ACHIEVING OUR COUNTRY: GEOGRAPHIC DESEGREGATION AND THE LOW-INCOME HOUSING TAX CREDIT

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I. INTRODUCTION

In *A Theory of Justice,* John Rawls challenged the view that "utilitarianism," which he described as a structure that "would require a lesser life prospect[] for some simply for the sake of greater advantage for others," was the correct way to construct a just social order.[1] Instead, Rawls established a construct based on a "veil of ig-

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[1] JOHN RAWLS, A THEORY OF JUSTICE 13 (rev. ed. 1999) (1971) [hereinafter RAWLS, THEORY]. Rawls stated that his aim was to work out a theory of justice that was an alternative to utilitarian thought. *Id.* at 20. John Stuart Mill defined utilitarianism as:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.

JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 6 (Ernest Rhys, ed., J.M. Dent & Sons 1936) (1910); *see also* AMARTYA SEN & BERNARD WILLIAMS, UTILITARIANISM AND BEYOND 3–4 (1982) (describing utilitarianism as a combination of (a) welfarism, through which a state

norance."[2] Imagine, he postulated, that people are born into a world where they do not know beforehand their sex, skin color, intelligence, genetic structure, or their parents' class.[3] He concluded that in such a setting, the social contract chosen would be based on "fairness," so that if a person drew the short straw, that person would know, as much as possible, that society had structures to redress the imbalance.[4] This means that society would establish an infrastructure of justice to ensure that each person, despite accident of birth, had access to key goods that would allow for the chance to develop talents, participate in the life of society, exercise liberties, and

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of affairs is judged exclusively on the basis of utility information related to that state; (b) sum-ranking, which merges individual utility pieces into one total lump, losing in the process the identity and separateness of individuals; and (c) consequentialism, in which this information is carried to the judgment of all variables such as actions, rules and institutions). Sen and Williams note that utilitarianism neglects personal autonomy and lacks interest in personal integrity. *Id.* at 5. For a summary of the development of utilitarian moral theory, see generally HENRY SIDGWICK, THE METHOD OF ETHICS (7th ed. 1907).

[2] RAWLS, THEORY, *supra* note 1, at 118–23.

[3] *Id.* at 118–19.

[4] *Id.* at 118–23; *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42–43 (Erin Kelly ed., 2001) [hereinafter RAWLS, FAIRNESS] (stating the two basic principles of justice). The two basic principles of justice are:

> [a] Each person has the same indefeasible claim to a fully adequate scheme of basic liberties, which scheme is compatible with the same scheme of liberties for all; and
>
> [b] Social and economic inequalities are to satisfy two conditions: first, they are to be allocated to offices and positions open to all under conditions of fair equality; and, second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

Id. at 42–43.

achieve basic living standards; in other words, to achieve full membership in society. In the Rawlsian view, those who are relatively well-off must recognize that their greater resources should be allowable in a just society only in a manner consistent with ensuring that the position of the "least-advantaged members of society" is the best it can be.[5] In such a society, the most-advantaged would accept their position as *fair* if it were swapped with the position of the least-advantaged.[6] Education is a key component in determining a person's life chances; therefore, access to a strong education is an integral part of the Rawlsian social contract.[7]

Even though it predated John Rawls's seminal philosophical work,[8] *Brown v. Board of Education* can be viewed as a "justice as fairness" case.[9] In 1954, the United States Supreme Court declared

[5] RAWLS, THEORY, *supra* note 1, at 86–87.

[6] *Id.* at 88–90, 120–21.

[7] *Id.* at 86–87 ("[T]he difference principle would allocate resources in education, say, so as to improve the long-term expectation of the least favored. . . . And in making this decision, the value of education should not be assessed solely in terms of economic efficiency and social welfare. Equally if not more important is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a sense of his own worth."); *see* RAWLS, FAIRNESS, *supra* note 4, at 156–157.

