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ESSAY

CHANGING THE FACE OF URBAN AMERICA: ASSESSING THE LOW-INCOME HOUSING TAX CREDIT

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ON June 25, 2015, the U.S. Supreme Court held that Low-Income Housing Tax Credit ("LIHTC") allocations could violate the Fair Housing Act ("FHA") if used to perpetuate racially concentrated poverty.[1] On the heels of this decision, on July 8, 2015, the U.S. Department of Housing and Urban Development ("HUD") issued its final rule on the FHA's Affirmatively Furthering Fair Housing ("AFFH") provisions, mandating that state and local governments use federal housing money to mitigate racial segregation or face sanctions.[2] This Essay reconciles incongruous concerns that the LIHTC is "creaming the crop" of subsidized tenants (that is to say, serving the working poor as opposed to the poorest), thereby displacing the most marginalized households from central cities, with the recent barrage of accusations that the "poverty housing industry" is only further relegating the poorest to slum, blight, and distress. Celebrating the LIHTC as a successful public-private partnership, this Essay suggests that the LIHTC is changing the face of urban America by investing in both high- and low-poverty neighborhoods, bringing higher-income households into the lowest-income urban tracts

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[1] Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys Project, Inc., 135 S.Ct. 2507, 2525 (2015).

[2] Julie Hirschfeld Davis & Binyamin Applebaum, Obama Unveils Stricter Rules Against Segregation in Housing, N.Y. Times (July 8, 2015), http://www.nytimes.com/2015/07/09/us/hud-issuing-new-rules-to-fight-segregation.html [https://perma.cc/YR2F-44XU].

and very low-income households into the suburbs. Countering criticisms of the LIHTC as redundant because of demand-side subsidies, this Essay concludes that the LIHTC is fostering a more regional distribution of affordable housing, an outcome unattainable by voucher provision alone.

INTRODUCTION

Today, the largest and most important federal housing program in the United States is the Low-Income Housing Tax Credit program,[3] with a size and scale comparable to public housing and the federal Section 8 program.[4] But, quite unlike public housing and Section 8, the LIHTC is not a deep subsidy. LIHTC projects are not targeted at households with very low incomes, nor do rental payments vary with a tenant's income. Yet, the LIHTC may still be serving the lowest-income families.

The community-level benefits of LIHTC developments far outweigh those of vouchers alone. The LIHTC has revitalized communities, mobilized a corporate lobby, and attracted ambitious professionals to the affordable housing industry, all to the ultimate benefit of low-income tenants. The public nature of U.S. Department of Housing and Urban Development programs means that they alone cannot achieve such outcomes. HUD needs the LIHTC to withstand political risk and to benefit from the incentive structure that only market mechanisms can provide. "Privatization" is not a singular phenomenon, but rather a complex set of relationships between public, private, and nonprofit entities. The LIHTC typifies the kind of place-based double, or even triple, bottom-line real estate investments needed in American cities today to address social problems while producing developer and investor profits. Rather than criticize the "poverty housing industry" for nefariously profiting from "federally financed ghettos,"[5] and further isolating the poor, this Essay

[3] Alex F. Schwartz, Housing Policy in the United States 103 (2d ed. 2010); Moelis Inst. for Affordable Hous. Policy, What Can We Learn About the Low-Income Housing Tax Credit Program by Looking at the Tenants? 1 (2012), http://furmancenter.org/files/publications/LIHTC_Final_Policy_Brief_v2.pdf [https://perma.cc/7EEU-G5Q4]; Low-Income Housing Tax Credits, HUD USER, http://www.huduser.org/portal/datasets/lihtc.html [https://perma.cc/6LTR-UC8R] (last visited May 16, 2016). The LIHTC is codified at 26 U.S.C. § 42 (2012).

[4] Katherine M. O'Regan & Keren M. Horn, What Can We Learn About the Low-Income Housing Tax Credit Program by Looking at the Tenants?, 23 Housing Pol'y Debate 597, 597 (2013).

[5] See Op-Ed., The End of Federally Financed Ghettos, N.Y. Times (July 11, 2015), http://www.nytimes.com/2015/07/12/opinion/the-end-of-federally-financed-ghettos.html?_r=0 [https://perma.cc/2PUU-6NNK].

celebrates the LIHTC as a successful public-private partnership that achieves a more regional distribution of affordable housing by moving more American households into lower-poverty, less-distressed areas, both urban and suburban.

I. PRIVATIZING LOW-INCOME HOUSING

The public housing program was born in 1937 as one of the final major pieces of New Deal legislation.[6] Yet public housing construction did not begin in earnest until after World War II.[7] The production of public housing continued to increase from the program's start until the 1980s.[8] While public housing was originally intended for two-parent middle class families as opposed to the poorest, "[t]he postwar period saw less of the submerged middle class remain in public housing."[9] The rapid growth of Federal Housing Administration mortgage insurance enabled millions of working- and middle-class families to purchase modest homes in new suburban developments, facilitating "white flight" from city centers.[10] Simultaneously, African Americans in the South were migrating to the rapidly industrializing North in search of economic and social mobility.[11] Facing discrimination in housing markets, very low-income people of color were soon obtaining housing in urban public housing projects.[12] Reflecting this, "the median income of public housing residents fell from 57% of the national median in 1950 to 41% in 1960, 29% in 1970, and less than 20% by the mid-1990s."[13] The stock of public housing reached its peak in 1994 at approximately 1.4 million units.[14] By 2008, it had declined 19% with a loss of almost 270,000

[6] Schwartz, supra note 3, at 125.

[7] Id. at 126.

[8] Id.

[9] Id. at 129.

[10] Priscilla A. Ocen, The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing, 59 UCLA L. Rev. 1540, 1555 (2012).

