

STRUGGLE AGAINST THE WATER: CONNECTING FAIR HOUSING LAW AND CLIMATE JUSTICE

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INTRODUCTION

In 1865, a group of freed slaves in North Carolina established the settlement of Freedom Hill, which is believed to be the oldest town chartered

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by formerly enslaved people in the United States.¹ The town is situated on marshes and swamp land along the Tar River in eastern North Carolina. From 1865 to 1958, there were six documented floods of the Tar-Pimlico River basin.² The town's historical outreach coordinator claims that parts of the town have flooded at least twenty-four times since 1870.³ Hurricanes have inundated the town with water, most recently Hurricane Floyd in 1999,⁴ and Hurricane Matthew in 2016.⁵ After Hurricane Floyd, which was billed as the "flood of the century"—a once-in-a-lifetime event that residents thought would never happen again—nearly every home was damaged.⁶ Some parts of the town were more than twenty feet under water.⁷ A 2016 New York Times article reported that many of the town's 2,100 residents—96 percent of whom were Black—were considering whether to sell their land, which would devastate the town's tax base, because they were struggling to rebuild after constant flooding.⁸ Sure enough, the 2020 Census put the town's population at 1,254—a steep decline from 2010.⁹ Daniel Hilliard, a Princeville native who was nineteen years old when Floyd came through and his parents lost everything, expressed the constant fear that residents of communities under siege from the risk of flooding must face: "Every time a hurricane come, it don't need to be everybody all stressed out thinking they're going to lose their home again."¹⁰

¹ See Jess Bidgood, *A Wrenching Decision Where Black History and Floods Intertwine*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/us/princeville-north-carolina-hurricane-matthew-floods-black-history.html> [https://perma.cc/8XCA-6HY5]. In 1885, Freedom Hill was incorporated as Princeville in honor of its founder. Richard M. Mizelle, Jr., *Princeville and the Environmental Landscape of Race*, OPEN RIVERS, Spring 2016, at 16, 18, https://openrivers.lib.umn.edu/wp-content/uploads/2016/08/openrivers_issue_2-2.pdf [https://perma.cc/LZ3Y-UN4F].

² Mizelle, Jr., *supra* note 1, at 20 ("Documented floods of the Tar-Pamlico River basin occurred in 1800, 1865, 1889, 1919, 1924, 1940, and 1958.").

³ Siobhan Riley, *Princeville Native Fears Climate Change Could Impact Historic Town Due to Lack of Resources to Address Flooding*, SPECTRUM NEWS 1, <https://spectrumlocalnews.com/nc/charlotte/news/2023/06/06/historic-town-of-princeville-looks-for-ways-to-address-climate-change-and-flooding> [https://perma.cc/CAF9-EVK4] (June 8, 2023, 4:54 PM).

⁴ *Id.*

⁵ Bidgood, *supra* note 1.

⁶ *Id.*; Riley, *supra* note 3.

⁷ Riley, *supra* note 3.

⁸ Bidgood, *supra* note 1.

⁹ Associated Press, *Historic Black Town in North Carolina Lies One Hurricane Away from Disaster*, WUNC 91.5 (Apr. 28, 2022, 11:20 AM), <https://www.wunc.org/news/2022-04-28/historic-black-town-north-carolina-hurricane-disaster-princeville-ap> [https://perma.cc/4J69-7J4J].

¹⁰ Riley, *supra* note 3.

Climate Change

“In 2020, natural disasters caused more internal displacement than war; floods, storms, and wildfires caused 30 million new displacements globally, and 1.7 million in the U.S. alone.”¹¹ In North and South America, climate disasters were the cause of most new displacements.¹² These two continents recorded more than 4.5 million displacements, the highest number in a decade.¹³ In a matter of decades, climate change will make some areas uninhabitable for humans.¹⁴ Rising sea levels will “profoundly alter[]” eight of the twenty largest metropolitan areas in the U.S., including Miami, New York, and Boston, affecting 50 million people.¹⁵

Based on recent data, more than 30 million people, representing nearly 10 percent of the nation’s population, live in an area with a 0.2 percent annual risk of flooding, while 15 million have a 1 percent annual chance of flooding.¹⁶ The risk is only growing as more people move into areas at greatest risk of flooding due to climate change. A 2021 Census Bureau study that analyzed mobility to coastal regions found that, between 1960 and 2008, there was a 150 percent increase in the population of coastal counties along the Gulf of Mexico.¹⁷ The growth of housing units along the coasts also outnumbered the national average and the production of housing in inland counties.¹⁸ Researchers in a satellite study estimating global exposure to flooding based on 913 large flood events between 2000 and 2018 estimate that flood exposure in the U.S. will increase from 2010 to 2030.¹⁹

¹¹ Raina Hasan, *Weathering the Storm: Establishing Internally Displaced People’s Right to Affordable Housing in the Wake of Natural Disasters*, 31 J.L. & POL’Y 177, 177–78 (2022).

¹² Internal Displacement Monitoring Ctr., Norwegian Refugee Council, *Global Report on Internal Displacement 2021: Internal Displacement in a Changing Climate*, 59 (2021), https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf [<https://perma.cc/4FJX-86UD>].

¹³ *Id.* at 61.

¹⁴ See Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html> [<https://perma.cc/AKM5-MVS7>].

¹⁵ Abrahm Lustgarten, *How Climate Migration Will Reshape America*, N.Y. TIMES MAG. (Sept. 15, 2020), <https://www.nytimes.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html> [<https://perma.cc/BPK8-HDJR>].

¹⁶ See Caroline Peri et al., *Population in the U.S. Floodplains 2* (2017), https://furmancenter.org/files/Floodplain_PopulationBrief_12DEC2017.pdf [<https://perma.cc/R554-GCMN>]; see also *Flood Zones*, FEMA, <https://www.fema.gov/glossary/flood-zones> [<https://perma.cc/2SPU-PTRF>] (July 8, 2020).

¹⁷ *Emergency Management Coastal Areas*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/preparedness/about/coastal-areas.html> [<https://perma.cc/X95B-NAZP>] (Nov. 20, 2021).

¹⁸ *Id.*

¹⁹ B. Tellman et al., *Satellite Imaging Reveals Increased Proportion of Population Exposed to Floods*, 596 NATURE 80, 80, 84 fig.4 (2021).

Climate Retreat

Rising sea levels and the flooding of rivers has led to the development of a practice referred to as “climate retreat” or “managed retreat.”²⁰ Climate retreat involves the relocation of residents in the most high-risk flood-prone areas to higher ground.²¹ Managed retreat, another term used in the literature, is arguably somewhat broader as it refers not only to relocation, but also to methods of adapting to the climate risk as well as the relocation of residences and other property “out of harm’s way”—if not to higher ground, then to a safer location.²² Laws that provide for the voluntary purchase, or buyout, of flooded homes by the government at their market value prior to the flood have become “the centerpiece of climate retreat law.”²³

Federal buyout laws, the largest of which is the Hazard Mitigation Grant Program (“HMGP”), compensate homeowners, but require that the homeowner relocate and that the land permanently remain unoccupied space.²⁴ As of 2021, there were more than 48,000 buyouts.²⁵ The government has since touted the benefits of completing 1 million buyouts, claiming it would save the government \$1 trillion.²⁶ Voluntary buyouts have thus become the mainstream response to addressing the risk of property loss for landowners as a result of flooding caused by climate change.²⁷ In fact, the buyout program has come to Princeville. Some homeowners have accepted buyouts from the North Carolina Hazard Mitigation Grant Program, according to a 2022 news report.²⁸ The Federal Emergency Management Agency

²⁰ See Leah A. Dundon & Mark Abkowitz, *Climate-Induced Managed Retreat in the U.S.: A Review of Current Research*, 33 CLIMATE RISK MGMT. 1, 2–3 (2021); see also Stephanie M. Stern, *Climate Transition Relief: Federal Buyouts for Underwater Homes*, 72 DUKE L.J. 161, 164 (2022).

²¹ Stern, *supra* note 20, at 164.

²² See Dundon & Abkowitz, *supra* note 20, at 1–2; see also Stern, *supra* note 20, at 164.

²³ Stern, *supra* note 20, at 164 (attributing this focus on buyouts “largely . . . to the dearth of other politically viable options”).

²⁴ 42 U.S.C. § 5170c(b)(2); Helen J.P. Wiley & Carolyn Kousky, *Speeding Up Post-Disaster Housing Buyouts*, SOLUTIONS J., Fall 2020, at 58–59 (referring to HMGP as the largest source of buyout funding).

²⁵ Elise Gout, *Are Buyouts a Viable Tool for Climate Adaptation?*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (June 29, 2021), <https://news.climate.columbia.edu/2021/06/29/are-buyouts-a-viable-tool-for-climate-adaptation> [https://perma.cc/5JD5-VCGX]; see also Katharine J. Mach & A.R. Siders, *Reframing Strategic, Managed Retreat for Transformative Climate Adaptation*, 372 SCIENCE 1294, 1294 (2021).

²⁶ Thomas Frank & E&E NEWS, *Removing 1 Million Homes from Flood Zones Could Save \$1 Trillion*, SCI. AM. (Apr. 27, 2020), <https://www.scientificamerican.com/article/removing-1-million-homes-from-flood-zones-could-save-1-trillion> [https://perma.cc/TP8S-YE9K].

²⁷ Stern, *supra* note 20, at 164.

²⁸ *Historic Black Town in North Carolina Lies One Hurricane Away from Disaster*, *supra* note 9. Other homeowners, however, have elevated their houses. The report character-

(“FEMA”) has also committed nearly \$11 million to relocate the town to “mitigate repetitive [flood] loss of infrastructure by relocating critical life-line utilities, emergency support services, and 54 units of affordable housing outside of the Special Flood Hazard Area.”²⁹

Housing Discrimination Against Communities of Color

Princeville’s location, however, is no accident of history. It is “an important case of historical environmental injustice because of the ways in which early Princeville settlers were forced to occupy the most vulnerable riparian landscape in the nineteenth century.”³⁰ For Princeville’s early Black settlers, “[t]heir existence in this space was not a matter of chance or choice, but instead the discarded and unwanted space was what former slaveholders allowed them to occupy.”³¹ Princeville’s location and how it came to be undermines the premise that “local governments are formed largely in response to local desires” and that “[s]uch boundary changes as do occur are often a result of local decisions.”³² This Article focuses on addressing the challenges that face majority-minority residential neighborhoods, particularly African American communities, in floodplains or flood zones as a matter of fair housing law and policy. The growing risk of more consistent flooding as a result of climate change warrants a proactive set of solutions to reduce that risk to residents in these communities.

This Article starts with the premise that the problem has its roots in historic discrimination that has established segregated living patterns which persist today. African American communities are not consistently located in areas where residents freely choose to live. African Americans moved into areas where landowners were willing to sell them land and were kept out of

ized the buyouts as “giv[ing] up” unlike some residents who have decided to “[s]tick with it” because “we didn’t come this far to turn around.” For residents in such a historic Black community, the commitment to stay in place has deep-seated roots. The mission of protecting the town is not unlike the commitment to “keep your eyes on the prize, hold on,” in the words of the African-American spiritual song associated with the modern Civil Rights Movement. *See Eyes on the Prize: America’s Civil Rights Movement* (PBS television broadcasts Jan. 21, 1987–Mar. 5, 1990); *see also Eyes on the Prize Theme Song*, YOUTUBE, <https://www.youtube.com/watch?v=-xFkfSdmwXs> [<https://perma.cc/SK9F-EKKT>] (Sept. 19, 2023).

²⁹ *North Carolina: Town of Princeville Relocation Project*, FEMA, <https://www.fema.gov/case-study/north-carolina-town-princeville-relocation-project> [<https://perma.cc/8WX9-CUKR>] (May 9, 2023). Notably, however, fifty-four units of affordable housing does not cover the needs of the more than 1,200 residents of the town based on Census data.

³⁰ Mizelle, Jr., *supra* note 1, at 18.

³¹ *Id.* at 19.

³² Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73 (1990); *see also* Jade A. Craig, “Pigs in the Parlor”: *The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. COLL. L. REV. 5, 44–45 (2022).

areas where landowners refused to sell them property, at least in part, as a result of racial prejudice.³³ Governmental decision-making limited the opportunities for African Americans to establish communities in particular areas—majority white neighborhoods—through the use of measures like racial zoning, lending discrimination or “redlining,” and race-restrictive covenants.³⁴ Flood zones and floodplains within most regions were considered areas that were undesirable for residential development by whites who could afford to live elsewhere.³⁵ As a result, African Americans struggling to find housing were the most likely buyers of the land.³⁶ Likewise, Black Americans were the most likely renters of properties in these areas.³⁷

In large part due to the history of communities like Princeville, it is evident that poor and marginalized communities will experience the consequences of climate change to a greater degree than other groups in the United States.³⁸ According to the 2010 Census, African Americans live in coastal counties along the eastern seaboard and the Gulf Coast at rates higher than the national average of 13.6 percent.³⁹ E&E News, a division of Politico, ana-

³³ See, e.g., Mizelle, Jr., *supra* note 1, at 19 (For Princeville’s earliest residents, “[t]heir existence in this space was not a matter of chance or choice, but instead the discarded and unwanted space was what former slaveholders allowed them to occupy.”). Isaiah T. Montgomery, the founder of Mound Bayou, Mississippi, was sold land by a railroad company in a section of the Mississippi Delta that was “the home of the mosquito, periodic floods, wild animals, and fever—where no person had previously been induced to settle.” NORMAN L. CROCKETT, *THE BLACK TOWNS* 9 (1979). The land commissioner for the railroad had tried convincing white farmers to settle in the area but because of these conditions, he began focusing on targeting Black farmers because he believed they “were immune to the diseases of the Delta and unaffected by the high humidity and intense heat.” *Id.* at 12.

³⁴ For evidence of the effects of these policies and the persistence of racial segregation, see generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998) (describing practices of redlining, racial steering, and failure of institutions to support recently integrated neighborhoods with credit); RESIDENTIAL APARTHEID: THE AMERICAN LEGACY (Robert D. Bullard et al. eds., 1994) (describing the lack of access to financial institutions for people of color and the direct relationship of redlining to neighborhood decline).

³⁵ Jeff Ueland & Barney Warf, *Racialized Topographies: Altitude and Race in Southern Cities*, 96 GEOGRAPHICAL REV. 50, 56 (2006).

³⁶ See William P. Quigley, *Katrina Voting Wrongs: Aftermath of Hurricane and Weak Enforcement Dilute African American Voting Rights in New Orleans*, 14 WASH. & LEE J.C.R. & SOC. JUST. 49, 60 (2007).

³⁷ See *id.*

³⁸ See Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENV’T L. REP. NEWS & ANALYSIS 11125, 11125 (2012) (“In the United States, poor and marginalized communities without sufficient financial and social resources will face significant adaptation challenges.” (citation omitted)).

³⁹ R. Dean Hardy et al., *Racial Coastal Formation: The Environmental Injustice of Color-blind Adaptation Planning for Sea-Level Rise*, 87 GEOFORUM 62, 64 fig.1 (2017). 47 percent of Black Americans live in coastal counties along the U.S. shoreline. NAT’L OCEANIC & ATMOSPHERIC ADMIN., NATIONAL COASTAL POPULATION REPORT: POPULATION TRENDS FROM 1970 TO 2020 6 (2013), <https://aambpublicoceanservice.blob.core.windows.net/ocea>

lyzed \$31 billion in claims for flood damage paid by FEMA's National Flood Insurance Program from January 2010 through August 2019 along with the ZIP codes in which the flood damage occurred.⁴⁰ Nearly 20 percent of the claim dollars went to ZIP codes where at least one-quarter of the residents are Black.⁴¹ These ZIP codes made up only 13 percent of the U.S. population, which suggests that Black people were hit harder by flood-related disasters.⁴²

Enter Fair Housing Law and Policy

Voluntary buyouts have the potential to reshape the makeup of American cities as we know them. They also disrupt attachments to place that have long maintained patterns of residential segregation or replicated and maintained structural disadvantages for people of color.⁴³ As Sheryll Cashin observed in her book, *The Failures of Integration: How Race and Class Are Undermining the American Dream*, “[w]e have not yet figured out how to break out of separatist patterns burnished in less enlightened times, and we rarely, if ever, have any explicit discourse about it.”⁴⁴ So, many questions remain. Should people move or remain at risk in flood-prone areas? Into what kinds of communities should they move—racially and socioeconomically integrated or similarly homogeneous ones? Like the other aspects of life that climate change and climate retreat turn upside down, both processes are challenging Americans to consider questions we have long avoided.

Yet research and policymakers have paid little attention to the application of fair housing principles to the design or execution of climate retreat policies. In this context, the focus has been on simply encouraging movement to locations outside of areas prone to flooding, with the assumption that these moves are taking place in “economically and racially heterogene-

nserviceprod/facts/coastal-population-report.pdf [https://perma.cc/6LU8-5GH8] [hereinafter NATIONAL COASTAL POPULATION REPORT].

⁴⁰ Thomas Frank & E&E News, *Flooding Disproportionately Harms Black Neighborhoods*, SCI. AM. (June 2, 2020), <https://www.scientificamerican.com/article/flooding-disproportionately-harms-black-neighborhoods/> [https://perma.cc/HF3Q-2UK3].

⁴¹ *Id.*

⁴² *Id.*

⁴³ This notion of “place” draws on the literature in geography and place making. “One of the oldest tenets of geography is the concept of place. As a result, place has numerous definitions, from the simple ‘a space or location with meaning’ to the more complex ‘an area having unique physical and human characteristics interconnected with other places.’” *Concept of Place*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/resource-library-concept-place/> [https://perma.cc/7522-9ZU7]. The “differential experience of place greatly affects opportunity.” Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J.L. REFORM 935, 939 (2014).

⁴⁴ SHERYLL D. CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* xi (2004).

ous floodplains.”⁴⁵ Everyone, however, does not have equal access to the resources necessary to relocate after a buyout.⁴⁶ They also often do not live in racially or socioeconomically integrated communities and the terms of buyout programs do not incentivize them to move into such communities.⁴⁷ Environmental justice often serves as a starting point for understanding the role of law in the impact of the environment on communities of color.⁴⁸ The inequitable racial impact of flooding due to climate change certainly implicates issues of environmental justice.⁴⁹

The concept of environmental justice is useful as it focuses on “the distributional inequities of environmental and land use policy in the United States.”⁵⁰ The environmental justice movement, however, has tended to focus on particular land use and policy decisions rather than remedying the structural results of historical decisions. For example, it has tended to focus on the disproportionately high burden of exposure to environmental hazards and unwanted land uses that people of color and low-income people have been forced to accept where they live and work rather than how the people settled in that location and remedying the negative results of that process.⁵¹ Building on the movement, the scholarship on environmental rac-

⁴⁵ Stern, *supra* note 20, at 165.

⁴⁶ See JAKE BITTLE, THE GREAT DISPLACEMENT: CLIMATE CHANGE AND THE NEXT AMERICAN MIGRATION 57 (2023).

⁴⁷ Many properties involved in buyout programs are “embedded in neighborhoods that have long been segregated and unequally served by government programs, especially in urban areas.” James R. Elliott et al., *Racial Inequities in the Federal Buyout of Flood-Prone Homes: A Nationwide Assessment of Environmental Adaptation*, 6 SOCIUS 1, 2 (2020) (citation omitted). In fact, “local flood control districts can apply restrictions and incentives to encourage homeowners to relocate nearby, thereby counteracting tax losses caused by the literal removal of local properties from local rolls.” *Id.* at 3 (citing Sherri B. Binder & Alex Greer, *The Devil Is in the Details: Linking Home Buyout Policy, Practice, and Experience after Hurricane Sandy*, 4 POL. & GOVERNANCE 97 (2016)).

