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## OUR PLURALIST HOUSING ETHICS AND THE STRUGGLE FOR AFFORDABILITY

*Tim Iglesias\**

*Building on recent scholarship, this Article explores the five “housing ethics” that have historically shaped U.S. housing law and policy: (1) housing as an economic good, (2) housing as home, (3) housing as a human right, (4) housing as providing social order, and (5) housing as one land use in a functional system. The “housing ethic” framework brings all of America’s housing law and policy under one conceptual roof. The Article argues that each of these housing ethics is deeply embedded in American housing policy and law, and that none has ever achieved a complete hegemony, i.e., that coexistence and pluralism among the housing ethics is the norm. The Article examines the challenges and opportunities that our housing ethic pluralism presents to the affordable housing movement. It identifies the “housing as one land use in a functional system” ethic as the single most promising ethic to advance affordability.*

### I. INTRODUCTION

Americans love their homes and the idea of “home.”<sup>1</sup> They appear to engage in near worship, referring to the “sanctity” of the home<sup>2</sup> and expending enormous amounts of time and money even on

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\* Professor of Law, University of San Francisco School of Law. Thanks to Fred Bosselman, Josh Davis, Alice Kaswan, Jim Kushner, Mike Rawson, and Josh Rosenberg for helpful comments on an earlier draft. Thanks also to the USF law faculty for comments and suggestions during a work-in-progress presentation. Finally, thanks to Paul Gruwell for research assistance.

1. John Edwards’s recent paeon to the importance of home is only one of the most recent contributions to this literature. *See generally* HOME: THE BLUEPRINTS OF OUR LIVES (John Edwards ed., 2006) [hereinafter BLUEPRINTS]. Of course, America is not alone in this passion. *See generally* LORNA FOX, CONCEPTUALIZING HOME: THEORIES, LAWS AND POLICIES (2007); Avital Margalit, *The Value of Home Ownership*, 7 THEORETICAL INQUIRIES L. 467 (2006) (discussing the importance of home ownership in Israel).

2. *See, e.g.,* Megan J. Ballard, *Legal Protections for Home Dwellers:*

modest houses.<sup>3</sup> They appreciate how important homes are to personal development as well as family and community life.<sup>4</sup> When natural disasters such as Hurricane Katrina leave people tragically homeless, many respond generously.<sup>5</sup> Congress's statement in 1949 declaring "a decent home and a suitable living environment for every American family" as a national goal is the most well-known legislative expression of this valuing of "home."<sup>6</sup> President George W. Bush's 2005 inaugural address proclaimed a vision of a new "ownership society" premised on his belief in the liberty of each family to own their own homes.<sup>7</sup>

The virtues of "home" are extolled as good and necessary for all,

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*Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 277 (2006) (referring to "[t]he sacred status of a home"); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006) ("[W]e have developed something of an ideology of home where the protection of home and all it stands for is an American virtue."); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786-87 (2006) (discussing recognition of the home's sanctity in the Fourth Amendment context); see also *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting) (discussing the home's sanctity in the Supreme Court's jurisprudence).

3. See, e.g., Barros, *supra* note 2, at 289 n.146 ("Even in the presence of a voluntary transaction, people tend to act in a manner that appears to be economically irrational about their homes, and this 'irrational' overvaluation can be seen as an expression of the individual's personal interest in the home.") (citation omitted); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2975 (2006) ("Owners devote attention on their homes, investing substantial resources even in the most modest of dwellings.").

4. See, e.g., BLUEPRINTS, *supra* note 1, at viii-xi (discussing Senator Edwards' home in relation to his personal development, family, and community); Ballard, *supra* note 2, at 286-89 (discussing how "a home can be constitutive of the dweller" and how "home embodies psychological and social benefits"); Barros, *supra* note 2, at 259-75 (discussing the home as a source of security, liberty, and privacy).

5. "Hurricane Katrina set off the largest, most expensive disaster relief operation in U.S. history. [Earlier this year] the Red Cross announced that current financial donations and pledges will cover the estimated \$2.116 billion costs for its response to Hurricanes Katrina, Rita and Wilma." AM. RED CROSS, TURNING COMPASSION INTO ACTION—DONOR DOLLARS AT WORK: HURRICANES KATRINA, RITA, AND WILMA (2006), <http://www.redcross.org/news/ds/hurricanes/support05/report.html>.

6. "[T]he Nation [should realize] . . . as soon as feasible . . . the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation." 42 U.S.C. § 1441 (2000). Congress reaffirmed this goal in 1968. 12 U.S.C. § 1701t (2000).

7. Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1231 (2005) (internal quotation marks omitted).

a building block, a foundation for life. However, the enthusiasm suddenly dries up when the topic is “homes” (housing) for low-income people or people of color. How do we reconcile the apparent contradictions between America’s love affair with home and its tolerance for massive and growing homelessness (both visible and hidden), the pervasive Not-In-My-Back-Yard (“NIMBY”) phenomenon, and—perhaps the most important challenge to housing—the well-documented and widening crisis in housing affordability?<sup>8</sup>

Significant recent legal scholarship focuses on “home.”<sup>9</sup> These writings engage in a social constructive interpretation of American housing law and policy. The scholars agree that housing is a

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8. See BIPARTISAN MILLENNIAL HOUS. COMM’N, MEETING OUR NATION’S HOUSING CHALLENGES 15-17 (2002), available at <http://govinfo.library.unt.edu/mhc/MHCReport.pdf>; HENRY CISNEROS ET AL., OPPORTUNITY AND PROGRESS: A BIPARTISAN PLATFORM FOR NATIONAL HOUSING POLICY 3-8 (2004); NAT’L LOW INCOME HOUS. COAL., OUT OF REACH 2006 (2006), available at <http://www.nlihc.org/oor/oor2006/?CFID=5696040&CFTOKEN=64782348>; Michael E. Stone, *Housing Affordability: One-Third of a Nation Shelter-Poor*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 38-60 (Bratt et al. eds., 2006) [hereinafter A RIGHT TO HOUSING]; Ctr. for Hous. Policy, *Paycheck to Paycheck* (2006), <http://www.nhc.org/chp/p2p/>; W. Paul Farmer, Am. Planning Ass’n, *Affordable Housing Crisis: The “Silent Killer,”* AFFORDABLE HOUSING READER (2004), <http://www.planning.org/affordablereader/domesticpolicy/apr04.htm>.

While Peter Salins disagrees with housing advocates’ proposed solutions to the affordability problem, he acknowledges that their “most valid concern” is “that households at the bottom of the income and social scale have a hard time finding good quality housing that is ‘affordable.’” Peter D. Salins, *Comment on Chester Hartman’s “The Case for a Right to Housing”: Housing Is a Right? Wrong!*, 9 HOUSING POL’Y DEBATE 259, 265 (1998). Affordability is one of six housing problems: supply of types, cost, quality, location, discrimination, and segregation. Affordability is usually defined in a relative way. Federal housing programs have used a fixed percentage of income, usually adjusted for family size and housing market. Historically, this has ranged from 20% of household income to the current 30% standard. The Department of Housing and Urban Development (“HUD”) defines housing as “affordable” if no more than 30% of a family’s income goes towards housing costs. U.S. Dep’t of Hous. and Urban Dev., *Affordable Housing*, <http://www.hud.gov/offices/cpd/affordablehousing/index.cfm> (last visited Mar. 7, 2007). Michael Stone has articulated an alternate measure called “shelter poverty” that takes into account household size, household income, and the cost of non-shelter basics, as opposed to a fixed percentage of income. Stone, *supra*, at 44-47.

9. See, e.g., Ballard, *supra* note 2; Barros, *supra* note 2; Fee, *supra* note 2; Peñalver, *supra* note 3. For a similar discussion regarding housing in Britain, see the works of Lorna Fox: FOX, *supra* note 1; Lorna Fox, *The Idea of Home in Law*, 2 HOME CULTURES 25 (2005) [hereinafter Fox, *Idea of Home*]; Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & SOC’Y 580 (2002) [hereinafter Fox, *Meaning of Home*].

“unique” type of property with a special character in our law and policy, compared to a wide range of other forms of property.<sup>10</sup> This scholarship might seem likely to boost the affordability movement because such valuing of home might lead to laws and policies making decent and affordable homes available for all.<sup>11</sup>

This Article argues that such hopes would be in vain. Americans’ love of “home” is narrowly focused. The “American Dream” is not the only driving force in housing law and policy.<sup>12</sup> Despite the common view of one’s home as one’s castle, the production, siting, and use of housing are heavily regulated. As a nation we subscribe to a pluralist housing ethic, which does not result in a uniform or uncritical embrace of housing whenever and wherever it might be. And, in some contexts, we are decidedly ambivalent or even actively hostile to housing. “Home” is only part of the story. It is only one of America’s five deeply embedded “housing ethics.”

The Article will explicate the five “housing ethics” in a manner inspired by Professor Fred Bosselman’s article entitled *Four Land Ethics: Order, Reform, Responsibility, Opportunity*.<sup>13</sup> In the “housing as an economic good” ethic, housing units are treated as consumer and investment goods to be produced and purchased in the market.<sup>14</sup> We take for granted the option of buying or renting a house. We expect to pay more for a three bedroom unit than a two

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10. Barros, *supra* note 2, at 256 (“On a general level, special legal treatment of homes is neither surprising nor controversial. Homes are different in meaningful ways from other types of property, and their unique nature justifies a favored legal status in many circumstances.”); Fee, *supra* note 2, at 793 (“There has always been something uniquely personal about one’s own home, making it different and in a sense of higher value than other forms of real property, although it might not appraise as such.”); Peñalver, *supra* note 3, at 2975 (“[T]he [home as castle] metaphor serves a crucial rhetorical purpose that itself functions as something of a political shield protecting this unique category of property.”). Others argue that housing is not a special type of property. See, e.g., James H. Carr, *Comment on Chester Hartman’s “The Case for a Right to Housing”: The Right to “Poverty with a Roof”—A Response to Hartman*, 9 HOUSING POL’Y DEBATE 247 (1998).

11. And, in fact, the affordable housing movement has attempted to capture the good feelings associated with the “home” ethic in communication strategies to support affordable housing programs. See *infra* Part II.B. This Article defines the “affordable housing movement” as non-profit affordable housing developers, affordable housing advocates (e.g., in community organizations), and civil rights attorneys who work in the field.

12. The “American Dream” is discussed *infra* Part III.A.

13. Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994).

14. The “housing as an economic good” ethic is discussed *infra* Part II.A.

bedroom unit. Or consider speculators who “flip” houses.

The “housing as home” ethic recognizes that the common experience of a dwelling as a “home” generates a wide range of human meanings, expectations, and interests related to liberty, privacy, security, and possession.<sup>15</sup> In some contexts, the law recognizes these expectations and interests as legal rights (e.g., the Fourth Amendment protection from unreasonable searches of houses). In other contexts, expectations associated with “home” are not protected by law.

The “housing as a human right” ethic focuses primarily on individual legal rights in the provision of housing itself, e.g., rights concerning access to housing, its quality, and its terms that are generally available to all persons, including those currently without housing or who are poorly housed.<sup>16</sup> This ethic often appears as the cry of the poor, those who suffer discrimination and uninhabitable housing conditions.

The core idea of the “housing as providing social order” ethic is the deliberate use of housing as a means to establish and maintain a specific social order which embodies a certain view of “the good life,” e.g., Jim Crow laws establishing explicitly racially segregated housing patterns.<sup>17</sup>

Finally, the “housing as one land use in a functional system” ethic focuses on the *functional* relationships between housing and other land uses (e.g., shopping, water, open space, transportation, schools, and medical facilities).<sup>18</sup> This ethic includes comprehensive planning requirements and subdivision regulations that seek to design and promote the development of a workable, livable land use system.

Dozens of articles and books have explored “environmental ethics”<sup>19</sup> and “land ethics,”<sup>20</sup> but none to date has explored “housing

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15. The “housing as home” ethic is discussed *infra* Part II.B. Barros, *supra* note 2, at 259-76, contributes to this ethic.

16. The “housing as a human right” ethic is discussed *infra* Part II.C.

17. The “housing as providing social order” ethic is discussed *infra* Part II.D. Frank S. Alexander contributes to this ethic. Professor Alexander’s article provides a detailed critique of how American housing law has often enforced particular conceptions of preferred social order. His conclusion urges the reform and development of housing law to serve the functional purposes of providing housing. Alexander, *supra* note 7, at 1269; *see also* discussion *infra* note 216 and accompanying text.

18. The “housing as one land use in a functional system” ethic is discussed *infra* Part II.E.

19. *See generally* ENVIRONMENTAL PRAGMATISM (Andrew Light & Eric Katz eds., 1996); ROBERT J. GOLDSTEIN, ENVIRONMENTAL ETHICS AND LAW (2004); RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL

ethics.” As used in this article, a “housing ethic” is an organizing principle that affects American housing and land policy by directing attention to certain kinds of facts and issues as relevant and important for policy and decisionmaking.<sup>21</sup> It may be pre-reflective or consciously employed. It enables a certain kind of discourse with its own concepts and vocabulary. Beyond just categorizing the world, each ethic incorporates a normative dimension; it is poised toward decision and action. There can be several strands or versions of each ethic. Each ethic can embrace more than one value and can be invoked in calls to defend or reform law or policy.<sup>22</sup> At times ethics may even make claims to a “moral” authority. These ethics are not merely abstract concepts or metaphors, but are established traditions with deep roots in our actual law and policy.

The Article argues that: (1) there are five distinct, decipherable, and stable housing ethics deeply embedded in American housing policy and law that influence current housing law and policy through an ongoing social dialogue;<sup>23</sup> (2) the five housing ethics can

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ETHICS (1989); PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986); Craig Anthony Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1 (2004); Robert C. Ellickson, *Liberty, Property, and Environmental Ethics*, 21 ECOLOGY L.Q. 397 (1994); Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63 (2003); Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1 (1994); Leslie Paul Thiele, *Limiting Risks: Environmental Ethics as a Policy Primer*, 28 POLY. STUD. J. 540 (2000). *Environmental Ethics*, a journal published by the John Muir Institute for Environmental Studies and the University of New Mexico, is also relevant.

20. See generally LYNTON KEITH CALDWELL & KRISTIN SHRADER-FRECHETTE, POLICY FOR LAND: LAW AND ETHICS (1993); Bosselman, *supra* note 13; Richard C. Collins, *Land Use Ethics and Property Rights*, 46 J. SOIL & WATER CONSERVATION 417 (1991); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989); Mark Sagoff, *Do We Need a Land Use Ethic?*, 3 ENVTL. ETHICS 293 (1981).

21. This Article takes no position on the issue of whether the housing ethics function as rhetorical devices, framing devices, ideologies, or separate rationalities (with the potential for bounded rationality), or some combination of these. This issue is left to future scholarship.

22. The ethics are not equivalent to interest groups or particular philosophical or political categories.

23. See Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1095-96 (1996) (arguing that American property law is best understood as an ongoing dialogue incorporating several fundamentally different perspectives on property rights).

combine with each other, and they may also conflict and function as reciprocal constraints on each other;<sup>24</sup> and (3) while there is a potential for temporary or limited hegemony in certain contexts, coexistence and pluralism among the housing ethics is the norm and is likely to persist.<sup>25</sup>

Building on recent housing scholarship,<sup>26</sup> Part II of this Article identifies and explicates each of the five housing ethics, shows how they operate in U.S. housing law and policy, and offers preliminary reflections on how each applies to affordability. It identifies the “housing as one land use in a functional system” ethic as the single most promising ethic to advance affordability. Part III examines the challenges and opportunities that our housing ethic pluralism presents to the affordable housing movement. Affordable housing law and policy (and housing rights in general) have been limited by our pluralist “housing ethics,” but insight into them offers hope to the affordable housing movement.

The Article comes to the following conclusions: (1) while the quest for affordable housing is not inherently inimical to the dominant version of the “housing as an economic good” ethic, there will always be tensions between them; (2) the “housing as home” ethic is a potential ally of affordability, but the fruitfulness of that alliance is limited because the dominant version of that ethic is ultimately indifferent to affordability because it is anchored in American individualism; (3) the historical reliance of the affordable housing movement on the “housing as a human right” ethic has

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24. This pluralism may help account for the past and current muddle of our housing law and policy. “Students of housing and community development programs should not expect to find a rationalized, integrated set of governmental interventions. These programs are an accumulation of decades of experimentation, often taking contradictory directions.” CHARLES E. DAYE ET AL., *HOUSING AND COMMUNITY DEVELOPMENT* 33 (3d ed. 1999). This Article will not explore all of the many complex relationships among the ethics. Nor will it discuss the many issues raised by the five housing ethics concerning the appropriate relative roles of federal, state, regional, and local government in housing policy.

25. These hypotheses closely parallel the author’s interpretation of Bosselman’s article. See Bosselman, *supra* note 13, at 1441.

26. Some of the recent articles employ “home” as their unit of analysis. See Ballard, *supra* note 2; Barros, *supra* note 2; Fee, *supra* note 2; Peñalver, *supra* note 3. In addition, an important recent article by Professor Robert Ellickson uses “household” as a unit of analysis. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *YALE L.J.* 226 (2006). This Article locates “home” as one of the housing ethics and uses “housing” as the unit of analysis in order to incorporate all of the relevant issues, conflicts, and values (including affordability) that affect American housing law and policy. *Id.*

generated some important benefits, but this ethic is unlikely to be as useful in the foreseeable future due to courts' reluctance to interpret law expansively to recognize individual housing rights and legislatures' reluctance to expand what are perceived as "welfare rights"; (4) our current housing patterns are largely the legacy of a racially and economically exclusive version of the "housing as social order" ethic. These patterns pose a formidable challenge to progress in achieving greater affordability, but competing "inclusive" versions of the "housing as social order" ethic may benefit affordability; and (5) while the struggle for affordability is best served when multiple ethics support it, the "housing as one land use in a functional system" ethic currently provides the most promising single housing ethic for increasing affordability for three reasons: (a) it can foster a view of affordability as a necessary element of a healthy community; (b) it can neutralize affordability's historical association with divisive poverty and race issues; and (c) it can lead to the recognition of "social rights to housing,"<sup>27</sup> which will increase the production of affordable housing. There are, however, strong and enduring tensions between affordability and some environmentalist versions of the "housing as one land use in a functional system" ethic. And, it is uncertain whether this ethic can support affordability for very low income households, including homeless people.

## II. OUR FIVE HOUSING ETHICS

A review of judicial doctrine, local, state and federal regulation, academic commentary, and other sources demonstrates that there are five housing ethics:<sup>28</sup> (1) housing as an economic good, (2)

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27. See *infra* notes 364-85 and accompanying text (distinguishing "social rights to housing" from individual housing rights).

28. "Housing as a focal point for self-governance" may be an additional emerging housing ethic. Currently, approximately fifty million Americans live in some form of "common interest community" ("CIC") in which housing ownership is linked to membership and voting rights in a self-governing body. CMTY. ASS'NS INST., AN INTRODUCTION TO COMMUNITY ASSOCIATION LIVING 2-3, 35 (2003), available at [http://www.regenesis.net/community\\_association\\_living.pdf](http://www.regenesis.net/community_association_living.pdf). Some argue these developments enable community formation, social capital building, and citizenship skill building. Dell Champlin, *The Privatization of Community: Implications for Urban Policy*, 32 J. ECON. ISSUES 595 (1998) (discussing the economic and social reasons favoring CICs); Robert H. Nelson, *Pro-Choice Living Arrangements*, FORBES, June 14, 1999, at 222. Others argue that CICs are the latest form of exclusion and represent privatization of government. EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 44 (1997). See generally Symposium, *AALS Common Interest Communities Symposium*, 37 URB. LAW.

housing as home, (3) housing as a human right, (4) housing as providing social order, and (5) housing as one land use in a functional system.

Each subpart will explain the meaning of a housing ethic and demonstrate its presence in American housing law and policy through cases, statutes, professional discourse, lay discourse, or other reference points, and then explore the relationship between that housing ethic and affordability.

A. *Housing as an Economic Good*

*Although a consumer good, owner-occupied housing is also widely viewed as an investment.*<sup>29</sup>

The “housing as an economic good” ethic directs our attention to the fact that most housing in the United States is financed, produced, and distributed by the private market. And, for many Americans, their house is their largest single investment and one of their largest monthly expenditures. In this ethic, houses are treated as consumer and investment goods—in particular, durable goods—that are produced, sold, and resold as efficiently as possible. In this view, a housing unit is an economic good which includes a set of property rights and the utility and economic benefits that are derived from these. Therefore, under this ethic, economic principles are critical. The questions this ethic poses to any proposed policy or legal rule are: *How will this proposal affect the supply and demand of housing and the price of housing? What housing types will be developed? How will it affect the flows of investment in housing development? and How will it affect residential property values?*

The United States has generally relied on the private market for most housing production and distribution.<sup>30</sup> The myriad of statutes and cases comprising real estate transaction law that treat housing as an improvement to real property testify to how deeply embedded the “housing as an economic good” ethic is in American

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325 (2005) (illustrating the various perspectives on CICs). In the author’s view, while these forms of housing are well-grounded in law, it is premature to determine whether or not they will create a new housing ethic. *See infra* Part II.D (categorizing CICs under the “housing as providing social order” ethic).

29. Jack Goodman, *Homeownership and Investment in Real Estate Stocks*, 9 J. REAL ESTATE PORTFOLIO MGMT. 93, 94 (2003).

30. *See* Peter Marcuse & W. Dennis Keating, *Federally-Assisted Housing in Conflict: Privatization or Preservation?*, in A RIGHT TO HOUSING, *supra* note 8; Carr, *supra* note 10, at 255; Peter Dreier, *The New Politics of Housing: How to Rebuild the Constituency for a Progressive Federal Housing Policy*, 63 J. AM. PLAN. ASS’N 5, 6 (1997) (“Among western democracies, the United States relies most heavily on private market forces to house its population.”).

housing law and policy.<sup>31</sup> Moreover, as a complex economic asset, many parties can simultaneously have distinct economic interests in a unit of housing. The present interest of a renter coupled with the future interest of a landlord is a simple example. But the property interests in an owner-occupied home or an apartment house can be considerably more complex.<sup>32</sup> There can be conflicts between and among residents, mortgagees, mortgagors, investors, various lien holders (e.g., mechanics' liens), and the government. A plethora of laws regulate these conflicting interests, e.g., laws determining relative priorities among lien holders.<sup>33</sup>

The U.S. Supreme Court's opinion in *Hawaii Housing Authority v. Midkiff*<sup>34</sup> exemplifies the "housing as an economic good" ethic in case law. In *Midkiff*, the Court upheld an exercise of eminent domain against the claim that the land was not taken for a "public use."<sup>35</sup> In order to reform a historically oligopolistic housing market, Hawaii's state legislature enacted a law requiring fee owners to sell fee interests in housing.<sup>36</sup> It sought to create a larger market for fee simple interests in residential property by increasing the alienability of fee interests.<sup>37</sup> This case demonstrates the "housing as an economic good" ethic because it exemplifies a court's confirmation of a legislature's attempt to fix the housing market.

Economic analysis dominates housing law and policy in this ethic. Professional economists discuss housing using econometric models of housing production and demand. These models have been developed and refined to a great extent.<sup>38</sup> In this discourse, early models conceived of housing as a "service" or bundle of services, assumed a neoclassical perfectly competitive market, and abstracted

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31. See GEORGE LEFCOE, REAL ESTATE TRANSACTIONS (3d ed. 1999).

32. See, e.g., Ellickson, *supra* note 26, at 234-36.

33. See, e.g., U.C.C. § 9-334 (1999). Sometimes, the provision of lien priorities to owners of certain economic interests are explained by the "housing as home" ethic. See *infra* notes 107-09 and accompanying text (explaining that the homestead exemption provides home owners with legal protection based on the housing as home ethic).

34. 467 U.S. 229 (1984).

35. *Id.* at 231-32.

36. *Id.* at 232-33.

37. *Id.* at 233.

38. See, e.g., RICHARD K. GREEN & STEPHEN MALPEZZI, A PRIMER ON U.S. HOUSING MARKETS AND HOUSING POLICY (2003); GEOFFREY P. MEEN, MODELLING SPATIAL HOUSING MARKETS: THEORY, ANALYSIS AND POLICY (2001); JEROME ROTHENBERG ET AL., THE MAZE OF URBAN HOUSING MARKETS: THEORY, EVIDENCE, AND POLICY 204 (1991); Isaac F. Megbolugbe et al., *The Economic Theory of Housing Demand: A Critical Review*, 6 J. REAL EST. RES. 381 (1991).

from the physical building.<sup>39</sup> More recent models include other elements, such as market imperfections and the hierarchy of housing quality submarkets.<sup>40</sup>

The National Association of Home Builders (“NAHB”), investors, financial services, title insurers, and realtors regularly speak among themselves in the “housing as an economic good” discourse.<sup>41</sup> Recognizing the substantial economic effects of housing production and consumption on the national economy, the federal government and the Federal Reserve Board have used housing markets either to stimulate or to cool economic activity via interest rate management.<sup>42</sup> Some urban redevelopment theories look to housing as an economic engine to revitalize depressed economies.<sup>43</sup>

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39. See, e.g., Richard F. Muth, *The Demand for Non-Farm Housing*, in THE DEMAND FOR DURABLE GOODS 29 (Arnold C. Harberger ed., 1960); Edgar O. Olsen, *A Competitive Theory of the Housing Market*, 59 AM. ECON. REV. 612, 613 (1969). To the degree this ethic is dominated by neoclassical analysis, distribution issues (which include affordability) are generally ignored. Most versions of economic analysis abstract from the other housing ethics. However, some versions do attempt to incorporate other housing ethics, e.g., “housing as social order” by incorporating a “discrimination premium” in the price of a home in racially exclusive areas. For a discussion and critique of economic theories of housing discrimination, see Gary A. Dymski, *Discrimination in the Credit and Housing Markets: Findings and Challenges*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 215 (William M. Rodgers ed., 2006).

40. See ROTHENBERG ET AL., *supra* note 38, at 231; Richard Arnott, *Economic Theory and Housing*, in 2 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 959, 960 (Edwin S. Mills ed., 1987); James L. Sweeney, *A Commodity Hierarchy Model of the Rental Housing Market*, 1 J. URB. ECON. 288, 288 (1974).

41. See Fee, *supra* note 2, at 792 (“[T]he concept of market value more closely reflects how business and investment owners typically value their property.”). The “Housing Industry Data” Web page of the National Association of Home Builders (“NAHB”) states:

As “the voice of America’s housing industry,” NAHB tracks the industry closely. We provide relevant data on the construction industry, including data on housing starts, permits, and completions, which includes single-family, multifamily, and total. Timely data on sales, prices, building materials prices, and interest rates are available. State and metro area data on housing permits and employment are also provided.

Nat’l Ass’n of Home Builders, Housing Industry Data, <http://www.nahb.org/page.aspx/category/sectionID=1052> (last visited Mar. 30, 2007).

