Risky Business:

Race, Risk, and Real Estate in the Development of the Home Ownership State

by

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DEDICATION

To my children and their families

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INTRODUCTION

In 1897, WEB DuBois wrote in *The Souls of Black Folk* that "To be a poor man is hard, but to be a poor race in a land of dollars is the very bottom of hardships."[1] In the intervening decades, the political and legal restrictions that shaped African American life have diminished, while economic disparities have persisted. The subprime crisis which began in 2008 and had its epicenter in the African American community[2] drew wider attention to one critical element of disparity- the longstanding racial gap in rates of home ownership.[3] This gap has persisted, largely unchanged in the long term, since the beginning of the 20th century, falling to its lowest point in 2004, but returning to previous levels after 2008.[4]

Lower rates of African American ownership and the lower median value of African American homes contribute to the current racial disparity in wealth[5]: In 2013, median African American net worth was $11,000 versus $141,900 for Whites.[6] The value of owner-occupied housing accounts for the majority of the net worth of all Americans, and for an even higher share

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[1] New York: Penguin, (1903/1996), 11.
[2] JS Rugh and DS Massey, "Racial Segregation and the American Foreclosure Crisis," *American Sociological Review* 75 (2010): 629-651.
[3] For a summary of studies on this disparity, see Robert A. Margo, "Historical Perspectives on Racial Economic Differences: A Summary of Recent Research," NBER *Reporter Research Summary*, Winter (2005).
[4] Laura Sullivan et al Why Policy Matters," *Institute for Assets and Social Policy/Demos* (2015): 9-15 [https://iasp.brandeis.edu/pdfs/2015/RWA.pdf.], January, 2015.
[5] Commission on Behavioral Social Sciences and Education, Social Science Research Council, *America Becoming. Racial Trends and Their Consequences*, Vol. 2 (2001): 266.
[6] Rakesh Kochhar and Richard Fry "Wealth Inequality Has Widened along Racial, Ethnic Lines since the End of the Great Recession," [http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/] August, 2014.

of the net worth of African Americans, who are less likely to have other investments.[7] For Whites, the median value of home equity in 2015 was $86,000; for African Americans, $50,000.[8] The effects of this difference are magnified by the fact that, largely due to the persistence of residential segregation, the median value of African American homes, which are more likely to be located in areas with poor infrastructure and other negative externalities, has appreciated far more slowly than that of homes owned by Whites.[9] Race is associated with differences both in access to home ownership and in opportunities to build wealth through ownership.

Even as overall rates of home ownership have risen, these qualitative and quantitative racial disparities have persisted.[10] In absolute terms, the rate of African American home ownership has declined and that of Whites has risen during the past 10 years. In the first quarter of 2016, 71.2% of White households owned homes, an increase of 5% since 2000. At the same point, however, only 41.5% of African Americans owned homes, a decrease of 4.8% since 2000.[11] In this project, I focus on the development of the relative racial disparity in ownership rates. Here, as in the case of overall income inequality, the critical issue is that of "pulling away"- that is, in the historical creation of a dual track ownership environment in which race creates a division in

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[7] Melvin Oliver and Thomas Shapiro, eds., *Black Wealth/White Wealth: A New Perspective on Racial Inequality*. (New York: Routledge, 2006); See also, for instance, George S. Masnick," Home Ownership Trends and Racial Inequality in the United States in the 20th Century," Harvard University Joint Center for Housing Studies, Working Paper W01-4 (2001):[http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/masnick_w01-4.pdf.] May, 2013.

[8] Laura Sullivan, et al, *The Racial Wealth Gap*, 9-11.

[9] See, for instance, Margalynne Armstrong, "Race and Property Values in Entrenched Segregation," *52 U. Miami L. Rev.* 1051 (1998).

[10] Between 1940 and 2010, overall rates of ownership increased from 47.8% to 65.10%. "Historical Census of Housing Tables, "United State Bureau of the Census, United States Census Bureau, Historical Census of Housing Tables, [https://www.census.gov/hhes/www/housing/census/historic/ownrate.html] December, 2013.

[11] Calculated from "Historical Census of Housing Tables, Housing by Race and Hispanic Origin." [https://www.census.gov/housing/census/data/ownershipbyrace/ownershipbyrace_tab.txt] April, 2015 and "Housing Characteristics 2010: Census Briefs, Table 7, Home Ownership Rates by Race and Ethnicity of Householder, 2012 from 2016", [http://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf.]April, 2015.

available opportunities to build wealth and to access quality educational and other public services.[12]

Literature Review

A great deal of attention has been generated by accounts that emphasize the role of discriminatory lending criteria employed by national programs to maintain and to expand home ownership during the New Deal and the period after World II. Authors such as Katznelson, Jackson, Sugrue, Denton and Massey, and Freund have done a service in noting that the effects of racially discriminatory criteria developed by the HOLC (created in 1933), and reiterated by the FHA (created in 1934), and the VA Home Loan Program (created in 1944) were amplified by the explosion of post-World War II construction in suburbs that were typically not open to African Americans and by the boom in home ownership resulting from the pent-up demand for ownership by returning soldiers.[13] These accounts make the important point that the federal programs that were responsible for the expansion of overall ownership during a critical period restricted access for African Americans, creating durable racial disparities in housing markets.

This focus, however, deflects attention from three other important issues. First, the foundations of the home ownership state- both in concrete and ideational terms- were laid earlier, in the period after World War I and before the election of Franklin Roosevelt. From an ideational perspective, the period was central to the development of what Ronald calls the "ideology" of home ownership that justified the development of an active state agenda to

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[12] On economic inequality in this context see, for instance, OECD Directorate for Employment, Labor and Social Affairs," Focus on Inequality and Growth" [https://www.oecd.org/social/Focus-Inequality-and-Growth-2014.pdf.], April, 2015.

[13] Ira Katznelson, *When Affirmative Action Was White: An Untold Story of Racial Inequality in the Twentieth Century* (New York: WW Norton, 2006); Kenneth Jackson, *The Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1987); Thomas Sugrue*, The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit,* (Princeton: Princeton University Press, 2014); Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass*,(Cambridge, Ma: Harvard University Press, 1993); David Freund. *Colored Property: State Policy and White Racial Politics in Suburban America*,(Chicago: University of Chicago Press, 2010).

promote this public good.[14] This agenda did not simply reflect the interests of groups that stood to make a financial profit from the growth of ownership; rather, it reflected the state's interest in generating support for domestic order, capitalism, and the institution of private property. In concrete terms, the public/private model that structured subsequent programs was instantiated in the FHLB, which was promoted by Herbert Hoover and signed into law in 1932.

Second, these accounts disconnect the FHA from the larger economic, social and legal environment in which it was embedded: They focus on political rather than on political economic explanations. In this view, the discriminatory practices of the FHA reflect the power of Southern Congressman who channeled demands from state and local officials that reflected local customs rooted in race prejudice. However, the FHA was created in an economic, social and legal environment shaped by the understanding that home financing in general was risky business which posed both present and future threats to lenders and that race piled on additional layers of risk. The notion of racial risk pervaded each of the sectors involved with home financing and home sales: Real estate brokers, the appraisal industry and property insurers each functioned under this belief, pricing it into services and calculations of value or using it to justify denials of service.

Third, the public/private structure of programs to expand home ownership opened the door to these private understandings about risk. Despite a substantial body of literature that examines the role of understandings about the role of risk in shaping American political and economic development,[15] and about the role of risk in shaping housing markets and lending practices,[16]

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[14] Richard Ronald, *The Ideology of Home Ownership*, (New York, Palgrave Macmillan, 2008).
[15] See, for instance, Dan Bouk, *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual*, (Chicago: University of Chicago Press, 2015); Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, Ma.: Harvard University Press, 2012); and BA Wiggins, *Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881-1948*, (Doctoral dissertation, University of Minnesota, 2013).

there has been little sustained examination of the way in which private attributions about racial risk have shaped public home ownership policies.[17]

The foundations for national programs to expand home ownership - including the use of a public/private model- were laid in the period after World War I, a period that has received much less attention. The policies and institutions designed to accomplish this goal were embedded in a legal, commercial, social, and economic environment in which African American property ownership was viewed as a threat both to the present and future value of White property, posing risks for lenders, underwriters, and White property owners. Since the expansion of ownership was accomplished through programs that employed the public/private model, the possibilities for implementation were shaped by attributions about African Americans' connections to property that prevailed in this environment.

By attributions, here, I mean shared understandings about the negative characteristics of African Americans both as individual property owners and as a racial group whose movements had the potential to affect value of White-owned properties. With respect to African Americans as individuals, these understandings suggested that they were poor financial managers, poor wage- earners, and poor stewards of property, with a propensity for participation in violence and in criminal and immoral activities. With respect to African Americans as a racial group, these understandings suggested that their movements into neighborhoods would lower the value of properties, drive out White residents, spill over into adjoining areas, and create negative externalities such as crime, congestion, and accelerated depreciation. Negative attributions

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[16] See, for instance, Guy Stuart, *Discriminating Risk: The US Mortgage Lending Industry in the Twentieth Century,* (Ithaca, New York: Cornell University Press, 2003).

[17] Thurston notes that there has been a general lack of attention to the public/private aspect of United States housing policy. Chloe Thurston, "Policy Feedback in the Public-Private Home Welfare State: Advocacy Groups and Access to Government Home Ownership Programs, 1934-1954," *Studies in American Political Development* 29, no 2 (2016):250-267.

structured the way in which racial risk was assessed by sectors involved in the real estate industry including primary lenders, secondary lenders, appraisers, insurers, real estate brokers and by White property owners. They were legitimated by court decisions that justified restrictive covenants as a means of protecting White property owners and the larger community from the negative effects of unchecked racial expansion.

However, these negative attributions were juxtaposed with another set of understandings about the way in which home ownership served as a school for what Stern calls "citizen virtues."[18] For African Americans, as for members of other racial and ethnic groups, ownership was believed to inculcate individual virtues such as thrift and domestic stability, and to have salutary public consequences by providing owners with a concrete, bricks and mortar interest in the continued health of market democracy. These attributions suggested that efforts to expand ownership ought to include African Americans.

The papers that I present here examine the way in which these attributions about the connections among race, risk and property ownership shaped the development of the home ownership state. By "home ownership state," I mean a national state that intervenes in mortgage markets, relying on expanded home ownership to address economic, political, and social problems that arise both from domestic and from international challenges.[19]

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[18] SM Stern, "Reassessing the Citizen Virtues of Homeownership," 100 *Columbia Law Review* 101 (2011): 890-938

[19] Amanda Tillotson "Race, Risk and Real Estate: The Federal Housing Administration and Black Homeownership in the Post World War II Home Ownership State," DePaul *Journal for Social Justice* 8, no 1 (2014): 25-52. The term "home ownership state" is another incarnation of what Jacobs and King (2009) have called "the adjectival state." They note that: "…the state has been adjoined with a series of new adjectives such as 'post-colonial state;" "post-communist state"; "post-conflict state"; "post-cold war state"; "failed state" and "collapsed state." Connecting these new descriptions is the centrality of the state as both an empirical institution failing or succeeding in developing activities with enormous political consequences….", "American State Building: The Theoretical Challenge," in *The Unsustainable American State*, edited by Lawrence Jacobs and Desmond King (New York: Oxford University Press, 2009), 301.

Racial divisions created by market forces,[20] by local zoning regulations,[21] and by the private use of racially restrictive covenants[22] had structured patterns of home ownership in metropolitan areas at least since the first wave of the Great Migration (1910-1930) brought over one million African Americans to these areas.[23] However, national policies to expand home ownership, which were first initiated in the period after World War I, exacerbated this racial divide.[24] Authors such as Katznelson, Jackson, Denton and Massey, Freund and Sugrue[25] have focused on a later stage of development, examining the role of federal programs created to support home ownership during the New Deal and after World War II. These authors point out that the HOLC, the VA and FHA programs, which provided federal guarantees for conforming loans written by private institutional lenders, used racialized underwriting criteria to create barriers for African American purchasers, confining them to densely-populated urban areas while increasing the ability of Whites to purchase homes in segregated suburbs.[26]

The role of the VA and the FHA in expanding White ownership was demonstrated by the 1950 census, which was the first to find that a majority (55%) of White Americans owned their homes. The racially disparate impact of these programs was also evident: Only 34.5% of African

[20] FHA officials who denied that their lending requirements produced residential racial segregation, for example, cited a survey made in 1930, prior to the creation of the Agency. This survey of 10,770 blocks in urban areas throughout the United States found that 84.8% were occupied exclusively by whites and 4.9% were exclusively occupied by nonwhites, while the remaining 10.3% were racially mixed. FHA, *The Structure and Growth of American Cities* (Washington, DC: US Government Printing Office,1939).
[21] See, for instance, C. Silver, "The Racial Origins of Zoning: Southern Cities from 1910–40," *Planning Perspective* 6, no 2 (1991): 189-205.
[22] Richard Brooks and Carol Rose*, Saving the Neighborhood: Racially Restrictive Covenants, Law and Social Norms* (Cambridge, Ma.: Harvard University Press, 2013).
[23] Spencer R. Crew (1987). "The Great Migration of African Americans, 1915-1940," *Monthly Labor Review* March, (1987): 36-39; Isabell Wilkerson, *The Warmth of Other Suns* (New York: Vintage, 2011).
[24] P. Fishback., Jonathan Rose and Kenneth Snowden, "The Patchwork Mortgage Market in the 1920's," in *Well Worth Saving: How the New Deal Safeguarded Home Ownership* edited by Price V. Fishback, Jonathan Rose and Kenneth Snowden, 9-19, (Chicago: University of Chicago Press, 2015).
[25] Katznelson, *When Affirmative Action*; Denton and Massey, *American Apartheid*; Freund, *Colored Properties*; Jackson, *The Crabgrass Frontier*; and Sugrue, *The Origins*.
[26] John Kimble, "Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans,*" Law & Social Inquiry* 32, no. 2 (2007): 399-434.

Americans were homeowners.[27] The ownership gap continued to expand in the period after World War II: between 1940 and 1960, ownership rates for Whites increased 24.2% as against 18.6% for Blacks, while the racial difference increased by five points during this period.[28] The gap widened after the introduction of these federal programs to expand access to home ownership.

Methodology

This project investigates the idea that two competing sets of attributions shaped the development of national programs to expand home ownership. On one hand, public programs to expand home ownership aimed to ameliorate public risks, including those posed by the growth of anti-capitalist ideologies and urban disorder. On the other hand, private sector entities involved with the housing industry, including lenders, the appraisal and insurance industries, and real estate brokers, aimed to minimize the risk arising from property transactions. The project examines the idea that race constituted an important source of risk, and that this understanding was embedded in the larger legal, social and economic environment. The project examines the idea that these the two sets of attributions came together in the development of public programs to expand home ownership.

Together, the papers that I present examine developments in the period between the end of World War I and 1950. The starting point coincides with the first sustained public efforts to advocate for state action to expand opportunities for home ownership as reflected, for example, in the political rhetoric of actors such as Calvin Coolidge and Herbert Hoover, and in the first efforts to develop institutions to accomplish this intervention. The termination point, 1950,

[27] United States Census Bureau, "Historical Census of Housing Tables," [https://www.census.gov/hhes/www/housing/census/historic/ownrate.html.], 4 April, 2015.
[28] William Collins and Robert Margo, "Race and Homeownership: A Century-Long View," *Explorations in Economic History* 38, no. 2 (2001):68-92.

marks the point at which the Federal Housing Administration, in the wake of Supreme Court decisions that declared state action to enforce restrictive covenants unconstitutional, began a slow and incomplete process of relaxing the racially discriminatory provisions of its lending criteria.

The project excavates the ideational roots of the home ownership state. In order to understand the way in which policymakers understood these developments, I performed close readings of policymakers' speech acts. I was interested, here, in their rhetoric, in the research materials that shaped their thinking, and in the publically-stated motives and the private justifications for national action to expand opportunities for home ownership. The materials that I analyzed in this context included the public papers and statements of Presidents Hoover and Coolidge, letters and internal memoranda, party platforms and supporting documents, campaign textbooks and media accounts. Some of this material was incorporated in the reports of conferences and programs to promote home ownership, such as the Better Homes Manual and the reports of the President's (1932) Conference on Homebuilding and Home Ownership. In this context, I located materials at the Herbert Hoover Presidential Library, the Library of Congress, and the National Archives.

I examined a very wide range of primary and secondary source materials to investigate whether attributions that connected race, risk and property were present and to understand the ways in which they were expressed. In order to determine- in the very first place- whether contemporary observers connected the issue of limitations on home ownership to the risk participation in episodes of urban disorder and to the possibility of support for anti-capitalist ideologies, I relied on close readings of materials such as the report of the commission investigating the Chicago riot; accounts in mainstream media such as *The New York Times*, the *Chicago Tribune*, *Delineator*; in specialty publications such as the *Building and Loan*

Association News; and in African American media such as the *Crisis*, *The Chicago Defender*, and *The LA Sentinel*; and on the transcripts of Congressional hearings on topics such as the rise of Bolshevism. In order to understand the way in which the African American community understood the development of racialized home ownership policies, I examined primary and secondary source materials on the New Negro movement and the return of African American soldiers from World War I. Here, I examined materials included in the NAACP papers. Finally, I examined secondary accounts on topics such as the race riots of 1919, and the politics and economics of race during the period.

In order to understand whether attributions about racial risk shaped the larger social and legal environment, I also relied on close reading of a variety of primary source materials. These included court decisions and case materials that addressed issues such as restrictive covenants, racial zoning, and other attempts to create residential segregation through laws and regulations. I also examined the many contemporary law journal articles that addressed restrictive covenants and racial issues. Outside the legal realm, I examined contemporary articles on urban planning, racial geography, and the difficulties that African Americans posed for urban areas both as individuals and as a group. These articles were contained in sources such as *The Annals of the Academy of Political and Social Sciences* and the *American Journal of Sociology*. I also studied many primary and secondary source materials that examined the way in which race and risk were addressed in the appraisal industry, the insurance industry, the real estate industry and in concerns around the possibility of miscegenation.

In order to determine whether attributions about risk and race shaped the development of policies to expand home ownership, I closely read a variety of primary source materials, including materials produced by the Own Your Home and Better homes movement, some of which were located in the archives of the National Association of Real Estate Boards. I also studied the Report of the President's Conference on Homebuilding and Home Ownership (1932) and the reports of each reporting committee, with special attention to the Report of the Committee on Negro Housing. I began my study of the FHA by reading each edition of the evaluation manual and I continued by examining many memos, reports, letters, letters and supplementary publications which I located in the National Archives, the Library of Congress, and at the Harry Truman Presidential Library. The Robert Weaver papers at the New York Public Library's Schomburg Center for the Study of Black Culture provided a longitudinal perspective on the role of race in the development of home ownership policies over time. I supplemented my primary source readings with many secondary source materials.

The research design that I employed has two principal limitations. First, by ending my investigation in 1950, I do not examine subsequent iterations of the home ownership state. Attempts to develop policies to expand home ownership in general, and to address issues of racial disparities in ownership, have continued as part of the political agenda incorporated, for example, in attempts to provide direct subsidies for home purchase through the ill-fated Section 235 program[29] (1968), in George W. Bush's "ownership society," and William Clinton's American Dream Down payment initiative. The terminus that I employ in this project does not allow me either to theorize about the larger rationale for these programs, about how this rationale may have changed over time, or to examine the effects of the subprime crisis on the home ownership state.

A second limitation arises from my decision to focus primarily on the public attributions of risk posed by anti-capitalist ideologies and episodes of urban disorder. The effects of expanded

[29] Kevin Fox Gotham, "Separate and unequal: The Housing Act of 1968 and the Section 235 program," in *Sociological Forum* 15, no. 1, pp. 13-37.

ownership on the diminution of economic cycles, the market for homes and home goods, and increased rates of employment also provided a rationale for these efforts, although, during the period which I examine, the idea that African Americans provided an expanding – and viable- consumer market for these items was at an early stage of development.

Scope and Thesis

Accounts that focus primarily on the period after World War II, examining these programs while giving short shrift to the larger historical, legal, and social environment in which they were situated leave unanswered questions. The papers in this project address three of these questions:

1. Did the development of federal programs to expand ownership lead directly and inevitably to the disparate inclusion of African Americans, or was there an earlier historical juncture at which other possibilities existed?
2. How did *ex ante* understandings about the way in which race conditioned property rights affect the legal environment in which the home ownership state was embedded?
3. How did the FHA's discriminatory criteria connect to prevailing economic, commercial and social understandings about the risks posed by African American property ownership?

The papers share a unifying theme. Each focuses on the way in which attributions about the economic and social risks posed by African American property ownership shaped the development of the home ownership state.

- Paper One: Present at the Creation: Race, Risk and the First Iteration of the Home Ownership State

The first paper in the series focuses on the period after World War I and before the election of Franklin Roosevelt. In this paper, I suggest that the first – but ultimately unsuccessful- national effort to intervene in mortgage markets in order to expand home ownership, the creation of the Federal Home Loan Bank Board (hereafter, FHLB) occurred under circumstances that might have led to a different outcome for African American home ownership. I argue that these initial efforts were shaped by the interaction of two attributions about the connections among race, risk and property. On one hand, primary lenders and institutional investors in secondary mortgage markets, along with developers, appraisers, city planners, and real estate professionals believed that African Americans posed economic risks both as individual borrowers, since they were less likely to maintain properties and to perform on their mortgages, and as members of a racial group that would destabilize property values in areas into which they moved.

On the other hand, public officials such as Herbert Hoover and Calvin Coolidge believed that the exclusion of African Americans from opportunities for home ownership made them vulnerable to appeals from groups that supported anti-capitalist ideologies such as Bolshevism and increased their propensity to engage in race riots. I argue that these attributions, along with changes in the relationship of African Americans to the Republican Party, led to the consideration of barriers to African American ownership in the 1931 President' Conference on Home Building and Home Ownership, which was convened in part to provide support for Hoover's proposed FHLB. The Conference included a Committee Negro Housing, which received the second highest level of funding among the 20 committees that submitted reports to the final conference. This Committee made sweeping recommendations about the need for national intervention in housing markets, arguing, for instance, that the problem of disparate African American access to home ownership was the result of structural factors rather than of the characteristics of African Americans as economic actors.

However, these issues were generally ignored both in the final report of the Committee and in the process of establishing a structure for the FHLB, which incorporated the public/private model that would characterize subsequent national programs to expand access to home ownership. By adopting a model in which financial institutions would be primary lenders who were voluntary participants in a program in which the national government provided liquidity to allow them to issue conforming loans, the FHLB ultimately accepted the understanding of racial risks that prevailed in the private sector and established a precedent for subsequent programs.

This paper moves beyond existing understandings in three ways. First, it focuses attention on the first iteration of the home ownership state- that is, the under-examined time period after World War I and before the election of Franklin Roosevelt which produced the FHLB. Secondly, it pinpoints this period as an historical juncture at which the expansion of ownership to African Americans was an explicit part of the national housing agenda. In this sense, it resurrects a history that has been generally overlooked in accounts that examine the development of national home ownership policy. Finally, it identifies the paradox of risk that shaped the way in which race was ultimately incorporated into this first round of national home ownership policy.

- Paper Two: Property as Theft: Racialized Property Rights, Restrictive Covenants and the Uncertain Legacy of *Shelley v. Kraemer*.

The second paper in the series examines the way in which litigation around restrictive covenants incorporated social, economic and attributions about the relationship among race, risk and property. It argues that a racialized theory of property rights was reflected in attempts to harmonize the use of restrictive covenants with common law understandings about the freedom of owners to alienate property, and the examines the way in which litigation around restrictive covenants incorporated attributions about the connections among race, risk and property values.

In 1934, the American Law Institute issued one of its periodic Restatements on Property. These authoritative restatements aimed to harmonize emerging lines of case law with common law understandings of property rights. The 1934 Restatement focused on the contrast between the developing line of case law that arose from litigation around restrictive covenants and common law understandings about the privileges arising from ownership. From a common law perspective, the restrictions on sellers imposed by covenants constrained their right to alienate (or dispose of) property. Common law held that the right to freely alienate property was one of the principal elements of ownership, and that restraints on this right were acceptable only when they served a compelling purpose. The Restatement examined legal theories incorporated in lines of case law that arose from litigation around restrictive covenants, attempting to situate them in the context of this common law.

In this paper, I argue that the legal theory presented by these cases can be summed up in the idea that African American acquisition of property was connected to the risk of lost property value for proximate Whites. Using themes extracted from the lines of case law cited in the ALI Restatement, I argue that these decisions implicitly incorporate the idea that African American acquisition of property was a kind of theft, occasioning losses for White owners. This idea was implicitly and explicitly expressed both in decisions to uphold and in decisions to over-turn restrictive covenants. I identify two lines of reasoning that incorporate this premise. First, I identify a line of court cases in which African American purchasers, rather than White sellers, were forced to pay additional penalties and costs in addition to the uncompensated loss of the property which they had purchased. This line of reasoning, I argue, construes African American purchasers- rather than White sellers who had originally purchased properties encumbered with the covenants- to be the parties at fault in the transaction.

Second, I discuss the use of the doctrine of changed circumstances to overturn covenants. This common law doctrine holds that, since the allowable purpose of covenants that produce alienation of property is to increase benefits to the owner, these instruments are voided if their purpose is frustrated by changed conditions. In cases where the changed circumstances doctrine was used to overturn covenants, decisions hinged on the two points. In one set of cases, these decisions held that the purpose of covenants was frustrated because the movement of African Americans into surrounding properties meant that there was no property value left to lose. A second line of reasoning held that, because African Americans were forced to pay higher prices for homes, White owners in neighborhoods that were experiencing an influx of African Americans stood to gain financially from a decision to abrogate the covenant, raising their potential sale price.

I conclude by discussing the implications of *Shelly v. Kraemer*, which found that state action to enforce covenants was illegal, while failing to address either their validity as individual contracts or the racialized economic logic that they incorporated. I argue that, in the short-run, *Shelley* allowed the continued use of restrictive covenants by the FHA and institutional lenders. In the long run, the segregated neighborhoods created by the use of covenants and redlining remained mired in a racialized real estate market in which price and value were disconnected from one another. These segregated neighborhoods later became prime targets for subprime lenders, suffering disparate impacts from the foreclosure crisis.

- Paper Three: Rating the FHA: Race and Risk in the Second Iteration of the Home Ownership State, 1934-1950

In this paper, I examine the way in which attributions about racial risk shaped the development of FHA lending criteria. I argue that, taken as a whole, FHA criteria for rating mortgage risk effectively rated the racial risks posed by proposed loans, reflecting and extending existing assumptions about the connections between race and property value. Most existing accounts of discriminatory FHA lending criteria have focused on the discriminatory impact of residential security maps or the use of restrictive covenants while giving little attention to the full range of criteria for rating mortgage risk or to the way in which larger understandings about the connections among race, risk and property were expressed in these lending standards.

The paper lays out the logic reflected in these larger understandings. The commercial sectors involved with property appraisal, insurance, financing and sales believed that African American attempts to acquire property ownership posed measureable risks, both because of individual racial characteristics and because of the negative externalities created by movements of this population into new areas. These attributions were legitimated by contemporary city planners and social scientists, who believed that these externalities, including crime, violence and accelerated depreciation of properties would drive out Whites and reduce property values in adjoining areas, triggering further waves of migration.

I indicate that FHA lending criteria incorporated these understandings about racial risk for two reasons: First, in order to secure the participation of institutional lenders in its voluntary program and, second, to reduce its own risks from underwriting mortgages for these lenders. I point out that the Administration required lenders to adopt terms that would simultaneously make mortgages more accessible for working- and middle-class individuals and slow the accumulation of equity, reducing both the value of collateral and the costs to borrowers from nonperformance and increasing the risk of future losses. I argue, however, that the FHA did not simply incorporate existing understandings of racial risk: Since it effectively created a national mortgage market, the Administration transformed and extended existing attributions, creating "objective" metrics for measuring racial risk and requiring the use of mechanisms such as restrictive covenants to control future risks.

The paper moves beyond existing understandings in two ways. First, rather than focusing primarily on the locational criteria that have been identified by existing accounts, it demonstrates that racial considerations permeated the process of assessing mortgage risk. Second, it examines the ways in which the public/private nature of the FHA program affected its use of racialized criteria.

Conclusion

Each of the papers in this project focuses on the way in which understandings about racial risk have shaped the structure of the home ownership state. As a group, they suggest that the current disparity between White and African American home ownership rates should be connected to a long historical process in which these understandings have been a constant theme. This project examines the early phases of this process; later work will build on this to examine the way in which these attributions changed over time.

