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Re-Imagining Housing Provision from Markets to Welfare

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Abstract

Cities around the world are facing a global housing crisis characterized by rising unaffordability, slums, gentrification, inequality, and urban segregation. The Global Financial Crisis highlighted the detrimental impact of highly financialized housing markets. This Article argues that transitioning from a market-based to a welfare-oriented approach is both necessary and feasible to ensure the right to adequate housing for everyone. This shift requires a fundamental re-imagining of housing issues, recognizing that the root causes lie in a political economy where law plays a pivotal role, crossing traditional boundaries between private and public law. We illustrate the legal foundations of adopting a welfare-based approach to the political economy of housing law, contrasting it with a market-based approach in three key areas: Land use regulation, housing finance, and rental markets.

Keywords: Housing Policy; Regulation; Housing Finance; Rental Markets; Neoliberalism; Welfare

A. Introduction

There is a housing crisis in many metropolitan areas around the world.¹ The number of people living in informal settlements, so-called “slums,” reached 1 billion in the developing world.² These communities often lack access to formal employment and healthcare provisions, while at the same time confront a mix of risks deriving from a lack of sanitation, traffic congestion, natural disasters, and toxic waste.³ Also for those living above the poverty line, housing has become a problem: Housing-related expenses have increased much faster than salaries and wages, leading to worsening housing conditions, such as inadequate or overcrowded housing. People are driven out of city centers, with urban areas becoming inaccessible for many. Inequality is high. Many suburban areas show a high level of poverty concentration.⁴ At the same time, addressing the housing crisis is a highly contested political issue. Although government policies focusing on efficient housing markets seem to be at odds with affordable and adequate housing for everybody, it is politically difficult to respond to calls for a stronger right to adequate housing. Housing markets cut across different but highly intertwined policy sectors, in which strong private actors

¹Steffen Wetzstein, *The Global Urban Housing Affordability Crisis*, 54 URB. STUDS. 3159, 3160 (2017).

²Neil Khor, Ben Arimah, Raymond Otieno Otieno, Matthijs van Oostrum, Mary Mutinda & Judith Oginga Martins, *Envisaging the Future of Cities*, U.N. HABITAT FOR A BETTER URB. FUTURE (2022), https://unhabitat.org/sites/default/files/2022/06/wcr_2022.pdf.

³This is the argument made by MIKE DAVIS, *PLANET OF SLUMS* (2017).

⁴For an analysis of the characteristics of urban poverty, see Paul A. Jargowsky, “Urban Poverty, Economic Segregation, and Urban Policy,” *THE OXFORD HANDBOOK OF URBAN ECONOMICS AND PLANNING*, 292 (Nancy Brooks, Kieran Donaghy, Gerrit-Jan Knaap eds., 2011).

play an important role in the production of housing and urban development. Capital markets in particular have an important stake in the institutional structure governing housing provision.⁵

Many studies from various disciplines have addressed different dimensions of the housing crisis, offering important snapshots of the problems. The main issues covered are: The impact of the financialization of housing,⁶ the role of zoning laws on increasing housing costs,⁷ the impact of particular policy instruments on affordable housing such as rent controls⁸ or government vouchers,⁹ the regulation of discriminatory practices in the housing market,¹⁰ the causes and consequences of evictions,¹¹ among others.¹² Legal work has mostly focused on housing rights, non-discrimination, and the protection from eviction.¹³ Although all these analyses deepen our understanding of and might offer specific solutions to housing problems, a holistic approach is missing. Studies are either geographically limited as case studies or focus on one specific legal problem. The more holistic idea of (re)developing the field of “urban law” is still in a very early stage and does not necessarily address housing problems as a structural challenge.¹⁴

Consequently, it is still an open question of how to generate adequate and affordable housing in large and vibrant urban areas.¹⁵ This would imply changing the rules and incentives that today shape the housing sector, including private rental markets, homeownership, and housing finance. A structural approach is necessary because housing problems do not only interact, accumulate, and play out in different legal fields but also have similar structural roots. From a political-economy perspective, the global housing crisis is unfolding in the context of markets playing a big role in the production of housing. Aligning with the enabling approach of the World Bank which

⁵JOSH RYAN-COLLINS, TOBY LLOYD & LAURIE MACFARLANE, *RETHINKING THE ECONOMICS OF LAND AND HOUSING* 109-160 (2017).

⁶See generally MANUEL B. AALBERS, *THE FINANCIALIZATION OF HOUSING: A POLITICAL ECONOMY APPROACH* (2016); Manuel B. Aalbers, *The Variegated Financialization of Housing*, 41 INT'L J. URB. & REG'L RSCH. 542 (2017) [hereinafter Aalbers, *Variegated*]; Rodrigo Fernandez & Manuel B. Aalbers, *Financialization and Housing: Between Globalization and Varieties of Capitalism*, 20 COMPETITION & CHANGE 71 (2016); Manuel B. Aalbers, Jannes Van Loon & Rodrigo Fernandez, *The Financialization of a Social Housing Provider*, 41 INT'L J. URB. & REG'L RSCH. 572 (2017); Ben Ansell, *The Political Economy of Ownership: Housing Markets and the Welfare State*, 108 AM. POLIT. SCI. REV. 383 (2014).

⁷See Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J. L. & ECON. 331 (2005).

⁸See Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365 (2019).

⁹See Ingrid Gould Ellen, *What Do We Know About Housing Choice Vouchers?*, 8 REG'L SCI. & URB. ECON. 103380 (2020).

¹⁰See John Yinger, *Housing Discrimination is Still Worth Worrying About*, 9 HOUS. POL'Y DEBATE 893 (1998).

¹¹See MATTHEW DESMOND, *EVICTED – POVERTY AND PROFIT IN THE AMERICAN CITY* (2017).

¹²See Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANNU. REV. LAW. SOC. SCI. 15 (2015) (reviewing the law and social science literature on housing and poverty).

¹³See, e.g., Padraic Kenna, *Globalization and Housing Rights*, 15 IND. J. GLOB. LEGAL STUD. 397 (2008); Padraic Kenna, *Can Housing Rights Be Applied to Modern Housing Systems?*, 2 INT'L J. L. BUILT ENV'T 103 (2010); Padraic Kenna, *Human Rights and Housing*, in INTERNATIONAL ENCYCLOPEDIA OF HOUSING AND HOME (S.J. Smith ed., 2011); Padraic Kenna, *Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights*, 13 EUR. HUM. RIGHTS L. REV. 193 (2008); Padraic Kenna & Héctor Simón-Moreno, *Towards a Common Standard of Protection of the Right to Housing in Europe Through the Charter of Fundamental Rights*, 25 EUR. L. J. 608 (2019); Kåre Lilleholt, *The Right to Housing and its Impact on Contract Law*, in VELFERD OG RETTFERD FESTSKRIFT TIL ASBJØRGN KJØNSTAD 70 ÅR 363 (Av Aslak Syse, Eivind Smith, Kåre Lilleholt & Kirsten Ketscher eds., 2013); Yvonne Donders, *Protecting the Home and Adequate Housing: Living in a Caravan or Trailer as a Human Right*, 5 INT'L HUM. RTS. L. REV. 1 (2016); JESSIE HOHMANN, *THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES* (2013); Irina Domurath & Chantal Mak, *Private Law and Housing Justice in Europe*, 83 MOD. L. REV. 1188 (2020); Casey Dawkins, *The Right to Housing in an Ownership Society*, 47 HOUS. & SOC'Y 81 (2020); Alex Latham-Gambi, *Talking Without Speaking, Hearing Without Listening? Evictions, the Law Lords and the European Court of Human Rights*, 2011 PUB. L. 730 (2011); Dave Cowan, Caroline Hunter & Hal Pawson, *Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights*, 39 J. L. & SOC'Y 269 (2012).

¹⁴Antonia Layard, *Researching Urban Law*, 21 GERMAN. L.J. 1446, 1455 (2020); *REGULATING THE CITY: CONTEMPORARY URBAN HOUSING LAW* (Julian Sidoli, Michel Vols & Marvin Noah Frank Kiel eds., 2017).

¹⁵Wetzstein, *supra* note 1, at 3163.

aimed at managing housing sectors as an *economic* sector,¹⁶ many governments have abandoned their roles as producers of housing. Regulation is *per se* regarded critically as an inhibitor of efficient (self)management of markets. The only regulation that is deemed efficient is the one that creates, and fosters markets and responds to market failures. Because this political economy arguably lies at the bottom of all housing problems,¹⁷ those can only be addressed structurally by abandoning the enabling approach and adopting a welfare-oriented model across housing sectors.

