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RESPONSIBLE DEVOLUTION OF AFFORDABLE HOUSING

Andrea J. Boyack*

ABSTRACT

The federal government has been heavily involved in promoting housing affordability since the 1930s and continues to have a critical role to play. Over the past several decades, the federal government has financed affordability by promoting development and income subsidies, but specific allocation decisions have devolved. Housing inequities can best be addressed locally, but only if localities are held to high standards of fairness and regional coordination is facilitated. Successful and sustainable local solutions to housing affordability will also require a substantial financial investment, one that the federal government can and should reliably and adequately provide. Each year, Congress permits households with the least household need to receive billions of taxpayer dollars in unnecessary housing subsidies — Congress must correct this misallocation of funds in order to help those facing the severest housing burdens.

Much of federal affordable housing policy today involves a patchwork of insufficient and ineffective measures mitigating affordability harms. These measures provide critical short-term relief for the minority of genuinely needy households who receive assistance, but the federal government has inadequately invested in long-term solutions for housing instability. The federal government’s responsibility to address persistent housing inequity arises in part from decades of its own harmful, racist housing policies. Although the inherently local nature of housing markets suggests that the actual

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implementation of housing assistance programs should continue to
devolve, responsibility for ensuring fair access to quality housing
ultimately lies with the federal government.

Part I of this Article describes the ubiquity and impacts of the
problem of unaffordable housing. Part II examines the spectrum of
approaches that a government can use to address housing
unaffordability, from police power mandates to supply- and demand-
side subsidies. Part III makes the normative case for significant but
reimagined federal involvement in the affordable housing sphere.
Part IV points out the risks inherent in relying on federal funding and
oversight and suggests ways the law might mitigate such risks.

INTRODUCTION

At its inception in 1934, the Federal Housing Administration
(FHA) established underwriting guidelines to ensure that taxpayer-

1. The FHA greatly impacted U.S. homeownership by introducing the thirty-
year, self-amortizing, fixed-rate residential mortgage loan as the primary lending
tool for “prime mortgage loans” and through offering generous homebuying
homeowners in the United States have had the particular benefit of deducting mortgage interest payments from their federally taxable income, a tax policy that has provided a disproportionate benefit (80%) to the highest income quintile, at a fiscal cost of more than $70 billion a year. Federal programs helped to raze entire urban communities and replace them with concrete mega-block public housing structures, simultaneously concentrating poverty and entrenching racial housing segregation. Five million households


2. Until 1986, all interest payments could be deducted by taxpayers, but the Tax Reform Act of 1986 limited interest deduction to certain specified types of loans, including loans on up to two residences. Although mortgage interest deductions are politically popular, economists have shown that the vast majority of households who receive a benefit under the mortgage interest deduction have incomes in the highest quintile. Will Fischer & Chye-Ching Huang, Mortgage Interest Deduction Is Ripe for Reform, CTR. ON BUDGET & POL’Y PRIORITIES 1–3 (2013), https://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform [https://perma.cc/7AWR-F4LV]; Bruce Katz, Brookings Inst., Cut to Invest: Reform the Mortgage Interest Deduction to Invest in Innovation and Advanced Industries, (2012), https://www.brookings.edu/wp-content/uploads/2016/06/06-mortgage-interest-deduction.pdf [https://perma.cc/KYL6-PD6Q]. The cost of the mortgage interest deduction has been estimated as somewhere between $70 billion and $100 billion (or even more) annually. See infra notes 218–28 and accompanying text.

3. See generally Lawrence M. Friedman, Government and Slum Housing, 32 L. & Contemp. Probs. 1 (1967) (discussing displacement and slum clearance in public housing development in the 1960s). Public housing was not originally designed to be low-income housing, but by the 1960s it was reconceived and employed to create large multi-family developments in urban centers. By the 1980s, “living conditions in the nation’s most dilapidated public housing developments were deplorable, and a complex layering of problems left these developments mired in the most destructive kind of poverty.” Susan J. Popkin et al., Urb. Inst., A Decade of Hope VI: Research Findings and Policy Challenges 7 (2004), http://webarchive.urban.org/UploadedPDF/411002_HOPEVI.pdf
currently live in rental homes subsidized by and ultimately under the supervision of the U.S. Department of Housing and Urban Development (HUD), but thousands of these dwellings are uninhabitable, infested with rodents, covered in mold, or exposing children to poisonous lead. Half of low-income households cannot afford their housing costs, but for every one such household receiving government housing assistance, another three go without. Affordable housing need is critical and increasing, but funding is erratic. When it comes to achieving lasting and equitable housing improvements, the government’s record is abysmal.

Housing costs today are so high relative to income that affordability is deemed a national “crisis.” The federal government’s inequitable and ineffective historic impact on housing markets suggests that, when it comes to promoting housing affordability, perhaps Uncle Sam is not the right man for the job. Housing markets are quintessentially local, and the affordability challenges facing a given community may arise from any of a number of different underlying factors. In some communities, the lack and misallocation of affordably priced housing units inflates housing prices. In other

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7. For example, in 2014, Shaun Donovan, Secretary of HUD, said that the United States is facing “the worst rental crisis in this nation, ever.” Ben Lane, HUD’s Donovan: “This Is The Worst Rental Crisis In This Nation, Ever,” HOUSINGWIRE (Apr. 22, 2014), https://www.housingwire.com/articles/29757-huds-donovan-this-is-the-worst-rental-crisis-in-this-nation-ever [https://perma.cc/9EWF-6MTU]. See also Paulette J. Williams, The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions, 31 FORDHAM URB. L.J. 413, 415 (2003) (pointing out — 15 years ago when housing affordability was better than it is today — that for several decades there had been an “acknowledged crisis in affordable housing”).

8. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 230 (2001); see also Andrea J. Boyack, Limiting the Collective Right to Exclude, 44 FORDHAM URB. L.J.
communities, there are a sufficient number of housing units, but affordable units are of unacceptable quality. Impoverished neighborhoods and neighborhoods of color face disparate residential realities in terms of the quality of schools, transportation, and community services. In many areas, unaffordable housing is primarily a symptom of intractable poverty. Different housing problems require different strategic responses, and the specific challenges faced by a given locality are likely best understood and addressed at the local level.

Nevertheless, there are several justifications for broader, federal-level involvement in the realm of housing. National funding for local housing projects is likely necessary to create sustainable and equitable housing support in all parts of the country, particularly in more impoverished areas. Coordination among jurisdictions in a given region is critical for assessing and addressing problems of housing and poverty, particularly in cases where communities individually would

9. See Steven Hwang et al., Housing and Population Health: A Review of the Literature, Sociology and Criminology Faculty Publications 126 SOC. CRIMINOLOGY FAC. PUBLICATIONS 1, 28 (1999); see also Michael Weitzman et al., Housing and Child Health, 43 CURRENT PROBS. IN PEDIATRIC & ADOLESCENT HEALTH CARE 187, 187–189 (2013) (describing the effects that low-quality housing and housing instability have on child health); Williams, supra note 7, at 419–20. See generally Gary Adamkiewicz et al., Moving Environmental Justice Indoors: Understanding Structural Influences on Residential Exposure Patterns in Low-Income Communities, 101 AM. J. PUB. HEALTH S238, S238 (2011).

10. Andrea J. Boyack, Sustainable Affordable Housing, 50 ARIZ. ST. L.J. 455, 465 (2018) [hereinafter Boyack, Sustainable]; BARBARA SARD & DOUGLAS RICE, CTR. ON BUDGET & POL’Y PRIORITIES, CREATING OPPORTUNITY FOR CHILDREN 1, 6 (2014); see also infra notes 106–13 and accompanying text.


prefer to offload and ignore affordability issues. Negative externalities from local housing affordability crunches impact the country as a whole. Furthermore, it was the federal government, through its policies and programs, that created some of the biggest obstacles to accessing affordable housing today. Regional inequalities and the need for regional coordination, economic externalities of inequitable housing systems, and the persistent, adverse effects of historic federal housing policies all justify a national framework to adequately address housing affordability.

Part I of this Article describes the ubiquity and impacts of the problem of unaffordable housing. Part II examines the spectrum of approaches that a government can use to address housing unaffordability, from police power mandates to supply-and-demand-side subsidies. Part III makes the normative case for significant but reimagined federal involvement in the affordable housing sphere. Part IV points out the risks inherent in relying on federal funding and oversight and suggests ways the law might mitigate such risks.

13. For example, Kansas City straddles the state line, and the metropolitan area is in both Missouri and Kansas. Recognizing the imperative of a metropolitan region approach rather than one artificially separated into states, HUD provided funding for coordinated planning efforts spearheaded by the Mid-America Regional Council. Results of regional planning evidence the absolute necessity of a regional approach. See, e.g., MID-AMERICA REG’L COUNCIL, HOUSING ELEMENT: CREATING SUSTAINABLE PLACES 9 (2014), http://marc.org/Regional-Planning/Housing/pdf/Housing_Element.aspx [https://perma.cc/M8PR-YMKQ]. Nevertheless, Kansas City’s public housing funds and planning are ultimately controlled by state-specific public housing agencies: The Housing Authority of Kansas City, Missouri, and the Kansas City Kansas Housing Authority, and each state develops its own housing plan for the city. See also AMERICAN PLANNING ASS’N, REGIONAL APPROACHES TO AFFORDABLE HOUSING PAS REPORT 513/514 (2003). See generally URBAN NEIGHBORHOOD INITIATIVE, A HOUSING POLICY FOR KANSAS CITY (2018), https://uni-kc.org/wp-content/uploads/2018/12/KCMO-Draft-Housing-Policy.pdf [https://perma.cc/2FGW-32RH]. Ironically, this plan, which starts by invoking Charles Dickens’ A Tale of Two Cities, deals only with the part of Kansas City located within the state of Missouri, without recognizing that a significant part of the “two cities” in Kansas City is part of the metropolitan region within Kansas.


15. See supra note 1; infra notes 302–13 and accompanying text.
I. DIAGNOSIS OF THE AFFORDABLE HOUSING CRISIS

Housing today is unaffordable for one-third of all U.S. households, and nearly half of Americans who rent. Because of rapidly inflating purchase prices and rental rates, more than 38 million households in the United States spend more than 30% of their income on housing costs (an allocation that renders housing “unaffordable” according to HUD metrics). Half of all renter households cannot afford to pay their rent and still have sufficient income remaining for food, healthcare, childcare, transportation, and other necessities. Housing unaffordability deepens inequalities and leads to housing instability.

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Unaffordable housing is not a new problem, but over the past decade, the issue has broadened and deepened. From 2001 to 2015, the number of “very low-income” renter households (making less than 50% of the area median income) has increased by 4.181 million, with 2.551 million of those households earning less than 30% of the average median income. In 2018, the average amount of monthly rent that a very low-income household (family of four) could afford was only $660, but the average cost of a

19. Matthew Desmond & Carl Gershensen, Housing and Employment Insecurity Among the Working Poor, 63 SOC. PROBS. 46, 49–50 (2016). “High housing costs have eroded renter incomes and exacerbated inequality among renter households. After paying for their housing, the amount of money that lowest-income renters had left over for all other expenses fell 18 percent from 2001 to 2016.” Joint Ctr. for Hous. Studies of Harv. Univ., America’s Rental Housing 31 (2017) [hereinafter RENTAL HOUSING 2017], https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf [https://perma.cc/7KGP-LRDS]. For median rentals in lower income quartile, only $500 a month of gross household income is left after paying for housing. Id. For further discussion of the broad and persistent impacts of housing instability, see generally Desmond, Evicted, supra note 11; Kathryn J. Edin & H. Luke Shaefer, $2.00 A Day: Living on Almost Nothing in America (2015); Raj Chetty et al., Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States, 129 Q.J. ECON. 1553 (2014); Rosser, supra note 18.


22. WORST CASE HOUSING NEEDS 2017, supra note 21, at 60. The number of households to which HUD provided rental assistance during this period actually decreased by 720,000. Id. at 29. See also State of Housing 2018, supra note 16, at 5 (tracking the gap between housing needs and housing assistance).
two-bedroom apartment that year was $1149.23 From 2001 to 2015, median rental rates increased by 8.6%, but median income for renters decreased by 6.2%.24 Seventy-five percent of low-income, cost-burdened households obtain no government assistance to help them afford a home.25

Part I of this Article explores the complexity of the problem of unaffordable housing, conceptualizing it along a spectrum of need with variations driven by multiple factors including, for example, income, location, race, marital status, and job type. After Section A frames the problem as involving different levels of housing inadequacy, Section B then examines the extent to which unaffordability is driven by lack and misallocation of affordable housing unit supply. Section C discusses the problem from the other side of the equation, namely, the lack of adequate household income. Finally, Section D focuses on a less quantifiable but equally important aspect of affordability, specifically, the cost of poor-quality housing and poor-quality neighborhoods.

A. Prioritizing Housing Need

Affordability concerns exist both in the context of homeownership and in the context of renting. In the two decades from 1998 to 2018, the median sales price of homes in the United States has more than doubled, from $153,000 (Q4 1998) to $322,880 (Q4 2018).26 Household incomes grew during this same period, but only at a modest 4.7%, from $58,612 (1998) to $61,372 (2017),27 and nearly all

25. See id.
income gains have been concentrated in the top income quintile. The disproportion between the growth in home prices and the growth in incomes makes buying a home relatively less affordable today than it was 20 years ago, and comparisons over a longer period (three or four decades instead of two) show an even larger disparity.

Increases in rental rates during the past two decades are steeper than home purchase price increases, however, and incomes of renters as a group have grown at a slower pace than owners’ incomes. Rental unaffordability, therefore, continues to be an even more pronounced problem than unaffordability caused by high home prices. In 1990, the median monthly rental rate for an unfurnished apartment was $600; in 2017, the median monthly rental rate was $1492, nearly 150 higher.

In the 1960s, less than a quarter of renter households were cost burdened, but today, nearly half of all renter households are cost burdened — a statistic that has been called “the new normal.”

Housing affordability affects households at most income levels, but its impact is the greatest among the lowest income households, particularly low-income renter households. Renters are on average


29. For example, the median price for a new home in December 1967 was $22,200, 3.08 times the median income that year of $7200. In December 2017, 40 years later, the median price for a new home had increased to $343,300, a price that represented 5.60 times the median income of 2017, $61,327. See U.S. Census Bureau, Median and Average Sale Prices of New Homes Sold in the United States, https://www.census.gov/construction/nrs/pdf/uspricemon.pdf [https://perma.cc/4TNE-X4KC]; U.S. Census Bureau, Household Income in 1967 and Selected Economic and Social Characteristics of Households (July 15, 1969), https://www2.census.gov/prod2/popscan/p60-062.pdf [https://perma.cc/YD4J-6SDV]; Mislinski, supra note 28.


31. Rental Housing 2017, supra note 19, at 4; State of Housing 2018 supra note 16, at 5. There are also more renter households today than in prior decades, both in real and relative numbers. Id. at 2–3. See generally Andrea J. Boyack, Equitably Housing (Almost) Half a Nation of Renters, 65 Buff. L. Rev. 109 (2017) [hereinafter Boyack, Equitably].
more housing cost burdened than owners, low-income households are more likely to rent than own, and among renters, the poorest households bear the most significant housing cost burdens. For example, in 2016, 80% of rental households earning less than $30,000 were cost burdened, and 55% were severely cost burdened. Among owner households earning less than $30,000, 63% were cost burdened, and 42% were severely cost burdened. As a comparison, only 6% of renter households with an income of over $75,000 in 2016 were cost burdened. Low-income households, those earning less than 80% of the local area median income (AMI) are often further categorized into very low-income, earning between 30% and 50% of AMI, and extremely low-income, earning below 30% of AMI. The rough estimate snapshot of housing burdens faced by low-income families is stark. The majority of low-income households spend half their income on housing, and a quarter of such households must dedicate more than 70% of their income to stay sheltered. Low-income

32. RENTAL HOUSING 2017, supra note 19, at 4. Demographic changes, financial downturns in the wake of the Foreclosure Crisis, increasing student debt, and changed perceptions regarding homeownership mean that this decreased homeownership level is unlikely to rebound anytime soon as evidenced by the decreased homeownership rate for people under age 45. U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2019, Table 6 (2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/XTF3-FY46]. Note that the average median income of renter households has recently increased, but this increase represents a shift among higher income households to renting rather than an improvement in income among the lower income households. RENTAL HOUSING 2017, supra note 19, at 26.


34. See STATE OF HOUSING 2018, supra note 16, at 30; see also supra note 13.

35. RENTAL HOUSING 2017, supra note 19, at 28.


37. RENTAL HOUSING 2017, supra note 19, at 27. The housing instability associated with paying such a high percentage of income to housing costs is often coupled with job instability, leading to a situation that has been called “double precarity.” Desmond & Gershenson, supra note 19, at 47-50. “Extremely low-income renters are much more likely to be severely housing cost-burdened than other income groups. Thirty-two percent of very low-income, eight percent of low-income, and two
households are disproportionately composed of seniors, disabled persons, and adult caregivers. Minority households (Native American, black, and Hispanic) are more likely to be extremely low-income than are white households. The 11 million extremely low-income households in the United States face the most severe cost burdens in the country: 71% (7.8 million) of extremely low-income households spend more than half of their income on housing. Extremely low-income renter households make up 73% of the severely cost-burdened renters in the country.

Many commentators on housing affordability challenges focus on urban areas, particularly in large coastal cities, but affordable housing shortages plague populations in all areas of the country, albeit driven by slightly different factors from place to place. For example, the states of New York, Florida, California, Colorado, and Hawaii all have about the same percentage of cost-burdened households (51–54%), but the housing and income realities of each of these states differ. In California and Hawaii, nominal housing prices are sky high, but median incomes are as well. Meanwhile, in Florida, Colorado, and New York, the median incomes are lower, but lack of supply keeps housing costs high. Generally speaking, more rural areas are relatively less cost burdened, but rural America does not escape the housing affordability crunch, even in places where housing

percent of middle-income renters are severely cost-burdened.” NLIHC 2019 GAP REPORT, supra note 36, at 1.

38. NLIHC 2019 GAP REPORT, supra note 36, at 1.

39. “Among renters, 38% of American Indian or Alaskan Native households, 35% of black households, 28% of Hispanic households, and 22% of white non-Hispanic households have extremely low incomes.” Id.

40. Id.

41. Id.

42. Id. at 7.

A majority of extremely low-income renters are severely housing cost-burdened in every state. The states with the greatest percentage of extremely low-income renter households with severe cost burdens are Florida (80%), Nevada (79%), Arizona (78%), California (76%), and Colorado (76%). Maine has the smallest, but still significant, percentage of extremely low-income renters with severe cost burdens (53%).