The project breaks new ground, making an original contribution both to understandings about the development of national policies to expand home ownership and to understandings about the role of race within that policy agenda. In the former sense, I highlight the importance of the foundational decision to adopt a public/private model. I demonstrate that, in a circumstance in which expanded ownership aimed to address public risks posed by the growth of anti-capitalist ideologies and urban disorder, the reliance on the private sector to implement this program opened the door to its understandings about the risks involved both in general home financing and in the specific risks arising from the relationship between race and property. In the latter sense, I demonstrate that, during the foundational phase of the home ownership state, issues of quantitative and qualitative disparities in African American ownership were explicitly considered, but that the possibility for solutions was constrained by the larger economic, social and political environment within which this consideration occurred.

CHAPTER ONE

Present at the Creation:

Race, Risk, and the First Iteration of the Home Ownership State

Introduction

In 1922, Vice President Calvin Coolidge declared expanded access to home ownership to be a matter of national interest: The survival of democracy, capitalism and the institution of private property were at stake. He argued that this interest warranted state action. "It is of little avail," Coolidge warned, "to assert that there is an inherent right to own property unless there is an open opportunity that this right may be enjoyed to a fair degree by all. That which is referred to in such critical terms as capitalism cannot prevail unless it is adapted to the general requirements. Unless it is of the people, it will cease to have a place under our institutions, even as slavery ceased.

It is time to demonstrate more effectively that property is of the people. It is time to transfer some of the approbation and effort that have gone into the building of public works into the building, and ornamenting of private homes by the people at large- attractive, worthy permanent homes."[1]

[1] Calvin Coolidge, "Better Homes," in *Better Homes in America: Plan Book for Demonstration Week*, October 9-14 (Washington, DC: US Government Printing Office, 1922). This speech became a central document of the post-World War I home ownership movement. It was reprinted, along with Herbert Hoover's essay on "The Home as an Investment" in each of the Demonstration Week programs prepared by the Better Homes Movement, a private initiative begun in 1922 that offered contests and seminars on home building and remodeling. The Movement was endorsed by national officials- Vice President Coolidge served as honorary chairman of its advisory council.

Coolidge famously advocated for a limited state and for fiscal restraint; he spoke during a period when protection from "unnecessary and "wasteful government expenditures" was construed, at least by the Republican Party, to be a "natural right."[2] By these lights, his criticism of expenditures for public works is unsurprising, but his call for public action to expand the ownership of private homes presents a puzzle that is made more complicated by his reference to slavery, implicitly raising the issue of racial disparities in opportunities for home ownership. In fact, Coolidge's remarks incorporate a policy logic that redefined the role of the state in the acquisition of private homes during the period between World War I and the election of Franklin Roosevelt in 1932. This period marked the initial phase of the "home ownership state," a national state that intervened in mortgage markets in order to expand ownership opportunities. This expansion aimed to address political, social and economic challenges that arose both from internal and from external events.[3] The logic that informed these efforts was put forward in Republican Party platforms,[4] in national media such as *Delineator*[5] and *The New York Times*,[6] in Congressional investigations,[7] in public inquiries into the causes of riots and social unrest,[8] and in materials produced by interest groups involved with home sales, construction, and remodeling.[9]

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[2] The Republican Platform of 1928 elevated restricted government expenditures to the status of a natural right: "The citizen and taxpayer has a natural right to be protected from unnecessary and wasteful expenditures."
[3] T. Skocpol, P. Evans, D. Rueschemeyer, eds., *Bringing the State Back In* (New York and Cambridge: Cambridge University Press, 1985).
[4] The Republican Platform of 1920
[5] Jacqueline Shine (2005/6)," The Better Homes in American Campaign as Social Index". *The NeoAmericanist* 10, no. 1 (2005/6). *The Delineator*- and particularly its longtime editor, Maria B. Meloney, took an early leadership role in efforts to expand ownership.
[6] "Home Ownership Urged as Solution to National Housing Problem," *New York Times*, July 14, 1918.
[7] In 1918, for example, Senator Morris Shepard of Texas commissioned an international survey on government policies to advance home ownership, and reported to Congress that the United States was a laggard in this regard. See, for instance, "US behind Other Lands in Helping People Own Homes". *New York Times*, Aug 19, 1918.
[8] Chicago Commission on Race Relations, *The Negro in Chicago* (Chicago: University of Chicago Press, 1922).
[9] Marc Weiss, "Marketing and Financing Home Ownership: Mortgage Lending and Public Policy in the United States, 1918-1989," *Business and Economic History* Second Series, Vol.18 (1989), 109-118.

From the perspective of conventional wisdom, this episode is jarring. Both in chronological and in substantive terms, it challenges dominant understandings about the origins and development of federal action to expand home ownership and about the role of race in those efforts.

Take, first, the chronological challenge. Academic discussion of the historical role of race in federal home ownership initiatives is dominated by accounts that emphasize developments that occurred during the Depression and in the period after World War II. The well-known narrative put forward by authors such as Jackson,[10] Denton and Massey,[11] and Katznelson[12] focuses on the role of national institutions that aimed to support and to expand home ownership in the New Deal and the period after World War II. This narrative considers the roles of the HOLC,[13] the FHA[14], and the Veterans Administration Home Loan Program[15]. Each of these agencies guaranteed conforming mortgages written by private institutional lenders, employing underwriting criteria that discriminated against African American borrowers.

The second challenge is substantive. By situating his discussion of barriers to ownership in the context of slavery, Coolidge implicitly addresses racial ownership disparities and warns that the national failure to address restrictions on ownership creates a public risk- the risk of organized, and potentially violent, opposition to the institution of private property Existing accounts indicate that national efforts to reduce these restrictions were driven by private

[10] Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, (New York: Oxford University Press,1987).
[11] Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of America's Underclass*, (Cambridge, Ma.: Harvard University Press,1993).
[12] Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth Century America,* (New York: WW Norton, 2006).
[13] The HOLC was created in 1933 by the Home Owners Loan Corporation Act.
[14] The FHA was created by the National Housing act of 1934, also known as the Capeheart Act, Pub.L. 84–345, 48 Stat. 847.
[15] The VA Home Loan Guarantee Program was originally created as part of the Servicemen's Readjustment Act of 1944, Public Law 78-346, but was extended in subsequent years. See United States Veterans Administration, *Legislative History of the VA Home Loan Guarantee Program*, (Washington, DC: Department of Veterans Affairs, 2006).

economic interests that aimed to benefit from the expansion of (White) home ownership and by politicians beholden to these interests.[16] Coolidge's remarks suggest another interpretation: They lay out a distinctive state interest in the expansion of ownership to groups – including African Americans- that were both disadvantaged by existing methods of finance and vulnerable to the appeal of anti-capitalist ideologies. This expansion was intended to strengthen support for the institution of private property and for the political and economic arrangements in which it was embedded.

However, private attributions about race and risk also shaped the initial phase of the home ownership state. The national institutions central to the post World War II expansion of home ownership were not erected on new ground. The HOLC, the FHA and the VA Home Loan Guarantee Program were created in a market environment that had been structured by shared understandings about the financial risks facing mortgage lenders, the ways in which race exacerbated those risks and the metrics used to assess these risks. Michael Lea points out that lenders' risks can be classified into five categories. Credit risk is the risk that payments will not be made in a timely fashion. Liquidity risk is the risk that the money will be needed before the note comes due. Cash flow risk, arising from situations such as exchange rate shifts and inflation, is the risk that changes in market conditions will alter the value of the agreed-upon stream of payments. Agency risk is the risk that an intermediary in the lending and payment process will behave in a manner contrary to the lenders' interest. Finally, he defines political risk as the risk that the legal or political framework in which the loan is embedded will change.[17]

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[16] Jacqueline Shine, "The Better Homes in American Campaign as a Social Index."
Clarissa Rile Hayward, *How Americans Make Race: Stories, Institutions, Spaces*, (New York: Cambridge University Press, 2013).
[17] M. J. Lea, "Innovation and the Cost of Mortgage Credit: A Historical Perspective," *Housing Policy Debate* 7, no.1 (1996): 149.

At least from the early years of the twentieth century, the economic sectors associated with home finance and home ownership, including lending institutions, property appraisers, and insurance carriers, believed that mortgage lending was risky business, and that race created an additional element of risk. This racial risk intersected with but was not reducible to the risks posed by lending to lower-wage workers. Initial state attempts to develop national policies and institutions to facilitate the extension of home ownership involved both identifying and attempting to adapt to these private understandings of risk.

By incorrectly periodizing the development of national efforts to expand home ownership, and by failing to consider the way in which these foundational efforts were shaped by the conflict between public and private concerns about racial risk, accounts that emphasize events that occurred during the New Deal and in the period after World War II elide a critical period in this history.[18] They miss the extent to which national authorities puzzled over the problem of race and property ownership during the period after World War I and fail to consider the ways in which this "collective puzzling" laid both the ideational and the institutional foundations for later developments.[19] Their discussion fails to reckon with the role of statist objectives in the expansion of home ownership and with the role that race played in these objectives.

Scope and Thesis

This paper was intended to be part of a larger project that would have examined the role of race in the development of the home ownership state from 1917 to 1978. Here, I focus on the period between the end of World War I and the election of Franklin Roosevelt, arguing that developments during this period laid the foundations for later efforts to expand home ownership.

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[18] Ira Katznelson, "Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science," in *Comparative Historical Analysis in Perspective,* ed. James Mahoney and Dietrich Rueschemeyer, (Cambridge: Cambridge University Press, 2003), 270-303.

[19] Hugh Heclo, *Modern Social Politics in Britain and Sweden: From Relief to Income Maintenance*, (New Haven: Yale University Press, 1974), 306.

The FHLB, signed into law by President Hoover on July 22, 1932,[20] was the first national program that attempted to intervene in mortgage markets in order to promote expanded home ownership. Employing the public/private model that characterized later national programs to expand ownership, it proposed to channel public funds to private banks, increasing their liquidity to allow them to expand mortgage lending.[21]

My discussion moves the boundaries set by existing accounts of the way in which race was incorporated into the development of national policies to expand home ownership. The majority of these accounts examine developments that occurred during the New Deal and the period after World War II, suggesting that racial discrimination in home ownership programs was created by the political and ideological dominance of interests that supported racial segregation. However, I argue that the period that begins with the end of World War I and ends with the election of Franklin Roosevelt was a critical historical juncture at which an alternative possibility was present- that of including concerns about racial ownership disparities in the emerging state agenda to expand ownership opportunities.[22]

This juncture came at the starting point for a flurry of innovation that led to permanent changes in the options for acquiring homes. The FHLB, created in 1932, was intended to create a credit reserve that could be used to provide liquidity for banks that issued mortgages that met program lending criteria. The HOLC, created in 1933; the FHA, created in 1934 and the VA Home Loan Guarantee Program, created in 1944 were loan guarantee programs in which federal agencies guaranteed (underwrote) conforming mortgages issued by private institutional lenders.

[20] The Federal Home Loan Bank Act, Pub.L. 72–304, 47 Stat. 725, enacted July 22, 1932, was signed in to law by President Herbert Hoover.

[21] Thomas Marvell, *The Federal Home Loan Bank Board*, (New York: Praeger, 1969).

[22] For an examination of critical historical junctures see, for instance, G. Capoccia and R.D. Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism, "World *Politics* 59, no. 3 (2007): 341-369; K. Thelen, "Historical Institutionalism in Comparative Politics," *Annual Review of Political Science* 2, no. 1 (1999): 369-404.

Government intervention in mortgage markets occurred by combining public and private activity.[23]

I argue that paradoxical attributions about race, risk and property shaped this juncture and its outcome. On one hand, I demonstrate that the policy logic implicit in Coolidge's comments suggested that restricted opportunities for African American home ownership increased the risk that these individuals would become vulnerable to anti-capitalist ideologies and to participation in urban violence, posing a potential problem for the state. On the other hand, the private sector entities involved with building, financing, appraising and insuring homes believed that mortgage lending was risky business, and that stringent lending criteria could reduce their potential liability from borrower nonperformance. These entities also believed that African Americans posed specific risks both in terms of the probability of payment and in their effect on property values. These competing perspectives on race, risk and property came into conflict at the President's Conference on Homebuilding and Homeownership, which occurred in 1931.[24]

The State of the Field

Academic discussions that examine the role of race in the development of national policies to expand home ownership have been dominated by accounts that focus on New Deal enactments and on developments in the period after World War II.[25] However, a few authors do consider events that occurred in the period between World War I and the election of Franklin Roosevelt, examining the importance of national initiatives to promote home ownership in this period as a

[23] For a discussion of the idea of "punctuated equilibria" in the policy realm, see Stephen Krasner (1989), "Sovereignty: An Institutional Perspective," in *The Elusive State: Comparative and International Perspectives*, ed James Caporoso, (Newbury Park, Ca: Sage), 69-96.
[24] Hoover modelled this conference after the Conference on Children initiated by President Theodore Roosevelt.
[25] Kenneth Jackson (1987); Douglas Massey and Nancy Denton (1993); Ira Katznelson (2006).

source of foundational understandings about the importance of ownership, about the role of race in these efforts, and about the role of the state.[26]

Works that utilize this chronology have primarily focused on two national initiatives. The Own Your Home campaign (1915-1925) produced pamphlets, newspaper advertisements, and sponsored essay contests on the topic of home ownership.[27] The campaign was originally sponsored by the National Association of Real Estate Boards.[28] In 1919, it was taken over by the United States Department of Labor and, in 1921, was transferred to the Department of Commerce. The Better Homes movement (1922-1942),[29] was originally promoted by *The Delineator,* the house magazine of the Butterick Pattern Company,[30] and was later funded — at Herbert Hoover's request — by the Laura Spelman Rockefeller Memorial Foundation.[31] This initiative aimed to encourage home ownership through demonstration and model home projects developed by local committees and by producing materials such as pamphlets and posters to encourage ownership.

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[26] The general lack of attention to national initiatives is in contrast to accounts that examine this period in terms of its importance for developing local support for expanded home ownership. See, for instance, M. Garb, A *City of American Dreams: A History of Housing and Home Ownership in Chicago, 1891-1919*, (Chicago: University of Chicago Press,2005).

[27] A widely-circulated example was National Association of Real Estate Boards, "From Fred to Tom: A Real Estate Industry Classic on Home Ownership: Letter from Buy a Home Campaign Committee Chairman Fred E. Reed to Tom Ingersoll, March, 1917," National Association of Real Estate Boards Archive, Folder: "Own Your Home."

[28] This initiative founded in 1915, was originally named "The Buy a Home" campaign. It was discontinued during World War I, and was restarted after the War as Own Your Home. National Association of Real Estate Boards, "Mission, Vision, History," [http://www.realtor.org/about-nar/mission-vision-and-history] January 4, 1914. See also "Own Your Own Home Campaign: Progress Report and National Campaign Plan, 1917, " National Association of Real Estate Boards archive, Folder: "Own Your Home."

[29] For a brief history of this movement see Roger Biles, *From Tenements to Taylor Homes in Search of a Housing Policy for Urban America, (*State College, Pa.: Penn State University Press, 2010), 80-88.

[30] Blanche Halbert, ed., *The Better Homes Manual*, (Chicago, Illinois: University of Chicago Press, 1931). *The Delineator* was sponsored by the Butterick Corporation, which produced and sold patterns for sewing clothing and domestic goods such as curtains and slipcovers.

[31] American Civic Association, "How National Attention was Directed to Better Homes in America," *American Civic Association Annual* (1929): 37-43.

Authors such as Hutchinson,[32] Altman,[33] Shine,[34] and Hayward[35] argue that the Own Your Home Movement and the Better Homes Movement created home ownership as a White cultural space inhabited by domesticated female consumers and male wage-earners. Hayward notes that this vision of ownership as a "White" entitlement was not simply ideological, but was embedded in material arrangements created by national initiatives to promote ownership. Differential access to ownership and to the way of life that it symbolized, she argues, became a critical element in the effort to "make race" in the period after World War I.

The concrete arrangements that produced racial disparities included the development of uniform standards for acceptable homes and for the characteristics of suitable neighborhoods. Greer contends, for example, that the Better Homes movement created a detailed list of standards that were later incorporated into the home appraisal criteria adopted by the HOLC and the FHA.[36] The indicators used to define the adequacy of homes were much more likely to be found in newly-developed suburban housing than in the aging, congested urban neighborhoods where African Americans could purchase property.[37]

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[32] J. Hutchinson, "The Cure for Domestic Neglect: Better Homes in America, 1922-1935*," Perspectives in Vernacular Architecture* (1986): 168-178; "Building for Babbitt: The State and the Suburban Home Ideal," *Journal of Policy History*, 9, no. 2 (1997): 184-210; and "Better Homes and Gullah," *Agricultural History*, 67, no. 2 (1993): 102-118.

[33] Karen Altman, "Consuming Ideology: The Better Homes in America Campaign,*" Critical Studies in Mass Communication* 7 (1990): 286-307.

[34] Jacqueline Shine,"The Better Homes in America Campaign."

[35] Hayward (2013). *How Americans Make Race.*

[36] J. Greer, "The Better Homes Movement and the Origins of Mortgage Redlining in the United States, " in *State-Building from the Margins: Between Reconstruction and the New Dea*l, edited by Carol Nackenoff and Julie Novkov, (Albany: SUNY Press,2014), 203-236. Greer fails to take account of the other factors that militated toward the introduction of standards, including the rapid development of zoning theory in the 1920's and 1930's, and the development of specific residential standards in the Tenement Acts that appeared in cities beginning at the turn of the 20th century.

[37] See, for instance, the description of the physical difficulties of African American neighborhoods in Herman Long and Charles Johnson, *People v. Property: Race Restrictive Covenants in Housing*, (Nashville: Fisk University Press, 1947), 2-4. At p. 4, Long and Johnson note the "the ill-kept and unsightly outward aspect of these areas with their teeming population."

While Vale,[38] Hutchinson,[39] and Altman[40] allow that attempts to improve African American housing were incorporated into these initiatives, they note that these projects were carried out by segregated committees and were almost exclusively located in southern states. Accounts that focus on the Own Your Home and Better Homes movements incorporate a specific set of assumptions about the nature of state involvement in efforts to expand home ownership and about the role of race in those efforts. The state, in this view, was simply an instrument in the hands of interest groups that stood to profit from expanded home ownership and increased consumption. To the extent that these initiatives to expand home ownership included attempts to improve African American housing, they sought to integrate African Americans into the developing consumer economy within a familiar paradigm that addressed housing and other racial issues as primarily Southern problems connected to the deficiencies of African American culture.[41]

These accounts also understate the challenges that confronted the national state in the period after World War I. The period was not simply defined by the growth of consumerism, the social construction of gendered domesticity, and the creation of a more robust middle class. Rather, there were both internal and external challenges to existing political, economic and social arrangements. Some of these challenges were racial, including a growing African American presence in urban areas throughout the nation, bloody urban riots, and increased activity by African American groups such as the NAACP and the New Negro movements. Other challenges

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38 Lawrence Vale, "The Ideological Origins of Affordable Home Ownership Efforts," *in Chasing the American Dream: New Perspectives on Affordable Home Ownership,* edited by William Rohe and Harry Watson, (Ithaca: Cornell University Press,2007), 15-40.
Hutchinson, "Better Homes and Gullah."
40 Altman, "Consuming Ideology."
41 There was an increased interest in the role of the African American as a consumer during the Post-World War I period. Paul Edwards, a Fisk University professor, had begun conducting studies of African American consumption patterns during the late 1920's. His book-length study, which focused on the South, was published in 1932. Paul Edwards, *The Urban Southern Negro as Consumer*, (New York: Prentice Hall, 1932).

wee ideological: In the wake of the Russian revolution, there was concern that lower-wage workers and other groups- including African Americans- disadvantaged by existing economic arrangements were vulnerable to anti-capitalist doctrines put forward by domestic Bolshevists and radical unions such as the IWW.

If the Own Your Home and Better Homes movements have received comparatively little academic attention, the Conference on Home Building and Home Ownership has received much less. At this privately-funded but government-sponsored event, 3,600 invited delegates heard reports from theirty-on committees — including a Committee on Negro Housing — that had involved 1000 participants representing two dozen interest associations. Prior to the conference, these committees had been involved in a year-long effort to develop "facts and a better understanding of the questions involved and inspiring better organization and the removal of influences which seriously limit the spread of homeownership, both in town and country."[42]

The Conference was also intended to create national support for the Hoover's proposed Federal Home Loan Bank. At its conclusion, the delegates unanimously voted to support Hoover's proposal. On signing the act that created the Bank, Hoover acknowledged this role, noting that it was "the outcome of the national conference on homeownership which represented every part of the country."[43] The influence of the Conference was magnified by the wide distribution of its final eleven-volume report: The first edition of 15,000 copies sold out within three months, and 50,000 additional copies were printed.[44]

[42]United States Government Printing Office, *Public Papers of the Presidents of the United States: Herbert Hoover, 1930*, (Washington, DC: United States Government Printing Office,1993),313.
[43] *Public Papers of the Presidents of the United States*: *Herbert Hoover, 1932-1933,* (Best Books, 1977), 331.
[44] United States Bureau of Standards, *Bureau of Standards Yearbook*, Volume 133, (Washington, DC: US Government Printing Office, 1932), 211.

Despite its role in the development of the FHLB, its specific attention to issues of African American housing and home ownership, and its influence in laying out the issues associated with the expansion of home ownership, this Conference has received minimal attention. In his discussion of the development of ideologies around low income home ownership, Vale notes in passing that the Committee devoted to this topic received little funding and had little influence over the final outcome.[45] In her discussion of Depression-era housing policies, Fish briefly notes that the Conference was an important influence on these policies and reports the participation of well-known academics and authorities on housing.[46] Crossney and Bartelt make a similarly brief reference, mentioning committee reports that emphasized slum clearance, the expansion of home ownership and city planning.[47] Their discussion highlights an omission that is common to existing accounts: Critiquing the "institutional ecology" approach that explains urban residential segregation as a simple function of "the interlocking matrix of political, economic, and social structures",[48] they make no mention of the Committee on Negro Housing.

The failure of existing accounts to consider the fact that this Committee was included in the Conference, the failure to analyze its findings and the failure to examine the way in which its findings were addressed in the context of the larger committee make it possible to overlook an important point: The initial attempt to formulate a national plan for the expansion of home ownership explicitly incorporated concerns about barriers to African American housing and home ownership. In this sense, the first iteration of the home ownership state was a critical juncture that shaped the future role of race in national home ownership policy. This juncture was

[45] Vale, "The Ideological Origins."
[46] Gertrude Fish, "Housing Policies in the Great Depression," In *The Story of Housing*, ed. Gertrude Fish, (New York: Macmillan/Federal National Mortgage Association,1977),177-179.
[47] K. B. Crossney and D.W. Bartelt, (2005), "The Legacy of the Home Owners' Loan Corporation," *Housing Policy Debate* 16, no 3-4 (2005): 547-574.
[48] Ibid., 548.

a relatively narrow one: That is, the possibilities for creating and implementing policies to increase African American access to home ownership were ultimately constrained by the racialized nature of the contemporary political economy. The crossroads, as I argue below, was marked by the clash between public and private attributions about the connections among race, risk and property.

The Paradox of Risk

The Conference and the creation of the FHLB have been identified as a response to the crash of 1929, and to the subsequent deterioration of the housing market.[49] However, this perspective suggests that the creation of the first national institution to expand home ownership by intervening in mortgage markets was simply a politically-inspired answer to a specific, contemporaneous problem. In fact, the path to national action was longer and more complex than these accounts allow. Issues of race and risk were intertwined with its development.

The Public Risks Posed by Limited Access to Home Ownership

Beginning almost immediately after World War I, concerns about rates of home ownership were connected to fears about the stability of existing political and economic arrangements in national political discourse. Ownership rates had shown a small but steady decline during the first decades of the twentieth century. The 1920 census demonstrated both that a minority (45.6%) of Americans owned their homes, and that the rate of overall home ownership had shown a marginal (.03%) decline since 1910.[50]

Herbert Hoover, then Secretary of Commerce, suggested that the small change in ownership rates posed out-sized risks. On October 16, 1921, he noted in a letter to the New York Realty

[49] David Wheelock, "The Federal Response to Mortgage Distress: Lessons from the Great Depression," *Federal Reserve Bank of St. Louis Review*, Part 1 (2008): 137.
[50] United States Census Bureau," Historical Census of Housing Tables 1", [https://www.census.gov/hhes/www/housing/census/historic/owner.html] January, 2015.

Convention that "The census returns demonstrate that the percentage of tenancy is too high, and if we are to have a happy, contented and stable population we must increase the number of those who own their own homes."[51] Extrapolating from these figures, he warned the National Association of Real Estate Brokers in 1922 that "the total number of homes owned by occupiers has decreased and nearly 60% of our people are living as tenants... if the trend continues, in two decades 75% of people will not be home owners."[52] In 1923, Warren Harding reiterated the connection between ownership and social stability: "The soundness of our social system and the security of our country," he noted, "are greatly enhanced by the development of love for a home and the creation of a home that can be loved."[53] Concerns about the population's "stability, happiness, and contentment" summarized more specific understandings about the risks arising from limited access to home ownership. Barriers to ownership were believed to increase individuals' vulnerabilities to the anti-capitalist doctrines promulgated by domestic Bolsheviks, anarchists and radical unionists.[54]

Worries about the potential domestic spread of these ideologies were reflected in popular media, in political discourse, and in Congressional investigations.[55] "Are the 'Reds' Stalking our College Women ?"Calvin Coolidge asked readers of *Delineator* in a 1921 article.[56] Congressional hearings aimed to identify the tactics used to secure supporters. One such investigation found that the promise of housing and home ownership was used as a lure. A witness at a 1919 hearing on Bolshevik propaganda noted that, in a part of Mexico that was

[51] *New York Times*, "More Houses by Community Action," (October 16, 1921).
[52] *American Building Association News*, "Home Ownership Assures Safe Government" 42 (1922):108.
[53] Letter from Warren Harding to Herbert Hoover, June 27, 1923. Box 65, Folder 01230 Herbert Hoover Library
[54] Vincent Cannoto, "A Home of One's Own," *National Affairs* 3 (2010): [http://www.nationalaffairs.com/publications/detail/a-home-of-ones-own].
[55] Robert K. Murray. *Red Scare: A Study in National Hysteria, 1919-1920* (Minneapolis: U of Minnesota Press, 1955).
[56] Calvin Coolidge, "Enemies of the Republic: Are the Reds Stalking our College Women?," *Delineator* XCVII (1921).

allegedly under communist control, the promise of government- sponsored housing kept citizens quiescent: "When a man wants a house, he goes to the Building Committee. Possibly he is told there is an empty house at such and such a place. If he does not like it, he is registered, and when his turn comes, he is built a house according to his wishes."[57]

The connection of home ownership to support for free market capitalism had troubling implications for a majoritarian democracy in which a minority of individuals owned homes. In a 1922 speech to the American Builders' Association, Hoover warned that "if the proportion of non- home owners becomes so great that legislation is enacted at the behest of a majority of voters, it will be inimical to private property rights…. a nation of majority rule should be a nation of majority home ownership."[58] High rates of tenancy were also connected to the possibility of extensive state intervention into housing markets. "We have ample evidence", he wrote in 1931, "that too great reliance on rented dwellings tends in the modern industrial state to inadequate housing and the demand for state participation in housing."[59]

In order to create a home-owning majority, he noted, "[i]t is necessary that the idea of home ownership be sold to the people of the nation."[60] This sales project was warranted by its anticipated effects on support for democratic capitalism: Homeowners, he argued elsewhere, "have an interest in the advancement of a social system that permits the individual to store up the fruits of his labor."[61] In a 1926 letter, Ward Connors, editor of the *Buffalo Courier*, summarized this logic: "[A] title deed to a home," he noted, "is a self-evident argument against bolshevism, socialism, communism and other cankers and cancers of fundamental doctrines of true

[57] Bolshevik Propaganda: Full Text of Hearings before a committee on the judiciary, United States Senate, 65th Congress, third session and thereafter, pursuant to Senate Res 439 and 469. February 11, 1919 to March 11, 1919: 18.
[58] "Home Ownership Assures Safe Government," 106.
[59] Blanche Halbert, The *Better Homes Manual*, 3.
[60] Ibid.
[61] Herbert Hoover (1923), "Forward" In *How to Own your Own Home*, edited by John S. Gries and James S. Taylor. (Washington, DC.: US Government Printing Office, 1923), 5.

democracy."[62] National action to expand ownership was warranted by the need to preserve, rather than to replace, existing patterns of property acquisition and the market democracy that supported them.

