Housing and Land Use Policies in the First Two Years of the Biden-Harris Administration

by Antonello Tarzia

Abstract: The essay analyzes the strategy of the Biden-Harris Administration to address the age-old problems of housing exclusion, instability and affordability further exacerbated by the COVID-19 pandemic. Zoning reform and justiciability of disparate impact claims would be the cornerstones of a renovated American Dream fed by a "comprehensive approach to advancing equity for all". The A. delineates the salient pieces of legislation and case-law on municipal zoning and land-uses, the idea of rethinking the Euclidean planning zones and the concrete results of innovative solutions, as the cooperation of State Supreme Courts and Law students in elaborating eviction diversion programs. Taking into account the colossal financial effort to face the socio-economic effects of the pandemic, the A. scrutinizes some critical aspects of the Biden-Harris' strategy to cope with spatial inequalities, suburban sprawl and segregation.

Keywords: COVID-19 and housing affordability; Housing Supply Action Plan; Exclusionary Zoning; metamorphosis of suburbs; disparate impact liability; eviction diversion programs; inflation.

1. A snapshot of the macroeconomic scenario: the impact of the COVID-19 pandemic on housing affordability and other key social and economic variables

In the aftermath of the COVID-19 pandemic, the U.S. ended the first half of 2022 with an annual increase in consumer prices equal to 9.1%, the highest in 40 years; the annual mean in 2021 was 4.7%. Besides other domestic and global factors, inflation was clearly fuelled by rising house prices also: free-to-let apartments rose up to a peak of 70% and rents to an average of $4.000 per month, while the mean monthly salary was less than $6.000. In response to this scenario, the Federal Reserve decided an interest rate hike. Taking into account that there is a huge gap between remunerations to high rank-management of great companies and salaries of the rest of population, especially people with precarious jobs, the evidence is that the middle-class strata could not afford to buy a house, while the working classes, still mostly immigrants, spent more than half of their income on rent. According to a Phillips curve framework, about the 3% of the overall U.S. inflation growth

DPCE online
ISSN: 2037-6677

is due to subsidies provided for by the CARES Act 2020[1] signed by President Trump and by the American Rescue Plan Act 2021 signed by President Biden.

Since the early stages of the pandemic, the loss of 40 million jobs raised fears of a wave of mass evictions as many tenants living "paycheck-to-paycheck" were no longer in the employment conditions to pay the rent regularly.[2]

All of the above led to an exponential increase in homelessness – which currently has reached over 600.000 people nationwide – whose access to vaccines remained critical for the whole of the 2021. As reported to Congress by the U.S. Department of Housing and Urban Development (HUD):

(a) on a single night in 2021 more than 326.000 people were experiencing sheltered homelessness, 4 out of 10 of them were families with children;

(b) the number of people staying in sheltered locations decreased to 8% between 2020 and 2021, but various opposite factors contributed to it: on the one side, some emergency shelter providers increased the space between people sleeping in congregate settings to reduce their risk of exposure, leading to fewer beds in congregate shelters; on the other side, various factors led to its decline (mainly, people's loathness to use offered shelter beds because of health risk, eviction moratoria and cash transfers that may have reduced inflow into homelessness);

(c) the number of sheltered people in families with children declined considerably between 2020 and 2021, probably due to the pandemic-related resources available through the CARES Act and other pandemic relief measures generous to families with children; the share of emergency shelter beds for people experiencing sheltered homelessness located in non-congregate settings (hotels, motels, and other not facility-based solutions) increased by 134%;

(d) on a single night in 2021, 15.763 people under the age of 25 experienced sheltered homelessness on their own as "unaccompanied youth", which represented a decline of 9% by comparison to 2020, but between 2020 and 2021 the number of transgender youth increased by 29%, the number of Native Americans increased by 21%, the number of sheltered individuals identified as chronically homelessness increased by 20%.[3]

Meanwhile**,** after decades of neoliberalism, housing policies that used to protect the social majority have been in regression for sure, but this has been complemented with a strong demand for buying property units by real estate investors.

Other disparities as mobility inequality and spatial segregation were amplified by lockdown measures, which revealed a massive impact on vulnerable communities.[4] Before the pandemic, studies had found that higher

[1] The *Coronavirus Aid, Relief, and Economic Security Act* (2020) and the *Coronavirus Response and Consolidated Appropriations Act* (2021) provided fast and direct economic assistance for American workers, families, small businesses, and industries.

[2] These data are derived from tradingeconomics.com.

[3] HUD, *The 2021 Annual Homeless Assessment Report (AHAR) to Congress*, Washington, 2022.

[4] A. Sevtsuk, R. Basu, D. Halpern, A. Hudson, K. Ng, J. de Jong, *A tale of two Americas: Socio-economic mobility gaps within and across American cities before and during the pandemic*,

income households made about 30% more trips than lower income households, with an average trip length about 40% larger; [5] furthermore, an inquiry into some local communities showed that lower income-residents used much more public transport than county residents as a whole, more rarely travelled as vehicle drivers, and made comparatively more trips for shopping and school and fewer trips for work and social purposes.[6] COVID-19 has had disparate effects on disadvantaged groups specifically[7]: while higher income groups had access to a vast array of mobility options (pay-per-use transport infrastructure and multiple vehicles per family, among others), lower income groups suffered even more from the already existing poor quality and shortage of coverage of public transport, difficulties in obtaining driving licenses, and so on. Inequities in the social determinants of health during previous pandemics had been elsewhere clearly revealed;[8] disparate access to quality public services and severe adverse effects on marginalized communities are exactly what COVID-19 has exacerbated.[9] Irrespective of the pandemic crisis, the quality, affordability, stability and location of a home are crucial to health and well-being.[10]

In its 2021 biennial report to Congress on Worst Case Housing Needs, HUD highlighted that in 2019, before the COVID-19 pandemic, 7.77 million households had worst case (i.e. very low-income renter households nationwide) housing needs: 2.27 million of them were families with children; 2.24 million households were headed by an older adult (62 years or older); 2.54 million were single adults. About 13% of households with worst case needs included people with disabilities younger than 62, and about one-half were non-White or of Hispanic ethnicity. Among very low-income renters, more than one-half of Asian, Native Hawaiian, and Other Pacific Islander households had worst case needs, as did more than 45% of Hispanic households, 44% of non-Hispanic White households, and 36% of non-Hispanic Black households.[11] According to the Report, worst case house needs are spread all over the Country, but rates are highest in the South and West and in central cities and urban suburbs.

in *Cities. The Int.'l J. of Urban Policy and Planning*, Vol. 131, 2022, 1 ff.; J. Lee, Y. Huang, *COVID-19 Impact on US Housing Markets: Evidence from Spatial Regression Models*, in *Spatial Economic Analysis*, Vol. 17, No. 3, 2022, 395 ff.

[5] J. Memmot, *Trends in Personal Income and Passenger Vehicle Miles* [Bureau of Transportation Statics, Special Report] 2007.

[6] A. Weinstein Agrawal, E.A. Blumenberg, S. Abel, G. Pierce, C.N. Darrah, *Getting Around When You're Just Getting By: The Travel Behavior and Transportation Expenditures of Low-Income Adults*, San José (CA), 2011, 1 ff., at 28.

[7] S. Chang, E. Pierson, P.W. Koh, J. Gerardin, B. Redbird, D. Grusky, J. Leskovec, *Mobility network models of COVID-19 explain inequities and inform reopening*, in *Nature*, Vol. 589, 2021, 82 ff.

[8] H. Zhao, R.J. Harris, J. Ellis, R.G. Pebody, *Ethnicity, deprivation and mortality due to 2009 pandemic influenza A (H1N1) in England during the 2009/2010 pandemic and the first post-pandemic season*, in *Epidemiology & Infection*, Vol. 143, No. 16, 2015, 3375 ff.

[9] See, *ex multis*, J.T. Chen, N. Krieger, *Revealing the unequal burden of COVID-19 by income, race/ethnicity, and household crowding: US county versus zip code analyses*, in *J. of Public Health Management and Practice*, Vol. 27, Suppl. 1, 2021, S43 ff.

[10] J. Krieger, D.L., Higgins, *Housing and Health: Time Again for Public Health Action*, in *Am. J. Public Health*, Vol. 92, No. 5, 2022, 758 ff.

[11] HUD, *Worst Case Housing Needs 2021 Report to Congress*, in www.huduser.gov.

DPCE online
ISSN: 2037-6677

Among his first acts as President, Biden issued a Memorandum for the Secretary of Housing and Urban Development to redress the long 20th century's legacy of bad practices by Federal, State and local governments that systematically implemented racially discriminatory housing policies that contributed to segregated neighborhoods so inhibiting equal opportunity and the chance to build wealth for Black, Latino, Asian American and Pacific Islander, and Native American families, and other underserved communities.[12] Immediately, by Executive Order 13985 the newly elected President pointed out that his overarching priority would be the increase of "equity", defined as «the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality»; then, «the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved,[13] marginalized, and adversely affected by persistent poverty and inequality»[14].

Since its creation as Cabinet-level Agency in 1965, HUD has been accomplishing its goal of reliably providing low-cost financing to American homeowners through the home loan insurance programs administered by its Federal Housing Administration (FHA) and the mortgage-backed securities (MBS) program managed by the Government National Mortgage Association (Ginnie Mae). In fiscal year 2022, the FHA continued its work to assist homeowners facing hardships, with a strong focus on protecting individuals and families of color disproportionately affected by the pandemic. At the same time, in a highly competitive real estate market, FHA ensured continued access to credit to expand first-time homeownership to first-time homebuyers and underserved populations and communities. During the pandemic, over 2 million FHA borrowers became delinquent; over 1.8 million FHA borrowers took advantage of FHA's COVID-19 forbearance offering, which permitted them to postpone their mortgage payments; over 1 million FHA borrower entered into a loss mitigation plan that enabled them to remain in the home through a home retention option or are still in the process of doing so.[15] Furthermore, FHA played a major role in providing affordable mortgage financing for people traditionally excluded

[12] EOP, *Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, Jan. 26, 2021, available at www.federalregister.gov.
[13] «The term "underserved communities" refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of "equity"» (E.O. 13985, sec. 2).
[14] Executive Order 13985 of January 20, 2021, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, available at www.federalregister.gov.
[15] HUD-FHA, *Annual Report to Congress Regarding the Financial Status of the Federal Administration Mutual Mortgage Insurance Fund*, Washington, 2022.

from the conventional market mortgage, including first-home homebuyers, households of color, and families living in rural areas. According to official data provided by FHA, since 2009 FHA has insured 9.1 million mortgages to first-time homebuyers for a total loan amount of $1.7 trillion.[16]

Nevertheless, all data submitted here demonstrate that in contemporary United States more action is needed. Hence, to fulfil its mission to create strong, sustainable, inclusive communities and quality affordable homes for all, HUD outlined five comprehensive strategic goals for fiscal years 2022 through 2026:

(1) *support undeserved communities*: advance housing justice, reduce homelessness and invest in the success of communities;

(2) *ensure access to and increase the production of affordable housing*: increase the supply of housing and improve rental assistance;

(3) *promote homeownership*: advance sustainable homeownership by expanding homeownership opportunities and by creating a more accessible and inclusive housing finance system;

(4) *advance sustainable communities*: guide investment in climate resilience, strengthen environmental justice and integrate health and housing;

(5) *strengthen HUD's internal capacity*: enable the HUD workforce, improve acquisition management, strengthen Information Technology, enhance financial and grants management, improve ease, effectiveness and trust in HUD services. [17]

Accordingly, it will be essential to fortify fair housing rights and to increase protections under the Fair Housing Act of 1968.

In July 2015, after two years of discussion and under the decisive impulse given by the Supreme Court in 2015,[18] HUD announced the "Affirmatively Furthering Fair Housing Rule" (AFFH). Under the rule, state and local governments receiving federal funds for housing and community development were required to identify and address the barriers provoking exclusion on racial grounds, to protect groups such as families with children or persons with disabilities, and to formulate plans to overcome these barriers. Just as HUD had started accomplishing the AFFH Rule, the Trump Administration not only suspended and then terminated it, but also deleted all data and resources related to the Fair Housing planning from the HUD webpage. Under the Biden-Harris Administration, HUD restored the rule in June 2021.[19]

All that said, the following sections of this essay will elucidate three cardinal elements for that strategy: i) the Housing Supply Action Plan; ii) the impetus for reforming exclusionary zoning and reducing its disparate impact on housing; iii) Supreme Courts and their role in Federal and State eviction diversion programmes. All three definitely go to the heart of the American Dream and enter a tangle of crucial constitutional issues in American history as Equal Protection of the laws, participation in local

[16] *Ibidem*, at 10.
[17] HUD, *Fiscal Year 2022-2026 Strategic Plan*, Washington, 2022.
[18] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015); see *infra*, §. 3.
[19] See www.hud.gov/press/press_releases_media_advisories/hud_no_21_098.

DPCE online
ISSN: 2037-6677

government, regulation in economics, local development, eminent domain and private property taking, federal and State preemption of local regulation, immigration law.

2. Federal subsidies for housing supply in the short-term Biden-Harris' strategy

In 1935 the Sixth Circuit Court of Appeals shaped federal housing policies by establishing that the goal of "removing blight" was not a legitimate public purpose of the federal government and thus could not justify the use of eminent domain to acquire property.[20] The Court safeguarded private property from taking as housing for another individual could not be considered a "public use". Soon after in 1936, a N.Y. State Court held that slum clearance and low-cost housing were public uses that justified the use of eminent domain.[21]

Thus, notwithstanding the New Deal Legislation on federal mortgage insurance to support finance for home ownership of 1934 and that for public housing of 1937, the key role of local governments and their Public Housing Authorities (PHAs) in housing policies was clearly established.

Since then, either based on tax breaks or on public housing, vouchers or other subsidies, the success of any national housing policy has depended on local authorities' willingness to adhere federal programs and/or on their own actions and decisions about what urban development[22] and where public housing would be located within their jurisdictions.[23]

2.1 From aid-to-place to aid-to-people: a brief history of housing and zoning since the Housing Act of 1949

Federal commitment in housing and urban development has been a road full of contradictions and inconsistencies at all times, notably after 1949 when one the most controversial programs in the nation's history was adopted. Since then, a key number of both federal and state constitutional facets raised by actions of seizing and demolishing large swaths of private and public property for the purpose of renovating and ameliorating neighborhoods, infrastructure, dismissed industrial sites and commercial activities.

After decades of economic depression and the war years, the Housing

[20] *U.S. v. Certain Lands in the City of Louisville, Ky.*, 78 F.2d 684 (1935); see R.A. Hays, *The Federal Government & Urban Housing*, Albany, 3rd ed., 2012, at 166.

[21] *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); see E.E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, in *Envtl. Law*, Vol. 11, No. 1, 1980, 1 ff., at 33-36, and D. Cuff, *The Provisional City. Los Angeles Stories of Architecture and Urbanism*, Cambridge (Mass.), 2000, at 97-100.

[22] Housing and urban development policies are two inseparable facets of the same matter. For an in-depth historical reconstruction of the U.S. housing and urban development policies from the "Keynesian Urban Policy Era" commenced under President Hoover to President Trump's crackdown on Sanctuary cities see A. Tarzia, *National urban policies, municipal zoning and disputes over Sanctuary Cities in Metropolitan America*, in *DPCEonline*, No. 1, 2021, 1161 ff.