⁴⁸ See, e.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 624 (1992); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10 (2001); Megan Haberle, *Fair Housing and Environmental Justice: New Strategies and Challenges*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 271, 271 (2017).

⁴⁹ See Stern, *supra* note 20, at 172 (“Income and racial heterogeneity on the floodplain add significant complexity and environmental justice concerns to designing legal regimes for climate retreat.”).

⁵⁰ Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. L. REV. 1, 4 (1998).

⁵¹ *Id.* at 4–7; see also Vicki Been, *What’s Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1007 (1993); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994).

ism has prioritized the discriminatory impact of environmental policy decisions on people of color.⁵²

There is also growing attention to the relationship between climate change and environmental justice as scholars recognize that “climate change will have the most severe effects on low-income people and communities of color” because of structural racism and social inequality.⁵³ The climate justice movement often links the issue of climate change to environmental justice’s usual concerns around the disproportionate siting of toxic land uses and the impact that climate change could have on increasing exposure to hazards for communities of color and low-income communities.⁵⁴ It also addresses the disproportionate effect that drivers of climate change such as carbon emissions have on marginalized communities, and the unfairness of this burden given their limited role in contributing to these drivers.⁵⁵

⁵² Arnold, *supra* note 50, at 7; *see also* Paul M. Hendrick, *Racism in American Land Use Decisions: The Slicing of the American Pie*, 2 FLA. COASTAL L.J. 395, 397 (2001); WILLIAM TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM* 34–38 (1982).

⁵³ Note, *RCRA as a Tool for Environmental Justice Communities and Others to Compel Climate Change Adaptation*, 131 HARV. L. REV. 2409, 2410 (2018) [hereinafter *RCRA as a Tool*]; *see also* Kaswan, *supra* note 38, at 11131; Renee Cho, *Why Climate Change Is an Environmental Justice Issue*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (Sept. 22, 2020), <https://news.climate.columbia.edu/2020/09/22/climate-change-environmental-justice> [https://perma.cc/R8DV-4N3T]; MICHAEL MÉNDEZ, *CLIMATE CHANGE FROM THE STREETS: HOW CONFLICT AND COLLABORATION STRENGTHEN THE ENVIRONMENTAL JUSTICE MOVEMENT* 1 (2020).

⁵⁴ *See, e.g., RCRA as a Tool*, *supra* note 53, at 2412 (discussing “compelling facilities housing toxic waste to plan for climate change effects”); ROBERT D. BULLARD & BEVERLY WRIGHT, *THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES* 51 (2012) (noting that “[c]limate change looms as the global environmental justice issue of the twenty-first century[.]” posing critical challenges “for communities that are already overburdened with air pollution, poverty, and environmentally related illnesses”); Rachel L. Zacharias, *Fewer of Whom? Climate-Based Population Policies Infringe Marginalized People’s Reproductive Autonomy*, 25 U. PA. J.L. & SOC. CHANGE 81, 87 (2021) (noting that, in the U.S., “[t]wo million people, most of whom are low-income and communities of color, live within a mile of one of the 327 Superfund sites (polluted locations requiring long-term cleanup of hazardous contaminations) at risk of climate change-related flooding.” (citing Megan Mayhew Bergman, ‘They Chose Us Because We Were Rural and Poor’: When Environmental Racism and Climate Change Collide, *GUARDIAN* (Mar. 8, 2019), <https://www.theguardian.com/environment/2019/mar/08/climate-changed-racism-environment-south> [https://perma.cc/A6RV-KKU3])).

⁵⁵ *See* Emily C. Gribble & David N. Pellow, *Climate Change and Incarcerated Populations: Confronting Environmental and Climate Injustices Behind Bars*, 49 FORDHAM URB. L.J. 341, 344 (2022) (“Specifically, low-income, BIPOC, and global South communities are hit hardest by the effects of climate change, and yet, they contribute the least to creating the problem since these communities produce far lower levels of carbon emissions.” (citation omitted)); *see also* J. TIMMONS ROBERTS & BRADLEY C. PARKS, *A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY* 5–8 (2007); Bekah Mandell, *Racial Reification and Global Warming: A Truly Inconvenient Truth*, 28 B.C. THIRD WORLD L.J. 289, 299–300 (2008) (discussing the effect of spatial segregation

Climate change, however, poses risks of its own, aside from the disproportionate presence of existing and the siting of new unwanted land uses near communities of color.⁵⁶ African Americans in particular were often restricted to occupying the very space in which their communities reside specifically because the land was undesirable due to its risk of flooding.⁵⁷ The history of the designation of locations for African American communities challenges advocates to think more expansively about the distributional justice concerns of environmental justice.⁵⁸ Indeed, distributional injustice starts with the fundamental issue of access to land for residential occupancy—spaces where communities begin. African Americans were often relegated to areas prone to flooding by design.⁵⁹ The results have only now become more apparent as climate change makes flooding occur more regularly.⁶⁰ Despite the fair housing implications of climate change policy, there has been very little investigation in the literature that focuses on the intersection between the two.⁶¹ Advocates have pursued claims under the

based on race and the abandonment of the urban core by wealthier individuals, which increases the reliance on vehicles and thus the use of fossil fuels, that hastens climate change).

⁵⁶ See *RCRA as a Tool*, *supra* note 53, at 2412 (discussing “compelling facilities housing toxic waste to plan for climate change effects”); see also BULLARD & WRIGHT, *supra* note 54, at 51.

⁵⁷ See, e.g., *Miller v. City of Dallas*, No. 3:98-CV-2955-D, 2002 WL 230834, at *4 (N.D. Tex. Feb. 14, 2002) (noting that the city of Dallas developed plans to locate a segregated African American community in an area that it knew was a floodplain); Ueland & Warf, *supra* note 35, at 56.

⁵⁸ See Craig, *supra* note 32, at 39 (Throughout the early to mid-20th century, “[t]he confinement of black residents into particular areas often included decisions to designate the most undesirable locations with built-in environmental risks and disadvantages for black occupancy.”); see also Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1113 (2005) (arguing that residential integration is “essential as a remedy to environmental racism” where racism would doom racially segregated communities to serve as “the dominant group’s dumping ground”).

⁵⁹ See, e.g., CRAIG E. COLTEN, *AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE* 77–79 (2005) (describing inequity in housing distribution across floodplains around New Orleans); SYLVIA HOOD WASHINGTON, *PACKING THEM IN: AN ARCHAEOLOGY OF ENVIRONMENTAL RACISM IN CHICAGO, 1865–1954* 26, 35–36 (2004).

⁶⁰ See Frank & E&E NEWS, *supra* note 40; see also John T. Cooper, Jr. & Jaimie Hicks Masterson, *How Black History has Influenced Disaster Planning*, CTR. FOR DISASTER PHILANTHROPY (Feb. 23, 2017), <https://disasterphilanthropy.org/blog/black-history-influenced-disaster-planning/> [<https://perma.cc/UTH5-GRG4>] (noting that “[t]oday, decades after the end of legal limits on their mobility, too many African-Americans and other highly vulnerable populations are place-bound; concentrated in disaster-prone areas without the resources to move out of harm’s way”).

⁶¹ Scholars have discussed the Fair Housing Act in the context of violations of the Act in the terms and conditions of disaster recovery programs, particularly in the aftermath of Hurricane Katrina and FEMA’s Road Home program. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 165–67 (2012) (discussing the litigation in *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev.*, 639 F.3d 1078 (D.C. Cir. 2011)); Megan Haberle, *An Evolving Fair*

Fair Housing Act to obtain redress for discriminatory practices in disaster relief programs that have a disparate impact on African American and Latino homeowners, largely in the aftermath of a disaster.⁶² Advocates have also successfully challenged local laws that limit the types of residents that can relocate to the community after a disaster, allegedly in ways designed to bar African American residents from entry.⁶³ Connecting fair housing advocacy and equitable disaster recovery admittedly presents logistical challenges giv-

Housing Movement: Forging New Partnerships and Agendas Across Policy Areas, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 45, 47 (2018). Save some notable examples upon which this article builds, they do not focus, however, on fair housing policy interventions in the design of these programs. See Morgan Williams & Nisha Arekapudi, *Disasters' Long-Term Impact on Fair Housing: Rebuilding as an Engine to Perpetuate or Challenge Entrenched Segregation*, in BUILDING COMMUNITY RESILIENCE POST-DISASTER: A GUIDE FOR AFFORDABLE HOUSING AND COMMUNITY ECONOMIC DEVELOPMENT PRACTITIONERS 345, 345–46 (Dorcas R. Gilmore & Diane M. Standaert eds., 2013). Likewise, the Fair Housing Act would seem to be fertile ground for environmental justice claims. Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENV'T L.J. 741, 741–44 (1995); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENV'T L.J. 189, 190, 192–93 (1998). But “[o]ften claims of environmental injustice have not fit into existing legal causes of action[,]” including under the Fair Housing Act. Hendrick, *supra* note 52, at 409. The literature around fair housing law and climate justice, however, rarely intersect. See, e.g., Alexandra Staropoli, *Fair Share Housing Center*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 315, 321 (2023) (discussing organization’s efforts to incorporate fair housing and climate change policy).

⁶² See Davida Finger, *Post-Disaster Housing Through the Lens of Litigation: The Katrina Housing Justice Docket*, 61 LOY. L. REV. 591, 609–12 (2015); see also Complaint for Declaratory and Injunctive Relief at ¶¶ 3, 56 & 58, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., No. 1:08-cv-01938, 2008 WL 5242538 (D.D.C. Nov. 12, 2008) (alleging that the FEMA Road Home program formula that calculated awards based on the pre-storm value of the home rather than repair costs had a disparate impact upon African-American homeowners). The case ultimately settled after the D.C. Circuit determined that the advocates were unlikely to prevail on the merits, but only after granting a request enjoining the Road Home program from applying the formula to future awards. Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., 723 F. Supp. 2d 11 (D.D.C. 2010), *rev’d*, 639 F.3d 1078, 1083 (D.C. Cir. 2011) (Road Home II); Kelly McGee, *A Place Worth Protecting: Rethinking Cost-Benefit Analysis Under FEMA’s Flood-Mitigation Programs*, 88 U. CHI. L. REV. 1925, 1947–54 (2021) (citing Road Home II) (describing potential theory for challenging cost-benefit analysis method built into FEMA flood response programs under a disparate impact theory of racial discrimination under the Fair Housing Act); Staropoli, *supra* note 61, at 321 (noting that Fair Share Housing Center “secured the largest federal Fair Housing Act settlement in American history with the Latino Action Network and New Jersey State Conference of the NAACP, which resulted in reallocating over a half-billion dollars in federal funds to ensure fair and resilient rebuilding in the most impacted communities of color following Hurricane Sandy in 2012.” (citations omitted)).

⁶³ Complaint for Injunctive Relief, Declaratory Judgment, and Remedial Relief at ¶¶ 1, 13, 19, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, No. 06-7185, 2006 WL 3383260 (Oct. 3, 2006 E.D. La.) (alleging that a parish ordinance prohibiting rental of single-family homes to tenants who were not blood relatives of the landlord was discriminatory in purpose and effect).

en that the two issues operate in separate spheres.⁶⁴ This challenge may explain the dearth of literature around fair housing policy and climate change planning.

This Article frames the disproportionate impact of flooding induced by climate change on Black communities as a result of housing discrimination. It stands as the first intervention which analyzes climate retreat policy—the single most common intervention for preventing property loss in high-risk flood zones—within the framework of fair housing law to determine how climate change policy should further fair housing goals.⁶⁵

Part I examines the challenge of climate change and the forced migration it has induced. It also explains the history of African American communities relegated to floodplains by government action and private discrimination. Part II outlines the challenge of equitable relocation of communities and the circumstances which indicate that climate retreat (essentially, relocation), rather than continued efforts at remediation, is the most sustainable resolution for high-risk flood zones long term. Part III places this problem in the context of fair housing law and explores the ways in which the duty to affirmatively further fair housing (“AFFH”) under the Fair Housing Act of 1968 may serve as an impetus for local governments to incorporate fair housing principles into their climate retreat policies. Further, Part III also proposes fair housing remedies that policymakers should apply to the process of relocation for Black communities in floodplains. These include housing mobility counseling provided to residents who relocate under a plan to implement the jurisdiction’s AFFH mandate along with the use of local land use policy to manage development in climate-safe areas in ways that provide for access to housing at various income levels to encourage residential integration.

I. BACKGROUND

A. *The Designation of Locations for Black Communities*

The presence of many historically black communities in flood zones is not a fluke or a coincidence of history. In earlier work, I have argued that a combination of governmental action and private discrimination determined

⁶⁴ See Haberle, *supra* note 61, at 46 (noting that “capacity limitations, resource scarcity, and specialization in response to policy silos have all tended to raise practical impediments to the scope of such efforts to engage in broader, issue-crossing work” between fair housing advocacy and disaster recovery).

⁶⁵ See Staropoli, *supra* note 61, at 321 (noting that Fair Share Housing Center in New Jersey “seeks to incorporate civil rights into state and federal disaster recovery and climate change policies”); see also Stern, *supra* note 20, at 164 (“Voluntary buyout laws that fund government acquisitions of flooded homes at preflood market value are poised to become the centerpiece of climate retreat law, largely due to the dearth of other politically viable options.”).

the locations of many historically black communities.⁶⁶ The racial zoning movement swept through the South starting in the early 20th century and established a pattern by which local government officials designated certain areas for Black residents to occupy and continued to engage in land use planning that maintained those boundaries, even after the Supreme Court struck down racial zoning ordinances in 1917.⁶⁷ David Troutt has argued that “[r]ace-neutral land use regulation reproduced the patterns of racial inequality that slavery, Jim Crow, and segregation inscribed.”⁶⁸

Urban geographers Jeff Ueland and Barney Warf have studied the relationship between altitude and the location of different ethnic communities throughout the South.⁶⁹ Their research has found that the residents of low-lying areas prone to flooding tend to be people of color.⁷⁰ This pattern held true in more than 140 cities across the South from 1990 to 2000.⁷¹ For example, the city planners in Birmingham, Alabama, “forc[ed] black labor to live in the city’s ‘vacant spaces,’ near creeks and railroads where whites did not wish to live,” dating back to the 1920s.⁷² The conditions which confined African Americans to particular, impoverished areas ultimately set the stage for the civil rights struggle that took hold throughout the mid-twentieth century.⁷³ In 1926, Birmingham passed a racial zoning law which set aside land that ran along Village Creek for Black occupancy.⁷⁴ The land flooded often and was known as the one of the least desirable areas for residential development.⁷⁵ At the time, the architectural firm run by John and Frederick Law Olmsted, Jr., the designers of New York’s Central Park, had developed a plan to turn the land along the creek into a park.⁷⁶ Their plan noted that the creek was susceptible to regular flooding and recommended it be developed as a park that provided natural flood control.⁷⁷ Nonetheless, city planners designated it for residential use by Black residents despite knowing the flood risk. The neighborhood suffered with problems from flooding for decades.⁷⁸ The city did not begin to undo some of these policies, by convert-

⁶⁶ See Craig, *supra* note 32, at 37–47.

⁶⁷ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); see also Craig, *supra* note 32, at 34–40.

⁶⁸ David D. Troutt, *Localism and Segregation*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 323, 323 (2007).

⁶⁹ See Ueland & Warf, *supra* note 35, at 50.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CHARLES E. CONNERLY, “THE MOST SEGREGATED CITY IN AMERICA”: CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920–1980 10 (2005).

⁷³ *Id.*

⁷⁴ DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 173 (2014).

⁷⁵ CONNERLY, *supra* note 72, at 6–7.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 51–52.

⁷⁸ *Id.* at 6–7.

ing some properties in the neighborhood to park land, until the 1990s.⁷⁹ In the meantime, however, the Army Corps of Engineers estimated annual property losses in the area to be \$2.5 million by the 1970s—a dramatic loss of wealth largely suffered by Black property owners.⁸⁰

The residents of East Austin, in Austin, Texas, today are predominately African American and Hispanic.⁸¹ The area was planned in 1928 as a “Negro district” and the city’s first zoning map in 1931 reflected this plan, despite the fact that racial zoning had been formally outlawed more than a decade earlier.⁸² The western part of Austin is dominated by hills and bluffs while the east includes broad plains.⁸³ “[C]reeks in the east create more floodplains than in the West.”⁸⁴ As a matter of income distribution, most moderate—and high—income residents live in the west and suburbs of Austin, while most of the low-income residents are concentrated in the eastern section of the city.⁸⁵ The history of the settlement of East Austin, however, and its current demographics clearly show that the issue is race, not just income.⁸⁶

Not far from Austin, Dallas has a similar history of local government discrimination that drove African Americans into low-lying areas. Dating back to the 1940s, the City of Dallas owned and operated a levee system

⁷⁹ *Id.* at 7.

⁸⁰ *Id.* at 52.

⁸¹ Arnold, *supra* note 50, at 99.

⁸² See Scott S. Greenberger, *A Legacy of Zoning Bias; East Austinites Seek to Reform Land Use Rules of 1931*, AUSTIN AM.-STATESMAN, July 21, 1997.

⁸³ Dalbyul Lee & Juchul Jung, *The Growth of Low-Income Population in Floodplains: A Case Study of Austin, TX*, 18 KSCE J. CIV. ENG’G 683, 685 (2014).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Michael Barnes, *What You Don’t Know About the History of East Austin*, AUSTIN AM. STATESMAN, <https://www.statesman.com/story/news/2016/09/03/what-you-dont-know-about-the-history-of-east-austin/10058269007/> [<https://perma.cc/JAZ2-7F44>] (Sept. 25, 2018, 5:25 PM); see also *How East Austin Became a Negro District*, AUSTIN’S E. END CULTURAL HERITAGE DIST., <http://www.eastendculturaldistrict.org/cms/gentrification-red-evelopment/how-east-austin-became-negro-district> [<https://perma.cc/E6P5-8YPY>]. Austin was named one of the ten most racially segregated metropolitan areas in the U.S. based on 2020 Census data. See Joe Cortright, *America’s Least (and Most) Segregated Metro Areas: 2020*, CITY OBSERVATORY (Oct. 20, 2021), <https://cityobservatory.org/most-segregated2020/> [<https://perma.cc/4W49-FLT8>]. The data, however, is either inconsistent or may be showing signs of improvement. Compare Luke Winkie, *Austin Was Built to Be Segregated*, VICE (June 16, 2014, 8:27 AM), <https://www.vice.com/en/article/nnqdk7/austin-was-built-to-be-segregated> [<https://perma.cc/67PV-LZKH>] (describing Austin as tenth-most segregated metro area in the U.S.), with Mike Maciag, *Residential Segregation Data for U.S. Metro Areas*, GOVERNING (Jan. 10, 2019), <https://www.governing.com/archive/residential-racial-segregation-metro-areas.html> [<https://perma.cc/2LPB-4EL4>] (ranking Austin below top ten), and *Most to Least Segregated Metro Regions in 2020*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/most-least-segregated-metro-regions-2020> [<https://perma.cc/YJE2-HUWL>] (ranking Austin number ninety-nine).

along the Trinity River which runs through the city.⁸⁷ The residents of Cadillac Heights, a neighborhood in South Dallas where 98.5 percent of the residents were people of color, filed a lawsuit against the city for failing to provide flood protection, among other municipal services, to the neighborhood.⁸⁸ They alleged that the Trinity River levee system was “constructed to provide protection only to Caucasian-owned property, and that the failure to extend levee protection to their neighborhood was racially motivated, with intent to discriminate against African-American property owners and residents.”⁸⁹ In 1945, the City of Dallas commissioned a “Master Plan for Housing” . . . before there was any residential or industrial development” in Cadillac Heights.⁹⁰ The master plan provided that there should be no residential development in the low-lying areas along the Trinity River or White Rock Creek, which extends from North to South Dallas.⁹¹ The City disregarded this directive two years later when the City Plan Engineer designated Cadillac Heights for “Negro Subdivision Development,” even though it was clearly within the floodplain of the Trinity River.⁹² The city knew the area was a flood zone and directed that a community specifically for Black residents be built there anyway. This directive took place thirty years after the U.S. Supreme Court ruled that racial zoning was impermissible—a display that indicates the pervasive extent to which race affected government planning and decision-making.⁹³

The refusal of white landowners to sell property to African Americans and the lack of recourse available for their refusal to do so also restricted the

⁸⁷ *Miller v. City of Dallas*, No. 3:98-CV-2955-D, 2002 WL 230834, at *3 (N.D. Tex. Feb. 14, 2002).