[11] See Elijah Anderson, The White Space, Sociology of Race and Ethnicity 10, 11 (2015) ("As blacks arrived and settled in cities, they were typically contained in ghettos . . . .").

[12] See Schwartz, supra note 3, at 129; Lawrence J. Vale, Purging the Poorest: Public Housing and the Design Politics of Twice-Cleared Communities 17 (2013) ("[P]ublic housing in most large urban centers changed because much of its initial white working-class constituency chose to leave it behind for other housing alternatives . . . .").

[13] Schwartz, supra note 3, at 129; accord Vale, supra note 12, at 17 ("By 1992, HUD reported that the majority of public housing incomes fell below 20 percent of the median of their metropolitan areas.").

[14] Schwartz, supra note 3, at 126.

units.[15] While public housing continues to provide housing to "more than a million households," its fate is sealed: Active production is rare, while the number of demolitions is significant.[16] And, although the federal government has not built public housing since 1983, the program still faces a severe backlog of repairs and unmet capital needs.[17] Changing the face of urban America, the public housing stock will only continue to contract over time, as the government shifts its resources away from publicly owned housing.[18]

Affordable housing delivery in the United States has evolved toward greater privatization, now constructed and maintained through an assortment of public and private financing tools, most of which public housing is unable to access or leverage.[19] Section 8, the first program to separate federal housing subsidies from the ownership of housing, refers to the voucher program's statutory authorization under Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974.[20] The Quality Housing and Work Responsibility Act of 1998[21] combined the tenant- and project-based rental assistance programs into a single program, the Housing Choice Voucher program, although it is still widely known simply as Section 8.[22]

Under the tenant-based program, a public housing authority ("PHA") provides a voucher to an eligible family and the family chooses the unit. If the family moves out of the unit, the contract with the owner terminates and the family can move with continued assistance to another unit

[15] Id.

[16] Kirk McClure & Bonnie Johnson, Housing Programs Fail to Deliver on Neighborhood Quality, Reexamined, 25 Housing Pol'y Debate 3–4 (2014), http://www.tandfonline.com/doi/pdf/10.1080/10511482.2014.944201 [https://perma.cc/D7WW-U33X].

[17] Schwartz, supra note 3, at 139; see also Rental Assistance Demonstration, U.S. Dep't Housing & Urb. Dev., http://portal.hud.gov/hudportal/HUD?src=/RAD [https://perma.cc/UL8S-KPC3] (last visited May 16, 2016) (estimating a $25.6 billion backlog of public housing capital improvements).

[18] McClure & Johnson, supra note 16, at 29.

[19] Criticized as privatization, yet celebrated as "cost-neutral," HUD's Rental Assistance Demonstration is a recent attempt to allow public housing agencies to leverage private debt and LIHTC equity investments. Rental Assistance Demonstration, supra note 17.

[20] Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437f (2012)); Schwartz, supra note 3, at 177–78.

[21] Pub. L. No. 105-276, tit. V, § 545, 112 Stat. 2518, 2596–604 (codified as amended at 42 U.S.C. § 1437f (2012)).

[22] Schwartz, supra note 3, at 180.

of choice.[23] Voucher recipients pay toward rent either 30% of monthly adjusted income, 10% of monthly income, the welfare rent, or a PHA minimum rent: whichever is greatest.[24] HUD covers the remaining costs, up to a PHA payment standard.[25] The difference between housing costs in the private market and tenant incomes thus determines the cost to the government of each voucher. About two million families currently receive tenant-based vouchers, including more than one million with minor children.[26]

A PHA can also project-base up to 20% of its available voucher funding.[27] Under the Section 8 project-based rental assistance ("PBRA") program, a PHA negotiates with a private owner for specific units, and "then refers families from its waiting list to the owner to fill vacancies."[28] Since assistance is linked to the apartment, if a family moves out of a project-based unit it is not guaranteed continued support. Although Section 8 PBRA is by far the biggest, there are also some smaller PBRA subsidies, such as project-based vouchers ("PBVs").[29] Unlike with PBRA, families with PBVs are still assisted by voucher payments even when they relocate.[30] PBRA remains an important source of gap financing in today's affordable housing deals, particularly in the absence of redevelopment funds in California[31] and in the face of further cuts to HUD programs such as the Community Development Block Grant ("CDBG")

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[23] Id.

[24] Lan Deng, The Cost-Effectiveness of the Low-Income Housing Tax Credit Relative to Vouchers: Evidence from Six Metropolitan Areas, 16 Housing Pol'y Debate 469, 488 (2005).

[25] Id.

[26] Deven Carlson et al., The Benefits and Costs of the Section 8 Housing Subsidy Program: A Framework and Estimates of First-Year Effects, 30 J. Pol'y Analysis & Mgmt. 233, 234 (2011).

[27] Project-Based Voucher Program, U.S. Dep't Housing & Urb. Dev., http://portal.hud.gov/hudportal/HUD?src=/hudprograms/projectbased [https://perma.cc/Y6BH-3MDE] (last visited May 16, 2016).

[28] Deng, supra note 24, at 493.

[29] Policy Basics: Section 8 Project-Based Rental Assistance, Ctr. on Budget & Pol'y Priorities 2 (June 1, 2015), http://www.cbpp.org/files/PolicyBasics-housing-1-25-13PBRA.pdf [https://perma.cc/8G74-RYY3].

[30] Id.

