
Law and Inclusive Urban Development

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Law and Inclusive Urban Development: Lessons from Chile's Enabling Markets Housing Policy Regime†

This Article addresses the recent international trend in development theory and practice towards an “enabling markets” approach in housing policy. This approach delegates to housing markets the responsibility of providing affordable housing and therefore limits the role of government to stimulating the private sector through targeted subsidies. I ask whether an enabling markets policy constitutes an adequate regulatory strategy for the provision of sustainable housing solutions for the urban poor. I explore this question through an in-depth case study of Chile’s housing policy regime, which was a pioneer in the implementation of an enabling markets strategy; for over four decades, successive governments have been able to provide access to housing to a vast portion of low-income residents, in the context of a regulatory framework that favors private real estate development. However, this success story is marred by an important failure. Through its market-based regime, Chile has routinely clustered low-income families on cheap land, usually located at the periphery of the country’s urban centers, and often in areas with poor public and private services. The main argument I present in this Article is that Chile’s commitment towards an enabling markets regulatory regime has helped to reinforce the pattern of urban exclusion, and has prevented the government from experimenting with alternative policy strategies that may be more effective in promoting inclusionary housing. The main limitation of the enabling

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markets strategy is that it assumes that the delivery of targeted subsidies will generate an adequate supply of affordable housing for the low-income sector. The Chilean experience shows that this assumption is false, because subsidies are rarely sufficient to enable beneficiaries to compete for well-located housing, while private companies have strong incentives to agglomerate low-income housing in the least desirable urban areas. I argue that, in order to promote urban inclusion, governments need to experiment with an alternative policy strategy that I call a “planning housing markets” approach, which involves using land-use governance mechanisms to ensure that low-income housing is fairly distributed within cities.

INTRODUCTION

Approximately 880 million people live in urban slums in the developing world.¹ To be sure, the percentage of the urban population living in slums in developing countries has decreased recently, from 46% in 1990 to 30% in 2014, but because of the massive migration from rural to urban areas in recent decades the total number has actually increased, from 689 million in 1990 to close to a billion people in 2014.² In many cities around the world, the informal sector provides more than 50% of housing for urban residents.³ Many of these informal neighborhoods are home for large communities of disadvantaged and minority populations, in substandard housing, often occupying a piece of land without any formal title and lacking minimum basic services.⁴ Therefore, one of the most pressing policy challenges that governments confront today is how to accommodate all the people that need adequate housing in urban areas.⁵

1. UN-HABITAT, URBANIZATION AND DEVELOPMENT: EMERGING FUTURES, WORLD CITIES REPORT 2016, at 51 (2015).

2. *Id.* at 14.

3. *Id.* at 51.

4. UN-Habitat defines slums as “a contiguous settlement that lacks one or more of the following five conditions: access to clean water, access to improved sanitation, sufficient living area that is not overcrowded, durable housing and secure tenure.” *See id.* at 57.

5. *Id.* (“Improving the lives of slum dwellers has been recognized as one of the essential means to end poverty worldwide. The impetus for this comes from the targets of the successive global development agendas. Upgrading slums moves the world towards a rights-based society in which cities become more inclusive, safe, resilient, prosperous and sustainable. Improving the living conditions in slums is indispensable to guarantee the full recognition of the urban poor as rightful citizens, to realize their potential and to enhance their prospects for future development gains.”). To be sure, this is also a prominent problem for many developed countries, although the scale of the problem is much bigger in developing countries. Many cities in the United States, for instance, are being affected by the lack of affordable housing. *See* Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 16 (2015) (“The lack of affordable housing is among the most pressing issues facing the urban poor.”). In the United States, along the Mexican border, there is also a significant number of irregular settlements, commonly known as “colonias.” Jane Larson reports that around 400,000 families live in these places, which are less publicly visible than those in the developing world and less studied. *See* Jane Larson, *Informality, Illegality and Inequality*, 20 YALE L. & POL’Y REV. 137, 141 (2002).

The provision of affordable housing is a very complex policy goal, not only because of the magnitude of the problem in terms of the number of people lacking access to formal housing, but also because today it is broadly agreed that “adequate housing” encompasses more than a habitable physical space, and includes “adequacy” in terms of location, transportation, and social integration.⁶

What may governments do to provide an effective and sustainable solution to the vast portion of the population without access to affordable housing and to good quality public services? What policy strategies are available? What is the appropriate role of government in the provision of affordable housing? These are critical questions for law and urban development.⁷

Recent decades have seen a growing consensus in development theory and practice on delegating to housing markets the supply of affordable housing for the urban poor.⁸ This consensus is largely a response to the problems associated with the public housing policy approach where governmental agencies control the production and administration of affordable housing, which was the dominant model in developed and some developing countries in the mid-twentieth century.⁹ As this public housing policy fell into disfavor, countries and international organizations have increasingly favored market-oriented housing policies.¹⁰ One particularly influential market-based regulatory discourse in the developing world is the “enabling markets housing policy” approach.¹¹ Under this model, the role of the government is to provide the general regulatory framework and incentives to encourage the housing supply from the market.¹² More concretely, this regulatory strategy favors the privatization of public housing, the reduction and simplification of urban housing regulations, and the

6. See Part I.A.

7. The governance of urban areas has been highlighted as a critical policy issue for law and development. See Patrick McAuslan, *Urbanization, Law and Development: A Record of Research*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 18, 46 (Edesio Fernandes & Ann Varley eds., 1998) (“With this caveat on the record, I suggest that the central urban issue for the foreseeable future is governance: the development of processes and procedures for managing a city and its activities which have at their core the participation and involvement of all citizens and their organizations; which provide for transparency and accountability; which aim to facilitate sustainable economic activity yet monitor and regulate it in the interests of environmental and social protection and which develop and assist in the development of practical programs for tackling urban poverty and restoring effective citizenship rights to the urban poor. In a word, the urban challenge is the development of legitimacy in urban governance.”).

8. See UN-HABITAT, *supra* note 1, at 49.

9. See WORLD BANK, *ENABLING MARKETS TO WORK* 19 (1993).

10. *Id.*

11. See *id.* Interestingly, even in the international human rights arena, the enabling markets housing policy approach has been recognized as a legitimate strategy to implement the right to housing. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS & UN-HABITAT, *THE RIGHT TO ADEQUATE HOUSING* 6 (2009).

12. See WORLD BANK, *supra* note 9, at 19.

allocation of targeted demand-side subsidies to the poor.¹³ The goal is to allow urban markets to operate as freely as possible, and to concentrate the role of governments on stimulating a competitive supply of low-income housing with minimal regulatory constraints.¹⁴

The rationale behind this market-based approach to housing laws and policies reflects a certain degree of skepticism about the role of government in the delivery of housing solutions for disadvantaged groups. It assumes that a well-functioning housing market with minimalist incentives to the private sector is the most efficient avenue for the expansion of formal affordable housing. This anti-government rationale may be attractive in many developing countries partly because many of them do not have strong administrative structures and need to rely on social policies that are able to serve a large number of low-income families without a sophisticated bureaucratic apparatus.

Is the enabling markets approach effective in promoting sustainable housing solutions for the urban poor? Is it possible to achieve the goals in this social policy sector through this strategy? The objective of this Article is to confront this influential development doctrine with an in-depth case study on the evolution of Chile's low-income housing policy regime over the last four decades. Chile represents an interesting case to test this policy approach because it was a pioneer in adopting an enabling markets strategy to affordable housing in the 1970s, and it has continued to rely on this strategy as its main

13. See UN-HABITAT, *supra* note 1, at 50.

14. Within the overall market-based approach in the housing sector, it is important to distinguish between the enabling markets strategy and the property formalization strategy. The latter has generated more attention from the law and development literature that has focused on the problem of urban informality. The central proposal of the property formalization model is that governments should provide free property titles to low-income households living in urban informality, as a way of bringing them into the formal economy where they can use their titles as an asset for wealth accumulation. One of the strongest defenders of this strategy is the Peruvian economist Hernando de Soto, who argues that property formalization could serve as an important vehicle for economic development. In contrast, the approach that will be discussed in this Article involves governments promoting the generation of affordable housing in cities through subsidies—in a sense, this approach incentivizes the housing mobility of beneficiaries rather than formalizing existing arrangements. This latter approach is particularly important because property formalization policies may not always be feasible or sufficient. Many countries around the world may have limited ability to regularize informal settlements because those settlements may be located on private property or in areas not suitable for human habitation. Also, not all people seeking affordable housing are currently living in irregular settlements. De Soto's key works on property formalization are HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (1989). The work of de Soto has generated a vast literature. For a critical examination of the property formalization approach, see Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 *RUTGERS L.J.* 59 (2007); Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 *J. INT'L L.* 397 (2014). For a recent analysis of the implementation of this approach in Latin America, see EDESIO FERNANDEZ, *LINCOLN INSTITUTE OF LAND POLICY: REGULARIZATION OF INFORMAL SETTLEMENTS IN LATIN AMERICA* (2011).

regulatory approach to the provision of low-income housing for over forty years.¹⁵ From a quantitative perspective, the regime has been a commendable success.¹⁶ Chile has radically decreased its deficit of low-income housing stock, and has significantly reduced the number of informal urban settlements, which is a remarkable achievement in the Latin American context.¹⁷ As a result, the Chilean model of housing assistance has become very influential in the developing world.¹⁸

The main argument I present in this Article is that Chile's commitment towards an enabling markets strategy has helped to reinforce the pattern of urban exclusion, and has prevented the government from experimenting with alternative regulatory approaches that may be more effective in generating affordable housing in a more inclusionary way. In essence, Chile's enabling markets strategy has relied on the distribution of targeted subsidies to stimulate the supply of low-income housing, in the context of a regulatory framework that favors private real estate development and strongly protects private property rights. However, in practice, the subsidies have rarely been sufficient to allow beneficiaries to compete for well-located housing. At the same time, private companies have had a strong profit incentive to agglomerate low-income housing for subsidy holders in the least desirable urban areas. Although the regime has been successful in expanding dramatically the access to formal housing, it has shown a spatial bias by routinely concentrating low-income families on cheap land, usually located at the periphery of the country's urban centers, often in areas poorly served by public and private services and disconnected from city centers. Therefore, it is not at all clear that recipients of governmental housing assistance have improved their overall socio-economic situation.

Chile's implementation of the enabling markets approach provides, therefore, a cautionary tale on the effectiveness and sustainability of this policy. My analysis shows that, in order to disrupt the housing market dynamics that generate social exclusion, governments need to implement forceful and sophisticated administrative interventions. This Article proposes an alternative policy strategy, which

15. See Alan Gilbert, *Power, Ideology and the Washington Consensus: The Development and Spread of Chilean Housing Policy*, 17 HOUSING STUD. 305 (2002).

16. See *infra* Part II.C.

17. Alan Gilbert, *Housing in Latin America* 23 (Inter-Am. Dev. Bank, Working Paper Series I-7UE, 2001) ("With the notable exception of Chile since 1990, no Latin American country has managed to build enough housing units to even keep up with the increase in new households.")

18. See Alan Gilbert, *Helping the Poor Through Housing Subsidies: Lessons from Chile, Colombia and South Africa*, 28 HABITAT INT'L 14 (2004) ("Since the middle 1980s, the major development banks and the United Nations have been preaching that major public projects should be removed from the housing agenda and replaced by new forms of intervention. Particularly popular has been the idea of providing subsidies to poor families to allow them to buy homes produced by the private sector. The up-front capital subsidy pioneered by the Chileans in 1977 has been an exemplar of this new housing approach.")

I call a “planning markets housing policy” approach, employing land-use governance mechanisms to incentivize the supply of affordable housing in well-located neighborhoods. More concretely, this strategy involves linking land-use regulatory processes with the generation of affordable housing in an explicit and direct way. Although some of the instruments adopted under the enabling markets approach are compatible with a planning housing markets approach, the current skepticism about the role of administrative interventions in housing markets needs to be abandoned in order to address the problem of urban exclusion.

The analysis is based on comprehensive fieldwork conducted in Chile between 2013 and 2015, which involved more than fifty interviews with key stakeholders involved in the design and implementation of Chile’s housing laws and policies in the past decades. The strategy behind the selection of interviewees was inspired by the desire to maximize the variety and range of perspectives of the phenomenon under study. The majority of interviewees were, at the time of the interview, acting or former public officials of Chile’s Ministry of Housing and Urbanism (MHU). I also interviewed people working on housing issues in several municipalities in the greater Santiago metropolitan area, the capital of the country: officials from nonprofit and for-profit organizations that act as developers or intervene in the construction and administration of affordable housing projects, persons from the real estate industry, congressmen and representatives of community organizations (who represent the voice of the actual beneficiaries of the policy), and relevant influential individuals from academia and advocacy groups. The information obtained through the interviews was complemented by data from public and private documents, administrative datasets, and other secondary sources.¹⁹

19. I conducted a total of fifty-two interviews with key stakeholders between 2013 and 2015, mostly in person in Santiago, the capital of Chile. I talked to acting and former officials from the MHU to assure that I had obtained perspectives of people from across the political spectrum. All interviews were conducted in Spanish, and the quotes used in this Article were translated into English by the author. I used an open-ended and semi-structured interview protocol that included general questions about the goals of the policy, its main outcomes, successes and limitations, the primary instruments and actors involved, the principal challenges identified, the influence of the housing market and land-use regulations, among others. In this Article, interviewees are identified according to the job they held when the interview was conducted—although many have moved to a different job after the interview. The data collection process also involved gathering relevant documentation and administrative data. I obtained access to relevant documentation from several sources. Some of them are publicly available through the Internet. Some interviewees provided me with other documents and data. The rest I obtained from the library of the MHU. For case study methodology, see generally ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* (2009). For interview sampling strategies in qualitative studies, see Oisín Tansey, *Process Tracing and Elite Interviewing: A Case for Non-probability Sampling*, 40 *POL. SCI. & POL.* 765 (2007) (defending the importance of conducting non-random elite interviews for the analysis of institutional processes).

The Article proceeds as follows. Part I examines some core international trends in the housing policy sector, which set the stage for the subsequent discussion of the Chilean case study. The first trend has to do with the evolution in the normative framework guiding housing policy around the world, which now includes a special concern about the location of affordable housing and about urban inclusion in general. The second trend refers to the recent transition from policy approaches that relied on governmentally controlled production of housing for the urban poor to approaches that limit the role of government to the stimulation of housing markets.

Part II offers an in-depth examination of the implementation of Chile's enabling markets housing policy regime over the last four decades. I show the pervasive influence of the enabling markets rationale in the implementation of the regime, and the main limitations it has had with respect to the promotion of urban inclusion.

Part III discusses the various policy strategies and roles that governments may play in the provision of affordable housing, and proposes a planning markets approach, which involves the use of land-use regulation and governance to explicitly promote the supply of inclusionary housing. I also describe some concrete policy guidelines that could be adopted to implement this approach.

