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
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-Pamlico 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.”\(^10\)

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\(^2\) 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.”).


\(^4\) Id.

\(^5\) Bidgood, supra note 1.

\(^6\) Id.; Riley, supra note 3.

\(^7\) Riley, supra note 3.

\(^8\) Bidgood, supra note 1.


\(^10\) 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.” In North and South America, climate disasters were the cause of most new displacements. These two continents recorded more than 4.5 million displacements, the highest number in a decade. In a matter of decades, climate change will make some areas uninhabitable for humans. 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.

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. 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. The growth of housing units along the coasts also outnumbered the national average and the production of housing in inland counties. 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.

13 Id. at 61.
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.” Climate retreat involves the relocation of residents in the most high-risk flood-prone areas to higher ground. 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. 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.”

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. As of 2021, there were more than 48,000 buyouts. The government has since touted the benefits of completing 1 million buyouts, claiming it would save the government $1 trillion. 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. 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. 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).
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.”

**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.” 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.” 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 “such boundary changes as do occur are often a result of local decisions.” 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.

29 North Carolina: Town of Princeville Relocation Project, FEMA, [https://www.fema.gov/case-study/north-carolina-town-princeville-relocation-project](https://www.fema.gov/case-study/north-carolina-town-princeville-relocation-project) (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.

areas where landowners refused to sell them property, at least in part, as a result of racial prejudice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{35} As a result, African Americans struggling to find housing were the most likely buyers of the land.\textsuperscript{36} Likewise, Black Americans were the most likely renters of properties in these areas.\textsuperscript{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.\textsuperscript{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.\textsuperscript{39} E&E News, a division of Politico, ana-

\textsuperscript{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.

\textsuperscript{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).


\textsuperscript{37} See id.

\textsuperscript{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)).

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. Nearly 20 percent of the claim dollars went to ZIP codes where at least one-quarter of the residents are Black. 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.

**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. 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 burned in less enlightened times, and we rarely, if ever, have any explicit discourse about it.” 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-


41 Id.

42 Id.


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)).
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.”).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55}


\textsuperscript{55} See Emily C. Gribble & David N. Pellow, \textit{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, \textit{A Climate of Injustice: Global Inequality, North-South Politics, And Climate Policy} 5–8 (2007); Bekah Mandell, \textit{Racial Retification 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. 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. 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. 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. The results have only now become more apparent as climate change makes flooding occur more regularly. 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. Advocates have pursued claims under the…

50 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.


52 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”).


54 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”).

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.\textsuperscript{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.\textsuperscript{63} Connecting fair housing advocacy and equitable disaster recovery admittedly presents logistical challenges giv-
en that the two issues operate in separate spheres. 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.

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 pre-flood 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. 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. David Troutt has argued that “[r]ace-neutral land use regulation reproduced the patterns of racial inequality that slavery, Jim Crow, and segregation inscribed.”

Urban geographers Jeff Ueland and Barney Warf have studied the relationship between altitude and the location of different ethnic communities throughout the South. Their research has found that the residents of low-lying areas prone to flooding tend to be people of color. This pattern held true in more than 140 cities across the South from 1990 to 2000. 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. 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. In 1926, Birmingham passed a racial zoning law which set aside land that ran along Village Creek for Black occupancy. The land flooded often and was known as the one of the least desirable areas for residential development. 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. Their plan noted that the creek was susceptible to regular flooding and recommended it be developed as a park that provided natural flood control. 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. 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.
69 See Ueland & Warf, supra note 35, at 50.
70 Id.
71 Id.
73 Id.
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. The residents of East Austin, in Austin, Texas, today are predominately African American and Hispanic. 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. The western part of Austin is dominated by hills and bluffs while the east includes broad plains. “[C]reeks in the east create more floodplains than in the West.” 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. The history of the settlement of East Austin, however, and its current demographics clearly show that the issue is race, not just income.

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.
83 Id.
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


\(^{89}\) Miller, 2002 WL 230834, at *3.

\(^{90}\) Id. at *5.


\(^{93}\) 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. The land most often made available for them was in undesirable, low-lying areas prone to flooding. 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. 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. 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. The town was situated in an alluvial floodplain that passed through Forsyth County. Despite the flood risk, the residents owned land there and many were prosperous farmers. 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. They murdered some residents and forced others to flee from the violence. 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. 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.

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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).
101 Phillips, supra note 98; Givens et al., supra note 100.
103 Givens et al., supra note 100.
land was flooded to control the repeated flooding of the land along the Chattahoochee River where the town once stood. 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.