⁸⁸ Complaint at 1–2, *Miller v. City of Dallas*, No. 3:98-CV-2955-D (N.D. Tex. Feb. 14, 2002).

⁸⁹ *Miller*, 2002 WL 230834, at *3.

⁹⁰ *Id.* at *5.

⁹¹ *Id.*; see also *White Rock Creek (Collin County)*, TEX. STATE HIS. ASS’N, <https://www.tshaonline.org/handbook/entries/white-rock-creek-collin-county> [https://perma.cc/8DMK-BJNN] (Mar. 1, 1996) (describing the path of the creek into South Dallas).

⁹² *Miller*, 2002 WL 230834, at *5–6 (denying summary judgment against Plaintiffs’ claims of lack of flood protection in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981).

⁹³ See *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). Dallas in particular was committed to using race to enact discriminatory housing and land use policies into the middle of the twentieth century. See *City of Dallas v. Liberty Annex Corp.*, 19 S.W.2d 845, 847 (Tex. App. 1929) (holding that the city’s segregation ordinance violated due process rights under the state and federal constitutions and was unenforceable); see also *Hous. Auth. of Dallas v. Higginbotham*, 143 S.W.2d 95, 95 (Tex. App. 1940) (upholding a restriction of housing projects to Black residents because the city provided similar facilities for whites); *Walker v. U.S. Dep’t of Hous. & Urb. Dev.*, 734 F. Supp. 1289, 1294 n.18, 1314 (N.D. Tex. 1989) (noting that city charter from 1907 authorized city to engage in racial segregation of housing and that city actions “established ‘racially segregated housing patterns [that] have not yet fully been eradicated’” (alteration in original)).

choices of where Black residents could build communities.⁹⁴ The land most often made available for them was in undesirable, low-lying areas prone to flooding.⁹⁵ For example, the “dirty and polluted banks” of the Anacostia River has been the primary location of a large Black community in Washington, D.C. since the late nineteenth century.⁹⁶ The government built public housing developments in the same area after World War II, despite the fact that it was low-lying land, while reserving higher ground for whites.⁹⁷ Just outside of Atlanta, Oscarville, Georgia developed along the banks of the Chattahoochee River as a small town of 1,100 residents, almost all of whom were Black, after the Civil War.⁹⁸ The town was situated in an alluvial floodplain that passed through Forsyth County.⁹⁹ Despite the flood risk, the residents owned land there and many were prosperous farmers.¹⁰⁰ In 1912, however, a white mob stormed the town after the body of a young white woman who had allegedly been sexually assaulted was found in the woods near Oscarville.¹⁰¹ They murdered some residents and forced others to flee from the violence.¹⁰² As the town lay in ruins, neighboring whites reportedly took the land of their Black neighbors who had been forced out as part of a campaign to remove all of the Black residents in Forsyth County in the early 1900s.¹⁰³ The site of the town, however, was later submerged when the U.S. Army Corps of Engineers flooded the area with water from the construction of the Buford Dam, completed in 1956, to form Lake Lanier.¹⁰⁴ The

⁹⁴ Craig, *supra* note 32, at 44–46.

⁹⁵ *Id.* at 40 (“Dating back to the rise of Jim Crow, black communities in the South ‘often found themselves consigned to the least desirable areas, many of which were swampy, mosquito infested, prone to smoke from fires, and frequented by floods’ in part due to exclusionary zoning.” (quoting Jeff Ueland & Barney Warf, *supra* note 35, at 54)).

⁹⁶ Ueland & Warf, *supra* note 35, at 65.

⁹⁷ See Brett Williams, *A River Runs Through Us*, 103 AM. ANTHROPOLOGIST 409, 420 (2001).

⁹⁸ PATRICK PHILLIPS, BLOOD AT THE ROOT: A RACIAL CLEANSING IN AMERICA (2016).

⁹⁹ *Native American History of Forsyth County, Georgia*, ACCESS GENEALOGY, <https://accessgenealogy.com/georgia/native-american-history-of-forsyth-county-georgia.htm> [<https://perma.cc/7S3B-2P49>].

¹⁰⁰ La'Tasha Givens et al., *Relative of Oscarville Resident Shares History Behind the City Underneath Lake Lanier*, 11 ALIVE, <https://www.11alive.com/article/news/community/voices-for-equality/oscarville-lanier-lake-black-town-riot-mae-crow-chattahoochee-beulah-rucker/85-8647e2be-a07b-4e80-91cc-61613d0ff472> [<https://perma.cc/D3M7-DDUB>] (July 14, 2022, 6:56 PM).

¹⁰¹ PHILLIPS, *supra* note 98; Givens et al., *supra* note 100.

¹⁰² See Sophia Dodd, *Forsyth 1912: Examining the Displacement of the County's Black Residents*, ATLANTA HIST. CTR. (May 22, 2023), <https://www.atlantahistorycenter.com/blog/forsyth-1912-examining-the-displacement-of-the-countys-black-residents/> [<https://perma.cc/7HSG-2TPD>].

¹⁰³ Givens et al., *supra* note 100.

¹⁰⁴ *Buford Dam*, U.S. NAT'L PARK SERV., <https://www.nps.gov/places/buford-dam-place.htm> [<https://perma.cc/RT26-4G3Q>] (Feb. 4, 2021) (“Buford Dam, which forms Lake Sidney Lanier, marks the start of the Chattahoochee River National Recreation Area . . .”).

land was flooded to control the repeated flooding of the land along the Chattahoochee River where the town once stood.¹⁰⁵ Now, the story of Oscarville has been lost to history and covered by a lake known for recreational sports which serves as a getaway for metro Atlanta residents.¹⁰⁶

These designations of low-lying and flood-prone areas for Black residents expose persistent racial inequality when natural disasters strike. In New Orleans, whites historically occupied the highest and best part of a natural levee, the land at the highest points above sea level—an important position given that the city is surrounded by the Mississippi River to the south and Lake Pontchartrain to the north.¹⁰⁷ The lowest-lying land was all that was left for most Black residents. According to geographer Peirce Lewis, “blacks were pushed into the demiland on the inland margin of the natural levee, where drainage was bad, foundation material precarious, streets atrociously unmaintained, mosquitoes endemic, and flooding a recurring hazard.”¹⁰⁸ The Lower Ninth Ward, another one of the city’s largest majority-Black residential areas, is bordered by the Mississippi River to the south and the city’s Industrial Canal to the west.¹⁰⁹ When Hurricane Katrina hit New Orleans in 2005, flooding from the river and the breaking of the Industrial Canal decimated the Lower Ninth Ward.¹¹⁰ Indeed, the catastrophic results of this practice of forcing people of color into flood zones came into stark relief when a natural disaster hit—the kind that is driving climate migration.¹¹¹

¹⁰⁵ See Bilal G. Morris, *The Haunting of Lake Lanier and the Black City Buried Underneath*, NEWSONE (Aug. 21, 2021), <https://newsone.com/4185919/lake-lanier-black-city-oscarville/> [https://perma.cc/ZES4-L2RW].

¹⁰⁶ See, e.g., Clay Abney, *Head Just North of Atlanta For Watersports and Parks at Lake Lanier*, ATLANTA CONVENTION & VISITORS BUREAU, <https://discoveratlanta.com/blog/head-just-north-of-atlanta-for-watersports-and-parks-at-lake-lanier/> [https://perma.cc/4969-V D2F] (Feb. 7, 2023) (“For fun on the water, Lake Lanier is a perfect spot near the landlocked metro Atlanta area . . .”).

¹⁰⁷ PEIRCE F. LEWIS, *NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE* 52 & fig.3 (2003).

¹⁰⁸ *Id.* at 52.

¹⁰⁹ *Id.* at fig.4.

¹¹⁰ See Carlton Waterhouse, *Failed Plans and Planned Failures: The Lower Ninth Ward, Hurricane Katrina, and the Continuing Story of Environmental Injustice*, in *HURRICANE KATRINA: AMERICA’S UNNATURAL DISASTER* 156, 172–75, 178 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009).

¹¹¹ See Wyatt G. Sassman & Danielle C. Jefferis, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV’T L. 161, 191 (2021) (“The displacement of people and communities from New Orleans by Hurricane Katrina presents a particularly compelling example of the gaps in federal law regarding internal movement of people resulting from environmental change.”); see also Reagan Moody, *The Climate Is Changing, So Should We: An Analysis of Legal Inadequacies Amidst the Rise of Climate Migration*, 10 LSU J. ENERGY L. & RES. 507, 528 (2022) (describing success of integrating climate migrants from New Orleans after Hurricane Katrina into Houston).

A community's status as formerly (or, in many cases, presently) all-Black creates what Daria Rothmayr has described as a racial "path dependence."¹¹² Racial Path Dependence is the notion that historical events related to racial segregation and exclusion determine modern outcomes, even where intentional discrimination is no longer operating.¹¹³ The vulnerability of these communities to climate-induced flooding is a result of the Racial Path Dependence that began with their establishment in the first place.¹¹⁴ As a result of this path dependence, in cities like New Orleans, whites in metropolitan areas "have enjoyed unrestricted access to and economic opportunities arising from appreciating markets of higher, less polluted lands. For poor blacks in public housing or increasingly concentrated low-ground antimarket neighborhoods, life became routinely more isolated from the political mainstream, viable neighborhood institutions, economic opportunity, and stability."¹¹⁵

B. *Flooding and the Legacy of Redlining*

Redlining in federal housing policy played a central role in creating and perpetuating state-sponsored segregation and racial disadvantage.¹¹⁶ Its effects show up in the disparate impact that flooding has on Black communities. In 2020, research showed that "74% of the neighborhoods redlined 80 years ago are now low-to-moderate income, and 64% of these neighborhoods are primarily occupied by people of color."¹¹⁷ In 2021, the real estate listing company Redfin analyzed the "flood potential" of properties in its da-

¹¹² Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 39–41 (2003); see also DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 93–99, 116–19 (2014). Erika Wilson has examined how this phenomenon plays out in protecting the status of communities that were formerly all-white in ways that maintain racial advantage. Erika K. Wilson, *White Cities, White Schools*, 123 COLUM. L. REV. 1221, 1227 (2023). I argue that this theory also explains how path dependence reinforces the disadvantaged status of communities that were constructed as all-Black.

¹¹³ See Roithmayr, *supra* note 112, at 39–41.

¹¹⁴ Erika Wilson describes the way in which the racially exclusionary origins of all-white towns have led to increased property values, developing positive reputations, and drawing more higher-income and higher-status residents to the districts, increasing their tax base and capital. Wilson, *supra* note 112. Much like the role that Racial Path Dependence plays in the consistent accrual of advantages that made school districts for all-white towns that have reinforced their power, it has resulted in an accrual of disadvantages for Black communities, one of which is the risk of loss due to the low-lying location.

¹¹⁵ David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1141 (2008).

¹¹⁶ See, e.g., RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA VII, X, XIV, XVII (2017).

¹¹⁷ *Turning the Tide: Opportunities to Build Social Equity Through Federal Flood Disaster Policy*, AM. FLOOD COAL. (Aug. 2020), <https://assets.floodcoalition.org/2020/08/e77e13287e90914325f82c7063666448-American-Flood-Coalition-Turning-the-Tide-Toward-Equity-8.3.2020.pdf> [<https://perma.cc/7F8U-M8VK>].

tabase.¹¹⁸ It found that homes in formerly redlined neighborhoods were at a disproportionately high risk of future flooding.¹¹⁹ Scientific consensus indicates that, as climate change accelerates, people living in flood-prone areas will experience more significant and more frequent flooding.¹²⁰

“Previously redlined neighborhoods often overlap with the new practice of ‘blue-lining,’ which involves banks or mortgage lenders drawing boundaries around neighborhoods with increased environmental risk.”¹²¹ Blue-lined neighborhoods receive less investment for flood prevention because they have been deemed to have high environmental risks.¹²² “Blue-lining compounds the discriminatory effects of redlining to the detriment of renters and homeowners of color, putting them at greater risk of displacement in the aftermath of a natural disaster.”¹²³

II. EQUITABLE RELOCATION

Flood zones across the U.S. “are home to some of the nation’s wealthiest and poorest people.”¹²⁴ “The bifurcation is likely due to upper-income households’ preference for coastal locations on the one hand, and the comparative affordability of some (often very high-risk) flood zones and wetlands for lower-income households on the other.”¹²⁵ In the context of climate change, “a rising tide lifts all boats.”¹²⁶ It does not, however, lift them

¹¹⁸ Lily Katz, *A Racist Past, a Flooded Future: Formerly Redlined Areas Have \$107 Billion Worth of Homes Facing High Flood Risk--25% More Than Non-Redlined Areas*, REDFIN (Mar. 15, 2021, 12:05 AM), <https://www.redfin.com/news/redlining-flood-risk/> [<https://perma.cc/P96C-VUAV>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Hasan, *supra* note 11, at 182.

¹²² Taylor Gauthier & Fin. Sec. Program, *The Devastating Effects of Climate Change on US Housing Security*, ASPEN INST. (Apr. 9, 2021), <https://www.aspeninstitute.org/blog-posts/the-devastating-effects-of-climate-change-on-us-housing-security/> [<https://perma.cc/NXA4-3KSZ>].

¹²³ Hasan, *supra* note 11, at 183.

¹²⁴ A.R. Siders, *Social Justice Implications of US Managed Retreat Buyout Programs*, 152 CLIMATIC CHANGE 239, 240 (2019).

¹²⁵ Stern, *supra* note 20, at 172.

¹²⁶ Former President John F. Kennedy is credited with coining the aphorism, “A rising tide lifts all boats”—a phrase he used several times throughout his career to illustrate the benefits of shared economic prosperity. See Donald Lazere, *A Rising Tide Lifts All Boats: Has the Right Been Misusing JFK’s Quote?*, HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/73227> [<https://perma.cc/5XGA-7VWT>]; see also Paolo Gaudiano, *A Rising Tide Of Inclusion Does Not Lift All Diversity Boats Equally*, FORBES (Mar. 10, 2022, 11:00 AM), <https://www.forbes.com/sites/paologaudiano/2022/03/10/a-rising-tide-of-inclusion-does-not-lift-all-diversity-boats-equally/?sh=24a96b005fd4> [<https://perma.cc/PBD7-FMSN>] (suggesting that the benefits of a broader program of diversity and inclusion are not even and refining the metaphor by noting that “a rising tide of inclusion gives the greatest lift to boats that are normally the most excluded”).

equally because the boats on the water differ.¹²⁷ There is also not just an income dimension, but a racial dimension to the crisis.¹²⁸ More Latinos compared to their percentage in the national population (25 percent versus 17 percent nationally) live in the 500-year floodplain (an area with a 0.2 percent annual risk of flooding).¹²⁹ Evidence also indicates that African-American residents experience higher amounts of flood damage than other racial groups, at least in part because they are more likely to live at lower elevations.¹³⁰

Policymakers face an important choice that shapes how communities of color may respond to proposed relocations of their communities to higher ground. On one hand, segregation and limitations on the areas in which African Americans could acquire housing led to the development of communities in low-lying areas prone to flooding.¹³¹ At the same time, these communities also received less public and private investment as a result of redlining and similar discriminatory policies.¹³² These neighborhoods often have substandard drainage and sewage systems due to insufficient public investment, which increase “their risk of incomplete or prolonged recovery after natural disasters.”¹³³ So, the choice becomes whether the government should remedy the discriminatory policies of the past by facilitating their relocation altogether or improving the infrastructure that it so long neglected or failed to

¹²⁷ See Oliver E. J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, 12 NATURE CLIMATE CHANGE 156, 156 (2022). “The Anthropocene Epoch is an unofficial unit of geologic time, used to describe the most recent period in Earth’s history when human activity started to have a significant impact on the planet’s climate and ecosystems.” *Anthropocene*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/anthropocene/> [https://perma.cc/K9XX-H83Y].

¹²⁸ See Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE. (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change> [https://perma.cc/KMD5-PVQU]; see also U.S. DEP’T OF THE TREASURY, THE IMPACT OF CLIMATE CHANGE ON AMERICAN HOUSEHOLD FINANCES 3, 12 (2023), https://home.treasury.gov/system/files/136/Climate_Change_Household_Finances.pdf [https://perma.cc/2GHJ-M8H4] (asserting that climate change is expected to exacerbate existing social inequalities in the U.S. and put millions of people at risk of severe financial distress).

¹²⁹ The 500-year flood refers to the statistical probability of a specified magnitude of flooding occurring every 500 years, equaling a 0.2 percent probability of that level of flood occurring each year. See *Flood Zones*, FEMA, <https://www.fema.gov/glossary/flood-zones> [https://perma.cc/9KLJ-3KEF] (July 8, 2020). Whites, however, are underrepresented in flood zones compared to their percentage in the population (“55% in floodplain[s] versus 62% nationally.”). Peri et al., *supra* note 16, at 3.

¹³⁰ Camilo Sarmiento & Ted E. Miller, *Inequities in Flood Management Protection Outcomes*, 13–14 (2006).

¹³¹ See, e.g., CROCKETT, *supra* note 33, at 9; Ueland & Warf, *supra* note 35, at 56; CONNERLY, *supra* note 72, at 10; LEWIS, *supra* note 107, at 52.

¹³² Hasan, *supra* note 11, at 182.

¹³³ *Id.*; see also Gauthier & Fin. Sec. Program, *supra* note 122.

provide.¹³⁴ Why should a historically African American community be forced to move and disrupt its social networks and community ties when the government's actions contributed to the constant flooding that requires the move in the first place?

