

INNOVATIVE RESPONSES TO FORECLOSURES: PATHS TO NEIGHBORHOOD STABILITY AND HOUSING OPPORTUNITY

*Justin P. Steil**

This Article argues that the current foreclosure crisis illustrates how economic stability and racial justice are intertwined. Recent research has found that the more racially segregated a metropolitan region is, the higher the number and rate of its foreclosures. Indeed, the high levels of racial residential segregation in the U.S. facilitated discriminatory and abusive lending practices and contributed to instability in regional housing markets. The Article contends that current fair housing laws alone are insufficient to dismantle the economic and political structures that continue to produce segregation, particularly the architecture of fragmented and unequal local governments competing with each other for resources. Responses to foreclosures provide an opportunity to chip away at these incentives for segregation by encouraging regional collaboration and shared-equity homeownership structures. Two promising examples of such collaboration are examined: first, a partnership between local governments and non-profits conducting targeted redevelopment through the federal Neighborhood Stabilization Program; and, second, a joint effort by a community development financial institution and a community development corporation to buy portfolios of distressed notes at a discount in order to rehabilitate scattered-site properties as affordable housing. Building on these examples, the Article proposes that the next significant step toward creating durable solutions is for municipalities to

* Fellow, Center for Institutional and Social Change, Columbia Law School. B.A., Harvard College; J.D., Columbia Law School; M.Sc., London School of Economics; Ph.D. candidate, Columbia Graduate School of Architecture, Planning, and Preservation. Thank you to Samantha Bent, Anurima Bhargava, James Connolly, Annie Decker, Adam Gordon, Stephanie Greenwood, Stephen Hayes, Olatunde Johnson, Peter Marcuse, Kerim Odekon, Amy Offner, Devi Rao, and Yleana Roman for their helpful comments.

support shared-equity homeownership structures designed to create permanent affordability and neighborhood stability. Innovative responses to foreclosures from federal, state, and local policymakers hold the promise of advancing both economic security and racial justice.

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I. INTRODUCTION

The United States is currently experiencing a level of foreclosures not seen since the Great Depression, with broad impacts on families and neighborhoods across the country. At the current rate, banks will repossess more than one million homes in 2010 and initiate foreclosure proceedings on three million more—approximately one in every forty-five homes.¹ One in nine homeowners is more than sixty days delinquent on their mortgage² and twenty-three percent of homeowners owe more in mortgage debt than their home is worth.³

This Article argues that one of the causes of the current foreclosure crisis is the high-level of residential segregation that persists in the United States. Residential patterns in the United States are currently even more segregated by race and class than they were a century ago.⁴ This segregation simultaneously has facilitated and has been perpetuated by the creation of a two-tiered financial services sector offering separate and unequal products in different neighborhoods and to different consumers.⁵ This two-tiered

¹ Realtytrac, *1.65 Million Properties Receive Foreclosure Filings in First Half of 2010* (July 15, 2010), available at <http://www.realtytrac.com/content/foreclosure-market-report/165-million-properties-receive-foreclosure-filings-in-first-half-of-2010-5877>.

² Press Release, Mortg. Bankers Ass'n, Mortgage Bankers Association National Delinquency Study (Feb. 19, 2010), available at <http://www.mbaa.org/NewsandMedia/PressCenter/71891.htm>.

³ Ruth Simon & James R. Hagerty, *One in Four Borrowers is Under Water*, WALL ST. J., Nov. 14, 2009, at A1.

⁴ Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA 39, 42-52 (James H. Carr & Nandinee K. Kutty eds., 2009); KEVIN GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT 27-70 (2002).

⁵ The Department of Justice has uncovered significant evidence of patterns and practices of redlining, discriminatory underwriting, and discriminatory pricing by various lenders. As examples of redlining, see *United States v. Chevy Chase Fed. Sav. Bank*, No. 94 Civ. 1824 (D.D.C. 1994) (bringing suit against Chevy Chase Bank for failing to market and refusing to make loans in predominantly non-white neighborhoods); *United States v. Albank, FSB*, No. 97 Civ. 1206 (N.D.N.Y. 1997) (charging Albank with violations of the Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA) for refusing to make loans in particular cities where the majority of African American and Latino residents in its lending region lived). Regarding underwriting discrimination and evidence that banks were not providing the same assistance to African American and Latino applicants that they were providing to white applicants, see *United States v. Decatur Fed. Sav. & Loan Assoc.*, No. 92 Civ. 2198 (N.D. Ga. 1992), *United States v. Northern Trust Co.*, No. 95 Civ. 3239 (N.D. Ill. 1995), *United States v. First Nat'l Bank of Dona Ana Cnty.*,

structure of financial services contributed to the mass-marketing of subprime financial products. These financial products were then the catalyst for the high rates of foreclosures and subsequent credit crisis that began in 2007.

A clearer understanding of the roots of the current housing crisis creates new urgency for the effort to dismantle the structures that entrench segregation. While continuing discrimination remains significant, the most powerful force perpetuating segregation is the current structure of fragmented, unequal local governments that are highly dependent on local tax revenues. This structure encourages municipalities to compete with each other to attract investment and to exclude those who may require services or be seen as reducing property values. The existing distribution of strong land use powers to local governments, coupled with minimal restrictions on their ability to exclude based on wealth, simultaneously perpetuates segregation and shields municipalities from liability. More robust protections against discrimination within the current compliance-based model of accountability, while beneficial, can go only so far in unraveling this persistent segregation, which has been legally woven into the existing structures of local governance and fiscal policy. Anti-discrimination laws alone can neither level the unequal economic footing on which different local governments stand nor proscribe the legally-sanctioned exclusionary practices of many municipalities.⁶

An effective response to foreclosures, therefore, must address both the governance structures that have entrenched segregation and the current home ownership and financing structures that have encouraged speculation. The housing crisis creates new opportunities to look at local models in order to foster collaboration across municipal lines, as well as innovative methods to reduce speculation and to make homes the stable and secure

No. 97 Civ. 96 (D.N.M. 1997), and *United States v. Shanmut Mortg. Co.*, No. 93 Civ. 2453 (D. Conn. 1993). Regarding pricing discrimination and evidence that loan officers were charging higher up-front fees for home mortgage loans to African American and Latino borrowers than whites or encouraging loan officers and independent mortgage brokers to use discretionary pricing in a discriminatory manner, see *United States v. Huntington Mortg. Co.*, No. 95 Civ. 2211 (N.D. Ohio 1995). See also *United States v. Fleet Mortg. Corp.*, No. 96 Civ. 2279 (E.D.N.Y. 1996); *United States v. Long Beach Mortg. Co.*, No. 96 Civ. 6159 (C.D. Cal. 1996).

⁶ Most common among these exclusionary practices is the use of zoning laws to increase the cost of housing and limit rental units. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 125 (2000). See also *infra* note 11.

long-term investment buyers hope for. Working to prevent and respond to foreclosures also should be understood as an opportunity to begin to dismantle segregation by focusing on regional solutions and on stable alternative homeownership structures.

After briefly summarizing the roots of housing segregation throughout the twentieth century, Part II of this Article reviews the most recent comprehensive study of contemporary housing discrimination. Part III analyzes the way in which the current segregated metropolitan pattern was central in enabling the foreclosure crisis. Part IV analyzes the limitations of existing fair housing laws, which are characterized by ad hoc enforcement and weak penalties that together fail to effectively deter violations. It also considers the obstacles to creating regional remedies in light of two recent fair housing cases, *Thompson v. United States Department of Housing & Urban Development*⁷ and *United States ex rel. Anti-discrimination Center of Metro New York, Inc. v. Westchester County*.⁸ Given the limited ability of existing fair housing laws to address entrenched segregation, Part V examines the economic assumptions that undergird current structures of local governance and advances two main critiques of these dominant assumptions. Part VI then puts forward an innovative regional collaboration that has developed to address foreclosures in the Essex County, New Jersey metropolitan area, and discusses shared-equity forms of home ownership that cities are considering in response to the foreclosure crisis.

II. RACIAL DISCRIMINATION AND RESIDENTIAL SEGREGATION

A. The Historical Roots of Residential Segregation

Over the past century, segregation was established and perpetuated through a combination of both public and private actions. One of the leading scholars in the field, Douglas Massey, concludes that “white Americans made a series of deliberate historical decisions to deny blacks full access to urban housing and to enforce their spatial isolation in society.”⁹ White mob violence against integrated neighborhoods in the late 1890’s and early 1900’s

⁷ 348 F. Supp. 2d 398 (D. Md. 2005).

⁸ No. 06 Civ. 2860, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

⁹ Massey, *supra* note 4, at 39.

drove African Americans from their homes¹⁰ and was reinforced by municipal zoning restrictions excluding African Americans from white neighborhoods.¹¹ In 1948, after the National Association for the Advancement of Colored People (NAACP) challenged these racially-based zoning provisions and the Supreme Court found them unconstitutional,¹² private neighborhood improvement associations implemented racially restrictive covenants to take their place.¹³ After the 1930's, the most significant force intensifying segregation

¹⁰ *Id.* at 53-54. In multiple cities around the United States, whites led racial assaults against African Americans in multiracial neighborhoods—destroying black homes, terrorizing black residents, and creating new and rigid borders between black and white communities. See THOMAS W. HANCHETT, *SORTING OUT THE NEW SOUTH CITY: RACE, CLASS AND URBAN DEVELOPMENT IN CHARLOTTE 1875-1975* (1998); JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 90-115 (2005); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

¹¹ Cities and towns throughout the South and Midwest passed zoning ordinances to legally establish separate white and black neighborhoods. For instance, in 1914, Louisville, Kentucky passed “[a]n ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.” *Buchanan v. Warley*, 245 U.S. 60, 70 (1917). See A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 807-62 (1991); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983); Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179 (1968).

¹² The NAACP filed suit to challenge the state enforcement of segregation, and the Supreme Court found these laws unconstitutional in 1917. *Buchanan v. Warley*, 245 U.S. 60 (1917). Nevertheless, many municipalities continued to adopt and enforce racially restrictive zoning agreements well into the 1940's. See *Monk v. City of Birmingham*, 185 F.2d 859 (5th Cir. 1950) (invalidating ordinance Birmingham passed in 1949 implementing racial zoning statutes dating to 1926); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 579 (M.D. Fla.1986) (pointing out that Kissimmee continued to enforce a racial zoning ordinance into the 1940's); *State v. Wilson*, 25 So. 2d 860 (Fla. 1946) (striking down racial zoning ordinance enacted by Dade County in 1945).

¹³ The typical racially restrictive covenant was similar to that struck down in *Shelley v. Kraemer*, which stated that “no part of said property or any portion thereof shall be . . . occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.” *Shelley v. Kraemer*, 334 U.S. 1, 4-5 (1948). The Federal Housing Authority recommended the use of racially restrictive covenants until 1950. Massey, *supra* note 4, at 55-56.

nationally was the growth of suburbs, combined with the discriminatory loan-underwriting standards created by the Federal Home Owners Loan Corporation, which were adopted by the Federal Housing Authority and almost universally used by the banking industry.¹⁴ Through the purchase of subsidized suburban homes, post-war white homebuyers “came to accept as natural the conflation of whiteness and property ownership with upward social mobility,” and they also created new collective identities united on issues of property taxation and racial segregation.¹⁵ These collective identities were reinforced further by the creation of local government boundaries (through processes of municipal incorporation or secession) that divided on the basis of race and

¹⁴ The four-tiered underwriting system developed by the Federal Home Owners Loan Corporation (HOLC) in the early 1930’s systematically undervalued racially mixed neighborhoods and strongly discouraged lending in integrated or primarily non-white communities. The Federal Housing Authority included the HOLC tiered rating system in its 1939 Underwriting Manual, expressing concern about the impact of “incompatible racial or nationality groups” on property values and stating that, “if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.” GREGORY SQUIRES, *CAPITAL AND COMMUNITIES IN BLACK AND WHITE* 53 (1994). Private banks quickly came to rely on the HOLC and Federal Housing Authority rating system to make their own loan decisions, leading to the nearly complete denial of mortgage financing in African American neighborhoods through the process that came to be called “redlining.” The Federal Housing Authority loans created by the National Housing Act of 1937 and the Veterans Administration loans created by the Servicemen’s Readjustment Act of 1944 (the GI Bill) increased the purchasing power of the white middle class and spurred the growth of suburbs. The loan programs guaranteed the value of collateral for loans made by private banks, enabling banks to make loans for up to ninety percent of the purchase price and to extend the repayment period for mortgages to thirty years. The reduced risk for banks led to lower interest rates and dramatically increased homeownership rates among whites, but the same discriminatory lending standards applied and the program did little to benefit African Americans, who ended up trapped in inner cities as the white middle class left for new single-family suburban homes. *See* CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* (1955); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* (1994); BERYL SATTER, *FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA* (2009); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 *YALE L.J.* 186 (2005).

¹⁵ ROBERT SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* 16 (2003).

class.¹⁶ Local governments perpetuated these divisions by adopting zoning ordinances that fostered race and class segregation, without explicitly mentioning race, by zoning whole communities only for large lot sizes with single-family homes or by restricting any multi-family housing that might be permitted to largely minority urban renewal areas.¹⁷ From the 1950's to the 1970's, federal urban renewal policies were used to clear black neighborhoods seen as encroaching on white business districts and elite institutions.¹⁸

Together, the spatial isolation of African American communities and the systematic disinvestment from black neighborhoods made it exceedingly difficult for African American

¹⁶ See Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

¹⁷ See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (holding that the town's decision to zone multi-family housing only in narrow urban renewal area already with a predominate minority population would have a disproportionate impact on African Americans), *aff'd*, 488 U.S. 15 (1988); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974) (finding that the city's decision not to include zoning for multi-family housing violated the FHA because it would perpetuate segregation); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 570-73 (N.D. Tex. 2000) (finding intent to discriminate where town's zoning laws banned multi-family housing and required a minimum of one-acre lots for residential development, given the evidence that town had a history of excluding African Americans and departed from normal procedures in rejecting developer's rezoning application for multi-family housing); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985) (finding discriminatory intent in the siting of public housing where the city rejected the planning board's site recommendations for subsidized housing in primarily white neighborhoods and rezoned available sites to make them unavailable), *aff'd*, 837 F.2d 1181 (2d Cir. 1987).