In this Article we attempt to provide impetus for a structural re-thinking of government policy across housing sectors. This attempt is to be understood as a contribution to the “play of ideas” that is important for social learning as expressed through policy.¹⁸ For legal inquiry, this demands to re-imagine the role of law and its rationales in the construction of housing markets. This, in turn, requires to challenge preconceptions and to employ legal vocabulary in new ways in order to reach different interpretations by choosing from different alternatives within a given frame of possibilities.¹⁹ The overall question we want to answer is: How can housing policy be transformed from a market-based to a welfare approach, and what are the corresponding legal and regulatory foundations of such a transformation? Answering this question helps us to understand the structuring role of law in housing markets as well as the range of possibilities and the criteria of legitimization of government intervention in housing sectors.

The analysis is based on two key assumptions. First, the legal framework plays a crucial role in the political economy of housing. Legal and policy instruments addressing the affordable housing crisis are deeply intertwined with the social and political context.²⁰ The law shapes and transforms housing systems, influencing both market-based and welfare-based models of housing provision. Essentially, the law reflects and molds political-economic arrangements, which in turn determine the policy tools used to tackle housing issues. A comprehensive perspective is necessary to understand the extensive role of the law in structuring specific policy fields and determining their outcomes. Second, we conceptualize housing law as a set of functional rules that address specific problems and shape markets, rather than as a field divided by formalistic branches of law. A critical reflection on the political economy of housing law requires moving beyond traditional dichotomies between public and private law. By overcoming this division, we can address housing as both a social and economic good, with both public and private functions. In contrast, narrow disciplinary perspectives may fail to capture the complex relationships between political-economic contexts, housing law and regulations, and social outcomes.

We aim to show that market and welfare-based approaches to housing supply have very different theoretical foundations, and therefore lead to different legal and regulatory implications in the structure of housing sectors. More specifically, the political-economic structure that shapes the housing field is highly dependent on the political and legal conceptualizations of private property rights and property’s social function. These conceptualizations are not uniform across places and times. They vary according to the political and social context in which they emerge. And they have very different institutional and legal implications, as we will see in three sectors that are critical to housing provisions: Land use regulation, housing finance, and rental markets.

A few disclaimers are in place. First, market-based and welfare-based political-economic approaches should not be understood as a dichotomy but rather as a spectrum of possibilities for

¹⁶THE WORLD BANK, HOUSING: ENABLING MARKETS TO WORK (1993), <https://www.calpnetwork.org/wp-content/uploads/2020/03/housing-enabling-markets-to-work-1.pdf>.

¹⁷Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights*, 37 INT’L J. URB. & REG’L RSCH. 1058, 1059 (2013).

¹⁸Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMPAR. POLS. 275, 289 (1993).

¹⁹See generally MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300–1870 1-3 (2021) (demonstrating how Martti Koskenniemi uses the term “legal imagination”).

²⁰See Manuel B. Aalbers & Brett Christopher, *Centering Housing in Political Economy*, 31 HOUS. THEORY & SOC’Y 373, 388 (2014).

governments. On one end of the spectrum, states pursue an enabling approach under strong protection of private property rights as a means to generate a competitive and sufficient supply of housing units for every income level. On the other end of the spectrum, states can regulate housing markets and private property rights more closely and to the extent necessary to ensure access to affordable and adequate housing. Those emphases are neither natural nor spontaneous but socially and politically constructed under particular institutional frameworks, which often lean towards one of these approaches. Second, the conceptual focus of this Article is complemented with examples of the “Western” countries we have studied more in depth, for example, European countries, the United States, and Chile. This does not mean that we plan to present certain countries as more or less market-oriented or neoliberal; instead, we focus on specific policies and regulations that we deem more or less market or welfare oriented. Third, even though we refer to the right to housing on several occasions in this Article, we do not aim to provide an interpretation of that right. Seeing the right to housing as a “marker of concern”²¹ for public policy, our focus lies in the analysis of legal policies that shape the interpretation and implementation of that right.

Finally, we focus on the role of the regulatory state, amply understood. The regulatory state is often associated with the neoliberal reforms since the 1970s. As in many countries the privatization of public services led to the adoption of regulatory schemes and agencies with the double purpose of ensuring that private companies would have a stable regulatory environment in which to operate, and that these companies would provide uninterrupted services with pre-defined quality standards and prices. In contrast, a welfare-based model of housing provision is often associated with public housing in many “Western” countries during the twentieth century, where governments had a direct role in the construction, administration, and delivery of housing units. In this Article, we use the idea of the regulatory state in a broader sense, referring to the fact that governments may use a wide array of regulatory instruments that may be more consistent with either a market or a welfare approach to housing provision. We use an ideologically neutral idea of the regulatory state to show that, depending on its particular political-economic structure, the regulatory state may have different institutional outcomes.

B. Market-Based Housing Law and Policy

In market-based housing systems, the law’s objective is to facilitate the establishment and well-functioning of markets. At the forefront is the character of housing as an investment, an economic rather than a social good. In order to enable investment, property rights are strongly protected, and the free movement of capital must be guaranteed. Housing is turned into a commodity. Once markets for commodified housing are established, regulatory interventions are allowed only in cases of market failure. Interventions with the aim of redistribution or other social goals are secondary.

I. The Political Economic Framework of Neoliberal Housing Law

The political-economic framework for the market-based approach to housing is characterized by an abrogation of political responsibility for the housing sector, under the framework known as neoliberalism. Neoliberalism is a theory of political economic practices that rests on the assumption that human well-being can be best achieved by liberating entrepreneurial freedom within an institutional framework of strong private property rights, free markets, and free trade.²² It was born as a response to Marxist centralized state planning and interventionist Keynesian theories, which sought to deal with the Great Depression by keeping control of business cycles and

²¹Bo Bengtsson, *Housing as a Social Right: Implications for Welfare State Theory*, 24 SCANDINAVIAN POLIT. STUD. 255, 256 (2001).

²²DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

recessions.²³ As such, neoliberalism is an ideological project encompassing politics, the economy, and law.²⁴ It is considered expansionist because the market-modeled concepts of efficiency and autonomy shape policy, doctrine, and discourses of legitimacy also outside of “traditionally” economic areas.²⁵ Markets are considered the best means to achieve human well-being—freedom—and, therefore, are to be created and fostered.

Even though neoliberalism harnesses the ideas of 19th century “classical liberalism,” emphasizing individual autonomy and freedom, there are, at least two conceptual distinctions between classical liberalism and neoliberalism. First, in classical liberalism economic and political freedoms are conceptually distinct; in neoliberalism, political ideas of liberty are harnessed to the economic ideas of “free markets.”²⁶ Political freedoms are equated to market freedoms. In the *consumerized* relationship between consumers and service providers, purchasing rights are considered similar to political rights and consumer choice to political choice.²⁷ In classical liberalism, the touchstone act of personal choice is the employment contract and the distribution of power and income in the workplace, but in neoliberalism it is the unfettered enjoyment of consumer choice.²⁸ In ever-expanding markets, this consumer conception of autonomy and individual freedom relates to anything from traditional commodities—dryers, cars—to any new commodities, from housing, health, or education to even voting.²⁹ Second, classical liberalism sought to define an area of social and private life prior to and outside of political decision-making, whereas neoliberalism operates in and even creates a mixed public-private sphere.³⁰ In neoliberalism, a distinct public-private area, in which the public and private are contingent upon each other, emerges along the porous and unfixed boundaries of ever-growing markets.³¹

The neoliberal state is not a passive but a distinctive kind of state.³² It is a “regulatory state,” to be distinguished from the “dirigiste state” of the past,³³ with a particular neoliberal rationale. In the dirigiste state of the past, governments had strong influence over economic and social activity. In the neoliberal regulatory state, the main objective is the creation and maintenance of markets; thus, the focus is on re-regulation and privatization in order to withdraw from the direct provision of goods. In a move towards “government by contract,” it outsources its functions³⁴ to private actors and markets. Neoliberal states do not regulate less, but they regulate in order to create and serve markets that should operate freely. They do not withdraw from the economy but rather intervene in markets in order to foster economic freedoms and undistorted competition, thus shaping a capitalist market society.³⁵

In neoliberal states, the approach to housing sector regulation is based on the conceptualization of housing as a complex commodity. A durable asset that serves both consumption and

²³*Id.* at 11–20.

²⁴Honor Brabazon, *Introduction: Understanding Neoliberal Legality*, in *NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT* 2 (Honor Brabazon ed., 2017).

²⁵David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 3 (2014).

²⁶Stuart Hall, *The Neo-Liberal Revolution*, 25 CULTURAL STUD. 705, 710 (2011).

²⁷This is the argument made in JIM DAVIES, *THE EUROPEAN CONSUMER CITIZEN IN LAW AND POLICY* (2011).

²⁸Grewal & Purdy, *supra* note 26, at 13.

²⁹*Id.* (identifying a second dimension of this consumerized autonomy: Identity). Due to its operation outside of economic relations, we are not including it in our analysis.

³⁰*Id.* at 3.