[31] See, e.g., Angela Kopolovich, California Supreme Court Upholds Law Dissolving Redevelopment Agencies, St. Ct. Docket Watch (Federalist Soc'y for L. & Pub. Pol'y Studies), Spring 2012, at 5 (discussing *California Redevelopment Ass'n v. Matosantos*, 267 P.3d 580 (Cal. 2011), which upheld a state law eliminating redevelopment agencies entirely).

and the HOME Investment Partnerships Program.[32] It is likely that many HUD programs will only continue to diminish over time[33] given the "more insistent cries to run government like a business."[34]

Nevertheless, thanks to the LIHTC, the federal government still has a large and growing footprint in the multifamily affordable housing industry. In fact, the creation of the LIHTC with the Tax Reform Act of 1986[35] marked nothing short of a radical transformation in the provision of subsidized housing, changing the face of urban America. Just as the central city was being cleared of public housing, the LIHTC emerged to drastically change where subsidized housing was being located.

Achieving the long-elusive goal of deconcentrating poverty, the LIHTC fosters a more regional distribution of affordable housing, finally giving low-income families more access to "high-opportunity" neighborhoods. Locating more than one-third of its units in the suburbs, the LIHTC is "meeting, and even exceeding, the . . . [voucher] program in offering opportunities to live in low-poverty suburban settings."[36] Counterintuitively, the LIHTC is also reducing poverty concentration in high-poverty urban neighborhoods "since [many] residents of tax-credit housing tend to have incomes that are well-above the poverty line."[37] This is important because "extremely low-income renters are more likely to live in poorer quality neighborhoods."[38] So-called "gentrification"[39] may in

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[32] See, e.g., Obama's FY 2015 Budget Requests $46.7 Billion for HUD Programs, Nat'l Housing & Rehabilitation Ass'n (Mar. 5, 2014), https://www.housingonline.com/2014/03/05/obamas-fy-2015-budget-requests-467-billion-for-hud-programs/ [https://perma.cc/93E3-L6L9] (reporting that President Obama's fiscal year 2015 budget "reduc[es] funding for the CDBG to $2.8 billion and HOME to $950 million, which combined is $280 million less than [the] 2014 enacted level").

[33] McClure & Johnson, supra note 16, at 7.

[34] See Jon D. Michaels, Running Government Like a Business . . . Then and Now, 128 Harv. L. Rev. 1152, 1152 (2015) (reviewing Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government 1780–1940 (2013)).

[35] Pub. L. No. 99-514, tit. II, § 252(a), 100 Stat. 2085, 2189–205 (codified as amended at 26 U.S.C. § 42 (2012)).

[36] McClure & Johnson, supra note 16, at 10–11, 18 (concluding that the LIHTC performs as well as the Housing Choice Voucher program in "making entry into the suburbs, migrating away from the distress so often found in central-city neighborhoods").

[37] Schwartz, supra note 3, at 115.

[38] Joint Ctr. for Hous. Studies of Harvard Univ., The State of the Nation's Housing 29 (2014).

[39] Adam Gopnik, Naked Cities: The Death and Life of Urban America, New Yorker, Oct. 5, 2015, http://www.newyorker.com/magazine/2015/10/05/naked-cities [https://perma.cc/93DH-MM72] ("[T]he chief way that cities have renewed and restored themselves in recent times is through the process that has the ill-given name of gentrification—ill-given be-

fact create neighborhoods more attractive to minority households.[40] And, although a desire to maximize the amount of LIHTCs received attracts developers to neighborhoods designated as Difficult Development Areas ("DDAs") or Qualified Census Tracts ("QCTs"),[41] which are often minority and low income, LIHTC neighborhoods are still not as disadvantaged as those with public housing and other project-based federal subsidies.[42] In fact, housing subsidized by the LIHTC is far less likely to be in highly segregated neighborhoods than is public housing.[43] By locating in a wide variety of neighborhoods, then, LIHTC developments may bring both "somewhat higher-income households into very low-income tracts" and "very low-income households into higher-income tracts,"[44] ameliorating poverty's spatial effects. Perhaps even more significantly, though, beyond the number or quality of units or characteristics of the neighborhoods where these units are built, the LIHTC has overhauled the politics of low-income housing in the United States by gaining credence with profit developers and thus "pushing local politics toward allowing affordable housing rather than opposing it."[45] Profit developers "are not merely participants" in the program but initiators of the process.[46]

cause it is dehumanizing to fix under the label 'gentry' the mixture of social types who reenter the urban arena, ranging from real-estate keeners to young gay couples to painters seeking space, just as it is to label a similar mixture of social types an 'underclass.'").

[40] See John Buntin, The Myth of Gentrification: It's Extremely Rare and Not as Bad for the Poor as You Think, Slate, Jan. 14, 2015, http://www.slate.com/articles/news_and_politics/politics/2015/01/the_gentrification_myth_it_s_rare_and_not_as_bad_for_the_poor_as_people.html [https://perma.cc/PG4Q-2BCS] (suggesting the real problem is "gentrification" too often bypassing black neighborhoods).

[41] David Black et al., Office of the Comptroller of the Currency, Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks, Community Dev. Insights, Apr. 2014, at 12 & nn.38–39 (stating that projects in QCTs "with a poverty rate of at least 25 percent or . . . where 50 percent of the households have incomes below 60 percent of the area median income," or in DDAs with "high construction, land, and utility costs relative to the area median gross income," may receive a "basis boost" of 30% more eligible costs in the LIHTC calculation).

[42] Schwartz, supra note 3, at 115; McClure & Johnson, supra note 16, at 10.

[43] Alex Schwartz, The Low-Income Housing Tax Credit, Community Development, and Fair Housing: A Response to Orfield et al., 26 Housing Pol'y Debate 276, 277 (2016).

[44] Ingrid Gould Ellen & Katherine O'Regan, Exploring Changes in Low-Income Neighborhoods in the 1990s, *in* Neighborhood and Life Chances: How Place Matters in Modern America 103, 117 (Harriet B. Newburger et al. eds., 2011).

[45] McClure & Johnson, supra note 16, at 12.

[46] Id.