[23] A.F. Schwartz, *Housing Policy in the United States*, N.Y., 3rd ed. 2015, at 170-171.

Act of 1949 – with its national goal of a "decent house" for all American families – and its later iterations were passed to help address the decay of urban housing provoked by the exodus to the suburbs. A large amount of federal financial resources should have buoyed cities in reconfiguring downtowns, clearing slums and rebuilding blighted areas, improving the available housing stock for American families and creating new and better neighborhood facilities. Local governments would have been encouraged to plan basic water and sewer facilities eligible for federal assistance and would have received grants and loans to cover the cost of land purchases and write-downs; middle-income working-class Americans, associated in non-profit cooperative ownership housing corporation or non-profit cooperative housing trust, would have been granted access to low-interest and long-term mortgage insurances for housing.

To obtain federal funds, each participant city was required to develop a Workable Program to prevent future slums by adopting or improving municipal codes on housing and zoning; impressively, it was maintained that the program constituted one the most significant development in federal-municipal relationship.

The simplistic vision of the Act relied on «the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family» (Sec. 2): according to the slightly revised form in which the bill on "Urban Redevelopment" (renamed "Urban Renewal" from the Housing Act of 1954 onward) was enacted, slums clearance and construction of new dwelling units would have solved the problems of American cities.[24]

Cutting across different federal Administrations, many obstacles stood in the way of the various urban development programs: the opposition of the real estate lobby and of the U.S. Savings and Loan League; different wars the U.S. were involved in, with correlated decisions to allocate federal resources elsewhere; sharp cuts in federal funds soon after the adoption of new programs due to inflationary and economic crisis periods or radical changes in American politics[25] that provoked shifts from (main accent on) supply-side housing policies to (main accent to) demand-side ones; absence of coordination among various federal Agencies and programs; unsuccessful attempts to involve enterprises in urban revitalization programs; lack of participation in urban planning by the interested communities; and so on. All of these aspects have been dealt with elsewhere.[26]

[24] In *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court held in a unanimous opinion that the V Amendment does not limit Congress' power to seize private property with just compensation to any specific purpose. In 1945 Congress passed the District of Columbia Redevelopment Act which created the District of Columbia Redevelopment Land Agency whose purpose would have been to identify and redevelop blighted areas of Washington, D.C.; on the new agency was conferred the power of eminent domain – the ability to seize private property with just compensation. The Court concluded that the power to determine what values to consider in seizing property for public welfare is Congress' alone.

[25] Mainly, at times of entering in the "New Federalism" era in the 1980s'.

[26] A. Tarzia, *National urban policies, municipal zoning and disputes over Sanctuary Cities in Metropolitan America*, cit.

DPCE online
ISSN: 2037-6677

Usually and inappropriately associated only with high-rise buildings,[27] public housing[28] is still the best known housing program in the U.S., but it is no longer the national largest subsidy program for low-income households as the Housing Choice Voucher Section 8 and the Low-Income Housing Tax Credit (LIHTC) programs have acquired a predominant role.

As will be explained below, there's an evident trade-off between the essential features of public housing (public property perpetually destined to very low-income people) and the quality of dwelling units offered and neighborhood services related to: the more is the quality, the more is the risk of exclusionary requirements to participate in the program. President Clinton's HOPE VI, for example, aimed at reducing high rate of crimes and other social problems by replacing high-rise building with smaller scale units and lower density developments, thereby reducing the number of assisted people by lifting the one-for-one replacement rule and demolishing the most unliveable buildings. As HOPE VI demonstrated, the goal of improving quality life in blighted areas through demolitions, reconstructions and rehabilitations by providing amenities and better public services do not necessarily improve assistance to VLI people: the new dwelling-units, built on a smaller scale and embellished with such features as dishwashers, air-conditioning, washers, dryers, front porches, bay windows and gabled roofs, erected multiple barriers and created a somewhat segregationist side-effect because not all previous residents were eligible to the program (people with poor credit histories, with criminal records, or that didn't demonstrate sufficient house-keeping skills[29]).

[27] As reported in HUD, *Characteristics of HUD-Assisted Renters and Their Units in 2019* [2021], in 2019 the distribution of assisted housing by structure type under all HUD's programs (i.e. public housing, vouchers, and privately owned multifamily units) was as follows: Mobile Homes, Single-Family Detached, Other 13.7%; single-family attached 3,7%; 2-4 people 20,4%; 10 to 19 9,4%; 20 to 49 10,7%; 50 or more 26,8%. «Senior and small renter households generally favor units in garden or high-rise apartments that are safe and low maintenance, whereas households with children generally favor single-family units, whether detached or attached (for example, townhouses). The most important distinction between HUD-assisted housing and both VLI rental housing and all rental housing is the far lower share of HUD-assisted housing units that are single-family detached units and mobile homes. Only 13.7 percent of HUD-assisted units fall into this category, approximately one-half the percentage found among households in VLI units or all rental units. The second most important distinction is the greater share of HUD-assisted housing units that are in large buildings (those with 50 or more units). Among the HUD-assisted units, 26.8 percent are in large buildings, compared with 15.7 percent among units occupied by VLI renter households and 12.6 percent among all renters. These two distinctions are even sharper when the focus is restricted to public housing or units in privately owned multifamily projects: 31.9 percent of public housing tenant households and 42.1 percent of households in privately owned multifamily projects live in buildings with 50 or more units» (*ivi*, at p. 36).

[28] According to HUD'S Picture of Subsidized Households, in 2021 public housing subsidized 931.624 units (957.971 in 2020, 987.133 in 2019, 1.155.557, in 2008, 1.184.541 in 2004, 1.282.099 in 2000); in 2021 the HUD's programs as a whole subsidized 5098041 units, providing assistance to 917.0091 people (www.huduser.gov/portal/datasets/assthsg.html).

[29] A.F. Schwartz, *Housing Policy in the United States*, cit., 188; S.J., Popkin, M.K. Cunningham, M. Burt, *Public Housing Transformation and the "Hard to House"*, in *Housing Policy Debate*, Vol. 16, No. 1, 2005, 1 ff.; H.G. Cisneros, L. Engdahl (Eds.), *From*

The Housing Choice Voucher[30] is the federal government's main program for supporting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market. If the owner agrees to rent under the program and the property meets the federal government's physical quality standards, the participant may elect any house (single-family homes, townhouses and apartments) that meets the requirements of the program and is not limited to units located in subsidized housing projects. Vouchers are administered locally by PHAs, which receive federal funds from HUD to administer the program and pay the subsidy to the landlord directly; the family then pays the difference between the actual rent charged by the owner and the amount subsidized by the program. A family which receives a housing voucher can select a unit with a rent that is below or above the payment standard. The housing voucher family must pay 30% of its monthly adjusted gross income for rent and utilities, and if the unit rent is greater than the payment standard the family is required to pay the additional amount. By law, whenever a family moves to a new unit where the rent exceeds the payment standard, it may not pay more than 40 percent of its adjusted monthly income for rent.[31] It deserves to be recalled that the Section 8[32] was created by Nixon Administration in 1974 and that initially the program included both supply- and demand-side subsidies. Until the supply-side part of the program was ceased by Reagan in 1983, it produced about new or rehabilitated 850.000 housing units.[33] House Vouchers has always been controversial: initially they were advocated by conservatives, who believed that they were less expensive, more cost-effective and more

Despair to Hope: Hope VI and the New Promise of Public Housing in America's Cities, Washington, 2009.

[30] As reported by A. von Hoffman, «[d]uring the 1990s, rental vouchers became a firmly established part of federal housing policy. Under the George H.W. Bush administration, another struggle between the advocates and opponents of government-supported low-income housing production ended in the compromise of the Affordable Housing Act of 1990 which gave some money to vouchers for new construction, as well as HUD Secretary Jack Kemp's effort to sell public housing units to tenants. During the presidency of Bill Clinton, the political positions on vouchers changed once again. Henry Cisneros, Clinton's HUD Secretary, adopted part of the agenda developed by Jack Kemp in the preceding Republican administration and declared the Clinton administration's support for vouchers. This position blunted the Republicans' attempt to gut HUD's housing programs, after they won control of both houses of Congress in 1994. In reaction to Clinton's and Cisneros's support, some Republicans now opposed vouchers—and all housing assistance— while others continued to back this approach to low-income housing. By the end of Clinton's second term, the political parties had changed places on the issue, with most Democrats now voting to fund more rental vouchers and most Republicans rejecting them. Completing the reversal, the administration and Congress merged the Section 8 rental certificates, the product of the first compromise on the issue, into vouchers, now renamed as Housing Choice Vouchers» (*History Lessons for Today's Housing Policy. The Political Processes of Making Low-Income Housing Policy*, in *Housing Policy Debate*, Vol. 22, No.3, 321 ff., available at www.jchs.harvard.edu).

[31] 42 U.S. Code § 1437f; see www.hud.gov/topics/housing_choice_voucher_program_section_8.

[32] A detailed history of the *Housing in the Seventies* program and of the Section 8 in R.A. Hays, *The Federal Government & Urban Housing*, cit., 139 ff.

[33] A.F. Schwartz, *Housing Policy in the United States*, cit., 208.

DPCE online
ISSN: 2037-6677

residential choice-friendly to move from one neighborhood to another; liberals feared their inflationary impact on the local housing market. Later on, there were periods in American politics when republicans opposed to them and democrats were favourable.

Created by the Tax Reform Act of 1986 and later modified numerous times, the LIHTC program currently gives State and local LIHTC-allocating agencies the equivalent of nearly $8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing for low- and moderate-income tenants. State housing agencies then award the credits to private developers of affordable rental housing projects through a competitive procedure. Developers usually sell the credits to private investors to get capital. Once the housing project is realized (essentially, made available to tenants), investors can claim the LIHTC over a 10-year period.[34]

2.2 The Biden-Harris Housing Supply Action Plan

In May 2022 President Biden announced the Housing Supply Action Plan to tackle inflation and to ease the burden of housing costs. Emphatically labelled as "the most comprehensive all of government effort to close the housing supply shortfall in history",[35] the Plan is made up of legislative and administrative measures aimed at boosting the supply of quality housing to reduce the gap in five years.

Larger house affordability would be granted by the complementary action of rental and downpayment assistance, in combination with the creation and preservation of hundreds of thousands of housing units in three years. Ostensibly, this should decrease inflation by reducing the mismatch between housing supply and housing demand.

Urging Congress to act on a bipartisan basis, the Biden-Harris Administration has identified five main areas of concern and the related actions to be taken:

(1) *Reward jurisdictions that have reformed zoning and land-use policies* with higher scores in certain federal grant processes, for the first time at scale. The Administration maintains that restrictive land uses regulations has been limiting housing density, inflating prices, perpetuating historical patterns of segregation, limiting economic growth and keeping workers in lower productivity regions. To encourage this kind of reforms, the Administration defined the following actions to be drawn up: a) leveraging transportation funding from the Bipartisan Infrastructure Law (BIL[36]). In 2022 the U.S. Department of Transportation (DOT) released

[34] See www.huduser.gov and www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work.

[35] www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/

[36] On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58, also known as the "Bipartisan Infrastructure Law") into law. It provides $550 billion over fiscal years 2022 through 2026 in new Federal investment in infrastructure as roads, bridges, mass transit, water infrastructure, resilience, and broadband.

three funding applications for competitive grants totalling nearly $6 billion in funding for jurisdictions that acted in order to reform land uses for promoting density and rural main street revitalization; b) integrating affordable housing into DOT programs by increasing financial support for Transportation Infrastructure Finance and Innovation Act programs projects that embrace residential development; c) including land use within the U.S. Economic Development Administration's (EDA) investment priorities.

(2) *Deploy new financing mechanisms* to build and preserve more housing where financing gaps currently exist: manufactured housing (including with chattel loans that the majority of manufactured housing purchasers rely on), accessory dwelling units (ADUs), 2-4 unit properties, and smaller multifamily buildings: a) as regards manufactured housing, increased flexibility in enabling people to use conventional mortgages – instead of chattel landing, more expensive – is required; to this end, in their Duty to Serve Program,[37] the action of Freddie Mac and Fannie Mae will be crucial. This will require «working to increase the usability of FHA's Title I loan program for Manufactured Housing, supporting greater securitization of Title I loans through Ginnie Mae's platform, updating the HUD Code to allow manufacturers to modernize and expand their production lines, and helping manufacturers respond to supply chain issues»;[38] b) scaling up ADUs and piloting ADU and home renovation financing tools; c) boosting rural single-family construction.

(3) *Expand and improve existing forms of federal financing*, including for affordable multifamily development and preservation. This includes making Construction to Permanent loans (where one loan finances the construction but is also a long-term mortgage) more widely available by exploring the feasibility of Fannie Mae purchase of these loans; promoting the use of state, local, and tribal government COVID-19 recovery funds to expand affordable housing supply; and announcing reforms for expanding the Low Income Housing Tax Credit (LIHTC), which provides credits to private investors developing affordable rental housing and the HOME Investment Partnerships Program (HOME), which provides grants to states and localities that communities use to fund a wide range of housing activities. President Biden urged the Senate to pass "The Neighborhood Homes Investment Act" (NHIA) already passed by H.R.; the bill calls for the creation of a new federal tax credit targeted to the new construction or rehabilitation of affordable 1-4 family housing placed in distressed urban, suburban, and rural neighborhoods; it would mobilize private investment to build and rehabilitate 500,000 affordable homes for moderate- and middle-income homeowners over the next 10 years. Treasury pressed state, local, and tribal governments to dedicate more of their American Rescue Plan funds to build further affordable housing at lower costs for families and individuals. Another action to be taken is the alignment of federal funds to reduce transaction costs and duplication, and accelerate development.

(4) Ensure that *more government-owned supply* of homes

[37] www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/Duty-to-Serve.aspx
[38] www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/

DPCE online
ISSN: 2037-6677

and other housing goes *to owners* who will live in them – or non-profits who will rehab them – and *not to large institutional investors*.

(5) *Work with the private sector* to address supply chain challenges and improve building techniques to finish construction in 2022 on the most new homes in any year since 2006. [39]

These areas of concern cumulate with the climate commitment to reach global peaking of greenhouse gas emissions assumed by the Biden-Harris Administration at the beginning of the presidential term by rejoining the Paris Agreement.

For the purposes of the present essay and in order to better enlighten the expected effects of the Biden-Harris strategy on housing over the long-run, a focus on racial discrimination and exclusionary zoning is needed.

3. Exclusionary Zoning before the Courts: the long and winding road to disparate impact's justiciability

"Exclusionary Zoning" is a catchall syntagm that refers to usually local land-use regulations that, voluntarily or not, effectively raise cumbersome barriers for low- and moderate-income households to find housing in some neighborhoods, driving them towards separated districts under a hierarchical division of housing types. Some anti-EZers used the expression to refer to an all-inclusive vast array of "regulatory barriers to affordability" that encompasses restrictions to multi-family dwellings; large minimum requirements for housing, lot and yards sizes in restricted residential districts; strict building codes that requires the use of certain costly methods and materials; veto powers of the residential community to change the shape of its district; labor regulations that require paying prevailing union wages for constructions on even small-scale housing projects if federal funds are involved; regulations of developers' hiring practices; historical preservations regulations; environmental regulations; impact or development fees and exactions upon new housing; regulations on mobile homes; rent controls; even «state and local ordinances or constitutional provisions that prohibit local governments from raising taxes or increasing their spending enough to provide the infrastructures necessary to accommodate the population growth experienced by the area concerned»;[40] and many others .