I. LAW AND URBAN DEVELOPMENT DOCTRINES

In this Part, I present two recent international trends that have shaped the role of the government in the affordable housing sector. The first trend is the evolution of the normative framework guiding housing policies around the world. Until relatively recently, governments' basic objective in this social policy sector was to provide a secure physical space that would meet minimum quality requirements for people that lack access to affordable housing by their own means. In recent decades, however, this normative framework has become more demanding, and includes goals related to the integration of disadvantaged groups in well-located neighborhoods and equal access to the benefits of city life. The second international trend refers to the institutional regimes that governments have implemented for the purpose of satisfying those goals. Here, regimes where governmental agencies occupied the central role in the provision of affordable housing have given way to regulatory strategies that strongly rely on the private housing market to respond to the shelter needs of the urban poor. In the following subsections, I examine both trends to set the stage for the subsequent analysis of the Chilean case.

A. *From Access to Housing to Urban Inclusion*

The primary goal of low-income housing policies is to ensure access to adequate housing for segments of the population who cannot

obtain it by their own means alone.²⁰ In other words, the purpose is to correct a failure of housing markets, which, under ordinary contract rules and private property rights, do not normally satisfy the housing needs of the poor.

What “adequate housing” means is of course subject to interpretation, and is historically and contextually dependent. Historically, housing assistance programs aimed to provide the poor with access to formal housing that would meet minimum quality standards. In the United States, for instance, in the context of the rapid industrialization of cities after the Civil War, which was accompanied by a massive influx of immigrants, the first legal reforms in this policy sector imposed certain minimum conditions for all buildings in order to guarantee that everyone would live in a relatively safe and healthy space.²¹ The next major governmental intervention in the housing sector was the federally funded construction of public housing for low-income households, which started in the 1930s.²²

More recently, there is a growing consensus that the term “adequate housing” encompasses more than just ensuring access to an affordable physical space. The United Nations, for instance, has stated that there are seven minimum conditions involved in the term “adequate housing”: (1) security of tenure, (2) availability of basic services and infrastructure, (3) affordability, (4) habitability, (5) accessibility, (6) location, and (7) cultural adequacy.²³ From this list it becomes clear that today the term “adequate housing” involves a complex set of goals, which go beyond the provision of decent shelter to include concerns about issues such as the location of the dwelling units provided and the cultural identity of the beneficiaries.²⁴ Similarly broad interpretations of the goal to ensure adequate housing have been embraced in the United States and in Europe, where today there is widespread acknowledgment of the importance of designing housing policies that

20. The adoption of laws and policies usually responds to multiple public goals, and the housing policy sector is no exception. Consider, for instance, the first federal public housing program in the United States, adopted under the Housing Act of 1937, Pub. L. 75-412, 50 Stat. 888 (1937). The primary goal of the program was to provide affordable rental housing to low-income families, but it also served the larger policy goal of increasing employment in the construction sector as a way to stimulate the economy as the country pushed its way out of the Great Depression. Yet another purpose served by this public housing program was slum clearance, as it was commonly considered that many low-income families were living in housing that did not meet minimum quality and safety standards at the time. See Robert Collinson et al., *Low-Income Housing Policy*, in 2 *ECONOMICS OF MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES* 59, 65–66 (Robert A. Moffitt ed., 2016).

21. See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 532–33 (2007).

22. *Id.*

23. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS & UN-HABITAT, *supra* note 11, at 3–4.

24. *Id.*

can effectively achieve objectives related to an equitable and sustainable metropolitan growth.²⁵

Many of these aims for contemporary housing policies are captured in the term “urban inclusion.”²⁶ The term urban inclusion may be defined in two ways.²⁷ One refers to the location of disadvantaged groups in neighborhoods that are adequately connected to public and private services, such as good schools, good health care providers, job opportunities, and so on. The second refers to the actual social mixture within buildings or neighborhoods of families from different social backgrounds.²⁸

The focus on urban inclusion as a policy objective is at least partly explained by the widespread acknowledgment of the significant impact that neighborhoods have on social and individual behavior, described in the literature as “neighborhood effects.”²⁹ A large body of academic research and dramatic historical accounts show that neighborhoods constitute important mediators of social life and often have independent impact on human behavior. Moreover, neighborhoods can reinforce existent inequalities between social groups.³⁰

In particular, the literature demonstrates that the concentration of disadvantaged families in segregated neighborhoods may lead to negative outcomes for those families, reinforcing their deprived

25. Alex Schwartz, quoting the work of Bruce Katz and colleagues, argues that housing policy in the United States involves seven primary goals, which include, among others, the supply of good quality housing, affordability, racial and economic diversity within communities and neighborhoods, and balanced, sustainable metropolitan growth. See ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 6–7 (2015) (quoting BRUCE KATZ ET AL., RETHINKING LOCAL AFFORDABLE HOUSING STRATEGIES (2003)). The Economic Commission for Europe published guidelines for social housing in 2006, in which it stated that “the basic goal of housing policy is to provide the whole population with adequately equipped dwellings of suitable size in a well-functioning environment of decent quality at reasonable cost.” According to the Commission, this general goal involves addressing issues such as access to affordable housing for low-income families, enforcement of quality standards for construction and the surrounding environment, the problem of social residential segregation, and social diversity within neighborhoods, among others. See ECON. COMM’N FOR EUROPE, GUIDELINES ON SOCIAL HOUSING: PRINCIPLES AND EXAMPLES 9 (2006).

26. UN-Habitat, for instance, has proposed five key principles for the new urban agenda, one of which is “ensuring equitable urban development and inclusive growth.” See UN-HABITAT, *supra* note 1, at 180.

27. In this Article the terms “urban inclusion” and “urban integration” will be used interchangeably.

28. Tim Iglesias has proposed two similar definitions for the term “residential integration”; the “traditional integration” model refers to the actual social mixture of different social groups in a neighborhood, while the “individual access to the opportunity structure” model refers to the location of disadvantaged groups in neighborhoods that are well served by public and private services. See Tim Iglesias, *Two Competing Concepts of Residential Integration*, in SOCIAL EQUITY IN A TIME OF CHANGE: A CRITICAL 21ST CENTURY SOCIAL MOVEMENT 19, 23–25 (Richard Gregory Johnson III ed., 2017).

29. For a very interesting synthesis and analysis of the neighborhood effects literature, see ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 31–49 (2012).

30. See *id.* at 46.

situation.³¹ For instance, a seminal empirical study in the United States found that African-Americans living in segregated cities have lower graduation rates from high school, earn less income, and are more likely to become single mothers than African-Americans living in less segregated cities.³² Along similar lines, another study suggests that poverty concentration is associated with the concentration of crime.³³

In addition to showing the negative consequences caused by the concentration of minorities, the literature in the United States has also revealed that moving disadvantaged families to affluent neighborhoods may have some significant positive effects. For instance, a recent study on the effects of the construction of a low-income housing project in a wealthy neighborhood in New Jersey found very positive outcomes for the families that moved to that project on indicators such as exposure to violence and social disorder, mental health, children's educational outcomes, and economic independence, among others.³⁴ Another recent study that evaluated the results of the famous "Moving to Opportunity" program in the United States found that children from low-income families that moved to affluent neighborhoods when they were under thirteen years old have higher incomes in their adult life, are more likely to attend college, are more likely to attend good colleges, and perform better in college than similar children who did not move to those more privileged urban areas.³⁵

In sum, there is a growing international consensus about the importance of placing urban inclusion at the center of housing policy,

31. A large body of literature in the United States has documented the effects of residential segregation on African-American families in urban areas. Two key works in this literature are WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

32. See David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827 (1997).

33. See Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517 (2001)

34. See DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* (2013). The authors conducted a comprehensive, multidimensional study on the effects of the construction of the original affordable housing project that led to the famous decisions of the Supreme Court of New Jersey known as *Mount Laurel I* and *Mount Laurel II*. After a twenty-year legal battle between the leaders of a community of low-income families that wanted to construct an affordable housing project in Mount Laurel, New Jersey, and the local government that tried to resist the construction, the project was finally built and the families were able to move to an affluent neighborhood. In addition to the positive outcomes for the families that moved to the project, the authors also discovered that the affordable housing project did not increase crime, decrease property values, or raise property taxes. Moreover, the strong opposition to the project diminished significantly within eight years of the first tenant's arrival.

35. See Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016). The Moving to Opportunity (MTO) program randomly assigned housing vouchers to low-income families to move from high-poverty to low-poverty areas in five cities in the United States, offering a very good methodological basis to test the effects of moving to better neighborhoods.

which has been confirmed by robust empirical studies. Laws and policies designed to promote the generation of affordable housing must take into account the location of such housing in neighborhoods that provide a good geography of opportunities. This raises critical questions about the types of institutions and policy strategies governments may adopt to promote both access to formal housing and urban inclusion. In the next subsection, I describe the institutional trend towards regimes that delegate to markets the provision of affordable housing.

B. *From Governments to Markets*

In most countries around the world, the housing policy sector has seen a transition from policy approaches where the provision of affordable housing was carried out by governmental agencies operating outside the regular rules of markets, to approaches where the private sector and market dynamics are ultimately responsible for delivering formal housing to low-income families. This transition has occurred in the developed world as well as in countries that have transitioned from socialist regimes to market economies,³⁶ and even in countries that to a large extent still have centrally planned economies like China.³⁷

Take, for example, the case of the United States, where the public housing program was the primary federal housing policy for expanding access to formal housing for the urban poor from the late 1930s until the 1970s.³⁸ Established by the Housing Act of 1937, the program involved rental housing constructed, owned, and operated by newly formed local public housing authorities (PHAs).³⁹ Through annual contracts, the federal government provided the financing for the capital costs of the housing projects operated by the PHAs.⁴⁰ The PHAs, in turn, were charged with administering the federally financed housing projects in compliance with the corresponding federal regulations.⁴¹ Under this institutional logic, governmental agencies maintain control of the entire process of developing affordable housing and may use all of their administrative powers to produce the desired result. Public agencies are therefore responsible for the financing, construction, allocation, and administration of affordable housing units. Some

36. See WORLD BANK, *supra* note 9, at 13 (“Even in centrally planned and formerly centrally planned economies, policymakers increasingly view housing as a commodity with an exchange value rather than as a good to be produced and allocated outside of the marketplace.”).

37. See J. Albert Cao & Ramin Keivani, *The Limits and Potentials of the Housing Market Enabling Paradigm: An Evaluation of China’s Housing Policies from 1998 to 2011*, 29 HOUSING STUD. 44 (2013).

38. See generally Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PENN. L. REV. 1285, 1291 (1995).

39. See Schill & Wachter, *supra* note 38, at 1291.

40. *Id.*

41. *Id.*

of the stages of the process of housing development might be externalized through contracts with private sector actors, but the government maintains control and oversees the entire process. By the 1980s, the public housing program had become discredited and a new consensus had emerged on the benefits of public–private partnerships for the solution of public problems.⁴² The United States started to implement a complex set of new programs providing a bigger role to the private sector.⁴³ Today, most housing programs in the United States involve government stimulation of the private sector for the production of affordable housing through supply and demand subsidies.⁴⁴

In development thinking and practice, one of the most conspicuous expressions of the transition from governments to markets in the provision of affordable housing is the “enabling markets housing policy” approach.⁴⁵ This approach was part of the Washington Consensus agenda favoring the minimalist state and a bigger role for markets in the delivery of public services.⁴⁶ Although today there is some recognition of the limitations of this approach—particularly its limited ability to solve the large-scale problem of lack of formal housing in cities within the developing world—the enabling markets model constitutes a coherent body of ideas on the relationship between law and urban development that still exerts considerable influence in the developing world.⁴⁷

The main ideas of the emerging markets approach are detailed in a very influential and widely circulated white paper published by the World Bank in 1993.⁴⁸ The central idea was to limit the role of governments to the adoption of rules and policies to stimulate the market supply to meet housing demand.⁴⁹ The World Bank explicitly sought to move away from an institutional model where governments produce, finance, and maintain housing.⁵⁰ The strategy was grounded in the belief that when governments frame their interventions in housing as a welfare issue, they end up transferring public resources to a small group of households and distorting the operation of the housing market.⁵¹ Instead, governments should redirect their attention to embrace the whole housing sector, establishing the regulatory environment and incentives to allow the private sector to be the primary responsible agent for the production and finance of housing, even for the low-income sector. In other words, the World Bank was promoting a transition from governments as producers of housing to

42. See Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 984 (2009).

43. *Id.* at 990.

44. *Id.*

45. See *supra* notes 11–14 and accompanying text.

46. See generally Gilbert, *supra* note 15.

47. See UN-HABITAT, *supra* note 1, at 49–68.

48. See WORLD BANK, *supra* note 9.

49. *Id.* at 3.

50. *Id.* at 7.

51. *Id.* at 11.

governments as enablers of the private sector for the overall production of housing.⁵²

The white paper suggests several instruments to stimulate the demand and supply of affordable housing within the framework provided by the enabling markets approach.⁵³ On the demand side, the basic proposal includes having clearly defined and protected private property rights to allow real estate transactions to operate fluidly; a well-developed private mortgage finance system where individuals may have access, on a transparent and neutral basis, to adequate financing to participate in real estate transactions; and targeted subsidies for low-income families, subsidies that finance individuals and not houses, and that do not generate any distortion and inefficiencies in the regular operation of free housing markets.⁵⁴ The type of governmental subsidies that an enabling markets strategy should favor, according to this view, are well-targeted to low-income households, do not distort housing prices, and are consistent with available fiscal resources, such as one-time capital grants or housing allowances with a predefined duration.⁵⁵

On the supply side, an enabling markets strategy should favor the governmental provision of infrastructure to allow residential development in urban land, with adequate mechanisms of cost recovery.⁵⁶ Also, this regulatory approach promotes the adoption of land-use laws and policies that favor real estate development and the general operation of housing markets,⁵⁷ and that incentivize competition within the building industry by removing entry barriers that may favor monopolistic positions.⁵⁸

A number of studies have examined the implementation of the enabling markets housing policy approach in various developing countries. For example, one study shows how post-apartheid South Africa embraced some of the core components of the enabling markets strategy, especially its focus on the distribution of targeted subsidies to poor households, and on incentivizing the participation of the private financial industry in the provision of mortgages to low-income families.⁵⁹ The authors argue that this regime, which was based on

52. *Id.* at 19.

53. *Id.* at 39.

54. *Id.* at 115–27.

55. *Id.* at 124–26. Subsidies that should be avoided according to the World Bank are, for instance, governmental loans favoring a privileged group connected to the government, at below-market interest rate. Or non-direct subsidies such as rent control, which could act as a disincentive for landlords to maintain their buildings and units while the price cannot be increased, as well as forcing residents to remain in units that no longer match household needs. Rent control may also lead to underinvestment in rental housing.

56. *Id.* at 127–33.