[8] *See* RAWLS, FAIRNESS, *supra* note 4. This work was published in 2001, nearly fifty years after the Court decided *Brown*.

[9] *See generally*, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954). Chief Justice Warren wrote that the question presented in *Brown* was: "Does segregation of children in public schools solely on the basis of race, even though the physical

that public education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[10] The Court unanimously concluded that "separate educational facilities are inherently unequal."[11] Because the government played an active role in providing education,[12] the Court held that racially segregated public schools violated the Fourteenth Amendment's Equal Protection clause.[13]

Notwithstanding *Brown*'s conclusion, school integration did not occur of its own volition, much less with "all deliberate speed."[14] By

facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" *Id*. at 493. The Court concluded that it did, holding "that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id*. at 495.; *see also* Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1095 (1988) (book review) (stating that although "the strategy was to attack segregation in education, . . . the real agenda was the removal of the basic barrier to full and equal citizen rights for blacks in this country, . . .").

[10] *Brown I*, 347 U.S. at 493 (1954); *see also* RAWLS, FAIRNESS, *supra* note 4, at 156–57 (discussing several philosophical approaches states can take with regard to children's education).

[11] *Brown I*, 347 U.S. at 495.

[12] *See id*. ("[E]ducation is perhaps the most important function of state and local governments.").

[13] *Id.*

[14] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955); *see* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 125–28 (2004). *See generally* Charles L. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279

1964, ten years after *Brown*, only 2.3% of southern black students attended majority-white schools.[15] Thereafter, the courts and the federal government enforced desegregation policies, and by 1970, 33.1% of southern black students attended majority-white schools.[16] However, beginning in the 1970s, the United States Supreme Court issued several decisions that contributed to increased racial segregation in schools.[17] A study published in 2007 shows that United States public schools were more segregated in 2005 than in 1970.[18] Another study indicates that in 2005, 26% of midwestern black stu-

(2008) (discussing Arkansas' struggles with desegregating public schools and related Supreme Court cases).

[15] *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 19 (2004), *available at* http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf.

[16] *Id.*

[17] *See* Missouri v. Jenkins, 515 U.S. 70 (1995) (finding district court exceeded its authority by examining student achievement levels to determine unitary status and by ordering teacher salary increases in urban schools); Freeman v. Pitts, 503 U.S. 467 (1992) (stating desegregation orders can be terminated one component at a time); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) (instructing district court to terminate a desegregation order that had been in place for thirteen years after sixty-five years of segregation); Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (finding that segregation in a single school district did not warrant interdistrict remedies).

[18] *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 23 (2007) [hereinafter ORFIELD & LEE, ACCELERATING RESEGREGATION], *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (indicating that in 2005, 27% of southern black students attended majority-white schools, while in 1970, 33.1% of southern black students attended majority-white schools).

dents and 23% of northeastern black students attended schools that were 99–100% minority, and that nationwide, 38% of black students attended schools that were 90–100% minority.[19] White students are the most isolated racial group and, on average, attend schools that are 78% white.[20]

In 2007, the United States Supreme Court, in a fractured and sharply divided opinion, held that certain voluntary efforts by local school districts to achieve more racially integrated public schools were unconstitutional.[21] In the parts of his opinion that were supported by a majority of the Court, Chief Justice Roberts reasoned that because the Seattle, Washington and Louisville, Kentucky school districts' plans involved racial classifications, they violated the Equal Protection Clause unless they were "narrowly tailored" to achieve a

[19] *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 10 (2006), *available at* http://civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (referring to the racial composition of schools for 2003–04).

[20] *See* ORFIELD & LEE, ACCELERATING RESEGREGATION, *supra* note 15, at 8. See generally JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005) for a discussion of the effects of segregation and re-segregation on the education system.