Today, the LIHTC program supports more than 2.5 million units, increasing by about 90,000 to 100,000 units per year, and financing 85,000 subsidized apartments since 2000.[47] Almost all new low-income housing in the United States leverages the LIHTC. It works by encouraging private investors to make equity investments in limited partnership or limited liability company entities that generate tax credits, reducing federal taxes owed dollar for dollar. In return, the units developed have to be rented to households whose initial incomes do not exceed 60% or 50% of the area median income ("AMI"). By applying for LIHTCs, developers agree to set aside either 40% of units for residents earning no more than 60% of AMI or 20% of units for residents earning no more than 50% of AMI.[48] Developers use the equity generated to reduce the debt burden on the properties, thus making it easier to offer affordable rents.[49]

Big banks are motivated to participate in the LIHTC program to receive favorable consideration under the federal Community Reinvestment Act ("CRA").[50] The CRA was passed by Congress in 1977 and mandates that banks invest resources in the local communities in which they operate.[51] It requires federal regulators to evaluate an institution's lending in low-income neighborhoods.[52] Fortunately for the development of low-income housing, banks receive positive CRA review for LIHTC investments when they benefit a bank's assessment area, defined to include where the bank has its main office, branches, and deposit-taking ATMs.[53] For major financial institutions, then, the LIHTC offers a true double bottom-line opportunity.[54] Not only do investors receive a

[47] Schwartz, supra note 43, at 277; McClure & Johnson, supra note 16, at 6.
[48] Schwartz, supra note 3, at 105.
[49] Id.
[50] 12 U.S.C. §§ 2901–2908 (2012).
[51] Schwartz, supra note 3, at 281.
[52] Id.
[53] Community Reinvestment Act, Partnership for Progress, http://www.fedpartnership.gov/bank-life-cycle/topic-index/community-reinvestment-act.cfm [https://perma.cc/R63N-Y5PF] (last updated Sept. 6, 2013).
[54] See Alison Lingane & Sara Olsen, Guidelines for Social Return on Investment, 46 Cal. Mgmt. Rev 116, 117 (2004) (conceptualizing "social bottom line" as the social parallel to a firm's "financial bottom line" and defining the term as "[t]he net social benefit from business operations").

credit that reduces tax liability, plus passive loss benefits, but banks receive credits toward their regulatory ratings under the CRA.[55]

The LIHTC also garners bipartisan support by motivating private-sector investment, and thus reducing reliance on federal grants. Its market-based features please politicians, and the allocation of credits to the states on a per capita basis is supported by Congress. By benefiting more parties than the typical HUD program, the LIHTC has forged a "broad political constituency to advocate for the creation and maintenance of the provision."[56] Reframing low-income housing's long-contentious politics, the LIHTC has resulted in "less controversy and more success."[57]

In fact, the diverse coalition supporting the credit, including housing advocates, financial institutions, nonprofits,[58] and law and accounting firms, has allowed for an enlargement of the credit at a time when comparable spending programs have been constrained. Many members of the American public, and its political leaders, think there is no reason for the federal government to subsidize low-income housing.[59] Criticisms that HUD is too "costly" and "clunky"[60] abound. Yet because of its exclusion from the regular budget process, a tax provision like the LIHTC escapes the annual review required of a direct appropriation.[61] It therefore costs the government in the form of foregone federal tax revenue, but it does not show up as an expense.

II. CREAMING THE CROP? REFUTING CRITICISMS OF THE LIHTC

The LIHTC is not a deep subsidy, differing starkly from other forms of federal housing assistance. With most HUD programs, gross rent, defined to include rent and tenant-paid utilities, cannot exceed 30% of ac-

[55] Black et al., supra note 41, at 2 n.3, 7, 9–12 (discussing passive loss benefits, the CRA, and tax credits).

[56] Clinton G. Wallace, Note, The Case for Tradable Tax Credits, 8 N.Y.U. J.L. & Bus. 227, 269 (2011).

[57] McClure & Johnson, supra note 16, at 12.

[58] Federal law requires that 10% of each state's annual housing tax credit ceiling be set aside for projects involving nonprofits. 26 U.S.C. § 42(h)(5) (2012).

[59] See, e.g., Josh Barro, Romney Is Right: Abolish HUD, Forbes (Apr. 16, 2012, 10:52 AM), http://www.forbes.com/sites/joshbarro/2012/04/16/romney-is-right-abolish-hud/ [https://perma.cc/M5MN-2MYV].

[60] But see Michaels, supra note 34, at 1177, 1181–82 (advocating for a celebration of government's clunkiness as what "enables businesses to run like businesses" (emphasis omitted)).

[61] Wallace, supra note 56, at 271.

tual tenant income.[62] But, with the LIHTC, "maximum unit rents are set at 30% of the applicable income limit under which the *unit* qualified for tax credits."[63] Thus, little is actually known about the rent burden of families in LIHTC developments. For example, "[i]f a unit that qualifies as LIHTC at 60% of AMI is occupied by a household with an income lower than that, the maximum rent chargeable does not change."[64] Tenant advocates are justifiably concerned that tax-credit housing is not reaching the poorest and most vulnerable households.

Since the Internal Revenue Service ("IRS") does not collect data on LIHTC tenants, very little is known about them. Fortunately, Congress remedied this by recently mandating that the state housing agencies that monitor LIHTC compliance provide HUD with tenant data.[65] However, whether and when these data will become publicly available is uncertain.[66] Until then, the little we do know about LIHTC tenants is based on the small number of studies that presently exist. And LIHTC tenants appear to be much poorer than is popularly assumed.

