay anything to the water and sewer authority? Assuming that municipal water pipes are at the property boundary, the answer is “yes” because this vacant lot is more valuable than it would otherwise be if no water pipes were nearby. Thus, achieving a balance between infrastructure user fees and infrastructure access fees (LVRR) is important.

72. In addition to the *TRB Guidebook*, *supra* note 25, TRB has also recently posted a presentation on this topic. See <http://www.trb.org/Main/Blurbs/178905.aspx>. Additionally, the Strong Towns website posted articles on this topic during the first week in March 2019. See <https://www.strongtowns.org/landtax>.