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. 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.”

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. When Hurricane Katrina hit New Orleans in 2005, flooding from the river and the breaking of the Industrial Canal decimated the Lower Ninth Ward. 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.

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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.
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.


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

“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.” Blue-lined neighborhoods receive less investment for flood prevention because they have been deemed to have high environmental risks.

“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.”

II. EQUITABLE RELOCATION

Flood zones across the U.S. “are home to some of the nation’s wealthiest and poorest people.”214 “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.”215 In the context of climate change, “a rising tide lifts all boats.”216 It does not, however, lift them

119 Id.
120 Id.
121 Hasan, supra note 11, at 182.
123 Hasan, supra note 11, at 183.
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.\textsuperscript{127} There is also not just an income dimension, but a racial dimension to the crisis.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{131} At the same time, these communities also received less public and private investment as a result of redlining and similar discriminatory policies.\textsuperscript{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.”\textsuperscript{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

\begin{footnotesize}

\textsuperscript{127} See Oliver E. J. Wing et al., \textit{Inequitable Patterns of US Flood Risk in the Anthropocene}, 12 \textit{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.” \textit{Anthropocene}, NAT’L GEOGRAPHIC, https://education.nationalgeographic.org/resource/anthropocene/ [https://perma.cc/K9XX-H83Y].


\textsuperscript{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. \textit{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., \textit{supra} note 16, at 3.


\textsuperscript{131} \textit{See, e.g.}, Crockett, \textit{supra} note 33, at 9; Ueland & Warf, \textit{supra} note 35, at 56; Connerly, \textit{supra} note 72, at 10; Lewis, \textit{supra} note 107, at 52.

\textsuperscript{132} Hasan, \textit{supra} note 11, at 182.

\textsuperscript{133} \textit{Id.}; \textit{see also} Gauthier & Fin. Sec. Program, \textit{supra} note 122.

\end{footnotesize}
provide. 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. 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. The reasons for the differences in experience call for a public policy resolution under civil rights law.

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.” The federal government’s move toward broadening

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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.

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. Each of these priorities focuses on infrastructure and makes no room for social equity.

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.” The largest federal voluntary buyout program also provides relief only to landowners—not renters. Nationally, African Americans and Latinos are more likely to rent their homes than white adults. 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. By contrast, only 28 percent of non-Hispanic white Americans pay rent as well as 40 percent of Asian American households. 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...
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,
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.\textsuperscript{153} There is a draw to “this happy ‘we’ feeling.”\textsuperscript{154} Some “attempted buyouts have led to protests, sometimes based on concerns about discriminatory selection of minority communities for climate retreat.”\textsuperscript{155} For example, in the historic Black neighborhood of Kashmere Gardens in Houston, buyouts were controversial, and at one point, residents rejected a buyout.\textsuperscript{156} In the face of climate change increasing flooding and wildfires alike, James Baldwin’s question in his book, entitled \textit{The Fire Next Time}, becomes all the more pressing: “Do I really want to be integrated into a burning house?”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{153}

\textsuperscript{154} \textit{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 \textit{Sinn Féin}, BRITANNICA KIDS, https://kids.britannica.com/students/article/Sinn-F%C3%A9in/384786 \[https://perma.cc/87XE-5D5Q\].


Even in the Netherlands, however, the viability of strategies to hold the water back as sea levels rise due to climate change remain uncertain. 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.”

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. 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. 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.


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.”).


Elevating dikes and levees could reduce flood damage, a very valuable outcome, but elevation is not a reliable solution. It would also likely come with significant damage to the environment. Research from Europe has shown that elevating dikes may be a cost-effective measure, but create its own harms that may outweigh its utility. 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.

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. 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. Communities may follow the same budgetary priorities.

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

166 Vousdoukas et al., supra note 165, at 2 ("Hard 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 ("At 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) ("Across 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

\footnotesize{\textsuperscript{171} See Roithmayr, supra note 112, at 39–41; see also Roithmayr, supra note 112, at 99, 116–17.}

\footnotesize{\textsuperscript{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.”).}


\footnotesize{\textsuperscript{174} See Stern, supra note 20, at 181; see also John Englelander, Moving To Higher Ground: Rising Sea Level And The Path Forward 12–15 (2021).}


to state intervention, for African Americans has deep historical roots. 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.” Nonetheless, “[l]earning to identify the reflex reactions emanating from grief’s intermediate stages will help us make better choices.”

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. 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.