[21] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

"compelling government interest."[22] Roberts determined that only two interests are recognized as compelling in the public school context: "remedying effects of past intentional discrimination" and obtaining "diversity in higher education."[23] The first purpose did not provide traction in *Parents Involved* because the Seattle schools had not shown they were segregated by law or under judicial decree, and the Louisville schools had achieved "unitary status" and had thereby remedied the original constitutional wrong of race-based school assignments.[24] The second purpose did not provide a constitutionally acceptable basis for the racial-integration plans either, because the school districts treated race as a "decisive" factor, rather than as a "part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"[25]

In those parts of his opinion that were joined by three other Justices, Roberts wrote that the districts' plans were "not narrowly tai-

[22] *See id.* at 702 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

[23] *See id.* at 720, 722 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992) (past intentional discrimination) and Grutter v. Bollinger, 539 U.S. 306, 328 (diversity in higher education)). The Court did not state that these are the only two compelling interests, and left open whether there might be additional compelling interests. *See id.* at 720. The Court also distinguished *Grutter* based on its application to higher education, ruling that "[t]he present cases are not governed by *Grutter*." *Id.* at 725.

[24] *Id.* at 715.

[25] *Id.* at 723.

lored to the goal of achieving educational . . . benefits asserted to flow from racial diversity," but they instead attempted to achieve racial balancing because they were tied to the districts' specific racial demographics and not any level of diversity needed to obtain educational benefits.[26] He concluded that "[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society"[27] with "no logical stopping point."[28] After taking issue with the goal of integration, the plurality portion of Roberts's opinion concluded with the vague aphorism that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[29]

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[26] *Id.* at 726.

[27] *Id.* at 730.

[28] *Id.* at 731 (quoting City of Richmond v. J.A. Cronson Co., 488 U.S. 469, 498 (1989)).

[29] *Id.* at 748. As noted above, one can view the Court's unanimous decision in *Brown I* as based on the liberal theories of "justice as fairness" that animate Rawlsian philosophy. *See generally* RAWLS, FAIRNESS *supra*, note 4 (discussing the Rawlsian "justice as fairness" philosophy in depth). One can view Roberts's majority and plurality opinions in *Parents Involved* as rooted in a utilitarian tradition-in which society must live with unfairness, inequality, and injustice, but only as long as this is offset by sufficient general well being—either at present or in the future. *See* RAWLS, FAIRNESS *supra*, note 4 and accompanying text. In this utilitarian view, unconstrained individual liberty is a fundamental value. *Id.* It allows positive discrimination in favor of some on the basis of race while depriving others of their unrestrained right to equal treatment in choosing their public schools. One sees a glimpse of this utilitarian analysis in Justice Roberts's statement that:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitu-

Justice Kennedy concurred in part, and dissented in part, with the Roberts opinion.[30] He criticized the opinion for minimizing the compelling public interest of "diversity" in public education.[31] Kennedy agreed that race contributes to diversity, but he ruled that the Seattle and Louisville plans failed to pass constitutional muster because their proponents did not demonstrate how blunt, binary racial distinctions furthered the espoused educational goal.[32] In Kennedy's view, the goal of diversity is constitutionally acceptable, but the use of straightforward, voluntary means to achieve that goal could be un-

> tion's guaranty of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race will never be achieved.'"

Id. at 705 (citations omitted). Similarly, Roberts cites City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) for the argument that "government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to politics of racial hostility.'" *Parents Involved*, 551 U.S. at 746 (quoting *Croson*, 488 U.S. at 493). One can argue that the Court's heightened focus on equality creates a diminished focus on justice; and that by invoking standards of color-blindness, the Court allows direct competition for resources even though certain people are less able to compete due to lower educational standards, community vulnerability and the like.

[30] *Parents Involved*, 551 U.S. at 748–782.

[31] *Id.* at 783 ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.").