"Preference" is critical for responding to the reasons that higher-income, disproportionately white residents in coastal areas deal with the higher risk of flooding.¹³⁵ Their choice to live in the area despite the known risk suggests that they bear some responsibility for the consequences of their choices. By contrast, flood-prone areas were specifically designated for occupancy by African Americans by local government officials in many cases and historically resulted from discrimination in the housing market by private white landowners.¹³⁶ The reasons for the differences in experience call for a public policy resolution under civil rights law.¹³⁷

Both FEMA's disaster response efforts and its climate retreat programs focus on "infrastructure, their protection in place, repair[ing], rebuild[ing], and managed retreat."¹³⁸ The federal government's move toward broadening

¹³⁴ See Erica R. Bower et al., *Enabling Pathways for Sustainable Livelihoods in Planned Relocation*, 13 NATURE CLIMATE CHANGE 919, 919 (2023); see also Robin Bronen, *Rights, Resilience and Community-Led Relocation: Creating a National Governance Framework*, 45 HARBINGER 25, 25 (2021); Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L.J. 1051, 1061–62 (2021) (explaining that, historically, state and local governments invested in improved infrastructure for whites while denying these same protections for non-whites and instead engaged in various discriminatory policies, including zoning Black neighborhoods in floodplains).

¹³⁵ White communities are currently at highest risk of flooding in the 100-year floodplain. See Peri et al., *supra* note 16, at 4. This risk stems in large part from a long-held preference among white homeowners for coastal areas. Amy McCaig, *White Communities Prefer to Risk Repeat Flooding Rather Than Move to Safer but More Diverse Neighborhoods*, PHYS.ORG (June 18, 2023), <https://phys.org/news/2023-06-white-communities-safer-diverse-neighborhoods.html> [<https://perma.cc/LFA5-5JDJ>]; *Why Coastal Access Is an Environmental Justice Issue*, NAT. RES. DEF. COUNCIL (Aug 31, 2023), <https://www.nrdc.org/stories/why-coastal-access-environmental-justice-issue>, [<https://perma.cc/3QMZ-PGM9>] ("It's no accident that coastal communities in the United States are predominantly white. Racist and exclusionary laws, policies, and practices kept many beaches, even public ones, off-limits to people of color through the 1970s."). While white Americans are at greater risk of flooding in the short term, Black Americans face a higher level of risk of flooding in the long term. *Communities at Risk of Flooding*, CONG. BUDGET OFF. (Sept. 2023), <https://www.cbo.gov/system/files/2023-09/58953-Flooding.pdf> [<https://perma.cc/C9EF-ST8V>] ("Risk is more prevalent in communities with a greater share of White householders, but communities in which most householders are Black (except for those in which the median household income is high) face the largest increases in flood risk from 2020 to 2050.").

¹³⁶ See, e.g., CROCKETT, *supra* note 33, at 9, 169; Ueland & Warf, *supra* note 35, at 56; CONNERLY, *supra* note 72, at 10.

¹³⁷ See Ueland & Warf, *supra* note 35, at 56.

¹³⁸ See Bronen, *supra* note 134, at 35 n.38; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-488, A CLIMATE MIGRATION PILOT PROGRAM COULD ENHANCE THE NATION'S RESILIENCE AND REDUCE FEDERAL FISCAL EXPOSURE 13, 23 (2020), <https://www.gao.gov/asse>

the use of buyout programs to manage the risks of climate change overlooks a deeper, underlying risk: perpetuating racial and social inequality through the programs. A 2020 report by the U.S. Government Accountability Office highlights the three pillars of the disaster resilience framework: information, integration, and incentives.¹³⁹ Each of these priorities focuses on infrastructure and makes no room for social equity.¹⁴⁰

The literature is inconsistent about the extent to which racial disparities exist in federal buyout programs. In one of the first comprehensive program reviews investigating the issue, researchers found that “[c]ounties that have had locally administered buyout projects have higher income, education, population, and population density compared to counties without buyouts,” but others found that “[w]ithin counties with buyouts, . . . the bought-out properties are located in relatively poorer, less densely populated areas, also with relatively lower education levels, lower English language proficiency, and greater racial diversity.”¹⁴¹ The largest federal voluntary buyout program also provides relief only to landowners—not renters.¹⁴² Nationally, African Americans and Latinos are more likely to rent their homes than white adults.¹⁴³ According to a 2019 study, about 58 percent of households headed by Black adults rented their homes as well as 52 percent of Hispanic or Latino-led households.¹⁴⁴ By contrast, only 28 percent of non-Hispanic white Americans pay rent as well as 40 percent of Asian American households.¹⁴⁵ Yet these residents will still have to find new housing when a flood comes to their apartment building or the house they rent. The research suggests

ts/710/707961.pdf [https://perma.cc/2H6H-AH4G] [hereinafter CLIMATE MIGRATION PILOT PROGRAM].

¹³⁹ CLIMATE MIGRATION PILOT PROGRAM, *supra* note 138, at 10–11.

¹⁴⁰ See Bronen, *supra* note 134, at 35 n.38.

¹⁴¹ Katharine J. Mach et al., *Managed Retreat Through Voluntary Buyouts of Flood-Prone Properties*, 5 SCI. ADVANCES 1, 3, 6 (2019). But see Elliott et al., *supra* note 47, at 7 (“[T]he whiter a tract’s racial composition relative to its surrounding county the higher its probability of participating in the federal buyout program, all else equal.”).

¹⁴² 42 U.S.C. § 5170c(b)(2); Stern, *supra* note 20, at 164.

¹⁴³ See Alexander Hermann, *In Nearly Every State, People of Color Are Less Likely to Own Homes Compared to White Households*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (Feb. 8, 2023), <https://www.jchs.harvard.edu/blog/nearly-every-state-people-color-are-less-likely-own-homes-compared-white-households> [https://perma.cc/9TFV-HEHT]; see also *More Americans Own Their Homes, but Black-White Homeownership Rate Gap Is Biggest in a Decade*, NAR Report Finds, NAT’L ASS’N OF REALTORS (Mar. 2, 2023), <https://www.nar.realtor/newsroom/more-americans-own-their-homes-but-black-white-homeownership-rate-gap-is-biggest-in-a-decade-nar> [https://perma.cc/676F-UJA2].

¹⁴⁴ See Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), <https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/#> [https://perma.cc/W5E6-A87W].

¹⁴⁵ *Id.*

that the program is disproportionately benefiting white American homeowners.¹⁴⁶

There is also a need for more research on climate retreat outside of coastal areas.¹⁴⁷ This research is critical to understanding the impact of climate retreat systems on people of color in more rural areas. While 47 percent of Black Americans live in coastal counties along the U.S. shoreline, the majority (53 percent) lived inland as of 2010.¹⁴⁸ Research has shown that, in cities in the South further inland and away from coastlines, African American communities have historically been situated in low-lying areas, while whites occupied more desirable land at higher elevations.¹⁴⁹ Thus, the spatial patterns of segregation in certain inland communities make it more likely that buyout programs will need to account for historically Black communities that are more vulnerable to flooding because of their proximity to sea level.¹⁵⁰

The environmental justice movement has long been concerned about the lack of information, full participation, and self-determination for low-income people and communities of color in making decisions about land uses that have negative environmental consequences.¹⁵¹ The literature around racial integration in housing also raises the concern that many residents in majority Black or Latino communities may not want to relocate from their neighborhood and move to an integrated community.¹⁵² Sherryl Cashin notes that,

¹⁴⁶ See Elyse Zavar & Lauren Ames Fischer, *Fractured Landscapes: The Racialization of Home Buyout Programs and Climate Adaptation*, 3 CURRENT RSCH. ENV'T SUSTAINABILITY 1, 4 (2021) (“[H]omeowners view buyout programs as ‘pathways to residential attainment’ where participants seek out more privileged (e.g. whiter) neighborhoods regardless of environmental risks in an attempt to improve socioeconomic standing. The result is whiter neighborhoods and counties are more likely to receive a buyout offer from an implementing agency . . .” (citations omitted)); see also Thomas Frank, *Relocation Program Helps Richer Americans Leave Risky Areas*, POLITICO PRO (Oct. 10, 2019, 7:04 AM), <https://subscriber.politicopro.com/article/eenews/1061235335> [<https://perma.cc/WQR4-VEB7>].

¹⁴⁷ Dundon & Abkowitz, *supra* note 20, at 7.

¹⁴⁸ Similarly, there is a slim divide between Hispanic or Latino Americans in coastal vs. non-coastal counties, with 49 percent in coastal counties. A clear majority, however, of Asian Americans resided in coastal counties in 2010. NATIONAL COASTAL POPULATION REPORT *supra* note 39, at 6.

¹⁴⁹ Ueland & Warf, *supra* note 35, at 63; Craig, *supra* note 32, at 40.

¹⁵⁰ Ueland & Warf, *supra* note 35, at 50; Cooper & Masterson, *supra* note 60; Frank & E&E News, *supra* note 40.

¹⁵¹ See Cole, *supra* note 48, at 621; see also Arnold, *supra* note 50, at 12.

¹⁵² See, e.g., Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1634 (2007) (discussing research on “integration fatigue” that some Black Americans face as a result of resistance and isolation they encounter in majority white communities); CASHIN, *supra* note 44, at xii–xiii (“Black people . . . have become integration weary. Most African Americans do not crave integration, although they support it. What seems to matter

In opinion polls, the majority of African Americans say that they would prefer to live in an integrated neighborhood; but for some of us integration now means a majority-black neighborhood—one where you are not overwhelmed by white people and where there are plenty of your own kind around to make you feel comfortable, supported, and welcome.¹⁵³

There is a draw to “this happy ‘we’ feeling.”¹⁵⁴ Some “attempted buyouts have led to protests, sometimes based on concerns about discriminatory selection of minority communities for climate retreat.”¹⁵⁵ For example, in the historic Black neighborhood of Kashmere Gardens in Houston, buyouts were controversial, and at one point, residents rejected a buyout.¹⁵⁶ In the face of climate change increasing flooding and wildfires alike, James Baldwin’s question in his book, entitled *The Fire Next Time*, becomes all the more pressing: “Do I really *want* to be integrated into a burning house?”¹⁵⁷

The reality, however, is that efforts to shore up communities in high-risk flood zones are often cost-prohibitive and have varied, and sometimes unknown, degrees of success.¹⁵⁸ The problem persists in the Netherlands, a country that regularly deals with low-lying land and the setting for the famous story of the boy who saved a town by placing his finger in the dike.¹⁵⁹

most to black people is not living in a well-integrated neighborhood but having the same access to the good things in life as everyone else.”).

¹⁵³ CASHIN, *supra* note 44, at xiii.

¹⁵⁴ *Id.* This draw to a feeling of “we-ness” is not uncommon in marginalized ethnic groups longing for a space that celebrates their identity and independence. For example, Sinn Féin, the name of the Irish political party that advocates for the end of British rule in Northern Ireland and the establishment of a united, independent Ireland, means “We Ourselves” in Irish. See Sinn Féin, BRITANNICA KIDS, <https://kids.britannica.com/students/article/Sinn-F%C3%A9in/384786> [<https://perma.cc/87XE-5D5Q>].

¹⁵⁵ Stern, *supra* note 20, at 177, 220 n.255–56 (2022).

¹⁵⁶ See Kevin A. Lynn, *Who Defines ‘Whole’: An Urban Political Ecology of Flood Control and Community Relocation in Houston, Texas*, 24 J. POL. ECOLOGY 951, 957 (2017); see also Juliette Landphair, “The Forgotten People of New Orleans”: Community, Vulnerability, and the Lower Ninth Ward, 94 J. AM. HIST. 837, 844 (2007); A.R. Siders, *supra* note 124, at 250.

¹⁵⁷ JAMES BALDWIN, *THE FIRE NEXT TIME* 94 (1963). Indeed, experts have also proposed retreat to deal with the growing risk of wildfires due to climate change. See, e.g., Katharine J. Mach & A.R. Siders, Opinion, *Is Your Town Threatened by Floods or Fires? Consider a ‘Managed Retreat.’*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/opinion/managed-retreat-climate-change.html> [<https://perma.cc/QMA7-CHJ8>].

¹⁵⁸ See Stern, *supra* note 20, at 233; see also Caroline Wenger, *Better Use and Management of Levees: Reducing Flood Risk in a Changing Climate*, 23 ENV’T REV. 240, 242–45 (2015) (describing the limitations of flood control and recommending potential strategies for improvement).

¹⁵⁹ See MARY MAPES DODGE, *HANS BRINKER OR THE SILVER SKATES: A STORY OF LIFE IN HOLLAND* 107 (1907). It is ironic that a monument to the character, dedicated to “the perpetual struggle of Holland against the water,” was erected in Haarlem, the Netherlands. See John Hansen, *The Hoax of the Hero of Haarlem: The Dutch Boy Who Put His Finger in the Dike*, HUB PUBL’N. (Jan. 28, 2023), <https://thehubpublication.com/the-hoax-of-the-hero-of-haarlem-19f2e098d407> [<https://perma.cc/QZ77-DMLK>]; see also *The Netherlands: The Hero of Haarlem*, TIME (June 19, 1950), <https://content.time.com/time/s>

Even in the Netherlands, however, the viability of strategies to hold the water back as sea levels rise due to climate change remain uncertain.¹⁶⁰ Researchers have concluded that the expected increase in the frequency and magnitude of river floods due to climate change makes increasing levees and other physical protections against water “not sustainable in the long term.”¹⁶¹ For example, the aftermath of Hurricane Katrina and the flooding that ruined the lives of thousands of Black residents in and around New Orleans brought the inequitable impact of flooding on Black communities into stark relief.¹⁶² The Army Corps of Engineers constructed a levee around the city with state-of-the-art technology at a cost of \$14 billion after the hurricane.¹⁶³ In 2021, the levees passed their first test with Hurricane Ida, but the Army Corps of Engineers reported in 2019 that they had started sinking and they are likely not up to 100-year flood resistance standards as of last year.¹⁶⁴

subscriber/article/0,33009,858818,00.html [https://perma.cc/M8AL-ZYXY]. In considering the impact of flooding and climate change on African-American communities, it is ironic that the city of Haarlem in the Netherlands is the namesake of Harlem, the section of New York City that became known as one of the most iconic Black communities in America. See *Harlem: Hamilton Grange National Memorial*, U.S. NAT'L PARK SERV., <https://www.nps.gov/articles/000/harlem.htm> [https://perma.cc/U7D2-U7SB]; see also *New York City: The Harlem Renaissance and Beyond*, SMITHSONIAN AM. ART MUSEUM, https://americanexperience.si.edu/wp-content/uploads/2014/07/New-York-City_The-Harlem-Renaissance-and-Beyond.pdf [https://perma.cc/6T22-LKTV] (“By the 1920s Harlem had become the most famous African American community in the world” for the social, cultural and artistic revolution that developed there.).

¹⁶⁰ See Nina Joung, *The Dutch Are Building a Barricade Against Climate Change*, PBS (July 10, 2019), <https://www.pbs.org/wnet/peril-and-promise/2019/07/dutch-barricade-against-climate-change> [https://perma.cc/GD3V-VWM7].

¹⁶¹ Lorenzo Alfieri et al., *Increasing Flood Risk Under Climate Change: A Pan-European Assessment of the Benefits of Four Adaptation Strategies*, 136 CLIMATIC CHANGE 507, 519 (2016).

¹⁶² See Frank & E&E NEWS, *supra* note 40 (“The disparity [in rates of flooding in Black neighborhoods] was particularly acute in Louisiana when Hurricane Katrina notoriously destroyed many Black neighborhoods such as New Orleans’ Lower Ninth Ward.”); see also Gary Rivlin, *White New Orleans Has Recovered from Hurricane Katrina. Black New Orleans Has Not.*, TALK POVERTY (Aug. 29, 2016), <https://talkpoverty.org/2016/08/29/white-new-orleans-recovered-hurricane-katrina-black-new-orleans-not/index.html> [https://perma.cc/D7E4-R5P3] (“Nearly 1 in 3 black residents have not returned to the city after the storm.”).

¹⁶³ Thomas Frank & E&E News, *After a \$14-Billion Upgrade, New Orleans’ Levees Are Sinking*, SCI. AM. (Apr. 11, 2019), <https://www.scientificamerican.com/article/after-a-14-billion-upgrade-new-orleans-levees-are-sinking> [https://perma.cc/8B6J-DZ6T].

¹⁶⁴ Laura Parker, *New Orleans Levees Pass Their First Major Test*, NAT'L GEOGRAPHIC (Sept. 3, 2021), <https://www.nationalgeographic.com/environment/article/new-orleans-levees-passed-their-first-major-test> [https://perma.cc/G58H-U6T3]; Mario Picazo, *New Orleans’ Levees are Sinking. City in Vulnerable Position*, WEATHER NETWORK (Apr. 23, 2019, 4:52 PM), <https://www.theweathernetwork.com/en/news/climate/solutions/new-orleans-levees-sinking-rising-sea-levels> [https://perma.cc/4AH8-4T2Z]; Andy Horowitz, Opinion, *When the Levees Break Again*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/opinion/new-orleans-floods-levees.html> [https://p

Elevating dikes and levees could reduce flood damage, a very valuable outcome, but elevation is not a reliable solution.¹⁶⁵ It would also likely come with significant damage to the environment.¹⁶⁶ Research from Europe has shown that elevating dikes may be a cost-effective measure, but create its own harms that may outweigh its utility.¹⁶⁷ Some flood protection measures may survive a cost-benefit analysis, but fail because the government cannot secure the massive amount of funding needed for major infrastructure projects.¹⁶⁸

When it comes to protecting Black communities, the concern around costs often arises as a barrier to solutions. The lack of political will to make the necessary investments in strengthening Black communities or addressing problems that disproportionately burden African Americans makes the claims that there is not enough funding suspicious.¹⁶⁹ The notion of path dependence also accounts for failures by state and local governments to shift funding toward physical protections for neighborhoods with mostly residents of color.¹⁷⁰ Communities may follow the same budgetary priorities

erma.cc/9H6R-RD9W] (“As early as 2023, the levee system may no longer protect New Orleans and its suburbs against a so-called 100-year storm, or a hurricane with a 1 percent chance of happening here each year.”).

¹⁶⁵ See Michalis I. Voudoukas et al., *Economic Motivation for Raising Coastal Flood Defenses in Europe*, 11 NATURE COMM’NS 1, 1–5 (2020); see also Brenden Jongman, *Effective Adaptation to Rising Flood Risk*, 9 NATURE COMM’NS 1, 2 (2018) (“[I]ncreasing flood protection [including dikes and levees] can give a false sense of security and may boost development in these protected flood-prone areas.”).

¹⁶⁶ Voudoukas et al., *supra* note 165, at 2 (“[H]ard protection [against flooding] can affect the landscape in a negative way, increase erosion, reduce amenity value and result in more catastrophic events in the case of failure.”).

¹⁶⁷ See *id.* at 1 (“[A]t least 83% of flood damages in Europe could be avoided by elevating dykes in an economically efficient way . . . specifically where high value conurbations exist.”).

¹⁶⁸ See Stern, *supra* note 20, at 170 n.31; see also Jongman, *supra* note 165, at 2 (2018) (noting that adapting to the risk of increased flooding depends on the “right mix of measures . . . subject to levels of risk, funding, and political will”).

¹⁶⁹ For discussions of the problem of political will in other contexts, see Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U.L. REV. 1461, 1462 (2003) (“There has never been the political will to pursue equal educational opportunity. Since the 1960s, no president has devoted any attention to decreasing segregation or to equalizing school funding.”); see also NOLIWE ROOKS, CUTTING SCHOOL: PRIVATIZATION, SEGREGATION, AND THE END OF PUBLIC EDUCATION 118 (2017) (“[A]cross a variety of political beliefs, in the 1970s America there was little to no political will to fund measures that would allow for racial integration in public schools.”); Thaddeus J. Hackworth, *The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation*, 12 GEO. J. POVERTY L. & POL’Y 181, 183 (2005) (noting the lack of political will to fund the Housing Choice Voucher Program, commonly known as Section 8); Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 62 (2018) (noting lack of political will to provide adequate funding for counsel for indigent defendants in criminal cases).