Race, Risk, and Real Estate

Increased attention to the destabilizing effects of barriers to home ownership included specific consideration of the risks posed by racial disparities. African American ownership rates, which had traditionally lagged those of Whites, were also in decline. Robert Margo finds that the Great Migration produced an overall decline in ownership since African Americans living in central cities were far less likely to be homeowners than those living in rural areas.[63] Restrictions on the areas in which African Americans could reside, restrictions on the methods of financing available to these buyers, and the economic challenges facing these workers reduced opportunities for ownership. While overall African American ownership rates rose during the first decade of the twentieth century, they fell between 1910 and 1920, and most estimates suggest that there was a racial ownership gap in the area of 24%.[64]

The topic of racial disparities in housing and home ownership was well-known and frequently discussed in the period after World War I. *The New York Times* carried stories with headlines such as "Home Ownership will Solve Color Problem in US"[65] and "Sees Negro Housing Wretched in Cities."[66] Racial disparities were also widely discussed in African American media: Newspapers such as *The Amsterdam News*, *The Atlanta Daily World*, and *The Chicago Defender* routinely featured articles reporting on the state of African American home ownership and the

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[62] W. Connors (1926), Letter of transmittal for housing data sheet to Herbert Hoover. Herbert Hoover Library, Box 68. Folder: Own Your Home, 1921-1928.
[63] Robert Margo, "Historical Perspectives on Racial Economic Differences: A Research Summary," NBER Reporter, Winter (2005).
[64] Ibid. Interestingly, this gap has- except for a few brief periods- remained almost unchanged since the beginning of the 20th century.
[65] *New York Times*, "Home Ownership Will Solve Color Problem in US.", (August 18, 1922).
[66] *New York Times*," Sees Negro Housing Wretched in Cities," (November 27, 1931).

barriers facing home buyers.[67] Academic studies of the difficulties with African American housing had become a cottage industry: In the preface to the final report of the Committee on Negro Housing, Robert Lamont, Secretary of Commerce in the Hoover administration, noted that its bibliography listed over forty studies documenting these problems.[68]

Limitations on opportunities for home ownership and on the areas in which urban African Americans could reside were identified as sources of urban disorder. The Great Migration had changed the geography of race, unsettling existing patterns of race relations. In the period between 1916 and 1930, an estimated one million Blacks relocated to cities outside the South.[69] The Final Report of the Committee on Negro Housing noted that "[t]he proportion of Negroes in the total population of New York increased from 1.9 in 1910 to 4.7 in 1930, in Cleveland from 1.5 to 7.9, in Philadelphia from 5.5 to 11.3, and in Detroit from 1.2 to 7.7.[70] Waves of bloody urban race riots soon followed:[71] The East St. Louis riot in 1917;[72] the Chicago riot and at least 24 other riots that occurred in what James Weldon Johnson called "the red summer" of 1919;[73] and the Tulsa riot of 1921.[74]

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[67] For instance, *Chicago Defender*, "Homes Owned by Race," (November 18, 1932).
[68] *Final Report, Committee on Negro Housing*, 260. See, for instance, Bernard J. Newman*, Housing of the City Negro*, (Philadelphia Pa: Whittier Center, Paper Number 2, 1915).
[69] See, for instance, Carole Marks Farwell*, We're Good and Gone--The Great Black Migration,* (Bloomington, Ind.: Indiana University Press, 1989),1. There was also growth in the urban African American population in the South.
[70] Final Report, Committee on Negro Housing, v.
[71] Gunnar Myrdal objected to the use of the term "riots" to describe these phenomena, preferring the terms "terrorization" or "massacre". He regarded them as a type of mass lynching. *An American Dilemma* (New York: Transaction, 1995), 566. Michael Jones Correa (2009) has argued that race riots during this period constituted a critical juncture in the development of urban policy. "Race Riots as Critical Junctures," *in The City in American Political Development*, ed. Richardson Dillworth, (New York: Routledge,2009), 179-199.
[72] WEB Dubois wrote a much-circulated description of this riot and the forces that produced it*. Darkwater: Voices from Within the Veil, (*New York: Harcourt Brace,1920), Chapter Four. The riot destroyed the wealthiest African American community in the country.
[73]On the wave of race riots in 1919, see Cameron McWhirter, *Red Summer: The Race Riots of 1919 and the Awakening of Black America*, (New York: Henry Holt, 2011). As I indicate below, the report on the Chicago riot, which resulted from an intensive investigation that included reports by noted sociologists, gave a great deal of attention to the role of access to home ownership and home financing in laying the groundwork for the disruption. Chicago Commission on Race Relations (1922). *The Negro in Chicago: A Study of Race Relations and a Race Riot*. Chicago: University of Chicago Press. See also William Tuttle, Jr., (1996). *Race Riot: Chicago in the Red Summer*

The Negro in Chicago, the 1921 report produced by the commission investigating the Chicago riot, drew clear connections between urban unrest and patterns of home ownership. This intensive investigation utilized then-cutting edge social science techniques such as survey research and neighborhood mapping and involved sociologists, city planning authorities and other academics at the University of Chicago and elsewhere. Interviews with bank officials, real estate agents and investors, and African American home buyers provided detailed information about the barriers to home ownership.

These barriers were critical because the investigation linked low rates of African American ownership to the increased likelihood of participation in riots and other disruptive activities. Franklin Frazier, a well-known African American sociologist who participated in the investigation noted that "[h]ome ownership is one index to social stability and good citizenship." He argued that the salutary effects of ownership could be read from the progressive rates of stabilization observed as one travelled from zones with low African American ownership rates to those with higher ones.[75] Ownership was also connected to better neighborhood conditions. The Report found that "In the outlying sections where the Negroes are chiefly home owners, the percentage of delinquency is about as low as for similar sections where there are no Negroes, and lower than contiguous sections with a relatively high per cent of foreign born as compared with

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of 1919, (Champaign, Ill.: University of Illinois Press, 1996) and Walter F. White, "N.A.A.C.P.—Chicago and Its Eight Reasons." *Crisis* 18 (1919) ,293–29.

[74] See for instance, Walter White), "The Eruption of Tulsa," *Nation* 112 (June 29, 1921): 909–910.

[75] *The Negro in Chicago*, 83. See also Franklin Frazier, The Negro Family, *Annals of the American Academy of Political and Social Sciences* 140 (1928): 44-51. Interestingly, Michael Jones Correa (n.d.), finds that white ownership increased the propensity for neighborhood riot activity. His analysis of census data on home ownership from 1910 and 1920 finds that in 6 cities in which riots occurred, "the higher the number of white homeowners, the greater the chances of an urban disturbance. For every 10,000 new white homeowners, there was a 2% increase in the chances of rioting." The logic, here, is that home owners have a higher financial investment in their neighborhoods and are less willing to move as the racial balance changes, so that they are more likely to use violence against African Americans. "American Riots: Structure, Institutions, History." Cambridge: Department of Government, Harvard University, nd.

native whites, and where practically no Negroes live."[76] As I indicate below, this report became a major source of information for the Committee on Negro Housing and Home Ownership.

Other contemporary accounts also connected the deficiencies in African American housing to participation in riots. For instance, the July 18, 1918 issue of the *Savings and Loan Association News* noted that the two major problems involving "negroes" were those of health- particularly their tendency to serve as a vector of diseases such as smallpox- and housing. The anonymous author opined that "Riots and bloodshed, such as have taken place in East St. Louis and other points would not have taken place if proper housing conditions and other facilities were offered to these people."[77]

A developing politics of active resistance to existing racial arrangements added another layer of concern. The NAACP, which had been founded in 1909, developed a growing program of litigation and protest against discriminatory laws and practices. Attempts to overturn practices that restricted African American housing and home ownership such as racial zoning laws[78] and, later, the use of restrictive covenants[79] were a main focus.[80] The New Negro Movement, founded in 1917, advocated for active opposition to existing patterns of race relations: "The New Negro: Hit Him, He Hits Back" warned one article that explained the movement.[81] The large number of African American soldiers returning from World War I often supported these initiatives , and

[76] *The Negro in Chicago*, 14.
[77] The American Building Association News, "The American Negroes," *Savings and Loan Association News* 28, no. 7, (July, 1918): 296.
[78] Christopher Silver, "The Racial Origins of Zoning in American Cities," in *Urban Planning and the African American Community: In the Shadows,* edited by June Manning Thomas and Marsha Ritzdorf, (New York: Sage, 1997), 23-42.
[79] Clement Vose (1968*). Caucasians Only: The Supreme Court, The NAACP and the Restrictive Covenant Cases*. Berkeley: University of California Press.
[80] For a general history, see Margaret Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement,* (*New* York: New Press,2010). See also Vose, *Caucasians*; and Stephen Grant Meyer, *As Long as They Don't Move in Next Door: Segregation and Racial Conflict in American Neighborhoods, (*New York: Rowan and Littlefield, 2001).
[81] Rollin Lind Hartt, "The New Negro: Hit Him, He Hits Back," *Independent* 15 January (1922): 59-60.

publically questioned why they were unable to experience the benefits of the democracy for which they had fought: “We return from fighting; we return fighting” wrote WEB Dubois in his much-discussed 1919 essay, “Returning Soldiers.[82] Noting that the Chicago riot, which was the first in which Blacks appeared to offer organized resistance to White violence, was centered in an area where almost 2,000 of the nearly 30,000 Black inhabitants had served in the War, NAACP Secretary Walter White argued in *Crisis* that “These men, with their new outlook on life, injected the same spirit of independence into their companions.”[83]

Beginning immediately after World War I and continuing throughout the period, political and popular discourse reiterated the theme that African Americans were fodder for Bolshevik organizers. “Reds Try to Stir Negroes to Revolt,” read one 1919 New York Times headline.[84]“Radical Propaganda among Negroes Growing;”[85] “Negroes of the World Prey of Agitators;”[86] warned others. In 1931, Walter White told members at the NAACP’s national convention that “the position of the Communists is in some respects a perfectly logical one. It is their conviction that, since the Negro is the most exploited and most oppressed group of America, he should be the most fertile field for their propaganda.”[87]

Concern about riots became conflated with fears about African American participation in a potential Bolshevik revolution.[88] In 1919, *The Wall Street Journal* opined that “Race riots seem to have for their genesis a Bolshevist, a Negro, and a gun.”[89] Media reports often characterized riots as “Negro uprisings” or revolts: African American participants in the 1919 riot in Elaine,

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[82] *Crisis* 18, 13.
[83] Walter F. White (1919), “N.A.A.C.P.—Chicago and Its Eight Reasons,” *Crisis* 18 (1919), 293–297.
[84] *New York Time*s, “Reds Try to Stir Negroes to Revolt,” (July 28, 1919).
[85] *New York Times,* “Radical Propaganda among Negroes Growing,” (October 5, 1919).
[86] *New York Times,* “Negroes of World Prey of Agitators,” (August 24, 1919).
[87] *New York Times*, “Warns of Red Appeal to Negroes Here,” (July 6, 1931).
[88] Walter Kerlin’s 1919 compilation of articles from the African American Press, for example, contained a Chapter on “The Negro, Labor Unions and Bolshevism,” *The Voice of the Negro*, (New York: EP Dutton).
[89] McWhirter*, Red Summer*, 160.

Arkansas were described by *The New York Times* as "insurgents.[90] As a population vulnerable to the appeals of anti-capitalist ideologies and to participation in spates of urban disorder, African Americans were a logical target population for state intervention to expand home ownership. As I demonstrate below, however, the decision to rely on a public-private model had important implications for this process.

Private Risks: Financing Home Ownership as Risky Business

The expansion of home ownership was intended to strengthen the institution of private property and the economic, social and political arrangements in which it was embedded. The Republican Campaign Textbook of 1920, which elaborated the Party's electoral platform, noted that the plank that addressed expanded ownership posed an implicit question: ": "[W]hether the National Government can render a service in its solution without departing from the established principles of federal action."[91] These principals required that expanded opportunities would be created within the boundaries of a private financial system that aimed to minimize the risks to lenders.

<u>General Risks</u>

"A risk decision," Guy Stuart notes in his study of risk and mortgage discrimination, "is a decision that has consequences, gains or losses in the future. The mortgage loan decision is a decision about the future. A lender makes the loan in the anticipation of the loan being repaid the full amount of principal, with interest, at some date in the future."[92] The role of risk assessment in shaping markets for homes took on new importance in the period after World War I. It was magnified by the changing economic meaning of home ownership and by changing methods of

[90] *New York Times*," Reds Try to Stir Negroes to Revolt," (July 8, 1919).
[91] *Republican Campaign Textbook* (Republican National Committee, 1920)
[92] Guy Stuart, *Discriminating Risk: The US Mortgage Lending Industry in the Twentieth Century*, (Ithaca, New York: Cornell University Press, 2003).

home finance. Beginning in this period, the worth of homes was increasingly evaluated in terms of market-value rather than simply in those of use-value.[93] Lending institutions and the real estate and appraisal industries had long used present property prices as a metric, but in the new housing environment, the home, as Herbert Hoover famously noted in 1922, had become an investment rather than simply a shelter.[94] In 1929, the National Association of Real Estate Boards (NAREB) defined market value as "that competitively established price which at that date represents the present worth of all the rights to future benefits arising from ownership."[95] Factors that affected the estimated future market value of homes became more relevant to financing decisions.

Metrics that aimed to measure risk became increasingly influential in structuring calculations of future market value during this period, and race played an important role in these calculations.[96] Appraisal manuals and city planning texts came to view the market values of city properties as "dynamic" markers that responded to changes in the racial, ethnic and economic character of neighborhoods. Social scientists and urban planners developed formal schemes to categorize stages of racial and ethnic "decay," facilitating the process of calculating the investment risk posed by particular locations at particular points in time.[97] Formal calculations of risk also became more important as institutional lenders such as banks, thrifts, and savings and loans became more significant sources of home finance during this period. The developing field

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[93] In using the term "market value", I follow the conventional definition of the value at which an asset would trade in a competitive auction setting- in other words, its value compared to that of other assets. In employing the term "use value," I mean a value set by the utility of consumption of the good.

[94] Herbert Hoover, "The Home as an Investment," in *The Better Homes in America Plan Book for Demonstration Week, October 9 to 14, 1922.*

[95] National Association of Real Estate Boards, "Standards of Appraisal Practice for Realtor Appraisers and Appraisal Committee Members of Real Estate Boards," *Annals of Real Estate Practice*, (Chicago: National Association of Real Estate Boards, 1929), 886.

[96] For an extended discussion of this development, see Stuart, *Discriminating Risk*, 29-69.

[97] E.W. Burgess, "Residential Segregation in American Cities," *The Annals of the American Academy of Political and Social Science* (1928): 105-115.

of actuarial science reinforced the idea that "objective" indicators could be used to quantify the relationship between race and risk.[98]

General Understandings

During the period between World War I and the election of Franklin Roosevelt, there were three principal options for home financing. Each of these options effectively aimed to shift the majority of future risk from lenders to purchasers;[99] each created limits on access to home ownership.[100]

Some homes were acquired by owner-financed arrangements called "land contracts" or "contracts for deed." These loans did not amortize: Sellers held title until the property was paid in full, so that buyers assumed all the risks that might arise from failure to meet terms. These conditional sales effectively left purchasers responsible for the maintenance and taxes on homes to which they did not hold title and in which they did not accumulate equity.[101] Because they were individual contracts, down payment requirements, monthly payments, loan duration and other terms were negotiated, but, since buyers had no equity, when they failed to pay the property could be resold for its original price.[102]

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[98] B.A. Wiggins, *Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881-1948* (Doctoral dissertation, University of Minnesota, 2013).

[99] N. Postel-Vinay finds that mortgage lending was indeed risky business during this period. She finds that, even with restrictive terms, banks with the largest share of mortgages had the highest failure rates. *Sitting Ducks: Banks, Mortgage Lending, and the Great Depression in the Chicago Area, 1923-193,* (Doctoral dissertation, The London School of Economics and Political Science, 2014).

[100] For an overview, see P. Fishback, Jonathan Rose and Kenneth Snowden (2013), "The Patchwork Mortgage Market in the 1920's," in *Well Worth Saving: How the New Deal Safeguarded Home Ownership* edited by Price V. Fishback, Jonathan Rose and Kenneth Snowden, (Chicago: University of Chicago Press, 2013) ,9-19; Barry Eichengreen, *Hall of Mirrors: The Great Depression, the Great Recession and the Uses and Mis-Uses of History* (New York: Oxford University Press, 2014), 451, n.29.

[101] These contracts were a major source of financing for African American properties and this situation continued to define the racialized realty market in the period after World War II. For a discussion of the role of contracts for deed in African American property acquisition in Chicago, see Beryl Satter, *Family Properties: Race, Real Estate and the Exploitation of Black Urban America* (New York: Macmillan, 2010).

[102] For a general discussion see G. S. Nelson, "Contract for Deed as a Mortgage: The Case for the Restatement Approach," BYU L. Rev., 1111 (1998).

Other homes were financed by building and loan associations,[103] which offered mortgages only to members who made deposits or paid subscriptions, sometimes offering terms that extended for as long as twelve years. These institutions managed lending risks in two ways. First, mortgages were given only to individuals who participated in a well- established, mutual relationship. Second, many loans used a share-accumulation model.[104] In this system, monthly payments on principal purchased shares in an institutional "sinking fund": These shares accumulated interest which, over time, became sufficient to pay the note in full. In this sense, the loan amortized, but if the buyer defaulted, both the shares and the home were lost. The buyer also assumed the risk that the institution could experience financial difficulties that reduced or voided the value of shares.

Other terms that characterized mortgages issued by banks and mutual lending associations were designed to shift virtually all risks of future loss onto purchasers.[105] Mortgages did not amortize, and had a typical duration of three to five years.[106] This, along with down payment requirements of 50% to 75% of total purchase price, increased the probability that the bank would not experience losses if the borrower defaulted.[107] These terms also meant that most purchasers could become home owners only by taking on second, or junior mortgages, which typically could finance another 25% of the total property value.[108] Loans that were not paid off by the end of the term required either a balloon payment of the remaining principle or

[103] These were also known as "thrifts".
[104] Fishback, Rose and Snowden, "The Patchwork," 14-15; Eichengren, *Hall of Mirrors*, 451, n.29.
[105] For state chartered banks, some of these rules were established by "safety and soundness" requirements that limited the percentage of funds that could be put at risk. See Adam Gordon, "The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks, "115 *Yale Law Journal* 186 (2005): 186-226.
[106] Although some building and loan mortgages extended up to 12 years.
[107] See, for instance, Louis Hyman, *Debtor Nation: The History of America in Red Ink* (Princeton: Princeton University Press, 2011).
[108] H. M. Bodfish and A.C. Bayless, (1928), "Costs and Encumbrance Ratios in a Highly Developed Real Estate Market," *The Journal of Land & Public Utility Economics* 4, no. 2 (1928): 125-138.

refinancing. The 1931 *Better Homes Manual* warned that "No mortgage on a home should be regarded as permanent, for if there is a shortage of mortgage money when it falls due there may be difficulty about renewing it."[109]

Banks also addressed risk and maintained liquidity by reselling mortgage notes, either singly or in bundles, to individuals, to institutional investors, such as insurance trusts, or to mortgage pools, which were formed when investors pooled funds to buy notes. The requirements of these secondary markets, which also sought to reduce the risk of default, therefore influenced the terms of the original mortgages.[110] The risk-management practices of mortgage lenders restricted the availability of mortgages. High down payment requirements and short mortgage durations meant that individuals typically purchased homes later in life, so that – even among Whites- there was a shortage of housing for younger working and lower-middle class families.[111] These risk management practices produced even more restrictions when the element of race was added.[112]

Racial Risk

The investigation of the Chicago riot of 1919 included an intensive investigation of real estate practices that impacted African American opportunities for ownership. In the light of its findings, this investigation concluded that "how the Negro is to be financed in his effort to improve his citizenship and home life through home ownership … becomes a matter of great concern".[113] This concern was generated by the way in which lending practices discriminated against these borrowers. Attributions about the potential risks arising from sales to African Americans were central to these disparities.

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109 James Gries, "Home Ownership and Home Financing." Better Homes Manual, 17.
110 Gordon, 2005.
111 Weiss, "Marketing and Financing Home Ownership."
112 P. Craig-Taylor, "To Be Free: Liberty, Citizenship, Property, and Race," *Harv. BlackLetter LJ*, 14 (1998): 45.
113 *The Negro in Chicago*, 83.

One set of attributions focused on the negative characteristics of African Americans as individual borrowers. First, they were more likely to be low wage-earners. The report noted that "The Negro population of America, due to factors in its history, constitutes at present a considerable proportion of the familiar low-income group families and, in like manner, has in its own composition a larger proportion of families of this level than is true of other groups of the population."[114] Their employment was also viewed as unstable. Most lenders believed "that if wage reductions become general they will fall most heavily unskilled workers and render difficult the meeting of payments by such Negroes, who constitute the great majority."[115]

Second, although the riot report found some disagreement on this point, African Americans were generally construed to be poor financial managers who did not prioritize basic necessities such as rent or mortgage payments. It cited a warning issued in the February 15, 1920 edition of the Property Owners Journal: "People who sell their property to Negroes and take first and second mortgages and promises to pay monthly sums do not know what risks they are taking in trying to collect the money."[116] It also found that lenders believed that African Americans tended to take on housing payments that they could not afford.[117] Finally, investigators found that African Americans were generally believed to be poor stewards of property, endangering the value of collateral. Although there was also some disagreement on this point, many lenders noted that African Americans neglected to maintain their properties, and that practices such as taking in boarders and large numbers of relatives accelerated depreciation.[118]

Risks also arose from difficulties with the resale of African American mortgage notes. The lenders surveyed agreed that insurance trusts and individual investors typically refused to

[114] Ibid., 222.
[115] Ibid., 223.
[116] Ibid., 128.
[117] Ibid., 219.
[118] Ibid., 119.

purchase these notes, so that the institution that held the original mortgage retained full liability for future losses.[119] The high levels of risk associated with financing African American homes drastically restricted the number of institutions that would provide mortgages to this group, and meant that higher levels of risk would be priced into any loans that were available. One lender explained "that the Negroes are usually allowed $1000 to the white man's $1500; only 35 per cent of the value of the property is loaned to the Negro, whereas 50 per cent is granted to whites. Maximum time of loan was five years for the White and three years for the Negro."[120]

Another set of risks increased lenders' reluctance to finance African American purchases. It was a settled understanding in the real estate, appraisal and financial sectors that the movement of African Americans into a neighborhood would cause lower property values and cause Whites to flee, endangering existing mortgages and reducing the future value of collateral.[121] Further, employing a racialized version of domino theory, city planners, social scientists and appraisal experts warned that once a neighborhood had "turned," African Americans were likely to spill over into surrounding areas, triggering further devaluation.[122] Institutions that financed White homes therefore had a vested interest in refusing service to African Americans.

Race and Risk at the Critical Juncture: The Conference on Homebuilding and Home Ownership

Public understandings about the risks arising from limited access to home ownership and private concerns about the risks inherent in home financing came together in 1931 at the President's Conference on Home Building and Home Ownership. In the short-term, the

[119] Ibid, 334.
[120] Ibid., 130.
[121] See, for instance, Frederick Babcock, *The Valuation of Real Estate, (*New York: McGraw Hill, 1932), 9; Homer Hoyt, *One Hundred Years of Land Values in Chicago* (Chicago: University of Chicago Press, 1933), 13.
[122] EW Burgess, "Residential Segregation in American Cities." *The Annals of the American Academy of Political and Social Science* (1928): 105-115; Robert Park provides a more theoretical and historically-informed discussion of this concept in "Succession, An Ecological Concept*," American Sociological Review* 1, no. 2 (1936): 171-179.

Conference was a response to the housing slump that followed the crash of 1929: Foreclosure rates rose, new construction for resale nearly ceased, and credit institutions drastically restricted or froze lending for home purchases.[123] These events were particularly problematic because the previous two decades had been devoted to a project that constructed home ownership as a linchpin of capitalist democracy and an indicator of full citizenship.

In the longer term, however, the Conference aimed to take advantage of the crisis to build support for the next phase of this project. This phase included the attempt to build concrete national policies and institutions to expand access to ownership while remaining within the constraints imposed by a private system for home finance that aimed to minimize the lenders' risks. The specific goal was to demonstrate broad-based support for Hoover's proposed FHLB, which would create a federal system of home loan banks patterned after existing programs such as the Farm Loan Bank system that had been created to encourage the provision of credit to agricultural producers. This institution would not replace direct lenders. Rather, Hoover noted in 1932, " the plan and method ….would give impulse, security and safety and lower interest rates to the already existing institutions, especially the mutual institutions in order that they may extend the fullest measure of credit to would-be home owners."[124]

To develop this support, the Conference incorporated — and expanded — Hoover's vision of an "associative state" that met policy goals by coordinating the efforts of private sector stakeholders.[125] It followed the plan that had organized the Division of Home Building and Home Ownership which Hoover had established as Secretary of Commerce. The Division, which

[123]David Wheelock (2008), "The Federal Response to Mortgage Distress: Lessons from the Great Depression," *Federal Reserve Bank of St. Louis Review*, Part 1 (2008): 137
[124] Letter, Herbert Hoover to C. Sherlock, Editor of the Ladies Home Journal, May 13, 1932. Hoover Library, Box 68, Folder on Home Ownership.
[125] E. W. Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an" Associative State, 1921-1928," *The Journal of American History* (1974): 116-140.

operated from 1921 to 1923, aimed to improve the efficiency of housing production and to encourage financial institutions to increase mortgage lending by involving representatives from labor, the construction industry, and the financial sector.[126] Acting as Secretary, Hoover also employed this strategy. For example, in 1923, he obtained an agreement from the construction industry that it would provide ongoing data on housing starts and costs in order to assist the government in economic forecasting.[127]

This vision was reflected both in the roster of thirty-one[128] committees that reported to the Conference and in the membership of those committees. Members were opinion leaders in the sectors represented by each committee: Many were industry executives; most were Republican loyalists. The eleven volumes that summarized committee reports provide insight into the range of concerns that were examined: Planning for Residential Districts; Home Finance and Taxation; Slums, Large Scale Housing and Decentralization; Home Ownership, Income and Types of Dwellings; House Design, Construction and Equipment; Farm and Village Housing; Home Repair and Remodeling; Household Management and Kitchens; Home-Making, Home Furnishing, and Information Services; Housing Objectives and Programs; and, finally, the report on Negro Housing.

The Committee on Negro Housing

As demonstrated by its level of funding, this Committee had more than symbolic importance: Secretary of Commerce Robert Lamont noted in his preface to its final report that the Committee had a larger than average membership and "somewhat larger funds at its disposal than most other committees save that on Farm and Village Housing which represented not one- tenth but two-

[126] Weiss, "Marketing and Financing Home Ownership."
[127] *New York Times*, "Hoover Approves Program to Stress Evils in Building" (June 1, 1923).
[128] Three of these committees were "correlating committees," which evaluated the findings of other committees to determine which should be included in final reports.

fifths of our population."[129] What accounts for the attention given to the housing issues of this tenth? The housing problems experienced by African Americans warranted a separate investigation for two principal reasons.

First, these problems were construed to be a vector for the spread of social and political unrest. In his Preface, Lamont allowed that the public risks included physical risks posed by the spread of disease due to poor sanitation and living conditions; and the threats posed by "dilapidation" or fire. However, he emphasized a more serious risk: "Exploitation or injustice…exert a poisonous influence upon general social attitudes and ideals, and may create habits of thought or action which spread the evil to other social groups or permeate the entire social fabric."[130] The most significant of these evils, as I have demonstrated above, were support for anti-capitalist ideologies and participation in urban riots.