57. *Id.* at 134–38.

58. *Id.* at 138–40.

59. See Gareth A. Jones & Kavita Datta, *Enabling Markets to Work? Housing Policy in the “New” South Africa*, 5 INT’L PLANNING STUD. 393 (2000).

targeted subsidies that had to be complemented with savings and credits from the private sector, was not effective in generating affordable housing for poor households because the price of the subsidy was insufficient, and because many beneficiaries could not secure financing from the private sector.⁶⁰ They also suggest that the focus on owner-occupied housing—such as the requirement that households use subsidies to build on their own land or to purchase land—added another layer of complexity, relative to what could have happened if the subsidies were directed towards the rental market.⁶¹

Another study has compared the implementation of housing subsidy programs—one of the core components of the enabling markets approach—in Chile, Colombia, and South Africa, using data from the late 1990s.⁶² In each of the three countries, the government provided an up-front capital subsidy targeted to poor households to allow them to buy homes.⁶³ The study finds that, with this new policy approach, governments had greater control over their public spending in housing assistance, and were better able to target the poor—two issues that are important components of the enabling markets strategy.⁶⁴ However, while Chile was able to significantly reduce its housing deficit, in all three countries, the demand for low-income housing was greater than what the subsidy programs could deliver.⁶⁵ Another significant problem suggested by the author is that many of the housing projects financed with the subsidies are located in the periphery of urban areas and show signs of becoming deteriorated neighborhoods in the future.⁶⁶ Finally, in all three countries the governments struggled to incentivize the private financial sector to provide mortgages to low-income households.⁶⁷ Although the author mentions the problem of urban exclusion, his work does not provide an in-depth examination of the relationship between this phenomenon and the enabling markets policy strategy, which is the main contribution of this Article. Also, his analysis of Chile's regime covers until the late 1990s, which is an important limitation because, as I show in the next Part, only since the early 2000s has the policy for low-income households started to operate completely according to the prescriptions of the enabling markets approach.⁶⁸

A more recent paper analyzes the implementation of the enabling markets approach in China between 1998 and 2011.⁶⁹ In recent decades

60. *Id.* at 408–09.

61. *Id.* at 409.

62. See Gilbert, *supra* note 18.

63. *Id.* at 16.

64. *Id.* at 33–34.

65. *Id.* at 26–27.

66. *Id.* at 29–32.

67. *Id.* at 32–33.

68. See Mario Navarro, *Housing Finance Policy in Chile: The Last 30 Years*, LAND LINES, July 2005, at 12.

69. See Cao & Keivani, *supra* note 37.

China has increasingly adopted many of the instruments proposed by the World Bank's enabling markets housing policy approach.⁷⁰ On the demand side, China has adopted a leasehold system of private land ownership, worked to increase market transactions of land-use rights, allowed state-owned banks to provide mortgage finance to individuals to buy a home, privatized public housing, and offered production and rent subsidies to enable the generation of affordable housing for low-income households.⁷¹ On the supply side, China has improved urban infrastructure, and has been active in increasing the supply of land for market transactions through the leasehold system and through public provision of land for housing projects.⁷² The authors suggest that these reforms have allowed the housing market in China to operate more dynamically, but most of the benefits of these policies—such as access to privatized housing, to private finance, and to the subsidies—have been captured by wealthier individuals, without reaching the poorest families.⁷³ They also suggest that it is unclear whether the deregulation of the housing market and the improvement of urban infrastructure have increased low-income housing production; on the contrary, it seems these policies have primarily boosted construction for wealthier families.⁷⁴

The developed world, as mentioned above, has also seen a transition towards market-based approaches to housing law and policy, although, to my knowledge, the enabling markets approach has not been used as an explicit regulatory discourse. These market-based reforms have generated a strong debate on whether this approach is adequate to meet the normative aspirations in this social policy sector.⁷⁵ In a recent paper, Justin Kadi and Richard Ronald describe market-based housing reforms in New York, Amsterdam, and Tokyo.⁷⁶ They show that the regimes adopted in these three cities are very different in terms of the particular laws and policies implemented, but they shared a common result: in each case the reforms have made access to these cities more difficult for the urban poor.⁷⁷

70. *Id.*

71. *Id.* at 53–57.

72. *Id.* at 57–61.

73. *Id.* at 57.

74. *Id.* at 61.

75. Raquel Rolnik, the former UN Special Rapporteur on the right to adequate housing, recently wrote: “The reform of housing policies—with all its components of homeownership, private property and binding financial commitments—has been central to the political and ideological strategies through which the dominance of neoliberalism is maintained.” See Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights*, 37 INT'L J. URB. & REGIONAL RES. 1058, 1064 (2013).

76. Justin Kadi & Richard Ronald, *Market-Based Housing Reforms and the “Right to the City”: The Variegated Experiences of New York, Amsterdam and Tokyo*, 14 INT'L J. HOUSING POL'Y 268 (2014).

77. *Id.* at 287–88.

In sum, the enabling markets housing policy approach constitutes a coherent regulatory discourse that has had a pervasive influence on housing law and policy in the developing world. Moreover, although in the developed world this discourse on law and urban development has not been explicit, there has also been an important transition towards market-based policies, many of which resemble the enabling markets strategy. This convergence is not random. With its 1993 white paper, the World Bank clearly aimed to persuade developing countries to avoid the public housing model that was the dominant approach in the developed world for most of the twentieth century, where governments used to produce, finance, and maintain affordable housing projects. As developed countries like the United States were abandoning this model and adopting market-based instruments, the World Bank and other international organizations started to construct a new regulatory narrative on law and urban development for the developing world.

It is interesting to note that this transition from governments to markets occurred more or less at the same time as the emergence of urban inclusion in the normative framework guiding housing policies around the world. In my view, this convergence is, again, hardly accidental. Actually, it is widely acknowledged that the public housing policies adopted by governments in the developed world were responsible for the construction of racially segregated neighborhoods.⁷⁸ Nevertheless, urban inclusion has not been a focus of the enabling markets discourse, and the question remains whether market-oriented housing policies such as the ones favored by the enabling markets discourse can successfully promote access to formal housing with urban inclusion. The Chilean case that will be examined in the next Part provides the first systematic study of this question, and my analysis suggests we should be cautious about the effectiveness of an enabling markets approach to promote inclusionary housing.

II. CASE STUDY: THE PROMISES AND LIMITATIONS OF CHILE'S ENABLING MARKETS HOUSING POLICY REGIME

In this Part, I address the effectiveness of the enabling markets housing policy approach through an in-depth examination of one of the pioneer cases of this institutional model: Chile's housing policy regime implemented in the last four decades. The analysis of this case aims to respond the following questions: How has the enabling markets approach been implemented in Chile? Has this regime been effective in achieving the goals of this policy sector? What have been

78. See Nico Calavita & Alan Mallach, *An International Perspective on Inclusionary Housing*, in *INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, AND LAND VALUE RECAPTURE* 1, 5–7 (Nico Calavita & Alan Mallach eds., 2010).

the main advantages and limitations of this regulatory strategy? The main argument I develop in this Part is that the enabling markets approach implemented in Chile has reinforced the problem of urban exclusion that exists in the country. Although other authors have argued that Chile's housing policy has had a spatial bias against the poor, my contribution is unique in explaining this outcome as a function of the implementation of a general regulatory discourse that has been hegemonic in the country since the 1970s, when the dictatorship adopted it. The contribution is also novel in explaining, using the information collected through fieldwork, some of the core problems of the policy tools used under this regulatory strategy from the perspective of urban inclusion.

A. *The Adoption of Chile's Regime*

Chile is also part of the trend that increasingly considers urban inclusion as one of the goals for contemporary housing law and policy. Historically, Chilean governments' central concern in the affordable housing sector was the lack of access to formal housing in urban areas for a great number of low-income families, which became an acute problem with the massive migration from rural to urban areas that started in the 1930s.⁷⁹ However, in recent decades the problem of urban exclusion and social segregation became a very relevant one.⁸⁰

The core regulatory architecture of Chile's long-standing market-based housing policy model is the result of the transformation carried out by the military dictatorship that governed the country between 1973 and 1990. While it is true that there have been some variations with respect to the institutional structure shaping the regime, the underlying rationale and many of the main instruments have been maintained throughout this period. As a real estate developer that has worked for decades in the affordable housing sector told me,

[the new housing policy] was born practically in 1976, 1977 That is when the policy is re-founded, when they create the demand-side subsidy, because this is about a demand-side subsidy Look, with all the names that you want, the policy was created there. Everything that has been done afterwards—either during the Concertación governments

79. See RODRIGO HIDALGO, *LA VIVIENDA SOCIAL EN CHILE Y LA CONSTRUCCIÓN DEL ESPACIO URBANO EN EL SANTIAGO DEL SIGLO XX*, at 186 (2005).

80. Recently, during the center-right administration of President Piñera (2010–2014), the government appointed a multidisciplinary group of experts and personalities, from across the political spectrum, to elaborate the “National Policy for Urban Development” (*Política Nacional de Desarrollo Urbano*). The document contains an ambitious set of goals and guidelines for future reforms on urban policy and governance. One of the five topics of urban policy that the document addresses with a list of policy proposals is urban integration, where the text explicitly acknowledges that urban inequality and social segregation is a major problem for the majority of Chile's urban areas. The report states the following:

[center-left coalition] or in the current one—is just an improvement of the system.⁸¹

Before the new policy model was established, public agencies were responsible for the provision of affordable housing; these agencies operated as genuine real estate developers, similar to the public housing model used by developed countries in the mid-twentieth century.⁸² The provision of affordable housing was believed to require an active government role, which could operate through a wide range of possible administrative interventions.⁸³

The radical transformation of Chile's housing policy regime in the 1970s was part of a larger package of neoliberal reforms implemented

The majority of medium and large Chilean cities present high levels of urban inequality and social segregation, with areas with high levels of poverty concentration, insecurity, lack of access to public services, and scarce connectivity. Segregation does not only affect people that live in segregated areas, but to the entire population, challenging also our values and concept of society, and harming the competitiveness and sustainability of our cities.

See MINISTERIO DE VIVIENDA Y URBANISMO, *POLÍTICA NACIONAL DE DESARROLLO URBANO, CIUDADES SUSTENTABLES Y CALIDAD DE VIDA* 23 (2014) (translated by author). It is important to note that the concern about urban segregation is not new. For instance, before the dictatorship, during President Allende's government (1970–1973), there were official documents declaring that the goal of housing policy was “to carry out the remodeling of cities and neighborhoods, with the criteria of preventing vulnerable groups from being thrown to the periphery.” Cited in HIDALGO, *supra* note 79, at 313–14 (emphasis added) (translated by author). The goal of preventing segregation was largely suppressed during the subsequent military dictatorship, but it re-emerged when democratic governance resumed in 1990. An official document from 1990 states that one of the goals in the housing policy field is “to achieve more social and urban integration through the creation of neighborhoods and cities in balanced conditions of development, correcting in this way the current concentration of housing in segregated zones.” See GOBIERNO DE CHILE, MENSAJE PRESIDENCIAL 217 (1990) (translated by author). The goal of promoting the urban inclusion of low-income families lost priority later in the 1990s, however; simply housing the more than one million people in need took center stage. The problem of urban segregation took on new force in the early 2000s and continued onwards. For instance, an official document from 2000 says, “[w]e will work against the *social and economic segregation* that many of our cities present, providing special support for the construction of housing in urban zones that shall be declared development priorities in historical downtown areas.” See GOBIERNO DE CHILE, MENSAJE PRESIDENCIAL 265 (2000) (emphasis added) (translated by author).

81. Interview with Real Estate Developer, in Santiago, Chile (Dec. 4, 2013).

82. See CAMILO ARRIAGADA ET AL., CHILE: UN SIGLO DE POLÍTICAS DE VIVIENDA Y BARRIO 127–45 (2004). See also Enrique Rajevic, *La privatización de las funciones públicas en el urbanismo y la vivienda*, in *Lo PÚBLICO Y PRIVADO EN DERECHO ADMINISTRATIVO, ACTAS DE LAS VIII JORNADAS DE DERECHO ADMINISTRATIVO* 221, 246–50 (Gabriel Bocksang & Alejandro Vergara eds., 2013).

83. The law that created one of these old public agencies known as “CORVI” states that part of the objectives and policy tools of the public corporation were

[t]o collaborate with the Planning Department of the Ministry of Public Works in the study and elaboration of the Housing Plan; to expropriate, buy, urbanize, remodel, subdivide, and exchange land lots; to plan and construct affordable housing by its own means or through third parties; to grant loans for the construction of affordable housing; . . . to elaborate and implement a rationalization and mechanization plan for the construction industry; and to sell or rent housing or units constructed by CORVI with its own resources, as well as to sell lots of land subdivisions that she [CORVI] makes.

by the military dictatorship.⁸⁴ Two main objectives guided social policy reforms during this period. The first involved the establishment of a “subsidiary state,” by which it was implied that the government should only intervene in those areas that the market could not adequately serve on its own.⁸⁵ The objective was to transfer the provision of as many public services as possible to the market and to private entrepreneurship. In this model, the role of government is to stimulate the private sector rather than replace it. The second objective involved reaching the most efficient allocation of government aid to those in most socioeconomic need.⁸⁶ The diagnosis of the military government was that social policy was not reaching the poorest families of the country. The primary role of government thus became the design of effective instruments to identify and assist those families that most needed social and economic aid. To a large extent, these two main principles of social policy have been retained up to the present day.⁸⁷

In the realm of housing policy, the military dictatorship laid the foundation for a regulatory model that relies on stimulating the market through targeted subsidies as the main mechanism for the provision of affordable housing.⁸⁸ The adoption of this approach in Chile was encouraged by international organizations and the United States.⁸⁹ The philosophy of this model was consistent with the neoliberal prescriptions that the U.S. government was trying to implement in Chile, a philosophy that directly reflected neoliberalism’s particular skepticism regarding direct government provision of public goods.⁹⁰ In other words, private solutions for public problems.

Since its inception, the core of Chile’s market-based housing regime has been a complex set of subsidy programs targeted to low-income families. The creation of the subsidy programs was complemented by other institutional and legal reforms that together comprise the current market-based regime. Arguably, the most important legal reform was the deregulation of the urban land market.⁹¹ In 1979, the military

This quote shows the breadth of the regulatory powers of these old public corporations. See Decreto con Fuerza de Ley No. 285, Agosto 5, 1953, BOLETÍN DE LEYES Y DECRETOS DE LA CONTRALORÍA GENERAL DE LA REPÚBLICA, cited in HIDALGO, *supra* note 79, at 213 (translated by author).

84. Although there is a debate on the degree of success of the economic and social policy transformation implemented by the military dictatorship in the 1970s, the most common view is generally positive about these reforms. See, e.g., Ronald J. Gilson & Curtis J. Milhaupt, *Economically Benevolent Dictators: Lessons for Developing Democracies*, 59 AM. J. COMP. L. 227 (2011) (using Pinochet’s regime as a case study of an economically benevolent dictator, along with South Korea and China).