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/5Q7Z-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. 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.” But FHA-guaranteed mortgages provide access to homeownership for a disproportionate percentage of African American and Latino borrowers. 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. 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. 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.” 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. 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. 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-

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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 SOCIOLO. 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. & SCI. 481, 487 (2021).
191 DADE CNTY. CODE § 33B-54(a) (2023).
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. 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 King’s admonition that “[w]e must learn to live together as brothers or we will perish together as fools.” The risk of perishing in floods of biblical proportions is now more real than ever.

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. 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.” The chance to combat segregation and unequal access to opportunity has serious implications for fair housing law and policy and

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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].


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.”).

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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{204} The problem, however, is that

\textsuperscript{200} Cashin, supra note 44, at 1.
\textsuperscript{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).
\textsuperscript{202} See 42 U.S.C. §§ 3601, 3604–3606.
\textsuperscript{203} See Cashin, supra note 44, at 10.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{208} Yet they have had limited effectiveness in remedying structural racism.\textsuperscript{209} Two core themes drive fair housing law: “anti-discrimination and anti-segregation.”\textsuperscript{210} The anti-discrimination element focuses on the “public and...
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 segregation-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))).

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”).
216 Id. at 412.
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 limi-
tations, 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 bal-
anced living patterns.”224 In addition to integration, “fair housing law is funda-
mentally about reducing economic inequality.”225 Both goals are critical,
as formal legal equality and integration can mask ongoing, severe racial in-
equalities 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_o-
pp/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 insuffi-
ciently focuses on “systemic group disadvantage rather than individual harm” and “sub-
stantive group results over individual justice.” Nicholas Pedriana & Robin Stryker, From
Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employ-
ment 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 chal-
 lenging.
223 Craig, supra note 32, at 83; see also Austin W. King, Note, Affirmatively Further: Re-
viving the Fair Housing Act’s Integrationist Purpose, 88 N.Y.U. L. REV. 2182, 2183–85
(2013).
2706, 3422 (statement of Sen. Mondale)).
225 Troutt, supra note 210, at 6.
226 See generally Derrick A. Bell, 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.\(^\text{227}\) 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.\(^\text{228}\) The obligation is commonly referred to as “affirmatively furthering fair housing” or “AFFH.”\(^\text{229}\)

The federal government has historically proven ineffective and ambivalent toward its obligation to enforce the mandate.\(^\text{230}\) 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.\(^\text{231}\) Federal courts generally recognize the government’s obliga-

\(^{227}\) 42 U.S.C. § 3608(e)(5).
\(^{228}\) 42 U.S.C. § 3608(d).

\(^{230}\) 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. In 2015, HUD promulgated a rule designed to implement the AFFH mandate. 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. The Biden Administration, however, has made a renewed commitment to affirmatively furthering fair housing.

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.” 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.” 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.” 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.” 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. On February 9, 2023, HUD published a Notice of

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232 See Otero, 484 F.2d at 1134.
234 Instead, HUD introduce a proposed rule entitled “Preserving Community and Neighborhood Choice.” Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 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.
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.”\textsuperscript{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.”\textsuperscript{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 disproportionally 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.\textsuperscript{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.\textsuperscript{244} The applicability of Atuahene’s work is best understood when one views the United States in the context of a post-colonial so-

\textsuperscript{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).
\textsuperscript{242} King, \textit{supra} note 223, at 2184.
\textsuperscript{243} Craig, \textit{supra} note 32, at 83 (arguing that AFFH mandate can play similar role in curing the legacies of racial zoning, including the designation of floodplains for housing for people of color).
\textsuperscript{244} See \textit{generally} BERNADETTE ATUAHENE, \textit{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 “nav-
igate the perilous landscape surrounding the return of land and other prop-
erty to displaced or decimated populations,”246 the United States must ad-
dress its own history of restricting people to the most undesirable land. The
challenges around whether to relocate individuals living in floodplains im-
plicates a history of restricting people to certain areas, which is different
from stripping people of land they once owned. But climate change is re-
quiring 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 fi-
nancial benefit. There is a long-term benefit to the extent it is not sustaina-
ble 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 tak-
ings are a subset of takings which occur “when [the] state directly or indi-
rectly 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, re-
stricting people to the least desirable land without the opportunity to pur-
chase elsewhere—was a type of dignity taking. Dispossession includes re-
stricting 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 sys-
tems); 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 Af-
ricans 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 “loca-
tions”).
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.\footnote{ATUAHENE, supra note 244, at 2.} 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.\footnote{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).} 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.\footnote{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”).} Dignity restoration focuses on “reintegr[ing the dispossessed] into the fabric of society through an emphasis on process.”\footnote{ATUAHENE, supra note 244, at 4.} This process is the higher calling of affirmatively furthering fair housing. “[R]emedying past property violations can confer legitimacy on the state and its governing structures.”\footnote{Id. at 6.} 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
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. 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. While the Supreme Court has "read racial integration out of constitutional jurisprudence," 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.