¹⁸ Massey, *supra* note 4, at 73-74. Attempts to address the growing disinvestment from inner cities led to the Housing Acts of 1949 and 1954 and the national urban renewal programs. Urban renewal made federal funds available to municipalities to acquire land, clear it, and prepare it for redevelopment. The program was frequently used to empty African American neighborhoods near central business districts and move displaced residents into concentrated public housing developments, further contributing to segregation. See NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 91-34, at 12 (1968); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960 (1983); JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN POSTWAR DETROIT (1997); Marc A. Weiss, *The Origins and Legacy of Urban Renewal*, in URBAN AND REGIONAL PLANNING IN AN AGE OF AUSTERITY 53, 53-80 (Pierre Clavel et al. eds., 1980); Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUS. POL'Y DEBATE 443 (2000).

families to accumulate wealth. This historical lack of access to mainstream financial services and to homeownership has been the central factor in creating the racial disparities in wealth that still structure United States' society.¹⁹

B. Evidence of Contemporary Discrimination

The residential isolation experienced by non-white families, and the discrimination that fostered it, both persist today.²⁰ The

¹⁹ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995). The median household net worth for white households in 2007 was \$170,000 compared with \$17,000 for African American households. Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, Fed. Res. Bull., Feb. 2009, at A4, A8. See also Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze* 29 (Levy Econ. Inst., Working Paper No. 502, 2007), available at http://www.levy.institute.org/pubs/wp_502.pdf (estimating the 2004 net worth of Latino households at \$5,500). Racial disparities in wealth are significantly larger than disparities in income, primarily because of the wide gaps in homeownership rates and home values between whites and nonwhites. See Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 J.L. & POL'Y 52 (2006); George Masnick, *Home Ownership Trends and Racial Inequality in the United States in the 20th Century* (Joint Ctr. for Hous. Stud., Working Paper No. 01-4, 2001), available at http://www.jchs.harvard.edu/publications/homeownership/masnick_w01-4.pdf. In 2008, seventy-five percent of white households owned their own homes, whereas less than fifty percent of African American and Latino households did. U.S. CENSUS BUREAU, *AMERICAN HOUSING SURVEY* (2008), available at <http://www.census.gov/hhes/www/housing/hvs/annual08/ann08ind.html>.

²⁰ The most common measure of segregation is the index of dissimilarity. It measures the evenness with which two groups are distributed across a set of smaller geographic areas that comprise the larger area being studied. It is a measure generally from zero to one or zero to one hundred, where the higher the number, the more segregated the two groups are. The index score can be interpreted as the percentage of one of the two groups included in the calculation that would have to move to different areas in order to produce a completely even distribution. See Otis D. Duncan & Beverly Duncan, *A Methodological Analysis of Segregation Indexes*, 20 AM. SOC. REV. 210 (1955). For evaluations and critiques of the dissimilarity index, see Charles F. Cortese et al., *Further Considerations on the Methodological Analysis of Segregation Indices*, 41 AM. SOC. REV. 630 (1976); Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281 (1988). African Americans in major U.S. cities in 2000 generally experienced levels of segregation between sixty and eighty, and Latinos between forty and seventy, indicating high levels of segregation for both groups. Nancy A. Denton,

2000 Housing Discrimination Study (HDS 2000), sponsored by HUD, found that African American, Latino, and Native American customers were denied at least some of the information and assistance comparable to that which white customers received in approximately one of five visits to a real estate or rental agent.²¹ Furthermore, it remained common for African American and Latino renters to be told that a housing unit was unavailable when a white renter was offered the same unit.²²

Between 1989 and 2000, racial steering of African Americans seeking to buy homes increased,²³ thereby perpetuating

Segregation and Discrimination in Housing, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 61 (Rachel G. Bratt et al. eds., 2006).

²¹ Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 81, 86 (Xavier de Souza Briggs ed., 2005); Margery Austin Turner et al., *Housing Discrimination in Metropolitan America: Unequal Treatment of African Americans, Hispanics, Asians, and Native Americans*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT HOUSING AND FAIRNESS 40 (John Goering ed., 2007) [hereinafter Turner et al., *Housing Discrimination in Metropolitan America*]; MARGERY AUSTIN TURNER ET AL., THE URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000 (2002), available at http://www.huduser.org/portal/Publications/pdf/Phase1_Report.pdf [hereinafter TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS]. Conducted by the Urban Institute, the HDS 2000 study sent out paired researchers—one white and one of color—posing as otherwise identical home-seekers to visit real estate or rental agents to inquire about the availability of housing units in more than 5,400 paired tests in twenty-three metropolitan areas.

²² TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS, *supra* note 21, at iv (The overall incidence of white-favored treatment over African American renters declined from 26.4% in 1989 to 21.6% in 2000. The overall incidence of white-favored treatment over Latino renters was 26%, not significantly different from 1989 to 2000.). Since 1989, there was also an increase in the percentage of Latino renters who were quoted a higher rent than their white counterparts for the same unit. *Id.* at 3-7.

²³ TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS, *supra* note 21, at 6-6 (The HDS 2000 study found that in 16.5% of paired tests, white homebuyers were shown more homes in neighborhoods with a higher percentage of white residents than African American homebuyers, a ten percentage point increase in the gross incidence of steering since the previous study in 1989. Both the 2000 and 1989 studies were sponsored by HUD and conducted by the Urban Institute. The HDS 2000 study replicated the basic research design and testing protocols used in the 1989 HDS study in order to yield comparable measures of differences in treatment.).

racial segregation by directing African American home-seekers away from predominantly white neighborhoods.²⁴ Given that homes in white communities appreciate in value more quickly than homes of similar design, size, and appearance in black communities, the chances of accumulating wealth from investment in black communities are reduced.²⁵ Some scholars have described the home value differentials as a “segregation tax” imposed on African American homeowners with the result that for every dollar African Americans spend on a house, they receive only eighty-two percent of the value that white homeowners receive.²⁶

African Americans and Latinos also experienced unequal access to the financial services associated with buying a home.²⁷ When individuals are denied advice and information about mortgage financing or steered into higher priced loans than they qualify for, their chances of obtaining favorable loan terms are compromised. Indeed, high-interest subprime loans are five times more likely to be made in predominantly African American neighborhoods than white ones.²⁸

²⁴ Steering can include: (1) direct segregation steering, where non-whites are encouraged to consider more non-white neighborhoods than whites; (2) information steering, where non-whites receive less information about a narrower range of neighborhoods in general than whites; and (3) class steering, in which non-whites are encouraged to consider less affluent neighborhoods than otherwise similarly situated whites. Turner et al., *Housing Discrimination in Metropolitan America*, *supra* note 21, at 49-50.

²⁵ OLIVER & SHAPIRO, *supra* note 19, at 147; Chenoa Flippen, *Unequal Returns to Housing Investments? A Study of Real Housing Appreciation Among Black, White, and Hispanic Households*, 82 SOC. FORCES 1523 (2004).

²⁶ DAVID RUSK, THE BROOKINGS INST., THE “SEGREGATION TAX”: THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS (2001), available at <http://www.brookings.edu/es/urban/publications/rusk.pdf> (Examining the causes of the variation in home value between blacks and whites across one hundred metropolitan areas, Rusk controlled for numerous factors including the size of the metropolitan area, economic inequality across neighborhoods, and rates of home-ownership and found that the strongest predictor of the racial gap in home value were measures of racial segregation through both dissimilarity and isolation indices.)

²⁷ TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS, *supra* note 21, at 8-1 to 8-6.

²⁸ U.S. DEPT OF HOUS. & URBAN DEV., UNEQUAL BURDEN: RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), available at http://www.huduser.org/Publications/pdf/unequal_full.pdf. Subprime loans can be defined as home loans with an annual percentage rate at least three percentage points above the rate on U.S. Treasury securities of comparable maturity. Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375 (2010).

Some argue that racial residential segregation is not primarily a byproduct of racial discrimination, but rather a result of nondiscriminatory class separation or different neighborhood preferences. While wealth and preferences may each play a role, the results of the paired testing in the HDS 2000 study confirm that racial discrimination continues to pervade housing decisions. Analysis of the dissimilarity index of U.S. metropolitan areas by both race and class demonstrates that while economic status does play some role in explaining segregation, race continues to be a significant factor.²⁹ Thus, both racial discrimination in housing and residential segregation continue.

The ability to access housing in a particular location fundamentally shapes individuals' and households' ability to access opportunity.³⁰ This Article focuses primarily on how segregation shapes households' access to financial services and, as a result, how segregation was a key catalyst in the foreclosure crisis. In addition, segregation has significant, well-documented, independent effects on employment,³¹ health,³² and education.³³

²⁹ For instance, the differences in segregation between high and low socio-economic status Latinos and Asian Americans are significantly larger than those among African Americans. John Iceland, *Racial and Ethnic Residential Segregation and the Role of Socioeconomic Status 1980-2000*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT HOUSING AND FAIRNESS, *supra* note 21, at 107, 114. The pairing of race and class in the study was designed to control for class and isolate the effect of race. The study found that race continues to play a significant role independent of socio-economic status in producing residential segregation, especially for African Americans. *Id.* at 117.

³⁰ See Xavier de Souza Briggs, *Re-shaping the Geography of Opportunity: Place Effects in Global Perspective*, 18 HOUS. STUD. 915 (2003); George C. Galster, *Trans-Atlantic Perspectives on Opportunity, Deprivation and the Housing Nexus*, 17 HOUS. STUD. 5 (2002); Gregory D. Squires & Charis E. Kubrin, *Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America*, 42 URB. STUD. 47 (2005); Rachel G. Kleit, *Neighborhood Segregation, Personal Networks, and Access to Social Resources*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 4, at 237.

³¹ The relation between employment and residence has been extensively discussed in debates over skills and spatial mismatches and the shift of manufacturing to the suburbs, the sunbelt, and overseas, as well as the relative decline of industrial jobs and rise of the service sector in the U.S. See WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1990); John Kasarda, *Structural Factors Affecting the Location and Timing of Underclass Growth*, 11 URB. GEOGRAPHY 234-64 (1990). For critiques, see ROGER WALDINGER, *STILL THE PROMISED CITY: AFRICAN AMERICANS AND NEW IMMIGRANTS IN POSTINDUSTRIAL NEW YORK* (1999); Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105, 105-22 (1991).

See also Margery Austin Turner, *Residential Segregation and Employment Inequality*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 4, at 151-66 (While workplaces are less segregated than residences, African Americans and Latinos still work in different locations than whites. The ratio of jobs to population is higher in primarily white suburbs than in multiracial neighborhoods or those with an African American or Latino majority. Further, jobs requiring low skill levels are more decentralized than high-skilled jobs, with roughly two-thirds of the low-skill openings located in primarily white suburbs. The geography of employment intersects with the geography of residence to segregate low-skilled workers of color and place them at a disadvantage in discovering and accessing available jobs.).

³² As owners and as renters, African Americans are more likely than whites to live in inadequate housing, with conditions such as lead paint, mold, rodents, insects, dampness and cold. These conditions affect children's educational attendance and success, as well as adults' work attendance. The location of housing and the attendant neighborhood conditions also affect residents' access to recreational facilities, healthy food, and supportive social institutions. Dolores Acevedo-Garcia & Theresa L. Oyspuk, *Impacts of Housing and Neighborhoods on Health: Pathways, Racial/Ethnic Disparities and Policy Directions*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 4, at 197; James Krieger & Donna Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 760 (2002); David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404 (2001). High debt and unmanageable payments that come with the predatory loans often targeted at African American and Latino borrowers may lead to detrimental physical and psychological health effects, especially for those who have difficulty making mortgage payments. See William M. Rohe et al., *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research* 4-11 (Joint Ctr. for Hous. Stud., Low-Income Homeownership Working Paper No. 01-12, 2001), available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf>; Sarah Nettleton & Roger Burrows, *Mortgage Debt, Insecure Homeownership and Health: An Exploratory Analysis*, 20 SOC. HEALTH & ILLNESS 753 (2004).

³³ School segregation for African American and Latino students has been increasing steadily since the 1980's, partially because of continuing housing discrimination and persistent residential segregation. GARY ORFIELD & CHUNGMEI LEE, HARVARD CIV. RTS. PROJECT, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? (2004) (on file with the *Columbia Journal of Race and Law*). Under current school financing systems, the separation of households along race and class lines leads to unequal resources for schools, generally accompanied by a divergence in the quality of teachers and the preparation of students. GARY ORFIELD & CHUNGMEI LEE, HARVARD CIV. RTS. PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005) (on file with the *Columbia Journal of Race and Law*). Housing and neighborhood quality each have significant independent impacts on student outcomes. Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 4, at 125, 130; Ingrid Gould Ellen & Margery Austin Turner, *Does Neighborhood Matter? Assessing Recent Evidence*, 8 HOUS. POLY DEBATE 833 (1997).

III. SEGREGATION AND THE FINANCIAL COLLAPSE

Scholars have detailed the ways in which overbuilding, highly leveraged refinancings, widespread speculation, poor regulation of mortgage lenders, and the collapse of housing prices all played central roles in the rise in foreclosures across the country.³⁴ Scholars also have pointed to the ways in which sub-prime lenders targeted African American and Latino communities.³⁵ However, few have identified the ways in which entrenched segregation and the unequal footing of different local governments contributed significantly to the economic conditions that enabled the collapse that began in 2007.

Segregation was both the product of and a contributor to the development of a two-tiered financial services market.³⁶ In communities of color, the history of redlining and the lack of experience with mainstream banks often limited consumers' abilities to shop for and find the best products in the marketplace. At the same time, loan originators frequently received incentives that encouraged them to charge the highest combination of fees and interest that they could extract from a borrower. This system led to unsolicited searches for the most inexperienced borrowers—who were the most easily overcharged—which led to discriminatory race-based targeting. These discriminatory loan terms led to high foreclosure rates and devastating consequences for households unable to keep up with their rising housing costs. These practices also led to millions of dollars in public losses and significantly exacerbated persistent racial disparities in wealth.

³⁴ See, e.g., DAN IMMERGLUCK, *FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET* (2009); Edward L. Glaeser et al., *Housing Supply and Housing Bubbles*, 45 *URB. STUD.* 693 (2008).

³⁵ Debbie Grunstein Bocian et al., *Race, Ethnicity and Subprime Home Loan Pricing*, 60 *J. ECON. & BUS.* 1 (2008); Elvin K. Wyly et al., *Subprime Mortgage Segmentation in the American Urban System*, 99 *TJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE* 1 (2007).

³⁶ See George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, 24 *URB. AFF. Q.* 87 (1988). While racial residential segregation is partially the product of historic and continuing discrimination in financial services, it also interacted with financial deregulation to foster the expansion of a two-tiered financial services sector.