85. See HIDALGO, *supra* note 79, at 349–50.

86. *Id.* at 350.

87. See, e.g., ROSSANA CASTIGLIONI, *THE POLITICS OF SOCIAL POLICY CHANGE IN CHILE AND URUGUAY: RETRENCHMENT VERSUS MAINTENANCE, 1973–1998* (2005).

88. See José Miguel Simian, *Logros y Desafíos de la Política Habitacional en Chile*, 117 ESTUDIOS PÚBLICOS 269, 285 (2010).

89. See Gilbert, *supra* note 15.

90. *Id.*

91. See HIDALGO, *supra* note 79, at 366–75.

government formulated a National Policy for Urban Development.⁹² The guiding theory of that official policy document was that, in order for the housing market to function properly, land could not be a scarce resource.⁹³ In other words, land uses should be determined by rates of profitability, and not by urban planning and regulations. This principle was implemented through a series of reforms that dramatically extended urban boundaries in Chilean cities, especially in Santiago, and that reduced property taxes and urban regulations.⁹⁴ These policies immediately made much more land available for urban transactions and greatly reduced regulatory constraints for real estate developers.⁹⁵ Policymakers from the military regime expected that increasing the supply of available land would reduce urban land prices.⁹⁶ Research has demonstrated that this did not actually occur.⁹⁷ On the contrary, prices increased, mainly because landowners quickly seized the opportunity for speculation.⁹⁸ Other important reforms included the creation of new local jurisdictions in urban areas in an effort to allocate more responsibility in the provision of public services to the municipalities,⁹⁹ and the reorganization of the MHU to focus on the distribution of subsidies.¹⁰⁰

92. See 1 MINISTERIO DE VIVIENDA Y URBANISMO, *HACIA UNA NUEVA POLÍTICA URBANA PARA CHILE, ANTECEDENTES HISTÓRICOS* (2012).

93. See HIDALGO, *supra* note 79, at 366–75.

94. *Id.*

95. *Id.*

96. *Id.*

97. See Francisco Sabatini, *Reforma de los mercados de suelo en Santiago, Chile: Efectos sobre los precios de la tierra y la segregación residencial*, 26 *EURE* 49 (2000).

98. *Id.*

99. See HIDALGO, *supra* note 79, at 379–85.

100. The work of the MHU was divided between centralized agencies in charge of the design of land-use and housing laws and policies, and decentralized agencies, which were responsible for the implementation of those policies. The main centralized agency within the MHU is the Division of Housing Policy (*División de Política Habitacional*), which is responsible for administering the subsidy programs and which absorbs most of the budget allocated to the Ministry. The division in charge of elaborating urban planning regulations has a lesser role than the Division of Housing Policy, which is another indication that the bulk of governmental effort in this area has been directed to the subsidy programs rather than the elaboration of land-use guidelines and rules that effectively address the policy objectives. The MHU has also decentralized the agencies responsible for implementing its policies. Each region of the country has a “Housing and Urbanism Service” (*Servicio de Vivienda y Urbanismo*, SERVIU); these services are the successors of the public agencies of the 1950s and 1960s that were responsible for providing housing aid to the population in need. From a formal legal perspective, it seems that SERVIUs may use all the legal tools that previous governmental agencies used to promote the construction of affordable housing, but the rationale behind the creation of these agencies was to place them within the market-based model where governmental intervention would be limited to stimulating the housing market. This is why SERVIUs have ended up focusing mostly on administering subsidy programs rather than acting as truly public developers, in contrast with what previous agencies did. See *id.* at 362–66. See also Enrique Rajevic, *Cohesión Social e Intervención Administrativa en el Territorio Urbano (con especial referencia a España y Chile)* 426–30 (Sept. 2010) (unpublished Ph.D. dissertation, Universidad Carlos III de Madrid, Spain) (on file with author).

There was one aspect of Chile's former housing regime that the military dictatorship decided to retain: the exclusive focus on subsidizing homeownership.¹⁰¹ Until 2016, all governmental housing assistance throughout Chile's history has supported the acquisition of shelter in property rather than rental housing.¹⁰² The common justification behind this institutional choice is the association between homeownership and social mobility—owning a home is supposed to enable low-income families to accumulate wealth through their full participation in a market economy.¹⁰³ Security tenure permits homeowners to have access to the financial sector, mortgaging their properties, while promoting overall economic development at the same time.¹⁰⁴

The focus on homeownership policies is certainly consistent with an enabling markets strategy, which is probably another reason why the military dictatorship did not change this structural aspect of Chile's housing laws and policies. From a general economic perspective, markets work well when there are clearly defined property rights that allow certainty in contract transactions. In other words, ownership creates strong incentives for people to enter into market transactions, because the distribution of risks and gains is relatively clear. From a social policy perspective, market-oriented policies focused on homeownership may require less governmental intervention and monitoring than policies supporting rental housing, because the government's role in assisting a home purchase is typically limited to a single transaction to approve and distribute a one-time subsidy. Usually rental policies require higher ongoing administration because governments need to make sure that tenants continue to meet the requirements of the subsidy and that they apply the subsidy to appropriate housing.

B. The Implementation of Chile's Regime

A number of governmental programs and policies have been implemented by the MHU since the adoption of this market-based regime. To a large extent, all these programs and policies reflect the principles of the enabling markets regulatory discourse. As mentioned, the core of this regime has involved a complex system of subsidy programs aimed at stimulating the housing market. These programs are complemented by a regulatory framework that supports

101. A famous quote attributed to Augusto Pinochet, the leader of the military junta, was “[n]ation is to try to make of Chile a country of homeowners, and not of proletarians.” (“Nación es tratar de hacer de Chile un país de propietarios y no de proletarios.”). Apparently, the statement is from an interview with Pinochet by *El Mercurio*, on April 24, 1987, but I could not confirm the source.

102. See *infra* notes 166–70 and accompanying text.

103. See *supra* note 14.

104. See *supra* note 14.

the free operation of the housing market. The analysis below focuses on the implementation of this market-based model since 1990, the year democratic governance resumed in the country. This is the moment when a new anti-dictatorship administration not only embraced the former regime's market-based model but scaled it up.¹⁰⁵

1. The Subsidy Programs

All subsidy programs that have been implemented in Chile from 1990 to the present constitute targeted certificates that the government allocates to finance the construction or acquisition of affordable housing. To a large extent, all the programs implemented have complied with the prescriptions of the enabling markets approach promoted by the World Bank, insofar as they are one-time capital grants that are supposed to target people, not projects.¹⁰⁶

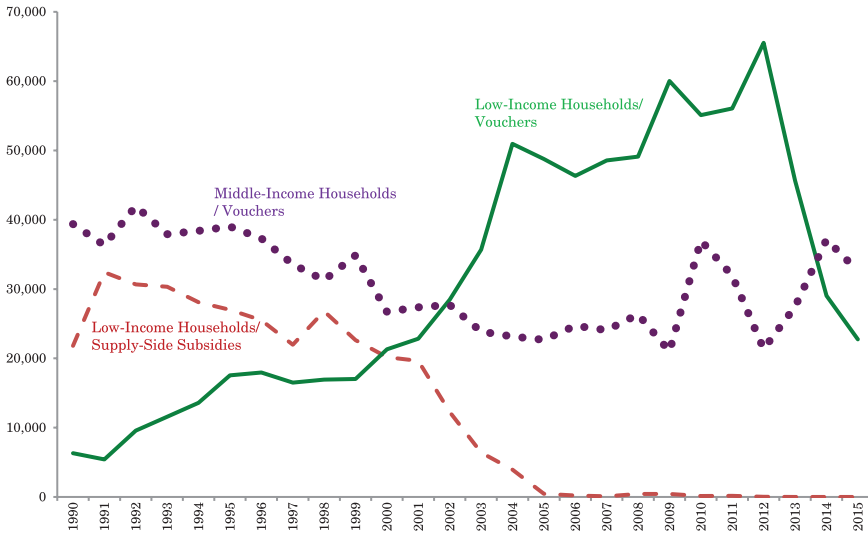
Since the 1990s, the subsidy programs have been regulated by numerous executive decrees, and over time some features have varied considerably. However, it is possible to identify three core institutional strategies, which are represented in [Figure 1](#) below. From 1990 to 2015, in total the MHU has financed 1,955,232 housing units to households lacking access to formal housing in the country.

[Figure 1](#) shows three interesting facts. First, despite the robust narrative about the need to concentrate governmental aid to assist the country's poorest families, the truth is that, at least with regards to the housing sector, governmental subsidies have always benefited middle-income as well as low-income families, as the line with circles shows. From 1990 to 2015, more than 800,000 middle-income families have had access to an affordable housing unit through these subsidy programs, with an average of approximately 30,000 vouchers delivered per year in this period of time. Second, a voucher-based logic has become increasingly dominant in the regime. The programs for low-income households in the 1990s, represented by the dashed line, operated in practice as a supply-side subsidy regime. Those programs were cancelled in the early 2000s, and new programs for low-income

105. The implementation of Chile's housing law and policy during the dictatorship deserves a study of its own. The information and studies available for this period of time are more limited in comparison with what happened from 1990 onwards, which is part of the reason why I decided to focus the analysis in this subsection on the latter period of time. Housing programs during the military governments were functional to its political agenda, so it's more difficult to attribute the results of the policy during this period of time to the implementation of the enabling markets discourse. One of the major governmental actions in this policy sector was the strong intervention on the hundreds of irregular settlements that existed in the country. The dictatorship implemented a program to eradicate these settlements and to place the people in peripheral neighborhoods of Chilean cities. Class-based urban segregation was actually explicitly promoted during this period of time. *See* HIDALGO, *supra* note 79, at 375–91.

106. The World Bank's white paper published in 1993 explaining the enabling markets approach praises Chile as an example for the type of subsidies used. *See* WORLD BANK, *supra* note 9, at 48.

FIGURE 1. TOTAL NUMBER OF SUBSIDIES/UNITS DELIVERED PER INSTITUTIONAL STRATEGY.



Source: Author's elaboration based on data from MINISTERIO DE VIVIENDA Y URBANISMO, www.observatoriohabitacional.cl (last visited May 1, 2018).

families were created, which are represented by the continuous line, all of which have operated closer to a demand-side subsidy (or voucher) logic. Third, housing assistance for low-income households has increased over time. In the 2000s many more subsidies were delivered to the low-income sector than to middle-income families.¹⁰⁷

All programs targeting middle-income groups have operated in a similar fashion since the adoption of the market-based approach: they operate primarily as a housing voucher regime, where eligible households receive certificates that must be complemented with personal savings and a mortgage loan, and which can be freely used in the housing market.¹⁰⁸ Most changes have involved merely an update of the subsidy prices and of the price cap of the units that can be purchased with the voucher. At the beginning, these programs only allowed the use of the subsidies to purchase a new affordable housing unit.¹⁰⁹ However, in 1996 the regime was modified to allow the purchase of

107. The dramatic fall in the number of subsidies granted to low-income families since 2012 shown in Figure 1 appears to be a reversal of the focus on low-income housing. However, although more research is needed, this drop seems to be explained by a change in the structure of the subsidy program rather than an increasing focus on middle-income recipients, as will be explained later in this Part.

108. See generally Simian, *supra* note 88, at 288–93.

109. *Id.* at 289.

used housing.¹¹⁰ The subsidy comes in the form of a certificate with a pay order in the name of the subsidy beneficiary, which is paid by the MHU to the builder or seller as soon as the beneficiary proves that the ownership of the dwelling unit has been transferred to her.¹¹¹ Usually, the beneficiary has a number of months from the moment the subsidy is granted to prove the transfer of property is complete.¹¹² All these programs have attributed a passive role to the MHU, which does little more than select beneficiaries and allocate demand subsidies or vouchers to stimulate the housing market for the target population segment. The private sector plays a major role in the implementation of these subsidy programs, which rely on the operation of real estate companies that would attract demand and organize the actual project, including its construction and financing.

While the programs for middle-income groups have remained consistent, the programs for the low-income sector have undergone more changes since the adoption of the regime. From 1990 to the present, two main institutional structures can be clearly identified. The first one, represented by the dashed line in [Figure 1](#), is the main regulatory logic implemented in the 1990s, when the programs involved the allocation of affordable dwelling units of certain dimensions financed by a governmental subsidy, a small amount of household savings, and a mortgage loan granted by either the MHU or the financial sector.¹¹³ The main difference between this program and the ones benefiting middle-income groups lies in the way the subsidies were allocated. Low-income beneficiaries had a more passive role, while the MHU participated more actively in the organization and construction of housing units by contracting directly with construction companies through public tenders.¹¹⁴ In those public tenders, the government defined the number of housing units to be constructed, the amount of money available for the project, and some minimal building standards.¹¹⁵ The MHU also chose the families to whom the housing units would be delivered.¹¹⁶ The government maintained a list of eligible households for the affordable housing projects prioritized on the basis of criteria such as seniority, amount of savings proven, number of family members, and socioeconomic characteristics.¹¹⁷

These programs operated differently than the voucher-like system the dictatorship regime originally had intended. The beneficiaries of these subsidies did not freely participate in the housing

110. *Id.*

111. See ARRIAGADA ET AL., *supra* note 82, at 196.

112. *Id.*

113. See Simian, *supra* note 88, at 293–98.

114. *Id.* at 296–97.

115. *Id.*

116. See Andrea Tokman, *El MINVU, la política habitacional y la expansión excesiva de Santiago*, in SANTIAGO: DONDE ESTAMOS Y HACIA DÓNDE VAMOS 490, 510–12 (Alexander Galetovic ed., 2006).

117. *Id.*

market, nor could they use the certificate to buy the housing of their preference. The subsidies were paid directly to the construction companies, and the demand for their projects was essentially captured. The justification for this model was that the targets of these programs were families who did not have the capacity to operate in the market autonomously. Some authors have suggested that, in practice, these programs should be viewed as supply-side subsidies rather than demand-side subsidies.¹¹⁸

This first type of subsidy program for low-income families was cancelled in the early 2000s, when a new institutional strategy was put in place.¹¹⁹ It has been argued that the full implementation of the enabling markets approach in Chile only occurred when this new line of subsidy programs was adopted, because only at this time did the regime begin to focus more on low-income households and to switch to voucher-like subsidies for this target group.¹²⁰

One important feature of the programs for low-income households since the early 2000s is that they have not required beneficiaries to take a mortgage loan from the private sector.¹²¹ Access to affordable housing was supposed to be financed only with a governmental subsidy and a small percentage of household savings. Indeed, each applicant only needed to prove that they possessed a small amount of savings, which totaled less than 5% of the voucher. In practical terms, the government provides free houses to low-income families.