³¹ANTOINE VAUCHEZ & PIERRE FRANCE, *THE NEOLIBERAL REPUBLIC: CORPORATE LAWYERS, STATECRAFT, AND THE MAKING OF PUBLIC-PRIVATE FRANCE* 54 (2020) (demonstrating powerfully the example of France). VAUCHEZ & FRANCE refer to the shaping of a new private-public sphere by actors who habitually cross the lines between corporations and politics.

³²Grewal & Purdy, *supra* note 25, at 8.

³³G. Majone, *The Rise of the Regulatory State in Europe*, in *A READER ON REGULATION* 192, (Robert Baldwin, Colin Scott & Christopher Hood eds., 1998).

³⁴Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 2 (Jody Freeman & Martha Minow eds., 2009).

³⁵VAUCHEZ & FRANCE, *supra* note 31, at 7.

investment purposes, is usually purchased with debt financing, and is characterized by situational attributes relating to spatiality and social context.³⁶ Its optimal distribution is best achieved by following housing demand based on neoclassical economic models of supply and demand, which are predicated on the assumption that housing decision-making parallels consumer decision-making in terms of optimizing utility of a heterogeneous commodity, housing, that is purchased within the constraints imposed by market prices and household income.³⁷

Thus, as a first step, states need to give up their role, if they ever had one, of providing housing themselves. In fact, in many states, especially more developed welfare states, where the state had previously held a providing role in the housing sector, the development of housing markets took off with the sale of public housing units. For example, in the United Kingdom, the privatization of public housing included the sale to sitting tenants of public rented housing through right-to-buy policies.³⁸ In other countries, public housing property was transferred to not-for-profit (Netherlands) or profit-maximizing actors (Germany or the United States).³⁹

Once housing is submitted to market rationale, law in the neoliberal state serves to shape what the “market” actually is and means.⁴⁰ Market states need to emphasize private property and freedom of contract in order to allow for negotiation and maximization of profit. According to this approach, private property and contracts are considered optimal institutions for increasing overall welfare, protecting individual freedoms, and disciplining economic actors. These institutions are viewed as more effective compared to democratic politics and public institutions, inherently ruling out certain policy options.⁴¹ Market-based property law emphasizes individual freedom and the individual right to property at the expense of possible social functions of property or social obligations deriving from it.⁴² In market-based systems of housing provision this is achieved by interpreting broadly the right to private property, encompassing the right to be able to acquire property for own living purposes, for renting it out, or for construction and or sale as well as a guarantee against—unlawful—expropriation. In capitalist economic systems, the right to property also includes the right to make a profit. This implies the right to leave a property vacant if it is more profitable than renting it out.⁴³

II. Legal Bases

The market-based approach to housing systems results in minimal or no central political control over housing markets. More autonomy is granted to market actors, allowing them to optimize their housing properties as they see fit and to shape the development of the housing sector in

³⁶Isaac Megbolugbe, Allen Marks & Mary Schwartz, *The Economic Theory of Housing Demand: A Critical Review*, 6 J. REAL EST. RSCH. 381, 384 (1991).

³⁷*Id.* at 382.

³⁸Helen Carr, *The Right to Buy, the Leaseholder, and the Impoverishment of Ownership*, 38 J. L. & SOC'Y 519, 520 (2011).

³⁹See Raquel Rolnik & Lidia Rabinovich, *Late-Neoliberalism: The Financialisation of Homeownership and the Housing Rights of the Poor*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 57, 61 (Aoife Nolan ed., 2014) (providing an overview).

⁴⁰Grewal & Purdy, *supra* note 25, at 7. (describing that neoliberalism presupposes certain legal arrangements and is not a self-consistent political program).

⁴¹*Id.* at 6.

⁴²Most of the major human rights treaties contain variations on the rights to privacy, *see, e.g.*, G.A. 217 (III) A, Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; Ass'n of Southeast Asian Nations [ASEAN] Human Rights Declaration art. 17. Similarly, many constitutions contain a right to property, *see, e.g.*, Grundgesetz [GG] [Basic Law], art. 14; Constitución Política de la República de Chile [C.P.] art. 19, ¶ 24.

⁴³Martina Gentili & Joris Hoekstra, *Houses Without People and People Without Houses: A Cultural and Institutional Exploration of an Italian Paradox*, 34 HOUS. STUD. 425, 427 (2019).

general. The regulatory state intervenes only in cases of narrowly defined market failures, such as a lack of competition, under-provision of public goods, externalities, or information asymmetries. Specifically, land use is intended to operate in a bottom-up, decentralized manner with minimal political planning. The ideology of private home ownership facilitates the financialization of housing sectors, and poses challenges to the security of tenure for those who do not own their homes.

1. Minimal Land Use Regulation

Urban development is a regulated market. Land use regulations are the central mechanisms through which governments control how cities grow.⁴⁴ They have a direct impact on the physical shape of a city, as well as on the production, affordability, and distribution of housing. Because urban development imposes advantages and disadvantages on city residents, the design of land use controls must take a normative decision on how to distribute the costs and benefits of urban development between the different private and public actors involved in housing markets. In economic analysis terms, externalities are everywhere, so what counts as an externality that private actors ought to internalize is a first order question in land use regulation. And a question that has had different and contested answers. Generally, it is assumed that society as a whole benefits more in an institutional scheme where private agents have more freedom to implement their own land use choices.⁴⁵ This view finds support in studies that show that strict land use controls have had a significant effect in the rapid increase in housing prices observed in many cities through restricting the supply of dwelling units, and therefore constitute one of the main explanations of the housing affordability crisis affecting numerous metropolitan areas across the globe.⁴⁶

Two market-based models that are built on the intellectual premises of neoclassical economics have been very influential. Both models assume, first, that urban market actors are rational self-interested agents, and second, that they are in the best position to make decisions that maximize their individual benefits. The first model is the Tiebout model.⁴⁷ Tiebout's work is a theoretical exercise that aims to show that it is possible, at the sub-federal level, to build a decentralized regime that promotes an optimum level of consumption of public goods. Tiebout argues that in metropolitan areas that are institutionally fragmented among many local governments, and where there are strong differences between localities, "consumer-voters" are in a better position to satisfy their housing and urban preferences. In that institutional setting, therefore, there should be more aggregated welfare because a bigger number of people would maximize their own rational choices. This model assumes many premises, such as: That consumer-voters have complete residential mobility, that they have information about taxes and services offered by each municipality, that there is a reasonable big number of local communities that they can choose, that there are no significant labor restrictions, and that public services do not generate externalities beyond each municipal jurisdiction.⁴⁸ Some of these assumptions are hard—or perhaps impossible—to find in contemporary metropolitan areas. However, Tiebout seeks to demonstrate that it is possible to build a land use regulatory regime modeled on market systems, where there is competition among local communities to attract residents, and where people can express their preferences by consuming the level of public goods and paying the taxes that are more consistent with their own interests.

⁴⁴ROBERT ELICKSON, VICKI BEEN, RODERICK HILLS & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* xxvii (5th ed. 2020).

⁴⁵David Schleicher, *The City as Law and Economic Subject*, 2010 U. Ill. L. Rev. 1507, 1510 (2010).

⁴⁶See Edward L. Glaeser & Joseph Gyourko, *Building Restrictions and Housing Availability*, (June Issue) *ECON. POLICY REV.* 21, 35 (2003). See also Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, 5 *HANDBOOK REG'L & URB. ECONS.* 1289, 1293 (2015).

⁴⁷Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1996).

⁴⁸*Id.* at 419.

The second market-based model comes from the contribution of agglomeration economics and its implications for land use regimes.⁴⁹ This theory presupposes that individuals and firms take rational self-interested decisions on where to locate within a city, and that it is in their interest to agglomerate rather than to separate. Dense urban markets reduce the transportation costs of goods and services, allow deeper labor specialization, and promote more accumulation and spillover of information and knowledge. Therefore, land use regulations should favor those decisions towards urban agglomeration because they not only benefit private agents but also society as a whole. The land use implication here is straightforward—minimalist land use regulatory frameworks are better than highly regulated city markets.

Both market-based models, although starting from similar premises, do not necessarily overlap with respect to their legal and policy implications. The Tiebout model favors metropolitan fragmentation into a diverse array of local jurisdictions and land use regimes, accepting that a competitive local market should have some municipalities with strict and others with more flexible land use controls. At the same time, the agglomeration economics framework has been used to propose the deregulation of zoning regimes across metropolitan areas to facilitate the location choices of individuals and firms. But both models strongly believe in institutional schemes that favor competition and decentralization in land use choices. In other words, the market logic should discipline land use decisions rather than central planning mechanisms seeking public goals.