[39] These areas of concern coincide to a significant extent with those suggested by some urban and housing specialists: D. Immergluck, for instance, suggested the Administration to «establish a right to housing for every U.S. household, including undocumented immigrants»; to strengthen the enforcement of the Fair Housing Act and the Community Reinvestment Act, especially the AFFH rule; to focus on housing stability, as well as affordability, by enhancing federal support for short-term rental assistance and right to counsel programs; to reverse the trend towards the reduction of the federal role in housing finance; «to prioritize issue of climate change and economic and ecological resilience in housing policies and programmes» (*Housing Policy Recommendations for the Biden/Harris Administration*, in *Housing Policy Debate*, Vol. 31, No. 6, 2021, 1050 ff.; see also, Id., *Preventing the Next Mortgage Crisis: the Meltdown, the Federal Response, and the Future of Housing in America*, Lanham, 2015).

[40] See A. Downs, *Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments*, in G.T. Kingsley, M.A. Turner (Eds.), *Housing Markets and Residential*

The near universal critics[41] on EZ usually point on its social and racial segregationist effects: it tends to bottle up the poor in the central cities and deny them access to better housing and public services, especially the better public education offered in suburban schools.[42]

But there is a long practice of studies upon its economic rationale that in early stages, from mid- to late-20th Century, provided justification for it grounded in assumptions on efficient allocations of public goods. According to the idea that «zoning and other land use controls are most usefully viewed as collective property rights controlled and exchanged by rational economic agents»,[43] various motivations related to local finance and public services had been given for it:[44]

(a) *Fiscal Zoning*, grounded on the idea to exclude people who pay less in local taxes than they obtain in local services. Being based upon «the assumption that costs of local public services are shared equally among households»,[45] this mechanism would have effectively enabled Tiebout's model of efficient supply of public services;

(b) *Public Goods Zoning*, according to which «people are prevented from entering a community because they will have a deleterious effect on the cost of producing local public services».[46] According to Schwab and Oates, for the creation of mixed communities (i.e., the admission of low-

Mobility, Washington, 1993, 255 ff., at 257-259, and Florida Department of Community Affairs, *Enriching Florida's Communities*, Tallahassee, 2011, at 141-142.

[41] *Ex multis*, in the last decade, E.G. Goetz, *The One-way Street of Integration: Fair Housing and the Pursuit of Racial Justice in American Cities*, Ithaca, 2018; R. Florida, *The New Urban Crisis: How Our Cities Are Increasing Inequality, Deepening Segregation, and Failing the Middle Class – And What We Can Do About It*, N.Y., 2017; E.L. Glaeser, *Reforming Land Use Regulations*, 2017, in www.brookings.edu; P.A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, Aug. 7, 2015, in www.tcf.org; D.S. Massey, L. Albright, R. Casciano, E. Derickson, D.N. Kinsey, *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*, Princeton, 2013; J.T. Rothwell, D.S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, in *Social Science Q.*, Vol. 91, No. 5, 2010, 1123 ff.

[42] See A. Downs, *New Visions for Metropolitan America*, Washington, 1994; J. Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, Washington DC, 2012.

[43] W.A. Fischel, *The Economics of Zoning Laws. A Property Rights Approach to American Land Use Controls*, Baltimore, 1985, at xiii. At that time, the A. expressed a sharp opinion on "inclusionary zoning": «It is called, ironically, "inclusionary zoning". In a town with inclusionary zoning, the landowner-developer is required to construct units reserved for lower-income residents as a price for being permitted to develop higher-income units. This requirement amounts to an in-kind tax on the landowner-developer. The proceeds are earmarked for subsidized housing rather than for general municipal uses. … The irony of this is that the more vigorously the community pursues low-income housing through inclusionary zoning the higher the tax is, and more development is discouraged» (*ivi*, at 327-328).

[44] W.T Bogart, *What Big Teeth You Have!: Identifying the Motivations for Exclusionary Zoning*, in *Urban Studies*, Vol. 30, No. 10, 1993, 1669 ff., at 1671-1672.

[45] B.W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, in *Urban Studies*, Vol. 12, No. 2, 1975, 205 ff., at 211: «Casual empiricism suggests that the constraints missing from the Tiebout model are provided in real world by various forms of land-use restrictions which I classify under the heading of zoning» (*ivi*, at 205-206).

[46] W.T Bogart, *What Big Teeth You Have!*, cit., 1671.

DPCE online
ISSN: 2037-6677

or moderate-income people in previously barred districts) a system of "equalizing intergovernmental grants" would be indispensable to balance the increase in costs to one group of producing the public good which is offset by the benefit to the other group;[47]

(c) *Political Economic Zoning*: the residents of a town tend to exclude potential entrants whose preferences for public goods differ. Large differences in preferences for public services among groups of households can aggravate (or possibly alleviate) exclusionary preferences;[48]

(d) *Consumption Zoning*: there can be negative externalities in the consumption of private goods resulting from community heterogeneity.[49]

Late contemporary studies on public economics turned to a critical line on exclusionary zoning for awareness of inefficiencies it creates elsewhere.[50] Some Authors emphasized that, redirecting lower-income people to less desirable locations, EZ generates costs for new roads, new schools, and so on,[51] retards economic growth by impeding the absorption of new workers in growing job markets and reduces economic opportunities by limiting dense development in the most productive areas of the Country,[52] generates disparities in the provision of public goods and feeds regional inequality.[53]

Certain Authors have recently provided case studies based on standardized multiple-regression methods to evaluate the persistent impact

[47] R. Schwab, W. Oates, *Community Composition and the Provision of Local Public Goods: A Normative Analysis*, in *J. of Public Economics*, Vol. 44, 1991, 217 ff.: «By making more generous grant payments to local governments with relatively large numbers of low-income households, a higher level government (like a metropolitan area government) can overcome the opposition of communities to the kinds of heterogeneity that are required for efficient outputs of local public goods. We also find that equalizing grants appear to solve an existence problem: they create a local-finance equilibrium by effectively offsetting an incentive for continued "pursuit" of higher-income households. Such a system of grants may, in this way, eliminate (or at least reduce) the powerful incentives for the adoption by local governments of various sorts of exclusionary devices» (*ivi*, at 219).

[48] *Ex multis*, S. Rose-Ackerman, *Beyond Tiebout: Modeling the Political Economy of Local Government*, in G. Zodrow (Ed.) *Local Provision of Public Service: The Tiebout Model after Twenty-five Years*, N.Y., 1983, 55 ff.: «within any town with a fixed population, preferences are single-peaked, and majority rule voting produces a unique outcome. The restrictions on both the tax system and the number of goods permit majority rule to "work" by reducing the public choice problem to one dimension. In equilibrium with a fixed number of communities, the political choices of each community must produce a pattern of public services where no one wants to migrate» (*ivi*, at 67).

[49] For example, Jencks and Mayer conducted a survey on social effects of heterogeneous neighborhood and schools: C. Jencks, S. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood: A Review*, in L.E. Lynn, M.G.H. McGeary (Eds.), *Inner-City Poverty in the United States*, Washington DC, 1990, 111 ff.

[50] *Ex multis*, the same W.A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, in *Urban Studies*, Vol. 41, No. 2, 2004, 317 ff.

[51] *Ex multis*, E.L. Glaeser, *Triumph of the City. How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier*, N.Y., 2011.

[52] E.L. Glaeser, J. Gyourko, R.E. Saks, *Urban Growth and Housing Supply*, in *J. of Economic Geography*, Vol. 6, No. 1, 2006, 71 ff.

[53] *Ex multis*, P. Ganong, D. Shoag, *Why Has Regional Income Convergence in the US Declined?*, in *J. of Urban Economics*, Vol. 102, 2017, 76 ff.

of initial zoning ordinances over contemporary outcomes relative to transportation networks, geography, demographics, patterns of commercial and industrial development.[54]

Lately, even jagged decades-long estimations lacking empirical traction of the impact on the gross domestic product appeared.[55]

3.1 The metamorphosis of suburbs: rethinking Euclidean planning zones for contemporary Metropolitan America

The first branded example of land-use zoning in the United States was an 1880 ordinance of the City of San Francisco[56] that made it illegal to operate a laundry in a wooden building without a (very discretional) permit from the Board of Supervisors. The regulation aimed at containing Chinese Americans, who owned or operated about two-thirds of that industry in the city, so pushing them towards specific city districts.[57]

Later on and beginning with Baltimore in 1910,[58] several southern and

[54] A. Shertzer, T. Twinam, R.P. Walsh, *Zoning and Segregation in Urban Economic History*, in *Regional Science and Urban Economics*, Vol. 94, 2022, 1 ff.: with regard to Chicago, Ead., *Zoning and the Economic Geography of Cities*, in *J. of Urban Economics*, Vol. 105, 2018, 20 ff.; with regard to Seattle, T. Twinam, *The Long-Run Impact of Zoning: Institutional Hysteresis and Durable Capital in Seattle, 1920–2015*, in *Regional Science and Urban Economics*, Vol. 73, 2018, 155 ff.

[55] In a highly influential *N.Y. Times* OP-ED, Chang-Tai Hsieh and Enrico Moretti stated that «Without these regulations, our research shows [N/A: Ead., *Why Do Cities Matter? Local Growth and Aggregate Growth*, Kreisman Working Paper Series in Housing Law and Policy 36, 2015], the United States economy today would be 9 percent bigger — which would mean, for the average American worker, an additional $6,775 in annual income. … The cost for the country of too-stringent housing regulations in high-wage, high-productivity cities in forgone gross domestic product is $1.4 trillion. That is the equivalent of losing New York State's gross domestic product» (*How Local Housing Regulations Smother the U.S. Economy*, *The N.Y. Times*, Sept. 6, 2017); a ruthless critic of the methodology and reliability of the data used by the two OP-EDs has been provided by Z. Bronstein, *When Affordable Housing Meets Free-Market Fantasy*, Dec. 11, 2017, in www.dissentmagazine.org.

[56] Order No. 156, passed May 26, 1880. Something different was the 1890 San Francisco Order No. 2190 designating the location and the district in which Chinese were directed to reside and carry on business; the order, which required all persons of Chinese descent to move out of a San Francisco neighborhood, was held unconstitutional for violating both the Equal Protection Clause and the Due Process Clause [*In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890)]. Anyway, these two examples clearly foreshadowed the Chinese Exclusion Act of 1882 that would have moulded the immigration policy for a long time (see A. Tarzia, *Il giudice e lo straniero. Linguaggi e culture nei percorsi giurisdizionali*, Napoli, 2020, 194 ff.).

[57] In a unanimous opinion authored by Justice Matthews, the Supreme Court concluded that «[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution» [*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)]. See A.H. Whittemore, *Exclusionary Zoning: Origins, Open Suburbs, and Contemporary Debates*, in *J. of American Planning Association*, Vol. 87, No. 2, 2021, 167 ff., at. 168.

[58] In 1910 the City of Baltimore passed a residential segregation ordinance – known as "West Ordinance" – to ban the arrival of Mr. George W.F. McMechen, a black Yale-

359

DPCE online
ISSN: 2037-6677

border cities enacted strict racial zoning ordinances defining separate residential districts for whites and blacks.[59]

From their inception in the pre-zoning period and even after *Shelley v. Kraemer*,[60] great importance had had private covenants usually on racial

educated lawyer, in the all-white block of McCulloh street; see *The N.Y. Times*, Dec. 25, 1910, *Baltimore Tries Drastic Plan of Race Segregation: Strange Situation*: «Strange Situation Which Led the Oriole City to Adopt the Most Pronounced "Jim Crow" Measure on Record». The City Council tried to hide its segregative intent by prohibiting whites from moving into neighborhoods with majority black populations; see G. Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, in *Maryland L. Rev.*, Vol. 42, 1983, 289 ff.

[59] J.C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, in *Minnesota L. Rev.*, Vol. 77, 1993, 739 ff., at 744-745; E.M. Basset, *Zoning*, in *National Municipal Review* Supplement, 1922, 315 ff.

[60] *Shelley v. Kraemer*, 334 U.S. 1 (1948). In 1924, the National Association of Real Estate Brokers circulated its first code of ethics to guide real estate mediators in their business transactions. According to article 34 of the 1924 code, «[a] Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighbourhood». In *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court upheld the use of restrictive covenants: «none of these amendments [N/A: V, XIII and XIV] prohibited private individuals from entering into contracts respecting the control and disposition of their own property, and there is no color whatever for the contention that they rendered the indenture void». Consequently, deeds hampering the transfer of property to non-whites and Jews became usual in white neighborhoods throughout the Country; even FHA made housing assistance conditional upon restrictive covenants sometimes, ostensibly to preserve the character and property values of existing neighborhoods. In *Shelley v. Kraemer*, a unanimous Court held that private racial covenants «standing alone, cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State, and the provisions of the Amendment have not been violated»; however, it would have been violative of the Equal Protection Clause for State courts to enforce them. In 1950, NAREB reacted to *Shelley v. Kraemer* by revising its code of ethics. In the code published by the Oregon Real Estate Board in 1956, explicit reference to race has been removed, but it was replaced by the implied discriminatory language of art. 5: "«A Realtor should not be instrumental in introducing into a neighborhood a character of property or use which will clearly be detrimental to property values in that neighborhood». Although restrictive covenants were no longer legally enforceable after *Shelley v. Kraemer*, they continued to be used by realtors to maintain segregated neighborhoods. In Portland, for example, when the 1948 Columbia River flood destroyed the Vanport community, many African Americans did not succeed in finding homes in and around Portland's metropolitan area: most realtors refuted to represent non-white clients, missing and cancelling schedules with "colored" people, temporarily taking homes off of the market until they found white buyers, and making sales dependent upon the approval of white neighbors; mortgage lenders typically refused to offer them credit. This way, many African Americans were pushed towards Albina, a neighborhood with a sizable African American population. See R. Helper, *Racial Policies and Practices of Real Estate Brokers*, Minneapolis, 1969, and www.oregonhistoryproject.org/articles/historical-records/nareb-code-of-ethics/#.Y7NW_nbMJD8.

grounds on the future development and composition of the neighbor.[61]

Since then, advocates of land use zoning maintained that single-family and multi-family housing should have been separated, with the latter «exist[ing] only in the neighborhood of factory and business centers».[62] This solution would have conserved property value, saved enormous waste in building construction and prevented «the development of great blighted areas near the heart of the city»; this way, it would have been preserved «the morale of the various neighborhoods or communities into which the city is divided» and fostered the «confidence that the existing character of the neighborhood will be preserved. Such confidence is essential to the improvement of the area and to the maintenance of a vigorous local civic pride and spirit».[63] Then, for decades «students of planning learned that the construction of any housing at a density higher than its single-family detached neighbors was abominable».[64] Ordinances alike were struck down by the Supreme Court in the 1917 case *Buchanan v. Warley*.[65]

In 1916, New York passed the first race blind *comprehensive zoning ordinance*,[66] separating and protecting residential uses from incompatible

[61] A typical clause was the following: «That the said land or buildings thereon shall never be rented, leased or sold, transferred or conveyed to, nor shall the same be occupied exclusively by any negro or colored person or persons of negro blood».
[62] B.C. Marsh, *An Introduction to City Planning. Democracy's Challenge to the American City* [1904], N.Y., reprinted in 1974, 130.
[63] R.H. Whitten, F.R. Walker, *The Cleveland Zone Plan*, Cleveland, 1921, at 4-6. Seventy years later, in a 1993 influential essay, J. Frug still recognized that: «It can help us break out of the cliched vision of open cities and closed suburbs often imagined in the context of exclusionary zoning. The effort to pass condominium conversion legislation demonstrates that the instinct for exclusion is not limited to the suburbs. Feelings of race and class privilege, desires to protect "home and family, property, and community," and allegiance to separateness exist on both sides of the city/suburb boundary. Many blacks fear the weakening of the city/suburb line as an attack on the political power they have gained in central cities, and many residents of ethnic neighborhoods fear integration as a destruction of their community. The prevention of gentrification, like exclusionary zoning, enables people to preserve comparatively homogeneous communities and advances the interests that the members of the community have in common. City and suburban residents thus have similar reasons to protect territorial identity: racial pride, feelings of community, fear of outsiders, and preference for their own way of life over that lived on the other side of the border (*Decentering Decentralization*, in *The Univ. of Chicago L. Rev.*, Vol. 60, No. 2, 1993, 253 ff., 289-290).
[64] A.H. Whittemore, *Exclusionary Zoning*, cit., 169.
[65] *Buchanan v. Warley*, 245 U.S. 60 (1917): in a unanimous decision, the Court reversed the Kentucky Court of Appeals and ruled that the ordinance was unconstitutional. Writing for the Court, Justice William R. Day recognized Louisville's interest in exercising its police power and the «promotion of the public health, safety, and welfare», but established that the Fourteenth Amendment «was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the States».
[66] According to William Fischel, the idea of comprehensive zoning was probably imported from Germany, whose cities had adopted it around 1870 (*An Economic History of Zoning*, cit., 319); anyway, evidence that land-use regulations in the U.S. had begun during colonial times are provided in J.F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, in *Harvard L. Rev.*, Vol. 109, No. 6, 1996, 1252 ff.

