

HOME EQUITY: RETHINKING RACE AND FEDERAL HOUSING POLICY

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ABSTRACT

Neighborhoods shape every element of our lives. Where we live determines economic opportunities; our exposure to police and pollution; and the availability of positive amenities for a healthy life. Home inequity—both financial and racial—is not accidental. Federal government programs have armed white people with agency to construct “white” spaces while stigmatizing “Black” spaces. The urgency of addressing structural injustice in housing has been laid bare by police-involved shootings and the disparate death rates linked to COVID-19.

Using political philosopher Tommy Shelbie’s theory of corrective justice, this Article explores the historical and present-day harms that need to be rectified and then offers a path forward through concrete changes to federal housing policy. This Article’s proposals address access to homeownership, stable housing for renters, reliable mass transit, and increased availability of affordable housing. The policy prescriptions are intended to address systemic racism, but the changes wrought would benefit people across race and ethnicity. As those on the front lines of the Black Lives Matter movement argue: freedom and justice for Black people will extend to freedom and justice for all people.

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“Home! The very word begins to have a despairing and diabolical ring. You must consider what happens to this citizen, after all he has endured, when he returns—home: starch, in his shoes, for a job, for a place to live . . . imagine yourself being told to “wait.” And all this is happening in the richest and freest country in the world, and in the middle of the twentieth century.”

- James Baldwin¹

INTRODUCTION

Where we live shapes every element of our lives. Neighborhoods determine education and employment opportunities; the value of our homes; how we are policed; our exposure to pollution; and the availability of medical care, healthy groceries, and open spaces for recreation. The extraordinary salience of the *location* of our homes is not accidental. Past and present federal housing policies have inextricably linked home equity—both racial and financial—to race.² James Baldwin's powerful words continue to ring true in the twenty-first century: this is the moment to rethink federal housing policy.

1. James Baldwin, *Letter from a Region in My Mind*, NEW YORKER (Nov. 9, 1962), <https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind>.

2. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* ix–xii (2017); see also Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

We are experiencing a racial reckoning. Police-involved shootings of unarmed Black people in cities and towns across the country have triggered protests and uprisings not seen since the Civil Rights Movement.³ Recognition of the harms of “systemic racism” are reflected in statements by leaders of Fortune 500 companies. General Motors’ Chief Executive Officer (CEO) declared: “I am both impatient and disgusted,” and in a letter to suppliers stated that “the firm will not tolerate racism and will stand up against injustice.”⁴ IBM’s CEO went further and sent a letter to Congress that critiqued policing and refused to make “facial-recognition software available for racial profiling.”⁵ Darren Walker, the head of the Ford Foundation, spoke to two dozen CEOs and reported that “everyone is riveted . . . the murder of George Floyd has gripped the psyche of white Americans like nothing I’ve seen in my lifetime.”⁶

The tragic deaths and protests emerged on the heels of studies that revealed the disproportionate effect that COVID-19 has had on Black families. In Chicago, for example, Black people account for about 30% of the population and about 68% of COVID-related deaths.⁷ In New York City, the Black population has an age-adjusted COVID mortality rate nearly twice that of their white counterparts.⁸ These disturbing trends “span[] the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups.”⁹

Racial segregation in housing is central to the events that catalyzed this moment.¹⁰ Corrective justice requires a rethinking of federal housing policy that addresses the inequities of the past and establishes forward-looking policies that give agency to those who have long been denied it.

3. Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter may be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>; see also Jack Healy & Kim Barker, *Other Protests Flare and Fade. Why this Movement Already Seems Different.*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/07/us/unrest-protests-minneapolis-ending.html>.

4. *Bosses say they want to Tackle Racial Injustice*, ECONOMIST (June 11, 2020), <https://www.economist.com/business/2020/06/11/bosses-say-they-want-to-tackle-racial-injustice>.

5. *Id.*

6. *Id.*

7. Cecilia Reyes, Nausheen Husain, Christy Gutowski, Stacy St. Clair, & Gregory Pratt, *Chicago’s Coronavirus Disparity: Black Chicagoans are Dying at Nearly Six Times the Rate of White Residents*, *Data Show*, CHI. TRIB. (Apr. 7, 2020, 9:47 AM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-coronavirus-deaths-demographics-lightfoot-20200406-77nlylhiavgjzb2wa4ckivh7mu-story.html>.

8. *See Age-adjusted Rates of Lab Confirmed COVID-19 Non-Hospitalized Cases, Estimated Non-Fatal Hospitalized Cases, and Patients Known to Have Died per 100,000 by Race/Ethnicity Groups as of April 16, 2020*, N.Y.C. HEALTH (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-deaths-race-ethnicity-04162020-1.pdf>.

9. Richard A. Oppel, Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright, & Mitch Smith, *The Fullest Look yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html?action=click&module=Top%20Stories&pgtype=Homepage>.

10. See *infra* Part I.

We argue that all people need agency—“the capacity, condition, or state of acting or of exerting power”¹¹—over the choice of where to live. The exercise of such agency, however, depends not only on the individual but also on external conditions that affect the exercise of power.¹² In American housing policy, the racial identity of individuals and groups frequently affects who the government empowers and who the government excludes from power.¹³

This Article focuses specifically on anti-Black racism. As leaders of Latinx and Asian-American communities have recognized, anti-Blackness pervades America and societies across the globe.¹⁴ This is not to minimize the unique injustices experienced by other communities of color in the United States, but to acknowledge that anti-Blackness is deeply entrenched, particularly in housing. How people are policed and their exposure to pollutants (which is directly linked to vulnerability to death from COVID-19) are two of the many place-based phenomena linked to race.¹⁵ Where people live—the agency they have been able to exercise in housing and community building—has been historically racialized.¹⁶ With few exceptions, the government at every level has empowered white people to create “white spaces”¹⁷ and has both stigmatized and failed to invest in Black neighborhoods and communities.

COVID-19 has added a new urgency to the need for transformative actions that correct past injustices in housing policy. Preliminary data suggest that the COVID-19 pandemic may spur permanent changes in housing preferences, with people moving in search of more open space or larger dwellings.¹⁸ Without corrective action, history will repeat itself. This means white people will have more housing opportunities than people of color—and the differences will be most profound for Black people.

Bold and transformative federal policy will interrupt this pattern. Our proposals are massive in size and scope but so is the systemic injustice that

11. Agency, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/agency> (last visited Mar. 14, 2021).

12. See *infra* Part III.

13. See *infra* Parts I, III.

14. Leaders of Latinx and Asian-Americans have issued statements of solidarity with the Black community. Catherine E. Shoichet, *These Leaders say Latinos Need to Acknowledge Their Racism, Too*, CNN (June 9, 2020, 5:22 PM), <https://www.cnn.com/2020/06/09/us/latino-leaders-racism-letter/index.html>; Jeremy C. Fox, *Asian-American Leaders Declare Solidarity with Black Americans, Double Down on Controversial Message*, BOS. GLOBE (June 16, 2020, 11:27 PM), <https://www.bostonglobe.com/2020/06/16/metro/asian-american-leaders-declare-solidarity-with-black-americans-double-down-controversial-message/>.

15. See discussion *infra* Sections IA–B.

16. See *infra* Part II.

17. See, e.g., Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 401, 428, 450 (2010).

18. See Uri Berliner, *New Yorkers Look to Suburbs and Beyond. Other City Dwellers may be Next*, NPR (July 8, 2020, 11:51 AM), <https://www.npr.org/2020/07/08/887585383/new-yorkers-look-to-suburbs-and-beyond-other-city-dwellers-may-be-next>.

Black families face in the housing market.¹⁹ To counter the de jure denial of access to homeownership, we propose a \$100 billion federal fund to offer down payment assistance to those who live in neighborhoods that put them at the greatest risk of either being denied access to homeowner loans or being offered loans with harsh terms. We also identify measures that will ensure stable housing for renters and help guard against the harms that gentrification can inflict on Black communities. Because affordable housing is connected to affordable commuting,²⁰ we call for the federal government to reallocate its transportation spending so that the lion's share goes to mass transit instead of highways. We also recommend amendments to the Fair Housing Act²¹ to ensure that it is an effective weapon against those who might oppose measures that bring corrective justice to the housing market.

Part I explains the link between residential racial segregation and policing and COVID-19 deaths and makes the case for corrective action in housing policy. Part II provides the foundation for our proposals by describing the historical trajectory and the inflection points in which federal policies invested in white people and white spaces while simultaneously precluding investment in Black people and Black spaces. Part III proposes specific bold correctives for this systemic injustice. Part IV explains why we are guardedly optimistic that our proposed correctives are politically realistic and then discusses necessary amendments to the Fair Housing Act.

I. WHY HOUSING IS CENTRAL TO ADDRESSING THE RACIAL RECKONING

In spring 2020, protests in response to the murder of George Floyd, the killing of Breonna Taylor, and the disproportionate deaths from COVID-19 within Black communities focused the world on the salience of race in American life.²² While only a few of the protests focused on racialized housing patterns,²³ residential segregation has long been

19. See, e.g., Danyelle Solomon, Connor Maxwell, & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/>; see also Dima Williams, *A Look at Housing Inequality and Racism in the U.S.*, FORBES (June 3, 2020, 11:17 AM), <https://www.forbes.com/sites/dimawilliams/2020/06/03/in-light-of-george-floyd-protests-a-look-at-housing-inequality/>.

20. TRIP POLLARD, S. ENV'T L. CTR., JOBS, TRANSPORTATION, AND AFFORDABLE HOUSING: CONNECTING HOME AND WORK 1–2, 5–6, 9 (2010).

21. 42 U.S.C. §§ 3601–3619.

22. See Brenda Gayle Plummer, *Civil Rights has Always Been a Global Movement*, FOREIGN AFFS. (June 19, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-06-19/civil-rights-has-always-been-global-movement>; Catherine Powell, “Viral Convergence”: *Interconnected Pandemics as Portal to Racial Justice*, COUNCIL ON FOREIGN RELS. (Aug. 5, 2020, 8:00 AM), <https://www.cfr.org/blog/viral-convergence-interconnected-pandemics-portal-racial-justice>.

23. See, e.g., *Vision for Black Lives*, M4BL, <https://m4bl.org/policy-platforms/> (last visited Mar. 14, 2021) (“The Vision, endorsed by over 50 Black-led organizations in the M4BL ecosystem and hundreds of allied organizations and individuals, has since inspired campaigns across the country to achieve its goals.”); see also Gabrielle Gurley, *Black Lives Matter Plunges into the Affordable Housing Crisis*, AM. PROSPECT (Sept. 2, 2016), <https://prospect.org/civil-rights/black-lives-matter->

recognized as a factor in critical life domains including education, job opportunities, health care, and environmental quality of life.²⁴ This Part shows the centrality of racial segregation to both policing and COVID-related deaths and makes the case for corrective action that promotes investment in Black people and Black spaces.

A. Segregation and Policing

The creation of white spaces and the segregation of Black people have profoundly affected how the police operate. Empirical research shows that racial segregation is both a consequence of and contributor to police brutality.²⁵ In other words, racially segregated neighborhoods are policed differently because they are segregated and that difference in policing sustains continued segregation.²⁶

The evidence for how policing unfolds differently in racially segregated communities is multifaceted. Consent decrees are not in effect in the vast majority of segregated cities,²⁷ but more highly segregated cities have higher levels of police brutality and are more likely to be under consent decree.²⁸ In a study of cities with 100,000 or more people, researchers found a correlation between the degree of racial residential segregation and the number of sustained excessive force complaints—neither city population, violent crime level, nor income inequality were statistically

plunges-affordable-housing-crisis/; Noah Y. Kim, *Housing Will Test White Support for Black Lives*, BOS. GLOBE (Aug. 21, 2020, 4:00 AM), <https://www.bostonglobe.com/2020/08/21/opinion/test-white-support-black-lives/>.

24. See Kim, *supra* note 23.

25. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 653 (2020) (making the counter-argument that “[v]arious practices of urban policing—some unconstitutional-but-unjust, and some perfectly aligned with urban policing ‘best practices’—are both consequences of and contributors to residential segregation”).

26. *Id.* at 687–88, 688 n.177.

27. See *id.* at 653.

28. *Id.* at 651–54.

Baltimore, Maryland. Buffalo, New York. Cleveland, Ohio. Chicago, Illinois. Cincinnati, Ohio. Columbus, Ohio. Detroit, Michigan. East Haven, Connecticut. Ferguson, Missouri. Highland Park, Illinois. Los Angeles, California. Miami, Florida. Montgomery County, Maryland. Mount Prospect, Illinois. New Orleans, Louisiana. Newark, New Jersey. Orange County, California. Pittsburgh, Pennsylvania. Prince Georges County, Maryland. Suffolk County, New York. Villa Rica, Georgia. Warren, Ohio. Washington, D.C. Yonkers, New York. These municipalities are united by at least three common threads. One is that they were or are part of some of America’s oldest and most prominent metropolitan areas. Another is that their police departments have all been party to U.S. Department of Justice (DOJ) 42 U.S.C. § 14141 investigations, settlement agreements, or consent decrees for having a pattern or practice of violating people’s constitutional rights

Id. at 651–52. In the context of policing, consent decrees are settlements between the federal government and a city. Decrees require the city and its police department enact specific reforms, such as revisions to policies involving the use of force. Consent decrees are often extremely detailed in their requirements and can exceed 200 pages of provisions. Ian Millhiser, *Trump’s Justice Department has a Powerful Tool to Fight Police Abuse. It Refuses to Use it.*, VOX (June 30, 2020, 5:00 AM), <https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse>; see also *Consent Decree*, CITY OF CHI., <https://www.chicago.gov/city/en/sites/police-reform/home/consent-decree.html> (last visited Mar. 14, 2021).

significant.²⁹ Indeed, “[a] one standard deviation increase in percent [B]lack resulted in about 66 percent more sustained complaints, whereas a standard deviation increase in percent Hispanic produced about 44 percent more complaints.”³⁰ The most powerful differentiating variable was how racially segregated the cities were, with significantly higher levels of sustained complaints in the most segregated cities. This only proved true, however, for segregation of Black residents, not for Latinx/Hispanic residents.³¹

Relying on extant research, the study’s authors posited that the relationship between Black residential segregation and excessive use of force is based upon the associations police officers develop between what they perceive to be Black spaces and criminality.³² Because this research controlled for the *actual* presence of violent crime and found it *not* to be significant, this study is a powerful indicator that the mere “presence of people *perceived* as threatening may trigger cognitive and emotional responses that predispose the police to use force gratuitously in such areas.”³³ This research suggests that it is the stereotypes of Black people and criminality that lead police to use excessive force in racially segregated cities. Because stereotypes are most powerful when people lack actual knowledge based upon relationships and day-to-day interactions,³⁴ residential segregation leads to a vicious cycle that Black people experience through police violence and in other ways.³⁵

B. Segregation and COVID-19 Deaths

Predominantly Black communities have experienced disproportionate rates of infection and deaths from COVID-19.³⁶ The Centers for Disease Control reported that the rate of COVID-19 deaths is 1.9 times higher among Black Americans than white Americans, the rate of hospitalizations

29. See Brad W. Smith & Malcolm D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOC. PROBS. 83, 93, 95–96 (2014).

30. *Id.* at 93. The researchers analyzed whether higher proportions of Black police officers made a difference. *Id.* at 94. They found that having more Black police officers resulted in lower level of complaints. *Id.* at 97. However, “the effects of percent [B]lack and [B]lack dissimilarity remain quite large. Simply increasing the representation of [B]lacks in police departments may not overcome the profound structural inequalities of race and class that characterize many American cities and produce excessive force problems.” *Id.*

31. *Id.* at 96.

32. *Id.* at 98.

33. *Id.* (emphasis added) (citation omitted).

34. See Rebecca C. Hetey, *Implicit Bias, the Power of Institutions, and How to Reduce Racial Disparities in Policing*, in *BIAS IN THE LAW: A DEFINITIVE LOOK AT RACIAL PREJUDICE IN THE U.S. CRIMINAL JUSTICE SYSTEM* 37, 38–39 (Joseph Avery & Joel Cooper eds., 2020).

35. See *id.* at 43–46 (“[T]he rate at which force was used with Blacks was 2.5 times the overall use of force rate and 3.6 times the rate for Whites.”).

36. Gregorio A. Millett, Austin T. Jones, David Benkeser, Stefan Baral, Laina Mercer, Chris Beyrer, Brian Honermann, Elise Lankiewicz, Leandro Mena, Jeffrey S. Crowley, Jennifer Sherwood, & Patrick S. Sullivan, *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS EPIDEMIOLOGY 37, 37, 39 (2020).

is 2.9 times higher, and the rate of cases is 1.1 times higher.³⁷ Researchers found that the rates of infection are not the result of chosen behavior—indeed, a study found social distancing behavior is more prevalent among Black people.³⁸ Instead, underlying structural factors such as physical proximity to health care, being an essential worker, and having to take public transportation were significant in explaining the disparate rates of infection.³⁹

COVID-19 has also brought the link between pollution and the racial composition of neighborhoods into sharp relief. In “[a] study of more than 3,000 . . . counties released in April [2020],” researchers found that “even a small increase in particulate matter . . . corresponded to a significant increase in Covid-19 mortality.”⁴⁰ The researchers found “[e]ach increased microgram” of PM_{2.5} “per cubic meter of air is associated with an 8 percent increase in death from Covid-19.”⁴¹

Pollutants such as particulate matter and PM 2.5 are more prevalent in Black communities. In a study published in 2019,⁴² researchers found that “racial/ethnic minorities (vs. [w]hites) are exposed to greater concentrations of three types of air pollutants in their residential neighborhoods,” and noted that the outcomes were not as stark for predominantly Latinx or Asian communities.⁴³ The specific pollutants studied—PM₁₀, PM_{2.5}, and nitrogen oxide (NO_x)—are those that are most linked to respiratory ailments.⁴⁴ This study is consistent with other research showing that Black people “in the United States suffer worse air quality across multiple metrics, geographic scales, and multiple pollution metrics.”⁴⁵ Specifically,

37. *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last updated Mar. 12, 2021).

38. Millett et al., *supra* note 36, at 42.

39. *Id.* at 40–42; see also Trevor Hughes, *Poor, Essential and on the Bus: Coronavirus is Putting Public Transportation Riders at Risk*, USA TODAY (Apr. 15, 2020, 2:01 PM), <https://www.usatoday.com/story/news/nation/2020/04/14/public-transportation-users-risk-coronavirusspreads-across-us/2979779001>.

40. Linda Villarosa, *Pollution is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>; see also X. Wu, R. C. Nethery, M. B. Sabath, D. Braun, & F. Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES, Nov. 4, 2020, at 1.

41. Villarosa, *supra* note 40.

42. Bongki Woo, Nicole Kravitz-Wirtz, Victoria Sass, Kyle Crowder, Samantha Teixeira, & David T. Takeuchi, *Residential Segregation and Racial/Ethnic Disparities in Ambient Air Pollution*, 11 RACE & SOC. PROBS. 60, 61 (2019) (examining “two decades of nationally-representative data on individual respondents combined with census data on metropolitan areas and spatially-precise measures of neighborhood air pollution to examine the independent and joint impacts of race/ethnicity and racial residential segregation on inequalities in air pollution exposure”).