A. Financial Deregulation and the Commodification of Housing

Over the past three decades, the financial industry succeeded in lobbying Congress for broad deregulation of mortgage lending, as well as for the creation of institutional and regulatory frameworks supporting the secondary mortgage market. The deregulation intensified the commodification of urban environments in general and housing markets in particular.³⁷ The 1980 Depository Institutions Deregulation and Monetary Control Act preempted state usury laws and eliminated state limits on the points or fees banks could add to residential mortgage loans.³⁸ The elimination of these limits expanded access to home loans and created significant new opportunities for lenders to profit, but they also created significant new risks for borrowers. Continuing the federal trend to eliminate state consumer financial protections, the 1982 Alternative Mortgage Transaction Parity Act preempted state laws restricting residential loans to conventional fixed-rate mortgages and thus opened the market to adjustable rate mortgages, interest-only loans, and balloon clauses.³⁹ Once these laws authorized new types of loans and eliminated usury caps, the 1984 Secondary Mortgage Market Enhancement Act⁴⁰ augmented the ability of investment banks' to invest in new collateralized mortgage obligations, which created the opportunity for a secondary market in mortgages to develop. Furthermore, the 1989 Financial Institutions Reform, Recovery and Enforcement Act⁴¹ increased capital requirements for savings banks, which encouraged them to sell the home loans that they had originated on the secondary market. In addition, the 1992 Federal Housing Enterprises Safety and Soundness Act⁴² amended the charters of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Company (Freddie Mac) in order to reinforce the stability of these government-sponsored entities designed to foster confidence in the secondary mortgage market and increase the liquidity of mortgage investments. Together, these legislative actions transformed inherently localized,

³⁷ See Kathe Newman, *Post-Industrial Widgets: Capital Flows and the Production of the Urban*, 33 INT'L J. URB. & REG'L RES. 314, 316-18 (2009).

³⁸ Pub. L. No. 96-221, 94 Stat. 132 (1980).

³⁹ Pub. L. No. 97-320, 96 Stat. 1469 (1982).

⁴⁰ Pub. L. No. 98-440, 98 Stat. 1689 (1984).

⁴¹ Pub. L. No. 101-73, 103 Stat. 498 (1989).

⁴² Pub. L. No. 102-550, 106 Stat. 3941 (1992).

varied, and complex goods—homes—into standardized securities that national and international investors could purchase.⁴³

Federal deregulation encouraging investment in real estate together with institutional investors' desire to find products with steady returns increased capital flows into the secondary mortgage market and contributed to easier lending terms, which increased demand for housing and led to rising home prices.⁴⁴ As a result, investors, lenders and homebuyers increasingly came to see housing less as a home and more as an investment vehicle that would only increase in value. Real estate investing strategies moved from being the topic of late-night infomercials to popular prime-time cable TV shows such as "Flip This House" and "Property Ladder."

B. Two-Tiered Financial Services: Redlining and Reverse Redlining

Decades of redlining denied predominantly African American and Latino communities equal access to mainstream credit.⁴⁵ After financial institutions created a relative vacuum in communities of color, which lacked access to and experience with mainstream capital, they realized that money could be made by targeting these same neighborhoods for separate and unequal financial products—a process that came to be known as reverse redlining.⁴⁶ Lenders pioneered high-cost alternative mortgage structures at both the high- and low-income extremes, and brokers

⁴³ Kevin Gotham, *The Secondary Circuit of Capital Reconsidered: Globalization and the U.S. Real Estate Sector*, 112 AM. J. SOC. 231, 232 (2006).

⁴⁴ Newman, *supra* note 37, at 318.

⁴⁵ See *supra* note 14 and accompanying text.

⁴⁶ See, e.g., *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000) (recognizing reverse redlining as the practice of extending credit on unfair terms to communities that had previously been redlined and finding that these predatory loan practices can make housing unavailable and thus constitute a violation of the FHA); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874 (S.D. Ohio 2002) (finding that defendants' targeting of elderly, unmarried women homeowners for high-cost home equity loans constituted reverse redlining and was cognizable as violations of the FHA and ECOA); *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875, 2010 WL 3709278 (E.D.N.Y. Sep. 13, 2010) (denying defendants' motion for summary judgment on reverse redlining and other claims and describing reverse redlining as a situation in which a lender unlawfully discriminates by extending credit to a neighborhood or class of people on terms less favorable than would be extended to those outside of the class).

and lenders then pushed these high-cost products and coercive sales tactics more widely.⁴⁷

Focusing on “borrowers with little knowledge of mortgage lending in general and their own financial options in particular,” lenders employed marketing techniques targeting communities of color that previously had been systematically denied credit and “deliberately sought out financially vulnerable borrowers for deceptive sales tactics and predatory mortgages.”⁴⁸ Extensive evidence of lenders’ targeting of communities of color and of lenders’ discriminatory pricing is beginning to emerge in courts from suits alleging violations of state and federal fair lending, human rights, and deceptive practices laws that are currently being litigated by borrowers⁴⁹ and by state attorneys general.⁵⁰

Recent research has confirmed that racial discrimination has been widespread at each step in the lending process, from

⁴⁷ Subprime loans grew from less than five percent of all home loan originations in 1994 to nearly a quarter of the mortgage market by 2006. Schwemm & Taren, *supra* note 28, at 378.

⁴⁸ Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL’Y 121, 122, 124 (2009); Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act, and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV’T L. REV. 164, 172-73 (2009). See Second Amended Complaint, Mayor and City Council of Baltimore v. Wells Fargo, No. 08 Civ. 62 (D. Md. Apr. 7, 2010); Complaint, City of Memphis v. Wells Fargo, No. 09 Civ. 2857 (W.D. Tenn. Dec. 30, 2009).

⁴⁹ One case thus far has been granted class certification, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010). Several other cases have survived defendants’ motions to dismiss. See e.g., *Guerra v. GMAC LLC*, No. 08-CV-01297, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); *Steele v. GE MoneyBank*, No. 08-CV-1880, 2009 WL 393860 (N.D. Ill. Feb 17, 2009); *Barrett v. H&R Block, Inc.* 652 F. Supp. 2d 104 (D. Mass. 2009); *Hoffman v. Option One Mortg. Corp.* 589 F. Supp. 2d 1009 (N.D. Ill. 2008); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008).

⁵⁰ See, e.g., *State of Ohio v. Barclay’s Capital Real Estate*, No. 09 Civ. 10136 (Montgomery Cnty. Ct. C.P. Sep. 16, 2010) (denying motion to dismiss complaint alleging violations of state unfair and deceptive practice laws); *Commonwealth of Massachusetts v. Countrywide Fin. Corp.*, No. 10 Civ. 1169 (Suffolk Cnty. Sup. Ct. Mar. 24, 2010) (approving settlement of case alleging unfair and discriminatory lending practices); *Commonwealth of Massachusetts v. Fremont Inv. & Loan*, 897 N.E.2d 548 (Mass. 2008) (affirming trial court’s grant of preliminary injunction preventing defendant from foreclosing on certain “presumptively unfair” loans); Complaint, *Illinois v. Wells Fargo*, No. 09 Ch. 2643 (Cook Cnty. Cir. Ct. July 31, 2009) (alleging violations of state human rights, fairness in lending, and deceptive business practices laws).

origination to mortgage servicing and foreclosure.⁵¹ When compared to white borrowers with similar credit histories, loan-to-value ratios, personal characteristics, and residential locations, African Americans were significantly more likely to receive subprime loans.⁵² Further, African American and Latino borrowers were significantly more likely than similarly situated white borrowers to receive loans with less favorable terms including higher cost ratios, prepayment penalties, and balloon payments.⁵³ Analysis of national data on segregation, sub-prime lending, and foreclosures reveals that the variation in the rate of subprime loans received by African American and Latino borrowers as compared to white borrowers is strongly correlated with the level of segregation in the metropolitan region.⁵⁴ In other words, national data indicates that the more segregated a metropolitan region is, the more likely African American and Latino borrowers were to receive high-cost, subprime loans.

C. Discretionary Pricing and Discrimination

The correlation between segregation and subprime lending exists partially because national lenders designed compensation systems that incentivized loan officers and brokers to use their discretion to charge higher interest rates and fees than borrowers actually qualified for, rewarding originators with yield spread

⁵¹ See, e.g., IMMERGLUCK, *supra* note 34, at 78-98; GUY STUART, *DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY* (2003); Carolyn Bond & Richard Williams, *Residential Segregation and the Transformation of Home Mortgage Lending*, 86 SOC. FORCES 671 (2007); Elvin K. Wyly et al., *American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States*, 88 GEOGRAFISKA ANNALER. 105 (2006).

⁵² Robert B. Avery et al., *The 2007 HMDA Data*, 93 FED. RES. BULL. 344 (2008). Debbie Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, 60 J. ECON. & BUS. 114 (2006); Chris Mayer & Karen Pence, *Subprime Mortgages: What, Where, and to Whom?* 14 (Fed. Res. Bd. Fin & Econ. Discussion Series, Working Paper No. 2008-29, 2008), available at <http://www.federalreserve.gov/pubs/feds/2008/200829/200829pap.pdf> ("Even controlling for credit scores and other zip code characteristics, race and ethnicity appear to be strongly and statistically significantly related to the proportion of subprime loans.").

⁵³ Michael LaCour-Little & Cynthia Holmes, *Prepayment Penalties in Residential Mortgage Contracts: A Cost Benefit Analysis*, 19 HOUS. POL'Y DEBATE 631 (2008); Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments*, 18 HOUS. POL'Y DEBATE 311 (2007).

⁵⁴ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 642 (2010).

premiums and other forms of loan cost-based compensation.⁵⁵ Both lenders and brokers profited when borrowers paid inflated rates—lenders profited from higher interest rates than those justified by the economic risk (which also increased the values of the loan on the secondary market), while brokers collected larger compensation.⁵⁶ Borrowers, however, suffered from significantly higher costs over the life of the loan which then lead to increased risks of default and foreclosure.⁵⁷ This discretionary pricing structure created a system in which borrowers with prime credit, but lacking financial savvy, were steered into subprime loans,⁵⁸ thereby predictably leading to widespread discrimination on the basis of race, age, and gender.⁵⁹ The originators that made the loans, the

⁵⁵ Brokers were often paid through a combination of fees based on a percentage of the loan amount combined with yield spread premiums, which is a portion of the capitalized value of the difference between the minimum base rate at which the lender was willing to make the loan and the higher interest rate that the broker actually secured from the borrower. Schwemm & Taren, *supra* note 28, at 395-97.

⁵⁶ *Id.* at 379.

⁵⁷ See IMMERGLUCK, *supra* note 34, at 133-58 (describing the economic and social costs of subprime lending). Lenders frequently made loans where it was unlikely that borrowers could repay. *Id.* at 142-43. Market participants frequently assumed house prices would always rise over time, and thus lenders presumed that the original borrower of an adjustable rate mortgage would refinance before their rates adjusted to a higher level that they would be unable to repay (or that if the bank had to foreclose, the home would exceed the value of the loan by then). Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 606 (2009). In the short term, this was not damaging to lenders because they were securitizing the majority of loans and selling them to investors on the secondary market, thus making money from the loan without retaining the risk. U.S. GOV'T ACCOUNTABILITY OFFICE, HOME MORTGAGE DEFAULTS AND FORECLOSURES: RECENT TRENDS AND ASSOCIATED ECONOMIC AND MARKET DEVELOPMENTS 22-23 (2007). In other cases, loans by predatory lenders targeted towards long-time homeowners with significant home equity actually were designed to lead to foreclosure so that the lender could seize the home and sell it to gain the equity. See, e.g., *United States v. Delta Funding Corp.*, No. 00 Civ. 1872 (E.D.N.Y. Mar. 30, 2000); *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875, 2010 WL 3709278 (E.D.N.Y. Sep. 13, 2010). See also Schwemm & Taren, *supra* note 28, at 379.

⁵⁸ In addition to paying higher interest rates and fees for subprime and predatory loans, lenders also frequently added excessive points and fees that did not correspond to any benefits for the borrowers and included substantial prepayment penalties that trapped borrowers in the high-cost loans. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259-70 (2002).

⁵⁹ The combination of discrimination on the basis of race, age, and gender is an example of the intersectionality of discrimination. Kimberlé

commercial banks that packaged them into mortgage backed securities, and the investment banks that sold them let a desire for short-term profits triumph over ethics and the basics of long-term financial stability.⁶⁰

In one of the early cases challenging discretionary pricing policies, plaintiffs claimed that Countrywide Bank⁶¹ allowed its “retail salesmen, independent brokers, and correspondent lenders to add various charges and fees based on subjective non-risk factors, . . . which, in turn, has a racially discriminatory impact on African American borrowers”⁶² Plaintiffs allege that the discretionary pricing system made African American borrowers from Countrywide more than three times more likely to receive a subprime loan than similarly situated white borrowers.⁶³ The court found that the facts alleged presented “a classic case of disparate impact: White homeowners with identical or similar credit scores paid different rates and charges than African American

Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241 (1991). See also ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED’N OF AM., WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET, (2006), available at <http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>; Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1 (2000). A case that epitomizes this intersecting discrimination is *United States v. Delta Funding Corp.*, No. 00 Civ. 1872 (E.D.N.Y. Mar. 30, 2000). In *Delta Funding*, the Department of Justice, together with the Federal Trade Commission and the Secretary of the Department of Housing and Urban Development, brought suit against a lender who had engaged in a pattern and practice of targeting elderly African American widows with little or no mortgage debt and then persuading them to take out high-priced refinance loans that they could not afford in order to foreclose on and take their homes in order to strip their home equity.

⁶⁰ Sheila Bair, Chair, Fed. Deposit Ins. Corp., Comments at the Urban Land Institute Conference (Oct. 13, 2010) (on file with the *Columbia Journal of Race and Law*).

⁶¹ *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255 (D. Mass. 2008). The case named as defendants Countrywide Bank, N.A., along with its subsidiaries Countrywide Home Loans, Inc., Countrywide Correspondent Lending, Full Spectrum Lending, Inc., Summit Mortgage LLC; and Loans for Residential Homes Mortgage Corp. Bank of America purchased Countrywide on July 1, 2008.

⁶² *Id.*

⁶³ *Id.* at 253.

homeowners, because of a policy that allowed racial bias to play a part in the pricing scheme.”⁶⁴

In a context of extreme information asymmetries between borrowers and lenders, segregation facilitated the exploitation of those least able to protect themselves from lenders subject to minimal government regulation.⁶⁵ The result was predictable discrimination in lending, which has had significant nationwide impacts on delinquencies and foreclosures, as well as on homeownership rates and disparities in household wealth.

D. Disparate Impacts in Foreclosures

As early as the late 1990’s, high-cost subprime loans accounted for more than half of home loans in predominantly African American neighborhoods, compared with just nine percent in primarily white communities.⁶⁶ Fannie Mae estimates that as many as half of subprime borrowers actually qualified for credit at lower prime rates—meaning that hundreds of millions of dollars annually were siphoned away from uninformed, working and middle-class families to mortgage brokers and to investors.⁶⁷

Seen together, these discriminatory lending practices result in African American and Latino borrowers who continue in these same loans paying substantially higher interest rates than comparable white borrowers, which means that in the aggregate, they are making billions of dollars in extra, discriminatory payments on their

⁶⁴ *Id.* at 254.