Many cities around the world have land use regulatory systems that arguably follow the theoretical foundations of these market-based models. Particularly, metropolitan fragmentation into several separated local jurisdictions with strong land use powers is quite common in many countries, in the Global North and South, with problematic outcomes.⁵⁰ For instance, an interesting comparative case study that includes Boston, London, Paris, San Francisco, and Toronto, argues that there are two relevant dimensions of metropolitan fragmentation: The actual separation of metropolitan areas into several local governments, and the mechanisms through which some localities may accumulate resources relative to others that belong to the same urban area.⁵¹ The combination of both may lead to high levels of inequality within cities. With respect to agglomeration economics, the literature usually claims that most economically vibrant cities have too much land use regulation, which has an impact on housing affordability. But there are good arguments to suggest that the deregulation of land use would not necessarily benefit the access of low-income groups to well-located and highly demanded neighborhoods.⁵²

2. Extended Housing Finance

In the political economy of neoliberal markets, private homeownership has become an ideology.⁵³ It is pivotal in two ways. First, because states have retreated from the public provision of housing, individuals need to be able to access housing through markets. Many do so by buying their own home. Second, individuals may see housing as property that can be rented out as part of an investment. For both, the financialization of the housing sector is essential. For private homeowners, housing becomes accessible through mortgage credit. For investors, housing property absorbs surplus capital and financialization enables the expansion of the “terrain for global capital.”⁵⁴

⁴⁹Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 638 (2012).

⁵⁰See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1121 (1996).

⁵¹Yonah Freemark, Justin Steil & Kathleen Thelen, *Varieties of Urbanism: A Comparative View of Inequality and the Dual Dimensions of Metropolitan Fragmentation*, 48 POL. & SOC'Y 235, 237 (2020).

⁵²Richard C. Schrager, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 127 (2021).

⁵³RICHARD RONALD, *THE IDEOLOGY OF HOME OWNERSHIP: HOMEOWNER SOCIETIES AND THE ROLE OF HOUSING* 8 (2008).

⁵⁴Saskia Sassen, *Expanding the Terrain for Global Capital: When Local Housing Becomes an Electronic Instrument*, in SUBPRIME CITIES: THE POLITICAL ECONOMY OF MORTGAGE MARKETS 74, 74 (Manuel B. Aalbers ed., 2012).

Financialization is the patterned accumulation in which profits are made increasingly through financial channels rather than through the production and trade of commodities.⁵⁵ For housing, this implies the increasing dominance of financial actors—hedge funds, private equity firms, listed real estate companies—, markets, and their corresponding practices, measurements and narratives, causing a structural transformation of economies, firms, states, and households.⁵⁶ In order to enable financialization, states have to abolish possible restrictions on foreign investment. They do so through market-building on the one hand, and responding to market failures on the other hand.

Making and expanding a mortgage credit market is based on the premise that the housing market, if properly regulated, can ensure access to adequate and affordable housing.⁵⁷ Macroeconomics and tax policies are used to increase demand for, and the supply of, mortgage capital,⁵⁸ such as providing mortgage loans, subsidies, or tax exemptions for the purchase, rental, construction, or improvement of housing units.⁵⁹ Private debt is extended significantly in this way, often to the ones previously excluded from mortgage markets. So-called financial innovation achieves this by granting mortgage loans on two incomes rather than one, and by introducing or modernizing schemes for the deductibility of mortgage interest rate payments from income tax.⁶⁰ The securitization of mortgages loans but also the use of credit scoring and risk-based pricing changed mortgage markets from facilitating markets for homeowners in search of credit to facilitating global markets for investment.⁶¹ This expansion of mortgage finance not only led to the expansion of private homeownership worldwide but also increased the importance of land in the making of global financial capitalism.⁶²

Although national developments and trends certainly differ from each other, most states have—at different degrees and at different times—enabled and encouraged the financialization of their housing sectors in order to encourage investment in and ownership of housing property.⁶³ With regard to private home ownership, a prime example is the 1980s U.K. Housing Act, which introduced the right to buy for tenants of social housing. Also, in Central and Eastern European countries, housing was privatized wholesale to foster private homeownership. In contrast, Germany's move towards private homeownership was quite slower. A notable mortgage credit market developed only in the first decade of the 2000s and is still smaller than in other countries. Chile, in turn, is an example of a country that adopted a quite different approach to private homeownership—capital-grant subsidy approach to targeted low-income households.⁶⁴ Mortgage finance was reserved for the middle-class.

Financialization also allowed for the entry of investors into housing markets. For example, in Chile, construction companies were prominent actors in the politically mediated process of

⁵⁵Greta R. Krippner, *The Financialization of the American Economy*, 3 SOCIO-ECON. REV. 173, 174 (2005).

⁵⁶See AALBERS, *supra* note 6, at 2. See also Gertjan Wijburg & Manuel B. Aalbers, *The Alternative Financialization of the German Housing Market*, 32 HOUS. STUD. 968 (2017).

⁵⁷Rolnik & Rabinovich, *supra* note 39.

⁵⁸Kathe Newman, *Post-Industrial Widgets: Capital Flows and the Production of the Urban*, 33 INT'L J. URB. & REG'L RSCH. 314 (2009).

⁵⁹Rolnik & Rabinovich, *supra* note 39, at 62.

⁶⁰Rodrigo Fernandez & Manuel B. Aalbers, *Housing and Capital in the Twenty-First Century: Realigning Housing Studies and Political Economy*, 34 HOUS. THEORY & SOC'Y 151, 156 (2017).

⁶¹Manuel B. Aalbers, *The Financialization of Home and the Mortgage Market Crisis*, 12 COMPETITION & CHANGE 148, 154 (2008) [hereinafter Aalbers, *Financialization*].

⁶²See Daniel Coq-Huelva, *Urbanisation and Financialisation in the Context of a Rescaling State: The Case of Spain*, 45 ANTIPODE 1213 (2013).

⁶³See Wijburg & Aalbers, *supra* note 56. Germany, for example, has long been considered an outlier of financialization. However, lately the characteristics of the German housing market, marked by low levels of financialization and private home ownership with a large private renting sector, are changing and financial actors are investing especially in the German rental housing stock. Displacement of migrants and the poor are the result.

⁶⁴Diego Gil McCawley, *Law and Inclusive Urban Development: Lessons from Chile's Enabling Markets Housing Policy Regimes*, 67 AM. J. COMPAR. L. 587, 611 (2019).

financialization.⁶⁵ The regulation of housing markets—which were at the center of a complete restructuring of the relations between state and market, neoliberalism, privatization, marketization, since the late 1970s—facilitated investment, and housing investments funds were increasingly pushing towards the construction of—more profitable—vertical housing.⁶⁶ In Germany, a latecomer in the move towards private homeownership, far-reaching policy reforms allowed for the large-scale sale of social housing to private equity and hedge funds; Germany’s social housing stock was primarily sold to international financial corporations.⁶⁷ These policies were facilitated by the newly established European single market which seeks to abolish all barriers on intra-EU trade, including capital investment in housing markets.⁶⁸

Protection from over-indebtedness of homeowners is not a regulatory goal in this approach. Instead, debtors are supposed to be empowered through financial education and the provision of—standard—information in mortgage agreements,⁶⁹ and, in this way, be enabled to understand the financial obligations they were entering into. Another concern for regulation is market failure, especially where financial institutions focus on short-term profit and externalize credit default risk through securitization or minimize it via high interests and fees. These practices lower the incentives of financial institutions to undertake thorough creditworthiness assessments [hereinafter CWAs] and take seriously their results.⁷⁰ In the aftermath of the Global Financial Crisis international bodies have emphasized the importance of following CWAs. For example, the “effective verification of income and other financial information” is the first of the European Financial Stability Board [hereinafter FSB] *Principles for Sound Residential Mortgage Underwriting*.⁷¹ Similarly, the G20 High-Level Principles of Financial Consumer Protection contain in their *Responsible Business Conduct of Financial Services Providers and Authorized Agents* the obligation of financial services providers to assess the “financial capabilities, situation and needs of their customers before agreeing to provide them with a product, advice or service.”⁷²

3. Free Rental Markets

Similarly to the approach in land use and finance, rental markets—under the market approach—are considered to be competitive, and rent prices determined solely by supply and demand. States emphasize this self-regulatory force of markets and intervene little or not at all for the sake of accessibility and affordability. Conceptually, renting out private property is nothing more than proprietors exercising their right to make a profit from their property. Concerns of affordability and security of tenure, and quality of housing for that matter, take a backseat in public policy because they are left to the negotiation between private parties. The level of rent prices is generally not controlled.

Market-oriented contract law takes seriously the principle of freedom of contract. There are only a few regulatory interventions in the case of market failures like the danger of unfairness in

⁶⁵David León Kornbluth Cambor, *El diseño político del proceso de financiarización de la vivienda y la infraestructura en Chile*, 36 REVISTA INVI 54 (2021).

⁶⁶Rodrigo Andrés Cattaneo Pineda, *Los fondos de inversión inmobiliaria y la producción privada de vivienda en Santiago de Chile: ¿Un nuevo paso hacia la financiarización de la ciudad?*, 37 EURE (SANTIAGO) 5 (2011).