[32] *Id.* at 777, 82.

acceptable.[33] Kennedy then identified general and indirect strategies that were race-conscious without creating binary racial definitions, and he urged school districts to "continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds."[34] Among the strategies Kennedy identified for enhancing diversity were strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allowing resources for special programs; applying targeted recruiting of students and faculty; and using race-based tracking of enrollment, performance, and other statistics.[35]

In his opinion, Roberts noted that some proponents of the Seattle plan defended it "as necessary to address the consequences of racially identifiable housing patterns," but Roberts thought that "[t]he sweep of the mandate claimed by the district [was] contrary to [the Court's] rulings that remedying *past societal discrimination* does not

[33] However, Kennedy did not entirely close the door on plans such as those in Seattle and Louisville; rather, he indicated that he would permit use of racial classification in assigning students after less invidious means have been tried and failed. *Id.* at 798 ("[M]easures other than differential treatment based on racial typing of individuals first must be exhausted.").

[34] *Id.*

[35] *Id.* at 789.

justify race-conscious government action."[36] However, Roberts's conclusion that "societal discrimination" created segregated housing is incorrect; instead, housing segregation was initiated and institutionalized with governmental support. Indeed, *Parents Involved* is one in a line of cases that fallaciously adopt a theory of "suburban innocence" and governmental noninvolvement in housing patterns, and thereby, in school patterns.[37]

[36] *Id.* at 731 (emphasis added).

[37] *See generally* Freeman v. Pitts, 503 U.S. 467(1992); Bd. of Educ. v. Dowell, 498 U.S. 237(1991); Milliken v. Bradley, 418 U.S. 717 (1974). Generally, the *Milliken*, *Dowell*, and *Freeman* decisions rest on findings about housing segregation and its relationship to school segregation. *See also* Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1398 (1995) ("The primary constitutional value became the autonomy of the suburban school districts rather than the correction of unconstitutional segregation. This shift was made possible by a theory of suburban innocence that excluded all discussion of how the Detroit suburbs came to be among the nation's most rigidly segregated in terms of housing and, therefore, in terms of schools."). *See generally* THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) [hereinafter, SUGRUE, SWEET LAND OF LIBERTY] (discussing desegregation efforts in the U.S. since the 1920s). The Court's approach in *Milliken*, *Dowell*, and *Freeman* differed from the Court's approach in prior school-desegregation cases, such as Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). Both *Swann* and *Keyes* recognized the relationship between housing decisions and school segregation. *See Swann*, 402 U.S. at 20; *Keyes*, 413 U.S. at 201-02. In *Keyes*, the Court stated:

> First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominately white. Similarly, the practice of building a school . . . to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer poli-

In their classic book, *American Apartheid*, Douglas Massey and Nancy Denton demonstrate that geographic segregation in residential housing did not result from acts of nature and unfettered private choice; to the contrary, a series of deliberate public policy decisions, including some by the federal government, denied minorities access to certain housing markets and reinforced spatial segregation.[38]

> cies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

Keyes, 413 U.S. at 201–02 (footnote omitted) (citation omitted).

[38] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); *see* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM (Joshua Cohen, et. al, eds. 2003) [hereinafter FISS, A WAY OUT]; DOLORES HAYDEN, BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH 1820–2000 (2003); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); SUGRUE, SWEET LAND OF LIBERTY, *supra* note 37, at 200–50; THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996) [hereinafter, SUGRUE, URBAN CRISIS]; WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 25–61 (2009) (discussing structural forces shaping concentrated poverty and the role of political actions). Arnold Hirsch notes a particular irony in federal housing programs: as *Brown* established a public school desegregation requirement, local governments used federal housing and urban renewal programs to create new segregative housing patterns. ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960 at 196–215 (2nd ed. 1998)*; see also* ARNOLD R. HIRSCH, POVERTY & RACE RESEARCH ACTION COUNCIL, "THE LAST AND MOST DIFFICULT BARRIER": SEGREGATION AND FEDERAL HOUSING POLICY IN THE EISENHOWER ADMINISTRATION, 1953–1960 (2005) (describing the urban renewal program recommended by President Eisenhower's Advisory Committee on Housing in 1953. The article discusses the substance and effect of the Eisenhower ad-