361

DPCE online
ISSN: 2037-6677

commercial and industrial uses;[67] such ordinances were championed by the Wilson Administration and, within a few years, by 1925 roughly 500 municipalities had already passed them.[68] In 1921, the Secretary of Commerce and future President Herbert Hoover appointed an Advisory Committee charged with drafting the Standard State Zoning Enabling Act 1922, which guided the States in delegating powers for zoning control to municipalities according to the principle of non-interference with market forces[69] and to the Dillon's rule.

The traditional common law tort of nuisance had provided the pillars for the police powers to protect residents from the hazards of noise, odors, traffic, and all other intrusions in the comfort, health, safety, and quality of life of the community. It was immediately patent that these regulations served the purpose to address mass migrations to U.S. cities from the rural South or from abroad in response to economic opportunities. As clearly stated by FHA in 1939, «even in slowly growing cities, deterioration in the quality of neighborhoods will result from the obsolescence and decay of the existing structures, and from the change in the character of the residents as the first inhabitants grow old and are replaced by a younger generation or by newcomers»; and «inharmonious racial groups tend to have an influence upon rents in urban residential areas» and «where members of different races live together that racial mixtures tend to have a depressing effect upon land values – and therefore, upon rents».[70]

As persuasively argued by William Fischel, transformation in the zoning of the cities were driven by the arrival of automobile, the motor truck and the jitney bus, that determined the spread of a mechanically powered, intraurban transport system and originated several offspring as metropolitan areas fragmentation, within-city decentralisation of industry, possibility for manufacturers to take advantage of lower-cost land in residential districts, incorporation of reluctant suburbs and little municipalities in central cities. All of the above, the encroachment of zoning and fiscal capacity and the invention of steel-frame skyscraper shaped the image of the cities.[71]

In the 1926 case *Village of Euclid v. Ambler Realty*[72] the Supreme Court held that «very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district». Writing for the Court,

[67] In 1920, the New York Court of Appeals upheld the validity of this ordinance [*Lincoln Trust Co. v. The Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920).
[68] D.E. Mills, *Segregation, Rationing and Zoning*, in *Southern Economic J.*, Vol. 45, No. 4, 1979, 1195 ff.,
[69] See B. Cullingworth, R.W. Caves, *Planning in the USA. Policies, issues, and* processes, N.Y., 3rd ed., 2009, at 101-104.
[70] FHA, *The Structure and the Growth of Residential Neighborhoods in the United States*, Washington, 1939, respectively at pages 88, 5 and 62; see S.A. Hirt, *The rules of residential segregation: U.S. housing taxonomies and their precedents*, in *Planning Perspectives*, Vol. 30, No. 3, 2015, 367 ff.
[71] W.A. Fischel, *An Economic History of Zoning*, cit., 320 ff.: «Instead of having apartment builders following the rails, the buses could be depended upon to follow apartment builders» (at 321).
[72] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Justice Sutherland legitimated the idea of the single-family lifestyle in low-density residential zones by accepting the exclusion of multi-family housing from those "Euclidean" districts.

That ruling was a forerunner of the post-war American Dream built upon the idea of the white nuclear family living in a single detached house surrounded by a yard[73] (those lily-white places attracting tens of millions of middle- and working-class families fairly represented in 1950s and 1960s sitcoms).

By establishing a judicial "Lochnerian" deference to local authorities' conceptions of the public interest as «near dogma»,[74] the decision of the Supreme Court contributed to forge the unique American zoning paradigm that led the urban development of the Country in the post-war period: land uses had been regulated according to a pyramidal scheme whose vertex were single-family residential zones, and by establishing who could live in that houses and how people could interact in that portion of territory; at lower levels situated commercial, industrial, and then agricultural uses. Later on, the growing separation of public and private spheres steered local ordinances to turn out to be less hierarchical and more segregationist, with a generalized prohibition to mix land uses,[75] which favoured the sprawling landscape of suburban America.[76]

The foregoing stratified on a Jim Craw laws' approach to zoning that had originated the "separate but equal" doctrine in *Plessy v. Ferguson*.[77] Although the fight against Exclusionary Zoning became a major claim of the civil rights movement in the late 1960s and 1970s,[78] that approach passed unscathed to several federal and state Courts' decisions that slightly

[73] See A.C. Micklow, M.E. Warner, *Not Your Mother's Suburb: Remaking Communities for a More Diverse Population*, in *The Urban Lawyer*, Vol. 46, No. 4, 2014, 729 ff.; see also E. Levy, *The American Dream of Family in Film: From Decline to a Comeback*, in *J. of Comparative Family Studies*, Vol. 22 [monographic number on *The American Dream of Family: Ideals and Changing Realities*], No. 2, 1991, 187 ff.

[74] R.A. Williams, *Euclid's Lochnerian legacy*, in C.M. Haar, J.S. Kayden (Eds.), *Zoning and the American dream: Promises still to keep*, N.Y., 1989, 278 ff., at 294.

[75] See S. Hirt, *Home, Sweet Home: American Residential Zoning in Comparative Perspective*, in J. *of Planning Education and Research*, Vol. 33, No. 3, 292 ff.

[76] A.C. Micklow, M.E. Warner, *Not Your Mother's Suburb*, cit., 731. «The land use classes are further divided into subclasses (e.g., residential branches into one-family, two-family, and multi-family residential) and then designated to relatively large districts. For each zone, the code typically specifies primary (permitted by right) uses, accessory uses (e.g., garages in residential zones), and conditional uses (e.g., civic buildings in residential zones). In hierarchical codes, as already noted, mixing is allowed in the lower-level zones. But in the more common nonhierarchical codes, any mixing is very limited» (S. Hirt, *The Devil Is in the Definitions. Contrasting American and German Approaches to Zoning*, in *J. of the American Planning Association*, Vol. 73, No. 4, 2007, 436 ff., at 439).

[77] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[78] A leading voice was Paul Davidoff: see P. Davidoff, *Advocacy and pluralism in planning*, in *J. of the American Institute of Planners*, Vol. 31, No. 4, 1965, 331 ff; P. Davidoff, L. Davidoff, L. (1971). *Opening the suburbs: Toward inclusionary land use controls*, in *Syracuse L. Rev.*, Vol. 22, No. 2, 1971, 509 ff.; P. Davidoff, M.E. Brooks, *Zoning Out the Poor*, in P.C. Dolce (Ed.), *Suburbia: The American Dream and Dilemma*, Garden City-N.Y., 1976, pp. 135 ff.

DPCE online
ISSN: 2037-6677

started enlarging the equal protection of the laws.[79] In the early 1970s exponents of the Open-Suburbs Movement continued claiming the violation of the American value of equal opportunity.[80]

In 1974, almost 50 years after *Euclid*, in *Village of Belle Terre v. Boraas*[81] Justice Douglas for the Court still recognized the preservation of traditional family values as a legitimate State objective.

An ordinance of the New York village of Belle Terre had restricted land use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly excluding from the term lodging, boarding, fraternity, or multiple dwelling houses. After the owners of a house in the village, who had leased it to six unrelated college students, were cited for violating the ordinance, this action was brought to have the ordinance declared unconstitutional as violative of Equal Protection and the rights of association, travel, and privacy.

The District Court held the ordinance constitutional, and the Court of Appeals reversed. The Supreme Court held that «the ordinance – which is not aimed at transients and involves no procedural disparity inflicted on some but not on others or deprivation of any "fundamental" right – meets that constitutional standard, and must be upheld as valid land use legislation addressed to family needs». This decision and various others[82] fortified the

[79] In 1965, the Pennsylvania Supreme Court overturned a fiscally motivated zoning ordinance holding that «[z]oning is a means by which a governmental body can plan for the future it may not be used as a means to deny the future. ... Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring» [*National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504 (1965)]. In 1974, the U.S. Court of Appeals for the Eighth Circuit ruled that the city of Black Jack (MO) had violated the Fair Housing Act in rezoning land for low-density development to impede the building of subsidized housing: «We hold that Zoning Ordinance No. 12 of the City of Black Jack violates Title VIII, because it denies persons housing on the basis of race, in violation of § 3604(a), and interferes with the exercise of the right to equal housing opportunity, in violation of § 3617. The remedy for this violation of the Fair Housing Act is provided in § 3615: "... any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid"» [*United States v. City of Black Jack*, MO, 508 F.2d 1179, 1188 (8th Cir. 1974)].

[80] Among others, in the preface of his *Opening Up the Suburbs. An Urban Strategy for America* [Yale, 1973, at vii], Anthony Downs stated that «[t]he most serious drawback of this division is exclusion of most poor, near-poor, and ethnic minority households from many of our suburban areas. Such exclusion helps perpetuate a host of problems by concentrating the burdens of coping with poverty inside central cities. It also prevents suburbs from achieving certain improvements in their efficiency and quality of life. Moreover, this exclusion will eventually undermine achievement of one of our fundamental goals: true equality of opportunity».

[81] *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

[82] In *James v. Valtierra* [402 U.S. 137 (1971)], the Supreme Court upheld local voter referendums on low-income housing: «The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the

prerogative of local authorities to regulate zoning as they wished.

In the 1977 case *Metropolitan Housing Corporation v. Village of Arlinghton Heights*[83] the Court held that an all-White suburban Illinois community's refusal to rezone land for racially integrated low- and moderate-income housing[84] did not constitute racial discrimination, despite producing discriminatory effects:

«Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision.

(a) Official action will not be held unconstitutional solely because it results in a racially *disproportionate impact*. "[Such] impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." ... A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision makers, must be shown».

As regards multi-family housing (apartment buildings, condominiums, duplexes, townhouses, to name just a few), already in the 1970s the New Jersey Supreme Court has offered in *Mount Laurel I-II* an alternative view of suburban landscape by allowing minimum levels of affordable multi-family housing.[85]

In recent years that landscape has profoundly changed. Urban sprawl, demographic changes (an increasing aging and more racially and ethnically

future development of their own community. This procedure for democratic decision-making does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws"». In *Warth v. Seldin* [422 U.S. 490 (1975)] the Court denied standing to a group of low-income plaintiffs against the town of Penfield's zoning practices that reduced to 0.3% the land available for multifamily structures (apartments, townhouses, and the like); according to petitioners, even on that limited space, housing for low- and moderate-income persons was not economically feasible because of low density and other requirements; the Court held that the plaintiffs could not demonstrate that they were directly excluded.

[83] *Metropolitan Housing Corporation v. Village of Arlinghton Heights* [429 U.S. 252 (1977)].

[84] See M. Ritzdorf, *Locked out of paradise: Contemporary exclusionary zoning, the Supreme Court, and African-Americans*, in J.M. Thomas, M. Ritzdorf (Eds.), *Urban planning and the African American community: In the shadows*, Thousand Oaks, 1997, 43 ff., at 53.

[85] *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975), and *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158 (1983); see M.A. Hughes, P.M. Vandoren, *Social Policy through Land Reform: New Jersey's Mount Laurel Controversy*, in *Political Science Q.*, Vol. 105, No. 1, 1990, 97 ff., and J.P. Byrne, *Are Suburbs Unconstitutional?*, in *The Georgetown Law J.*, Vol. 85, 1997, 2265 ff.

DPCE online
ISSN: 2037-6677

diverse population[86] beyond 2030[87], mainly), deindustrialization,[88] technology and the rise of the clustered knowledge economy,[89] new constitutional sensibilities on the concept of family, gender equality, fight against racial discrimination, have been defying that archetype upon which suburbs were built, calling for new zoning and land use regulations.

At present, American suburbs are undergoing thorough transformations due to the increase of singles,[90] elders, multigenerational[91] and ethnic households.

According to Generations United – a National non-profit that improves children, youth and older adults' lives through inter-generational programs and policies –, five major factors emerge as causes of the increase in multigenerational households:[92]

(a) *slower starts*: people are marrying later and more unmarried 20-somethings continue to live with their parents, by choice or economic necessity;

[86] U.S.' increased diversity over the 21st Century is reflected in the rapid population growth of Latino or Hispanic Americans (the nation's largest minority), Asian Americans, and persons identifying as two or more races – along with smaller gains in Black and Native American populations. All together, these groups increased by 51% between 2000 and 2018, compared with just a 1% increase in the white population (in www.brookings.edu).

[87] U.S. Census, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, February 2020, in www.census.gov/content/census/en/library/publications/2020/demo/p25-1144.html.

[88] See, *ex multis*, T. Neumann, *Remaking the Rust Belt. The Postindustrial Transformation of North America*, Philadelphia, 2016; C.E. Taft, *From Steel to Slots. Casino Capitalism in the Postindustrial City*, Cambridge, 2016; P. Cooper-McCann, *Negotiating the Postindustrial City*, in *J. of Planning History*, Vol. 18, No. 4, 2019, 329 ff.; and the landmark B. Bluestone, B. Harrison, *The Deindustrialization of America. Plant Closings, Community Abandonment, and the Dismantling of Basic Industry*, N.Y., 1982.

[89] R. Florida, *The Changing Demographics of America's Suburbs*, in *Bloomberg City Lab*, Nov. 7, 2019, in www.bloomberg.com.