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. 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.” 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.” 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.” With respect to crafting climate re-

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 Data & Mapping Tool.” 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.” 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. 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.” 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. Research has established that homes in majority-Black neighborhoods are valued at about half the price of homes in neighborhoods with no Black residents.


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


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

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. 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. 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.” 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. 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.” 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.

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.” 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. 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-

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.
278 See BITTEL, 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. 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.” 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. 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. 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. They have since become a regular remedy recommended in litigation to resolve fair housing disputes, particularly those involving public housing resi-


280 Id. at 5.

281 BITTLE, supra note 46, at 261–62.


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.” 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. 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,

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.

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


See Stacy Seichnaydre, 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”).


Seichnaydre, supra note 286, at 173.
section of race and fair housing law. 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.” 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.” 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. 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. 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.” Comprehensive plans cover many aspects of the city or region’s broader physical development. 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.

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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.
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." 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.” 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.

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. 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. 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."

Disaster law came to be the frame through which we

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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. 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.

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. 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. Only 5 percent of whites and 6 percent of Black people chose integration over the other two options. The preference of whites to live among whites persists, and race matters, not just as a proxy for class. Nonetheless, “segregation is highly valued and reflects a concerted effort to maintain social domination.” 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

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310 See Stern, supra note 20, at 177, 179 (“Government programs for residential relocation, even voluntary relocation, are politically incendiary . . . .”).
312 CASHIN, supra note 44, at 12. 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.
313 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{321} The focus of disaster law aligns with place-based investments in communities of color while climate retreat pro-

\begin{footnotes}
\footnotetext[317]{Cashin, \textit{supra} note 44, at XIX.}


\footnotetext[319]{Cashin, \textit{supra} note 44, at XVII.}

\footnotetext[320]{See Julia Mizutani, \textit{In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana}, 31 \textit{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.”).}

\footnotetext[321]{Stern, \textit{supra} note 20, at 179.}
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vides a structure within which to facilitate movement into communities in a way that promotes residential integration.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{325} Black Americans disproportionately rely on public transportation to travel within and between cit-

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\textsuperscript{322} See, e.g., Philip D. Tegeler, \textit{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, \textit{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 \textit{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 . . . .").
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\textsuperscript{323} See Arnold, \textit{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.").
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ies.\textsuperscript{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.\textsuperscript{327} Most of the buyouts come from authority under the Stafford Act or disaster provisions within other legislation.\textsuperscript{328} Most funding for buyouts comes from the FEMA Hazard Mitigation Grant Program ("HMGP").\textsuperscript{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).\textsuperscript{330} State and local governments are also increasing development of buyout laws and programs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{334}

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


\textsuperscript{327} See Stern, supra note 20, at 174.


\textsuperscript{329} Stern, supra note 20, at 174.


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

\textsuperscript{332} See MINN. STAT. § 103F.161 (2023).

\textsuperscript{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).

\textsuperscript{334} Peterson et al., supra note 333, at 9–12.

\textsuperscript{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.
\(341\) Id.
\(343\) 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.
in or move to areas at high risk of flooding.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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

\textsuperscript{344} Id.

\textsuperscript{345} See Sheryll Cashin, \textit{Race, Class, and Real Estate}, 15 \textit{Race Poverty & Envt’} 56, 57 (2008); see also Rachel D. Godsil & Sarah E. Waldeck, \textit{Home Equity: Rethinking Race and Federal Housing Policy}, 98 \textit{Envt. 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.”).

\textsuperscript{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 res-
dents in the decision-making process about infrastructure development or
relocation. While relocations of entire communities are challenging and ra-
re, federal and local buyout programs must provide the resources for resi-
dents to leave in ways that move them to higher ground. They must also
provide residents with guidance about the opportunity to move into an in-
tegrated community in order to reduce the extent to which people choose to
live in the same neighborhoods not by choice, but because of path depend-
ence or they have no other option given the financial compensation provid-
ed 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 in-
come levels to live in the safest sections of the jurisdiction. The climate cri-
sis can ultimately become an opportunity for change.