Second, the issue of disparities in access to home ownership was a central concern of African American advocacy organizations and political leaders and therefore influenced African American support for White political candidates such as Hoover. The value of ownership was a concept that united radical racial activists, such as WEB Du Bois,[131] Marcus Garvey,[132] and leaders such as Booker T. Washington, who subscribed to the "racial elevation" ideology that connected home ownership to the improvement of African American culture.[133] In the period after World War I, the ties that bound African Americans to the Republican Party were

[129]Robert Lamont, "Preface," Report of the Committee on Negro Housing. Washington, DC: National Capital Press, (1931), xi.
[130] Ibid.
[131] See, for instance, W. E. B. Dubois (1906), "The Economic Future of the Negro," *Publications of the American Economic Association* 7, no. 1 (1906), 219-242.
[132] A. I. Seligman," City of American Dreams: A History of Home Ownership and Housing Reform in Chicago, 1871–1919, *"The Journal of American History* 93, no. 2 (2006): 557-558.
[133] See, for instance, A. Meier, *Negro Thought in America, 1880-1915: Racial Ideologies in the Age of Booker T. Washington*, (Ann Arbor: University of Michigan Press,1963).

loosening, and support for Hoover was particularly problematic.[134] Concerns about Hoover's racial program was another factor that united activists and traditionalists: WEB Du Bois, Walter White, and Robert R. Moton,[135] the conservative African American who served as the Republican advisor on racial issues all distrusted both Hoover's actions and his attitudes.[136]

The Committee on Negro Housing was intended to demonstrate that the President was giving serious attention to this issue on the eve of the 1932 election. In his statement announcing the Conference, he pointed out that a "committee of representative civic leaders of the Negro race are devoting attention to the problems of Negro housing."[137]

While the Committee was supervised by Robert Lamont, Secretary of Commerce, and Ray Lyman Wilbur, Secretary of the Interior, who were White, its members were African Americans in professions such as banking, insurance, higher education, and social work. The Chair, Nannie Helen Burroughs, who was frequently referred to as "the female Booker T. Washington" was a Republican activist[138] who had given speeches in support of Hoover's 1928 campaign. She was the author of a well-known essay, "Twelve Things the Negro Must Do for Himself," that placed, at Number One, "The Negro Must Learn To Put First Things First. The First Things Are: Education; Development of Character Traits; A Trade and Home Ownership. The Negro puts too much of his earning in clothes, in food, in show and in having what he calls "a good time…"[139]

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[134] George F. Garcia, "Herbert Hoover and the Issue of Race," The Annals of Iowa 44 (1979):507-515; Donald J. DeLisio. *Hoover, Blacks and Lilly Whites: A Study of Southern Strategies,* (Chapel Hill: University of North Carolina Press,2012).
[135] Robert Moton, Letter to Newton (April 18, 1930), Herbert Hoover.
Papers, Herbert Hoover Presidential Library, Parker File. Moton was Booker T. Washington's successor.
[136] Moton, interestingly, was appointed to the Commission as a member of one of the correlating committees.
[137] Herbert Hoover, "Statement Announcing the White House Conference on Home Building and Home Ownership," (September 15, 1931): American Presidency Project. [http://www.presidency.ucsb.edu/ws/?pid=22804] 5 May, 2014.
[138] Jo Freeman, *A Room at a Time: How Women Entered Party Politics* (New York: Rowan and Littlefield, 2002), 297.
[139] Nannie Helen Burroughs *Twelve Things the Negro Must Do for Himself and Twelve Things White People Must Stop Doing to the Negro*. (No place of publication/no publisher, 1900's/1968).

The "Introduction" to the Committee's findings, prepared by Conference Executive Secretary John Gries, suggested that a major revision was needed in the way in which housing issues were understood, noting that its findings "emphasize the present shortcomings of our individualistic theory of housing, and the failure which grows out of expecting each person in our highly complex industrial civilization to provide his own housing as best he may."[140] This failure, the report noted, was particularly significant for African Americans since "The experience of Negroes, in the mass, indicates quite definitely that the community cannot always be trusted to give, unaided by governmental authority, adequate attention to the weaker elements in its structure."[141] The message was clear: Action by the national state would be required to address the difficulties with African American housing.

The investigation conducted by the Committee catalogued these difficulties. The Report's full title noted that it examined "physical aspects, social and economic aspects, and home ownership and home financing." Relying on materials that included the report of the commission investigating the Chicago riot as well as on studies and surveys conducted in cities such as Baltimore, Buffalo, and Columbus, Ohio, the investigation provided an exhaustive account of the physical difficulties associated both with the properties and the neighborhoods available to African Americans, connecting these disparities to social problems such as poverty, crime and delinquency. At some points, this analysis did more than reiterate well-known tropes: The discussion of restrictive covenants, for example, noted that their use produced the congested, dilapidated, and crime-ridden neighborhoods that were used to justify the assertion that African

[140] *Final Report, Committee on Negro Housing*, vii
[141] Ibid, 51.

American residents lowered property values, requiring the use of covenants to protect property values.[142]

The Report's chapter on home ownership reiterated familiar themes about the salutary effects of home ownership both for individuals and for communities. However, based on case studies of African American home buyers and survey research it concluded that "special difficulties are encountered in the financing of Negro homes."[143] The following chapter elaborated these difficulties, demonstrating the problem with expanding access to ownership within the constraints created by the existing system for home finance.[144]

Chapter Five, "Financing of Negro Home Buying," addressed racial risk in each of its three sections.[145] The first section, "Elements of Risk in Financing Negro Properties" focused on the problems with the collateral value of homes that were available to African Americans, noting that these homes were generally in poor condition, that lenders believed that the presence of African Americans lowered property values, that the isolation of these districts meant that property values were unlikely to be driven up by future development, and that the secondary market refused to purchase these notes. The next section, "Mortgages on Negro Properties" commented that the "problem of loans for Negroes, on both first and second mortgages, is bound up with the economics of the situation."[146]

These economic circumstances exacerbated the degree of racial risk to involved in lending to African Americans since "Their income is low, as has been pointed out in another section, their securities and savings meager, and their chances of meeting regular monthly payments

[142] *Final Report of the Committee on Negro Housing*, 30-48.
[143] Ibid, 91.
[144] Ibid, 92.
[145] Ibid, 92-93.
[146] Ibid, 93.

contingent upon their status as marginal workers."[147] This led either to the outright refusal to issue loans or to the terms that raised interest and fees and in order to price in these risks.[148] Therefore, presumably because they were better acquainted with the difficulties of these consumers, it recommended that African American insurance companies and savings and loans would be better positioned to provide finance. The final section, "Negroes as Credit Risks," returned to theme of the economic difficulties experienced by African Americans as employees, citing both the widespread belief that these individuals were poor credit risks and studies that contradicted this belief.

The Committee offered no recommendations for improving the way in which mainstream financial institutions or the larger lending system could be adjusted to expand access for African Americans. The only one of the sixteen recommendations that dealt with ownership was the suggestion that African American building and loan societies "be encouraged."[149] This recommendation, which essentially accepted that White financial institutions would continue to practice racial discrimination, took account of the growth of the African American savings and loan industry, and its increased importance in funding African American ownership during this period,[150] but failed to consider either the small relative size of this sector in relation to the larger home finance industry or the complex ways in which attributions about racial risks and problems of racial violence shaped the environment within which they operated. Charles Abrams provides an example of these complicated constraints. He notes that one problem that confronted these savings and loans was the possibility that properties owned by African Americans would be

[147] Ibid, 93-94.
[148] Ibid, 93.
[149] Ibid, 115.
[150] David Mason, "Home Ownership is Colorblind: The Role of African American Savings and Loans in Home Finance, 1880-1980," *Business and Economic History* 8 (2010) [http://www.thebhc.org/sites/default/files/mason.pdf]. May, 2014; and *From Buildings and Loans to Bail-Outs: A History of the American Savings and Loan Industry, 1831-1995*. New York: Cambridge University Press, 2009.

subject to arson by angry Whites, voiding the value of the collateral. These fears made fire insurance a critical factor in financing decisions, but the possibility of arson or other violence-in addition to the general actuarial attributions about racial risk- led home insurance companies to refuse coverage on these properties.[151]

The final report of the Committee on Negro Housing followed a familiar pattern. It reiterated the value of African American home ownership as a means of reducing the risk of social disorder. It also identified without arguing for major changes in – the more obvious constraints imposed by existing methods of home finance.

In the final report of the Conference on Home Building and Home Ownership, the issue of race was addressed only in relation to the report of the Committee on Negro Housing: Even recommendations for slum clearance avoided any discussion of this issue. Recommendations regarding African American ownership were entirely absent from the final report. The Negro Committee's 270-page volume was reduced to the following short paragraph that failed to address the issue of home ownership or of the unequal opportunities created by the practices of the financial sector: "This committee recommends zoning when not applied for racial segregation, the enforcement of housing, building and plumbing codes, the removal of legislation restrictive of Negro residence in desirable districts, and the establishment of minimum standards of housing for tenants on plantations. It recommends that a citizen's committee to promote law and law enforcement in the housing field and to render housing assistance to Negro tenants be organized. The committee states that new legislation is not needed by negroes but rather protection against discrimination application of the basic laws now existing."[152]

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[151] "Bias in the Use of Governmental Regulatory Powers," *The University of Chicago Law Review* 20, no. 3 (1953): 414-425.
[152] Ibid, 94.

Despite these disappointing results, the involvement of African Americans produced initial support for the project by some African American media. Just after its creation, for example, *Atlanta Daily World*, opined that "the creation of the federal home loan bank board and the throwing of the wheels of the home loan Bank (sic) under federal auspices will prove a tremendous boon to the many thousands of Negro home and property owners because it underlying objective is to help the smaller man in his dire needs…" These small property owners, the article incorrectly supposed, would find it easier to refinance their homes under the new system.[153]

Conclusion

It is often tempting to read history backward, constructing a developmental trajectory that moves in a direct line from present conditions to what we take to be their historical origins. In order to draw such a straight line, however, it is necessary to ignore switchbacks, false starts and historical conjunctures. The history of race and home ownership in America seems to invite this sort of retrospective determinism. After all, the disparity between African American and White home ownership rates has not narrowed by any appreciable amount since data became available, and the racialized elements of programs such as the HOLC, the FHA and the VA in the period after World War II are easily identified. The discriminatory characteristics of these programs seem to connect easily to other elements of twentieth century racial history such as Jim Crow laws, lynchings, and episodes of violent opposition to the integration of neighborhoods and of schools.

However, by beginning the chronology of national policies to expand home ownership at an earlier point and by focusing new attention on an overlooked episode in their development, it is possible both to create a more complex and more accurate understanding. This episode draws

[153] T.W. Anderson, ''Federal Home Loan Bank to Aid Home Owners," *Pittsburgh Courier* (August 23, 1932).

attention to another pattern that has characterized the development of national policies to extend home ownership. State efforts to reduce the ownership disparities that confronted African Americans and other low-income individuals have never been entirely absent: In many cases, they have been instituted in the wake of riots or other disruptions.

These programs have been largely ineffective. Examples of programs that attempted to accomplish these goals include Section 235 of the Housing Act of 1968, which subsidized house payments for qualified low income individuals, and the Community Reinvestment Act of 1977, which required depository institutions to meet the needs of borrowers in the communities in which they were located. They were justified by the expectation that home ownership would provide African Americans with a bricks and mortar interest in their communities and in the stability of the larger political and social order. In the long term, this expectation has not been fulfilled: Since they required the co-operation of a private sphere that was pervaded by specific understandings about racial risk, they produced only brief reductions in racial ownership disparities.

CHAPTER TWO

Property as Theft? Restrictive Covenants, Racialized Property Rights,

and the Uncertain Legacy of *Shelley v. Kraemer*[1]

In 1942, the Supreme Court of Oklahoma decided the case of *Lyon v. Wallen*.[2] The case involved the following set of facts. The owners of a group of residential properties had signed a racial restrictive covenant requiring that, for a term of ninety-nine years, neither they nor their heirs would sell to African Americans.[3] Fifteen years later, one owner sold two lots to an African American purchaser. The purchaser and the seller were sued by other owners and the original court held that the covenant was enforceable and voided the deeds granted to the purchaser. This finding was upheld by the Oklahoma Supreme Court. Commenting on the case, DO McGoveny, a noted legal opponent of covenants, pointed out that the holding was particularly significant in that it placed additional penalties on the African American purchaser: "[T]he court in effect awarded punitive damages against the Negro by giving the plaintiff a judgment for costs and attorney's fees, making the judgment a lien on the lots, a lien prior to that given the Negro for the purchase price. Thus the Negro was deprived of his property from a

[1] The title is in debt to Pierre-Joseph Proudhon's 1840 statement that "property is theft." This is found in his volume *What Is Property? An Inquiry into the Principle of Right and Government*.
[2] *Lyon v. Wallen*, 191 Okla 567, 133 PL (2d) 555, 1915 OK 415.
[3] Restrictive covenants were private contracts which "ran with the land," binding the original White owners who were signatories and their heirs or subsequent purchasers not to sell the property to Blacks. Covenants could be initiated by individuals, by neighborhood associations and by suburban developers, and were required or "recommended" by the FHA, which – until 1950 - linked their use to favorable action on mortgage applications and set out the provisions for acceptable covenants in each edition of its Underwriting Manual.

willing seller and mulcted for it." [4] By applying punitive damages, the Court branded the purchaser as a bad actor: his attempt to acquire property, although it followed normal purchase procedures, was treated as unlawful acquisition and punished both by the loss of that property and by additional financial sanctions. The African American purchaser's attempt to acquire real property was effectively construed to be a kind of theft.

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In her seminal article "Whiteness as Property," Cheryl Harris points out that "rights in property are contingent on, intertwined with, and conflated with race."[5] This is nowhere more evident than in the racially differentiated constructions of real property rights laid out in litigation around restrictive covenants prior to *Shelley v. Kraemer*.[6] Both decisions to uphold and decisions to overturn covenants construed Black attempts to acquire real property in primarily White neighborhoods as threats to White property rights, effectively stealing actual and potential value from White owners and reducing the investment value of "Whiteness."[7]

The racialized theories of property rights implicit in these decisions were codified in official statements of property law, "coloring" common law understandings about the alienation of property. A critical move in this process came in 1944, when the American Law Institute issued a revised Restatement of Property. ALI restatements were authoritative statements of current

[4]D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional," 33 *Cal. L. Rev*. 5 (1945). McGovney was an early and influential opponent of restrictive covenants. See also Clement Vose, *Caucasians Only: The Supreme Court, the NAACP and the Restrictive Covenant Cases, (*Berkeley: University of California Press, 1967).

[5] C. I. Harris, "Whiteness as Property, "106 *Harvard Law Review* 1707 (1992).

[6] By "real property" rights, I mean rights to land and to buildings attached to this land. Rights to other forms of property, such as intellectual property, but the notion of racialized property rights has not, to my knowledge, been extensively explored in the context of other categories. For an interesting exception, see D. D. Troutt, "Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription,"*38 UC Davis Law Review* 1141 (2004).

[7] G. Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics,* (Philadelphia: Temple University Press, 2006); and "The Possessive Investment in Whiteness: Racialized Social Democracy and the 'White 'Problem in American Studies," *American Quarterly,* 47, no. 3 (1995): 369-387; Derrick Bell, "Property Rights in Whiteness: Their Legal Legacy and Economic Costs," in *Critical Race Theory: The Cutting Edge*, edited by Richard Delgado and Jean Stefancic, 71-79 (Philadelphia: Temple University Press, 2000).

legal understandings about best legal practices that aimed to harmonize developing case law with common law.[8] The 1944 Restatement, which was written a by a committee composed of well-known judges, attorneys and legal scholars, attempted to provide an authoritative resolution to an apparent contradiction between legal understandings about restraints on owners' rights to alienate property and the use of restrictive covenants.[9]

The heart of the contradiction was this: Both in terms of common law and in terms of settled case law, a critical element of ownership was the right of owners to dispose of – or alienate-property as they saw fit. Exceptions were warranted only if they met compelling state interests. The Restatement took account of the developing line of case law that found restrictive covenants to be warranted by the compelling need to maintain property values and to alleviate social tensions: It based its restatement of existing doctrine on the results of court decisions in cases that challenged restrictive covenants. These decisions incorporated an economic logic that connected race, property ownership and financial risk. This risk took two forms: First, Black attempts to acquire property posed elevated levels of risk for lenders because they lowered both the present and future value of financed real estate; second, these attempts posed increased levels of risk for White property owners, reducing the value of proximate White owned properties.[10] The analysis presented here excavates the economic logic implicit in the ALI's Restatement. I analyze the line of reasoning incorporated in the developing line of case law on which the ALI

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[8] American Law Institute*, Restatement of the Law of Property*, 8th Edition (American Law Institute Publishers, 1944).
[9] The ALI Committee was composed of Richard R. Powell, Columbia University; A. James Casner, Harvard University; Julian S. Bush, New York University; Harry A. Bigelow, University of Chicago; Everett Fraser, University of Minnesota; J. Warren Madden, United State Court of Claims; Oliver S. Rundell, University of Wisconsin; Lewis M. Simes, University of Michigan; Henry Upson Sims, Birmingham, Alabama; and William Draper Lewis of the ALI.
[10] Ibid. See also C. Rose, (2013). "Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants," in *Powell on Real Property*, edited by Michael Allan Wolf and Richard R. Powell, 13-21 (LexisNexis, 2013); and Leland B. Ware, "Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases," 67 Wash. *U. L. Q*. 737 (1989). C. Vose*, Caucasians*, notes at pages 20-21 that not all state courts accepted the *Resettlement* interpretation, pointing out that courts in California and West Virginia had refused to enforce covenants on the ground that they constituted unlawful restraints on alienation.

restatement was based. The ALI Restatement cited cases that incorporated five principal lines of reasoning about the way in which race affected property rights.[11]

One line of case law cited in the ALI Restatement indicated that covenants were justified because the presence of African Americans reduced the value of property for Whites by affecting their right to "peaceful enjoyment" of their property. The Restatement specifically referenced the issues presented in *Wyatt v. Adair*,[12] a 1926 Alabama case. Here, the court overturned and remanded a lower-court decision holding that a landlord had not erred by renting a home to an African American family who would share toilet facilities with a white family, despite an implied covenant based on common understandings in the local real estate market that the races would not share facilities. *Wyatt*'s holding was based on the premise that a landlord had the right, as an individual, to insert contract provisions that would promote the "peaceful enjoyment" of his premises, even when these provisions created racially disparate property rights. The shared use of toilets by African Americans, this decision held, prevented "peaceful enjoyment" by White tenants.

A second line of case law arising from the cases cited in the Restatement established that the proximity of African Americans posed specific risks to the monetary value of properties. *Chandler v. Zeigler*,[13] a 1930 Colorado case, arose from a situation in which a seller had falsely represented that a property was protected by a covenant. The seller argued both that the insertion of an actual covenant would have violated common law understandings about the owners' right to alienate property, and that the lack of a covenant reduced the value of his property. The decision held that the insertion of a covenant would not have constituted unacceptable alienation. More significantly, however, the court found that the seller would be liable for the monetary

[11] The *Restatement* also cited two Missouri cases that were not reported.
[12] 215 Ala 323 (1926)
[13] 88 Colo 1, 291 Pac 822 (1930).

difference between the value of the lot had it been protected by a covenant and its lower value as an unprotected property. Further, the court set a monetary value on this loss. In its decision, the court accepted the testimony of a local real estate agent, who estimated that the difference was 1,000. By assessing this liability, the court in effect found that the seller had stolen this amount from the purchaser.

A third line of reasoning made it clear that the sole legitimate purpose of restrictive covenants was to benefit the interests of White property owners. The ALI restatement referenced *Clark v. Vaughan*,[14] a 1930 Kansas case in which a covenant was overturned because changed conditions in the neighborhood, including the sale of two "formerly Caucasian" churches to African Americans and declining employment opportunities for neighborhood Whites, would make enforcement of the covenant "very burdensome and inequitable to … [white] defendants." The decision implicitly incorporated the idea that changes in the racial character of the neighborhood might make it impossible to find White purchasers, so that sales to African Americans would provide their only option for receiving value for their property.

The Restatement also relied on cases that addressed the issue of liability for breaches of covenants and the justification of restrictive covenants as a permissible use of public policy. A fourth line of reasoning, incorporated in the case of *Lyons v. Wallen,*[15] which opened this paper, addressed the issue of liability for breaches of covenants. Here, the African American purchaser rather than the White seller, was found to be liable for damages arising from the breach. A fifth issue was addressed in *Queensborough Land Co. v. Cazeaux* (1915*),*[16] which upheld a Louisiana

[14] 131 Kan 438, 292 Pac 783 (1930).
[15] *Porter v. Pryor* and SW 2nd 529 (Kansas City Court of App, Mo, 1938, not officially reported) and *Thornhill v. Herdt* 164 130 SW 2nd 175 (Mo App 1939, not officially reported).
[16] 136 La. 724, 67 So. 641 (1915).

covenant on the ground that the restriction on the owner's right to dispose of property was permissible because it served legitimate ends of public policy.

As the cases included in the ALI restatement demonstrate, the logic that construed African American attempts to acquire property as a kind of theft can be found in decisions both to uphold and to overturn restrictive covenants: In each case, decisions turned on whether action on the covenant would increase value to White owners. This paper lays out the moves that harmonized this logic with common law understandings about the alienation of property. It demonstrates that this line of reasoning was not severed by the *Shelley* decision, and that the economic logic used to rationalize decisions under restrictive covenants survived to perpetuate policies and institutions that reproduced racially differentiated understandings of property rights.

The premises that constructed the economic logic connecting race to risk were not simply derived from social prejudice; rather, they were rationalized by academic studies in disciplines and professions that aimed to apply scientific principles to the study and management of racial issues.[17] Assumptions about the connection between race and risk guided the practices of real estate agents and developers,[18] mortgage lenders,[19] appraisers, and providers of complementary goods such as home owners' insurance.[20] Chapter VII of Frederick Babcock's classic 1932 text, *The Valuation of Real Estate*, was, for example, devoted to a discussion of "Influence of Social and Racial Factors on Value." He noted that that, while small degrees of neighborhood heterogeneity did not produce rapid declines in value, "[t]here is one difference in people,

[17] B. A. Wiggins, *Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881-1948,* (Doctoral dissertation, University of Minnesota, 2013).
[18] See, for instance, Rose Helper, *Racial Policies and Practices of Real Estate Brokers,* (Minneapolis: University of Minnesota Press, 1969).
[19] Prior to the advent of the FHA in 1948, home mortgages were provided by a patchwork of lenders that included mortgage pools, insurance trusts, private investors, and savings and loans.
[20] Amanda Tillotson, "Race, Risk and Real Estate: The Federal Housing Administration and Black Homeownership in the Post World War II Home Ownership State," *DePaul Journal for Social Justice* 8, no. 1 (2015): 25-52.

namely race, which results in a very rapid decline."[21] Other contemporary studies of land values and valuation practices employed a similar logic. In 1933, Homer Hoyt's *One Hundred Years of Land Values in Chicago* noted that "land values in areas occupied by certain racial and national groups are invariably low because of the lower rents that these groups pay their greater deteriorating effects on property, and white people's unwillingness to live near them."[22]

As federal programs to promote home ownership by underwriting mortgages were created, they employed this logic to establish methods of property evaluation that would reduce their exposure to financial risk. These methods created "objective" metrics to capture racialized attributions that connected race, risk and property. The Homeowners Loan Corporation, established in 1933 to refinance mortgages in danger of foreclosure, created a grid system for the assessment of housing values that ranked neighborhoods on a list of measures that included "racial homogeneity", and produced "residential security maps" that excluded many Black and virtually all racially- mixed neighborhoods.[23] The FHA, founded in 1934 to provide federal guarantees for newly-originated mortgages, incorporated and extended this evaluation strategy. FHA underwriting manuals and Agency documents defined the Agency's principal mission as one of managing the inevitable risks arising from mortgage lending. The 1936 Underwriting Manual noted, for example, that "(m)ortgage risk is created every time a mortgage is made. It lies in the future. The risk continues to exist throughout the life of the loan, although the degree

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[21] Frederick Babcock, The *Valuation of Real Estate* (New York: McGraw Hill,1932), 9.

[22] Homer Hoyt, *One Hundred Years of Land Values in Chicago*, (Chicago: University of Chicago Press,1933), 13.

[23] Amy Hillier's examination of HOLC origination records from Philadelphia finds that the HOLC in fact refinanced a substantial number of mortgages in neighborhoods that were already primarily Black. Amy Hillier, "Residential Security Maps and Neighborhood Appraisals: The Home Owners Loan Corporation and the Case of Philadelphia," Journal *of Social Science History* 29, no. 2(2005): 207-233. See also L. L. Woods, "The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Lending Discrimination, 1921–1950," *Journal of Urban History* 38, no.1 (2012): 1036-1059.

of risk may change."[24] Incorporating existing understandings about the negative effects of Black residence on property values, the Agency sought to reduce its risks by creating a rating system that prioritized racial homogeneity, and viewed the movement of Blacks into an area as a "special" hazard and an "adverse circumstance."[25] FHA property evaluators were required not only to determine the racial makeup of existing neighborhoods, but to survey surrounding neighborhoods for evidence of "inharmonious" racial groups that might migrate to proximate properties.[26] In order to address this possibility, successive editions of the Agency's underwriting manual recommended the use of restrictive covenants, noting that successful mortgage applications would demonstrate that both the property under consideration and surrounding properties were covered by these instruments.[27]

The Legal Development of Racial Containment: Racial Zoning to Restrictive Covenants

Peggy Pascoe points out that "the legal system does more than just reflect social and scientific ideas about race; it also produces and reproduces them."[28] In litigation around restrictive covenants, forms, language, and conventions that structured common law understandings of property rights and legal precedents were reworked and appropriated to serve racial ends. Similarly, ideas about race produced and reproduced particular understandings of property rights. By embedding the theories on which these practices rested in the legal order, court decisions legitimated and reproduced a racialized economic logic that survived *Shelley*.

[24] Federal Housing Administration*, Underwriting and Valuation Procedure Under Title II of the National Housing Act., S. 207* (Washington DC: US Government Printing Office, 1936).
[25] James Loewen*, Sundown Towns: A Hidden Dimension of American Racism*, (Touchstone, 2005).
[26] Amanda Tillotson, "Race, Risk."
[27] Federal Housing Administration Underwriting and Valuation Procedure Under Title II of the National Housing Act (1936), 980 (3) (f). See also New *York Times* "Warning to Buyers: Deeds Should Be Examined for Restrictive Covenants," (November 13, 1938).
[28] Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *The Journal of American History* (1996): 44-69. The term "racial containment" was coined by Arnold Hirsch, "Containment on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War," *Journal of Urban History* 26, no. 2 (2000): 158-169.

Between 1910 and 1930, 1.6 million African Americans migrated from the rural south to cities in northern, Midwestern, western and Middle Atlantic states.[29] The influx of African American residents, which contemporary accounts often described as an "invasion"[30] unsettled existing housing patterns in which poor and middle-class whites often lived in racially mixed neighborhoods. [31] As urban African American populations grew, Whites pressed for legislation to restrict these migrants to particular geographic areas.[32] In addition to raising concerns about the increased social interaction of African Americans and Whites in increasingly crowded urban areas, proponents of racial zoning argued that concentrations of African Americans created negative externalities such as high adult and juvenile delinquency rates and poorly maintained properties, leading to lower property values and making neighborhoods uninhabitable for most Whites.[33] In 1910, Baltimore enacted the first racial zoning ordinance. The practice spread rapidly to Southern cities and, as urban African American populations grew, expanded to cities in other areas.[34]

Legal challenges, many supported by the newly-formed NAACP,[35] began almost immediately. A number of these challenges succeeded on the ground that zoning laws that failed to "grandfather" in previous land owners were unlawful taking. In 1915, however, the Virginia

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[29] Isabel Wilkerson, *The Warmth of Other Suns*, (New York: Vintage, 2011).
[30] See, for instance, Ernest Burgess, "Residential Segregation in American Cities," *The Annals of the American Academy of Political and Social Science* (1928): 105-115.
[31] Roger L. Rice, "Residential segregation by Law, 1910-1917,"*The Journal of Southern History* 34, no:2 (1968):179-199. The formal segregation of services, such as education, had a much longer history. In 1850, for example, a Black parent sued to allow his child access to a white public school in the family's neighborhood. See *Roberts v. Boston*, 59 Mass. 198.
[32] Racial zoning was also used to restrict the residence of other racial and ethnic groups. In California, for example, cities such as San Francisco created Chinese zones.
[33] See, for instance, Robert Park, "Community Organization and Juvenile Delinquency," in The *City: Suggestions for Investigation of Human Behavior in the Urban Environment* edited by Robert E. Park and Ernest W. Burgess, 99-112 (Chicago: University of Chicago Press, 1925/1967).
[34] C. Silver, "The Racial Origins of Zoning in American Cities" in *Urban Planning and the African American Community: In the Shadows,* edited by *June* Manning Thomas and Marsha Ritzdorf, 23-42 (New York: Sage, 1997). C. Silver, "The Racial Origins of Zoning: Southern Cities from 1910–40," Planning *Perspective* 6, no. 2 (1991), 189-205.
[35] The NAACP was organized in 1909.

Supreme Court decided *Hopkins v. Richmond*,[36] which considered a Richmond, Virginia statute that included a “grandfather” provision. The decision was based on cases involving two plaintiffs, one White and one African American. Each had moved into rental housing in a district predominantly occupied by persons not of their race. The moves occurred after passage of zoning legislation. The court held that individuals who had lived in the area prior to racial restrictions would not have been bound by the new regulation, but that individuals who moved in subsequent to regulation were bound. Racial zoning was construed to be a legitimate use of city police powers in order to maintain property values and reduce social tension, and, the court held, did not constitute unlawful taking.[37]

However, in 1917, the Supreme Court considered *Buchanan v. Warley*,[38] which challenged a racial zoning ordinance in Louisville, Kentucky. Describing this ordinance, the Court laid out the economic and social logic behind racial residential restriction: “It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.”[39]

The Court held that this logic did not justify the use of the state’s police powers. *Buchanan* specifically addressed and rejected the issue of racialized property rights, along with the economic and sociological logic incorporated by legislation of this sort.[40] "Colored persons,”

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[36] *Hopkins et al. v. City of Richmond.* (No. 1.) Coleman v. Town of Ashland. (No. 2.) September 9, 1915. [86 S. E. 139.]