Another important characteristic of the newer subsidy programs is that the MHU stopped contracting directly with construction companies. Now, the organization of the affordable housing project is delegated to the families who will live there. The details of the implementation of these programs has varied. Most of the time, the subsidy

118. See Ana Sugranyes, *La Política Habitacional en Chile, 1980–2000: Un Éxito Liberal para Dar Techo a los Pobres*, in *LOS CON TECHO, UN DESAFÍO PARA LA POLÍTICA DE VIVIENDA SOCIAL 27* (Alfredo Rodríguez & Ana Sugranyes eds., 2005).

119. Several problems led to the adoption of the new institutional strategy for low-income households. One problem was the quality of the construction of some units built through these programs. In 1997, during a very rainy winter, public scandal erupted when many subsidized housing units were found to have serious structural defects. Another problem was the high level of overcrowding and poverty concentration in some affordable housing projects constructed through these programs. Finally, many low-income families ended up defaulting on their mortgages, which were still required under the Basic Housing Program. In recognition of these serious problems, the government undertook significant reforms in the programs for low-income families. See Simian, *supra* note 88, at 296–98.

120. See Navarro, *supra* note 68.

121. Since the early 2000s, the two main subsidy programs for eligible low-income households enacted by the Ministry of Housing and Urbanism have been the *Fondo Solidario de Vivienda* (“Solidarity Housing Fund”), adopted by Decreto Supremo No. 174, Febrero 9, 2006, DIARIO OFICIAL [D.O.], which consolidated earlier regulations, and the *Fondo Solidario de Elección de Vivienda* (“Solidarity Fund for Housing Choice”), established by Decreto Supremo No. 49, Abril 26, 2012, D.O. The analysis that follows is based on an examination of those regulations and interview material that provided information about the implementation of these programs.

programs have favored collective application to the individual subsidies, where at least ten eligible households had to apply together by presenting an affordable housing project proposal to the MHU with the support of an intermediary institution. The collective application was conceived as a way of encouraging the creation of new neighborhoods and communities through self-selection by families. The legal recognition of intermediary institutions in the housing policy represented an important change. By empowering these entities to play a key role in the process, the government delegated an important portion of the tasks it had previously undertaken. Moreover, families' interests were better represented throughout the application process, which was considered an important issue in the case of low-income households.

In 2012, subsidy program regulations were changed to permit collective applications to the housing vouchers without the sponsorship of an intermediary institution. The new policy was prompted by the recognition that many of these intermediaries were connected with or owned by construction companies, and favored the company interests over those of the families they were supposed to assist. However, many collective applications without the support of an intermediary institution failed to use the subsidies. Therefore, in 2015 the MHU returned to the old regulations requiring that collective applications be sponsored by intermediary organizations. The subsidy programs to low-income households have also allowed the individual application to the subsidies, where eligible families can obtain a voucher to buy a new or used housing unit.

Table 1 summarizes the main features of the subsidy programs implemented in Chile from 1990 to 2015.

2. The Regulatory Framework

On the supply side, the enabling markets discourse endorses the creation of a minimalist regulatory environment that allows the fluid operation of housing markets and incentivizes competition in the residential real estate development sector.¹²² Chile also complies with these prescriptions, because its regulatory framework governing urban land use provides strong protection of private property rights and offers a friendly environment for real estate development and transactions.

At the highest level of this regulatory framework is the Constitution, which was adopted by the military dictatorship in 1980 and remains in force today. In order to ensure that the regime's economic reforms would continue after the eventual return of democratic governance to the country,¹²³ the drafters of the Constitution included

122. See WORLD BANK, *supra* note 9, at 40–42.

123. See Javier Couso, *Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980*, 29 *WIS. INT'L L.J.* 393, 405 (2011) ("Parallel to implementing the sweeping program of social, economic, and administrative reform, Pinochet and his economic team started planning a strategy to make sure the revolutionary changes introduced would survive the eventual return of democratic rule to Chile.").

TABLE 1. MAIN CHARACTERISTICS OF SUBSIDY PROGRAMS.

Main characteristics	Demand-side subsidy programs for middle-income households^a	Supply-side subsidy programs for low-income households	Demand-side subsidy programs for low-income households^b
Main period of implementation	1990–2015	1990–2004	2000–2015
Maximum subsidy price^c	18,705 USD to purchase used or new house, and 18,850 USD construct a house.	5,075 USD to purchase a new house.	28,782 USD to purchase used or new house, and 33,749 USD to construct a house.
Additional finance	Mortgage credit granted by private sector and savings.	Mortgage credit, usually granted by the government, and very small amount of savings.	Very small amount of savings. The regulations allow to complement the finance with public or private donations.
Application format	Eligible households may apply individually or collectively (in groups of at least ten individuals but not more than 300).	Eligible households applied individually.	Eligible households may apply individually or collectively (in groups of at least ten individuals but not more than 160). Collective applications are only allowed to finance the construction of a subsidized project.
Main role of government	Organize the application process and selection of beneficiaries. Payment of the subsidies used.	The government organized public tenders to promote affordable housing projects from private sector. The government organized an application process to select beneficiaries of the subsidies and offered the housing units of the private projects selected to those benefited with the subsidies.	Organize the application process and selection of beneficiaries. Payment of the subsidies used.

TABLE 1. CONTINUED

Main characteristics	Demand-side subsidy programs for middle-income households ^a	Supply-side subsidy programs for low-income households	Demand-side subsidy programs for low-income households ^b
Main role of intermediaries	All collective applications require the sponsor of intermediary to assist families through the whole process of applying to the subsidies and purchasing or constructing housing units.	Did not formally exist in the regulations.	Individual and collective applications to construct a subsidized house or project require the sponsor of an intermediary to assist families through the whole process of applying to the subsidies and constructing subsidized housing.
Main role of private sector	Compete for subsidies offering affordable housing targeted to this group.	Participate in public tenders organized by the government.	Compete for subsidies offering affordable housing targeted to this group.

^a The Table represents the main feature of the subsidies for middle-income families according to its current regulation in the Ministry of Housing and Urbanism's Decreto Supremo No. 1, Junio 6, 2011, DIARIO OFICIAL [D.O.]

^b The table represents the main feature of the subsidies for low-income families according to its current regulation in the Ministry of Housing and Urbanism's Decreto Supremo No. 49, Abril 26, 2012, D.O., regulation that was significantly rewritten in 2014.

^c The price of the subsidy is established by a Chilean currency that is adjusted by inflation. I converted the amounts to dollars according to the price of the dollar in Chilean pesos on December 30, 2015, as established by the Central Bank of Chile. See BANCO CENTRAL DE CHILE, www.bcentral.cl (last visited May 1, 2018).

a number of provisions that have imposed some significant obstacles to legal and policy change in the country.¹²⁴

Among these obstacles is a set of constitutional provisions that some legal scholars in Chile call the “economic public order,” because they basically protect some core institutions of the market economy.¹²⁵ In particular, Article 19(21) guarantees the freedom to develop business activities and restricts the state’s authority to engage directly in business activities.¹²⁶ Indeed, the law permits state-run businesses only by special authorization from Congress with a supermajoritarian quorum, and prohibits special privileges for state-owned companies that would favor their position relative to the private sector.¹²⁷ Some authors have argued that this constitutional provision establishes a subsidiary state, because it implies that the government can participate in a business sector only when the private sector is unable to

124. *Id.* at 413–14.

125. *Id.* at 405–13. See also CARL BAUER, AGAINST THE CURRENT: PRIVATIZATION, WATER MARKETS, AND THE STATE IN CHILE 17–19 (1998).

126. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(21).

127. *Id.*

do so in an adequate way.¹²⁸ Other constitutional provisions provide strong protection to private property rights. Article 19(23) establishes every citizen's right to acquire property¹²⁹ and Article 19(24), after declaring the constitutional right of all forms of private property, contains a detailed and strict regulation of the cases where private property can be limited or expropriated.¹³⁰ Finally, Article 19(26) prohibits any legislation or regulation that infringes on the core of any of the rights enumerated in the Constitution.¹³¹

Although constitutional rules often constitute ambiguous mandates that may be interpreted in different ways, the provisions described above are quite consistent with an enabling markets discourse that limits the role of the government to minimal interventions in urban markets. Indeed, some stakeholders in the field believe that the Constitution significantly constrains the ability to change the enabling markets approach in Chile. As a former high-level MHU official told me,

[t]he problem in the 1990s, the main reason why this was maintained, although there are many things that were changed, but the reason why the provision of affordable housing was maintained in that way, is because to do what was done before 1973, which was when the government used to construct affordable housing, we had to have land, because we lacked land, and to have land we would have to modify the Constitution of 1980. Because, the right to private property was guaranteed in such way that that was untouchable. So, to start expropriating large parcels to be able to have land for affordable housing would have taken the four years of the presidential administration, with a fierce confrontation with a Constitution that actually aimed for the contrary. Until today that has not been able to change¹³²

After the Constitution, the next level in this regulatory framework is constituted by the General Law of Urbanism and Construction (GLUC), which has been amended numerous times since its original text was approved in 1975.¹³³ This general statute regulates the process of elaboration of urban plans that may be adopted at the national, regional, metropolitan, and local levels, establishes the land-use approval process for real estate development projects, and defines the responsibility of all the actors involved in these development projects. This statute broadly

128. The recognition and interpretation of a principle of subsidiarity in Chile's Constitution has generated a large academic debate. See, e.g., Pablo Ruiz-Tagle, *Principios Constitucionales del Estado Empresario*, 62 REVISTA DE DERECHO PÚBLICO 48 (2000).

129. C.P. art. 19(23).

130. *Id.* art. 19(24).

131. *Id.* art. 19(26).

132. Interview with Former High-Level MHU Official, in Santiago, Chile (Sept. 2, 2013).

133. Decreto con Fuerza de Ley No. 458, Abril 13, 1976, DIARIO OFICIAL [D.O.].

delegates authority to the General Ordinance for Urban Planning and Construction, which must implement the rules established by the General Law. These two documents specify the general principles that are to guide the local regulation of land use, which is concretely carried out through what the statute calls “urban regulatory plans.” The law recognizes four territorial levels of urban regulatory plans: (1) national, (2) regional, (3) inter-district or metropolitan, and (4) district. The first three are established by the MHU, and the fourth is adopted by each municipality governing the corresponding district. The national and regional urban regulatory plans may be enacted to provide general guidelines for the elaboration of metropolitan and district plans, and the latter contain the actual rules for urban land use, including the definition of urban boundaries and the actual zoning regulations.

Notably, this regulatory framework does not contain rules or regulate processes that may facilitate the inclusion of affordable housing in well-located neighborhoods.¹³⁴ The GLUC, which constitutes the basic regulatory framework for urban land use in the country, seldom refers to affordable housing, and basically regulates the process through which national, regional, and local public institutions may define what and how to construct in urban territories.¹³⁵ It is focused on ensuring that real estate developments comply with some minimum standards, standards that are detailed in regulations adopted by other public agencies. However, with few exceptions, the legal framework simply does not address the generation of affordable housing and its adequate territorial distribution in urban areas.¹³⁶ Moreover, one particular provision of the GLUC, article 55, is very problematic rule from the perspective of inclusionary affordable housing. This article prohibits the construction of urban neighborhoods outside the urban limits of a city, except for the cases of affordable housing projects. This is an explicit invitation to construct low-income housing units in peripheral urban areas that are often badly served by public and private services.

There are only a few exceptional rules or instruments in Chile’s land-use regulatory framework that represent some concern about the promotion of inclusionary housing. One is article 50 of the GLUC states that the MHU may change the zoning rules of local plans if they do not allow the construction of those affordable housing projects organized by the regional agencies of the MHU. However, this has been interpreted very narrowly to apply only when the land that will host the affordable housing project is public and not private.¹³⁷ To my knowledge, the use of

134. Enrique Rajevic has argued that this legal framework is focused on facilitating real estate development by ensuring private property rights and the right to develop business activities. See Enrique Rajevic, *El paulatino pero insuficiente desarrollo del Derecho urbanístico en Chile: En tránsito de la Adolescencia a la madurez*, 9 F. DE DEREITO URBANO E AMBIENTAL 61, 63–64 (2010).

135. *Id.*

136. *Id.*

137. See the discussion about this rule in Rajevic, *supra* note 100, at 430–36.

this rule has been very limited. Another rule is a provision included in 2014 in the statute that regulates some incentives for the construction of what is called “economic housing” (housing that has less than 140 square meters) that allows the MHU, after consulting with the corresponding municipality, to provide land-use incentives to housing projects that contribute to social integration in certain zones of Chilean cities.¹³⁸ This provision has not yet been implemented, and the MHU was discussing an executive decree to implement it when I finish the research for this Article. A similar rule was adopted in 2016, which is article 184 of the GLUC. This article allows municipalities to grant land-use incentives to the development of real estate projects that contribute to social integration. Basically, the provision allows for the adoption of local inclusionary zoning ordinances; but it is a permission, not an obligation, so it is not at all clear that local governments will actually provide those incentives. Finally, a third legal instrument addressing inclusionary housing is a conditional zoning rule adopted some years ago through the metropolitan plan of Santiago, the capital of Chile. The rule allowed real estate development outside the city’s boundaries under the condition that the project would include a quota of affordable housing, with the aim of promoting social mixture. These instruments, however, have been unsuccessful in generating inclusionary housing.¹³⁹

138. Decreto con Fuerza de Ley No. 2 arts. 1.8, 1.9, Julio 31, 1959, DIARIO OFICIAL [D.O.].

139. The conditional zoning instruments were the so-called Conditional Zones of Urban Development (*Zonas de Urbanización Condicionada*, ZODUC) adopted in 1997 together with the “Conditional Projects of Urban Development” (*Proyectos de Desarrollo Urbano Condicionado*, PDUC) established in 2003. ZODUC was introduced following the decision to expand the urban boundary of Santiago under the rationale that the added zones were going to be developed by the private sector. ZODUC established a zoning regime requiring that 5% of the total land that became urbanized must be reserved for social housing. However, ZODUC did not establish mechanisms to enforce the construction of the social housing quota, and to date no affordable housing unit has been constructed in that area. The PDUC had a slightly different rationale. The objective was to define procedures and conditions for development projects outside the urban limit of Santiago. It was not a legal decision defining a new urban zone, but rather a legal decision authorizing the expansion of the city limit under certain conditions, which also included the requirement that a percentage of the construction be devoted to social housing units. Many projects have been submitted but, apparently, most of them were abandoned during the process; to date, no PDUC has been executed. To the best of my knowledge, no systematic analysis of the failure of these policies has been produced, but this situation casts doubts on the MHU’s commitment to using this regulatory strategy to generate affordable housing. It is also telling that these conditional zoning strategies have only been adopted in cases where Santiago’s urban boundaries underwent expansion. Even if these instruments are successfully implemented such that subsidized housing projects are constructed in these zones, affordable housing will still be located very far from central urban areas, which leaves room for skepticism regarding this particular mechanism’s capacity to promote urban integration. For that goal, conditional zoning needs to be used in central, higher income areas, which is something that has not been considered seriously in Chile. See Pablo Trivelli y Cia. Ltda., *Urban Structure, Land Markets and Social Housing in Santiago, Chile* 63–66 (2010) (unpublished manuscript) (on file with author) (“There has not been a rigorous evaluation of this policy, but taking more than seven years for their approval is not reasonable if this mechanism is to operate fluently.”) (translated by author).