42. NAT’L ASS’N OF HOME BUILDERS, GOVERNMENT MANDATES AND ECONOMIC POLICY SUMMARY OVERVIEW, <http://www.nahb.org/generic.aspx?genericContentID=9203> (last visited Mar. 30, 2007).

43. There are numerous versions of this strategy. See Brian R. Ball, *Coleman’s Objective: 10K Downtown Units*, BUS. FIRST COLUMBUS, Apr. 12, 2002, at A1; Bennett L. Hecht, *Housing-Led Economic Development: Managing*

This ethic dominates some academic literature on housing.<sup>44</sup> Legal academicians employ it as well.<sup>45</sup> Professor William Fischel, for example, makes the property value dimension of homeownership central to his theories about homeowner voting behavior.<sup>46</sup> Numerous public policy research institutions make the “housing as an economic good” ethic the basis for their analysis and policy recommendations.<sup>47</sup> This ethic is also widely embraced by many

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*Housing Assets for Economic Development of Residents*, SHELTERFORCE ONLINE, Sept.-Oct. 1996, <http://www.nhi.org/online/issues/89/housingecodev.html>; Dan Levy, *Downtown Brown: Oakland's Mayor Has Made Dramatic Progress in His Ambitious Plan to Bring 10,000 New Residents to the City's Core*, S.F. CHRON. ONLINE, Mar. 20, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/03/20/REGTLBPTH1.DTL>.

44. See, e.g., J. HOUSING ECON.; J. URB. ECON.

45. See Michael Greenberg et al., *Property Taxes and Residents' Housing Choices: A Case Study of Middlesex County, New Jersey*, 17 HOUSING POL'Y DEBATE 571, 571-72 (2006) (noting that a variety of factors, including return on investment and neighborhood social relationships, influence the home ownership decision); George S. Masnick et al., *Emerging Cohort Trends in Housing Debt and Home Equity*, 17 HOUSING POL'Y DEBATE 491, 492-93 (2006) (describing a recent explosion in homeowner debt).

46. Under Professor Fischel's “homevoter hypothesis,” homeowners act differently than owners of other assets because “homeowners have large portions of their wealth . . . in their homes. As a result, homeowners cannot diversify the risk of loss to their homes as they can with other types of investments, and any loss has the potential to have a very significant impact on the homeowner's financial position.” WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 74-75 (2001).

47. Libertarian and property rights research institutions such as Reason Foundation, The American Enterprise Institute for Public Policy Research, and Pacific Legal Foundation, regularly analyze housing problems through the “housing as an economic good” ethic. See, e.g., John H. Makin, *Am. Enterprise Inst. for Pub. Pol'y Res., Housing and American Recessions* 1 (2006), [http://www.aei.org/publications/pubID.25209,filter.all/pub\\_detail.asp](http://www.aei.org/publications/pubID.25209,filter.all/pub_detail.asp) (linking housing slowdowns to American recessions); BENJAMIN POWELL & EDWARD STRINGHAM, REASON FOUND., *HOUSING SUPPLY AND AFFORDABILITY: DO AFFORDABLE HOUSING MANDATES WORK?* 2 (2004), available at <http://www.reason.org/ps318.pdf> (analyzing the effectiveness of inclusionary zoning from an economic perspective).

This ethic also provides the common way housing issues are discussed on property rights blogs. See, e.g., Massachusetts Housing Costs Increased by Government Regulation, *The Real Estate Bloggers*, <http://www.therealestatebloggers.com/2006/01/08/massachusetts-housing-costs-increased-by-government-regulation/> (Jan. 8, 2006) (arguing that state and local government regulations have inflated Massachusetts housing prices); Posting of Doug Mataconis to *The Liberty Papers*, <http://www.thelibertypapers.org/2006/07/09/government-regulation-and-the-housing-market/> (July 9, 2006, 11:06 EST) (arguing that government regulation of land use distorts the Washington, D.C. area home market); Posting of Doug Mataconis to *Below the Beltway*,

individuals and families who rely on their house as their primary investment vehicle for their children's education, rainy day fund, or retirement nest egg.<sup>48</sup>

In sum, the "housing as an economic good" ethic is a widely shared familiar way that Americans, including courts and policymakers, think, talk, debate, and make decisions about housing. Collectively, these various and overlapping discourses maintain this ethic as a strong point of reference.<sup>49</sup>

*The "Housing as an Economic Good" Ethic and Affordability*

Most of our past and current housing subsidy programs are based upon the view that the housing markets do not serve all populations. Public policy debates regarding affordability as framed by the "housing as an economic good" ethic usually concern the proper role of government in regulating housing markets. This in turn depends upon (1) whether analysts think that there are market imperfections or market failures causing affordability problems; (2) what the causes of those market imperfections or market failures are; and, finally, (3) what is the best role for government to play.

Peter Salins represents one end of the spectrum. In his view, housing is just another economic product.<sup>50</sup> He is suspicious of

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<http://belowthebeltway.com/2006/07/09/how-zoning-laws-distort-the-housing-market/> (July 9, 2006, 15:12 EST) (same).

48. This part of the layperson's discourse employing this ethic focuses on sales or purchases—the *exchange value* of housing in contrast to *rights to use and possess*.

49. Despite the ubiquitous "housing as home" discourse, discussed *infra* Part II.B, which holds that housing is "special," the "housing as an economic good" ethic reminds us that some housing consumers—both homeowners and renters—do not invest *any* subjective meaning in their dwelling, but only consider its "exchange value and/or use value" to them as a housing service, the way one might think of a one night stay at a non-descript motel room. Housing investors and financial intermediaries of housing sales are even less likely to view the product as imbued with special meaning. Housing speculation, e.g., "flipping" houses (the purchase of housing for the sole purpose of reselling for quick profit without ever intending to live there or develop any "home" attachment to it), is the archetype of how this ethic differs from the "housing as home" ethic. Yet, because housing is just another good competing with other goods for the consumers' dollar, housing sellers regularly appeal to the "housing as home" ethic in their marketing efforts. See, e.g., Nat'l Ass'n of Realtors, <http://www.realtor.org/pac.nsf/pages/print#BuyNow> (displaying realtors' Web sites and advertisements) (last visited Apr. 10, 2007).

50. "The superior quality of America's housing—as well as its extraordinary variety—is no happy accident. It is a tribute to the successful functioning of a relatively unfettered private housing market . . ." Salins,

defining “affordability” as a serious housing problem.<sup>51</sup> Another view would acknowledge an “affordability problem” but focus national policy on shepherding the national economy to maintain high levels of growth in employment and low levels of inflation and interest rates. To the degree necessary, this view would offer general income transfers to families but not “interfere” with the housing market directly on the demand or supply side.<sup>52</sup> To a great extent, these theories have historically relied upon various versions of the “filtration model” to understand the supply of lower cost housing.<sup>53</sup> Under the filtration model, whenever new and better housing units are added to the stock, older and lower quality housing units become available at lower prices.<sup>54</sup>

Another form this discourse takes is debate about abolishing zoning,<sup>55</sup> milder forms of deregulation (especially of zoning, subdivision regulation, building regulations, and environmental regulations),<sup>56</sup> and resistance to proposed regulation.<sup>57</sup> Currently,

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*supra* note 8, at 262. “In virtually every other consumer good sector, private enterprises have been able to serve the entire spectrum of American households. There is no reason why housing need be an exception.” *Id.* at 265.

51. Peter D. Salins, *Toward a Permanent Housing Problem*, 85 PUB. INT. 22, 25 (1986) (criticizing “affordability” as one of several “moving target[s]” that housing advocates identify and one which “can never be eliminated”). To the degree affordability is a real problem, it should be addressed by deregulation. See Salins, *supra* note 8, at 265-66.

52. See, e.g., John F. Kain, *America’s Persistent Housing Crises: Errors in Analysis and Policy*, 465 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 145 (1983) (positing that interest rates, unemployment, and property value uncertainty caused previous affordability crises, and that cash subsidies would have “helped maintain the existing housing stock”). Another commentator, James Carr of the Fannie Mae Foundation, acknowledges a serious affordability problem but views housing as having no particular or compelling claim for government intervention for purposes of solving poverty. Rather, affordability is the wrong focus. Carr, *supra* note 10, at 250-51. This view is discussed *infra* Part II.E.

53. WALLACE F. SMITH, FILTERING AND NEIGHBORHOOD CHANGE 5 (1964); Matthew Edel, *Filtering in a Private Housing Market*, in READINGS IN URBAN ECONOMICS 204-05 (Matthew Edel & Jerome Rothenberg eds., 1972); Brendan O’Flaherty, *An Economic Theory of Homelessness and Housing*, 4 J. HOUSING ECON. 13, 16 (1995); Michael A. Stegman, *The Neighborhood Effects of Filtering*, 5 J. AM. REAL EST. & URB. ECON. ASS’N 227, 227 (1977).

54. John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn’t It More Affordable?*, J. ECON. PERSPS., Winter 2004, at 191, 205.

55. See, e.g., BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 93, 95 (1972) (describing how zoning regulations curtail the filtration process). But see Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 182 (1995) (arguing that the most unregulated land market produces inexpensive and deplorable housing).

56. See Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 CAL. W. L.

deregulation versions of this ethic appear dominant.<sup>58</sup> The idea is that a “freer market” will produce a greater supply of housing that is priced more affordably.<sup>59</sup> Therefore, government measures that increase the cost of housing, like building codes, should be abolished or reduced.<sup>60</sup>

One point of debate concerning affordability within this ethic is whether “affordability” means relatively low prices provided by the market (what this article will term “market affordability”), or whether true “affordability” is only achieved by a legally restricted rental or sales price.<sup>61</sup> According to filtering theories, any significant

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REV. 127, 128 (1994) (opposing a proposed Houston ordinance because it would create a complex procedure for obtaining a building permit).

57. See, e.g., EDWARD L. GLAESER ET AL., RAPPAPORT INST. FOR GREATER BOSTON & PIONEER INST. FOR PUB. POL’Y RES., REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON iv (2006), available at [http://www.ksg.harvard.edu/rappaport/downloads/housing\\_regulations/regulation\\_housingprices.pdf](http://www.ksg.harvard.edu/rappaport/downloads/housing_regulations/regulation_housingprices.pdf) (concluding that land use regulations increase local home prices); Richard K. Green, *Land Use Regulation and the Price of Housing in a Suburban Wisconsin County*, 8 J. HOUSING ECON. 144, 158 (1999) (remarking that land use regulations “tend to fall more heavily on lower income households than they do on anyone else”); Quigley & Raphael, *supra* note 54, at 210 (asserting that the case for removing barriers to construction is clear); Salins, *supra* note 8, at 259 (stating that housing regulations “prevent the private housing sector from meeting the needs of lower-income and untypical households”); James A. Thorson, *The Effect of Zoning on Housing Construction*, 6 J. HOUSING ECON. 81, 90 (1997) (demonstrating that strict agricultural zoning ordinances significantly reduce housing starts); Nat’l Ass’n of Home Builders, *Governors Urged to Take the Lead on Housing Affordability*, NATION’S BUILDING NEWS, Oct. 9, 2006, [http://www.nahb.org/news\\_details.aspx?newsID=3394&print=true](http://www.nahb.org/news_details.aspx?newsID=3394&print=true) (“NAHB President-elect Brian Catalde warned the governors to avoid following in the footsteps of California, whose excessive regulatory constraints have put a stranglehold on housing affordability in the state.”); Nat’l Ass’n of Home Builders, *Local Regs Hammer Affordable Housing, Study Finds*, NATION’S BUILDING NEWS, Jan. 30, 2006 (discussing results of study entitled “Regulation and the Rise of Housing Prices in Greater Boston”).

58. See Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 625 (2006) (reviewing ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* (2005) and JOEL KOTKIN, *THE CITY: A GLOBAL HISTORY* (2005)) (“[T]he dominant alternative to use-based zoning is . . . replacing single-use zones with mixed land use environments.”).

59. See GLAESER ET AL., *supra* note 57, at v.

60. See *id.*

61. Housing advocates regularly argue for legally enforceable affordability restrictions. In rental housing this often takes the form of maximum household income requirements for eligibility and limitations on rent and other housing costs (e.g., a percentage of household income or limitations on increases). See ILL. HOUS. DEV. AUTH., *SMALL RENTAL PROPERTIES PROGRAM 3* (2006), available at <http://www.ihda.org/admin/Upload/Files/a009abd5->

increase in the supply of housing units will result in an increase in the supply of lower-cost housing, thus increasing affordability.<sup>62</sup>

However, many affordable housing advocates do not place their trust in the market for affordability.<sup>63</sup> They are concerned that while deregulation will cut producers' costs, the promised boon to affordability may not be realized because, in the absence of perfectly competitive markets, deregulation might only enable increased profits by either developers (in higher housing prices) or by land sellers (who can reap this surplus in a higher sales price).<sup>64</sup>

Some forms of housing, e.g., manufactured housing, secondary units, and single room occupancy hotels, are more likely to be market affordable.<sup>65</sup> Often, the supply of these is hindered by local regulation.<sup>66</sup> Affordable housing advocates are more likely to support deregulation in the context of these forms of housing.<sup>67</sup>

At the other end of the spectrum from commentators such as Peter Salins are those calling for the complete decommodification of housing—taking housing production, sales, and rental out of the

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6f58-443f-91dccc602116a27.pdf; Green Cmty., Loans, <http://www.greencommunitiesonline.org/about-essentials-loans.asp> (last visited Mar. 19, 2007). For for-sale housing, the limits can take the form of resale controls (e.g., limiting the price that can be charged by a formula related to purchase price) or first rights of refusal at a price set by a pre-determined formula. See U.S. Dep't of Hous. & Urb. Dev., *Homes & Communities*, HOMEFIRES, June 2003, <http://www.hud.gov/offices/cpd/affordablehousing/library/homefires/volumes/vol5no2.cfm>; Cmty. Legal Res., Affordability Preservation Project: Homebuyer's Guide to Affordable Housing Restrictions (2006), <http://www.clronline.org/resources/app/HomeBuyersGuide.pdf>. Such legal limits may also conflict with longstanding common law property principles such as the rejection of unreasonable restraints on alienation and the Rule Against Perpetuities. For a partial critique of the reliance on deed-restrictions to guarantee affordability in homeownership developments, see Robert D. Carroll, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247 (2001).

62. Carroll, *supra* note 61, at 1280-81.

63. See, e.g., Peter Dreier & Winton Pitcoff, *I'm a Tenant and I Vote! New Yorkers Find Victory in Rent Struggle*, SHELTERFORCE ONLINE, July-Aug. 1997, <http://www.nhi.org/online/issues/94/dreier.html>.

64. See STEVEN L. NEWMAN, REAL EST. INST., AFFORDABLE HOUSING IN NEW YORK CITY 61 (2005).

65. Tim Iglesias, *State and Local Regulation of Particular Types of Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 113-43 (Tim Iglesias & Rochelle E. Lento eds., 2005) [hereinafter IGLESIAS & LENTO]. Amy Schmitz, *Promoting the Promise: Manufactured Homes Provide for Affordable Housing*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 384 (2004).

66. See Iglesias, *supra* note 65.

67. See *id.* at 114.

market completely, thereby enabling permanent affordability—either through government produced and managed housing, e.g., public housing,<sup>68</sup> or by the production and management of housing by the “Third Sector,” in which consumer housing prices are not subject to market forces.<sup>69</sup> Using government subsidies, non-profit housing developers often seek to make affordability restrictions essentially permanent.<sup>70</sup> Community land trusts and limited equity cooperatives are two additional examples of the “Third Sector” housing strategy.<sup>71</sup> In a community land trust (“CLT”), a non-profit organization acquires land in perpetuity, transfers ownership of housing units on the land along with long-term ground leases at affordable prices, and retains a preemptive right to purchase the housing units under a predetermined formula.<sup>72</sup> Limited equity cooperatives (“LECs”) are business corporations in which the primary asset of the corporation is a residential building in which cooperative owners have a right to live.<sup>73</sup> Permanent affordability can be guaranteed through limiting the return from resale that owners can receive. Both CLTs and LECs are viable forms of legally restricted affordable housing. Yet, to date, both have experienced a

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68. The public housing program is discussed *infra* Part II.C.

69. See John Emmeus Davis, *Introduction to THE AFFORDABLE CITY: TOWARD A THIRD SECTOR HOUSING POLICY* 3-8 (John Emmeus Davis ed., 1994); C. Theodore Koebel, *Nonprofit Housing: Theory, Research, and Policy*, in *SHELTER AND SOCIETY* 3, 4 (C. Theodore Koebel ed., 1998); *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* ch. 10-11 (Charles Geisler & Gail Daneker eds., 2000) [hereinafter *PROPERTY AND VALUES*].

70. Some government-subsidized housing is effectively “permanently” affordable because the legal restrictions extend to the “useful life of the building.” See JOHN EMMEUS DAVIS, *SHARED EQUITY HOMEOWNERSHIP* 79 (2006), available at <http://nhi.org/pdf/SharedEquityHome.pdf>; see also VT. HOUS. & CONS. BD., *THE POLICY BASIS BEHIND PERMANENTLY AFFORDABLE HOUSING: A CORNERSTONE OF VERMONT’S HOUSING POLICY SINCE 1987* (2006), <http://www.vhcb.org/pdfs/permanentaffordability06.pdf>.

71. For an explanation of community land trusts, see, e.g., David M. Abromowitz, *An Essay on Community Land Trusts: Toward Permanently Affordable Housing*, in *PROPERTY AND VALUES*, *supra* note 69, at 213; Inst. for Cmty. Econ., *Community Land Trusts*, <http://www.iceclt.org/clt/> (last visited Mar. 8, 2007); The Community Land Trust, <http://www.communitylandtrust.org.uk/> (last visited Mar. 8, 2007). For an explanation of limited equity cooperatives, see Thomas J. Miceli et al., *The Role of Limited-Equity Cooperatives in Providing Affordable Housing*, 5 *HOUSING POLY DEBATE* 469 (1994), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0504\\_miceli.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0504_miceli.pdf); Nat’l Ass’n of Hous. Coops., *About NAHC & Housing Coops*, [http://www.coophousing.org/about\\_nahc.shtml](http://www.coophousing.org/about_nahc.shtml) (last visited Mar. 8, 2007).

72. See 42 U.S.C. § 12773(f) (2000).

73. See PolicyLink, *Limited Equity Housing Cooperatives*, <http://www.policylink.org/EDTK/LEHC/default.html> (last visited Mar. 8, 2007).

limited demand.<sup>74</sup> One reason is that they are complex and unfamiliar to consumers as a “housing product.”<sup>75</sup> Perhaps more profoundly, their limited profit potential feature conflicts with the traditional expectation of housing as economic investment good assumed by prospective homeowners.<sup>76</sup>

The most common policy debates about affordability within the “housing as an economic good” ethic concern how, when, and in whose interest the government should intervene to promote affordability as a social response to private housing market imperfections or market failures. These debates concern complex analyses of housing markets and difficult tradeoffs.<sup>77</sup> They focus on

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74. See DAVIS, *supra* note 70, at 22, 27 (putting the range of residential units controlled by CLTs between 5000 and 9000 and the number of units contained within limited equity or zero equity cooperatives at 425,000).

75. *Id.* at 18-19, 23-24, 115.

76. This problem was the subject of a training by Local Initiatives Support Corporation (“LISC”), a national intermediary and capacity-building organization for community organizations including non-profit affordable housing developers. See *Innovative LISC Training: Balancing Wealth Creation and Permanent Affordability in Homeownership Programs*, LOCAL INITIATIVES SUPPORT CORP. ENEWSLETTER, Dec. 2004, [http://www.bayarealisec.org/bay\\_area/assets/asset\\_upload\\_file605\\_7532.pdf](http://www.bayarealisec.org/bay_area/assets/asset_upload_file605_7532.pdf).

77. In contrast, sometimes debates about the appropriate role of government in regulating housing markets can become “ideological” in the sense that disputants take extreme positions leaving little ground for constructive discussion. Perhaps no other topic regarding affordable housing is more likely to stir vigorous debate than rent control. Barros notes that “[t]he attention given to residential rent control by legal academia is perhaps disproportionate to its real-world impact.” Barros, *supra* note 2, at 285. For an analysis of free market ideology, see Longview Inst., Market Fundamentalism, <http://www.longviewinstitute.org/projects/marketfundamentalism/marketfundamentalism> (last visited Mar. 8, 2007). Such ideological debates often ignore the important positive roles government has played in enabling and enlarging production, sales, and consumer access in the housing market. For example, federal government action made thirty-year mortgages possible, which, in turn, significantly expanded the market for home purchases. Government action also created the government enterprises Fannie Mae and Freddie Mac (now quasi-public) that formed the secondary market for mortgages, significantly expanding access to homeownership and creating new, lucrative housing investment opportunities. See KENT W. COLTON, JOINT CTR. FOR HOUS. STUDS., HOUSING FINANCE IN THE UNITED STATES: THE TRANSFORMATION OF THE U.S. HOUSING FINANCE SYSTEM 8-9 (2002), available at [http://www.jchs.harvard.edu/publications/finance/W02-5\\_Colton.pdf](http://www.jchs.harvard.edu/publications/finance/W02-5_Colton.pdf); Salins, *supra* note 8, at 261 (acknowledging the value of certain federal government housing policies, including “the Federal Housing Administration’s and the U.S. Department of Veterans Affairs’ trailblazing in making homeownership more available and affordable . . . [t]he income tax deductibility of homeowners’ interest and property taxes . . . [a]nd government-initiated development of

the goals and the relative efficacy and efficiency of housing programs, as well as the distributional consequences of the means selected, e.g., supply-side subsidies versus demand-side subsidies or other affordability-promoting regulation.<sup>78</sup>

There is no *inherent* conflict between the “housing as an economic good” ethic and affordability. For example, under the Low Income Housing Tax Credit (“LIHTC”) program (currently the largest federal affordable housing production program), affordable housing is completely commodified as private investors (including large corporations) buy ownership interests in it for tax write-off purposes.<sup>79</sup> The extent to which property rights and the relative roles of investors, producers, owners, and managers of housing can be creatively structured to enable affordability is impressive.<sup>80</sup> Most new legally restricted affordable housing is produced as a public-private partnership.<sup>81</sup> Private for-profit owners and developers regularly participate in the government subsidized housing market.<sup>82</sup> The development of affordable housing can provide an

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secondary mortgage markets (i.e. Fannie Mae and Freddie Mac.”). Another example is federal manufactured home regulations which helped both sell manufactured homes as products and reduced local opposition to them by local governments. IGLESIAS & LENTO, *supra* note 65, at 116-17.

78. Perusing any issue of *Housing Policy Debate* will demonstrate that these issues are the bread and butter of most housing policy debates.

79. Under the LIHTC program, private investors exchange equity investments in affordable housing developments for federal income tax credits. See Adam McNeely, *Improving Low Income Housing: Eliminating the Conflict Between Property Taxes and the LIHTC Program*, 15 J. AFFORDABLE HOUSING & COMM. DEV. L. 324, 325-29 (2006). “Whether from a syndicator or directly from the developer, corporations purchase about 70 percent of the tax credits awarded nationwide through the LIHTC.” *Id.* at 329 (citing Eric A. Smith, *Low-Income Housing Tax Credit Basics*, J. FIN. PLAN., May 2000, at 114, 116). Ironically, the LIHTC program, which was heralded as a market-oriented reform to our national housing policy, is probably the least efficient means of subsidizing housing because of its high transaction costs. See, e.g., Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAW. 869, 878-81 (2004).

80. See, e.g., the LIHTC program, discussed *supra* note 79, and the “Third Sector” materials, *supra* note 69.

81. See Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. 263, 263-67 (2006) (discussing the recent surge of privatization).

82. Private owners of existing housing participate through the Section 8 voucher program. See Ann O’Hara, U.S. Dep’t of Health & Human Servs., Using the Section 8 Voucher Program for Rental Housing, <http://www.os.dhhs.gov/ocr/sec8.html> (last visited Mar. 19, 2007). For-profit developers compete for tax credits in the LIHTC program, though some states set aside some portion of tax credits for non-profit developers. See Rochelle E.

economic stimulus to a community's economy.<sup>83</sup>

The relationship between the "housing as an economic good" ethic and affordability varies considerably depending upon the version of the ethic's interpretations of housing markets and the appropriate role for government. While affordability and the "housing as an economic good" ethic are not necessarily at odds, there are profound and persistent tensions between them. The currently dominant view favoring deregulation of housing markets is hostile to housing subsidies and legally restricted affordability.<sup>84</sup> This has required the affordable housing movement to conduct a strenuous effort to defend federal subsidy programs against budget cuts while simultaneously pursuing ongoing complex policy debates about reforms to improve these policies.<sup>85</sup> Meanwhile, the "Third

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Lento, *Federal Sources of Financing*, in IGLESIAS & LENTO, *supra* note 65, at 231-34 (discussing Internal Revenue Service regulations concerning non-profit set-asides).

83. See Or. Hous. & Cmty. Servs., HOUSING AS AN ECONOMIC STIMULUS: THE ECONOMIC AND COMMUNITY BENEFITS OF AFFORDABLE HOUSING DEVELOPMENT (2005), available at [http://www.novoco.com/low\\_income\\_housing/resource\\_files/research\\_center/HousingEconomicStimulus.pdf](http://www.novoco.com/low_income_housing/resource_files/research_center/HousingEconomicStimulus.pdf). However, in the context of siting affordable housing, a frequently raised concern that causes conflicts between affordable housing advocates and the "housing as an economic good" ethic is that affordable housing will lower nearby property values. This concern is amplified when the largest single investment asset held by many households is their house. However, many empirical studies have consistently demonstrated that well-designed and professionally managed contemporary affordable housing does not lower nearby property values. See, e.g., Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* (NYU, Law & Econ. Research Paper No. 05-04, 2005), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=721632](http://papers.ssrn.com/paper.taf?abstract_id=721632); INNOVATIVE HOUS. INST., THE HOUSE NEXT DOOR, <http://www.inhousing.org/housenex.htm> (last visited Apr. 17, 2007). In fact, many studies have demonstrated that contemporary affordable housing has positive effects on nearby properties. See, e.g., Amy Ellen Schwartz et al., *The External Effects of Place-Based Subsidized Housing* (NYU, Law & Econ. Research Paper No. 05-05, 2005), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=720103](http://papers.ssrn.com/paper.taf?abstract_id=720103). For studies concerning the effects of market-rate and subsidized apartments, see NAT'L MULTI HOUS. COUNCIL, FROM NIMBY TO GOOD NEIGHBORS: RECENT STUDIES REINFORCE THAT APARTMENTS ARE GOOD FOR A COMMUNITY (2006), available at <http://www.nmhc.org/Content/ServeFile.cfm?FileID=5408>.