First, Americans adopted a system of local governance premised on local autonomy, including the use of zoning power through so-called "Euclidean zoning," to exclude undesirable land uses and undesired populations.[39] Second, the federal government, through the Federal

ministration's housing policy and how it enabled local authorities to adopt housing plans which only exacerbated segregation problems); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965) (exploring the Constitutional arguments surrounding public schools that are predominantly black due to the geographic distribution of the population). For a discussion of similar issues in different contexts, see generally IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA (2005).

[39] MASSEY & DENTON, *supra* note 38, at 49–51. The term "Euclidean zoning" comes from the Supreme Court decision upholding this particular zoning technique. *See* Villiage of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); CASHIN, *supra* note 38, at 104–110. Euclidean zoning is zoning that separates single-family detached housing from other permissible uses, including multi-family apartment buildings; it has become a favorite form of suburban zoning. *See* William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 317–31 (2004) (explaining that Justice Sutherland's reference in *Euclid* to apartments—and by extension, their inhabitants—as "mere parasites" on residential neighborhoods presaged local governments' reluctance to permit the density levels generally believed necessary to encourage developers to build affordable housing). Additionally, Kenneth Jackson notes that within ten years of the *Euclid* decision, 85% of American cities had Euclidean zoning ordinances. JACKSON, *supra* note 38, at 242. *See generally* Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459 (2007) (discussing zoning inputs on desegregated housing). Although racial zoning was ruled unconstitutional in Buchanan v. Warley, 245 U.S. 60 (1917), because it interfered with property owners' rights to dispose of their property, local governments often imposed—and courts legitimated—private deed restrictions and racial covenants on residential real estate until 1948. *See* Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (holding such covenants unconstitutional). Even after *Shelley*, racial covenants remained on the books in many communities. After de jure housing segregation became unlawful, local land use policy in the form of zoning ordinances took its place. While such policies are facially neutral, they can perpetuate racial and economic exclusion. For example, communities can forbid multi-family residential housing development or use design or density requirements to make affordable housing development economically infeasible. *See* Village of Arlington Heights v.

Home Administration ("FHA") Home Mortgage Insurance Program, adopted and propagated the view that racial and class homogeneity was necessary to ensure stable property values.[40] The FHA based its underwriting practices on this view and provided insurance primarily for single-family homes in predominately white areas, while "redlining" less desirable areas and providing little or no insurance for

Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977). The United States Supreme Court allows the use of exclusionary zoning when there is no clear evidence of discriminatory interest. *See e.g.* Alexander v. Sandoval, 532 U.S. 275, 292–93 (2001) (holding that there is no private right of action to enforce disparate impact regulations under Title VI of Civil Rights Act of 1964 because Title VI prohibits only intentional discrimination); *Village of Arlington Heights*, 429 U.S. at 264–66 (finding discriminatory effect not relevant for Equal Protection Clause challenge to housing discrimination); Washington v. Davis, 426 U.S. 229, 239–41 (1976) (constitutional challenge to facially neutral law or official act must show discriminatory intent rather than solely disparate racial impact); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 614 (2008) [hereinafter Powell, *Reflections*] (providing an overview of exclusionary zoning and localism). Proving discriminatory intent in the context of local governmental action is inherently difficult. Powell, *Reflections*, at 615.