Unsurprisingly, compared to those living in public housing or Section 8–assisted housing, "a significantly smaller share of LIHTC households have [extremely low incomes]," defined as "at or below 30% of AMI."[67] While over a full three-quarters of families served by HUD's largest programs meet this standard, only 45% of LIHTC households do.[68] Nevertheless, the LIHTC is still providing housing for some of the poorest and most vulnerable households, far more than the LIHTC rules require.[69] Approximately 46% of families overall, and more than 70% of extremely low-income families, in LIHTC units are simultaneously receiving some additional form of rental assistance.[70] For example, about

[62] O'Regan & Horn, supra note 4, at 599.
[63] Id.
[64] Id. at 605.
[65] Id. at 598; see Moelis Inst. for Affordable Hous. Policy, supra note 3, at 2 ("The Housing and Economic Recovery Act (HERA) of 2008 required state housing finance agencies to begin reporting tenant incomes and rents to HUD.").
[66] O'Regan & Horn, supra note 4, at 598.
[67] Id. at 602.
[68] Id. at 602–03; accord Moelis Inst. for Affordable Hous. Policy, supra note 3, at 4.
[69] Moelis Inst. for Affordable Hous. Policy, supra note 3, at 4 ("[A]lmost two-thirds of LIHTC units serve households whose incomes fall well below the maximum permitted income levels.").
[70] Id. at 3; New Study Reveals Incomes and Rent Burdens of LIHTC Households, Nat'l Low Income Hous. Coalition (July 13, 2012), http://nlihc.org/article/new-study-reveals-incomes-and-rent-burdens-lihtc-households [https://perma.cc/T4X2-HCT7].

47% of the LIHTC "properties placed in service from 1995 through 2006 house one or more tenants with rental vouchers."[71] Around 16% of voucher holders are believed to reside in LIHTC developments.[72] This is partly because LIHTC owners, unlike private owners, cannot discriminate based on the source of income and must accept vouchers.[73]

Gap financing from HUD and state and local governments remains imperative if developers are expected to house families with incomes at or below the poverty level.[74] In fact, "rental assistance plays a significant role in allowing LIHTC developments to serve extremely low-income households."[75] For these reasons, scholars such as David Weisbach contend that the LIHTC should be replaced with more direct spending on tenant vouchers.[76] And, it is true, the late tax scholar Stanley Surrey, known widely as a "dean of the academic tax bar"[77] and "the greatest tax scholar of his generation,"[78] advanced the view that tax expenditures in general are bad tax policy.[79]

According to scholars such as David Weisbach and Jacob Nussim, locating a policy program in the tax code makes sense only if the IRS is a more efficient administrator of that program.[80] This is the case only for programs where measuring income and processing paper predominate, such as welfare benefits.[81] Yet, arguably by political accident, the IRS

[71] Schwartz, supra note 3, at 113.
[72] McClure & Johnson, supra note 16, at 7.
[73] O'Regan & Horn, supra note 4, at 604.
[74] See Joint Ctr. for Hous. Studies of Harvard Univ., supra note 38, at 32 ("[T]he private sector is simply unable to provide additional low-cost housing without subsidies. For lowest-income renters, government assistance is the only means to secure housing . . . .").
[75] Moelis Inst. for Affordable Hous. Policy, supra note 3, at 4.
[76] David A. Weisbach, Tax Expenditures, Principal-Agent Problems, and Redundancy, 84 Wash. U. L. Rev. 1823, 1827 (2006).
[77] Obituary, Stanley S. Surrey, 74; Taxation Law Expert, N.Y. Times (Aug. 28, 1984), http://www.nytimes.com/1984/08/28/obituaries/stanley-s-surrey-74-taxation-law-expert.html [https://perma.cc/3WNF-UJ7V] (quoting Louis Loss, Cromwell Professor Emeritus at Harvard Law School).
[78] Erwin N. Griswold, In Memoriam: Stanley S. Surrey – A True Public Servant, 98 Harv. L. Rev. 329, 331 (1984).
[79] Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 734 (1970).
[80] See David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 Yale L.J. 955, 957 (2004) ("[T]he tax expenditure decision . . . is solely a matter of institutional design.").
[81] Id. at 959.

nonetheless administers the largest supply-side housing program in the United States.[82]

Administration by the IRS may have the unintended benefit of raising the quality of affordable housing, however. Although the IRS does not possess any expertise in housing, over a fifteen-year period it places on investors the risk of recapture of the credits, plus interest.[83] Administration by the IRS thereby effectively privatizes oversight. This provides a needed market check on projects, in turn resulting in higher-quality housing and upgrading the urban environment, possibly by raising property values and spurring commercial activity.[84] Lacking the efficiency and discipline of the private market, HUD is not as adequately staffed or as motivated to provide the same degree of vigilance.

Weisbach nonetheless contends that supply- and demand-side housing subsidies are redundant. And, it is true that, until 1986, the shift to demand-side programs appeared permanent.[85] Even so, much of the criticism of the LIHTC is based on the credit in its infancy.[86] Today, not only have syndication costs decreased, but investors are willing to accept lower returns, due to the stability of the program and in part motivated by the depreciation deductions. There are also growing market types and conditions in which the LIHTC may be more cost-

[82] See Doug Guthrie & Michael McQuarrie, Privatization and Low-Income Housing in the United States Since 1986, *in* 14 Research in Political Sociology: Politics and the Corporation 15, 32–36 (Harland Prechel ed., 2005) (detailing how key interest groups capitalized on opportunities that expanded community development through the LIHTC).

[83] Joint Ctr. for Hous. Studies of Harvard Univ., The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives 3 (2009).

[84] See Michael Rubinger, Op-Ed., Two Tax Credits That Work, N.Y. Times (July 13, 2013), http://www.nytimes.com/2013/07/13/opinion/two-tax-credits-that-work.html?_r=0 [https://perma.cc/ABS9-S6AQ] (suggesting that the LIHTC's private-sector incentives "lead to greater accountability and superior project performance when compared with federal grant programs").