[37] The decision also implicitly called into question the finding in Plessy v. Ferguson that “reasonable” racial discrimination was an appropriate use of police power. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[38] *Buchanan v. Warley* 245 US 60 (1917)

[39] Michael Klarman notes that Buchanan was an outlier in the racial jurisprudence of the Progressive era. “Race and the Court in the Progressive Era,” 51 *Vanderbilt Law Review* 883 (1998).

[40] Ely argues that Buchanan rejected ‘sociological’ logic in favor of an emphasis on property rights. J. W. Ely Jr., “Reflections on *Buchanan v. Warley*, Property Rights, and Race,” 51 *Vanderbilt Law Review* 953 (1998). See also

the decision held, "are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color." *Buchanan* also addressed and rejected the notion that restrictions on African American occupancy could be justified as a means of protecting White property values. Justice Day noted that reduced property values could also be caused by "undesirable white neighbors" or by proximity to property "put to disagreeable though lawful uses."[41]

Following the *Buchanan* decision, the use of racial restrictive covenants became increasingly common in urban and suburban areas.[42] In their 1947 study of restrictive racial covenants in Chicago and St. Louis, Long and Johnson found that the period between 1925 and 1935 showed the greatest growth in the percentage of properties covered by restrictive covenants and that the increase in covenants tracked the growth of the African American population.[43] The details of these covenants initially varied: Instruments drafted by particular developers and put forward in particular geographic areas differed in the specific mechanisms that structured the agreements. Some, for example, set a limit on the term of the covenant — 99 years was a common duration. Others required that a specific number of neighborhood property holders consent before the agreement was activated.[44]

D. Bernstein, "Philip Sober Controlling Philip drunk: Buchanan v. Warley in Historical Perspective," 51 *Vanderbilt Law Review* 4 (1998); Richard Epstein, "Lest we forget: *Buchanan v. Warley* and Constitutional Jurisprudence of the 'Progressive Era," 51 *Vanderbilt Law Review* 787 (1998) and "Notice and Freedom of Contract in the Law of Servitudes," 55 *Southern California Law Review* 1353 (1981).

[41] *Buchanan* has been criticized on the ground that the decision hinged on the property interest of a White man and avoided consideration of the farther-reaching implications of the equal protection requirements of the 14th amendment. "Race Segregation Ordinance Invalid," Note, *Harvard Law Review* XXXI (1918): 475-479.

[42] Michael Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115, no. 4 (2000), 541-568.

[43] Herman Long and Charles Johnson*, People v. Property: Race Restrictive Covenants in Housing* (Nashville: Fisk University Press, 1947). In this study of restrictive racial covenants in Chicago and St. Louis, Long and Johnson find that the period between 1925 and 1935 showed the greatest growth in the percentage of properties covered by restrictive covenants and that the increase in covenants tracked the growth of the African population.

[44] Long and Johnson, ibid., p. 11, provide a chart that categorizes the various requirements of covenants used in Chicago and St. Louis.

From its inception, however, the FHA mandated the inclusion of restrictive covenants as a requirement for a successful mortgage application and established minimum criteria for acceptable covenants. This requirement embedded the use of covenants in the national mortgage market which the FHA created. The 1935 edition of its *Underwriting Manual* contained a "model" covenant which read that "no persons of any race other than (race to be inserted] shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race with an owner or tenant."[45] The wording was intended to give the illusion of racial equality, since the "blank" could be filled by entering the word White as well as the word African American, and to give the impression that covenants were designed to prevent what the Manual called "the infiltration of inharmonious racial groups" into settled neighborhoods rather than to infringe on African American property rights. Offending occupants, of course, were almost invariably African American, and sellers White.[46]

The use of restrictive covenants was repeatedly challenged in the courts. During the period from 1926 to 1947, the NAACP and civil rights lawyers tried (and generally lost) hundreds of cases challenging covenants.[47] Although, as I demonstrate below, racialized interpretations of property rights were central to court decisions around restrictive covenants, *Shelley v. Kraemer*, the final case in this line of litigation sidestepped issues of race and property rights. *Shelley* was decided on the ground that, while discriminatory covenants were not unconstitutional as

[45] *Federal Housing Administration Underwriting Manual* (1935), Section 310, 315, 330.

[46] The distinction between occupancy and purchase was an important one. A number of decisions held that Blacks could own, but not inhabit, properties encumbered with restricted covenants. This doctrine provided the illusion of racial economic equity, since it suggested that Blacks could invest in any property, although as Martin (1933) noted, "probably very few Negroes invest in property than can be used only by white people."
Arthur T. Martin, "Segregation of the Residences of Negroes," *Michigan Law Review* 32 (1934): 721-42, 737.Cited in Brooks and Rose, 61. For a case in which only use and occupancy were prohibited, see Stratton v. Cornelius, 277 P. 893 (Cal. App. 1929). For a case in which both were forbidden, see Mays v. Burgess, 147 F.2d 869 (1945).

[47] Clement Vose, *Caucasians Only* and "NAACP Strategy in the Restrictive Covenants Court Cases," 6 *Western Reserve Law Review* 101 (1994). This effort ramped up after the founding of the NAACP Legal Defense fund in 1940, under the leadership of Thurgood Marshall.

individual contracts, state enforcement of these contracts violated the 14th amendment.[48] In contrast to the *Buchanan* decision, *Shelley* ignored the economic logic that informed racialized interpretations of property rights.

Existing analyses of restrictive covenants rarely contextualize them in terms of the longer term development of racialized property rights. Legal analyses often focus on difficulties with the specific structure of covenants- as, for example, on the requirement in many neighborhood covenants that a specified percentage of residents sign on before they were activated, or on the incorporation of term limits to address issues posed by legal conventions such as the Rule against Perpetuities.[49] Discussions of covenants and of litigation around covenants that elide or omit connections to the longer term development of property rights miss a fundamental connection. As Justice Brandeis noted in his 1918 dissent in *International News Service v. Associated Press*: "“[a]n essential element of individual property is the legal right to exclude others from enjoying it.”[50] This formulation has specific implications for the study of restrictive covenants: Court decisions that rationalize racial exclusions from ownership invariably create and legitimate racialized understandings of property rights. The connection between property and citizenship in the American and British tradition makes the racialization of property rights particularly significant. The right to acquire and occupy real property had been closely connected to the idea

[48] Shelley over-turned the doctrine laid out in *Corrigan v. Buckley* (271 US 323, 1926) which held that covenants were enforceable on the basis of individual freedom to make contracts concerning one’s property. For a detailed summary and analysis of *Shelley* see Michael F. Higgenbottam, *Race Law: Cases, Questions and Commentary*, (Durham, NC: Carolina Academic Press,2001).
[49] The rule against perpetuities holds that properties cannot be alienated for an unlimited period of time. For a discussion of technical problems with covenants, see Scovel Richardson, “Some of the Defenses Available in Restrictive Covenant Suits against Colored American Citizens,” 3 *National Bar Journal* 50 (1945).
[50] *International Telegraph V. Associated Press*, 248 US 215, 250.

of citizenship. Locke defined a slave as one who is "incapable of property."[51] Two hundred years later, TH Marshall defined the right to own property as a critical element of civil citizenship.[52]

Judith Shklar's observation that citizenship includes "the right to earn" also connects to the right to own real property, particularly homes.[53] With the creation of the FHA, changes in mortgage terms required as a condition for underwriting transformed home ownership into a critical vehicle for asset accumulation, making it the principal vehicle through which Americans transformed income into wealth.[54] Racial disparities in ownership opportunities during this period have been cited by authors such as Oliver and Shapiro[55] as a principal reason for the large current gap in racial net worth.[56]

The well-known national programs to expand home ownership that developed after World War II had deeper historical roots: Beginning in the period around World War I, political discourse explicitly identified property ownership, and particularly home ownership, as the criterion for a full citizenship that extended beyond simple possession of the franchise, and created a personal investment in national institutions and continued national prosperity.[57] This development resurrected and revised earlier connections between property and citizenship.[58] Real property requirements for the franchise had been a staple of early American life. The early

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[51] *Second Treatise on Government*.

[52] TH Marshall, "Class, Citizenship and Social Development," in *Democracy: A Reader*, edited by Ricardo Blaug and John Shwartsmantel, (New York: Columbia University Press, 1964), 211.

[53] Judith Shklar, *American Citizenship: The Quest for Inclusion*, (Cambridge, Ma.: Harvard University Press,1998)

[54] Adam Gordon, "The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks, "115 *The Yale Law Journal* 186 (2005): 186-226.

[55] Melvin Oliver and Thomas Shapiro, *Black Wealth, White Wealth: A New Perspective on Racial Inequality*, (New York: Routledge, 2006); Thomas Shapiro, *The Hidden Cost of Being African American: How Race Perpetuates Inequality* (New York: Oxford University Press, 2004); and David Rusk, *The 'Segregation Tax': The Cost of Racial Segregation to Black Homeowners,* (Washington, D.C.: Brookings Institution Center on Urban Policy, 2001)

[56] Rakesh Kochar and Richard Fry, "Wealth Inequality Has Widened along Racial and Ethnic Lines since the End of the Great Recession." Pew Research Center Fact Track, [http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ and Metropolitan Policy] December, 2015.

[57] S. M. Stern, "Reassessing the Citizen Virtues of Homeownership," 100 *Columbia Law Review* 101 (2011): 890-938.

[58] P. Craig-Taylor, "To Be Free: Liberty, Citizenship, Property, and Race, "*Harv. Blackletter LJ* 14 (1998): 45.

English colonies continued the British tradition of tying the vote to property ownership, which was believed to create an interest in the long term welfare of the community.[59] By 1807, however, real estate qualifications for voting had generally been abolished, though minimal personal property requirements survived in the suffrage restrictions for paupers that continued, in many states, into the late 19th century.[60]

The reconstructed version of property-based citizenship connected to fears about the possible appeal of domestic Bolshevism, radical unionism, and other movements that threatened the 9economic, social, and political *status quo*. Its logic suggested that ownership created a bricks and mortar interest in social, economic, and political stability — that is, in the continuation of capitalism and the institution of private property. Speaking to the National Association of Real Estate Boards in 1922, Secretary of Commerce Herbert Hoover declared that "The average individual is affected by his way of life, by his environment and it does not seem at all unlikely that if the proportion of non- home owners becomes so great that legislation is enacted at the behest of a majority of voters, it will be inimical to private property rights . . . a nation of majority rule should be a nation of majority ownership."[61]

As the logic of propertied citizenship developed, ownership was increasingly constructed as a right, albeit one contingent on individual economic virtue. In 1932, Hoover noted that "Every thrifty family has an inherent right to own a home."[62] By this logic, property ownership was "about" more than ownership: It concerned access to full citizenship, to support for the property

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[59] S.L. Engerman and K. L. Sokoloff," The Evolution of Suffrage Institutions in the New World," *The Journal of Economic History*, 65, no. 4 (2005): 891-921; Chilton Williamson, *American Suffrage: From Property to Democracy 1760-1860*, (Princeton: Princeton University Press, 1960).
[60] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, (New York: Basic, 2009).
[61] American Building Association News, "Home Ownership Assures Safe Government," *Savings and Loan Association News* 42 (1922): 108.
[62]Herbert Hoover, "Forward", in *Final Report on President's Conference on Home Building and Home Ownership* (Washington, DC: US Government Printing Office, 1932), 122.

rights that created it, and to support for the political and economic arrangements in which these right were embedded .[63] Developing state involvement in efforts to extend ownership to a larger swathe of citizens reflected this understanding.[64] The Federal Home Loan Bank Board, which represented the first attempt to develop a national policy to promote the expansion of ownership, and its successors, the Home Owners Loan Corporation and the Federal Housing Administration were created in an environment in which property rights were conditioned by race.

Second, racial disparities in property ownership and the existence of legal, regulatory and financial mechanisms that perpetuated them were well known at the time, and were frequently addressed in the courts, in legal, academic[65] and public discussions. The discriminatory nature of FHA underwriting provisions was regularly discussed in the contemporary African American press. For example, a *Chicago Defender* headline on December 30, 1938 read, "Exposes 'Color Law' in Federal Housing Plans. Manual on Mortgages Outlines Jim Crow Ruling on Loans." This extensive discussion, along with the pressures on African American housing produced by increased migration to urban and areas that had racially restricted real estate markets, produced many legal challenges.[66] Law journal articles discussing restrictive covenants both in positive and in negative terms abounded.[67] The ALI Restatement underscores the fact that discriminatory

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[63] The notion of the right to property as a precondition for full citizenship has a lengthy philosophical lineage. In *The Second Treatise on Government*, Locke defines a slave as one who is "not capable of property." Corey Brettschneider argues that property rights are a necessary precondition for democracy. *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2007).

[64] Amanda Tillotson, "Constructing Racialized Housing Markets, Constructing Racialized Citizenship", Paper presented at the 2014 meetings of the Midwestern Political Science Association, Chicago.

[65]See, for instance, Long and Johnson, "*People vs. Property*"; Robert Weaver, "Race Restrictive Housing Covenants", *The Journal of Land & Public Utility Economics* (1944): 183-193; D.H. Heard Jr, "Race and Residence: The Current Status of Racial Restrictive Covenants," 1 *Baylor L. Rev*. 20 (1948).

[66] Clement Vose," *Caucasians*" and "NAACP Strategy". The NAACP 's formal legal defense program was organized in 1940 under the leadership of Thurgood Marshall.

[67] Some examples include Loren Miller, "Race Restrictions on Ownership or Occupancy of Land*," Law. Guild Rev*. 7 (1947): 99; James A. Crooks, "Racial Covenant Cases," *37 Geo*. LJ (1948): 514; Charles Tefft, "Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants," 2 *Nat Bar J.* 133 (1946); James D. Barnett, "Race-Restrictive Covenants Restricted," 28 *Or. L. Rev*. 1 (1948); William R. Ming, Jr.,"Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases."*16 U. Chi. L.* Rev. 203 (1948); R. Gordon Lowe, "Racial

usages in constructing and protecting racialized rights to property acquisition did not develop outside or alongside the legal order- they were embedded within it.

Finally, negative attributions about African Americans and their relationship to property formed an important – if under examined — thread in public discourse about African Americans. The discourse that connected African Americans to criminality, suggesting that they were prone to theft and other crimes against property, was longstanding. For example, WEB Dubois found that these tropes structured media accounts of African Americans during Reconstruction.[68]

These attributions became connected to the geography of race as the migration of African Americans into urban areas were connected to elevated rates of crime and disorder, including waves of race riots. The 1921 report of the committee investigating the 1919 Chicago race riot, for example, noted that

> There is…no section of the country in which it is not generally believed by whites that Negroes are instinctively criminal in inclination. Some believe that they are criminal by nature and explain it as a result of heredity; some feel that it is a combination of heredity and environment; while others may feel that this inclination is due to environment alone. How, indeed, may the belief be avoided? Crime figures on Negroes are consistently unfavorable to any other conclusion. Students have gone so far as to accept without question these figures and proceed to explain that criminal tendency scientifically.[69]

The connection between crime, urban disorder and race provided an additional justification for policies that restricted African Americans to particular geographic areas, limiting their property rights.

African Americans were also construed to be poor stewards of property and to lack personal characteristics that supported responsible ownership. A 1920 article in *The Property Owners'*

Restrictive Covenants." 1 *Ala. Law Rev* 15 (1948); and Harold Kahen, "Validity of anti-Negro Restrictive Covenants: A Reconsideration of the Problem," 12 *U. Chi. L. Rev*. 198 (1945).

[68] WEB Du Bois, *Black Reconstruction 1860-188*0 (New York: Free Press, 1999).

[69] Chicago Commission on Race Relations, *The Negro in Chicago*. (Chicago: University of Chicago Press,1922), 438.

Journal summed up some of these attributions, noting “the Negroes' innate desire to ‘flash,’ to live in the present, not reckoning the future, their inordinate love for display ... In their loud mouthing about equality with the whites,” it continued, “they have wormed their course into white neighborhoods, where they are not wanted and where they have not the means to support property.”[70] Explaining its failure to lend to African Americans, one Chicago bank noted difficulty with reselling the notes because investors “say they don't keep up the property; they let it deteriorate; they don't improve it.”[71].

Given these assumptions, even the possibility that African Americans might move into a neighborhood increased White purchasers’ risks and changed calculations of value. The movement of African Americans into an area would produce declining property values, depriving White owners by reducing the existing value of their property, by eliminating possible future appreciation, and by creating negative externalities such as crime and disorder. A real estate agent explained to the Chicago Committee on Relations that “Whatever depreciates real estate necessarily depresses its security value—whether the cause is fact or opinion.”[72] The belief that property values would fall and risks rise with African American occupancy undergirded the neighborhood maps and residential classifications that structured HOLC and FHA underwriting requirements.[73]

Careful analysis of the history of litigation under restrictive covenants reveals the implicit theories of racialized property rights that construed African American attempts to purchase restricted properties as a kind of theft. This racialized theory of property values viewed urban

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[70] *The Property Owners Journal*, February 15, 1920, cited in *The Negro in Chicago:* 128.
[71] *The Negro in Chicago*, Ibid.
[72] Ibid.
[73] Tillotson, “Race, Risk and Real Estate”; Kenneth Jackson, “Race, Ethnicity and Real Estate Appraisal: The Homeowners Loan Corporation and the Federal Housing Authority,” *Journal of Urban History* 6, no. 19 (1980): 435-450.

real estate markets as a zero sum game in which the acquisition of property by African Americans reduced the value of properties owned by area Whites. These theories were reflected both in cases overturning and in those upholding covenants.

Purchasers as Perpetrators

Restrictive covenants were intended to constrain sales (and rentals) to African Americans, but they often did so in a way that penalized African American purchasers much more severely than White sellers[74]. Purchasers were construed to be individuals who deprived neighboring Whites of the value of their property. Even where covenants contained language that placed some liability on the seller, as, for instance, allowing for injunctions against future sales, African American purchasers faced more severe penalties.

In the case of *Lyons v. Wallen*, which opened this paper, the covenant held that "no one of such owners, his or her heirs, executors, administrators or assigns will ever, within a given period, sell, lease, or give away any of the lots so owned or any interest therein to any person of the African or Negro race". The original case was therefore brought against both the seller and the purchaser. The decision, however, enjoined the White seller from future sales to African Americans, but – because it voided the purchaser's deed- returned title to the seller without requiring him to compensate the purchaser and made the African American purchaser liable for all costs- penalized him more severely. The trial court in *Lyons* did not explicitly justify the imposition of these additional penalties. Like many decisions of this kind, it construed covenants to be contracts, and based its decision on the right of property owners to freely enter into these

[74] Depending on local conditions, covenants also sometimes constrained Asians (who were often identified as 'Mongolians), Mexican, "Assyrian", Catholics, and Jewish or" Semitic" individuals. Robert Fogelson cites a district in Pennsylvania that added Hungarians, Greeks and other European immigrants to the list. *Bourgeois Nightmares: Suburbia 1870-1930*, (New Haven: Yale University Press, 2005). In a few cases, covenants prevented sales on ideological grounds, enjoining sales to Communists or members of the German Bund. Covenants to prevent African American sales and occupancy, however, were far more common.

contracts, although the imposition of financial penalties clearly labelled the buyer as the offender.

Lyons was not unique in this regard. For example, in the 1929 case of *Cornish v. O'Donoghue*, decided by the Washington, DC Circuit Court, the plaintiff, who was African American, had purchased a property that was covered by a restrictive covenant which held "That said lot shall never be rented, leased, sold, transferred, or conveyed unto any negro or colored person under penalty of $2,000, which shall be a lien against said property." The original court found that Cornish was at fault, revoked his deed and ordered him evicted from the premises. Cornish appealed, and the appellate court upheld the ruling of the lower court, assessing costs against Cornish. As in *Lyons*, the African American purchaser therefore lost both the purchase price and the property that he had purchased, and was forced to pay court costs both for himself and for his opponent.

Exceptions to the practice of penalizing purchasers more harshly than sellers provide additional insight into the way in which occupation by African Americans was perceived to involve a loss of value, and into the differential role of race. These exceptions occurred, Charles Mangum noted in his pioneering 1940 book on *The Legal Status of the Negro*, in "instances where fraudulent representations have been relied up on with the result that white persons have been disappointed in their wish to live apart from negroes," and resulted in compensation to the purchasers for loss of value.[75] In *Chandler v. Zeigler*, which was specifically cited in the ALI Restatement, the White purchaser was compensated because he had been falsely told that other lots in the area were covered by restrictive covenants. The decision established a specific

[75] Charles Mangum, *The Legal Status of the Negro* (Clark, New Jersey: The Law Book Exchange Ltd, 1940/2000), 157.

monetary figure - $1000 - for this lost value.[76] In the 1917 Missouri case of *Keltner v. Harris*, a White plaintiff successfully sued to set aside the sale of his property to a white real estate agent who falsely represented that he was the buyer, when the actual buyer was a African American man with whom the seller had already refused to do business.[77]

Nothing Left to Lose: Racializing the Doctrine of Changed Circumstances

One line of decisions that refused to enforce restrictive covenants followed a different logic but implicitly upheld the notion that African American attempts to purchase property would result in the loss of value for White owners. Decisions based on a racialized interpretation of the common law doctrine of changed circumstances held that restrictive covenants did not apply when the encroachment of African Americans into nearby areas meant that no property value remained to be diminished. This doctrine held that covenants regarding property could be voided if changed circumstances frustrated their purpose- that is, if the intended goals of the covenant could not be attained due to the changed conditions. The general theory of property law required that covenants "touch and concern" the land- that is, that they improve one party's enjoyment of the property while burdening that of another.[78] If this enjoyment were diminished or negated, this purpose was frustrated. Mangum noted that a racialized version of this doctrine could be applied to overturn covenants: "It is true that a changed situation may develop when there has been such an influx of colored persons into the restricted property as to make the enforcement of these covenants or agreements inequitable and unsuitable under existing social conditions."[79]

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[76] *Chandler v. Ziegler* 88 Col. 1, 291 Pac. 822.
[77] *Keltner v. Harris*, 196 S. W. 1, (Mo).
[78] H. Boyer, S.F. Hovenkamp, S.F. and R.E. Kurtz, *The Law of Property: An Introductory Survey*, (West Group. 4th edition, 2001), §10.2.
[79] At 153. Mangum notes that this strategy typically succeeded only when there was clear proof that Black encroachment was significant enough to affect the value of the lot in question, not simply that of other neighborhood properties.

The case of *Fairchild v. Raines*,[80] decided in 1944 by the California Supreme Court, demonstrates the racialized use of this doctrine to void a covenant. The defendants, Ross and Helen Raines, a African American married couple, had purchased lots in Pasadena that were encumbered by a restrictive covenant in which some, but not all, property owners in the tract agreed that their property could not be sold to or occupied by African Americans prior to January 1, 1950.[81] The White sellers, who had not signed the original agreement but had purchased the lots with the encumbrance, sold them on land contract to the Raines family. Interestingly, the land contract specified that, until the lot was paid in full, the purchasers could use and occupy the lot, but would not have clear title. Rather than suing the White seller who still held title, the owners of other encumbered lots sued the Raines, alleging that their purchase (and occupancy) violated the covenant. The original Court upheld this claim.

The Raines appealed on the ground that the area was no longer entirely White. Their case relied on testimony that demonstrated that, due to the movement of African Americans into unrestricted lots, the property had no remaining value to lose, so that no damages could be established. A local physician, for example, testified on defendants' behalf that "I maintain my office in Pasadena; I am familiar with the northwest part of Pasadena and particularly that part wherein is located Palisades, Del Monte, Forrest and Washington streets; I have patients living on all those streets upon whom I make professional calls and those patients are negroes; I know of at least twelve families of negroes living on Washington street immediately south of Palisades street and west of Forrest; that part of Pasadena is occupied predominantly by negroes and is more suitable for negroes than for white people."

[80] *Fairchild v. Raines* 24 Cal 2nd 1818 (1944).
[81] The covenant therefore incorporated both a date certain for termination, satisfying the rule against perpetuities and the requirement that a particular percentage of affected parties agree.

A local real estate agent testified to the decline in property values brought about by African American occupancy. Noting that he had maintained his office in Pasadena for "many years", he testified that “It has been my experience that invariably when a Negro family moves into a neighborhood theretofore occupied by white people, the value of the surrounding property drops fifty per cent. The fact that Negro families have moved in and are living on Washington Street on lots directly south of Palisades street would cause the same decrease in realty values."

The Court accepted the real estate agent’s testimony as evidence that no loss of value could be proved, finding, in effect, that there were no damages because “the damage occasioned that neighborhood by negro occupancy had already been sustained by reason of the influx of Negroes on Washington Street in the same tract.” The Court also relied on a witness who resided in the area and testified “that over twenty years ago only white people lived in that area but at the present time, with the exception of the lots covered by the race restriction agreement, it is occupied principally by negroes and is more suitable for the occupancy of negroes than of white people." The decision therefore refused to uphold the covenant, reasoning that no wrongdoing had occurred because the property had been devalued by changes in the neighborhood. Although the decision invalidated the specific covenant that applied to the Raines, it- like other decisions that employed this logic to void covenants- ironically provided legal support for the notion that African American property ownership effectively diminished the value of proximate properties for Whites.

Racialized Constructions of Price and Value

The holding in the 1942 case of *Hundley v. Gorewitz*[82], which occurred in Washington, DC, followed a similar logic with a twist that incorporated a new version of the racially disparate theory of property rights. The covenant, which had been signed thirty years previously, was

[82] *Hundley v. Gorewitz* 132 F.2d 23 (D.C Cir 1942).

identical to that in the Lyons and Donoghue cases: "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars ($2,000) which shall be a lien against said property." The Hundleys, an African American married couple, purchased a home encumbered with this covenant. Two White neighbors sued, asking that the Hundley's deed be cancelled, and the lower court agreed.

The appellate court affirmed the validity of the covenant, but found that changes in the character of the neighborhood frustrated its purpose. The opinion returned the case to the original court, noting that "strict enforcement of all five covenants will not alter the fact that the purpose has been essentially defeated by the presence of a Negro family now living in an unrestricted house in the midst of the restricted group, and as well by the ownership by another Negro of a house almost directly across the street. And this is just the beginning. The trend is unmistakable, its effect is apparent."

The finding, however, incorporated a theory that took account of a racially divided real estate market in which African Americans paid higher prices in order to acquire homes, while these purchases lowered their value on the open market. Congestion in the African American neighborhoods of Washington combined with residential restrictions meant that African American purchasers were made to pay higher housing prices. Noting this circumstance, the opinion stated that "the evidence satisfies us that the effect of all this is to make the market value of property on Thirteenth Street, in this particular block and nearby, greater for colored occupancy than for white." The court noted that "There is also evidence to the effect that the local citizens' association, upon learning that appellants' vendor contemplated selling to appellants or other Negroes, tried to procure a white purchaser, and that one of appellees himself had purchased the house numbered 2534 *25 from Home Owners Loan Corporation for $2,000 less than that Corporation was offered by a colored bishop."

The decision effectively held that because African Americans, who lacked other housing opportunities, would pay more for properties than Whites, White sellers stood to gain more by the Court's decision to vacate the covenant than by a decision upholding it. "It is well settled, " the Court's opinion noted, "that, since the purpose of such restrictions is the mutual benefit of the burdened properties, when it is shown that the neighborhood in question has so changed in its character and environment and in the uses to which the property therein may be put that the purpose of the covenant cannot be carried out, or that its enforcement would substantially lessen the value of the property, or, in short, that injunctive relief would not give a benefit but rather impose a hardship, the rule will not be enforced." The court's calculus of benefits took the following form: African Americans benefitted by being allowed to purchase properties at above (White) market prices, while initial White sellers profited from the opportunity to charge African Americans higher market prices for these properties.

Although the decision noted that the value of properties would rise with African American residence, this premise was based on the existence of racially restricted real estate markets that affected the way in which the price and value of real estate was calculated. That is, African American purchasers, confronted with a shortage of properties that met racial restrictions would pay higher prices than comparable Whites. Once these purchases occurred, however, proximate properties lost value for White purchasers. The decision to return the case for rehearing based on changed circumstances therefore incorporated a revised version of the racialized "changed circumstances" doctrine that had informed the *Raines* decision.