¹⁷⁰ See, e.g., Erin Scharff, *Cities on Their Own: Local Revenue When Federalism Fails*, 48 FORDHAM URB. L.J. 919, 942 (2021) (noting that police budgets have increased in the

they have traditionally set in ways that maintain the status quo and reinforce the marginalized status of their most vulnerable, historically Black communities.¹⁷¹ The impact of fledgling political will and path dependence requires vigilance around securing cost-effective protections in communities of color with higher risks of long-term massive flooding.¹⁷²

The shift toward climate retreat is also not necessarily a permanent one. “In the future, it may be possible to reduce retreat if flood-control technology advances or if we follow the Netherlands and create dedicated floodplains, construct homes whose ground floors are dedicated to flood overflow not habitation, and design floating or ‘amphibious’ homes (homes built to float when floods occur).”¹⁷³ Indeed, we have made several technological advances that have enhanced our ability to measure flood risk for certain areas and predicting storms in ways that have made flooding more foreseeable.¹⁷⁴ This greater predictive ability, however, does not necessarily equate to avoiding or even seriously reducing the risk of property loss altogether.¹⁷⁵

The process of coming to grips with the need to change the relationship between water and residential living has some elements of the stages of grief, particularly for Black Americans that are deeply connected to and sustained by the towns and neighborhoods in which they live and want to protect them.¹⁷⁶ The insecurity of land tenure and ownership, particularly due

wake of George Floyd’s murder and to shift funds from policing to investments in human services in part due to path dependence).

¹⁷¹ See Roithmayr, *supra* note 112, at 39–41; see also ROITHMAYR, *supra* note 112, at 99, 116–17.

¹⁷² See Jongman, *supra* note 165, at 2 (“The right mix of measures [for adapting to rising flood risk] varies from place to place, subject to levels of risk, funding, and political will.”); see also Elliott et al., *supra* note 47, at 3 (“[S]egregation, along with ongoing racial inequities in wealth and political power, can enter the federal buyout program in unexpected ways at various steps of its implementation.”).

¹⁷³ Stern, *supra* note 20, at 171; see also Sander van Alphen, *Room for the River: Innovation, or Tradition? The Case of the Noordwaard*, in ADAPTIVE STRATEGIES FOR WATER HERITAGE: PAST, PRESENT AND FUTURE 309, 309 (Carola Hein ed., 2020) (describing the Dutch Room for the River plan for residential living, which is designed around water flow); Thomas Erdbrink, *To Avoid River Flooding, Go With the Flow, the Dutch Say*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2021/09/07/world/europe/dutch-rivers-flood-control.html> [<https://perma.cc/BS99-D8R5>] (explaining Dutch floodplain construction); Anna Holligan, *Flood-Proof Homes the Dutch Way*, BBC (Feb. 22, 2014), <https://www.bbc.com/news/av/world-europe-26302176> [<https://perma.cc/L356-K7JU>].

¹⁷⁴ See Stern, *supra* note 20, at 181; see also JOHN ENGLANDER, MOVING TO HIGHER GROUND: RISING SEA LEVEL AND THE PATH FORWARD 12–15 (2021).

¹⁷⁵ See Minh Kim & E&E News, *First-Ever Flood Forecasting Maps Show Houses and Roads at Risk*, SCI. AM. (Nov. 13, 2023), <https://www.scientificamerican.com/article/first-ever-flood-forecasting-maps-show-houses-and-roads-at-risk/> [<https://perma.cc/WZU7-W9CF>] (National Weather Service’s first real-time flood forecasting system has several limitations, including the fact that it does not “display projected flood depth and ignores the chances of levees failing.”).

¹⁷⁶ See generally ELISABETH KUBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS (2005) (identifying as

to state intervention, for African Americans has deep historical roots.¹⁷⁷ As an African American, I relate to this range of emotions. I share Sheryll Cashin's sentiment in addressing the challenge of integration—"I come to this as a scholar but also a black [man] who values black institutions and communities even as I advocate for race and class integration."¹⁷⁸ Nonetheless, "[l]earning to identify the reflex reactions emanating from grief's intermediate stages will help us make better choices."¹⁷⁹

The challenge of accepting the massive social upheaval that climate-induced flooding will cause is not, however, limited to Black Americans. Among the general population, there is a tendency to deny the increased risk of flooding altogether.¹⁸⁰ Likewise, the effort to require unsustainable and inconsistently reliable construction measures to stave off the effects of flooding may be akin to bargaining, suggesting that there is always another remedy besides moving that we have yet to try.¹⁸¹

the five stages denial, anger, bargaining, depression, and acceptance, and exploring the relationships between them); Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. 1017, 1020–21 (2021). The reference to stages of grief is not intended to minimize the extent to which government decision-making makes choices about whose property and neighborhoods are worth protecting in ways that "work systemic economic and racialized injustice." Rather, it is a way to engage with the range of responses to climate retreat policy may induce for communities of color which are uprooted as expectations of property ownership, security, and place are literally washed away out from under them. *See id.* (referring to stages of grief as a device to explain the evolution of technology law scholarship as "the organizational forms that underpin our familiar legal institutions have been in the process of evolving out from under us").

¹⁷⁷ *See* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 855 (2011) (observing that "stability for some within the system of property ownership is provided at the expense of instability for others"); *see also* Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107, 109 (2020) (describing a phenomenon in which public officials, with several examples of cities with large Black populations, "systematically take property from residents and transfer it to public coffers, intentionally or unintentionally violating domestic laws or basic human rights.").

¹⁷⁸ CASHIN, *supra* note 44, at xix.

¹⁷⁹ Cohen, *supra* note 176, at 1021.

¹⁸⁰ *See* Stern, *supra* note 20, at 169 ("Movement into flood-prone regions has persisted and increased in coastal areas, despite copious media coverage and rising public awareness of climate-related hurricanes and other flood disasters."). Even after Hurricane Andrew, people moved into the same area despite the extensive flood damage the storm left behind. *See id.* at 169 n.27; *see also* *Emergency Management Coastal Areas*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/preparedness/about/coastal-areas.html> [<https://perma.cc/9SPG-NYQX>] (Nov. 20, 2021).

¹⁸¹ For example, the majority-Black neighborhood of Eastwick in Philadelphia sits in a low-lying area that has seen twenty floods in the last forty-three years, a number expected to grow as climate change worsens. Jon Hurdle, *Clock Is Ticking for the Black Residents of Flood-Prone Southwest Philadelphia*, MOTHER JONES (Oct. 15, 2023), <https://www.motherjones.com/environment/2023/10/southwest-philadelphia-flooding-risk-black-environmental-justice/> [<https://perma.cc/5QTZ-CPV3>] ("The three major solutions under consideration by the city and researchers from three universities are: better control

The evidence, however, showing the unsustainability of relying on infrastructure improvements to avoid property loss due to flooding in high-risk areas requires serious consideration of the possibility that governments cannot throw enough money at infrastructure to avoid inevitable damage. Comprehensive reform of flood zone lending policies, insurance regulations, and zoning arguably may have a greater impact than climate retreat.¹⁸² These approaches, however, also come with their own negative social consequences. Stephanie Stern discusses the Federal Housing Finance Agency's failure to "price even extreme climate risk into mortgage eligibility or terms" and "guarantee[ing] mortgages in severe flood zones with regularity."¹⁸³ But FHA-guaranteed mortgages provide access to homeownership for a disproportionate percentage of African American and Latino borrowers.¹⁸⁴ Raising the cost of home loans to "price in" climate risk due to a home's location in a flood zone would disproportionately make the cost of purchasing a home at all cost-prohibitive for Black and Latino borrowers, as the cost of housing in areas susceptible to flooding is generally lower.¹⁸⁵ It also may make it difficult for them to make the free choice to live in a community where a larger percentage of the residents share their racial/ethnic background.

Given the legacy of designating flood zones for the development of Black communities, it also may function as a form of redlining to make loans in flood zones either prohibited or financially out of reach. It may be more appropriate for FHA-guaranteed mortgages to incentivize the purchase of

of stormwater upstream in the watersheds of the two creeks that historically flood Eastwick; an earthen levee that would protect the neighborhood's most vulnerable areas; and a 'land swap' . . . also known as 'managed retreat.'"). Community leaders discuss the uncertainty associated with the effectiveness of a levee depending on where the storm is coming from. *See id.* Upstream control also requires cooperation from multiple jurisdictions which is admittedly hard to control. *Id.* They ultimately conclude that a land swap is the best course of action, after grappling with the challenges posed by alternate courses of action. *See id.*

¹⁸² *See* J.B. Ruhl & Robin Kundis Craig, 4°C, 106 MINN. L. REV. 191, 256–58 (2021); *see also* Stern, *supra* note 20, at 233. For example, Stephanie Stern has proposed "pricing climate risk into FHA-guaranteed mortgages and federal flood insurance." *Id.* at 167.

¹⁸³ Stern, *supra* note 20, at 174 n.47.

¹⁸⁴ *See* CONSUMER FIN. PROT. BUREAU, DATA POINT: 2019 MORTGAGE MARKET ACTIVITY AND TRENDS 31 (2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf [<https://perma.cc/PA5N-ECW7>] ("In 2019, among those obtaining a first-lien, owner-occupied, site-built, one-to-four-family home purchase mortgage, 60.6 percent of Blacks and 48.8 percent of Hispanic Whites took out a nonconventional loan [defined to include loans insured by the FHA or guaranteed by the Veterans Administration, Rural Housing Service, or Farm Service Agency], whereas 29.7 percent of non-Hispanic Whites and just 12.4 percent of Asians did so.").

¹⁸⁵ *See* Zavar & Fischer, *supra* note 146, at 3–4 (noting that "many properties in high-risk areas remain lower in monetary value and often house the socially vulnerable" despite the flood-prone but high value property close to water amenities, like beaches and rivers).

housing more resilient to the risk of flooding by making loans for resilient housing more affordable, particularly because the research shows that less-resilient housing is one of the drivers for the disproportionate amount of damage that Black homeowners experience due to flooding.¹⁸⁶ The historical context behind the presence of Black communities in flood zones moves in favor of a carrot approach rather than a stick approach, given that Black borrowers have fewer choices for affordable housing in an area with a sizable Black population.

Stern has also proposed “adopting rigorous state and local restrictions on development in risky areas.”¹⁸⁷ While pricing climate risk into government-backed mortgages and restricting development in high-risk areas may change decision-making about purchasing real estate and leasing homes in flood zones, they do not include any incentives for relocating to racially integrated communities or providing for mixed-income housing in climate-safe areas.

The historical designation of floodplains as places for African Americans to inhabit has led to the cruel irony of climate retreat policies that now require those same individuals to abandon the communities that they built and called their own. The relocation process must be a choice-based model that provides the requisite financial support to transition to new housing outside of a floodplain if a resident so chooses. Indeed, state and local governments that administer federal buyout programs must offer buyouts voluntarily and may not use or threaten eminent domain to obtain buyouts.¹⁸⁸ It is also important to interrogate the context in which residents make choices about where they live. The places in which African Americans often established communities did not arise from choice in a free market where land was readily available. Until the passage of the Fair Housing Act of 1968, there were very limited options for recourse if someone was a victim of discrimination in a real estate transaction and someone refused to sell land to them because of their race.¹⁸⁹ African Americans, however, built community despite the opposition and the difficult circumstances around them. Community is hard to build, and it is not easy to maintain the same community in the event of a relocation.

There are also alternatives to relocation that communities must be allowed to consider. “For example, governments could use buyouts to invest in low-income communities, rather than dispossess them, by buying flood-prone parcels and creating parks and green space in conjunction with flood-

¹⁸⁶ See Sarmiento & Miller, *supra* note 130, at 13–14.

¹⁸⁷ Stern, *supra* note 20, at 167.

¹⁸⁸ 44 C.F.R. § 80.13(a)(4) (2024); Stern, *supra* note 20, at 183.

¹⁸⁹ See Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIOLOGICAL F. 571, 571, 579 (2015) (with the passage of the Fair Housing Act, “[f]or the first time in American history, legislation banned racial discrimination in the sale or rental of housing”).

safe affordable housing.”¹⁹⁰ An understanding of the infrastructure that would be necessary to protect a community against future flooding or climate disasters must also drive decision-making around relocation. Where financing for infrastructure to protect a community against long-term damage is available, residents and city planners may give those responses priority. The greater the cost compared to the benefit, however, of an infrastructure project investment to protect a community, the greater should be the consideration of relocation. The focus on examining the costs of climate resilience measures compared to the benefit should be weighed to avoid circumstances in which state or local governments organize the relocation of a community from an area and developers ultimately come in and take the land that residents left to create another use tailored to high-income, mostly white residents or visitors.

Land use policy measures may also be brought to bear in disincentivizing residential or other kinds of development in an area particularly at risk of flooding. For example, the Miami-Dade County Board of Commissioners adopted an ordinance in 1982 that requires sellers within the “East Everglades Area of Critical Environmental Concern” to include a warning in the documents of sale.¹⁹¹ This warning must advise the potential purchaser that the “land is subject to periodic, natural flooding, which poses a serious risk to persons and property in the area and makes the property unsuitable for residential, commercial, and industrial development.”¹⁹² The measure does not bar the sale of land in these areas or amount to a physical taking of the property, but it heavily discourages it.

The relationship between race, residential segregation and altitude also provides an indication of the extent to which climate gentrification will become a more prevalent feature of American life in the wake of increased flooding due to climate change.¹⁹³ A 2006 study that focused on cities in the U.S. South found that “blacks lived at higher elevations in riverfront or coastal cities, [while] properties with views of rivers or coastlines were predominately white.”¹⁹⁴ The intense focus on coastal communities in climate retreat policy may lead to buyouts that disproportionately benefit white residents. As they search for replacement housing, areas that many higher-

¹⁹⁰ Stern, *supra* note 20, at 220 n.257; Caroline M. Kraan et al., *Promoting Equity in Retreat Through Voluntary Property Buyout Programs*, 11 J. ENV'T STUD. & SCIS. 481, 487 (2021).

¹⁹¹ DADE CNTY. CODE § 33B-54(a) (2023).

¹⁹² *Id.*; Nelson v. Wiggs, 699 So. 2d 258, 263 (Fla. 3d DCA 1997) (Sorondo, J., dissenting).

¹⁹³ See David A. Dana, *Climate Change Adaptation as a Problem of Inequality and Possible Legal Reforms*, 117 NW. U.L. REV. 71, 76 (2022) (describing “‘climate gentrification’—the gentrification brought by high-income people moving to neighborhoods that have become more attractive because of climate change” in Miami where “there has already been a movement of high-income households to somewhat more elevated locations slightly inland” as the city’s flood risk increases).

¹⁹⁴ Craig, *supra* note 32, at 40; see also Ueland & Warf, *supra* note 35, at 53–54, 59.

income whites once rejected—areas at higher elevations and away from waterfronts—will become more attractive.¹⁹⁵ The disparities in access to credit make it more likely that they will have the resources to purchase properties in historically Black neighborhoods, leading to higher property values and displacing those legacy residents. The opportunity to pursue greater residential integration as part of climate retreat policy should not be ignored. When it comes to addressing climate change, we should remember Rev. Dr. Martin Luther's King's admonition that "[w]e must learn to live together as brothers or we will perish together as fools."¹⁹⁶ The risk of perishing in floods of biblical proportions is now more real than ever.¹⁹⁷

III. FAIR HOUSING IN THE AGE OF CLIMATE RETREAT

Climate migration and retreat will require people to relocate to new communities around the country at an unprecedented rate.¹⁹⁸ This movement presents a remarkable opportunity to reduce patterns of segregation and disadvantage that arise based on where people live. "The basic fact of where one lives has a substantial impact on educational opportunities, work opportunities, the ability to own a home, the probability of becoming a victim of or witness to violent crime, and, cumulatively, the possibility of escaping poverty."¹⁹⁹ The chance to combat segregation and unequal access to opportunity has serious implications for fair housing law and policy and

¹⁹⁵ See Dana, *supra* note 193. Dana discusses this movement with Miami as an example. The neighborhoods undergoing gentrification due to climate change includes places into which racist planning policies and housing discrimination historically shunned the city's Black population, including Overtown, known during the Jim Crow era as "Colored Town." See Craig, *supra* note 32, at 39; see also Raymond A. Mohl, *Making the Second Ghetto in Metropolitan Miami, 1940-1960*, 21 J. URB. HIST. 395, 397-98 (1995); Patrick Sisson, *As Sea Level Rises, Miami Neighborhoods Feel Rising Tide of Gentrification*, CURBED (Feb. 10, 2020, 11:30 AM), <https://archive.curbed.com/2020/2/10/21128496/miami-real-estate-climate-change-gentrification> [<https://perma.cc/37JZ-VRPA>].

¹⁹⁶ Martin Luther King, Jr., L.A. TIMES ARCHIVE (Jan. 19, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-jan-19-me-10002-story.html> [<https://perma.cc/2RA9-SUVC>].

¹⁹⁷ See Peter Gleick, *Ancient Flood Myths Were a Warning: Heed the Power of Water*, WASH. POST (Sept. 14, 2023), <https://www.washingtonpost.com/opinions/2023/09/14/apocalyptic-floods-noah-gilgamesh-climate-change/> [<https://perma.cc/YEL4-GMZ5>] (discussing lessons to be taken from flooding that killed thousands in Northern Libya and other catastrophic water-induced disasters due to climate change at the scale reminiscent of prophecies in the Bible).

¹⁹⁸ See BITTLE, *supra* note 46, at 11 ("By the end of the century, climate change will displace more people in the United States than moved during the Great Migration [which included more than six million African Americans from the 1920s to the 1970s], uprooting millions of people in every region of the country.").

¹⁹⁹ Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 BELMONT L. REV. 78, 80 (2018).

calls for a fair housing rights approach to structuring climate retreat programs.

Sheryll Cashin has argued that “[h]ousing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”²⁰⁰ Congress passed Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act (the “Act”) in the wake of Martin Luther King, Jr.’s assassination in April 1968.²⁰¹ The Fair Housing Act prohibits discrimination in residential real estate transactions on the basis of race, color, sex, religion, national origin, familial status, and disability.²⁰² The conduct that led to the assignment of African Americans and Latinos to low-lying areas prone to flooding would clearly violate the Fair Housing Act if it took place today. The refusal to sell land for housing to African Americans because of their race by a private landowner, a practice which relegated Black Americans to living in floodplains because it was the only land a white landowner would sell them, would violate the Fair Housing Act.²⁰³ Likewise, a local government that explicitly used its zoning code or other land use controls to restrict African Americans to specific areas would also violate the Fair Housing Act.²⁰⁴ The problem, however, is that

²⁰⁰ CASHIN, *supra* note 44, at 1.