[85] From the 1930s to 1980s, there was a decided shift away from supply-side housing programs; the federal government has not built public housing since 1983. In its place, rental assistance was provided in the form of vouchers. However, in 1986, Congress unexpectedly enacted the LIHTC, transforming the low-income housing industry. See generally Guthrie & McQuarrie, supra note 82, at 26–32 (outlining the political history of the LIHTC).

[86] See Schwartz, supra note 3, at 106 (detailing changes between "the years immediately following the establishment of the credit" and after the credit was made permanent); see also id. at 116 (describing "criticisms [that] were leveled during the first years of the program").

efficient than vouchers, specifically in gentrifying urban communities with high rent.[87]

In fact, the depressed rental housing market of the late 1970s may be the reason for the perceived cost advantages of vouchers.[88] Today, as America's urban neighborhoods rebound, driving up rents, the cost to the federal government of administering the voucher program continues to grow.[89] The LIHTC may thus be more effective than vouchers both in retaining the original residents of the country's reviving city centers and in allowing more low-income households to relocate to middle-income suburbs.[90] The LIHTC is also justified as part of an overall community development strategy, which may incur higher costs but triggers neighborhood gains.[91] Extensive investment in affordable housing construction and rehabilitation has been proven to "completely rebuil[d] the urban fabric."[92]

Since the 1990s, U.S. cities have experienced a revived interest in urban living that is likely not attributable to market shifts alone.[93] Rather, the LIHTC has been a major driver of this urban investment. Bringing higher-income households into the lowest-income urban tracts and very low-income households into the suburbs, the LIHTC is hypothesized to have fostered "place prosperity,"[94] changing the face of

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[87] See Edward Glaeser, How to Make San Francisco's Housing More Affordable, BloombergView (Dec. 13, 2013, 9:33 AM), http://www.bloombergview.com/articles/2013-12-13/how-to-make-san-francisco-s-housing-more-affordable [https://perma.cc/CFK2-JHGS] ("In constrained cities, supply-side policies such as the Low-Income Housing Tax Credits are more likely to make an impact.").

[88] Deng, supra note 24, at 474.

[89] Joint Ctr. for Hous. Studies of Harvard Univ., supra note 38, at 30.

[90] Schwartz, supra note 3, at 115.

[91] See Ellen & O'Regan, supra note 44, at 114–16; see also Rubinger, supra note 84 (arguing that the LIHTC is partially responsible for the "rebirth" of neighborhoods across the United States).

[92] Schwartz, supra note 43, at 281.

[93] Lan Deng, Assessing Changes in Neighborhoods Hosting the Low-Income Housing Tax Credit Projects 37 (Univ. of Mich. Ctr. for Local, State & Urban Policy, CLOSUP Working Paper Series No. 8, 2009), http://closup.umich.edu/files/closup-wp-8-lihtc.pdf [https://perma.cc/XH3G-N42V].

[94] See Louis Winnick, Place Prosperity vs. People Prosperity: Welfare Considerations in the Geographic Redistribution of Economic Activity, *in* Essays in Urban Land Economics 273, 273 (1966) (coining the term "place prosperity," but rejecting place-based policies in favor of people-based programs); see also Nestor M. Davidson, Reconciling People and Place in Housing and Community Development Policy, 16 Geo. J. Poverty L. & Pol'y 1, 1–2, 6–7, 10 (2009) (rejecting the people/place dichotomy, observing that "people-based" vouchers' emphasis on individual mobility "somewhat ironically elevates the centrality of

urban America.[95] And while a dichotomy is sometimes posed between people-based and place-based policies, "people are place, and place is people."[96] The widespread regeneration of America's low-income urban communities has not perpetuated a classic pattern of gentrification. Original residents in the country's reviving city centers "are much less harmed than is typically assumed."[97] Nor has urban America's resurgence disproportionately hurt people of color.[98] Rather, both the voucher and LIHTC programs have grown in importance over recent years, moving more American households into lower-poverty, less-distressed areas.

Despite recent outcry over the retrenchment of federal housing assistance by scholars like Edward Goetz and Lawrence Vale,[99] the reality is that there are far more households assisted by subsidies today than there were in 1997.[100] While in 1997, there were only 699,461 units assisted by the LIHTC program, in 2010, there were 1,971,093.[101] Likewise, while 1,433,000 households received vouchers in 1997, a full 2,300,144 received them by 2010.[102] In total, 6,087,413 households were in assisted housing in 2010, compared to only 4,997,716 in 1997.[103] Homelessness has also fallen since 2007.[104] Rather than "creaming the crop," then, contemporary federal housing policy is aiding the poorest in consuming existing housing, while offering a smaller "subsidy to assist a

place," and concluding that "project-based subsidies can alleviate rather than contribute to concentrated poverty and segregation if new construction and subsidies for the preservation of existing housing focus on a diverse set of communities").

[95] Ellen & O'Regan, supra note 44, at 117.

[96] Davidson, supra note 94, at 1–2 (noting that "[t]he debate about place-based versus people-based approaches has been etched in the evolution of housing and community development policy since at least the post-War era," and arguing that "this dichotomy is much more illusory than the traditional debate assumes").

[97] Ingrid Gould Ellen & Katherine M. O'Regan, How Low Income Neighborhoods Change: Entry, Exit, and Enhancement, 41 Regional Sci. & Urb. Econ. 89, 97 (2011).

[98] See Terra McKinnish, Randall Walsh & T. Kirk White, Who Gentrifies Low-Income Neighborhoods?, 67 J. Urb. Econ. 180, 180–81 (2010) ("[T]he demographic flows associated with the gentrification of urban neighborhoods during the 1990s are not consistent with displacement and harm to minority households.").

[99] See Edward G. Goetz, New Deal Ruins: Race, Economic Justice, & Public Housing Policy (2013) (analyzing the effects of the dismantlement of public housing); Vale, supra note 12 (detailing examples of cleared public housing).

