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Responsible Devolution of Affordable Housing

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RESPONSIBLE DEVOLUTION OF AFFORDABLE HOUSING

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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-funded home mortgage insurance would be channeled to neighborhoods with stable or increasing property values, defined by the government as white-only neighborhoods.[1] For many decades,

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.[2] 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.[3] Five million households

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assistance in the form of mortgage insurance for first-time homebuyers. David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1023–24, 1073 (2016). For decades, white homeowners in white neighborhoods were the exclusive beneficiaries of FHA's programs and funding. *See generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, 26 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 5 (2017). *See also* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 109 (2013); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–91 (1985). The FHA's own Underwriting Manual mandated that mortgage funding be used primarily in non-diverse communities and advised communities to preserve their property values by creating real covenant-based barriers to minority occupancy. FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT § 980(3), 980(3)(g) (1938) ("Recommended restrictions should include provision for the following . . . [p]rohibition of the occupancy of properties except by the race for which they are intended.").

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),[4] but thousands of these dwellings are uninhabitable, infested with rodents, covered in mold, or exposing children to poisonous lead.[5] Half of low-income households cannot afford their housing costs, but for every one such household receiving government housing assistance, another three go without.[6] 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."[7] 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.[8] In other

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[https://perma.cc/46LA-X86F]. "These developments had become dangerous and destructive communities in which to live, undermining the welfare of families and children." *Id.*

4. *National and State Housing Fact Sheets & Data*, CTR. ON BUDGET & POL'Y PRIORITIES (May 9, 2019), https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data [https://perma.cc/EU8J-4VKU].

5. Suzy Khimm et al., *Under Ben Carson, More Families Live in HUD Housing That Fails Health and Safety Inspections*, NBC NEWS (Nov. 14, 2018, 4:17 PM), https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421 [https://perma.cc/FG2K-3GE8]; MSNBC FOIA request documents, available at http://media1.s-nbcnews.com/i/today/z_creative/InfillFoiaReacReport.pdf [https://perma.cc/A8YD-QYPS].

6. Will Fischer & Barbara Sard, *Chart Book: Federal Housing Spending is Poorly Matched to Need*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 8, 2017), https://www.cbpp.org/research/housing/chart-book-federal-housing-spending-is-poorly-matched-to-need [https://perma.cc/6AT5-GXT4].

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.[9] Impoverished neighborhoods and neighborhoods of color face disparate residential realities in terms of the quality of schools, transportation, and community services.[10] In many areas, unaffordable housing is primarily a symptom of intractable poverty.[11] 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.[12] 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

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451, 469–70 (2017) [hereinafter Boyack, *Exclude*]; *infra* notes 47–77 and accompanying text.

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.

11. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 296–97, 302–03 (2016) [hereinafter DESMOND, EVICTED]. *See generally* Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction,* 22 INST. FOR RES. ON POVERTY 1, 5 (2015) [hereinafter Desmond, *Unaffordable*].

12. There is a wide fiscal disparity among municipalities and states in terms of resources and availability of financing. Some states grapple with fiscal gaps and others enjoy budget surpluses. *See, e.g.*, TRACY GORDON ET AL., URB. INST., ASSESSING FISCAL CAPACITIES OF STATES vi-vii, 1–5, 11–33 (2016), https://www.taxpolicycenter.org/sites/default/files/publication/140136/2000646-assessing-fiscal-capacities-of-states-a-representative-revenue-system-representative-expenditure-system-approach-fiscal-year-2012.pdf [https://perma.cc/2PNY-LF2T]; Hal Wolman et al., *Comparing Local Government Autonomy Across States,* NAT'L TAX ASS'N PROCEEDINGS 377 (2008), https://www.ntanet.org/wp-content/uploads/proceedings/2008/046-wolman-comparing-local-government-2008-nta-proceedings.pdf [https://perma.cc/Y8M2-Y723].

prefer to offload and ignore affordability issues.[13] Negative externalities from local housing affordability crunches impact the country as a whole.[14] Furthermore, it was the federal government, through its policies and programs, that created some of the biggest obstacles to accessing affordable housing today.[15] 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.

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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 the part of the metropolitan region within Kansas.

14. *See* Ed Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply* 21 (Zell/Lurie Real Estate Ctr., Working Paper No. 802, 2017), http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/802.pdf [https://perma.cc/7AGW-CEL4]; Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 34–35 (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015).

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.[16] 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).[17] 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.[18] Housing unaffordability deepens inequalities and leads to housing instability

16. JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., STATE OF THE NATION'S HOUS. 2018 30–31 (2018) [hereinafter STATE OF HOUSING 2018], https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [https://perma.cc/XQ8S-QNY9]. Housing affordability is typically measured by calculating the percentage of a household's gross income that must be allocated to housing costs, with anything more than 30% rendering the household "cost burdened" and anything more than 50% causing the household to be "severely cost burdened." *CHAS: Background*, U.S. DEP'T HOUS. & URB. DEV., https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html [https://perma.cc/CBN9-S5DG].

17. STATE OF HOUSING 2018, *supra* note 16, at 5. The 30% figure evolved from the 1969 "Brooke Amendment" to the 1934 Housing Act, proposed in response to complaints that rents in public housing were going up. The amendment capped the rent charged in public housing at 25% of a tenant's household income, but Congress raised the cap to 30% in 1981, and that percentage has remained the industry standard for whether housing costs are considered "affordable" ever since. Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (codified as amended at 12 U.S.C. § 1715z-1 (2012)). The income to housing comparison is not universally recognized as the appropriate measure of housing unaffordability. *See, e.g.*, Glaeser & Gyourko, *supra* note 14, at 2–3; Boyack, *Sustainable*, *supra* note 10, at 458–62. *See generally* CHRISTOPHER HERBERT ET AL., JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., MEASURING HOUSING AFFORDABILITY: ASSESSING THE 30 PERCENT OF INCOME STANDARD (2018) https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Herbert_Hermann_McCue_measuring_housing_affordability.pdf [https://perma.cc/S6N4-JY8Z].

18. Boyack, *Sustainable*, *supra* note 10, at 463. *See generally* Ezra Rosser, *Laying the Foundation: The Private Rental Market and Affordable Housing*, 44 FORDHAM URB. L.J. 499, 522 (2017); Press Release, MacArthur Found, Pessimism About Prolonged Housing Affordability Crisis Is On the Rise, 2016 How Housing Matters Survey Finds, (June 16, 2016), https://www.macfound.org/press/press-releases/pessimism-about-prolonged-affordable-housing-crisis-rise-2016-how-housing-matters-survey-finds/ [https://perma.cc/REE4-3MQS] (quoting MacArthur President Julia Stasch). The tradeoff between housing and other necessities is particularly difficult for low-income households with children. Such households have an average of $490 to spend after paying housing costs, but by the Economic Policy Institute's estimate, the minimum needed to support families with children in even affordable metro areas is $2700 per month for non-housing expenses. *See* STATE OF HOUSING 2018, *supra* note 16, at 31.

with its myriad ill-effects.[19] Unaffordable housing is not a new problem,[20] but over the past decade, the issue has broadened and deepened.[21] 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.[22] 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-LRD5]. 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.

20. *See* JOHN I. GILDERBLOOM & RICHARD P. APPELBAUM, RETHINKING RENTAL HOUSING 3 (1987).

21. HUD's most recent report to Congress on housing indicated that 8.3 million households have "worst-case housing needs," meaning they are very low-income renters who receive no government housing assistance and pay more than half of their income for rent, live in severely inadequate conditions, or both. The number of households with worst-case housing needs has increased from 7.72 million in 2013. OFF. OF HOUS. POL'Y DEV. & RES., U.S. DEP'T OF HOUS. & URB. DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS ix–xi, figs.1–3 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf [https://perma.cc/YH4U-BLZU] [hereinafter WORST CASE HOUSING NEEDS 2017]; *see also* JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 1–6 (2016), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_2016_state_of_the_nations_housing_lowres.pdf [https://perma.cc/45M9-9G6A]; BIPARTISAN POL'Y CTR., HOUSING AMERICA'S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY 7 (2013); MEGAN BOLTON ET AL., NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 4 (2015), https://nlihc.org/sites/default/files/oor/OOR_2015_FULL.pdf [https://perma.cc/Y82A-UN3L] ("the number of renters spending more than they can afford on housing is unacceptably high and growing").

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

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23. ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING (2018) [hereinafter NLIHC OUT OF REACH 2018], https://nlihc.org/sites/default/files/oor/OOR_2018.pdf [https://perma.cc/424A-V62Z].

24. *See* Fischer & Sard, *supra* note 6.

25. *See id.*

26. *Median Sales Price of Houses Sold for the United States*, FED. RES. BANK ST. LOUIS: FRED ECONOMIC DATA (updated July 24, 2019) https://fred.stlouisfed.org/series/MSPUS [https://perma.cc/37VX-Z44X]. Even a decade ago, in the depths of the great recession, the median home price of $222,500 (Q4 2008) was still up 45% from 1998. *Id.* Median home prices rose 41% faster than overall inflation in the period from 1990 to 2016. STATE OF HOUSING 2018, *supra* note 16, at 1.

27. *Real Median Household Income in the United States*, FED. RES. BANK ST. LOUIS: FRED ECONOMIC DATA (updated Sept. 12, 2018) https://fred.stlouisfed.org/series/MEHOINUSA672N [https://perma.cc/FD98-B9XA]; Erin Duffin, *Average (Median) Household Income in the United States from 1990 to 2017 (in US Dollars)*, STATISTA (Sep 24, 2019), https://www.statista.com/statistics/200838/median-household-income-in-the-united-states/ [https://perma.cc/4TT8-YFNF]. Incomes, particularly those in the lower four

income gains have been concentrated in the top income quintile.[28] 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.[29] 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.[30] 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."[31]

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

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quartiles, have not grown in tandem with GDP per capita growth, which has increased 52% from 1988–2017. STATE OF HOUSING 2018, *supra* note 16, at 2.

28. *See* Jill Mislinkski, *U.S. Household Incomes: A 51-Year Perspective*, ADVISOR PERSPECTIVES (Oct. 16, 2018), https://www.advisorperspectives.com/dshort/updates/2018/10/16/u-s-household-incomes-a-51-year-perspective [https://perma.cc/G73Q-E9Z3]. The bottom four income quintiles have remained virtually flat since 1998 and have increased less than 10% since 1980. *Id.* The real median income of households in the bottom quartile has increased only 3%. STATE OF HOUSING 2018, *supra* note 16, at 1.

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]; Mislinkski, *supra note 28.*

30. Jennifer Rudden, *Asking Rent for Unfurnished Apartments in the U.S. 1980–2017*, STATISTA (July 17, 2019), https://www.statista.com/statistics/200223/median-apartment-rent-in-the-us-since-1980/ [https://perma.cc/63VC-FERG]. Median rent rose 20% faster than overall inflation in the period from 1990 to 2016. STATE OF HOUSING 2018, *supra* note 16, at 1.

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.[32] For example, in 2016, 80% of rental households earning less than $30,000 were cost burdened, and 55% were severely cost burdened.[33] Among owner households earning less than $30,000, 63% were cost burdened, and 42% were severely cost burdened.[34] As a comparison, only 6% of renter households with an income of over $75,000 in 2016 were cost burdened.[35] 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.[36] 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.[37] 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.

33. STATE OF HOUSING 2018, *supra* note 16, at 30. HUD uses the terms "cost burdened" and "severely cost burdened" to refer to households respectively spending more than 30% and 50% of gross income on housing. *Affordable Housing*, U.S. DEP'T. OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/comm_planning/affordablehousing/ [https://perma.cc/T5V3-Y4F2] (last visited Sept. 25, 2019).