[40] MASSEY & DENTON, *supra* note 38, at 51–55; CASHIN, *supra* note 38, at 110–113; *see* Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 207-08 (2005); *see also* Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1308–1313 (1995) (demonstrating how federal mortgage insurance programs have contributed to neighborhood destabilization and concentrated poverty); Thomas J. Sugrue, *The Structure of Urban Poverty: The Reorganization of Space and Work in Three Periods of American History*, in THE "UNDERCLASS" DEBATE: VIEWS FROM HISTORY 85–117 (Michael B. Katz ed. 1993) (describing a history of socio-economic conditions, racial discrimination, and impoverishment using Detroit as representative of northern industrial cites).

multi-family housing.[41] Third, the interstate highway system opened up easy avenues for some individuals to exercise their choice to move their homes away from cities.[42] This left others, who lacked the means to relocate, behind in urban communities that, due to the localization of the property and sales tax systems, were deprived of tax and other resources necessary for adequate education and other public goods. Fourth, the federal government, through its urban renewal programs, and in the name of removing "blights," destroyed black-occupied housing located near central business districts and forced the residents to move elsewhere, including to public housing.[43] At the same time, federal housing programs, by their design

[41] *See* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 675–79 (2002) [hereinafter Roisman, *Teaching*] (explaining that even after the Supreme Court ruled that racial covenants were unenforceable, the FHA continued to require such covenants; this policy changed only after presidential intervention in 1949).

[42] CASHIN, *supra* note 38, at 113–115; *see* Raymond Mohl, *Planned Destruction: The Interstates and Inner City Housing*, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH CENTURY AMERICA 226–45 (John F. Bauman et al. eds., 2000).

[43] MASSEY & DENTON, *supra* note 38, at 55–56; CASHIN, *supra* note 38, at 115–117. One court has stated its opinion that until the adoption of Title VI of the Civil Rights Act in 1964, "public housing was de jure segregated. These projects were operated according to a Public Housing Administration ('federal PHA') policy of 'separate but equal.'" Young v. Pierce, 628 F. Supp. 1037, 1045 (E.D. Tex. 1985) (citation omitted) (citing Cohen v. Publ. Hous. Admin., 257 F.2d 73, 74 (5th Cir. 1958)); *see* Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 206 (John F. Bauman et al. eds., 2000); *see also* MARTIN ANDERSON, THE FEDERAL

and placement of public housing projects, created concentrated black poverty.[44]

The effects of these government actions continue in present patterns of segregation,[45] which demonstrate that the reduction or elimi-

BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949–1962 (1964) (chronicling the negative impact of social engineering programs).

Federal public housing programs deferred to local will important decisions, including the location and tenant selection for public housing. The result was that public housing was built in a racially segregated fashion with few public housing developments being built in white and middle-class communities. *See* ALEXANDER POLIKOFF, HOUSING THE POOR: THE CASE FOR HEROISM (1978); *see also* Michelle Adams, *Separate and (Un)Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 436 (1996) (discussing decentralized structure of public housing decisions and dominant role of local governments in site selection decisions).

[44] MASSEY & DENTON, *supra* note 38, at 56–57; CASHIN, *supra* note 38, at 115–117; *see* Gautreaux v. Romney, 448 F.2d 731, 737 (7th Cir. 1971) (holding that HUD violated the Due Process Clause and Title VI because it had "approved and funded [Chicago Housing Authority]-chosen regular family housing sites between 1950 and 1969, knowing that such sites were not 'optimal' and that the reason for their exclusive location in black areas of Chicago was that 'sites other then in the south or west side, if proposed for regular family housing, invariably [encountered] sufficient opposition in the [City] Council to preclude Council approval.'"); *see also* Schill & Wachter, *supra* note 40, at 1290–1305 (arguing that the federal housing program generating the most intense pattern of concentrated poverty is the public housing program); George Galster, *A Response to Schill and Wachter's The Spatial Bias of Federal Housing Law and Policy*, 143 U. PA. L. REV. 1343, 1349 (1995) (concluding historical case records prove that federal housing laws and policy have contributed to the concentration of poor families in inner-city areas); Roberta Achtenberg, *Shaping American Communities: Segregation, Housing & The Urban Poor*, 143 U. PA. L. REV. 1191, 1193 (1995) ("Originally, public-housing regulations and handbooks encouraged the assignment of families to projects on the basis of their race and the racial composition of the surrounding neighborhoods.").