⁶⁵ See Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 4, at 81; William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra* note 21, at 101-03; Newman, *supra* note 37.

⁶⁶ James Carr & Jenny Schuetz, *Financial Services in Distressed Communities: Framing the Issue, Finding Solutions* 11-12 (Fannie Mae Found., Working Paper, 2001), available at <http://www.knowledgeplex.org/kp/report/report/relfiles/FinancialServices.pdf>.

⁶⁷ James Carr & Lopa Kolluri, *Predatory Lending: An Overview* 37 (Fannie Mae Found., Working Paper, 2001), available at <http://www.knowledgeplex.org/kp/report/report/relfiles/FinancialServices.pdf>. Analyses of national lending data have found that as subprime lending increased it included more and more borrowers with prime credit scores. In 2006, more than sixty percent of subprime loans were made to borrowers with prime credit scores. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

mortgages.⁶⁸ These extra payments simultaneously strip money away from communities of color and ultimately lead to higher foreclosure rates.⁶⁹ Foreclosure often means the loss of significant equity that homeowners had built up in their home, usually their largest asset. Both default and foreclosure also drastically lower borrowers' credit scores, often leading to significant collateral negative impacts on social and economic opportunities, as credit histories are used increasingly in evaluating applications for employment, rental housing, and access to other forms of capital. Foreclosures also have negative emotional and psychological consequences for those households forced to leave their homes, and often their neighborhoods and schools.⁷⁰ Finally, foreclosures are often contributing to further segregation, especially in high value housing markets, where foreclosures are intertwined with gentrification.

In addition to having a far-reaching negative impact on individuals and households, foreclosures create significant economic and social costs for neighborhoods, cities, and counties.⁷¹ Several cities and counties have filed suit alleging that lenders' deceptive and

⁶⁸ Schwemm & Taren, *supra* note 28, at 375-76.

⁶⁹ Professor John Powell has estimated the loss of equity to subprime borrowers of color facing foreclosure at nearly one quarter of a trillion dollars. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 624 (2008). Subprime refinance loans with prepayment penalties have been found to be twenty percent more likely to lead to foreclosure than otherwise similar loans, while those with balloon payments were fifty percent more likely. Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments*, 18 HOUS. POL'Y DEBATE 311 (2007).

⁷⁰ G. THOMAS KINGSLEY ET AL., THE URBAN INST., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES (2009), available at http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf; VICKI BEEN ET AL., INST. FOR EDUC. & SOC. POL'Y, FURMAN CTR., KIDS AND FORECLOSURES: NEW YORK CITY (2010), available at http://furmancenter.org/files/Foreclosures_and_Kids_Policy_Brief_Sept_2010.pdf.

⁷¹ A study of Chicago estimated the direct costs to the city for each foreclosed, abandoned property requiring demolition at \$30,000, including expenditures cities are forced to make for increased police and fire services, building inspections, sanitation activities, and demolition contracts. WILLIAM APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (2005) (on file with the *Columbia Journal of Race and Law*). In Chicago, foreclosures have been found to reduce the value of homes within one-eighth of a mile by one to one and one-half percent, adding up to an aggregate of \$598 million in 1997 and 1998. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL'Y DEBATE 57 (2006).

discriminatory loan terms led to unnecessarily high foreclosure rates and millions of dollars in public losses through reduced property tax revenues together with increased spending in response to vacant and abandoned buildings.⁷² These cases highlight the ways in which the segregation of neighborhoods facilitated further discrimination by enabling community-specific targeting,⁷³ and the ways that these discriminatory lending practices have had significant disparate impacts on communities of color.⁷⁴

⁷² See *Mayor and City Council of Baltimore v. Wells Fargo*, No. 08 Civ. 62 (D. Md. Sep. 14, 2010) (dismissing plaintiffs' suit under the FHA for lack of standing because of the lack of traceability of the alleged damages, but finding that "theoretically the City does have viable claims, if it can prove property specific injuries inflicted upon it at properties that would not have been vacant but for improper loans made by Wells Fargo" and granting the city leave to file a third amended complaint); *Complaint, City of Memphis v. Wells Fargo*, No. 09 Civ. 2857 (W.D. Tenn. Dec. 30, 2009). See also *Complaint, City of Buffalo and Byron W. Brown v. ABN AMRO Mortg. Grp., Inc.*, No. 08 Civ. 2200 (Erie Cnty. Sup. Ct. Feb. 20, 2008). But see *Cleveland v. Ameriquest*, 615 F.3d 496 (6th Cir. 2010) (affirming dismissal of city's nuisance action against lenders on the grounds that the connection between the city's increased costs in dealing with vacant properties and the lenders' misconduct was too indirect to warrant discovery); *City of Birmingham v. Argent*, No. 09 Civ. 467 (N.D. Ala. Aug. 19, 2009) (dismissing the case for lack of standing on the ground that the city's injuries were too tenuously connected to, and thus not fairly traceable to, the defendants' conduct).

⁷³ See Second Amended Complaint paras. 50-56, *Wells Fargo*, No. 08 Civ. 62 (describing the techniques that Wells Fargo employees used to target African American neighborhoods, including a drop-down menu of languages in which loan officers could choose "African-American" as a language option for their marketing materials); *id.* paras. 57-62 (describing the significant financial and other incentives Wells Fargo created which encouraged loan officers to steer borrowers who qualified for low-cost prime loans into high-cost subprime loans and the common practices through which loan officers deceived borrowers into accepting higher cost loans so that loan officers could increase their commissions); Complaint para. 60, *City of Memphis v. Wells Fargo*, No. 09 Civ. 2857 (W.D. Tenn. Dec. 30, 2009) (alleging that within Shelby County, Tennessee, a Wells Fargo loan in a predominantly African American neighborhood is eight times more likely to result in foreclosure than a loan in a predominantly white neighborhood).

⁷⁴ APGAR & DUDA, *supra* note 71; Dan Immergluck, *Community Response to the Foreclosure Crisis: Thoughts on Local Interventions* (Fed. Reserve Bank of Atlanta, Community Affairs Discussion Paper No. 01-08, 2008), available at http://www.frbatlanta.org/filelegacydocs/dp_0108.pdf. Experts estimate that more than \$500 billion in property value has been lost because of foreclosures on nearby homes. CENTER FOR RESPONSIBLE LENDING, SOARING SPILLOVER: FORECLOSURES TO COST NEIGHBORS \$502 BILLION 1 (2009), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>.

Regression analyses of national data have found that the higher the level of African American and Latino segregation in a metropolitan region, the higher the number and rate of foreclosures in that same region.⁷⁵ In fact, Jacob Rugh and Douglas Massey's analysis indicated, "segregation's effect is independent of other economic causes of the crisis, and that segregation's explanatory power exceeds that of other factors hitherto identified as key causes."⁷⁶ With homes, and home equity lost and credit scores damaged, these individual acts of discrimination cumulate into significant intergenerational impacts that further exacerbate racial disparities in wealth and perpetuate unequal access to opportunity.

IV. SEGREGATION AND FAIR HOUSING LAW

Housing discrimination and unequal access to credit continue to contribute to residential segregation. Residential segregation in turn exacerbates social inequality, with high social and economic costs for the country as a whole. The primary tool to combat discrimination is the Fair Housing Act (FHA),⁷⁷ passed in April of 1968 in the aftermath of Dr. Martin Luther King's assassination and amended in 1988. As detailed below, however, efforts to enforce the FHA are crippled by a combination of lack of awareness by victims of discrimination, low levels of enforcement by the government agencies empowered to implement it, and weak penalties for law-breakers. Even more fundamentally, however, the FHA can do little to dismantle segregation because the structures that encourage and perpetuate it are legally entrenched in our local government boundaries and home ownership structures.

A. Limits to Current Fair Housing Enforcement

1. Low Reporting Levels

Recognizing the discrepancy between the significant amount of discrimination experienced and the relatively low number of complaints filed, HUD sponsored two studies in 2002 and 2006, which were designed to examine the extent to which the public is

⁷⁵ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 644 (2010).

⁷⁶ *Id.*

⁷⁷ 42 U.S.C. §§ 3601-3631 (2006).

aware of fair housing laws and whether participants believed they had ever experienced unfair treatment in a housing transaction.⁷⁸

Most prospective renters or homebuyers who are denied housing or are offered unequal terms never know either the reason behind the denial or that someone else was offered the same house on more favorable terms. Victims of discrimination often do not know fair housing laws, do not know they have been discriminated against, or both. The current structure of fair housing enforcement, however, places the burden on victims to identify when they have encountered discrimination.⁷⁹

HUD's studies confirmed that some groups perceive less discrimination than that documented by national paired-testing studies.⁸⁰ Further, between one-fifth and one-half of the public is not aware of one or more of the discriminatory acts that fair housing laws prohibit.⁸¹ Even among those who believed that they were discriminated against, four of every five took no action in response.⁸² The studies further revealed that only thirteen percent

⁷⁸ MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, THE URBAN INST., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS (2002), available at <http://www.huduser.org/Publications/pdf/hmwk.pdf>; MARTIN D. ABRAVANEL, THE URBAN INST., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW (2006), available at <http://www.huduser.org/Publications/pdf/FairHousingSurveyReport.pdf> [hereinafter ABRAVANEL, DO WE KNOW MORE NOW?]. See also Martin Abravanel, *Paradoxes in the Fair Housing Attitudes of the American Public, 2001-2005*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT HOUSING AND FAIRNESS, *supra* note 21, at 81.

⁷⁹ See Michael Schill, *Implementing the Federal Fair Housing Act: The Adjudication of Complaints*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT HOUSING AND FAIRNESS, *supra* note 21, at 143, 151 (arguing that placing the burden of discrimination on the victim creates perverse incentives because "the more sophisticated the violator is, the less likely it is that the victim will successfully identify him or her").

⁸⁰ ABRAVANEL, DO WE KNOW MORE NOW?, *supra* note 78, at 33-35 (finding that only six percent of Latinos reported perceiving discrimination based on their race or ethnicity, four percent of households with children reported perceiving discrimination based on family status, and less than one percent of persons in households with a disabled individual reported perceiving discrimination based on disability, even though paired testing and other studies indicate discrimination against these groups is significantly more common than their perception suggests).

⁸¹ *Id.* at 8-19.

⁸² *Id.* at 36 (finding that those who were better informed about fair housing laws were more than twice as likely to take action in response to discrimination than those who were less well informed, but that even among

of the public thinks that it is “very likely” that “good results” would be accomplished from filing a fair housing complaint with HUD.⁸³ This belief is, perhaps, one reason for the low number of complaints filed.

2. Ad Hoc Enforcement and Weak Penalties

A study conducted by Michael Schill has revealed that this widespread skepticism about the efficacy of filing fair housing complaints may be well-founded.⁸⁴ Building on research about the extent of discrimination and the lack of public confidence in the fair housing enforcement system, Schill analyzed data on the adjudication of fair housing complaints under existing law.⁸⁵ He found that only three percent of all claims filed led to HUD bringing charges against the respondent, and the number of claims pursued has been declining in recent years.⁸⁶ In those cases that settled, the average settlement was less than \$2,000.⁸⁷ Claims that were adjudicated by HUD administrative law judges or in federal court had average awards of less than \$10,000.⁸⁸

Based on this data, Schill argued that in the current complaint-based system of regulation, fair housing enforcement is unsystematic and penalties are too low to have the broad impact required to reduce discrimination significantly.⁸⁹ Laws such as the FHA can have a substantial deterrent effect only under two sets of conditions: (1) if penalties are low, then enforcement must be intensive so that the majority of lawbreakers will face consequences; or (2) if identification and prosecution of the majority of

the well-informed three out of four people still took no action in response to discrimination).

⁸³ *Id.* at 43.

⁸⁴ Schill, *supra* note 79, at 151-56.

⁸⁵ *Id.* at 143, 151-56. Over the past two decades, an average of approximately 7,750 fair housing complaints have been filed annually with HUD or with state or local Fair Housing Assistance Program agencies. Of the claims filed between 1989 and 2003, just over one-third were settled, just under one-third were withdrawn for reasons unrelated to the merits of the case, and about one-quarter were dismissed by HUD on the basis of a determination that no cause existed to believe that discrimination had occurred. Of the complainants that Schill surveyed, 82.9 percent reported that it had taken HUD over one year to decide whether or not to issue a charge against the respondent. *Id.* at 160.

⁸⁶ *Id.* at 154.

⁸⁷ *Id.* at 158 fig.7.4.

⁸⁸ *Id.* at 174 n.23.

⁸⁹ *Id.* at 169.

lawbreakers is not feasible, then deterrence requires high penalties for the few who are caught.⁹⁰ According to Schill, “[c]urrent enforcement of the Fair Housing Act shares neither of these characteristics—very few . . . cases are actually brought (when measured against baseline estimates of the amount of discrimination in the housing market) and the average penalty is exceedingly low.”⁹¹

B. Limits to Fair Housing Remedies: Obstacles to Regional Responsibility

Nevertheless, efforts to create truly open access to housing options through civil rights enforcement recently have had significant successes, especially in giving renewed importance to the FHA’s requirement that HUD, and any government entities that receive HUD funding, “affirmatively further” fair housing.⁹² In *Thompson v. U.S. Department of Housing and Urban Development*, the federal district court found HUD liable for having violated its statutory duty to affirmatively further fair housing because it failed to consider adequately regional approaches to reducing racial segregation in public housing in Baltimore County.⁹³ The decision is

⁹⁰ *Id.*

⁹¹ *Id.* Schill concludes that “[a] move away from individual complaint processing, investigation, and prosecution and toward a greater emphasis on pattern and practice investigations would be most successful if it could engage the energy and expertise of the large number of private Fair Housing enforcement groups throughout the nation.” *Id.* at 170. See also Mara Sidney, *National Fair Housing Policy and Its (Perverse) Effects on Local Advocacy*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT HOUSING AND FAIRNESS, *supra* note 21, at 203 (analyzing the federal Fair Housing Initiatives Program (FHIP) that was created by the 1987 Housing and Community Development Act, 42 U.S.C. § 3616 (2006); Pub. L. No. 100-242, § 561, 101 Stat. 1815 (1988), to fund private nonprofit fair housing organizations on an annual competitive basis to undertake enforcement and education activities and finding that the lack of support in private philanthropy for fair housing work, the limited government funding, the annual competitive applications, and shifting federal priorities for grantees mean that “[p]olicies intended to fight injustice in effect help to sustain it by weakening logical local alliances Locally based fair housing advocacy, central to the promotion and execution of civil rights, has become unstable, lacks creative approaches to problems, and relies too heavily on federal as opposed to local resources and support.”).