[90] According to US Census data, the percent of one-person households has passed from 16,7 in 1969 to 28,4 in 2019 (www.census.gov/library/visualizations/2019/comm/one-person-households.html).

[91] The U.S. Census Bureau defines multigenerational families as those consisting of more than two generations living under the same roof. Many researchers also include households with a grandparent and at least one other generation. According to a Generations United survey, between 2000 and 2016, the number of multigenerational households increased by a remarkable 21.6 million, passing from 42.4 million in 2000 to 64 million in 2016. Today, 1 in 5 American households are multigenerational (www.gu.org). The National Association of Realtors found that buyers who completed their transaction after the pandemic began in March 2020 were more likely to purchase a multigenerational home (NAR, *2020 Profile of Home Buyers and Sellers*, available at www.nar.realtor).

[92] See www.gu.org/explore-our-topics/multigenerational-households.

(b) *suburbanization of immigration*[93]: Latin Americans and Asians have immigrated to the U.S. in large numbers; their presence in the suburbs has increased in the last decades and statistics demonstrate that immigrants are more likely to live in multigenerational families; simultaneously, a number of low-income African Americans are being pushed out of gentrifying parts of cities;

(c) *availability of kin*: There are more Baby Boomers now financially secure and able to offer their parents a place to live in their old age while providing a home to their own children;

(d) *health and disability issues*;

(e) *economic conditions*: The Great Recession caused job loss or other forms of reduced income; sharing household expenses across generations make them more practicable.

These changes are so profound that some wrote about the "end of suburbs",[94] as many affluent and educated people are moving back to the cities; some others talked about the rise of "new melting-pot suburbs"[95] or called for a "new sociology of the suburbs"[96] akin to the urban sociology pioneered by Robert Park and the Chicago School of the early 20th Century; still others, observing that the older pattern of rich suburbs that grew as bedroom communities or homes to industrial or office parks near poor cities is reversed, with poor suburbs now surrounding rich cities, coined new terms like "Slumburbia"[97] to catch the "migration of poverty"[98].

Plainly, exclusive suburbs still do exist and continue to thrive: more urbanized, closer-in and walkable ones; connected to pulsating urban centers by public transit; home to knowledge institutions like universities, colleges, or major R&D labs; surrounded by amenities like coastlines, mountains, or parks; or those that have developed new economic functions and connections to the knowledge economy like the Silicon Valley.[99]

Anyway, even if white Americans still live in mostly white

[93] This phenomenon is quite the opposite of the earlier 20th century pattern where immigrants packed themselves into inner-city neighborhoods. «As of 2010, more than half of all immigrants (51 percent) resided in the suburbs. Today's suburban immigrants are also more highly educated than those of the past. One reason they choose suburbs is for access to their schools. The second trend is the racial and ethnic transformation of suburbia. Part of this is due to immigration, but another part is the suburbanization of African Americans. Between 1970 and 2000, the share of African Americans living in suburban Atlanta increased from 27 percent to 78 percent; while in greater Washington D.C it rose from 25 percent in 1970 to 82 percent» (R. Florida, *The Changing Demographics of America's Suburbs*, cit.); see also R. Florida, *The New Geography of American Immigration*, in *Bloomberg City Lab*, October 15, 2019, in www.bloomberg.com.

[94] L. Gallagher, *The End of the Suburbs: Where the American Dream Is Moving*, N.Y., 2013.

[95] W.H. Frey, *The rise of melting-pot suburbs*, May 26, 2015, in www.brookings.edu.

[96] K. Lacy, *New Sociology of Suburbs: A Research Agenda for Analysis of Emerging Trends*, in *Annual Rev. of Sociology*, Vol. 42, 2016, 369 ff.

[97] T. Egan, *Slumburbia*, in *The New York Times*, February 10, 2010, in opinionator.blogs.nytimes.com.

[98] A.J. Howell, J.M. Timberlake, *Racial and Ethnic Trends in the Suburbanization of Poverty in U.S. Metropolitan Areas, 1980–2010*, in *J. of Urban Affairs*, Vol. 36, No. 1, 2014, 79 ff.

[99] R. Florida, *The Changing Demographics of America's Suburbs*, cit.

DPCE online
ISSN: 2037-6677

neighborhoods,[100] the 20th Century narrative on white suburb as a privileged residence in the metropolitan landscape, separated from workplace,[101] with low services and infrastructure costs, high property values and low poverty is definitely blurred. Notwithstanding, racial steering[102] in the U.S. housing markets did not vanish at all.[103]

All these great transformations not only convey a metamorphosis of suburbs' cultural identity but require more public services and renovated regulations on zoning and land use classifications.

There is a demand for smaller (one-person households) and larger (multigenerational families) houses, subsidized mortgages, more services for elders, new technologies and ease of communication that would allow to combine home and work.

These new needs couple with a reprioritization of the zoning hierarchy in privileging commercial uses that has started to materialize in 1990s. Many localities, relying on *Kelo v. New London*ruling,[104] have adopted form-based codes that allow for a greater mixing of land uses, sometimes reprioritizing commercial uses over residential ones.

In *Kelo*, a 5-4 opinion delivered by Justice Stevens, the majority held that the city's taking of private property to sell for private development qualified as a "public use" falls within the meaning of the Takings Clause. The city was not taking the land simply to benefit a certain group of private individuals, but as part of an economic development plan. Such justifications for land takings – the majority argued – should be given deference. The takings were qualified as "public use" even though the land was not going to be used by the public. The Fifth Amendment don't necessitate "literal" public use but the «broader and more natural interpretation of public use as "public purpose"»: economic development on private property is a legitimate public use because of the increase in tax value and the raise of tax revenue.

Some commentators emphasized the risk of demolition of lower-valued buildings in favor of commercial development and of displacement of people living within, as the decision allows the condemnation of land on

[100] W.H. Frey, *Even as metropolitan areas diversify, white Americans still live in mostly white neighborhoods*, March 23, 2020, in www.brookings.edu.

[101] A.R Markusen noted that «[t]he most striking aspects of modern U.S. city spatial structure are the significant spatial segregation of residence from the capitalist work-place, the increasing low-density settlement, and the predominant single-family form of residential housing. … The fundamental separation between "work" spheres and home corresponds roughly to the division of primary responsibility between adult men and women for household production and wage labor, at least historically» (*City Spatial Structure, Women's Household Work, and National Urban Policy*, in *Signs*, Vol. 5, No. 3, Supplement. *Women and the American City*, 1980), S22 ff., at S27 and S29, respectively)

[102] «Racial steering may be defined as behaviors by real estate agent vis-à-vis a client that tend to direct the client toward particular neighborhoods and/or away from others» (G. Galster, *Racial Steering by Real Estate Agents: Mechanisms and Motives*, in *The Rev. of Black Political Economy*, Vol. 19, No. 1, 1990, 39 ff.); see *infra*, note 119 and accompanying text.

[103] See M. Hall, J.M. Timberlake, E. Johns-Wolfe, A. Currit, *The Dynamic Process of Racial Steering in U.S. Housing Markets*, March 2020, in www.osf.io.

[104] *Kelo v. City of New London*, 545 U.S. 469 (2005).

which poor people live under the guise of alleviating blight.[105]

After the generalized tumbling down in 2009-2011, an year-on-year growth of the number of multi-family building permits has been recorded[106]: trend towards smaller homes suggests that space is becoming increasingly limited, or that consumers prefer smaller homes due to smaller mortgages, lower maintenance costs and lower utility costs.

It's worth noting that resistance to the introduction of alternative forms of housing has been frequently opposed by reasons of concerns about overcrowding, degradation of neighborhood quality, decline of property values, rise of costs in infrastructure related to the increase in density (in suburbs, sewer, water, electrical and even roadway systems have traditionally been designed specifically for single-family houses); on the contrary, new forms of houses could finally recognize the centrality of the caregiving issue in multigenerational families.

[105] I. Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, in *Northwestern Univ. Law Rev.*, Vol. 101, No. 4, 2007, 1931 ff.: soon after *Kelo*, the Author noted, «most of the states that have enacted post-*Kelo* reform laws have either banned both blight and economic development takings (five states, plus Utah, which enacted its reform law prior to *Kelo*), or defined "blight" so broadly that virtually any property can be declared "blighted" and taken (sixteen states). Several other states have enacted reforms that provide no real protection to any property owners because of other types of shortcomings».

[106] See Statista, *Multifamily Home in the United States*, 2020, in www.statista.com: «This statistic [˜"Volume of multifamily housing units completed in the U.S. 1997-2020"˜] shows the volume of multifamily housing units completed in the United States from 1997 to 2020. In 2019, there were 281,000 multifamily housing units built in the United States and 280,000 are forecast to be completed in 2020» (p. 33); «There were 524,000 building permits for multifamily housing units granted in the United States in 2019, compared with 473,000 over the previous twelve months. In contrast, there were around 862,000 building permits for single-family housing units authorized in 2019. Multifamily housing projects are on the increase. Multifamily homes refer to buildings that contain at least two housing units, including apartment buildings and duplexes. In 2019, building work had started on over 400,000 multifamily housing units in the United States – the highest number recorded in recent decades. Overall, there were more than 56 million multifamily dwellings in the United States in 2018, and the number is predicted to exceed 155 million by 2023. What are the trends in size of different properties? One of the noticeable differences between multifamily and single-family housing is the size of the units. In 2019, the median size of a multifamily unit in the United States reached 1,076 square feet; in contrast, the median size of a single-family housing unit was more than twice as large» ("Number of multifamily building permits in the U.S. 2000-2019", p. 34).

DPCE online
ISSN: 2037-6677

On this matter, in *State v. Baker*,[107] the New Jersey Supreme Court paved the way to overcome discriminatory family definitions, such as those provided in zoning regulations limiting the number of persons living together. Grounding the decision in the Substantive Due Process, the Court rejected *Belle Terre* and invalidated a zoning ordinance that prohibited more than four unrelated individuals living together.

Some commentators noted that municipalities have essentially two options.

The first one is to define family functionally or to avoid definitions and employ regulations to prevent overcrowding: «Defining a functional family can be troublesome for policymakers because the definition needs to be enforceable. In many cases, a functional family is synonymous with a single housekeeping unit identified by communal cooking, pooled finances, or shared domestic responsibilities. The functional family definition offers some promise because it removes the marriage or blood-related requirement from the regulation, but still conforms to a traditional view of what makes a family». The second option for policymakers «is to adopt lifestyle-neutral ordinances or form-based codes. Lifestyle neutral ordinances retain the height and yard restrictions of traditional single-family ordinances without regulating the household composition with restrictive definitions»[108]. The form-based codes are keyed to a regulating plan that defines the proper form and scale of development, rather than only distinctions in land-use types.[109]

Actually various little and big municipalities[110] have been adopting form-based codes. The Chicago Metropolitan Agency for Urban Development[111] has detailed the following differences between conventional zoning and form-based codes.

Conventional zoning arose out of the need to protect public health, safety, and welfare by preventing the most negative impacts of siting, size, and use of buildings. In general, conventional zoning:

[107] *State v. Baker*, 81 N.J. 99 (1979): «The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors or even of judges" from residing in a single unit within the municipality. ... On the other hand, a group consisting of 10 distant cousins could so reside without violating the ordinance. Thus the ordinance distinguishes between acceptable and prohibited uses on grounds which may, in many cases, have no rational relationship to the problem sought to be ameliorated. Regulations based upon biological traits or legal relationships necessarily reflect generalized assumptions about the stability and social desirability of households comprised of unrelated individuals' assumptions which in many cases do not reflect the real world».

[108] A.C. Micklow, M.E. Warner, *Not Your Mother's Suburb*, cit., 748.

[109] See, *ex multis*, D. Walters, Designing Community. Charrettes, master plans and form-based codes, Burlington (MA), 2007, and D.G. Parolek, K. Parolek, P.C. Crawford, *Form-Based Codes. A Guide for Planners, Urban Designers, Municipalities and Developers*, Hoboken (N.J.), 2008.

[110] The Form Based Codes Institute provides a library of more the 60 codes adopted in the U.S. at www.formbasedcodes.org/all-codes.

[111] Chicago Metropolitan Agency for Planning, *Form-Based Codes: A Step-by-Step Guide for Communities*, Chicago, 2013, available at www.formbasedcodes.org.

(a) Separates uses related to daily activity, such as home, school, and work;
(b) Frequently promotes low-density development and relatively limited housing choices;
(c) Often encourages excessive land consumption and automobile dependency;
(d) Ends up focusing on what uses are not allowed, rather than encouraging what the community actually wants;
(e) Applies standards and design requirements generically, in a "one-size-fits-all" manner, throughout the entire community;
(f) Uses regulations such as floor area ratio, which can shape the form of development in ways that are hard to visualize beforehand and may encourage developers to "max out" the massing of a building within allowed limits, often at the expense of its architectural detailing and sensitivity to existing context;
(g) Regulates private development, but typically not the design or character of the streets that serve it. This usually leaves development of standards to the city engineer or public works department, which tend to focus on accommodating automobile traffic.

On the contrary, form-based codes:

(a) Encourages a mix of land uses, often reducing the need to travel extensively as part of one's daily routine;
(b) Promotes a mix of housing types;
(c) Is "proactive," focusing on what the community wants and not what it dislikes;
(d) Results from a public design process, which creates consensus and a clear vision for a community;
(e) Tailors the requirements to fit specific places or neighborhoods by reflecting local architecture and overall character;
(f) Emphasizes site design and building form, which will last many years beyond specific numerical parameters such as density and use regulations that are likely to change over time;
(g) Addresses the design of the public realm and the importance that streetscape design and individual building character have in defining public spaces and a special "sense of place";
(h) Provides information that is easier to use than conventional zoning codes because it is shorter, more concise, and emphasizes illustrations over text.

3.2 The disparate impact liability before the Courts

Disparate impact, also referred to as "adverse (or discriminatory) effect", raises when a law, that on its face is neutral, in practice has an oversized effect on a particular group.[112] In *Washington v. Davis*[113] the

[112] «A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin» (24 Code of Federal Regulations § 100.500 (a)).
[113] *Washington v. Davis*, 426 U.S. 229 (1976).

DPCE online
ISSN: 2037-6677

Supreme Court had expressly held that disparate impact theory could not be used to establish a constitutional claim under the Equal Protection Clause of the XIV Amendment.

Unexpectedly, towards the end of Obama's Presidency, in a case concerning an alleged disproportionate allocation of low-income tax credit (LIHTC[114]) the Supreme Court upheld a limited disparate impact liability under the Fair Housing Act in order to «prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping» [*Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, often referred to in subsequent case law as *Inclusive Communities* or *ICP*].[115]

Earlier constructions of the Fair Housing Act just forbade "*disparate treatment*", where a plaintiff must establish that the defendant has a discriminatory intent or motive[116] «because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions».[117] HUD regulations carefully identified further behaviors considered to be disparate treatment: blockbusting,[118] steering,[119] and discrimination in the provision of brokerage services.[120]

By 2013, twelve federal courts recognized disparate impact liability under HUD's "Implementation of the Fair Housing Act's Discriminatory Effects Standard"[121] that set forth a 3 step burden shifting framework

[114] See *supra* note 34 and accompanying text.

[115] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). See Q. Marker, *Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis*, in *Univ. of Cincinnati L. Rev.*, Vol. 88, No. 4, 2020, 1105 ff., and J. Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, in *Columbia Human Rights L. Rev.*, Vol. 48, No. 3, 2017, 98 ff.