43. RENTAL HOUSING 2017, supra note 19, at 27.

44. Id. “Median rents have risen at twice the national pace in markets with rapid population growth, such as Austin, Denver, and Seattle. And within these fast-growing metros, rents in previously low-cost neighborhoods rose nearly a percentage point faster each year than in high-cost neighborhoods.” Id. at 4. Housing Needs by State: Colorado, NAT’L LOW INCOME HOUSING COALITION, https://nlihc.org/housing-needs-by-state/colorado [https://perma.cc/7TRQ-BABQ] (last visited Sept. 25, 2019).
costs are relatively low. Even in states with the smallest percentage of cost-burdened renters (Montana, North Dakota, South Dakota, and Wyoming), more than a third of renter households still allocate more than 30% of their income to housing.

B. Supply Allocation and Demand Elasticity

Even though the size of the supply gap varies widely from place to place, a gap between affordable housing need and available, affordable dwelling units exists in every single state. Such a ubiquitous problem of housing affordability seems to demand a national solution, but specific local concerns shape housing challenges in a given community. In many, but not all, areas, a lack of supply of lower-priced housing units is the chief cause of expensive housing. On a national basis, there is a significant lack of supply of housing units affordable to the lowest-income households. There are 7 million more extremely low-income households than there are homes that can affordably house them; for every 100 extremely low-income households, only 37 appropriately priced units are available.


47. NLIHC 2019 GAP REPORT, supra, note 36, at 1. “The current relative supply ranges from 19 affordable and available homes for every 100 extremely low-income renter households in Nevada to 66 in Wyoming” and “[t]he shortage of affordable homes ranges from 5,800 in Wyoming to one million in California.” Id. “On average, smaller counties have a higher ratio of supply to demand than larger urban counties, while large urban counties have the greatest deficit.” RENTAL HOUSING 2017, supra note 19, at 30.


49. NLIHC 2019 GAP REPORT, supra note 36, at 1.
Although there is a supply gap in all states (the size of that gap varying significantly from place to place), there is not a supply gap among all income levels. Basic economic forces of supply and demand work well at the top end of the market, and higher-income renters find an ample supply of units they can afford in most housing markets. Although the recent boom in rental production has created a sufficient number of market-level rental units to house the number of renter households that can afford to pay market rents in many areas, there is an insufficient number of units that are affordable to lower-income renters. The gap between demand for housing and affordable housing supply widens as the household’s income decreases. Comparing rental stock at certain price points to rental demand at those price points may itself reveal a shortage of supply compared to demand, but it is misleading to compare existing inventory to demand without considering actual availability of such units. For example, there are 7.4 million rental homes in the nation that are affordable to the 11 million extremely low-income households, but only 4 million of those homes are allocated to extremely low-income households — higher-income renters occupy the remaining 3.4 million of those homes. This imperfect matching


51. In certain geographic locations, a shortage of market-level rental housing still exists. For example, extremely low rental vacancy rates in the Atlanta, Dallas-Fort Worth, New York-New Jersey-Pennsylvania, and Phoenix urban centers suggest that a deficit of market-rate rental housing still exists in those markets. Natalia Siniavskaia, What Do Vacancy Rates Tell Us About the Shortage of Housing?, NAHB EYE ON HOUSING (Feb. 15, 2019), http://eyehousing.org/2019/02/what-do-vacancy-rates-tell-us-about-the-shortage-of-housing/ [https://perma.cc/7DHS-DKFF].

52. Id.

53. As of 2019, the total rental inventory in the United States is 35.3 million units, and some 26.6 million households rent. But this statistic belies the reality that at every below-median-income level, households’ demand for rentals priced at affordable levels far exceeds demand. See NLIHC 2019 GAP REPORT, supra note 36, at 3.

54. Id.
of income levels and housing prices means that the actual number of units available at each of the lower-income levels is far lower than the number of existing units that rent at low-income-affordable levels. As mentioned, only 37 available homes are affordable for every 100 extremely low-income households, and only 58 available homes are affordable for every 100 very low-income households. The gap for low-income households earning between 50% and 80% of Area Medium Income (AMI) is much smaller: there are 94 available homes affordable for every 100 such households. At 80% of median income and above, there is no general shortage. Furthermore, a simple comparison of available homes to housing demand in a given community fails to account for location relative to employment opportunities and in preferred neighborhoods with better schools and community amenities.

The government has tried to promote affordability through supply-side incentives, but the problem with exclusively focusing on increasing the number of dwelling units is that it may not — and historically has not — ensured that such units are optimally priced and placed. Because developers can make a higher profit in creating and selling or renting higher-end units that rent at or above the median levels, higher-income households can rely on the forces of supply and demand to meet their rental needs. However, development at the high end of the market appears to crowd out development affordable to lowest-income renters. For example, from 2005 to 2015, some 6.7 million housing units were added to the nation’s rental stock, but there was a 260,000-unit decline in the total number of rentals charging less than $800 a month. During that one decade, the number of homes renting for $2000 or more a month increased by 97% and the number of homes renting for $800 or less per month decreased by 2%. Thus, the vast majority of new rental units created during the decade following the Foreclosure Crisis...
were medium- or high-priced rental units, but the increase in demand for rental housing has been most pronounced among lowest-income households.62

The economic theory of supply and demand63 suggests that, although increasing demand motivates price increases in the short term, it also motivates increases in supply which, in the long term, will push prices down. This economic theory works imperfectly for housing, however: because shelter is essential to survival, higher-priced housing will not necessarily reduce demand. Even if housing is priced at unaffordable levels for lower-income households, people must somehow pay that higher price, even if that means foregoing other sorts of spending, including spending on other basic needs like healthcare, childcare, transportation, and even food. Lack of

first in the subprime and then prime residential mortgage sectors, rapid devaluation of mortgage-backed securities in both sectors, followed by credit downgrades of the issuers and invested financial institutions. In October 2008, the federal government intervened to provide capital to the market. During the decade following the September–October 2008 securities collapse and bank bailouts, foreclosures and home losses reached ten times the pre-crisis levels, and millions of homeowners lost their homes and their nest egg in one fell swoop. Loss of an owned home coupled with tight mortgage credit during and following the Foreclosure Crisis shifted a huge number of households from owning to renting their homes, increasing the demand for rental housing. Much has been written about the Financial Crisis in general and about the shift from owner-occupancy to rental housing for millions of Americans. See generally, e.g., ALAN S. BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD (2013); ATIF MIAN & AMIR SUFI, HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN (2015); JOINT CTR. FOR Hous. STUDIES OF HARV. UNIV., RENTAL MARKET CONDITIONS (2011). For a broader look at the worldwide causes and impacts of the crisis, see ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRICES CHANGED THE WORLD (2018). For a concise retrospective on housing market changes during the decade from 2008 to 2018, see Michelle Lerner, 10 Years Later: How the Housing Market Has Changed Since the Crash, WASH. POST (Oct. 4, 2018), [https://perma.cc/BP68-Y8VU].

62. STATE OF HOUSING 2018, supra note 16, at 27–30. Between 1990 and 2016, 2.5 million occupied rental units priced below $800 per month were lost, but an additional 2.6 million occupied rental units priced above $2000 were added to the rental housing stock. Id.; see also NLIHC OUT OF REACH 2018, supra note 23, at 5–6.

63. Elementary economic theory posits that increasing demand for a product relative to its supply will increase its price in the short term, and increasing the supply of a product relative to demand will lead to a price decrease. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 199 (Macmillan and Co. 1946) (1890). Studies have confirmed that economic theory holds true for housing and that limited supply of housing does indeed increase its cost. See, e.g., Glaeser & Gyourko, supra note 14, at 2–4.
sufficient means to afford all their basic needs forces low-income households to make “impossible choices.” The “invisible hand” fails to respond the same way in the context of markets for survival essentials, like housing, where demand is inelastic.

Rising housing production costs further encourage housing producers to build at the high end of the market, where it is easier to turn a profit. Development costs are driven by the cost of inputs: land, labor, and materials, all of which have become significantly more expensive in the past few years. In the one year between 2016 and 2017, for example, estimated costs of building a “basic, three-story apartment building” increased by 8%. Land use regulations inflate development costs and ultimately put downward pressure on the supply of housing priced too low to recoup such additional expenses. Zoning tools can also directly limit the supply of homes in a community, driving up home values and increasing the wealth of


65. Adam Smith’s foundational economic theory of the “invisible hand” posits that at some point, prices will be too high and this will drive down demand. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 349 (Metalibri 2007) (1776). Incidentally, Smith also opined that “[n]o society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable” and theorized that although laws interfering with the market and favoring economic elites are by definition unjust, regulations that are “in favour of the workmen” are “always just and equitable.” Id. at 66, 115.

66. According to the Joint Center for Housing Studies of Harvard University: Between 2012 and 2017, the price of vacant commercial land — a proxy for developable multifamily sites — was up 62 percent. Over this same period, the combined costs of construction labor, materials, and contractor fees rose 25 percent, far faster than the general inflation rate of just 7 percent. Cost increases for key building materials, such as gypsum, concrete, and lumber, have also outpaced inflation in recent years. RENTAL HOUSING 2017, supra note 19, at 17.

67. Id. at 3.

68. See Richard A. Epstein, The Unassailable Case Against Affordable Housing Mandates, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 64, 66–67 (Lee Anne Fennell & Benjamin J. Keyes eds., 2017) (explaining that gaps in housing supply “are only aggravated by stringent zoning and excessive permitting restrictions”). Local governments can “promote construction of much-needed rental units (particularly lower-rent units) by expediting approvals; guaranteeing by-right development of small multifamily buildings, particularly those with affordable units; reducing parking and other property requirements; and allowing higher densities for projects that are transit-accessible.” RENTAL HOUSING 2017, supra note 19, at 18.
local “homevoters” as well as municipal tax revenues.\textsuperscript{69} Housing prices in some of the country’s most expensive real estate markets are largely affected by aggressive exclusionary zoning that keeps existing home prices high and new homes out.\textsuperscript{70}

Low-income rental housing supply has been hit with the double whammy of rising development costs that crowd out new affordable units and an accelerated loss of existing affordable units, either through conversion from rented to owned homes or from low-income to higher-income rentals, or through physical deterioration.\textsuperscript{71} In markets where demand for rental housing is robust, financial incentives lead owners to convert affordable units to luxury or market-rate ones.\textsuperscript{72} In markets where demand is weak, there is little incentive for the upkeep of low-income housing and, in some cases, lack of landlord income to allocate to that effort in any case.\textsuperscript{73} Lack of maintenance results in unit obsolescence and uninhabitability, and under-maintained housing is likely to end up demolished or abandoned.\textsuperscript{74} More than 8.7 million affordable units, a majority of the nation’s low-income housing supply, exited housing inventory between 1985 and 2013.\textsuperscript{75} The National Housing Trust estimated that

\begin{itemize}
  \item \textsuperscript{69} FISCHEL, supra note 8, at 69 (coining the term “homevoter” to reflect homeowners whose policy choices are driven by their desire to maximize the value of their real property assets); Boyack, Exclude, supra note 8, at 472–74; Kristine Nelson Fuge, Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?, 18 HAMLINE J. PUB. L. & POL’Y 148, 159 (1996).
  \item \textsuperscript{71} See Boyack, Sustainable, supra note 10, at 469–70.
  \item \textsuperscript{72} KAROLINA GORSKA & MITCHELL CRISPELL, URB. DISPLACEMENT PROJECT, UNIV. CAL. BERKELEY, CONDOMINIUM CONVERSION POLICY BRIEF 2 (2016). See generally PETER MOSKOVITZ, HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD (2017).
  \item \textsuperscript{73} “If landlords are unable to charge enough rent to cover debt service, taxes, insurance, ongoing maintenance and repair, and a fair return on their investment, the most discretionary of these expenditures will be the most expendable.” SANDRA J. NEWMAN, URB. INST. LOW-END RENTAL HOUSING: THE FORGOTTEN STORY IN BALTIMORE’S HOUSING BOOM 16 (2005). “As one landlord put it, ‘A furnace is a furnace, and it costs the same whether you put it in a $600 unit or a $300 unit.’” Id.
  \item \textsuperscript{74} See RENTAL HOUSING 2017, supra note 19, at 30; see also infra note 143 and accompanying text.
  \item \textsuperscript{75} The biggest reductions were due to permanent removals, with 27 percent of affordable rentals in 1985 (4.1 million units) demolished, destroyed in disasters, or reconfigured into fewer units. About 18 percent (2.7 million units) were converted to owner-occupied or seasonal housing, while 12
“for every new affordable apartment created, two are lost due to deterioration, abandonment or conversion to more expensive housing.”

In many places, therefore, one of the most effective ways to combat affordability challenges is to enable and incentivize increases to the supply and maintenance of lower-priced housing units. A preliminary step to encouraging the development of lower-priced units is to make the development of such units less expensive. Removing artificial barriers to production, such as unjustifiable land use restrictions, can help leverage natural economic forces to create affordable housing.

For example, land use regulation can add up to 30% to the cost of housing development, and any savings in reducing this burden can be passed on to residents in the form of reduced rent.

New housing development can be channeled toward the lower end of the market by offering subsidies and other incentive programs that provide offsets or contributions to the cost of producing housing, in exchange for commitments to keep the units priced at affordable levels. In addition, supply deficits can be managed by preserving existing affordable units, possibly through the government funding the gap between net rental revenues and necessary maintenance costs.

percent (1.7 million units) were upgraded to higher rents through gentrification.


77. See Boyack, Sustainable, supra note 10, at 466–67; Epstein, supra note 68, at 64, 76; see also WILLIAM APGAR, RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY 28 (2004) (arguing that reducing the costs of zoning and regulatory approvals would positively impact housing affordability); James J. Hartnett, Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration, 68 N.Y.U. L. Rev. 89, 97 (1993) (concluding that “overregulation directly increases housing development costs both through lengthy and expensive approval processes and the imposition of high permit fees — costs that are passed on to home buyers and renters.”).

C. Ability to Pay

The problem of unaffordable housing not only represents a market disequilibrium of undersupply, resulting in prices that are too high, but it also represents the problem of incomes simply being too low. The income piece of the puzzle is particularly salient in communities with lower-priced housing, the modest cost of which is still out of reach for the very poorest residents whose incomes are almost nonexistent. For people whose incomes cannot support the costs of a modestly priced home, increasing supply of lower-priced units may prove insufficient to address housing needs. Where the critical component of housing unaffordability is poverty, viable solutions must address the ability to pay and not just rental supply.

The long-term solution to a renter’s lack of income is for the renter’s income to increase, ideally through improved employment — but for a majority of the households that are severely cost burdened, the problem is not as simple as a lack of employment. The majority of low-income renters are already employed or suffer some impairment that limits or prevents employment.79 Full-time employment does not guarantee sufficient income to afford housing in most areas of the country. A full-time employee in the United States earning the federal minimum wage would have to work three full-time jobs in order to afford a modest two-bedroom apartment.80


80. A full-time worker earning the federal minimum wage of $7.25 needs to work approximately 122 hours per week for all 52 weeks of the year, or approximately three full-time jobs, to afford a two-bedroom rental home at the national average fair market rent. The same worker needs to work 99 hours per week for all 52 weeks of the year, or approximately two and a half full-time jobs, to afford a one-bedroom home at the national average fair market rent.
Full-time workers earning the applicable federal- or state-mandated minimum wage in their jurisdiction cannot afford a two-bedroom home in any state, metropolitan area, or county in the nation.\(^1\) In fact, such a worker would only be able to afford a one-bedroom home in 22 counties in the United States (out of more than 3000 counties nationwide), each of which is located in a state that mandates a minimum wage higher than the $7.25 per hour federal minimum.\(^2\)

Ability to pay is best considered at local levels rather than based on national averages because not only does the price of housing vary widely based on location, but income levels do too. Considering housing costs in isolation tells only half of the affordability story. Certain coastal cities, including San Francisco, New York, Boston, Washington, Los Angeles, Seattle, and Miami, have some of the nation’s highest home prices and are easily perceived as housing markets that are unaffordable or “out of reach” for many renters. The median rent in San Francisco, California, for example, is a whopping $4580 a month, whereas median rent in Topeka, Kansas is only $800.\(^3\) Even though affordability is less apparent in cheaper housing markets, however, such lower-priced homes may still be unaffordable to local populations.\(^4\) Incomes in many areas with

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NLIHC Out of Reach 2018, supra note 23, at 1. The NLIHC cautions that raising the minimum wage will not, alone, solve housing affordability issues. The report notes that “[t]hirty-eight local jurisdictions have their own minimum wages higher than the state or federal minimum-wage, but all fall short of the local one-bedroom Housing Wage.” \(^5\) Id. 

\(^1\) Id. 

\(^2\) Id. 


\(^4\) Although many more modestly priced housing markets are in the middle of the country (as opposed to the coasts), this is an overgeneralization and there are important exceptions. Growing markets like Boise and Austin are becoming more and more expensive. See Dean Johnson, What’s Driving Boise’s Hot Housing Market?, Idaho Housing & Finance Ass’n (Oct. 19, 2018), https://www.idahohousing.com/blog/boise-housing-market/ [https://perma.cc/H47Z-WSM5]; Jonathan Silver, Here’s How Much Austin Prices Have Surged in the Past 5 Years, Austin CultureMap (Mar. 20, 2019), http://austin.culturemap.com/news/real-estate/03-20-19-austin-home-price-increase-north-america-report/ [https://perma.cc/4TWB-WH5X]. Several population centers in North and South Carolina, on the other hand, remain relatively inexpensive. Devon Thorsby, The 25 Best Affordable Places to Live in the U.S. in 2019, U.S. News (Apr. 9, 2019), https://realestate.usnews.com/real-estate/slideshows/best-affordable-places-to-live-in-the-us [https://perma.cc/2P8E-ZNRP].
moderate housing costs are disproportionately depressed.\textsuperscript{85} Just as growth in GDP has been unevenly distributed among income quintiles, economic improvement is also geographically diverse. For example, the nation’s median household income increased 2.4\% between 2015 and 2016, but different states experienced strikingly disparate financial realities during that one year.\textsuperscript{86} In Louisiana and Wyoming, median income fell by 1–2\%; in Kansas and Oklahoma, median incomes remained virtually flat; and in California, Idaho, and Massachusetts, median income increased by more than 4\%.\textsuperscript{87}

Unequal housing cost burdens represent not only location, but also reflect job type, race, and marital status of members of a household. The most severe housing cost burdens are associated with jobs in certain low-paying sectors such as personal care, service, food preparation and service, building and grounds maintenance, and healthcare support.\textsuperscript{88} Households with young children are more likely to be cost burdened — particularly those headed by only one parent — and some 63\% of single-parent households pay more than 50\% of household income toward shelter.\textsuperscript{89} A glimpse into the hardships such renters feel helps humanize and explain the impact of inadequate wages and resulting housing instability. The Guardian interviewed a single mother of two in Philadelphia, Alicia Hamiel, who earns $7.75 an hour working at McDonald’s.\textsuperscript{90} She works full

\textsuperscript{85} Income levels vary widely by employment sector and do not move in lockstep with housing costs. See Boyack, Sustainable, supra note 10, at 460–62 (explaining how regional variation in incomes does not track housing costs).


\textsuperscript{87} GUZMAN, supra note 86, at 3.


\textsuperscript{89} RENTAL HOUSING 2017, supra note 19, at 28–29.