⁹² 42 U.S.C. § 3608(e)(5) (2006) (“The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”).

⁹³ *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005). See Florence Wagman Roisman, *Affirmatively Furthering Fair*

significant both in finding liability under the duty to “affirmatively further” fair housing and in calling for a regional solution.

Promising results also emerged recently in the settlement among the parties in *Anti-discrimination Center of Metro New York v. Westchester County*, in which the district court confirmed that the duty to affirmatively further fair housing extended to county governments receiving HUD funding.⁹⁴ In that case, the Anti-discrimination Center of Metro New York (Anti-discrimination Center) brought suit under the False Claims Act,⁹⁵ alleging that the county had failed to analyze appropriately the obstacles to fair housing in terms of race, as required for receipt of millions of dollars in HUD grants. The court found that Westchester County had “utterly failed” to meet its obligations to affirmatively further fair housing and that Westchester’s certifications to HUD were “false or fraudulent.”⁹⁶ The county ultimately settled the case, agreeing to create 750 units of affordable housing. The majority of these units must be built in municipalities with an African American population of less than three percent and a Latino population of less than seven percent.⁹⁷

Both of these cases succeeded in winning innovative regional remedies for lack of housing choice by holding accountable entities that have a regional reach—in the first case an agency of the federal government, and in the second case a large suburban county. The outcome of these cases, however, also highlights the way in which the reification of fragmented structures of local governance has been used to effectively immunize local governments from liability for actions that have discriminatory impacts.

The court in *Thompson* stated that “[t]hrough regionalization, HUD had the practical power and leverage to accomplish desegregation through a course of action that Local Defendants could not implement on their own, given their own jurisdictional limitations.”⁹⁸ This absolution of local governments reveals a

Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation, 42 WAKE FOREST L. REV. 333 (2007).

⁹⁴ *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

⁹⁵ 31 U.S.C. §§ 3729-3733 (2006).

⁹⁶ *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc.*, 2009 WL 455269, at *14, *22.

⁹⁷ Stipulation and Order of Settlement and Dismissal, *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009).

⁹⁸ *Thompson*, 348 F. Supp. 2d at 462.

significant limitation in the effectiveness of fair housing enforcement. If courts are unable to look at the impact of individual municipalities' decisions together on the region as a whole, it becomes very difficult to hold local governments legally accountable for the entrenched segregation created by their zoning practices and boundaries.

Similarly, while the Anti-discrimination Center reached a favorable settlement with the county in its case, the ability to reach a countywide settlement relied on the fact that Westchester County received grants from HUD that it distributed to its towns and villages.⁹⁹ Those municipalities that receive no HUD funding are largely immune from similar suits, and suits against those municipalities that receive funding directly from HUD, if successful, would be unlikely to lead to regional or inter-municipal remedies.

Among other defenses, Westchester County claimed that its failure to address impediments to fair housing based on race was part of "a policy of cooperation with municipalities [within the County], in light of what [the County] terms 'political reality' and due to its belief that cooperation is the most productive avenue for increasing the stock of affordable housing."¹⁰⁰ In other words, the County implied that it was pursuing a strategy of acquiescing to the racially discriminatory actions of the county's local governments and excluding African American and Latino residents from subsidized housing to gain needed municipal support for the construction of affordable housing for white seniors and other residents whom the towns found acceptable. For example, two municipalities in Westchester had passed official resolutions refusing to cooperate with the County's affordable housing goals and the majority explicitly looked only to the housing needs of their existing residents, not to the needs of the County or region as a whole.¹⁰¹ Despite the fact that one of the driving forces perpetuating segregation within the County was pressure from local governments, the case broke no new ground in holding municipalities responsible for their exclusionary practices in relation to the region.¹⁰²

⁹⁹ *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc.*, 2009 WL 455269, at *2.

¹⁰⁰ *Id.*

¹⁰¹ Complaint paras. 44-67, *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860 (S.D.N.Y. Apr. 6, 2006).

¹⁰² Stipulation and Order of Settlement and Dismissal, *United States ex rel. Anti-discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860 (S.D.N.Y. Aug. 10, 2009). The settlement, however,

While advocates and civil rights lawyers should maintain the pressure that cases like these can create for creative regional solutions, these cases illuminate the need to address the institutional framework of local governance as the principal institution organizing the repetitive and structured interactions that limit housing choice. Addressing both discrimination and segregation will require adding to the compliance frame of accountability and ensuring that the frame draws on institutional analysis to engage a wider range of norms, actors, and social mechanisms in creating systemic change.¹⁰³ As legal scholars have argued in the employment context, widespread unconscious or implicit bias interacts with institutional structures to “generate[] inequalities that our current antidiscrimination law is not well equipped to solve,” because of its focus on proscribing primarily the discrete, deviant, and intentionally discriminatory acts of individuals.¹⁰⁴ Creating truly equal housing opportunity requires going beyond punishing intentional, individual acts to change the institutional structures of local governance that incentivize race and class segregation. It also requires creating more variety in the forms of housing tenure in order to create security for households across the wealth spectrum, as well as stability for neighborhoods with a mix of incomes.

V. SEGREGATION AND THE STRUCTURE OF LOCAL GOVERNANCE

Residential segregation continues to be produced through the social and legal architecture of strong private property rights, inter-municipal competition, and fragmented local government financing. While facially discriminatory laws mandating segregated neighborhoods have been overturned, local governance and financing structures, as well as the economic assumptions that

did require the County to repeal its law giving municipalities a “right to first refusal” on County land purchases for the construction of affordable housing. *Id.* para. 25(c). It also stated that the County shall “use all available means” to address a municipality’s failure to promote the objectives of the stipulation. *Id.* para. 7(i).

¹⁰³ ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005) (exploring how institutions influence behavior as well as providing tools for choosing the relevant levels of interaction at which to make institutional change).

¹⁰⁴ Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

encourage both racial and economic exclusion in suburban neighborhoods, remain.

Even systematic investigations of builders, brokers, lenders, or landlords who discriminate will not challenge the significant incentives that remain for real estate actors in wealthier, whiter neighborhoods to exclude non-white residents through legal policies such as exclusionary zoning or the refusal to provide public services needed by those who cannot afford them privately.¹⁰⁵ Thus, one must look beyond fair housing laws and their enforcement to the political and economic structures that perpetuate residential segregation in order to understand and address the persistence of racial discrimination in housing.

A. Economic Localism and Local Governance

Charles Tiebout and public choice theorists building on his work provide the most influential articulation of the economic assumptions supporting predominant local governance structures.¹⁰⁶ Tiebout celebrates the highly fragmented structure of local governments and supports the idea that local governments and public services should be funded primarily through local property taxes.¹⁰⁷ In Tiebout's abstract model, residents are consumers who pick a community that best satisfies their preferences for taxes levied and public goods provided.¹⁰⁸ Consumers' power in this model comes primarily from their ability to vote with their feet and

¹⁰⁵ See, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 739-40 (5th Cir. 2005) (dismissing the FHA claims of black homeowners alleging that the city knowingly tolerated an illegal landfill in their neighborhood which diminished the habitability of their homes and their ability to sell them "because the service was not 'connected' to the sale or rental of a dwelling"); *Steele v. City of Port Wentworth, Ga.*, 2008 WL 717813, slip op. at *12-13 (S.D. Ga. 2008) (dismissing the FHA claims of African American residents denied water and sewer services because the court found that the denial of services did not affect the availability of housing); *but cf.* *United Farmworkers of Fla. Hous. Project v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (finding that municipality's refusal to allow a proposed development to tie into water and sewer system constitutes evidence of prima facie case of racial discrimination); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993) (finding that the city's withdrawal of police protection violates § 3604(b) of the FHA). See also Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717 (2008).

¹⁰⁶ Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416-18 (1956); THE TIEBOUT MODEL AT FIFTY (William A. Fischel ed., 2006).

¹⁰⁷ Tiebout, *supra* 106, at 416.

¹⁰⁸ *Id.* at 418, 422.

leave municipalities that do not meet their preferences. Others have drawn from Tiebout's model to examine ways in which local governments compete with each other to attract high-income, low-service-demanding taxpayers by cutting both public services in general and redistributive programs in particular.¹⁰⁹

Macro-economic changes over the past three decades have reinforced the salience of Tiebout's theory as well as political support for rational choice approaches to policy-making.¹¹⁰ The past three decades in United States policy have witnessed a number of government initiatives to deregulate financial and other industries, as well as efforts to privatize public goods and encourage greater use of market incentives in government.¹¹¹ The shift from the manufacturing of commodities to the manufacturing of financial products and the increased centrality of finance and banking to the economy relied on both deregulation and government support for the commodification of housing and the expansion of mortgage

¹⁰⁹ See PAUL PETERSON, *CITY LIMITS* (1981); MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* (1989). This same logic of cities in competition to reduce taxes and public expenditures and to attract wealthy corporate and individual residents also has been applied to cities on a global scale. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991).

¹¹⁰ Political and economic theorists have identified a general shift in dominance from the Keynesian economic policies and "embedded liberal" capital-labor relations that dominated the first decades of the post-war era towards more laissez-faire and supply-side economic policies, beginning with the stagflation crisis and deindustrialization in the 1970's in the United Kingdom and the United States. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); MONICA PRASAD, *THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY & THE UNITED STATES* (2006); JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003). The experience of deindustrialization in U.S. cities in the 1960's and 1970's was part of the decentralization of economic activity internationally, and was paralleled by the concentration of control and services complexes and a rise in the prominence of the finance, insurance and real estate sectors. The increase in high-level, specialized jobs was accompanied by a larger expansion of low-wage, unskilled positions in both consumer services and in downgraded manufacturing sectors. This reorganization of capital-labor relations was characterized by polarization in the income distribution of the labor force. SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 136 (1988).

¹¹¹ See generally HARVEY, *supra* note 110; DAVID HARVEY, *THE URBAN EXPERIENCE* (1989).

lending.¹¹² These policies have devolved increasing responsibilities to state and local governments, while reducing the federal funding they receive to carry out these mandates, thereby strengthening the economic localism Tiebout theorized. This devolution has encouraged “entrepreneurial” governance structures and has forced local governments to rely increasingly on “own source revenues,”¹¹³ creating incentives to engage in a race to the bottom to attract or retain commercial taxpayers by offering corporate tax-breaks and reducing property taxes, while reducing the provision of public goods and services.¹¹⁴ This shift to increasing local responsibilities and simultaneously decreasing local aid adds to the already powerful incentives for race and class based segregation by encouraging localities to implement policies that will augment their tax base by seeking to attract wealthier homeowners while excluding vulnerable households. These pro-development policies also contributed to the “exuberance” that led to the creation of the housing bubble, as individuals, investors and local governments all depended increasingly on the promise of rising property values.¹¹⁵

¹¹² Greta Krippner, *The Financialization of the American Economy*, 3 SOCIO-ECON. REV. 173 (2005); Gotham, *supra* note 43, at 231-75; Newman, *supra* note 37.

¹¹³ See, e.g., David Harvey, *From Managerialism to Entrepreneurialism: The Transformation in Urban Governance in Late Capitalism*, 71 GEOGRAFISKA ANNALER. SERIES B, HUMAN GEOGRAPHY 3 (1989); Rachel Weber, *Extracting Value From the City: Neoliberalism and Urban Development*, in SPACES OF NEOLIBERALISM 172 (Neil Brenner & Nikolas Theodore eds., 2002) (arguing that in competing to attract investors, urban governments’ land use activities have sometimes been reduced to preparing urban property for the extraction of value by developers in the hopes that current redevelopment will lead to future increases in tax revenues).

¹¹⁴ JOHN MOLLENKOPF, *THE CONTESTED CITY* (1983); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* (1987); *STATE RESTRUCTURING AND LOCAL POWER: A COMPARATIVE PERSPECTIVE* (Chris Pickvance & Edmond Preteccelle eds., 1991). At the same time, there are many exceptions to this general trend: Cities and states have increasingly tried to demand more accountability from corporations in exchange for the benefits they receive and efforts at regional governance have had significant successes. See, e.g., Jennifer Gilbert, *Selling the City Without Selling Out: New Legislation on Development Incentives Emphasizes Accountability*, 27 URB. LAW. 427 (1995); see also the work of organizations such as Good Jobs First (www.goodjobsfirst.org) and Jobs with Justice (www.jwj.org). Nevertheless, the Tiebout model and the policy orientation of cities in competition that it supports remains dominant.

¹¹⁵ ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 1 (2000) (quoting Alan Greenspan, Chairman, Fed. Reserve, *The Challenge of Central Banking in a Democratic Society*, Address before The American Enterprise Institute for Public Policy Research, Washington, D.C. (Dec. 5, 1996), <http://www.federalreserve.gov>).

B. Grounds for Rejecting Localism

1. Equitable Grounds

While theories of cities¹¹⁶ in competition may describe some of the problems facing municipalities, that descriptive power does not translate into a normative justification for the current structure of local governments.¹¹⁷ Tiebout argues that municipalities should be understood to be products like any other and describes municipal differences as the result of efforts to cater to idiosyncratic “preferences.”¹¹⁸ The reality, however, is that governments are not commodities, citizens are not consumers, and there is no true market for legislative bodies or administrative agencies. Inter-local conflicts over land use regulation¹¹⁹ and school finance reform¹²⁰ are

gov/boarddocs/speeches/19961205.htm) (asking “. . . how do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions . . . ?”).

¹¹⁶ Cities and regions are not actors in themselves, and the references to cities and regions in this Article serve as shorthand for local governments and political and economic leaders that do act. See Peter Marcuse, *The City’ as Perverse Metaphor*, 9 CITY 247, 252 (2005).

¹¹⁷ As Richard Briffault points out, Tiebout’s focus on the central role of the mobile “consumer-voter” that chooses residence based on the combination of taxes levied and services provided encourages local governments to respond by competing with each other and catering to the needs of those who threaten to leave for another municipality with lower taxes: “[T]he individuals who drive the system and make it work are the ones who leave . . . [and] it is unclear why we should want a local government system in which the critical actors are those with the weakest ties to the locality.” Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415-16 (1990) [hereinafter Briffault, *Our Localism*].

¹¹⁸ Tiebout suggests that this public choice theory of local expenditures “reveals the consumer-voter’s demand for public goods” and that “[s]patial mobility provides the local public-goods counterpart to the private market’s shopping trip.” Tiebout, *supra* note 106, at 420, 422.