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.

36. NAT'L LOW INCOME HOUS. COAL., THE GAP REPORT: A SHORTAGE OF AFFORDABLE HOMES 2019, 2–3 (2019) [hereinafter NLIHC 2019 GAP REPORT], https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf [https://perma.cc/ZD8Q-ST7W]. There are 10.7 million severely housing cost-burdened renter households: approximately 7.8 million are extremely low-income, 2.1 million are very low-income, and 684,000 are low-income. *Id.* at 5.

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 & Gershenen, *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.[38] Minority households (Native American, black, and Hispanic) are more likely to be extremely low-income than are white households.[39] 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.[40] Extremely low-income renter households make up 73% of the severely cost-burdened renters in the country.[41]

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.[42] For example, the states of New York, Florida, California, Colorado, and Hawai'i all have about the same percentage of cost-burdened households (51–54%), but the housing and income realities of each of these states differ.[43] In California and Hawai'i, 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.[44] 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

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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%).

Id.

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.[45] 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.[46]

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.[47] Such a ubiquitous problem of housing affordability seems to demand a national solution, but specific local concerns shape housing challenges in a given community.[48] 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.[49]

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45. RENTAL HOUSING 2017, *supra* note 19, at 27. Even though Alabama, Kentucky, Maine, Mississippi and West Virginia enjoy relatively low housing costs, more than 40% of the renter households in these states are cost burdened. *Id.* "Cost-burdened households in rural areas are often more dispersed than in metro areas, making it difficult to target effective policy interventions." *Id.* at 28. In fact, some of the nation's worst housing situations are found in the most rural areas, particularly among Native American tribes. *Native American Housing*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/explore-issues/policy-priorities/native-american-housing [https://perma.cc/YZY7-W6DK] (last visited Sept. 25, 2019); U.S. COMM'N ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 136–38 (Dec. 2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/B6UP-W4QG]; Tim Henderson, *Housing Affordability Crisis Spreads to Rural America*, GOVERNING: STATELINE (March 25, 2019), https://www.governing.com/topics/transportation-infrastructure/sl-housing-affordability-crisis-rural-america.html [https://perma.cc/TEH2-VAH5]; RENTAL HOUSING 2017, *supra* note 19, at 27. Gillian B. White, *Rural America's Silent Housing Crisis*, ATLANTIC (Jan. 28, 2015), https://www.theatlantic.com/business/archive/2015/01/rural-americas-silent-housing-crisis/384885/ [https://perma.cc/FZ3U-YJPP].

46. RENTAL HOUSING 2017, *supra* note 19, at 27–28.

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.

48. Boyack, *Sustainable*, *supra* note 10, at 458–66.

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.[50] 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,[51] there is an insufficient number of units that are affordable to lower-income renters.[52] The gap between demand for housing and affordable housing supply widens as the household's income decreases.[53] 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.[54] This imperfect matching

50. SEAN CAPPERIS ET AL., NYU FURMAN CTR. & CAPITAL ONE, RENTING IN AMERICA'S LARGEST CITIES 5 (2015), http://furmancenter.org/files/CapOneNYUFurmanCenter__NationalRentalLandscape_MAY2015.pdf [https://perma.cc/238H-6EMY]; NLIHC OUT OF REACH 2018, *supra* note 23; *see also* RENTAL HOUSING 2017, *supra* note 19, at 2, 17.

> Virtually all of the 88 metros with data available had more homes for sale in the top third of the market by price than in the bottom third. In 46 of these metros, more than half of the available supply was at the high end. The largest imbalances were in moderately sized, moderately priced, and fast-growing metros such as Boise, Charlotte, Des Moines, and Durham, where about 65 percent of existing homes for sale were at the upper end of the market.

STATE OF HOUSING 2018, *supra* note 16, at 4.

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://eyeonhousing.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.[55] 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.[56] At 80% of median income and above, there is no general shortage.[57] 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.[58] 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.[59] 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%.[60] Thus, the vast majority of new rental units created during the decade following the Foreclosure Crisis[61]

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55. *Id.*

56. *Id.*

57. *Id.*; RENTAL HOUSING 2017, *supra* note 19, at 29.

58. *See, e.g.*, *infra* notes 204, 205, and 212–15 and accompanying text.

59. *NLIHC Out of Reach 2018*, *supra* note 23, at 6.

60. STATE OF HOUSING 2018, *supra* note 16, at 28, 36 (noting that 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).

61. After eight years of rapidly inflating U.S. real estate prices, residential home values plummeted in 2007 just as the interest rates for adjustable rate residential subprime mortgages were adjusting upwards. The result was a wave of foreclosures,

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 demand[63] 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 forgoing other sorts of spending, including spending on other basic needs like healthcare, childcare, transportation, and even food. Lack of

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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), https://www.jchs.harvard.edu/sites/default/files/ahr2011-2-rentalmarketconditions.pdf. [https://perma.cc/2RCP-GJPM]. For a broader look at the worldwide causes and impacts of the crisis, *see* ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES 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://www.washingtonpost.com/news/business/wp/2018/10/04/feature/10-years-later-how-the-housing-market-has-changed-since-the-crash/ [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."[64] The "invisible hand" fails to respond the same way in the context of markets for survival essentials, like housing, where demand is inelastic.[65]

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.[66] In the one year between 2016 and 2017, for example, estimated costs of building a "basic, three-story apartment building" increased by 8%.[67] Land use regulations inflate development costs and ultimately put downward pressure on the supply of housing priced too low to recoup such additional expenses.[68] Zoning tools can also directly limit the supply of homes in a community, driving up home values and increasing the wealth of

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64. NLIHC OUT OF REACH 2018, *supra* note 23, at 3; *see also* NABIHAH MAQBOOL ET AL., CTR. FOR HOUSING POL'Y, THE IMPACTS OF AFFORDABLE HOUSING ON HEALTH: A RESEARCH SUMMARY 1–2 (2015), https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf [https://perma.cc/3X4K-NNMM].

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.[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.[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.[71] In markets where demand for rental housing is robust, financial incentives lead owners to convert affordable units to luxury or market-rate ones.[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.[73] Lack of maintenance results in unit obsolescence and uninhabitability, and under-maintained housing is likely to end up demolished or abandoned.[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.[75] The National Housing Trust estimated that

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).

70. *See* Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL'Y REV. 21, 23, 28–30 (2003); Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 925–26 (2007).

71. *See* Boyack, *Sustainable*, *supra* note 10, at 469–70.

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).

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.*

74. *See* RENTAL HOUSING 2017, *supra* note 19, at 30; *see also infra* note 143 and accompanying text.

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."[76]

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.[77] 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.[78] 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.

RENTAL HOUSING 2017, *supra* note 19, at 30.

76. *What Is Preservation?*, NAT'L HOUSING TR., http://www.nationalhousingtrust.org/what-preservation [https://perma.cc/Q7GF-QXLW] (last visited Sept. 25, 2019).

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.").

78. *See* AFFORD. RENTAL HOUS. A.C.T.I.O.N., BUILDING AFFORDABLE HOUSING COMMUNITIES USING THE LOW-INCOME HOUSING TAX CREDIT 6 (2015), www.taxcreditcoalition.org/wp-content/uploads/2015/03/Housing-Credit-Ed-Deck-March-2015-ver-14-3.pdf [https://perma.cc/GA9L-HQGH] (estimating that land development costs would have to be reduced by 28% to make it profitable for the private sector to create affordable housing).

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 non-existent. 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]

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79. *See Affordable Housing Advocates Tell HUD and Congress — Keep Housing Affordable for Low Income Families*, NAT'L LOW INCOME HOUSING COALITION (Apr. 25, 2018), https://nlihc.org/news/affordable-housing-advocates-tell-hud-and-congress-keep-housing-affordable-low-income-families [https://perma.cc/4986-5G96]; Ann Stevens, *Employment and Poverty*, ECONOFACT (Jan. 7, 2018), https://econofact.org/employment-and-poverty [https://perma.cc/E3DV-3Y7S]. Poverty and especially housing instability are factors that make it more difficult for people to obtain stable and consistent employment. *See generally* AARP POL'Y INST., 19 MILLION WORKING-AGE AMERICANS HAVE A DISABILITY THAT LIMITS OR PREVENTS WORK (2009), https://assets.aarp.org/rgcenter/econ/fs153_ssdi.pdf [https://perma.cc/MT3T-ADGW]; Kristin F. Butcher & Diane Whitmore Schanzenbach, *Most Workers in Low-Wage Labor Market Work Substantial Hours, in Volatile Jobs*, CTR. ON BUDGET & POL'Y PRIORITIES (July 24, 2018), https://www.cbpp.org/research/poverty-and-inequality/most-workers-in-low-wage-labor-market-work-substantial-hours-in [https://perma.cc/GSZ9-NGRW]; Desmond & Gershensen, *supra* note 19.

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.[81] 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.[82]

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.[83] Even though affordability is less apparent in cheaper housing markets, however, such lower-priced homes may still be unaffordable to local populations.[84] 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." *Id.*

81. *Id.*

82. *Id.*

83. *San Francisco Home Prices & Values*, ZILLOW, https://www.zillow.com/san-francisco-ca/home-values/ [https://perma.cc/4JAQ-PTMV] (last visited Sept. 25, 2019); *Topeka Home Prices & Values*, ZILLOW, https://www.zillow.com/topeka-ks/home-values/ [https://perma.cc/PWL9-97H5] (last visited Sept. 25, 2019).

84. 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-ZNNP].

moderate housing costs are disproportionately depressed.[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.[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%.[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.[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.[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.[90] She works full

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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).

86. *See* GLORIA C. GUZMAN, U.S. CENSUS BUREAU, HOUSEHOLD INCOME 2016, AMERICAN COMMUNITY SURVEY BRIEFS (2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-02.pdf [https://perma.cc/YF3P-8WX7]; *Gross Domestic Product by State, First Quarter 2019*, U.S. BUREAU ECON. ANALYSIS (July 25, 2019), https://www.bea.gov/data/gdp/gdp-state [https://perma.cc/HL4C-83VQ]; *supra* note 29 and accompanying text.

87. GUZMAN, *supra* note 86, at 3.

88. NLIHC OUT OF REACH 2018, *supra* note 23, at 3–4. The number of jobs available in these lower-paying employment sectors are growing, suggesting that affordability problems are not necessarily indicative of inadequate employment *level* but rather of inadequate *wages*. *See* Naema Ahmed, *Most Jobs Created Since the Recession Have Been Low Paying*, AXIOS (Sep. 7, 2018), https://www.axios.com/most-jobs-created-since-recciu-1536269032-13ccc866-5fb0-44e8-bd14-286ae09c296f.html [https://perma.cc/5WHP-VRPJ]; Andrew VanDam & Heather Long, *How the U.S. Economy Turned Six Good Jobs into Bad Ones*, WASH. POST (Sep. 4, 2018), https://www.washingtonpost.com/business/2018/09/04/how-us-economy-turned-six-good-jobs-into-bad-ones [https://perma.cc/CLM8-PGPE].

89. RENTAL HOUSING 2017, *supra* note 19, at 28–29.

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.[91] 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."[92]

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.[93] 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.[94] 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.[95] 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

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housing-rentals-study [https://perma.cc/7U8W-USMY]; *see also* Libertina Brandt, *Here's How Much it Costs to Rent a One-Bedroom Apartment in 15 Major US Cities*, BUS. INSIDER (July 24, 2019), https://www.businessinsider.com/cost-of-one-bedroom-apartment-rent-major-us-cities-2019-6 [https://perma.cc/TVZ3-JLCX].