²⁰¹ Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 530 (2015) (“In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission’s recommendation and passing the Fair Housing Act.”); Kathy Trawick, *An Attack on Housing Equality*, 44 HUM. RTS. 24, 24 (2019) (noting that Congress passed the Act one week after Dr. King’s assassination). In 1967, the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission, released its report on the underlying causes of urban rebellions and social unrest in communities of color in the mid-1960s. *Inclusive Communities*, 576 U.S. at 529. The Kerner Commission found that “[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight.” *Id.* (alteration in original) (quoting REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91 (1967)). The Supreme Court recognized that the Commission identified a pattern in which “both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities.” *Id.* (citing REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967)). The Commission famously concluded that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” *Id.* (quoting REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1967)). It recommended that Congress enact “a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin.” *Id.* at 529–30 (quoting REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 263 (1967)). It also recommended that the government “[r]eorient Federal housing programs to place more low- and moderate-income housing outside of ghetto areas.” REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1967).

²⁰² See 42 U.S.C. §§ 3601, 3604–3606.

²⁰³ See CASHIN, *supra* note 44, at 10.

²⁰⁴ At the same time, various systems work together to effectively produce similar results, although not explicitly. Sheryll Cashin observes that “land-use planners have come

the past acts of discrimination which created racial path dependence took place at a time beyond the reach of the Act.²⁰⁵

In earlier work, I have discussed the ways in which the bar to claims under the FHA that relate to the habitability of property after a buyer or renter acquires it can limit legal theories designed to challenge racist decisions that relegated Black communities to certain locations.²⁰⁶ The Fair Housing Act provides a remedy as a matter of public policy for some of the wrongs of the past that should be brought to bear to address the modern results of these discriminatory practices. Courts have made clear, however, that the FHA “prohibits ‘both direct discrimination and practices with significant discriminatory effects’ on the availability of housing.”²⁰⁷ It is important, however, to make the distinction between enforcement and policy in fair housing law, and the reach of each. The Fair Housing Act and Title VI of the Civil Rights Act of 1964 are “two of the civil rights laws that most directly apply to challenging governmental and private market decisions that further racial disparities in housing and community development.”²⁰⁸ Yet they have had limited effectiveness in remedying structural racism.²⁰⁹ Two core themes drive fair housing law: “anti-discrimination and anti-segregation.”²¹⁰ The anti-discrimination element focuses on the “public and

to rely on a system of racial and economic profiling of neighborhoods to decide where to invest, develop, and do business. . . . Public policy choices support homogeneity.” CASHIN, *supra* note 44, at 10.

²⁰⁵ Note, however, that courts have recognized theories that may allow litigants to overcome statute of limitations challenges in FHA cases. *See* Thompson v. HUD, 348 F. Supp. 2d 398, 426 (D. Md. 2005) (finding that proof of a past FHA violation “would be admissible to establish the fact of the past violation as an element of a ‘dissipation of vestiges’ claim.”).

²⁰⁶ *See* Craig, *supra* note 32, at 76, 80–82.

²⁰⁷ *S. Camden Citizens in Action v. N.J. Dep’t of Env’t Prot.*, 254 F. Supp. 2d 486, 499 (D.N.J. 2003) (*quoting* Southend Neighborhood Improvement Ass’n v. Cnty. Of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984)); *see also* 42 U.S.C. § 3604(a).

²⁰⁸ Craig, *supra* note 32, at 69.

²⁰⁹ *See id.*; *see also* Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 384 (1988) (“[I]ndividual litigation victories rarely can address large-scale patterns and practices of discrimination.”); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1127 (1998) (“The rights-based strategy of fair housing, as enforced by HUD and in the courts, is an ideological victory that nonetheless has had insignificant effects in desegregating the metropolis and thereby improving the material life of the ghetto poor.”); Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1305 (2020) (arguing that courts have primarily interpreted Title VI and Title VIII of the Civil Rights Acts of 1964 and 1968, respectively, “to apply to discriminatory decisions after they have been made, place the burden of proof on members of the impacted community rather than on government agencies, and are applied against a legal backdrop that focuses on intent and ignores structural and systemic concerns”).

²¹⁰ David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 7 (2017); *see also* United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988) (“Congress saw the antidiscrimination policy as the means to effect the anti-

private capacity to resolve discrimination claims.”²¹¹ The focus on individualized enforcement of protections against housing discrimination, however, “unnecessarily limits the tools available to achieve fair housing.”²¹²

This Article continues the call for a reconsideration of the scope of fair housing’s meaning and its implications for broader state and federal policy, as it advances the application of fair housing law to managing the effects of climate change. “Fair housing” is a far more comprehensive term than commonly understood. The history of the nation’s approach to dealing with unequal access to and protection of property rights based on race indicates that the Fair Housing Act is more than an anti-discrimination law. The Act actually expanded on equal housing rights provided by 42 U.S.C. Section 1982, one of the statutes passed after the Civil War during Reconstruction to secure the equal social status of formerly enslaved people.²¹³ Section 1 of the Civil Rights Act of 1866 provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”²¹⁴ On April 1 and April 2, 1968, the U.S. Supreme Court heard oral argument in *Jones v. Alfred Mayer Co.*²¹⁵ Joseph Lee Jones, an African American man, alleged that a real estate company in St. Louis County, Missouri, refused to sell him a home in a particular neighborhood solely because of his race.²¹⁶ Congress passed the Fair Housing Act on April 11, 1968, two months before the Court released its opinion on June 17, 1968.²¹⁷ The passage of the Act in the intervening period provided the Court with an opportunity to describe the distinction between the Fair Housing Act and Section 1982, its less effective predecessor.²¹⁸ It described Section 1982 as a “general statute applicable only to racial discrimination in the rental and

egregation-integration policy.”). The two goals seek different remedies. See Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 718 (2008) (“The goal of the FHA was not merely to end housing discrimination based on race and national origin, but to replace the ghettos ‘by truly integrated and balanced living patterns.’” (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale))).

²¹¹ Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1193 (2011).

²¹² Craig, *supra* note 32, at 70; see also Johnson, *supra* note 211, at 1193–94 (calling for a rethinking of the “overly narrow conceptions of the FHA’s enforcement power”).

²¹³ Indeed, law professor Melvin J. Kelley IV aptly describes it as “[t]he nation’s first federal fair housing law.” Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 302 (2019).

²¹⁴ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (later codified at 42 U.S.C. § 1982).

²¹⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

²¹⁶ *Id.* at 412.

²¹⁷ An Act to Prescribe Penalties for Certain Acts of Violence or Intimidation, and for Other Purposes. Pub. L. No. 90-284, 82 Stat. 73 (enacted Apr. 11, 1968); *Jones*, 392 U.S. at 409.

²¹⁸ *Jones*, 392 U.S. at 416–17.

sale of property” and the Act “a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.”²¹⁹ The Act reaches more than racial discrimination in property rights—a set of rights that the Court upheld as enforceable in *Jones* under Section 1982 without the Fair Housing Act.²²⁰ The anti-segregation element of the Act is its truly novel innovation.

In the first provision of the Fair Housing Act, Congress declared that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”²²¹ Yet the private and public enforcement provisions of the Act have had limited effectiveness in shaping public policy around fair housing rights outside of individualized enforcement of the statute.²²² Scholars have considered what this “policy” should cover today. I have observed earlier that

[w]hile systemic fair housing litigation can lead to victories against a specific policy or practice with segregative effects, the power of the accumulated public and private policies that shaped racial segregation in housing through U.S. society requires an affirmative obligation to promote integration as a matter of public policy and private practice.²²³

Former U.S. Senator Walter Mondale, a co-sponsor of the Fair Housing Act, explained that the goal of the Act was to create “truly integrated and balanced living patterns.”²²⁴ In addition to integration, “fair housing law is fundamentally about reducing economic inequality.”²²⁵ Both goals are critical, as formal legal equality and integration can mask ongoing, severe racial inequalities and give society permission to avoid addressing them.²²⁶

²¹⁹ *Id.* at 417.

²²⁰ *See id.* at 416–17; *see also Housing Discrimination Under The Fair Housing Act*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_op/fair_housing_act_overview [<https://perma.cc/P9H9-ZLZ3>].

²²¹ 42 U.S.C. § 3601.

²²² Scholars have suggested that part of the problem is that, compared other federal civil rights statutes like Title VII (prohibiting discrimination in employment) and the Voting Rights Act, the statutory and enforcement framework of the Fair Housing Act insufficiently focuses on “systemic group disadvantage rather than individual harm” and “substantive group results over individual justice.” Nicholas Pedriana & Robin Stryker, *From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation*, 123 AM. J. SOCIO. 86, 86 (2017). This individualized focus makes applying the statute to issues of systemic injustice more challenging.

²²³ Craig, *supra* note 32, at 83; *see also* Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act’s Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2183–85 (2013).

²²⁴ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 2706, 3422 (statement of Sen. Mondale)).

²²⁵ Troutt, *supra* note 210, at 6.

²²⁶ *See generally* Derrick A. Bell, Jr., *Bell, J., Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 185, 185 (Jack M. Balkin ed., 2001).

A provision of the Fair Housing Act provides an important entry point to this obligation. 42 U.S.C. Section 3608 provides that the Secretary of Housing and Urban Development shall “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” fair housing.²²⁷ It also extends this obligation to “[a]ll executive departments and agencies” that administer housing and urban development programs “(including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further” fair housing and to cooperate with the HUD Secretary in this endeavor.²²⁸ The obligation is commonly referred to as “affirmatively furthering fair housing” or “AFFH.”²²⁹

The federal government has historically proven ineffective and ambivalent toward its obligation to enforce the mandate.²³⁰ From the 1970s through the 1990s, a handful of fair housing groups took advantage of the provision to challenge governmental decisions that promoted and reinforced racial segregation.²³¹ Federal courts generally recognize the government’s obliga-

²²⁷ 42 U.S.C. § 3608(e)(5).

²²⁸ 42 U.S.C. § 3608(d).

²²⁹ See *Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/AFFH> [<https://perma.cc/Y2DX-JFLD>].

²³⁰ See CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS 102–03 (2006); see also Craig, *supra* note 32, at 83.

²³¹ See Florence W. Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 363 (2007) (“Five judicial decisions have been particularly influential in interpreting the statutory ‘affirmatively further’ language.”); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210–12 (1972) (providing standing to redress “the loss of important benefits from interracial associations” as the Act protects “not only those against whom a discrimination is directed but also those whose complaint [concerns] . . . ‘the very quality of their daily lives’” (quoting *Shannon v. HUD*, 436 F.2d 809, 818 (3d Cir. 1970))); *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 931, 938–39 (7th Cir. 1974), *aff’d sub nom.* *Hills v. Gautreaux*, 425 U.S. 284 (1976) (ordering HUD to issue a metropolitan-wide remedy for segregation); *Shannon v. HUD*, 436 F.2d 809, 816 (3d Cir. 1970) (describing a “progression in the thinking of Congress” about fair housing obligations, moving from allowing the Secretary to “act neutrally on the issue of racial segregation” in the 1949 Housing Act, to “prevent discrimination in housing” under the 1964 Civil Rights Act, to directing the Secretary to “act affirmatively to achieve fair housing”); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (interpreting the AFFH mandate to provide that “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat”); *NAACP v. Sec’y. of HUD*, 817 F.2d 149, 155–56 (1st Cir. 1987) (interpreting Section 3608(e)(5) to provide “an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases” and the agency may be liable for not using “its immense leverage . . . to provide adequate desegregated housing” (quoting *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983))).

tion to take affirmative steps to remedy past discrimination.²³² In 2015, HUD promulgated a rule designed to implement the AFFH mandate.²³³ When the Trump Administration came to office, HUD Secretary Ben Carson shelved the proposed AFFH regulation and proposed a new one with lax enforcement standards.²³⁴ The Biden Administration, however, has made a renewed commitment to affirmatively furthering fair housing.²³⁵

Six days after President Joe Biden's inauguration, the White House issued a "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies."²³⁶ The Memorandum highlights the history of "racially discriminatory housing policies" at all levels of government "that contributed to segregated neighborhoods and inhibited equal opportunity and the chance to build wealth for Black, Latino, Asian American and Pacific Islander, and Native American families, and other underserved communities."²³⁷ It includes among the legacy of these policies the "disproportionate burden of pollution and exposure to the impacts of climate change in communities of color."²³⁸ The Memorandum makes clear that "[t]he Federal Government has a critical role to play in overcoming and redressing this history of discrimination" and that the goal of "fair and equal access to housing opportunity . . . for all throughout the United States" is "consistent with the Fair Housing Act, which imposes on Federal departments and agencies the duty to 'administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further' fair housing."²³⁹ The Memorandum orders the Secretary of the U.S. Department of Housing and Urban Development to examine several regulatory actions that took place during the Trump Administration, including the repeal of the July 16, 2015 rule implementing the AFFH mandate.²⁴⁰ On February 9, 2023, HUD published a Notice of

²³² See *Otero*, 484 F.2d at 1134.

²³³ 42 U.S.C. § 3608; see also *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42272, 42273 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

²³⁴ Instead, HUD introduced a proposed rule entitled "Preserving Community and Neighborhood Choice." *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47889, 47900–02 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). This 2020 rule was designed to replace the 2015 AFFH regulation and 1994 Analysis of Impediments ("AI") requirements that HUD first required during the Clinton Administration in an initial effort to implement the AFFH mandate. Under the proposed rule, "AFFH certifications [would] be deemed sufficient" provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination. *Id.* at 47900.

²³⁵ See *Affirmatively Furthering Fair Housing (AFFH)*, *supra* note 229.

²³⁶ Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021).

²³⁷ *Id.* at 7487.

²³⁸ *Id.*

²³⁹ *Id.* at 7488 (quoting 42 U.S.C. § 3608(d)).

²⁴⁰ *Id.*

Proposed Rulemaking that builds on the 2015 AFFH final rule “with certain improvements such as a more robust community engagement requirement, a streamlined required analysis, greater transparency, and an increased emphasis on goal setting and measuring progress.”²⁴¹ The 2023 AFFH rule remains pending as of the time of this writing.

Despite the movement of Democratic administrations to make the AFFH mandate a reality in the last ten years, the goal has gone “underdeveloped and unrealized.”²⁴² In the context of climate change, however, the terms of the currently pending proposed rule can provide a structure within which city leaders and stakeholders can specifically consider the legacy of residential segregation which disproportionately relegated Black Americans to low-lying and flood-prone areas, making them more vulnerable to climate change-induced flooding. It can also support the development of goals and strategies to remedy this history.²⁴³

Fair housing law and policy must drive decision-making by policymakers and provide protections for individuals managing the effects of climate change-induced flooding. It becomes relevant at a minimum at the following points: (1) when a historically Black community is in the process of considering how to manage continual flooding or its high flood risk, whether to develop more resilient infrastructure in place or to relocate; (2) the terms of a buyout program in the event residents decide to relocate; (3) the process of deciding where to relocate; and (4) the local government’s process of planning for climate retreat in the future, through land use policy. Each of these will be addressed in turn.

A. Considering Whether to Relocate

As Part II above discusses, local governments must provide communities of color devastated by flooding and flood risk with the option to relocate or remain in place, depending on the particular circumstances of the community at issue. Law professor Bernadette Atuahene’s work on land reclamation and repatriation in South Africa provides a cautionary tale for the risks associated with failing to involve residents in the decision-making process around relocation.²⁴⁴ The applicability of Atuahene’s work is best understood when one views the United States in the context of a post-colonial so-

²⁴¹ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

²⁴² King, *supra* note 223, at 2184.

²⁴³ Craig, *supra* note 32, at 83 (arguing that AFFH mandate can play similar role in curbing the legacies of racial zoning, including the designation of floodplains for housing for people of color).

²⁴⁴ See generally BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM (2014).

ciety.²⁴⁵ Just as other countries emerging from colonialism have had to “navigate the perilous landscape surrounding the return of land and other property to displaced or decimated populations,”²⁴⁶ the United States must address its own history of restricting people to the most undesirable land. The challenges around whether to relocate individuals living in floodplains implicates a history of restricting people to certain areas, which is different from stripping people of land they once owned. But climate change is requiring us to consider the possibility of having to remove or encourage them to leave land they own for the public benefit as well as their long-term financial benefit. There is a long-term benefit to the extent it is not sustainable to live in an area that repeatedly floods or is susceptible to hurricanes and will require constant rebuilding.

Atuahene describes the dispossession of land that Black South Africans suffered under the apartheid regime as a “dignity taking[.]”²⁴⁷ Dignity takings are a subset of takings which occur “when [the] state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation or without a legitimate public purpose.”²⁴⁸ In the context of climate migration or retreat, what happened to African Americans and Latinos during the late 19th century and throughout the early to mid-20th century—namely, restricting people to the least desirable land without the opportunity to purchase elsewhere—was a type of dignity taking. Dispossession includes restricting where people can buy land.²⁴⁹ “[D]enial of property is denial of membership in a community; it is a part of a radical othering.”²⁵⁰ This denial of access to land on equal terms with the other members of the polity whites starts the course of a history in which African Americans were relegated to flood plains and flood zones. A program of relocating people away from

²⁴⁵ Other scholars have also compared the United States to a post-colonial nation to draw parallels between the country and the lessons it might learn from other nations dealing with the legacy of racial supremacy embedded in colonial rule. See, e.g., Peggy Cooper Davis, *Post-Colonial Constitutionalism*, 44 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (2019) (suggesting that “governments that are self-consciously post-colonial have things to teach us about managing those tensions [between liberty and loving care]” in child welfare systems); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 1, 2 (1999) (arguing that post-colonial development theory and American critical race theory both illustrate the ways in which dominant legal systems perpetuate structural inequality between dominant and subordinate groups).

²⁴⁶ ATUAHENE, *supra* note 244, at 3.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 8–10 (describing similar history of colonial South African laws restricting Africans from purchasing or renting land outside of designated “reserves” and allowing them to “occupy, but not purchase” residences in urban areas known as “townships” or “locations”).

²⁵⁰ *Id.* at 23 (quoting Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 37 (2000)).

floodplains risks taking their dignity all over again in the classic sense.²⁵¹ Climate justice requires advocates and policymakers to think carefully about how these relocations take place.

Policymakers often take for granted that movement to a wealthier or higher-opportunity neighborhood is beneficial where a community has suffered financial disinvestment and blight.²⁵² The idea behind moving people to opportunity is that, although they no longer reside on the same physical land, they are moving to a place with other tangible and intangible benefits designed to make up for this change in location. But moving to opportunity is not as simple as it sounds as there is a cost to integration that people of color bear.²⁵³ Dignity restoration focuses on “reintegrat[ing the dispossessed] into the fabric of society through an emphasis on process.”²⁵⁴ This process is the higher calling of affirmatively furthering fair housing. “[R]emediating past property violations can confer legitimacy on the state and its governing structures.”²⁵⁵ Black Americans often view the U.S. government as lacking in legitimacy given its failure to address past wrongs. The need to shore up public legitimacy based on past property violations, however, has been less salient because Black Americans are in the minority while the dispossessed group in South Africa was the majority. Nonetheless, the same need for legitimacy applies in the United States.

The Fair Housing Act and the duty to affirmatively further housing within it presents an opportunity to use the right to housing on equal terms and conditions regardless of race and a mandate for the government to contribute to unraveling historic patterns of segregation as leverage to advance the interest in remedying the historic discrimination of the past that drove African American residents into flood zones. It also provides an obligation as a matter of policy to develop solutions that further the interest in racially integrated communities.

In many ways, the location of Black residents into floodplains resulted from privately ordered real estate transactions as well as government-sponsored discrimination. Where the result did not happen as a result of government discrimination, the challenge becomes a matter of the process by which one can intervene in unwinding the results of past discriminatory

²⁵¹ ATUAHENE, *supra* note 244, at 2.