Racialized Property Rights and the Legacy of Restrictive Covenants

The development of racialized property rights under restrictive covenants bears out William Faulkner's observation that "The past is never dead. It's not even past."[83] Brooks and Rose have observed that legal and social norms and conventions around racialized ownership were altered by the incorporation of covenants into the formal legal order, arguing that these changes continued to shape the connections between race and real estate.[84] However, the effect of covenants and litigation around covenants was more than normative. Rather, a concrete economic logic that connected race, risk and property owner was legitimated and codified by this process.

Unlike *Buchanan*, the *Shelley* decision failed to address the racialized economic logic around African American ownership, and relied entirely on the "state action" doctrine, allowing that covenants remained valid as individual contracts. The decision sidestepped the issues raised by U.S. Attorney General Tom Clark and Solicitor General Philip Perlman in the *amicus curiae* brief presented on behalf of the United States. The brief argued that the negative externalities cited to justify the notion that particular risks arose from African American residence were, in fact, created by segregated real estate markets. It warned that restrictive covenants "are responsible for areas in which over-crowded racial minorities are confined and in which living conditions are steadily worsened. . . . Inadequate shelter, disease, and juvenile delinquency are some of the evils directly attributable to racial restrictive covenants."[85]

[83] William Faulkner, *Requiem for a Nun*, Act I, Scene 3.
[84] Richard Brooks and Carol Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law and Social Norms*, (Cambridge, Ma.: Harvard University Press, 2013).
[85] Tom Clark and Philip Perlman*, Prejudice and Property: An Historic Brief against Racial Covenants Submitted to the Supreme Court*, (Washington, DC: Public Affairs Press, 1948). See the discussion of this brief in J. Kimble, "Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans," *Law & Social Inquiry* 32 no. 2 (2007), 399-434.

"Racial Realty Covenants Still in Force," the *New York Herald Tribune* reported on January 23, 1949 in an article that reported a survey finding that most bankers continued to support covenants and would demand that sellers perform on them. A "prominent Washington realtor" quoted in the article warned that the "covenants are still effective because people who want to violate them can't borrow money."[86] Further, as John Gist, Counsel to a New Jersey savings and loan noted in a letter to the FHA, the failure to perform on still-valid covenants raised the possibility that titles to encumbered property would be clouded.[87]

The decision also allowed the FHA, as well as other sectors involved in the sale of real estate to continue to incorporate this racialized economic logic into their business practices. In the short-run, this occurred in two ways. First, because *Shelley* did not address the legal issues raised in previous decisions around restrictive covenants, the FHA viewed it as an anomaly that would shortly be overturned and did not attempt to revise its Underwriting Manual or issue new rules to remove the recommended use of covenants until 1950. It eventually did so only on the basis of a compromise reached after pressure from the American Jewish Congress, the NACCP and the Truman administration, which allowed the Administration to enforce covenants filed before February 15, 1950.[88]

Secondly, the Court's finding that covenants were not illegal as individual contracts allowed the FHA to suborn the discriminatory practices of private lenders. Responding to Gist's letter, for example, the District Administrator of the FHA assured him that "the mere execution and filing for record after February 15, 1950 [the date when the FHA's post-Shelley administrative rules

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[86] "Racial Realty Covenants Still in Force", *New York Herald Tribune* (January 23, 1949).
[87] J.A. Gist, Letter to Federal Housing Administration (1949). National Archives RG 31. Records of the Federal Housing Administration, Program Correspondence of Assistant Commissioner for Operations 1936-1956. Folder: Minority Group Housing Field Letters.
[88] Richard Brooks," Covenants without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements," *The American Economic Review* 101, no. 3 (2011), 360-365.

would take effect] of a deed containing [a covenant] would not be construed by us as the filing for record of a 'restriction' upon the sale or occupancy of the mortgaged property on the ground of race, color, or creed nor would it be construed as the execution of an instrument which 'imposes' such a restriction upon the property."[89]

The failure to address the notion that African Americans posed risks to White property interests also had longer term consequences. First, since the inclusion of covenants into deeds remained lawful until the Fair Housing Act of 1968, these instruments could be used on a voluntary basis, and were employed by real estate brokers, insurers, and neighborhood associations to assure prospective purchasers that neighborhoods had the appropriate racial character.[90] Secondly, many of the areas that had been isolated by the FHA's use of restrictive covenants and racialized lending criteria continued to be segregated urban ghettos in which rates of property appreciation remained depressed.[91] These areas then become targets for subprime lenders, and were therefore hard-hit by the subprime foreclosure crisis.[92]

Conclusion

Ironically, most legal challenges to covenants were, like *Shelley v. Kraemer*, carried out by attorneys for the NAACP. Focused on the goal of overturning covenants in specific cases, these challenges often employed racialized economic logic to argue that particular sets of circumstances frustrated their purpose. As the *Raines* and *Hundley* cases demonstrate, this strategy was sometimes effective in securing victory at the case level. At another level, however, these victories were pyrrhic. Noting that *status quo* neutrality produces a kind of blindness to the

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89 District Administrator, FHA (December 23, 1949). Memo re Amendment to Administrative Rules Issued December 12, 1949 Relative to Racial Restrictive Covenants. NARA, Reference Group 31, Commissioner Correspondence and Subject Files, 1938-1958.

90 Brooks, "Covenants without Courts."

91 J Kimble, "Insuring Inequality."

92 J. Hernandez, "Redlining Revisited: Mortgage Lending Patterns in Sacramento 1930–2004," *International Journal of Urban and Regional Research* 33, no. 2 (2009): 291-313.

larger legal environment in which accepted practices are situated, Cass Sunstein points out that "Current rights of ownership are not seen as a product of law at all."[93] Disparate African American access to property and the notion that African American purchases effectively "stole" value from Whites survived the demise of the restrictive covenant, appearing in various guises throughout the remainder of the 20th century and into the 21st. Subprime lending, which was originally centered in minority communities, was arguably the most recent iteration of this racially disparate theory of property rights.

[93] Cass R. Sunstein, *The Partial Constitution* (Cambridge, Ma.: Harvard University Press, 1993), 3.

CHAPTER THREE

Rating the FHA: Race and Risk in the Second Iteration

of the Home Ownership State, 1934-1950

Introduction

The propensity for property ownership, and particularly home ownership, is central to the myth of American exceptionalism. In 1854, for example, deTocqueville defined "the love of property" as a definitive element of the American character.[1] The myth incorporates assumptions about historically high rates of home ownership, connecting these to the individualist ethos demonstrated by Frederick Jackson Turner's frontiersmen[2] and Jeffersonian "yeoman farmers."[3] An elaborated version, such as that contained in Frank Capra's "It's a Wonderful Life," adds an additional element, incorporating the relationship between prospective home buyers and banks or thrifts willing to lend to frugal working and lower-middle-class individuals. In this version, the interaction of financial institutions and individual market virtues such as thrift and hard work created opportunities for ownership. The idea that disparate opportunities were provided based on race and class is absent, and state action plays no role.

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[1] Alexis deTocqueville, *Democracy in America*, Vol. II (1838), 154.
[2] Frederick Jackson Turner, *The Frontier in American History* (Martino Fine Books, 2014/1984), 51.
[3] See, for instance, Andrew Robertson, William Shade, Robert Johnston, Robert Zeiger, Thomas Langston, Richard Valelly, eds., *The Encyclopedia of US Political History* (Washington DC; Congressional Quarterly Press, 2010), 30 and Judith DeNeufville and Stephen Barton, "Myths and the Definition of Policy Problems: An Exploration of Home Ownership and Public-Private Partnerships," *Policy Sciences* 20, no. 3 (1987): 181-206.

This narrative has been corrected by authors such as Ira Katznelson, Douglas Massey and Nancy Denton, Thomas Sugrue and Kenneth Jackson, who demonstrate that the actual history of American home ownership tells a different story. Majority ownership, they point out, was a post-World War II phenomenon that resulted from a major transition in the way in which property came to be owned: The transition was produced by the visible hand of state action rather than the invisible hand of supply and demand.[4]

This visible hand operated through two public-private programs: The Veterans Home Loan Program (VA Program) which was created by Title III of the Servicemen's Readjustment act of 1944 (Public Law 78-346) and the Federal Housing Administration, which was established by the Housing Act of 1934.[5] Both agencies guaranteed qualifying mortgages written by private institutional lenders, reducing the risks to these lenders; together, these two programs financed a large majority of the homes purchased after their enactment. However, both programs advantaged White home buyers while constructing barriers for African American purchasers.[6]

Data demonstrate that national policies enacted during the Depression and in the aftermath of World War II created majority home ownership for Whites while exacerbating racial disparities. The 1950 census was the first to report that a majority — 55% -- of White Americans owned homes as compared to 34.5% of African Americans.[7] This racial ownership gap was not new: Double-digit disparities in ownership had been documented by each census, beginning in 1900

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[4] Ira Katznelson ,*When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth Century America,* (New York: WW Norton, 2006); Thomas Sugrue , *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*, (Princeton: Princeton University Press, 1997/2014); Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States, (*New York: Oxford University Press, 1987); Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of America's Underclass*, (Cambridge, Ma.: Harvard University Press, 1993).

[5] National Housing Act of 1934, also known as the Capeheart Act, Pub.L. 84–345, 48 Stat. 847.

[6] Katznelson, *Affirmative Action*.

[7] United States Census Bureau, "Historical Census of Housing Tables," [https://www.census.gov/hhes/www/housing/census/historic/ownrate.html.] December, 2013.

when racial ownership rates began to be reported.[8] The tendency for African American and White rates to rise and fall in tandem, while maintaining the racial gap, was also a constant in census data. However, the difference expanded in the period after World War II: Collins and Margo find that between 1940 and 1960, ownership rates for Whites increased 24.2% as against 18.6% for African Americans, while the racial ownership gap increased by five points during this period.[9] The racial disparity widened after the introduction of federal programs to expand access to home ownership.

The growth of the racial ownership gap in the period after World War II was particularly critical for two reasons. First, housing values- particularly in suburban areas- increased rapidly during this period, so that racial differences in mortgage access had far-reaching consequences for African Americans' ability to accumulate wealth.[10] This effect was magnified by the fact that more generous mortgage terms offered by the FHA and the VA allowed individuals to purchase homes at an earlier average age, so that the value of owner-occupied homes had a longer period in which to appreciate.[11] A number of studies, including those of Oliver and Shapiro,[12] connect racial differences in access to home ownership in the period after World War II to the large

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[8] Ibid.

[9] William Collins and Robert Margo, "Race and Homeownership: A Century-Long View," *Explorations in Economic History* 38, no. 2 (2001): 68-92.

[10] Ta-Nihesi Coates (2014) has argued that this disparity is central to the case for reparations. "The Case for Reparations," *The Atlantic*, [http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/] June, 2014. See also Jonathan Kaplan and Andrew Valls, "Housing Discrimination as a Basis for Black Reparations." *Public Affairs Quarterly* 21, no. 7 (2007): 255-273.

[11] A. Gordon, "The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks," 115 *The Yale Law Journal* 186 (2005): 186-226.

[12] Melvin Oliver and Thomas Shapiro, *Black Wealth, White Wealth: A New Perspective on Racial Inequality,* (New York: Routledge, 2006); Thomas Shapiro, *The Hidden Cost of Being African American: How Race Perpetuates Inequality,* (New York: Oxford University Press, 2004); and David Rusk, *The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners"* (Washington, D.C.: Brookings Institution Center on Urban Policy, 2001).

current disparity between African American and White net worth: In 2013, median net worth for African Americans was $11,000 as against 141,900 for Whites.[13]

Second, federal policy and federal institutions had become the principal source of home ownership opportunities, initiating the development of a national mortgage market and insuring that this market would operate differently for African Americans and Whites.[14] The state, and specifically the racialized lending practices of the VA and the FHA, rather than simply "market forces", "local customs," or "societal prejudice" were now implicated both in the restriction of African American ownership and in the use of lending criteria to create a geographic division between White suburbs characterized by well-maintained, owner-occupied homes and densely-populated Black urban neighborhoods characterized by rental housing interspersed with dilapidated, owner-occupied properties purchased without federal assistance.[15]

Both agencies engaged in racially discriminatory practices, although each provided services to a different target population. The VA program extended housing opportunities to veterans both in order to reward their service and to address the shortage of housing for returning soldiers and their families. However, the Black population eligible for this assistance was restricted both by Administration loan criteria, which delegated operating authority to state and local governments and created criteria for eligible neighborhoods and physical structures that were less likely to be

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[13] Rakesh Kochar and Richard Fry, "Wealth Inequality Has Widened along Racial and Ethnic Lines since the End of the Great Recession," Pew Research Center Fact Track, [http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ and Metropolitan Policy] December, 2014.

[14] Marc A. Weiss, "Marketing and Financing Home Ownership: Mortgage Lending and Public Policy in the United States, 1918-1989," *Business and Economic History* 2, no. 18 (1898): 109-111; David Freund discusses the role of the FHA in making the national mortgage market. *Colored Property: State Policy and White Racial Politics in Suburban America, (*Chicago: University of Chicago Press, 2007), 125-128.

[15] See, for instance, Mark Seitles, "The Perpetuation of Residential Racial Discrimination in America: Historical Discrimination, Modern Forms of Exclusion and Inclusionary Remedies," 14 (1996) *Journal of Land Use and Environmental Law* 89; Charles Abrams," The Housing Problem and the Negro,*" Daedalus* 95, no. 1 (1966): 64-76; David Freund, *Colored Property*; and Jackson, *The Crabgrass Frontier.*

met in the older urban areas in which Blacks were able to purchase homes[16] and by the fact that that the World War II military imposed recruiting quotas for African Americans.[17] The FHA, by contrast, underwrote mortgages without imposing service requirements, drawing borrowers from a universe of working- and middle-class individuals that had been disadvantaged by existing methods of home finance. The population that benefitted was both large and White: the FHA financed three out of five homes purchased between 1935 and 1959;[18] only 2% of borrowers were non White.[19]

In this paper, I examine the development of racialized[20] underwriting practices by the FHA, arguing that they incorporated a logic connecting African American attempts to acquire homes to increased risks for lenders, for White property owners, and for the social and racial *status quo*. My analysis focuses on the period between 1934, when the Administration was established, and 1950. The latter year is an appropriate breakpoint for two reasons: first, because the 1950 census was the first to document the transition to majority home ownership for Whites; and second, because, following the Supreme Court's decisions in two 1948 cases, *Shelley v. Kraemer* [21]and

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[16] Katznelson, *Affirmative Action*, 121-122.
[17] The Army, for example, restricted the number of African American recruits to 10% of the total, and the other branches of the service also imposed quotas. Morris McGregor, *Integration in the Armed Forces, 1940-1965, (*Washington, DC: Center of Military History, 1981), 18. For an extensive consideration of the role of race and race policies in World War II see Daniel Kryder, *A Divided Arsenal: Race and the American State in World War II, (*New York: Cambridge University Press, 2001). See also Lizabeth Cohen, *The Politics of Mass Consumption: Mass Consumption in Postwar America* (New York: Vintage,2003), Chapter 3.
[18] Federal Housing Administration*, This is The FHA*. (Washington, DC: US Government Printing Office, 1959), 21.
[19] Marc Seitles*, Perpetuation*, 89. See also Beth J. Leif and Susan Goering," The Implementation of the Federal Mandate for Fair Housing," in *Divided Neighborhoods: Changing Patterns of Residential Segregation*, ed. Gary A. Tobin. London: Newbury Park, 1987), 89.
[20] By racialization, I mean the process by which policies shape and are shaped by the constructions about racial characteristics that pervade the larger society. See, for instance, Kevin Fox Gotham, *Race, Real Estate and Uneven Development: The Kansas City Experience, 1900-2000*, (Albany: State University of New York Press,2002); K. Murji, and J. Solomos (2005), "Introduction" in *Racialization in Theory and Practice* edited by K. Murji and J. Solomos, (New York: Oxford University Press, 2005),1 -27. For a history and critique of this concept, see R. Barot and J. Bird, "Racialization: The Genealogy and Critique of a Concept," *Ethnic and Racial Studies*, 24, no. 4 (2001):601-618.
[21] 334 US I. This decision held that, while restrictive covenants were not invalid as individual contracts, state court enforcement was contrary to the 14th amendment.

Hurd V. Hodge,[22] successive editions of the *FHA Underwriting Manual* began a slow process of revision in the way which race was addressed.

I first discuss the way in which the FHA created a national market for home mortgages, shifting the risks inherent in the process of home financing by underwriting mortgages that incorporated terms to make them more accessible to working and middle class individuals. I then lay out the logic reflected in contemporary understandings in the legal, financial, commercial, academic and real estate communities about the relationships among race, risk and property. I argue that, since the Administration operated in a public-private sphere, these attributions about racial economic risk shaped Administration lending requirements in two ways: They aimed both to reduce the Administration's risks from possible borrower nonperformance and from erosion in the value of homes used as collateral and to secure lender participation in the voluntary program. The process of incorporating existing ideas about racial risk consolidated, elaborated and transformed these understandings, allowing them to shape the geography of race on a national scale. I next review the mechanisms through which FHA lending requirements produced racially discriminatory outcomes, arguing that the criteria used to rate mortgage risk also functioned to assess and to mitigate the racial risk created by loans. I demonstrate that the logic of racial risk pervaded these requirements, structuring them more subtly and more completely than existing accounts allow. I conclude by examining some implications of the attributions about racial risks incorporated into FHA lending practices.

My analysis makes three contributions. First, I move the discussion of the FHA's use of racially discriminatory criteria beyond the boundaries of the Administration, examining the role of understandings about racial risk in the larger financial, commercial, legal, and political

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[22] 334 US 24. This decision held that court enforcement of restrictive covenants in the District of Columbia violated the 14th Amendment and the Civil Rights Act.

environment. I draw attention to the way in which private constructions of racial risk shaped the policies and practices of this public/private program. I also argue that FHA criteria amplified these constructions, embedding them in the national mortgage market which it created.[23] Second, I demonstrate that FHA lending criteria were more thoroughly racialized than most existing accounts allow. I show that attempts to manage racial risks were not confined to the frequently-cited neighborhood rankings, but pervaded the Administration's appraisal process. In short, I argue that the Administration's criteria for rating mortgage risk also served as a means of rating racial risk. Finally, I examine the way in which the FHA's public/private character shaped the way in which it addressed race. As Thurston notes, existing analyses of national home ownership policy have not given extended attention to the possible implications of this dual nature, while discussions of the public-private welfare state have similarly overlooked the area of home ownership policy.[24]

The FHA, Risk and Race: Current Understandings

Existing accounts view the FHA's use of discriminatory lending criteria from three perspectives. One set of accounts suggests that the Administration's racial practices resulted from its dependence on private sector interests in the housing industry. A second set indicates that the Administration's ability to develop and maintain racially disparate criteria followed from

[23] The discussion of public-private social policies has been most developed in the area of health care. See, for example, Jacob Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States*, (New York: Cambridge University Press, 2002). The general notion of reducing risk was central to the development of the ACA, since the involvement of private insurance companies meant that their understandings of risk pricing had to be accommodated. See, for instance, J. F. Wharam., D. Ross-Degnan, and MB Rosenthal, "The ACA and High-Deductible Insurance—Strategies for Sharpening a Blunt Instrument," *New England Journal of Medicine* 369, no. 16 (2013): 1481-1484; and American Academy of Actuaries, "ACA Risk-Sharing Mechanisms" [http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf]Septmebr, 1915.

[24] Chloe Thurston, "Policy Feedback in the Public-Private Home Welfare State: Advocacy Groups and Access to Government Home Ownership Programs, 1934-1954*," Studies in American Political Development* 29, no. 2 (2016): 250-267. Thurston notes that only two works, both by Christopher Howard, have explicitly examined the FHA in the public-private context: *The Welfare State Nobody Knows* (Princeton, NJ: Princeton University Press, 2007); and The *Hidden Welfare State* (Princeton: Princeton University Press, 1997).

its status as an autonomous bureaucracy. A third set focuses on the role of risk, arguing that FHA standards reflected existing understandings about the risks associated with lending to African Americans.

The FHA as Captive

One perspective suggests that the Administration was simply an instrument in the hands of exogenous interests that shaped its racial practices. Writing on October 1, 1956, for example, Robert Weaver, then New York State Rent Administrator and later Secretary of HUD (1966-1968), warned against a singular focus on the FHA as an independent actor in creating racial housing disparities, noting that "the Administration has long followed the lead of the real estate industry, financial institutions, and state and local governments.."[25] The FHA, as Gunnar Myrdal famously observed, chose to "side with these segregationists."[26]

There is no question that the real estate industry and other sectors involved in home finance expended a great deal of effort in attempting to influence federal housing policy or that their agenda included racial discrimination. Rose Helper's study of the racial policies and practices of the industry finds that a very large majority of brokers believed that the presence of African Americans lowered property values, and that this idea was an important trope in the textbooks and manuals used by brokers.[27] Nathaniel Keith documents the role of lobbyists for the NAREB and other real estate interests in influencing the structure of FHA requirements, although he focuses primarily on public housing policy.[28] Kenneth Jackson addresses the role of the appraisal industry as well as that of the real estate industry in applying racially disparate

[25] Letter from Robert Weaver to Robert Hughes, Reel 1, Robert Weaver papers, Schaumberg Center, New York Public Library. Weaver also expressed this belief in his 1948 book, *The Negro Ghetto* (New York: Harcourt Brace).
[26] Gunnar Myrdal, *An American Dilemma*. New York: Harper and Row, 1944/1962), 349.
[27] Rose Helper, *Racial Policies and Practices of Real Estate Brokers*, (Minneapolis: University of Minnesota Press, 1969).
[28] Nathaniel Keith, *Politics and the Housing Crisis since 1930* (New York: Universe Publishing, 1997).

standards, while Squires makes a similar point about the home insurance industry.[29] Accounts that view the Administration simply as an instrument of these interests, however, are based on a narrow reading of the way in which FHA requirements discriminated against African American borrowers. In fact, as I demonstrate below, Administration lending criteria incorporated a much wider — and much more detailed — range of understandings about the connection between race and risk than those typically put forward by real estate and other commercial interests.[30] Secondly, these accounts fail to consider that, in order to protect its own funds, the Administration had an independent interest in minimizing racial risk.[31]

Another line of argument suggests that the Administration's racial practices reflected the preferences of state and local officials, particularly those located in the South.[32] Although the FHA often invoked the need to respect regional practices in order to justify its racial agenda, its history suggests that this was primarily a tactic used to deflect critics. Before 1946, the Administration explicitly announced its goal of centralizing its mortgage activities, using standard evaluation criteria that made no provision for regional variations.[33] In order to offer mortgages on more generous terms, the FHA was first required to standardize state legislation that set these terms, erasing differences in the lending requirements set by state bank charters.[34] However, in 1946 as opposition from the NAACP[35] and from President Truman's Race Relations

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[29] Kenneth T. Jackson," Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*," Journal of Urban History*, 6, no .4 (1980): 419 and Crabgrass *Frontier*; and Gregory Squires, "Policies of Prejudice: Risky Encounters with the Property Insurance Business," *Challenge* 39, no. 4 (1996): 45–50.

[30] Denton and Massey, *American Apartheid*.

[31] See, for instance, K. F. Gotham, "Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration, *"Sociological Perspectives* 43, no 2 (2000): 291-317.

[32] Katznelson, *Affirmative Action*.

[33] C. Bradford and A. B. Shlay," Assuming a Can Opener: Economic Theory's Failure to Explain Discrimination in FHA Lending Markets,*" Cityscape* (1996*)*: 77-87.

[34] Kimble," Insuring Inequality."

[35] Almost from its founding in 1909, the NAACP became involved in attempting to overturn restrictive covenants and other discriminatory practices. See, for instance, Clement Vose, *The NAACP and the Restrictive Covenant Cases*, (Berkeley: University of California Press, 1959).

Commission[36] mounted, the Administration adopted what it billed as a "decentralized" model, creating a Race Relations service that employed regional specialists to work with local communities to harmonize FHA lending goals such as "enlarging and expanding the share of housing for minority groups" with the practices of local real estate markets.[37]

This "decentralized" program, however, operated in a centralized fashion that left little room for negotiating with local real estate interests. Regional specialists, who primarily interacted with local real estate brokers, bankers and public officials, simply reported to officials who were located in Washington; they were not authorized to question the racial practices of local institutions. One race relations specialist, for example, reported that his meeting with officials from two banks in Pocatello, Idaho, had mixed results, stating that "it was interesting to note that these representatives …stated that no minority racial applicant had ever requested FHA Title II Mortgage Insurance."[38] In sum, both in terms of its relationship to private and to public interests, the Administration's racial practices were primarily dictated from the top down rather than from the bottom up.[39]

<u>FHA as Autonomous Actor</u>

A second perspective, employed, for example, by Bonastia[40] and Jacobs and King,[41] indicates that the FHA functioned as an autonomous bureaucracy that was able to resist political control

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[36] For an extended discussion of the role of the Truman's Commission see Edith S Riehm, *Forging the Civil Rights Frontier: How Truman's Committee Set the Liberal Agenda for Reform 1947-1965* (PHD Dissertation, Georgia State University, 2012).

[37] The Federal Housing Administration, Draft: The FHA Program and Minority Groups (1946), NARA, RG 631. See also Memorandum from Frank Horne, Special Assistant to the Housing and Home Finance Administration Administrator to the HHFA staff, June 20, 1947, "Minority Group Considerations in the Administration of Governmental Housing Programs. Harry Truman Library, RG 220.

[38] Report of C. Floyd, Los Angeles Race Relations Advisor (Boise), December 30, 1952. NARA, RG 31, "Records of the FHA, Program Correspondence of the Assistant Commissioner for Operations, 1936-1956.

[39] Kimble, "Insuring Inequality."

[40] Christopher Bonastia, *Knocking on the Door: The Federal Government's Attempt to Desegregate the Suburbs*, (Princeton: Princeton University Press, 2010).

and to impose high political costs on its opponents, enabling it to develop and implement its racially discriminatory agenda. Bureaucracies, according to the model developed by Daniel Carpenter, achieve autonomy when their middle management establishes a wide-spread reputation for successfully providing unique services.[42] This perspective is appealing for two reasons. First, the FHA provided a unique service by underwriting home mortgages on qualified properties for individuals who did not meet VA service requirements, substantially increasing the national home ownership rate while funding its operations from administrative fees rather than from government subsidies. Secondly, for at least three decades, the FHA successfully resisted ongoing challenges to its racial agenda both from within and from outside the government.

This successful resistance is central to the argument that the FHA functioned in an autonomous fashion. Its history is well known. Opposition to the FHA's discriminatory lending practices began with the publication of the first edition of its underwriting manual in 1934. By 1938, the NAACP had formally requested that these provisions, including the recommended use of restrictive covenants, be eliminated from Administration lending criteria, and these objections continued throughout period after World War II.[43] African American media, other interest groups, and members of Congress also continued to object to discriminatory criteria, but subsequent versions of the FHA Manual maintained and extended its discriminatory provisions.[44] As Lamb and Nye note, the FHA also evaded most efforts of President Truman and of his Civil

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[41] Desmond King and Robert Lieberman, "American State Building: The Theoretical Challenge," in *The Unsustainable American State*, edited by Lawrence Jacobs and Desmond King, (New York: Oxford University Press, 2009), 314.
[42] Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001).
[43] For example, *Crisis*, "Housing Authority Draws Mortgage Color Line" (February, 1939), 55.
[44] Letter from Senator Sheridan Downey to DC Maginnis, November 18, 1948. NARA, RG 31, Commissioner Correspondence and Subject Files, 1938-1958.

Rights Commission to bring about meaningful change in its racial practices.[45] This resistance did not end with the post-War period: Even after President Kennedy issued Executive order 11063 which required HUD and all other executive agencies "to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices with respect to residential property and related facilities heretofore provided with Federal financial assistance,"[46] the Administration attempted to substitute symbolic for actual change in its racial practices.[47]

However, unlike the bureaucracies identified in Carpenter's seminal work, the FHA operated in the public/private sphere.[48] The FHA's ability to protect its racial agenda from pressure by government officials and exogenous interest groups was based on its reputation. The Administration underwrote a majority of the mortgages issued in the post-war period and, in most years, was self-supporting as a result of fees and administrative charges.[49] This reputation, in turn, was based on the active participation of lending institutions and builders as well as that of potential home buyers. The FHA's ability to accomplish its goals was conditioned on the voluntary co-operation of lenders and the commercial interests which were involved in the process of constructing, selling, appraising and insuring homes. The FHA actively marketed its services to these groups: It produced fliers, held conventions, and sponsored media coverage designed to assure both lenders and buyers that its evaluation criteria would operate within the

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[45] Charles M. Lamb and Adam W. Nye, "Do Presidents Control Bureaucracy? The Federal Housing Administration during the Truman‐Eisenhower Era," *Political Science Quarterly* 127, no. 3 (2012): 445-467.
[46] Executive Order 11063, Sec. 102.
[47] See, for instance, David Freund, "Democracy's Unfinished Business: Federal Policy and the Search for Fair Hosing, 1961-1968." Paper presented to the Poverty and Race Research Action Council [http://www.prrac.org/pdf/freund.pdf.] 2004.
[48] Carpenter identifies the Department of the Post Office and the Department of Agriculture as bureaucracies that succeeded in achieving autonomy, comparing them to the Department of the Interior, which did not.
[49] Raymond J. Saulnier, Harold G. Halcrow, Neil H. Jacoby, "Have Federal Credit Programs Been Self-Supporting?" in *Federal Lending: Its Growth and Impact,* edited by Raymond J. Saulnier, Harold G. Halcrow, and Neil H. Jacoby, (Washington DC: US Government Printing Office, 1957), 27-28.

parameters of the "free market" — a market that was structured by *ex-ante* assumptions about the relationship between race and property value.[50] Since it operated within the public-private sphere, the Administration's autonomy was conditional: It could advance its racial agenda in the face of opposition only so long as this agenda did not conflict with that of its private partners.