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/YGY5-ZA54].

94. *See* RENTAL HOUSING 2017, *supra* note 19, at 3, 15.

95. NLIHC OUT OF REACH 2018, *supra* note 23, at 6.

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.[96] 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.[97] 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.[98] 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.[99] 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.[100]

Tenants like Brooks are not solely dependent on HUD inspectors because landlord-tenant law also protects tenants' right to a habitable home.[101] 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.[102] 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).

99. Khimm et al., *supra* note 5; *see also* the results of NBC's FOIA request, available at http://media1.s-nbcnews.com/i/today/z_creative/InfillFoiaReacReport.pdf [https://perma.cc/QX67-3Y69]. Local authorities in cities including Houston, St. Louis, and Chicago, have attempted to address habitability deficits that HUD has not addressed. Molly Parker, *"Pretty Much a Failure:" HUD Inspections Pass Dangerous Apartments Filled with Rats, Roaches, and Toxic Mold*, PROPUBLICA (Nov. 16, 2018), https://www.propublica.org/article/hud-inspections-pass-dangerous-apartments-with-rats-roaches-toxic-mold [https://perma.cc/XKE6-HQ4N].

100. Khimm et al., *supra* note 5.

101. *See* Paula Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 1 (2016); Myron Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1446 (1974). Uniform laws have endorsed granting tenants the legal ability to withhold rent during the time that the rented premises are uninhabitable. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 402 (UNIF. LAW COMM'N 2005).

102. *See generally* DESMOND, EVICTED, *supra* note 11.

in retaliation for complaints about habitability, the tenant would have no other affordable options for shelter.[103] 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.[104] 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.[105] 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.[106]

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.[107] 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.[108] Even when residents of such communities pay no

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103. Paula Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 65 FORDHAM URB. L.J. 662, 674 (2018).

104. *Id.*

105. *Id.*

106. *See generally* DESMOND, EVICTED, *supra* note 11.

107. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 20–24, 54–55, 81 (1993). "Ironically, almost every attempt to alleviate housing costs and encourage housing equity has resulted in at least some degree of segregation retrenchment." Andrea J. Boyack, *Side by Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHI.-KENT L. Rev. 435, 448–49 (2017) [hereinafter Boyack, *Revitalizing*]. "Neighborhood matters. Equality of opportunity is a myth when segments of the population live in high-crime, distressed neighborhoods." *Id.* at 449. To put it another way, "where you grow up affects where you wind up." MANUEL PASTOR & MARGERY AUSTIN TURNER, URB. INST., REDUCING POVERTY AND ECONOMIC DISTRESS AFTER ARRA: POTENTIAL ROLES FOR PLACE CONSCIOUS STRATEGIES 3 (2010).

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.[109] Crime is higher in areas of concentrated poverty, threatening financial and physical well-being of area inhabitants.[110] Residents of low-income neighborhoods lack access to quality jobs, stores with fresh, healthy foods, and adequate healthcare.[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.[112] Those unable to pay for shelter in

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the Fair Housing Act, 32 J. MARSHALL L. REV. 617 (1999); Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995); Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis,* 75 AM. SOC. REV. 629, 630–634 (2010).

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. 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. *See* PASTOR & TURNER, *supra* note 107, at 2.

110. *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); 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., *supra* note 64, at 6.

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

112. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 YALE L.J. 1383, 1389–90 (1994); 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, *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.[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,[114] to creating government-owned low-price housing,[115] to providing offsets and subsidies that either encourage increased affordable housing supply or subsidize households' ability to pay housing costs.[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.[117] In addition, federalism complexities and poorly designed policies make some government housing expenditures haphazard, inequitable, and

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Particulate Matter Components in the United States, 120 ENV'T. HEALTH PERSP. 1699, 1700–01 (2012).

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).

114. *See infra* Part II.A.

115. *See infra* Part II.B.

116. *See infra* Parts II.C and II.D, respectively.

117. *See, e.g.*, Boyack, *Sustainable*, *supra* note 10, at 487–90.

wasteful.[118] 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 for housing except in a temporary "emergency".[120]

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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.[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.[122]

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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.

Fla. Stat. § 166.043 (2001). Local rent control legislation is most common in New York. *See supra* note 120. New York City amended its rent control laws in 2019, and the amended rent control laws are currently the subject of litigation claiming that the legislation violates the Constitution. *See* Complaint, Cmty. Hous. Improv. Program v. City of New York Rent Guidelines Bd., No. 1:19-cv-04087 (E.D.N.Y. Jul. 15, 2019). Among other things, the complaint alleges that "[t]he New York City Housing 'Emergency'" has been "declared every three years for the last 50 years with no rational basis for the decision[.]" *Id.* at 59; *see also* Bobby Allyn, *New York Landlords Call Rent Control Laws "Illegal Taking" in New Federal Lawsuit*, NAT'L PUB. RADIO (July 17, 2019), https://www.npr.org/2019/07/17/742875001/new-york-landlords-call-rent-control-laws-an-illegal-taking-in-new-federal-lawsu [https://perma.cc/L48Y-BNHB].

121. Sasha Ingber, *Oregon Set to Pass the First Statewide Rent Control Bill*, NAT'L PUB. RADIO (Feb. 27, 2019), https://www.npr.org/2019/02/27/698509957/oregon-set-to-pass-the-first-statewide-rent-control-bill [https://perma.cc/V9QQ-FPHL]; Elliot Njus, *Oregon Gov. Kate Brown Signs Nation's First Statewide Rent Control Law*, OREGONIAN (Feb. 28, 2019), https://www.oregonlive.com/politics/2019/02/oregon-gov-kate-brown-signs-nations-first-statewide-rent-control-law.html [https://perma.cc/ED7E-XHFZ]. The Oregon law caps annual rental increases at 7% above inflation, with certain rental housing excepted. *Id.*

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

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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_lti/rnt_cntrl_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.[125] 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.[126] 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."[127] 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.[128]

In recent years, local governments have increasingly employed an indirect tool to indirectly mandate affordable rental pricing: inclusionary zoning.[129] Like rent regulation, inclusionary zoning is

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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).

127. "Rent is too DAMN high!" was the slogan popularized by habitual fringe New York mayoral and gubernatorial candidate Jimmy McMillan and his self-named "Rent Is Too Damn High Party." *See generally* Rent Is Too "Damn" High, http://www.rentistoodamnhigh.org/index.html [https://perma.cc/23BE-WNEN].

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.[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.[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.[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.[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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Practices, 37 PEPP. L. REV. 1039, 1051 (2010). Inclusionary zoning has become increasingly popular, and by 2018, over 500 municipalities have enacted some form of inclusionary zoning. William J. Diehl, *An Olympic Relay Race-Passing Atlanta's Public Housing to Public-Privative Partnerships from the 1996 Olympic Games to Today*, 26 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 575, 601 (2018). On the other hand, other states have recently specifically prohibited local inclusionary zoning mandates. *E.g.*, WIS. STAT. § 66.1015 (2018) ("No city, village, town, or county may enact, impose, or enforce an inclusionary zoning requirement").

130. Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1188 (1981) ("Inclusionary requirements are essentially excise taxes on the activity of homebuilding."); Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 600 (2015); Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 972–74 (2002); EPSTEIN, *supra* note 68, at 64; Floryan, *supra* note 129, at 1053.

131. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781–82 (1969); Boyack, *Exclude*, *supra* note 8, at 454 (discussing exclusionary zoning); Iglesias, *supra* note 130, at 600 (discussing the need to enact inclusionary zoning ordinances to counteract the adverse effects of decades of exclusionary zoning).

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

133. Brian R. Lerman, Note, *Mandatory Inclusionary Zoning — The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 385–86 (2006); Iglesias, *supra* note 130, at 600.

housing supply.[134] 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.[135]

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.[136] 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.[137] Public housing can be conceptualized as a

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134. 2910 Ga. Ave. LLC v. D.C., 234 F. Supp. 3d 281, 316 (D.D.C. 2017); Home Builders Ass'n of Greater Chi. v. City of Chi., 213 F. Supp. 3d 1019, 1029 (N.D. Ill. 2016); Cal. Bldg. Indus. Assn. v. City of San Jose, 351 P.3d 974, 979 (2015).

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).[138] 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.[139] 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.[140] 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.

139. *See* A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 548 (1995) (analyzing accountability concerns that arise over federal government corporations).

140. HUD's Office of Special Needs Assistance Programs provides funding to state and local governments as well as non-profit entities to be used to "quickly rehouse homeless individuals and families." *Homelessness Assistance*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/comm_planning/homeless [https://perma.cc/YTT6-R85D] (last visited Aug. 28, 2019). Because the number of homeless individuals and families is rapidly increasing, such state and local run (and partially federally funded) shelter programs continue to be a critical element of housing policy. Scott Greenstone, *Is Seattle's Homeless Crisis the Worst in the Country?*, THE SEATTLE TIMES (Apr. 26, 2018), https://www.seattletimes.com/seattle-news/homeless/is-seattles-homeless-crisis-the-worst-in-the-country/ [https://perma.cc/BA76-58MC] (quantifying and discussing the ten cities with the most extreme homeless challenges). *See, e.g.*, GISELLE ROUTHIER, COALITION FOR THE HOMELESS, STATE OF THE HOMELESS 2018 2, 4 (2018), https://www.coalitionforthehomeless.org/wp-

federally funded public housing units — the remnant of twentieth-century federal public housing programs — in our rental housing inventory.[141] But those housing programs were implemented in problematic ways that further concentrated poverty (and crime) and exacerbated racial inequality throughout the country.[142] 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.[143]

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.[144] Since then, a quarter million public housing units — an

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content/uploads/2018/03/CFHStateoftheHomeless2018.pdf [https://perma.cc/ASX4-RNYK] (tracking and projecting the homeless population and demand for emergency shelter in New York City). Federal funding is available to help shelter victims of domestic violence through the Family Violence Prevention and Services Program. *Family Violence Prevention Services*, BENEFITS.GOV, https://www.benefits.gov/benefit/626 [https://perma.cc/5N7H-CRAG] (last visited Aug. 28, 2019). The number of homeless people in the United States has increased over the past few years, most recently by 3800 in 2017. Some 1.4 million people, including 147,000 families with children, used a homeless shelter at some point during 2016. STATE OF HOUSING 2018, *supra* note 16, at 34.

141. *HUD's Public Housing Program*, HUD, https://www.hud.gov/topics/rental_assistance/phprog [https://perma.cc/U8AA-D5HV] (last visited Aug. 28, 2019).

142. Joseph Heathcott, *The Strange Career of Public Housing: Policy, Planning and the American Metropolis in the Twentieth Century*, 75 J. AM. PLAN. ASS'N 360, 367–70 (2012); Gregory A. Byrne et al., *Taking Stock of Public Housing*, PUB. HOUSING AUTHORITY DIRECTORS ASS'N 2 (2003), https://www.hud.gov/sites/documents/doc_25737.doc [https://perma.cc/7AQE-97NJ]; Joseph Heathcott, *The Strange Career of Public Housing: Policy, Planning and the American Metropolis in the Twentieth Century*, 75 J. AM. PLAN. ASS'N 360, 367–70 (2012).

143. *Policy Basics: Public Housing*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 15, 2017) [hereinafter *CBP on Public Housing*], https://www.cbpp.org/research/policy-basics-public-housing [https://perma.cc/KSV3-VCEC].