\textsuperscript{90} Alastair Gee, Outside in America: Minimum Wage, GUARDIAN (June 8, 2017) https://www.theguardian.com/us-news/2017/jun/08/minimum-wage-affordable-
time and lives in a low-priced one-bedroom apartment with her two children, paying only $400 a month, well below the median rental price for the region and even the nation. But her extremely low income is insufficient to afford even that low monthly rent. “I feel like I’m failing as a mom,” The Guardian quotes Hamiel as saying. “If I can’t make sure they have a roof over their heads, what am I doing? I feel like I’m doing the best that I can.”

D. Quality of Home, Quality of Community

An associated housing problem, connected to both lack of affordable units and lack of income, is the problem of uninhabitable home quality. In some places, there may be nearly a sufficient quantity of affordable housing units, but the biggest housing issue pertains to housing quality. Many of the units still in use and affordable to low-income households without government subsidy are in disrepair. A majority of units that rent for very low prices, below $650 a month, are at least 50 years old and face daunting maintenance needs, some of which significantly threaten the health and safety of their occupants. When weak local housing markets keep both rents and landlord profits low, landlords lack the financial incentive and/or ability to make improvements to their rental units — they cannot recoup these costs through increased rental rates. Rents in these areas stay mercifully low, but lack of housing quality, coupled with lack of any better, affordable alternatives, effectively condemns lower-income residents to life in a dilapidated, hazardous environment.

Even housing units that are subject to HUD inspection requirements may fail to meet minimal quality standards. Rondesha

91. Gee, supra note 90.
92. Id.
93. In 2012, the National Association of Homebuilders estimated that “[o]ver 10 million homes in the U.S. are physically inadequate, about double the number usually reported as having even moderate problems,” and explained that “[r]enters of inadequate housing are concentrated at the lower end of the income scale.” PAUL EMRATH, NAT’L ASS’N OF HOME BUILDERS, QUALITY OF THE EXISTING HOUSING STOCK: AS GOOD AS YOU THOUGHT? (2012), http://www.nahbclassic.org/generic.aspx?genericContentID=180537 [https://perma.cc/4GY5-ZA54].
94. See RENTAL HOUSING 2017, supra note 19, at 3, 15.
Brooks, for example, lives in a housing unit that receives project-based Section 8 subsidies from the government under a contract with HUD, pursuant to which the unit is required to be habitable. Yet, according to an NBC News report, “every corner” of her apartment, including the living room walls, the back of the sofa, and even her daughter’s shoes, is covered in mold. HUD is required by law to ensure the quality of subsidized housing units to ensure that recipients of federal housing assistance do not live in squalor. Yet nearly 2000 subsidized rental properties failed inspection in 2018, and still more technically passed inspection in spite of being beset with worrisome health and safety threats such as holes in the ceiling, pest infestation, serious mold, and the like. In a private meeting with tenants in October 2018, HUD officials admitted that “the system is broken,” and that understaffed local HUD offices could not adequately respond to complaints or thoroughly inspect properties.

Tenants like Brooks are not solely dependent on HUD inspectors because landlord-tenant law also protects tenants’ right to a habitable home. But local practices of blacklisting and retaliatory evictions undercut tenant legal protections, which can render the right to live in a safe and healthy home illusory. Professor Paula Franzese interviewed several tenants in New Jersey who resided in uninhabitable housing, some of it federally subsidized, and found widespread fears of landlord backlash kept tenants from asserting their rights to habitability: if a landlord evicted or blacklisted a tenant

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96. See Khimm et al., supra note 5.
97. Id.
98. Federal law authorizing Section 8 subsidies requires that subsidies only be provided to units that pass inspections for habitability. 42 U.S.C. § 1437f(p) (2016).
100. Khimm et al., supra note 5.
102. See generally DESMOND, EVICTED, supra note 11.
in retaliation for complaints about habitability, the tenant would have no other affordable options for shelter. In one example, Yanira Cortez, having lived with mold, rats, and roaches for some time, finally withheld rent in protest when her bathroom ceiling collapsed. In retaliation, before the eviction suit against her had even been decided, Cortez’s landlord added her name to a list of tenants who had been evicted for nonpayment of rent, a list that was used by local landlords to determine whether to rent to a given applicant. Lack of affordable rental options ties the hands of tenants and forces them to accept illegal living conditions. The market in many places offers no good choice to these low-income tenants: They can put up with poor quality homes or spend an unsustainably high percentage of their income on housing. Sometimes, they do both.

In addition to facing the problem of uninhabitable housing units, lower-income households are also more likely sited in poor quality neighborhoods. Affordable housing is predominantly located in areas of concentrated poverty, many of which are unsafe, unsupported, and even toxic. A majority of the residents of many such neighborhoods are people of color, condemned to live in poor quality neighborhoods by a history of systemic housing segregation, persistent poverty, and inequitable opportunities for advancement — all of which directly resulted from federal policies over the past several decades. Even when residents of such communities pay no

104. Id.
105. Id.
106. See generally DESMOND, EVICTED, supra note 11.
108. See generally MASSEY & DENTON, supra note 107; Andrea J. Boyack, A New American Dream for Detroit, 93 U. DET. MERCY L. REV. 573, 576–77 (2016) [hereinafter Boyack, Detroit]; Kelly DeRango, Discrimination and Segregation in Housing, 8 UPJOHN EMP. RES. 1 (2001); Charles L. Nier III, Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Relining Under
more than 30% of their income toward housing costs, they still bear significant, if less measurable, costs from living in depressed areas. The country’s most impoverished neighborhoods have some of the least effective and least supported schools, and children who attend these schools have a consequentially diminished potential.\textsuperscript{109} Crime is higher in areas of concentrated poverty, threatening financial and physical well-being of area inhabitants.\textsuperscript{110} Residents of low-income neighborhoods lack access to quality jobs, stores with fresh, healthy foods, and adequate healthcare.\textsuperscript{111} There are few neighborhood amenities in low-income tracts, and there are more locally undesirable land uses (so-called LULUs) that create significant health and environmental harms.\textsuperscript{112} Those unable to pay for shelter in


\textsuperscript{109} Not only are poorer neighborhoods more likely to have low-performing public schools, but families receiving every type of federal housing assistance (public housing, housing vouchers, or living in tax-credit-created low-income housing) are actually even more likely than other non-assisted poor families to be located near a state’s most disadvantaged schools. \textsc{Ingrid Gould Ellen & Keren Horn, Poverty & Race Research Action Council, Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance} 1 (2018). Children in high-poverty neighborhoods attend worse schools and are more likely to drop out and are less likely to go to college. \textit{See Pastor & Turner, supra note 107}, at 2.

\textsuperscript{110} \textit{See Anna Aizer, Nat’l Bureau of Econ. Research, Neighborhood Violence and Urban Youth} 279–89 (2008) (finding that poorer neighborhoods increase exposure to crime); \textsc{Anne C. Case & Lawrence F. Katz, Nat’l Bureau of Econ. Research, The Company You Keep: The Effects of Family and Neighborhood on Disadvantaged Youths} 3, 10, 17 (1991) (finding that neighborhood can substantially increase a person’s “probability of being involved in a crime”); Maqbool et al., \textit{supra} note 64, at 6.

\textsuperscript{111} \textit{See Chiquita A. Collins & David R. Williams, Segregation and Mortality: The Deadly Effects of Racism?}, 14 SOC. F. 495, 499–504 (1999); \textsc{Thomas A. LaVeist, Segregation, Poverty, and Empowerment: Health Consequences for African Americans}, 71 MILBANK Q. 41, 45–46, 55 (1993); Maqbool et al., \textit{supra} note 64, at 2–3.

\textsuperscript{112} Vicki Been, \textit{Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics}, 103 YALE L.J. 1383, 1389–90 (1994); \textsc{Antoine M. Thompson, Environmental Racism — A Quiet Killer in Black Communities}, N.Y. AMSTERDAM NEWS (Apr. 22, 2019), http://amsterdamnews.com/news/2019/apr/22/environmental-racism-black-communities/ [https://perma.cc/J2ZD-R7J6]. Disparate exposure to pollutants has been shown by multiple scientific studies. For example, a 2012 study of air quality demonstrated a significant inequality of exposure to poor air quality based on neighborhood, which also created a disparate impact based on race and ethnicity. Michelle L. Bell & Keita Ebisu, \textit{Environmental Inequality in Exposures to Airborne
healthy communities are therefore often condemned to live and raise their family in a neighborhood with deficits that diminish current and future opportunities for advancement. Living in poor quality neighborhoods perpetuates intergenerational poverty and results in lower quality and duration of life.\textsuperscript{113}

II. TREATING SYMPTOMS AND SEARCHING FOR A CURE

Housing unaffordability is a plague on our society. Federal, state, and local governments have been attempting to treat this socio-economic disease for decades. Methods of treatment vary, from limiting prices that housing providers can charge or mandating the production of affordable housing units,\textsuperscript{114} to creating government-owned low-price housing,\textsuperscript{115} to providing offsets and subsidies that either encourage increased affordable housing supply or subsidize households’ ability to pay housing costs.\textsuperscript{116} Many of these treatments have directly or indirectly improved certain people's housing burdens, but only a fraction of those affected by unaffordable housing receive publicly funded benefits, and some of the efforts to make housing affordable have caused troubling side effects.\textsuperscript{117} In addition, federalism complexities and poorly designed policies make some government housing expenditures haphazard, inequitable, and


\textsuperscript{113} See generally Maqbool et al., supra note 64. Children relocated into higher-opportunity neighborhoods enjoy measurably better health outcomes. See MEGAN SANDEL ET AL., CTR. FOR HOUSING POL’Y, HOUSING AS A HEALTH CARE INVESTMENT: AFFORDABLE HOUSING SUPPORTS CHILDREN’S HEALTH 4 2016. The Moving to Opportunity experiment showed that if young children were relocated to higher-quality neighborhoods, they were more likely to be able to break the multi-generational cycle of poverty, but that moving to higher-quality neighborhood later in life had significantly fewer measurable positive effects. See Raj Chetty et al., The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment, 106 Nat’l Bureau Econ. Res. 855, 889–891 (2015). For the purposes of the Moving to Opportunity experiment, a “high opportunity neighborhood” was defined as a neighborhood with poverty rates below 15, labor force participation rates above 60%, more than 20% of adults having completed college, and more than 70% of the neighborhood being occupied by non-Hispanic white households, with more than 200,000 low-wage jobs located within five miles of the center of the neighborhood. MARGERY AUSTIN TURNER ET AL., URB. INST., BENEFITS OF LIVING IN HIGH OPPORTUNITY NEIGHBORHOODS: INSIGHTS FROM THE MOVING TO OPPORTUNITY DEMONSTRATION 2 (2012).

\textsuperscript{114} See infra Part II.A.
\textsuperscript{115} See infra Part II.B.
\textsuperscript{116} See infra Parts II.C and II.D, respectively.
\textsuperscript{117} See, e.g., Boyack, Sustainable, supra note 10, at 487–90.
Furthermore, the spending allocated primarily to treat unbearable symptoms of housing unaffordability may not translate into helping to cure the problem.119

Part II of this Article discusses four categories of governmental responses to the problem of housing unaffordability. Section A examines government limits on housing prices through rent control regulations and inclusionary zoning requirements. Section B considers public housing. Sections C and D discuss supply-side and demand-side housing subsidies that allocate public funds to, on the one hand, offset the cost of creating and rehabilitating housing units, and, on the other hand, to offset the costs charged to households for housing, on the other.

A. Controlling the Price

In an unregulated market, housing consumers (renters and buyers) bear the burden of increasing housing costs — and in most of the country, the law does not change this cost allocation baseline. Generally, when market prices increase for any good or service, a would-be buyer must either pay more to obtain that good or service or go without it. In the context of housing, however, some jurisdictions have enacted local laws establishing direct and indirect price controls, even though many states’ laws explicitly prohibit local price controls, even though many states’ laws explicitly prohibit local price controls for housing except in a temporary “emergency”.120

118. “As a nation, we both pay too much and pay too little toward housing.” Id. at 458 (discussing inefficiencies and unsustainable program design and implementation in the context of housing).

119. Id. at 457–58.

120. At the end of 2018, local rent control only existed in four states (California, Maryland, New Jersey, New York) and the District of Columbia. See Residential Rent Control Law Guide by State, LANDLORD.COM, http://www.landlord.com/rent_control_laws_by_state.htm [https://perma.cc/TS6L-UMC9]. In each case, state law constrains municipal authority to impose controls on rents. In California, for example, the Costa-Hawkins Rental Housing Act of 1995 limited local governments from expanding then-existing price controls on rental housing, so that homes built after 1995 are free from local rent controls and cities’ rent stabilization regimes are unable to expand beyond what they covered in 1995. A ballot initiative to remove these state-level restrictions on municipal rent control was defeated in 2018, but in 2019, state legislators proposed various bills to roll back the 1995 Act to give local governments more flexibility to set rental rates. See, e.g., A.B. 36, 2019–20 Reg. Sess. (Cal. 2019) (allowing rent controls to apply to housing more than twenty years old), A.B. 1482, 2019–20 Reg. Sess. (Cal. 2019) (preventing landlords from increasing rents by more than a specified percentage above yearly inflation); Caroline Basile, Rent Control Back on the Table in California, HOUSINGWIRE (Mar. 15, 2019), housingwire.com/articles/48443-rent-control-back-on-the-table-in-california [https://perma.cc/2PQW-N3FQ]. In other areas of the country,
Historically, rent control ordinances were exclusively matters of local law, but in 2019, Oregon became the first jurisdiction to establish rent control at the state level.\textsuperscript{121} Controlling the price that can be charged for housing shifts costs onto housing providers, a move that is controversial and allegedly counterproductive in the long term.\textsuperscript{122}

state statutes explicitly prevent localities from creating rent control regimes unless there is a “housing emergency.” For example, Florida law provides:

No law, ordinance, rule, or other measure which would have the effect of imposing controls on rents shall be adopted or maintained in effect except as provided herein and unless it is found and determined, as hereinafter provided, that such controls are necessary and proper to eliminate an existing housing emergency which is so grave as to constitute a serious menace to the general public.

[https://perma.cc/L48Y-BNHB].


122. Richard Epstein, one of the most outspoken legal critics of rent control legislation, claims that economists are “well nigh unanimous in their condemnation of rent control statutes.” Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 BROOK. L. REV. 741, 759–60 (1988) (citing Bruno S. Frey et al., Consensus and Dissension Among Economists: An Empirical Inquiry, 74 AM. ECON. REV. 986 (1984) (noting that over 98% economics surveyed believed that rent control would negatively impact housing supply)). Critiques of rent control from Epstein and economists, however, have been criticized in turn by some urban planners, social scientists, and some other legal theorists. See, e.g., Kenneth K. Baar, Would the Abolition of Rent Controls Restore A Free Market?, 54 BROOK. L. REV. 1231, 1232–33 (1989) (citing several studies that purportedly show a lack of negative impact of rent control on housing supply); Note, Reassessing Rent Control: Its Economic Impact in A Gentrifying Housing Market, 101 HARV. L. REV. 1835, 1843–55 (1988) (making empirical, analytical, and policy arguments for rent control to counteract the negative implications of gentrification). A recent comparative study of 40 years of municipal rent control in New Jersey concluded that moderate rent control regimes have no impact on quality or quantity of housing. Joshua D.
Homebuying markets in the United States operate independently of government price controls — homes are bought and sold for whatever price a willing buyer and a willing seller agree on. Unregulated pricing is the reality in a majority of US rental markets as well, with the exception of a few local governments that have enacted price controls for certain rental units, typically in the form of rent stabilization and vacancy decontrol regulation.123

Rent control is a politically divisive, much-debated concept in the law. The federal government has, for the most part, allowed states and municipalities self-determination on the issue. Although housing price regulations have been challenged as unconstitutional takings, the Supreme Court has never (yet) invalidated a rent control ordinance on constitutional grounds.124 Economists criticize rent control regulations for their market disrupting effects, pointing out that decreasing landlord profits will push housing providers out of the

Ambrosius et al., Forty Years of Rent Control: Reexamining New Jersey’s Moderate Local Policies after the Great Recession, 49 CITIES 121, 123 (2015).

123. In five of the six jurisdictions that permit rent controls, local governments have enacted a variety of regulations affecting rental rates, including rent ceilings, limitations on rental increases, and, in many cases, vacancy decontrols. Although applicability of local rent control is limited by state law in California, see supra note 116, local rent regulation is still quite popular. See, e.g., BERKLEY, CAL. MUN. CODE § 13.76.060 (2018) (establishing a board that sets and periodically adjusts rent ceilings for rental units as permitted by state law); S.F., CAL. ADMIN. CODE § 37.8(b)(1)(A) (2019) (limiting annual rent increases to a maximum of 7%). New Jersey permits its municipalities to enact rent controls, and there are over 100 different rent control regimes in that state. See generally N.J. DEP’T OF CMTY. AFFAIRS, DIV. OF CODES & STANDARDS, LANDLORD-TENANT INFO. SERVS., 2009 RENT CONTROL SURVEY (2019) https://www.nj.gov/dca/divisions/codes/publications/pdf_lit/rent_ctlr_srvy_2009.pdf [https://perma.cc/W8W3-44P4]. For a discussion of various types of rent control statutes and legal vulnerabilities of each type, see Jakob S. Harle, Challenging Rent Control: Strategies for Attack, 34 UCLA L. REV. 149, 155–70 (1986). In 2019, Oregon became the first jurisdiction to pass a statewide rent control law. See supra note 121 and accompanying text.

124. In 1919, the Supreme Court upheld a District of Columbia law granting a commission temporary oversight of lease terms for properties in the city, holding that the rental housing market in Washington, D.C. was monopolized. Block v. Hirsh, 256 U.S. 135, 157 (1921). More than 60 years later, in the case of Pennell v. City of San Jose, 485 U.S. 1 (1988), the Court upheld a California rent control ordinance, specifically holding that it did not amount to a taking and did not violate the Equal Protection Clause because the ordinance was designed to promote “consumer welfare” and took into account a landlord’s financial situation. Id. at 13–15. The Supreme Court reiterated its holding from Pennell in later cases. See, e.g., Yee v. City of Escondido, 503 U.S. 519, 529 (1992). Rent control ordinances, like any statute, must be rationally related to a legitimate governmental purpose to be valid. See Pennell, 485 U.S. at 859. This modest burden is easily met in the case of rent control ordinances, since those ordinances are established to fulfill the legitimate government purpose of ensuring adequate affordable housing. See id. (“tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants”).
market, ultimately driving down housing supply. Some critics also cite unfair distributive effects of rent control ordinances, arguing that such regulations inequitably allocate the costs of unaffordable housing to impacted landlords rather than to the taxpaying public as a whole. Market dysfunction — perhaps due to monopolistic or exploitative pricing — might provide an economic justification for rent controls, but most rental regulations do not specifically target inefficiencies of poorly functioning markets, but instead are largely politically motivated quick answers to widespread complaints that rents are “too damn high.” It may be cheap, fast, and easy for governments to reduce rents by using their police power to pass a law restricting prices, but involuntary price controls may be counterproductive in the long term and create fairness concerns akin to regulatory takings.