84. See MARTIN ABRAVANEL ET AL., URBAN INST., TESTING PUBLIC HOUSING DEREGULATION: A SUMMARY ASSESSMENT OF HUD'S "MOVING TO WORK" DEMONSTRATION 1 (2004), available at [http://www.urban.org/UploadedPDF/311009\\_TestingPublicHousingDeregulation.pdf](http://www.urban.org/UploadedPDF/311009_TestingPublicHousingDeregulation.pdf). See generally Tamim Bayoumi, *Financial Deregulation and Household Saving*, 103 ECON. J. 1432, 1432-34 (1993).

85. For an example of this delicate balancing act, see Maeve Elise Brown, *Federal Regulation of Financing for Affordable Housing*, in IGLESIAS & LENTO, *supra* note 65, at 181-92.

Sector” housing movement, which would completely decommodify housing, has become relatively mature.<sup>86</sup>

*B. Housing as “Home”*

*Be it ever so humble, there’s no place like home.*<sup>87</sup>

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .*<sup>88</sup>

The “housing as home” ethic focuses on the fact that “homes” are *special* spaces for the people who live in them. In particular, the primary focus is what goes on “within the four walls” of the housing structure. There, people create their lives, their families, and their very selves. Therefore, under this ethic, this special space must be protected, and expectations deriving from it should receive legal recognition. The question this ethic raises for any proposed policy or legal rule is: *How will this proposal affect my domestic liberty, privacy, and security?*

The common experience of a dwelling not being merely a physical structure but a “home” generates a wide range of profound human meanings.<sup>89</sup> A vast amount of theoretical writing in many disciplines (and some empirical studies) explores the subjective aspects of housing as “home.”<sup>90</sup> The subjective meaning flows from the experience of regular shelter, the opportunity to invest, and

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86. See Yasmin Tong, *Merger Activity Among Nonprofits Enters New Phase*, AFFORDABLE HOUSING FIN., June 2006, available at [http://www.housingfinance.com/ahf/articles/2006/june/068\\_ahfun06.htm](http://www.housingfinance.com/ahf/articles/2006/june/068_ahfun06.htm).

87. JOHN HOWARD PAYNE, HOME, SWEET HOME (1822), reprinted in YALE BOOK OF AMERICAN VERSE 34, 34 (Thomas R. Lounsbury ed., 1912). For more inspiring quotes about housing as home, see WHERE THE HEART IS: A CELEBRATION OF HOME (Julienne Bennett & Mimi Luebberrmann eds., 1995) [hereinafter *Where*].

88. U.S. CONST. amend. IV.

89. See, e.g., THE ENCYCLOPEDIA OF HOUSING 222 (Willem van Vliet ed., 1998) (“[N]ot every house is a home. A house is a physical construction. A home is a mental construct. A house is a tangible, concrete object. Home is an elusive, nebulous notion. Home signifies an emotional attachment.”); Ballard, *supra* note 2, at 284-89 (discussing the potential for subjective meaning associated with a dwelling or lack thereof); Barros, *supra* note 2, at 259-75; Fee, *supra* note 2, at 793; Peñalver, *supra* note 3, at 2975. The assertion that housing is deep and complex is uncontroversial. See GLENN H. BEYER, HOUSING AND SOCIETY 3-4 (1965) (listing a wide range of disciplines needed to study housing); THE ENCYCLOPEDIA OF HOUSING, *supra*, at xx-xxi (describing the “Multidisciplinarity of the Field” of housing studies).

90. See Ballard, *supra* note 2, at 284-89 (discussing the home’s subjective meaning to the dweller); Barros, *supra* note 2, at 278-82 (reviewing “literature on the psychology of home”).

creating a “family” or a “self” there.

Many meanings associated with “home” are fundamentally private and subjective.<sup>91</sup> Not everyone who lives somewhere even for a long time develops an emotional attachment to the place as “home.”<sup>92</sup> The object of experiences of “home” may be a city, a job, a group of friends, etc., and not related to *any* residential structure.<sup>93</sup> While American culture has an arguably dominant normative meaning of “home,”<sup>94</sup> the content of the meaning in any individual instance is indeterminate.<sup>95</sup> The *substance* of these meanings (if

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91. The potential for subjective meaning depends upon a concept of the human person which includes the capacity to find or create such meanings. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 129-37 (Anchor Books 1967) (1966); ROBERT C. SOLOMON, *THE PASSIONS* 50-57 (Univ. of Notre Dame Press 1983) (1976). In contrast, the “rational economic actor” as constructed in the economic model at the center of the “housing as an economic good” ethic lacks this capacity. “Homo Economicus” is a view of a human person as a rational actor who instrumentally pursues maximum utility. On these accounts, there is neither potential nor need for a theory of human meaning. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55 (6th ed. 2003).

92. Even investing substantial sums of money in purchase and renovation or decoration of a dwelling does not necessarily mean subjective valuing as “home” will follow; some do it as an investment decision to “move up.”

93. Fee, *supra* note 2, at 785 n.13 (acknowledging that his analysis of the specialness of home “might extend partially to other forms of highly personalized property . . . such as religious property or family business property”); *id.* at 793 (“Admittedly, some business owners, like homeowners, become personally attached to their business property in ways that the market and eminent domain statutes do not value.”); accord THE ENCYCLOPEDIA OF HOUSING, *supra* note 89, at 222 (“Not all houses are homes to their occupants, nor are all homes found in houses. Partners in newly formed households may hold emotional allegiances to the different hometowns in which they grew up. Sometimes, immigrants feel homesick for their country of origin, and soulmates maintain homes in each other’s hearts. In this sense, home is lived experience.”). As the traditional song goes: “Home, home on the range . . . .” (The author is indebted to his daughter Lucy for this insight.)

94. Fee, *supra* note 2, at 788 (listing “autonomy, security, privacy, memory, and expression” as particularly important values associated with “home” and noting that a home’s “highest value is not as a commodity”).

95. There are complex relationships between legal and cultural notions of “family” and “home” (or “homestead”) which are beyond the scope of this article. See, e.g., Alexander, *supra* note 7; Ellickson, *supra* note 26; Alison D. Morantz, *There’s No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 L. & HIST. REV. 245 (2006). The actual subjective meaning any particular individual might have of “home” will largely depend upon his or her culture, gender, and what actually transpired in his or her actual residences. See, e.g., THE ENCYCLOPEDIA OF HOUSING, *supra* note 89, at 222 (“Insofar as houses are homes, their coincidence is shaped

they exist) are not determined by the types of legal tenure (homeownership vs. rental),<sup>96</sup> the composition of the household,<sup>97</sup> or the relative quality of the dwelling.<sup>98</sup> Finally, the level of psychological *intensity, importance, and profundity* of these meanings does not have any necessary relationship to any objective factors, e.g., type of legal tenure or quality of dwelling.<sup>99</sup>

Nonetheless, these subjective meanings ground strong

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significantly by economic and cultural factors.”); HOUSING WOMEN (Rose Gilroy ed., 1994); Jane Darke, *Women and the Meaning of Home*, in HOUSING WOMEN, *supra*, at 11; Barros, *supra* note 2, at 292-93 n.153 (commenting on feminist literature on home and family). For example, compare a welcoming hospitable home to strangers and friends as expressed in the familiar saying “*Mi casa es su casa*” (English translation is: “My house is your house”) to the “home as my castle” understood as a place to seek refuge from the “world” and anything not “me.” Subjective meanings can also be multiple and changeable, relating to different housing structures. Barros affirms both generalizations: “Additionally, many important psychological attachments to the home can move with an individual to a new home.” Barros, *supra* note 2, at 280. However, “[m]any of the important psychological ties to the home, such as feelings of rootedness, permanence, and belonging in the community, are not movable.” *Id.* at 281.

96. Barros, *supra* note 2, at 300-01 (“For all of the issues relating to security, liberty, and privacy . . . a resident’s interest in the home is the same regardless of whether the home is owned or rented.”). While there has been a long-standing cultural favoring of homeownership, there is no evidence that renters cannot attach the same meanings to their dwellings as homeowners. See Ballard, *supra* note 2, at 287; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (explaining a theory of property in which property can become an extension of one’s personhood and various philosophical bases for such a theory). A temporary shack can be a home; wherever a person can live a life of quality can be a “home.”

97. Meanings of “home” are not limited to traditional forms of the traditional family, but rather can be created and nurtured by whatever form of living unit is created and sustained by the actual members. Alexander, *supra* note 7, at 1267-70. Because of the close connection between the physical space itself and the household or “family,” the relationship between the “home space” as socialization and the household members can be complex. Ellickson examines the relationships among people in a wide variety of “household” types and the distribution of property rights among them. Ellickson, *supra* note 26, at 254-64.

98. Peñalver, *supra* note 3, at 2975 (“Primarily for the dignitary reasons identified above, people do really think of their homes, however humble, as their castles.”).

99. Despite Ballard’s and others’ attempts to ground subjective meaning in objective factors such as length of tenure, there is no necessity for such connections. Ballard, *supra* note 2, at 307-09; Fee, *supra* note 2, at 814-17, app. at 818-19. For example, note the spectacle of grief and anger when very poor people are forcibly separated from their shacks.

expectations for how one's home should be treated by government and others.<sup>100</sup> Some of the widely shared expectations and interests associated with "home" have received legal recognition as enforceable rights. In these contexts, use, possession, or ownership of a dwelling grounds a legal right.<sup>101</sup> Some of these rights apply to both homeowners and renters.<sup>102</sup>

In his article entitled *Home as a Legal Concept*,<sup>103</sup> Professor Barros provides a comprehensive explication of the favorable legal treatment "homes" receive in a wide range of legal doctrines, including criminal law and procedure, torts, privacy, landlord-tenant, debtor-creditor, family law, and income taxation.<sup>104</sup> He classifies these into two general categories. The first group are those relating to safety, freedom, and privacy.<sup>105</sup> This group of rights can be interpreted as providing a legally protected zone of control to home dwellers.<sup>106</sup> The second group are those relating to possession.<sup>107</sup> Housing as home concerns possession and use, and expectations of continued possession and use.<sup>108</sup> Homestead exemptions are an important example.<sup>109</sup> Professor Barros carefully

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100. "[P]eople expect their homes and their homeownership to be treated with the respect and dignity appropriate to the significance it has in their lives." Peñalver, *supra* note 3, at 2975.

101. Ballard, *supra* note 2, at 277 ("The sacred status of a home is reflected in legal norms that safeguard or promote various aspects of home ownership or occupancy, including homestead legislation, residential rent controls, constitutional privacy protections, and tax rules."); Barros, *supra* note 2, at 276 (noting the law's protection of a property owner's possession of property); Fee, *supra* note 2, at 786-88 (reviewing constitutional, statutory and common law examples of "the heightened status of the home in many areas of law").

102. For example, Fourth Amendment rights apply to homeowners and renters, *see infra* notes 111-12 and accompanying text, but homestead exemptions only apply to homeowners. Barros, *supra* note 2, at 284-85.

103. Barros, *supra* note 2.

104. Barros, *supra* note 2, at 260-75, 284-95, 304-05; *accord* Fee, *supra* note 2, at 786-88 (reviewing laws which recognize a "heightened status of the home").

105. Barros, *supra* note 2, at 256.

106. *Id.* at 259.

107. *Id.* at 256.

108. *Id.* at 276-77.

109. *See* Morantz, *supra* note 95, at 245. Professor Lorna Fox argues for liberalization of Britain's foreclosure laws as they apply to housing based upon the subjective importance and meaning of the "home." Fox, *Idea of Home*, *supra* note 9, at 586.

Possession rights in practice can conflict with another's economic rights in the housing, but the "housing as home" ethic discourse does not engage in analyzing *comparative* economic rights as the "housing as an economic good" ethic does. Barros, *supra* note 2, at 282-300 (balancing economic interests

explicates each of these rights and their limits.<sup>110</sup>

Importantly, *all of these rights attach to the owner or dweller apart from any subjective meaning of "home" that the inhabitants may or may not actually attach to their presence there.* For example, in determining whether a person may claim the Fourth Amendment's protections from unreasonable search and seizure, the test the courts apply is whether the person has "a legitimate expectation of privacy in the invaded place."<sup>111</sup> There is no inquiry concerning whether or not (or to what degree) the person claiming the Amendment's protection had any subjective feeling about the structure as her "home." The Court has held that overnight guests can claim this protection, further demonstrating that the right is unrelated to the subjective dimension of the "housing as home" ethic.<sup>112</sup>

Typically, as in Professor Barros' article, the focus of discourse in the "housing as home" ethic is *rights and privileges* flowing from "home," not *duties* associated with housing or "home" as *burdened by regulation*.<sup>113</sup> In other words, the focus is only on the "upside" of having a home.<sup>114</sup> Of course, the law does not respect everything that goes on within the four walls of a home, but the restrictions discussed in Barros' article concern limits to the rights of home, not any form of positive regulation of housing or duties arising from

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against the personal non-economic interests of the "home" claimant to "possession" based upon subjective meaning).

Support for homeownership sometimes reflects an interest in the protection of possession or tenure that homeownership provides relative to a typical leasehold interest so that one has the opportunity and incentive to invest in a particular dwelling as "home." However, other types of policies and laws can provide for similar security of tenure, e.g., just cause eviction ordinances, some eras of public housing, and community land trusts.

110. Barros, *supra* note 2, at 259-301.

111. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *see also* *Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.").

112. *Carter*, 525 U.S. at 90.

113. Peñalver's citations to Singer and Freyfogle identify the limits of these rights by the many laws that regulate the "spillover" effects of homeowners' activities on their property. Peñalver, *supra* note 3, at 2974.

114. Property ownership was not always conceived of as solely a matter of rights. *See* ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003); Bosselman, *supra* note 13, at 1449-50 (describing obligations in feudal forms of ownership); Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVTL. L. 279, 285-86 (1998); Hanoch Dagan, *The Social Responsibility of Ownership* (Sept. 29, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1035&context=taulwps>.

ownership or possession of a “home.”<sup>115</sup>

The relationship between current legally recognized interests in “home” and those not currently recognized is dynamic. In fact, a very common type of policy argument asserts that the state should create additional legal rights to protect currently legally unprotected subjective meanings or interests *because* of their grounding in a sense of “home.”<sup>116</sup> Following are a few examples.

The Institute for Justice (“IJ”), which represented the plaintiffs in the widely known *Kelo* case, made this type of argument in its public relations campaign after the Court’s decision.<sup>117</sup> The IJ appealed to Mrs. Kelo’s and similar homeowners’ subjective interests and investment in homes to ground an asserted right in greater protection for homes from the exercise of eminent domain.<sup>118</sup>

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115. For example, Barros notes that the privacy rights to home are limited by laws prohibiting possession of child pornography and domestic abuse. Barros, *supra* note 2, at 274 (“This recognition, however, amounts to a persuasive argument that the private sphere of home should have limits, not a persuasive argument against the private sphere of the home generally.”); *see also* Peñalver, *supra* note 3, at 2974 (citing Joseph Singer, Eric Freyfogle and others’ discussions of the limits of the “most extreme and literal version of despotic dominion”).

116. Ballard describes instances in which there is a mismatch between actual subjective attachments to dwellings as “home” and current legal protections because the household composition does not fit the traditional family model. Ballard, *supra* note 2, at 279 (“There is no statutory homestead protection or common law immunity for unmarried partners that would assist a survivor to continue to occupy the couple’s home after the death of one partner.”).

117. IJ’s \$3 million post-*Kelo* publicity campaign was named the “Hands Off My Home” campaign. *See* Press Release, Inst. for Justice, IJ’s \$3 Million National Campaign Tells Lawmakers: “Hands Off My Home” (June 29, 2005), available at [http://www.ij.org/private\\_property/castle/6\\_29\\_05pr.html](http://www.ij.org/private_property/castle/6_29_05pr.html). The implication of the argument was that “homes” deserve more protection from eminent domain than other forms of property. *See id.* However, the IJ never could directly state this view during the litigation because of their other business owner plaintiffs. Peñalver criticizes the IJ for “manipulation” of the “home as castle” metaphor to support its actual goal of limiting the exercise of eminent domain against any kind of property. Peñalver, *supra* note 3, at 2975-76.

118. Importantly, Mrs. Kelo was always the front figure of IJ’s publicity campaign, rather than IJ’s business owner clients. Googling “Susette Kelo” or “Kelo and pink” demonstrates the volume of news stories that featured Mrs. Kelo as the “face” of the *Kelo* case. She was regularly photographed in front of her now famous house with similar details about her relationship to it included in each article. She was characterized as taking a “principled” stance against the town of New London’s action and not interested in simply a larger payout (as would befit a “housing as an economic good” ethic). While not an acceptable outcome for Mrs. Kelo, it was apt that the apparent final resolution of that case

Current debates about the appropriate compensation for “homes” taken by eminent domain also exemplify this form of argument. Traditionally, when a government exercises its power of eminent domain under the Fifth Amendment to take private property, the “just compensation” due is calculated as fair market value (“FMV”).<sup>119</sup> One strand of eminent domain scholarship has argued that the traditional formula undercompensates.<sup>120</sup> One view within this strand argues that *all* property owners displaced by eminent domain are undercompensated, e.g., because the calculation of FMV in a forced trade is always counterfactual or because the displaced property owners do not share in the projected economic value of proposed development.<sup>121</sup> Another view would provide additional compensation only or primarily to owners of *residential property* because of their subjective investments in their “homes.”<sup>122</sup>

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was that Mrs. Kelo will keep her “home” in that her house will be moved to a different property. Christina Walsh, *Susette Kelo Lost Her Home, but Not Her House*, ECOLOGIC POWERHOUSE, July 3, 2006, available at <http://www.freedom.org/news/200607/03/walsh.phtml>.

119. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-12 (1979).

120. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83-84 (1986).

121. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 83 (1985); POSNER, *supra* note 91, at 57; Barbara L. Bezdek, *To Attain “the Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. (forthcoming Mar. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=947874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947874); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278-79 (1985); Lee Ann Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-63; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967); Amnon Lehari & Amir N. Licht, *Squaring the Eminent Domain Circle: A New Approach to Land Assembly Problems*, LAND LINES, Jan. 2007, at 14.

122. Barros articulates both of the positions: (1) all property owners are undercompensated by fair market value, see Barros, *supra* note 2, at 298; and (2) compensation for homes taken under eminent domain should be increased: “When the taken property is a home, however, market value compensation fails to compensate the owner for the personal interest in the home,” *id.* at 299, but only expounds upon the argument on behalf of homes. Some, like Barros, argue that “the home is under-protected [from eminent domain] both in the level of scrutiny given to government takings of homes and in the amount of compensation paid for those takings.” *Id.* at 291. Fee acknowledges that the logic of subjective investment could extend to other non-residential property, but the thrust of his argument (as revealed by the article title) is to gain greater compensation for homeowners only. See Fee, *supra* note 2, at 792-93. Peñalver clarifies that it is on the subjective dimension of “dignity” in the home that advocates are basing the demand for more compensation. Peñalver, *supra* note

The argument is that FMV will never be “fair” or “just” because it fails to capture the value of their specific subjective investments in their property as their “home.”<sup>123</sup> Numerous post-*Kelo* articles have invoked the home ethic as part of a critique of this compensation as inadequate.<sup>124</sup> Some authors have proposed formulae to capture this subjective value more fully (and, it is argued, “justly”) to compensate for this part of the loss.<sup>125</sup>

The “housing as home” ethic is well established in American culture and law. While not all interests or expectations generated from the experience of “home” are legally protected, many are. And, there is a potential for more expansive legal recognition of rights in “homes.”

*The “Housing as Home” Ethic and Affordability*

Overall, the “housing as home” ethic is rather indifferent to affordability. The legal rights pertaining to home are provided (in theory) equally to all housing units whatever their price (although some only apply to ownership tenure). And, a modest or even poor house can be a “home” and share in the rich depths of meanings.<sup>126</sup> So, in this sense, anyone can have and enjoy a home; it is not reserved for any economic class.

Yet, in at least one context, the courts have wavered on the “housing as home” ethic where public housing (one form of affordable housing) is at issue. It appears that public financing of

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3, at 2975 (“When the state deprives owners of their homes for reasons that appear to be insufficiently weighty or ill-considered, or when it offers them patently insufficient compensation, eminent domain becomes an affront to the dignity reflected in my second interpretation of the castle metaphor.”).

123. See, e.g., Barros, *supra* note 2, at 299.

124. See Barros, *supra* note 2, at 295-300; Fee, *supra* note 2, at 788 (noting that a home’s “highest value is not as a commodity”).

125. Barros, *supra* note 2, at 299-300; Fee, *supra* note 2, at 804-16, app. at 818-19. To the degree that post-*Kelo* writings on what constitutes “just compensation” base claims for greater compensation on the “significance of home,” an exclusive focus on homeownership is misguided. The formerly homeless person who has lived six months in a new affordable housing unit may value that “home” subjectively more profoundly than a wealthy homeowner of ten years. Renters could, and perhaps should, also be compensated on an objective formula based upon the length of occupancy since their subjective investment in a particular dwelling as “home” may be as deep and genuine as any homeowner’s.

126. See generally Susan Bennett, “The Possibility of a Beloved Place”: Residents and Placemaking in Public Housing Communities, 19 ST. LOUIS U. PUB. L. REV. 259 (2000).

public housing might somehow undercut the strength of typical legal rights associated with “home.” In *Department of Housing and Urban Development v. Rucker*,<sup>127</sup> the Court approved a HUD policy that subjected residents of public housing who were not involved in any illegal activity to eviction based upon the drug-related activities of a member of their household or a guest, regardless of whether the tenant knew, or should have known of the drug-related activity.<sup>128</sup> However, in *Pratt v. Chicago Housing Authority*,<sup>129</sup> the district court approved a preliminary injunction against a housing authority’s policy that authorized warrantless nonconsensual searches as a probable violation of the Fourth Amendment.<sup>130</sup>

Affordable housing campaigns often make appeals to the “housing as home” ethic to gain support for policies or proposals promoting affordability.<sup>131</sup> This appeal emphasizes that people who need affordable housing are just like other people.<sup>132</sup> They aim to evoke empathy from the currently well-housed, in effect asking: Don’t you think others deserve/want/need what you value so much about your home?<sup>133</sup>

Attempts to rely on the “housing as home” ethic to generate support for affordability measures have met with limited success.<sup>134</sup> This can be explained by reflection on the “housing as home” ethic. First, in our culture of “individualistic expressionism,” a house can be a primary object in one’s search for identity and self-expression.<sup>135</sup> But the “housing as home” ethic does not necessarily include any sense of obligation to others. Rather, it focuses on the rights and

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127. 535 U.S. 125 (2002).

128. *Id.* at 127-28.

129. 848 F. Supp. 792 (N.D. Ill. 1994).

130. *Id.* at 796-97.

131. *See, e.g.*, Midwest Hous. Equity Group Inc., <http://www.mheginc.com/index.html> (last visited March 30, 2007); Nat’l Low Income Hous. Coal., <http://www.nlihc.org/template/index.cfm> (last visited Mar. 30, 2007).

132. *See, e.g.*, EAH, <http://www.eahhousing.org/> (last visited March 30, 2007).

133. *See, e.g.*, EAH Resident Stories, <http://www.eahhousing.org/community/default.asp> (last visited Mar. 15, 2007).

134. *See, e.g.*, Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 496, 499-500 (1994) (explaining opposition to affordable housing construction).

135. “For many owners, their home is an extension of themselves, or like a part of their family, both in its expressive and protective aspects.” Fee, *supra* note 2, at 788 (footnote omitted). “A home is not a mere transient shelter; its essence lies in its permanence, in its capacity of accretion and solidification, in its quality of representing, in all its details, the personalities of the people who live in it.” *WHERE THE HEART IS*, *supra* note 87, at 15 (quoting H.L. Mencken).

privileges associated with having a home.

Second, the “housing as home” ethic is linked closely to actual possession and use—a house in which no one has ever lived is not a “home.” Affordable housing advocates’ attempts to build support for proposed—*but as yet unbuilt and unoccupied*—affordable housing by appealing to the “housing as home” ethic in the face of NIMBY opposition by current residents often fail to evoke the expected empathy.<sup>136</sup> An unbuilt apartment complex is no one’s “home,” whereas the sanctity of existing homes is prized. Additional housing, and particularly affordable housing, is seen as a threat to existing housing. However, appeals to the “housing as home” ethic on behalf of residents of existing housing may be more successful. For example, Professor Ballard argues in a recent article that subsidized tenants’ subjective investments in their apartments as “homes” should support a legal defense against eviction actions.<sup>137</sup>

Third, there is a risk of romanticization of housing by focusing on the term “home.” A focus on “home” fails to incorporate and implicitly excludes the “dark sides” of our laws and policies on housing, e.g., discrimination, segregation, the NIMBY syndrome, and homelessness.<sup>138</sup> Such analysis cannot make sense of laws and policies affecting housing—how much, what type, and where to build or not—which deeply affect the actual lived meanings of “home” for large parts of the American population, e.g., low-income and people of color in urban areas. Therefore, the “housing as home” ethic does not easily generate sympathy by the general public (e.g., voters) to help others get the affordable housing they need.

In sum, the current dominant version of the “housing as home”

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136. Gerrard, *supra* note 134, at 499-500, 507, 521.

137. Ballard, *supra* note 2, at 277 (explaining that the article will provide factors courts could consider “to assess the degree to which a subsidized tenant considers a dwelling to be a home”). Professor Ballard offers the following four “objective” factors as proxies for the admittedly subjective meaningfulness and importance of “home:” “length of tenure,” “degree to which a tenant customized or improved a dwelling,” “interests of children or other dependent family members residing in the dwelling,” and “reasonableness of the conduct or circumstances that put housing at risk.” *Id.* at 308-10. The fact that employing the subjective dimension of “home” to ground new legal rights is a common strategy of both “conservatives” and “liberals” demonstrates that the “housing as home” ethic is not the same as any particular interest group or political ideology.

138. See, e.g., Barros, *supra* note 2, at 274 (recognizing the need to consider the “dark side” of assertions for privacy of the home as “critical to striking the correct balance between competing interests”). However, overall Barros strives to expand and reform the concept of home as “a powerful and positive institution that is able to withstand criticism and change.” *Id.* at 293 n.153.

ethic is not particularly in conflict with or hostile to affordability, but rather is indifferent to it. The “housing as home” ethic is a potential ally of affordability, but the fruitfulness of that alliance is limited because the dominant version of that ethic is ultimately indifferent to affordability because it is anchored in American individualism.