43. *Id.* at 64–65 (specifically, this study “found that areas with higher Latino/a-White segregation had lower levels of PM_{2.5} and PM₁₀, and that areas with higher Asian-White segregation displayed lower NO₂ concentrations”).

44. See *Ambient (Outdoor) Air Pollution*, WORLD HEALTH ORG. (May 2, 2018), [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health).

45. Marie Lynn Miranda, Sharon E. Edwards, Martha H. Keating, & Christopher J. Paul, *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 INT’L J. ENV’T RSCH. & PUB. HEALTH 1755, 1768 (2011).

focusing on PM2.5 and ozone, the study found that “non-Hispanic [B]lacks are consistently overrepresented in communities with the poorest air quality.”⁴⁶ Epidemiological research has established a correlation between air pollution and health while controlling for other explanatory variables.⁴⁷

C. Need for Corrective Justice

Deaths linked to police activity and the harms of COVID-19 were the most vivid triggers for the focus on race that occurred in the spring and summer of 2020—but the widespread racial disparities that exist between neighborhoods have myriad other effects. The question is whether the underlying inequities will at last be meaningfully addressed. Our argument is that corrective justice requires government action that responds to the causes of the harm. Segregation must be redressed and the current tools that maintain segregation must be dismantled.

This argument is not new. In the wake of the racial reckoning and ensuing riots and uprisings across the United States triggered by the assassination of Dr. Martin Luther King Jr.,⁴⁸ this country explicitly recognized the racialized nature of housing at the federal level and codified a response. The Fair Housing Act stated: “It is the policy of the United States to provide . . . for fair housing throughout the United States.”⁴⁹ Congress implemented this policy by (1) prohibiting housing discrimination in private and public housing transactions, and (2) requiring the federal government to affirmatively further fair housing through its administration of federal housing and community development programs.⁵⁰

Given that segregating Black people has caused such harm, it may seem as though the obvious corrective is integration.⁵¹ The Fair Housing Act does not in its text prescribe integration, rather, it prohibits discrimination and requires the promotion of *fair* housing.⁵² Whether fair housing necessitates integration is contested. The National Advisory Commission on Civil Disorders (the Kerner Commission), convened by President Lyndon B. Johnson to understand the causes of the unrest that led to the violence in cities, famously concluded that continued racial segregation

46. *Id.* at 1755.

47. Spencer Banzhaf, Lala Ma, & Christopher Timmins, *Environmental Justice: The Economics of Race, Place, and Pollution*, 33 J. ECON. PERSPS. 185, 193 (2019).

48. See DeNeen L. Brown, *The Fair Housing Act was Languishing in Congress. Then Martin Luther King Jr. was Killed.*, WASH. POST (Apr. 11, 2018, 10:28 AM), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/>.

49. 42 U.S.C. § 3601.

50. See *id.* §§ 3605(a), 3608(d).

51. One of us has made this argument in the context of both education and environmental justice. See Rachel D. Godsil, *Rigor and Relationships: The Positive Case for Integration in Schools and Neighborhoods*, 40 CARDOZO L. REV. 1287, 1290 (2019); Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1112 (2004).

52. See *Housing Discrimination Under the Fair Housing Act*, HUD.GOV, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview (last visited Mar. 15, 2021).

and discrimination would engender “two societies, one [B]lack, one white—separate and unequal.”⁵³

Although the Kerner Commission embraced integration, it identified specific causes for the unrest that were distinct from the racial composition of neighborhoods:

Bad policing practices, a flawed justice system, unscrupulous consumer credit practices, poor or inadequate housing, high unemployment, voter suppression, and other culturally embedded forms of racial discrimination all converged to propel violent upheaval on the streets of African-American neighborhoods in American cities, north and south, east and west. And as [B]lack unrest arose, inadequately trained police officers and National Guard troops entered affected neighborhoods, often worsening the violence.⁵⁴

More than fifty years later, the Kerner Commission may as well have been describing what triggered protests in 2020. But it is notable that in 2020, the major cities where the protests were among the most peaceable were not integrated.⁵⁵ Instead, those peaceful protests were in Newark and Camden, New Jersey, where the majority of residents are Black or Hispanic.⁵⁶

At various points since the passage of the Fair Housing Act, there have been tensions between the anti-discrimination mandate of the Act and the goals of housing integration.⁵⁷ Within the civil rights advocacy community, integration—not merely anti-discrimination—has often been the preferred goal.⁵⁸ Michelle Adams has persuasively argued for what she called “radical integration,” contending that radical integration is not assimilationist, but rather “represents the desire that a previously separate environment actually facilitate instrumental equality for the purposes of facilitating black empowerment”⁵⁹ through genuine access to the sources of power and opportunity in American society.

53. “*Our Nation is Moving Toward Two Societies, One Black, One White—Separate and Unequal*”: *Excerpts from the Kerner Report*, HIST. MATTERS, <http://historymatters.gmu.edu/d/6545/> (last visited Mar. 15, 2021) (providing excerpts from the National Advisory Commission on Civil Disorders’ 1968 report).

54. Alice George, *The 1968 Kerner Commission got it Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/>.

55. See Tracey Tully & Kevin Armstrong, *How a City Once Consumed by Civil Unrest has Kept Protests Peaceful*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/06/01/ny-region/newark-peaceful-protests-george-floyd.html>.

56. See *id.*

57. See Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act> (reflecting on her childhood growing up in Detroit and how persistent segregation in Detroit is endemic of the shortcomings of the FHA).

58. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196–98 (2002).

59. Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 274 (2006).

Yet political philosopher Tommie Shelby's critique of the "new integrationists," who contend that integration (race and class) is a critical component of corrective justice, is also convincing.⁶⁰ As he explains, "[a]ny advocacy of integration as corrective justice must be sensitive to the reasonable demands and concerns of [B]lack themselves."⁶¹ He calls for the "abolition of the ghetto," but clarifies:

I'm not suggesting that [B]lack neighborhoods should be proscribed or that their poor [B]lack inhabitants should be dispersed. There is nothing wrong with the existence of predominantly [B]lack urban communities and, in light of the long-standing predicament of [B]lack people in the United States, there is much to be said in favor of such neighborhoods.⁶²

Shelby argues that the existence of what he terms the "dark ghetto" is "a sign that our social order is profoundly unjust" and that "[o]ur duty of justice calls for a response."⁶³ He develops a theory of corrective justice that establishes the contours of what meaningful government action should look like.⁶⁴ Shelby contends that corrective justice requires "altering the basic structure of a society so that it better approximates a well-ordered society . . . [and] mak[ing] amends to those burdened and harmed by unjust basic structures."⁶⁵ The first is "forward looking, oriented toward establishing a just society," and the latter is "backward looking, oriented toward settling unpaid moral debts."⁶⁶

To the argument that integration serves the interests of Black people by linking them to the power currently held by white people, Shelby responds that integration justified by the sharing of social capital between white and Black communities reinforces the social power that white people hold over Black people.⁶⁷ In this case, white individuals allow those they are in relationship with to "share in (not abolish) white privilege."⁶⁸ Ultimately, Shelby concludes that what is critical from a corrective justice perspective is that "individuals have the *option* to integrate (which is the demand for desegregation and social equality)."⁶⁹ Put simply, whether Black people choose to live in an integrated community, rather than a predominantly Black space, should not determine life opportunities or expectancies.

60. See TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSSENT, AND REFORM 49, 67 (2016).

61. *Id.* at 67.

62. *Id.* at 275.

63. *Id.* at 275–76.

64. See Tommie Shelby, *Racial Realities and Corrective Justice: A Reply to Charles Mills*, 1 CRITICAL PHIL. RACE 145, 145 (2013).

65. *Id.* at 154.

66. *Id.*

67. *Id.*

68. SHELBY, *supra* note 60, at 69–70; see also Timothy P. Glynn & Sarah E. Waldeck, *Penalizing Diversity: How School Rankings Mislead the Market*, 42 J. L. & EDUC. 417, 418–19 (2013) (discussing the experience of Black students in predominantly white schools).

69. SHELBY, *supra* note 60, at 72.

Shelby identifies principles that serve as a guide for how to best respond to the injustice of systemic racism.⁷⁰ Among them are the tenets that (1) “[p]rinciples of reform and revolution are standards that should guide efforts to transform an unjust institutional arrangement into a more just one,” and (2) “[p]rinciples of rectification should guide attempts to remedy or make amends for the injuries and losses victims have suffered as a result of ongoing or past injustice.”⁷¹ As Part II describes below, federal housing policies have invested in white people and white spaces, and thus have provided white families with agency in choosing where to live. The current racial reckoning requires that the federal government take corrective action that equalizes the investment in Black people and Black spaces.

Corrective housing policy must provide “agency”—defined simply as “the capacity, condition, or state of acting or of exerting power.”⁷² The idea of agency encapsulates ideas of power *and* the recognition that there are conditions outside of the individual—“capacity, condition or state”—that must exist in order for an individual or group to exercise power.⁷³ As such, agency implies there are factors other than *autonomy*—“the right not to be unduly coerced or manipulated by others”⁷⁴—which can be a component of agency or a modifier to agency, but does not include the positive element of the power to act.⁷⁵ Agency means that Black households are empowered to determine where and how to live.

Corrective federal investments aimed at agency are consistent with the transformative vision of those on the front lines:

[I]maging and creating a world free of anti-Blackness, where every Black person has the social, economic, and political power to thrive.

....

Every day, we recommit to healing ourselves and each other, and to co-creating alongside comrades, allies, and family a culture where each person feels seen, heard, and supported. We acknowledge, respect, and celebrate differences and commonalities. We work vigorously for freedom and justice for Black people and, by extension, all

70. *See id.* at 12.

71. *Id.* (emphasis omitted).

72. *Agency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/agency> (last visited Mar. 15, 2021).

73. *Id.*

74. Thomas E. Hill, Jr., *Autonomy and Agency*, 40 WM. & MARY L. REV. 847, 852 (1999); *see also* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 824 (1999) (“Many philosophers focus on an aspect of autonomy that they describe as self-definition. Self-definition may be described as determining how one conceives of oneself in terms of the goals one wants to achieve and the kind of person, with particular values and attributes, one considers oneself to be.”).

75. One of us has previously argued for “autonomy” in response to gentrification. *See* Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 323 (2013). In critiquing the effects of gentrification, Godsil argued that “[t]he current absence of true autonomy and choice for in-place residents of gentrifying neighborhoods threatens the legitimacy of any integration that may occur as a result of the influx of new residents.” *Id.* at 324.

people. We intentionally build and nurture a beloved community that is bonded together through a beautiful struggle that is restorative, not depleting.⁷⁶

Our argument is that the underpinnings of segregation must be addressed—and our hope is that what transpires is integration. But the more important hope is a vision of a country—and indeed a world—free from anti-Blackness with freedom and justice for Black people. As we will show in Part III, the policies this requires will, following the miner’s canary theory voiced by Lani Guinier and Gerald Torres, “improve conditions for everyone.”⁷⁷

II. INFLECTION POINTS FOR RACE IN FEDERAL HOUSING POLICY

The federal government has played a pivotal role in housing (or land distribution) since its inception—and below, we describe the key racial inflection points. The goal of this Part is to identify the key government decisions that established racial patterns in housing. This provides the foundation for identifying the corrective policies necessary to unravel those patterns.

The government’s early actions were largely focused on land distribution rather than the express provision of housing.⁷⁸ Until Congress enacted the Homestead Act, land held by the federal government was available only to those who could afford to purchase land—despite a movement for public land grants to American workers organized by laborers in the Eastern seaboard and other movements that developed following Thomas Jefferson’s death in 1826.⁷⁹ After decades of debate, which included ardent opposition by Southerners who feared the availability of land for formerly enslaved Black people, the movement for working-class-accessible land grants was successful when the Northern Congress passed the Homestead Act on the eve of the Civil War.⁸⁰ The Homestead Act allowed citizens to

76. See *BLACK LIVES MATTER...What We Believe*, UNIV. CENT. ARK., <https://uca.edu/training/files/2020/09/black-Lives-Matter-Handout.pdf> (last visited Mar. 15, 2021).

77. *The Miner’s Canary: Publisher’s Comments*, MAGERS & QUINN, https://www.magersandquinn.com/index.php?main_page=product_info&products_id=3099287&isbn_id=475002 (last visited Mar. 15, 2021) (“Like the canaries that alerted miners to a poisonous atmosphere, issues of race point to underlying problems in society that ultimately affect everyone.”). We also recognize that as two white law professors who have been in the position to choose to live in integrated communities, we are decidedly not in a position to advocate that our choices are the right choice for those who have experienced the harms of anti-Blackness. See generally Sarah E. Waldeck, *A Norms-Based Approach to Sustaining Integration*, 9 COLUM. J. RACE & L. 1 (2018) (discussing efforts by an Illinois village to foster integration).

78. ROY M. ROBBINS, *OUR LANDED HERITAGE. THE PUBLIC DOMAIN, 1776–1936*, at 3 (1942).

79. PAUL W. GATES, *FREE HOMESTEADS FOR ALL AMERICANS: THE HOMESTEAD ACT OF 1862*, at 4–5 (1962).

80. *Id.* at 6.

settle up to 160 acres of unclaimed land and receive ownership after living on and improving the land for five consecutive years.⁸¹

The first instance of advocacy for access to land intended largely for Black people occurred in October 1864 at the National Convention of Colored Citizens, where participants argued that the federal government should place planters' land in the public domain "making it available to all loyal Americans on easy terms."⁸² Attendees stated, "We claim . . . our fair share of the public domain, whether acquired by purchase, treaty, confiscation, or military conquest."⁸³ Historian Daryl Michael Scott argues that this was sophisticated advocacy on behalf of freedpeople, given that "the freedpeople were almost the only 'loyal Americans' in the South, so by invoking colorblind language, the elite took the moral high ground without risking the freedpeople's access to the land."⁸⁴

A. *The Significance of Land and Housing for Freedom*

The first inflection point occurred during Reconstruction,⁸⁵ immediately following the abolition of slavery, when the federal government failed to fulfill its promise of giving forty acres in land grants to those who were the formerly enslaved.⁸⁶ Land ownership was the avenue for Black people to achieve the "most cherished ambitions since emancipation: the ability to live outside of white control, provide for their families, and enjoy the private and public authority that came with owning land."⁸⁷ When the federal government failed to honor its promise, freedpeople migrated to states where the possibility of land ownership was greatest.⁸⁸ During this

81. The Homestead Act, 12 Stat. 392–93 (1862). The arguments for the Homestead Act ranged from Jeffersonian ideas about an agrarian society and freedom for the working class from the ills of cities to the argument that incentivizing homesteading would continue the expansion of white men rather than maintaining Native American land occupation. *See, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. (1860).

82. Daryl Michael Scott, *Their Faces were Black, but the Elites were Untrue*, 91 J. AFR. AM. HIST. 318, 320 (2006).

83. *Id.* (internal quotations omitted).

84. *Id.*

85. We note the shifting historiography of the Reconstruction era in the twenty-first century and the growing attention to "[B]lack transnationalism and the Atlantic world; to women, gender, and kinship; and historical methodologies of biography, family history, and microhistory." Kendra Field, *Introduction: African American Migration and Mobility After the Civil War, 1865–1915*, 102 J. AFR. AM. HIST. 421, 422 (2017). We also note the impossibility of addressing the distinctions historians have recognized between different southern states and cities within states. For example, post-war racial dynamics in New Orleans reflected the pre-war porousness of racial categories as "[B]lack leaders—including Afro-Creoles, other free blacks, and newly freed people—joined together to push back against racial categories and instead embraced a universal form of citizenship." Sian Zelbo, *E. J. Edmunds, School Integration, and White Supremacist Backlash in Reconstruction New Orleans*, 59 HIST. EDUC. Q. 379, 381 (2019).

86. *See* WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 1 (2020).

87. Story Matkin-Rawn, "*The Great Negro State of the Country*": *Arkansas's Reconstruction and the Other Great Migration*, 72 ARK. HIST. Q. 1, 12 (2013) (internal quotations omitted) (quoting Helen Hogue, *Protecting the "Perfect Africa": The Politics of Race and Property in Post-Reconstruction Arkansas* (2004) (Masters thesis, University of Wisconsin-Madison) (on file with University of Wisconsin-Madison)).

88. *See id.*

period, a Black middle and upper class emerged that sought to live in neighborhoods with those who shared their class status.⁸⁹ The upward mobility of Black people and their increased political power⁹⁰ suggested the possibility of a new egalitarian South.

However, this hope was short-lived and instead, white supremacy⁹¹ emerged in a new form as the white Southerners who rejected the end of racial hierarchy used violence by mobs and paramilitary groups—most notoriously,⁹² the Ku Klux Klan (the Klan)⁹³—against those who sought to exercise their newly won rights of economic, political, and social freedom.⁹⁴ The Klan created a sense of terror by engaging in hooded middle-of-the-night attacks on Black households and white people with whom they disagreed.⁹⁵

The racism of the Klan, which was driven underground by 1871,⁹⁶ was rooted in what became “a widespread conviction in the necessity for separating [B]lack and white [people], personally and politically.”⁹⁷ The Republican Party ceased its commitment to Reconstruction and by the early 1870s, Southern white people were undoing the Congressional Reconstruction process.⁹⁸ “Southern Redemption” was concentrated on reducing Black political involvement, reestablishing antebellum social relations, and the eventual establishment of Jim Crow laws.⁹⁹

The white backlash did not end Black Southerners’ efforts to obtain land. Indeed, Black Southerners responded to Jim Crow laws by focusing on “[B]lack community formation, including autonomous institutions,

89. See Willard B. Gatewood, *Aristocrats of Color: The Educated Black Elite of the Post-Reconstruction Era*, 29 J. BLACKS HIGHER EDUC. 112, 113 (2000).

90. In 1867, with the enactment of the Fifteenth Amendment, more than one million Black men registered to vote and 1,400 Black men held offices ranging from local school boards to state level offices to Congress and two Senators. See ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION*, at xiii-xv (1993).

91. For examples of strong literature on the changes and development of white supremacy from the late nineteenth into the twentieth centuries, see generally GRACE ELIZABETH HALE, *MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890–1940* (1998); MARK SCHULTZ, *THE RURAL FACE OF WHITE SUPREMACY: BEYOND JIM CROW* (2005).

92. Historians are still determining how the Reconstruction-era Klan functioned and the degree to which its notoriety exceeded its actual reach. See Bradley D. Proctor, “*The K. K. Alphabet*” *Secret Communication and Coordination of the Reconstruction-Era Ku Klux Klan in the Carolinas*, 8 J. CIV. WAR ERA 455, 458, 460 (2018).

93. For a description of the rise of the Klan, see Bradley David Proctor, *Whip, Pistol, and Hood: Ku Klux Klan Violence in the Carolinas During Reconstruction* (2013) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with Carolina Digital Repository, University of North Carolina).

94. See HANNAH ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 179–80* (Thadious M. Davis & Mary Kelley eds., 2009); KIDADA E. WILLIAMS, *THEY LEFT GREAT MARKS ON ME: AFRICAN AMERICAN TESTIMONIES OF RACIAL VIOLENCE FROM EMANCIPATION TO WORLD WAR I*, at 18–19, 23 (2012).

95. See Proctor, *supra* note 93, at 66.

96. *Id.* at 15.

97. *Id.* at 22.