[100] McClure & Johnson, supra note 16, at 7.

[101] Id.

[102] Id.

[103] Id.

[104] Joint Ctr. for Hous. Studies of Harvard Univ., supra note 38, at 31.

less poor population through production of new or fully renovated units,"[105] thereby remedying neighborhood distress.

III. PROBLEMATIZING THE "GHETTO" IN THE AMERICAN CULTURAL IMAGINATION

The LIHTC has long been decried as a tool of gentrification, assisting only the "barely poor" so as to displace the most marginalized from the central city in the name of profit-driven urban "revitalization."[106] Yet, in the wake of the U.S. Supreme Court's unexpected decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[107] and HUD's attendant Affirmatively Furthering Fair Housing final rule,[108] the LIHTC is now being called out, unfairly, for failing to provide the poor with access to affluent white suburbs and neighborhoods of "opportunity." This Essay suggests that the LIHTC has fallen victim to a false dichotomy, an urban/suburban, black/white distinction that is more a vestige of "the iconic ghetto and its relation to the white space"[109] than a contemporary reality. Taking the "history of state-sanctioned racial segregation"[110] most seriously, this Essay demonstrates that the LIHTC has mitigated, not exacerbated, the "impact of structural poverty and racism on the inner-city ghetto"[111] by achieving a more regional distribution of affordable housing. While it is clear that federal policymakers have "promulgat[ed], abbett[ed], and perpetuat[ed]" racial segregation and ghettoization, "the Low-Income Housing Tax Credit is not a significant part of this story."[112]

The Inclusive Communities Project, Inc. ("ICP"), a Dallas-based nonprofit, sued the State of Texas over how LIHTCs were allocated to

[105] McClure & Johnson, supra note 16, at 8.

[106] See generally Op-Ed, Affordable Housing, Racial Isolation, N.Y. Times (June 29, 2015), http://www.nytimes.com/2015/06/29/opinion/affordable-housing-racial-isolation.html [https://perma.cc/C78V-JDTS] (discussing racially discriminatory aspects of the FHA).

[107] 135 S. Ct. 2507, 2525 (2015).

[108] Affirmatively Furthering Fair Housing, 24 C.F.R. §§ 5, 91, 92, 570, 574, 576, 903 (2015).

[109] Anderson, supra note 11, at 20.

[110] Id. at 11. By underwriting all-white suburbs "with the explicit requirement that blacks be excluded from them," the federal government created racial ghettoization to begin with. See Richard Rothstein, The Supreme Court's Challenge to Housing Segregation, The American Prospect, July 5, 2015, http://prospect.org/article/supreme-courts-challenge-housing-segregation [https://perma.cc/VLA5-2DDU].

[111] Anderson, supra note 11, at 13.

[112] Schwartz, supra note 43, at 276.

the city of Dallas. The ICP alleged that Texas had violated the Fair Housing Act by allocating the vast majority of its LIHTCs to "predominantly black inner-city areas" and supporting too few developments in "white suburban neighborhoods."[113] The Court held that ICP's claim could proceed under the FHA, and then remanded the case to the district court to decide whether Texas's distribution of LIHTCs indeed resulted in a disparate impact on racial minorities.[114]

Two weeks later, HUD issued its final rule on the FHA's AFFH provisions, bolstering the *Inclusive Communities* decision by requiring that cities use federal housing money to reduce racial disparities, or face penalties.[115] While rightly lauded as important civil rights advances that revived a FHA that has long laid dormant, this Essay contends that both *Inclusive Communities* and the AFFH final rule rest on an incongruity. The LIHTC cannot coherently be faulted for sanitizing the inner city, "creaming the crop" of subsidized tenants to make way for white gentrification, while at the same time being attacked for catalyzing a "large and lucrative industry" profiting off the status quo by keeping black families out of the white suburbs.[116] Fortunately, this paradox is unraveled, easily, by a quick look at the data on where LIHTC developments are actually being sited, and the inconsistent policy priorities motivating developers' locational decisions.

The Qualified Allocation Plan ("QAP") is what states use to award the competitive 9% credits.[117] By law, states are to give preference to "projects serving the lowest income tenants"[118] and projects located in QCTs, census tracts with 25% of the population in poverty, or where at least 50% of households have incomes below 60% of area median income, "the development of which contributes to a concerted community revitalization plan."[119] However, since the LIHTC statute provides no

[113] *Inclusive Cmtys.*, 135 S. Ct. at 2514.
[114] Id. at 2525–26.
[115] See Davis & Applebaum, supra note 2.
[116] See Gayle Reaves, The Fight for Fair Housing, Texas Observer (Aug. 4, 2015), https://www.texasobserver.org/texas-lawsuits-affordable-fair-housing-inclusive-com munities/ [https://perma.cc/T8TQ-3V9W] (intimating that the LIHTC program is "serving a lot of people before it serves poor people").
[117] States are allocated both competitive 9% LIHTCs, which are capped, and 4% LIHTCs used together with tax-exempt bonds. See Ingrid Gould Ellen et al., U.S. Dep't of Hous. and Urban Dev., Office of Policy Dev. and Research, Effects of QAP Incentives on the Location of LIHTC Properties, Multi-Disciplinary Research Team Report (2015).
[118] 26 U.S.C. § 42(m)(1)(B)(ii)(I) (2012).
[119] Id. § 42(m)(1)(B)(ii)(III).

guidance on what constitutes such a plan,[120] "there is wide variation across states in the types of neighborhoods where tax-credit units are sited."[121]