144. "Congress has abandoned public housing properties, public housing residents, and the notion that the federal government should continue to own affordable housing." Shamus Roller & Jessica Cassella, *The Promise and Peril of HUD's RAD Program*, SHELTERFORCE (July 30, 2018), https://shelterforce.org/2018/07/30/the-promise-and-peril-of-huds-rad-program/ [https://perma.cc/GLK3-SV7P] (opining that what is really "broken" is Congress's perception of "the value of public housing, based largely on racist mythologies about the people who live in subsidized properties, about violence, and the 'undeserving' poor"). With some limited exceptions, the Quality Housing and Work Responsibility Act of 1998 banned nearly all construction of net new public housing units after 1999. Quality Housing and

average of 10,000 each year — have been demolished or otherwise removed from the housing stock.[145] Another 60,000 public housing units have been converted to units supported by project-based subsidies through Section 8.[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.[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.[148] Moreover, HUD has an inconsistent record in adequately providing for displaced low-income public housing tenants.[149]

Although funding and oversight for public housing come from HUD, these properties are managed locally by about 2900 public housing agencies (PHAs).[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.[151]

Work Responsibility Act of 1998, PUB. L. No. 105-276, § 9, 112 STAT. 2461, 2256 (codified as amended in scattered sections of 42 U.S.C.).

145. NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE 2017: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 4–8 (2017), http://nlihc.org/sites/default/files/2017_Advocates-Guide.pdf [https://perma.cc/GML3-XNWS]; *see also Rental Assistance Demonstration (RAD)*, Nat'l Housing L. Project (Sept. 7, 2017), https://www.nhlp.org/resources/rental-assistance-demonstration-rad/ [https://perma.cc/8GWB-Y39F]; *CBP on Public Housing*, *supra* note 143.

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.[152] But in practice, however, Congress has consistently underfunded public housing.[153] In 2010, HUD estimated that decades of deferred maintenance and lack of upgrades had created a public housing upkeep deficit of $26 million.[154] 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.[155] Government housing has, in many cases, been dismissed as a failure,[156] but public ownership and provision of housing for

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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].

154. MERYL FINKEL ET AL., U.S. DEP'T OF HOUSING & URB. DEV., CAPITAL NEEDS IN THE PUBLIC HOUSING PROGRAM (2010), https://www.hud.gov/sites/documents/PH_CAPITAL_NEEDS.PDF [https://perma.cc/TFX9-NBU5].

> 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.

Roller & Cassella, *supra* note 144.

155. The majority of public housing inhabitants today are elderly or disabled (or both). *Public Housing: Image Versus Facts*, U.S. DEP'T HOUSING & URB. DEV. (May 1995), https://www.huduser.gov/periodicals/ushmc/spring95/spring95.html [https://perma.cc/VX9K-EDVK].

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

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folk are stacked atop one another in too little space"); Howard Husock, *How Public Housing Harms Cities*, CITY J. (2003), https://www.city-journal.org/html/how-public-housing-harms-cities-12410.html [https://perma.cc/C3V6-UXTL] ("Housing projects radiate dysfunction and social problems outward, damaging local businesses and neighborhood property values.").

157. In the case of the extremely low-income residents of public housing with special needs for additional supportive services, housing challenges cannot be solved through increasing the supply of affordable units in the broader market. For these populations, public housing is likely the best solution. *See, e.g.*, Ehren Dohler et al., *Supportive Housing Helps Vulnerable People Live and Thrive in the Community*, CTR. ON BUDGET & POL'Y PRIORITIES (May 31, 2016), https://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community [https://perma.cc/C38J-GRGK]; Peter W. Salisch, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 730–31, 736 (2012).

158. There are numerous government programs encouraging housing supply and supporting housing demand for both owners and renters, funded through HUD, the Internal Revenue Service (IRS), the Department of Agriculture (USDA), and the U.S. Treasury Department. *See generally* CAROL N. BROWN, EXPERIENCING HOUSING LAW 626 (2016). Many of the programs focus on increasing housing supply, reasoning that increasing supply of a good will result in reducing its market price. *See* Vicki Been, *City Nimbys*, 33 J. LAND USE & ENVTL. L. 217, 227–28 (2018). Some affordable housing advocates and scholars caution that although increasing the supply of *affordable* housing units will help affordability, merely increasing the supply of housing units in general might not improve affordability if the overall supply of land in a given market is artificially constrained, by local land use regulations. VICKI BEEN ET AL., NYU FURMAN CTR., SUPPLY SKEPTICISM: HOUSING SUPPLY AND AFFORDABILITY, 3–8 (2017) [hereinafter BEEN, SUPPLY SKEPTICISM] https://furmancenter.org/files/Supply_Skepticism_-_Final.pdf [https://perma.cc/4HYB-6HDZ]; *see also What is Preservation?*, NAT'L HOUSING TR., http://www.nationalhousingtrust.org/what-preservation [https://perma.cc/6XPJ-5SCC]. *See generally* JOSEPH GYOURKO & RAVEN MOLLOY, REGULATION AND HOUSING SUPPLY 1 (2014).

disequilibrium in the housing market for lower price points.[159] Creating more affordable units leverages natural economic forces[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.[161]

Federal programs play a huge and vital role in helping to fund the production costs and encouraging the growth of affordable housing supply.[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.[163] Subsidy and incentive programs exist for both saleable homes and rental units.[164] Financial assistance

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

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

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

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. *See, e.g.*, *State Housing Finance Agencies: At the Center of the Affordable Housing System*, NAT'L COUNCIL ST. HOUSING AGENCIES (Sept. 7, 2018), https://www.ncsha.org/resource/hfas-at-the-center/ [https://perma.cc/6N6S-FF5E]; *see also Declining Federal Housing Funding*, INCLUSIONARY HOUSING, https://inclusionaryhousing.org/inclusionary-housing-explained/what-problems-does-iz-address/declining-federal-housing-funding/ [https://perma.cc/Y9JS-UYEK] (last visited Oct. 11, 2019). 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. *See Affordable Housing*, FHLBANKS, http://www.fhlbanks.com/affordable-housing.html [https://perma.cc/W6LS-N7UK] (last visited Oct. 11, 2019).

163. For a more complete list of federally funded or managed programs that promote the supply of affordable housing, see *HOME Tenant-Based Rental Assistance*, HUD EXCHANGE, https://www.hudexchange.info/programs/ [https://perma.cc/4572-MFBK] (last visited Oct. 1, 2019). Federal programs intersect with multiple other affordable housing programs administered through state and local agencies as well as public-private partnerships. *Id.*

164. *See infra* Section II.D.

delivered may be in the form of a tax credit,[165] a grant,[166] financing assistance decreasing the cost of capital,[167] low-cost government financing,[168] direct funding of specific production or rehabilitation costs,[169] public-private partnerships,[170] or one of a myriad of other structures.[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.[172]

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

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

167. Bond financing is often used to supplement tax credits when amassing capital for affordable housing projects. *See, e.g.*, Michael J. Novogradac, *Financing Affordable Housing*, CIRE MAG., https://www.ccim.com/cire-magazine/articles/financing-affordable-housing/?gmSsoPc=1 [https://perma.cc/9KYP-GQ8Z] (last visited Oct. 11, 2019).

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, *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, *Fannie/Freddie*]; *see also* Boyack, *Equitably*, *supra* note 31, at 147–59.

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

170. *See, e.g.*, PETER W. SALSICH, JR., AFFORDABLE HOUSING AND PUBLIC PRIVATE PARTNERSHIPS 69–91 (Nestor M. Davidson & Robin Paul Malloy eds., 2009); Hunter L. Johnson, *New Funding for Affordable Housing Encourages Public-Private Partnerships*, CCIM INST., https://www.ccim.com/cire-magazine/articles/new-funding-affordable-housing-encourages-publicprivate-partnerships/?gmSsoPc=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).

171. Urban Institute has an online interactive tool that provides much information about the options available for funding affordable housing creation. *See* Pamela Blumenthal et al., *How Affordable Housing Gets Built*, URB. INST. (July 26, 2016), https://www.urban.org/urban-wire/how-affordable-housing-gets-built [https://perma.cc/E8CZ-JELA] (referencing the online tool available at http://apps.urban.org/features/cost-of-affordable-housing/ [https://perma.cc/2SJG-MNK2]). Inventive developers create new combinations and processes each year. *See* Stockton Williams, *Preserving Multifamily Workforce and Affordable Housing: New Approaches for Investing in a Vital National Asset*, URB. LAND INST. 19–21 (2015), http://uli.org/wp-content/uploads/ULI-Documents/Preserving-Multifamily-Workforce-and-Affordable-Housing.pdf [https://perma.cc/4MHN-ZZRA].

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.[173] Approximately 10,000 affordable units a year are lost to obsolescence and poor management and upkeep.[174] 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 . . . ."[175] The HTF received no funding from Congress for the first eight years of its existence, but in 2015, Congress finally authorized funding.[176] Congress provided a total of $660 million to the HTF in the three years following.[177] 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."[178] Many projects funded in part by the HTF employ other affordable housing resources as well, particularly the

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aside either 20% of the constructed or rehabilitated units as rent restricted and occupied by households with incomes below 50% AMI or 40% of the units as rent restricted and occupied by households with incomes below 60% of AMI during a 30-year affordability period (inclusive of a 15-year compliance period an another 15-year extended use period). *See infra* notes 192–205 and accompanying text. During the affordability period, rents are set at 30% of the 50% or 60% AMI respectively. *See* Brown, *supra* note 158, at 628–29.

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).

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 8 (2018) [hereinafter *LIHTC Beyond 30*], https://nlihc.org/sites/default/files/Balancing-Priorities.pdf [https://perma.cc/5BST-T529];

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].

176. *Id.* at 1–2.

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.*

178. *Id.* at 2.

LIHTC, the HOME program, and the FHL Banks' Affordable Housing Program, in addition to state or local funds.[179]

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.[180] 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.[181] From 1992 to 2011, HUD's primary public-private partnership program was the controversial HOPE VI program.[182] 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.[183] 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].

181. For the history of programs reducing, rehabilitating, and privatizing public housing, see Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 3–4 (2014). For an extensive discussion of the many programs currently available, see generally NAT'L LOW INCOME HOUS. COALITION, 2019 ADVOCATES' GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING AND COMMUNITY PROGRAMS (2019), https://nlihc.org/explore-issues/publications-research/advocates-guide [https://perma.cc/5GM9-96PR].

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).

183. Choice Neighborhoods provides for rehabilitation or replacement of public housing units in connection with a neighborhood "Transformation Plan." The Choice Neighborhoods program provided Housing Choice Vouchers for any units that were not replaced or rehabilitated. *Choice Neighborhoods*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/cn [https://perma.cc/355V-K3C2] (last visited Oct. 11, 2019).

preserve and update public housing units.[184] 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.[185] 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.[186] Congress initially capped the RAD program at 60,000 units but later authorized an additional 225,000 units.[187] In 2018, the RAD program rehabilitated its 100,000th unit.[188] 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.[189] 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

184. Rental Assistance Demonstration, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD [https://perma.cc/8XYX-YTTH] (last visited Aug. 5, 2019).

185. *See infra* note 245, and accompanying text (discussing Section 8 rental assistance).

186. Gordon Cavanaugh, *Public Housing: From Archaic to Dynamic to Endangered*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 228, 233, 235–37 (2005); *Rental Assistance Demonstration (RAD)*, NAT'L HOUSING L. PROJECT (Sept. 7, 2017), https://www.nhlp.org/resources/rental-assistance-demonstration-rad/ [https://perma.cc/9KYU-9DS7].