¹¹⁹ See, e.g., *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670 (Tex. 1973) (addressing conflicts between a local school district and a city over the city’s efforts to prohibit the location of school facilities within its boundaries); *Vill. of Barrington Hills v. Vill of Hoffman Estates*, 410 N.E.2d 37 (Ill. 1980) (granting standing to a village to sue the neighboring village challenging its rezoning along the municipal boundary). See also Shelley Ross Saxer, *Local Autonomy or Regionalism? Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997).

¹²⁰ See, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (finding that the statutory method of financing public schools in Arkansas “bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district”); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex.

two of the most visible externalities and market failures inherent in current structures of local governance that help explain why we turn to representative democracy at multiple scales to help structure our social relations at the municipal level.¹²¹ The variation between different municipalities' taxing and spending decisions—while shaped by citizens' preferences—are determined largely by differences in local fiscal capacity that place municipalities within each metropolitan area on highly unequal footing. Indeed, the financial capacity of local governments depends often on the locational decisions of industrial, commercial, and financial firms and on broad regional, national or international economic developments that are beyond their control.

Structuring local governments around theories of economic localism and inter-municipal competition benefits those areas that are already wealthy at the expense of those regions that are socio-economically diverse, working class, or poor. The United States has one of the most fragmented structures of local government in the world with more than 90,000 local governments and an average of over one hundred local governments per metropolitan area.¹²² This proliferation of local governments is far from random; it almost goes without saying that local government boundaries frequently serve as boundaries between different socio-economic groups. This fragmentation then is often used to reinforce segregation by both income and race and it further exacerbates inequality in access to resources, as it forces cities and towns into competition with each other to maximize investment and minimize social expenditures.¹²³ As Richard Briffault points out, “economic localism reflects and reinforces existing interpersonal and inter-local inequalities [I]f the amelioration of inequality is to remain an important value in our

1989) (holding that “the state’s school financing system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge’” and thus violates the Texas Constitution, especially given that “[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves”). See also Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992); Dorothy Brown, *Deconstructing Local Control: Ohio’s Contribution*, 25 CAP. U. L. REV. 1 (1996).

¹²¹ PETER DREIER ET AL., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY (2001); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Todd Swanstrom, *What We Argue About When We Argue About Regionalism*, 23 J. URB. AFF. 479, 481 (2001).

¹²² RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 8 (7th ed. 2009); Swanstrom, *supra* note 121, at 483.

¹²³ Kenneth Newton, *American Urban Politics: Social Class, Political Structure and Public Goods*, 11 URB. AFF. Q. 241, 244-45 (1975).

legal and political culture, then economic localism cannot provide a sufficient normative basis for protecting, let alone extending, local autonomy.”¹²⁴

While market forces may foster geographical clustering by income, what is most problematic is the manipulation of municipal boundaries to isolate those clusters from responsibility for their advantage and their neighbors’ relative disadvantage that is most problematic. Indeed, wealthy communities often use economic gerrymandering to set themselves jurisdictionally and financially apart.

2. Economic Grounds

In addition to the strong arguments for rethinking the fragmentation of metropolitan areas based on equality and fairness grounds, there are also arguments based on the economic self-interest of both suburbs and cities. As economic competition is

¹²⁴ Briffault, *Our Localism*, *supra* note 117, at 425. This conception of localities in perpetual competition, forced to engage in a perpetual race to the bottom, however, has been questioned at both the local and the global level. See JAMES DEFILIPPIS, UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL (2004) (discussing actions local communities can perform to control their environments in a global economy); JENNIFER ROBINSON, ORDINARY CITIES: BETWEEN MODERNITY AND DEVELOPMENT (2006); MICHAEL PETER SMITH, TRANSNATIONAL URBANISM: LOCATING GLOBALIZATION (2001). Smith provocatively claims that the discourse of cities in global competition “actually creates the powerlessness that it projects by contributing to the hegemony of prevailing globalization metaphors of capitalism’s global reach, local penetration and placeless logic.” *Id.* at 58. Smith suggests instead that most economic relations are actually highly territorialized. *Id.* at 58-59. See also JANET ABU-LUGHOD, *Comparing Chicago, New York and Los Angeles: Testing Some World City Hypotheses*, in WORLD CITIES IN A WORLD SYSTEM (Paul Knox & Peter Taylor eds., 1995); Michael Storper, *Territories, Flows and Hierarchies in the Global Economy*, in SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL (Kevin Cox ed., 1997). Focusing on the territoriality of economic relations, DeFilippis analyzes informal employment sectors that one might imagine to be vulnerable to inter-municipal competition, such as domestic work, home health care, building services, restaurants, laundries, residential construction and garment manufacturing. James DeFilippis, *On Globalization, Competition and Economic Justice in Cities*, in SEARCHING FOR THE JUST CITY: DEBATES IN URBAN THEORY AND PRACTICE (Peter Marcuse et al. eds., 2009). Of these industries, DeFilippis finds that only one is shaped directly by extra-local competition—garment manufacturing. The rest of these goods and services are all produced and consumed locally, leading DeFilippis to argue that the long term sources of economic injustice continue to be rooted in relationships between capital and labor within a given locality.

increasingly globalized, it is also increasingly regional, and regional reforms are required to maintain economic competitiveness.¹²⁵ Urban downtowns are often the engines of regional economic growth, and the economic well-being of suburban residents arguably depends on the health of central cities.¹²⁶ More importantly, Edward Glaeser found in a national study of regional economic development that a flexible and varied housing supply was “the key determinant of regional growth.”¹²⁷ Glaeser suggested, “[a] more regional approach to housing supply might reduce the tendency of many localities to block new construction” and in the process impose costly externalities on their neighbors.¹²⁸ Not only is fragmentation problematic, but also inequality itself may further reduce economic growth as studies have found that those regions with greater income inequality have slower income and population growth as well as increased crime and decreased reports of happiness.¹²⁹

Regionalism in the United States has taken many forms, from elected regional governments to informal cooperation among municipalities. The crucial question in regional governance is what powers exist at which level of government. Thus, local governments and the benefits of local democracy can be maintained at the same time as limited powers important to metropolitan equity and efficiency are transferred to entities at a regional level.¹³⁰ For

¹²⁵ Allan D. Wallis, *Regions in Action: Crafting Regional Governance Under the Challenge of Global Competitiveness*, NAT'L CIVIC REV., Spring/Summer 1996, at 15-16. See also NEIL BRENNER, *NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD* (2004); ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1996); MICHAEL STORPER, *THE REGIONAL WORLD: TERRITORIAL DEVELOPMENT IN A GLOBAL ECONOMY* (1997).

¹²⁶ Richard Voith, *Do Suburbs Need Cities?*, 38 J. REG'L SCI. 445, 462 (1998) (finding statistically significant positive correlations between both suburban incomes' housing prices and the growth of income in the relevant central city); John A. Powell, *Race and Space: What Really Drives Metropolitan Growth*, BROOKINGS REV., Fall 1998, at 20-21 (“A failure to address central-city problems affects the entire region adversely. The failure to adopt regional strategies adversely affects the central cities.”).

¹²⁷ Edward Glaeser, *Do Regional Economies Need Regional Coordination?* 1 (Harv. Inst. of Econ. Research, Working Paper No. 2131, 2007), available at <http://www.economics.harvard.edu/pub/hier/2007/HIER2131.pdf>.

¹²⁸ *Id.*

¹²⁹ Edward L. Glaeser et al., *Urban Inequality* (Nat'l Bureau of Econ. Research, Working Paper No. 14419, 2008) (on file with the *Columbia Journal of Race and Law*).

¹³⁰ Powell, *supra* note 126, at 21 (“We need a regional approach that gives cities or communities a way to maintain appropriate control of their

example, residents of Portland, Oregon, have created an elected regional government with land-use and transportation planning powers as well as responsibility for parks and civic amenities.¹³¹ Similarly, building from the Minneapolis-St. Paul area's Twin Cities Metropolitan Council, Minnesota's "metropolitics" coalition in the state legislature enacted regional fair-share housing bills and regional revenue-sharing formulas to pool tax revenues from high-end housing.¹³² More often, regionalism takes the form of limited regional special purpose districts or *ad hoc* collaborative projects among municipalities. Recently, advocates also have pointed toward the role of community-based organizations as agents of regional reform.¹³³

This diversity of approaches to regionalism fits with the federalist tradition of states and local governments as "laboratories of democracy" and allows varied responses to different regional contexts. Regionalism does not guarantee equity and will not eliminate discrimination; regional bodies can also discriminate. Nevertheless, some problems are most effectively dealt with at the regional level. Residential segregation, foreclosure prevention, neighborhood stabilization, and inequalities between local governments are all interconnected issues that are best addressed regionally.

VI. CHALLENGING ECONOMIC LOCALISM

Addressing segregation requires more than new strategies for the enforcement of existing fair housing laws, although that remains an essential first step. Confronting the conditions that led to the credit collapse requires more than new consumer protection regulations,¹³⁴ although that is a crucial start. Both require addressing the political and economic context of spatial segregation on the basis of race and class. Both also require thinking creatively

political and cultural institutions, while sharing in regional resources and balancing regional policymaking.").

¹³¹ Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1777-78 (2002); Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 HOUS. POL'Y DEBATE 11 (1997).

¹³² MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 104-55 (1997).

¹³³ Todd Swanstrom & Brian Banks, *Going Regional: Community-Based Regionalism, Transportation, and Local Hiring Agreements*, 28 J. PLAN. EDUC. & RES. 355 (2009).

¹³⁴ See The Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

about the role of housing in the national economy and personal finances.

Segregation continues to be entrenched by governance structures that are arguably unwise from a regional development perspective, but that are not illegal. Thus, attention must be focused on the incentives that encourage segregation (such as fragmented local governments with strong land use powers, as well as taxation and financing structures that encourage speculation in real property), and contrasting incentives that can encourage collaboration among municipalities within a region and foster more equitable development.

Many urban actors seemingly have given up on advocating for regionalism given its complicated implications for democratic participation and the often entrenched opposition from wealthy suburban voters.¹³⁵ But the high foreclosure rate and the tremendous economic dislocation of the foreclosure crisis may provide new opportunities for regional collaboration regarding metropolitan housing markets. The steep decrease in home values and rise in abandonment create new opportunities for municipalities, community development corporations (CDCs), and community development financial institutions (CDFIs) to work together to acquire properties at a discount, rehabilitate them, and preserve them as homes that are permanently affordable in a form that can help stabilize distressed neighborhoods.

¹³⁵ While regional approaches to public policy have widespread support among urban planners and many public policy analysts, it has also faced significant opposition. Regionalism engages inherently with the question of the right scale for government, small enough for citizens to have an impact on decision-making but large enough for those decisions to have an effect on social issues. Larger regional governments are criticized for reducing citizen participation and government responsiveness. Regionalism also faces the daunting hurdle of entrenched local government bureaucracies and the tremendous investments that wealthy municipalities have in continuing to exclude others and control resources. *See* BRIFFAULT & REYNOLDS, *supra* note 122. If one could claim a recent heyday for regionalism, it seems to have been in the last decade of the last century, as mayors, state legislators, architects, legal academics, and public intellectuals published books and articles pressing the regional agenda. PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL* (2001); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT WALLS* (1999); ORFIELD, *supra* note 132; DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); REFLECTIONS ON REGIONALISM (Bruce Katz ed., 2000); Briffault, *Our Localsim*, *supra* note 117.

A. Regional Experimentation in Foreclosure Prevention

Unprecedented numbers of foreclosures have hit both city centers and suburban areas and the effects of increasing abandonment and vacancies are only beginning to be felt. The destabilizing effects of subprime lending and foreclosures on homeownership and on home values have not been confined to neighborhoods of color but have affected surrounding white and mixed-race neighborhoods as well.¹³⁶

While suburban municipalities sometimes have a brighter fiscal outlook than large central cities, suburbs often lack the civic infrastructure, particularly the network of housing nonprofits and government agencies with experience in housing policy, which is required to prevent foreclosures and minimize the neighborhood impact when they do occur.¹³⁷ Abandoned properties impose significant direct costs on local governments that become responsible for securing and maintaining them, and they have destructive effects on neighborhood safety and quality of life. At the same time, the diffuse nature of the ownership of many of these properties and the legal challenges in acquiring clear title requires a skill-set that is difficult and time-consuming for those unfamiliar with the process to develop. Further, it can be especially challenging for community development corporations or city agencies to acquire financing to buy properties in foreclosure at a time when housing values continue to decline. Finally, the skills to quickly redevelop abandoned and deteriorated units in an affordable and equitable manner are both crucial and difficult to find.

An effective response depends on these strong infrastructures of linked public, private, and nonprofit housing and community development actors. The need for these infrastructures is a significant impetus for collaboration, especially between central cities, declining inner-ring suburbs, and rapidly developing low-tax capacity exurbs.¹³⁸

¹³⁶ Jenny Schuetz et al., *Neighborhood Effects of Concentrated Mortgage Foreclosures*, 17 J. HOUS. ECON. 306 (2008).

¹³⁷ Todd Swanstrom et al., *Regional Resilience in the Face of Foreclosures: Evidence from Six Metropolitan Areas* (Macarthur Found. Research Network on Bldg. Resilient Regions, Working Paper No. 2009-05, 2009), available at <http://metrostudies.berkeley.edu/pubs/reports/2009-05.pdf>.

¹³⁸ For the definition of exurb, see Arthur C. Nelson & Kenneth J. Dueker, *The Exurbanization of America and Its Planning Policy Implications*, 9 J. PLAN. EDUC. & RES. 91, 93 (1990) (noting dictionary definition of an exurb as 'a region, generally semi-rural, beyond the suburbs of a city, inhabited largely by persons in the upper income group . . . [and an exurbanite as] a person

Over the past two years, the federal government has allocated almost six billion dollars to the Neighborhood Stabilization Program (NSP) to provide emergency assistance to state and local governments in acquiring and redeveloping foreclosed properties that otherwise might become sources of abandonment and blight.¹³⁹ The financing can be used by local governments to purchase foreclosed or abandoned homes and to rehabilitate, resell, or redevelop these homes in order to stabilize neighborhoods and stem the decline of house values. The funding available to local governments through the NSP could catalyze efforts both to explore alternative homeownership structures and to create new incentives for regional cooperation.

In neighborhoods that were formerly flooded with high-cost financial products, individual buyers and non-profit developers now face obstacles accessing conventional financing for the acquisition and redevelopment of housing, even if the projects have sufficient equity or public subsidy. Given the limited access to conventional financing, distressed properties then will often be purchased by speculative, absentee, “all cash” investors unlikely to make quality repairs and invest in the neighborhood for the long-term, thereby leading to further neighborhood deterioration and further decreases in regional home values. This situation means that public investment in the targeted neighborhoods is essential to stabilize them, connect them to streams of finance from CDFIs or other lenders, and reconnect them with the comparatively stronger regional labor and housing markets.

living in an exurb, especially one commuting to the city as a business or professional person’”) (internal citations omitted). Such an alliance of working and middle-class neighborhoods within a region can also undertake joint legislative efforts for regional property tax sharing and a redirection of government infrastructure spending from the wealthiest neighborhoods on the urban fringe to those neighborhoods most affected by foreclosures. *See also* ORFIELD, *supra* note 132.