C. *The Quantitative Success of Chile's Regime*

From a quantitative perspective, Chile's market-based housing policy regime is rightfully considered a big success, because it has promoted massive access to formal housing and significantly reduced the housing deficit in a relatively short period of time.¹⁴⁰ According to official statistics, from 1990 to 2011 Chile reduced the housing deficit from around 1,000,000 units to around 500,000 units; it should be noted that this reduction was achieved despite Chile's overall population growth and the concomitant increase in housing demand over that period of time, and even despite the effects of the 2010 earthquake that left thousands of families homeless.¹⁴¹ According to the same source, 86% of the housing deficit corresponds to households that are currently living with another family.¹⁴² A significant portion of all irregular settlements has been eradicated, which is quite a remarkable achievement in comparison with other developing countries.¹⁴³ According to data from 2011, a total of 86,862 people live in irregular settlements in the country, which for a country of around 17 million people represents a small percentage.¹⁴⁴ A representative of a community organization that works in the affordable housing sector told me: "If I compare to other countries where people still live under paperboard, there is no raw poverty in the country."¹⁴⁵

How did Chile's market-based regime, relying on targeted subsidies, increase the supply of low-income housing in the country so rapidly? The following is the explanation given by one interviewee, a real estate developer:

The first thing I would highlight from the regime, the very first thing, is the demand-side subsidy. I mean, the concept of the demand-side subsidy. It makes very clear who has to be assisted, who are the weakest link in the whole chain of negotiations. That is what the programs should focus on. Not only because they are the weakest link, but also, in addition, because of an issue of the market Being a subsidy to the demand is a very powerful signal: first, we need to assist that demand, second, that is the target of the programs. We need to make an analysis of the demand wherever it is, and we need to transform that housing need into assistance, district

140. See Gilbert, *supra* note 18.

141. See MINISTERIO DE VIVIENDA Y URBANISMO, *HACIA UNA NUEVA POLÍTICA URBANA PARA CHILE: ELEMENTOS DE DIAGNÓSTICO* 26 (2013).

142. *Id.*

143. See Rodrigo Salcedo, *The Last Slum: Moving from Illegal Settlements to Subsidized Home Ownership in Chile*, 46 *URB. AFF. REV.* 90, 91 (2010).

144. See MINISTERIO DE VIVIENDA Y URBANISMO, *CATASTRO 2011: MAPA SOCIAL DE CAMPAMENTOS* (2011).

145. Interview with Representative of Community Organization, in Santiago, Chile (Sept. 9, 2013).

by district. That is the starting point of the policy, where the focus has to be. A second contribution [of this policy strategy] that for me is fundamental is the financial aspect. Having a balanced financing system makes the programs sustainable over time. Sustainable over time in the long term, which allows the different actors to make decisions not only in the short term.¹⁴⁶

The quote identifies three aspects of Chile's market-based regime that have been critical to the quantitative success of the policy. The first one is the subsidy mechanism, which from its origin was conceived as an instrument that would improve the targeting of housing assistance. This instrument, along with the scorecard evaluation system used to identify eligible households, helps to identify the people and locations with genuine demand for affordable housing, as well as to direct all governmental efforts to those families. The second element is the finance structure. A very clear and stable finance mechanism has allowed the real estate industry to make investments that will be recovered in the long run, which is a strong incentive to participate in the market for affordable housing. Also, from the government's perspective, it is easier to control public spending when governmental spending in affordable housing is limited to the distribution of one-time capital subsidies. The government calculates the number of subsidies that can be distributed per year, and there is no additional funding besides the subsidies, which constitutes an effective way of monitoring public spending in this social policy sector. The final element is the overall institutional framework that has been continued for the last four decades and that has provided a high degree of certainty to all stakeholders. This also constitutes an incentive to the private sector to participate in the generation of subsidized housing.

Another successful aspect of Chile's housing regime is the high quality of construction of the delivered housing units. Using data from 2006, Simian shows that subsidized housing is of better quality than the nonsubsidized housing for the same income groups.¹⁴⁷ The average useful life of subsidized housing, according to Simian's estimation, is fifty years.¹⁴⁸ Arguably, the explanation for such quality housing indicators involves good housing construction legislation and effective enforcement. In the late 1990s, strong criticism focused on affordable housing projects that had significant construction problems, which led the MHU to push for legislation and regulations to improve the quality standards in the construction of subsidized housing.¹⁴⁹

146. Interview with Real Estate Developer, in Santiago, Chile (Dec. 4, 2013).

147. See Simian, *supra* note 88, at 314–19.

148. *Id.* at 315.

149. See OECD, *ECONOMIC SURVEYS: CHILE 2012*, at 84–85 (2012).

D. *The Failure of Urban Inclusion of Chile's Regime*

Today in Chile there is widespread acknowledgment of what I refer to as the “spatial bias” of Chile’s housing policy model. This term denotes the regime’s strong inclination to concentrate low-income families where cheap land is available—that is, in neighborhoods that typically lack adequate access to private and public goods, such as job opportunities, high quality schools, and so on, and certainly in peripheral areas located far higher income neighborhoods.

The academic literature began to identify the spatial bias of Chile’s housing policy regime in the late 1990s and early 2000s.¹⁵⁰ A well-known 2005 study of the implementation of Chile’s subsidy programs in the 1980s and 1990s argued that the regime was responsible for the creation of “the problem of people with roofs.”¹⁵¹ According to the authors, the main problem affecting Chilean cities shifted during this period of time from people living in irregular settlements (informality), to urban segregation of low-income people. Since then, other authors have documented through statistical methods the spatial bias of Chile’s low-income housing policy.¹⁵² These studies have confirmed what most stakeholders had known for many years: the policy structure that Chile has implemented tends to concentrate poverty on the boundaries of Chile’s urban areas. The existence of poor and spatially isolated neighborhoods is today a clear and crude reality in Chilean urban areas. A recent study estimates that 1,684,190 people live in some sort of ghetto in the twenty-five biggest Chilean cities.¹⁵³

150. See, e.g., María Elena Ducci, *Chile: The Dark Side of a Successful Housing Policy*, in *SOCIAL DEVELOPMENT IN LATIN AMERICA: THE POLITICS OF REFORM* 149 (Joseph S. Tulchin & Allison M. Garland eds., 2000).

151. See *LOS CON TECHO: UN DESAFÍO PARA LA POLÍTICA DE VIVIENDA SOCIAL* 14 (Ana Sugranyes & Alfredo Rodríguez eds., 2005) (translated by author).

152. See Tokman, *supra* note 116, at 507–09 (describing how all construction of affordable housing for low-income families between 1994 and 2000 occurred in peripheral zones, more than two thirds of which was located in three districts in the southern periphery). For a more recent analysis, see Dionysia Lambiri & Miguel Vargas, *Residential Segregation and Public Housing Policy, the Case of Chile* (Facultad de Economía y Empresa, Universidad Diego Portales, Working Paper No. 29, 2011) (finding that governmental housing assistance programs implemented between 1992 and 2006 have been a significantly determinant of urban segregation in Santiago); Jan Dohnke et al., *Achieving a Socio-Spatial Mix? Prospects and Limitations of Social Housing Policy in Santiago de Chile*, 30 *HOUSING STUD.* 839 (2015) (arguing, using data from 2006 to 2009, that there is a market dynamic in Santiago in which the districts with higher land prices attract more investment, resulting in further increase in property value, which effectively excludes the possibility of affordable dwellings in those areas).

153. See *ATISBA, GUETOS EN CHILE* (2010). The study defines a ghetto as a neighborhood with four characteristics: (1) it is predominantly inhabited by low-income families (family incomes under 700 USD per month); (2) it concentrates a significant proportion of the low-income families in the greater urban area; (3) the supply of commercial and other services is below average; and (4) its location is geographically distant from the primary city centers. The results of the study show that there are sixty-four ghettos in Chile, in which 1,684,190 people live. Thus, approximately 10% of Chile’s population lives in a ghetto. Forty-four percent of them are located in Chile’s largest urban area, the capital Santiago.

Moreover, although more evidence is needed, a number of recent studies have shown that the concentration and isolation of low-income families in subsidized housing projects have contributed to negative outcomes for those families.¹⁵⁴

Why has Chile's market-based housing policy regime held this spatial bias against the poor? I argue that segregation based on income is a natural outcome of Chile's commitment to an enabling markets regulatory rationale. This commitment is expressed in a regime that limits the role of the government to the delivery of targeted subsidies aimed at promoting homeownership, within a regulatory framework that facilitates private real estate development and transactions without an explicit concern for generating rules that may promote inclusionary housing.

154. See Osvaldo Larrañaga & Claudia Sanhueza, *Residential Segregation Effects on Poor's Opportunities in Chile* (Departamento de Economía, Universidad de Chile, Working Paper No. 259, 2007) (The authors studied the effect of residential segregation on the opportunities of poor families in the twenty-six Chilean cities with more than 100,000 inhabitants, and they show that residential segregation has a statistically significant negative effect for low-income families on measures such as preschool attendance, high school dropout rates, educational achievement, and youth employment. They do not find any effect on variables such as the probability of adolescent or single motherhood and certain health-related indicators. Although the negative results described were statistically significant, it should be mentioned that they were not large.). See also Pablo Celhay & Claudia Sanhueza, *Location, Location, Location: Labor Outcomes in Urban Slums of Santiago-Chile* (Instituto de Políticas Públicas, Universidad Diego Portales, Working Paper No. 10, 2011) (The authors compare a representative sample of Santiago families living in informal settlements, families living in subsidized housing projects that previously lived in slums, and families living in subsidized housing projects that had never lived in an informal settlement. The comparison is interesting because in Chile's urban areas, the settlements are usually better located than subsidized housing projects, which means better access to public services and job opportunities. The authors confirm the hypothesis that some families remain in irregular settlements instead of applying to government housing assistance because of better access to labor and other opportunities even though they could easily avail themselves of governmental subsidies to obtain housing in a subsidized project. The authors show that labor outcomes, such as rates of labor participation and employment, are better for the men that remain in settlements. This suggests that living in better connected neighborhoods can potentially increase labor opportunities compared to those available living in segregated neighborhoods.). Finally, see Francisco Sabatini & Guillermo Wormald, *Segregación de la vivienda social: Reducción de oportunidades, pérdida de cohesión*, in *SEGREGACIÓN DE LA VIVIENDA SOCIAL: OCHO CONJUNTOS EN SANTIAGO, CONCEPCIÓN Y TALCA* (Francisco Sabatini et al. eds., 2013) (The authors studied eight condominiums of subsidized housing in three different Chilean cities. These condominiums are similar in most aspects, with the exception of territorial isolation or segregation. The authors were able to compare the effects of varying degrees of housing segregation on the variables examined, and they found more negative outcomes in the more isolated condominiums, especially in Santiago, where the gap between the two social housing projects studied was quite significant. Less social mobility, higher rates of unemployment of the household head, higher rates of inactivity of the household head's partner, higher commute times to work, and a larger degree of access to predominantly lower quality jobs were all found in the worse connected condominiums. Interestingly, the study also revealed effects related to the stigmatization of these neighborhoods. Residents of the more segregated condominiums had a more negative perception of the place where they lived, perceived that living there affected their possibilities of finding a job, and expressed greater desire to leave the neighborhood.).

With respect to urban inclusion, the basic problem with the subsidy programs is that they rely on a price that is supposed to generate a competitive market of affordable housing. The assumption is that a competitive market will generate well-located affordable housing if there is demand for that. This equilibrium, however, requires that the subsidy price is sufficiently high to enable low-income families to compete with higher income groups, but this price is often beyond the scope of what a government can provide, especially for a middle-income or low-income country.

In Chile, subsidy prices are relatively low, despite the fact that the country is one of the top countries in public spending in housing, even compared to richer countries.¹⁵⁵ Since construction costs are relatively fixed in urban areas, the way real estate developers can profit from the construction of affordable housing projects is through raising the volume of units they build, and reducing land costs. A real estate developer interviewed for this project put it this way:

These are housing units of low cost, where the profit is in the volume of units that are built, not in a single unit. I mean, obviously, if you compare a housing unit of 800 U.F. with what you would earn with a house in La Dehesa [high-income district], where you can charge 7,000 U.F., I would of course do it there. But if you will build 500 units of 800 U.F., that is good business, because the profit margin is small, but the volume is what is of interest from the perspective of the investor.¹⁵⁶

During the 1990s, when the subsidy programs operated in practice as supply-side subsidies, the situation was even worse from the perspective of urban inclusion.¹⁵⁷ The MHU did not consider the location of the affordable housing projects that applied for the subsidies, and the quality requirements were very minimal. Also, the MHU favored the construction of projects that would include a high number of dwelling units, and contracted directly with real estate companies.¹⁵⁸ As long as the proposal involved a large, affordable housing condominium financed within the limits imposed by the subsidies, the project was approved.¹⁵⁹ Moreover, there is the relevant factor of captured demand. When the MHU would offer an eligible household a unit, the family was given limited time to respond and negative responses often meant staying on the waiting list for a number of years to come.¹⁶⁰ There was therefore no competition between construction companies for the

155. According to recent data, Chile ranks fifth among OECD countries in public spending on housing. See OECD, *supra* note 149, at 97.

156. Interview with Real Estate Developer, in Santiago, Chile (Dec. 4, 2013). U.F. is a unit of account used in Chile that is constantly adjusted for inflation.

157. See Tokman, *supra* note 116, at 510–12.

158. *Id.*

159. *Id.*

160. *Id.* at 511.

demand, competition which would have mitigated the massive tendency towards peripheral construction. In sum, the whole institutional structure of these subsidy programs constituted a strong incentive to agglomerate low-income families in segregated neighborhoods.

The early 2000s saw new low-income subsidy programs, which have operated in a fashion more similar to demand-side subsidies or vouchers. Yet this system also largely failed to increase the supply of affordable housing in well-located urban neighborhoods. The following quote from an interview with a mid-level MHU official is a good illustration of the limitations of the subsidy programs targeting low-income families:

That is the way it is sold, and that is the way that propaganda is made too. If you go over the Solidarity Fund for Housing Choice's propaganda [the current main subsidy program for low-income families], you will realize that there is a lot about that . . . this vision that families have the liberty and can now choose a home with the characteristics that they want, where they want, and that the market will provide for that preference that they have. But we know that in practice this is not true, I mean there is a price limitation that in the end limits all other possibilities in terms of physical space, design, place, equipment, etc.¹⁶¹

As the quote shows, the problem is, again, the inability to compete on price. Neighborhoods that are well connected to urban opportunities are in high demand. Living close to parks, employment opportunities, good schools, and so forth is expensive because demand for residences in neighborhoods with those characteristics exceeds the supply. Households benefiting from vouchers, whether individually or collectively, tend to be unable to compete for locations in high demand. The problem could be that the value of the subsidy has been set below what is necessary to compete for well-located land. However, in order to compete with high-income groups, the price of the subsidy would have to increase radically, raising questions of whether alternative uses of taxpayers' money might be more efficient or more just.