98. See HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901*, at 125–28, 140 (2001).

99. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 4, 6–8 (1955).

property, and places they might call ‘their own.’”¹⁰⁰ In cities, as well as Black towns and settlements, Black people created a variety of places that constituted “‘a shared conception of place,’ however momentary, within and beyond the city.”¹⁰¹ In addition to these autonomous places, such as Black churches, people had contact with each other across racial lines in both social and economic settings.¹⁰² Even though the interactions between Black people and white people were deeply unequal as a result of the advent of Jim Crow laws during the post-Reconstruction era, residential living patterns were not yet wholly segregated.¹⁰³

In Northern cities, Black residents had a reasonable degree of interracial contact, living in neighborhoods generally interspersed with white residents.¹⁰⁴ Class was a more significant determinant of where people lived—with upper-class Black people having contact with upper-class white people that was “frequent, cordial, and often intimate.”¹⁰⁵ Black and white segregation levels were fairly similar to European immigrant groups—Germans and Irish—and American-born white people during this era.¹⁰⁶

B. Residential Segregation as a Tool of White Supremacy

The era of relatively integrated living among different groups began to change in the first decades of the twentieth century as the nation began a period of intense industrialization, increased immigration from Europe, and a larger migration of Black people from the South to the North.¹⁰⁷ The “new immigrant groups,” such as Jewish, Polish, Italian, and Czech groups, experienced more segregation from American-born white people than had Irish and German immigrants of earlier eras. The larger flow of Black people from the South also began to crowd into segregated neighborhoods.¹⁰⁸

During the first two decades of the twentieth century—in the context of World War I, a global pandemic, and soaring inflation—American-

100. Field, *supra* note 85, at 424.

101. *Id.*

102. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 17–18 (1993).

103. See Lisa D. Cook, Trevon D. Logan, & John M. Parman, *Rural Segregation and Racial Violence: Historical Effects of Spatial Racism*, 77 *AM. J. ECON. & SOCIO.* 821, 821 (2018). Historians are delving more deeply into the level of rural residential segregation with recent studies suggesting a higher degree of residential segregation. *Id.* at 835–36.

104. *Id.* at 833–35. Prior to 1880, Black residents could be found in most neighborhoods in northern cities, widely scattered and far from isolated from white people. See *id.*

105. Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 39, 43 (James H. Carr & Nandinee K. Kutty eds., 2008).

106. See Douglas Massey, *Ethnic Residential Segregation: A Theoretical Synthesis and Empirical Review*, 69 *SOCIO. & SOC. RSCH.* 315, 315–350 (1985).

107. See MASSEY & DENTON, *supra* note 102, at 26–27.

108. *Id.* at 27; see also Ewa Morawska, *The Sociology and Historiography of Immigration*, in *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS* 187, 188–89 (Virginia Yans-McLaughlin ed., 1990).

born, white Protestants were deeply antagonistic to anyone seen as “other.”¹⁰⁹ The nativism, including religious and anti-immigrant hostility, was widespread, but anti-Blackness was the most virulent.¹¹⁰ The 1915 film *Birth of a Nation* shows Black men as savages trying to attack white women.¹¹¹ In the film, the Klan was depicted as heroic and honorable and, after the film was released, the Klan reemerged as a national force.¹¹² All-encompassing derogatory racial stereotypes and various forms of media linking Black people to criminality and vice began to erase the perception of differences among Black people.¹¹³

Due to the ideology of white supremacy and the success of stereotyping Black people as dangerous, white people in Northern cities began responding violently to the presence of Black people in “white neighborhoods.”¹¹⁴ Riots erupted in large cities, such as New York in 1900 and Chicago in 1919, and smaller towns, such as Evansville, Indiana, in 1903 and East St. Louis, Illinois, in 1917, in which bands of white people roamed the streets, attacked Black people, and ransacked and burned Black people’s homes.¹¹⁵ According to Douglas Massey and Nancy Denton, Black people “caught *trespassing* in ‘white’ neighborhoods were beaten, shot, or lynched.”¹¹⁶ The reference to *white* neighborhoods and the notion that a Black person present in such a neighborhood was *trespassing* shows a racialization of space.¹¹⁷ A neighborhood comprised of white residents was a white neighborhood that was dangerous for Black people to enter, much less to seek to reside.¹¹⁸

In addition to unorganized white violence seeking to maintain neighborhood “whiteness,” institutional actors, such as real estate boards and neighborhood associations, also engaged in efforts to bolster and protect racial segregation. Real estate boards adopted a code of ethics stating “a [r]ealtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be

109. See Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217, 218–19, 221–23 (2017).

110. See, e.g., LEON F. LITWAK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1999).

111. See Richard Brody, *The Worst Thing About “Birth of a Nation” is how good it is*, NEW YORKER (Feb. 1, 2013), <https://www.newyorker.com/culture/richard-brody/the-worst-thing-about-birth-of-a-nation-is-how-good-it-is>.

112. See LINDA GORDON, *THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION* 97, 141 (2017).

113. MASSEY & DENTON, *supra* note 102, at 30. See generally BRIAN D. BEHNKEN & GREGORY D. SMITHERS, *RACISM IN AMERICAN POPULAR MEDIA: FROM AUNT JEMIMA TO THE FRITO BANDITO* (2015), for a general discussion on the history of racism in print, film, and animated media.

114. See MASSEY & DENTON, *supra* note 102, at 29–30; see also Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 68 n.10 (2011) (“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.”).

115. MASSEY & DENTON, *supra* note 102, at 30.

116. *Id.* (emphasis added).

117. See *id.* at 30–34.

118. *Id.* at 30.

detrimental to property values in that neighborhood.”¹¹⁹ This translated to real estate agents acting at the behest of white homeowners to keep certain neighborhoods white. Simultaneously, realtors sought to capitalize on the money they were able to make when they engaged in blockbusting (intentionally targeting blocks where they would trigger white people to sell *en masse* and then resell to Black residents at inflated prices due to the limited supply available to Black homebuyers).¹²⁰ Neighborhood associations implemented “restrictive covenants,” contractual agreements among property owners that precluded the sale, occupation, or lease of property to certain groups.¹²¹ Sometimes these covenants included religious groups, such as Jews or Catholics, but most commonly the focus was on those who were non-white.¹²²

C. Federal Government Incentives for White Spaces

The entrée of the federal government to the housing markets as part of the New Deal was the next major inflection point. In light of the housing crisis, federal actions were particularly consequential.¹²³ White homeowners’ efforts to maintain white neighborhoods were successful to varying degrees, but the most significant contribution to the creation and maintenance of white neighborhoods and white communities were the federal government New Deal programs.¹²⁴ Various scholars—including Kenneth Jackson,¹²⁵ Douglas Massey, Nancy Denton,¹²⁶ and Richard Rothstein—have documented the racist practices of the Home Owners Loan Corporation (HOLC) and the Federal Housing Authority (FHA) that were critical to the structural underpinnings of Black and white residential segregation.¹²⁷ Looking backward with the goal of identifying how federal housing policy promoted the creation of segregated white spaces, the New Deal and post-World War II policies are critical.

HOLC’s “redlining” mapping practices—“redlining” by coding “red” neighborhoods containing people of color—“federaliz[ed] long-standing discriminatory practices in the mainstream real estate

119. *Id.* at 37 (internal quotations omitted) (quoting an article from the National Association of Real Estate Brokers’ code of ethics which was adopted in 1924).

120. *Id.* at 37–38.

121. *Id.* at 35–36.

122. See Yi-Seng Kiang, *Judicial Enforcement of Restrictive Covenants in the United States*, 24 WASH. L. REV. & ST. BAR J. 1, 3–4 (1949) (“While it is true that the institution of racial covenants is directed against Negroes who have suffered most as the largest single minority race in the United States, the restrictions are equally applicable to other minorities as well.”); see generally *Shelley v. Kraemer*, 334 U.S. 1, 4–5, 13–14, 20 (1948) (holding that racially restrictive covenants as private contracts are not subject to constitutional review but that court enforcement constituted state action and the enforcement of restrictive covenants would constitute a violation of the Equal Protection Clause). Despite being held unenforceable by courts, the Federal Housing Authority recommended the use of racially restrictive covenants until 1950. Massey, *supra* note 105, at 72.

123. See generally ROTHSTEIN, *supra* note 2.

124. See *id.* at 4–5.

125. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198–203, 207–09* (1985).

126. See MASSEY & DENTON, *supra* note 102, at 51–55.

127. See ROTHSTEIN, *supra* note 2.

industry and appl[ied] a veneer of social scientific methodology to property valuation.”¹²⁸ In addition, the actual lending was limited to Black homeowners who lived in Black neighborhoods.¹²⁹ Thus, the lending was consistent with racial segregation and disinvestment in Black neighborhoods given that HOLC’s mapping practices signaled that the presence of Black people depreciated home values.¹³⁰ Both government and private lenders refused to insure mortgages in and near redlined neighborhoods.¹³¹

The HOLC maps and the FHA’s refusal to insure loans in racially-mixed neighborhoods or white neighborhoods that might soon integrate created a cascade effect that continues today.¹³² In community after community, FHA-subsidized-builders were mass-producing entire subdivisions for white people—with the FHA’s loan requirements preventing the homes from being sold to Black people.¹³³ The FHA also refused to guarantee loans for Black people or white individuals who might lease to Black people.¹³⁴ Overall, the “U.S. Commission on Civil Rights . . . reported that the FHA insured mortgages on more than 2.7 million housing units between 1935 and 1950, financing 30 percent of all new residential construction. Black borrowers occupied only fifty thousand units—or about 2 percent of the total.”¹³⁵

Federal actions in transportation complemented these federal housing policies. The placement of interstate highways controlled where Black people lived.¹³⁶ Although substantial federal highway construction would not begin until the mid-1950s, in 1938 the federal government discussed the placement of interstate highways as a potential tool to eliminate Black communities, which a member of President Roosevelt’s cabinet described as “unsightly and unsanitary districts.”¹³⁷ When construction of interstate highways began in earnest two decades later, the federal government worked in concert with state authorities to demolish Black neighborhoods to make way for roads.¹³⁸ In Alabama, interstate highways were placed so

128. Todd M. Michney & LaDale Winling, *New Perspectives on New Deal Housing Policy: Explicating and Mapping HOLC Loans to African Americans*, 46 J. URB. HIST. 150, 151 (2019).

129. ROTHSTEIN, *supra* note 2, at 64–65.

130. *See id.* at 64.

131. *See Redlining in New Deal America*, MAPPING INEQUALITY, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58&text=intro> (last visited Mar. 15, 2021). While the effect of redlining over time has been most severe for the Black community, HOLC’s downgrading of neighborhoods based on social identity was not limited to Black people. *Id.*

132. *See* 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, 219 (2005).

133. ROTHSTEIN, *supra* note 2, at 116–17.

134. *Id.* at 118.

135. Fred Carroll, *The Racial Politics of Place: Jim Crow, the New Deal, and Suburban Housing on the Virginia Peninsula*, 40 J. URB. HIST. 514, 519 (2013).

136. *See* Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1281 (2020).

137. ROTHSTEIN, *supra* note 2, at 127 (quoting then Secretary of Agriculture Henry Wallace, who later served as Roosevelt’s Vice President until he was replaced by Harry Truman).

138. *Id.* at 128–31 (providing examples of Black communities that were destroyed by the placement of highways, including communities in Detroit, Miami, Camden, and Los Angeles).

as to remove Black voters from Montgomery and disrupt civil rights activities.¹³⁹

When financing rates for new homes in the suburbs made purchasing in the suburbs more economically desirable than renting in the city, transportation spending was transferred from public transportation that allowed efficient travel within cities to roadways and highways that favored the automobile.¹⁴⁰ As jobs began to move outward to the suburbs and were accessible only to those who owned cars, one contemporary writer observed that the authorization and funding of the multi-billion dollar system of metropolitan area highways had exerted a major influence on metropolitan dispersal “while restricting both the range of opportunities and the quality of life for [B]lacks and other minority groups . . . threaten[ing] to perpetuate the burdens and disadvantages which a long history of racial discrimination has produced.”¹⁴¹

The federal government also played a significant role in instantiating particular zoning patterns and encouraging restrictive covenants in newly growing suburbs.¹⁴² Traditional Euclidean zoning was favored to protect against “adverse influences”¹⁴³—which were described as “the infiltration of business and industrial uses, lower class occupancy, and inharmonious racial groups.”¹⁴⁴ The FHA manual explicitly stated: “A change in social or racial occupancy generally contributes to instability and a decline in values.”¹⁴⁵ The manual also encouraged restrictive covenants to supplement zoning ordinances.¹⁴⁶ Specifically, the FHA recommended that covenants should include a provision that requires the “[p]rohibition of the occupancy of properties except by the race for which they are intended.”¹⁴⁷

Post-World War II programs contributed to the inequality in federal investment. The much lauded GI Bill—formally the Servicemen’s Readjustment Act—provided a range of benefits, including guaranteed mortgages, to veterans of World War II.¹⁴⁸ However, “the law was deliberately designed to accommodate Jim Crow.”¹⁴⁹ As with many New Deal and post-World War II programs, the decision to leave implementation to the states and not to include anti-discrimination provisions meant that benefits

139. See Rebecca Retzlaff, *The Montgomery Bus Boycott and the Racial Basis for Interstate Highways and Urban Renewal*, J. URB. HIST., May 5, 2020, at 1, 20–21.

140. See ROTHSTEIN, *supra* note 2, at 170, 188–89.

141. Yale Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 64 (1973).

142. See generally U.S. FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT (1938).

143. *Id.* para. 933.

144. *Id.* para. 935.

145. *Id.* para. 937.

146. *Id.* para. 980(3).

147. *Id.* para. 980(3)(g).

148. *Education and Training: History and Timeline*, U.S. DEPT. OF VETERANS AFFS., <https://www.benefits.va.gov/gibill/history.asp> (last updated Nov. 21, 2013).

149. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 114 (2005).

ostensibly available to all veterans were denied to Black veterans.¹⁵⁰ For example, just 2 of the 3,000 mortgages that the Veterans Administration guaranteed in the state of Mississippi went to Black veterans, though 50% of the state's population was Black.¹⁵¹

The federal government's actions had a catalytic effect by influencing and legitimizing private lending actions.¹⁵² The private lending discrimination continued for decades with knowledge by the federal government. As Richard Rothstein has noted, the Federal Deposit Insurance Corporation (FDIC) Chairman Earl Cocks asserted in the early 1960s "that it was appropriate for banks under his supervision to deny loans to African Americans because white homeowners' property values might fall if they had [B]lack neighbors."¹⁵³

While the loan applications of Black families were being denied, lenders were encouraging investment in suburban communities that relied upon racialized zoning patterns and restrictive covenants to maintain their whiteness.¹⁵⁴ From a corrective justice perspective, the de jure racism the federal government employed to create exclusively white suburban communities went far beyond providing white individuals opportunities or choices of where to reside. Instead, the federal government empowered white residents to exclude those who were not white.¹⁵⁵

In sum, the power of the federal government, through its funding and express programmatic requirements, created conditions in which white families were able to purchase homes in the post-World War II era. The housing available to white people provided the basis for familial wealth—beyond shelter, owning a home permits the owner to leverage capital to purchase investment properties, start a business, pay for a child to go to college, or to have a source of income upon retirement.¹⁵⁶ Yet the agency

150. See Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, 53 J. BLACKS HIGHER EDUC. 92, 95 (2006).

151. *Id.* at 96.

152. See JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 13–21 (2012).

153. Richard Rothstein, *A Comment on Bank of America/Countrywide's Discriminatory Mortgage Lending and its Implications for Racial Segregation* 6 (Econ. Pol'y Inst., Briefing Paper No. 335, 2012), <https://www.epi.org/publication/bp335-boa-countrywide-discriminatory-lending/>. The FDIC was created by the Banking Act of 1933. *Id.*

154. See Steil, *supra* note 114, at 67–74.

155. See *id.*

156. *Id.* at 70–73. As Steil explains, "[t]his 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." *Id.* at 71. The median household net worth for white households in 2007 was \$170,000 compared with \$17,000 for Black households. Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach, & Kevin B. Moore, *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 FED. RES. BULL. A1, A11, A14 (2009); 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), http://www.levy-institute.org/pubs/wp_502.pdf (estimating the 2004 net worth of Latinx 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 white people and nonwhite people. See Thomas M.

conferred was not to individual people who happened to be white; it was to those white people as a group who wanted to maintain racial exclusivity where they lived.¹⁵⁷ No one—of any race or ethnicity—benefited from federal government funding if they sought to live in integrated communities. Racial integration was penalized.

D. Case Study: Federally Subsidized White Flight in St. Louis

Professor Colin Gordon's Geographic Information System (GIS) maps of the St. Louis metropolitan area demonstrate the continued effects of federal incentives for white spaces. Between 1940 and 1950, white people began to move from the city of St. Louis to its suburbs; from 1950 and 1970, almost 60% of white families moved out of the city.¹⁵⁸ White families kept pushing farther out, and by 1980, the center of the white population had reached far into western St. Louis County.¹⁵⁹ In contrast, between 1940 and 1950, Black families—whose options were constrained because of the dynamics just described—settled in a few city tracts, old industrial suburbs, and a few “scattered outposts” in northern St. Louis County.¹⁶⁰ During the 1950s, certain areas of the city of St. Louis lost their Black population as Black communities were razed in the name of “urban renewal.”¹⁶¹ Black families settled into census tracts that white people abandoned.¹⁶² Then, in the 1970s and 1980s, Black families began moving into the inner-ring suburbs that white families were leaving behind as they pushed even farther out from the city of St. Louis.¹⁶³

The maps below illustrate how white people in St. Louis—similar to white people in metropolitan areas across the country—exercised their racial agency. White dots represent white population growth and red dots represent white population decline; black dots represent Black population growth and yellow dots represent Black population decline.

Shapiro, *Race, Homeownership and Wealth*, 20 J. L. & POL'Y 53, 62 (2006); see also George S. Masnick, *Home Ownership Trends and Racial Inequality in the United States in the 20th Century* 19 (Joint Ctr. Hous. Stud., Working Paper No. 01-4, 2001), http://www.jchs.harvard.edu/publications/homeownership/masnick_w01-4.pdf. In 2008, 75% of white households owned their own homes, whereas less than 50% of African American and Latino households did. See U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007, at 46 (2008).

157. See ROTHSTEIN, *supra* note 2, at 132–37. Because where we live is so frequently linked to where our children go to school, this agency also extended into educational racial segregation. *Id.*

158. See COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 22–25 (2008).

159. See *id.* (discussing how “[p]eople [w]ho [c]an, [m]ove [a]way”).

160. *Id.* at 25.