In recent years, local governments have increasingly employed an indirect tool to indirectly mandate affordable rental pricing: inclusionary zoning. Like rent regulation, inclusionary zoning is

125. Economic theorists assert that rent control reduces both the quantity and quality of housing in a market. In the short run, there will be wait lists for housing units or units will be misallocated based on favoritism, bribes, and discrimination. In the long term, the supply of rental housing will diminish, particularly if conversion to condominium ownership is an available alternative. Empirical studies have posited that rent control is net wealth reducing for society because the benefits to tenants do not exceed the costs to landlords. See Epstein, supra note 122, at 759–63.

126. In his concurrent opinion in Pennell, Justice Scalia opined that,

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities — a problem caused by the society at large — has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that “public burdens . . . should be borne by the public as a whole,” Armstrong [v. United States, 364 U.S. 40, 49 (1960)], this is the only manner that our Constitution permits.

Pennell, 458 U.S. at 21–22 (Scalia, J., concurring).


128. Economics Professor Richard Muth likened rent control to “drinking to excess,” theorizing that in both cases, “its benefits are realized first and the costs are paid at a later date.” Richard F. Muth, Redistribution of Income Through Regulation in Housing, 32 EMORY L.J. 691, 693–94 (1983).

129. Inclusionary zoning refers to local land use laws that mandate the construction of affordable housing as a condition for other housing development. For a helpful overview of inclusionary zoning, see Michael Floryan, Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning
attractive to local governments grappling with housing unaffordability because it requires no outlay of funds.\textsuperscript{130} Inclusionary zoning is more than merely the absence of exclusionary zoning, a legal construct that creates a myriad of ill effects on housing markets, including inflated costs, segregation, and sprawl.\textsuperscript{131} Instead, inclusionary zoning is the use of land regulation tools to mandate the creation of low-priced rental units as a prerequisite for new development in a community. Inclusionary zoning increases the supply of affordable housing in a community (at least initially), but achieves such increases without purchasing voluntary commitments to produce affordable housing, as does the Low Income Housing Tax Credit, for example.\textsuperscript{132} When a government employs grants, tax credits, and financing subsidies to grow the supply of affordable housing, it pays a private entity to produce low-priced rental units. But when a government uses inclusionary zoning to increase the supply of affordable housing, it merely mandates that same result by law, without expending public funds.\textsuperscript{133} Although inclusionary zoning schemes have been challenged as unconstitutional takings in the form of exactions, courts have determined inclusionary zoning can be a valid exercise of police power — promoting the public purpose of increasing affordable

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132. For a discussion on LIHTCs, see infra notes 192–205 and accompanying text.

housing supply. Nevertheless, inclusionary zoning remains controversial and continues to be criticized on both legal and economic grounds on bases similar to critiques levied against rent controls.

Both rent control and inclusionary zoning occur at the local government level, and although they are technically revenue neutral, economists caution that both could negatively impact affordable housing supply and ironically drive up housing costs in the long term. In addition, both approaches potentially raise takings issues that would not exist with government expenditure of public funds to promote housing affordability. Sustainable solutions to unaffordable housing, therefore, will likely involve an investment of public funds even though doing so can be politically fraught.

B. Public Ownership

Public ownership of housing allows governments to ensure affordable pricing without the potential adverse market effects and takings concerns that arise over regulatory controls of housing costs. When a government controls the resource itself, it can act to price the resource to achieve consumer affordability rather than to maximize profit. Public control and pricing can be economically justified in cases of a “natural monopoly” (like a city’s water or sewage system) and in cases where demand is inelastic and public welfare concerns support universal access. Public housing can be conceptualized as a

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135. See, e.g., Epstein, supra note 68, at 69–70. Epstein cites to the experience of San Jose, California to illustrate his contention that inclusionary zoning adversely affects housing supply. Id. In the seven years before inclusionary zoning was enacted in San Jose, 28,000 new homes were built, and in the seven years after the inclusionary zoning program was enacted, only 11,000 new homes were built, of which 770 were affordable. Id. at 70. Epstein then queries, “is the community better off with 770 affordable units at the price of 17,000 aggregate units?” and concludes that it is a “terrible tradeoff.” Id; see also Ellickson, supra note 130, at 1188 (concluding that the inclusionary zoning requirements “are essentially excise taxes on the activity of homebuilding.”).

136. See supra notes 122, 125, 130.

137. See Frank A. Wolak, Public Utility Pricing and Finance, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 2 (Steven N. Durlaf & Lawrence E. Blum eds., 2008) (explaining the concept of economic justifications for and proper pricing of public utilities). There is a compelling argument that low-income housing is not a “natural monopoly,” and that public utility theory does not therefore apply to the resource, but demand inelasticity may create an alternate basis to apply the theory in this context.
public utility, and its justification turns on finding that because the resource (housing) is a necessity with inelastic demand, and is subject to out-of-reach costs (for lower income people), making public distribution and pricing of the resource is optimal. When the government owns a resource, any gap between the cost to produce the resource and the cost consumers pay to enjoy it will be borne by the public at large rather than by certain private landlords (as is the case under price control legislation). Public management of a resource means that the government chooses its pricing rather than allowing it to be set by the market. Although government ownership can ensure lower prices, it also means that resource management and allocation are not subject to market discipline. Public ownership schemes must grapple with such issues.

Public ownership does, however, enable consumers to obtain access to resources at reasonable prices. Thus, in the abstract, the publicly owned, affordably priced housing could be a good way to provide homes to low-income renters who cannot afford to pay market rates for shelter. Public shelter programs currently exist at state and local levels, targeting populations with critical, but often temporary, housing needs, such as women fleeing domestic abuse and people who are homeless. There are also about one million

138. After all, regulatory takings claims are essentially based on the argument that it is unfair to impose the costs of a public benefit on a handful of private owners rather than on the public at large. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting) (“The question in this case is whether the cost associated with the city of New York’s desire to preserve a limited number of ‘landmarks’ within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.”). Public ownership of a regulated resource avoids this problem by distributing the cost of subsidized access across all taxpayers.


federally funded public housing units — the remnant of twentieth-century federal public housing programs — in our rental housing inventory. But those housing programs were implemented in problematic ways that further concentrated poverty (and crime) and exacerbated racial inequality throughout the country. Some of the problems with public housing came from siting of the properties — predominantly in very low-income, high-crime, often racially segregated tracts — and some of the problems came from the physical design and maintenance of the projects themselves.

By the 1990s, in reaction to the notorious failings of public housing projects, the federal government essentially ceased producing public housing and created programs transitioning many existing public housing developments away from government ownership and control. Since then, a quarter million public housing units — an
average of 10,000 each year — have been demolished or otherwise removed from the housing stock.\textsuperscript{145} Another 60,000 public housing units have been converted to units supported by project-based subsidies through Section 8.\textsuperscript{146} Even though public housing has been subject to harsh criticism, some 2.6 million people still live in just under one million public housing units throughout the country.\textsuperscript{147} Eliminating public housing units can cause low-income families to lose access to affordable housing if they are not provided with equivalent options and supports.\textsuperscript{148} Moreover, HUD has an inconsistent record in adequately providing for displaced low-income public housing tenants.\textsuperscript{149}

Although funding and oversight for public housing come from HUD, these properties are managed locally by about 2900 public housing agencies (PHAs).\textsuperscript{150} Public housing provides homes for some of the most impoverished households in the country, the overwhelming majority of which (90\%) are composed of the elderly, those with disabilities, or those who meet work requirements.\textsuperscript{151}


146. The voucher programs were established by HUD in 1974 under the authority of Section 8 of the Housing Act of 1937. Vouchers provide for payment from HUD to landlords for a portion of rents in excess of 30\% of the tenant’s gross income. Section 8 Rental Certificate Program, U.S. DEP’T OF HOUSING & URB. DEV., https://www.hud.gov/programdescription/cert8 [https://perma.cc/K3EG-7GF2]; Policy Basics: Housing Choice Voucher Program, CTR. ON BUDGET & POLICY PRIORITIES 2 (2017), https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13vouch.pdf [https://perma.cc/MS4C-L7CG]; see also CBP on Public Housing, supra note 143. HUD has authorized another 185,000 additional public units to be converted in the future. Id. see infra notes 245–63.

147. “HUD data indicate that the number of public housing units fell from 1.1 million in 2006 to 1.0 million in 2016.” RENTAL HOUSING 2017, supra note 19, at 32. “[P]ublic housing units are located in all 50 states and several territories, one in five of them in rural areas.” CBP on Public Housing, supra note 143.

148. Roller & Cassella, supra note 144.

149. Id.

150. CBP on Public Housing, supra note 143.

151. Units are available only to low-income families, with incomes at 80\% of the local median income or lower. At least 40 of new families admitted to public housing each year must be “extremely low-income,” defined as having an income at or below 30\% of the local median. Id.
Families housed in such units pay 30% of their income as rent, while the federal government supposedly bears the operating and maintenance costs associated with the housing that are not covered by rental receipts. But in practice, however, Congress has consistently underfunded public housing. In 2010, HUD estimated that decades of deferred maintenance and lack of upgrades had created a public housing upkeep deficit of $26 million. The public housing approach to reducing the costs of housing is critically important to the people who live in such units and, for certain populations (disabled veterans, for example), may be the best housing solution. Government housing has, in many cases, been dismissed as a failure, but public ownership and provision of housing for

152. Id.
153. Id. Funding for public housing comes from both the Public Housing Operating Fund (to cover operating costs) and the Public Housing Capital Fund (to cover capital improvements); but in all but two years since 2002, the Public Housing Operating Fund has been deliberately underfunded. Id. In a similar vein, necessary capital improvements to public housing have been consistently deferred, however Congress did fund The Choice Neighborhoods Initiative in 2010 and the HOPE VI program, which provided a small number of grants to revitalize distressed public housing developments. Id. Douglas Rice & Barbara Sard, Decade of Neglect Has Weakened Federal Low-Income Housing Programs: New Resources Required to Meet Growing Needs, CTR. ON BUDGET & POL’Y PRIORITIES 15 (2009), https://www.cbpp.org/research/decade-of-neglect-has-weakened-federal-low-income-housing-programs [https://perma.cc/YJR6-S4DC].


Congress’s failure to adequately fund public housing, along with many instances of mismanagement in sites across the country, has left housing authorities in untenable positions: demolish or convert to other types of HUD housing assistance through RAD. The program serves as a powerful tool for the preservation of public housing units, but it comes with a host of challenges.


156. See, e.g., Edward G. Goetz, The Audacity of HOPE VI: Discourse and the Dismantling of Public Housing, 35 CITIES 342, 342–46 (2013) (comparing public housing residents’ positive perspective regarding public housing with the “discourse of disaster” generally used to vilify public housing in order to justify dismantling public housing as something “deviant, dysfunctional, or obsolete”); Ben Austen, The Last Tower: The Decline and Fall of Public Housing, HARPER’S MAG. (Apr. 2012), https://harpers.org/archive/2012/05/the-last-tower/ [https://perma.cc/2BML-V5DV] (calling Cabrini-Green in Chicago a “nightmare vision of public housing, the ungovernable inner-city horrors that many believe arise when too many poor black
vulnerable populations would be an effective tool to combat housing unaffordability if appropriately designed and implemented.157

C. Subsidizing Production Costs to Increase Affordable Housing Supply

The gap between the supply of and demand for low-cost rental housing is a significant part of the housing affordability puzzle, and government spending to encourage an increase in the supply of affordable rentals and the preservation of existing affordable units is a critical part of the solution to the affordable housing crisis.158 Economists prefer efforts to increase housing supply over efforts to mandate pricing or subsidies of consumers’ housing costs because increasing the supply of units can help stabilize the supply-demand
disequilibrium in the housing market for lower price points.\footnote{159} Creating more affordable units leverages natural economic forces\footnote{160} and theoretically produces longer-term benefits for housing adequacy. Increasing the supply can be framed as an investment in the housing system as a whole, not just a stop-gap measure to minimize the impact of costly housing on specific households.\footnote{161}

Federal programs play a huge and vital role in helping to fund the production costs and encouraging the growth of affordable housing supply.\footnote{162} The various federal programs providing financial incentives designed to increase the supply of affordable housing are legion, and a description of all the various methods and specifics is beyond the scope of this Article.\footnote{163} Subsidy and incentive programs exist for both saleable homes and rental units.\footnote{164} Financial assistance

\footnote{159. \textit{See generally} Glaeser & Gyourko, \textit{supra} note 14 (focusing on creating an economic justification for supply-side housing initiatives).}

\footnote{160. Basic economic theory holds that increasing supply of a good while holding demand constant will lead to a decrease in price. \textit{See} \textit{OpenStax, Principles of Economics} ch. 3.2 (2018), \url{https://opentextbc.ca/principlesofeconomics/chapter/3-2-shifts-in-demand-and-supply-for-goods-and-services/} [\url{https://perma.cc/25MP-95SY}]; \textit{see also supra} note 63 and accompanying text.}

\footnote{161. For a lengthier discussion on the import of supply-side affordability programs, see Boyack, \textit{Sustainable}, \textit{supra} note 10, at 473–81; \textit{see also} Boyack, \textit{Equitably}, \textit{supra} note 31, at 132–47.}

\footnote{162. It is difficult to precisely allocate the share of affordable housing funding among federal, state, local, and non-profit and for-profit sources because these various governmental and private providers often act in concert and combine efforts. For example, federal funding is provided to state housing finance entities who employ both federal and state-level tax credits and bond financing options, combined with federal grants and non-profit contributions and private debt or equity financing. \textit{See, e.g.}, \textit{State Housing Finance Agencies: At the Center of the Affordable Housing System, Nat’l Council St. Housing Agencies} (Sept. 7, 2018), \url{https://www.nesha.org/resource/hfas-at-the-center/} [\url{https://perma.cc/6N6S-FF5E}]; \textit{see also Declining Federal Housing Funding, Inclusionary Housing, https://inclusionaryhousing.org/inclusionary-housing-explained/what-problems-does-iz-address/declining-federal-housing-funding/} [\url{https://perma.cc/Y9JS-UYEK}]. Some housing finance providers are difficult to categorize as federal or local. For example, the Federal Home Loan Banks (FHLBanks) are local lenders established by federal law and administered both federally and locally. The FHLBanks have funded the creation of more than 800,000 affordable housing units. \textit{See Affordable Housing, FHLBanks,} \url{http://www.fhlbanks.com/affordable-housing.html} [\url{https://perma.cc/W6LS-N7UK}] (last visited Oct. 11, 2019).}

\footnote{163. For a more complete list of federally funded or managed programs that promote the supply of affordable housing, see \textit{HOME Tenant-Based Rental Assistance, HUD Exchange}, \url{https://www.hudexchange.info/programs/} [\url{https://perma.cc/4572-MFBK}]. Federal programs intersect with multiple other affordable housing programs administered through state and local agencies as well as public-private partnerships. \textit{Id.}}

\footnote{164. \textit{See infra} Section II.D.}
delivered may be in the form of a tax credit,\textsuperscript{165} a grant,\textsuperscript{166} financing assistance decreasing the cost of capital,\textsuperscript{167} low-cost government financing,\textsuperscript{168} direct funding of specific production or rehabilitation costs,\textsuperscript{169} public-private partnerships,\textsuperscript{170} or one of a myriad of other structures.\textsuperscript{171} The essential goal and impact of all these incentive programs are similar: the government offers a financial incentive in exchange for a commitment to produce a certain number of housing units, rented at specified affordable levels for specified periods.\textsuperscript{172}

\textsuperscript{165} See, e.g., infra notes 192–205 and accompanying text (discussing the Low Income Housing Tax Credit).

\textsuperscript{166} See, e.g., infra notes 206–10 and accompanying text (discussing the HOME Investment Partnerships Program and the Community Block Development Grant Program).


\textsuperscript{168} Fannie Mae and Freddie Mac provide loans to multi-family developers, but focus on lending on for market-rent housing developments. Although subsidizing market-rent housing units does not directly increase the supply of affordable housing, it increases overall housing supply, and this can lead to more existing affordable units becoming available for rent by lower income households. See, e.g., Andrea J. Boyack, \textit{Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac}, 60 AM. U.L. REV. 1489, 1547–51 (2011) [hereinafter Boyack, \textit{Fannie/Freddie}]; see also Boyack, \textit{Equitably}, supra note 31, at 147–59.

\textsuperscript{169} See, e.g., infra notes 175–78 and accompanying text (discussing the Housing Trust Fund).

\textsuperscript{170} See, e.g., \textsc{Peter W. Salsich, Jr.}, \textit{Affordable Housing and Public Private Partnerships} 69–91 (Nestor M. Davidson & Robin Paul Malloy eds., 2009); Hunter L. Johnson, \textit{New Funding for Affordable Housing Encourages Public-Private Partnerships}, CCIM INST., https://www.ccim.com/cire-magazine/articles/new-funding-affordable-housing-encourages-public-private-partnerships/?gmsopc=1 [https://perma.cc/CJ3P-Y66U] (last visited Oct. 1, 2019); see also infra notes 181–91 and accompanying text (discussing federal programs that established private-public partnerships for affordable housing, such as the HOPE VI program and the Rental Assistance Demonstration).


\textsuperscript{172} The Low Income Housing Tax Credit (LIHTC) offers a 10-year tax credit in exchange for an investment in affordable housing and requires that a developer set
One of the most cost-effective ways to support supply adequacy in affordable housing is to preserve and maintain existing affordable housing units, many of which are aging badly and rapidly exiting the national rental unit inventory.\footnote{173}{Rehabilitating an existing affordable apartment can cost one-third to one-half less than building a new apartment. Without preserving existing affordable housing, we fall two steps back for every step we take forward.” What Is Preservation?, NAT’L HOUS. TR., https://www.nationalhousingtrust.org/what-preservation [https://perma.cc/Q48N-22MP] (last visited Oct. 11, 2019).} Approximately 10,000 affordable units a year are lost to obsolescence and poor management and upkeep.\footnote{174}{See NAT’L LOW INCOME HOUS. COAL., BALANCING PRIORITIES: PRESERVATION AND NEIGHBORHOOD OPPORTUNITY IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BEYOND YEAR 30 \textsuperscript{8} (2018) [hereinafter LIHTC Beyond 30], https://nlihc.org/sites/default/files/Balancing-Priorities.pdf [https://perma.cc/5BST-T529];} The Housing Trust Fund (HTF) is one source of federal monies that can be used for preservation and rehabilitation of existing affordable housing. The HTF was established in 2008 under the Housing and Economic Recovery Act to “provide[ ] block grants to states to build, rehabilitate, or preserve housing affordable to extremely low income households . . . .”\footnote{175}{Ed Gramlich, Nat’l Low Income Hous. Coal., Getting Started: First Homes Being Built With 2016 National Housing Trust Fund Awards 1 (2018), https://nlihc.org/sites/default/files/NHTF_Getting-Started_2018.pdf [https://perma.cc/VA9Q-4BEK].} The HTF received no funding from Congress for the first eight years of its existence, but in 2015, Congress finally authorized funding.\footnote{176}{Id. at 1–2.} Congress provided a total of $660 million to the HTF in the three years following.\footnote{177}{Id. Failure to fund the HTF was blamed on the Financial Crisis and, specifically, the government bailout of Fannie Mae and Freddie Mac, entities that pursuant to the Federal Housing Finance Agency, were intended to contribute to the HTF. Fannie Mae and Freddie Mac were not deemed financially able to make these contributions until 2015. Id.} To date, states have used or earmarked most of the HTF funds they have and will receive for projects serving “people experiencing homelessness, people with disabilities, elderly people, or other special needs populations.”\footnote{178}{Id. at 2.} Many projects funded in part by the HTF employ other affordable housing resources as well, particularly the
LIHTC, the HOME program, and the FHL Banks’ Affordable Housing Program, in addition to state or local funds.  