187. RENTAL HOUSING 2017, *supra* note 19, at 5.

188. HUD issued a press release and a flyer promoting the milestone. *RAD*, U.S. DEP'T HOUSING & URB. DEV. https://www.hud.gov/sites/dfiles/Housing/documents/RAD_100000_Homes_20180813.pdf [https://perma.cc/3U34-R5H8]. RAD has been heavily marketed as the best solution to an aging public housing inventory, and the HUD website celebrates successful RAD conversions through photo essays and case studies (*RAD Photo Essays and Case Studies*, *RAD*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD/news/case-studies [https://perma.cc/DW3F-CBQ5] (last visited Oct. 11, 2019)), newsletters (*RAD Newsletter*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD/news/newsletter [https://perma.cc/65BX-CCTF] (last visited Oct. 11, 2019)), media coverage (*RAD Events*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD/news/events [https://perma.cc/RA87-SMQ5] (last visited Oct. 11, 2019)), design contests (*Curb Appeal Project*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD/pha-curbappeal [https://perma.cc/PF8B-TZ92] (last visited Oct. 11, 2019)), and "RADBlast!" listserve email updates (*RADBlast!*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/RAD/news/radblasts [https://perma.cc/S76N-SA6P] (last visited Oct. 11, 2019)).

189. RENTAL ASSISTANCE DEMONSTRATION, *supra* note 184.

detriment of the low-income occupants.[190] Moreover, RAD redevelopments 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.[191]

In 1986, Congress created the Low Income Housing Tax Credit (LIHTC) program to incentivize the production of affordable housing.[192] LIHTC is currently the largest support for increasing affordable housing supply, measured in terms of the number of units it has created.[193] LIHTC has financed the construction or preservation of about three million housing units since 1987, about 70,000 affordable rental units per year.[194] 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.[195] 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

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].

191. *See generally* CAROLINA K. REID, TERNER CTR. FOR HOUS. INNOVATION, U.C. BERKELEY, LESSONS FOR THE FUTURE OF PUBLIC HOUSING: ASSESSING THE EARLY IMPLEMENTATION OF THE RENTAL ASSISTANCE DEMONSTRATION (2017), http://ternercenter.berkeley.edu/uploads/RAD_Report_FINAL.pdf [https://perma.cc/GY7R-GL8H].

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.[196] 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.[197] Many households who rent LIHTC units, therefore, remain cost burdened unless they obtain additional rental assistance, for example through housing voucher programs.[198]

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.[199] 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.[200] Some states, foreseeing the problems that expiring affordability periods would eventually cause, expanded the affordability period —

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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.

205. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Incl., 135 S. Ct. 2507, 2525-26 (2015); *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 7–8 (N.J. Super. Ct. App. Div. 2004); *LIHTC Beyond 30*, *supra* note 174, at 13–18 (giving details regarding the poor neighborhood quality for places where most LIHTC units are located).

206. *Home Investment Partnerships Program*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/comm_planning/affordablehousing/programs/home/ [https://perma.cc/RNT2-K27R] (last visited Oct. 11, 2019).

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."[207] HOME provides both housing grants to local governments and tenant-based rental assistance (subsidizing demand) and requires matching grants from other sources.[208] 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.[209] 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.[210]

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.[211] Second, siting of units produced under the various supply-

207. *Id.*

208. *Home Tenant-Based Rental Assistance*, U.S. DEP'T HOUSING & URB. DEV., https://www.hudexchange.info/programs/home/topics/tbra/#policy-guidance-and-faqs [https://perma.cc/3NXC-KBWU] (last visited Oct. 11, 2019).

209. Ed Gramlich, *Community Development Block Grant Program*, NAT'L LOW INCOME HOUSING COALITION, https://nlihc.org/sites/default/files/AG-2017/2017AG_Ch08-S02_Community-Development-Block-Grant.pdf [https://perma.cc/AG4Z-BS6H] (last visited Oct. 11, 2019).

210. DARIA DANIEL, NAT'L ASS'N OF CTYS., 2019 POLICY BRIEF: SUPPORT LOCAL DEVELOPMENT AND INFRASTRUCTURE PROJECTS THROUGH THE COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM (2019), https://www.naco.org/sites/default/files/documents/CDBG 202019 20Leg 20Conferenc e 20- 20final.pdf [https://perma.cc/VN23-HP4T]; URBAN NEIGHBORHOOD INITIATIVE, *supra* note 13.

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

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"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).

212. In 2015, HUD released a final rule to require and support local efforts to deliberately desegregate housing patterns through aid allocation decision-making at the local level. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42, 272 (July 16, 2015) (to be codified at 24 C.F.R pts. 5, 91, 92, 570, 576, 903), https://www.huduser.gov/portal/affht_pt.html#final-rule [https://perma.cc/9U7H-UY7P]; *see also*, *AFFH Fact Sheet*, U.S. DEP'T HOUSING & URB. DEV. https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf [https://perma.cc/UD9A-2XYQ] (last visited Oct. 15, 2019). In January 2018, Secretary Carson announced that HUD would delay implementing the AFFH Rule until 2020. *See* Kriston Capps, *The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation*, CITYLAB (Jan. 4, 2018), https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/ [https://perma.cc/B3AT-7PRD].

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.[214] 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.[215]

"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/ [https://perma.cc/5XCB-PYUH] (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 [https://perma.cc/2BER-LU53] (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/ [https://perma.cc/28J3-97LD]. 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.

214. *See* Chetty et al., *supra* note 113, at 897–98; *see also* Ingrid Gould Ellen & Keren Mertens Horn, *Points for Place: Can State Governments Shape Siting Patterns of Low-Income Housing Tax Credit Developments?*, HOUSING POL'Y DEBATE 13–14 (2018). Case in point: the proposed American Housing and Economic Mobility Act not only provided for increased funding for housing production, but takes specific steps to make higher quality neighborhoods accessible to low-income individuals. S. 3503, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/3503/actions [https://perma.cc/N6F3-EB2Q]. A new version of the proposal was introduced in the Senate in March 2019. S. 787, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/787/actions [https://perma.cc/UR53-HDY5], which the National Low Income Housing Coalition has endorsed. *See American Housing and Economic Mobility Act*, NAT'L LOW INCOME HOUSING COALITION, https://nlihc.org/sites/default/files/Warren-HEOM-Bill.pdf [https://perma.cc/KU2Z-97DR] (last visited Oct. 15, 2019).

215. *See* Boyack, *Sustainable*, *supra* note 10, at 464–65.

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.[216] 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.[217]

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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 N. 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).[218] 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.[219] 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.[220]

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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

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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 Allec, *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).

224. *See, e.g.*, Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667, 672 (2017); Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 FORDHAM J. CORP. & FIN. L. 751, 757–58 (2012); Boyack, *Sustainable supra* note 10, at 473–74

expensive homes and biggest mortgage loans.[225] 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.[226] 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.[227]

> 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.[228]

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.[229]

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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.[230] 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.[231] The FHA also provides mortgage insurance to qualifying homebuyers, increasing access to and decreasing the cost of credit, thereby subsidizing homeownership costs.[232] 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.[233]

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.").

230. NAT'L LOW INCOME HOUS. COAL., ADVOCATE'S GUIDE 2018: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 4–10 (2018), https://nlihc.org/sites/default/files/AG-2018/2018_Advocates-Guide.pdf [https://perma.cc/YXR4-UPS2].

231. *See* 12 U.S.C. §§ 1716–23 (1992); *Self-Help Homeownership Opportunity Program (SHOP)*, U.S. DEP'T HOUSING & URB. DEV., https://www.hudexchange.info/programs/shop/ [https://perma.cc/2HBR-7TN5]; Reiss, *supra* note 1, at 1090–91.

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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234. ROTHSTEIN, *supra* note 1, at 63–75; *see also* JACKSON, *supra* note 1, at 191–218. Although race-based and disparately provided mortgage assistance is illegal today, federally subsidized access to credit still seems to be unevenly distributed. *See* CTR. FOR RESPONSIBLE LENDING, DESPITE GROWING MARKET, AFRICAN AMERICANS AND LATINOS REMAIN UNDERSERVED 1–5 (2017), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-2016hmda-policy-brief-sep2017.pdf [https://perma.cc/35NX-QY2N]; Drew DeSilver & Kristen Bialik, *Blacks and Hispanics face extra challenges in getting home loans,* PEW RES. CTR. (Jan. 10, 2017), https://www.pewresearch.org/fact-tank/2017/01/10/blacks-and-hispanics-face-extra-challenges-in-getting-home-loans/ [https://perma.cc/4AT5-SN8K]; Aaron Glantz & Emmanuel Martinez, *Kept Out: For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/ [https://perma.cc/AJF4-LWCD]; Sarah Mikhitarian, *Black Mortgage Applicants Denied at More Than Twice the Rate of Whites*, ZILLOW (Apr. 19, 2018), https://www.zillow.com/research/black-white-mortgage-denials-19616/ [https://perma.cc/4QNK-TM4N].

235. DAVID RUSK, THE BROOKINGS INST., CTR. ON URBAN & METRO. STUDIES, THE "SEGREGATION TAX": THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS 2 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/rusk.pdf [https://perma.cc/U294-55BJ] ("Home equity is the typical American family's most important financial asset, and an important vehicle for transmitting wealth from generation to generation."); Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 670 n.300 (2006) ("According to a 2004 study of census data by the Pew Hispanic Center, the median net worth of renters is only 1% of the median net worth of homeowners."); Brown, *supra* note 216, at 332 ("Homeownership in America has historically been viewed as a solid investment both financially and as a means of living the American Dream," but "homeownership has never been a good financial investment for either the vast majority of African-American homeowners or for low-income homeowners.").

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.

241. STATE OF HOUSING 2018, *supra* note 16, at 3, 19–20; Brown, *supra* note 216, at 349–62; *see also* Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. STAT. 281, 281 (2002); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1207–08 (2001); Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 68 (2006).

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

243. Laurie Goodman et al., *The US Homeownership Rate Has Lost Ground Compared with Other Developed Countries*, URB. INST. (Mar. 12, 2018), https://www.urban.org/urban-wire/us-homeownership-rate-has-lost-ground-compared-other-developed-countries [https://perma.cc/T8DC-3F7K]; *United States Home Ownership Rates*, TRADING ECON., https://tradingeconomics.com/united-states/home-ownership-rate [https://perma.cc/C852-P49J] (last visited Oct. 5, 2019, 2:13 PM).

244. STATE OF HOUSING 2018, *supra* note 16, at 1–2.

programs.[245] 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.[246] 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.[247] There are currently 1.2 million project-based subsidy units and more than 2 million HCVs,[248] 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.[249] 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.[250] Because demand for vouchers exceeds supply, the local PHAs who distribute the vouchers must determine who among the

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245. 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 HOUSING & URB. DEV., https://www.hud.gov/programdescription/cert8 [https://perma.cc/452E-J84N] (last visited Oct. 5, 2019); *see also* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: HOUSING CHOICE VOUCHER PROGRAM 1 (2017), https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13vouch.pdf [https://perma.cc/G66B-W3J8].

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

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

248. CTR. ON BUDGET & POLICY PRIORITIES, RENTAL ASSISTANCE IS EFFECTIVE BUT SERVES ONLY A FRACTION OF ELIGIBLE HOUSEHOLDS 10, https://www.cbpp.org/sites/default/files/atoms/files/2-24-09hous-sec2.pdf /https://perma.cc/2ETX-TG7E] (last visited Sept. 25, 2019).