⁶⁷Wijburg & Aalbers, *supra* note 56, at 978–79.

⁶⁸See Joined Cases C-197/11 & C-203/11, *Eric Libert and Others v. Gouvernement Flamand*, ECLI:EU:C:2013:288 (May 8, 2013).

⁶⁹See IRINA DOMURATH, CONSUMER VULNERABILITY AND WELFARE IN MORTGAGE CONTRACTS, at 78 et subs (2017).

⁷⁰Yesim M. Atamer, *Duty of Responsible Lending: Should the European Union Take Action?*, in FINANCIAL SERVICES, FINANCIAL CRISIS AND GENERAL EUROPEAN CONTRACT LAW (Stefan Grundmann & Yesim M. Atamer eds., 2011).

⁷¹FINANCIAL STABILITY BOARD, FSB PRINCIPLES FOR SOUND RESIDENTIAL MORTGAGE UNDERWRITING PRACTICES (2012), https://www.fsb.org/wp-content/uploads/r_120418.pdf.

⁷²G20 & ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, G20/OECD HIGH-LEVEL PRINCIPLES ON FINANCIAL CONSUMER PROTECTION (2022), https://web.archive.oecd.org/2022-12-12/648348-G20_OECD%20FCP%20Principles.pdf.

contracts of adhesion.⁷³ An example of this approach is EU Law, where tenancy agreements fall under the framework of consumer law, specifically the Unfair Terms Directive 93/13 [hereinafter UCTD].⁷⁴ Although the conceptual fusion of housing law with consumer law could be considered to be a “protective” move, the EU consumer law framework is made for making markets work rather than accommodating affordability or security of tenure concerns. The unfairness assessment under the UCTD specifically leaves out any concern for prices, as indicated in Article 4 (2) UCTD.⁷⁵ And as consumer law is conceptually concerned with remedying the asymmetry in bargaining power in contracts of adhesion by correcting an information asymmetry, it is not concerned with substantives regulatory goal such as affordability or urban integration. It simply enables profit-making from housing through contract terms, below the threshold of “abuse.”

In the model of free rental markets, rent control is treated as an interference with the right to property that needs to be justified and satisfy the requirements of the principle of proportionality. The case law of the European Court of Human Rights [hereinafter ECtHR] provides a case in point. Although the ECtHR acknowledges the state’s legitimate interest in promoting social justice,⁷⁶ protecting less affluent tenants from soaring rental prices in the private market,⁷⁷ and combating housing shortages,⁷⁸ it is essential to assess the proportionality of the rent control measure in question. Rent controls can be proportionate, for example, if the owners can still pass on various expenses to tenants, if a transitional provision is in place,⁷⁹ or if a rent restriction was already in place at the time of acquisition of the housing property.⁸⁰ If the level of the rent is particularly low, the rent control measure can be disproportionate.⁸¹ So, rent control measures are only legitimate as long as the core of the right to derive some profit from housing property remains intact.

Rent control measures are based on conceptually weak grounds. First, because they serve “blurry” social-justice goals that not only are different from country to country but that are also subject to political struggles within each country where ideas about what is meant by the term “social justice” and what it should mean might vary. Second, because they have to be justified against the yardstick of a well-defined, strong, and hardly disputed right to property.⁸² The right to housing is usually not mentioned in those cases.

C. Welfare-Based Housing Law and Policy

In welfare-based housing systems, the law aims at the allocation and re-distribution of housing beyond market dynamics, emphasizing the social character of housing over its economic function.

⁷³The concept of “contracts of adhesion” became a point of scholarly reference since Friedrich Kessler, *The Contracts of Adhesion - Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629 (1943).

⁷⁴See Case C-488/11, Dirk Frederik Asbeek Brusse & Katarina de Man Garabito v. Jahani BV, ECLI:EU:C:2013:341, (May 30, 2013); Case C-488/11, Dirk Frederik Asbeek Brusse & Katarina de Man Garabito v. Jahani BV, ECLI:EU:C:2013:341 (May 30, 2013).

⁷⁵See Case C-450/22, Caixabank SA and Others v. Asociación de Usuarios de Bancos, Cajas de Ahorro y Seguros de España (Adicae) and Others, ECLI:EU:C:2024:577 (July 4, 2024) (holding the respective contract term must be drafted in plain, intelligible language and the quality-price-ratio can only be taken into account when analyzing other terms in the contract).

⁷⁶Mellacher & Others v. Austria, 1989 E.C.R. 391.

⁷⁷Lindheim & Others v. Norway, App. No. 13221/08 (Oct. 22, 2012), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-111420%22%7D>].

⁷⁸Nobel & Others v. The Netherlands, App. No. 27126/11 (Feb. 7, 2013), <https://hudoc.echr.coe.int/eng?i=001-122988>.

⁷⁹Mellacher, App. No. 10522/83, ¶ 223.

⁸⁰Nobel, App. No. 27126/11, ¶ 39.

⁸¹Lindheim & Others v. Norway, App. No. 13221/08 (Oct. 22, 2012) (fixing annual rent at less than 0.25 percent of market value).

⁸²See Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, (2019) (detecting a structural disadvantage for housing campaigns).

The normative standards are associated with the right to housing which can justify broader limitations to the right to property. The political economic framework for a welfare-based approach to housing can be socialist or social-democratic. The socialist economic approach would demand social or public ownership of the entire housing stock, whereas a social-democratic perspective would favor stronger state involvement in housing provision and a stronger regulation of private actors in the context of a capitalist society.

I. The Political Economic Framework of Welfarist Housing Law

In a welfare-based approach, the justification for government intervention in the housing policy sector is broader because it goes beyond pure market-failure rationales and pursues the substantive, albeit more fuzzy goal of interpreting more strongly the right housing and emphasizing the social function of property. The right to housing is part of the catalogue of social rights that many constitutions and international treaties around the world recognize. In an intellectual tradition that connects the concept of social rights with the idea of citizenship, these are conceptualized as demands for reasonable levels of equality in relevant areas of social welfare.⁸³ Given that the place where people live has a strong impact on how they accumulate economic, social, and cultural capital or wellbeing, the right to housing demands that governments ensure access to adequate housing. This comprises not only a place that meets certain quality standards and that has proper connection to basic services, but also that is well-located and that provides reasonably equal access to a geography of opportunities allowing individuals to live a reasonable life as full members of their political communities both inside and outside urban areas.

In our view, a welfare-based approach is not necessarily the same as the public housing model that was the main predominant policy approach in many advanced economies before the neoliberal turn. Here, the government operated mainly as developer, with high control over the finance, construction, and delivery of housing units. A welfare approach to housing provision can also be achieved through and is consistent with an active role of the regulatory state in housing markets. Through regulations and incentives promoting outcomes in line with the social function of housing property and an amply interpreted right to housing, governments can go beyond the market-failure rationale for regulation. Acknowledging the descriptive and normative limitations of the market failure approach,⁸⁴ regulatory interventions are justified as mechanisms to promote values that are usually in competition with others, with governments needing to achieve an equilibrium among those values considering the specific political and social context. Tony Prosser has developed the idea of social solidarity as a regulatory principle, which has, at least, two clear implications: One is to provide the moral foundations for market relations, through ensuring that these are based on mutual trust and respect; the other concerns the role of regulation in preventing or mitigating the social fragmenting effects of markets.⁸⁵ The latter is particularly relevant in justifying an active regulatory state in housing markets. Limiting the justification for government action to cases of market failure falls short if the aspiration is to consider the right to housing as access to opportunities and to more egalitarian relations in the urban space.⁸⁶

One of the challenges for the commitment towards an active regulatory state in housing markets is the tension between an amply understood right to housing and the right to private property. This is why a welfare-based approach places a strong emphasis on the concept of the

⁸³T. H. Marshall, *Citizenship and Social Class*, in *THE CITIZENSHIP DEBATES: A READER* 93 (Gershon Shafir ed., 1998).

⁸⁴See Tony Prosser, *Regulation and Social Solidarity*, 33 J. L. & SOC'Y 364, 369 (2006). See also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 48 (1990).

⁸⁵See Prosser, *supra* note 84, at 382–86.

⁸⁶See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006) (making a similar line of argument).

“social function of property.” This idea, attributed to Leon Duguit,⁸⁷ has gained traction especially in continental Europe and Latin America. It has been included in Germany’s Basic Law and many constitutions of Latin American countries.⁸⁸ Even in a country like the United States, with a long tradition of a liberal and individualistic approach to property law, there are authors favoring the concept. Gregory Alexander, for instance, argues that U.S. property law not only already includes a social-obligation norm but that this norm is also best suited to promote human flourishing, which means enabling individuals to live dignified lives.⁸⁹ Suffice to say here that the core idea is that property rights should be understood and interpreted in the context of societies characterized by the interconnection and interdependence between individuals. From this perspective, property rights not only have external and exceptional limitations but also internal obligations that are justified based on the duties that individuals owe to their communities. Additionally, we think a distinction has to be made between housing property acquired for own living purposes and real estate acquired by investors or investment funds. If housing property is used for own living purposes, the individual and social functions of housing overlap, whereas in real estate investment the social function of property, more often than not, does not overlap with the investor interest. For these cases, the social function of property should be activated through law and regulation.