Since 2002, the allocation of tax credits has "shifted away from high-poverty neighborhoods" and "towards moderate- and low-poverty neighborhoods," while "a few states have adopted large increases in their prioritization of opportunity areas."[122] Accordingly, more than one-third of all LIHTC developments are now located in the suburbs.[123] And of the LIHTC units built in suburbs, half are in census tracts with poverty rates of less than 10% .[124] However, the suburbs have grown poorer.[125] Today, poverty is growing twice as fast in suburbs as in cities.[126] Suburbs are also increasingly non-white.[127] As Myron Orfield observes, "[i]f the suburbs were ever a homogeneous bastion of untroubled prosperity, they certainly are no longer."[128] For these reasons, recent polemics stage a false dualism between those seeking "full integration of poor people, and especially poor minorities, into well-off, largely white [suburban] neighborhoods" and the "poverty housing industry" accused of "justif[ying] the placement of affordable housing in the poorest [urban] sectors by arguing it will encourage neighborhood revitalization and economic growth."[129]

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[120] Historically, most states simply prioritized QCTs in the QAPs and ignored the requirement of a "concerted community revitalization plan." See Jill Khadduri, Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans, Poverty & Race Research Action Council 10 (2013).

[121] Ellen, supra note 117 , at 13.

[122] Id. at 12, 13. Only since the Housing and Economic Recovery Act of 2008 have states been able to set their own priorities. See Schwartz, supra note 43, at 279.

[123] Kirk McClure, The Low-Income Housing Tax Credit Program Goes Mainstream and Moves to the Suburbs, 17 Hous. Pol'y Debate 419, 434 (2006).

[124] Id. at 437 tbl. 2.

[125] See Elizabeth Kneebone & Alan Berube, Confronting Suburban Poverty in America (2013).

[126] Brad Plumer, Poverty is Growing Twice as Fast in the Suburbs as in Cities, Wash. Post (May 23, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/23/poverty-is-now-growing-twice-as-fast-in-the-suburbs-as-in-the-city/ [https://perma.cc/6E4B-SZ3L].

[127] The Brookings Inst. Metro. Policy Program, State of Metropolitan America: On The Front Lines of Demographic Transformation 61 (2010).

[128] Myron Orfield, Metropolitics and Fiscal Equity, *in* The City Reader 338, 341 (Richard T. LeGates & Frederic Stout eds., 2016).

[129] See Thomas B. Edsall, Op-Ed, Where Should a Poor Family Live?, N.Y. Times (Aug. 5, 2015), http://www.nytimes.com/2015/08/05/opinion/where-should-a-poor-family-live.html [https://perma.cc/RWV8-B5T8].

The voucher program was intended to allow poor families to relocate to high-opportunity neighborhoods, but has failed as an instrument of desegregation since landlords are not required to accept tenants who rely on Section 8.[130] Therefore, the LIHTC has been better able to "penetrate the low-poverty suburbs"[131] and is thus doing more to deconcentrate poverty than its critics allow. Since developers "chase points," the preference in the LIHTC statute for "projects serving the lowest income tenants" works against a desire for more LIHTC projects in high-income areas.[132] If lawmakers are to maintain the preference for QCTs, the mandate of a "concerted community revitalization plan"[133] must be made more concrete if the LIHTC program is to affirmatively further fair housing by "replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity."[134] Otherwise, the LIHTC program cannot be rebuked for not making inroads into "opportunity" neighborhoods when policymakers themselves are conflicted.

IV. FORGING AN INDUSTRY BASED ON PUBLIC-PRIVATE PARTNERSHIP

Today, public-private partnerships are a significant and growing sector of the urban economy, with the LIHTC a pivotal driver of innovation in housing policy at the federal, state, and local levels. The LIHTC has not only broadened low-income housing's political constituency, but has enlarged the concept of "value." This benefits America's poorest households in ways that a cost-efficiency comparison with HUD programs cannot reveal. Rather than assume that social and financial goals must be in opposition, the LIHTC is a paradigmatic example of what Professor Nestor Davidson calls "the practical mechanisms of [a] private ordering."[135] By this he means that, by aligning the profit motive of a private client with the goal of providing market-rate shelter to poor families, mitigating the impacts of

[130] See Alana Semuels, How Housing Policy is Failing America's Poor, Atlantic (June 24, 2015) http://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/ [https://perma.cc/KS8Y-73JE].

[131] McClure, supra note 123, at 439.

[132] 26 U.S.C. § 42(m)(1)(B)(ii)(I) (2012).

[133] Id. § 42(m)(1)(B)(ii)(III).

[134] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,353 (July 16, 2015) (to be codified at 24 C.F.R. § 5.152).

[135] Nestor M. Davidson, Values and Value Creation in Public-Private Transactions, 94 Iowa L. Rev. 937, 943 (2009).

concentrated urban poverty, the LIHTC expands a real estate transaction's value beyond simply maximizing overall return.[136] Using private means to achieve public ends, the LIHTC invests the government in the outcome of private transacting with unprecedented vigor.

Scholars like Jon Michaels rightly worry about overreliance on the private sector and the concomitant hollowing out of the federal government. And it is true that American privatization is now a "trillion-dollar phenomenon," with private actors carrying out more and more public functions.[137] Yet, despite its negative connotations, "privatization" may in reality be a complex set of relationships between government at all levels, financial institutions, and nonprofits, always with conflicting goals. It is precisely this diversity of interests represented by any given LIHTC deal that this Essay suggests is propelling policy innovation by attracting ambitious deal makers motivated by private incentives but also driven by public goals.

CONCLUSION

Perhaps the LIHTC explains why the face of urban America has changed so drastically since the 1990s. Maybe privatization does not have to pose a challenge to the goal of providing housing to the poorest population. After all, it is at least possible that financial institutions can gain from affordable housing's transformation while nevertheless improving the lives of poor tenants.

[136] Id.
[137] Jon D. Michaels, Privatization's Pretensions, 77 U. Chi. L. Rev. 717, 724 (2010).