249. *See* BRUCE KATZ & MARGERY AUSTEN TURNER, BROOKINGS INST., RETHINKING U.S. RENTAL HOUSING POLICY: BUILD ON STATE & LOCAL INNOVATION 4–5 (2008); Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489, 497–98 (2000). Ironically, vouchers can also create a problematic economic effect by nudging housing prices up in a market because they increase tenants' ability to pay. Boyack, *Sustainable, supra* note 10, at 489–90.

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.[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.[252] Waitlists for available vouchers can be long and wait times can exceed two years.[253]

PBVs attach to a specific unit and are not portable, whereas tenant recipients of HCVs can move and take their vouchers with them.[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.[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.[256] But that is the rub. In most states, landlords are free to refuse payment of rent in the form of HCVs.[257]

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251. HOUS. COMM'N BIPARTISAN POLICY CTR., HOUSING AMERICA'S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY 11 (2013); *NLIHC Out of Reach 2018*, *supra* note 23, at 3.

252. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, PHA GUIDEBOOK TO ENDING HOMELESSNESS 8 (2013).

253. In Boston, for example, more than 10,000 people applied for just 73 additional vouchers issued in November 2014. Katie Johnson, *Demand Soars for Affordable Housing in Boston Area*, BOS. GLOBE (Nov. 28, 2014), https://www.bostonglobe.com/business/2014/11/28/demand-for-affordable-housing-soars/hCb4RSkLTbpqdMJR1eCYTI/story.html [https://perma.cc/U8E3-TH7J]; *see also*; *Millions of Families on Voucher and Public Housing Waiting Lists*, NAT'L LOW INCOME HOUS. COAL. (Apr. 30, 2019), https://nlihc.org/resource/millions-families-voucher-and-public-housing-waiting-lists [https://perma.cc/8WR7-D5QM]; Bolton et. al., *supra* note 21, at 5.

254. Barbara Sard, *Project-Based Vouchers*, *in* NATIONAL LOW-INCOME HOUSING COALITION 2018 ADVOCATES' GUIDE 4–48 (2018), https://nlihc.org/sites/default/files/AG-2018/Ch04-S12_Project-Based-Vouchers_2018.pdf [https://perma.cc/KD2N-QR2R].

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, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 805–07 (2012).

256. Brown, *supra* note 158, at 699.

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. *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.[258] A small handful of states have outlawed source-of-income-based discrimination in rental housing,[259] and Congress periodically proposes expanding the Fair Housing Act protections to cover people who are denied housing because they pay with a voucher.[260] 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.[261] In

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Vouchers Fact Sheet, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/99NM-RSFP]. Even in such states, however, enforcement is "generally weak" and landlords still often discriminate against voucher holders. Ingrid Gould Ellen, *What Do We Know about Housing Choice Vouchers?*, 30 REGIONAL SCI. & URB. ECON. 1, 1–2 (2018), https://furmancenter.org/files/What_do_we_know_about_housing_vouchers.pdf [https://perma.cc/ZR8R-6FZF].

258. Socioeconomic status "is tightly linked to race, minority status, sex, and disability," so it is difficult to tease out the reasons that landlords may refuse to rent to housing voucher recipients. Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 220 (2011). For a more thorough discussion of the issues surrounding source of income discrimination, *see* Jenna Bernstein, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1412 (2010); Stefanie DeLuca, *Why Don't More Voucher Holders Escape Poor Neighborhoods*, NYU FURMAN CTR. (Oct. 2014), http://furmancenter.org/research/iri/essay/why-dont-more-voucher-holders-escape-poor-neighborhoods [https://perma.cc/CUA3-DQYJ]; Ellen, *supra* note 257, at 2.

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 [https://perma.cc/FM7X-RB7Y]. 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

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against voucher recipients. Brentin Mock, *New Orleans' Leading Affordable-Housing Developer Explains Its Lack of Affordable Housing*, CITYLAB (Sept. 3, 2015), https://www.citylab.com/equity/2015/09/new-orleans-leading-affordable-housing-developer-explains-its-lack-of-affordable-housing/403351/ [https://perma.cc/EQH9-WCQ3] (describing a developer's advice to landlords in post-Katrina New Orleans to refuse to rent to voucher recipients).

262. HUD's Small Area Fair Market Rent demonstration explored the possibility of defining reasonable rents for voucher purposes based on zip code rather than region in order to allow voucher recipients better access to higher priced neighborhoods. MERYL FINKEL ET AL., U.S. DEP'T OF HOUS. & URB. DEV., SMALL AREA FAIR MARKET RENT DEMONSTRATION EVALUATION, at v (2017); *see* 24 C.F.R. §§ 888.113, 982.503 (2018).

263. *Housing Voucher Policy Designed to Expand Opportunity Targets Areas That Need It*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 9, 2018), https://www.cbpp.org/research/housing/housing-voucher-policy-designed-to-expand-opportunity-targets-areas-that-need-it [https://perma.cc/M6PB-VFF3].

264. *See supra* notes 96–100 and accompanying text.

265. Congress is not solely to blame. The Trump Administration has proposed annual budgets (for FY18, FY19 and FY20) that significantly reduce affordable housing's federal funding. *See President Trump Proposes Drastic Cuts to Affordable Housing Programs*, NAT'L LOW INCOME HOUSING COALITION (Mar. 11, 2019)

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.[266] 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.[267] Federal

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[hereinafter NLIHC, *Trump 2020 Budget*], https://nlihc.org/resource/president-trump-proposes-drastic-cuts-affordable-housing-programs [https://perma.cc/PJF2-U2TC]. This communicates the executive branch's lack of concern for the ability of low-income households to pay housing costs and reside in habitable homes.

266. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939) ("Glinda: You've always had the power to go back to Kansas. Dorothy: I have?").

267. Robert Collinson et al., *Low Income Housing Policy*, *in* ECONOMICS OF MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 59–61 (Robert A. Moffitt ed., 2016) https://www.nber.org/chapters/c13485.pdf [https://perma.cc/C6GS-4MWP] (calculating that nearly $40 billion annual funds are allocated to means-

housing policy today provides benefits to people who do not financially need them.[268] 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.[269] 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.[270]

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

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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, "[l]ess 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].

270. Current and prior legislative proposals have detailed numerous ways to decrease the administrative costs of housing programs. *See, e.g.*, Will Fischer, *Streamlining Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 21, 2015), https://www.cbpp.org/housing/streamlining-federal-rental-assistance [https://perma.cc/DN5D-XFM9].

assistance at all.[271] In addition, homeowner subsidies are provided without any dignitary costs, while renter subsidies, when provided, come with stigma, autonomy constraints, and possibly with onerous behavioral mandates.[272] 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.[273] Rental housing assistance, on the other hand, is more visible and carries a stigma.[274] 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.[275] 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.[276] In many cases, rental housing assistance does little to improve long-term prospects and diminish long-term need.[277] 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.

272. There is no stigma associated with claiming deductions related to homeownership. *See* Kevin Gu, *An Origin of Welfare Stigma*, RAMAPO J.L. & SOC'Y (2016), https://www.ramapo.edu/law-journal/files/2016/01/An-Origin-of-Welfare-Stigma.pdf [https://perma.cc/B3QY-U7L8]. But stigmas associated with receiving governmental rental subsidies are significant and well documented. *See, e.g.*, Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Desegregation*, 27 FORDHAM URB. L.J. 533, 561–62 (1999); Steven J. Eagle, *"Affordable Housing" As Metaphor*, 44 FORDHAM URB. L.J. 301, 314 (2017); Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 713–14 (2011).

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

274. *See* Kristi Andrasik, *When It Comes to Housing, Your Voucher is Your Stigma*, REALCLEAR POL'Y (Oct. 3, 2016), https://www.realclearpolicy.com/blog/2016/10/04/when_it_comes_to_housing_your_voucher_is_your_stigma_1724.html [https://perma.cc/UA7N-X64P]; Emily Badger, *How Section 8 Became a 'Racial Slur,'* WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm_term=.e56ffeb042f2 [https://perma.cc/B6LL-MG8T]; Maria Elkin, *What Everyone Gets Wrong about Affordable Housing*, NEW AMERICA (Aug. 24, 2017), https://www.newamerica.org/weekly/edition-174/what-everyone-gets-wrong-about-affordable-housing/ [https://perma.cc/FE2M-2CMF]; *see also infra* note 305 and accompanying text.

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

276. *See* Richard D. Kalenberg, *An Economic Fair Housing Act*, CENTURY FOUND. (Aug. 3, 2017), https://tcf.org/content/report/economic-fair-housing-act/?agreed=1 [https://perma.cc/BH4H-LHW9].

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.[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.[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.[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.

279. *See generally* JAMES H. CARR ET AL., NAT'L ASS'N OF REAL ESTATE BROKERS, THE STATE OF BLACK HOUSING IN AMERICA (2016), http://www.nareb.com/site-files/uploads/2016/08/NAREB-SHIBA-REPORT-2016-final.pdf [https://perma.cc/TAZ8-L73N]; Sean Veal & Jonathan Spader, *Nearly a Third of American Households Were Cost-Burdened Last Year*, HARV. UNIV. JOINT CTR. FOR HOUSING STUD. (Dec. 7, 2018), https://www.jchs.harvard.edu/blog/more-than-a-third-of-american-households-were-cost-burdened-last-year/ [https://perma.cc/L3HH-LK8E]. Pending legislation proposals include aid for struggling homeowners. For a summary of the Foreclosure Crisis and its impacts, see *supra* note 61.

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] A

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281. *See* Robert O. Zdenek, *The Art and Science of Community Economic Development*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 331, 331–33 (2004) (reviewing and summarizing MIHAILO TEMALI, THE COMMUNITY ECONOMIC DEVELOPMENT HANDBOOK: STRATEGIES AND TOOLS TO REVITALIZE YOUR NEIGHBORHOOD (2002)).

282. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., U.S. DEP'T OF HOUS. & URB. DEV., "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 3 (1991); 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, 151 (1996); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 6 (2006); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 3 (2001); *see also* U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

283. Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease a Home*, 49 REAL PROP. TR. & EST. L.J. 203, 208–11 (2014); *see also* Boyack, *Revitalizing*, *supra* note 107, at 471–74.

284. S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 411–22, 433, 441–51 (N.J. 1983); S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 724–25, 732–34 (N.J. 1975). The

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.[285] Local, regional exclusions can be combatted 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.[286] Treating multi-jurisdictional housing markets as a whole will better address neighborhood quality concerns, residential desegregation, and regional affordability.[287] It will also enable coordination for

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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).

285. There are many discussions of how land use regulations affects affordable housing. *See, e.g.*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 84–89 (2d ed., West 2003) (discussing minimum lot sizes and building setback lines); Richard Briffault, *Our Localism: Part I–The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990) (discussing minimum lot sizes); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 101–102 (1970) (discussing minimum lot sizes in Houston, a city purportedly without zoning); *see also* Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 925–27 (2007); Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. HAW. L. REV. 39, 69–70 (2015); Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093, 1131–33 (2007); Michael Lewyn, *Zoning and Land Use Planning*, 44 REAL EST. L.J. 558, 558–63 (2016); Boyack, *Revitalizing*, *supra* note 107, at 448–57.