II. Legal Bases

The welfare-based approach to housing systems grants governments greater political control over housing markets. Government policies actively intervene to shape the social function of property and ensure access to affordable housing. Land use and zoning regulations are focused on promoting social inclusion and justice. Housing finance is governed by a regulatory framework that emphasizes responsible lending. Additionally, rent controls may be implemented to maintain affordability and enhance security of tenure.

1. Land Use Regulation

Instead of being modeled under the idea of a competitive market where private agents are understood as consumers of private and public goods, land use regulations under the welfare approach respond to the goal of constructing a more inclusive and just housing sector.

The paradigmatic land use regulatory instruments are zoning ordinances. These ordinances typically define the permissible uses for different neighborhoods within a city and establish norms that regulate the types of constructions allowed, such as maximum heights and densities. To be sure, the origins of modern zoning are related to the separation of uses that were considered incompatible,⁹⁰ such as separate residential uses and industrial or commercial areas. In some contexts, however, these origins were intertwined with exclusionary motives towards minority groups. For instance, some early local ordinances in the United States approved at the dawn of the twentieth century had the explicit purpose of segregating African Americans from certain neighborhoods dominated by whites.⁹¹ Nowadays, however, there is a strong debate on which normative principles should guide zoning decisions—and land use controls more generally. For instance, the original idea of separating uses and creating relatively homogeneous neighborhoods

⁸⁷LEON DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON XX* (Hachette Livre 2017) (1912).

⁸⁸Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Law Perspective*, 80 *FORDHAM L. REV.* 1003, 1008 (2011).

⁸⁹This argument is laid out in: Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *CORNELL LAW REV.* 745, 748 (2009) [hereinafter Alexander, *Social-Obligation*]; Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 *CORNELL LAW REV.* 991 (2019) [hereinafter Alexander, *Property, Dignity*].

⁹⁰Christopher Serkin, *A Case for Zoning*, 96 *NOTRE DAME L. REV.* 749, 749 (2020).

⁹¹*Id.* at 754-55.

contrasts with more contemporary ideas that many urbanists propose regarding building communities where mixed uses are allowed and where people could live, work, buy, and enjoy public spaces in the very same neighborhood.

A welfare-based model starts by acknowledging the significant relationship between land use controls and housing provision. This means that land use controls should be adopted with the explicit purpose of expanding access to housing and building strong communities, especially for the low-income population. The elaboration of the concrete characteristics that land use regimes should have to promote the realization of the right to adequate housing is beyond the scope of this Article. However, some examples from recent academic and policy discussions on the relationship between land use regimes and housing affordability may illustrate the point. One prominent example is the discussion on the impact of strict land use controls on housing prices. There is evidence indicating that strict land use controls are associated with higher housing prices in urban areas, which creates an obstacle for expanding affordable housing.⁹² However, although it is reasonable to predict that a land use regulatory environment that allows the construction of dense housing developments would have an impact on the price of dwelling units for all income groups, it is not clear that it would benefit the most disadvantaged population.⁹³

One strategy to link in a more direct way land use controls and the provision of housing is through inclusionary zoning mechanisms. These refer to the use of the land use planning system to require and or incentivize developers to include a quota of affordable housing units in their development projects.⁹⁴ The United States has extensive experience with these mechanisms from the early 1970s to the present.⁹⁵ Many other countries have also implemented similar strategies.⁹⁶ One locality in which the implementation of its inclusionary zoning program has been considered successful is Montgomery County, a suburban jurisdiction located close to Washington D.C.⁹⁷ The county's regulations require that almost all housing development projects with at least 20 dwelling units must set aside 12.5% of its units to affordable housing. To compensate, the regulations allow these projects to increase their density according to some pre-defined standards. These requirements operate through the land use approval process. A certain percentage of the affordable units produced through these land use requirements must be offered for sale to the local housing authority, which usually buys and distributes them to low-income families. There are authors who have strongly criticized inclusionary zoning strategies because of altering market incentives.⁹⁸ However, when carefully designed and implemented, it could be a powerful mechanism to promote socially inclusive affordable housing in expensive neighborhoods.⁹⁹

Land use regimes could also promote bargaining processes between local authorities and real estate developers in order to achieve distributive goals. In the United States, for instance, some cities recognize the validity of community benefits agreements, where community groups

⁹²Gyourko & Molloy, *supra* note 46.

⁹³Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 25 (2019).

⁹⁴See Nico Calavita & Alan Mallach, *An International Perspective on Inclusionary Housing*, in INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, AND LAND VALUE RECAPTURE (Nico Calavita & Alan Mallach eds., 2010).

⁹⁵Alan Mallach & Nico Calavita, *United States: From Radical Innovation to Mainstream Housing Policy*, in INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION AND LAND VALUE RECAPTURE 15, 25 (Nico Calavita & Alan Mallach eds., 2010).

⁹⁶*Id.* at 2.

⁹⁷MONTGOMERY COUNTY OFFICE OF LEGISLATIVE OVERSIGHT, A STUDY OF MODERATELY PRICE DWELLING UNIT PROGRAM IMPLEMENTATION (2007), <https://www.montgomerycountymd.gov/olo/resources/files/2007-9-mpdu.pdf>.

⁹⁸Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 984 (2010).

⁹⁹See Heather L. Schwarz, Liisa Ecola, Kristin J. Leuschner & Aaron Kofner, *Is Inclusionary Zoning Inclusionary? A Guide for Practitioners*, RAND CORP. (2012), https://www.rand.org/pubs/technical_reports/TR1231.html. See also Lisa A. Sturtevant, *Separating Fact from Fiction to Design Effective Inclusionary Housing Programs*, CTR. FOR HOUS. POL'Y (May 2016), <https://ihusa.org/wp-content/uploads/Separating-Fact-from-Fiction.pdf>.

negotiate with developer's certain conditions in order to support their land use approval applications for their projects. These conditions may go from requiring low-income units to issues related to employment and environmental protections.¹⁰⁰ To a certain extent, depending on the concrete policies, this requires departure from a focus on income-generating land uses.¹⁰¹

2. Restrictive Housing Finance

Seeing housing as a social good also has far-reaching implications for housing finance, cutting across different fields of law and regulation, including construction and investment law. One challenge is that every individual mortgage is bound up in the financial system and, thus, a potential concern for financial stability.¹⁰² Although it is impossible to analyze all implications of a welfare approach to housing finance, we will outline the most prominent of the possible policies, which is—to our minds—indispensable in order to change from a market-based to a welfare-oriented housing law: Broadly interpreted responsible lending. Taking responsible lending seriously implies nothing less than the acknowledgment of the public role of credit and debt regulation,¹⁰³ and of the embeddedness of mortgage credit in a globally interconnected system. This implies activating a kind of social dimension of mortgage credit.¹⁰⁴

Therese Wilson points out that most responsible-lending initiatives—in Australia, the United States, South Africa, and Europe—are intimately connected to *responsible borrowing* practices—based on financial education and active self-management of financial issues.¹⁰⁵ Although these certainly are important strategies of empowerment, it must be borne in mind that in a highly complex, global financial market, the actual role of consumers is radically limited. As Wilson makes it clear, they are embedded in a neoliberal context of individual responsibilities which place the burden for protecting consumers from potential harm created by financial markets on the shoulders of consumers,¹⁰⁶ without them being able to influence the workings of those markets. Moreover, those policies are reactive in nature and aim at protecting markets, not consumers.¹⁰⁷ Therefore, she advocates for a regulatory framework that is proactive in protecting homeowners from over-indebted and the associated social risks.¹⁰⁸ Following the same line of arguments, Iain Ramsay has argued for an approach that turns away from “truth in lending”—based on anonymous credit scoring—towards *responsible* lending based on individualized lending processes with the aim of reducing over-indebtedness and default risk to a socially acceptable level.¹⁰⁹ Both are in agreement with those who not only advocate for tighter rules on responsible lending but also sanctions for violation of those rules.¹¹⁰

Moreover, renegotiation of mortgage contracts must be made possible. Once a crisis does hit and the borrower is not able to service the debt burden, mortgage credit contracts must be

¹⁰⁰Schragger, *supra* note 52, at 190–94.

¹⁰¹See Federico Savini, *Planning, Uncertainty and Risk: The Neoliberal Logics of Amsterdam Urbanism*, 49 ENV'T & PLAN. A: ECON & SPACE 857 (2017) (making this case with regard to co-produced “new urbanism” strategies in Amsterdam).