Other preservation efforts have attempted to revitalize poorly maintained public housing units by leveraging private capital. A series of programs have created public-private partnerships to improve the quality of public housing units. Some of these programs have reduced the number of publicly held units or converted some publicly held units into privately held low-income units (or both) in exchange for improvements to unit and neighborhood quality. From 1992 to 2011, HUD’s primary public-private partnership program was the controversial HOPE VI program. Beginning in 2010, HOPE VI was gradually replaced by the Choice Neighborhoods program, which focused on rehabilitating severely distressed public housing and improving the energy efficiency of such units. In 2012, HUD launched the Rental Assistance Demonstration (RAD) program, which enabled the government to “leverage public and private debt and equity” to

179. See infra notes 186–195, 200–204 and accompanying text (discussing these programs).
180. Some grant programs, such as the Capital Magnet Fund, requires $10 of private financing to leverage every $1 of public funding provided. The Capital Magnet Fund provides development and other loan capital for economically distressed, underserved communities and is funded with a portion of the assessments made on Fannie Mae and Freddie Mac’s new business. Federal Funding for Affordable Housing, LOCAL HOUSING SOLUTIONS (2019), https://www.localhousingsolutions.org/fund/federal-funding-for-affordable-housing/ [https://perma.cc/YG6C-8MKN].
182. Failure to provide voucher replacements for destroyed public housing was legally problematic under HOPE VI. See, e.g., Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 96 C 6949, 1997 WL 31002, at *2 (N.D. Ill., Jan 22, 1997).
preserve and update public housing units. RAD allows for public housing units to become privately owned, albeit subject to long-term, mandatorily renewable contracts with HUD providing project-based Section 8 rental assistance. Such public-private partnerships allow for more flexible financing arrangements and may be able to achieve rehabilitative goals with a smaller outlay of public funds. Congress initially capped the RAD program at 60,000 units but later authorized an additional 225,000 units. In 2018, the RAD program rehabilitated its 100,000th unit. Because the RAD program uses private equity and debt funding, albeit in concert with public funds and government credit, the program is ostensibly more “cost neutral” — a politically attractive selling point. Involving private money and control in previously public housing saves the government money and potentially allows for improvements that may not otherwise have been funded by Congress, but partnering with private developers comes at a cost. There have been troubling instances of HUD delegating control of RAD housing to private entities to the

185. See infra note 245, and accompanying text (discussing Section 8 rental assistance).
187. RENTAL HOUSING 2017, supra note 19, at 5.
189. RENTAL ASSISTANCE DEMONSTRATION, supra note 184.
detriment of the low-income occupants. Moreover, RAD re-developments often result in a net loss of affordable housing units, even though the quality of remaining units typically improves. Protections built into the RAD system ensure that additional housing vouchers replace publicly owned units lost.

In 1986, Congress created the Low Income Housing Tax Credit (LIHTC) program to incentivize the production of affordable housing. LIHTC is currently the largest support for increasing affordable housing supply, measured in terms of the number of units it has created. LIHTC has financed the construction or preservation of about three million housing units since 1987, about 70,000 affordable rental units per year. Under this program, the IRS provides a ten-year tax credit to developers selected by local PHAs who build housing units to be occupied by and affordable to low-income households for 30 years. These tax credits are of limited supply and have been in high demand since their inception because their value can be immediately capitalized and used to offset

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190. For example, in a RAD property in Hopewell, Virginia, private managers refused disability-required accommodation requests of a resident, a denial which may have contributed to the resident’s subsequent death. Roller & Cassella supra note 146. Roller and Cassella assert that violation of RAD tenants’ rights are examples of “perils on the path” to privatization, and they caution that “[t]o deliver on its promise, the program requires more oversight from HUD, and local advocates must be involved in RAD conversions to support low-income residents.” Id. The Government Accounting Office Report on RAD agrees; see generally, U.S. GOV’T ACCT. OFF., GAO-18-123, RENTAL ASSISTANCE DEMONSTRATION: HUD NEEDS TO TAKE ACTION TO IMPROVE METRICS AND ONGOING OVERSIGHT (2018), https://www.gao.gov/assets/700/690210.pdf [https://perma.cc/YUR7-GUEZ].


192. The LIHTC was created by the Tax Reform Act of 1986 and is codified at 26 U.S.C. § 42. The IRS provides guidance and advice for distributing and using the LIHTCs. See LIHTC Beyond 30, supra note 174, at 5–6; NAT’L LOW INCOME HOUS. COAL., supra note 181.

193. See RENTAL HOUSING 2017, supra note 19, at 32–33; see also LIHTC Beyond 30, supra note 174, at 4.

194. RENTAL HOUSING 2017, supra note 19, at 5.

195. LIHTC Beyond 30, supra note 174, at 4. LIHTC affordability periods are technically 15-year periods that can be renewed once. See, e.g., OFF. OF POL’Y DEV. & RES., U.S. DEP’T OF HOUS. & URB. DEV., WHAT HAPPENS TO LOW INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? (2012), https://www.huduser.gov/portal/publications/pdf/what_happens_lihtc_v2.pdf [https://perma.cc/38DD-X6VD]. States receive low-income housing tax credits equivalent to $2.35 per person (2016 figures), and local PHAs determine which developers are awarded LIHTCs for which specific qualifying developments.
development costs. Developments qualify as “low-income” for LIHTC purposes if rents are affordable for low-income households, but such rents are not necessarily low enough to be affordable for very low-income or extremely low-income households. Many households who rent LIHTC units, therefore, remain cost burdened unless they obtain additional rental assistance, for example through housing voucher programs.

Although the LIHTC program has been a successful tool for promoting affordable housing supply, it faces challenges, starting with the fact that between 2020 and 2029, over 500,000 current LIHTC units will reach the end of their 30-year affordability period. Extending affordability requirements for such units will likely require additional federal funding, possibly cannibalizing funding that otherwise would be allocated to create new LIHTC developments. Some states, foreseeing the problems that expiring affordability periods would eventually cause, expanded the affordability period —

196. For several years running, California Senator Maria Cantwell has annually proposed increasing the number of LIHTCs available as a way to grow the supply of affordable housing units in areas of the country where supply is the biggest problem. OFFICE OF U.S. SENATOR MARIA CANTWELL, MEETING THE CHALLENGES OF THE GROWING AFFORDABLE HOUSING CRISIS: EXPANDING AND IMPROVING THE HOUSING TAX CREDIT (2017); see also Sarah Brundage, Cantwell & Hatch Reintroduce Affordable Housing Credit Improvement Act with Support of Over 2,000 Businesses and Organizations, AFFORDABLE RENTAL HOUSING A.C.T.I.O.N. BLOG (Mar. 7, 2017), http://rentalhousingaction.org/blog/2017/3/7/sens-cantwell-hatch-reintroduce-affordable-housing-credit-improvement-act-with-support-of-over-2000-businesses-and-organizations [https://perma.cc/9UP6-K9VR]. The Tax Cuts and Jobs Act reduced corporate tax rates and therefore the value of investments in LIHTC properties; the effect of this change on LIHTC value and therefore demand has not yet been determined. Urban Institute Evaluates the Low Income Housing Tax Credit, NAT’L LOW INCOME HOUSING COALITION (Jul. 23, 2018), https://nlihc.org/resource/urban-institute-evaluates-low-income-housing-tax-credit [https://perma.cc/GS9Q-R37M].

197. Rents for designated low-income units created pursuant to the LIHTC are set at the amount that is “affordable” for (namely, 30% of) a household with an income of either 50% or 60% AMI, depending on the affordability designation chosen by the developer. See supra note 172.

198. A Furman Center report found that LIHTC recipients tend to have higher incomes than other assisted households and that 70% of ELI households in LIHTC homes have other forms of rental assistance and nearly all of the remaining 30% of ELI households in LIHTC homes spend more than 30% of gross household income on housing. NLIHC 2019 GAP REPORT, supra note 36, at 10.

199. LIHTC Beyond 30, supra note 174, at 4. Affordability periods for 478,000 LIHTC units will expire by 2028. RENTAL HOUSING 2017 supra note 19, at 33–34.

200. RENTAL HOUSING 2017, supra note 19, at 33–34. Tax reform proposals to expand funding in order to address the expiration of the initial affordability periods are considering eliminating the 4% LIHTC program, which accounted for about half of housing unit production in 2015. Id. at 6.
under state law — for periods beyond the 30-year federal limit.201 Because, the few state-level extensions that exist were enacted only after 2000 and do not apply retroactively, they will not affect any LIHTC units in those states until 2030 or later.202 The federal government has not yet addressed the issue of expiring LIHTC units, although there are pending proposals to renew LIHTC affordability periods, possibly in conjunction with proposals revisiting the of optimal siting of affordable units.203

The LIHTC program faces objections primarily for its location of units, not its affordability duration. Only 29% of LIHTC units are located in neighborhoods that offer their residents enhanced economic opportunity through local labor markets, high-quality educational opportunity, transit access, and a healthy environment, and only 9% of these are in mixed-income (as opposed to low-income) neighborhoods.204 Like many other federal programs, LIHTC seems to have increased the affordable housing supply primarily in impoverished, poor-quality neighborhoods, thus concentrating and perpetuating poverty in addition to the housing need that federal affordable housing funding is supposed to address.205

HUD also provides various grant funds to private developers to build low-income housing rentals and homes for sale pursuant to numerous criteria, including the Home Investors Partners Program (HOME), a grant program designed to fund state and local efforts to create housing affordable to low-income households, and the Community Development Block Grant (CDBG), a HUD program with broader housing objectives that has been active since 1975.206 HOME is the largest federal block grant used to create affordable

201. Id. at 34. California requires an addition 25-year affordability period for LIHTC properties, and New Hampshire, Utah, and Vermont require an additional 69 years of affordability. Id.

202. Id.

203. LIHTC Beyond 30, supra note 174, at 18–21 (discussing possible approaches that include neighborhood quality considerations in addition to renewing or replacing expiring LIHTC units).

204. Id. at 13–14.


housing and provides flexible funding for states and localities that can be used for “building, buying, and/or rehabilitating affordable housing for rent or homeownership or providing direct rental assistance to low-income people.” HOME provides both housing grants to local governments and tenant-based rental assistance (subsidizing demand) and requires matching grants from other sources. CDBG funds are allocated to create and rebuild low-cost housing for sale or rent in areas with particular needs, including locations that have faced significant destruction due to disaster or financial collapse, but these grants also can be used for demand subsidies such as down-payment assistance. Federal funding for CDBG grants has been significantly reduced over time, and in 2018, the Trump administration threatened to eliminate the program before finally agreeing to retain CDBG under lower funding levels than previously provided.

The various supply-enhancing programs, mostly federally funded, have created a significant number of affordable rental units, without which the affordable housing crisis would be far worse. But affordability relief from such programs may be kicking the proverbial can down the road. First, mandated affordability for federally incentivized, but not publicly owned, units is bound by a fixed period, and it is not always clear what happens to such units when the period expires. Second, siting of units produced under the various supply-enhancing programs raises new questions about the long-term sustainability and accessibility of these units. Some policy analysts and scholars have floated the idea of creating permanent affordability mandates for certain properties, but permanent land use requirements can be tricky and raise concerns of how to handle future needs for flexibility. At least one proposal includes making project-based voucher properties “permanently” affordable.

207. Id.
211. The concern regarding imminent expiration for LIHTC units is a case in point. Some policy analysts and scholars have floated the idea of creating permanent affordability mandates for certain properties, but permanent land use requirements can be tricky and raise concerns of how to handle future needs for flexibility. At least one proposal includes making project-based voucher properties “permanently” affordable. Amy Glassman, Project-Based Voucher Reforms Will Facilitate Development of Affordable Units but Should Be Taken Further, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 71, 76 (2008). Housing for especially vulnerable populations in need of additional supportive services is sometimes conceived of as
side programs is problematic. On the one hand, it makes sense to place affordable housing in areas where lower-income households currently reside and where land costs are relatively low, but such placements keep lower-income households in poor neighborhoods and limits opportunities and future outcomes for such renters, their children, and grandchildren. Poor siting of affordable housing can increase the likelihood that a perpetual need for government housing assistance is passed on to future generations. HUD directives regarding affordable housing siting are somewhat contradictory on this point, simultaneously preferring siting in places where the largest low-income populations are located and where land is cheapest, but also requiring that HUD monies be used to “affirmatively further fair housing,” as required under the Fair Housing Act, by promoting desegregation.212

Furthermore, PHA attempts to locate affordable housing developments in higher-income communities are more likely to be resisted by community residents.213 Current legislative proposals “permanently affordable” rather than affordable for a particular period of time. Peter W. Salsich, Jr., Toward A Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing, 42 WAKE FOREST L. REV. 459, 507–08 (2007). Community land bank structures attempt to achieve permanent affordability by separating out the price for land and for improvements on the land and holding the ownership of the land separately, by the land bank entity, thus reducing the price paid for property by the proportion of the property’s value allocated to the land itself. The government could potentially explore a similar method of permanent affordability where ownership is split among residents or landlords and the public land bank company. See Julie Gilgoff, Local Responses to Today’s Housing Crisis: Permanently Affordable Housing Models, 20 CUNY L. REV. 587, 590–95 (2017); James J. Kelly, Jr., Sustaining Neighborhoods of Choice: From Land Bank(Ing) to Land Trust(Ing), 54 WASHBURN L.J. 613, 619–24 (2015); Julia Bartolf Milne, Will Alternative Forms of Common-Interest Communities Succeed with Municipal Involvement?: A Study of Community Land Trusts and Limited Equity Cooperatives, 38 REAL EST. L.J. 273, 275 (2009).


213. Local resistance to affordable housing in more affluent communities is an aspect of a tendency sometimes known by its descriptive acronym NIMBY, meaning...
specifically incorporate mandates to place affordable housing in neighborhoods offering better opportunities to their residents. Appropriate placement of affordable units can be conceived of as an investment in reducing poverty and its associated housing cost needs for the future. Sustained housing self-sufficiency not only requires an increase in the number of quality affordable housing units; it also requires that those units provide low-income households access to quality neighborhoods.

“not in my backyard.” NIMBYism with respect to affordable housing has occurred throughout the country. See, e.g., Joshua M. Zeitz, White Ethnic New York: Jews, Catholics, and the Shaping of Postwar Politics 190–94 (2007) (describing resistance to affordable housing in Forest Hills, Queens, New York City); see also Jake Blumgart, Integrating Whitman, Shelterforce (May 4, 2016), https://shelterforce.org/2016/05/04/integrating-whitman/ (describing resistance to affordable housing in Philadelphia); Maya Dukmasova, Opposition to Affordable Housing in Jefferson Park is Nothing New for Chicago, Chi. Reader (Feb. 23, 2017), https://www.chicagoreader.com/Bleader/archives/2017/02/23/opposition-to-affordable-housing-in-jefferson-park-is-nothing-new-for-chicago (describing resistance to affordable housing in Chicago). More recently, there has been a movement in reaction to the dearth of affordable and market housing to resist all development except for housing, with new housing developments being expressly welcomed in communities. This tendency is known by the acronym YIMBY, meaning “yes in my backyard.” “YIMBYs push for reductions on zoning restrictions to increase the supply of housing, reasoning that all new housing, market-rate as well as subsidized, helps to keep housing prices under control.” Roderick M. Hills, Why Do So Many Affordable Housing Advocates Reject the Law of Supply and Demand?, Wash. Post (Sept. 18, 2018), https://www.washingtonpost.com/outlook/2018/09/18/why-do-so-many-affordable-housing-advocates-reject-law-supply-demand/ Most affordable housing advocates agree that any housing supply increase will eventually, directly or through filtering, improve affordability. Vicki Been of the Furman Institute points out that adding supply of higher-rent units may increase prices but not affordability if land use is constrained. See Been, Supply Skepticism, supra note 158, at 5, 8–10.


D. Subsidizing Households' Ability to Pay for Housing

The federal government spends billions of dollars annually subsidizing housing costs, but the vast majority of such spending disproportionately benefits the wealthiest homeowners rather than the neediest renters. Federal funds can pay for or offset a consumer’s housing costs in various ways, including through payment vouchers (paid to consumers or housing providers), federally funded reductions of home acquisition costs, or tax benefits that offset the cost of housing.

The vast majority of federally funded housing benefits come in the form of tax deductions, capital gains deferrals, and other U.S. Tax Code preferences for homeowners. There are no equivalent tax subsidies available for renter households. Many homeowner tax benefits technically offset the cost of financing home acquisition rather than the home’s purchase price itself, but because the vast majority of homebuyers pay for their homes in large part with mortgage financing, the cost-subsidizing impact is almost the same.

216. See, e.g., Dorothy A. Brown, Shades of the American Dream, 87 Wash. U. L. Rev. 329, 339 (2009) (estimating the lost tax revenue cost of homeownership subsidies at $207 billion); see also William G. Gale et al., Encouraging Homeownership Through the Tax Code, 115 Tax Notes 1171, 1171 (2007) (explaining that the mortgage interest deduction “drains significant revenues from the treasury every year,” does little to impact the homeownership rate, and “provides much larger benefits to high-income households” than to other households); Mark Andrew Snider, The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?, 32 Ky. L. Rev. 157, 159–69 (2005) (calculating total tax subsidies for homeownership as aggregating over $400 billion, and identifying the mortgage interest deduction alone as “by far the single largest itemized deduction,” costing $200 billion).