¹³⁹ The Neighborhood Stabilization Program was initially established by the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008), with a \$3.92 billion allocation and expanded in the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), with a further \$2 billion. The funding can be used for the establishment of financing mechanisms for the purchase of foreclosed homes, the purchase and rehabilitation of abandoned or foreclosed homes, land banking of foreclosed homes, demolition of blighted structures, and redevelopment of vacant or demolished property. Neighborhood Stabilization Program funding, however, has been dwarfed by the seventy-five billion dollar Making Home Affordable program, which largely reinforces the status quo by giving lenders money to incentivize them to modify existing loans.

1. Cross-Border Collaboration in the NSP¹⁴⁰

The City of Newark, New Jersey and many of its surrounding suburbs have been creating innovative regional public-private collaborations to address foreclosures since before the credit crisis began in earnest. Conscious of the rising foreclosure rate, the city worked with Essex County, neighboring municipalities, and non-profit organizations from throughout the metropolitan area in the fall of 2007 and created a foreclosure prevention taskforce. The taskforce worked on a range of foreclosure issues, from homebuyer counseling to foreclosure prevention to mitigating the impact of foreclosures on neighborhood quality of life.

The partners who had begun working together in the foreclosure prevention taskforce decided to prepare a joint application to HUD for the second round of NSP funding in 2009. The application included the City of Newark, Essex County, the City of East Orange, the City of Irvington, the City of Montclair, and the Township of Orange, as well as eight community-based organizations, three housing developers, and the Community Loan Fund of New Jersey. The partners recognized that the housing markets in Newark and the surrounding towns and suburbs are closely intertwined and that the foreclosure crisis is truly a regional problem. Furthermore, many of the towns and suburbs realized that they did not have a strong chance of winning significant resources in the application process unless they collaborated with Newark, while Newark felt that submitting a regional application would make the submission more competitive.¹⁴¹ While the partnership does not necessarily bridge the gap to include higher-income, predominantly white exurbs to which many white former Newark residents had moved decades before, the partnership between an inner-city, a number of its surrounding suburbs, and the wealthy surrounding county still highlights the ways in which urban and suburban municipalities within a metropolitan region can benefit from regional cooperation.¹⁴²

¹⁴⁰ The author obtained the information contained in this section relating to the Neighborhood Stabilization Program (NSP) through in-person interviews with Stephanie Greenwood on February 21, 2010 and October 20, 2010. See generally Interview with Stephanie Greenwood, Cmty. Dev. Manager, Newark Dep't of Econ. & Hous. Dev., in Newark, N.J. (Feb. 21, 2010, Oct. 20, 2010) (on file with the *Columbia Journal of Race and Law*).

¹⁴¹ *Id.* at 4.

¹⁴² Essex County is a relatively affluent county with average household incomes of \$69,232 in 2007, compared to a national average of \$63,211. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 2006-2008,

The partners appreciated the need to target strategically the limited financial resources to maximize their impact and felt that a comprehensive approach to neighborhood development could support housing rehabilitation with public infrastructure investment and connections to employment and training initiatives. To target the resources effectively, the partners identified those census tracts where high levels of foreclosures and abandonment overlapped with the presence of an established community organization that could oversee the rehabilitation process and locations where the public efforts could realistically leverage further public and private investment to multiply their effect.¹⁴³ Several of the eleven neighborhoods selected crossed municipal lines, further highlighting the reality that the problem and its solutions are regional in nature.¹⁴⁴

The collaboration has brought significant benefits to the partners, from increased ability to access resources to increased capability to recognize shared problems and draw on a broader skills base to address them. For instance, suburban non-profits and housing developers seeking to leverage the NSP funds to access other financing have been drawing on the expertise of urban groups that are more accustomed to piecing together financing for affordable housing rehabilitation from multiple sources.¹⁴⁵ The collaboration also has opened space for discussion about the distrust

available at http://factfinder.census.gov/home/saff/main.html?_lang=en.

Nevertheless, it has been significantly affected by the foreclosure crisis, not primarily because of speculative over-development but because of subprime and predatory lending, which are often targeted at middle-class African American communities with significant home equity. Sixty percent of all mortgage originations in the NSP targeted neighborhoods between 2005 and 2007 were high-cost, subprime loans. Newark/Essex NSP2 Consortium, *Neighborhood Stabilization Program II Application*, 1 (2009), http://www.ci.newark.nj.us/userimages/downloads/nsp2_NSP2Application.pdf (based on an unpublished analysis of Home Mortgage Disclosure Act data by Assistant Professor Katherine Newman, Edward J. Bloustein School of Planning and Public Policy, Rutgers University). By 2009, more than one-quarter of the subprime loans originated in these neighborhoods between 2005 and 2007 were already in foreclosure. *Id.* at 1. While it is neighborhoods like these with large numbers of high-cost refinancings that have been hardest hit, rising unemployment and declining home values mean that foreclosures are increasingly spreading to more affluent suburbs, creating even more of an impetus for regional collaboration.

¹⁴³ Newark/Essex NSP2 Consortium, *Neighborhood Stabilization Program II Application Overview*, 4 (2007), http://www.ci.newark.nj.us/userimages/downloads/nsp2_NSP_II_Application_Overview.pdf.

¹⁴⁴ Greenwood, *supra* note 140, at 4.

¹⁴⁵ *Id.* at 4-5.

that has existed between governments within the region, where smaller towns sometimes feel that Newark consumes a disproportionate share of state resources and does not consult with neighbors on projects of shared interest.¹⁴⁶ Closer relationships among local leaders has enabled the sharing of data and of best practices and has laid the groundwork for a richer understanding of the regional housing market as well as opportunities for collective responses.

One of these collective responses has been the ability of municipalities to learn from each other in making use of new legislation such as the state-wide Abandoned Properties Rehabilitation Act,¹⁴⁷ which allows municipalities to take vacant properties in need of rehabilitation into receivership and redevelop them as affordable or workforce housing. Newark has taken the lead in using this statute to address abandoned buildings and transform them into affordable housing, and neighboring towns have been meeting with Newark officials to learn how to use the statute in their towns.¹⁴⁸

In trying to take advantage of the down-market period to preserve affordable housing, municipalities are looking into creating land banks and community land trusts to purchase sites for affordable housing, until the housing market returns to previous levels. Municipalities are buying these sites in order to prevent speculators from buying up and sitting on properties that then could become neighborhood hazards. Similarly, in situations where there are a number of abandoned properties in a small radius, which are owned by the same bank and which have been foreclosed on, local governments are investigating options for low-rise, scattered-site, limited-equity, cooperative housing.¹⁴⁹

¹⁴⁶ *Id.* at 3-4.

¹⁴⁷ N.J. STAT. ANN. § 55:19-98 (West 2003) (effective Jan. 8, 2004) (empowering municipalities to seek possession of abandoned property through the courts after giving the owner the opportunity to rehabilitate the abandoned property, granting municipalities recourse to recover funds spent for repairs or demolition from any other assets of the owners, and defining an “abandoned property” as any property that has not been legally occupied for six months and is either (a) in need of rehabilitation, (b) uncompleted, (c) in tax arrears, or (d) determined to be a nuisance).

¹⁴⁸ Greenwood, *supra* note 140, at 5 (noting that the threat of condemnation also has been effective in forcing owners to come forward and fix other abandoned properties threatened with condemnation). *See also* ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS (2006).

¹⁴⁹ Greenwood, *supra* note 140, at 6.

2. Discounted Bulk Purchases of Distressed Notes for Affordable Housing

Another innovative example of regional collaboration related to the Essex County foreclosure prevention taskforce has been the successful effort by leaders of state-wide housing intermediaries, local CDCs, and a local CDFI to create a new model for foreclosure response: the Community Asset Preservation Corporation (CAPC). CAPC is a non-profit organization created to stabilize neighborhoods by buying distressed notes in bulk from lenders and then assisting existing homeowners to preserve their assets and financial integrity by avoiding foreclosure while also returning vacant foreclosed properties to productive and affordable reuse in an efficient and equitable manner.¹⁵⁰

Local community developers and housing experts saw two significant obstacles to effective community revitalization: 1) the lack of accessible and flexible capital available for the strategic acquisition and redevelopment of properties in the foreclosure process, and 2) a lack of capacity in local CDCs to take advantage of a bulk-purchase strategy in order to rapidly acquire, develop, and return to use properties scattered throughout the region.¹⁵¹ In response, the group conceived and designed CAPC, partnered with an experienced local CDC, and approached JPMorgan Chase to negotiate over the bulk purchase of a portfolio of forty-seven non-performing mortgages at a steep discount.¹⁵² A statewide CDFI, New Jersey Community Capital, contributed fifty-two percent of the equity and the partner CDC committed the remainder, supporting a total project 80/20 debt-to-equity ratio.¹⁵³ Approximately seventy percent of the ninety-three units are currently being developed into affordable rental or homeownership opportunities, and CAPC has already been able to pay down \$1 million of the \$3.6 million in debt for the project ahead of schedule.¹⁵⁴

¹⁵⁰ Community Asset Preservation Corporation, Application to the National Community Stabilization Trust REO Capital Fund for Acquisition and Rehabilitation Financing, 3 (on file with the *Columbia Journal of Race and Law*).

¹⁵¹ *Id.* at 1-2.

¹⁵² Harold Simon, *The Community Asset Preservation Corporation: A New Approach to Community Revitalization*, in REO AND VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION 123 (Fed. Reserve Bank of Boston, Fed. Reserve Bank of Cleveland & Fed. Reserve Bd. eds., 2010).

¹⁵³ *Id.* at 127.

¹⁵⁴ *Id.*

CAPC drew on regional and state-wide resources and partnered an experienced CDFI with capable CDCs. As a result, CAPC was able to evaluate carefully the rehabilitation costs and exit strategies for the properties, secure flexible financing, and negotiate a steeply discounted bulk purchase price that would enable the majority of the properties to be sold or rented to low and moderate income households. CAPC then was able to bring the project to fruition by acquiring clear title and renovating the units or transferring them to responsible redevelopers.¹⁵⁵

Both the Newark and CAPC experiences are examples of municipalities, CDFIs, and CDCs collaborating to engage residents and address foreclosures regionally. While housing markets are regional, the competence and capacity to respond to foreclosures are concentrated in urban areas, even as the need to open up affordable housing opportunities exists in suburban areas. Responses to foreclosures present an opportunity to enhance both equity and efficiency through regional collaboration. While not without challenges,¹⁵⁶ discounted bulk purchases of distressed notes spread throughout a region encourage regional collaboration across the public and private nonprofit sectors, and they create affordable scattered-site housing that opens up new opportunities to challenge segregation. In order to maximize the value of the equity invested and make these housing opportunities permanently affordable, more can be done to experiment with alternative forms of tenure as well.

B. Shared-Equity Homeownership Structures

As the Newark example shows, creative thinking about neighborhood stabilization creates the potential to pilot shared-equity ownership structures. For example, limited equity housing cooperatives and community land trusts could return the focus on housing to its role as a home and as part of a neighborhood, not as an investment vehicle. The foreclosure crisis has highlighted the need in the market for both intermediary steps between renting and owning as well as more supportive ownership structures. Shared equity housing that intermediates between individual buyers and the property can fill these needs.

¹⁵⁵ Community Asset Preservation Corporation, *supra* note 150, at 5.

¹⁵⁶ Challenges raised by the CAPC example include the difficulty of quickly negotiating a competitive purchase price, the obstacles to rehabilitating buildings across a widely scattered area, and the limited impact such dispersed efforts have on the stabilization of any one neighborhood.

1. Rethinking Dominant Homeownership Models

Emblematic of the sea change in popular attitudes, a recent *Time Magazine* cover entitled “The Case Against Homeownership” emphasizes the negatives aspects of homeownership.¹⁵⁷ As the article pointed out, homeownership has been promoted and subsidized by the government for ideological reasons during a period extending from the Cold War, when Franklin Roosevelt told the nation that a country of homeowners was “unconquerable,” to the 1990’s when George H.W. Bush’s Secretary of Housing and Urban Development, Jack Kemp, suggested that homeownership could “save babies, save children, save families and save America.”¹⁵⁸ This ideological trend continued through George W. Bush’s more recent promotion of homeownership as part of the “ownership society.”¹⁵⁹ As historian Robert Self has argued,

[T]he detached, single-family home ha[s] been elevated in popular culture as the preeminent symbol of both independence and assimilation. Together, markets and culture—and later, electoral politics—encouraged homeowners . . . to identify property ownership first and foremost in terms of their own individual financial interests [H]omeownership stood at the core of political identification, and small property holders emerged as the most important social class and political constituency.¹⁶⁰

In *The Washington Post*, however, veteran business journalist Robert J. Samuelson recently went so far as to argue that “[t]he relentless promotion of homeownership as the embodiment of the American dream has outlived its usefulness.”¹⁶¹

The commoditization of housing after the Second World War was essential to the creation of a middle-class and to the

¹⁵⁷ Barbara Kiviat, *The Case Against Homeownership*, TIME, Sep. 6, 2010, at 40.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ SELF, *supra* note 15, at 99.

¹⁶¹ Robert J. Samuelson, *How a Homeownership Fetish Hurt the American Dream*, WASH. POST, Aug. 23, 2010, at A13. See also Georgette Chapman Phillips, *An Urban Slice of Apple Pie: Rethinking Homeownership in U.S. Cities*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 187 (2010); A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189 (2009).

solidification of racial identifications and boundaries.¹⁶² Indeed, racial segregation cannot be truly addressed without challenging the understandable societal fixation on property values and the attendant policies of exclusionary zoning.