[45] The 2000 census indicated that, while residential racial segregation of blacks had been declining slightly, it would be decades before a moderate level of segregation was reached if the decline continued at the 2000 rate. Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 916 (2005). One might

nation of governmental segregation-inducing programs will not suffice to desegregate housing.[46] Housing patterns have a tendency to remain stable due to the fact that individual housing choices are made relatively infrequently. In addition, although the 1968 Fair Housing Act outlawed racial discrimination in housing-market transactions, federal enforcement of the Fair Housing Act has generally been weak, and most of the burden for enforcing the law and combating unlawful discrimination has been placed on the victims of such discrimination.[47] The government's involvement in creating racially segregated residential patterns, coupled with its lax enforcement of housing discrimination laws, mandates current governmental action in eliminating the ongoing discrimination.

This Article argues that government action directed toward the broader issue of combating residential segregation would have the

suspect that the recent housing foreclosure crisis may have had further negative impact.

[46] *See* Achtenberg, *supra* note 44, *at* 1199–1200 (1995) ("[T]his is not the time to abandon our federal commitment to housing. This is not the time to leave individuals to bargain for their civil rights on their own.").

[47] *See id.* at 1194 (noting increased governmental enforcement mechanisms in Fair Housing Amendments Act of 1988, while also noting political reluctance to enforce). In my view, fair housing enforcement relies excessively on the existence of political will, which has at times been in short supply. Therefore, I argue for economically driven remedies as necessary for integration. *Compare* MASSEY & DENTON, *supra* note 38, at 217 (arguing for an "unprecedented commitment by the public and a fundamental change in leadership at the highest levels.").

collateral effect of also achieving greater school integration. To that end, this Article proposes using the Federal Low-Income Housing Tax Credit (LIHTC) program[48] as a tool for improving integration in high-income areas with the greatest resources. Advocates for school integration have long argued that school integration has a strong, positive impact on residential integration.[49] By preventing voluntary local efforts to desegregate public schools, *Parents Involved* put the housing segregation issue back on the national agenda. In a sense, this Article turns the school integration debate on its head by taking an approach that starts with residential integration, and uses it as a tool to obtain school integration.[50] Thus, realistically[51] accepting the

[48] I.R.C. § 42 (2006).

[49] *See* Brief for Housing Scholars and Research & Advocacy Organizations as Amici Curiae Supporting Respondents, Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (Nos. 05-908 & 05-915) 2006 WL 2927078 at *3 ("School districts also have a compelling interest in undertaking voluntary efforts to integrate their schools due to the strong, positive impact school integration has on residential integration in both the short and long term.").

[50] *See* James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 140 (2007) (noting that the United States Supreme Court has "never really confronted the primary cause of most school segregation in the country: residential segregation. This is the gaping hole in the Court's desegregation jurisprudence."); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 71 (2002) ("Racially separate housing patterns perpetuate segregated schools."); Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 420–22 (2004) (noting that patterns of residential segregation impact "property values, the quality of education, and the social fabric of our communities").

Court's conclusion in *Parents Involved*—that racial diversity does not provide a constitutionally acceptable basis for school-integration plans—does not foreclose another conclusion: reducing the present "racially identifiable housing patterns" will achieve greater school integration.

A geographic desegregation effort should be acceptable to a majority of the Court's present Justices as an alternative, indirect, non-binary strategy for "bringing together students of different . . . backgrounds."[52] Those who accept *Brown*'s goal of social and racial equity need to increasingly focus on ensuring that people of diverse backgrounds enjoy access to housing in communities that provide greater opportunities, broaden social horizons, and garner political influence, rather than being limited to communities that are isolated with second-class educational and support systems. A focus on affordable, desegregated housing is inextricably linked to educational and economic opportunity, and thereby, to a just society.[53]

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[51] Here I use "realistically" in its academic sense—namely, that the law is what the courts say it is. *See* Robert P. Taylor, *Licensing in Theory and Practice: Licensor-Licensee Relationships*, 53 ANTITRUST L.J. 561, 563 (1985) (noting that in a legal sense, "realistically" implies what can be realistically argued to courts).