C. *Housing as a Human Right*

*The [Catholic] Church has traditionally viewed housing, not as a commodity, but as a basic human right. This conviction is grounded in our view of the human person and the responsibility of society to protect the life and dignity of every person by providing the conditions where human life and human dignity are not undermined, but enhanced.*<sup>139</sup>

Natural disasters, e.g., fires, floods, and hurricanes, that leave large numbers of previously housed people homeless often evoke humanitarian responses that amount to a collective expectation that “people should be housed!”<sup>140</sup> The “housing as a human right” ethic<sup>141</sup> focuses attention on the fact that decent, safe, and affordable housing is critical to proper human development. Its normative thrust is the conclusion that all people should have legal rights to housing. This ethic focuses on legal rights in the provision of housing itself, e.g., rights concerning access to housing, its quality, and its terms.<sup>142</sup> The term “right” is used in the sense that implies a correlative duty on the part of another party, usually the state, to recognize and provide for what the right entails. The focus is on individual rights as general entitlements that will be available to all

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139. ADMIN. BD., U.S. CATHOLIC CONFERENCE, HOMELESSNESS AND HOUSING: A HUMAN TRAGEDY, A MORAL CHALLENGE: A STATEMENT 3 (1988).

140. *See supra* note 5 and accompanying text.

141. Despite its breadth of sources, housing as a right discourse is anthropocentric, in contrast to the environmentalist wing of the housing as habitat discourse. *See infra* notes 334-37 and accompanying text.

142. This focus contrasts with the “housing as home” ethic which considered legal rights that were derived from current housing possession or ownership. Housing rights derived from the housing as a human right ethic more frequently conflict with economic interests or rights of others than do the housing as home rights. As provided in this Article, when the issue is a right to extended possession by one who is already in possession, there can be an overlap between the “housing as home” ethic and the “housing as a human right” ethic. Fee, *supra* note 2, at 787-88 (“When a person’s identity becomes closely bound up with certain things with society’s acquiescence . . . there arises a moral expectation and presumptive entitlement to the continuation of the person’s enjoyment of that thing.”) (footnote omitted); *see also* Radin, *supra* note 96, at 962-70 (explaining property as it relates to “theories of the person”).

persons, including those currently without housing or who are poorly housed.<sup>143</sup> The question this ethic poses to any proposed rule or policy is: *Will this proposal help ensure access to and tenure in safe, decent housing for all those who need it?*

All rights claims require social justification. Many different voices have clamored for rights to housing based upon our common humanity, among them civil rights advocates,<sup>144</sup> religious traditions,<sup>145</sup> and the United Nations.<sup>146</sup> Religious traditions typically ground the claim in the common dignity of humans before the divine.<sup>147</sup> Some right-to-housing arguments depend upon a claim that housing is “special.”<sup>148</sup> For example, longstanding right-to-housing advocate Chester Hartman partially grounds the right in a “housing as home” ethic, characterizing housing as the foundation for life and a launching pad which is fundamental to human development.<sup>149</sup> Often the justification for the housing right sounds in traditional liberal discourse,<sup>150</sup> emphasizing the costs and benefits

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143. Some statutes have provided what might be termed a “social right” to housing which is not redeemable by a particular person for a particular dwelling. These include the famous *Mount Laurel* cases and several states’ mandatory planning laws which require local jurisdictions to plan for housing for all incomes. These decisions are treated as part of a “housing as one land use in a functional system” discourse because they treat housing as a functionally required land use for workable, successful cities rather than granting individual housing rights. See discussion *infra* Part II.E.

144. See A RIGHT TO HOUSING, *supra* note 8.

145. See, e.g., Gustav Niebuhr, *Religion Leaders Call Housing a Sacred Right*, N.Y. TIMES, Sept. 10, 1999, at A19.

146. Chester Hartman cites extensively to international documents supporting a right to housing, including the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and more recently, the June 1996 UN Conference on Human Settlements (Habitat II). Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL’Y DEBATE, 223, 228-29 (1998); see also Fox, *Idea of Home*, *supra* note 9 (discussing the “respect for home” in the European Convention on Human Rights).

147. See *supra* notes 139 and 145. Hartman cites additional religious documents from several denominations supporting a right to housing. Hartman, *supra* note 146, at 227-28.

148. This justification for housing rights may appear as an overlap with the “housing as home” ethic, but here the emphasis is on housing as special in the sense of a universal need for all people, not special to those who already have it by virtue of their subjective investments in a particular dwelling. See *supra* Part II.B (discussing “housing as home” ethic).

149. Hartman, *supra* note 146, at 225-27, 229.

150. See Ellickson, *supra* note 26, at 267-68 (“A liberal state has two basic rationales for regulating how individuals or groups use private property and enter into contracts: externalities and paternalism.”); see also LAWRENCE M.

to those affected,<sup>151</sup> or the social costs and benefits to society of providing such a right.<sup>152</sup>

The substance (or scope) of a right to housing is a critical issue in the housing as a human right discourse. Sometimes, only a minimal right to shelter is advocated, e.g., some campaigns that would require emergency shelter for homeless people.<sup>153</sup> Such claims sometimes seek only temporary shelter (without any tenurial rights) and usually only minimum quality standards with few amenities.<sup>154</sup> In contrast, other advocates have articulated full-blown versions of a right to housing.<sup>155</sup> Hartman includes affordability, physical quality of the unit, non-discriminatory access, secure tenure, and social and physical characteristics of the neighborhood environment<sup>156</sup> as the

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FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 3-4 (1968) (describing the same as “social-cost approach” and the “welfare approach,” respectively).

151. See, e.g., Ballard, *supra* note 2, at 284-94; Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 686, 741-43 (1994) (arguing that public housing is necessary to protect low-income families from being exploited by private market housing).

152. Hartman, *supra* note 146, at 225-27. For recognition of the social benefit without a call for housing rights, see NAT'L ASSOC. OF HOME BUILDERS ET AL., HOUSING POLICY FOR THE 21ST CENTURY (2004).

153. See, e.g., Anitra L. Freeman, *Hosting a Homeless Shelter*, <http://anitraweb.org/homelessness/faqs/helping/hosting.html> (last visited Mar. 15, 2007) (calling for church groups to host a homeless shelter). Advocates argue that if such shelter is not feasibly available, then cities should not be able to legally prevent someone from sleeping in public places. See Richard Marosi, *Ruling Sides with Homeless*, L.A. TIMES, Mar. 1, 1999, at A3 (explaining that a California court of appeals panel threw out the conviction of a man cited under Santa Ana's anti-camping law, saying that lack of shelter can be a defense). Many advocates for the homeless now push for “supportive housing,” permanent housing with supportive services for homeless people. See Corp. for Supportive Hous., <http://www.csh.org> (last visited Mar. 15, 2007).

154. See, e.g., Freeman, *supra* note 153 (outlining the “basic requirements” of hosting a temporary homeless shelter). *But see* SAM DAVIS, *DESIGNING FOR THE HOMELESS: ARCHITECTURE THAT WORKS* (2005) (advocating that housing for homeless people be attractive, psychologically comforting, and tailored specifically for their needs).

155. See David B. Bryson, *The Role of the Courts and a Right to Housing*, in *A RIGHT TO HOUSING*, *supra* note 8, at 193-212.

156. Regarding Hartman's inclusion of a healthy neighborhood as part of an individual right to housing, this view further extends a full-blown housing right to include an individual right to a “healthy habitat.” Under this Article's analysis, this extends the “right to housing” to overlap with the “housing as one land use in a functional system” ethic because it considers housing in relationship to other land uses. Except for this right, the rest of the rights typically articulated in a “right to housing” are individual rights in which

components of a complete right to housing.<sup>157</sup> The late housing advocate David Bryson articulates similar elements<sup>158</sup> and notes the value of guaranteed legal representation for adequate enforcement of the right.<sup>159</sup> The full-blown version raises numerous hard policy questions, which are rarely answered to the satisfaction of critics and skeptics.<sup>160</sup> Thus, the proposal regularly evokes strong opposition.<sup>161</sup>

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individuals who are denied the privilege or benefit have standing to sue and, if successful, gain the privilege or benefit for themselves.

157. Hartman, *supra* note 146, at 237-38. "Antidiscrimination requirements should permit choice of neighborhoods: the option of in-place as well as dispersion remedies for badly impacted inner-city neighborhoods." *Id.* at 238. On the continuing relevance of housing discrimination, see generally John Yinger, *Housing Discrimination Is Still Worth Worrying About*, 9 HOUSING POL'Y DEBATE 893 (1998).

158. Bryson, *supra* note 155, at 194 (specifying decent physical conditions, security of tenure, antidiscrimination guarantees, protections from abuses and guarantees of fair treatment, an appropriate and healthy neighborhood, and affordability as necessary elements "[t]o achieve the goal of a Right to Housing"); see also Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970) (discussing the potential elements or substance of such a right: (1) the right to be housed; (2) the right not to be tendered substandard housing; (3) the right to free choice in housing; (4) the right not to be forced into racially segregated housing and variations in the use of housing; (5) the right not to be uprooted, either through compulsory acquisition or eviction; (6) the right to own one's home; (7) the right to exercise control over one's environment; and (8) the right of tenants to organize and bargain collectively with a landlord).

159. Bryson, *supra* note 155, at 208.

160. See, e.g., Carr, *supra* note 10; Hartman, *supra* note 146; Salins, *supra* note 8 (debating a right to housing). Chester Hartman gives preliminary thoughts on how it would work, but acknowledges that "a great variety of concrete questions must be answered with respect to how such a right should be defined and implemented." Hartman, *supra* note 146, at 237. Even when affordability is recognized as important, there is an unresolved debate over the appropriate relative affordability standard. See *infra* notes 196-209 and accompanying text (explaining affordability standards).

161. One critic, James Carr, argues that the focus on housing as a right is premature. Carr, *supra* note 10, at 251. He argues that housing is only one of several nested aspects of poverty that concern access to different resources, including education, transportation, and employment. *Id.* at 248. In his view, achievement of this goal would only lead to "poverty with a roof" with concentrated minority-renter households. *Id.* His argument is based upon his recognition of the importance of deeply-entrenched racist and classist social order in our current housing patterns. See discussion *infra* Part II.D. Peter Salins also argues strenuously against recognizing a legal right to housing. Salins, *supra* note 8. See also Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 17 (1992) (arguing a right to housing "would be counterproductive, even for the poor").

Nevertheless, numerous particular housing rights have been established incrementally. Both courts and legislatures have recognized some housing rights. A detailed review of what rights in housing have been established in the United States is impressive.<sup>162</sup> For example, the implied warranty of habitability was first established in common law,<sup>163</sup> and then adopted as policy by many state legislatures<sup>164</sup> and by HUD for its subsidized housing programs.<sup>165</sup> This right provides a tenant with a wide range of remedies and is usually non-waivable.<sup>166</sup>

Anti-discrimination rights, such as those secured by the federal Fair Housing Act<sup>167</sup> and its state equivalents,<sup>168</sup> protect a right to fair access to housing. Various other doctrines developed by the courts and enacted by legislatures protect security of tenure.<sup>169</sup> Jurisdictions with “just cause eviction” ordinances restrict landlords’ rights to evict tenants to specified reasons.<sup>170</sup> Rights to be free from retaliatory eviction complement the other rights and are needed to make them workable so that those who contemplate exercising their rights do not have to fear eviction as a response.<sup>171</sup> Even state statutes providing for summary eviction proceedings—which arguably benefit landlords by providing quick access to courts—

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162. See Bryson, *supra* note 155, at 196-206.

163. See, e.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) (updating common law to allow tenants to stop paying rent where housing violates housing code). For a more complete discussion of the development of this right, see Bryson, *supra* note 155, at 196-99; see also *Brown v. Southall Realty Co.*, 237 A.2d 834, 837 (D.C. 1968) (establishing the doctrine of illegal lease).

164. Cf. *Brown*, 237 A.2d at 837 (discussing habitability regulations for rental housing in District of Columbia).

165. See, e.g., 24 C.F.R. § 982.401 (2006) (setting forth housing quality standards under HUD’s Section 8 program).

166. Remedies typically include a right to terminate payment of rent and a “repair and deduct” remedy. It may include using the right as a defense to an eviction proceeding or an action to collect rent from an abandoning tenant. See Bryson, *supra* note 155, at 196-97. Notably, this housing right is framed as establishing a floor for the acceptable conditions for human habitation of a structure; it does not require or address conditions sufficient to making a “home.”

167. 42 U.S.C. § 3601 (2000).

168. See, e.g., N.C. GEN. STAT. § 41A (2005).

169. For a more complete discussion of the development of these rights, see Bryson, *supra* note 155, at 199-201.

170. See PolicyLink, Just Cause Eviction Controls, <http://www.policylink.org/EDTK/JustCause/> (last visited Mar. 19, 2007).

171. *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968) (holding that retaliatory eviction is a limit on landlord’s property rights).

elaborate sometimes demanding procedures for evictions that provide due process protection to tenants from landlords' exercise of "self help" remedies such as lock-outs.<sup>172</sup> Moreover, some states have prohibited discrimination on the basis of the source of one's income.<sup>173</sup>

The "housing as a human right" ethic goes beyond existing rights, with proponents arguing for legal recognition of additional, currently unrecognized interests in housing. This ethic is commonly evoked as a cry for reform of the existing housing law and policy by low-income, under-represented, or subordinated people along with their allies and representatives. Proponents of the "housing as a human right" ethic are ultimately committed to procuring universal housing rights, but their campaigns or strategies may focus on attaining housing rights for particular subpopulations, particularly those most politically or economically vulnerable. For example, renters, low-income people, people of color, homeless people, persons with disabilities, and veterans have been the focal point of housing rights efforts.<sup>174</sup> Rising homelessness in the United States since the 1980s keeps the right to housing discussion alive.<sup>175</sup>

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172. See, e.g., *Jordan v. Talbot*, 361 P.2d 20, 23-25 (Cal. 1961) (describing California summary eviction proceedings); *Berg v. Wiley*, 264 N.W.2d 145, 150 (Minn. 1978) (describing Minnesota summary eviction proceedings). For a discussion of a variety of due process protections associated with housing, see Bryson, *supra* note 155, at 201-02.

173. See, e.g., CAL. GOV'T CODE §§ 12955(a), 65008(d)(1)-(2)(A) (Deering Supp. 2007).

174. See Bryson, *supra* note 155, at 202-04 (discussing racial and ethnic discrimination). Notably, the full-blown right version incorporates a response to all of the ways that the other housing ethics have limited subordinated people in their access to and use of housing. The affordability requirement responds to limits imposed by the "housing as economic good" ethic. Moreover, the right to fair access counters restrictions imposed by racist implementation of the "housing as social order" ethic.

175. See Alexander, *supra* note 7, at 1234; see also Florence W. Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 IND. L. REV. 103 (2005); Rob Rosenthal and Maria Foscarinis, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in A RIGHT TO HOUSING, *supra* note 8, at 316. While the establishment of a full-blown "right to housing" in the United States in the near future appears unlikely, South Africa's post-apartheid constitution famously included a "right to housing." See *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 10-11 (S. Afr.), available at [http://www.escri-net.org/usr\\_doc/Grootboom\\_Judgment\\_Full\\_Text\\_\(CC\).pdf](http://www.escri-net.org/usr_doc/Grootboom_Judgment_Full_Text_(CC).pdf) (requiring reasonable government action to ensure the progressive realization of the constitutional right of access to adequate housing). Also, Scotland and France recently committed to establishing a "right to housing." See Martin Arnold, *France Adopts Scottish*

Housing rights advocates have sought constitutional recognition of such rights. In the landmark *Lindsey v. Normet*<sup>176</sup> case, the U.S. Supreme Court refused to recognize an individual right to housing under the Due Process and Equal Protection Clauses of the Federal Constitution.<sup>177</sup> This case considered a facial challenge to Oregon's judicial procedure for eviction of tenants after nonpayment of rent.<sup>178</sup> Plaintiff tenants argued that the "need for decent shelter" and "right to retain peaceful possession of one's home" should be recognized as "fundamental interests" requiring the Court to apply strict scrutiny to statutes infringing on them.<sup>179</sup> In rejecting the due process claim, the Court refused to interpret the U.S. Constitution as federalizing the substantive law of landlord-tenant relations, which, in some states, would favor plaintiffs' claims.<sup>180</sup> And, again applying rational basis review, the Court rejected the equal protection claim based upon the State's legitimate interest in providing for speedy resolution of the right to possess real property in order to avoid landlord self-help and potential violence.<sup>181</sup> Although reserving strict scrutiny to a narrower class of cases, the Court stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definitions of the landlord-tenant relationships are legislative, not judicial

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*Policy of Legal Right to Housing*, FIN. TIMES ONLINE, Jan. 3, 2007, <http://www.ft.com/cms/s/716f63c0-9b55-11db-aa70-0000779e2340.html>; Kerstin Gehmlich, *France Endorses Housing as a Legal Right*, BOSTON GLOBE ONLINE, Jan. 4, 2007, [http://www.boston.com/news/world/europe/articles/2007/01/04/france\\_endorses\\_housing\\_as\\_a\\_legal\\_right/](http://www.boston.com/news/world/europe/articles/2007/01/04/france_endorses_housing_as_a_legal_right/); see also Padraic Kenna, *Housing Rights—The New Benchmarks for Housing Policy in Europe?*, 37 URB. LAW. 87, 87 (2005) (describing the development of EU housing rights). For a different view of how to conceptualize housing rights for homeless people, see Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 273 (2004).

176. 405 U.S. 56 (1972).

177. *Id.* at 74. This case should be seen in the context of the U.S. Supreme Court backing off of extending federal constitutional protection to welfare rights. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

178. *Lindsey*, 405 U.S. at 58.

179. *Id.* at 73.

180. *Id.* at 68.

181. *Id.* at 69-70.

functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.<sup>182</sup>

Even though the question is well settled at the federal level, some hope for a constitutional or statutory right to housing still exists at the state and local level.<sup>183</sup>

While there have been dozens of federal housing programs, federal policy has never provided an individual right to housing available to all who qualify for them.<sup>184</sup> Even the majestic language of the Housing Act of 1949 did not provide a legal right, but only a policy goal that the nation should achieve “as soon as feasible.”<sup>185</sup> The public housing program was never conceived of as offering a general right to housing.<sup>186</sup> And Congress never appropriated

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182. *Id.* at 74. The Court did strike down the statute’s requirement for tenants to post bonds on appeal for double the amount of rent at issue as arbitrary and irrational discrimination against poor people. *Id.* at 74, 76–79.

183. See Bradley R. Haywood, Note, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 159 (2002) (arguing that the right to shelter should be recognized as a fundamental interest under the New York Constitution); Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL’Y SYMP. 111, 111 (1996) (“[S]tate constitutions are an appropriate place to include provisions setting forth an obligation to aid the needy, including homeless citizens.”). The leading housing and community development casebook discusses the following cases and local ordinance in this regard: D.C. CODE ANN. § 4-709 (2001) (repealed 2005); *Boehm v. Superior Court*, 223 Cal. Rptr. 716 (Ct. App. 1986), *abrogated by Saldana v. Globe-Weis Systems Co.*, 285 Cal. Rptr. 385 (Ct. App. 1991), *superseded by statute as stated in Gardener v. County of Los Angeles*, 40 Cal Rptr. 2d 271 (Ct. App. 1995); *Franklin v. N.J. Dep’t of Human Servs.*, 543 A.2d 1 (N.J. 1988); *Maticka v. City of Atlantic City*, 524 A.2d 416 (N.J. Super. Ct. App. Div. 1987); *Eldredge v. Koch*, 459 N.Y.S.2d 960 (N.Y. Sup. Ct. 1982), *rev’d*, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983); *Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983); *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10. DAYE ET AL., *supra* note 24, at 56-58. At the local government level, in 2005, New York City enacted NYC Local Law 50, which guarantees a right to housing for homeless people living with AIDS, available at <http://webdocs.nycouncil.info/textfiles/Int%200535-2005.htm?CFID=2366304&CFTOKEN=77066579> (last visited April 16, 2007).

184. See Salins, *supra* note 51, at 26-27 (“Housing assistance, unlike, for example, public assistance in nutrition or health care, is a lottery.”).

185. 42 U.S.C. § 1441 (2000).

186. A primary purpose of the public housing program was to act as an employment program to stimulate the construction industry, with housing as a secondary goal. LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION*, 104-06 (1968) (indicating that support came not from the very poor, but from the “submerged and potential middle class”); EUGENE J. MEEHAN, *PUBLIC HOUSING POLICY: CONVENTION VERSUS REALITY* 171 (1975) (“The major concerns built into the legislation had to do with the construction of

sufficient funding for it to fulfill even its lesser role as “housing of last resort” for the very poor.<sup>187</sup> For many years, there have been astoundingly long waiting lists of several years for a public housing unit.<sup>188</sup> In the last decade, federal funding for public housing has dwindled considerably.<sup>189</sup> Even the “HOPE VI” program, which was to revitalize public housing, has been limited and is regularly under threat of termination.<sup>190</sup> None of the other federal housing programs even aspired to serve all those who might be eligible according to each program’s income restrictions.<sup>191</sup>

Like the highly technical discourse of housing as an economic good among economists, a highly technical “housing rights” discourse exists among lawyers and in the courts. Housing rights are regularly litigated.<sup>192</sup> In contrast to the moral and intuitive character of lay discourse invoking housing as a human right, this discourse is quintessentially “legalistic,” disputing what “right” (if any) is created by a statute, defining who has standing to enforce the right, defending and extending the scope of a right, how it should be enforced, and what remedies are available.<sup>193</sup> Of course, recognition of a legal housing right raises the likelihood of conflicts

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housing and not the provision of housing-in-use, with the latent function of construction in eliminating slums and providing employment and not the satisfaction of the need for shelter.”). The statute initially enacting the program was the United States Housing Act of 1937, codified at 42 U.S.C. §§ 1401-1436. MEEHAN, *supra*. The public housing program has been revised many times. *Id.* The current act is codified at 42 U.S.C. §§ 1437-1437bbb-9. *Id.*

187. MEEHAN, *supra* note 186, at 177.

188. *See, e.g.*, MID-AM. INST. ON POVERTY, HEARTLAND ALLIANCE FOR HUM. NEEDS & HUM. RTS., NOT EVEN A PLACE IN LINE 2007: PUBLIC HOUSING & HOUSING CHOICE VOUCHER CAPACITY AND WAITING LISTS IN ILLINOIS 2-3 (2007), available at [http://www.heartlandalliance.org/maip/documents/NotEvenaPlaceinLine2007\\_001.pdf](http://www.heartlandalliance.org/maip/documents/NotEvenaPlaceinLine2007_001.pdf) (discussing the difficulty of obtaining public housing in Illinois).

189. *Id.* at 4-6.

190. Nat’l Low Income Hous. Coal., Hope VI, [http://www.nlihc.org/detail/article.cfm?article\\_id=2772&id=19](http://www.nlihc.org/detail/article.cfm?article_id=2772&id=19) (last visited Mar. 19, 2007) (“For four consecutive fiscal years, the [Bush] Administration has proposed the elimination of funding for the HOPE VI program.”). The HOPE VI program was enacted in the Department of Veteran Affairs, Housing and Urban Development, and Independent Agencies Appropriation Act, Pub. L. No. 102-389, 106 Stat. 1571, 1579-81 (1992). For a description of the program, see Paul K. Casey & Amy M. McClain, *Mixed-Finance Development of Public Housing*, in IGLESIAS & LENTO, *supra* note 65, at 329-60.

191. Hartman, *supra* note 146, at 231-32.

192. *See generally* Bryson, *supra* note 155.

193. *See, e.g.*, BETH HARRIS, DEFENDING THE RIGHT TO A HOME: THE POWER OF ANTI-POVERTY LAWYERS 74-78 (2004); Bryson, *supra* note 155 (reviewing the role of the courts in establishing and enforcing housing rights).

between housing rights and other legally recognized rights.<sup>194</sup>

The “housing as human right” ethic often includes an economic critique of the private market production system. Though acknowledging the legitimate role of housing as an economic good to owners and investors, Chester Hartman disapproves of the nature of the housing market: “The profit-maximizing behavior of all actors in that market—landowners, developers, builders, materials suppliers, real estate brokers, landlords, even homeowners—at all points works against assuring that everyone has decent, affordable housing, absent a legally enforceable right to housing and explicit commitment of resources to its realization.”<sup>195</sup>

The “housing as a human right” ethic has fostered the development of many important individual rights to housing, but courts and legislatures have stopped short of recognizing a full-blown individual right to housing.

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194. For example, the FHAA sometimes conflicts with the First Amendment. See *Statement of Roberta Achtenberg, Asst. Sec’y for Fair Hous. & Equal Opportunity*, WEST’S LEGAL NEWS, Aug. 21, 1995, at 1334, 1995 WL 908976. *But see* *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 919 (Cal. 1996) (holding that FEHA prohibition against discrimination based on marital status did not violate the free exercise clause of the First Amendment).

195. Hartman, *supra* note 146, at 230; see also Rachel G. Bratt et al., *Why a Right to Housing Is Needed and Makes Sense: Editors’ Introduction*, in *A RIGHT TO HOUSING*, *supra* note 8, at 1, 8 (identifying the five most important roots of America’s housing problems as “the workings of the private housing market, widening income inequality, persistent and pervasive housing discrimination, overdependence on debt and capital markets to finance housing, and public policies that are inadequate to counter these trends and, at worst, exacerbate them”); see also Peter Marcuse, *Housing on the Defensive*, PRACTICING PLANNER, WINTER 2004, <http://www.planning.org/affordablereader/pracplanner/housingvol2n4.htm?project=Print> (criticizing the current economic system as a fundamental cause of housing problems).

*Housing as a Human Right and Affordability*

The “housing as a human right” ethic is the natural “home” to efforts to ensure relative affordability in housing. Although affordability is only one part of the full bundle of housing rights, it is regularly included and held as important in the “housing as a human right” ethic.

Affordable housing advocates are often grounded in the “housing as a human right” ethic. The United States has established many programs which help provide affordability to those who participate in them, but these programs have never been funded to enable all those who are eligible to actually benefit from them.<sup>196</sup> The only program that arguably provides a legal “right” of affordability to all who are eligible is the federal mortgage interest deduction.<sup>197</sup> This tax deduction makes housing ownership more affordable because it enables prospective homebuyers to qualify for larger mortgages than their incomes would otherwise justify.<sup>198</sup> Under this program, with few exceptions, any homeowner who chooses to claim this deduction from federal income taxes may do so.<sup>199</sup> Affordable housing advocates have been unsuccessful in establishing any similar *universal legal right* relative to affordability for *rental* housing.<sup>200</sup> There are at least three reasons these efforts have not succeeded.

First, many housing advocates’ concern for relative affordability

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196. Hartman, *supra* note 146, at 231-37.

197. Some argue that although the federal mortgage interest deduction is only a statutory policy, it should be considered as a “right” because it is treated as a politically inviolable entitlement. *See id.* at 235 (“The various homeowners’ income tax deductions provide the federal government’s only true (civilian) housing entitlement ‘program’: All homeowners are entitled to deduct from their taxable income base virtually all mortgage interest and all property tax[es] . . .”).

198. *See id.* (noting that the deduction often allows homeowners to avoid capital gains taxes altogether).