161. *Id.*

162. *Id.*

163. *Id.*

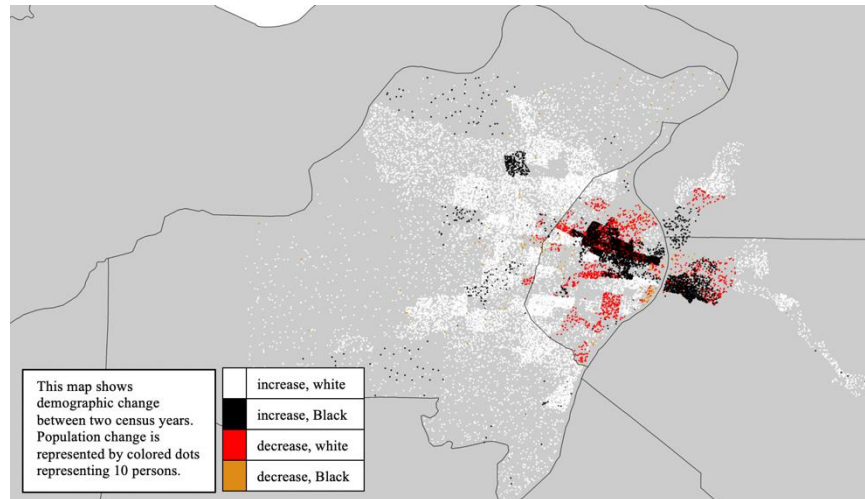


FIGURE 1. 1940–1950—*St. Louis Metropolitan Area*¹⁶⁴

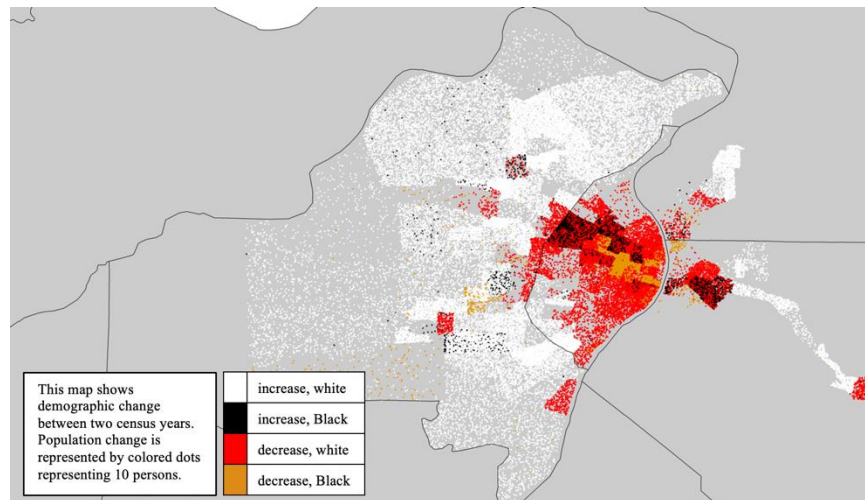


FIGURE 2. 1950–1960—*St. Louis Metropolitan Area*¹⁶⁵

164. *St. Louis and the American City: White Flight*, MAPPING DECLINE, <http://mappingdecline.lib.uiowa.edu/map/> (last visited Mar. 18, 2021) (showing demographic change in St. Louis between census years 1940 and 1950).

165. *Id.* (showing demographic change in St. Louis between census years 1950 and 1960).

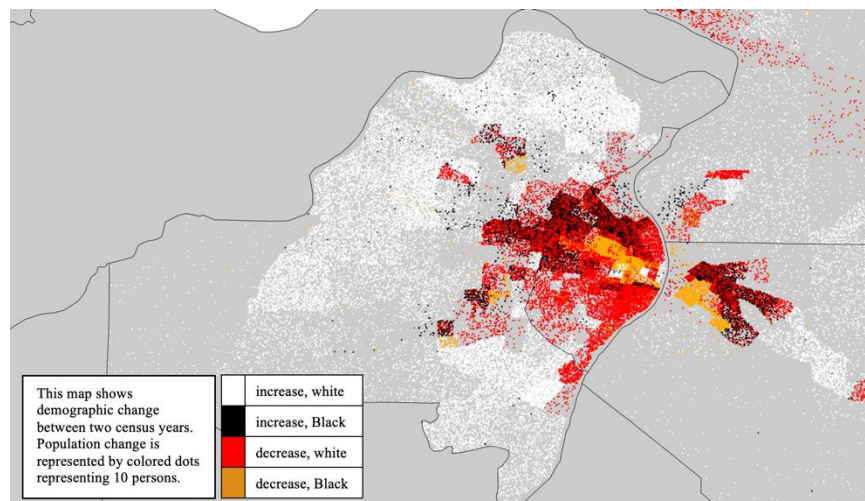


FIGURE 3. 1960–1970—*St. Louis Metropolitan Area*¹⁶⁶

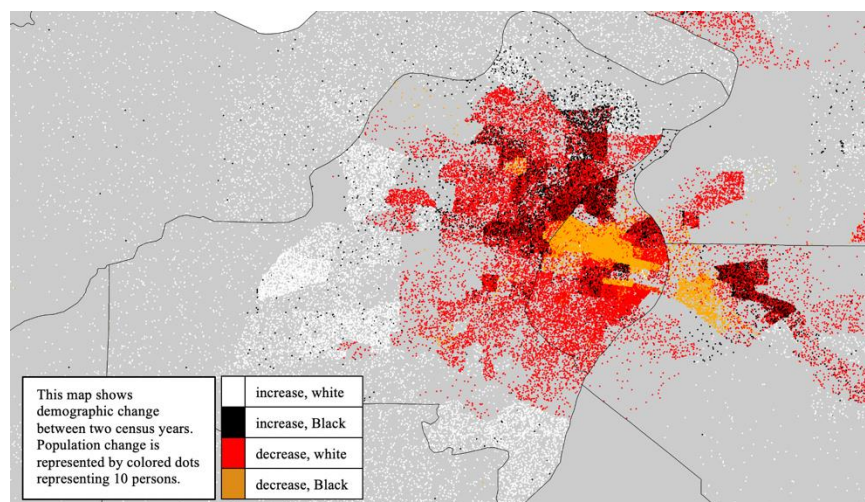


FIGURE 4. 1970–1980—*St. Louis Metropolitan Area*¹⁶⁷

Essentially, white and red dots represent how white people utilized the benefits of the investment in their homes and the agency conferred upon them, while black and yellow dots represent the effects of

166. *Id.* (showing demographic change in St. Louis between census years 1960 and 1970).

167. *Id.* (showing demographic change in St. Louis between census years 1970 and 1980).

disinvestment. From 1940 to 1980, white people, with the power of the federal government behind them, ended up in very different places than Black people without the same tailwinds.¹⁶⁸

Decreasing levels of segregation in metropolitan neighborhoods was one of the headline-grabbing findings from the 2010 census.¹⁶⁹ Metropolitan areas are comprised not just of central cities and their individual neighborhoods, but of all the cities' suburbs and surrounding places.¹⁷⁰ Between those places, segregation is increasing.¹⁷¹ Put differently, when demographers “zoom” in on city neighborhoods, they see decreasing segregation. When they zoom out to consider a city and its surrounding areas, however, they see increasing segregation.

This increasing segregation largely resulted from the “new white flight.”¹⁷² In the new white flight, “suburban whites are . . . distancing themselves from other racial groups across America’s diversifying suburban places.”¹⁷³ In other words, as people of color move into suburbs, white people move out. This movement by white individuals from diverse places “to predominantly white places is far greater than what would be expected by chance alone.”¹⁷⁴ In the new white flight, white people are moving from inner to outer suburbs and to counties on the exurban fringe.¹⁷⁵ From 2000 to 2010, white populations in the outer exurban areas of large metropolitan areas increased “by a whopping 12[%]”.¹⁷⁶ While some moved to areas far from city centers in search of affordable housing,¹⁷⁷ some white migration to outer suburbs and exurbs has created “racially concentrated areas of affluence” that may warrant as much regulatory attention as the U.S.

168. See *supra* FIGURES 1, 2, 3, & 4.

169. Sam Roberts, *Segregation Curtailed in U.S. Cities, Study Finds*, N.Y. TIMES (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/us/Segregation-Curtailed-in-US-Cities-Study-Finds.html>; see also Carol Morello & Dan Keating, *Census: The New U.S. Neighborhood Defined by Diversity as All-White Enclaves Vanish*, WASH. POST (Oct. 29, 2011), https://www.washingtonpost.com/local/census-the-new-us-neighborhood-defined-by-diversity-as-all-white-enclaves-vanish/2011/09/14/g1QA5QAuSM_story.html.

170. See COMM. ON IMPROVING THE FUTURE OF U.S. CITIES THROUGH IMPROVED METRO. AREA GOVERNANCE, NAT’L RSCH. COUNCIL, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 22–24 (Alan Altshuler et al. eds., 1999).

171. See Daniel T. Lichter, Domenico Parisi, & Michael C. Taquino, *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, 80 AM. SOCIO. R. 843, 850–51 (2015); Daniel T. Lichter, Domenico Parisi, & Michael C. Taquino, *Together but Apart: Do US Whites Live in Racially Diverse Cities and Neighborhoods?*, 43 POPULATION & DEV. R. 229, 229–30 (2017).

172. Domenico Parisi, Daniel T. Lichter, & Michael C. Taquino, *Remaking Metropolitan America? Residential Mobility and Racial Integration in the Suburbs*, SOCIOUS: SOCIO. RSCH. FOR DYNAMIC WORLD, June 18, 2019, at 1, 14, 16 (2019).

173. *Id.* at 16.

174. *Id.* at 8.

175. WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 140–41 (2015).

176. *Id.* at 141.

177. Jenny Schuetz, *Cost, Crowding, or Commuting? Housing Stress on the Middle Class*, BROOKINGS (May 7, 2019), <https://www.brookings.edu/research/cost-crowding-or-commuting-housing-stress-on-the-middle-class/>; see also Laura Kusisto, *A Decade After the Housing Bust, the Exurbs are Back*, WALL ST. J. (Mar. 26, 2019, 10:32 AM), <https://www.wsj.com/articles/a-decade-after-the-housing-bust-the-exurbs-are-back-11553610771>.

Department of Housing and Urban Development (HUD) has given to racially or ethnically concentrated areas of poverty.¹⁷⁸

Professor Gordon's GSI maps also illustrate the new white flight. This next series of maps reflects census data from the 1990, 2000, and 2010 censuses.

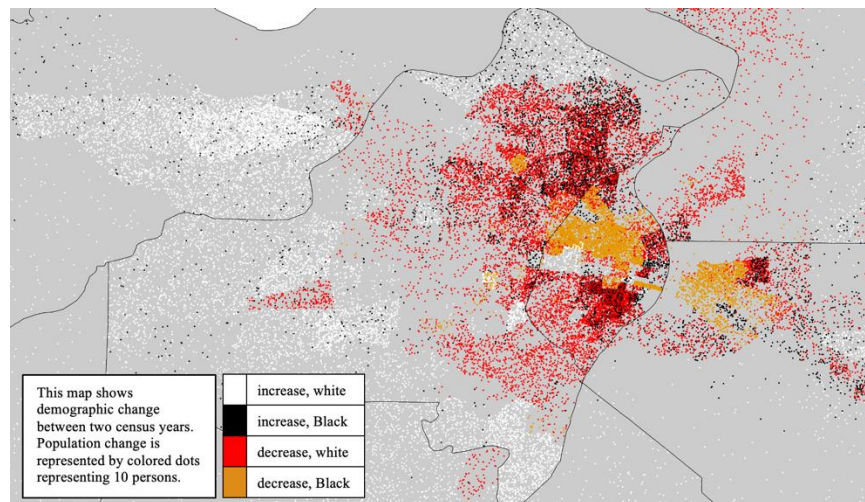


FIGURE 5. 1980–1990—*St. Louis Metropolitan Area*¹⁷⁹

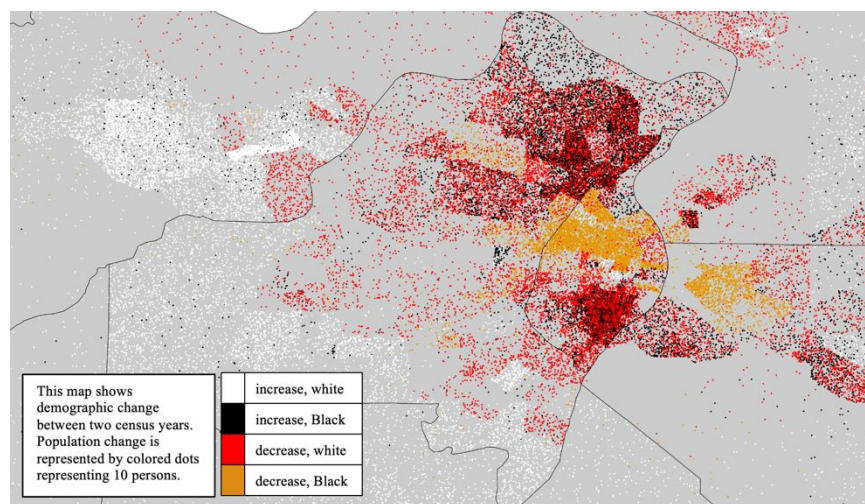


FIGURE 6. 1990–2000—*St. Louis Metropolitan Area*¹⁸⁰

178. Edward G. Goetz, Anthony Damiano, & Rashad A. Williams, *Racially Concentrated Areas of Affluence: A Preliminary Investigation*, 21 CITYSCAPE 99, 99–100 (2019).

179. *St. Louis and the American City: White Flight*, *supra* note 164 (showing demographic change in St. Louis between census years 1980 and 1990).

180. *Id.* (showing demographic change in St. Louis between census years 1990 and 2000).

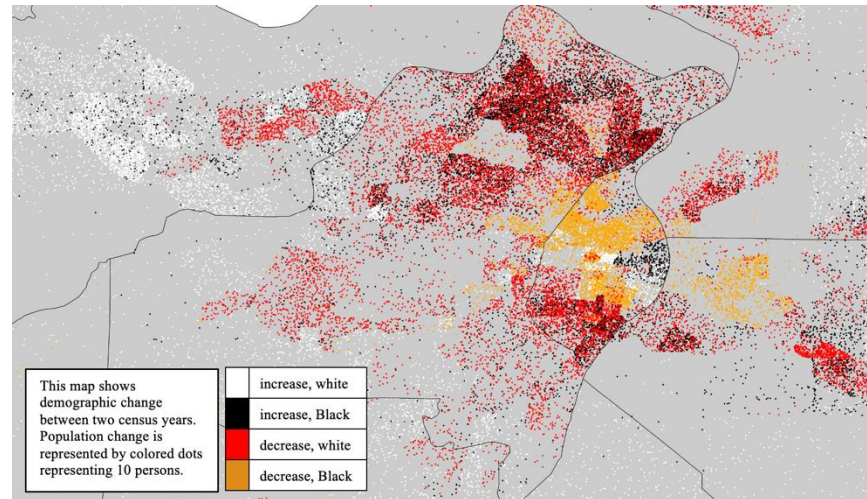


FIGURE 7. 2000–2010—*St. Louis Metropolitan Area*¹⁸¹

These maps show how, over the course of thirty years, white population growth pushed further and further out to the distant edges of the St. Louis metropolitan area. White population loss (red dots) was also acute in places where the Black population grew (black dots).¹⁸²

While the pattern of new white flight is apparent, the reasons are not. Researchers disagree about the extent to which white housing preferences are shaped by outright racial prejudice; the concern that racial integration leads to declines in neighborhood and school quality;¹⁸³ social network effects that ensure white people looking to move will have more information about white places than predominantly minority or integrated ones;¹⁸⁴ the preference among “all races to live [with] a substantial number of coethnic neighbors”;¹⁸⁵ or—with respect to the exurban locations far from the city center—the straightforward desire to live in smaller communities in closer proximity to natural resources.¹⁸⁶ But regardless of *why*, one point is certain: white people have continued to maintain white spaces in ways that separate them from Black people.

181. *Id.* (showing demographic change in St. Louis between census years 2000 and 2010).

182. *See supra* FIGURES 5, 6, & 7.

183. *See* Samuel H. Kye, *The Persistence of White Flight in Middle-Class Suburbia*, 72 SOC. SCI. RSCH. 38, 38 (2018) (compiling data summarizing racial threat and racial proxy theories).

184. *See* MARIA KRYSAN & KYLE CROWDER, CYCLES OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION 66–84 (2017); *see also* Rachel Garshick Kleit, *The Role of Neighborhood Social Networks in Scattered-Site Public Housing Residents' Search for Jobs*, 12 HOUS. POL'Y DEBATE 541, 541–42 (2001).

185. Christopher S. Fowler, Barrett A. Lee, & Stephen A. Matthews, *The Contributions of Places to Metropolitan Ethnoracial Diversity and Segregation: Decomposing Change Across Space and Time*, 53 DEMOGRAPHY 1955, 1960 (2016).

186. FREY, *supra* note 175, at 140–41.

III. CORRECTIVE INVESTMENTS

This Part proposes new programs that will correct for the federal government's historical investment in whiteness. These proposals include investments in homeownership, affordable rental housing, and mass transit. The proposals are massive in size and scope. So, however, were the New Deal and post-World War II programs that provided white families with the power to choose where to live.

A. Agency in Homeownership

Direct housing investment will necessarily be part of the post-COVID response to address the looming housing crisis. First and foremost, going forward the federal government must address the exclusion of people of color from massive New Deal investments and the perpetuation of racially exclusive white communities. Because Black neighborhoods were designated as “at risk” solely by the race of their residents, home equity in Black neighborhoods is far lower than otherwise identical homes in white neighborhoods.¹⁸⁷

The designation of communities of color as “lesser” has had cascading negative consequences. Even after the Fair Housing Act in 1968 formally prohibited discrimination, private investors continued to discriminate against Black lenders in the housing industry by applying different lending standards to predominantly Black neighborhoods in what was then termed “reverse redlining.”¹⁸⁸ Reverse redlining followed the original redlining practice of “targeting residents ‘within certain geographic boundaries, often based on income, race, or ethnicity,’”¹⁸⁹ but rather than denying loans, this version targeted borrowers with exceedingly harsh “subprime” loan terms.¹⁹⁰ People who borrowed under subprime lending terms were far more likely to default than those borrowing under conventional prime loans, leading to losses of both homes and wealth in communities of color.¹⁹¹ The predatory lending practices that constitute reverse redlining were particularly destructive because often the borrowers were eligible for conventional loans: “Instead of denying conventional loans to qualified minority borrowers, lenders disproportionately marketed exploitative loans to these borrowers.”¹⁹²

187. See Sheryll Cashin, *Race, Class, and Real Estate*, 15 RACE POVERTY & ENVIRONMENT 56, 57 (2008).

188. See 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, 167–68 (2009).

189. See Asma Husain, *Reverse Redlining and the Destruction of Minority Wealth*, MICH. J. RACE & L. (Nov. 2, 2016), <https://mjrl.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth/> (quoting Brescia, *supra* note 188, at 167 n.7).

190. See Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 950, 990 (2008).

191. *Id.* at 961, 963–64.

192. Rothstein, *supra* note 153, at 2.

Despite the history of racism and contrary to common stereotypes, median incomes for Black households have been rising with highs of \$74,978 in the Washington, D.C. metropolitan area, \$59,083 in the San Francisco, California metropolitan area, \$54,456 in the Atlanta, Georgia metropolitan area, and \$41,511 nationwide.¹⁹³ While COVID-19 may well affect these numbers, a significant majority of Black people do *not* fall under the poverty line (the poverty rate nationally for Black people was 21.2%).¹⁹⁴ However, the racial wealth gap is significant¹⁹⁵ and so even when households have an income that would support a home purchase, finding funds for the down payment remains challenging.