FHA as Risk Manager

A third perspective focuses on the role of assumptions about risk in setting the FHA's racial agenda. In this view, the FHA's use of racialized lending criteria reflected both the need to secure the voluntary participation of the financial community in the Administration's program and the Administration's need to manage its own risks. Mortgage lending, as Guy Stuart points out,[51] is risky business, and the risks are temporally located in the future.[52] Lenders face the possibility of future losses from borrower nonperformance and the possibility that that the value of the property that serves as loan collateral will deteriorate. The public/private structure of the FHA shaped the structure of risk: The Administration required that participating institutions offer mortgages on terms that reduced down payment requirements and extended mortgage terms, increasing lenders' risk profiles. By underwriting these mortgages, the FHA assumed a majority of these risks.

Most existing accounts that connect risk management to racialized lending criteria equate risk with lower property values, arguing that the movement of African Americans into an area depressed the value of lenders' collateral.[53] However, the risks posed by these movements were more complicated. The fact that African Americans could select housing only in limited areas

[50] David Freund, "Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America," in *The New Suburban History*, edited by Kevin M. Kruse and Thomas J. Sugrue (Chicago: University of Chicago Press, 2006), 24.
[51] Guy Stuart, *Discriminating Risk: The US Mortgage Lending Industry in the Twentieth Century*,(Ithaca, NY: Cornell University Press, 2003).
[52] This notion of future risk is inherent in the etymology of the word "mortgage," which is derived from medieval French words meaning "dead" and "pledge."
[53] John Kimble, "Insuring Inequality."

meant that demand outpaced supply, affecting both the quality and price of accessible housing. African Americans were forced to pay higher prices for less desirable housing. The price of homes in neighborhoods that had begun to integrate would rise for African Americans, giving Whites an additional incentive to sell out and flee.[54] The result was a disjuncture between housing prices and housing values: homes in African American neighborhoods would lose value in the eyes of appraisers, insurers, and prospective White purchasers, even as their actual prices rose. As neighborhoods changed their racial character, the area entered a real estate market in which conventional connections between price and value ceased to apply. The movement of African Americans into an area posed an additional risk. The potential for African Americans to "spill over" into adjacent areas destabilized prices in surrounding areas, making it impossible to predict the future value of properties in these areas.

Further, the FHA's position as an underwriter in a national mortgage market in which loans were offered for an extended period of time posed additional challenges for risk management. Since the Administration operated in a centralized fashion, standardized lending criteria to identify racial risks in all possible markets were needed to replace the individual judgments made by local lenders and appraisers. In order to protect the Administration's investment, these criteria needed to support predictions about racial movements over a time horizon that matched the underwriting obligation, and to attempt — as far as possible — to control these future movements. FHA lending criteria therefore incorporated- but moved well beyond- the practices that private lending institutions and complimentary commercial sectors used to manage racial risks. The idea of racial risk management sheds new light on the racial implications of the

[54] This reality was recognized in some court cases in which restrictive covenants were voided because White owners stood to gain more by selling to African Americans at higher prices. See, for instance, *Hundley v. Gorewitz* 132 F.2d 23 (D.C Cir 1942).

FHA's lending criteria, and speaks to the need to examine these criteria in more detail, moving well beyond the idea that racial risks were limited to the immediate loss of property value.

Shifting Risks and Restructuring Mortgages

The FHA aimed to improve access to home ownership for financially responsible borrowers who purchased properties that met its underwriting criteria. It accomplished this by insuring loans made by "banks, trust companies, personal finance companies, building and loan association, installment lending companies" and other approved financial institutions.[55] In a 1947 memo to the President's Commission on Civil Rights, Commission Secretary Robert Carr noted that "[p]erhaps the most innovative principle of the legislation [creating the FHA] was the insurance of housing loans and mortgages against default in order to encourage lending institutions to make funds available in a very adverse housing market."[56] Financial institutions could apply for guarantees on conforming loans prior to mortgage approval or within one year afterward. These guarantees shifted most of the risk of nonperformance from lending institutions to the Administration, largely replacing a patchwork of state and local institutions that provided home finance with a program that effectively created a national housing market.

The FHA required that guaranteed loans incorporate terms that altered the traditional structure of newly-originated bank mortgages to make them more accessible to working- and middle-class individuals and to individuals in their early working years. This, Adam Gordon and others have argued, transformed homes into an economic vehicle that had investment value as well as use-value for their owners.[57] FHA regulations required mortgages to contain specific terms that

[55] National Housing Act of 1934, 48 Statute 1246.
[56] Robert K. Carr, Draft Memorandum on Housing and Civil Rights, June 28, 1947. Truman Library, RG 201, Box 20.
[57] As Adam Gordon, "The Creation of Home Ownership" notes, high down payment requirements meant that, for most individuals, the transition to ownership occurred late in the life course, reducing the potential for appreciation. See also Edward N. Wolff, "Recent Trends in Wealth Ownership from 1983-1998," in *Assets for the Poor*, edited by Thomas Shapiro and Edward N. Wolff, (New York: Russell Sage, 2001),34, 36.

largely replicated those offered by the HOLC and by some traditional savings and loans.[58] First, up to 80% of a maximum principal of $16,000 could be financed, significantly lowering down payment requirements. Second, the mortgage could have a duration of up to twenty years.[59] Third, interest rates could be no more than 6% a year, lowering prevailing rates by at least 2%. Finally, loans were required to be self-amortizing.[60]

These terms represented a major change in the structure of newly originated bank mortgages, which were regulated by state provisions that set standards for mortgage terms, including down payment requirements and interest.[61] Before national policy intervened to reduce lenders' risks, these mortgage terms severely restricted access to home ownership. In order to minimize the amount of outstanding loans balance and maximize the lender's collateral, borrowers were required to make very high down payments: Fifty to 80% of appraised value was typical. Further, the duration of mortgages was limited: Five to seven years was the typical range.[62] Due to their limited duration and to the fact that most loans did not amortize, virtually all mortgages required refinancing to extend their term or to avoid large balloon payments. The 1931 *Better Homes Manual,* issued as part of the Better Homes Movement, a privately-funded and government-sponsored initiative to expand ownership, warned that "[n]o mortgage on a home should be regarded as permanent, for if there is a shortage of mortgage money when it falls due there may be difficulty about renewing it."[63] National bank mortgages on urban property, which became available after 1916, could be made only for a one year terms and required a 50% down

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[58] Weiss, "Marketing and Financing."
[59] In 1938, P.L. 75–424, which was passed at the suggestion of the National Association of Real Estate Brokers, increased this term to 25 years and raised the loan-to-value ratio to 90% on mortgages that did not exceed 5,400. David Freund, *Colored Property,* 126.
[60] National Housing Act of 1934, 48 Statute 1248.
[61] Michael Carliner, "Development of Federal Home Ownership 'Policy'," *Housing Policy Debate* 9, no. 2 (1998), 299-322. This regulation was made possible because banks were chartered by states.
[62] Louis Hyman, *Debtor Nation: The History of America in Red Ink*. (Princeton: Princeton University Press,2012).
[63] John M. Gries and James S. Taylor, "How to Own your Home," in *The Better Homes Manual*, ed. Blanche Halbert (Chicago: University of Chicago Press,1931), 9.

payment.[64] Strict enforcement of these terms was produced both by state regulation of chartered banks and by the fact that many mortgages were designed to be resold to individual investors or to insurance trusts, which had a very low tolerance for risk.[65]

In order to create a national mortgage market that operated under these restructured terms, the FHA was therefore required to create a regulatory environment which would permit these changes and support a national market for the resale of the resulting mortgage notes, replacing, in the first case, a patchwork of state and national regulations and, in the second, a patchwork of private investors. The first required change led the Administration to persuade federal bank regulators and state agencies to revise the "safety and soundness" requirements that set high down payments and limited mortgage duration.[66] The second was accomplished because underwriting standardized the form of these mortgages and guaranteed the underlying value of mortgage notes, so that they became fungible financial instruments that could be combined and sold in bulk to secondary investors.[67] In 1938, national policy was used to create a secondary market: The Federal National Mortgage Association (Fannie Mae) was created by an amendment to the National Housing Act in order to provide a government-sponsored secondary market to provide liquidity to primary lenders.

The attempt to create a national mortgage market also required the FHA to persuade lending institutions to participate in this voluntary program. The importance of this was demonstrated by the fate of the first national attempt to intervene in national mortgage markets, the Federal Home Loan Bank Board, which had been created in 1932 to guarantee mortgages and encourage private

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[64] Barbara Ballinger, "Home Ownership in America," *Realtor Mag: The Magazine of the National Association of Realtors*, May, 2008.
[65] Chicago Commission on Race Relations, *The Negro in Chicago.*
[66] Gordon, "The Creation of Home Ownership"; Kimble, "Insuring Inequality."
[67] C. Bradford, "Financing Home Ownership the Federal Role in Neighborhood Decline," *Urban Affairs Review* 14, no. 3 (1979): 316.

banks to extend mortgage credit more freely.[68] The FHLB was unsuccessful- financial institutions did not alter their accustomed lending criteria, and very few of these institutions applied for funds. In the first two years of operation, four loans were approved from a field of 41,000 applications.[69]

The restructured mortgage terms presented the FHA with a dilemma. On one hand, the transition to more generous mortgage terms was required to expand opportunities for ownership. On the other, they increased the possibility of borrower default, heightening risks for the Administration and for participating financial institutions, since funds could be tied up in nonperforming mortgages until FHA compensation arrived. Reduced down payment requirements meant that purchasers would have a smaller financial stake in their properties, reducing their potential losses from default. Smaller monthly payments resulting from reduced interest and extended mortgage terms had a similar effect, slowing the accumulation of equity. Extended mortgage terms also required both institutional lenders and the Administration to evaluate the longer-term value of properties, since declining values over the long term would erode the value of their collateral.[70]

These risks were pointed up by the experience of building and loans and the HOLC, which had offered loans on more generous terms. Building and loan associations experienced very high default rates in the run-up to the Depression, resulting in large losses to lenders and contributing to their high rate of failure.[71] The HOLC experienced similar difficulties. By June of 1936,

[68] Created by the Federal Home Loan Bank Act (Public Law 72-304, 47 Stat 725).
[69] Thomas Marvell, *The Federal Home Loan Bank Board* (New York: Praeger, 1969), 23.
[70] Adam Gordon, "The Creation of Home Ownership." See also Guy Stuart. *Discriminating Risk.*
[71] Price V. Fishback, Jonathan Rose, and Kenneth Snowden in *Well Worth Saving: How the New Deal Safeguarded Home Ownership,* edited by Price V. Fishback, Jonathan Rose, and Kenneth Snowden, (Chicago: University of Chicago Press, 2013), 9-19.

39.4% of HOLC borrowers were more than three months behind on their mortgage payments; by 1940, the HOLC had foreclosed on 16.7% of its loans.[72]

The risks inherent in the FHA's underwriting activities were explicitly addressed by successive editions of its Underwriting *Manual*. The 1936 edition noted that "[m]ortgage risk is created every time a mortgage is made. It lies in the future. The risk continues to exist during the life of the loan, although the degree of risk may change. It is fallacious to presume that mortgages fall into two classes viz., those that are safe and those that are unsafe. Each and every mortgage investment is hazardous to some degree. However, different mortgages vary as to degree of risk."[73] The *Manual* defined risk as a construct that shaped the process of mortgage underwriting, laid out its sources, and discussed the necessity for developing objective metrics to calculate degrees of risk:

> The Mortgage [sic] risk is an entity and can be treated as such. It is essential to so treat it in order to make it possible to express a measurement of risk in simple terms. As an entity, the overall degree of risk is composed of all the possibilities of trouble, expense, and loss in connection with the lending of mortgage funds. In other words, risk includes probability of: Difficulty in connection with collections; unusual expense in connection with collections; excessive servicing costs, foreclosure trouble; cost of foreclosure; delay in foreclosure; cost of rehabilitation; cost of carrying until sold; cost of resale; loss, if any, on resale…The overall degree of risk" is necessarily associated with the relative degrees to which there is likelihood of trouble and financial losses such as those listed above. The list indicates the elements which contribute to and affect mortgage risk. The factors comprising them are numerous, complex, and subject to an almost infinite number of possible combinations in practical cases.[74]

[72] Federal Home Loan Bank Board, *Fifth Annual Report of the Federal Home Loan Bank Board* (Washington DC: US Government Printing Office, 1938), 28. To contextualize these figures, it is, of course, important to note that the HOLC targeted mortgages that were already in arrears.
[73] Federal Housing Administration, *Underwriting Manual: Underwriting and Valuation Procedure under Title II of the National Housing Act, (*Washington DC: United States Government Printing Office, 1936).
[74] Ibid., Sec 208.

Property and the Logic of Racial Risk

Although successive editions of the *Manual* avoided specific references to African Americans, repeated references to "inharmonious racial groups," as well as the more subtle discriminatory provisions that I discuss below, demonstrated that race was a central factor in assessing the possible mortgage risk that could arise from borrower default and the diminished value of the property that served as collateral.[75] The *Manual* also incorporated provisions that operationalized prevailing concerns about a longer-term source of risk- the possibility that residential integration would produce "racial amalgamation" and eventual economic and social decline.

Neither racial discrimination in mortgage financing nor racially segregated urban housing patterns originated with the HOLC or the FHA.[76] One 1930 survey of 10,770 blocks in urban areas throughout the United States found that 84.8% were occupied exclusively by whites and 4.9% were exclusively occupied by nonwhites, while the remaining 10.3% were racially mixed.[77] Racially disparate opportunities for home finance were also well-established. Prior to the development of the national programs to intervene in mortgage markets, very few institutional lenders would provide financing for African American homes. When loans were available, they were offered on much more restrictive terms that were designed to address the higher anticipated risks by providing lenders with more collateral and further restricting the terms of financing. In

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[75] The coded term "inharmonious groups" also appeared in standard appraisal texts of the day. See, for instance, American Institute of Real Estate Appraisers, *Real Estate Appraisal, (*Chicago: American Institute of Real Estate Appraisers, Text no. 9, 1935).

[76] A. E. Hillier finds for example, that HOLC criteria simply reiterated existing practices in the financial industry. "Redlining and the Home Owners' Loan Corporation," *Journal of Urban History,* 29, no. 4 (2003): 394-420.

[77] FHA, The *Structure and Growth of American Cities*, (Washington, DC: US Government Printing Office, 1939). In this document, the Administration used these figures to make the point that racial segregation resulted from natural market forces and personal preference, and that FHA lending criteria simply aimed to honor these "natural" patterns. This study has since been used to argue that segregation was produced by consumer choice rather than by the structure of FHA lending. See, for instance, Edward Pinto, "FHA from 1934 to 1938: Lessons for Wealth Building," Washington, DC: AEI International Center on Housing Risk. [https://www.aei.org/wp-content/uploads/2014/12/Pinto_FHA-1934-to-1938_12.12.14.pdf] 12 December, 2014.

1921, for example, one lender explained to the Chicago Commission on Race Relations "that the Negroes are usually allowed $1000 to the white man's $1500; only 35 per cent of the value of the property is loaned to the Negro, whereas 50 per cent is granted to whites. Maximum time of loan was five years for the White and three years for the Negro."[78] These loans were also problematic because they limited the ability of banks to engage in the common practice of shifting risks onto the secondary mortgage market, since the insurance trusts and private investors that created the largest secondary market for mortgage notes generally refused to purchase loans made to African Americans.[79]

The effect of disparate financing terms on ownership was magnified by the fact that African Americans typically paid higher prices to secure less desirable properties, creating a dual real estate market in which property prices and underlying property values were disconnected.[80] Restrictive covenants and the threat of violent White response limited purchases to particular neighborhoods, lowering the supply and quality of available homes and raising their prices for African Americans, while drastically reducing the prospects for resale to Whites.[81]

As these *ex ante* restrictions on lending to African Americans demonstrate, neither the HOLC nor the FHA originated the idea that race created distinctive risks. Both agencies operated within a financial, commercial and legal environment structured by two notions. First, although the financial risks arising from race included those arising from class, they were construed to be much more complex and potentially much more serious. Second, these attributions were informed by the idea that African American residents raised the risk of default and lowered

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[78] Chicago Commission on Race Relations, *The Negro in Chicago,* 130.
[79] Ibid, 120.
[80] Robert Weaver, *Hemmed in: The ABC's of Race Restrictive Housing Covenants* (American Council on Race Relations, 1945). Weaver points out that the higher prices that African Americans pay for the lower-quality homes that were available to them meant that once neighborhoods had become largely African American, the option of selling to Whites, who could obtain better accommodations at lower prices, was foreclosed.
[81] *Fairchild v. Raines* 24 Cal 2nd 1818.

property values both because, as individuals, they had racial characteristics that made them poor stewards of property and problematic payers, and because the movement of a few African Americans into a neighborhood or onto its outskirts would produce White flight, physical degradation of neighborhood properties and infrastructure, an increase in negative externalities such as crime, vice, delinquency, and riots, and eventual migration into adjoining neighborhoods. FHA lending criteria attempted to quantify, to objectify, and to manage these racial risks both in order to secure the co-operation of financial institutions and in order to conserve Administration resources by forestalling the future movement of African Americans.

Class played a part in the assessments of racial risk.[82] Black workers were, as a group, judged to be less securely employed and to receive lower wages than whites.[83] Describing racial barriers to home ownership, the 1921 report of the Chicago Civil Rights Commission, which conducted extensive interviews of bank officials and realtors as part of its study of the 1919 Chicago riot, noted that the "Negro population of America, due to factors in its history, constitutes at present a considerable proportion of the familiar low-income group families and, in like manner, has in its own composition a larger proportion of families of this level than is true of other groups of the population."[84] The 1932 report of the Committee on Negro Housing, which reported to President Hoover's Commission on Home Building and Home Ownership, found that "half of the Negro chief wage earners receive less than $1,200 a year as compared to approximately 20 per cent of the white chief wage earners. Six per cent of the white chief wage earners earned more than $1,800, but none of the Negro."[85] Black employment was also believed to be more tenuous than that of Whites: A 1921 survey of Chicago lenders found that

[82] S. Prakash, "Racial Dimensions of Property Value Protection Under the Fair Housing Act," 101 *California Law Review* 1437 (2103): 1446-1447.
[83] See, for instance, Myrdal, *An American Dilemma,* 205-219.
[84] Chicago Commission on Race Relations, *The Negro in Chicago*, 221.
[85] *Report of the Committee on Negro Housing*, (Washington, DC: National Capital Press, 1931), 60-61.

most shared the belief that "if wage reductions become general they will fall most heavily unskilled workers and render difficult the meeting of payments by such Negroes, who constitute the great majority."[86]

The risks produced by race were not limited to those posed by individual borrowers who might default. In its final report to the 1931 Conference on Home Building and Home Ownership organized by President Herbert Hoover, the Committee on Negro Housing listed eleven factors that distinguished difficulties with improving Black ownership and housing opportunities from those involved with expanding opportunities for Whites:

> 1. The course of selection and segregation which, almost without exception, draws the Negro population into the most deteriorated residence sections of the city. This is in part the process of city growth, in part economic selection and segregation, and in part racial selection, the tendency to compactness and group solidarity. This is enforced in part from without and in part from within.
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> 2. The accelerated rate of deterioration inherent in the character of Negro properties, due to age and use.
>
> 3. The depreciation of property values attributed to Negro occupancy or proximity. This is in part economic and in part psychological.
>
> 4. Segregation legislation designed to restrict areas of residence as a public measure.
>
> 5. Restrictive compacts and covenants, designed to restrict areas of Negro residence as a private measure.
>
> 6. Objection of white residents to the presence of Negroes in certain areas, as registered in:(a) Clashes, (b) Bombings of property, (c) Intimidation.
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> 7. Exclusion of the Negroes from new housing developments.
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> 8. Limitation of facilities for financing of Negro home ownership.
>
> 9. Increased rentals with Negro occupancy.
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> 10. Factors related to the level of culture of the majority population of the Negro group, as reflected in the care of property.

[86] Ibid., 223.

> 11. The relation of such physical factors as excessive congestion, and physical deterioration to correspondingly excessive rates of delinquency and mortality in Negro areas.[87]

These characteristics, which fall into three general categories, can be understood as a catalogue of racial risks arising both from individual behavior and from neighborhood characteristics. First, both the residences of individual African Americans and African American neighborhoods were poorly maintained and prone to accelerated deterioration, making them unsuitable for investment. Second, high rates of African American occupancy were associated with negative externalities such as elevated rates of violence, crime, delinquency, and other social problems that affected investment values. Third, in an environment characterized by geographic restrictions on African American occupancy, conditions were almost certain to deteriorate, further reducing property values and affecting longer-term returns.

Assessment grids created by the HOLC and the FHA to construct "objective" estimates of mortgage risk reflected these concerns, mirroring practices in the real estate, insurance, financial, and appraisal industries.[88] The assumption that African Americans lowered property values was incorporated in the Code of Ethics adopted by the National Association of Real Estate Brokers in 1924: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood."[89]

The appraisal industry operated under similar assumptions. HOLC and FHA evaluation criteria were partially developed by Frederick Babcock, author of a classic 1932 text, *The*

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[87] President's Conference on Home Building and Home Ownership, 2-3.
[88] Charles Neir III, "The Shadow of Credit: The Historical Origin of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation," 11 *University of Pennsylvania Journal of Law and Social Change* 131 (2103): 78.
[89] National Association of Real Estate Boards, *Code of Ethics* (New York: National Association of Real Estate Boards, 1924), Article 34.

Valuation of Real Estate. Chapter VIII of this text was devoted to a discussion of "Influence of Social and Racial Factors on Value." He noted that while small degrees of neighborhood heterogeneity did not produce rapid declines in value, "[t]here is one difference in people, namely race, which results in a very rapid decline."[90] Other appraisal texts of the time routinely connected neighborhood racial composition and land values. In his influential 1933 study *One Hundred Years of Land Values in Chicago*, for example, Homer Hoyt noted that "land values occupied by certain racial and national groups are invariably low because of the lower rents that these groups pay, their greater deteriorating effects on property, and white peoples' unwillingness to live near them." He then cited a rating system developed by a Chicago real estate broker that presented a numeric scale connecting neighborhood ethnicity and property values: Neighborhoods in which English residents predominated ranker highest of the ten categories. Those in which Blacks settled were ranked ninth, followed only by those that had Mexican residents.[91]

The FHA used Hoyt's theories to support evaluation standards that explicitly enforced residential segregation. In 1939, the FHA commissioned him to edit a monograph, *The Structure and Growth of Residential Neighborhoods in American Cities*, that outlined the Administration's plan for using property evaluation practices to assure the "segregation of sectors populated by different races." This segregation, the monograph noted, was needed because African Americans could not be assimilated into the larger society and because integration would produce intermarriage, a practice which would be "frowned upon by peoples of any color."[92]

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[90] Frederick M. Babcock, *The Valuation of Real Estate in The United States* (New York: McGraw Hill,1932), 9.
[91] Stanley McMichael, *McMichael's Appraising Manual: A Real Estate Appraising Handbook for Field Work and Advanced Study Courses, (*New York: Prentice Hall, 1931).
[92] Federal Housing Administration, *The Structure and Growth of Residential Neighborhoods in American Cities* (Washington DC: US Government Printing Office, 1939), 62.

Understandings about the relationship of race and property values were also embedded in the legal order. From around 1920, extensive litigation around restrictive covenants both reflected and legitimized this connection. These private agreements which "ran with the land," bound property owners to refrain from selling to African Americans (and, in some cases, other racial and ethnic groups).[93] They had had been used on a limited basis from the turn of the century, but became increasingly common as African American migration to urban areas increased.[94] Decisions upholding covenants typically held that they served a legitimate public purpose- that of maintaining the value of covered properties.[95] On the other hand, successful challenges to covenants most often relied on the doctrine of "changed circumstances," which held that if the purpose of a covenant — that of maintaining property values — had been frustrated by changes in external conditions, it could be voided.[96] The legal theory presented by these cases was that the influx of African Americans into areas around the restrictive properties had already reduced their value, frustrating their purpose. In the 1944 case of *Fairchild v. Raines*, for example, the California Supreme Court relied on testimony of neighborhood residents, including a physician and a real estate agent, to find that the purpose of the covenant had been frustrated because "the damage occasioned … by Negro occupancy had already been sustained by reason of the influx of Negroes in the same tract."[97]

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[93] The ethnic composition of local communities often determined whether additional groups would be excluded. In California, for example, covenants sometimes forbid sales to Asians (who were sometimes identified as Mongolians. In other areas, sales to Arabs were forbidden. Sales to Jewish purchasers were also frequently forbidden. Covenants also sometimes forbade sales on the basis of political criteria- as, for instance, to Communists or to members of the German bund.

[94] Michael Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115, no. 4 (2000): 541-568.

[95] Vose, *Caucasians Only.*

[96] David Delaney, "Geographies of Judgement: The Doctrine of Changed Circumstances and the Geopolitics of Race," *Annals of the Association of American Geographers* 83: no. 1 (1983): 48-65; and *Race, Place and the Law, 1836-1948 (*Austin: University of Texas Press, 1998).

[97] *Fairchild v. Raines* 24 Cal 2d 818,823 (1944).

This connection was reiterated by official statements of property law. In 1944, the American Law Institute issued a revised edition of its *Restatement of Property.* These periodic restatements were intended to communicate current understandings about best practices in property law. As part of the ALI's continuing attempt to harmonize apparently contradictory rules of common law and developing case law, this *Restatement* attempted to provide an authoritative resolution to an apparent contradiction: Both in terms of common law and in settled case law, a critical element of ownership was the right to dispose of — or alienate — property. Exceptions were warranted only if they met compelling state interests. The revised *Restatement* held that, because they would stabilize property values, restrictive covenants met this test.[98]

The FHA's emphasis on mortgage risk as an entity that extended far into the future was central to the way in which understandings about the relationship of race, risk and property values produced racially disparate opportunities for home ownership. Beginning with waves of ethnic immigration to urban areas in the latter half of the nineteenth century, city planners, academics, real estate professional and appraisers had developed a dynamic model of urban property values which indicated that, as the ethnic and racial character of neighborhoods changed, property values declined, creating what housing authority Charles Abrams later termed a "Gresham's Law of neighborhoods."[99] This process of decline was described in "scientific" terms that assumed that ethnic and racial "invasions" of urban neighborhoods would trigger an inevitable process of decline that could be divided into sequential stages, enabling predictions about the future value of property in the area.[100] By this logic, the "invasion" of a neighborhood also lowered property

[98] American Law Institute, *Restatement of the Law of Property,* (American Law Institute Press,1944).
[99] Charles Abrams, "The New Gresham's Law of Neighborhoods: Fact or Fiction," *Appraisal Journal* 10, no. 8 (1952): 324-28.
[100] Bradford points out that the use of this model connected to the contemporary popularity of social Darwinism and the notion of evolutionary stages in the social as well as the natural world. Calvin Bradford, "Financing Home Ownership: The Federal Role in Neighborhood Decline," *Urban Affairs Review*, 14, no. 3 (1979): 313-335; and "An Analysis of Underwriting and Appraisal Practices and Their Impact on Credit Availability," *Real Estate Issues* 3

values in adjoining neighborhoods because the proximity of African Americans produced negative externalities that would impact surrounding areas, leading to White flight and facilitating further racial expansion. Stanley McMichael, author of a standard 1932 appraisal manual, expressed this understanding when he described the process of deterioration by which the influx of African Americans from nearby properties created “twilight” or “blighted” zones.[101]

Prominent sociologists and city planners such as Robert Park connected these trajectories to a longer-term element of racial risk, arguing that residential integration would promote social interaction and eventual racial amalgamation, leading both to national and to neighborhood economic and social decline.[102] Park opined that “in migration, the breakdown of the social order is initiated by the impact of an invading population, and completed by the contact and fusion of native with alien peoples.”[103] Unless this process was interrupted by physical separation of the races, Park warned, “[i]n the long run, people and races who live together, sharing in the same economy, inevitably interbreed, assimilation is inevitable…the conquering people impose their culture and their standards upon the conquered.”[104] In the case of African Americans, dominant understandings suggested that these cultural standards would include an aversion to monogamy and to productive employment and tolerance for sexual immorality and criminal activities.[105] Similar concerns produced other attempts to use public policy to forestall racial amalgamation during this period, including anti-miscegenation legislation, which became

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(Spring, 1978): 16-26. For a contemporary example of this line of reasoning, see EW Burgess, “Residential Segregation in American Cities,” *The Annals of the American Academy of Political and Social Science* (1928): 105-115. Robert Park provides a more theoretical and historically-informed discussion of this concept in “Succession, An Ecological Concept,” *American Sociological Review* 1, no 2 (1936): 171-179.