199. *See* Alexander, *supra* note 7, at 1269 (commenting that the deduction is available to all “taxpayers who itemize their deductions”); Dreier, *supra* note 30, at 9 (“The federal tax code allows all homeowners to deduct mortgage interest payments from their income taxes. Whether it is labeled a ‘subsidy’ or a ‘tax expenditure,’ the homeowner deduction cost the federal government over \$58.3 billion in 1995 alone.”); *Home Mortgage Interest Deduction Tops Housing Tax Expenditures*, 35 HDRCURDEV 10, Feb. 19, 2007 (reporting that “[t]he federal government will ‘spend’ \$520,260 billion on the home mortgage interest deduction over the fiscal 2008–2012 period”). Of course, defenders argue that the tax deduction is not a “subsidy.”

200. *See* Dreier, *supra* note 30, at 9 (“Subsidized housing for the poor is essentially a lottery, not an entitlement.”).

ultimately extends to the position that no matter what one's income or lack thereof, it should not prevent one from having decent housing.<sup>201</sup> At this point, their claim merges with the effort to establish a full-blown individual right to housing, and consequently meets the same resistance as that effort. In particular, the amount of budget appropriations that would be needed to guarantee such a right is significant, even if it is arguably worthwhile and "reasonable" in comparison with other expenditures.<sup>202</sup>

Second, because housing problems (including affordability) are most evident in urban areas and especially in areas characterized by high levels of poverty and racial concentrations,<sup>203</sup> affordability is intimately entangled with the broader, deeper, cumulative, and mutually reinforcing problems of poverty and race. This entanglement reduces political support for affordability because the divisive and complex issues of poverty and race overwhelm the cause for affordability.

Third, these rights conflict head-on with the dominant deregulation (or "free market") version of the "housing as an economic good" ethic. Public housing and other government-subsidized housing include both income-based eligibility requirements and limitations on rents (or mortgages in the case of subsidized ownership programs) that can be charged.<sup>204</sup> According to the free market view, these restrictions interfere with market mechanisms, and so will lead to inefficient results that are suboptimal for society. Rent control is a primary example of a right to affordable housing guaranteed to individuals by the state.<sup>205</sup> The debate over rent control illustrates the conflict between "housing as a right" and "housing as economic good" discourses. The vast majority of economists applying the standard neoclassical analysis argue that rent control is an inefficient and ineffective policy.<sup>206</sup> They believe there will be more affordable housing available in a

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201. "Willful nonpayment would be grounds for eviction or foreclosure, but systems should be established to provide needed emergency and longer-term subsidies if incomes are inadequate to pay contracted housing costs, in order to avoid loss of one's home." Hartman, *supra* note 146, at 238.

202. *See, e.g.*, Hartman, *supra* note 146, at 238-39.

203. *See* REINVESTMENT FUND & METRO. PHILA. POL'Y CTR., CHOICES: A REPORT ON THE STATE OF THE REGION'S HOUSING MARKET 12 (2001), available at <http://www.trfund.com/resource/downloads/policypubs/Choices.pdf>.

204. *See generally* Lento, *supra* note 82, at 215-58.

205. *See* Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (upholding city rent control ordinance against regulatory taking challenge).

206. *See, e.g.*, Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 759-60 (1988).

market without rent controls because rent control stifles investment in new housing developments and gives current landlords incentives to leave the market.<sup>207</sup> Nevertheless, some cities still maintain these policies, although they design their rent control programs to avoid some of the predicted negative effects.<sup>208</sup> Generally, courts have upheld rent control in the face of constitutional challenges, accepting them as furthering legitimate government interests in regulating the economy.<sup>209</sup>

The “housing as a human right” ethic is the natural “home” to efforts to ensure relative affordability in housing. However, the successes have been hard fought and are in constant need of defense from arguments proceeding from the other housing ethics, especially “housing as an economic good.” This ethic is unlikely to be as useful for affordable housing in the foreseeable future due to courts’ reluctance to interpret law expansively to recognize individual

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207. *Id.* at 767. See William Tucker, *How Rent Control Drives Out Affordable Housing*, CATO INST., May 21, 1997, <http://cato.org/pubs/pas/pa-274.html>.

208. At least four cities in California maintain rent control programs: Berkeley, San Jose, Santa Monica, and San Francisco.

209. See *Yee v. City of Escondido*, 503 U.S. 519 (1992) (upholding a mobile home park rent control law against a Loretto-type physical takings claim); *Cashman v. City of Cotati*, 415 F.3d 1027 (9th Cir. 2005) (withdrawing opinion that had found mobile home park rent control law constituted a regulatory taking under “failing to substantially advance a legitimate government interest” theory because of U.S. Supreme Court’s opinion in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), in which the Court found that theory does not articulate a valid regulatory taking test); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1003-07 (Cal. 1999) (finding that the alleged failure of rent control law to achieve the goal of providing affordable housing did not give rise to an inverse condemnation claim, as the law substantially advanced legitimate state purposes of preventing excessive and unreasonable rent increases); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 57 (Ct. App. 1983) (holding that the city’s mobile home park rent control ordinance was not unconstitutional); *S G Borello & Sons, Inc. v. City of Hayward*, No. C03-0891 VRW, 2006 WL 3365598, at \*6 (N.D. Cal. Nov. 20, 2006) (granting the City’s motion to dismiss in part because the due process clause does not support a claim for a right to a fair return on investment). *But see* *Girard v. Town of Allenstown*, 428 A.2d 488, 491 (N.H. 1981) (finding that a statute providing that towns may make bylaws for the making and ordering of their prudential affairs did not authorize the town to adopt and enforce a rent control ordinance); *Helmsley v. Borough of Fort Lee*, 394 A.2d 65, 79 (N.J. 1978) (holding that the provision of a rent control ordinance that imposed a 2.5% ceiling on rent increases and failed to provide adequate administrative relief from foreseeable future confiscatory effects of such limitation was unconstitutional). In California, opponents have been successful in obtaining state legislation that restricts existing rent control programs and stops their growth. CAL. GOV’T CODE § 7060 (Deering 2002) (popularly known as “The Ellis Act”).

housing rights and legislatures' reluctance to expand what are perceived as "welfare rights" for individuals.

*D. Housing as Providing "Social Order"*

"This place is for us and for our kids,' said Josephine Benitez . . . . She said she dislikes the idea of the [low-income] housing project because those who will live in it 'will be people who don't belong in our neighborhood, and we won't know them.'"<sup>210</sup>

The core idea of the "housing as providing social order" ethic is the deliberate use of housing as a means to establish and maintain a specific social order that embodies a certain view of "the good life."<sup>211</sup> This ethic focuses attention on the fact that our housing settlement patterns—the relative location of housing and the types of housing in an area and who lives in them—create a particular social order. Where and among whom we live structures important parts of our lives. Therefore, under this view, our housing law and policy should respect and promote "good communities" by respecting whom people want to associate with in their neighborhoods. This ethic poses the following question to any new housing policy or rule: *How will this proposal affect who will live in "my community"?*<sup>212</sup>

In this ethic, housing is always considered and analyzed in relationship to other housing and, in particular, who lives in the other housing. Some versions of this ethic seek distinctions to provide a relative ranking of social status with the relevant comparison group.<sup>213</sup> This ethic is widely socially understood and incorporates broadly shared social meanings.<sup>214</sup>

One consequence of such ordering is common social perceptions or stereotypes—all else being equal, where you live (e.g., city, neighborhood) is generally taken to provide significant information about "who you are" relative to other people who live in other cities or neighborhoods. The social meaning of where one lives is "given"

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210. Associated Press, *Amid Protest, Vacant School's Demolition Work on Hold*, Feb. 7, 2001, available at [http://wc.arizona.edu/papers/94/94/01\\_97\\_m.html](http://wc.arizona.edu/papers/94/94/01_97_m.html).

211. There is nothing theoretically or practically necessary about housing creating social order or the meanings we attach, nor about the history of how or why neighborhoods are segregated.

212. This ethic may be interpreted as expressing the desire to extend the zone of control from one's own house—the core of the "housing as home" ethic discussed *supra* Part II.B—to the neighborhood or community.

213. Hartman, *supra* note 146, at 229; see also *infra* Part III.A (discussing the "American Dream").

214. People of color and low-income people interpret housing patterns as part of a social order as much as whites and high-income people.

even if not intended or “merited” by a person living in the subject area. This dynamic functions at the city and neighborhood levels and in fact at any geographical level in which it plausibly can be claimed, “we have a community here.” Certain cities and neighborhoods have national reputations, e.g., Chevy Chase, Maryland; Beverly Hills, California; Oakland, California. At least at the regional level, the reputations of neighborhoods are well-known or easily discovered.

Many argue that the desire to live among people that one perceives as “similar” to oneself in some relevant way is a natural, inevitable, and useful or wholesome, or at least understandable, human tendency.<sup>215</sup> Many people feel that they have earned the right to exclusive housing with the aesthetic and safety benefits they feel it provides. Certainly, the actual and apparent “ordering” of neighborhoods by income appears to validate a perception that when one earns enough money to live in such a neighborhood, one deserves the amenities such a neighborhood offers. This same tendency to want to associate by virtue of the location of one’s housing with people considered similar to oneself can be criticized as morally or legally blameworthy “discrimination” or “exclusion.” On the normative question of whether or not housing law and policy should be used to create or support a particular social order, Professor Alexander urges that “if there is to be a social and cultural judgment enforced by laws about the relationships that count in deciding who lives in our neighborhoods, then let us present these moral convictions openly for debate and not hide them in the varieties of housing laws.”<sup>216</sup>

America has a deep and long tradition of using housing as a means of providing for a particular social order.<sup>217</sup> Public law,

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215. ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 97 (2005); Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Desegregation*, 27 *FORDHAM URB. L.J.* 533, 533-34 (1999) (noting replication of segregation in suburbs and analyzing “individual preference factors”).

216. Alexander, *supra* note 7, at 1267.

217. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993); see also Bosselman, *supra* note 13, at 1441-57 (discussing “order” as one land ethic). The history described is summarized in many publications, including Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 *J. LAND USE & ENVTL. L.* 89 (1998); Gary Orfield, *The Civil Rights Project, Harvard Univ., National Press Club Address: Housing Segregation: Causes, Effects, Possible Cures 1-3* (Apr. 3, 2001) (transcript on file at Educational Resources Information Center, Office of Educational Research and Improvement, U.S. Department of Education). This housing ethic is not unique to the United States. See *Republic of South Africa v. Grootboom*

including planning, zoning, subdivision law, and funding programs, provides some of the legal means of establishing and preserving social order.<sup>218</sup> Private ordering schemes are also used.<sup>219</sup>

Historically, one form of organization has been by “race” and ethnicity.<sup>220</sup> Organization of housing by the government and private owners by race to establish and maintain a racial hierarchy was explicit from the time of slavery<sup>221</sup> through the adoption of Jim Crow laws after the enactment of the Thirteenth and Fourteenth Amendments.<sup>222</sup> After *Buchanan v. Warley*<sup>223</sup> was decided in 1917, it was no longer constitutionally permissible for governments to discriminate explicitly by race in setting housing settlement patterns.<sup>224</sup> However, it was still legal and socially acceptable

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2001 (1) SA 46 (CC) (S. Afr.) (discussing South Africa’s apartheid system).

218. See FISCHER, *supra* note 46, at 261 (discussing exclusionary zoning). Following the “Tiebout Hypothesis,” Fischer argues that local governments compete to create a product (the mix of services and taxes that living in that jurisdiction offers) and market themselves to potential residents (“homevoters”). See generally *id.*

219. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 4-5 (1948) (discussing racially restrictive covenants); *Sanborn v. McLean*, 206 N.W. 496, 497 (Mich. 1925) (discussing minimum cost requirements for housing).

220. See MASSEY & DENTON, *supra* note 217; Orfield, *supra* note 217. This article uses the term “race” recognizing that it is a social construct. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

221. James Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 559-66 (1979) (offering extensive analysis focusing on the role of government and courts in causing segregation); see also Joshua M. Levine, Comment, *Stigma’s Opening: Grutter’s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CAL. L. REV. 457, 486 n.130 (2006) (“There were two kinds of slaves, the house Negro and the field Negro.”) (citations omitted).

222. See *supra* notes 183-84. See generally Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983) (providing a historical and legal analysis of Baltimore’s explicitly racially segregative zoning ordinances).

223. 245 U.S. 60 (1917). The facts that property values were affected by Jim Crow laws and that the “housing as home” ethic could be mustered to defend racial segregation once it was in place were *consequences* of a deliberate attempt to create a racial social order, rather than *causes*.

224. *The Village of Euclid v. Ambler Realty Co.* case, 272 U.S. 365 (1926), and comprehensive zoning had racial undertones. These are more explicit in the district court decision, *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924) (criticizing comprehensive zoning because the court believed it would be classist).

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in

(among some) for private parties to do so using racially restrictive covenants.<sup>225</sup> In the wake of the *Corrigan*<sup>226</sup> decision (which appeared to give a green light to private ordering schemes based explicitly on race), there were widespread organizing drives by private parties to expand their use broadly.<sup>227</sup> In *Shelley v. Kraemer*,<sup>228</sup> the U.S. Supreme Court found that state court enforcement of racially restrictive covenants violated the Fourteenth Amendment, but the discriminatory covenants themselves did not violate the Constitution.<sup>229</sup> After *Shelley* was decided, governments withdrew from these schemes, yet private parties continued to enforce them through private social means, e.g., by putting various kinds of social pressure on their neighbors to enforce the covenants.<sup>230</sup> It is also now widely recognized that the siting of many public housing developments was racially directed.<sup>231</sup>

In 1968, such explicit racial organization of housing was made illegal when, in the immediate aftermath of the assassination of Dr. Martin Luther King, Jr., Congress enacted the federal Fair Housing Act<sup>232</sup> and the U.S. Supreme Court held in *Jones v. Alfred H. Mayer Co.*<sup>233</sup> that *private* discrimination against constitutionally protected

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a straight-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.”

*Id.*; see also Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 597-98 (2001) (arguing that the *Euclid* decision was a product of that era's racism). The *Euclid* case is discussed in detail *infra* notes 350-56.

225. Not only “blacks” but other races, nationalities, ethnic categories, and religions were excluded and socially subordinated by these methods.

226. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

227. See Orfield, *supra* note 217, at 2.

228. 334 U.S. 1 (1948).

229. *Id.* at 13, 23.

230. See, e.g., Carol Rose, *The Story of Shelley v. Kraemer*, in PROPERTY STORIES 198-200 (Gerald Korngold & Andrew P. Morriss eds., 2004); Richard R.W. Brooks, *Covenants and Conventions* 12-13 (Northwestern Law & Econ. Research Paper No. 02-8, 2002), available at <http://ssrn.com/abstract=353723>.

231. Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 319-23 (2002) (discussing *Hills v. Gautreaux*, 425 U.S. 284 (1976)).

232. The “Housing as a Human Right” section, *supra* Part II.C, discussed the federal Fair Housing Act's provision of individual housing rights by protecting individuals against discrimination in access, terms, and conditions by sellers, landlords, brokers, and financial institutions. The application of the federal Fair Housing Act to land use decisions is discussed *infra* at notes 273-77 and accompanying text.

233. 392 U.S. 409 (1968).

property rights violated the Thirteenth Amendment.<sup>234</sup> However, by that time, the segregated housing patterns were deeply etched in cities and towns all over the United States.<sup>235</sup>

The intuitions and fears that maintain this order have not completely dissipated.<sup>236</sup> Much discrimination has gone underground, making it harder to prove. Some case law, notably *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>237</sup> added to the legal difficulty in challenging racist social ordering using housing by requiring plaintiffs to prove defendants had an intent to discriminate in order to find a constitutional violation. And, court decisions after *Brown v. Board of Education*<sup>238</sup> have explicitly refused to interfere with the private housing market to prevent resegregation of public schools.<sup>239</sup> This refusal to find

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234. *Id.* at 413.

235. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004) [hereinafter CASHIN, THE FAILURES OF INTEGRATION]; Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 596 (2002) (arguing that “[s]egregation is the natural tendency in America” and that “with each passing decade, we as a nation are becoming increasingly segregated by income”) [hereinafter Cashin, *Drifting Apart*].

236. See NAT’L FAIR HOUS. ALLIANCE, NO HOME FOR THE HOLIDAYS: REPORT ON HOUSING DISCRIMINATION AGAINST HURRICANE KATRINA SURVIVORS 2-5 (2005), available at <http://nationalfairhousing.org/resources/newsArchive/NFHA%20Katrina%20Discrimination%20Report.pdf>; NAT’L FAIR HOUS. ALLIANCE, 2005 FAIR HOUSING TRENDS REPORT 7-11 (2005), available at <http://nationalfairhousing.org/resources/newsArchive/2005%20Trends%20Report.pdf> (documenting fair housing complaints and estimating fair housing violations); Lisa de Moraes, *ABC Faces Reality, Pulls Welcome Mat on ‘Neighborhood’*, WASH. POST, June 30, 2005, at C7 (documenting ABC’s cancellation of a reality TV show named “Welcome to the Neighborhood,” in which white suburban families living on a Texas cul-de-sac decide which of seven families—including one black, one Asian, one Hispanic, and one gay couple—would move into their community).

237. 429 U.S. 252, 265-66 (1977) (*Arlington I*) (declaring that violation of the U.S. Constitution Equal Protection Clause requires a showing of discriminatory purpose as a motivating factor).

238. 347 U.S. 483 (1954).

239. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (considering resegregation after desegregation order as result of intervening demographic changes); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436-37 (1976) (stating that desired racial mix in schools, once achieved, could not be maintained “in perpetuity”); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (denying multi-district relief). The following cases involved petitions for dissolution of desegregation orders: *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002), *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001); *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971 (W.D. Mich. 2002).

“social discrimination” actionable in effect defers to these well-established forces. These decisions enable the established patterns of residential segregation to determine likely public school attendance, which is traditionally a defining characteristic of a neighborhood or community. Professor Richard Ford has argued that, given the legacy of patterns of racially identifiable neighborhoods and communities, further *intentional* enforcement or reinforcement of those patterns is not necessary to maintain them because they are to some degree self-replicating via the market economy.<sup>240</sup>

Using housing as a means of social organization by “class”—roughly wealth and income—is also long-standing and continues.<sup>241</sup> To some degree, the fact that housing production is primarily provided by the private market will help determine the location of housing. High-end housing developments exclude by virtue of price. And, of course, individual homeowners can build what have been called “McMansions” to individually mark their social status.<sup>242</sup> Yet, Professor Alexander documents the deliberate and historically evolving strategy of using restrictive covenants, housing and building codes, and then zoning restrictions in order to enshrine and defend a classist order in housing law and policy.<sup>243</sup> For example, private restrictive covenants required that houses cost a certain

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The following decisions rejected voluntarily created desegregation plans: Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998). For a report documenting the resegregation, see ERIKA FRANKENBERG & CHUNGMEI LEE, HARVARD CIVIL RIGHTS PROJECT, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Race\\_in\\_American\\_Public\\_Schools1.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf); see also Arnold R. Hirsch, “Containment” on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War, 26 J. URB. HIST. 158, 160 (2000) (suggesting that segregation in federally-financed programs may have resulted directly from efforts to evade the mandate of *Brown v. Board of Education*); Arnold R. Hirsch, Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954, 11 HOUSING POL’Y DEBATE 393, 429-30 (2000) (noting that, at the time of *Brown*, “numerous Southern communities were using urban renewal to foster school segregation”).

240. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844-45 (1994).

241. Of course, in practice, race and class are inextricably interrelated.

242. This can only be done within the limits set by a locality’s regulation. See, e.g., Jasmine Kripalani, *Moratorium to Prevent “McMansions,”* MIAMI HERALD, Feb. 11, 2007, at GS.

243. Alexander, *supra* note 7, at 1233.

amount<sup>244</sup> and often excluded more affordable types of housing, including apartments and numerous forms of congregate living, from neighborhoods restricted to single-family homes.<sup>245</sup> The proliferation of gated communities may represent the latest stage in maintaining the established social order through housing.<sup>246</sup>

America's long-standing policies supporting homeownership can be interpreted as supporting a classist version of this ethic.<sup>247</sup> For example, housing advocates often point to the substantial amounts of money dedicated by tax expenditure to the federal interest mortgage deduction as a sign of America's willingness to subsidize housing and thereby support affordability.<sup>248</sup> Then, comparing the dollar amounts of tax revenues foregone by the mortgage interest deduction to HUD's budget, they criticize the distributional consequences of subsidizing homeownership over rental housing and advocate for a reallocation of total federal housing subsidies to benefit lower income households.<sup>249</sup>

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244. See, e.g., *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (discussing minimum cost requirements for housing). These covenants were apparently viewed as necessary to compensate for the market's failures in ensuring classist income separation.

245. See, e.g., Alexander, *supra* note 7, at 1237-42 (discussing use of restrictive covenants to protect the "first class residence"). Some courts enforcing these covenants construed the intent of such covenants as protecting "the economic value of the property, which would decline in the presence of high density dwellings." *Id.* at 1239. The famous dicta in the Supreme Court's opinion in *Euclid* offers a good example where "residential" is used to refer to single-family housing but not "apartments." *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) ("The serious question . . . involves the validity of . . . the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded."). The *Euclid* case is discussed *infra* notes 350-56 and accompanying text.

246. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 186-87 (1994); David L. Callies, *Common Interest Communities: An Introduction*, 37 *URB. LAW.* 325, 325 (2005); see *supra* note 28 (discussing whether these forms of housing herald a new housing ethic).

247. Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 *STAN. L. REV.* 1109, 1110 (1996) (reemphasizing the economic causes of racially segregated housing patterns). See *infra* Part III.A for an extended discussion of the relationship of homeownership policies to the housing ethics.

248. Dreier, *supra* note 30, at 8-9.

249. *Id.* at 9 ("In fact, mortgage interest deductions for those earning over \$100,000 are a sum greater than the entire HUD budget."); see also Hartman, *supra* note 146, at 235 n.21 ("Seventy percent of the mortgage interest deduction and 65 percent of the homeowners' property tax deduction went to taxpayers in the \$75,000-and-above income class in 1997 . . .") (quoting U.S. Congress Joint Committee on Taxation 1997). *But see* Nat'l Ass'n of Realtors,

Unlike explicit racial organization, which is now illegal, housing patterns characterized by income or class are still widely accepted.<sup>250</sup> In 1974, in *Village of Belle Terre v. Boraas*,<sup>251</sup> the U.S. Supreme Court appeared to bless the use of zoning to establish and protect a desired social order.<sup>252</sup> In that case, the Court upheld a zoning ordinance's definition of family that excluded households of more than two unrelated occupants.<sup>253</sup> However, in often cited expansively worded dicta, the Court approved the use of zoning as a means to promote other social values:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>254</sup>

Recently, Professor Alexander, writing about housing as providing social order, explored how housing has been used as a

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Defending the Mortgage Interest Deduction, [http://www.realtor.org/government\\_affairs/mortgage\\_interest\\_deduction/index.html](http://www.realtor.org/government_affairs/mortgage_interest_deduction/index.html) (last visited Mar. 19, 2007).

250. See discussion *infra* notes 294-300 and accompanying text.

251. 416 U.S. 1 (1974).

252. *Id.* at 7-10.

253. *Id.* at 2, 10.

254. *Id.* at 9. Relatedly, the Standard State Zoning Enabling Act, which provided a model zoning enabling statute that was widely adopted, offered the promotion of "morals" and the preservation of "the character of the district" as legitimate purposes of zoning. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 1, at 4, § 3, at 6-7 (1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>; see also SIDNEY BROWER, GOOD NEIGHBORHOODS: A STUDY OF IN-TOWN AND SUBURBAN RESIDENTIAL ENVIRONMENTS 43 (1996) ("Arguments in favor of comprehensive planning in the early twentieth century were really arguments for social segregation."). In contrast, in the *Euclid* case, the U.S. Supreme Court held that the basis of constitutional validation of comprehensive zoning was an extension of nuisance abatement and prevention. 272 U.S. 387-89. For a more complete discussion of the *Euclid* case, see *infra* notes 350-56 and accompanying text. A few years after the *Belle Terre* case, however, the Court drew back from such a deferential stance and struck down a definition of "family" that limited allowed residents to the "nuclear family," thereby embracing a different, more expansive, and older "traditional" definition of family as extended family. *Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1977).

means of social ordering via legal definitions of “family.”<sup>255</sup> He finds: “Our housing laws have been used, directly and indirectly, consciously and unconsciously, as vehicles for the definition and control of families, of what relationships count in determining what constitutes a family.”<sup>256</sup> He explores in detail how restrictive covenants, housing and building codes, and zoning law have become tools for social control.<sup>257</sup> While he finds that the classist and culturally biased intent behind the use of housing law has been consistently clear, his survey of court decisions reveals that the effectiveness of such schemes has varied as the courts interpret and apply them.<sup>258</sup>

Exclusionary versions of housing as providing social order—excluding people from a neighborhood because of their race or economic class—arguably were one of the dominant housing ethics in U.S. housing law and policy for decades. Unsurprisingly, attempts to challenge or undercut the social order established during this period are met with strong resistance. A few constitutional and statutory efforts are discussed here.

A number of important state constitutional decisions address the housing as social order ethic. In the famous *Mount Laurel*<sup>259</sup> cases, New Jersey’s Supreme Court took a strong stand against the “exclusionary zoning” commonly practiced by suburban municipalities in New Jersey and around the United States.<sup>260</sup> While there is no universally agreed-upon definition of “exclusionary zoning,” the term generally refers to zoning ordinances and planning codes “that have the intent or effect of excluding disadvantaged

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255. See Alexander, *supra* note 7.

256. *Id.* at 1232.

257. *Id.* at 1233.

258. Professor Alexander finds that courts often succumbed to (or possibly agreed with) segregationist interests by adopting questionable interpretations of words, e.g., regularly concluding that the presence of domestic servants did not violate a single-family restriction defining “family” as persons related by blood, marriage, or adoption. *Id.* at 1250. Yet, he also finds numerous cases in which courts applied the language of a restrictive covenant without such restrictive consequences, e.g., when courts refused to apply covenants restricting use to “dwellings” to exclude multi-unit buildings. *Id.* at 1239-40. This judicial inconsistency evidences the pluralism of our housing ethics. Overall, however, the historical trend Alexander traces is toward more refined and explicit restrictions adopted by promoters and being enforced by courts.

259. *S. Burlington County NAACP v. Twp. of Mount Laurel* (“*Mount Laurel II*”), 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Twp. of Mount Laurel* (“*Mount Laurel I*”), 336 A.2d 713 (N.J. 1975).