The role of speculative profit is central to the current housing market crisis and to the perpetuation of segregation, and it has been raised directly in one of the class action suits against lenders. In *Miller v. Countrywide Bank*, Countrywide argued in its defense “that the complaint boils down to a claim that Countrywide should not be able to have a policy of selling its product for what people will pay for it after negotiating in the shadow of market forces.”¹⁶³ Judge Gertner, denying Countrywide’s motion to dismiss, found the “‘market forces’ argument troubling. It is precisely because the market could not self-correct for discrimination that statutes like Title VII, the FHA, and ECOA were necessary. The market, after all, traditionally valued ‘individual preferences,’ even when those preferences derived from racial and gender-based stereotypes.”¹⁶⁴ A leading legal scholar in the field, Robert Schwemm, similarly argues that “[s]o long as our home-finance system relies primarily on profit-seeking lenders, it is naïve to believe that these firms will voluntarily put a high value on conforming with civil rights laws if discrimination appears to offer the prospect of more profits.”¹⁶⁵

Wrestling with the market forces that make discrimination profitable requires reconsideration of the economic and racial divisions entrenched in taken-for-granted municipal boundaries, as well as the role of housing in personal and public finance.¹⁶⁶ As

¹⁶² SELF, *supra* note 15, at 98-99. Self writes, “The most significant political, economic, and spatial transformation in the postwar United States was the overdevelopment of suburbs and the underdevelopment of cities. As ostensible signifiers of this transformation, ‘white flight’ and ‘urban decline’ mask volatile and protracted social and political struggles over land, taxes, jobs, and public policy . . .” *Id.* at 1. Although white suburban residents may have been “diverse in class background and place of origin, . . . the structure of the housing markets into which they entered in the postwar decades would begin to give them a common identity, to shape for them a set of concerns and interest that would unite more than divide them.” *Id.* at 98.

¹⁶³ *Miller v. Countrywide Bank*, N.A., 571 F. Supp. 2d 251, 257 (D. Mass. 2008).

¹⁶⁴ *Id.* at 258 (citations omitted).

¹⁶⁵ Schwemm & Taren, *supra* note 28, at 432.

¹⁶⁶ See Peter Marcuse & Emily Achtenberg, *Towards the Decommodification of Housing: A Political Analysis and a Progressive Program*, in CRITICAL PERSPECTIVES ON HOUSING (Rachel Bratt et al. eds., 1986). It is also relevant to point out that housing is not like most other commodities in

Newark and other regions have been exploring, low property values create an opportunity to use shared-equity forms of tenure to deliver the benefits of homeownership, such as security of tenure, while also creating durable affordability and reducing the speculation involved in housing markets. With wider acceptance of the idea that owning a home is not primarily a speculative profit-making venture but instead can be a safe investment in a personal and social good consumed over a long period of time, such alternative tenures can deliver both greater affordability and security for owners, as well as increased race and class diversity in neighborhoods.¹⁶⁷

2. Land-Trusts and Durable Affordability

Land trusts make housing more affordable in the long term by removing the cost of land from the housing price. While continuing to own the land in the trust, land trusts provide for the private use of a parcel through long-term ground lease agreements that give the homeowner exclusive access and use rights, but they limit resale rights to ensure that the home remains affordable and is sold to qualified low- or moderate-income buyers.¹⁶⁸ While formulas for calculating resale values in shared-equity structures vary, most allow owners to get back what they invested in the property at the time of the purchase along with improvements they made. Additionally, they recover a share of the appreciation in value (which is frequently linked to an index of low-income households' buying power such as the area median income, thus tying housing price appreciation to rises in income).

There are currently more than two hundred community land trusts in operation in thirty-one states across the country, with thousands of affordable homeownership units in a mix of single and multi-family buildings.¹⁶⁹ As cities have watched prior investments in affordable housing through local, state, and federal subsidies expire, land trusts are increasingly appealing as a way to guarantee

that it is fixed, durable, costly, lacks transparency, involves high-transaction costs, and, most importantly, has tremendous social and economic externalities.

¹⁶⁷ Rick Jacobus & Michael Brown, *City Hall Steps In, SHELTERFORCE*, Spring 2007, <http://www.nhi.org/online/issues/149/cityhall.html>.

¹⁶⁸ Julie Farrell Curtin & Lance Bocarsly, *CLTs: A Growing Trend in Affordable Homeownership*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 367, 370 (2008).

¹⁶⁹ Emily Thaden & Greg Rosenberg, *Outperforming the Market: Delinquency and Foreclosure Rates in Community Land Trusts*, LAND LINES, Oct. 2010, at 2, 4; see also Curtin & Bocarsly, *supra* note 168.

permanent affordability.¹⁷⁰ As a result, a diverse range of cities, including Cincinnati, Ohio, Irvine, California, and Chicago, Illinois, have formed land trusts as part of their housing development strategies.¹⁷¹

3. Land Trusts and Neighborhood Stability

One significant advantage of community land trusts is their ability to increase neighborhood stability, both because of their community development mission and because of their robust support systems for first-time homeowners. Land trusts stabilize local economies by purchasing vacant land and building or renovating affordable homes. At the same time, land trusts also build household assets by working with homebuyers to secure the financial resources necessary to afford and maintain homeownership, and they foster community engagement by creating forums through which land trust homeowners can participate in the governance of the trust and the development of the broader community.¹⁷²

Evidence of community land trusts' ability to foster neighborhood stability is demonstrated by the fact that their lessees have outperformed the market by a wide margin in delinquencies and foreclosures during the housing crisis, despite supporting predominantly low and moderate income households. The National Delinquency Survey conducted by the Mortgage Bankers Association reported that 30.6% of subprime loans and 7% of prime loans were seriously delinquent in 2009.¹⁷³ By contrast, a national survey of community land trusts reported that only 1.6% of loans on community land trust units were delinquent.¹⁷⁴ Similarly, the Mortgage Bankers Association reported 15.6% of subprime loans in foreclosure and 3.3% of prime loans in foreclosure in 2009 as compared with less than 0.6% of loans on community land trust units in foreclosure.¹⁷⁵

¹⁷⁰ David Abromowitz, *Community Land Trusts and Ground Leases*, 1 J. AFFORDABLE HOUS. & CMTY. DEV. L. 5, 5 (1992).

¹⁷¹ Curtin & Bocarsly, *supra* note 168, at 371; Jacobus & Brown, *supra* note 167.

¹⁷² Jeff Corey, *A Model for All Markets?*, SHELTERFORCE, Fall/Winter 2009, http://www.shelterforce.org/article/a_model_for_all_markets/a_model_for_all_markets.

¹⁷³ Thaden & Rosenberg, *supra* note 169, at 4.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Due to the fact that community land trusts make homeownership more affordable and ensure that households spend no more than thirty to forty percent of their income on housing costs, land trust homes are significantly less likely to become delinquent. Land trusts also outperform the market because of the stewardship practices in which they engage, including pre-purchase education on homeownership for homebuyers, post-purchase opportunities for education in financial literacy, support in finding contractors and managing repairs, and contractual provisions limiting high-cost refinancing loans.¹⁷⁶ Finally, if homeowners do become delinquent on loans, CLTs often intervene to help by contacting lenders, providing financial counseling, or even by lending emergency funds to prevent foreclosure.¹⁷⁷

As Duncan Kennedy has argued, in shared-equity homeownership structures “[t]he point is not just to help people move up through the market system, but also to counter the tendency of the market to generate, through the combination of employment instability, neighborhood instability, and the various forms of race and class discrimination, an endlessly renewed sector of urban misery.”¹⁷⁸

4. Expanding Shared-Equity Opportunities

Expanding the diversity of housing options that households at all income levels can access by growing the shared-equity sector can contribute both to increasing housing opportunities and strengthening neighborhood stability. A first step in that direction is investigating and sharing best practices in the variety of shared-equity models such as community land trusts, limited equity cooperatives, and other deed-restricted affordable tenures. Identifying and sharing best practices can contribute to increased standardization and make it easier for land trusts and for homeowners to access capital from both private lenders and public funders.¹⁷⁹

The most exciting recent development for shared-equity housing has been increased interest from city and county

¹⁷⁶ Thaden & Rosenberg, *supra* note 169, at 3, 6.

¹⁷⁷ *Id.* at 2-7.

¹⁷⁸ Duncan Kennedy, *The Limited Equity Coop As a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 91 (2002).

¹⁷⁹ John Emmeus Davis, *Toward a Common Agenda: Growing Shared-Equity Housing*, SHELTERFORCE, Spring 2007, http://www.shelterforce.org/article/680/toward_a_common_agenda/.

governments. Public support is essential to creating a more tolerant climate for shared or limited equity structures, especially in creating valuation systems that tax limited equity housing fairly in ways that represent their limited resale value. Participation by local governments also can contribute some of the capital necessary to start community land trusts and bring them to scale. As previous subsidies and affordability restrictions have begun to expire, local governments are recognizing the wisdom of creating durable long-term affordability in ways that retain the subsidies. They are also recognizing the unique benefits shared equity housing provides to neighborhoods and individual owners particularly in terms of affordability, which is preserved for subsequent generations, and stability, which derives from stewardship programs that pool risks, share responsibilities, and increase the odds that first-time homebuyers succeed and flourish.

Two recent examples of city participation in community land trusts are from Irvine, California and Chicago, Illinois. In 2005, the Irvine City Council created a housing task force led by the mayor which has set a goal for the city to develop 9,700 units of new affordable housing under the stewardship of a municipally-sponsored CLT. Similarly, in 2006, the mayor and city council in Chicago created a city-wide, municipally-sponsored land trust with the goal of adding 250 units to the trust annually in locations spread throughout the city.¹⁸⁰ Since their formation, both trusts have acquired land, developed housing, sold affordable homes to qualified buyers, and continued to grow.¹⁸¹

By highlighting the ways in which the current system of housing regulation is not functioning, the current crisis presents a number of opportunities to address the root causes of the housing bubble, including segregation and speculation. Any solution must create regional structures to bring together fragmented governments and their financing. A truly long-term solution also should explore alternative homeownership structures that reduce the commoditization of housing and reorient our focus towards its social benefits.¹⁸²

¹⁸⁰ Jacobus & Brown, *supra* note 167.

¹⁸¹ *Id.*

¹⁸² See, e.g., DEFILIPPIS, *supra* note 124; MICHAEL HARLOE, THE PEOPLE'S HOME: SOCIAL RENTED HOUSING IN EUROPE AND AMERICA (1995); CRITICAL PERSPECTIVES ON HOUSING, *supra* note 166; A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA, *supra* note 20.

VII. CONCLUSION

The problem of segregation is not primarily that people desire to live and associate with others for whom they feel an affinity, but rather that through segregation, certain groups establish material privilege, perpetuate social and economic hierarchies, and maintain political exclusion.¹⁸³ Regions can counteract this process by bringing localities together to create fair distributions of affordable housing, pool resources and expertise to create equitable public education, and take strong stands against housing discrimination. In these ways, regions can contribute to a climate in which strangers with diverging loyalties, diverse local affinities, and different priorities recognize that they live together in a shared metropolitan region with shared responsibilities. Restructuring local governance in ways that both highlight and address the shared responsibilities within regions and reduce the existing incentives for segregation can help develop a much-needed sense of solidarity among neighbors.

As the name *apartheid* suggests, the South African government used spatial segregation as a central tool to maintain white supremacy. Recognizing the ways in which municipal fragmentation perpetuated economic inequality, the South African liberation struggle popularized the slogan “One City, One Tax Base” to demand metropolitan integration and tax base sharing.¹⁸⁴ Township residents organized rent and service payment boycotts to give expression to the slogan and speed the fall of the white supremacist government.

Recognizing that the definition of local government boundaries fundamentally shapes access to opportunity, South Africa’s first democratically-elected government undertook a national effort to redesign local government boundaries and responsibilities in light of both historic inequalities and current social and political relationships.¹⁸⁵ The national effort concluded that local governments are the basis for equitable and just metropolitan areas and that strategic land-use planning and regional

¹⁸³ IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 218 (2002).

¹⁸⁴ MARINA OTTAWAY, SOUTH AFRICA: THE STRUGGLE FOR A NEW ORDER 114-31 (1993); Richard Tomlinson et al., *The Postapartheid Struggle for an Integrated Johannesburg*, in EMERGING JOHANNESBURG: PERSPECTIVES ON THE POSTAPARTHEID CITY 3, 8-14 (Richard Tomlinson et al. eds., 2003).

¹⁸⁵ Robert Cameron, *Local Government Boundary Reorganization*, in DEMOCRACY AND DELIVERY: URBAN POLICY IN SOUTH AFRICA 76 (Udesh Pillay et al. eds., 2006).

development frameworks are crucial for economic and social development.¹⁸⁶

After the civil rights movement in the United States, however, local government boundaries and responsibilities were not reconsidered systematically. Generally, local government structures and boundaries are often assumed to be fixed, but in reality, they are frequently changing. Even in the United States, boundaries are more fluid than we often imagine. Local government boundaries in the United States are changed most often not to realize more equitable distributions of government resources but, rather, to perpetuate the local economic and political status quo through processes such as “defensive incorporation.”¹⁸⁷ Conversely, efforts to change municipal boundaries in order to achieve more equitable sharing of the tax-base have been struck down in the courts.¹⁸⁸ To lay the groundwork for improved housing markets and increased access to opportunity, the federal government should collaborate with states and municipalities to undertake a systematic reconsideration of existing structures of local government, which could enhance local democracy and economic growth simultaneously.

Soon after taking office, President Obama created the White House Office of Urban Affairs and highlighted a regional approach as one of the guiding principles of its efforts. While the role of the Office of Urban Affairs thus far has been muted, it could and should lead a dynamic effort to support innovative local housing financing efforts, such as community land trusts, and to spread lessons from regional cooperation between cities and suburbs that can simultaneously enhance economic productivity and equity. This kind of effort by the Office can play a crucial role in learning from local creativity and spreading these successes across the country in the true spirit of federalism’s laboratories of democracy.

¹⁸⁶ *Id.* at 80.

¹⁸⁷ Defensive incorporation describes the actions of unincorporated areas, often wealthy, predominantly white areas, which incorporate to prevent annexation by another entity, often a neighboring urban area. *See, e.g., Green v. Tucson*, 340 F.3d 891 (9th Cir. 2003) (rejecting constitutional challenges to an Arizona law seeking to limit defensive incorporation by requiring new incorporations within a minimum distance from existing municipalities to obtain their consent).

¹⁸⁸ *See e.g., Bunch v. City of Jackson*, 691 So. 2d 978 (Miss. 1997) (prohibiting the City of Jackson’s proposed annexation of neighboring unincorporated land as unfair and unreasonable and suggesting it was motivated by a desire to increase the City’s tax base).

As a significant political and economic liability for the United States, segregation fosters inequality and economic crisis. The collaborations in Essex County accessing joint funding, developing common principles, sharing data, disseminating best practices, and conducting public education demonstrate ways in which metropolitan partnerships can benefit both urban and suburban residents and make possible regional public policy innovations. The unprecedented number of foreclosures and high rate of unemployment in areas across the country serve as a reminder that housing and labor are regional markets and that metropolitan collaboration is necessary to address neighborhood stabilization. The realization of potential social and economic gains that arise from more truly open access to housing can be an integral part of the national recovery from the current economic crisis.