Thus, the most immediate corrective for the systemic effects of federal racialized investment is a program offering down payment assistance.¹⁹⁶ Scholars and politicians have suggested programs that would offer up to \$100 billion for down payment assistance.¹⁹⁷

The challenge will be determining to whom such a program—and other sources of federal investment—should be made available. Because anti-Black racism was arguably the primary driver of the white racial agency supported by New Deal federal programs, designating this as a program with a preference for Black people would be consistent with the corrective justice goals we have identified. We obviously recognize the constitutional difficulty of such a program in light of current doctrine¹⁹⁸ and note that residents of other ethnicities and races were also affected by redlining practices.¹⁹⁹

193. Alan Berube, *Black Household Income is Rising Across the United States*, BROOKINGS (Oct. 3, 2019), <https://www.brookings.edu/blog/the-avenue/2019/10/03/black-household-income-is-rising-across-the-united-states/>.

194. *Poverty Rate by Race/Ethnicity: 2019*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited Mar. 18, 2021).

195. See Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, Joanne W. Hsu, & Julia Hewitt, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RESRV. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm#:~:text=New%20data%20from%20the%202019,family%20and%20five%20times%20the> (“In the 2019 survey, White families have the highest level of both median and mean family wealth: \$188,200 and \$983,400, respectively. . . . Black and Hispanic families have considerably less wealth than White families. Black families’ median and mean wealth is less than 15 percent that of White families, at \$24,100 and \$142,500, respectively. Hispanic families’ median and mean wealth is \$36,100 and \$165,500, respectively.”).

196. Professors Mehrsa Baradaran and Darrick Hamilton have praised the proposal advanced by Elizabeth Warren under which first-time homebuyers who live in a formerly redlined neighborhoods or communities that were segregated by law and are still currently low-income would be entitled to a substantial grant that they could use for a down payment on a home anywhere in the country. Mehrsa Baradaran & Darrick Hamilton, *Elizabeth Warren’s New Housing Proposal is Actually a Brilliant Plan to Close the Racial Wealth Gap*, SLATE (Oct. 26, 2018, 2:12 PM), <https://slate.com/business/2018/10/elizabeth-warren-housing-plan-racial-wealth-gap.html>.

197. Andre M. Perry & David Harshbarger, *America’s Formerly Redlined Neighborhoods have Changed, and so must Solutions to Rectify them*, BROOKINGS (Oct. 14, 2019), <https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/>.

198. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989) (allowing claims of past discrimination to serve as the basis for racial quotas would actually subvert constitutional values).

199. See *Redlining in New Deal America*, *supra* note 131.

Another obvious direct corrective would be to make the program available to those who lived in, or are descended from, those who lived in redlined neighborhoods during the requisite historical periods.²⁰⁰ However, this is administratively difficult and excludes those who may not have lived in redlined neighborhoods but were denied access to FHA housing built exclusively for white people.

More administratively feasible, and a possibility often suggested, is to focus on those who currently live in neighborhoods that were redlined in the original HOLC maps. This has the goal of redressing redlining's harms to communities. But using the HOLC redlined neighborhoods as the limiting principle has two significant problems. First, current residents in redlined neighborhoods that have been gentrified or are gentrifying may have already benefitted from past federal investments, and now have moved to neighborhoods where homes were undervalued because of redlining.²⁰¹ The response to this concern is often to limit the assistance to those who have lived in the neighborhood for a certain period of time—a standard range of three to ten years—and who are low income or live in rental or government housing.²⁰²

As Brookings scholars Andre Perry and David Harshberger have noted, however, limiting such programs to people currently living in formerly redlined neighborhoods excludes an enormous number of people who would seem to be entitled to benefit.²⁰³ According to the University of Richmond's Mapping Inequality project, which has digitized scans of the more than 200 HOLC redlining maps, "approximately 11 million Americans (10,852,727) live in once-redlined areas."²⁰⁴ The concern is that this population contains only 8% of the Black residents in the United States, and of the people living in the formerly redlined areas, only 28% are Black.²⁰⁵ While it is true that people of other races and ethnicities lived in the areas that were redlined during the relevant time period, for this program to be so underinclusive of Black aspiring homebuyers is inconsistent with the intention of rectifying a historical wrong.

The way to most effectively address the harm from past discriminatory practices is to use the tools that resulted in recent redlining and reverse redlining. A series of lawsuits have shown that many private banks continued either to refuse to loan or to engage in predatory lending in predominantly Black and Hispanic neighborhoods.²⁰⁶ Establishing a fund for those

200. See Perry & Harshberger, *supra* note 197.

201. See Godsil, *supra* note 75, at 332–33.

202. See Perry & Harshberger, *supra* note 197.

203. *Id.*

204. *Id.* (relying on data from the 2017 Census Bureau's American Community Survey).

205. *Id.*

206. Brentin Mock, *Redlining is Alive and Well—and Evolving*, BLOOMBERG CITY LAB (Sept. 28, 2015, 1:43 PM), <https://www.bloomberg.com/news/articles/2015-09-28/eight-recent-cases-that>

who live in neighborhoods at greatest risk of homebuyers either being denied access to homeowner loans or being offered loans with harsh terms would be directly responsive to the way that certain neighborhoods have been “racialized.”²⁰⁷

This strategy would be consistent with the data that supports the proposition that certain “spaces” have been racialized and as a result, individuals occupying those spaces have been subjected to unfair loan practices.²⁰⁸ According to one study, for example, “[b]orrowers living in zip codes where more than half of residents were minority had a 35 percent greater chance of having mortgages with prepayment penalties than borrowers with otherwise similar known economic characteristics living in zip codes where less than 10 percent of the residents were minority.”²⁰⁹ The Justice Department under President Obama concluded that “[t]he more segregated a community of color is, the more likely it is that homeowners will face foreclosure because the lenders who peddled the most toxic loans targeted those communities.”²¹⁰

Some may argue that victims of reverse redlining have already been made whole—or could have been—by the lawsuits brought either by them or on their behalf. However, as Richard Rothstein argued in his comment on the settlement against Countrywide:

The legal settlement’s \$335 million in compensation to the victims of Countrywide’s discriminatory subprime lending—an average of less than \$2,000 apiece—will not return victims to their homes and will not reverse the spread of slumlike conditions to middle-class African American and Hispanic neighborhoods facing foreclosure epidemics.

show-redlining-is-still-alive-and-evolving. For example, according to the Justice Department, Hudson City Savings Bank which serviced one of the largest housing markets in the nation, covering mortgages throughout New Jersey, New York, and even Philadelphia, avoided doing mortgage business with Black and Latino people. Similarly, “New York Attorney General Eric Schneiderman settled with Evans Bank for \$825,000 after discovering that the bank erased [B]lack neighborhoods from maps used for determining mortgage lending.” *Id.* “Los Angeles filed lawsuits against four banks last year—J. P. Morgan, Bank of America, Wells Fargo, and Citigroup—accusing them of both traditional redlining (denying loans to people of color), and also the ‘reverse redlining’ of making predatory loans rain on black and brown communities.” *Id.*

207. See Boddie, *supra* note 17, at 446 (“The premise of racial territoriality is that spaces are claimed or defended because of their conscious or unconscious racial associations. These associations lead space to become racialized—it is treated as ‘belonging’ to certain racial groups and not to others.”).

208. “In census tracts where the population was at least 80 [percent] minority, 46.6 [percent had subprime] loans, compared to 21.7 [percent]” in tracts where the population was less than 10 percent minority. Gregory D Squires, Derek S. Hyra, & Robert N Renner, *Segregation and the Subprime Lending Crisis* 3 (Econ. Pol’y Inst., Briefing Paper No. 244, 2009). For metropolitan areas as a whole, borrowers in more-segregated metropolitan areas were more likely to get subprime loans than borrowers in less-segregated metropolitan areas. *Id.*

209. Rothstein, *supra* note 153, at 4.

210. *Id.* (internal quotations omitted).

Indeed, many of the victims who lost their homes may now be impossible to locate and will receive nothing.²¹¹

And in the wake of the subprime mortgage crisis, urban planning scholar Justin Steil warns that “[c]hanges in lending since the foreclosure crisis raise the possibility that African-Americans and Latinos will once again be marginalized from mortgage markets, returning stratification to the old days of opportunity hoarding through redlining and other forms of discrimination.”²¹²

The combination of a down payment assistance program and the availability of conventional loan terms are critical to ensuring Black households have the agency to purchase homes with the attendant wealth and other benefits homeownership offers. As Dorothy A. Brown and other scholars have shown, homeownership has not had the same economic advantages for Black families as it has had for white families.²¹³ In order for that to change, the structures that have exclusively supported white communities must be dismantled.

B. Agency for Renters to Gain Access to Stable Quality Housing

Even with a well-designed program addressing historical inequity in homeownership for Black households, some percentage of this group may require access to affordable rental units. Currently, low-income Black renters are frequently whipsawed by a combination of high housing costs and poor-quality housing.²¹⁴ COVID-19 has only exacerbated the plight of renters by creating a degree of housing precarity not seen since the Great Depression.²¹⁵ Given these challenges, it is critical that renters have access to stable, affordable housing in communities with good schools, open space, healthy food options, and clean air.

211. *Id.* at 7 (citation omitted). In contrast to the inadequate amounts to victims of predatory lending, far larger amounts are being awarded to victims of subprime lending. “Wells Fargo will pay more than \$2 billion for allegedly lying about the quality of subprime and Alt-A mortgages that backed residential mortgage-backed securities in the run-up to the housing crisis.” Ben Lane, *Wells Fargo to Pay \$2 Billion for Allegedly Lying about Subprime Mortgages*, HOUSINGWIRE (Aug. 1, 2018, 1:59 PM), <https://www.housingwire.com/articles/46335-wells-fargo-to-pay-2-billion-for-allegedly-lying-about-subprime-mortgages/>.

212. Justin P. Steil, Len Albright, Jacob S. Rugh, & Douglass S. Massey, *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759, 773 (2018) (citations omitted).

213. See Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 332–33 (2009) (exploring how homeownership has never been a good financial investment for either the vast majority of Black homeowners or for low-income homeowners). Brown argues that government subsidies for homeownership, especially federal tax subsidies, create winners and losers generally along race and class lines. *Id.* “From 2000–2017, the [B]lack homeownership rate dropped by 4.8 percentage points, while Hispanics and other race/ethnic groups experienced an increase in homeownership.” URB. INST., DATA TALK: BLACK HOMEOWNERSHIP GAP: RESEARCH TRENDS AND WHY THE GROWING GAP MATTERS 5 (2019), https://www.urban.org/sites/default/files/2019/07/16/black_homeownership_data_talk_slides.pdf.

214. See Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 819–22 (2012).

215. Ben Metcalf & David Garcia, *A Plan to Keep Renters Housed Through the COVID-19 Recovery*, TERNER CTR. FOR HOUS. INNOVATION (May 4, 2020), <https://turnercenter.berkeley.edu/research-and-policy/a-plan-to-keep-renters-housed-through-the-covid-19-recovery/>.

Before changes to HUD regulations in July 2020,²¹⁶ HUD sought to further fair housing for low-income households by addressing affordability through programs such as Section 8, which provides housing vouchers to supplement rental costs.²¹⁷ HUD had also been examining programs to ensure those programs “also reduce segregation and exposure to poverty concentration for protected classes.”²¹⁸ Under the terms of the 2015 Affirmatively Furthering Fair Housing regulation,²¹⁹ HUD’s efforts included addressing barriers to housing such as exclusionary zoning, housing discrimination, and local agencies that lacked incentives to provide information to families of color about housing available in predominantly white communities.²²⁰

Another major barrier to quality housing for renters is a set of problematic incentives historically built into subsidized housing regulations and procedures that preclude genuine mobility and housing options. One example is how HUD determines how much a landlord may charge a Section 8 tenant. Tenants pay 30% of their income and the Section 8 program pays the remaining 70%.²²¹ HUD will only pay landlords who charge a “fair market rent,” but the formula to determine fair market rent is the “40th percentile of gross rents for regular, standard quality units in a local housing market.”²²² The local housing market generally encompasses entire metropolitan areas, which means in practice that it includes areas with very low rents. Pegging fair market rent at the 40th percentile means that Section 8 renters usually cannot afford rent levels in neighborhoods with better conditions and resources for children.²²³

For low-income households of any race to secure quality housing, the federal government must dismantle the barriers to fair housing HUD identified prior to its July 2020 rescission of the Affirmatively Furthering Fair Housing regulation. The federal government must also fully fund Section 8. HUD acknowledges that currently:

[Because] the demand for housing assistance often exceeds the limited resources available to HUD and the local housing agencies, long waiting periods are common. In fact, a [public housing authority] may

216. See Press Release, U.S. Dep’t of Hous. & Urb. Dev., Secretary Carson Terminates 2015 AFFH Rule (July 23, 2020) (on file with authors).

217. See *Housing Choice Vouchers Fact Sheet*, HUD.GOV, https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Mar. 18, 2021).

218. Dolores Acevedo-Garcia, Nancy McArdle, Erin Hardy, Keri-Nicole Dillman, Jason Reece, Unda Ioana Crisan, David Norris, & Theresa L. Osypuk, *Neighborhood Opportunity and Location Affordability for Low-Income Renter Families*, 26 HOUS. POL’Y DEBATE 607, 610 (2016).

219. 24 C.F.R. § 5.150 (2015).

220. Acevedo-Garcia et al., *supra* note 218, at 610.

221. *Fair Market Rents for Section 8 Properties*, HUD.LOANS (June 9, 2019), <https://www.hud.loans/hud-loans-blog/what-is-fair-market-rent>.

222. *Id.*

223. See Acevedo-Garcia et al., *supra* note 218, at 610.

close its waiting list when it has more families on the list than can be assisted in the near future.²²⁴

In addition, Section 8 policies and procedures must be evaluated to ensure maximum mobility, and other HUD programs must partner with local governments to expand the supply of housing in neighborhoods with the qualities described above.

C. Agency to Retain Community

For some Black households, the goal is not to move to either previously white or integrated suburbs but rather to remain in predominantly Black communities. In some contexts, the increased availability of down payment assistance and conventional loan terms will be sufficient, and an increase in homeownership rates will be valuable for individual households and the community more generally. The increase in demand for housing will be a boon to builders—and ideally will support an increase in jobs and businesses. However, particularly in large cities in which redlining led to disinvestment in Black neighborhoods and white flight, current gentrification patterns create obstacles to Black households who seek to remain in the communities they fought to preserve.²²⁵

The homeownership corrective we propose will be insufficient if housing costs skyrocket due to the influx of affluent purchasers resulting in gentrification. Researchers do not agree²²⁶ on what exactly constitutes gentrification.²²⁷ A general definition is that a neighborhood is gentrifying if higher-income outsiders move into a neighborhood where properties are undervalued due to historical disinvestment and then housing costs increase substantially.²²⁸ Gentrification is often decried because of its possible displacement effects.²²⁹ However, urban-planning scholar Lance

224. See *Housing Choice Vouchers Fact Sheet*, *supra* note 217.

225. See Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html>.

226. See Mahasin S. Mujahid, Elizabeth Kelley Sohn, Jacob Izenberg, Xing Gao, Melody E. Tulier, Matthew M. Lee, & Irene H. Yen, *Gentrification and Displacement in the San Francisco Bay Area: A Comparison of Measurement Approaches*, INT'L J. ENV'T RSCH. & PUB. HEALTH, June 25, 2019, at 2, 11.

227. The original term was coined “in England by sociologist Ruth Glass in the mid-1960s to describe changes in coastal villages and London neighborhoods Her characterization of the phenomenon of an upgrading housing stock and the influx of higher income homeowners is now the common nomenclature and is used internationally in both academic literature and cultural conversation.” Godsil, *supra* note 75, at 325.

228. See *id.*

229. See Lance Freeman, *Creating Integrated Communities is More than Preventing Displacement*, NYU FURMAN CTR. (May 2014), <https://furmancenter.org/research/iri/essay/creating-integrated-communities-is-more-than-preventing-displacement>.

Freeman and other researchers have shown that “the major force of demographic change in gentrifying neighborhoods is the alteration in who is able to move into such neighborhoods, not how quickly the current residents move out.”²³⁰ In gentrifying neighborhoods, those who move in are often single-person households and households with unrelated adults.²³¹ Frequently, as the white population increases, the Black population—and the overall stock of affordable housing—decreases.²³²

For Black people particularly, gentrification can be associated with negative outcomes. Studies have shown, for example, that Black people in gentrifying areas are more likely to report that they are experiencing fair and poor health compared to those living in non-gentrifying neighborhoods.²³³ The changes that occur as a result of outsiders moving in and altering the fabric of the community can be the source of the negative outcomes:

When a family sees the neighbourhood around it changing dramatically, when their friends are leaving the neighbourhood, when the stores they patronize are liquidating and new stores for other clientele are taking their places, and when changes in public facilities, in transportation patterns, and in support services all clearly are making the neighbourhood less and less liveable, then the pressure of displacement already is severe.²³⁴

First and foremost, those who have lived in gentrifying neighborhoods for a long time—even as renters—have a stake in the community that should allow them to sufficiently benefit from the increase in housing values so they can remain.²³⁵

Yet the larger goal, as Lance Freeman argues, is for community-based organizations to have available resources to fund affordable housing and community mobilizing.²³⁶ The role of mobilization is for long-term residents:

230. *Id.* (citation omitted).

231. NYU FURMAN CTR., FOCUS ON GENTRIFICATION 11, 11 n.3 (2016).

232. *See id.* at 12.

233. Mujahid et al., *supra* note 226, at 11 (citing Joseph Gibbons & Michael S. Barton, *The Association of Minority Self-Rated Health with Black Versus White Gentrification*, 93 J. URB. HEALTH 909 (2016)).

234. Kate S. Shaw & Iris W. Hagemans, ‘Gentrification Without Displacement’ and the Consequent Loss of Place: The Effects of Class Transition on Low-income Residents of Secure Housing in Gentrifying Areas, 39 INT’L J. URB. & REG’L RSCH. 323, 325–26, 328 (2015). The effects of gentrification are in many ways ontological:

Deep changes in social structure (a transition from knowing others and being ‘known’ in a place, to becoming unknowing and ‘unknown’) as well as changes in the nature of government intervention (from the familiar, which may be not much at all, to interventions on behalf of and in favour of quite different interests) can amount to a kind of community displacement.

Id. at 328.

235. *See* Godsil, *supra* note 75, at 324. Needless to say, the option to exit would also be available. *Id.* at 335–36.

236. Freeman, *supra* note 229.

[To] feel that they have a say in what happens in their community and so that they won't come to ask questions like the one posed by a long-term resident of one gentrifying Brooklyn neighborhood, "...why does it take an influx of white New Yorkers in the south Bronx, in Harlem, in Bed Stuy, in Crown Heights for the facilities to get better?"²³⁷

In other words, the goal is agency so that improvements are taking place for the benefit of long-term community members and not primarily for newcomers. With genuine mobilization, community members will have "the capacity to look after [their] own interests."²³⁸

D. Agency and Community Transformation

As described in Part I, New Deal and post-World War II federal programs resulted in new white suburban communities. These new suburbs were built on what had been wholly undeveloped land, which was more affordable than housing in city centers.²³⁹ In many places, providing comparable agency for Black people to construct communities of choice will require a different model. Undeveloped land is apt to be expensive and the environmental costs of building on such land are now evident.²⁴⁰ Yet opportunities for new affordable housing remain—on properties previously used for commercial or retail uses.