260. See *Mount Laurel I*, 336 A.2d at 734; *Mount Laurel II*, 456 A.2d at 490-91.

groups, particularly low- and moderate-income people and racial minorities, from a locality.”<sup>261</sup> These typically include: exclusion of multiple dwellings from all or most of a jurisdiction, minimum building size (or floor space), minimum lot sizes, frontage (lot width) requirements, and restrictions on the number of bedrooms. The *Mount Laurel* cases directly confront the classist dimension of exclusionary zoning by cities.<sup>262</sup> The court found that common zoning ordinances excluded many low- and moderate-income households.<sup>263</sup> The court found that, under the state constitution, a municipality “cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations [it] must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.”<sup>264</sup>

The *Mount Laurel* decisions were met with massive rebuke and intransigent resistance by politicians and communities.<sup>265</sup> The results of the doctrine are disputed.<sup>266</sup> A few states followed this trend,<sup>267</sup> but most did not. For example, in California’s landmark exclusionary zoning case, *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*,<sup>268</sup> the California Supreme Court upheld a voter-adopted zoning ordinance with exclusionary effects

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261. See Paul Davidoff & Linda Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 519 (1971); Ken Zimmerman & Arielle Cohen, *Exclusionary Zoning: Constitutional and Federal Statutory Responses*, in IGLESIAS & LENTO, *supra* note 65, at 39, 41 (citing 2 KENNETH H. YOUNG, ANDERSON’S AM. LAW OF ZONING §8.02 (4th ed. 1996)).

262. Interestingly, the briefs specifically framed the conflict in racial terms, but the court chose not to adopt that framing. See *Mount Laurel I*, 336 A.2d at 717. The case could also be interpreted as a challenge to an established exclusionary social order and support for the “housing as one land use in a functional system” ethic in that the court interpreted the state constitution to require localities to serve the regional general welfare in exercising their delegated land use authority regarding housing zoning and decisions.

263. *Id.* at 728.

264. *Id.* at 724-25.

265. Schuck, *supra* note 231, at 313. In addition, legal academics criticized the court as violating the separation of powers and reaching beyond its institutional competence. See, e.g., Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1008-09 (1985).

266. See, e.g., DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995); John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685 (1998) (reviewing CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996)).

267. See, e.g., *Berenson v. Town of New Castle*, 341 N.E.2d 236, 243 (N.Y. 1975); *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 613 (Pa. 1965).

268. 557 P.2d 473 (Cal. 1976).

on several grounds while it remanded the case for an additional determination.<sup>269</sup> This result provoked two strong dissents,<sup>270</sup> one of which explicitly raised the specter of society divided by class through housing settlement patterns:

[M]ay Livermore build a Chinese Wall to insulate itself from growth problems today? And if Livermore may do so, why not every municipality in Alameda County and in all other counties in Northern California? With a patchwork of enclaves the inevitable result will be creation of an aristocracy housed in exclusive suburbs while modest wage earners will be confined to declining neighborhoods, crowded into sterile, monotonous, multifamily projects, or assigned to pockets of marginal housing on the urban fringe. The overriding objective should be to minimize rather than exacerbate social and economic disparities, to lower barriers rather than raise them, to emphasize heterogeneity rather than homogeneity, to increase choice rather than limit it.<sup>271</sup>

The federal Fair Housing Amendments Act (“FHAA”)<sup>272</sup> and its state equivalents<sup>273</sup> attempt to counter the use of housing to create and sustain an exclusive racial/ethnic social order.<sup>274</sup> Courts have held that the FHAA prohibits discrimination by governments in their exercise of delegated land use authority, e.g., by refusing to

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269. *Id.* at 475, 489-90.

270. *Id.* at 490-92 (Clark, J., dissenting); *id.* at 493-97 (Mosk, J., dissenting).

271. *Id.* at 494 (Mosk, J., dissenting).

272. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (2000).

273. *See, e.g.*, N.C. GEN. STAT. § 41A (2005).

274. Alexander, *supra* note 7, at 1265 (“The interpretation and application of the Fair Housing Act Amendments of 1988 present precisely the context for revealing these hidden social biases in our housing laws.”). While the federal Fair Housing Act (“FHAA”) does not address class-based discrimination directly, it does so partially and indirectly through the linkages between race/ethnicity and economic class. *See* Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399 (2003) (describing housing advocates’ historical decision to not include economic status as a protected class in “fair housing” law). In truth, the FHAA itself is ambivalent. It includes the so-called “Mrs. Murphy exception,” which exempts owner-occupied structures of four families or less from FHAA coverage. 42 U.S.C. § 3603(b)(2). This exemption subordinates the FHAA’s overall effort to resist the use of housing as providing social order to the “housing as home” ethic. The effect is the same whether the exemption was included for principled or pragmatic reasons (i.e., to get needed votes to pass the FHAA by not rocking the “social order” established by existing housing patterns and social expectations too radically). In effect, fair housing law has been shaped to be not just “within constitutional limits,” but also within limits set by the other housing ethics.

grant discretionary land use approvals to a housing development because it would primarily serve members of protected classes.<sup>275</sup> While all the federal circuits have adopted some version of disparate impact theory for proving this kind of discrimination under the FHAA,<sup>276</sup> it is not clear that the U.S. Supreme Court will embrace that theory.<sup>277</sup> The FHAA was strengthened in 1988, but, to date, it has never been vigorously enforced.<sup>278</sup>

The lengthy and complex *Gautreaux* litigation is another example of a complex, protracted effort to reform our current housing social order.<sup>279</sup> This effort successfully challenged Chicago's long-standing practice of locating public housing developments to create and maintain racial segregation.<sup>280</sup> The court awarded an innovative remedy—mobility vouchers—to enable public housing residents (who were mostly people of color) to move to communities that were not negatively racially coded.<sup>281</sup> Later, HUD operated a demonstration “Moving to Opportunity” program modeled after this remedy.<sup>282</sup> Some see mobility vouchers as a potential national antidote to the prior racist and classist social ordering by housing.<sup>283</sup>

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275. *Casa Marie, Inc. v. Superior Court*, 988 F.2d 252, 257 n.6 (1st Cir. 1993) (stating that the FHAA covers the discriminatory use of zoning laws); *United States v. City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) (holding city is a “person” under the FHAA).

276. See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* (2006); see also *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (setting out the four prong disparate impact test). “Disparate impact” claims can succeed (in theory) without proving intent.

277. See Anthony W. Cresap, *The Fair Housing Act Case That Never Was*, *LAND USE & ZONING DIG.*, July 2003, at 12, 13, available at <http://www.planning.org/PEL/commentary/jul03e.htm>.

278. See, e.g., NAT'L FAIR HOUS. ALLIANCE, 2005 FAIR HOUSING TRENDS REPORT 2 (2005), available at <http://www.nationalfairhousing.org/resources/newsArchive/2005%20Trends%20Report.pdf>; John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071-72 (1998); Victoria A. Roberts, *With a Handshake and a Smile: The Fight to Eliminate Housing Discrimination*, 73 MICH. B.J. 276, 277 (1994).

279. *Gautreaux v. Chi. Hous. Auth.*, 436 F.2d 306, 312-13 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971) (finding defendant housing authority had intentionally maintained a system of public housing that unconstitutionally discriminated on racial grounds with respect to selection of public housing sites and granting equitable relief to plaintiffs).

280. *Id.* at 307, 312-13.

281. See Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 459 (1988).

282. MARGERY TURNER & KALE WILLIAMS, *HOUSING MOBILITY: REALIZING THE PROMISE* 33-44 (1998) (reporting on the “Moving to Opportunity” project).

283. Margery Austin Turner & Dolores Acevedo-Garcia, *Why Housing*

In opposition to visions of using housing to enact exclusive racist and classist ideals, there are competing “progressive” visions of inclusive community in which housing law and policy are deployed to promote a non-stratified social order.<sup>284</sup> These include mixed-income housing,<sup>285</sup> ethnically diverse communities,<sup>286</sup> and various forms of cooperative housing.<sup>287</sup> There is an ongoing debate about whether, in addition to anti-discrimination (or desegregation), the promotion of racial and economic integration was one of the policy goals of the federal Fair Housing Act in 1968.<sup>288</sup> The case law construing the integration purpose of fair housing law is complex and unsettled.<sup>289</sup> In *United States v. Yonkers Board of Education*,<sup>290</sup> the court upheld a decree mandating construction of subsidized housing in white neighborhoods to achieve residential integration after finding sufficient evidence to prove intentional discrimination

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*Mobility? The Research Evidence Today*, POVERTY & RACE, Jan.-Feb. 2005, at 1; Symposium, *A National Gautreaux Program*, POVERTY & RACE, Jan.-Feb. 2005, at 3.

284. For a critique of progress of housing authorities to assure an integrated housing policy, see Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619 (1993). Affordability is nearly always a key part of these progressive visions.

285. See Paul C. Brophy & Rhonda N. Smith, *Mixed-Income Housing: Factors for Success*, 3 CITYSCAPE 3 (1997); Jill Khadduri & Marge Martin, *Mixed-Income Housing in the HUD Multifamily Stock*, 3 CITYSCAPE 33 (1997); James Rosenbaum et al., *Lake Parc Place: A Study of Mixed-Income Housing*, 9 HOUSING POL'Y DEBATE 703 (1998).

286. INGRID GOULD ELLEN, *SHARING AMERICA'S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION* 8-9 (2000); Jill Mazullo, *Organizing for Regional Equity: The Gamaliel Foundation*, POVERTY & RACE, Sept.-Oct. 2004, at 5 (summarizing some projects of a private foundation); Philip Nyden et al., *The Emergence of Stable Racially and Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities*, 8 HOUSING POL'Y DEBATE 491 (1997).

287. Ellickson, *supra* note 26, at 274-75; William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1364 (1991) (lauding cooperative housing for “creat[ing] a fairly strong form of interdependence, as well as opportunities for collective action”). For information on cohousing, see CHRIS SCOTTHANSON & KELLY SCOTTHANSON, *THE COHOUSING HANDBOOK: BUILDING A PLACE FOR COMMUNITY* (2005); The Cohousing Ass'n of the U.S., <http://www.cohousing.org> (last visited Mar. 4, 2007).

288. Robert G. Schwemm, *Integration as a Goal of Title VII*, in HOUSING DISCRIMINATION, *supra* note 276, § 2:3.

289. See, e.g., James J. Sing, Case Note, *Integration as a Two-Way Street: Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), 108 YALE L.J. 479, 479 (1998) (arguing that the court improperly underemphasized the objectives of the FHA in its analysis).

290. 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

under both the Equal Protection Clause and the FHAA.<sup>291</sup> This extensively litigated case was followed by equally extensive post-judgment conflict in implementing its remedies.<sup>292</sup> It may be seen as the FHAA's counterpart to the *Mount Laurel* cases.<sup>293</sup>

An exclusive version of the "housing as providing a social" order ethic has been well established in U.S. housing law and policy for decades. While it is now illegal to construct and maintain racially exclusive neighborhoods, many laws and policies continue to preserve neighborhoods characterized by economic class.

*The "Housing as Providing Social Order" Ethic and Affordability*

Our current housing patterns are largely the legacy of a racially and economically exclusive version of this ethic. These patterns and ongoing acceptance of class-based housing patterns pose a formidable challenge to progress in achieving greater affordability. For this reason, the struggle to ensure relative affordability clashes most dramatically and consistently with the dominant and exclusive "housing as providing social order" ethic. Nearly every type of affordable housing policy encounters stiff resistance from the established "housing as providing social order" ethic. However, pro-affordability policies and laws have made some inroads. A few such policies are reviewed here. Competing "inclusive" versions of the "housing as providing social order" ethic may benefit affordability. As discussed, affordability's (real and perceived) entanglement with race and poverty hinder affordable housing efforts that challenge the status quo.

Exclusionary zoning (discussed *supra*) and NIMBY opposition to the siting of affordable housing developments exemplify the conflict between affordability and the currently dominant housing as social order ethic. They both present substantial obstacles to the siting of affordable housing developments. Nearly any proposed affordable housing development will require discretionary land use and funding approvals by the locality in which it is proposed. In the NIMBY phenomenon, affordable housing is opposed by existing residents in the discretionary review process as not fitting "the character of their neighborhood."<sup>294</sup> Attempts to site affordable

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291. *Id.* at 1184.

292. See Schuck, *supra* note 231, at 345-56.

293. See *id.* at 309-19 (discussing the *Mount Laurel* cases and their aftermath).

294. There is vast literature documenting the NIMBY phenomenon. For a

housing in “established neighborhoods” provokes stereotypes of “those people” who, it is feared, will bring chaos to an otherwise stable and wholesome social order in the neighborhood.<sup>295</sup> The feared residents must be kept separate and distinct, preferably somewhere else far away, which means that the housing proposal that would serve them must be opposed.<sup>296</sup> The resistance is often expressed as concerns about traditional land use issues, e.g., design, traffic, congestion, and increased demands on schools.<sup>297</sup> When these concerns are well-founded, they are often easily dealt with by developers and municipalities (if the localities’ policies are inclined to support the development).<sup>298</sup> Yet, opposition usually continues, leading developers and housing advocates to point to a consistent current of racism and classism that drives the opposition. It is not enough to reassure existing residents regarding property values and crime statistics, because the real concern is about “those people” living in “my neighborhood.”<sup>299</sup> Attempts to plan mixed-income neighborhoods and housing also run up against this aspect of the social order.<sup>300</sup>

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selected list, see Tim Iglesias, *Managing Local Opposition: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & CMTY. DEV. L. 78, 102 n.5 (2002).

295. *See id.* at 79-83.

296. *Id.* at 81-83.

297. *Id.* at 90-91; see also HOMEBASE: THE CTR. FOR COMMON CONCERNS, BUILDING INCLUSIVE COMMUNITY: TOOLS TO CREATE SUPPORT FOR AFFORDABLE HOUSING 44-50, 87-94 (1996).

298. Of course, if the locality’s policies disfavor affordable housing, then approval is even less likely.

299. For up-to-date resources on anti-NIMBY/pro-community housing projects, see Building Better Cmtys. Network, <http://www.bettercommunities.org> (last visited Mar. 4, 2007); Building Better Cmtys. Network, NIMBY Reports, <http://www.bettercommunities.org/index.cfm?method=nimby.list&new=1> (last visited Mar. 4, 2007). Importantly, effective responses to NIMBY recognize the underlying racism and classism but do not narrowly address it on that basis. Iglesias, *supra* note 294, at 107 n.22.

300. *See, e.g.*, GREAT CITIES INST., CREATING MIXED INCOME NEIGHBORHOODS: A CHALLENGE TO CHICAGO’S LEADERSHIP (1996), available at <http://www.uic.edu/cuppa/gci/publications/working%20paper%20series/pdf/income.pdf>; MICH. STATE UNIV. EXTENSION, MIXED-INCOME NEIGHBORHOODS: A SUMMARY OF TWO STUDIES (Brian Anderson ed., 2004), available at <http://www.unitedgrowth.org/pdfs/reports/Mixed.pdf>; NEIGHBORHOOD REINVESTMENT CORP., EARLY CONCLUSIONS FROM THE MIXED-INCOME DEMONSTRATION PROGRAM: REACHING EXTREMELY LOW-INCOME FAMILIES IN MIXED-INCOME SETTINGS (2002), available at <http://www.nw.org/network/pubs/studies/documents/MixedIncomerReport2002.pdf>; ALASTAIR SMITH, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV. & NEIGHBORHOOD REINVESTMENT CORP., MIXED-INCOME HOUSING DEVELOPMENTS: PROMISE AND REALITY (2002), available at [http://www.jchs.harvard.edu/publications/W02-10\\_Smith.pdf](http://www.jchs.harvard.edu/publications/W02-10_Smith.pdf).

The FHAA is only marginally effective against NIMBY, particularly if the opposition is sophisticated. Economic status is not a protected class under the FHAA.<sup>301</sup> Therefore, evidence of opposition to the proposal based upon the income of the intended residents is not evidence of a violation of the FHAA. California and a few other states have adopted so-called “anti-NIMBY” laws.<sup>302</sup> For example, one law limits localities’ discretion in disapproving certain affordable housing developments and requires certain findings for such disapprovals.<sup>303</sup> Another specifically prohibits discrimination against affordable housing, the residents or potential residents of affordable housing, or the developers of affordable housing.<sup>304</sup> Yet another exempted certain affordable housing developments from environmental review, a common weapon opponents use to attack housing proposals.<sup>305</sup> These laws have met with mixed results.<sup>306</sup>

“Inclusionary zoning” offers another attack on the social order historically created by housing patterns.<sup>307</sup> “Inclusionary zoning” is a type of regulation in which a local government encourages or requires a private market-rate housing development to include some percentage of rent-restricted units for lower income households in its development.<sup>308</sup> It can be seen as a response to previous “exclusionary zoning.”<sup>309</sup> Often such ordinances include economic

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301. 42 U.S.C. § 3604(a) (2000).

302. See generally CAL. AFFORDABLE HOUS. LAW PROJECT, LAWS AFFECTING THE LOCATION & APPROVAL OF AFFORDABLE HOUSING FOR FAMILIES AND HOMELESS PEOPLE: HOW THEY WORK & HOW TO USE THEM (2000), available at <http://www.pilpca.org/docs/CASCManual-Title.pdf>.

303. CAL. GOV’T CODE §§ 65589.5, 65589.7 (Deering Supp. 2007).

304. CAL. GOV’T CODE § 65008 (Deering Supp. 2007).

305. CAL. PUB. RES. CODE § 21080.7 (Deering 1996) (repealed 2002). California also created special damages provisions to deter bad faith suits. See CAL. CIV. PROC. CODE § 529.2 (Deering 1995); see also CAL. GOV’T CODE § 65914 (Deering 1987) (allowing courts to award costs of the suit to a prevailing public entity in actions challenging low- and moderate-income housing developments).

306. See generally Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in IGLESIAS & LENTO, *supra* note 65, at 73.

307. For an excellent explanation of inclusionary zoning, see Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002); see also Salsich, *supra* note 306, at 89-103.

308. See Kautz, *supra* note 307, at 971-74. Many ordinances also offer developers the option of siting affordable units off-site, paying “in lieu” fees, or demonstrating that the requirement should not apply to their development.

309. “Proponents [argue] that inclusionary zoning merely corrects suburban exclusionary zoning that artificially raises prices.” Kautz, *supra* note 306, at 974; see also *infra* note 421 and accompanying text (discussing how inclusionary zoning could also be expressed and justified as a land use control).

incentives, such as a “density bonus,” which allows the developer to build more units on the land than she would normally have been allowed to build in order to reduce the economic burden of the inclusionary requirement.<sup>310</sup> Beyond its potential economic costs to developers, landowners, and/or new home buyers,<sup>311</sup> inclusionary zoning is threatening because it makes affordability in housing part of a new progressive social order created by an orderly process.

All levels of government (federal, state, and local) have established programs that make homeownership available to some low-income households.<sup>312</sup> Developments providing low-income homeownership sometimes encounter less NIMBY opposition, possibly because they comport with the “housing as social order” ethic’s preference for homeownership.<sup>313</sup> In addition, cities and neighborhoods are more likely to accept “market affordable” forms of housing (such as secondary units and manufactured housing) than government-subsidized housing because occupants of these forms of housing do not attract the stigma associated with people who rely on government benefits to meet their housing needs. Yet, often even these policies and developments are stung by NIMBY opposition.<sup>314</sup> A few federal efforts and several state statutes attempt to address this problem for these market-affordable forms of housing. For example, the National Manufactured Home Construction and Safety Standards Act of 1974<sup>315</sup> was enacted in part to increase local governments’ confidence in the safety and quality of manufactured housing, so that they would be more willing to allow it in their jurisdictions.<sup>316</sup> These efforts have met with mixed results because

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310. Kautz, *supra* note 307, at 981.

311. *See id.* at 983-87. *See generally* Andrew G. Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 *FORDHAM URB. L.J.* 23 (1996); Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 *S. CAL. L. REV.* 1167 (1981).

312. *See, e.g.*, Nat’l Low Income Hous. Coal., HOME Investment Partnership Program (Feb. 28, 2006), [http://www.nlihc.org/detail/article.cfm?article\\_id=2770&id=19](http://www.nlihc.org/detail/article.cfm?article_id=2770&id=19).

313. *See infra* Part III.A (discussing homeownership).

314. *See, e.g.*, Iglesias, *supra* note 65, at 113, 116 (discussing local opposition to mobile homes and manufactured housing). This suggests that NIMBY opposition to affordable housing is class and race related, not fueled merely by a market versus non-market housing distinction.

315. 42 U.S.C. §§ 5401-5426 (2000). The Department of Housing and Urban Development also promulgated regulations. *See* 24 C.F.R. §§ 3280.1-.904 (2006).

316. 42 U.S.C. § 5401(a)-(b); *see also* Iglesias, *supra* note 314, at 116-17; S. Mark White, *State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter*, 28 *URB. LAW.*

local governments typically have sufficient discretion to evade or avoid their intended effects.<sup>317</sup>

Efforts to guarantee affordability in housing inevitably conflict with historical patterns of exclusive social order. While it is now illegal to use racial criteria in housing decisions, such discrimination continues to occur. American society is conflicted about whether economic class distinctions are an appropriate basis upon which to fashion our housing law and policy.

*E. Housing as One Land Use in a Functional System*

*In order for communities to function, there must be an adequate supply of housing in proximity to employment, public transportation, and community facilities, such as public schools.*<sup>318</sup>

The “housing as one land use in a functional system” ethic focuses on the *functional* relationships between housing and other land uses (e.g., shopping, water, open space, transportation, schools, and medical facilities)<sup>319</sup> with the intent of designing and promoting the development of a workable, livable land use system. This ethic values the study and analysis of systems of relationships and uses the information in planning interventions to maintain or to revise those systems.<sup>320</sup> This ethic focuses attention on the fact that housing is only *one* of many land uses that are necessary for a healthy living environment. Depending upon its location, density, design, and other factors, housing like all land uses may have positive and negative effects on the surrounding land uses and environs.<sup>321</sup> Therefore, housing law and policy should focus on understanding the functional relationships among housing and other land uses instead of considering housing in isolation from or abstracted from these relationships. This ethic stresses the need for housing law and policy to be conscious and deliberate about

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263, 266 (1996).

317. See *supra* note 274 and accompanying text (discussing the burden for challenging zoning regulations in the affordable housing context).

318. AM. PLANNING ASS'N, POLICY GUIDE ON HOUSING (2006), available at <http://www.planning.org/policyguides/pdf/housing2006.pdf>.

319. This contrasts with the “housing as home” ethic, which largely views housing in isolation from these relationships.

320. Economists and others question this goal’s feasibility. Environmentalists may also question it. See Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 *ECOLOGY L.Q.* 335, 371 (1991) (“Ecological relationships, in particular, are extraordinarily complex and often ill-understood.”).

321. Sometimes these effects can be considered “externalities,” and one may perform a similar but distinct analysis of them using an economic model.

financing, producing, designing, and siting housing, considering its relationships to other land uses in the relevant geographical unit. The question this ethic poses to any new housing policy or rule is: *How will this proposal affect our infrastructure needs, our schools, our jobs-housing balance, and our employers' capacity to hire and retain workers?*

There are two primary schools of thought in this ethic: the "planning community" and the "environmentalist community."<sup>322</sup> The "planning community" is concerned with the physical and economic order and development of a locality, traditionally a legally-defined political jurisdiction. It treats housing as part of a city or town's land use system.<sup>323</sup>

Two of the primary bodies of law controlling land use—zoning and subdivision law—involve determining the proper relation of land uses from a functional perspective, e.g., separating incompatible uses and calculating for a given number of housing units how much traffic will be generated, how many fire stations, police stations, and schools will be needed, and determining the appropriate relative locations of each to enable proper utilization and to avoid incompatibilities.<sup>324</sup>

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322. Of course, members of the planning community often also are concerned with the environment and ecosystems. Some commentators consider that land use law and environmental law may become more entwined in the future. *See, e.g.,* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 7 (2003). Compared to the other housing ethics, this ethic may be somewhat less familiar to the general public, except for those who have participated in public hearings of Planning Commissions. However, the recent campaigns on behalf of "Smart Growth" and "sustainable development" may be increasing public awareness. The "housing as one land use in a functional system" ethic can also be seen in some aspects of consumer demand for housing. Someone might rent or buy a dwelling primarily because of what is it near and what opportunities its proximity to other land uses provide, even if the actual dimensions, layout, or quality of the dwelling itself are less than desired. This choice would be informed by the "housing as one land use in a functional system" ethic. *See* Lia Karsten, *Housing as a Way of Life: Towards an Understanding of Middle Class Families' Preference for an Urban Residential Location*, 22 *HOUSING STUDS.* 83 (2007). From the "housing as economic good" ethic, this same decision may be interpreted in a different way: all elements of the environment are assumed to be capitalized into the price of an apartment or detached dwelling.

323. *See supra* note 318 and accompanying text.

324. *See, e.g.,* ROBERT H. FREILICH & MICHAEL M. SCHULTZ, *MODEL SUBDIVISION REGULATIONS: PLANNING AND LAW* (2d ed. 1995) (including various types of functional plans); ERIC DAMIAN KELLY & BARBARA BECKER, *COMMUNITY PLANNING: AN INTRODUCTION TO THE COMPREHENSIVE PLAN* (1999); S. MARK WHITE, *APA PLANNING ADVISORY SERV., ADEQUATE PUBLIC FACILITIES*

State-mandated planning laws are another example of the legal expression of this ethic. Several states that delegate land use authority to localities require them to produce a separate planning document (usually called a “general plan” or a “comprehensive plan”) upon which to base their zoning ordinances and land use decisions. For example, California requires each locality to produce a comprehensive plan for the physical development of the area.<sup>325</sup> The plan must include seven particular elements, including a “housing element.”<sup>326</sup> Each element has specified content and must be consistent with the others and the whole plan.<sup>327</sup> Under California’s law, the comprehensive plan is the “constitution for all future development” upon which the locality’s land use authority is exercised.<sup>328</sup> If a locality fails to produce a plan or its plan is found to be not in “substantial compliance” because it does not conform to the state requirements, then a court may strip the locality of all land use authority until the plan is brought into compliance.<sup>329</sup> The fact

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ORDINANCES AND TRANSPORTATION MANAGEMENT (1996). To the degree that the Homesteading Acts distributed land for the purpose of encouraging the formation of livable communities by human settlement, they could also be considered consistent with this ethic. See Trina Williams, *The Homestead Act: A Major Asset-Building Policy in American History* 5-6 (Ctr. for Soc. Dev., Working Paper No. 00-9, 2000), available at <http://gwweb.wustl.edu/csd/Publications/2000/wp00-9.pdf>. This is an example of government making land for housing available to those who might not otherwise be able to obtain a house.

325. CAL. GOV’T CODE §§ 65300-65307 (Deering 1987 & Supp. 2007). California probably has the most detailed planning requirements of any state.

326. California requires the following seven elements in a General Plan: land use element, circulation element, housing element, conservation element, open-space element, noise element, and safety element. *Id.* § 65302.