286. Lavea Brachman, *New State and Federal Policy Agendas: Realizing the Potential of America's Legacy Cities and Their Regions*, *in* REBUILDING AMERICA'S LEGACY CITIES: NEW DIRECTIONS FOR THE INDUSTRIAL HEARTLAND 276–77 (Alan Mallach ed., 2012); *see also* Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 532, 546 (2005); Abraham Gutman et. al., *Health, Housing, and the Law*, 11 NE. U.L. REV. 251, 310–12 (2019) (discussing various regional coordinated efforts to address housing deficiencies); Megan Haberle & Philip Tegeler, *Coordinated Action on School and Housing Integration: The Role of State Government*, 53 U. RICH. L. REV. 949, 957 (2019) (discussing how the "absence of widespread regional solutions" has hamstrung attempts to desegregate communities and public schools).

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

tenant blacklisting,[291] and be ensured the right to counsel in eviction proceedings.[292] Federal law could create, and federal courts could ensure, a residential tenants' bill of rights.[293]

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.[294] 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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reframing of harms to tenants from uninhabitable premises); Franzese et al., *supra* note 101, at 42–43 (2016) (suggesting better enforcement mechanisms).

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

292. Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527 (1991); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509–17 (2004); Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562–76 (1988). New York recently passed a law — "the first of its kind in the nation" — that guarantees legal representation for low-income tenants facing eviction. Andrew Scherer, *The Right to Counsel for Tenants Who Face Eviction*, N.Y. L. SCH.: CITYLAND (Feb. 20, 2018), https://www.citylandnyc.org/the-right-to-counsel-for-tenants-who-face-eviction/ [https://perma.cc/69G3-S33D]. San Francisco, the District of Columbia, and Philadelphia have all taken steps towards enacting similar supports for low-income tenants facing eviction. Clare Pastore & John Pollock, *Into the Breach: Progress on the Right to Counsel in Civil Matters*, 41 L.A. LAW. 13, 14 (2018); DESMOND, EVICTED, *supra* note 11, at 303–04.

293. Currently, federal law essentially establishes only two areas of protection for residential tenants: protection from discrimination under FHA and protection from eviction due to landlord foreclosure in the Protecting Tenants in Foreclosure Act, expanded into a permanent law in May 2018. *Congress Permanently Authorizes the Protecting Tenants in Foreclosure Act*, NAT'L LOW INCOME HOUSING COALITION (May 29, 2018), https://nlihc.org/resource/congress-permanently-authorizes-protecting-tenants-foreclosure-act [https://perma.cc/3JAY-H6NA]. Federal law does not mandate counsel in eviction proceedings, require habitable quality of rented premises, or otherwise impose a floor for state landlord-tenant law. The U.S. Department of Defense, however, is in the process of preparing and promulgating a "Tenant Bill of Rights" creating supplemental legal tenant protections for service personnel in rental housing. *U.S. Military Plans Release of Tenant Bill of Rights*, U.S. ARMY (Mar. 6, 2019), https://www.army.mil/article/218198/us_military_plans_release_of_tenant_bill_of_rights [https://perma.cc/J3QL-6RW9].

294. MAGGIE MCCARTY, CONG. RESEARCH SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 11 (2014), https://fas.org/sgp/crs/misc/R41654.pdf [https://perma.cc/Q5ES-QCGP].

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]

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295. *See generally supra* notes 1, 234–44 and accompanying text.

296. *See* Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 B.U. L. REV. 851, 870–71 (2015).

297. Roderick M. Hills, Jr., *Saving* Mount Laurel*?*, 40 FORDHAM URB. L.J. 1611, 1615 (2013).

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 109, 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.[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.[303] Housing instability decreases income, decreasing federal and state tax revenues, and increasing the burden on federal and state social services.[304] When housing unaffordability leads to homelessness, the costs are very extreme.[305] In 2015 alone, the federal government spent $4.5 billion to address homelessness.[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.[307] Local decision-makers should not be permitted to impose such negative economic impacts on the country as a whole.

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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.

303. *See* Jeff Larrimore & Jenny Schuetz, *Assessing the Severity of Rent Burden on Low-Income Families*, BOARD GOVERNORS FED. RES. SYS. (Dec. 22, 2017) https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.htm [https://perma.cc/W7HX-GJ46].

304. *Id.*

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.

306. *See* STATE OF HOMELESSNESS, *supra* note 305, at 4.

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.[308] 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.[309] Federal housing policy helped concentrate poverty into environmentally hostile and neglected neighborhoods.[310] It spurred environmentally problematic suburban sprawl and disinvestment in America's cities.[311] 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.[312] 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.[313] 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

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308. *See generally* Rothstein, *supra* note 1.

309. *Id.*; *see also* Kelo v. City of New London, Conn., 545 U.S. 469, 519–22 (2005) (Thomas, J., dissenting).

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 dysfunction,[315] 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

314. *See generally* DARREL M. WEST, DIVIDED POLITICS, DIVIDED NATION: HYPERCONFLICT IN THE TRUMP ERA (2019). Polarization is reflected differently in state and local politics. *See* Richard Florida, *Are Local Politics as Polarized as National? Depends on the Issue*, CITYLAB (Apr. 24, 2019), https://www.citylab.com/life/2019/04/polarization-cities-education-labor-public-opinion-taxes/587746/ [https://perma.cc/C2Z5-U2AA]; Amalie Jensen et al., City Limits to Partisan Polarization in the American Public (Mar. 2019) (unpublished paper), http://williammarble.co/docs/CityLimits-Mar2019.pdf [https://perma.cc/29EK-WRTR] (showing "affordable housing" as an issue that is relatively more polarizing in some localities, but enjoys a relative consensus of opinion in others, compared to the consistently partisan issues of labor unions and education).

315. *See* M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN ST. L. REV. 61, 68 (2016); Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html [https://perma.cc/33LL-V2EQ]. Although news stories, opinion pieces, and articles about federal government dysfunction during the Trump administration are legion, federal government dysfunction is not a recent phenomenon. *See generally* BRENNAN CTR. FOR JUSTICE, THE GOVERNING CRISIS: EXPLORING SOLUTIONS (2014), http://www.brennancenter.org/sites/default/files/publications/dysfunction 20V7 2005 2 012.pdf [https://perma.cc/JP6L-W3VU].

316. *See supra* notes 222–32 and accompanying text.

Housing Trust Fund.[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.[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.[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.[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

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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].

318. *See, e.g.*, Jared Bernstein, *Opportunity Zones: Can a Tax Break for Rich People Really Help Poor People?*, WASH. POST (Jan. 14, 2019), https://www.washingtonpost.com/outlook/2019/01/14/opportunity-zones-can-tax-break-rich-people-really-help-poor-people/ [https://perma.cc/Q4RB-ATKX]; Lori Chatman, *Opportunity Zones: What They Are, Why They Matter*, AFFORDABLE HOUSING FIN. (Feb. 26, 2018), https://www.housingfinance.com/news/opportunity-zones-what-they-are-why-they-matter_o [https://perma.cc/XYS8-RLQP]; *Opportunity Zones*, ECON. INNOVATION GROUP, https://eig.org/opportunityzones [https://perma.cc/8JHU-WF62] (last visited Oct. 5, 2019 7:34 PM); Catalina Vielma, *Opportunity Zones and Tax Credits: A Match Made In . . . ?*, AFFORDABLE HOUSING FIN. (Aug. 1, 2018), https://www.housingfinance.com/finance/opportunity-zones-and-tax-credits-a-match-made-in_o [https://perma.cc/85C5-36RN]. For a more cynical analysis, see Gbenga Ajilore, *How a Tax Break Meant for Low-Income Communities Became a Mini Tax Haven for the Rich*, TALK POVERTY (Dec. 13, 2018), https://talkpoverty.org/2018/12/13/tax-break-low-income-opportunity-rich/ [https://perma.cc/A4SJ-R323].

319. NLIHC, *Trump 2020 Budget*, *supra* note 265.

320. *See House Releases Robust FY2020 Housing Spending Bill*, NAT'L LOW INCOME HOUSING COALITION (May 22, 2019), https://nlihc.org/resource/house-releases-robust-fy2020-housing-spending-bill [https://perma.cc/N5FV-KXUC].

for any affirmative integration efforts.[321] 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.[322]

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.[323] 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.[324] The shutdown also interrupted HUD

321. *See* Kriston Capps, *The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation*, CITYLAB (Jan. 4, 2018), https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/ [https://perma.cc/G9KS-EBEG]; *House GOP Members Call for HUD to Rescind AFFH Rule, Secretary Carson Says HUD will "Reinterpret" the Rule*, NAT'L LOW INCOME HOUSING COALITION (Apr. 30, 2019), https://nlihc.org/resource/house-gop-members-call-hud-rescind-affh-rule-secretary-carson-says-hud-will-reinterpret [https://perma.cc/JM8X-HM2C].

322. Kriston 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/ [https://perma.cc/QM29-CYUF]. 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.

324. Salary interruptions for federal employees caused worries with respect to employees' ability to make monthly rental and mortgage payments for housing. Letter from Campaign for Housing and Community Development Funding to Sen. McConnell et al., (Jan. 8, 2019) [hereinafter *CHCDF Letter*], https://cdn.theatlantic.com/assets/media/files/chcdf_letter_re_government_shutdown_010819.pdf [https://perma.cc/4V2W-3BSL]. Federal employee housing payments due in January 2019 alone were estimated to be over $400 million in aggregate. Shawn M. Carter, *Workers Going Unpaid during the Shutdown Owe $438 Million in Rent and Mortgage Payments This Month*, CNBC (Jan. 18, 2019), https://www.cnbc.com/2019/01/15/federal-workers-who-arent-being-paid-oew-438-million-for-housing.html [https://perma.cc/6P8J-3VJP]; *see also* Liz Frazier Peck, *The*

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

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Real Financial Impact of the Government Shutdown on Workers, FORBES (Jan. 14, 2019), https://www.forbes.com/sites/lizfrazierpeck/2019/01/14/the-real-financial-impact-of-the-government-shutdown-on-workers/#596d26c242b5 [https://perma.cc/JTK8-9TJR]. News reports during the shutdown bear witness to widespread worry and even panic among those who are to some extent dependent upon federal housing assistance or management. *See, e.g.*, Suzy Khimm & Laura Strickler, *'There's No Money': Shutdown Freezes HUD Funds for Low-income Senior Citizens*, NBC NEWS (Jan. 11, 2019), https://www.nbcnews.com/politics/white-house/there-s-no-money-shutdown-freezes-hud-funds-low-income-n957386 [https://perma.cc/C7LZ-4XKL]; Tracy Jan & William Wan, *Food Stamps, Rent Aid and the Safety Net for American's Poorest at Risk as Shutdown Drags On*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/business/economy/food-stamps-housing-subsidies-and-other-services-for-vulnerable-americans-in-jeopardy-as-shutdown-drags-on/2019/01/09/e025549c-1374-11e9-803c-4ef28312c8b9_story.html?noredirect=on [https://perma.cc/4J2F-3WGH]; Khushubu Shah, *'We Are Being Held Emotionally Hostage': Shutdown Hits Affordable Housing*, GUARDIAN (Jan. 10, 2019), https://www.theguardian.com/society/2019/jan/10/government-shutdown-affordable-housing-hud-trump [https://perma.cc/A9RU-9PL4]. A statement issued by the Trump Administration advised landlords with federal employee tenants to cover any unpaid rents "with reserves" and suggested that federal employees could offer to perform upkeep services in kind in lieu of making rental or mortgage payments. *See* Mariana Alfredo, *A Government Agency Shared Tips for Employees to Send to Landlords While the Shutdown Leaves Them without Paychecks*, BUS. INSIDER (Dec. 28, 2018 2:51 PM), https://www.businessinsider.com/government-shutdown-agency-shared-tips-for-employees-to-send-to-landlords-2018-12 [https://perma.cc/5X4Q-Z8LT].