217. The mortgage interest deduction was not actually created in order to promote homeownership. The deduction is a residual tax benefit that remained after tax reform in the 1980s that disallowed deductions for other sorts of interest payments. See Mark P. Keightley, Cong. Res. Serv., R41596, The Mortgage Interest and Property Tax Deductions: Analysis and Options 4 (2014); James R. Follain & David C. Ling, The Federal Tax Subsidy to Housing and the Reduced Value of the Mortgage Interest Deduction, 44 Nat'l Tax J. 147, 147–68 (1991) (discussing how the Tax Reform Act of 1986 “reduced the value of the mortgage interest deduction, especially for low and middle-income households” by increasing the standard deduction and by making certain formerly deductible expenses nondeductible). Retroactively, homeownership promotion and housing affordability have been cited as justifications for allowing home mortgage interest payments to be deducted from federal taxable income. President Reagan, for example, cited the deduction as a key component of advancing “the American Dream.” Robert Hardaway, Great American Housing Bubble: Re-Examining Cause and Effect, 35 U. Dayton L. Rev. 33, 51 (2009). Although the mortgage income deduction has become a fixture in tax policy, there is scant evidence that it does or has ever increased the homeownership rate. In fact, the consensus of economists and other
The largest and most notorious of the homeowner tax benefits is the mortgage interest deduction (MID) which allows homeowners to deduct their mortgage interest payments (up to a certain limit). The Tax Code grants owners other tax benefits as well, including other sorts of deductions, for example, for property taxes paid, and deferral of capital gains, none of which are available to renters. Tax benefits available to homeowners do not target low-income populations, although caps on available deductions do provide some limit on the size of the tax benefit a household can recognize.

scholars is that the deduction either has no effect on homeownership or acts to subtly reduce homeownership by contributing to higher home prices and larger home mortgages. See Roberta F. Mann, The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction, 32 Ariz. St. L.J. 1347, 1391 (2000) (“None of the evidence from economists or from other countries suggests that the repeal of the home mortgage interest deduction would reduce demand for owner occupied housing or home ownership rates.”); see also Christian A.L. Hilber & Tracy M. Turner, The Mortgage Interest Deduction and Its Impact on Homeownership Decisions, 96 Rev. Econ. & Stat. 618, 635 (2014) (finding that mortgage interest deductions had no statistically significant impact on homeownership attainment in aggregate); Roger Lowenstein, Who Needs the Mortgage-Interest Deduction?, N.Y. Times (Mar. 5, 2006), https://www.nytimes.com/2006/03/05/magazine/who-needs-the-mortgageinterest-deduction.html [https://perma.cc/VG7E-V38Q] (“Economists don’t agree on much, but they do agree on this: the interest deduction doesn’t do a thing for homeownership rates. If you eliminated the deduction tomorrow, America would have the same number of homeowners.”).

218. Although politically popular, the vast majority of taxpayers, and even the majority of homeowners, do not benefit from the mortgage interest deduction because they take the standard deduction in lieu of itemizing deductions on their tax returns. See Phyllis C. Taite, Taxes, the Problem and Solution: A Model for Vanishing Deductions and Exclusions for Residence-Based Tax Preferences, 59 N.Y.L. Sch. L. Rev. 361, 363, 378 (2015) (finding that the mortgage interest deduction subsidizes wealthier homeowners while providing little-to-no-benefit to the vast majority of the population because only a small minority of low income homeowners itemized their deductions because the mortgage interest deduction was not likely to exceed the standard deduction); see generally William C. Handorf, Government Fiscal Policy and the Housing Market, 47 Real Estate Rev. J. 27 (2018) (describing the effect the Tax Cuts and Jobs Act will have on MIDs).

219. In addition to the mortgage interest deduction, owners can also deduct property tax payments, and can defer capital gains on home sales and need not count imputed income for rental value of the home in which they live. See Patric H. Hendershott & Michael White, The Rise and Fall of Housing’s Favored Investment Status, 11 J. Housing Res. 257, 257–61 (2000); Apgar, supra note 77, at 11–12; see also 26 U.S.C. § 121 (2017) (exclusion of gain from sale of principle residence); 26 U.S.C. § 164(a)(1) (2017) (state, local and foreign real property taxes are deductible); 26 U.S.C. § 280A(g)(2) (1999) (rental income generated from dwelling unit will not be included in gross income).

220. The Tax Cuts and Jobs Act of 2017 reduced the cap for the Mortgage Interest Deduction to $750,000 (from $1,000,000) for mortgage loans made after 2017 and increased the standard deduction. 26 U.S.C. § 163(h)(3)(F)(II-IV) (2018) (lowering the cap on the deduction to $750,000 for mortgages but not retroactive); 26 U.S.C. §
Meanwhile, increasing the standard deduction available to all taxpayers makes deduction benefits less relevant to a majority of households and reduces the disparate tax treatment among renters and owners.221

Many discussions of federal affordable housing policy omit entirely any discussion of the MID, reasoning that this tax benefit provides a cost subsidy to any (itemizing) homeowner, not just low-income households.222 But the MID is a federal expenditure that reduces the cost of housing for those who own homes (if they itemize their tax returns), and, at an annual estimated cost of between $70 and $100 billion, it represents the largest line item in the federal budget that subsidizes housing costs.223 In stark contrast to the limited supply of subsidies available to a mere quarter of low-income renters, the huge MID subsidy is available to all homeowners with mortgage loans, should they choose to itemize their tax returns.224 As with any tax deduction, the MID provides the largest benefits to households with the highest incomes, and because the amount of the deduction is higher for taxpayers with bigger mortgages, up to the applicable cap, it provides the most significant benefits to people with the most

63I(7)(A)(i-ii) (2017) (increasing the standard deduction). Increasing the standard deduction makes the mortgage interest deduction even less broadly applicable — a homeowner would have to have an outstanding mortgage principle of approximately $460,000 or more for itemization to equal a deduction higher than the standard one. See Handorf, supra note 218, at 3. The cap on the amount of mortgage interest that is deductible does somewhat mitigate the deduction’s benefits to the very highest income (and most expensive home-owning) taxpayers, though. See Dean Stansel & Anthony Randazzo, The Reason Found., Unmasking the Mortgage Interest Deduction: Who Benefits and By How Much? 9 (2011), https://reason.org/wp-content/uploads/files/mortgage_interest_deduction_2013_update.pdf [https://perma.cc/BA8A-Q6PF].

221. Several states offer renters a tax credit under state income tax. See Logan Allc, Here are the States that Give Renters a Tax Credit, RENT.COM (Feb. 27, 2019), https://www.rent.com/blog/states-with-a-renters-tax-credit/ [https://perma.cc/JP9T-9PH5].

222. See, e.g., Dennis J. Ventry, Jr., The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest, 73 L. & CONTEMP. PROBS. 233 (2010).

223. The Joint Committee on Taxation estimated that the cost of the mortgage interest tax deduction in 2016 would represent a $79.2 billion tax expenditure in 2016. STAFF OF THE JOINT COMM. ON TAXATION, 113TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017 33 (Comm. Print 2013).

expensive homes and biggest mortgage loans. More than four-fifths of the MID cost subsidy accrues to those in the top income quintile, and owners of expensive homes in expensive cities benefit more than owners of modestly priced homes in less inflated housing markets. Having the largest taxpayer-funded housing subsidy go almost exclusively to offset housing costs for the wealthiest homeowners is inequitable in the extreme. As Will Fischer and Barbara Sard explained in a policy brief for the Center on Budget and Policy Priorities, the federal government spends four times as much to offset housing costs for households with annual incomes above $200,000 as it does for households with incomes below $20,000.

Overall, about 60 percent of federal housing spending for which income data are available (counting both tax expenditures and program spending) benefits households with incomes above $100,000. The 7 million households with incomes of $200,000 or more receive a larger share of such spending than the more than 50 million households with incomes of $50,000 or less, even though lower-income families are far more likely to struggle to afford housing.

Housing cost subsidies to households that do not suffer a housing cost burden do nothing to increase housing affordability — they are simply publicly funded windfalls enriching the already rich.

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225. See, e.g., Hemel & Rozema, supra note 224, at 667–70. The benefit of the mortgage interest deduction increases as the size, price, and indebtedness of the home increases (up to the cap), suggesting that the main effect of the deduction is to raise home prices and mortgage amounts, results that run directly counter to housing affordability and stability goals. See Edward L. Glaeser & Jesse M. Shapiro, The Benefits of the Home Mortgage Interest Deduction, 17 TAX POL’Y & ECON. 37, 39 (2003) (“While the deduction appears to increase the amount spent on housing, it also appears to have almost no effect on the homeownership rate.”); see also Dennis J. Ventry Jr., The Fake Third Rail of Tax Reform, 135 TAX NOTES 181, 181–86 (2012) (analyzing why higher-income households capture a disproportionate share of the MID); Mann, supra note 217, at 1361 (“The home mortgage interest deduction thus constitutes an upside-down subsidy — the greater the need, the smaller the subsidy.”).

226. Fischer & Sard, supra note 6, at 1. “Most homeownership expenditures go to the top fifth of households by income. More than four-fifths of the value of the mortgage interest and property tax deductions goes to households with incomes of more than $100,000, and more than two-fifths goes to families with incomes above $200,000.” Id.

227. Id. at 2–3.

228. Id. at 1–2.

229. ADAM CARASSO ET AL., URB. INST., MAKING TAX INCENTIVES FOR HOMEOWNERSHIP MORE EQUITABLE AND EFFICIENT, app. at tbl.2 (2005) (showing how households in higher income percentiles are more likely to receive tax benefits than households in lower percentiles and will benefit less from these benefits); Alfred
There are, of course, federal housing cost subsidies that provide targeted benefits to lower-income households. Several federal (and some state) programs provide down payment assistance for first-time and lower-income homeowners. The FHA, the Department of Agriculture, and the Veterans Administration all have programs that provide down payment assistance, reducing acquisition costs for homebuyers, many of whom are low- or middle-income. The FHA also provides mortgage insurance to qualifying homebuyers, increasing access to and decreasing the cost of credit, thereby subsidizing homeownership costs. Although not always categorized as a subsidy, the federal government’s support and underwriting of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks similarly operates to reduce the cost of home mortgage borrowing and reduces acquisition costs for many homebuyers.

M. Clark III, Homelessness and the Crisis of Affordable Housing: The Abandonment of a Federal Affordable Housing Policy, 25 J. AFFORDABLE HOUSING 85, 101–02 (2016); J. B. McCombs, Refining the Itemized Deduction for Home Property Tax Payments, 44 VAND. L. REV. 317, 328–30 (1991). Furthermore, there is ample evidence that the mortgage interest deduction does nothing to improve the homeownership rate in the country. Gale et al., supra note 216, at 1171 (“Evidence suggests . . . that the mortgage interest deduction . . . does little if anything to encourage homeownership. Instead, it serves mainly to raise the price of housing and land and to encourage people who do buy homes to borrow more and to buy larger homes than they otherwise would.”).


232. Reiss, supra note 1, at 1090–91. Professor David Reiss questions the appropriate level of government down payment assistance, pointing out that homebuyers who do not contribute sufficient amounts of their own capital to purchase homes are more likely to eventually default on their mortgages and lose their homes, along with their subsidized housing benefits. Id. at 1079–81.

233. See Boyack, Equitably, supra note 31, at 126–30 (describing Fannie Mae and Freddie Mac, along with Federal Home Loan Banks and their various predecessor & associated entities, purchase mortgage loans made to qualifying homeowners on qualifying homes on the secondary mortgage market); Boyack, Fannie/Freddie, supra note 168, at 1495–1500. Secondary market purchases provide liquidity to home mortgage markets and reduce the cost of mortgage credit, making homebuying more accessible and borrowing cheaper. Id. When the system works as anticipated, this cost reduction is revenue neutral because Fannie Mae and Freddie Mac use private funds for their secondary market purchases, but the federal government expended significant money preserving and funding these secondary mortgage market participants when the mortgage market crashed in 2008. Id. at 1520–21.
Non-tax federal home mortgage subsidies have a problematic history. Until the Fair Housing Act of 1968, these subsidies were primarily — and sometimes exclusively — available to white homebuyers acquiring homes in racially segregated, white-only neighborhoods.\(^{234}\) The federal programs and policies subsidizing home mortgage borrowing with federal money and credit were instrumental in increasing the homeownership rate in the twentieth century and establishing an intergenerational pattern for wealth-building through homeownership.\(^{235}\) But the housing and wealth benefits distributed through these programs were provided predominantly to white households.\(^{236}\) Persistent gaps in homeownership and wealth between black and white households reflect the lasting impact of this disparate allocation of federal housing subsidies.\(^{237}\) Race-based underwriting criteria developed by

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\(^{236}\) See Brown, supra note 216, at 349; Rothstein, supra note 1, at 63–75, 177–93.

\(^{237}\) See Rothstein, supra note 1, at 177–93.
the federal government also established the geography of residential racial segregation that still exists today.238

The federal government has historically allocated a majority of its financial support for housing to benefit white, wealthy owners of expensive homes.239 Numerous politicians have justified supports for homeownership generally based on purported autonomy-promoting, citizenship-enhancing, and wealth-building benefits of homeownership,240 but any such benefits have been distributed unevenly.241 Furthermore, despite decades of government spending that ostensibly promoted homeownership and subsidized housing costs for owner households, the homeownership rate today has decreased to 64%, the same level it was in the early 1990s.242 It is well below the rate in several other developed countries that do not subsidize home buying.243 At the same time, U.S. median home prices in 2019 are higher than they have ever been, and homeownership is therefore even more financially out of reach for an ever-increasing segment of the population.244

The majority of federal housing expenditures benefit homeowners rather than renters, but the federal government does spend a substantial amount of money each year subsidizing low-income rental housing costs. This is often done through Section 8 voucher

238. Id.

239. A. Mechele Dickerson, Public Interest, Public Choice, and the Cult of Homeownership, 2 U.C. IRVINE L. REV. 843, 858 (2012); Rothstein, supra note 1, at 63–75.

240. See Glaeser & Shapiro, supra note 225, at 38.


242. STATE OF HOUSING 2018, supra note 16, at 3 (stating that the national homeownership rate has recently increased to 63.9%).


244. STATE OF HOUSING 2018, supra note 16, at 1–2.
Housing vouchers obligate the government to pay the difference between the rental amount that would be affordable to a given renter, based on that renter’s income, and the lesser of the actual rent charged and a reasonable market rent for the unit in question. There are several different types of housing voucher programs, the two most significant being project-based vouchers (PBVs) and housing choice vouchers (HCVs), both authorized under Section 8. There are currently 1.2 million project-based subsidy units and more than 2 million HCVs, but HUD has never provided sufficient subsidies to fund the affordability gap for all, or even a majority, of low-income households with cost burdens. Because federal funding for vouchers decreased (or at least insufficiently increased) as the intensity of cost-burdens increased among an ever-growing number of renters, the percentage of low-income households receiving federal subsidies has declined over the past 20 years. In 2000, HUD provided housing assistance to about a third of needy low-income renter households; today, HUD only has funding to assist one fourth. Because demand for vouchers exceeds supply, the local PHAs who distribute the vouchers must determine who among the


246. See CTR. ON BUDGET & POLICY PRIORITIES, supra note 245.

247. See generally Section 8 Rental Certificate Program, supra note 245.


250. The population of low-income renter households increased by 29% from 2001 to 2015 (from 14.9 million to 19.2 million), but during that period the number of very low-income households receiving rental assistance rose only 14%, from 4.2 million to 4.8 million, causing the share of very low-income households receiving assistance to decline from 28% to 25%. RENTAL HOUSING 2017, supra note 19, at 32; see also STATE OF HOUSING 2018, supra note 16, at 5.
needy renters receive assistance and who does not.\textsuperscript{251} There are various allocation schemes that PHAs use to distribute vouchers, usually preferring certain categories of renters (often veterans or recently homeless households), and then allocating remaining vouchers (if any) either on a first-in-time basis or even by lottery.\textsuperscript{252} Waitlists for available vouchers can be long and wait times can exceed two years.\textsuperscript{253}

PBVs attach to a specific unit and are not portable, whereas tenant recipients of HCVs can move and take their vouchers with them.\textsuperscript{254} Because PBVs apply to designated units, they could be deliberately sited in higher opportunity areas, but most of them are not and, instead, are located in low-income neighborhoods.\textsuperscript{255} PBVs are therefore subject to the same sorts of criticisms that apply to public housing and grant- and tax-subsidized low-income units located in poor quality neighborhoods. HCVs are more numerous than PBVs and avoid some of the siting problems that PBVs face because they can be used anywhere a tenant finds housing as long as the landlord agrees to accept the vouchers.\textsuperscript{256} But that is the rub. In most states, landlords are free to refuse payment of rent in the form of HCVs.\textsuperscript{257}

\begin{footnotes}
\footnote{251. \textit{Hous. Comm’n Bipartisan Policy Ctr., Housing America’s Future: New Directions for National Policy} 11 (2013); \textit{NLIHC Out of Reach} 2018, supra note 23, at 3.}
\footnote{252. \textit{U.S. Interagency Council on Homelessness, PHA Guidebook to Ending Homelessness} 8 (2013).}
\footnote{255. Note that location itself may be far less objectionable than neighborhood upkeep, amenities, and safety, and inner-city neighborhoods are likely better conceived of as insufficiently supported economically than somehow inherently “deficient” and “places of despair.” Lisa T. Alexander, \textit{Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law}, 63 HASTINGS L.J. 803, 805-07 (2012).}
\footnote{256. Brown, \textit{supra} note 158, at 699.}
\footnote{257. Federal law does not require that landlords accept Section 8 vouchers towards rent, but state law in 13 states and local law in several municipalities specifically prohibits landlords from discriminating against voucher holders. \textit{Housing Choice}...
Landlords are virtually guaranteed payment from the government for the amount represented by an HCV but sometimes refuse to accept vouchers, perhaps because of conscious or unconscious discrimination, based on source of income, socio-economic class, or other factors. A small handful of states have outlawed source-of-income-based discrimination in rental housing, and Congress periodically proposes expanding the Fair Housing Act protections to cover people who are denied housing because they pay with a voucher. Unless and until such protections apply, however, landlords can and do refuse to rent to low-income renters with vouchers, and this significantly impairs the utility of the HCVs.

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259. As of January 2019, the following states have laws prohibiting discrimination against housing voucher holders: Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, Washington, Wisconsin, and the District of Columbia. POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM 6–29 (2019), https://prrac.org/pdf/AppendixB.pdf. There are source of income discrimination prohibitions in California, Delaware, and Wisconsin as well, but these do not apply to voucher holders. Id. at 6, 10–11, 28–29. In addition, over 80 local municipalities have regulations prohibiting source of income discrimination in rental housing. See id. at 30–128.

260. For example, the proposed “American Housing and Economic Mobility Act” expands the Fair Housing Act along several metrics, including banning source of income discrimination. For a discussion of how and why the Act should be expanded to cover voucher-based discrimination, see Tamica H. Daniel, Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act, 98 GEO. L.J. 769, 772 (2010).