327. *Id.* § 65300.5 (“In construing the provisions of this article, the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency.”). For example, the “circulation element” is required to include the “general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities.” *Id.* § 65302(b). The “land use element” must provide, inter alia, the expected types and densities of development, including of undeveloped land. *Id.* § 65302(a). Moreover, there must be “internal consistency” within each element and in the plan as a whole. *Concerned Citizens of Calaveras County v. Calaveras County Bd. of Supervisors*, 212 Cal. Rptr. 273, 275-79 (Ct. App. 1985). In sum, there must be “horizontal consistency” among all of the elements of the plan and “vertical consistency” among the plan, a locality’s zoning ordinances, regulations, and land use decisions to ensure implementation of the plan.

328. *O’Loane v. O’Rourke*, 42 Cal. Rptr. 283, 288 (Ct. App. 1965).

329. See *Camp v. Mendocino County Bd. of Supervisors*, 176 Cal. Rptr. 620,

that housing is just *one* of seven required elements and the various consistency requirements seek to functionally harmonize housing with other land uses can be seen as an expression of the “housing as one land use in a functional system” ethic.

Courts have upheld state requirements on localities to perform mandated planning.<sup>330</sup> In addition, courts have been very deferential to such functional planning efforts initiated by cities themselves, upholding them against a variety of attacks, such as regulatory takings, especially if they are founded on substantial studies and analysis.<sup>331</sup> And, while the U.S. Supreme Court cases reviewing property-rights-based claims against local governments have not always embraced functionally oriented planning,<sup>332</sup> on balance they appear to recognize and affirm its value.<sup>333</sup>

The “planning community” discourse traditionally embodies a conscious or unconscious “anthropocentric” view: its focus is primarily on creating and sustaining a human-built environment as a habitat for humans. The traditional planning view can incorporate environmentalist concerns but regularly prioritizes human needs and preferences. In contrast, the “environmentalist community” views housing as part of a larger ecosystem and views human interventions in the ecosystem as bearing the risk of interfering with the habitats of plants and other animals.<sup>334</sup> The environmentalist community is primarily concerned with the entire ecosystem’s order and development, especially potential conflicts between human uses or interventions and the rest of the ecosystem. There are many distinct and conflicting versions of the environmentalist discourse.<sup>335</sup> One version is concerned with the sustainability of the ecosystem as a human habitat, recognizing that humans can change it to meet their preferences but that they are ultimately subject to its rules.<sup>336</sup> Another version refuses to

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629 (Ct. App. 1981).

330. *See, e.g.*, *Hoffmaster v. City of San Diego*, 64 Cal. Rptr. 2d 684, 697 (Ct. App. 1997).

331. *See, e.g.*, *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291, 304-05 (N.Y. 1972).

332. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992).

333. *See, e.g.*, *Kelo v. City of New London*, 125 S.Ct. 2655, 2668 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

334. *See generally* James Salzman, *A Field of Green? The Past and Future of Ecosystem Services*, 21 J. LAND USE & ENVTL. L. 133 (2006).

335. *See supra* note 19 and accompanying text.

336. John A. Humbach states:

A new land ethic, an ethic of planning and stability, has emerged.

subordinate the habitat interests of other animals and plants to human needs and preferences.<sup>337</sup>

Environmental versions of this ethic can frequently conflict with any new housing proposal. The National Association of Home Builders' criticisms of the effects of environmental legislation on the supply of housing is one expression of this common conflict.<sup>338</sup>

While there are inevitable conflicts between environmental preservation and urban or suburban growth, the "Smart Growth" movement integrates the planning community discourse, which accepts the need and inevitability of housing development, with one version of the environmental community discourse.<sup>339</sup> The "Smart Growth" analysis begins with a critique of "sprawl development" in the context of strategies to manage urban and suburban growth.<sup>340</sup>

The concern about "sprawl development" (still disputed by some) is that certain land use patterns that were promoted by zoning schemes dominant in the post-World War II period and enabled by government subsidies—including low-density, single-family housing development that is separated from all other uses—have created an auto-dependent lifestyle that is dysfunctional and unsustainable.<sup>341</sup> In response, various versions of "Smart Growth"

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. . . The spread of zoning and environmental regulation is proof that the American landbase is seen, more than ever, as a shared resource of all. The permanence and immobility of land make it a very special kind of commodity. Decisions about land use effectively determine for everyone what our communities and countryside will look like and the quality of life that our land will sustain. The use of private land is never an entirely private affair.

Humbach, *supra* note 20, at 341-42 (footnotes omitted).

337. Eric T. Freyfogle describes the distinction in his interpretation of the development of Aldo Leopold's thought. Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217, 223 (1990) (describing how Aldo Leopold "replac[ed] his anthropocentrism with a largely biocentric world view" and developed his "view of mankind as but one part of a larger natural community").

338. See Peter J. May & Chris Koski, *State Environmental Policies: Analyzing Green Building Mandates*, 24 REV. POL'Y RES. 49, 53 (2007), available at <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1541-1338.2007.00267.x>.

339. See Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 117-26 (2002). There are numerous versions of "Smart Growth." "Sustainable Development" is a similar but more environmentally-exacting combination of planning and environmental discourse. These discussions and debates have been conducted in planning and legal circles for over a decade.

340. See Parris N. Glendingen, *Smart Growth: Maryland's Innovative Answer to Sprawl*, 10 B.U. PUB. INT. L.J. 416 (2001).

341. See, e.g., ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL*

propose mixed-use and transit-oriented development and walkable neighborhoods as alternative development patterns.<sup>342</sup> The “Growing Smart” project, a multi-year effort by the American Planning Association to promote reform of state laws delegating land use authority to local governments, is a good example.<sup>343</sup>

The problem of the “fiscalization of land use” is another important dimension of contemporary conflicts regarding whether and how housing fits in a community.<sup>344</sup> To compensate for reduced tax revenues and continuing or expanding expenses, many municipalities have considered the fiscal impacts of a proposed land use as an important, if not determinative, factor in discretionary approval processes.<sup>345</sup> While it is still a matter of dispute, the common view is that housing developments are fiscal “losers” because the tax revenues they generate do not cover the municipal costs they impose on the community.<sup>346</sup> Cities respond to this problem by adopting policies to restrain all residential growth, adopting exclusionary policies to allow only high-end housing developments, or imposing additional fees and taxes on residential development so that it becomes revenue neutral.<sup>347</sup>

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AND THE DECLINE OF THE AMERICAN DREAM (2000).

342. See URBAN LAND INST., FORGING PARTNERSHIPS: OVERCOMING COMMUNITY RESISTANCE TO DEVELOPING WORKFORCE HOUSING (2001) (offering recommendations such as using transit-oriented design to encourage mixed-use, pedestrian-oriented developments for middle-income residents; employing land trusts and affordable housing trust funds to promote the development of affordable housing; and using inclusionary zoning, voluntary set-asides, and bonus provisions to engender housing development); see also Smart Growth America, <http://www.smartgrowthamerica.org/> (last visited Mar. 1, 2007); Smart Growth Network, Smart Growth America, <http://www.smartgrowth.org/Default.asp?res=1024> (last visited Mar. 1, 2007).

343. See STUART MECK, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (2002) [hereinafter MECK, GUIDEBOOK]; STUART MECK, THE AMERICAN PLANNING ASSOCIATION'S GROWING SMART PROJECT: AN OVERVIEW FOR ATTORNEYS (2001), available at SG021 ALI-ABA 559 [hereinafter MECK, OVERVIEW].

344. See, e.g., Cal. Planning Roundtable, Restoring the Balance: Managing Fiscal Issues and Land Use Planning Decisions in California (2001), <http://www.cprroundtable.org/cprwww/docs/fiscal.html>.

345. *Id.*

346. *Id.*

347. *Id.* Some view the “fiscalization of land use” as a distortion of the values and analysis that this ethic should promote. See, e.g., *id.* For an interesting consideration of how metropolitan governmental structures could help resolve this problem and promote affordable housing, see Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL'Y & L. 471 (1998).

The “housing as one land use in a functional system” ethic has a complex relationship with the “housing as part of social order” ethic. While plans do state “goals” that are value-laden, e.g., to provide for the harmonious development of all needed land uses,<sup>348</sup> unlike efforts in the “housing as providing social order” ethic, planning goals do not aim to establish a particular social order. Most state a “liberal” vision of the “good life”—meaning that they try to maximize the individual’s opportunities to seek his or her own version of the “good life” with a similar liberty for all. However, the implementation of a plan derived from the “housing as one land use in a functional system” ethic will result in discernable patterns of housing development, and these patterns *may* yield a social order in which housing plays an important role, even if the establishment of that social order may not be a deliberate goal of the ethic.<sup>349</sup>

*Village of Euclid v. Ambler Realty Co.*<sup>350</sup> exemplifies how the “housing as social order” ethic can be entangled with the “housing as one land use in a functional system” ethic. In *Euclid*, the U.S. Supreme Court upheld the use of the police power for comprehensive zoning against a due process challenge.<sup>351</sup> The Court’s primary expressed rationale for affirming the constitutional validity of comprehensive zoning sounded in the “housing as one land use in a functional system” ethic.<sup>352</sup> The Court analogized to common law nuisance, observing that comprehensive zoning was only a means to prevent and regulate conflicts among land uses.<sup>353</sup> This analogy justifies the zoning power in functional terms.<sup>354</sup> And, on the “serious question” of the case, regarding the constitutional validity of exclusive single-family housing zones, the Court’s expressed justification is similarly functional, relying on a bevy of studies that concluded that the proximity of “tenements” to single-family homes

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348. For example, the City of Fremont, California’s General Plan lists fourteen fundamental goals, including “Fremont as a city of quality and distinction,” “[a] harmonious blend of the natural and built environments,” “[a] Cityscape with an open feeling,” and “[a]n inclusive community that welcomes people of different ages, ethnicity, and income.” FREMONT GENERAL PLAN 2-3 to 2-4 (2005) (on file with author).

349. It is also possible to argue that any pattern created by a plan *will* definitely lead to a social order, even it is not foreseeable. Some versions of “Smart Growth” arguably extend to the “housing as providing social order” ethic when they seek to create housing patterns that foster “community life” among residents.

350. 272 U.S. 365 (1926).

351. *Id.* at 397.

352. *See id.* at 388-96.

353. *Id.* at 387-89.

354. *See id.*

ruined the latter to justify excluding the former from the same zone.<sup>355</sup> In contrast, the district court opinion in *Euclid* found comprehensive zoning constitutionally infirm, in part because the court viewed the real goal of the program as establishing a classist “social order” by separating housing of different incomes into different zones.<sup>356</sup> One of the reasons for the continuing and apparently intractable conundrum over “functional” land use regulation, such as zoning, is that, in practice, it is both a means of establishing a functional land use system and, whether deliberately or unconsciously, also may promote a particular “social order.”

The “housing as part of habit” ethic thrives in contemporary planning codes and zoning ordinances nationwide. It also is the focal point of vigorous reform efforts addressing our land use patterns, including housing.

*The “Housing as One Land Use in a Functional System” Ethic and Affordability*

Within the “housing as one land use in a functional system” ethic, affordability in housing can pragmatically be considered as necessary for a functional community. Over the years, many planners, elected officials, business groups, and community activists have been sympathetic to the need for housing affordability.<sup>357</sup> They have understood that well-designed and professionally managed contemporary affordable housing does not have the expected

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355. *Id.* at 390-96. The Court accepted the city’s treatment of single-family housing as a distinct land use from “apartments.” *Id.* at 390. This discussion concerns the type of discourse used and is not to deny the possible motives and racial context of the case. *See* Chused, *supra* note 224. Notably, the *Euclid* zoning ordinance’s definition of “family” (as in many early zoning ordinances) was a functional one: “any number of individuals living and cooking together on the premises as a single housekeeping unit.” *Euclid Village, Ohio, Ordinance of 1922, cited in Alexander, supra* note 7, at 1258. Alexander notes: “The focus of these housing laws during this period of time tended to be on the use or function of the structures on the property and not on the relationships among the occupants. . . . [This] continued to be the dominant approach across the country into the 1930s, 1940s, and 1950s.” *Id.*

356. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924). The district court, which embraced the view of an unfettered “free market,” also relied upon the “housing as economic good” ethic. *See id.* at 309-10.

357. *See, e.g.,* LITTLE HOOVER COMM’N, REBUILDING THE DREAM: SOLVING CALIFORNIA’S AFFORDABLE HOUSING CRISIS 63-67 (2002), *available at* [http://www.novoco.com/low\\_income\\_housing/resource\\_files/research\\_center/calif\\_hoover\\_report.pdf](http://www.novoco.com/low_income_housing/resource_files/research_center/calif_hoover_report.pdf) (listing government, business, and community members who testified at the Commission’s hearings about the need to ensure an adequate supply of housing, including affordable housing).

negative effects that plague the image of public and government-subsidized housing.<sup>358</sup> They are open to its incorporation into a healthy land use system.<sup>359</sup> Moreover, they claim that affordable housing can be a necessary part of a functional land use system and a community asset.<sup>360</sup> When affordable housing is perceived as a community asset that is necessary for a healthy land use system, the affordability movement is strengthened. Conversely, it is weakened when plausible arguments can be made that affordable housing is unnecessary or harmful to surrounding land use, e.g., because of increased crime and lowered property values. Clearly, the relationship between this ethic and affordability will vary depending upon the actual goals and priorities of planning or intervention efforts. In some contexts, planners have supported affordability, but decisionmakers have been ambivalent or opposed. Additionally, some environmentalists oppose any or most housing development, prioritizing the habitat of plants and animals over housing for people.

California's comprehensive planning law is an example of a legislative effort to promote affordability within a "housing as one part of a functional system" ethic.<sup>361</sup> This law requires that the housing element component of each locality's comprehensive plan provide for the possible development of needed housing for every income level, including homeless people.<sup>362</sup> Localities must consider and address the regional needs for affordable housing at each stage

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358. For examples of studies investigating the effects of affordable housing on nearby land uses, see *supra* note 83 and accompanying text.

359. See AM. PLANNING ASS'N, POLICY GUIDE ON HOUSING 1 (2006), available at <http://www.planning.org/policyguides/pdf/housing2006.pdf>:

The housing stock must include affordable and accessible for sale and rental units, not only to meet social equity goals, but in order to ensure community viability. The development of a diverse and affordable housing stock must be carried out without sacrificing sound regulations that are in place to protect the environment and public health.

*Id.* See generally AFFORDABLE HOUSING READER, <http://www.planning.org/affordablereader> (last visited Mar. 18, 2007) (compiling articles that identify and evaluate various solutions to the affordable housing problem). Chapter 4 of the American Planning Association's *Growing Smart Legislative Guidebook* includes options for state mandated planning for affordable housing and state appeals boards for affordable housing developments. MECK, GUIDEBOOK, *supra* note 343, at ch. 4.

360. MECK, GUIDEBOOK, *supra* note 343, at ch. 4; see also *Study Finds Public Housing Benefits Low-Wage Workers, Communities*, 35 HDRCURDEV 9, Feb. 19, 2007; *supra* note 83 and accompanying text.

361. See CAL. GOV'T CODE §§ 65583(a)(1), (a)(6) (Deering 1987).

362. *Id.*

of their planning process, e.g., recognizing regional needs for affordable housing as part of the facts their plan must address, reviewing the effects of their current zoning and planning policies on affordable housing, and proposing new policies and programs to address unmet needs.<sup>363</sup> This law (and others like it) create what might be called a “social right to housing.”<sup>364</sup> There is a legal obligation owed by the government to the community. The law provides a private right of action, although the available remedy is not an individual claim on a housing unit but an injunction requiring the local government to revise its housing element to be in compliance with the state law.<sup>365</sup>

Courts too have acknowledged the functional value of affordable housing for a healthy land use system. For example, in *Commercial Builders of Northern California v. City of Sacramento*,<sup>366</sup> a California appellate court upheld a locally adopted linkage fee program against a regulatory takings challenge.<sup>367</sup> A linkage fee program requires commercial developments above a certain size to pay additional fees to the city that will be used to subsidize the development of affordable housing in the jurisdiction at the affordability level needed by lower-wage workers.<sup>368</sup> The concept behind a linkage fee is functional: new business developments create a need for housing their workers, some of whom will be low-income (as measured by anticipated wage scales) and some of whom will live in the

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363. *Id.* §§ 65583(a)-(c).

364. David Flanagan, president of Elm Street Development, supports mandated regional and state planning for production of new housing in areas where housing demand exceeds supply. NAT'L ASS'N OF HOME BUILDERS & FREDDIE MAC, AMERICA'S WORKING FAMILIES: WHERE WILL THEY LIVE? CLOSE TO HOME: A SYMPOSIUM ON WORKFORCE HOUSING 18 (2004), available at [http://www.nahb.org/fileUpload\\_details.aspx?contentTypeID=7&contentID=481](http://www.nahb.org/fileUpload_details.aspx?contentTypeID=7&contentID=481) [hereinafter CLOSE TO HOME]. The term “social right to housing” should be distinguished from the common expression “social housing,” which refers to either government-supplied or government-subsidized housing, especially in Europe. Professor Bo Bengtsson addresses a similar concept regarding Swedish housing law. Bo Bengtsson, *Housing as a Social Right: Implications for Welfare State Theory*, 24 SCANDINAVIAN POL. STUDS. 255, 255-75 (2001) (copy on file with author).

365. CAL. GOV'T CODE §§ 65754-65761 (Deering 1987).

366. 941 F.2d 872 (9th Cir. 1991).

367. *Id.* at 873.

368. *Id.* “The Ordinance lists several city-wide findings, including the finding that nonresidential development is ‘a major factor in attracting new employees to the region’ and that the influx of new employees ‘create[s] a need for additional housing in the City.’” *Id.* A version of the “housing as economic good” ethic that takes externalities seriously could support a commercial linkage fee ordinance as a means to internalize the development's externalities.

jurisdiction where the business development is to be built. Again, this kind of law provides for a “social right to housing,” but no individual housing rights.

Inclusionary zoning ordinances can also be framed as pragmatic functional responses to affordable housing needs and create social rights to housing. The wealthy community of Aspen, Colorado, enacted an inclusionary zoning ordinance<sup>369</sup> to ensure that lower-income service workers would be able to live in the community and be available for their jobs.<sup>370</sup> In *Home Builders Association of Northern California v. City of Napa*,<sup>371</sup> a California court of appeals recognized the functional importance and value of affordable housing when it upheld an inclusionary zoning ordinance against a facial regulatory takings claim.<sup>372</sup> The court wrote:

City, like many other localities in California, has a shortage of affordable housing. This shortage has negative consequences for all of City’s population, but causes particularly severe problems for those on the lower end of the economic spectrum. Manual laborers, some of whom work in the region’s wine or leisure industries, are forced to live in crowded, substandard housing. There is a large and growing population of homeless, including many families and teenagers. Workers from low-income families increasingly are forced to live greater distances from their places of employment, which causes increased traffic congestion and pollution.<sup>373</sup>

Another recent focus of discussion in planning and development for affordable housing is the promotion of “workforce housing.” The affordability crisis affects a wide range of workers, even many who are perceived to have “good jobs.”<sup>374</sup> “Workforce housing” programs

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369. See generally ASPEN/PITKIN COUNTY HOUS. AUTH., ASPEN/PITKIN COUNTY HOUSING GUIDELINES (2007), available at [http://www.aspenhousingoffice.com/GUIDELINES\\_2007/2007\\_Guidelines.pdf](http://www.aspenhousingoffice.com/GUIDELINES_2007/2007_Guidelines.pdf).

370. *Id.* at 5.

371. 108 Cal. Rptr. 2d 60 (Ct. App. 2001). For a discussion of “inclusionary zoning,” see *supra* notes 307-11.

372. *Home Builders Ass’n*, 108 Cal. Rptr. at 66.

373. *Id.* at 62.

374. JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV. & CTR. FOR WORKFORCE PREPARATION, U.S. CHAMBER OF COMMERCE, STRENGTHENING OUR WORKFORCE AND OUR COMMUNITIES THROUGH HOUSING SOLUTIONS 8-9 (2006), available at [http://www.jchs.harvard.edu/publications/markets/wh05-1\\_workforce\\_housing\\_report.pdf](http://www.jchs.harvard.edu/publications/markets/wh05-1_workforce_housing_report.pdf); Carol A. Bell, *Workforce Housing: The New Economic Imperative?*, 4 HOUSING FACTS & FINDINGS 3, 3 (2002), available at [http://www.fanniemaefoundation.org/programs/hff/pdf/HFF\\_v4i2.pdf](http://www.fanniemaefoundation.org/programs/hff/pdf/HFF_v4i2.pdf); see also Press Release, Nat’l Hous. Conf., Health Care Workers Priced out of Homeownership in Majority of U.S. Metro Areas, New Study Finds (Jan. 10,

are an effort by cities to keep municipal and key workers (usually including at least firefighters, police, and other emergency personnel) living within the jurisdiction's borders so that they can be available to the city to perform their necessary tasks in the event of an emergency that cuts off transportation.<sup>375</sup> These programs specifically seek to ensure a supply of housing within the jurisdiction that will be affordable to these occupations based upon their salary scales. One organization has developed a substantial national database with information about wages and housing costs to aid the promotion of workforce housing.<sup>376</sup> The public appeal of such programs is the functional necessity of these workers for the city's harmonious operation and the consequent need to enable these workers to live within the jurisdiction.<sup>377</sup> Sometimes these programs are extended to support affordable housing for public school teachers as a means of retaining them.<sup>378</sup>

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2007), available at <http://www.nhc.org/index/chp-newsroom-news-011007>.

375. Some San Francisco Bay area workers would need to travel dozens of miles on freeways and possibly cross at least one bridge to get from their homes to their cities. Local governments in California changed police officers' work schedules from five eight-hour shifts per week to three twelve-hour shifts per week and put them up in dormitories between shifts because of their commute times. *CLOSE TO HOME*, *supra* note 364, at 7.

376. The National Housing Conference's Center for Housing Policy provides an online, interactive database with wage information for more than sixty occupations and home prices and rents for nearly 200 metropolitan areas. According to the Web site, the study, called *Paycheck to Paycheck*, utilizes consistent measures of wages and housing costs so that users can see how workers in an individual metropolitan area are faring in the housing market, as well as view the big picture for housing affordability for working families in various occupations. *Ctr. for Hous. Pol'y*, *supra* note 8.

377. Workforce housing is presented as a functional means to sustain the present order rather than as a disruption or change to it. For this reason, these programs may not be perceived as conflicting with the dominant version of the "housing as providing social order" ethic.

378. See, e.g., Mandy Jackson, *Teachers Still Struggling to Find Entry-Level Homes*, *SAN DIEGO BUS. J.*, Oct. 13, 2003, at 16; Vaishali Honawar, *School Districts Devising New Ways to Offer Teachers Affordable Housing*, *EDWEEK.ORG*, Aug. 9, 2006, <http://www2.edweek.org/agentk12/employerresources/2006/08/09/44homes.h25.html>; San Jose Dep't of Hous., *Teacher Homebuyer Program*, <http://www.sjhousing.org/program/thp.html> (last visited Mar. 18, 2007). At the other end of the economic spectrum, the workforce housing argument has been extended to skilled and relatively high-paid private company workers, e.g., computer engineers, to enable recruitment and retention of these workers in high cost housing markets like Silicon Valley. See Stephanie A. Jennings, *Reinventing the Company Town: Employer-Assisted Housing in the 21st Century*, 2 *HOUSING FACTS & FINDINGS* 1, 1, 6 (2000), available at [http://www.fanniemaefoundation.org/programs/hff/pdf/HFF\\_v2i2](http://www.fanniemaefoundation.org/programs/hff/pdf/HFF_v2i2).

Another example of this ethic promoting affordable housing is the characterization of affordable housing as a “public use.” Affordable housing has been considered a “public use” for purposes of redevelopment programs that allow the proceeds of tax-exempt bonds to be used to subsidize private non-profit affordable housing.<sup>379</sup> Affordable housing qualifies as having a “public character” because it is a necessary land use in the city.<sup>380</sup> This contrasts with the common view that housing is a quintessentially “private” use.<sup>381</sup>

Some versions of “Smart Growth” proposals also contribute to housing affordability. The argument is that low-wage workers are needed by many businesses. If sprawl patterns of housing development persist, these workers must commute long distances from their homes to their jobs, causing traffic congestion and pollution. The manner and degree to which “Smart Growth” proposals promote housing affordability is in dispute and depends largely upon the details and implementation of a particular set of policies.<sup>382</sup> Some versions, such as the APA’s Growing Smart Project, present incorporation of housing affordability as a preferred

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pdf.

379. See *Utah Hous. Fin. Agency v. Smart*, 561 P.2d 1052, 1056 (Utah 1977) (upholding state legislation establishing state housing finance agencies from state constitutional claims regarding creating public debt, lending state credit, and using public funds for private activities). “The legislature therefore specifically declares it a public purpose for the State to cooperate with private institutions to increase the amount of reasonably available financing for the construction, purchase, and rehabilitation of decent, low and moderate income housing.” *Id.* at 1053.

380. Based upon a shortage of homeless shelters in their jurisdictions, a few cities, including Marin and Long Beach, have declared an “emergency housing crisis” pursuant to California’s Shelter Crisis Statute, CAL. GOV’T CODE §§ 8698-8698.2 (Deering 1997) (documents on file with author).

381. In the wake of the *Kelo* decision, the discussion about defining “public use” for eminent domain purposes has taken on a new dimension. See Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 853 (2006) (arguing that *Kelo*’s broader view of “public purpose” will result in more cities exercising eminent domain in pursuit of revenue-producing projects rather than affordable housing developments).

382. See Ngai Pindell, *Planning for Housing Requirements*, in IGLESIAS AND LENTO, *supra* note 65, 3, 20-27; see also Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado, as a Case Study*, 37 URB. LAW. 299, 309-10 (2005). “Smart Growth” can be limited to the functional vision, but other versions aim to help foster “community life,” which links them to a progressive version of the “housing as social order” ethic discourse. While this is obviously an uphill challenge in light of an individualistic culture, there does seem to be a palpable thirst for “community” in many quarters.

option.<sup>383</sup> Others neglect or do not prioritize affordability as an element of “Smart Growth.”<sup>384</sup> Certainly, there are still often major conflicts between supporters of affordable housing and environmentalists.<sup>385</sup>

The “housing as one land use in a functional system” ethic appears to be consistent with, and at times, relatively supportive of affordable housing. In each of the examples discussed above, affordable housing can be supported by functional, practical reasons for making the city a working community for all. Several of these policies provide for a “social right to housing” rather than an individual housing right.

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383. Chapter 4 of the American Planning Association’s Growing Smart overview for attorneys includes options for state-mandated planning for affordable housing and state appeals boards for affordable housing developments. MECK, OVERVIEW, *supra* note 343, at 6-9.