325. *See generally Frequently Asked Questions (FAQs) in the Event of a Government Shutdown*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/sites/dfiles/Main/documents/GENERALFAQS.pdf [https://perma.cc/TJ93-9E6K] (last visited Oct. 6, 2019); *CHCDF Letter*, *supra* note 324. HUD was shuttered during the government shutdown and Deputy Secretary Pam Patenaude, the highest-ranking HUD official with any housing experience, quit. Jacob Gaffney, *HUD Deputy Secretary Pam Patenaude Resigns, Ends 35-Year Career in Housing*, HOUSINGWIRE (Dec. 17, 2018), https://www.housingwire.com/articles/47714-hud-deputy-secretary-pam-patenaude-resigns [https://perma.cc/CZP3-NTAN].

326. ; Glen Thrush, *Shutdown's Pain Cuts Deep for the Homeless and Other Vulnerable Americans*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/us/politics/government-shutdown-housing-services.html [https://perma.cc/LS5H-JJMG]; *CHCDF Letter*, *supra* note 324.

327. Brakkton Booker, *Thousands Face Threat of Eviction After HUD Contracts Expire Due to Shutdown*, NAT'L PUB. RADIO (Jan. 11, 2019), https://www.npr.org/2019/01/11/684414651/thousands-face-threat-of-eviction-after-hud-contracts-expire-due-to-shutdown [https://perma.cc/Y9TQ-WAP2];; *Expired or Expiring HUD Project-Based Rental Assistance Contracts (December 2018 to

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.[328] The shutdown also put financial pressure on the private landlords and other organizations that serve as key partners for federal housing programs.[329] 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."[330]

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

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February 2019), NAT'L LOW INCOME HOUSING COALITION (Jan. 11, 2019), https://nlihc.org/sites/default/files/Shutdown-by-State.pdf [https://perma.cc/RNH6-FN7A]; *Impacts of Government Shutdown on Affordable Housing Programs*, CAMPAIGN FOR HOUSING & COMMUNITY DEV. FUNDING (Jan. 14, 2019), https://nlihc.org/sites/default/files/FY19_Shutdown_Factsheet.pdf [https://perma.cc/R25P-BAWA]; *CHCDF Letter*, *supra* note 324. Extremely low-income households, by definition, have an income that is below 30% of the average median income. The median income of a four-person extremely low-income household in 2017 was $17,050. WORST CASE HOUSING NEEDS 2017, *supra* note 21, at 1.

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].

330. Sanjana Karanth & Arthur Delaney, *Some Renters Are Already Facing Eviction, Thanks to the Shutdown*, HUFFINGTON POST (Jan. 15, 2019), https://www.huffpost.com/entry/shutdown-low-income-renters-housing-programs-section-8-eviction_n_5c3e1823e4b01c93e00e1a86 [https://perma.cc/JYE5-T7UC]. The shutdown resulted from disagreements between Congress and President Trump regarding border security. Peter Lawrence, *House Approved 2019 Omnibus Appropriations Would End Shutdown, Increase HUD Funding but Wall Funding Impasse Prevents Enactment*, NOVOGRADIC: HUD RESOURCE CENTER (Jan. 8, 2019), https://www.novoco.com/notes-from-novogradac/house-approved-2019-omnibus-appropriations-would-end-shutdown-increase-hud-funding-wall-funding [https://perma.cc/EX6E-HRVL].

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.[331] 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.[332]

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.[333]
- Guaranteeing particular legal protections for tenants individually and low-income households as a group.[334]
- Expanding the Fair Housing Act to include source-of-income discrimination.[335]

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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.[336]
- Repealing the MID while legally mandating that all increased revenues from its elimination be allocated to fund affordable housing initiatives.[337]
- Expanding supply-producing initiatives, such as the LIHTC program, to address affordable supply deficits[338] and the expiring affordability periods of existing low-income housing,[339] specifying that the majority of new affordable housing units be created in higher quality neighborhoods.[340]
- Mandating sufficient funding to cover the affordability gap, at least with respect to all very low-income families.[341]
- Guaranteeing publicly provided shelter programs for the most vulnerable populations (extremely low- and no-income households that are homeless, disabled, or elderly).[342]

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

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).

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.*

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

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

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

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).

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).

342. *See supra* notes 37, 155, 178, 307–08 and accompanying text; *see also* LAUVENA 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]

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343. *See* Boyack, *Revitalizing*, *supra* note 107, at 448–49 (discussing how neighborhood improvements in areas of poverty concentration can create improved outcomes for low-income households if displacement is avoided); *see also* Elizabeth Kneebone, *The Growth and Spread of Concentrated Poverty, 2000 to 2008-2012*, BROOKINGS INST. (July 31, 2014), https://www.brookings.edu/interactives/the-growth-and-spread-of-concentrated-poverty-2000-to-2008-2012/ [https://perma.cc/ZT43-7QVH] (discussing the neighborhood effects of concentrated poverty in neighborhoods with poor education, health, and physical infrastructure).

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].

345. Improvements in support for single-parent households, including better childcare, healthcare, and parental leave, will pay dividends in available income and, thus, housing affordability. *See generally* GINA ADAMS ET AL., URB. INST., STRATEGIES TO MEET THE CHILD CARE NEEDS OF LOW-INCOME PARENTS SEEKING EDUCATION AND TRAINING (2016), https://www.urban.org/sites/default/files/publication/84326/2000938-Strategies-to-Meet-the-Child-Care-Needs-of-Low-Income-Parents-Seeking-Education-and-Training.pdf [https://perma.cc/X4TV-XMG8]; Kelli A. Komro et al., *Creating Nurturing Environments: A Science-Based Framework for Promoting Child Health and Development within High-Poverty Neighborhoods*, 14 CLINICAL CHILD & FAM. PSYCHOL. REV. 111 (2011); Elizabeth A. Mulroy & Terry S. Lane, *Housing Affordability, Stress and Single Mothers: Pathway to Homelessness*, 19 J. SOC. & SOC'Y WELFARE 51 (1992). HUD and state agencies do have specific programs that aim to support the housing needs of single parents; *see, e.g.*, *HUD Public Housing for Single Mothers*, GRANTS FOR SINGLE MOTHERS, http://singlemothersgrants.org/hud-public-housing-for-single-mothers/ [https://perma.cc/S6AN-NSNA] (last visited Oct. 6, 2019, 1:20 PM).

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.[346] 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,[347] but this bill risks dying in committee based on a handful of

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346. *See, e.g.*, Section 8 Voucher Reform Act of 2009, H.R. 3045, 111th Cong. (2009); Common Sense Housing Investment Act of 2013, H.R. 1213, 112th Cong. (2013); Housing Opportunity through Modernization Act of 2016, H.R. 3700, 114th Cong. (2016); Affordable Housing Credit Improvement Act of 2017, S. 548, 115th Cong. (2017); American Housing and Mobility Act of 2018, S. 3503, 115th Cong. (2018); Affordable Housing Crisis Act of 2018, S. 3231, 115th Cong. (2018); *Affordable Housing and Self-Sufficiency Improvement Act (AHSSI)*, NAT'L LOW INCOME HOUSING COALITION (Jun. 2012), https://www.smgov.net/uploadedFiles/Departments/HED/Housing_and_Redevelopment/Housing/Housing_Commission_Agendas/2012/Attach 20C 20AHSSIA_FS.pdf [https://perma.cc/Q4XR-EFWL]. Currently, the American Housing and Economic Mobility Act of 2019, S. 787, 116th Cong. (2019), is still in committee.

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.[348] 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.[349] If Congress could successfully enact smaller, specific bills, Congress may start to meet its responsibility of effectively shaping federal affordable housing law and policy.[350]

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

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COALITION (Mar. 13, 2019), https://nlihc.org/sites/default/files/Warren-HEOM-Bill.pdf [https://perma.cc/F32Z-UM5F]. There are good arguments that would support the passage of any one of the Act's mandates, but if the entire omnibus bill cannot be passed, none of these improvements would become law. It would be better to successfully pass some of these initiatives than fail to pass all of them.

348. *See* Kriston Capps, *Elizabeth Warren's Housing Crisis Plan Hints at Reparations*, CITYLAB (Jan. 4, 2019), https://www.citylab.com/equity/2019/01/elizabeth-warren-housing-plan-redlining-racial-justice-reparations/579268/ [https://perma.cc/BG95-AV89]; Madeline Carlisle, *Elizabeth Warren's Ambitious Fix for America's Housing Crisis*, ATLANTIC (Sept. 25, 2018), https://www.theatlantic.com/politics/archive/2018/09/elizabeth-warrens-fix-americas-housing-crisis/571210/ [https://perma.cc/6E7N-DWYT]; Donna Kimura, *Warren Introduces Massive Housing Bill*, AFFORDABLE HOUSING FIN. (Sept. 26, 2018), https://www.housingfinance.com/policy-legislation/warren-introduces-massive-housing-bill_o [https://perma.cc/4HBJ-MY3N]. For a summary of changes between the 2018 and the 2019 version of the bill, see Pete Harrison, *An Update on Elizabeth Warren's Housing Plans*, DATA FOR PROGRESS (Mar. 15, 2019), https://www.dataforprogress.org/blog/2019/3/15/an-update-on-elizabeth-warrens-housing-plan [https://perma.cc/T978-4SX9].

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."[351] 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.[353] 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.[354] 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.

352. For additional discussions of the necessity of increased federal involvement in solving affordable housing problems, see, for example, OFFICE OF U.S. SENATOR MARIA CANTWELL, ADDRESSING THE CHALLENGES OF AFFORDABLE HOUSING & HOMELESSNESS: THE HOUSING TAX CREDIT 4–7 (2016); HOUSING DEVELOPMENT TOOLKIT, THE WHITE HOUSE (2016); CENTER FOR AMERICAN PROGRESS, A RESPONSIBLE MARKET FOR RENTAL HOUSING FINANCE: ENVISIONING THE FUTURE OF THE U.S. SECONDARY MARKET FOR MULTIFAMILY RESIDENTIAL RENTAL MORTGAGES (2010); Anthony Pennington-Cross & Anthony M. Yezer, *The Federal Housing Administration in the New Millennium*, 11 J. HOUSING RES. 357, 366–70 (2000); Boyack, *Equitably, supra* note 31, at 132–59.

353. RENTAL HOUSING 2017, *supra* note 19, at 6.

354. Beverly Gologorsky, *In One of the Richest Countries in the World, Extreme Poverty is on the Rise*, NATION (June 18, 2018), https://www.thenation.com/article/one-richest-countries-world-extreme-poverty-rise/ [https://perma.cc/LD9A-2BWY]. "America, it seems, is becoming something like the world's first poor rich country." Umair Haque, *Why America is the World's First Poor Rich Country*, MEDIUM (May 23, 2018), https://eand.co/why-america-is-the-worlds-first-poor-rich-country-17f5a80e444a [https://perma.cc/4W8T-3JWW]. The United States is currently ranked #17 in the world by U.S. News based on quality of life. *Quality of Life*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/best-countries/quality-of-life-rankings /https://perma.cc/JR7F-GN4M] (last visited August 18, 2019).

particularly when significant public subsidies are already being allocated to populations that do not have unmet housing needs.[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.[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.

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

356. *See, e.g.*, SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 83–124 (2004); WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 28–42 (2009); Ta-Nehisi Coats, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/G66K-RZYM]; JACKSON *supra* note 1, at 289–96; MASSEY & DENTON, *supra* note 107, at 51–57; ROTHSTEIN, *supra* note 1, at 177–93.