[116] «Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin» [*Ricci v. DeStefano*, 557 U.S. 557 (2009)].

[117] Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.5 (a).

[118] «Prohibited actions under this section ["Blockbusting"] include, but are not limited to: (1) Engaging, for profit, in conduct (including uninvited solicitations for listings) which conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status, or national origin of persons residing in it, in order to encourage the person to offer a dwelling for sale or rental. (2) Encouraging, for profit, any person to sell or rent a dwelling through assertions that the entry or prospective entry of persons of a particular race, color, religion, sex, familial status, or national origin, or with handicaps, can or will result in undesirable consequences for the project, neighborhood or community, such as a lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other services or facilities» (24 C.F.R. § 100.85 (c)).

[119] Defined as, «to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development» (24 C.F.R. § 100.70).

[120] «It shall be unlawful to deny any person access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against any person in the terms or conditions of such access, membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin» (24 C.F.R. § 100.90 (a)).

[121] 78 Fed. Reg. 11460.

inserted in 24 C.F.R. § 100.500 (c) – "Burdens of proof in discriminatory effects cases":

(1) «The charging party ... has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect»;

(2) «Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant»;

(3) «If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect».

The regulation also provides that any of the defendant's justifications «must be supported by evidence and may not be hypothetical or speculative».[122]

In a narrow 5-4 opinion delivered by J. Kennedy, the Court held that "disparate impact" claims are cognizable under the Fair Housing Act, but wisely, in our opinion, neglected to fully adopt HUD's framework, remanded the case,[123] and restricted its magnitude by outlining a series of limitations.

The Court acknowledged that

«Recognition of disparate-impact claims is consistent with the FHA's central purpose. ... The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. … These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. … Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society" … we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white – separate and unequal." ... The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society»,

but called for «a *robust causality* requirement» according to the following rationale (emphasis added):

(a) «Racial imbalance ... does not, without more, establish a *prima facie case* of disparate impact»,

(b) This way, developers and housing authorities are protected «from being held liable for racial disparities they did not create»,

(c) «Without adequate safeguards at the *prima facie* stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private

[122] 24 C.F.R. § 100.500 (c)(3).

[123] On remand, the U.S. District Court for The Northern District of Texas Dallas Division held that «that ICP has failed to prove a prima facie case of discrimination» (*Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, Civil Action No. 3:08-CV-0546-D, Aug. 26, 2016).

DPCE online
ISSN: 2037-6677

entities to use "numerical quotas," and serious constitutional questions then could arise»,

so,

(d) «Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision» and,

(e) «housing authorities and private developers [must] be allowed to *maintain a policy* if they can prove it is *necessary to achieve a valid interest*», and, finally,

(f) «when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." ... If additional measures are adopted, *courts should strive to design them to eliminate racial disparities through race-neutral means*».

The doctrine of the Supreme Court has found swinging application in federal courts.

(1) In *Oviedo Town Center v. City Oviedo*[124], the Eleventh Circuit held that «[i]f a disparate impact claim could be founded on nothing more than a showing that a policy impacted more members of a protected class than non-members of protected classes, disparate-impact liability undeniably would overburden cities and developers … It does not establish a disparate impact, let alone any causal connection between the 2012 Policy [N/A: increases in utility rates in low-income rental housing] and the disparate impact. If this were enough to make a prima facie showing, we would face precisely the circumstance the Court sought to avoid in Inclusive Communities, inappropriately injecting race into a city's decision-making process and creating "disparate-impact liability" that "might displace valid governmental and private priorities"».

(2) In *de Reyes v. Waples Mobile Home Park*,[125] the Fourth Circuit stated that "robust causation" may be proven by statistical evidence, and remanded to District Court. Four Latino couples who lived at Waples Mobile Home Park challenged the Park's policy requiring all occupants to provide documentation evidencing legal status in the United States to renew their leases. Plaintiffs contended that the policy violated the Fair Housing Act because it disproportionately ousted Latinos as compared to non-Latinos. According to the Fourth Circuit,

«[t]o establish causation in a disparate-impact claim, "[t]he plaintiff must begin by identifying the specific ... practice that is challenged" [Wards Cove, 490 U.S. at 656 (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988))]. The plaintiff must also "demonstrate that the disparity they complain of is the result of one or more of the … practices that they are attacking … specifically showing that each challenged practice has a significantly disparate impact" on the protected class. ... In other words, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity" [ICP] ... Additionally, "the plaintiff must offer statistical

[124] *Oviedo Town Center II, LLLP, et al. v. City of Oviedo*, Florida, No. 17-14254 (11th Cir. 2018).

[125] *De Reyes v. Waples Mobile Home Park Ltd.*, 251 F. Supp. 3d 1006 (E.D. Virginia 2017).

evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion [complained of] because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation" [Watson] ... In their Complaint, Plaintiffs provided statistical evidence that Latinos constitute 64.6% of the total undocumented immigrant population in Virginia, and that Latinos are ten times more likely than non-Latinos to be adversely affected by the Policy, as undocumented immigrants constitute 36.4% of the Latino population compared with only 3.6% of the non-Latino population».[126]

(3) In *Ellis v. City of Minneapolis*,[127] the Eight Circuit required plaintiff to demonstrate that the policy at issue was «arbitrary or unnecessary». Andrew and Harriet Ellis were for-profit, low-income rental housing providers in Minneapolis. The Ellises filed suit against the City of Minneapolis and city officials alleging the City's heightened enforcement of housing and rental standards had a disparate impact on the availability of housing for individuals protected under the Fair Housing Act. Under City ordinances, property owners must license their residential rental dwellings, and if they fail to comply with minimum standards and conditions, the City may revoke their rental licenses. The City website explains: "Since 2005, the City has changed more than two dozen ordinances to strengthen rental licensing and property ownership standards to protect tenants from problem landlords. Because of these changes, the City has increased the number of rental licenses it has revoked by more than 500 percent for owners who have violated one or more rental license standards". According to the Ellises, the City's rental license revocations have displaced hundreds of "protected class" families from their rental homes since July 31, 2012. The Court stated: «We also note that the Ellises mount no serious challenge to the housing code itself. To the extent their complaint mentions specific housing-code provisions, there are no factually supported allegations that those provisions are arbitrary or unnecessary to health and safety».

As has been observed, the Eight Circuit's prima facie standard «is particularly burdensome in this way; requiring not only robust causality, but a showing that the challenged practice is arbitrary and unnecessary».[128]

(4) In *Mhany Management v. County of Nassau*,[129] the Second Circuit dealt with a civil rights action brought by plaintiffs against the

[126] In dissenting, J. Barbara Milano Keenan, argued: «In my view, the plaintiffs have not adequately alleged that the defendants' policy caused the statistical disparity that they challenge. The plaintiffs rest their claim of causality on statistics showing that Latinos constitute the majority of undocumented aliens in the geographic area of the park, and thus that Latinos are disproportionately impacted by a policy targeting undocumented aliens. Despite this statistical imbalance, however, all occupants of the park must comply with the policy addressing their immigration status, irrespective whether they are Latino. Not all Latinos are impacted negatively by the policy, nor are Latino undocumented aliens impacted more harshly than non-Latino undocumented aliens. Accordingly, I would conclude that the defendants' policy disproportionately impacts Latinos not because they are Latino, but because Latinos are the predominant sub-group of undocumented aliens in a specific geographical area».
[127] *Ellis v. City of Minneapolis*, No. 16-2019 (8th Cir. 2017).
[128] Q. Marker, *Zoning for All!*, cit., at 1116.
[129] *Mhany Management v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

DPCE online
ISSN: 2037-6677

County of Nassau, Garden City and the Garden City Board of Trustees. Citing concerns about increased traffic and school overcrowding, residents of Garden City complained against a multi-family development that would have granted affordable housing to minorities; then, the city passed a new zoning code that effectively eradicated the possibility of multi-family development on the parcel shifting from zoning properties as multi-family residential group (R-M) to residential-townhouse (R-T) category. At trial, MHANY Management, Inc. presented expert testimony that under its proposals, the likely renter pool would have been 18 to 32 percent minority. Under the accepted R-T zoning bid, the expert predicted that only three to six minority households could afford to purchase a single-family home. Nassau County claimed the zoning decision was made to prevent increased traffic and overcrowded schools.

Beginning with the Supreme Court's admonishment that all too often «zoning laws and other housing restrictions . . . function unfairly to exclude minorities from certain neighborhoods without any sufficient justification» and that «[s]uits targeting such practices reside at the heartland of disparate impact liability» [*ICP*], the Second Circuit agreed with the E.D. N.Y. District Court in applying the less restrictive test in judging disparate impact claims elaborated by the same Second Circuit in 2002:

(a) the occurrence of certain outwardly neutral practices, and
(b) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices. [130]

The Second Circuit, then, found that the District Court had acted properly in recognizing that Plaintiffs had established a prima facie case of disparate impact and shifting completely the burden to Defendants to prove both a legitimate and bona fide governmental interest.

The Second Circuit found «no merit in Defendants' argument that the district court improperly allowed Plaintiffs to challenge a single, isolated zoning "decision", rather than a general zoning "policy"», and that even if «Defendants identified legitimate, bona fide governmental interests, such as increased traffic and strain on public schools», they failed «to demonstrate they would have made the same decision absent discriminatory considerations» and to prove that no alternative would serve with less discriminatory effect.

In 2019, claiming that revisions were needed "to better reflect" the *ICP* ruling, the Trump Administration, through HUD, proposed the reform of 2013 regulation to shift to plaintiffs most burden of proof in discriminatory effect cases by introducing new pleading requirements, new proof requirements, and new defenses, all of which would have made it harder to establish that a policy was violating the Fair Housing Act. The final rule was published in the Federal Register in September 2020,[131] but it was immediately stopped by the U.S. District Court for the District of Massachusetts that issued a nationwide preliminary injunction that delayed

[130] *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002).
[131] HUD's "Implementation of the Fair Housing Act's Disparate Impact Standard", in Federal Register, Vol. 85, No. 186, September 24, 2020 - Rules and Regulations, available at www.www.govinfo.gov.

the effective date of HUD's 2020 rule until its own final judgment on the case. The court granted plaintiff a preliminary relief because: a) the defendant's [HUD] purported justifications for the new rule appeared «inadequately justified»; b) «Plaintiff have shown a substantial likelihood of success on the merits as to their claim that the 2020 Rule is arbitrary and capricious under the APA»; and c) «the balance of harms and public interest supports a preliminary injunction pending a complete review of Plaintiffs' APA challenge».[132]

In 2021, the Biden Administration, through HUD, proposed the reinstatement of the 2013 rule. Currently (December 2022) the "Reinstatement of HUD's Discriminatory Effects Standard" is at the Final Rule Stage.

4. Law students and State Supreme Courts at work for eviction diversion programs

Through the § 4024 of the CARES Act 2020 Congress provided a temporary 120-day period of moratorium on eviction filings for properties that participated in federal assistance programs or were subject to federally backed loans (about 6.4 million families, 15 million people affected[133]). At the same time, the Trump Administration launched the Emergency Rental Assistance program (ERA 1), providing up to $25 billion under the Consolidated Appropriations Act of 2020.[134]

The eviction moratorium began on March 27, 2020, and ended on July 24, 2020. Covered tenants could not be forced to vacate, and landlords could not file notices to vacate, until 30 days after the expiration of the moratorium (August 23, 2020).

The Trump Administration, through the Department of Health and Human Services (HHS) – Centers for Disease Control and Prevention (CDC), in September extended the moratorium through December 31, 2020. Absent an *ad hoc* Congressional authorization, CDC issued an Order under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2, specifying that:

«eviction moratoria – like quarantine, isolation, and social distancing – can be an effective public health measure utilized to prevent the spread of communicable disease. Eviction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition. They also allow State and local authorities to more easily implement stay-at-home and social distancing directives to mitigate the community spread of COVID-19. Furthermore, housing stability helps protect public health because homelessness increases the likelihood of individuals moving into congregate

[132] *Massachusetts Fair Housing Center, And Housing Works, Inc. v. HUD*, Civil Action No. 20-11765-MGM, Oct. 25, 2020.
[133] The eviction system allows 3.6 million filings a year, even for small amounts of funds and without any legal representation or eviction diversion.
[134] See, *ex multis*, C. Aiken, I. Harner, V. Reina, A. Aurand, R. Yae, *Emergency Rental Assistance (ERA) During the Pandemic: Implications for the Design of Permanent ERA Program*, Research Brief, March 2022, available at www.nlihc.org

DPCE online
ISSN: 2037-6677

settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19».[135]

Then, the moratorium was extended through January 31, 2021, and again by CDC through March 31, 2021. On March 29, 2021, CDC further extended the moratorium until June 30, 2021. At the expiration of the period, on July 31, 2021, many of the households interested in the moratorium had lost their jobs during the pandemic; there was, then, a very-high risk for them to be thrown out of their homes for not paying due rents or mortgages. President Biden asked Congress to intervene when it was already too late (July 29) because of the August break. In August 10, some researchers in partnership with the Right to the City Alliance estimated $21.3 billion in unpaid rent debt nationwide.[136]

The Biden Administration, through CDC, then issued a new eviction freeze from August 2021 to October 2022, and launched the Emergency Rental Assistance program 2 (ERA 2), providing up to $21.55 billion under the American Rescue Plan Act of 2021.

Real Estate groups sued to protect their property rights against the financial hardship provoked by CDC Orders.

On May 5, 2021, the U.S. District Court for the District of Columbia issued an opinion that CDC exceeded its statutory authority by issuing and extending the nationwide moratorium.[137] A judgment was entered vacating the moratorium, that at time was set to expire on June 30, 2021. Yet, the Court entered a stay of this judgment pending the outcome of an appeal to the U.S. Court of Appeals for the D.C. Circuit. The plaintiffs unsuccessful appealed this stay to the D.C. Circuit; then filed an application to the United States Supreme Court for vacatur.

In June, in a 5-4 decision, the Supreme Court denied the application.[138]

In the only written opinion, in concurring J. Kavanaugh argued:

«Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order».

On August 12, 2021, the Supreme Court granted a temporary injunctive relief[139] against the New York's Covid-19 Emergency Eviction and Foreclosure Procedure Act that allowed tenants to suspend or "stay" an eviction proceeding by filing a Hardship Declaration:

«If a tenant self-certifies financial hardship, Part A of CEEFPA generally precludes a landlord from contesting that certification and denies the landlord a

[135] HHS-CDC, "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19", in *Federal Register*, Vol. 85, No. 173, Friday, Sept. 4, 2020.

[136] S. Treuhaft, M. Huang, A. Ramiller, J. Scoggins, A. Langston, J. Henderson – The Right to City Alliance, *Rent Debt in America: Stabilizing Renters Is Key to Equitable Recovery*, Aug. 10, 2021, available at www.nationalequityatlas.org.

[137] *Alabama Association of Realtors v. U.S. Department of Health and Human Services*, No. 20-cv-3377 (DLF) (D.D.C. May 5, 2021).

[138] *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, On Application to Vacate Stay, 594 U.S. _ (2021), No. 20A169, June 29, 2021.