The economic changes resulting from COVID-19 create a context in which these opportunities are highly viable. As a result of the pandemic, businesses in many states are allowing employees to work from home, and that trend is expected to continue after the pandemic ends.²⁴¹ If it does, there will be a glut of empty office space. Retail space will also have a high level of vacancies. Even before COVID-19, traditional brick-and-mortar retailers were struggling against strong competition from online vendors.²⁴² The pandemic has compounded the problems of traditional retailers and spurred a shift toward online retail, thereby eliminating the need for large flagship storefronts.²⁴³ Researchers anticipate that

237. *Id.*

238. *Id.*

239. See JACKSON, *supra* note 125, at 234, 237.

240. See Steve Lander, *Advantages & Disadvantages of Building on Undeveloped Land*, SFGATE (June 19, 2018), <https://homeguides.sfgate.com/advantages-disadvantages-building-undeveloped-land-81414.html>.

241. See Ari Levy, *Working from home is here to stay, even when the Economy Reopens*, CNBC (May 11, 2020, 1:01 PM), <https://www.cnbc.com/2020/05/11/work-from-home-is-here-to-stay-after-coronavirus.html>. Twitter has said that it may extend its work from home policy indefinitely. Dana Brownlee, *Twitter, Square Announce Work from Home Forever Option: What are the Risks?*, FORBES (May 18, 2020, 8:08 PM), <https://www.forbes.com/sites/danabrownlee/2020/05/18/twitter-square-announce-work-from-home-forever-option-what-are-the-risks/#636db8b92565>.

242. See, e.g., Catherine Thorbecke, *Macy's Closing 125 Stores Signals 'More Pain' for Retailers*, ABCNEWS (Feb. 5, 2020, 11:39 AM), <https://abcnews.go.com/Business/macys-closing-125-stores-band-aid-major-systemic/story?id=68774026> (reporting significant store closures by Macy's in February 2020, before the pandemic hit).

243. See Jason Goldberg, *The Impact of Covid-19 on U.S. Brands and Retailers*, FORBES (Mar. 29, 2020, 1:20 PM), <https://www.forbes.com/sites/jasongoldberg/2020/03/29/the-impact-of-covid-19-on-us-brands-and-retailers/>.

“55%-60% of all store closures will be mall-based” and that “[t]he coronavirus outbreak could accelerate a correction in mall space that already looks overdue.”²⁴⁴ All this vacant real estate will need to be put to some other use.

Real estate developers are predisposed to meet market demand, and COVID-19 may create high demand for affordable suburban housing.²⁴⁵ Consequently, dead malls and empty office parks are prime targets for what urban planners call “suburban retrofitting.”²⁴⁶ Retrofitting embodies three core principles: (1) increasing uses, walkability, and built density (the ratio of building structures to plot surface); (2) creating green spaces, from small parks to the restoration of wetlands and other ecologies destroyed by earlier development; and (3) accomplishing this by reusing existing structures and landscapes.²⁴⁷ Suburban retrofitting has the potential to create new, affordable housing options. Such new housing would allow for community construction should Black people choose to leave housing that is either close to polluting industry or lacks the positive qualities people with agency may choose.

Suburban retrofitting emphasizes mixed-use development, where residential, retail, office, civic, and recreational spaces are close to each other.²⁴⁸ Mixed-use development and its corresponding built density allow the creation of the “missing middle” in housing—options that fall between large apartment buildings and substantial single-family homes.²⁴⁹ This missing middle includes small lot single-family homes and townhouses, stacked townhouses and flats, two-to-four family buildings, courtyard housing, and small apartment buildings.²⁵⁰

Communities with these varied options can offer affordable housing to individuals with a wide range of incomes. Neighborhood retailers also benefit from mixed-use development as the variety helps generate foot traffic which, in turn, yields customers. This form of development is also “greener” than Euclidean zoning. When different uses are proximate, they

244. Kelly Tyko, *Are more Store Closings Coming? As many as 25,000 Stores Could Shutter in 2020 due to COVID-19 Impact*, USA TODAY (June 13, 2020, 6:53 PM) (internal quotations omitted), <https://www.usatoday.com/story/money/2020/06/09/store-closures-2020-coronavirus-impact/5325795002/>.

245. Lisa Prevost, *5 Ways the Coronavirus has Changed Suburban Real Estate*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/17/realestate/coronavirus-suburbs-real-estate.html>.

246. See ELLEN DUNHAM-JONES & JUNE WILLIAMSON, *RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS 4* (updated ed. 2011).

247. June Williamson, *Urban Design Tactics for Suburban Retrofitting*, in *RETROFITTING SPRAWL: ADDRESSING SEVENTY YEARS OF FAILED URBAN FORM* 103, 105 (Emily Talen ed., 2015).

248. See Robert Steuteville, *Designing and Building Mixed-Use Centers in the Suburbs*, CONG. FOR THE NEW URBANISM (Dec. 11, 2019), <https://www.cnu.org/publicsquare/2019/12/11/designing-and-building-mixed-use-centers-suburbs>.

249. *Missing Middle Housing*, CONG. FOR THE NEW URBANISM, <https://www.cnu.org/our-projects/missing-middle-housing> (last visited Mar. 18, 2021).

250. See *id.*

can be configured in ways that are walkable, reducing both car trips and the amount of space that needs to be devoted to impervious parking lots.

Examples of retrofitting demonstrate what is possible. In Lakewood, Colorado, developers transformed a low-rise enclosed shopping mall surrounded by parking lots into twenty-three streets and blocks, with nearly triple the built density of the original mall.²⁵¹ This new neighborhood contains retail, office, and civic buildings and a range of residential options—rentals over retail shops, townhouses, loft condominiums, and zero-lot line houses.²⁵² Parts of the original mall were adapted for other uses, demolition materials were recycled, and the new buildings were Leadership in Energy and Environmental Design (LEED) certified.²⁵³ Developers even put a wind farm in a former parking lot.²⁵⁴ This Lakewood project is not unique. In 2017, “about 200 enclosed malls [were at] various stages of . . . redevelopment,” including 63 that were becoming mixed-used downtowns.²⁵⁵ In the Cape Cod town of Mashpee, Massachusetts, a 1960s strip mall gradually became a walkable town commons with retail, a post office, a library, a medical office building, and subsidized senior housing.²⁵⁶ Developers also acquired adjacent land to build almost 400 dwellings—ranging from apartments over retail to single-family houses—with one-fourth of the units explicitly designated as affordable homes.²⁵⁷ Notably, after decades of promoting development on large lots with septic systems, Cape Cod’s regional planning authority supported higher density as a means of protecting the watershed.²⁵⁸ As a final example, in Doral, Florida, a 1970s business park, which sat on 120 acres, was reinvented as a city center.²⁵⁹ Before the retrofit, the site had “33 buildings and 1.5 million square feet of office space.”²⁶⁰ Today, the site contains almost 3,000 dwellings, retail, office space, a school, and a town hall.²⁶¹

In sum, COVID-19 has changed the workplace in ways that are likely to be permanent and accelerated changes in the retail industry that were already on the horizon. The upshot is that square foot upon square foot of commercial real estate will have to be put to a different purpose. In many

251. DUNHAM-JONES & WILLIAMSON, *supra* note 246, at 155.

252. *Id.* A zero-lot-line house is one in which the structure comes up to the edge of the lot line. James Chen, *Defining a Zero-Lot-Line House*, INVESTOPEDIA, <https://www.investopedia.com/terms/z/zero-lot-line-house.asp> (last updated Dec. 12, 2020).

253. DUNHAM-JONES & WILLIAMSON, *supra* note 246, at 155.

254. *Id.*

255. Robert Steuteville, *Great Idea: Building Better Suburbs Through Retrofit*, CONG. FOR THE NEW URBANISM (Feb. 15, 2017), <https://www.cnu.org/publicsquare/2017/02/15/great-idea-building-better-suburbs-through-retrofit>.

256. DUNHAM-JONES & WILLIAMSON, *supra* note 246, at 99.

257. *Id.* at 101–02.

258. *Id.* at 99; *see also* Robert Steuteville, *Sprawl Retrofit Tools*, BUILD A BETTER BURB, <http://buildabetterburb.org/build-a-better-burb-sprawl-retrofit-tools/> (last visited Mar. 18, 2021).

259. Steuteville, *supra* note 258.

260. *Id.*

261. *Id.*

places, including the suburbs, commercial real estate will become residential communities.

E. Corrective Justice and Transit

The new white flight into exclusive communities far from cities and inaccessible except by car occurs as a direct result of federal spending. The most significant subsidy is the funding of roads and highways instead of public transportation.²⁶² To expand access to housing of choice for Black people—as was the goal for white people with the New Deal and later programs—transit is key. Our proposed corrective is for the federal government to flip its current allocation of resources from highways to mass transit.

1. Transit and Housing Affordability

Affordability necessarily includes housing and transit costs. According to HUD, housing is “affordable” when it requires no more than 30% of a household’s income.²⁶³ However, true affordability depends not just on the cost of housing but on the cost of moving between housing and other necessary places, such as work, grocery stores, and health care providers.²⁶⁴ After housing, transportation costs are the second-largest expense for American households.²⁶⁵ The average household in the United States spends almost 20% of its total income on transportation expenses and for low-income households the average burden can be as high as 30%.²⁶⁶ In other words, people fortunate enough to have what HUD considers affordable housing may find themselves spending about 60% of their income on housing and transit.²⁶⁷ Meanwhile, the recommendation is that people spend no more than 45% of their income on housing and transportation combined.²⁶⁸

262. See Jesús “Chuy” García, *It’s Time for Congress to Give Public Transportation the Funding it Deserves*, DATA FOR PROGRESS (Dec. 10, 2020), <https://www.dataforprogress.org/blog/2020/12/10/give-public-transportation-the-funding-it-deserves>.

263. *Defining Housing Affordability*, PD&R EDGE, <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> (last visited Mar. 18, 2021).

264. See *Housing and Transportation Affordability*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/mission/health/housing-and-transportation-affordability> (last updated Aug. 24, 2015).

265. CTR. FOR TRANSIT-ORIENTED DEV., *CREATING CONNECTED COMMUNITIES: A GUIDEBOOK FOR IMPROVING TRANSPORTATION CONNECTIONS FOR LOW- AND MODERATE-INCOME HOUSEHOLDS IN SMALL AND MID-SIZED CITIES* xi (2014).

266. See BARBARA J. LIPMAN, CTR. FOR HOUS. POL’Y, *A HEAVY LOAD: THE COMBINED HOUSING AND TRANSPORTATION BURDENS OF WORKING FAMILIES I* (2006) (according to a survey of twenty-eight metropolitan areas across the country).

267. See *id.*

268. *Housing + Transportation Index*, CTR. FOR NEIGHBORHOOD TECH, <https://www.cnt.org/tools/housing-and-transportation-affordability-index> (last visited Mar. 19, 2021).

CNT’s Housing + Transportation Index . . . provid[es] an overview of affordability at the neighborhood level . . . Their [index] has found that, among the 337 metropolitan areas included in the H&T index (which captures 80% of the US population and 90% of US GDP), the number of communities considered affordable drops dramatically when the definition of affordability includes not just housing costs but transportation costs as well.

Transportation costs are high because most people are forced to rely upon automobiles rather than mass transit. Car owners pay not only for the vehicle itself but also for gasoline, insurance, maintenance, and repairs. These ancillary costs can be large and unpredictable.²⁶⁹

Mass transit includes fixed route systems that run on rails (such as commuter trains, subways, and streetcars) and non-fixed route systems along surface streets or water (such as buses and ferries).²⁷⁰ If people can get where they need to go without hopping in a car, they will not have to own one. Measures that allow people to move within their immediate neighborhoods without using a car or mass transit—such as bike lanes, sidewalks, and pedestrian-friendly intersections—are also important.

The federal government has overwhelmingly chosen to invest in highways instead of mass transit.²⁷¹ Investment is funded through the Highway Trust Fund.²⁷² In 1982, the Highway Trust Fund was split into two separate accounts: one for highways and the other for mass transit.²⁷³ The allocation of revenue reveals the federal government's priorities. Currently, the federal tax is 18.4 cents-per-gallon on gasoline and 24.4 cents on diesel fuel.²⁷⁴ "The transit account receives [only] 2.86 cents per gallon of [these] fuel taxes," with the highway account receiving the rest.²⁷⁵ Since Congress started making transfers from the U.S. Treasury to the fund in

Shruti Vaidyanathan, *America's Transportation Energy Burden for Low-Income Families*, AM. COUNCIL FOR AN ENERGY EFFICIENT ECON. (July 29, 2016), <https://www.aceee.org/blog/2016/07/america-s-transportation-energy>.

269. For example, in the last five years, the average cost of a gallon of gasoline has ranged from \$3.43 in 2014 to \$2.69 in 2019. U.S. *all Grades all Formulations Retail Gasoline Prices*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMM_EPM0_PTE_NUS_DPG&f=A (last visited Mar. 19, 2021).

270. See *Interpretations of Definitions*, FED. TRANSIT ADMIN., <https://www.transit.dot.gov/research-innovation/interpretations-definitions> (last updated Dec. 7, 2015) (defining public transportation service as "the operation of a vehicle that provides general or special service to the public on a regular and continuing basis").

271. See ROBERT S. KIRK & WILLIAM J. MALLETT, CONG. RSCH. SERV., R45350, *FUNDING AND FINANCING HIGHWAYS AND PUBLIC TRANSPORTATION 1* (2020). For about fifty years, a combination of increased motor vehicle use and occasional gas tax increases allowed the Highway Trust Fund to accommodate growth in federal spending on surface transportation. *Id.* In 2008, however, Congress had to begin providing transfers from the Treasury general fund to keep the Highway Trust Fund solvent. *Id.* Those transfers continue to the present day and as of 2020 total more than \$140 billion. *Id.* All road construction and maintenance is done in partnership with states, with the federal government covering 90% of the costs and the states covering the remainder and arranging for actual completion of the work. See *id.*

272. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., PUB NO. FHWA-PL-17-011, *FUNDING FEDERAL-AID HIGHWAYS 41* (2017).

273. *Id.* at 42.

274. *Id.* at 44 tbl.7.

275. KIRK & MALLETT, *supra* note 271, at 1.

2008, 25% of transfers have gone to the transit fund and 75% have gone to the highway fund.²⁷⁶

Beyond funding issues, the federal government has simply made it easier for states to build roads instead of transit. As two researchers summarized, if the federal government applied the same rules to roads that it applies to transit:

Cities would have to aggressively compete against one another for their highway funds based on the quality and justification of the proposed project. The rules for the competition would be subject to change without any input Only a few highway segments could begin construction in any year [H]ighways would need a congressional “sponsor” who would secure an earmark by competing with other members for scarce funds Local governments would have to demonstrate that they have sufficient funds to pay for their share of the costs of building the highways. They would also have to demonstrate that they would be able to operate and maintain these highways, as well as their existing highways, into the future In many instances, public referenda would have to be conducted and be approved to get local authorization for project funding. Also, highway projects would have to compete with police, fire, education, and other programs for funding. In times of budget shortages, highways could be closed completely or eliminated. The highway would need to be justified on an explicit measure of cost effectiveness. Agencies would have to specifically state how they would manage the land use impacts of their highways. Finally, intensive mandated study activities would have to precede the project and would be subject to an independent review by the federal government and an open comparison to other projects.²⁷⁷

Increases in mass-transit funding will benefit all people but particularly people of color, who use transit more frequently than white people. Among urban dwellers, 34% of Black people report taking public transit daily or weekly compared with only 14% of white people.²⁷⁸ Researchers speculate that Black people use mass transit more often than white people because Black people are more likely to live in large metropolitan areas, which have more mass transit options than other less population-dense

276. See *id.* at 3 tbl.1 (reporting that \$114.685 billion of transfers from the Treasury have gone to the highway fund while \$28.942 billion has gone to the mass transit fund).

277. Edward Beimborn & Robert Puentes, *Highways and Transit: Leveling the Playing Field in Federal Transportation Policy*, in TAKING THE HIGH ROAD: A METROPOLITAN AGENDA IN TRANSPORTATION REFORM 257, 257–58 (Bruce Katz & Robert Puentes eds., 2005).

278. Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/> (reporting that 27% of Hispanic people use transit weekly or daily). There are few racial differences between non-urban users of transit, but the lack of mass transit outside cities makes it difficult to use mass transit in other places. See *id.* Only 6% of suburban residents and 3% of rural residents use transit on a regular basis. *Id.*

places.²⁷⁹ Black people are also less likely than white people to have access to a car and more likely to use mass transit to commute to work.²⁸⁰

Mass transit is most valuable when it connects the places people live with the places they work.²⁸¹ Across the United States, the connectivity of transit is dismal.²⁸² Most regions are particularly poorly equipped to provide transit to low-income residents who need access to low-skill and medium-skill jobs.²⁸³ The typical metropolitan worker can reach only about 25% of these kinds of jobs by transit in ninety minutes or less.²⁸⁴ While high-skill jobs tend to be concentrated in cities, low-skill and medium-skill jobs are sprinkled throughout an entire metropolitan area.²⁸⁵ Across every U.S. metropolitan region and every industry, city jobs are more accessible by transit than suburban jobs.²⁸⁶ In general, transit coverage is far better in cities and low-income communities than suburbs and high-income communities.²⁸⁷

This dearth of mass transit has the practical effect of denying agency in housing. People who cannot afford a car are forced into cities or low-income communities with mass transit options and are deprived of the job opportunities in the inadequately-connected suburbs. Moreover, any affordable housing that is built in suburbs that lack transit may be unaffordable once the cost of transportation is factored in.²⁸⁸ And the necessity of owning a car means that lower-income Black families will spend a disproportionately high percentage of their income on a depreciating vehicle, making that income unavailable for savings, education, or other investments that yield long-term benefits.

Our proposed corrective is to flip the federal government's surface transportation priorities. Currently, the Highway Trust Fund allocates 16% of the tax collected on gasoline and 12% of the tax collected on diesel fuels to mass transit,²⁸⁹ and transit has received 25% of the additional Treasury transfers authorized by Congress.²⁹⁰ Under our corrective, the Highway Fund would allocate 16% of the tax collected on gasoline and 12% of the

279. *Id.*

280. *Id.*

281. Tanya Snyder, *Brookings: Transit Access to Jobs is the Missing Link*, STREETS BLOG USA (May 13, 2011), <https://usa.streetsblog.org/2011/05/13/brookings-transit-access-to-jobs-is-the-missing-link/>.

282. *See id.* (noting that "the typical metropolitan resident can reach only about 30[%] of jobs in their region via transit in 90 minutes").

283. *See* ADIE TOMER, ELIZABETH KNEEBONE, ROBERT PUENTES, & ALAN BERUBE, BROOKINGS INST., MISSED OPPORTUNITY: TRANSIT AND JOBS IN METROPOLITAN AMERICA 1 (2011).

284. *Id.*

285. *Id.* at 17–19.

286. *See* ADIE TOMER, BROOKINGS INST., WHERE THE JOBS ARE: EMPLOYER ACCESS TO LABOR BY TRANSIT 1 (2012).