384. See ROBERT D. BULLARD ET AL., ENVTL. JUSTICE RES. CTR., RACE, EQUITY, AND SMART GROWTH: WHY PEOPLE OF COLOR MUST SPEAK FOR THEMSELVES, <http://www.ejrc.cau.edu/raceequitysmartgrowth.htm> (last visited Mar. 16, 2007) (“[M]uch of the smart growth dialogue, meetings, and action agendas have only marginally involved people of color, working class, and low-income persons.”); Anthony Downs, *Introduction*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 1, 3 (Anthony Downs ed., 2004).

385. Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 36 URB. LAW. 557, 559 (2004) (“[T]wo laudable goals—affordable housing and environmental protection—are ostensibly pitted against each other.”); Lisa Prevost, *When Good Causes Collide*, N.Y. TIMES, Feb. 4, 2007, at 13 (describing conflict between affordable housing development for seniors and environmentalists).

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### III. APPLYING OUR PLURALIST HOUSING ETHICS TO THE STRUGGLE FOR HOUSING AFFORDABILITY

This Part will locate “affordability” within America’s pluralist housing ethics in order to gain perspective on the challenges and opportunities facing the affordable housing movement.

#### A. *The American Dream, Affordability, and the Five Housing Ethics*

The “American Dream” of homeownership might appear as America’s one universal housing ethic. Our zoning patterns have consistently supported the development of single-family housing.<sup>386</sup> Federal policies supporting homeownership, e.g., the federal mortgage interest deduction,<sup>387</sup> have been some of the most stable housing policies. Moreover, homeownership is not a politically partisan concern or solely of interest to high-income households.<sup>388</sup> Yet, the preference for homeownership as a type of housing tenure is not itself a housing ethic. Rather, it is a set of policies that find support in certain versions of *all* of our housing ethics. The asset-building aspect of homeownership incorporates the “housing as economic good” ethic by focusing on a house as a good investment. Obviously, the economic interests of builders, realtors, and financial institutions also help explain the popularity of the policy. Homeownership appeals to the “housing as home” ethic by reassuring homeowners of their privacy rights and fueling imaginations about positive subjective meanings associated with “homes.” The “housing as home” ethic is regularly invoked to support homeownership because, while rental housing can provide a “home” equally amenable to subjective personal investment, the

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386. See *supra* notes 340-41 and accompanying text (discussing sprawl). At about sixty-nine percent, America’s rate of homeownership is nearly its highest ever. U.S. Census Bureau, Homeownership Rates for the U.S. and Regions: 1965 to Present, available at <http://www.census.gov/hhes/www/housing/hvs/historic/hist14.html> (last visited Apr. 2, 2007). However, as Professor Alexander notes, America is also “witnessing the highest recorded rates of residential foreclosures, and the average family has less equity in their home than ever before.” Alexander, *supra* note 7, at 1232 (footnotes omitted).

387. See *supra* notes 197-99 and accompanying text.

388. See, e.g., Nat’l Council of La Raza, Homeownership, <http://www.nclr.org/content/policy/detail/2564> (last visited Mar. 17, 2007) (supporting increased homeownership for Latinos, who, due to “[u]ntraditional sources of credit, lack of affordable units and information about the homebuying [sic] process, and other market barriers,” have yet to enjoy “the same access to homeownership as other Americans”).

more secure the tenure, the greater the likelihood that residents will make the dwelling their “home.” Sometimes there is also a hint of the “housing as a human right” ethic in calls for government to regulate in such a way that makes the “American Dream” possible for all. Homeownership is consistent with the “housing as social order” ethic by its inference that: “You’ve really (only) made it in this society when you own your own home.” Traditional republican political theory can support homeownership directly in the voice of the “housing as social order” ethic, arguing that since homeownership makes better citizens, the state should support it.<sup>389</sup> The element of mobility that sometimes accompanies the American Dream presumes a hierarchically arranged set of neighborhoods in which one climbs from a good house in one neighborhood to a better house in a “better neighborhood.” Arguably, at least the consequence of these policies—if not the intent—is to promote a classist social order using housing policy.<sup>390</sup> And, homeownership is consistent with the “housing as one land use of a functional system” ethic in the association of single-family houses in suburbs as good, safe places for raising children. The “American Dream” is so powerful in part because it seamlessly weaves together versions of all of America’s housing ethics.<sup>391</sup>

The quest for relative affordability in housing (as a characteristic of housing price) is also not its own housing ethic. In contrast to homeownership, and despite decades of government programs implementing affordability requirements in housing markets,<sup>392</sup> affordability is core to only one of our five ethics: “housing as a human right.” Affordability *can* be consistent with some version of each of the housing ethics. Affordability is

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389. Barros, *supra* note 2, at 290 n.147.

390. The “American Dream” does not address affordability directly. Rather, it assumes that hard work and commitment to the goal will succeed in a fair meritocracy for anyone who really wants to share in the dream.

391. The “American Dream” is both descriptive of the desires of many and has a normative quality—that all should aspire to it—that redounds to a bias against rental housing. Some commentators have argued that the dominant focus on homeownership amounts to an unjustified bias against the rental form of tenure. LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL (Nicolas P. Retsinas & Eric S. Belsky eds., 2002); Nicolas P. Retsinas & William Apgar, *Homeownership Should Not Be Sole Barometer of Housing Success*, MHP NEWS, July 15, 2005, [http://www.mhp.net/homeownership/news.php?page\\_function=detail&mhp\\_news\\_id=22](http://www.mhp.net/homeownership/news.php?page_function=detail&mhp_news_id=22).

392. For an overview of the history of government housing programs, see R. Allen Hays, *Housing America’s Poor: Conflicting Values and Failed Policies*, 28 J. URB. HIST. 369 (2002); Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL’Y DEBATE 489 (2000).

consistent with versions of the “housing as an economic good” ethic that recognize that market imperfections and failures justify government intervention to promote affordability. The “housing as home” ethic is largely indifferent to affordability, but nothing in this ethic would deny someone a home because of her income. Our established “housing as part of social order” ethic is largely hostile to affordability, but competing inclusive visions of community would promote it. Finally, affordability can often be consistent with a “housing as one land use in a functional system” ethic when it is seen as functionally necessary or valuable. However, the demand for affordability tends to conflict with several of the currently dominant versions of our housing ethics.

Like the “American Dream,” laws and policies supporting affordability are strongest and most stable when they combine multiple housing ethics.<sup>393</sup> However, historically, the affordable housing movement has largely relied on one housing ethic: the “housing as a human right” ethic. Pursuing affordability under a “housing as a human right” ethic has been a useful but limited and limiting approach. It is important to not underestimate how much was achieved for housing under this ethic.<sup>394</sup> Sometimes lawsuits are an appropriate alternative means to exert power by the politically disenfranchised. But constitutional theories aimed at guaranteeing a right to housing have not been completely successful, and the increasingly conservative cast of courts makes it even less likely that courts will interpret law expansively in a manner that ensures relative affordability and commits the legislative branches of government to programs requiring significant resources. Legislatures also appear reluctant to establish new individual “welfare rights” to housing. Therefore, while critical to defending existing housing rights, the “housing as a human right” ethic is not likely to gain much more for affordability in the foreseeable future.

More recently, affordable housing advocates have sought to

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393. Interestingly, numerous supporters of affordability from various parts of the political spectrum are speaking of housing concerns, including affordability, in terms of combining the terms “housing” and “opportunity.” See, e.g., CISNEROS ET AL., *supra* note 8; Cashin, *Drifting Apart*, *supra* note 235, at 603-04; John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY. DEV. L. 188, 189-92 (2003). Even though it does not resolve any difficult policy issues, this phrasing may be politically and socially powerful as it can combine several housing ethics in support of affordability in a manner parallel to the ever-popular “American Dream.”

394. See *supra* notes 139-209 and accompanying text (discussing housing as a human right).

enlist the strong and enduring power of the “housing as home” ethic to their cause. The hope is that the “housing as home” ethic, which has been such a profound and rich generator of personal meaning and legal rights, is still fertile for producing additional housing rights on behalf of those currently without safe, decent, and affordable housing. However, this effort has floundered because in the current context that ethic is driven by individualistic meanings attached to housing by those who already have it. While arguments aimed at extending this interest to garner support for public policies and laws that would make “homes” available to others have a certain ring, they fail to capture the full power of the “home” ethic because of this ethic’s anchorage in our individualism, which does not have any inherent sense of obligation to others.<sup>395</sup>

*B. Challenges: Surviving Pluralism and Resisting Hegemony*

The affordable housing movement faces the twin challenges of surviving our housing ethics’ pluralism and resisting the threatened hegemony of versions of two housing ethics: the deregulation (or “free market”) version of the “housing as an economic good” ethic and the exclusionary version of the “housing as providing social order” ethic.

Surviving pluralism requires acknowledging persistent pluralism instead of hoping that the favored “housing as a human right ethic” will become dominant.<sup>396</sup> Professor Bosselman’s assertions about land ethics apply equally to housing ethics:

We have inherited deeply engrained ethical ideas about land that we can not easily cast aside even if we choose. Any search for a new land ethic needs to understand and play off of our different historical attitudes toward land. We need to develop an understanding of land’s role in Anglo-American historical traditions to help us create dispute resolution mechanisms that take into account the deeply held values that land represents to different people. Many different land ethics exercise an important influence over the way people regard land in the United States and I do not intend to postulate an

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395. In contrast, realtors can more successfully invoke “home” in marketing their product to people in the market on the verge of purchasing a house for themselves. Perhaps the best hope for affordable housing advocates here is to ally with the “housing as home” ethic through public education in order to demonstrate that residents of contemporary affordable housing have the traditional *home* qualities and that contemporary affordable housing engenders these experiences by its design and other program components.

396. See Bosselman, *supra* note 13, at 1511 n.296 (providing references to articles “on the general need for multiple ethical viewpoints”).

ideal land ethic. Rather . . . I hope to demonstrate that the search for a single consistent land ethic . . . may be futile.

. . . I conclude that only a pluralistic process in which multiple land ethics are debated will be a satisfactory basis for the resolution of many of the current bitter conflicts over land in America.<sup>397</sup>

Surviving pluralism also means acknowledging America's housing successes that have been achieved through the private housing market with government collaboration and support.<sup>398</sup> Professor Koebel notes that the difficulty that relative affordability issues have in getting political traction in the United States is due to the Janus-like character of the housing debate in the United States: we are the "best housed" nation and yet in chronic crisis.<sup>399</sup>

Of course, to survive our housing ethics pluralism, the affordable housing movement needs to remember and to claim its own successes too. Claiming its successes has been difficult and subject to some irony. For example, because contemporary non-profit affordable housing is largely indistinguishable from market-rate housing, it remains relatively *invisible*.<sup>400</sup> Yet past and current affordable housing failures are well-known and endlessly repeated in the media.<sup>401</sup> So, due to their relative invisibility, the newer versions of affordable housing have a limited capacity to replace the past images that continue to occupy the public's imagination. For this reason, affordable housing education campaigns—particularly outside of the context of a particular affordable housing proposal—are critical to the future success of the movement.<sup>402</sup>

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397. *Id.* at 1441.

398. Salins, *supra* note 8, at 260-61 (reviewing the historical data and acknowledging the importance of some government policies and programs).

399. See C. Theodore Koebel, *The Wheel of Fortune: How to Play the Housing Affordability Game*, VA. ISSUES & ANSWERS, Summer 2004, at 10, 10-11, available at <http://www.vchr.vt.edu/pdfreports/wheel%20-of-fortune.pdf>; see also Carr, *supra* note 10, at 247 ("America is arguably the most well housed nation in the world. . . . At the same time, America has many severe housing problems.").

400. See Iglesias, *supra* note 294, at 79, 102 nn.8-9.

401. For a recent exception, see Bob Herbert, *Home in the Ruins*, N.Y. TIMES, Jan. 11, 2007, at A31 (regarding successes of non-profit housing developers in New Orleans).

402. See, e.g., NEIGHBORHOOD REINVESTMENT CORP., CHANGING MINDS, BUILDING COMMUNITIES: ADVANCING AFFORDABLE HOUSING THROUGH COMMUNICATIONS CAMPAIGNS (2004), available at <http://www.nw.org/network/pubs/studies/documents/ChangingMindsSymposium.pdf>; Campaign for Affordable Housing, <http://www.tcuh.org/index.cfm> (last visited Mar. 1, 2007);

The affordable housing movement must also continue to resist the hegemony of two housing ethics with which it regularly conflicts: the deregulation version of the “housing as an economic good” and the exclusive version of the “housing as providing social order” ethic. Affordable housing advocates could be forgiven if they feared that the “free market” version of the “housing as economic good” ethic had achieved or is on the verge of achieving hegemony among America’s housing ethics. While bipartisanship was evident in federal housing policy from the New Deal era until the late 1970s, Professor Dreier marks the current time as an era of market dominance and government withdrawal.<sup>403</sup> The evidence for this is unassailable: drastic reductions in HUD funding and serious consideration of eliminating HUD altogether, as well as the likelihood that growing U.S. debt heralds another future squeeze on social programs, including those least politically protected, such as housing.<sup>404</sup>

Yet, despite the *apparent* breakdown or weakening of the “welfare state,”<sup>405</sup> the free market version of the “housing as economic good” ethic has not triumphed, and the hope for affordability is not lost.<sup>406</sup> Because housing production is primarily market-produced and housing law and policy are often setting limits on or “intervening” in the market to serve distributional or other

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Non-Profit Hous. Ass’n of N. Cal., Community Acceptance, <http://www.nonprohousing.org/actioncenter/toolbox/acceptance/default.aspx> (last visited Mar. 1, 2007).

403. Dreier, *supra* note 30, at 6.

404. See, e.g., Michael Freedman, *In Search of Congressional Intent: Does LIHPRHA Restrict State and Local Governments from Preserving Affordable Housing?*, 13 J. L. & POL’Y 741, 742-43 (2005). The current perceived dominance of the deregulatory “free market” ethic on the part of affordable housing advocates is probably due at least in part to well-financed and organized “free market” and “property rights” advocacy over the last thirty years. For overviews of the “property rights movement,” see Harvey M. Jacobs, *Introduction: Is All That Is Solid Melting Into Air*, in PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 1, 1-15 (Harvey M. Jacobs ed., 2004); Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in LAND RIGHTS: THE 1990S’ PROPERTY RIGHTS REBELLION 1, 1-30, (Bruce Yandle ed., 1995); Joseph L. Sax, *Environment and its Mortal Enemy: The Rise and Decline of the Property Rights Movement*, 28 U. HAW. L. REV. 7 (2005).

405. See David Kettler, *Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy*, 21 LAW & SOC’Y REV. 9, 15-16 (1987).

406. See Peter Marcuse, *Housing on the Defensive*, PRACTICING PLANNER, Winter 2004, <http://www.planning.org/affordablereader/pracplanner/housingvol2no4.htm?project=Print> (explaining how current housing problems could be solved by government action).

social goals, it is common to see American housing law and policy framed as a conflict between “housing as an economic good” and all other social values. This Article demonstrates that this view lumps too many distinct issues and concerns into the “non-market” side of the duality that require disaggregation to be properly understood.<sup>407</sup> Affordable housing production has not been so much privatized as thrust into more complex public-private partnerships.<sup>408</sup> And, as demonstrated in this Article, all of the other housing ethics continue to influence American housing law and policy.<sup>409</sup>

The “housing as providing social order” ethic poses perhaps an even greater threat to gaining hegemony over the other housing ethics. America’s current housing patterns are largely the legacy of powerful and sophisticated efforts to use housing to create a racist and classist social order. Affordability is historically deeply entangled in race and class issues, which, in turn, are largely affected by segregated housing patterns of development they produce. Even market-affordable forms of housing meet community resistance. There is a strong likelihood of that social order replicating itself and even increasing in strength.<sup>410</sup>

However, against these “exclusive” racist and classist visions, there are competing “progressive” visions of inclusive social order that would use housing to promote a more diverse community life. Affordability is nearly always a key part of these progressive visions. These reforms are not utopias: mixed-income and mixed-race neighborhoods have thrived in America.<sup>411</sup>

Surely, the risk of hegemony is real, but to date the history of America’s housing policy has been something of a muddle because of

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407. See *supra* Parts II & III.

408. It is true that most programs are “privatized” compared to the public housing program, but most new affordable housing is produced as part of a public-private partnership. Davidson, *supra* note 81, at 284-85.

409. “Housing as home” is very deep, but it hasn’t achieved hegemony either. See *supra* notes 117-25 and accompanying text (discussing the fact that homes are treated the same as all other property under eminent domain). While discrimination and NIMBY are pervasive, fair housing and other anti-discrimination laws have achieved some recognition and acceptance. See MARTIN D. ABRAVANEL, URBAN INST., DO WE KNOW MORE NOW?: TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW 25 (2006), available at <http://www.huduser.org/intercept.asp?loc=/Publications/pdf/FairHousingSurveyReport.pdf>.

410. See CASHIN, THE FAILURES OF INTEGRATION, *supra* note 235; Cashin, *Drifting Apart*, *supra* note 235, at 600; Ford, *supra* note 240, at 1885.

411. See, e.g., Phillip Nyden et al., *The Emergence of Stable Racially and Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities*, 8 HOUSING POL’Y DEBATE 491, 491 (1997).

the complex and enduring tensions created by the pluralism of our housing ethics. The “muddle” stems not only from a primary reliance on the market for housing production, but also from the simultaneous maintenance of the four other housing ethics. Each housing ethic makes sense, finds support, and to an extent reproduces itself. For example, the “housing as home” ethic reproduces itself independently every day in many houses. This muddle is likely to continue. Therefore, there will never be a grand or perfect affordable housing policy.<sup>412</sup> There will always be policy disputes and numerous inevitable tradeoffs.<sup>413</sup> Yet the affordable housing movement can take advantage of opportunities to advance its agenda—albeit in a piecemeal fashion—because of the persistence of our pluralist housing ethics.

*C. Opportunities: Thriving Within Pluralism*

This section offers some tentative reflections for the future success of the affordable housing movement in light of our pluralist housing ethics.

While affordability is not one of our housing ethics, it is not a permanent minority interest either.<sup>414</sup> Every major sector of society

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412. Of course, there have been plenty of plans and suggestions for the best mix. *See, e.g.*, CISNEROS ET AL., *supra* note 8; NAT'L LOW INCOME HOUS. COAL., THE CRISIS IN AMERICA'S HOUSING: CONFRONTING MYTHS AND PROMOTING A BALANCED HOUSING POLICY 2 (2005), available at <http://www.nlihc.org/doc/housingmyths.pdf>; MARY K. NENNO, ENDING THE STALEMATE: MOVING HOUSING AND URBAN DEVELOPMENT INTO THE MAINSTREAM OF AMERICA'S FUTURE 273-97 (1996); Sam Brownback, *Resolving HUD's Existing Problems Should Take Precedence over Implementing New Policies*, 16 ST. LOUIS U. PUB. L. REV. 235, 236 (1997); Dreier, *supra* note 30, at 18-22.

413. The many difficult program design issues and inevitable tradeoffs were recognized as early as 1968. KAISER COMM., REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 68-73 (1968). For additional examples of early recognition, see Richard F. Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 693 (1983) (recognizing several potential problems stemming from restrictive housing policies); Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 204-05 (1988) (arguing that existing tax credit system is both an ineffective incentive for affordable housing creation and an inefficient government policy).

414. Public opinion polls show support for affordable housing. For example, a recent national Zogby America poll shows that “more than half of Americans believe housing policy, with respect to the provision of affordable housing, is on the wrong track.” Cherie Duvall, *Poll Shows Great Concern Over Affordable Housing*, NAT'L CITIES, <http://www.nlc.org/articles/articledetail.aspx?ThreadKey={70B00DC5-D585-4646-810E-CDC3BA89F402}> (last visited April 16, 2007). For a discussion of relevant public opinion research from the late

(business, religion, and civic society) has acknowledged at least in principle that affordability in housing is an important value. Affordability has regularly received bipartisan support.<sup>415</sup> Affordability is an achievable goal requiring subsidies and appropriate zoning, which in turn requires political will.<sup>416</sup> Affordability can be consistent with versions of all of our housing ethics.

Most of the past and present programs providing subsidies for affordability can be supported by arguments addressing “housing as an economic good.” Market-affordable forms of housing, such as secondary units and manufactured housing, may be worth more exploration. Tactical alliances with promoters of these forms of housing to oppose restrictive regulations that prevent their broader utilization appear appropriate. The Third Sector is well established nationally. Its future success may largely depend upon how well the current developments perform (and are perceived as performing) in the next ten years.

Yet, the “housing as one land use in a functional system” ethic appears to be the ethic promising the most fruitful opportunities to

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1990s to 2003, see CAMPAIGN FOR AFFORDABLE HOUS. & BELDEN, RUSSONELLO & STEWART, WHAT WE KNOW ABOUT PUBLIC ATTITUDES ON AFFORDABLE HOUSING: A REVIEW OF EXISTING PUBLIC OPINION RESEARCH (2004), *available at* [http://www.tcuh.org/pdf/Public\\_Attitudes.pdf](http://www.tcuh.org/pdf/Public_Attitudes.pdf). The National Association of Home Builders and Freddie Mac commissioned a telephone survey in July 2004. The findings included: (1) the availability of affordably priced housing is one of the top concerns of the American public, along with affordable health care and jobs; (2) 90% of respondents indicated that workers should be able to live in the communities where they work; (3) U.S. households were about evenly split regarding whether higher densities were an acceptable means for reducing housing costs; (4) 72% indicated support for neighborhoods with mixed household types; (5) 50% said that companies should provide economic assistance to help their employees obtain affordable housing; (6) 55% saw a role for local government in ensuring the availability of affordable housing; and (7) 72% thought that affordable workforce housing ought to be a concern of politicians. CLOSE TO HOME, *supra* note 364, at 11.

415. *See, e.g.*, CISNEROS ET AL., *supra* note 8.

416. *See* Hartman, *supra* note 146, at 238 (discussing the political element involved in the necessary increase in budgetary outlays required to achieve a right to housing). Senator Joseph Clark of Pennsylvania, a supporter of the Housing Act of 1965, once stated: “We are the richest nation in the history of mankind. When we fail to provide a decent home for every American, it is not because we can’t, but because we won’t.” *Not Good Enough Housing Bill*, N.Y. TIMES, July 17, 1965, at 24. *But see* Ronald A. Wertz, *Housing Affordability: Catch Me if You Can*, FEDGAZETTE, May 2005, <http://www.minneapolisfed.org/pubs/fedgaz/05-05/housing.cfm> (criticizing affordability as being a moving target that will be difficult to eliminate).

promote affordability in the current and near future. First, this ethic supports the growing view of affordability as a necessary element of a healthy community. Second, this ethic can help neutralize affordability's historical association with divisive poverty and race issues. Certain versions of this ethic challenge (implicitly at least) stereotypes about what kind of people need and qualify for affordable housing, highlighting that workers in "good jobs" also both need and qualify for it.<sup>417</sup> These policies can be understood as "developmental policy" for cities, rather than as "redistributive policy" as many past housing programs are perceived.<sup>418</sup> This helps to extricate affordability from its excessive entanglement with stereotypes associated with poverty and race.<sup>419</sup> Housing for the very poor, seniors, disabled persons, and homeless people will continue to be needed and will require particular programs. Incorporating affordable housing for these populations as part of a healthy community is a challenge but may be possible.<sup>420</sup> Third, this ethic can help generate a "social right to housing" that is relatively affordable, for example, "workforce housing," inclusionary zoning,

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417. Of course, the struggle about affordability is: how far does the "workforce" definition go? Does it include the whole range of low-wage workers needed for the operation of both municipal functions and public-serving industries needed for a city to function, such as hotels, restaurants, and hospitals?

418. See Victoria Basolo, *Explaining the Support for Homeownership Policy in US Cities: A Political Economy Perspective*, 22 HOUSING STUD. 99 (2007) (making a similar distinction about local government policies favoring homeownership). Of course, developers and landowners may still perceive and oppose such policies as redistributive.

419. This is not to deny the historical fact that much policy harming affordability was pursued because a large number of the likely beneficiaries would be members of a disfavored race or class. Nor is it to deny that statistical correlation between race, poverty, and the need for affordable housing is, in part, an effect of such previous policies. The point here is that negative stereotypes continue to plague affordable housing policies and proposed developments when, in the current situation, affordability problems extend well beyond those communities.

420. After all, if a functioning community needs working hospitals, it requires a wider range of workers than just doctors and nurses. Kevin Kast, President and CEO of SSM St. Joseph Health Center in St. Charles, Missouri, "worries about having the nurses, radiologists, cooks, maintenance staff and others who are so essential to the hospital's functioning." CLOSE TO HOME, *supra* note 364, at 16. Another Web site includes janitors, retail salespeople, and food preparers in its database of wages and occupations considered as workforce housing. Ctr. for Hous. Policy, *supra* note 8; see also A DAY WITHOUT A MEXICAN (Eye on the Ball Films 2004). California's mandatory housing element requires local governments to plan for housing for each of these groups. CAL. GOV'T CODE § 65583(a)(1), (6) (Deering 1987).

commercial linkage fee programs, and mandatory “housing elements” as part of comprehensive plans.<sup>421</sup> Legislatures are more likely to enact social rights to affordable housing because they do not commit themselves to open-ended financial commitments. Courts are more comfortable enforcing these rights because this exertion of judicial power seems more consistent with separation of powers doctrines—to the degree they are mandating expenditures, they are only expenditures that the government had not already committed itself to. To be effective, however, the “social rights to housing” strategy must include wide legal standing and sufficient legal resources to enforce such rights.<sup>422</sup> The resulting housing rights would be a patchwork, but that is only realistic given our housing ethics pluralism.

While there are enduring tensions between affordability and some environmentalist versions of this ethic, “Smart Growth” efforts that include a genuine commitment to affordability also reframe affordable housing from an issue of “special pleading” and “welfare” to an important functional attribute of a workable community.

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421. See discussions *supra* Part II.E of each of these approaches. Inclusionary zoning may also lend itself to articulation in the “housing as one land use in a functional system” ethic; *see also* Kautz, *supra* note 307, at 977 (discussing how inclusionary zoning can be framed as a land use control); Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—the Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 384 (2006) (supporting state mandated inclusionary zoning). In addition, *Mount Laurel’s* requirements of mandatory planning and zoning that enable the development of moderate- and low-income housing can be characterized under a “housing as one land use in a functional system” ethic. *See also* Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 438 (2003) (proposing a state-mandated housing impact statement to force localities to integrate housing concerns into their decisionmaking).

422. *See* Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 50-51 (1993); Brian Augusta, Comment, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503, 513-14 (1999). The potential for attorney’s fees awards to parties prevailing over a government defendant is appropriate. *See, e.g.*, Mike Geniella, *Mendocino County Loses Housing Ruling*, SANTA ROSA PRESS DEMOCRAT, Sept. 28, 2005, at B3 (reporting attorneys fees award for successful lawsuit under California’s housing element law).