In defense of demand-side subsidies, it could still be argued that the more the amount of the subsidy is increased, the more affordable housing can be obtained in good locations. Yet the Chilean experience contradicts this assertion. In 2006, the MHU introduced a subsidy called the "differentiated location subsidy" with the explicit purpose of supplementing the regular subsidy in order to improve the location of affordable housing projects; this has been the main policy adopted to fight urban segregation in the 2000s.¹⁶² The problem with this special

161. Telephone Interview with MHU Mid-Level Official (Apr. 14, 2013).

162. See Pia Mora et al., *Disyuntivas en la Política Habitacional Chilena* 26–27 (June 2014) (working paper for the Lincoln Institute of Land Policy) (on file with author).

subsidy was that, very quickly, the urban land market internalized the increased amount of the subsidy. In other words, the main impact of the differentiated location subsidy was an increase in the price of land available for social housing projects, rather than improved locations for affordable housing.¹⁶³

The differentiated subsidy for location did not improve the location of affordable housing projects. Instead, private landowners who were willing to sell property for subsidized housing projects captured the increased value of the subsidy, especially in the case of low-income subsidy beneficiaries. This happened because of a number of problems in the design of this special subsidy. First, the requirements for the land sites that could be purchased with this special subsidy were too broad, hence most urban locations in cities like Santiago were suitable for projects that could take advantage of the differentiated subsidy.¹⁶⁴ A recent study affirms, for instance, that nearly the whole of Santiago's urban area was eligible for the special subsidy.¹⁶⁵ Once landowners realized that most sites were eligible for the supplemental voucher, they responded by raising their prices accordingly. Second, the differentiated subsidy involved a uniform increase in the value of the subsidy. Beneficiaries would not receive different amounts depending on the location characteristics of the unit they wanted to purchase. This feature, together with the fact that the subsidy programs for low-income families that have been implemented since the turn of the century subsidize nearly 100% of the price of affordable housing, signaled the government's increased disposition to pay more for affordable housing to the suppliers. The suppliers' response was obvious: a general increase in prices.

163. A recent econometric study that analyzed all subsidized transactions between 2007 and 2009, the first years of operation of this special subsidy, concluded that [t]he evidence suggests that in most cases virtually the entire increase in the subsidy to the purchaser, which is intended to make housing more affordable, is translated into increased housing prices. In fact, in subsidized transactions between 2007 and 2009 the agreed purchase prices were almost entirely determined by the maximum subsidy amounts set by the housing authority. This occurred repeatedly in transactions performed through programs where the granted subsidy was virtually a 1 to 1 function of the agreed transaction price and where subsidy beneficiaries have little or no incentive to bargain [subsidy programs for low-income families]. In such a framework, all the increases in subsidy levels that occurred in the period were translated into equivalent increases in prices with very limited improvements in the quality and location of the units purchased.

See Slaven Razmilic, *Property Values, Housing Subsidies and Incentives: Evidence from Chile's Current Housing Policies* (Sept. 2010) (unpublished Master's dissertation, Department of Urban Studies and Planning, Massachusetts Institute of Technology) (on file with author). In my interviews, this effect was widely acknowledged in the field by observers from across the political spectrum.

164. Mora et al., *supra* note 162, at 26–27.

165. Juan Correa, *Subsidio de localización para los condominios sociales. ¿Es realmente efectivo?* (Clave de Política Pública, Instituto de Políticas Públicas, Universidad Diego Portales, Abril 2014).

A more general problem, common to all of the subsidy programs implemented in Chile, is the almost exclusive focus on promoting homeownership.¹⁶⁶ Recently, Magdalena Opazo examined the implementation of the subsidy programs in the 1990s in Santiago, and found that rather than affecting urban segregation—measured statistically by the territorial separation of income groups—the policy affected housing mobility, by concentrating low-income families at the boundaries of the metropolis, without allowing them to move from those places to better located neighborhoods.¹⁶⁷ According to the author, providing housing assistance in homeownership is a big factor explaining why the poor have not been able to move from these peripheral places.¹⁶⁸ Although further research is needed, basically the argument is that subsidizing homeownership in peripheral urban locations may produce that low-income families get stuck in “bad” neighborhoods, because after they receive government’s housing assistance they do not have the means nor the support to move to better places.¹⁶⁹ If subsidizing rent facilitates the residential mobility of low-income families without raising the overall cost of the subsidy program, that greater access could justify reducing and perhaps abandoning altogether the strong emphasis on homeownership undergirding this market-based model.¹⁷⁰

The ineffectiveness of the subsidy programs to promote urban inclusion is also reinforced by a legal framework for urban governance that is disconnected from the national goals for affordable housing. Chile’s land-use regulatory framework provides stable and clear rules that facilitate the general operation of housing markets, which is one of the core components of the enabling markets regulatory discourse. However, this supply-side framework does not contain provisions that would guarantee that affordable housing is generated in an inclusionary way. It assumes that the government’s intervention in the

166. See *supra* note 14 (explaining the influence of de Soto’s ideas about the relationship between property rights and development. Although de Soto’s ideas have largely been followed in regularization programs implemented in the developing world, his arguments apply more generally to housing policies that promote homeownership for low-income families, such as the Chilean regime).

167. See Magdalena Opazo, *Evaluación de la política de vivienda social en la década de los noventa sobre la segregación y movilidad residencial en Chile* (July 2014) (unpublished Ph.D. dissertation, Universidad Autónoma de Madrid, Spain) (on file with author).

168. *Id.* at 128–29.

169. *Id.*

170. Slaven Razmilic evaluated a pilot rental voucher program implemented in 2014. His analysis suggests that the rate of actual use of the vouchers is relatively high in comparison with the regular subsidy programs, that the overcrowding rate of the beneficiaries has diminished, and that the percentage of family income that eligible households had to contribute from their own pocket to complement the subsidy is reasonably low. However, beneficiaries did not improve their housing location by renting with the vouchers. Most beneficiaries came from areas of high poverty, and most of them stay relatively near their previous homes. It is, again, too soon to make general claims about the performance of this new program. See Slaven Razmilic, *Subsidio al arriendo: primeros resultados y pasos a seguir*, PROPUESTAS DE POLÍTICA PÚBLICA, CENTRO DE ESTUDIOS PÚBLICOS, Marzo 2015, at 1.

affordable housing sector is carried out on the demand side through the subsidy programs, not through land-use incentives and obligations. Moreover, local governments have been increasingly using their discretionary authority to elaborate local land-use plans that respond to the interests of their jurisdictions; this trend has significant effects on how people are distributed within urban areas, especially because high-income districts have strong incentives to preserve the socioeconomic character of their jurisdictions.¹⁷¹

In sum, Chile has implemented an enabling markets approach that has limited the role of the government to the delivery of targeted subsidies, in the context of a regulatory framework that provides strong protection to private property rights and favors real estate development. The success in terms of urban inclusion has been limited. On the contrary, low-income households have been able to access formal housing, but that housing is almost exclusively located in those places where there is less demand from higher income groups, often located in isolated neighborhoods where land is cheap. The general lesson that this story offers is that limiting policy interventions to targeted subsidies, which has been one of the central instruments favored by the World Bank and other international organizations when disseminating the enabling markets regulatory approach,¹⁷² has strong limitations with respect to the promotion of inclusionary housing. Therefore, smarter and more intensive regulatory strategies are needed to promote the supply of affordable housing in well-located neighborhoods.¹⁷³

171. See Diego Gil Mc Cawley, *The Political Economy of Land Use Governance in Santiago, Chile and Its Implications for Class-Based Segregation*, 47 *URB. LAW.* 119 (2015).

172. See UN-HABITAT, *supra* note 1, at 49–50.

173. Very recently, the government of Chile designed two new subsidy programs that are expected to promote access to affordable housing in better located neighborhoods. These programs are not included in the analysis here because they started full operation only in 2016; thus, there is not enough evidence to evaluate them. One is the aforementioned rental subsidy program, which was designed based on the experience of the U.S. federal voucher program (“Section 8”). This program is targeted to eligible middle-income and low-income households that are seeking temporary rental housing assistance. The amount provided by the government varies depending on the geographical area where the voucher will to be applied, ranging from about 100 USD to 200 USD per month, which has to be complemented by household funds. The maximum time that households can use the voucher is eight years, with a total cap amount of approximately 6,000 USD. See *Arrendar una propiedad: Arrendar una Vivienda*, PROGRAMAS DEL MINISTERIO DE VIVIENDA Y URBANISMO, <http://beneficios.minvu.gob.cl/arrendar-una-propiedad/arrendar-una-vivienda/> (last visited May 1, 2018). The other program is called “Program of Social and Territorial Integration” and involves higher value subsidies for low-income and middle-income families to live in an affordable housing project that includes families from different income segments. This program is a reformulation of unsuccessful past attempts along similar lines. See *Comprar una Vivienda: Programa de Integración Social y Territorial DS 19*, PROGRAMAS DEL MINISTERIO DE VIVIENDA Y URBANISMO, <https://beneficios.minvu.gob.cl/comprar-una-vivienda/programa-ds-19/> (last visited May 1, 2018).

III. TOWARDS A PLANNING MARKETS HOUSING POLICY APPROACH

The law and urban development field confronts an important challenge: how to provide massive access to formal housing to disadvantaged families in an inclusionary way. To a significant extent, the ability to achieve more urban inclusion depends on the type of housing and land-use institutional arrangements that countries adopt. In this Part, my aim is to provide a comparative institutional analysis between different regulatory approaches that governments may implement to provide affordable housing, based primarily on the experience and policy debates of the United States.¹⁷⁴ I use the term regulatory approach to refer to the main institutional choices that shape the way governments intervene in housing markets for the purpose of promoting affordable housing.¹⁷⁵ Different regulatory approaches represent different equilibrium points between the role of governmental agencies and the role of market dynamics in the affordable housing sector. One important aspect of a regulatory approach in the affordable housing sector refers to the instruments and programs implemented to directly generate affordable housing. Another aspect is related to the main principles and institutions contained in the land-use regulatory framework where those instruments and programs operate.¹⁷⁶

The enabling markets regulatory discourse represents a regulatory approach where the government acts mainly as a financier. It proposes minimalist governmental interventions in housing markets through the use of finance mechanisms like demand-side targeted subsidies. Now, there are different ways through which governments may operate as a financier in the affordable housing sector. It may involve public agencies providing financial support to targeted beneficiaries or to specific projects in order to give low-income families access to formal housing. Hence, the financial support can typically be structured either as supply-side or as demand-side assistance. The United States, for instance, has both types of policies in its federal housing assistance programs: on the supply side, an extensive program called the Low-Income Housing Tax Credit operates through the delivery of tax credits to project developers who can sell those credits to investors that need tax relief.¹⁷⁷ To qualify to receive the credits, a

174. The analysis builds on the distinctions about different types of land-use interventions provided by ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 897–972 (2013).

175. For a general comparative institutional analysis framework, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994).

176. In this Article, I focus mostly on the direct instruments used to generate affordable housing. However, urban development, including affordable housing, is shaped by multiple legal and political arrangements, such as those that set the boundaries and powers of local jurisdictions, define property taxes, organize the provision of public services, regulate and enforce the operation of housing transactions, and so on. These less direct instruments are not part of the analysis.

177. See ELLICKSON ET AL., *supra* note 174, at 960–61.

project must involve new construction or substantial rehabilitation, and it must offer, for at least fifteen years, a minimum of 20% of the housing units at reduced rents for low-income families.¹⁷⁸ On the demand side, the program known as Section 8 provides portable certificates, popularly known as “vouchers,” that eligible households can use to rent a house of their choice.¹⁷⁹ The federal government funds the vouchers, but local housing authorities administer them.¹⁸⁰

The enabling markets policy approach was formulated as an alternative to the public housing model, which was the predominant policy rationale in advanced economies in the middle of the twentieth century.¹⁸¹ In the public housing model, the government acts as a developer. Under this institutional logic the government maintains control of the entire process of developing affordable housing and may use all of its administrative powers to produce the desired result. Public agencies are therefore responsible for the financing, construction, allocation, and administration of affordable housing units. Some of the stages of the process of housing development might be externalized through contracts with private sector actors, but the government maintains control and oversees the entire process.

The public housing program in the United States described above is a good example of governmental agencies acting as developers.¹⁸² This program, however, is generally blamed for causing the segregation of minority groups in urban areas of the country, at least in the way it was implemented in the second half of the twentieth century.¹⁸³ According to Michael Schill and Susan Wachter, several components of the U.S. public housing program led to this problematic outcome.¹⁸⁴ One important factor was that this was a federal program that relied on municipalities’ decisions regarding the location of housing projects, and high-income suburbs were not obliged to participate.¹⁸⁵ Moreover, an explicit provision mandated that, for each housing unit constructed through the program, a substandard housing unit had to be demolished, which further discouraged the participation of high-income suburbs, where there were not many substandard units.¹⁸⁶ There was little oversight or regulation of municipalities’ decisions on where to locate the projects, many of which ended up in the least desirable zones of the inner city, where a majority of minority families already resided, and where it was easiest to avoid local opposition.¹⁸⁷

178. *Id.*

179. Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 990–92 (2009).

180. *Id.*

181. See Calavita & Mallach, *supra* note 78, at 4–7.

182. ELLICKSON ET AL., *supra* note 174, at 944–50.

183. Schill & Wachter, *supra* note 38.

184. *Id.* at 1292–300.

185. *Id.* at 1292.

186. *Id.*

187. *Id.* at 1295–96.

In addition, land prices in those zones were not necessarily low, which constituted an incentive for the public agencies involved to construct high-density projects.¹⁸⁸ Another problem was that the program required that all the units built in these projects must house families of very low income, which intensified the high levels of poverty concentration in the projects.¹⁸⁹ Finally, in many cases housing projects were not appropriately administered by the local housing authorities, in part because the operation costs were financed by the tenants themselves, who had very limited resources to spare.¹⁹⁰

Although a public housing program could be designed in a way that may enable public agencies to achieve better results in terms of generating inclusionary housing, public agencies acting as real estate developers are generally not in a good position to overcome the market dynamics that lead to exclusion. In metropolitan areas where there is high demand for housing, unless the government owns large and well-located pieces of land, it would be difficult for a public agency to compete for location unless it is willing to pay a high price or expropriate. There is also a problem with respect to the administration of the units constructed by the government. Governments may sell the units generated, but if these are units located in good neighborhoods the pressure toward gentrification will be strong, and housing that was supposed to serve low-income families may end up in the hands of wealthier households. The other alternative is to rent the units and to provide public administration, as the U.S. public housing program did, in order to keep benefiting low-income families. In the U.S. experience, however, the program failed to provide adequate supervision and incentives to ensure proper administration of the affordable housing buildings by public housing authorities.¹⁹¹ Therefore, governmental agencies acting as real estate developers may have significant obstacles to compete via price for well-located land, in addition to the problems of designing and regulating new public institutions that can effectively organize and administer an affordable housing project.