287. TOMER ET AL., *supra* note 283, at 9.

288. *See Housing and Transportation Affordability*, *supra* note 264. Any tradeoff in housing savings gained at the cost of a longer commute "is eroding, with 77 cents being spent on transportation for every dollar spent on housing." *Id.*

289. *See* KIRK & MALLETT, *supra* note 271, at 1.

290. *Id.*

tax collected on diesel fuels to *highways*,²⁹¹ and *highways* would receive 25% of the Treasury transfers authorized by Congress. The rest would be allocated to mass transit.²⁹² If this corrective had been in place since 2008, Congress would have transferred \$28.94 billion to the highway fund and \$114.69 billion into the transit fund.²⁹³ With this flip, the federal government would maintain existing roads but would not improve or create new ones. Instead, the federal government would build and improve mass transit.²⁹⁴

To further agency in housing, the federal government should prioritize grants that would:

- Connect suburbs to cities, connect suburbs to each other, and offer transit options within a suburb. Because rail transit—the most expensive option²⁹⁵—requires built density to be economically feasible, mass transit in most suburbs will look different than in the cities. Suburbs will likely rely on bus service, whose non-fixed stops do not require a large investment in real estate and allow a community or region to easily adjust routes depending on demand. The overarching goal is to create a sense of connectivity akin to that provided by roads.
- Create or improve mass transit options within racially/ethnically concentrated areas of poverty (R/ECAPS)²⁹⁶ and connect

291. *Id.*

292. The Partnership for Sustainable Communities (PSC) provides an overarching template for how federal agencies can come together to support mass transit initiatives that help create affordable housing and create racial agency for Black families. See Lauren C. Heberle, Brandon McReynolds, Steve Sizemore, & Joseph Schilling, *HUD's Sustainable Communities Initiative: An Emerging Model of Place-Based Federal Policy and Collaborative Capacity Building*, 19 CITYSCAPE 9, 9–10 (2017). Launched in 2009, the PSC was aimed at increasing economic prosperity through local solutions that would create jobs and boost recovery from the Great Recession. *Id.* Despite its short life, the program is viewed as a successful interagency collaboration. *Id.* at 32–33.

293. KIRK & MALLETT, *supra* note 271, at 3 tbl.1. Prior to the COVID-19 outbreak in 2020, the HTF was projected to have a balance of approximately \$18.97 billion. *Id.* at 5. However, due to funding shortfalls, the HTF was projected to have a negative balance of \$68.82 billion in 2026 only five years later. *Id.* at 6. How to deal with these funding shortfalls is an ongoing debate on Capitol Hill, but a reduction in expenditures on transportation would not provide immediate relief. *Id.*

294. The federal funds allocated for transit would be awarded to communities and regional transit authorities under the auspices of a joint program between HUD and the Department of Transportation. The program would be rooted in the FHA's mandate to affirmatively further fair housing, which federal regulations define as "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." *Affirmatively Furthering Fair Housing*, SV@HOME (Sept. 8, 2020), <https://siliconvalleyathome.org/resource-map/affirmatively-furthering-fair-housing/> (quoting the 2015 AFFH rules which "require[s] jurisdictions that receive HUD funding to submit a plan on how they would address fair housing").

295. See Joseph L. Schofer, *Mass Transit: Mass Transit Finance*, BRITANNICA, <https://www.britannica.com/topic/mass-transit/Mass-transit-finance> (last visited Mar. 19, 2021).

296. To identify R/ECAPS, HUD uses a census tract-based definition that involves both a racial/ethnic concentration threshold and a poverty test. U.S. DEP'T OF HOUS. & URB. DEV., AFFH DATA DOCUMENTATION: DRAFT 1 (2013), <https://www.huduser.gov/publications/pdf/FR-5173-P->

R/ECAPS to other places, particularly those with low- and medium-skill employment opportunities.

- Incorporate plans to create a substantial amount of affordable housing near transit stops and prevent transit-induced gentrification, which can occur when the desirability of “good transit” (particularly light rail) drives up surrounding land prices.²⁹⁷ One potential counterstrategy is for the federal government to acquire land near planned transit stops and make that land available to developers to build affordable housing.²⁹⁸
- Rein in new white flight and the creation of new white spaces with urban growth boundaries or other measures that limit new development on the fringe of metropolitan areas.²⁹⁹

For Black households aspiring to homeownership, genuine agency requires access to funding and affordable transit.

IV. THE CARROT AND THE STICK: INTEREST CONVERGENCE AND THE FAIR HOUSING ACT

New Deal and post-World War II policies provided a previously unknown level of agency to working-class white people. Protections for union organizing, higher education opportunities for returning soldiers, and, particularly, the power to choose to purchase a home—with all the corresponding present and future benefits it provides—led to a period in American history where many white working-class families were able to live a version of the “good life” that was denied entirely to Black people.³⁰⁰ This Article has proposed steps the federal government can take as a corrective so that conditions are present for many more Black people to have the

01_AFFH_data_documentation.pdf. To meet the racial/ethnic concentration threshold, a neighborhood must have a non-white population of 50% or more. *Id.* To meet the poverty test, a neighborhood must have a poverty rate that exceeds 40% or is three or more times the average tract poverty rate for the metropolitan/micropolitan area, whichever threshold is lower. *Id.*

297. Shadi O. Tehrani, Shuling J. Wu, & Jennifer D. Roberts, *The Color of Health: Residential Segregation, Light Rail Transit Developments, and Gentrification in the United States*, INT’L J. ENV’T RSCH. & PUB. HEALTH, Sept. 30, 2019, at 1, 5–8.

298. Anna Kramer, *The Unaffordable City: Housing and Transit in North American Cities*, CITIES, Dec. 31, 2018, at 1, 9.

299. Urban growth boundaries (UBGs) control sprawl by creating a “no new development past this point” line between urban areas and agricultural and natural lands. Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 558–59 (1998). They have been used in places throughout the United States, with Portland as the most well-known example. *See id.* at 572. UBGs have been criticized for limiting supply and thereby increasing housing costs within the boundary, and for causing a population jump to other nearby areas that are not within the UBG. These problems can be addressed by increasing housing density (and thus supply) within the boundary, and by cooperative regional planning. *See id.* at 569–71.

300. *See The Rise of American Consumerism*, PUB. BROAD. SERV., <https://www.pbs.org/wgbh/americanexperience/features/tupperware-consumer> (last visited Mar. 19, 2021).

agency in housing—and the attendant benefits—that many white people have long enjoyed.

Some will be skeptical that these systemic changes will actually be enacted given the extraordinary opposition to similar reform efforts in decades past.³⁰¹ We disagree. As described, a confluence of painful circumstances has led to an unprecedented level of interest in addressing systemic racism.³⁰² We believe that the political will exists to finally begin dismantling the structures that have undergirded residential racial segregation.

COVID-19 and the shock waves that followed will require the federal government to act. Millions of people have sheltered in place, donned a mask, and socially distanced. Unemployment has been at levels not seen since the Great Depression³⁰³ and entire industries have been upended.³⁰⁴ Because of these cataclysmic results, in March 2020, Congress and the Trump Administration agreed to a \$2 trillion economic stabilization package: the Coronavirus Aid, Relief, and Economic Security Act (CARES).³⁰⁵ The package addressed immediate needs precipitated by the pandemic, including providing direct payments to millions of Americans, suspending federal student loan payments,³⁰⁶ expanding the availability of jobless aid and benefits, including jobless freelancers and gig workers,³⁰⁷ as well as providing loans to small businesses,³⁰⁸ distressed companies,³⁰⁹ and hospitals.³¹⁰ The CARES Act also prevented eviction and foreclosure relief for those with federally guaranteed loans.³¹¹ The Act was “unprecedented

301. See generally Thomas J. PlaHovinsak, *Exclusionary Zoning: Policy Design Lessons from the Mount Laurel Decisions*, 30 HOUS. POL’Y DEBATE 806 (2020) (detailing the aftermath of New Jersey’s Mount Laurel cases and explaining how wealthier communities shifted the responsibility for affordable housing to lower-income communities); DOUGLAS S. MASSEY, LEN ALBRIGHT, REBECCA CASCIANO, ELIZABETH DERICKSON, & DAVID N. KINSEY, *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 100–01 (2013).

302. See, e.g., N’dea Yancey-Bragg, *What is Systemic Racism? Here’s what it means and how you can help Dismantle it*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/> (Jan. 29, 2021, 8:53 AM).

303. BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., *THE EMPLOYMENT SITUATION—DECEMBER 2020*, at 2 (2021); see also Greg Iacurci, *Unemployment is Nearing Great Depression Levels. Here’s how the Eras are Similar—and Different*, CNBC (June 10, 2020, 9:03 AM), <https://www.cnbc.com/2020/05/19/unemployment-today-vs-the-great-depression-how-do-the-eras-compare.html>.

304. See *supra* notes 241–44 and accompanying text.

305. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001–9080).

306. *What’s in the \$2 Trillion Coronavirus Stimulus Bill*, CNN (Mar. 26, 2020, 9:35 AM), <https://www.cnn.com/2020/03/25/politics/stimulus-package-details-coronavirus/index.html>.

307. Tami Luhby, *Stimulus Bill Offers \$600 a Week to the Unemployed for 4 Months*, CNN (Mar. 26, 2020, 8:44 AM), <https://www.cnn.com/2020/03/25/politics/senate-stimulus-unemployment-benefits-coronavirus/index.html>.

308. *Coronavirus (COVID-19): Small Business Guidance & Loan Resources*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources> (last visited Mar. 19, 2020).

309. *What’s in the \$2 Trillion Senate Coronavirus Bill*, WALL ST. J. (Mar. 26, 2020), <https://www.wsj.com/articles/whats-in-the-2-trillion-senate-coronavirus-bill-11585185450>.

310. *Id.*

311. RACHEL D. GODSIL, THE JUST. COLLABORATIVE INST., *ADDRESSING HOUSING PRECARITY IN THE CONTEXT OF CORONAVIRUS CRISIS* 3–4 (2020).

in its sheer scope and size, touching on every facet of American life with the goal of salvaging and ultimately reviving a battered economy.”³¹² CARES was followed by a second relief package in December 2020, which included another round of individual direct payments for qualifying individuals, a continued expansion of unemployment benefits, an expansion of the eviction moratoriums, more money for small business loans, and an expansion of the food benefits.³¹³ Then, in March 2021, President Biden signed the American Rescue Act into law. This Act weighed in at about 1.9 trillion dollars and built upon the provisions in the two prior relief packages.³¹⁴ Together, these investments were the most significant federal and state government economic involvement since the New Deal and the post-WWII era³¹⁵ and suggest that the federal government and the American people are ready for change that is transformative and not incremental.

We are also pragmatists. In addition to the justice-based arguments supporting these changes, there is also a significant “interest convergence”³¹⁶ between people across lines of race and ethnicity in reimagining the suburbs and altering persistent development patterns. Derrick Bell described interest convergence as the principle that “[t]he interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”³¹⁷ Even if the current interest in racial equity ebbs, the proposals we suggest would intersect with the interests of

312. Emily Cochrane & Nicholas Fandos, *Senate Approves \$2 Trillion Stimulus After Bipartisan Deal*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html>.

313. Zach Montague, *The Second Stimulus Package: Here’s What’s Included*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/us/politics/second-stimulus-whats-included.html>; Emily Cochrane, *Congress Passes Huge Coronavirus Relief Bill*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2020/12/21/us/politics/coronavirus-stimulus-deal.html>; Rachel Siegel, Jeff Stein, & Mike DeBonis, *Here’s What’s in the \$900 Billion Stimulus Package*, WASH. POST (Dec. 27, 2020, 5:58 PM), <https://www.washingtonpost.com/business/2020/12/20/stimulus-package-details/>.

314. Emily Cochrane, *Divided Senate Passes Biden’s Pandemic Aid Plan*, N.Y. TIMES (Mar. 13, 2021), <https://www.nytimes.com/2021/03/06/us/politics/biden-stimulus-plan.html>; Barbara Sprunt, *Here’s What’s in the American Rescue Plan*, NPR (Mar. 11, 2021, 2:39 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/09/974841565/heres-whats-in-the-american-rescue-plan-as-it-heads-toward-final-passage>; *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP’T OF THE TREASURY (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families>.

315. *Id.*; see also Peter Frintzilas, *Coronavirus Aid, Relief and Economic Security Act – Reminiscent of 2008-09 Bailouts and the New Deal*, FORDHAM J. OF CORP. & FIN. L.: BLOG (Apr. 26, 2020), <https://news.law.fordham.edu/jcfl/2020/04/26/coronavirus-aid-relief-and-economic-security-act-reminiscent-of-2008-09-bailouts-and-the-new-deal/>.

316. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–21, 523–25, 528 (1980) (arguing that “interest convergence” between elite white people and Black people in the cold-war period rather than genuine concerns about racial equality explains the decision in *Brown*). While one of us has been critical of “interest convergence” as a mechanism for interpreting court cases, see Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 546 (2006), it is clear that it can be useful as a matter of practical politics to consider when the interests of the dominant group converge with the interest of non-dominant groups.

317. Bell, Jr., *supra* note 316, at 523.

environmentalists concerned about climate change and Millennials who are uninterested in traditional suburban living.

A. Environmental Interest Convergence

The shift of funding from highways to mass transit addresses one of suburbia's biggest environmental downsides: automobile emissions. Cars emit NO_x, which reacts with volatile organic chemicals (VOC) to create ground-level ozone, or smog.³¹⁸ Ground-level ozone is dangerous to those with respiratory conditions and can impair lung function even in healthy adults.³¹⁹

Carbon dioxide emissions from cars also contribute to the greenhouse effect and global warming. In 2017, transportation was the largest greenhouse gas (GHG) emitting sector, accounting for 29% of all U.S. GHG emissions.³²⁰ Just under 60% of those emissions were attributed to light-duty vehicles, which includes cars, sport utility vehicles (SUVs), pickup trucks, and other light trucks.³²¹ Researchers have estimated that suburbia accounts for about 50% of U.S. GHG emissions,³²² with suburban growth around cities almost cancelling out any GHG-related benefit of urban population density.³²³ Between 1980 and 2012, urban metros accounted for 80% of the increase in U.S. transportation-related emissions growth.³²⁴ Researchers attribute this to population increases in the suburbs and exurbs.³²⁵ The overwhelming consensus is that suburbanization increases the use of passenger vehicles and thereby leads to increases in GHG emissions.³²⁶ Automobile emissions are a pressing enough environmental concern that the “Green New Deal” called for “a \$300 billion investment” in affordable public transportation.³²⁷

318. *How Mobile Source Pollution Affects your Health*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/mobile-source-pollution/how-mobile-source-pollution-affects-your-health> (last updated Dec. 15, 2016).

319. *See id.*

320. U.S. ENV'T PROT. AGENCY, EPA-420-F-19-047, FAST FACTS: U.S. TRANSPORTATION SECTOR GREENHOUSE GAS EMISSIONS 1990–2017, at 1 (2019).

321. *Id.*

322. Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENV'T SCI. & TECH. 895, 900–01 (2014).

323. *Id.* at 899–901.

324. *Study of Vehicle Emissions Will Aid Urban Sustainability Efforts*, EUREKALERT! (Apr. 6, 2015), https://www.eurekalert.org/pub_releases/2015-04/bu-sov040215.php; *see also* Conor K. Gatley, Lucy R. Hutyra, & Ian Sue Wing, *Cities, Traffic, and CO₂: A Multidecadal Assessment of Trends, Drivers, and Scaling Relationships*, 112 PROC. NAT'L ACAD. SCI. 4999, 4999 (2015).

325. *Study of Vehicle Emissions Will Aid Urban Sustainability Efforts*, *supra* note 324. For example, in places like Salt Lake City, the population of the city stayed about the same over a thirty-three-year-period, but emissions from transit almost doubled. *See* Gatley et al., *supra* note 324, at 5002 fig.4B.

326. *See* Matthew E. Kahn, *The Environmental Impact of Suburbanization*, 19 J. POL'Y ANALYSIS & MGMT. 569, 569–70 (2000).

327. *ISSUES: The Green New Deal*, BERNIE, <https://bernieanders.com/issues/green-new-deal/> (last visited Mar. 19, 2021). The Green New Deal, popularized by Congresswoman Alexandria Ocasio-Cortez, is a fourteen-page house resolution. This resolution calls for the creation of a

Our proposals also recommend suburban retrofitting and the creation of affordable housing—which typically does not encompass single-family homes. From an environmental perspective, the fewer single-family homes, the better. Single-family homes are staggeringly energy inefficient when compared to apartments, townhouses, condominiums, and other forms of housing in which each dwelling is immediately adjacent to the next.³²⁸ For example, on average, a person living in a single-family home uses twice as much energy as a person living in a building that has five or more apartments.³²⁹

The environmental soundness of our proposals may even appeal to many Americans who do not label themselves “environmentalists.” In 2020, 73% of Americans surveyed by Yale’s “Climate Change in the American Mind” project believed in global warming, and 62% believed that global warming is a human-caused event.³³⁰ Additionally, two-thirds of Americans felt at least “somewhat worried” about climate change, with a quarter feeling “very worried.”³³¹ Many Americans also believe that climate change affects the places they live. A 2019 survey by Pew Research Center found that 62% of Americans believe that “climate change is

comprehensive climate action plan which would include a just transition to a sustainable economy bolstering workers rights and investment in environmentally-friendly infrastructure. *See* Green New Deal, H.R. 109, 116th Cong. (1st Sess. 2019).

328. *See* Emily Badger, *The Missing Link of Climate Change: Single-Family Suburban Homes*, BLOOMBERG CITYLAB (Dec. 7, 2011, 6:30 AM), <https://www.bloomberg.com/news/articles/2011-12-07/the-missing-link-of-climate-change-single-family-suburban-homes>.

329. *Apartments in Buildings with 5 or More Units use Less Energy than Other Home Types*, U.S. ENERGY INFO. ADMIN. (July 15, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11731#:~:text=As%20percent%20new%20construction%20joins,as%20other%20types%20of%20homes>. Owners of existing houses can lessen their carbon footprint by making energy-efficient upgrades, and new homes can be built with sustainable design and construction. Sarah E. Knuth, *Addressing Place in Climate Change Mitigation: Reducing Emissions in a Suburban Landscape*, 30 APPLIED GEOGRAPHY 518, 525 (2010). But energy saving improvements can only do so much. Even the most energy efficient single-family home is likely to use more energy than an ordinary townhouse or condominium. *See* Badger, *supra* note 328; *see also* PETER CALTHROPE, *URBANISM IN THE AGE OF CLIMATE CHANGE* 19 (2011). The electrical utilities that power these single-family homes emit GHG and particulate matter. *Sources of Greenhouse Gas Emissions*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last updated Dec. 4, 2020). Particulate matter is linked to respiratory and heart conditions, as well as lake and stream acidification. *Health and Environmental Effects of Particulate Matter (PM)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm> (last updated Apr. 13, 2020). The natural gas that some homes use as a partial alternative to electricity is a source of VOCs. *Basic Information About Oil and Natural Gas Air Pollution Standards*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/basic-information-about-oil-and-natural-gas> (last updated Aug. 25, 2020); *see also* *Natural Gas Explained: Use of Natural Gas*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php> (last updated Nov. 30, 2020). Thirty-six percent of natural gas is used for electricity generation and 16% of natural gas is used for other residential purposes. *Id.*

330. ANTHONY LEISEROWITZ, EDWARD MAIBACH, SETH ROSENTHAL, JOHN KOTCHER, PARRISH BERGQUIST, MATTHEW BALLEW, MATTHEW GOLDBERG, ABEL GUSTAFSON, & XINRAN WANG, *YALE PROGRAM ON CLIMATE CHANGE COMM’M, CLIMATE CHANGE IN THE AMERICAN MIND: APRIL 2020*, at 4 (2020).