²⁵² See Jonathan Rothwell, *Sociology's Revenge: Moving to Opportunity (MTO) Revisited*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/articles/sociologys-revenge-moving-to-opportunity-mto-revisited/> [<https://perma.cc/KQN2-BZK3>]; see also Kirk McClure et al., *The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High-Opportunity Neighborhoods*, 6 TEX. A&M J. PROP. L. 89, 98 (2020).

²⁵³ See, e.g., Calmore, *supra* note 209, at 1107–08 (noting that “there is a profound integration fatigue that is compounded by the alienation and distrust of whites that is associated with the black experience of having ‘integrated’ dominant institutions and parts of society”).

²⁵⁴ ATUAHENE, *supra* note 244, at 4.

²⁵⁵ *Id.* at 6.

transactions. The use of a rights-based framework may be essential for advancing the interests of African American residents of floodplains around this crucial public policy issue. African Americans have often relied on rights to combat oppression.²⁵⁶ Federal civil rights statutes and the regulations that implement them offer greater legal protections against racial disparities in environmental burdens and harms than does the federal Equal Protection Clause.²⁵⁷ While the Supreme Court has “read racial integration out of constitutional jurisprudence,”²⁵⁸ the Fair Housing Act is one context in which it has recently held that avoiding racial isolation and achieving diversity is a compelling governmental interest that the statute may pursue.²⁵⁹

The Biden Administration’s proposed AFFH Rule, like the 2015 Obama-era rule, includes a requirement for community participation that expands on the public participation requirement in the 2015 rule.²⁶⁰ The proposed rule explains that “[w]hen HUD implemented its 2015 AFFH Rule, program participants and community members alike consistently reported to HUD that community engagement (then called community participation) was an extremely effective and important part of identifying fair housing issues and figuring out how best to prioritize and address them.”²⁶¹ The 2023 rule requires “program participants to consult with a broad range of community members, to hold meetings in diverse settings, ensure that individuals with disabilities and their advocates have equal access to those meetings, and partner with local community-based organizations and stakeholders to engage with protected class groups and underserved communities.”²⁶² HUD also commits to “make the data HUD provides to program participants publicly available, including maps and other information demonstrating the existence of fair housing issues such as segregated areas, to facilitate public engagement throughout the process.”²⁶³ With respect to crafting climate re-

²⁵⁶ See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163–64 (1991) (expressing the growth of rights for African Americans as a process of empowerment).

²⁵⁷ Arnold, *supra* note 50, at 52 (citing Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619); see also Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.* 523, 530–31 (1994); James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *STAN. ENV’T L.J.* 125, 152 (1994).

²⁵⁸ Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 *UCLA L. REV.* 1140, 1158 & n.69 (2019) (citing *Milliken v. Bradley*, 418 U.S. 717 (1974); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

²⁵⁹ See *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 543–46 (2015) (recognizing disparate impact as a basis of liability but requiring proof of causation).

²⁶⁰ See *Affirmatively Furthering Fair Housing*, 88 *Fed. Reg.* 8516, 8517 (Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 8518.

treat policy, the availability of data is crucial to helping residents understand the nature and level of risk that their community faces. HUD's usual data, however, may not be sufficient. HUD has committed to "continue to provide program participants datasets, including maps, and tools that contain at least as much data as is currently provided in the AFFH-T"²⁶⁴ Data & Mapping Tool."²⁶⁵ HUD explains that AFFH-T is "a dynamic online mapping and data-generating tool for communities to aid in their completion of fair housing planning. The data provided in the AFFH-T is not exhaustive and should not supplant local data or knowledge that is more robust."²⁶⁶ Reports from local governments conducting fair housing planning analysis do not refer to the AFFH-T data mapping tool as a source of data for flood plains and flood risk in their communities.²⁶⁷ Communities should build on this data from other sources, including FEMA and local governments, and incorporate it into the planning process as a fair housing issue.

B. Buyout Programs and Fair Housing

"Ultimately, buyout programs are the most cost-effective form of mitigation."²⁶⁸ The cost effectiveness of this approach for the government, however, may leave residents at a disadvantage. FEMA's cost-benefit criterion for determining whether to offer buyouts in particular communities factors in the disproportionately lower property values in primarily Black and Latino neighborhoods.²⁶⁹ Research has established that homes in majority-Black neighborhoods are valued at about half the price of homes in neighborhoods with no Black residents.²⁷⁰

²⁶⁴ "AFFH-T" refers to the Affirmatively Furthering Fair Housing Data and Mapping Tool. See *AFFH-T*, U.S. DEP'T OF HOUS. & URB. DEV., <https://egis.hud.gov/affht/> [<https://perma.cc/9VHE-SWAM>].

²⁶⁵ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8520.

²⁶⁶ *Data and Fair Housing Planning: Affirmatively Furthering Fair Housing Data and Mapping Tool Video Series Now Available*, U.S. DEP'T OF HOUS. & URB. DEV. (Dec. 23, 2022), <https://www.hudexchange.info/news/data-and-fair-housing-planning-affh-t-video-series-now-available/> [<https://perma.cc/M8KM-4J5Q>].

²⁶⁷ See, e.g., ALAMEDA CNTY. CMTY. DEV. AGENCY PLAN. DEP'T, ALAMEDA COUNTY HOUSING ELEMENT PUBLIC REVIEW, APPENDIX F: AFFIRMATIVELY FURTHERING FAIR HOUSING (AFFH) F-105-06 (2023), <https://www.acgov.org/cda/planning/housing-element/documents/AlamedaCountyHousingElementPublicReviewAugust2023FULLDOCUMENT.pdf> [<https://perma.cc/92CJ-T9M4>] (referring to local knowledge of recent floods in sections of the county); CITY OF HIGHLAND, 6TH CYCLE HOUSING ELEMENT, APPENDIX D: AFFIRMATIVELY FURTHERING FAIR HOUSING ANALYSIS 83, 85 (2022), <https://www.hcd.ca.gov/housing-elements/docs/highland-6th-adopted021422.pdf> [<https://perma.cc/GQ2V-DRBL>] (referring to FEMA as source of flood hazard maps).

²⁶⁸ McGee, *supra* note 62, at 1967.

²⁶⁹ See Zavar & Fischer, *supra* note 146, at 4.

²⁷⁰ ANDRE PERRY ET AL., *THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY* 11 (2018).

Kelly McGee has argued that a challenge to the buyout program's criteria may be difficult under a disparate impact theory in the case law interpreting the Fair Housing Act.²⁷¹ In a challenge to FEMA's Road Home program formula brought by the Greater New Orleans Fair Housing Action Center, the D.C. Circuit ruled that the deduction of insurance payouts from the grant totals of white recipients balanced out the lower market values that affected the amounts that Black grant recipients received.²⁷² McGee argues that "a court could conclude that the existence of the buyout option constitutes a 'compensating factor' negating the disparity in infrastructure investment, even if recipients of buyout funds might prefer to stay within their communities."²⁷³ The plaintiff would also have to demonstrate that there is a "robust causal link" between the cost-benefit analysis method for awarding flood mitigation funds and the racial disparities in flood protection.²⁷⁴ McGee suggests that a municipal defendant might argue that "racial disparities in flood-risk exposure are caused in part by self-selection of Black residents into more affordable—and flood-prone—neighborhoods."²⁷⁵ But the legacy of racial zoning and the history of multiple local governments designating flood zones for occupancy by Black communities roundly refutes this argument, to the extent plaintiffs can marshal the historical evidence of the governmental planning decisions that forced them into that particular neighborhood.²⁷⁶

The lower property values may make it such that "lower-income households may be less able to relocate to safer neighborhoods if they lack the resources or knowledge to conduct widespread housing searches. They may also be able to afford to live only in equally flood-prone or low-opportunity areas."²⁷⁷ Additionally, many residents may find it impossible to move to a safer neighborhood because their house has an existing mortgage and the amount of the buyout payment does not sufficiently cover the remainder of the loan.²⁷⁸ In light of its history and as a matter of policy, a local government administering a buyout program might increase the amount of payments to cover the cost of any existing mortgage on the home plus its mar-

²⁷¹ McGee, *supra* note 62, at 1955–56 (citing *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, 639 F.3d 1078, 1088 (D.C. Cir. 2011)).

²⁷² See *Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1087–88.

²⁷³ McGee, *supra* note 62, at 1956.

²⁷⁴ *Id.* (citing 24 C.F.R. § 100.500(b)(3)); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015)).

²⁷⁵ McGee, *supra* note 62, at 1956.

²⁷⁶ See Craig, *supra* note 32, at 39–41.

²⁷⁷ McGee, *supra* note 62, at 1967.

²⁷⁸ See BITTLE, *supra* note 46, at 58 (describing residents of a historically Black community in Lincoln City, North Carolina, who had already paid off their homes, but the buyout funds were not enough to purchase a new home outright, so they had to take out new mortgages—going back into debt, sometimes just as they lost their jobs or entered retirement).

ket value. Alternatively, it could decide to allocate payments based on a calculation of the average fair market value of a home within a certain radius of the jurisdiction that accounts for the cost of moving to and purchasing a home in a higher-opportunity neighborhood.

C. Deciding Where to Relocate: The Role of Housing Counseling for Mobility

Recent research has shown the long-term effects that neighborhood quality has on lifetime earnings and wellness, especially for children.²⁷⁹ Researchers, including Raj Chetty, have predicted that “moves from low- to high-opportunity Census tracts induced by [the experiment] will increase average undiscounted lifetime household incomes by \$212,000 (8.3%) for children who move at birth and stay in their new neighborhoods throughout childhood.”²⁸⁰ In the context of climate migration, demographers have observed that individuals who leave high-risk areas tend to be younger and wealthier, and they tend to move to the nearest large city that does not face climate risk.²⁸¹ So, people from New Orleans might move to Dallas and people from Miami might move to Orlando, or people from Mobile may move to Atlanta. Thus, inland mid-size cities stand to benefit from the population loss that will affect coastal cities.

The decision to move that many residents will face provides a useful basis for local governments to incorporate housing mobility counseling into their buyout programs and broader climate retreat policies as a matter of affirmatively furthering fair housing. Historically, housing mobility counseling has largely been associated with helping low-income families with children use Housing Choice (formerly known as Section 8) Vouchers to move to high-opportunity neighborhoods.²⁸² The housing counseling “mobility” programs initially arose from litigation, starting with the program in Chicago created in 1976 by a consent decree entered in *Gautreaux v. HUD*.²⁸³ They have since become a regular remedy recommended in litigation to resolve fair housing disputes, particularly those involving public housing resi-

²⁷⁹ See Peter Bergman et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* 1, 2 n.3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26164, 2023).

²⁸⁰ *Id.* at 5.

²⁸¹ BITTLE, *supra* note 46, at 261–62.

²⁸² *What Are Housing Mobility Programs and Why Are They Needed?*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 19, 2019), <https://www.cbpp.org/research/housing/what-are-housing-mobility-programs-and-why-are-they-needed> [https://perma.cc/G3XR-L7ST]; see also Philip Tegeler et al., *Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card*, 22 J. AFFORDABLE HOUS. 27, 42 (2013). See generally MARGERY AUSTIN TURNER & SUSAN J. POPKIN, URBAN INSTITUTE: WHY HOUSING CHOICE AND MOBILITY MATTER (Aug. 17, 2010).

²⁸³ Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 NW. J.L. & SOC. POL’Y 1, 10–11 (2006).

dents.²⁸⁴ Yet there is no reason that the use of housing counseling geared toward mobility cannot serve the needs of climate migrants. For example, the directors of the Poverty & Race Research Action Council have proposed providing mobility counseling to all individuals whose homes are in areas that undergo redevelopment—“not only those who express an initial preference to move beyond the neighborhood, so that all residents are able to make an informed choice.”²⁸⁵ This population of home-seekers similarly may struggle with having sufficient information about high-opportunity neighborhoods that have less climate risk exposure, particularly when they decide to move to another section of the same city.²⁸⁶ While it is useful to note that at least one scholar has suggested that services designed to address readiness to move may be more important than housing mobility counseling,²⁸⁷ failing to do so would amount to a missed opportunity for a significant percentage of residents, particularly in the context of historically Black, high-poverty communities which are the focus of this Article.²⁸⁸

The presence of African Americans in historically Black communities in low-lying areas specifically implicates the toughest challenge at the inter-

²⁸⁴ See SUSAN J. POPKIN ET AL., BASELINE ASSESSMENT OF PUBLIC HOUSING DESEGREGATION CASES: CROSS SITE REPORT, U.S. DEPT. HOUS. & URB. DEV. 93 (2000), <https://www.huduser.gov/portal/sites/default/files/pdf/baseline.pdf> [https://perma.cc/BG73-GR78] (discussing seven cases that included the establishment of “[m]obility counseling” as part of remedy); see also Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third?*, 94 NW. U.L. REV. 1049, 1066 n.95 (2000) (citing Bd. of Sch. Dirs. v. Thompson, No. 84-C-877 (E.D. Wis. 1987) (providing mobility counseling to existing Section 8 voucher holders in the settlement agreement)); Timothy L. Thompson, *Promoting Mobility and Equal Opportunity*: Hollman v. Cisneros, 5 J. AFFORDABLE HOUS. & CMTY. DEV. L. 237, 253–54 (1996) (discussing mobility counseling requirements in consent decree with Minneapolis Housing Authority); Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE J. POL’Y. DEV. & RSCH 171, 180 n.17 (1999) (noting that, following *Gautreaux*, “mobility programs were created through litigation in Cincinnati; Dallas; Memphis, Tennessee; Yonkers, New York; New Haven and Hartford, Connecticut (under threat of litigation); and elsewhere”); Corinne Anne Carey, *The Need for Community-Based Housing Development in Integration Efforts*, J. AFFORDABLE HOUS. & CMTY. DEV. L. 85, 89 (1997) (describing settlement between HUD and City of Buffalo, New York, that required mobility counseling to Section 8 voucher holders).

²⁸⁵ Philip Tegeler et al., *Affirmatively Furthering Fair Housing at HUD: A First Term Report Card*, POVERTY & RACE RSCH. ACTION COUNCIL, Jan. 2013, at 20.

²⁸⁶ See Stacy Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 L. & CONTEMP. PROBS. 173, 194–95 (2016) (noting that “data and counseling can assist households to make housing choices that are informed by alternatives to high-poverty neighborhoods”).

²⁸⁷ Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J.L. & SOC. POL’Y 25, 58 (2006).

²⁸⁸ Seicshnaydre, *supra* note 286, at 173.

section of race and fair housing law.²⁸⁹ Audrey MacFarlane has suggested that “[t]he racial integration we pursue today is the problem that was not solved by the Fair Housing Act: segregation of Black, lower-income people, the non-middle class.”²⁹⁰ “The Fair Housing Act of 1968 succeeded mainly in freeing black middle- and upper-class people to live in areas where they had the money to purchase.”²⁹¹ Black middle- and upper-class residents tended to leave these historically Black neighborhoods as the ban on explicit housing discrimination opened up housing options in the suburbs.²⁹² Between 1970 and 1995, more than 7 million Black people moved to the suburbs—far more than the 4.5 million who moved from the South to the North in the second wave of the Great Migration, from 1940 to 1970.²⁹³ Thus, the residents with the greatest need for counseling will be those “left behind.” The families that have moved into the middle class have less of a need for housing mobility counseling, although the service may focus on information about integrated neighborhoods with amenities to reduce the extent to which people (particularly white Americans) rely on proxies for race in deciding to avoid areas with significant percentages of people of color.

D. Land Use Planning for Opportunity

Planning is the process of identifying goals for the future, developing policies or plans for achieving these goals, and fashioning specific mechanisms for implementing these plans. “It also contains phases of pre-plan study and post-plan monitoring and feedback.”²⁹⁴ Comprehensive plans cover many aspects of the city or region’s broader physical development.²⁹⁵ Different states have different requirements. For example, California requires that every general plan contain seven elements: land use, circulation, housing, conservation, open space, noise, and safety.²⁹⁶

²⁸⁹ See Norrinda Brown Hayat, *Urban Decolonization*, 24 MICH. J. RACE & L. 75, 75 (2018) (arguing that “focusing modern fair housing policy on the relatively small number of Black people for whom mobility is an option (either through high incomes or federal programs) is shortsighted, given the breadth of need for quality housing in economically-subordinated inner-city communities”); see also McFarlane, *supra* note 258, at 1146.

²⁹⁰ McFarlane, *supra* note 258, at 1146.

²⁹¹ *Id.* at 1146 n.21.

²⁹² See, e.g., Alexander W. Bartik & Evan Mast, *Black Suburbanization: Causes and Consequences of a Transformation of American Cities* 1, 2 (Upjohn Inst. Working Paper No. 21-355, 2023) (finding that, over the past fifty years, the share of the Black population living in the forty most populous central cities in the U.S. fell from 40 percent to 24 percent as “the Black share of the suburban population nearly tripled, rising from 5 to 13 percent”).

²⁹³ CASHIN, *supra* note 44, at 134.

²⁹⁴ Arnold, *supra* note 50, at 90 (citing THE PRACTICE OF LOCAL GOVERNMENT PLANNING 10–11 (Frank S. So & Judith Getzels eds., 2d ed. 1988)).

²⁹⁵ *Id.* at 91.

²⁹⁶ CAL. GOV’T CODE § 65302.

The relationship between planning and regulation varies considerably from place to place. On one hand, zoning implements planning, and most state zoning enabling statutes require that comprehensive plans guide local zoning decisions. At the same time, zoning ordinances are often inconsistent with comprehensive plans and, as a result, the plans are difficult to enforce. Zoning ordinances are also adopted without much attention to planning priorities. Nonetheless, both land use planning and land use regulation “are intertwined in an imperfect, yet persistent symbiotic relationship.”²⁹⁷

The primary methods of land use regulation are zoning ordinances, subdivision regulations, building and design codes, and official maps.²⁹⁸ In many ways, federal law governing buyouts makes applying a planning framework to a climate retreat program very difficult. Stephanie Stern has observed that most of the funding for buyouts at the federal level comes through disaster relief statutes and addressed some of the perverse incentives built into addressing climate retreat through this framework.²⁹⁹ For example, the federal Hazard Mitigation Grant Program (“HMGP”) requires the President to declare the existence of a disaster to release funds for hazard mitigation measures, including buyouts.³⁰⁰ “The statute defines disaster as a natural occurrence that has caused damage that states and localities cannot rectify without federal financial assistance.”³⁰¹

The statutes do provide some attention to pre-disaster hazard mitigation. Section 1234 of the Disaster Recovery Reform Act, which amended the Stafford Act, addresses pre-disaster hazard mitigation, and creates funding set-aside for pre-disaster mitigation measures.³⁰² But the bulk of the program’s focus is on buyouts after a disaster.³⁰³ An additional problem, however, is that limiting funding to events involving a natural disaster, where catastrophic loss has already occurred, does not provide state and local governments the funding to engage in buyouts proactively and provide the requisite support for intentionally planning for an integrated community on higher ground—a process that may require building a social infrastructure that incentivizes the choice to live in an integrated community rather than the sudden decision-making that comes from a buyout in a crisis.

²⁹⁷ Arnold, *supra* note 50, at 92–93.

²⁹⁸ See ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS 362–63 (1981); see also KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 1.12 (4th ed. 1996).

²⁹⁹ See Stern, *supra* note 20, at 212.