[139] A petition for a writ of certiorari was pending before the Second Circuit: «In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court» (*Pantelis Chrysafis, et al. v. Lawrence K. Marks*, On application for injunctive relief, 594 U.S._ (2021), No. 21A8, Aug. 12, 2021).

hearing. This scheme violates the Court's longstanding teaching that ordinarily "no man can be a judge in his own case" consistent with the Due Process Clause».

On August 26, 2021, the Supreme Court rendered a *per curiam* decision[140] that granted the application to vacate stay according to the following rationale (emphasis added):

(a) «When the eviction moratorium expired in July, Congress did not renew it. Concluding that further action was needed, the CDC decided to do what Congress had not. … The CDC relied on §361(a) of the Public Health Service Act for authority to promulgate and extend the eviction moratorium. That provision states:

"The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary"».

Originally passed in 1944, this provision has *rarely been invoked* – and n*ever before to justify an eviction moratorium.* … Regulations under this authority *have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease.*

(b) The moratorium expired on July 31, 2021. Three days later, the CDC reimposed it. ... Apart from slightly narrowing the geographic scope, the new moratorium is indistinguishable from the old. 379

[But, the geographical limitation is unreasonable as] If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID–19.

[Indeed] Vaccine and rental-assistance distribution had improved since the stay was entered, while the harm to landlords had continued to increase»

(c) The moratorium *intrudes into an area that is the particular domain of state law*: the landlord-tenant relationship.

(d) Our precedents require *Congress to enact exceedingly clear language* if it wishes to significantly alter the *balance between federal and state power and the power of the Government over private property* [quoting U.*S. Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S._, (2020)]».

This way, the Supreme Court decided the definitive end to moratorium. Some different actions were needed to come to the rescue.

On July 1, 2020, the Michigan Supreme Court C.J., Bridget McCormack, issued a standing order to pause the eviction process once a rental assistance application was submitted,[141] because:

«While the pandemic was not the disruption we wanted, it may be the disruption we needed to transform the landlord/tenant docket into a resource that serves the community. By funding a statewide eviction diversion program, we have the opportunity to build on the success of local court programs that have kept people in their homes and supported stronger neighborhoods. Judges across Michigan are ready to take advantage of this win-win plan that helps families to

[140] *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, On Application to Vacate Stay, 594 U.S. _ (2021), No. 21A23, August 26, 2021.
[141] Administrative Order No. 2020-17.

DPCE online
ISSN: 2037-6677

stop worrying about losing their housing and helps landlords get paid so they can stay in business».[142]

On June 24, 2021, the Associate Attorney General sent a letter to State Courts Chief Justices,[143] explaining that «[a]ccording to recent estimates by the Department of Housing and Urban Development (HUD), over 6 million renter households are behind on rent. More than 40% of adult renters who say they are behind on rent believe they will be evicted from their homes in the next two months. As the public health crisis recedes in the months ahead, and federal and state eviction moratoria begin to lapse, eviction filings are expected to overwhelm courts across the country», and that «[s]tudies show that women and people of color will be disproportionately affected. Women, particularly Black and Latina women, are evicted at higher rates than men. This disparity has persisted through the pandemic as Black, Latino, and Asian families report that they are behind on rent at roughly double the rate of white families». For all that, the Ass. Attorney General suggested Supreme Courts to:

(1) Require landlords to apply for rental assistance before filing: «Courts could issue a temporary administrative order that requires landlords to apply for rental assistance prior to filing for eviction for nonpayment of rent, and which allows sufficient time for processing those applications. In Philadelphia, the Municipal Court issued an order requiring landlords to apply for rental assistance 45 days before filing a complaint»;

(2) Extend time in pending cases;

(3) Modify summonses and other form filings;

(4) Partner with Community-Based Organizations (CBOs) and Legal Services Providers.

An unprecedented pure original strategy, completely different from the eviction moratorium, was taking shape. The Biden-Harris Administration invited 180 jurisdictions in 36 States to develop eviction diversion programs under ERA 2.

Several State Supreme Courts created a network with various subjects to provide or create: a) housing stability services; b) community-based outreach services; c) eviction diversion programs.

This network was made up of:

- 99 Law Schools that started or expanded clinics to provide legal assistance for eviction. In the second half of 2021 nearly 2.100 students dedicated over 81.000 hours to serve over 10.000 households. Students supported pro bono families facing evictions and, together with law professors, partnered Supreme Courts to draft eviction diversion programs.
- Legal associations: American Bar association, National Bar association, Hispanic National Bar association, Legal Services Corporation, Association for Pro Bono Counsel, Law Firm Antiracism Alliance.
- State and local governments. Just a few references will suffice: 3 States and 15 Cities have legislatively adopted the right to counsel for tenants facing eviction; 60 Cities have expanded access to legal counsel for

[142] *Chief Justice Bridget M. McCormack Praises Eviction Diversion Plan*, Press Release, available at www.courts.michigan.gov.

[143] Letter from The Associate Attorney General (Vanita Gupta) to State Courts Chief Justices, June 24, 2021, available at www.justice.gov/media/1148446/dl?inline=

tenants using federal funds; in Michigan, as for June 2022, legal representation for tenants increased from 5% to 90-95%; in New Mexico, as of July 2022, the State distributed $148 million in rent and utility payments as well as emergency stays and moving costs; the City of Louisville, KY, has allocated $400.000 to enact a right to counsel for tenants with children who are facing eviction.

In New Mexico, C.J. Shannon Bacon created a task force to design a State diversion program that includes legal representation, mediation, and financial navigators to provide services to tenants at risk of eviction.

In Texas, Gov. Greg Abbot announced in Sept. 2021 the creation of Texas Diversion Program that would use $171 million for a voluntary program created as alternative to evictions when both tenants and landlords agree to participate, offering up to 15 months of rental and utility assistance for tenants. Once tenants and their landlords agree in Court to pursue State assistance, eviction proceedings can be delayed for up to 60 days. To be eligible for the program, tenants must have an active eviction case and a household income either at or below 80% of the median income in their area.

According to the Pulitzer Prize-Winning – Author of *Evicted* – and Eviction Lab Founder Matthew Desmond: «The Emergency Rental Assistance Program along with the federal eviction moratorium formed the most important federal housing policy in the last decade. These combined initiatives were the deepest investment in low-income renters the federal government has made since the nation launched its public housing system. This was a real win, the most important eviction prevention policy in American history».[144]

5. A critical reading of the main housing and land-uses concerns in Biden-Harris Administration's strategy

Is the American Dream still alive?

In the 1990s and early 2000s Fannie Mae contributed to start inflating the housing bubble, that would detonate in 2007, by broadcasting in selling home loans ads the idea that buying a house, even beyond the available means, was still the cornerstone of the American Dream.[145] Land and house[146] have been considered the prerequisites for "the pursuit of

[144] The White House, *Fact Sheet: White House Summit on Building Lasting Eviction Prevention Reform*, Aug. 2, 2022, available at www.whitehouse.gov.

[145] That advertising spot is still available at www.adforum.com/creative-work/ad/player/34290/american-dream/fannie-mae. Patently, when James Truslow Adams coined the expression "American Dream" he meant something more thoughtful: «It is not a dream of motor cars and high wages merely, but a dream of a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position» (J. Truslow Adams, *The Epic of America*, N.Y., 1931, at 404).

[146] «In American history, land and opportunity have been closely related. In the early decades of the new country, the frontier offered new spaces and new chances for millions who heeded the exhortation to "go West." The idea of owning your own piece of land and your own home became an important part of the American dream and of the American idea of success. Home ownership remains vivid in the American

DPCE online
ISSN: 2037-6677

Happiness" since 1776 at least. Through the Centuries, a stable job or a business activity, family, healthcare, education, and finally equality have become "such stuff as [that dream is] made on".

It is hardly surprising, therefore, that housing and land-uses reside at the heartland of American constitutional law, always leading to questions about equal protection of the laws, participation in local government, regulation in economics, local development, eminent domain and private property taking, federal and State preemption of local regulation, immigration law.

By depicting a century of inconsistencies in their development, in the present essay[147] we demonstrated how quarrelsome is marriage between housing and urban policies. Disparities and segregations – by income, race, personal and social conditions – in and among neighborhoods still persist and drive evident injustices in safety, education, employment, health. Over the last decades, federal decisions to underfunds equity goals in housing patently did not contribute to cope with problems of sprawling and unsustainable development. To some Authors, the history of American urban policy appears to be "a narrative of failure" even.[148]

American metropolitan landscape and its suburbs had undergone through radical changes[149] that led to the need of rethinking the "Euclidean" idea of white nuclear family living in a single detached house. Various factors contributed to them: demographic changes; new constitutional concerns as to a redefined concept of family, gender equality, and racial discrimination; the social and economic impact of the increasing number of multigenerational families. These factors and many others described in this essay led legislators and Courts to a difficult work of accommodation of the law and of protection of disadvantaged groups from disparate impact.

All this, exacerbated by an unprecedented pandemic emergency, constituted the difficult legacy that the Biden-Harris Administration tried to face through policies aimed at helping low-income people, overcoming disparate treatment and disparate segregationist effects, supporting the economy in crisis, in order to fulfil «the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States».[150]

Trying to take a critical look on the several issues at stakes, three aspects deserve to be pointed out.

I. *Housing, space and inequalities.* Empirical research found that urban residents have responded to Covid-19 by fleeing city centers for the suburbs, and home sales have grown more rapidly among less densely populated neighborhoods or farther from metropolitan downtown areas. All

imagination; hence homeowners' highly favorable (but deeply regressive) tax status» (R.V. Reeves, *Dream Hoarders. How the American Upper Middle Class Is Leaving Everyone Else in the Dust, Why That Is a Problem, and What to Do About It*, Washington, D.C., 2017, at 104).

[147] And in previous works, see A. Tarzia, *National urban policies, municipal zoning and disputes over Sanctuary Cities in Metropolitan America*, cit.

[148] M.B. Katz, *Narratives of Failure? Historical Interpretations of Federal Urban Policy*, in *City and Community*, Vol. 9, No. 1, 2010, 13 ff.

[149] See *supra* notes 86 ff. and accompanying text.

[150] Fair Housing Act § 801 [42 U.S.C. 3601].

this brings up, for the umpteenth time in American history, the symbiosis between zoning, transportation systems and other public services, and spatial features of economy.[151] Mobility inequality in cities increased during the pandemic: while middle- and higher-income households could more eagerly work and provide childcare from homes often placed in neighborhoods with higher levels of walkability, transit accessibility and other amenities as access to the internet,[152] lower-income tenants were more intensively forced to travel to work, to go to healthcare centers, to go to retail establishment, and so on.[153] These findings reveal that the idea of simply affording a home in "high-quality" neighborhoods without supportive policies that grant commercial amenities, recreational facilities and public service accessibility, especially as regards healthcare and education, do not solve problems related to the overall quality of life.

As often happens, the main issue at stake is the relationship between the (failures of the) state and the (failures of the) market; in second place, the political and conceptual problem of using space to solve social problems.[154]

Zoning regulations forbid building anything other than single-family detached houses on three-quarters of land in most U.S. cities (among them Los Angeles, Chicago, Portland, Charlotte, Seattle, San José).[155] This way, detached dwellings with large minimum lot sizes and generous building setbacks and yard requirements, low-density, car-dependent development with large roads and huge parking lots – "urban sprawl" – are charged with many societal ills, including homelessness, pollution, congestion, gas emissions, excessive consumption of energy, poor physical fitness. Climate impact could be – but not clearly invoked in state legislation yet[156] – an excellent pretext for State preemption of conventional municipal zoning. By increasing the distance to be travelled from place to place, from home to work, from home to shopping malls and supermarkets,[157] sprawling has a key determinant role in Greenhouse Gas Emissions from transportation,[158]

[151] J. Lee, Y. Huang, *COVID-19 Impact on US Housing Markets*, cit., 410.
[152] C. Dimke, M.C. Lee, J. Bayham, *Working from a distance: Who can afford to stay home during COVID-19? Evidence from mobile device data*, 2020, available at www.medrxiv.org.
[153] A. Sevtsuk, R. Basu, D. Halpern, A. Hudson, K. Ng, J. de Jong, *A tale of two Americas*, cit.; the Authors realized a research on nine great American Cities: Atlanta, Boston, Chicago, Denver, Houston, Los Angeles, Philadelphia, Seattle, St. Louis.
[154] D. De Filippis, Place Matters, *but Maybe Not in the Ways They Think It Does* …, in *Urbain Affairs Review*, Vol. 53, No. 1, 189 ff.
[155] See J. Schuetz, *To improve housing affordability, we need better alignment of zoning, taxes, and subsidies*, Jan. 2020, in www.brookings.edu, and E. Badger, Q. Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, in *N.Y. Times*, June 18, 2019, available at www.nytimes.com.
[156] See *Developments in the Law – Climate Change*, Ch. III - *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, in *Harvard L. Rev.*, Vol. 135, No. 6, 2022, 1592 ff., at 1605-1609.
[157] According to T. Litman, at global level «sprawl typically increases per capita land consumption 60-80% and motor vehicle travel by 20-60%» (*Analysis of Public Policies That Unintentionally Encourage and Subsidize Urban Sprawl*, March 2015, available at www.newclimateeconomy.report).
[158] See, *ex multis*, G. Glovin, *A* Mount Laurel *for Climate Change? The Judicial Role in Reducing Greenhouse Gas Emissions from Land Use and Transportation*, in *Environmental Law Reporter*, Vol. 49, 2019, 10938 ff.

DPCE online
ISSN: 2037-6677

that had recently estimated to account for the 29% of the overall U.S. emissions.[159] Sprawling has various direct effect on climate: it obliges to more municipal infrastructure like roads, storm drainage, water, sewer and transportation facilities; it encourages the construction of larger houses that foster larger energy demands;[160] it neutralizes the effect of low-carbon transport policies.

According to most Authors, this shape of American metropolitan areas is simply what most Americans request, and the market has no interest in providing alternatives for build-compact, mixed-use and transit-accessible neighborhoods.[161]

As stated above in this essay, the Biden-Harris Administration agrees with mainstream Authors who advocate that spatial inequalities, suburban sprawl and segregation are products of zoning and/or metropolitan political fragmentation, unable to target market failures[162] but oriented towards feeding Tiebout Stratification.[163] Zoning reform would be the solution, as more freedom in land-uses and in building multi-family dwellings and compact housing types such as apartments, condominiums or townhouses would be more inclusive and would solve the scarcity of houses. This approach raises some questions:

1) if the correlation is true, why a city like Houston which has no zoning codes[164] presents a White/Non White Dissimilarity Index of 52.01, superior to that of Portland 22.73, Boston 33.80, San Francisco 37.23, Minneapolis 44.39, Baltimore 50.36?[165]

2) far from the hypostatization of the market, if the legal rules conform it, what kind of rules have to be passed and by whom? There is much to learn about market from the first two decades of XXI Century. It is a commonplace that high housing prices are produced by a shortage of supply. It appears quite the contrary. When the housing bubble inflated, in the period 2000-2007, the Country grew by 6.1 million household, but the

[159] B. Yudkin, D. Kay, J. Marsh, J. Tomchek, *Our Driving Habits Must Be Part of the Climate Conversation*, Aug. 24, 2021, available at www.rmi.org.