331. *Id.* The Climate Change in the American Mind project has been measuring American attitudes about climate change since 2008. *Id.* at 7.

currently affecting their local community.”³³² Of these Americans, eight in ten believed that climate change was responsible for unusually long periods of hot weather, while seven in ten attributed severe weather events, such as floods and intense storms, to climate change.³³³ The environmental appeal of our proposals may particularly resonate with younger voters. A recent Gallup poll found that over two-thirds of eighteen- to twenty-nine-year-olds and about half of thirty- to forty-nine-year-olds believe that climate change “is [a] real, man-made[,] and . . . serious threat.”³³⁴ Because the correctives we recommend are inherently “green,” they will appeal to Americans concerned about the environment and climate change.

B. Potential Alignment with Millennial Housing Preferences

The communities that our correctives help create will have good transit options, a range of housing choices, and mixed-use development. These qualities will appeal to many Millennials across race and ethnicity who have, to date, opted for city living. In a pattern that first began emerging with younger Gen Xers and older Millennials,³³⁵ young adults have become increasingly attracted to cities with concentrated urban amenities—most critically, reliable mass transit.³³⁶ These preferences have only become stronger with each new cohort of young adults, so that (at least pre-COVID-19) the desire to live in cities was most pronounced in adults aged twenty to twenty-four.³³⁷ As of 2015, Millennials of all races were 25% of those living in urban cores, and almost 42% of Millennials living in urban cores were white.³³⁸ Between 2000 and 2010, a range of cities—including Seattle, Denver, Washington, D.C., Brooklyn, and Manhattan—experienced white population gains.³³⁹ Professor Gordon’s GSI map of 2010 census data, which shows white population growth in the city of St. Louis, illustrates this phenomenon.³⁴⁰ While some of the white population growth in cities is attributable to empty-nesters attracted to city

332. Meg Heffernon, *Most Americans say Climate Change Impacts Their Community, but Effects Vary by Region*, PEW RSCH. CTR. (Dec. 2, 2019), <https://www.pewresearch.org/fact-tank/2019/12/02/most-americans-say-climate-change-impacts-their-community-but-effects-vary-by-region/>.

333. *Id.* The effects noted by survey respondents varied by region. For example, respondents living in the Pacific and Mountain regions were more likely to mention increased wildfires than respondents from other regions, and those near coastal areas mentioned rising sea levels at a greater rate than those farther inland. *Id.*

334. Jennifer Robison, *Millennials Worry About the Environment—Should Your Company?*, GALLUP (May 29, 2019), <https://www.gallup.com/workplace/257786/millennials-worry-environment-company.aspx>.

335. According to Pew Research Center, Millennials are those who were “born between 1981 and 1996.” Michael Dimock, *Defining Generations: Where Millennials end and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/>.

336. Yongsung Lee, Bumsoo Lee, & Md Tanvir Hossain Shubho, *Urban Revival by Millennials? Intraurban Net Migration Patterns of Young Adults, 1980–2010*, 59 J. REG’L SCI. 538, 548–50 (2019).

337. *Id.* at 548.

338. WILLIAM H. FREY, METRO. POL’Y PROGRAM, *THE MILLENNIAL GENERATION: A DEMOGRAPHIC BRIDGE TO AMERICA’S DIVERSE FUTURE* 22 (2018).

339. FREY, *supra* note 175, at 142.

340. *See supra* FIGURE 7.

amenities,³⁴¹ the young adult demographic has driven migration toward urban centers.³⁴² Moreover, when young adults move out of cities, anecdotal evidence suggests that many are seeking more affordable housing in places that are walkable and have transit options.³⁴³ Our correctives will ensure that there are more of these kinds of places.

C. Fair Housing Act Challenges to Opposition to Reforms

The Fair Housing Act should be the vehicle that private plaintiffs and the government use to effectively challenge opposition to the reforms we suggest—particularly attempts by local governments to use zoning and other land use tools to maintain de facto white spaces. The U.S. Supreme Court acknowledged this in *Texas Department of Housing Affairs v. Inclusive Communities Project, Inc.*³⁴⁴ In that case, the Court affirmed what lower courts had previously held: the Federal Housing Act prohibits practices and policies that have a disparate impact on people with protected characteristics.³⁴⁵ As the Court explained, the relevant policies include “zoning laws and other housing restrictions that [function] unfairly [to] exclude minorities from certain neighborhoods Suits targeting such practices reside at the heartland of disparate-impact liability.”³⁴⁶ In other words, when the practical effect of a seemingly race-neutral zoning restriction is to “zone out” Black people, that restriction can be challenged under a disparate impact theory.

Our particular concern derives from the housing barrier cases³⁴⁷:

[These are cases targeting regulations that] prevent the construction of housing that will likely be used by minority groups in places that currently lack minority residents; . . . confine housing that will be used by minority group members to neighborhoods where minority households already predominate; or . . . deny minority households freedom of

341. FREY, *supra* note 175, at 142.

342. *Id.*

343. See Danielle Braff, *Chicagoland Renters and Buyers are Itching for Walkable Suburbs. Enter ‘Subban.’*, CHI. TRIB. (May 17, 2018, 5:00 AM), <https://www.chicagotribune.com/real-estate/ct-re-0520-walkable-suburbs-20180515-story.html>; see also Christopher B. Leinberger, *Now Coveted: A Walkable, Convenient Place*, N.Y. TIMES (May 25, 2012), <https://www.nytimes.com/2012/05/27/opinion/sunday/now-coveted-a-walkable-convenient-place.html>; Dan Reed, *Young Families Increasingly want Urban Living*, GREATER GREATER WASH. (Apr. 12, 2013), <https://ggwash.org/view/30904/young-families-increasingly-want-urban-living>.

344. *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 519, 521 (2015).

345. *Id.* at 519.

346. *Id.* at 521, 539–40 (first citing *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18 (1988) (invalidating zoning law preventing construction of multifamily rental units); then citing *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1182–88 (8th Cir. 1974) (invalidating ordinance prohibiting construction of new multifamily dwellings); and then citing *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only “blood relate[s]” in an area of the city that was 88.3% white and 7.6% Black)).

347. See Daniel Sheehan, *Disparate Impact Liability Under the Fair Housing Act After Inclusive Communities*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 391, 402 (2017).

movement in a wider housing marketplace. In short, housing barrier regulations frequently perpetuate racial segregation.³⁴⁸

In housing barrier cases, the remedy is to remove the barrier. This means, for instance, invalidating a zoning law that prevents the construction of multifamily dwellings³⁴⁹ or striking down an ordinance that restricts the rental of housing units to only blood relatives in an area comprised predominantly of white people.³⁵⁰

In *Inclusive Communities*, however, the majority adopted a “robust causality” requirement that sets a higher bar for plaintiffs than is standard in disparate impact cases, making it much more difficult for plaintiffs to prevail.³⁵¹ Thus, Congress should amend the FHA to make clear that usual disparate impact analysis applies, not *Inclusive Communities*’ souped-up version. Specifically, the text of the FHA should make clear that to state a prima facie case, the plaintiff need only show that a “facially neutral practice actually or predictably impose[s] a disproportionate burden upon members of [a] protected class.”³⁵²

There are other advantages to having the text of the FHA make clear that the usual disparate impact rules apply. Specifically, it helps guard against an Executive Branch inclined to a regulatory watering-down of the FHA. In 2013, HUD issued federal regulations that made clear that the FHA prohibits practices that have a discriminatory effect, not just practices that have discriminatory intent.³⁵³ These regulations echo the language of traditional disparate impact analysis. In 2018, HUD asked for public comments on possible amendments to its disparate impact regulation.³⁵⁴ In 2019, the Washington Post reported that the Justice Department under President Trump directed senior federal civil rights officials “to examine how disparate impact . . . standards [could] be changed or removed in their areas of expertise.”³⁵⁵ The reconsideration of the FHA’s disparate impact rule “was likely part of [the larger] Trump Administration initiative to limit disparate impact liability in the enforcement of federal civil rights laws.”³⁵⁶ In 2019, HUD proposed sweeping amendments to its disparate

348. Stacey E. Seicshnaydre, *Is Disparate Impact Having any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 361 (2013).

349. See *Huntington*, 408 U.S. at 16–18.

350. See *St. Bernard Par.*, 641 F. Supp. 2d at 569.

351. See *Inclusive Cmty.*, 576 U.S. at 538.

352. Sheehan, *supra* note 347, at 396 (internal quotations omitted) (quoting *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 98–99 (2d Cir. 2000)).

353. See 24 C.F.R. § 100.500(a) (2013).

354. Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28560, 28561–62 (proposed June 20, 2018) (to be codified at 24 C.F.R. pt. 100).

355. Henry Rose, *How the Trump Administration’s Plan to Limit Disparate Impact Liability Would Undermine the Fair Housing Act’s Goal of Promoting Residential Integration*, 48 REAL EST. L.J. 402, 411 (2020).

356. *Id.*

impact regulations.³⁵⁷ These amendments, which became effective in October 2020, include a HUD regulation that would impose five pleading requirements on plaintiffs, making it even more difficult than under the standard established in *Inclusive Communities* for plaintiffs to successfully state a prima facie case.³⁵⁸ Articulating the framework for a disparate impact analysis within the text of the statute itself would curtail the Executive Branch's ability to use its regulatory authority to dilute the FHA.

D. Challenging "Community Character" as a Defense

In discussing the rebuttal of the prima facie case,³⁵⁹ *Inclusive Communities* emphasized the importance of giving housing authorities the "leeway to state and explain the valid interest served by their policies."³⁶⁰ The ostensibly valid interest of "protecting community character" is often a justification to maintain exclusionary land use provisions.³⁶¹ As Justice Kennedy noted:

Zoning officials . . . must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are

357. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854, 42862 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

358. The proposed HUD regulation states:

To allege a prima facie case based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff or the charging party (collectively, "plaintiff") must state facts plausibly alleging each of the following elements: (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law; (2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect; (3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class; (4) That the alleged disparity caused by the policy or practice is significant; and (5) That there is a direct link between the disparate impact and the complaining party's alleged injury.

Id. HUD describes the proposed regulation as necessary to keep the "specter of disparate-impact [claims]" from deterring municipalities from implementing laws with legitimate objectives and to prevent the injection of "racial considerations into every housing decision." *Id.* at 42858.

359. See *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015). A defendant rebuts a plaintiff's prima facie case by showing that its policy advances a legitimate interest. As Justice Kennedy explained:

Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.

Id. at 541 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)). If the defendant can establish a valid interest, the plaintiff can still prevail by showing that the same interest could be served by a different policy that would have less of an adverse impact on the protected class. *Id.*

360. *Id.* at 541 (drawing an analogy between a defendant's valid interest in an FHA disparate impact case and an employer's "business necessity" in an employment discrimination case).

361. See *S. Burlington Cty. NAACP v. Mount Laurel Twp.*, 336 A.2d 713, 728, 731 (N.J. 1975).

legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development As HUD itself recognized in its recent rulemaking, disparate-impact liability “does not mandate that affordable housing be located in neighborhoods with any particular characteristic.”³⁶²

With this statement, *Inclusive Communities* implicitly endorses one of the greatest barriers to affordable housing: subjective preferences about community character and quality of life.

Myriad local land-use controls act as barriers to affordable housing, including minimum lot and house size requirements, restrictions on multifamily development or density, restrictions on manufactured housing, and design and site development standards (such as landscaping, side and front yard setbacks, and material requirements).³⁶³ Depending on the precise context, some of these land use controls may serve objective purposes, such as a materials requirement that helps control the flammability of a dwelling. But much more often, these kinds of regulations aim to control the look and feel of a community.

About forty years before *Inclusive Communities*, the plaintiffs in *Village of Belle Terre v. Boraas*³⁶⁴ challenged a zoning ordinance that limited the number of unrelated people who could live in a single-family home to two.³⁶⁵ In upholding the ordinance, the Court opined:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.³⁶⁶

Of course, many communities prefer zoning that results in lower density, abundant green space, and less traffic. For many, these features are part of the proverbial “good life.” The difficulty is the considerable overlap between economic discrimination (zoning out affordable housing) and racial discrimination (zoning out Black people). Because the wealth of a typical white family is almost ten times greater than the wealth of a typical Black

362. *Inclusive Cmty.*, 576 U.S. at 542 (quoting Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11476 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100)).

363. See Jonathan Zasloff, *The Price of Equality: Fair Housing, Land use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 129–41 (2017).

364. 416 U.S. 1 (1974).

365. *Id.* at 12–13.

366. *Id.* at 9.

family,³⁶⁷ policies that are barriers to affordable housing are likely to disparately impact Black families.³⁶⁸

As described in Part II, federal government practices advancing white agency created the suburbs as white spaces.³⁶⁹ Thus, preserving the look and feel of community often means maintaining an exclusively white space. These subjective perceptions of “look and feel” are frequently infused with implicit³⁷⁰—and sometimes explicit—biases about *who* a community thinks belongs. And the place that feels like home to white residents may feel exclusionary to potential Black residents.

ProPublica’s reporting on the quest to bring affordable housing to the state of Connecticut is instructive.³⁷¹ For example, a developer requested that the town of Westport rezone a parcel to allow for multifamily homes and single homes with smaller lot sizes.³⁷² As ProPublica describes, the discussion by Westport’s Zoning and Planning Commission “was couched in . . . code words and never directly addressed race or income.”³⁷³ One commissioner who voted against the rezoning said, “[t]o me, it’s too much density. It’s putting too much in a little area. To me, this is ghettoizing Westport.”³⁷⁴ Another Westport politician said that the issue of high-density developments kept him up at night, and:

The challenge to our community is not just the character of neighborhoods, but also to firefighting and police response, potentially to educational capacity, to human services support and to our tradition as a single-family home community Within the tri-state region,

367. See Lisa J. Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Jeffrey P. Thompson, & Elizabeth Llanes, *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RSRV. (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm>. The Federal Reserve reports that in 2016, the median wealth for white families was \$171,000, compared to a median wealth for Black families of \$17,600. *Id.*; see also Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> (comprehensively discussing the extent of the Black-white wealth gap and its causes).

368. See Zasloff, *supra* note 363, at 111.

369. See Boddie, *supra* note 17, at 412–25, for a discussion of the social science underlying the social meaning of “spaces” and how they can be racialized.

370. See generally JENNIFER EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2020). For a thoughtful analysis of implicit bias and segregation, see Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25–44 (Justin D. Levinson & Robert J. Smith eds., 2012).

371. See Jacqueline Rabe Thomas, *Separated by Design: How some of America’s Richest Towns Fight Affordable Housing*, PROPUBLICA (May 22, 2019, 5:00 AM), <https://www.propublica.org/article/how-some-of-americas-richest-towns-fight-affordable-housing>; see also David Madden, *Five Myths About Public Housing*, WASH. POST (Sept. 11, 2015), https://www.washingtonpost.com/opinions/live-myths-about-public-housing/2015/09/11/2e55a57e-57c9-11e5-abe9-27d53f250b11_story.html; Sarah Goodyear, *Selling the Public on Public Housing*, BLOOMBERG (May 23, 2013, 11:06 AM), <https://www.bloomberg.com/news/articles/2013-05-23/selling-the-public-on-public-housing>.

372. Thomas, *supra* note 371.

373. *Id.*

374. *Id.*

Westport remains an attractive and desirable location relative to many nearby communities, and we must invest in keeping our town in that position.³⁷⁵

Within Westport, a political party was formed to help elect zoning commissioners who would “preserve [Westport’s] neighborhoods and small-town New England character.”³⁷⁶ In another Connecticut town, a local official deciding whether to rezone for affordable housing said, “I’m not for putting slumlords into Oxford. You know, that’s perhaps an overstatement, and I am sure it is, but I am concerned about these units.”³⁷⁷

Subjective judgments about a community’s character are often about more than just the physical appearance of a place. They are also about the people who are likely to live in particular spaces. Again, ProPublica’s reporting is revealing.³⁷⁸ An elected official in Oxford, fretting about whether an affordable housing project had adequate parking, said, “I’m sure they could have their little parking spaces, but somebody throws a party, or it’s Cinco de Mayo or something else and pretty soon you can’t park there.”³⁷⁹ A resident of Branford, Connecticut, testifying about a proposal to build sixty-seven affordable housing units, said:

The drug addicts are going to be here, believe me . . . Retirees, disabled, old people—I have no objection to renovate the whole place and make it nice for them. But don’t get too much of that riffraff in. There will be a lot of riffraff. Then we go onto, with a project like this, you need security guards in the area.³⁸⁰

In Greenwich, a resident testifying against an apartment building said, “[t]hey won’t be able to afford to eat in any restaurant but Dunkin’ Donuts and maybe grab a slice at Arcadia Pizza. They won’t even be able to afford getting a scoop of ice cream at Darlene’s.”³⁸¹ Another said, “[t]hey can afford the rent, but what else? They aren’t going to the restaurants down there. Everything they can afford [is a car or bus ride] away. It’s pretty sad.”³⁸² In the subjective judgments of these Connecticut residents, the people who live in affordable housing are racial minorities, drug addicts, and criminals—or possibly all three.

When Congress amends the Fair Housing Act to squarely address disparate impact liability, it must make clear that subjective considerations about a community’s character, look and feel, and quality of life are not valid interests that can justify local land use controls that zone out affordable housing, and by implication, the Black families that may live in that

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

housing. These subjective concerns are inherently exclusionary: they push communities and their elected leaders towards maintaining the status quo. And because places like those discussed in Connecticut are the product of white agency, maintaining the status quo means maintaining communities as white places. This is directly contrary to the spirit of the Fair Housing Act.

We are not naive enough to think that zoning officials will run out of excuses to zone out affordable housing once subjective judgments about character are off the table. A zoning official can pivot from “character of the neighborhood” to a concern that an apartment complex will create too much traffic. But the second step of the disparate impact analysis requires the defendant to demonstrate how its policies are necessary to achieve a valid interest.³⁸³ If the interest is objective, the plaintiff can rely on concrete data to challenge the necessity of the defendant’s policy and the validity of the interest.³⁸⁴

CONCLUSION

James Baldwin published the words that opened this Article in the early 1960s as the United States was in the midst of the Civil Rights Movement. His prose conveys more powerfully than any statistic how federal housing policy has failed Black Americans. Now, in 2021, we have finally reached the moment in which America can reverse the racialized harms wrought by the federal government. The racial reckoning and havoc wreaked by COVID-19 is a confluence of crises that has created an opportunity: the United States can finally dismantle the racialized structures that created white spaces.

383. See Zasloff, *supra* note 363, at 103.

384. See *id.* at 113–45 (arguing that if courts evaluate valid interests under an intermediate scrutiny standard, defendants will often find it difficult to rebut the plaintiff’s prima facie case).