261. See generally J. Rosie Tighe et al., Source of Discrimination and Fair Housing Policy, 32 J. PLAN. LITERATURE 3 (2016) (discussing and providing evidence for this type of discrimination). There is “rampant discrimination from private landlords”
addition, even if landlords agree to take vouchers, tenants are financially precluded from renting in areas where housing units rent at higher-than-median levels since the voucher will not cover rental amounts in excess of “reasonable” market rents (median rents in the region).262 These limitations likely contribute to the fact that only 8% of voucher recipients live in neighborhoods where fewer than 10% of residents are poor.263 Furthermore, because HUD oversight of subsidized housing units is sometimes spotty, thousands of voucher recipients live in uninhabitable homes.264

III. OPTIMIZING THE FEDERAL GOVERNMENT’S ROLE

The government’s job of ensuring that the nation’s housing is sufficiently affordable is made up of at least three components: (1) designing and implementing programs to improve housing markets; (2) funding necessary housing programs and housing cost subsidies for households with remaining needs; and (3) providing and enforcing laws that guarantee adequate housing rights (for households) and impose sufficient housing obligations on state and local governments and instrumentalities that lead to long-term improvements in housing equity. The debate regarding the appropriate role for the federal government in affordable housing sometimes erroneously conflates these components. Congress has embraced affordable housing devolution conceptually, but seems to see it as a way of avoiding ultimate responsibility.265 Affordable housing devolution will only
succeed, however, if Congress remains responsible for setting standards and providing adequate funds. Local and regional decision makers are likely better at understanding and addressing the affordable housing needs of specific geographic areas, and they should be empowered and encouraged in their efforts. After all, housing markets are inherently local, significantly shaped by state and local markets and laws. However, federal leadership in setting and enforcing standards of fairness is needed to ensure equitable treatment for vulnerable populations throughout the country and to avoid the negative external impacts that local affordability crises create. Furthermore, the federal government is the only level of government that can provide sufficient funding to sustainably decrease housing inequity. Pragmatic necessity justifies federal financial and legal responsibility for solving the housing crisis, and the history of federal housing policy provides the compelling moral imperative for the federal government’s continuing accountability in fair and affordable housing.

Part III.A first explains how the federal government would have sufficient revenues to fully fund housing needs if allocations and priorities within housing policy were changed. Part III.B then articulates the pragmatic, economic, and moral justifications for reallocating policy priorities and government resources.

A. Full Funding for Housing Affordability Programs

The federal government has the financial capacity to meaningfully invest in affordable housing creation. Like Dorothy in the Wizard of Oz, the government has “always had the power” to fulfill this quest, if only it recognizes how to use it. The federal government could very quickly at least double or triple its investment in affordable housing solutions merely by reallocating resources from one category of housing expenditures, namely, those benefiting wealthy homeowners that do not improve housing affordability, to expenditures that do address housing cost burdens. Federal
housing policy today provides benefits to people who do not financially need them. The impact of reallocating those benefits to those who do, in fact, struggle to pay for housing could be designed as essentially budget-neutral, although the wealthiest homeowners would pay a slightly higher tax without the MID, freeing up tax revenues to be used in subsidizing very low income households and investing in housing and neighborhood infrastructure. In addition to recapturing unjustifiable tax benefits currently subsidizing wealthy homeowners, Congress should adopt and encourage local governments to adopt measures to reduce administrative costs and, through more effective delegation of program management to PHAs, minimize multi-layered bureaucratic waste.

The growing magnitude of need among low-income renters provides both a moral and economic imperative for reallocation of federal funding from homeowner subsidies toward the creation of affordable rentals and adequately subsidizing the housing affordability gap for the nation’s neediest households. Current subsidies unjustifiably provide economic benefits disproportionately to median and above-median income homeowners while the vast majority of low-income rental households receive no federal housing tested housing programs, like vouchers, and LIHTC expenditures make up another $6 billion, comparing that total of $46 billion spent on affordable rentals to the “roughly $195 billion” of homeowner subsidies created by the mortgage interest deduction alone).

268. “Most of the government’s spending on housing, or roughly $195 billion of an estimated $270 billion, goes toward subsidizing homeowners through the tax code.” Id. at 61. See also Jenny Schuetz, Under US Housing Policies, Homeowners Mostly Win, While Renters Mostly Lose, BROOKINGS INST. (July 10, 2018), https://www.brookings.edu/research/under-us-housing-policies-homeowners-mostly-win-while-renters-mostly-lose/ [https://perma.cc/NWL4-AX6L].

269. In 2015, for example, the government spent $190 billion to assist in homebuying and renting, and about three-fourths of that amount subsidized homeownership costs for high-income households. See Fischer & Sard, supra note 6. Also, “[i]less than 30 percent of federal housing spending in 2015 went to renters . . . . Owners received more than 70 percent of federal housing subsidies, despite making up less than two-thirds of all households and just 40 percent of those with severe housing cost burdens.” See id.; see also Bruce Katz, BROOKINGS INST., CUT TO INVEST: REFORM THE MORTGAGE INTEREST DEDUCTION TO INVEST IN INNOVATION AND ADVANCED INDUSTRIES 4–5 (2012), brookings.edu/wp-content/uploads/2016/06/06-mortgage-interest-deduction.pdf [https://perma.cc/C3AW-YLJ7].

assistance at all. Homeowner subsidies are provided without any dignitary costs, while renter subsidies, when provided, come with stigma, autonomy constraints, and possibly with onerous behavioral mandates. Homeowner housing costs subsidies are fairly invisible (delivered mostly through tax benefits and mortgage subsidies) and impose no autonomy limitations or behavioral requirements, for example limiting where recipients may live or requiring them to work a certain number of hours. Rental housing assistance, on the other hand, is more visible and carries a stigma. Subsidies delivered via vouchers or placement in designated homes also practically limit choice concerning the neighborhood in which to live and, sometimes, the quality of one’s home. Because the majority of rental assistance recipients end up living in poor quality neighborhoods, their opportunities for future improvements to income and quality of life for generations to come are severely curtailed. In many cases, rental housing assistance does little to improve long-term prospects and diminish long-term need. Such allocations treat some of the symptoms of unaffordable housing, but they insufficiently address its underlying causes.

271. See supra notes 245–49 and accompanying text.


273. See supra notes 212–25 and accompanying text.


275. See generally supra notes 255–63 and accompanying text.


277. See generally Boyack, supra note 10.
Congress should immediately re-allocate funding first toward alleviating the symptoms for those three million very low-income and extremely low-income households with HUD-identified worst-case housing needs — those households that allocate more than 50% of their income to housing or live in substandard conditions or both.\(^\text{278}\)

Once the worst case needs are met, Congress should channel funding toward creating long-term solutions to the lack of affordable housing supply in higher opportunity neighborhoods, with the expectation that investing in sufficient affordable housing in quality neighborhoods for all low-income households will decrease the percentage and number of households requiring rental subsidies in the future. The federal government should also address the needs of the nation’s 7.5 million severely cost-burdened homeowners, many of whom suffered wealth and housing affordability losses due to predatory lending schemes and the fallout from the Financial Crisis.\(^\text{279}\)

Funding of housing need through national channels avoids the problem that plagues all local funding regimes: the places with the greatest need for government assistance produce the smallest amount of tax revenue.\(^\text{280}\) Congressional allocations based on local needs rather than local means smooth out the difference between localities with fewer financial resources and those with more robust ability to self-fund, creating a more equitable distribution of aid. Distressed municipalities can use federal funding to build neighborhood infrastructure, investing in improvements that, once again, will pay

\(^{278}\) See WORST CASE HOUSING NEEDS 2017, supra note 21, at 2.


\(^{280}\) This is one reason that poor neighborhoods, and particularly neighborhoods with the lowest-cost housing, are also neighborhoods with the relatively weakest public schools. See INGRID GOULD ELLEN & KEREN HORN, POVERTY & RACE RES. ACTION COUNCIL, NYU FURMAN CTR. & UNIV. OF MASS. BOSTON, HOUSING AND EDUCATIONAL OPPORTUNITY: CHARACTERISTICS OF LOCAL SCHOOLS NEAR FAMILIES WITH FEDERAL HOUSING ASSISTANCE 1 (2018), https://furmancenter.org/files/HousingLocationSchools2018.pdf [https://perma.cc/X88F-4KUV].
long-term dividends in terms of greater resident opportunities, wealth, and municipal resources.281

B. Pragmatic, Economic, and Moral Justifications for Federal Responsibility

Pragmatics, economics, and history all warrant a significant federal government role in improving the equities of housing markets. Federal law limitations on state and local housing laws are essential because local laws can be and are used to impose unjustifiable costs on vulnerable, low-income populations.282 The most cost-effective way to make lasting improvements in housing affordability is through limiting the efficacy of exclusionary land use regulations, prohibiting source-of-income discrimination by landlords, and ensuring adequately habitable premises in low-income housing units. Exclusionary zoning’s constitutionality should be rethought and limited to separation of harmful and incompatible uses only; local land use laws should not be permitted to restrict the residential integration of disparate economic classes.283 To date, states have found it difficult to rein in local governments from using their land use regulations to directly or indirectly exclude low-income households from their communities, with the notable exception of New Jersey, where a series of lengthy and hard-fought legal challenges has given birth to the Mount Laurel doctrine that requires each locality to include its “fair share” of affordable housing.284


renewal of traditional, constitutional protections of private property rights at the federal court level, however, could push back against local laws creating neighborhood exclusions and allow market forces to naturally grow affordable housing supply. Local, regional exclusions can be combated through both federal mandates and assisted regional coordination for housing markets that cross jurisdictional boundaries. Regional coordination is imperative in interconnected housing markets because exclusions in one area impose cost externalities on other communities in the region. Treating multi-jurisdictional housing markets as a whole will better address neighborhood quality concerns, residential desegregation, and regional affordability. It will also enable coordination for

Mount Laurel doctrine, articulated by the New Jersey Supreme Court in the 1975 case of the same name, stated that all municipalities in the state have an “affirmative obligation” to meet their “fair share” of affordable rental housing in order to meet regional needs. Mount Laurel II, 456 A.2d at 420. The Mount Laurel doctrine has been foundational for fair-housing and affordable-housing advocates to push for inclusive siting of low-income and moderate-income housing developments, and the case and its doctrine have been frequently cited in litigation around the country. For more details on the Mount Laurel case, its circumstances, impacts, and the continuing struggle to apply the associated legal doctrine, see generally DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (2013).


287. Brachman, supra note 286, at 277.
infrastructure projects, such as public transit, that should rationally be considered at the regional level.288

In a similar vein, federal Fair Housing law should be expanded to prohibit housing discrimination based on a tenant’s (or home purchaser’s) source of income, for example, using vouchers to pay rent.289 Eliminating legal source-of-income housing discrimination would increase the quantity and quality of homes available to housing aid recipients, making the federal rental subsidies more effective and more likely to achieve long-lasting improvements for the recipients. Federal law could also be expanded to create a minimum level of property rights protections for tenants, either through an expanded judicial interpretation of constitutional property and civil rights or through affirmative legislation. At a minimum, tenants across the country should be guaranteed the right to withhold rent for uninhabitable premises,290 be protected from retaliatory eviction and

288. Id.

289. See supra notes 248–54 and accompanying text. Although several states have passed legislation protecting against source of income discrimination, and although expanding FHA to cover source of income discrimination has been proposed, Congress has not yet acted to protect voucher recipients’ ability to obtain housing. One reason that proposals to expand FHA protections have not passed, however, has been that the issue of source of income discrimination has been bundled with other classifications that are more politically controversial. For example, current legislative proposals involve expanding FHA protections to discriminatory housing actions based on sexual preference and gender identity as well as those based on source of income. See, e.g., Affordable Housing Crisis Act of 2018, S. 3231, 115th Cong. (2018); American Housing and Economic Mobility Act of 2019, S. 787/H.R. 1737, 116th Cong. (2019). Although such expansions may very well be warranted, political expediency argues that source of income discrimination should be separately considered by Congress to increase the likelihood of the measure actually being passed.

290. The implied warranty of habitability is part of state landlord-tenant law, but there are significant differences from state-to-state. See generally Memorandum from Alice Noble-Allgire to the Uniform Residential Landlord Tenant Act Drafting Comm. (Feb. 2, 2012), https://www.nhlp.org/wp-content/uploads/Research-Memo-re-50-State-Survey-of-the-Warranty-of-Habitability.pdf [https://perma.cc/QQ3V-2RFD]. Although about half of the states have adopted the Universal Residential Landlord Tenant Act, even in those states, the law pertaining to the implied warranty of habitability in residential leases is not uniform. Id. at 14. In some jurisdictions, tenants have an absolute right to withhold rent while residing in premises that the tenant considers uninhabitable; in other places, a tenant can sue for a rent reduction but must continue to pay rent (at least into an escrow account) pending court determination of inhabitability. Id. at 16–17. There may be utility in harmonizing such laws or at the very least creating a federal floor for fair treatment of tenants. Several scholars have suggested legal changes that could help the implied warranty of habitability better achieve its tenant protection purposes. See, e.g., Melissa T. Lonegrass, Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective, 85 TUL. L. REV. 413, 415 (2010) (suggesting a judicial
and be ensured the right to counsel in eviction proceedings. Federal law could create, and federal courts could ensure, a residential tenants’ bill of rights. Federal funding provided to local governments and agencies provides another method for incentivizing equitable and appropriate local housing policies and programs. HUD already exercises control over the PHAs and imposes federal policy mandates by attaching conditions to the receipt of federal housing funds. The strings attached to federal funding need to follow a well thought-out, consistent plan for long-term systemic improvements and not change haphazardly to reflect the political concern du jour. For example, if new low-income housing should be built in high opportunity

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291. See Desmond, Unaffordable, supra note 11, at 4–5; Franzese, supra note 103, at 675–76.


neighborhoods, this mandate needs to be clear and consistent. Funds can also be earmarked for specific purposes to achieve public policy goals. For example, the federal government can require that state and local governments provide emergency shelter for otherwise homeless households. Ideally, consistency in funding allocation requirements could be ensured by legislation clarifying HUD’s mission and priorities.

HUD should map out specific steps that localities must take to help dismantle the effects of generations of housing segregation rather than affirmatively requiring PHAs to prove, essentially, that their planned use of funds will not make racial segregation worse. It is imperative that the federal government not only recommit to requiring that local programs “affirmatively further fair housing,” but also map out how to achieve FHA’s residential racial integration mandate. Persistently segregated housing patterns create a host of costly social problems, so de-segregation will help decrease housing assistance needs in the long run.295 Housing segregation increases racial tensions and violence,296 concentrates poverty,297 enables a “secession of the successful,”298 and leads to disinvestment in neighborhood services for essential public goods, such as parks, libraries, and even schools.299 Desegregation can be encouraged through strategic siting of housing options for lower-income households,300 increasing access for minority households to higher opportunity neighborhoods, and subsidizing mortgage capital in a way designed to make up for decades of discriminatory credit allocation.301

295. See generally supra notes 1, 234–44 and accompanying text.
298. Sheryll D. Cashin, Privatized Communities and the “Secession of the Successful”: Democracy and Fairness Beyond the Gate, 28 FORDHAM URB. L.J. 1675, 1679–83 (2001).
299. ELLEN & HORN, supra note 10, at 1; Boyack, Detroit, supra note 108, at 604; Kalenberg, supra note 276.
300. See generally Boyack, Revitalizing, supra note 107.
301. The homeownership rate among black households is not only significantly lower than that of white households, black households are the “one group that has made no appreciable progress” when it comes to homeownership. STATE OF HOUSING 2018, supra note 16, at 3. The homeownership rate should not be an end in itself, since unsustainable homeownership has created a net decline in the wealth and housing stability for many black households. See Reiss, supra note 1, at 1091.
There is an economic cost to allowing unaffordable local housing markets to persist. Local unaffordable housing creates both negative externalities in the region and artificially represses regional economic growth.\textsuperscript{302} Housing unaffordability imposes adverse social effects and economic costs, locally, regionally, and nationally. For one thing, high housing costs has lead to an increased need for various forms of state and federal welfare assistance.\textsuperscript{303} Housing instability decreases income, decreasing federal and state tax revenues, and increasing the burden on federal and state social services.\textsuperscript{304} When housing unaffordability leads to homelessness, the costs are very extreme.\textsuperscript{305} In 2015 alone, the federal government spent $4.5 billion to address homelessness.\textsuperscript{306} In addition, housing cost-burdens drive down economic growth by discouraging people from locating in the most productive, but most expensive, areas of the country.\textsuperscript{307} Local decision-makers should not be permitted to impose such negative economic impacts on the country as a whole.

\textsuperscript{302} See Daniel Shoag, The Hamilton Project, Removing Barriers to Accessing High-Productivity Places 8 (2019), https://www.hamiltonproject.org/assets/files/Shoag_PP_web_20190128.pdf [https://perma.cc/P9CK-YVLK] (explaining that local and national economies are adversely affected by barriers to entry into vibrant labor markets that expensive housing creates); see also Been, Supply Skepticism, supra note 158, at 10–12.


\textsuperscript{304} Id.

\textsuperscript{305} See Nat’l All. to End Homelessness, The State of Homelessness in America 36 (2015), http://endhomelessness.org/wp-content/uploads/2015/04/2015-state-of-homelessness.pdf [https://perma.cc/85SE-6EBW] [hereinafter STATE OF HOMELESSNESS]. Unaffordable housing is a huge factor contributing to homelessness, and homelessness itself is costly. See Julien P. Doucette-Préville, The Challenge of Homelessness to Spatial Practices, 8 Ont. Int’l Dev. Agency J. Sustainable Dev. 111, 114–15 (2015) (discussing urban redevelopment plans addressing homeless populations); Stefan G. Kertesz et al., Permanent Supportive Housing for Homeless People — Reframing the Debate, 375 New Eng. J. Med. 2115, 2115–16 (2016) (explaining that even if a purely economic analysis would not justify a Housing First approach, a broader conception of the costs of chronic homelessness would). More than half a million people are homeless on any given night in the United States, and more than half of them are located in the country’s highest cost metropolitan areas. STATE OF HOUSING 2018, supra note 16, at 34. Although recent improvements in shelter programs for homeless individuals and families, such as the “housing first” model, have provided important supports for homeless persons, housing affordability remains an underlying issue in many cases, contributing to instability and intermittent homelessness. Id.; see generally Desmond & Gershensen, supra note 19.

\textsuperscript{306} See STATE OF HOMELESSNESS, supra note 305, at 4.

\textsuperscript{307} See Glaeser & Gyourko, supra note 14, at 17–19.
Federal housing policy of decades past provides a final justification for decisive financial and legal actions by the federal government to improve housing inequity. Historically, federal housing policy cemented a geography of racial residential segregation throughout the country. Federal housing policy destroyed cohesive communities of color by enabling “slum clearance” efforts that ultimately decreased social supports and diminished opportunities for advancement among poor and minority urban residents. Federal housing policy helped concentrate poverty into environmentally hostile and neglected neighborhoods. It spurred environmentally problematic suburban sprawl and disinvestment in America’s cities. Along with tax policy, it operated to transfer billions of dollars of wealth from low-income households to reward homeownership among the nation’s most wealthy. It also incentivized irresponsible mortgage lending that destabilized the financial and housing systems of the country (and the world) and destroyed household wealth and housing stability throughout the nation, particularly for households of color and low-income renters and owners alike. After creating such widespread, persistent harms for the country’s most impoverished and vulnerable households, the federal government cannot in good faith now disclaim responsibility for improving housing quality and affordability for the adversely impacted groups.