³⁰⁰ See 42 U.S.C. § 5170c(a) (“The President may contribute up to 75 percent of the cost of hazard mitigation measures which the President has determined are cost effective and which substantially reduce the risk of, or increase resilience to, future damage, hardship, loss, or suffering in any area affected by a major disaster.”).

³⁰¹ Stern, *supra* note 20, at 175.

³⁰² 42 U.S.C. § 5133(b).

³⁰³ See Stern, *supra* note 20, at 175.

Audrey McFarlane, however, has suggested that “mixed-income housing is implemented as a surreptitious form of racial and economic integration that accommodates and replicates prevailing race and class assumptions detrimental to the needs and interests of low to moderate-income individuals in need of housing.”³⁰⁴ It effectively becomes a strategy and “form of discrimination management—a way to work around the race and class discriminatory impulses of residents within a development and within a particular jurisdiction.”³⁰⁵ Her argument, however, is not that this “work around” in itself is unnecessary or problematic, but that we must consider its risks and the extent to which it can perpetuate disadvantage for the communities it is designed to support.³⁰⁶ Given the strategic avoidance of integration that characterizes the housing market in many high-opportunity communities, achieving integration requires some creativity, including responding to tendencies to discriminate and exclude lower-income people of color.³⁰⁷ The development of mixed-income housing as one part of a broader strategy for building an integrated neighborhood on higher ground may be a necessary step toward incentivizing integration, even if it is a “work around” that takes into account social prejudices.

Residents also often receive a buyout, but there is no planning for relocation and no direct relocation assistance or policy.³⁰⁸ In many ways, climate retreat policy provides a missed opportunity to both advance population shifts to climate-safe areas as well as fair housing goals in a market where there is very little incentive to make choices focused on the benefits of racial integration. Mixed income housing has come to the fore as “an increasingly popular policy approach to provide both housing integration and access to the city.”³⁰⁹ Disaster law came to be the frame through which we

³⁰⁴ McFarlane, *supra* note 258, at 1140.

³⁰⁵ *Id.*

³⁰⁶ *See id.*

³⁰⁷ Indeed, sometimes the cause of racial equity requires creative approaches to advance the broader interests of people of color. Jesus tells his disciples: “I am sending you out like sheep among wolves. Therefore be as shrewd as snakes and as innocent as doves.” *Matthew* 10:16 (NIV). Nelson Miller argues that lawyers require “a practical understanding of the ethics—call them motivations, justifications, or rationales—on which lawyers and clients are operating.” Nelson P. Miller, *Meta-Ethical Competence as a Lawyer Skill: Variant Ethics Affecting Lawyer and Client Decision-Making*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 91, 93 (2007). This mindset applies beyond lawyers and clients; it also applies to forces on the other side of social problems around which lawyers are organizing to craft solutions for their clients. Discrimination is a rationale and a motivating force that shapes housing choices. Miller concludes: “Lawyers must be ethically shrewd (in the better sense of the word), not merely ethical.” *Id.* at 116 (citing *Matthew* 10:16 (NIV)). Mixed-income housing as a means toward integration may have a tactical benefit in the stride toward integration and access to opportunity.

³⁰⁸ *See* Stern, *supra* note 20, at 167 (discussing the need to “prioritize relocation to flood-safe areas”).

³⁰⁹ McFarlane, *supra* note 258, at 1145. “Mixed-income housing” and “mixed-income communities” refers to “the mixing of people of different incomes living in the same geo-

have run the largest climate risk management programs because it was the most politically viable option, not because it is the most efficient.³¹⁰ Like individuals searching for housing, disaster law and climate retreat policy “operate in a market environment that decidedly undervalues racial and economic integration and, frankly, overvalues whiteness. The end result is separatism.”³¹¹

A climate retreat policy that focuses on relocating individuals to safe areas and away from high-risk flood zones has the potential to direct people toward new housing patterns as it incentivizes residing in certain places over others. Such a program could focus more on creating equal outcomes in terms of movement toward socioeconomically and racially integrated neighborhoods. While Americans have generally held that integration is an important goal, the vast majority of white and Black Americans will not choose it as an objective for achieving racial equality.³¹² In a 2000 study, 60 percent of whites and 62 percent of Black people chose equal opportunity as a goal over racial integration and equal results.³¹³ Only 5 percent of whites and 6 percent of Black people chose integration over the other two options.³¹⁴ The preference of whites to live among whites persists, and race matters, not just as a proxy for class.³¹⁵ Nonetheless, “segregation is highly valued and reflects a concerted effort to maintain social domination.”³¹⁶ Part of this challenge implicates a tension in fair housing law and policy that struggles between promoting integration, primarily through promoting mobility for people of color into majority-white communities, and investing in

graphic area” by developing a housing arrangement for multiple families that includes both units rented or sold at market rates as well as subsidized units that low- or moderate-income families can afford. See *What Is Mixed Income*, CASE W. RES. UNIV., <https://case.edu/socialwork/nimc/about-us/what-is-mixed-income> [<https://perma.cc/LC7B-S22Y>].

³¹⁰ See Stern, *supra* note 20, at 177, 179 (“Government programs for residential relocation, even voluntary relocation, are politically incendiary . . .”).

³¹¹ CASHIN, *supra* note 44, at 11.

³¹² CASHIN, *supra* note 44, at 12; Jamelle Bouie, *White Out: Why Integrating America’s Neighborhoods and Cities is Harder than We Think*, SLATE (May 15, 2015, 11:35 AM), <https://slate.com/news-and-politics/2015/05/whites-prefer-to-live-with-whites-why-integrating-americas-neighborhoods-and-cities-is-harder-than-we-think.html> [<https://perma.cc/92AP-WQDR>].

³¹³ CASHIN, *supra* note 44, at 12.

³¹⁴ *Id.*

³¹⁵ See Bouie, *supra* note 312. The literature has long acknowledged, however, that class is deeply bound up with race. “Class is a racialized concept in the United States, and questions of economic justice are intertwined with racial justice.” McFarlane, *supra* note 258, at 1157 & n.65.

³¹⁶ McFarlane, *supra* note 258, at 1147; see also CASHIN, *supra* note 44, at 10 (arguing that racial separation persists in part because “[w]hites place a premium on homogeneity,” demonstrating a willingness to pay 13 percent more for housing to live in an all-white neighborhood, according to one study).

communities of color to provide greater access to opportunities and amenities and encouraging residents to remain in place.

While residents of communities must decide for themselves whether to promote integration or investment in communities of color, it is important to recognize that:

unless and until we complete the unfinished business of the civil rights movement, meaningfully integrating our public and private realms in a way that gives all Americans, especially those who have been the most marginalized, real choices and opportunities, we will not solve the conundrum of race and class inequality in America.³¹⁷

The Fair Housing Act weighs in favor of racial integration rather than separation. “Our public policy choices must be premised on an integrationist vision if we are to achieve the highest aspiration and the promise that America says it embraces: full and equal opportunity for all. Integration should be viewed as inherent to American citizenship.”³¹⁸ “[W]e are all making choices about where to live in a market system that values racial and economic homogeneity, at least of the white kind, over racial and economic integration.”³¹⁹

It is necessary that we pursue climate change policies that both further integration and provide effective means of preventing the destruction of communities of color from flooding.³²⁰ That protection may involve infrastructure investments that allow residents to remain in place depending on the level of flood risk associated with the current location of the community. It may also involve providing the means for historically Black and Latino communities to transfer to higher ground with some degree of spatial integrity intact.

The answer lies in a robust community participation process in which community members make decisions based on data and their particular visions for the future of their communities. “Climate retreat seeks to shift people and infrastructure out of harm’s way, while disaster law has historically funded state and local recovery from disasters by rebuilding in place, and largely continues to do so today.”³²¹ The focus of disaster law aligns with place-based investments in communities of color while climate retreat pro-

³¹⁷ CASHIN, *supra* note 44, at XIX.

³¹⁸ Sheryll Cashin, *The Failures of Integration*, CAP20 (June 15, 2005), <https://www.americanprogress.org/article/the-failures-of-integration/> [<https://perma.cc/7ZGC-BTZN>].

³¹⁹ CASHIN, *supra* note 44, at XVII.

³²⁰ See Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV’T L. REV. 363, 379 (2019) (“Unless intentional efforts are made to integrate and protect minority communities from environmental destruction, history will repeat itself when the next hurricane lands.”).

³²¹ Stern, *supra* note 20, at 179.

vides a structure within which to facilitate movement into communities in a way that promotes residential integration.³²²

The context of long-term climate change which will ultimately increase flooding in a community may appear to some communities of color in flood zones as rather remote. The lack of immediacy associated with the problem may make it harder to mobilize groups and press for government intervention.³²³ Although some scholars have argued that politicians may support social justice causes, despite political costs, because of personal moral views about the public good,³²⁴ it is unclear in the current polarized racial and political climate whether the number of politicians who will support social justice causes is dwindling and whether the political costs have increased in ways that supersede a focus on the public good.

Applying a fair housing planning framework to climate retreat policies also highlights the extent to which they must extend beyond focusing on residential properties. Fair housing planning requires consideration of the relationship between housing and a variety of public facilities and amenities that make communities livable. Policymakers must plan for the relocation of facilities that provide a public service, including transportation systems in at-risk areas, in addition to relocating housing.³²⁵ Black Americans disproportionately rely on public transportation to travel within and between cit-

³²² See, e.g., Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197, 197 (Xavier de Souza Briggs ed., 2005) (noting that the most important low-income housing development programs are largely unregulated from a civil rights perspective; stating that this reflects a growing emphasis on community revitalization strategies (upgrading the places where disadvantaged people are already living) while efforts to promote residential integration (changing where people can and do choose to live) have faced repeated and seemingly intractable obstacles); Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310, 329 (Xavier de Souza Briggs ed., 2005) (“The public conversation in America has often ignored, and well-intended policy debates tend to muddle, a crucial distinction. Framed as a question of strategy, the distinction is this: Should we emphasize reducing *segregation* by race and class (through what I term ‘cure’ strategies), or should we emphasize reducing its terrible *social costs* without trying to reduce the extent of segregation itself to any significant degree (via ‘mitigation’ strategies)? Put differently should we invest in changing where people are willing and able to live, or should we try to transform the mechanisms that link a person’s place of residence to their opportunity set? . . . For ethical and practical reasons, it is hard to imagine choosing one strategy, always and everywhere, instead of the other . . .”).

³²³ See Arnold, *supra* note 50, at 44 (“[C]ommunity organizing and political activity may be easier when the community has a concrete and immediate danger to fight or conflict to address.”).

³²⁴ See Craig Anthony (Tony) Arnold, *Beyond Self-Interest: Policy Entrepreneurs and Aid to the Homeless*, 18 POL’Y STUD. J. 47, 48 (1989).

³²⁵ See Manisha Patel & Allie Reilly, *Cooperative Federalism: A Path to Proactive Managed Retreat*, 35 NAT. RES. & ENV’T 20, 20 (2021).

ies.³²⁶ The process of relocation requires considering how the move will disrupt the network of services on which communities of color depend to manage their lives. Otherwise, residents may find themselves adrift and have an even harder time building a life in a new area. These kinds of challenges call for an approach to climate retreat that incentivizes movement to certain areas to support developing integrated communities and that provides the infrastructure for individuals at a variety of income levels to thrive.

Five federal programs offer buyouts for homeowners in hazard zones.³²⁷ Most of the buyouts come from authority under the Stafford Act or disaster provisions within other legislation.³²⁸ Most funding for buyouts comes from the FEMA Hazard Mitigation Grant Program (“HMGP”).³²⁹ The other FEMA programs that fund residential buyouts are the Flood Mitigation Assistance (“FMA”) program and the Building Resilient Infrastructure and Communities (“BRIC”) program (formerly the Pre-Disaster Mitigation Program).³³⁰ State and local governments are also increasing development of buyout laws and programs.³³¹ For example, the Minnesota Flood Damage Reduction Grant Assistance program finances buyouts and other efforts to reduce the impact of flooding in an equal cost-sharing model with the local or federal government.³³² The Wisconsin Municipal Flood Control Program provides grants funded through revenue from a state general obligation municipal bonds with a 50 percent match from the local government.³³³ At the local level, as of 2020, seventeen local governments have started paying for buyouts, either in their entirety or by matching FEMA funds at 25 percent through the use of stormwater utility fees, local-option sales taxes, and municipal and green bonds.³³⁴

HUD funding often contributes to the cost that state and local governments must provide in order to qualify for federal grant assistance.³³⁵ The

³²⁶ See Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/short-reads/2016/04/07/who-relies-on-public-transit-in-the-u-s/> [<https://perma.cc/4E2X-X756>] (“Among urban residents, 34% of blacks and 27% of Hispanics report taking public transit daily or weekly, compared with only 14% of whites.”).

³²⁷ See Stern, *supra* note 20, at 174.

³²⁸ *Stafford Act*, FEMA, <https://www.fema.gov/disaster/stafford-act> [<https://perma.cc/CTU3-ENTQ>] (June 6, 2023).

³²⁹ Stern, *supra* note 20, at 174.

³³⁰ 42 U.S.C. § 4104c(a); 44 C.F.R. § 78 (2021); *Building Resilient Infrastructure and Communities*, FEMA, <https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities> [<https://perma.cc/KF7R-FUMZ>] (Jan. 9, 2024).

³³¹ See Patel & Reilly, *supra* note 325, at 23–24; see also Siders, *supra* note 124, at 241.

³³² See MINN. STAT. § 103F.161 (2023).

³³³ See WIS. STAT. § 281.665 (2024); see also Kelsey Peterson et al., *A Review of Funding Mechanisms for US Floodplain Buyouts*, 12 SUSTAINABILITY 1, 9 (2020).

³³⁴ Peterson et al., *supra* note 333, at 9–12.

³³⁵ *Id.*

HMGP and other FEMA buyout programs provide a maximum of 75 percent funding and require a 25 percent cost share from the state, locality, or homeowner.³³⁶ BRIC buyout funds require cost sharing of up to 75 percent, but it does provide for up to 90 percent cost sharing for economically disadvantaged localities with under 3,000 residents.³³⁷ State and local governments sometimes obtain additional federal funds from community development block grants issued by HUD to pay all or part of the 25 percent cost share.³³⁸ HUD administers the Community Development Block Grants (“CDBG”) and Community Development Block Grants-Disaster Relief (“CDBG-DR”) programs, which functions as HUD’s major buyout program.³³⁹ Neither of them require cost-sharing when buyouts occur through the use of those grant funds.³⁴⁰ The AFFH mandate specifically applies to these two programs.³⁴¹

The lack of direction in the terms of the grant, however, have allowed some jurisdictions to use grant funds for amenities that benefit higher-income neighborhoods even in a low-income city in ways that disproportionately benefit white residents.³⁴² Title VI applies to the federal programs. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race in programs that receive federal financial assistance. The problem with Title VI as a source of a remedy is that, in this context, the focus is on providing a policy framework for ensuring that these programs promote residential integration and access to opportunity going forward rather than preventing a current discriminatory act.

The structure of the programs affects the extent to which the programs furthers fair housing goals. Stephanie Stern has argued that “[c]limate retreat confronts the dual goals of remedying individuals’ climate-induced dispossession and incentivizing population shifts to higher ground. Buyout laws vacillate between these two goals but place more emphasis on providing dispossession relief for owners.”³⁴³ She argues that the focus on making homeowners “as whole as possible” by paying for property, often at its fair market value before the flood, encourages homeowners and buyers to stay

³³⁶ *Id.* at 9–11.

³³⁷ 42 U.S.C. § 5133(a) & (h)(2).

³³⁸ *See* 42 U.S.C. § 5170c(a).

³³⁹ *See* Brett Theodos et al., *Taking Stock of the Community Development Block Grant*, URB. INST. (Apr. 2017), https://www.urban.org/sites/default/files/publication/89551/cdbg_brief.pdf [https://perma.cc/4XWU-JAC7].

³⁴⁰ *Id.*

³⁴¹ *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8533, 8543, 8568 (Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

³⁴² *See* Theodos et al., *supra* note 339 (noting, for example, that studies show higher-income neighborhoods in lower-income council districts in Los Angeles received more funds than lower-income neighborhoods in higher-income districts); *see also* Craig, *supra* note 32, at 75 & n.412.

³⁴³ Stern, *supra* note 20, at 181.

in or move to areas at high risk of flooding.³⁴⁴ The dispossession bias and buyout laws are often not strong enough to meet the needs of low-income residents in areas with lower property values, who are disproportionately Black and Latino.³⁴⁵

Payment for property at its pre-flood fair market value often does not provide enough funds for residents in lower property value neighborhoods to pay off their mortgage and buy a home on higher ground.³⁴⁶ As climate gentrification intensifies, land values on higher ground in various regions will likely increase, making it harder for low- to moderate-income families to move away from flood zones, where land value is lower. As a result, a family may move from a high-risk flood zone as a result of a buyout only to a lower-risk flood zone (or, worse yet, another high-risk area not yet subject to a buyout) because they cannot afford housing on higher ground. Neighborhoods on higher ground may also become increasingly white as land values rise and higher-income white residents are primarily the ones who can afford to purchase in these areas. In order to achieve their goals of compensating landowners for the dispossession of their property and incentivizing people to move to safer areas, buyout programs should pay for the cost of relocation, including the outstanding balance on a mortgage, with some attention to the fair market value of the cost of relocation to an area with less flood risk to cover that expense. In short, full compensation for dispossession is necessary to providing the means for climate-safe resettlement.

CONCLUSION

Princeville, North Carolina, is not alone in its struggle against the water. The fact that it is the oldest town established by formerly enslaved people in the United States increases the symbolic significance of the challenges with climate-induced flooding that it faces today as a result of the discriminatory conditions that determined its location over a century ago after the Civil War. The Fair Housing Act was designed to provide a remedy for housing discrimination, but also to require the federal government to take steps to affirmatively further fair housing. The decision about whether communities like Princeville—whether primarily Black or Latino towns or neighborhoods—requires a view toward equitable decision-making in relocation and access to reasonable amounts of infrastructure support that will help a

³⁴⁴ *Id.*

³⁴⁵ See Sheryll Cashin, *Race, Class, and Real Estate*, 15 RACE POVERTY & ENV'T 56, 57 (2008); see also Rachel D. Godsil & Sarah E. Waldeck, *Home Equity: Rethinking Race and Federal Housing Policy*, 98 DENV. L. REV. 523, 550 (2021) (“Because Black neighborhoods were designated as ‘at risk’ solely by the race of their residents, home equity in Black neighborhoods is far lower than otherwise identical homes in white neighborhoods.”).

³⁴⁶ BITTLE, *supra* note 46, at 47–48; Kraan et al., *supra* note 190, at 484 (describing factors that can lead to undercompensating lower-income households).

community avoid relocation. Jurisdictions have an obligation to involve residents in the decision-making process about infrastructure development or relocation. While relocations of entire communities are challenging and rare, federal and local buyout programs must provide the resources for residents to leave in ways that move them to higher ground. They must also provide residents with guidance about the opportunity to move into an integrated community in order to reduce the extent to which people choose to live in the same neighborhoods not by choice, but because of path dependence or they have no other option given the financial compensation provided by the buyout. As for local governments, climate migration also provides an opportunity to plan for retreat by investing in land use planning tools that will facilitate the development of housing for people at a variety of income levels to live in the safest sections of the jurisdiction. The climate crisis can ultimately become an opportunity for change.