¹⁰²Guido Comparato, *Financial Stability in Private Law: Intersections, Conflicts, Choices*, 58 COMMON MKT. L. REV. 391, at 422–423 (2021), discussing the CJEU's Gutiérrez Naranjo case in which financial stability concerns influenced the interpretation of mortgage contracts.

¹⁰³Iain Ramsay, *From Truth in Lending to Responsible Lending*, in INFORMATION RIGHTS AND OBLIGATIONS, 47 (Geraint Howells, Andre Janssen & Reiner Schulze eds., 2005).

¹⁰⁴DOMURATH, *supra* note 69.

¹⁰⁵Therese Ann Wilson, *The Responsible Lending Response*, in INTERNATIONAL RESPONSES TO ISSUES OF CREDIT AND OVER-INDEBTEDNESS IN THE WAKE OF CRISIS (Therese Ann Wilson ed., 2013).

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸See DOMURATH, *supra* note 69 (taking a more favorable stance on restrictive lending practices).

¹⁰⁹See Ramsay, *supra* note 103.

¹¹⁰See, e.g., Peter Rott, *Mitverantwortung des Kreditgebers bei der Kreditaufnahme: Warum eigentlich nicht?*, ZEITSCHRIFT FÜR BANK- UND KAP. 851–859 (2003).

modified to address the changed circumstances. In private legal theory, which applies to the financial sector, there is ample space for the modification of terms after a significant change of circumstance, and many civil codes include specific provisions to this end.¹¹¹ Furthermore, economists have argued that re-negotiations would have made economic sense to avoid the downward spiral that was set in motion by large-scale foreclosures.¹¹² When borrowers are able to, partially, freeze the payment of monthly installments or suspend payment temporarily until their financial situations have improved again, they might gain financial breathing space and, most importantly from the viewpoint of housing justice, might be able to continue living in their homes. In a globally interconnected financial system, where mass defaults on mortgages affect borrowers and financial stability worldwide, re-negotiation might also help to avoid economic recession and welfare decline elsewhere.

3. Control of Market Rent Prices

On rental markets, the welfare approach aims at achieving accessibility of housing and security of tenure. This implies thinking about how adequate rental contracts can be promoted to enable a social function of housing property. The main application of a social function of property within the framework of welfarist housing law is rent control, a regulatory measure that determines appropriate levels of rent and rent increases.

In fact, gentrification and soaring rental prices especially in urban areas have led several countries to adopt rent control as a public policy and directly intervene into tenancy contracts by amending their civil code, making clear the regulatory dimension of tenancy law as part of urban planning. Several countries have introduced caps on rent increases for new and renewed leases in “high-pressure” areas.¹¹³ Also, local authorities are imposing caps on rent, for example in Paris, Berlin, Catalunya, and the Barcelona City Council. In Germany, courts have dealt with the legality of such caps, albeit not necessarily from a social-justice point of view but as an issue of a conflict of competences for national contract law on one hand—federal legislator—and competences for the regulation of housing sectors on the other hand—municipal legislator.¹¹⁴

Academically, rent control is a hotly debated topic. On the one hand, price controls are not unheard of in other sectors, such as telecommunications, energy, or transports services. And some authors have started to think about extending the rationale, including the possibility for affordability criteria, of Services of General Economic Interest as known under the EU legal framework, to the field of housing.¹¹⁵ On the other hand, some authors, especially economists, reject rent control because it causes immediate reductions to the market value of rental housing

¹¹¹Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMPAR. ECON. 315, 329 (2013); DOMURATH, *supra* note 69, (regarding *rebus sic stantibus* being applied in different ways in different European countries).

¹¹²ATIF MIAN & AMIR SUFI, *HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN* 137 (2014).

¹¹³See Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 556d, 556g, https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.) (setting out new rules for the calculation of rental increases). See also Article 140 LOI n° 2018-1021 du 23 novembre 2018 portant évolution du logement, de l'aménagement et du numérique (Fr) (setting caps on rent increases for new and renewed leases in “zones tenues.”) In Ireland, the Irish government introduced rent increase restrictions in “Rent Pressure Zones”, see Residential Tenancies (Amendment) Act 2021, <https://data.oireachtas.ie/ie/oireachtas/act/2021/39/eng/enacted/a3921.pdf>.

¹¹⁴See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 1/20, 2 BvL 5/20, 2 BvL 4/20, Mar. 25, 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-028.html> (providing the latest case in point on the lack of competences of the Berlin Senate).

¹¹⁵Analyzing and arguing in favour of applying the concept of Services of General Interests: Irina Domurath, *Housing as a Double Irritant in EU Law: Towards an SGEI Between Markets and Local Needs*, 38 Y.B. EUR. L. 400 (2020); Padraic Kenna, *Supporting the Irish Housing System to Address Housing Market Failure: Cost Rental Housing and Services of General Economic Interest (SGEI)*, CTR. FOR HOUS. L. RS. & POL'Y & IRISH COUNCIL FOR SOC. HOUS. (2021), <https://icsh.ie/resources/8055/>.

and rent increases for the unregulated sector,¹¹⁶ can reduce maintenance, at least if not accompanied by mandated rewards for quality improvements,¹¹⁷ will make re-development of land hasty,¹¹⁸ and induce inefficient allocation of flats, thus questioning whether targeted groups really benefit.¹¹⁹ Moreover, rent control can lead to both under- and overallocation in the controlled sectors.¹²⁰ The problem with many of these studies is, however, that they are mainly grounded on theoretical models that—depending on the validity of the assumptions—provide unclear results on the effects of rent controls on the target groups. Also, some of the methodologies used are quite narrow.¹²¹ And even authors who empirically test assumptions about the ineffectiveness of rent control measures—be it rental caps or rental brakes—mostly only look into short-term effects. Moreover, what is also missing in many studies is the possibility of tenants to enforce their rights, neglecting the influences of enforcement on the effectiveness of rent control measures.¹²²

Other analysts attribute ambiguous or positive effects to rent control, depending on the concrete policy design. On the one hand, even though rent controls could be effective in bringing down the levels of rent or at least slowing their growth, they might lead to other adverse effects, such as higher rents for uncontrolled dwellings, rising homeownership, less housing mobility, and diminished quality of housing.¹²³ On the other hand, Arnott and Igarashi argue that “mild” controls are welfare-improving while stronger ones are not.¹²⁴ There also seems to be a persistent, albeit small positive effect of the rental brake alone and in combination with capping limits.¹²⁵ A recent study found that rent control policies can reduce rental prices while not shrinking the rental market in return.¹²⁶ These more recent results confirm the attractiveness of rent control as a targeted policy tool with the objective of bringing down levels of rent, especially in countries in which there is social pressure in favor of rent controls. From a policy point of view, this means that if governments take the decision for rent control, they might be well advised to monitor for adverse effects and maybe combine rent control with other measures to address the latter.

In order to be effective, rent control must also be accommodated legally. We have seen above in the ECtHR case law that hitherto rent control measures need to be justified as restrictions of the right to property. This makes the right to property the yardstick of assessing the proportionality of measures such as rent control. One possible approach is to lower the burden of proof for governments implementing rent control measures, when they are aiming to alleviate affordability pressures in the housing sector as part of achieving social justice.

¹¹⁶Dirk W. Early & Jon T. Phelps, *Rent Regulations’ Pricing Effect in the Uncontrolled Sector: An Empirical Investigation*, 10 J. HOUS. RSCH. 267, 278 (1999).

¹¹⁷Nandinee K. Kutty, *The Impact of Rent Control on Housing Maintenance: A Dynamic Analysis Incorporating European and North American Rent Regulations*, 11 HOUS. STUD. 69 (1996).

¹¹⁸Alastair McFarlane, *Rent Stabilization and the Long-Run Supply of Housing*, 33 REG’L SCI. & URB. ECONS. 305, 331–32 (2003).

¹¹⁹Edward L. Glaeser & Eroz F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93 AM. ECON. REV. 1027, 1031 (2003).

¹²⁰Morten Skak & Gintautas Bloze, *Rent Control and Misallocation*, 50 URB. STUD. 1988, 2003 (2013).

¹²¹See, e.g., Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J. ECON. PERSPS. 99 (1995).

¹²²See Konstantin A. Kholodilin, Andreas Mense & Claus Michelsen, *Discussion Papers: Market Break or Simply Fake? Empirics on the Causal Effects of Rent Controls in Germany*, DEUTSCHES INSTITUT FÜR WIRTSCHAFTSFORSCHUNG (2016), https://www.diw.de/documents/publikationen/73/diw_01.c.535869.de/dp1584.pdf (providing an example of when enforcement has so far not played a big role in economists’ analyses of rent control).