Adequate financial investment in affordable housing creation and neighborhood improvement is critical for the health and future of the

308. See generally Rothstein, supra note 1.
310. Rothstein, supra note 1, at 177–93.
311. See Jackson, supra note 1, 190–94 (exploring the government’s complicity in and the social costs of the phenomenon of suburbanization).
312. Michelle D. Layser, How Federal Tax Law Rewards Housing Segregation, 93 IND. L.J. 915, 962 (2018); see also Donald A. Krueckenberg, The Grapes of Rent: A History of Renting in a Country of Owners, 10 HOUSING POL’Y DEBATE 9, 9–10 (1999) (explaining the “ideology of property” and how federal preferences for homeownership reflect this); APGAR, supra note 77, at 5 (criticizing the government’s subsidization of homeownership and cataloguing the harms mis-incentives to purchase real property have created).
313. See generally Carr et al., supra note 279; see also Abbye Atkinson, Modifying Mortgage Discrimination in Consumer Bankruptcy, 57 ARIZ. L. REV. 1041, 1064 (2015) (cataloguing the disparate wealth destruction caused by the Financial Crisis); Shelby D. Green, Testing Fannie Mae’s and Freddie Mac’s Post-Crisis Self-Preservation Policies Under the Fair Housing Act, 66 CLEV. ST. L. REV. 477, 517–18 (2018) (explaining how government policy choices before, during, and after the 2008 crisis created negative impacts that “were felt disproportionately by minority borrowers”).
United States. It also is the only way for the federal government to start making amends for federal policy’s historic negative impacts on low-income households and communities of color. Setting appropriate legal standards to protect less economically and politically advantaged citizens (low-income households and tenants) is wise policy. Devolution to local experts regarding specific programmatic design and implementation makes sense, but the federal government remains financially and morally responsible for ensuring the success of these efforts.

IV. FEDERAL HOUSING POLICY RISK MANAGEMENT

Even though the federal government can and should play an essential funding, coordinating, and justice-promoting role in developing affordable housing throughout the country, reliance on federal solutions is risky — particularly in today’s polarized political environment.314 Despite federal government dysfunction315 there have recently been some small hopeful steps in the realm of federal housing policy. First, the previously untouchable MID was slightly modified by prospectively (and temporarily) lowering its cap.316 Second, Congress slightly increased funding for affordable housing under the past few budgets, including finally allocating funds to the


316. See supra notes 222–32 and accompanying text.
Housing Trust Fund.\textsuperscript{317} In addition, community development innovations, such as the provisions in the Tax Cuts and Jobs Act of 2017 for local development of “Opportunity Zones,” may indicate an increased willingness to invest in housing and neighborhood infrastructure.\textsuperscript{318} But recent federal actions and inactions have also created sizable problems and concerns for affordable housing policy and funding now and in the future. Taking the same general approach as in previous years of his administration, President Trump has proposed a budget for fiscal year 2020 that cuts funding for HUD by $9.6 billion (an 18% reduction of its budget), eliminates funding for the Housing Trust Fund and public housing capital repairs, and significantly reduces funding for the Housing Choice Voucher program through raising tenant payment responsibilities.\textsuperscript{319} The House Appropriations Subcommittee’s proposed 2020 budget, on the other hand, renews or increases funding for all rental housing assistance programs, supportive housing programs, and programs addressing homelessness.\textsuperscript{320} Another worrisome development is HUD’s refusal to implement the Affirmatively Furthering Fair Housing (AFFH) Rule it created in 2015 to further the purposes of the Fair Housing Act. Instead of taking steps to address increasing residential segregation, HUD Secretary Carson announced that HUD will “reinterpret” the AFFH Rule, presumably to undercut the need

\textsuperscript{317} See generally supra notes 177–81 and accompanying text; Senate Committee Approves Robust Funding for Affordable Housing in FY 19, NAT’L LOW INCOME HOUSING COALITION (June 11, 2018), https://nlihc.org/resource/senate-committee-approves-robust-funding-affordable-housing-fy19-0 [https://perma.cc/BCM8-ALGK].


\textsuperscript{319} NLIHC, Trump 2020 Budget, supra note 265.

for any affirmative integration efforts. There are other worrisome housing developments too. For example, HUD proposed a new rule, implementing a Trump executive order, that creates unrealistically onerous work requirements for low-income housing subsidy recipients, the overwhelming majority of whom either are already working full time or cannot work due to a disability or need to care for a family member.

Politicized agency actions and dysfunction in the federal government threaten not only its ability to make new laws and funding allocations, but also the ability of the government to operate in the ordinary course. Disagreements regarding appropriations led to the longest federal government shutdown in history from December 22, 2018, to January 25, 2019. The shutdown negatively impacted federal employees and contractors whose salaries were deferred or reduced by inhibiting their ability to meet housing costs and other expenses. The shutdown also interrupted HUD

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322. Kristen Capps, Why HUD Wants to Raise the Rent, CITYLAB (Apr. 25, 2018), https://www.citylab.com/equity/2018/04/hud-ben-carson-work-requirements-rent-hikes/558920/. The proposed work requirement is unrealistic and will be ineffective because (a) the vast majority of extremely low-income renters already work in low-wage jobs; (b) many low-income aid recipients are unable to work because of age (26% are seniors) and/or disability (22% are disabled); and (c) the overwhelming majority of non-elderly/disabled housing aid recipients who are not already working full time are either full-time students or single-adult caregivers to young children or a household member with a disability. NLIHC 2019 GAP REPORT, supra note 36, at 9; see also NLIHC, Trump 2020 Budget, supra note 265.

323. This 35-day shutdown of the federal government arose from appropriations disagreement with respect to funding a border wall. Zaveri et al., supra note 314.

operations and reduced the efficacy of affordable housing programs.325 For example, the critical repairs and upkeep for public housing units that had been planned for December and January had to be deferred,326 and over 1000 project-based rental assistance contracts expired during the shutdown, leaving over 40,000 extremely low-income households with no housing assistance.327 Funding


reductions and delays in project-based developments impacted the provision of associated supportive services such as assistance for disabled individuals and seniors who cannot live independently. The shutdown also put financial pressure on the private landlords and other organizations that serve as key partners for federal housing programs. Diane Yentel, director of the National Low Income Housing Coalition, condemned the shutdown, stated that it was “incredibly reckless to risk the homes of some of our country’s poorest seniors, people with disabilities, and families with children as perceived leverage for a fight that has nothing to do with them.”

Today’s highly politicized federal government sector may suggest that, even though the federal government should, in theory, take


328. CHCDF Letter, supra note 324.

329. The effects of a shutdown outlast the weeks during which HUD and other government agencies are shuttered. Lengthy shutdowns create market uncertainty, raising transaction costs and increasing the hesitancy of various partners regarding working with the government in the future. The very real economic costs of unpredictability are particularly keen in contexts like affordable housing where there is extensive partnering of public and private entities and dependence on certifications, funding, and management from federal government actors. See, e.g., Thrush, supra note 326. Our increasingly privatized low-income housing system is dependent upon cooperation and participation of private landlords, and “the experience [of the protracted shutdown] could make private landlords less likely to take part in federal housing programs.” Audrey McGlinchy, As Shutdown Drags On, Low-Income Housing Providers in Austin Worry Funding for Rent Could Run Out, TEXAS STANDARD (Jan. 15, 2019), https://www.texasstandard.org/stories/as-shutdown-drags-on-low-income-housing-providers-in-austin-worry-funding-for-rent-could-run-out/ [https://perma.cc/BQ9R-5UA2].

responsibility for providing adequate financial, legal, and policy support for affordable housing, actually relying on federal agencies to fulfill this responsibility is unwise. If a particular administration is hostile to Congressional affordable housing goals, it can effectively undercut the achievement of those goals by staffing (or understaffing) decisions regarding government agencies. Considering the willingness of certain segments of the federal government to use housing programs as pawns in a political power play suggests that trusting the federal government to simply do the right thing may be hopelessly naïve.

There are some ways to mitigate the risk of reliance on the federal government to consistently and correctly do its job, but these require bold steps by Congress in passing targeted legislation that would narrow the scope of federal agency discretion and mandate specific outcomes and funding adequacy for affordable housing. Specifically, some of the affordable housing mandates that Congress should consider include:

- Shoring up property rights protections in order to rein in local land use regimes that unjustifiably restrict the supply and location of affordable housing and otherwise constrain market efficiencies, impose economic harms, and effectively re-entrench patterns of residential segregation.
- Guaranteeing particular legal protections for tenants individually and low-income households as a group.
- Expanding the Fair Housing Act to include source-of-income discrimination.

331. For a fascinating look at the role of agency rulemaking and inaction in the context of separation of powers and the blurry line between “law” and “not-law” actions by the government, see David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267, 293 (2015).

332. Professor Steven Eagle, for example, doubts that the federal government can or will take steps to improve affordable housing. See generally Steven J. Eagle, “Affordable Housing” as Metaphor, 44 FORDHAM URB. L.J. 301 (2017).

333. See generally SHOAG, supra note 302; see also supra notes 283–88 and accompanying text.

334. For example, shoring up state protections of premises habitability. See supra notes 96–106, 290–93 and accompanying text. Another critically important tenant protection that could be ensured is a right to legal counsel in evictions. The presence or absence of an attorney in an eviction proceeding significantly affects the outcome, and more than 90% of tenants lack legal counsel in that context. See Desmond, *Unaffordable* supra note 11, at 5.
• Requiring greater accountability in the use of HUD funds to further Fair Housing purposes.\textsuperscript{336}

• Repealing the MID while legally mandating that all increased revenues from its elimination be allocated to fund affordable housing initiatives.\textsuperscript{337}

• Expanding supply-producing initiatives, such as the LIHTC program, to address affordable supply deficits\textsuperscript{338} and the expiring affordability periods of existing low-income housing,\textsuperscript{339} specifying that the majority of new affordable housing units be created in higher quality neighborhoods.\textsuperscript{340}

• Mandating sufficient funding to cover the affordability gap, at least with respect to all very low-income families.\textsuperscript{341}

• Guaranteeing publicly provided shelter programs for the most vulnerable populations (extremely low- and no-income households that are homeless, disabled, or elderly).\textsuperscript{342}

Congress could also invest in long-term improvements to housing equity through a variety of initiatives that combat past discrimination

\textsuperscript{335} See supra notes 257–62, 289 and accompanying text (discussing the importance of and lack of protection against source-of-income discrimination by private landlords in a majority of states).

\textsuperscript{336} This would effectively mandate the substance of HUD’s 2015 AFFH Rule. See supra note 321 and accompanying text. Currently, the AFFH Rule is vulnerable to agency “reinterpretation” and implementation discretion. See id.

\textsuperscript{337} See supra notes 219–29 and accompanying text (discussing the cost and impact of the mortgage interest deduction).

\textsuperscript{338} See supra Section II.C (discussing the need and efficacy of supply-side supports for affordable housing rehabilitation and production).

\textsuperscript{339} See supra notes 199–203, 211 and accompanying text (discussing the problem of expiring affordability periods).

\textsuperscript{340} See supra notes 204–05, 214–15 and accompanying text (discussing the importance of siting in the context of affordable housing, particularly for improving long-term outcomes of persons residing in affordable housing units).

\textsuperscript{341} See supra notes 249–53 and accompanying text (discussing the inadequacy of cost subsidies for the nation’s most impoverished households). See generally WORST CASE HOUSING NEEDS 2017, supra note 21. See also supra Section I.C (discussing shared characteristics and challenges of lowest income households and barriers to improvements income).

\textsuperscript{342} See supra notes 37, 155, 178, 307–08 and accompanying text; see also LAUENA STATEN, SEATTLE UNIV. SCH. OF LAW, HOMELESS RIGHTS ADVOCACY PROJECT, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT 11–28 (2019); Stefan G. Kertesz et al., Permanent Supportive Housing for Homeless People — Reframing the Debate, 375 NEW ENG. J. MED. 2115, 2115–16 (2016). Note that “the number of worst case [housing] needs has increased by 40.6 percent since 2007, when the recession began, and by 65.6 percent (3.29 million households) since 2001.” WORST CASE HOUSING NEEDS 2017, supra note 21, at 8.
and extreme income inequality. For example, long-term improvements in housing equity and affordability could be assisted by:

- Providing funding for infrastructure investment to rehabilitate and improve poorer quality neighborhoods while specifically preserving residency of current low-income households located there.343
- Taking steps to increase pay equity and adequacy for all workers.344
- Providing childcare and healthcare supports for parents, particularly single parents with young children.345


344. Unaffordable housing is both a problem of high housing costs and of low incomes. See, e.g., Ezra Rosser, Exploiting the Poor: Housing, Markets, and Vulnerability, 126 YALE L.J. FORUM 458 (2017); Desmond, Unaffordable, supra note 11. Part of the reason that housing is becoming less affordable is that incomes are growing at a slower rate than rents. Thus, a sustainable solution to unaffordable housing will require efforts to make markets more responsive to need as well as investment in growing incomes. Brenda Richardson, America’s Housing Affordability Crisis Only Getting Worse, FORBES (Jan. 31, 2019), https://www.forbes.com/sites/brendarichardson/2019/01/31/americas-housing-affordability-crisis-only-getting-worse/#79d2e2d104b3 [https://perma.cc/8EE2-FLKH].

In today’s antagonistic political environment, it is increasingly irresponsible for Congress to pass the buck when it comes to setting policy objective and legal mandates. Giving housing imperatives the force of law would keep agencies from playing politics with people’s lives.

To avoid reliance on agency discretion and being caught in the crossfire of political power struggles, Congress will have to actually pass detailed legislation regarding affordable housing. The last several bills attempting to improve laws regarding affordable housing, however, have never even been brought to a vote. Legislative impotence might be improved if Congress moves away from considering issues in a bundled, omnibus bill that includes a wide variety and huge number of legal mandates. It may be more effective, as well as more transparent to constituents, if Congress addresses housing issues one at a time, in shorter, targeted, more understandable legislation. Single-issue legislation might be able to accomplish in baby steps what never-passed omnibus bills do not. For example, the recently proposed American Housing and Economic Mobility Act includes numerous legal improvements to our housing system, but this bill risks dying in committee based on a handful of


347. For example, the proposed act would expand the Housing Trust Fund to adequately preserve affordable housing units at risk of obsolescence, ban housing discrimination on the basis of sexual orientation, gender identity, marital status, and source of income, direct HUD to establish regional consortia to reduce the cost and increase the effectiveness of regional housing voucher administration, establish incentives for local government reduction of zoning barriers to housing development, fund grants for infrastructure and community development, rehabilitate and build housing in Native American tribal areas, expand funding to create 380,000 affordable rental homes and homeownership subsidies for rural areas, fund supportive services in low and middle-income neighborhoods, create an emergency housing fund for places where housing costs are rapidly increasing, strengthen the Community Reinvestment Act to ensure credit access for low and moderate income borrowers, provide down payment assistance to first-time homebuyers in formerly redlined areas, and provide relief to homeowners whose equity was destroyed by the financial crisis. American Housing and Economic Mobility Act, NAT’L LOW INCOME HOUSING
controversial issues included in it. On the other hand, the Landlord Accountability Act introduced in the House by New York’s Representative Velasquez focuses on the single issue of rental discrimination based on the use of Section 8 vouchers. If Congress could successfully enact smaller, specific bills, Congress may start to meet its responsibility of effectively shaping federal affordable housing law and policy.

Housing programs and incentives today are often necessarily responsive to immediate and dramatic housing needs, but Congress must take a longer view and also invest funds in improving neighborhood quality, affordable housing location, the sufficiency of gap funding, and residential desegregation. Addressing these issues helps cure the disease of housing unaffordability, not just treat its symptoms. Improving neighborhood quality, residential racial integration, and housing instability among low-income households will lead to improved household outcomes now and in future


349. Perhaps it is overly optimistic to think that even short, single-issue bills could actually be enacted into law, however. H.R. 323 is still stuck in committee, and a similar resolution was never brought to a vote in the 115th Congress. See, e.g., Landlord Accountability Act of 2017, H.R. 202, 115th Cong. (2017); see also H.R. 323, 116th Cong. (2019).

350. Another example of taking “baby steps” toward housing systemic improvement is the Safe Housing for Families Act introduced earlier this year by Senator Kamala Harris and Representatives Jesús García and Joe Cunningham. This short bill focuses on requiring functioning carbon monoxide detectors in public and assisted housing and is likely to be uncontroversial and, hopefully, adopted. Safe Housing for Families Act, S. 755, 116th Cong. (2019); Carbon Monoxide Alarms Leading Every Resident to Safety Act of 2019, H.R. 1690, 116th Cong. (2019); see Agricultural Worker Program Act of 2019, S. 175, 116th Cong. (2019).
generations, eventually reducing the number of cost-burdened households and intensity of their unmet housing needs. Residential segregation, for example, is rampant and limits economic potential individually and as a society. Segregation also “reduces social cohesion and intergroup trust, increases prejudice, and erodes democratic participation.” It will take committed, consistent investment to undo residential segregation, de-concentrate poverty, and improve deficient neighborhood infrastructure. But such investments are necessary for the lasting improvements to housing affordability that are the federal government’s responsibility to achieve.352

CONCLUSION

Unaffordable and poor-quality housing is costly and unfair for the many households who struggle to pay for shelter and never obtain a stable, quality place to call home. Unaffordable housing is also bad for the country as a whole: It is costly, destabilizing, and unsustainable. The United States is the wealthiest country in the world, and yet ranks far behind many other developed countries when it comes to quality of life for its poorest citizens. It is unjustifiable to cite lack of funding as an excuse for treating only some of the symptoms of housing instability and ignoring its underlying causes,

351. RENTAL HOUSING 2017, supra note 19, at 36.
353. RENTAL HOUSING 2017, supra note 19, at 6.
particularly when significant public subsidies are already being allocated to populations that do not have unmet housing needs.\textsuperscript{355}

It is within our financial capacity to significantly ameliorate the housing instability that millions of Americans face daily, and there are ample practical, economic, and moral justifications for the federal government assuming a more responsible role in ensuring that affordable housing for all becomes a reality. Affordable housing is a complex problem with different solutions required in different locations. Some places primarily need an increase of supply, other places need more income supports and subsidies, and other places struggle more with deficient housing and neighborhood quality. Responsible devolution can be the answer, allowing specifically tailored responses to local needs, but only if backed by the full financial and legal support of the federal government.

Congress can erect an improved affordable housing legal framework by shoring up property rights of renters and owners and mandating investment in long-term neighborhood solutions as well as adequate supports for critical short-term household needs. The federal government’s failure to act will lead in the opposite direction, resulting in increased homelessness, income- and family-destroying housing instability, and intractable poverty throughout the country. The federal government must not walk away from a problem that, in large part, it helped to create.\textsuperscript{356} Irresponsible devolution would be personally devastating for low-income households, inhumane and politically destabilizing, and would rob our country of its most precious resource: its human capital.

\textsuperscript{355} See supra notes 219–29 and accompanying text (discussing the cost and impact of the mortgage interest deduction).