[160] According to R. Ewing and F. Rong, «[c]ompared with households living in multifamily units, otherwise comparable households living in single-family detached units consume 54 percent more energy for space heating and 26 percent more energy for space cooling» (*The Impact of Urban Form on U.S. Residential Energy Use*, in *Housing Policy Debate*, Vol. 19, No. 1, 1 ff., at 20).

[161] A suggestive and critical analysis has been provided by J. Levine, *Zoned Out. Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use*, Washington, D.C., 2006.

[162] Among the most influential, P. Dreier, J. Mollenkopf, T. Swanstrom, *Place Matters: Metropolitics for The Twenty-first Century*, Lawrence (KA), 2nd ed., 2004, at xvi, 104, 251 et passim.

[163] See P. Bayer, R. McMillan, *Tiebout Sorting and Neighborhood Stratification*, 2011, available at www.nber.org.

[164] «The City of Houston does not have zoning, but development is governed by ordinance codes that address how property can be subdivided. The City codes do not address land use», at www.houstontx.gov/planning/DevelopRegs.

[165] See J. Cortright, *America's least (and most) segregated cities*, 17-8-2020, available at cityobservatory.org (consulted Jan. 4, 2023); the most segregated city is Detroit, with a dissimilarity index equal to 68.52.

Nation's housing stock grew by 11.0 million units;[166] notwithstanding the crash of 2007-2008, the overbuilding continued in the period 2007-2013 by adding 5.8 million housing units. At the end of 2022, the estimated total housing units in the United States was nearly 144 million, with a rental vacancy rate equal to 6.0% and a homeowner vacancy rate equal to 0.9%.[167] The problem of affordability, then, is due to a lower level of demand and other factors we referred to in previous sections of this work that have been transforming urban landscape in the last decades: quality of public services, migration of poverty to "slumburbia", income, racial and ethnic segregation, relocation of job opportunities, gentrification, declining appeal of aging housing stock in older suburbs. Their mix before, during and after the pandemic has had diverse impact across more than 300 metropolitan markets of different dimensions.

Exclusion and inequalities may occur at various spatial scales: in residential suburbs, where exclusionary practices have more evidently marked American urban development, as in Midtown Manhattan with its mounting number of poor around Times Square, where there are no detached dwellings.

As Mustafa Dikeç dazzlingly pointed out, urban inequalities derive from the combination of the spatial dialectics of injustice, the right to the city, and the right to difference. The triad presents two inseparable facets so difficult to direct towards emancipatory politics: the spatiality of injustice and the injustice of spatiality. The first «implies that justice has a spatial dimension … and that a spatial perspective might be used to discern injustice in spaces»; the second «implies existing structures in their capacities to produce and reproduce injustice through space. It is, compared with the spatiality of injustice, more dynamic and process oriented».[168]

Uneven spatial development is an inherent characteristic of capitalism that state (i.e. government) might heal but, strangely in this case, solutions proposed by those who still believe that "Government is the problem" and those who disbelieve in market coincide: zoning hyper-regulation is the evil. As some minority opinions suggest, if aimed only at deregulation, the effort to dismantle Exclusionary Zoning «give[s] rise to sociopolitical outcomes far more detrimental to the cause of social justice than the actual adverse effects».[169] Like President Biden, President Trump coped with exclusionary zoning through the Executive Order 13878 of June 25, 2019, that established a White House Council on Eliminating Regulatory Barriers to Affordable Housing but with the flagrant goal of deregulation.[170]

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[166] Cfr. K. McKlure, N. Gurran, G. Bramley, *Planning, Housing Supply and Affordable Development in the USA*, in N. Gurran, G. Bramley (Eds.), *Urban Planning and the Housing Market. International Perspectives for Policy and Practice*, London, 2017, 165 ff., at 176-177.

[167] U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, Third Quarter 2022*, press release Nov. 2, 2022, available at www.census.gov.

[168] M. Dikeç, *Justice and the Spatial Imagination*, in *Environment and Planning*, Vol. 33, 2001, 1785 ff., at 1792-1793.

[169] D. Imbroscio, *Rethinking Exclusionary Zoning or: How I Stopped Worrying and Learned to Love It*, in *Urban Affairs Review*, Vol. 57, No. 1, 2019, 209 ff., at. 215.

[170] «These regulatory barriers include overly restrictive zoning and growth management controls; rent controls; cumbersome building and rehabilitation codes;

DPCE online
ISSN: 2037-6677

Then, if we agree with Diteç, we shouldn't embrace deregulation but foster the participatory and bottom-up processes which form-based codes rely upon.

II. *Federal conditional grants and State preemption of local authorities' regulations.* Since the early 1900s, municipal authorities have governed land-uses and housing programmes through zoning regulations with an increasing nationwide popularity. Puzzlingly, the federal Standard State Zoning Enabling Act of 1922 created a legislative model for the States, and so paved the way to delegation of powers for zoning control to municipalities,[171] which were following the Dillon's Rule at that time; but soon after, for the reasons stated above, the subject matter became of interest of the federal government first, of state governments later.

As in many other areas of public policy, local authorities' housing decision-making is situated in a complex network of intergovernmental relations that may materialize in cooperative actions, as the above described eviction diversion programmes, or rather in clashes of local policies' goals with federal or state interests that lead to preemption of local decisions.

As reported above,[172] at federal level the Biden-Harris Administration's strategy focuses on rewarding jurisdictions that have reformed or will reform zoning and land-use policies, essentially by means of HUD and DOT conditional programs; deploying new financing mechanisms that will involve Fannie Mae and Freddie Mac, and Ginnie Mae platform; expanding and improving existing forms of federal financing, including for affordable multifamily development and preservation. Clearly, much will depend on the availability of federal funds and on the fallouts and sustainability of the financial effort made with the stimulus package.

As regards relationship with the state level, the main source of concern for local governments is the aggressive usage of a "new state preemption" supported by resurgence of strict application of the Dillon's rule which, absent any express protection of local autonomy in the federal Constitution, could jeopardize the home rule that finds constitutional or statutory protection in nearly all States. Different from the "classic" state preemption that still consists in the judicial determination of coexistence of local regulation with state laws, this "new preemption" refers to «state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems».[173] A couple of examples will suffice.

In 2019, Oregon passed the House Bill 2001 aimed at expanding the ability of property owners to build "middle housing" in residential zones. The House Bill requires municipalities to update restrictive local regulations

excessive energy and water efficiency mandates; unreasonable maximum-density allowances; historic preservation requirements; overly burdensome wetland or environmental regulations; outdated manufactured-housing regulations and restrictions; undue parking requirements; cumbersome and time-consuming permitting and review procedures; tax policies that discourage investment or reinvestment; overly complex labor requirements; and inordinate impact or developer fees» (E.O. 13878).

[171] See C. Serkin, *A Case for Zoning*, in *Notre Dame L. Rev.*, Vol. 96, No. 2, 2020, 749 ff., at 755.

[172] See *supra*, § 2.2.

[173] R. Briffault, *The Challenge of the New Preemption*, in *Stanford L. Rev.*, Vol. 70, 2018, 1995 ff.

on the types of housing admitted: medium-sized cities (with a population of more than 10,000 and less than 25,000) not within a metropolitan service district must allow the development of a duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings; large-sized cities and cities in the Portland Metro region must allow duplexes, triplexes, quadplexes, cottage clusters, and townhouses in residential areas on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings. Throughout 2020, the Oregon Land Conservation and Development Commission adopted model codes for medium and large cities establishing compliance standards, and a process and criteria for the assessment of city plans to address infrastructure needs. The House Bill 2001 provided $3.5 million to the Department of Land Conservation and Development for planning assistance to local governments in the development of the new regulation and in the development of plans to improve infrastructure for all public services involved.

In 2021, California signed into law[174] a bill that eliminates single-family zoning throughout the State by allowing landowners to split their lots and/or convert their homes to duplexes or even quadplex.[175] To do all this, the Law removed the related actions under the California Environmental Quality Act that opponents to undesired residential development had at their disposal.

Advocates of preemption argue that it would be desirable when individual municipalities adopt (or miss to adopt) decisions that impose costs on other municipalities, with no interest in inter-municipal cooperation. Zoning is of the case: a top-down approach through binding state legislation would neutralize "neighborhood defenders"[176] and their efforts to slow down, alter and stop the development by using participatory institutions, and impede negative spillover and NYMBY's effects, with reference to GHG emissions for instance. Furthermore, it is unlikely that "homevoters",[177] comfortable in their blissful living in detached dwellings, vote for radical transformations of their neighborhood to solve the problems of affordability, exclusion, segregation.

[174] Senate Bill No. 9, Chapter 162, "An act to amend Section 66452.6 of, and to add Sections 65852.21 and 66411.7 to, the Government Code, relating to land use", available at www.leginfo.legislature.ca.gov.

[175] For critical remarks on the Act, see B. Metcalf, D. Garcia, I. Carlton, K. Macfarlane, *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single-Family Create New Homes? Assessing the Viability of New Housing Supply Under California's Senate Bill 9*, Berkeley, July 2021, available at www.ternercenter.berkeley.edu, and H. Grabar, *You Can Kill Single-Family Zoning, but You Can't Kill the Suburbs*, Sept. 17, 2021, in www.slate.com.

[176] K.L. Einstein, D.M. Glick, M. Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis*, in *Political Science Q.*, Vol. 135, No. 2, 2020, 271 ff.: «Our conceptualization of neighborhood defenders is related to, but distinct from, NIMBYism. The very term NIMBY – not in my backyard – connotes concerns about individual self-interest, whether it is worries about property values or encounters with individuals who differ demographically from oneself» (*ivi*, at 288).

[177] A portmanteau created by W.A. Fischel, *The Homevoter Hypothesis. How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*, Cambridge, Mass., 2005

DPCE online
ISSN: 2037-6677

Opponents to forms of aggressive preemption argue that the ban to single-family zoning and low density alone won't solve affordability problems, as won't mechanically reduce costs of constructions or rent and sales prices. Additional tools to boost the supply,[178] programs to lift the demand[179] and new arrangements for supra-municipal cooperation would be needed.[180] Moving in this direction, other tools for inclusionary zoning has been experimented across the Nation: for instance, "density bonuses"[181] has been largely introduced in California but a review of their use in San Diego found that they exacerbated the concentration of poverty as developers operated primarily in lower value land markets.[182] Furthermore, taking away the municipal zoning powers a consistent portion of direct democracy and local self-determination would be annihilated, producing the harmful side-effect of diluting the power of racial minorities at state level[183]. Even more, zoning preemption would seize opportunities for local housing innovations[184] and would prejudice the beneficial competition for residents through administrative efficiency[185]. Finally, state policies can be progressive or conservative; a conservative state preemption could impede the adoption of local progressive housing policies.[186] Aggressive preemption

[178] For instance, «California's statewide ADU laws were a step in the direction of gently adding more density to simultaneously address the housing, climate, and equity challenges faced by the state» (B. Metcalf, D. García, I. Carlton, K. Macfarlane, *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single-Family Create New Homes*, cit., at 14).

[179] For instance, distribution of subsidies to low-income people and the institution of rent controls (J. Schuetz, *To improve housing affordability, we need better alignment of zoning, taxes, and subsidies*, cit.).

[180] R. Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, in *Stanford L. Rev.*, Vol. 48, 1996, 1115 ff.: «Decentralized but regionally sensitive metropolitan governance is an attractive illusion. Regional structures and institutions are necessary to solve the critical questions of metropolitan area governance» (*ivi*, at 1164).

[181] «"Density bonuses" enable a developer to increase the number of housing units in a development, beyond what would normally be allowed under the zoning ordinance, if the development meets some specified public purpose» (K. McKlure, N. Gurran, G. Bramley, *Planning, Housing Supply and Affordable Development in the USA*, cit., at 189)

[182] S. Ryan, B.E. Enderle, *Examining Spatial Patters in Affordable Housing: The Case of California Density Bonus Implementation*, in *J. of Housing and the Built Environment*, 27, 2012, 413 ff.

[183] «Some preemption measures have the effect of shifting decisionmaking authority from majority-minority local governments to a white-dominated state government» (R. Briffault, *The Challenge of the New Preemption*, cit., at 2009).

[184] «Indeed, local governments have historically broken new ground in public health, education, sanitation, and infrastructure development» (D.N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, in *Michigan L. Rev.*, Vol. 118, 2019, 173 ff., at 181). As the Supreme Court recognized, «local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence"» [*Milliken v. Bradley*, 418 U.S. 717 (1974), quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)].

[185] See J. Frug, *Decentering Decentralization*, in *The Univ. of Chicago L. Rev.*, Vol. 60, No. 2, 1993, 253 ff.

[186] See R.C. Schragger, *The Perils of Land Use Deregulation*, in *Univ. of Pennsylvania L. Rev.*, Vol. 170, 2021, 125 ff., at 156-162.

would hurt the essence of the home rule, the participation of local governments in the exercise of police powers employing their "local knowledge".[187]

An illustrative case of how difficult is to manage urban development, participation and anti-segregationist policies related to housing is the outlandish case of Boyle Heights, one the earliest suburbs in Los Angeles. Due to the lack of racially restrictive covenants and regulation, in the early 1900s Boyle Heights opened to Jewish, Italian, Japanese, African-Americans and Mexicans; in the middle of twentieth century it became a Mexican-majority "barrio".[188] During the 1970s, many residents strongly opposed to urban renewal programs in order to preserve its Chicano character and its affordability, as the barrio was one the few places where working class immigrants could afford to live.

III. *Financial sustainability.* It appears plain that anti-EZ goals that animate the Biden-Harris Administration's strategy cannot produce stable and beneficial effects over the long-run without "equalizing intergovernmental grants"[189] and subsidies to low-income households. Availability of resources will be necessary for the preservation of neighborhoods and low-income people dwelling units in more than acceptable conditions, exactly what lacked most in the U.S. public housing history: public housing has often been poorly designed and worst maintained. In the words of the famous architect Oscar Newman, «[s]uch anonymous [deteriorated] public spaces made it impossible for even neighboring residents to develop an accord about acceptable behavior these areas. It was impossible to feel or exert proprietary feelings, impossible to tell resident from intruder»; inevitably, these units were destined to face an «heyday of pervasive crime and vandalism».[190]

By comparison with the Trump Administration, in its first two years the Biden-Harris Administration showed a great attention for inclusionary zoning, opted for cooperation with States and local government abandoning the lines of commandeering and preemption, reinstated (or is going to) the 2013 HUD rule and the AFFH rule aimed at reducing segregation, and continued programs like ERA launched in the previous presidential term.

The great unknown in the years to come will be the sustainability of the enormous financial stimulus package, and the capacity to cope with inflation and public debt.

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[187] L.A. Baker, D.B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, in *Denver University L. Rev.*, Vol. 86, No. 4, 2009, 1337 ff., at 1334, and D.B. Rodriguez, *State Constitutional Failure*, in *Univ. of Illinois L. Rev.*, no. 4, 2011, 1243 ff., at 1271-1272.
[188] A. Huante, *Planning the Barrio: Racial Order and Restructuring in Neoliberal Los Angeles*, in *Urban Affair Review*, Vol. 58, No. 4, 996 ff.
[189] In the meaning given by Oates and Schwab, see *supra*, note 47 and accompanying text.
[190] O. Newman, *Creating Defensible Space*, Washington, 1996, 11-12.

DPCE online
ISSN: 2037-6677