¹²³Konstantin A. Kholodilin, *DIW Roundup: Rent Control Effects Through the Lens of Empirical Research*, DEUTSCHES INSTITUT FÜR WIRTSCHAFTSFORSCHUNG (2022), https://www.diw.de/documents/publikationen/73/diw_01.c.833177.de/diw_roundup_139_en.pdf.

¹²⁴Richard Arnott & Masahiro Igarashi, *Rent Control, Mismatch Costs and Search Efficiency*, 30 REG’L SCI. & URB. ECONS. 249, 251 (2000).

¹²⁵Kholodilin, Mense & Michelsen, *supra* note 122.

¹²⁶Jordi Jofre-Monseny, Rodrigo Martínez-Mazza & Mariona Segú, *Effectiveness and Supply Effects of High-Coverage Rent Control Policies*, 101 REG’L SCI. & URB. ECONS. 103916 (2023).

D. Discussion

Once depicted as the “wobbly pillar” of the welfare state,¹²⁷ housing is now acknowledged as a central aspect in the life trajectory of individuals and communities. It does not only represent a secure and safe refuge for people but also the point of entry for the satisfaction of fundamental rights. For example, housing determines access to labor opportunities, medical services, education, or recreational services. Additionally, neighborhoods are a source of social and cultural capital. Ensuring access to adequate housing encompasses all these aspects.

We have shown in this Article that the legal and policy interventions that governments may adopt to provide and ensure adequate housing may vary significantly. These variations respond to the political-economic structure that shapes policy choices in each country. That political-economic structure determines what is possible and what is valid, and what legal measures are eventually adopted.

A market-based approach in housing law and policy has been very dominant in recent decades in most Western countries. It conceives individuals as consumer agents in the best position to make housing choices. Therefore, governments favor decentralized decision-making schemes promoting individual preferences, limiting their interventions to narrowly defined market failures. This explains the strong protection of private property rights defended by a neoliberal approach. The legal implications of this perspective are clear. In housing finance, all income groups are expected to actively participate in the financialization of housing. In land use regulation, a minimalist regulatory environment should be adopted to favor private location choices or a competitive market for public goods. In rental markets, the fluidity of markets should not be hindered by strong regulation, and contracts must be strictly enforced.

There are good arguments for re-thinking the market-based approach to housing, even though concrete answers might not be straightforward. For example, land use policies based on a market approach have serious shortcomings. They are associated with high urban segregation.¹²⁸ Under the competition of local governments, such as the one proposed by the Tiebout model described above, land use policies would be considered efficient even if there are socially homogeneous districts. Gerald Frug has argued that the Tiebout Model does not favor the construction of strong communities within cities.¹²⁹ According to Frug, the view of cities as shaped by land use preferences of consumers is an incomplete understanding of the role of individuals in urban areas. In cities, the preferences and the behavior of individuals affect each other, thus land use regimes should consider the interconnectedness and interdependence of urban residents. A similar argument may be formulated with respect to land use regimes based on favoring the location decisions made by individuals and firms.

Regarding housing finance, the verdict is scathing. Financialization is considered one of the main reasons for dispossession and growing inequalities.¹³⁰ The housing sector has served global investors’ interests rather than the needs of residents who struggle to pay rents and mortgages. Although mortgage credit surely enabled more individuals to buy their own homes, the Global Financial Crisis evidenced that the extreme expansion of housing finance is unsustainable. Previously not creditworthy individuals could get a mortgage and buy their own home because already low standards for CWAs were either lowered or ignored.¹³¹ Financial education initiatives had not worked. In the end, waves of eviction followed. Many lost their newly acquired home.

¹²⁷See Peter Malpass, *Housing and the New Welfare State: Wobbly Pillar or Cornerstone?*, 23 HOUS. STUD. 1, 1 (2008).

¹²⁸Gregory Verdugo & Sorana Toma, *Can Public Housing Decrease Segregation? Lessons and Challenges from Non-European Immigration in France*, 55 DEMOGRAPHY 1803,(2018).

¹²⁹Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 34–35 (1998).

¹³⁰This is the main claim advanced by: RAQUEL ROLNIK, *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE* (2019).

¹³¹See Irina Domurath, Guido Comparato & Hans-W. Micklitz, *The Over-Indbtedness of European Consumers: A View from Six Countries 1-319* (Eur. Univ. Inst., Working Paper, 2014) (providing a European cross-country analysis, which shows, inter alia, that lending standards were lowered in all countries under review in the years leading up to the Global Financial Crisis).

Similarly, leaving rental agreements to market forces may have detrimental effects for welfare and urban segregation. In England, private rental-led gentrification is considered more pernicious than gentrification linked to ownership, because it is currently widespread and leads to the displacement of poorer residents, and the dispossession of low-income owners.¹³²

A welfare-based approach to housing has quite different ideational foundations and policy implications. Its view of the role of individuals in housing markets goes beyond the idea of consumer agents. People do more than just consuming goods in the area where they live. They also care about the relationships with others with whom they interact and the community they are part of. Also, their life choices evolve through time and are significantly shaped by the institutional framework governing housing and urban development. This has a direct implication on how to imagine government interventions in housing markets. In a welfare-based approach, intervention cannot be reduced to correct market failures.¹³³ Instead, governments must pursue normative values and ideas backed by the best reasons on how to fulfill the right to housing for everyone.

In a “welfarist” housing finance sector, governments promote a stronger responsible lending framework, with the aim of avoiding mass lending programs that may end up promoting vicious cycles of over-indebtedness, large-scale evictions, and threats to financial instability. Social inclusion does not necessarily follow financial inclusion.¹³⁴ In cases of negative CWAs, it will be more socially just to deny mortgage credit while fostering possibilities for access to other adequate types of tenure. Governments could diversify tenures especially for lower income groups. Finally, governments should monitor and intervene when the intervention of the financial system has an impact increasing land prices and reducing housing affordability. In the land use realm, governments should abandon laws and regulations that lead to segregation. Although decentralized decision-making schemes are possible, governments can pursue normative goals and connect regulations with affordability goals, promote balanced zoning ordinances, and the generation with a more equal distribution of housing for all income groups. The procedures through which land use decisions are taken are then evaluated according to how they impact the social capital of urban relationships. With respect to the rental market, governments can consider strong and smart interventions to control radical increases in prices and discriminatory practices. Re-imagining the right to property is needed, including the right to derive a profit, especially vis-à-vis the right to housing.¹³⁵

A welfare-based model of housing provision is consistent with a regulatory state, and not only with the direct public provision of low-income housing. But a regulatory state with certain characteristics: Clearly defined normative standards related to the right to housing, and flexible and forceful regulatory interventions in housing markets that are continuously monitored to ensure their effectiveness.

Although most of the examples used in this Article are drawn from advanced Western economies, we argue that the analysis is applicable to other regions as well. Emerging economies in the Global South, as well as non-Western countries with historically distinct developmental models, have also experienced a shift towards market-based regimes in housing policy.¹³⁶ Countries undergoing this transition should carefully evaluate the legal and policy implications of

¹³²Antoine Paccoud, *Private Rental-Led Gentrification in England: Displacement, Commodification and Dispossession* 1-28 (LUX. INST. SOCIO-ECON. RSCH. Working Paper No. 6, 2015).

¹³³See Prosser, *supra* note 84.

¹³⁴GUIDO COMPARATO, *THE FINANCIALISATION OF THE CITIZEN: SOCIAL AND FINANCIAL INCLUSION THROUGH EUROPEAN PRIVATE LAW* (2020).

¹³⁵Ugo Mattei, Rocco Albanese & Ryan Fisher, *Commons as Possessions: The Path to Protection of the Commons in the ECHR System*, 25 EURO. L. J. 230 (2019) (providing inspiration from the attempt to re-interpret the “commons” as “possessions”).

¹³⁶See J. Albert Cao & Ramin Keivani, *The Limits and Potentials of the Housing Market Enabling Paradigm: An Evaluation of China's Housing Policies from 1998 to 2011*, 29 HOUS. STUD. 44, 44 (2013) (describing the housing policies in China); Gareth A. Jones & Kavita Datta, *Enabling Markets to Work? Housing Policy in the 'New' South Africa*, 5 INT'L PLAN. STUD. 393, 395 (2000) (describing the housing policies in South Africa).

adopting a market-based approach. Furthermore, this evaluation should consider the potential for developing a robust regulatory framework to mitigate the effects of market dynamics in the housing sector, particularly for low-income populations.

The global housing crisis necessitates abandoning predominant neoliberal ideas of housing policy in favor of experimenting with new ideas and legal tools that may better address current challenges. Transitioning to a welfare-based approach does not guarantee the resolution of all housing problems. After decades of market-based policies, many issues within the housing sector have become structural and may require many years of concerted and highly focused efforts to reverse these structures or mitigate their negative impacts. Given the importance of housing for all segments of society, such efforts may well be worthwhile.

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