A third policy approach involves the government acting as regulator with the explicit purpose of generating inclusionary housing. Here, public agencies adopt rules that force or incentivize the private sector to generate a supply of affordable housing. The private sector is then ultimately responsible for the construction and allocation of housing units. The role of the government is to establish appropriate regulations to promote the supply of affordable housing, and to monitor compliance with those rules. One paradigmatic example of this institutional logic is when a government uses its zoning power

188. *Id.*

189. *Id.* at 1293–95.

190. *Id.* at 1296–98.

191. *Id.*

to generate a supply of housing for the low-income sector.¹⁹² For instance, since the 1970s many municipalities in the United States have promoted mixed-income projects through the adoption of inclusionary zoning ordinances.¹⁹³ These regulations normally require real estate developers, as a condition for the approval of a housing development project, to set aside a number of units that must be sold or rented at below-market prices to certain type of households.¹⁹⁴

In the United States, there is a general consensus about the limitations of the public housing model, but there is disagreement on whether the government should prioritize finance or regulatory mechanisms for the promotion of inclusionary housing. Robert Ellickson, for example, has defended an approach focusing the role of governments in the delivery of rental vouchers as a better strategy to promote affordable housing and urban inclusion.¹⁹⁵ Among the advantages of vouchers is the fact that they allow choice, because eligible households are able to decide where they want to move; moreover, with a voucher system, it is easier to target people who best meet the criteria for housing assistance using.¹⁹⁶ Ellickson also argues that rental vouchers in particular are also less visible and therefore less likely to work as class markers when a poor family moves into a new neighborhood. Residents would not necessarily know that their new neighbors have a voucher, so class-based discrimination might be avoided.¹⁹⁷

Rental vouchers have, however, some important disadvantages that critics of this market-oriented policy strategy have formulated. One problem has to do with the information required to set the correct amount of the voucher. If the amount is set too low, the eligible household will have limited options when choosing the neighborhood they prefer. On the other hand, if the price is set too high, public resources will be wasted.¹⁹⁸ A second problem has to do with the asymmetry of information needed to make the appropriate residential choice. Research suggest that people given vouchers, but not housing counseling, usually end up in neighborhoods very similar to their previous ones.¹⁹⁹ There are also problems of coordination among the entities involved in the process of implementing the voucher policy. If urban inclusion is a goal, it is important to keep a social balance among the

192. For a comparative analysis of inclusionary zoning, see INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, AND LAND VALUE RECAPTURE, *supra* note 78.

193. See Alan Mallach & Nico Calavita, *United States: From Radical Innovation to Mainstream Housing Policy*, in INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, AND LAND VALUE RECAPTURE, *supra* note 78, at 15, 25.

194. *Id.* at 33–36.

195. See Ellickson, *supra* note 179.

196. *Id.* at 995–1012.

197. *Id.*

198. This argument is raised by Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 74–75 (2011).

199. *Id.* at 75.

different groups residing in the neighborhood. The institutions involved, however, do not have the power to coordinate this action.²⁰⁰ Finally, vouchers work where there is sufficient supply of housing for which the voucher can actually be used, which is usually not the case in many urban areas.²⁰¹

The use of urban planning regulations for the purpose of generating affordable housing is also a contested issue in the United States. For instance, there is a strong debate on the effectiveness of inclusionary zoning ordinances. Since the 1970s, this policy instrument has become a mainstream tool in the United States, Canada, and many Western European countries, in the context of central governments abandoning their role in the direct production of affordable housing and delegating its provision to regional and local governments, which generally impose the obligation to generate affordable housing to the private sector as an additional cost of the development process.²⁰² Inclusionary zoning ordinances promote the generation of affordable housing in a scattered way within an urban area, avoiding residential segregation of low-income families. It is a tool considered particularly effective in strong housing markets environments, where high demand increases the costs of housing, which makes traditional governmental subsidies less effective.²⁰³

There are, however, some strong critics of inclusionary zoning as a tool for the promotion of urban inclusion. Robert Ellickson argues that people in the same inclusionary housing complex usually know exactly who receives assistance and who does not, which potentially creates obstacles for genuine integration.²⁰⁴ Citing empirical studies, Ellickson also argues that inclusionary zoning raises the production costs of housing units because of all the administrative costs involved in the construction of subsidized units.²⁰⁵ He holds that developers lack adequate incentive to maintain the subsidized units properly, because the rental income of those units is lower and the tenants could be easily replaced with other eligible households.²⁰⁶ Another argument against inclusionary zoning proposed by Ellickson is the considerable likelihood of a mismatch between the tenants and the housing units that they are allocated.²⁰⁷ This argument hinges on the negative consequences of preventing people from choosing where they live and is often employed by proponents of “voucher” systems in which qualifying families receive a governmental subsidy that they apply wherever they want

200. *Id.*

201. See Vicki Been, *Residential Segregation: Vouchers and Local Government Monopolists*, 23 *YALE L. & POL'Y REV.* 33, 38–39 (2005).

202. See Calavita & Mallach, *supra* note 78, at 3–7.

203. *Id.* at 7.

204. Ellickson, *supra* note 179, at 1011.

205. *Id.* at 997–98.

206. *Id.* at 998–99.

207. *Id.* at 999–1001.

to live. Lastly, it has been argued that most of the people who benefit from such inclusionary programs are actually moderate-income, not low-income families. This pattern is reinforced by the sad fact that the poorer the family receiving governmental housing aid, the greater the resistance from would-be neighbors that family often faces.²⁰⁸

I acknowledge that the implementation of inclusionary zoning policies may have some significant costs, as the ones indicated by Ellickson, although recent research contradicts some of his claims.²⁰⁹ The critical question, though, is how effective inclusionary zoning policies are relative to other institutional arrangements with respect to promoting urban inclusion. A strong commitment with urban inclusion requires generating affordable housing in well-located neighborhoods. In those neighborhoods, however, the demand for housing tends to be particularly high. It is unlikely that vouchers, which is the type of instrument favored by Ellickson, would incentivize the supply of low-income housing in strong housing markets without the assistance of other instruments such as inclusionary zoning.²¹⁰

The Chilean experience actually shows that limiting the role of the government to the distribution of targeted subsidies is insufficient to achieve the demands for urban inclusion. Chile's subsidy programs have stimulated a strong response from the private sector in terms of generation of affordable housing units, but that response has had a strong tendency to agglomerate low-income housing in peripheral urban areas. In the interviews conducted for this project, there was a widespread agreement that the use of urban planning regulations for affordable housing is inevitable if the country wants to promote urban inclusion. The following quote from an MHU mid-level official working for the unit responsible for administering the subsidy programs is a good example of this view:

For me, urban planning is something that needs to be there long before, it has to give us the cities' rules of the game Is not something than can be done simultaneously, because they [land use planning policymakers] have a different logic and a different inertia than ours. We are a much faster machine, applying [to the subsidies] and constructing has to be done within two years for our institutional logic. For me, urban development and urban vision is the first phase that has to be done before our intervention They should give

208. See Byrne & Diamond, *supra* note 21, at 560.

209. Schwartz and colleagues examined the implementation of inclusionary zoning programs in eleven jurisdictions in the United States. Some of their findings are that these programs are effective in targeting low-income households, that the housing generated by these programs tend to be dispersed throughout the jurisdictions, that most of those homes are located in neighborhoods with low poverty rates, and that children get access to better schools. See HEATHER L. SCHWARTZ ET AL., *IS INCLUSIONARY ZONING INCLUSIONARY?* (2012).

210. See Been, *supra* note 201, at 39.

us the criteria for bad localization, the parameters for good localization, inviting us to go where they want, through visualizing and studying the city they should tell us that is better to grow to certain areas, so localization and subsidies should be preferred in those areas . . . ²¹¹

Given the limitations of the enabling markets regulatory discourse, governments confronting the need to promote access to affordable housing in an inclusionary way should rather experiment with what I call a “planning markets housing policy” approach. The term planning may evoke a negative association with the centrally planned economies of socialist regimes, but the truth is that most urban markets, even in capitalist societies, are heavily regulated by land-use rules that define urban development. A planning approach acknowledges this fact and uses the land-use governance regime to stimulate the supply of inclusionary housing. The basic idea of a planning housing markets approach is that the rules and institutional practices that govern urban development should be designed and implemented in a way that favors the generation of low-income housing in an inclusionary way. In a way, it proposes a strong connection between affordable housing and land-use planning, under the premise that affordable housing cannot compete for well-located land unless there are land-use regulatory obligations and incentives that explicitly promote that outcome.

The idea of using land-use planning mechanisms to incentivize the generation of affordable housing is commonly associated with inclusionary zoning policies. However, a planning housing markets approach should be understood as a broader regulatory rationale, one that addresses the failures of housing markets in generating inclusionary housing in a structural way. The implementation of this regulatory approach needs to address some of the criticisms that instruments such as inclusionary zoning have received in countries like the United States. But its premise is that without a land-use regulatory framework that facilitates the generation of inclusionary housing the goal of urban inclusion seems to be impossible to achieve, especially when there is a strong market for well-located neighborhoods.

A fully developed policy proposal is beyond the scope of this Article but some core aspects of a planning markets approach for inclusionary housing are outlined here. First, the promotion of inclusive housing should be adopted as an explicit objective of the land-use governance regime; in particular, all actors that have legal powers to enact urban planning regulations should have the obligation to do so in a way that would encourage the construction and fair distribution of low-income housing within a city. This is easier to do when there is a metropolitan

211. Interview with Mid-Level Official from MHU, in Santiago, Chile (Sept. 2, 2013).

authority responsible for planning urban development in the whole urban area. It may be more difficult to achieve when urban regulatory powers are fragmented among many local governments within a city, as is the case in Santiago.²¹² In the United States, where many metropolitan areas are divided into many local governments, one approach that has been used to secure the fair distribution of affordable housing is what is known as the fair-share regional approach, which consists of regulations that impose an affirmative obligation on municipalities to adopt policies, usually in the form of zoning ordinances, that ensure the construction of affordable housing that meets a defined “fair share” of regional needs.²¹³ The idea is for each municipality that forms part of a regional or metropolitan area to generate within its jurisdiction a share of the affordable housing necessary to overcome the wider area’s deficit.²¹⁴

Another important aspect of a planning markets housing policy approach is a legal commitment towards preventing exclusionary urban planning regulations and practices. For example, one strategy for avoiding the construction of low-income housing in well-located land is to adopt zoning rules that do not directly prohibit affordable housing development but that, in practice, make it impossible to build affordable housing.²¹⁵ For instance, one instrument that sometimes is used by local governments is to adopt low density levels, which makes constructing affordable housing projects impossible given that the finance of such projects normally requires building with high density. Empirical research in the United States shows that this and other land-use controls are used to prevent the construction of affordable housing.²¹⁶ This practice responds to the strong pressure that high-income local governments receive from homeowners to keep the “social character” of their districts.²¹⁷ A planning markets housing approach should ensure close monitoring of such practices and grant public agencies explicit legal authorization to remove exclusionary urban planning rules.

Finally, a planning markets approach should include some form of inclusionary zoning policy, that may enable the generation of affordable housing in market-driven real estate development projects.²¹⁸

212. See Gil Mc Cawley, *supra* note 171.

213. The fair-share regional approach was originated by two decisions of the Supreme Court of New Jersey that impose to all local governments in the state the obligation to ensure the construction of affordable housing in their jurisdictions that would meet a defined quota. For an analysis of the legal controversy, the judicial decisions, and its impact, see MASSEY ET AL., *supra* note 34. See also CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1997).

214. See MASSEY ET AL., *supra* note 34, at 39.

215. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 888–89 (2005).

216. See Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS REPORT (Apr. 24, 2017), www.brookings.edu/research/reforming-land-use-regulations/.

217. *Id.*

218. See Schwartz et al., *supra* note 209.

Inclusionary zoning policies may have different features and governments need to design them according to the particular need of an urban area.²¹⁹ For example, the quota of affordable housing required for any development project usually varies.²²⁰ Also, in some cases these policies allow developers to contribute to a housing fund instead of generating affordable housing in the same development project.²²¹ From an external perspective, the effectiveness of these policies depends on the existence of a strong and competitive urban market that is very attractive to the real estate industry.²²² From an internal perspective, it depends on regulations that impose reasonable costs to private developers.²²³ Inclusionary zoning is a critical component of a planning approach for inclusionary housing in urban areas where there is high competition for well-located land.

A planning markets housing policy approach has important differences from both the enabling markets strategy and the public housing model. Similar to the public housing model, it favors an active role of governments in housing markets, but government action is focused on designing and operating inclusionary urban planning regulations rather than designing and operating housing developments. In other words, according to this approach, in the affordable housing sector governments should focus on regulations rather than on operating as a developer. On the other hand, the planning markets approach is also similar to the enabling markets approach in its focus on establishing the institutional conditions for real estate development. However, a planning markets approach promotes an active role of public agencies in adopting and monitoring rules that favor the generation of low-income housing. It aims to push low-income housing through urban planning regulations to favor its dispersal within a city, so it cannot rely just on the allocation of targeted subsidies.

CONCLUSION

Reversing spatial bias in affordable housing and generating inclusionary housing are challenging goals to achieve. And complex policy goals require complex administrative interventions. If a country like Chile wants to provide sustainable affordable housing solutions to the urban poor, it needs multiple, intensive, and sophisticated instruments to alter the housing dynamics that prevents the development of affordable housing units in well-located neighborhoods with adequate quality standards. Reducing governmental intervention to a single instrument functional to the market dynamics that sort households into

219. *Id.* at 21–26.

220. *Id.* at 23.

221. *Id.* at 23–24.

222. *See* Mallach & Calavita, *supra* note 193, at 34.

223. *Id.*

neighborhoods according to their socioeconomic status is a poor recipe for law and urban development.

The lack of housing for the urban poor was a critical component of the old urban agenda. But it is still one of the critical challenges in the new urban agenda. To be sure, there were good reasons to abandon the skepticism towards markets reflected in the public housing approaches to the provision of affordable housing, both in the developed and the developing world. That skepticism, however, should not lead to complete distrust of the important role that governments and urban planning should play in the production of affordable housing in an inclusionary and sustainable way.