[101] Stanley Mc Michael, *McMichael’s Appraising Manual: A Real Estate Appraising Handbook for Field Work and Advanced Study Courses*, (New York: Prentice Hall, 1931).

[102] Park, like many individuals who espoused these theories, was associated with the Chicago School.

[103] R. E. Park,” Human Migration and the Marginal Man,” *American Journal of Sociology* (1928): 885.

[104] Ibid., 891.

[105] See, for instance, Frederick Ludwig Hoffman, *Race Traits and Tendencies of the American Negro* (Washington: American Economic Association, 1896), 1-4. Hoffman’s work was an important basis for actuarial understandings of racial risk and for the idea that metrics of racial risk could be calculated.

the basis for an unsuccessful attempt to mandate residential segregation in the city of Richmond, Virginia.[106]

Prior to national intervention into the market for home financing, policies to produce residential segregation had operated at the local level, although, for a time, they received support from state and federal courts. As African American migration to urban areas increased, racial zoning was the principal method through which explicit public policies promoted residential segregation. Cities, beginning in Baltimore in 1910, adopted racial zoning ordinances that limited the number of blocks or districts in which African Americans could reside.[107] Reflecting contemporary understandings about the connections between race and residence and presaging FHA policies, Barry Mahool, Mayor of Baltimore, explained his support for the policy by opining that "Blacks should be quarantined in isolated slums in order to reduce the incidence of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority."[108] These ordinances, which spread rapidly to cities in the South, Midwestern, and Middle Atlantic states, were enforced by state courts and federal courts, but were held unconstitutional by the Supreme Court in its 1917 decision in *Buchanan v. Warley*,[109] although attempts to use related practices such as expulsive zoning to promote segregation continued, in some cases, until the 1950s.[110]

[106] *City of Richmond v. Deans* 37 F2d 712 (1930).
[107] C. Silver, "The Racial Origins of Zoning: Southern Cities from 1910–40," *Planning Perspective* 6, no. 2 (1991): 189-205; J. H. Franklin, "History of Racial Segregation in the United States," *The Annals of the American Academy of Political and Social Science* 304, no 1 (1956): 8.
[108] Richard Rothstein, "How Government Policies Cemented the Racism that Reigns in Baltimore," *The American Prospec*t [http://prospect.org/article/how-government-policies-cemented-racism-reigns-baltimore], April 29, 2015.
[109] *Buchanan v. Warley* 245 US 60 (1917).
[110] C. Silver, *The Racial Origins of Zoning*. Expulsive zoning occurs when racially mixed neighborhoods are zoned for industrial or other uses, so that White individuals, who are able to move, do so, leaving behind African Americans who lack other options.

The Mechanisms of FHA Discrimination: Mortgage Risk as Racial Risk

The FHA's underwriting criteria aimed to manage present and future mortgage risk by the strict application of racialized social scientific principles to the underwriting process. They followed the pattern established by the commercial insurance industry's use of actuarial science to define African Americans as a population that posed extraordinary risks, justifying the denial of coverage.[111] Information on racial identity at the individual, block and neighborhood level and indicators that could provide a proxy for race were central to this effort: Racial demographic information made up over 50% of the data collected by the Administration's division of Economics and Statistics.[112] The FHA Manuals themselves used racially neutral terms such as "inharmonious elements" rather than referring specifically to African Americans but their racial implications were clear. Additionally, the Manuals used proxy indicators for race by assigning negative values to characteristics that were common both to properties and neighborhoods available to African Americans and to African Americans as individuals.

Rating Mortgage Risk, Rating Racial Risk

Part II of the FHA Manual, which provided instructions for "Mortgage Risk Rating," was central to the mortgage approval process. Administration-trained evaluators assessed potential purchasers and properties, rating mortgage risk in terms of four general categories: Property, Borrower, Location and Mortgage Pattern.[113] Although, on their surface, these criteria were expressed in terms of objective indicators, most scores required independent judgement by evaluators who were specifically instructed to fit "subjective" assessments into the categories laid out in assessment forms. Section 236 of the 1936 edition of the Manual noted that "they are

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[111] Dan Bouk, *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual*, (Chicago: University of Chicago Press, 2015), Ch. 2.; B. Wiggins, *Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881-1948*, (PhD Diss.: University of Minnesota, 2013).
[112] Kimble, "Insuring Inequality."
[113] *FHA Manual*, 1936.

expected to rely heavily upon their personal judgment in establishing the ratings. It is specifically suggested that there is no reason why they cannot form an over-all opinion with respect to the proper rating of an entire category and check the rating by a detailed analysis of the features. This device will serve to correct the tendency to treat the features and the system as a fetish…"

Each category enumerated under "Mortgage Risk" created particular obstacles for African American purchasers: The process of rating mortgage risk effectively rated racial risk. A close reading of these risk rating requirements demonstrates that the connections between race and risk were much more complex than those typically cited in studies of racial discrimination in FHA lending criteria.

Physical Criteria

Under the Property category, the *Manual* established physical criteria for insurable homes. These criteria had clear racial implications, since the difficulties with the condition of homes and neighborhoods available to African Americans were well-known. The report of the Chicago Commission on Race Relations noted that "for the most part the physical surroundings of the Negro family…are poor. The ordinary conveniences, considered necessities by the average white citizen are often lacking. Bathrooms are often missing. Gas lighting is common and electric lighting is a rarity. Heating is commonly done by wood or coal stoves and furnaces are rather exceptional."[114] Robert Lamont, Secretary of Commerce, noted in his preface to the 1932 Report of President Hoover's Committee on Negro Housing that its bibliography listed "more than forty surveys and investigations that have revealed, from time to time, atrocious housing conditions" in areas open to African American purchasers.[115]

[114] *The Negro in Chicago*, 152. See also, for example, T. J. Woofter and Associates, *Negro Problems in Cities* (Garden City, N. Y., Doubleday, Doran and Company, Inc, 1928).
[115] Final Report, Committee on Negro Housing, p. 260.

Evaluators classified the physical characteristics of properties on the basis of seven criteria: "Structural Soundness" (contributing 25% to the total on the item), "Resistance to Elements" (contributing 10%), "Resistance to Use (5%), Livability and Functional Plan" (25%), "Mechanical and Convenience Equipment"(10%), "Natural Light and Ventilation" (5%), and "Architectural Attractiveness (20%)"[116] Evaluation grids contained detailed prescriptions about amenities such as electrical outlets ("Suitable outlets should be provided in adequate numbers to permit the convenient use of electrical appliances and household electrical equipment.)"[117] They established standards for acceptable kitchens ("Kitchens should have adequate windows and their placement is critical for natural ventilation"),[118] and bathrooms ("Bathrooms should be located conveniently to the bedrooms.").[119]

The *Manual* noted that physical standards were intended to assure the durability of financed homes — in effect, maintaining the value of the loan's collateral. These criteria vastly increased the probability of financing for recently constructed homes, which were typically located in suburbs or developments that excluded African American purchasers.[120] The connection to suburban developments was reiterated in more straightforward terms in the section on Location, which noted that "Homogeneous development of properties in any neighbor- hood tends to reduce mortgage risk. Areas which contain structures of about the same age are usually better mortgage-lending areas than those in which, a variety of age groups is present. Areas in which development has been accomplished in accordance with accepted principles of good housing are quite apt to prove much more stable than those areas where little thought or attention has been

[116] Ibid., Part Two, Section 1.
[117] Federal Housing Administration (1936*). Underwriting and Valuation Procedure Under Title II of the National Housing Act*, Sec, 209 (a), 209 (c).
[118] Ibid., Sec. 203 (d).
[119] Ibid.
[120] Jackson, *The Crabgrass Frontier*; Freund, *Colored Property.*

paid to the various requirements for light and air lot coverage, and controlled similarity of types of structures."[121]

Borrower Characteristics

The "Borrower" category rated potential purchasers on five criteria: "Reputation" (which contributed 25% of the total on this item), "Attitude toward Obligations" (contributing 30%), "Ability to Pay" (30%), "Past Record" (10%), and "Future Prospects" (30%).[122] "It is obvious," the Manual noted, "that the risk involved in mortgage insurance transactions will vary according to the character, actions, financial status, and prospects of the borrower who is responsible for the repayment of the loan."[123] At Section 303, the *Manual* noted that "A borrower's reputation over a reasonable period of time usually reflects his thoughts, actions, and choice of associates. The reputation of the borrower indicates reasonably well the degree of his moral stability."[124] Assessments under this criterion were not confined to financial matters, nor to easily observable factors. There was no explicit mention of race, but the evaluation process included many proxy indicators. Section 312 of the 1936 edition of the *Manual* noted that, "if the Mortgage Risk Examiner makes the mistake of rating a borrower's reputation on the basis of the very few actions of the borrower which may be only publicly observed, and fails to secure or disregards information revealing his apparent trend of thought, the rating of the feature "Reputation" will not be correct."[125]

While evaluators were instructed to investigate both the borrower's business and social relationships , they were warned that the latter were more accurate indicators of reputation since they "the type of people who are voluntarily picked as associates, rather than those with whom

[121] *FHA Manual*, 1936, Sec. 202.
[122] *FHA Manual*, 1936, Sec. 301-332.
[123] Ibid, Sec. 303.
[124] Ibid.
[125] Ibid.

the borrower is thrown into association under conditions whereby he is not permitted to exercise free choice."[126] The 1938 revision of the manual provided additional guidance on this point, noting that the "highest rating could hardly be ascribed in cases where the borrower's chosen associates are other than substantial, law abiding, sober-acting, sane-thinking people of acceptable ethical standards."[127] Given popular constructions about the morality and social behavior of African Americans, this criterion provided evaluators with an opportunity to frame these constructions as scientific metrics.

A similar point can be made about "Attitude toward Obligations." "Obligations," here, were defined both in financial and in personal terms. At Section 317, the 1938 edition of the *Manual* instructed evaluators that "With regard to mortgage loans, it is usually found that borrowers with domestic responsibilities are more dependable than those without such responsibilities. This is especially true in cases where the wife is efficient in household economy and motivates and inspires the husband to apply himself closely to his work and urges him to regard the payment of his just debts as a requirement somewhat of the nature of a sacred obligation." By instructing evaluators to consider the domestic arrangements of borrowers, the Administration followed other national social and economic policies in discriminating against African Americans and other groups that often had common law or nontraditional household arrangements.[128] The assumption that households would consist of a working husband and a wife who was primarily concerned with managing the household (and her husband's work ethic) also reflected White

[126] Sec. 313
[127] *FHA Manual*, 1938, sec. 1014.
[128] See, for instance, Linda Faye Williams, *The Constraint of Race: Legacies of White Skin Privilege* (State College, Pa: Penn State University Press, 2004). Williams points out, for example, that early assistance programs such as Mothers Pensions typically excluded children born out of wedlock and women in common law relationships.

rather than African American norms.[129] The assumptions and judgements made in investigations of borrowers were then entered onto forms that converted them into "objective" measures."[130]

Location, Location, Location

The section on Location established the neighborhood criteria that have been the most frequently analyzed example of the FHA's use of racially discriminatory criteria.[131] Following the assessment grids used by the HOLC, under the "Location" category editions of the *Manual* beginning in 1938 classified neighborhoods into A, B,C and D levels based on their suitability for lending: Neighborhoods rated "A" received preference, while those ranked "D" typically did not qualify for mortgages.[132] "D" areas were outlined in red on HOLC maps, famously giving rise to the term "redlining."

Neighborhood characteristics were assessed by intensive investigations that considered both the present and possible future racial, social and economic characteristics of neighborhoods. The time horizon for these projections about neighborhood change was dictated by the maximum length of Administration mortgages. The 1936 edition of the *Manual* instructed evaluators to assess the probabilities of negative neighborhood change within a twenty-year period; the 1938 edition, prepared after the maximum term of mortgages was extended, raised this time horizon to twenty-five to thirty years.

Information about neighborhood characteristics was recorded in "City Survey Files" that included two sets of documents which lenders were required to keep on file: Residential Maps and Real Property inventories that collected detailed block by block information about residents'

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129 Karen Altman, "Consuming Ideology: The Better Homes in America Campaign," *Critical Studies in Mass Communication* 7 (1990): 286-307; Clarissa Rile Hayward, *How Americans Make Race: Stories, Institutions, Spaces* (New York: Cambridge University Press, 2013).
130 For a discussion of this process, see David Freund, *Making It Home: Race, Development, and the Politics of Place in Suburban Detroit, 1940-1967* (PhD Department of History Dissertation., University of Michigan, 1999).
131 Katznelson, *Affirmative Action*; Jackson, *Crabgrass Frontier*; Massey and Denton, *American Apartheid*.
132 *FHA Manual*, 1936, 207 (f).

racial identity, home ownership rates, and the physical characteristics of individual homes and of the neighborhood.[133] By assessing racial risk on a block by block basis and using these assessments to place African American and racially mixed neighborhoods in a category that did not qualify for mortgages, FHA lending requirements effectively integrated racial zoning into national housing policy, sidestepping *Buchanan v. Warley*.

These surveys also explicitly documented the racial and ethnic composition of particular city districts. The Property Analysis that resulted from the Survey for Peoria, Illinois, for example, reported on the racial and ethnic composition of major divisions in the metropolitan area and on racial differences in ownership rates. A histogram graphically reported the percentages of White, "foreign born," and negro residents, and provided information on the movement of these populations between 1920 and 1930. Accompanying text noted changes in the proportion of foreign born and negro residents to Whites in each area during the period, noting for example, that in the city of Peoria, "Between 1920 and 1930, the percentage of foreign-born decreased, while there was a slight increase in the proportion of negroes."[134] Elsewhere, the analysis reported that "Races other than whites are characteristically tenants rather than owners in Peoria, for members of the colored races account for 3.1% of the tenants but only 1% of the owners."[135]

A weighted eight-item scale detailed the importance assigned to each factor in assessing the suitability of neighborhoods for mortgage insurance. These requirements were implicitly connected to understandings about racial characteristics. Forty per cent of the determination was to be based on the neighborhood's "relative economic security," 20% on "protection from

[133] Kimble, "Insuring Inequality": 406.
[134] Federal Housing Administration, *Analysis of the Real Property Inventory and Financial Survey for Peoria, Illinois*, (Washington, DC: US Government Printing Office, April 1, 1935), Table IV, 10-11.
[135] Ibid., 42.

adverse influences" and 5% from "freedom from special hazards."[136] The movement or potential movement of African Americans into an area was viewed as a "special hazard" and an "adverse circumstance, since "a change in social or racial occupancy generally leads to instability and a reduction in values."[137] In order to assess the future possibility of negative changes, property evaluators were to investigate the surrounding areas for the presence of 'incompatible racial and social groups" and to determine whether the neighborhood might be "invaded" or "infiltrated" by these "inharmonious racial groups."[138]

The physical segregation of these elements was explicitly put forward as a criterion for neighborhood quality and as a potential indicator of future racial movements. With respect to public schools, for example, evaluators were warned that "although the physical surroundings of a neighborhood area may be favorable and conducive to enjoyable, pleasant living in its locations, if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist."[139] Integrated schools were viewed as a precursor to racial amalgamation and as a sign of future neighborhood deterioration.

The degree to which White neighborhoods were physically isolated from African Americans also affected the assessment of neighborhood quality, since isolation provided a hedge against future population movements. Successive editions of the *Manual* specified that neighborhoods protected from "adverse influences" by barriers such as parks, college campuses, highways, or topography would receive a higher ranking. It noted that where no such barriers existed, the

[136] Jackson "Race, Ethnicity and Real Estate Appraisal," 435.
[137] *FHA Manual*, Section 109.
[138] *FHA Manual*, 1936, Sec. 233.
[139] *FHA Manual*, 1936, Sec 266.

location's ranking could be improved by the creation of artificial barriers.[140] Zoning requirements were also recommended to perfect residential segregation.

Finally, the Administration aimed to assure the future of neighborhood segregation by linking the use of restrictive covenants to mortgage approval. Prior to their incorporation into FHA lending requirements, the provisions of covenants varied widely between and within metropolitan areas: Some specified set terms during which they would remain effective; some became active only when a specified number of adjacent property owners signed; some were appended to deeds in newly-built developments; others were drafted by neighborhood associations.[141] The Administration transformed these agreements by standardizing their requirements and by linking them to higher mortgage ratings. Ignoring existing legal controversies about the use of these deed restrictions,[142] the first edition of the FHA *Manual*, published in 1934, offered a model covenant which read: "no person of any race other than [race to be inserted] shall not occupy any building or any lot, except that this covenant shall not prevent occupation by domestic servants of a different race."[143]

The 1938 edition explicitly connected the use of standardized covenants to mortgage ratings, noting that for previously undeveloped or partially developed land, high ratings could be given only where appropriate zoning restrictions or restrictive covenants recorded with property deeds provided protection from "adverse influences" for a period of twenty-five to thirty years.[144] This edition of the *Manual* offered specific examples of conditions that should be barred by these

[140] Clarissa Rile Hayward describes the construction of a barrier fence in Detroit to separate an area in which a developer sought to obtain FHA financing from a nearby African American neighborhood. "The Difference States Make: Democracy, Identity, and the American City," *American Political Science Review* 97, no. 4 (2003): 501.
[141] For an extended discussion of covenants, see R.R. Brooks and Carole Rose, *Saving the Neighborhood* (Cambridge, Ma: Harvard University Press, 2013).
[142] Clement Vose, *Caucasians*, notes that over 200 cases challenging restrictive covenants were brought by the NAACP between 1919 and 1948.
[143] *Federal Housing Administration* (1934).
[144] *FHA Manual*, 1938, Sec. 980 (1).

restrictions: "Prohibition of the occupancy of the races for which they were not intended"[145] followed "Prohibition of stables or undesirable buildings such as stables, pig pens, temporary dwellings and high fences."[146] The *Manual* also indicated that, where similar restrictions on racial occupancy covered adjacent properties, mortgages would be graded favorably; noting that when no such similarity existed, properties would receive an unfavorable rating.[147] The importance of zoning and covenant restrictions was reiterated in public statements by FHA officials: On November 13, 1938, for example, *The New York Times* reported that an "unnamed" FHA official urged potential buyers in undeveloped areas to "examine the deeds to properties to determine…the protection that has been provided against undesirable encroachment by restrictive covenants."[148]

Mortgage Pattern

The final section, which addressed "mortgage pattern" contained grids and forms that converted ratings on each of the other three categories into a final assessment of risk. This section provided an opportunity to produce racially discriminatory results even in cases where scores on two of the three other measures were high. In the 1936 version of the Manual, the rating of mortgage pattern was laid out in Paragraphs 232 and 233.[149] Section 233 noted that It may be pointed out that the relative importance of the several categories of risk differs from case to case. For example, in a case in which either the Property, the Location, or the Borrower Category receives a very low rating and the other two categories receive relatively high ratings, the relative importance of the one low-rated category in the over-all degree of risk is

[145] Ibid., Sec 980 (3) (g).
[146] Ibid., Sec. 980 (3) (f).
[147] Ibid.
[148] *New York Times*, "Warning to Buyers: Deeds Should Be Examined for Restrictive Covenants," (November 13, 1938).
[149] In the 1938 edition, this was addressed in paragraphs 935 and 937.

substantially greater than in a case in which all three categories are rated alike. For this reason, the fourth category, namely, the Mortgage Pattern, includes a device by means of which to take account of this relationship. The category having the lowest rating is more heavily weighted than the other two on the grid of the Mortgage Pattern. In other words, an "objective" reason to deny a mortgage could be constructed from a situation in which 2/3 of the categories received a positive rating.

Walter White, Secretary of the NAACP, identified this section as a critical source of racial disparities in mortgage access. Following a much publicized 1938 analysis of FHA lending criteria conducted by the Jamaica, New York NAACP, White demanded that the FHA revise this section. Frederick Babcock, the head of the Administration's underwriting division responded that "No possible interpretation of these paragraphs could lead to the conclusion…that the FHA discriminates against negroes or fosters their segregation."[150]

Conclusion

The FHA's provisions for rating mortgage risk were also calculated to rate racial risk. These racialized criteria were not confined to the neighborhood rankings that have most often been cited in discussions of the Administration's racial agenda. Taken as a whole, the racial effects of the FHA's risk rating criteria were subtler and more comprehensive than the discriminatory mechanisms that had been employed by individual financial institutions. These criteria transformed local and regional practices into national policies, sidestepped existing court decisions and legal controversies, and converted social constructions about African Americans

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[150] "US Housing Heads Draw Color Line," (December 29, 1938). "US Housing Heads Draw Color Line," *Los Angeles Sentinel*, "Reveal Rigid Policy of Segregation in FHA" (December 31, 1938). "Reveal Rigid Policy of Segregation in FHA," *New York Amsterdam News* (December 31, 1938).
Walter White, Letter to Frederick Babcock (December 23, 1938), and Stewart McDonald. NARA RG 31; Frederick Babcock. Letter to Stewart McDonald, (January 6, 1939), NARA RG 31, Program Correspondence of the Assistant Commissioner for Operations, 1936-1956.

into apparently objective indicators that could be used to shape the emerging national mortgage market.

EPILOGUE

"The past is never over. It's not even past."

William Faulkner

"Everything old is new again."

Cole Porter

"Hindsight is twenty/twenty," the old adage goes, but its truth in any particular case depends on the mirror through which one views the past. In the case of accounts that examine the development of racial disparities in home ownership, the metaphorical mirror should have a warning label that reads "distances are longer – and landscapes more complex- than they appear."

The subprime crisis, which had its epicenter in African American communities, drew attention to the longstanding gap between White and African American ownership rates and to the difficulties that confronted African Americans in their attempts to become home owners, including the racial disparities produced by federal programs to expand access to ownership. A longer and broader historical view demonstrates both that the practices that created the subprime crisis were not new, and that the crisis did not mark their final appearance. It also demonstrates that the discriminatory practices of federal programs cannot be isolated from the larger legal, economic, social and political environment in which they operate. In this project, I have argued that these sectors shared a common belief that African Americans pose specific risks as borrowers and as property owners.

The racial ownership gap has — except for a few brief periods, including the height of the subprime "boom" — remained virtually constant, hovering around 25% since the beginning of the twentieth century. The effects of this longstanding quantitative gap are magnified by equally durable qualitative differences: In the present day, as in earlier decades, homes owned by African Americans are more likely to be located in segregated areas, to appreciate at lower rates than those of Whites, to be located in areas characterized by decaying infrastructure and inferior levels of public service, and to be financed by methods that are less advantageous to the purchaser. These financing mechanisms include contracts for deed, which do not amortize and provide purchasers with no equity prior to pay off, and predatory mortgages that carry higher – often variable- interest rates, require large balloon payments, and often include other terms that disadvantage borrowers. The financial practices that created the subprime crisis were not new: Investigations of racial disparities in home ownership that occurred in the period after World War I found the same racial differences in terms of financing, the same reliance on secondary markets to shift risks from primary lenders, and the same tendency to view African Americans as particularly risky borrowers and to price these imagined risks into loans or- more often- to deny loans entirely. For African Americans, the path to home ownership has been and continues to be both more difficult and less rewarding than for Whites with comparable levels of income and similar credit scores.

Existing explanations for the development and persistence of racial ownership disparities fall short both by adopting a truncated chronology and by failing to examine the full implications of the private/public model that has structured national programs to expand ownership. The dominant line of reasoning, which is incorporated in the accounts of authors such as Katznelson, Denton and Massey, Sugrue and Jackson, focuses on events that occurred in the New Deal and in the aftermath of World War II. They identify the racialized lending practices of the HOLC, the FHA and the Veterans' Home Loan program, each of which incorporated a public/private model, as the usual suspects in holding down African American ownership rates and in creating a division between White suburbs inhabited primarily by home owners and urban ghettos in which dilapidated owner occupied housing co-exists with rental housing. Their singular focus on the institutions created during this period- the HOLC, the FHA and the VA Home Loan program- disconnect these programs both from the first round of attempts to take national action to expand access to home ownership in the period after World War I and from the pervasive understandings about the risks of African American property ownership that shaped national policies and institutions. These accounts leave unanswered questions about the reasons that public policies aimed to expand home ownership and about the reasons that they included discriminatory mechanisms.

By resetting the chronology of national policies to expand home ownership and by examining the environment in which these policies were situated, I suggested that — in a paradoxical way — the answer to both sets of questions involves the need to manage risk. In the first paper in the series, I focused on the period between the end of World War I and the election of Franklin Roosevelt, arguing that-both in ideational and in institutional terms- this period represented the first phase of the home ownership state, a national state that intervenes in mortgage markets in order to expand access to home ownership.

I have argued that expanded access to ownership aimed to address public risks posed by the dissemination of anti-capitalist ideologies and increased incidents of urban disorder. The expansion of ownership was intended to create an electorate in which the majority of individuals had a bricks and mortar interest in the institution of private property and in the social and political arrangements in which it was embedded. The argument for this expansion was, in fact, strongest for the groups that were both more vulnerable to the appeals of radical ideologies and most likely to be excluded from ownership by existing methods of home finance. I have demonstrated that issues of increasing African American access to ownership were explicitly considered in the run-up to the creation of the first federal program to expand ownership, the FHLB. I have also argued that these concerns were not translated into public policy because the decision to rely on private lenders opened the door to private attributions about the risks of lending to African Americans.

The subsequent papers in the series provided a more detailed understanding of these private attributions about racial risk. The second paper examined the way in which court decisions around restrictive covenants aimed to reduce the risks that White property owners would experience as a result of African American attempts to acquire property. Both in decisions to overturn and in decisions to uphold covenants, court decisions legitimated and codified understandings that viewed property acquisition as a racialized version of a zero sum game in which African Americans who attempted to purchase restricted properties rather than White sellers were held to account.

The third and final paper argued that the FHA's criteria for rating mortgage risk were, in fact, criteria for rating the racial risk posed by prospective borrowers. While existing accounts have focused primarily on the discriminatory effects of neighborhood ratings, I have demonstrated by a detailed analysis of risk rating criteria that- in their entirety- the FHA requirements for rating mortgage risk served to rate and to attempt to manage racial risks. These requirements extended and elaborated understandings about racial risk that pervaded the sectors involved with the acquisition of property.

Implications

The analysis that I have presented has implications both for the disciplines of political science and for social work. It also creates a path for future research. From the perspective of political science, this work has three major implications. First, it demonstrates the utility of beginning the study of the development of discriminatory mechanisms in national programs at the point at which they are first created, avoiding the tendency to construct developmental trajectories by reading backward rather than forward from actual origins. Second, it demonstrates that institutions do not exist in a vacuum: Particularly in the case of highly-charged variables such as race and class, the development of specific institutional mechanisms and practices needs to be connected to the norms and practices that instantiate understandings of risk in the larger environment within which they operate. Finally, it suggests that the way in which private understandings about risk constrain the possibilities for implementation in public/private programs has been under-theorized.

From the perspective of social work, this project demonstrates the need to translate large but ultimately vague concepts such as “institutional racism” into an understanding of specific historical and structural forces that perpetuate inequality. It also demonstrated that assumptions about the role of home ownership in asset accumulation strategies for addressing poverty need to be re-evaluated to take strict account of the way in which race has- and continues to- inscribe- divisions in the possibilities for using ownership to accumulate wealth.

The project also suggests a path for future research. Policies to expand opportunities for home ownership, with particular reference to minorities, have continued to appear on the national political agenda, put forward by representatives of both major political parties. However, home ownership continues to operate very differently for African Americans and for

Whites, both in terms of access to ownership and in terms of their effects on asset-building. A longer-term study of the development of the home ownership state and on the role of public and private attributions about race, risk and property is therefore warranted.

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