[52] *Parents Involved,* 551 U.S. at 798.

[53] Racial segregation in housing is particularly vicious because of the correlation between geographic location and resource allocation. *See* Xavier de Souza

Briggs, *Introduction*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 1, 1–13 (Xavier de Souza Briggs ed., 2005) (stating that racial segregation correlates with unequal outcomes and contributes to worsening inequality and arguing a need to focus on housing policy, particularly issues involving housing location, as a public issue); *see also* Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1205–06 (2001) ("Residential segregation limits individual accumulation of human capital via education and the job market . . . . By preventing residents of segregated neighborhoods from obtaining high quality educations and jobs, segregation imposes limits on how much wealth and property they can amass as a result of their own efforts . . . .").

Furthermore, during periods of economic dislocation, segregation concentrates poverty and the ill effects associated with poverty, thereby making vulnerable communities even more vulnerable. *See* WILSON, *supra* note 38; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1210 (1995); Powell, *Reflections*, *supra* note 39, at 620–27 (arguing that the lending and foreclosure crisis threatens to unravel successes in homeownership for communities of color); John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 629 (2008) ("[W]ith the advent of the subprime mortgage foreclosure crisis . . . we now face an economic tsunami with the potential to destroy decades of tentative progress in America's inner city black and Hispanic communities."); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 809–13 (2008) (discussing housing segregation and limited access to economic opportunity, particularly jobs). Housing provides, among other things, shelter, wealth, security and a means for social integration. *See* Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 442 (2003) ("Housing is never merely shelter. However inadequate and temporary, one's shelter becomes the ground floor for meeting basic needs, a foundation for job search and education, and a piece of one's identity—a 'home' of sorts."); *see also* Manuel Mariano Lopez, *Su Casa No Es Mi Casa: Hispanic Housing Conditions in Contemporary America, 1949–1980*, *in* RACE, ETHNICITY, AND MINORITY HOUSING IN THE UNITED STATES 127, 127 (Jamshid A. Momeni ed. 1986) (noting that housing provides a setting for one's entire social existence and substandard housing can lead to deprivations in health, safety and transportation, which negatively affects employment, education opportunities and economic stability); Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. 339, 342–51 (1996) (explaining that housing is closely linked to employment and educational opportunities, access to health care and financial capital, and access to mentoring and information networks); Ingrid Gould Ellen & Margery Austin Turner, *Does Neighborhood Matter? Assessing Recent Evidence*, 8 HOUS. POL'Y DEBATE 833 (1997) (discussing relationship between neighborhood condi-

This Article proceeds as follows: Part II details the Low-Income Housing Tax Credit ("LIHTC") program; Part III examines recent studies considering the LIHTC program's effect on the racial and economic makeup of communities with tax-credit-financed housing; Part IV sets forth several ideas for programmatic changes that would enable deployment of such housing in order to allow greater neighborhood integration; Part V concludes.

II. THE LOW-INCOME HOUSING TAX CREDIT PROGRAM

In the 1960s, Congress decided it was more efficient for the government to enable the private sector to develop low-income housing with public subsidies than it was for the government to undertake those activities directly.[54] The LIHTC program, which was enacted

tions and lives of residents). For a first-hand discussion of the housing affordability issue, see BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (discussing the housing affordability issue from a first-hand point of view). *See, e.g.*, Achtenberg, *supra* note 44, at 1191–92 ("It was understood by Congress [in enacting the Fair Housing Act of 1968] and the nation that, in order for people to lift themselves and their children to a better life, they must first be able to obtain housing in decent, safe communities."). Note that increasing the supply of affordable housing and expanding the geography of affordable housing are distinct goals, and can be somewhat contradictory. *Id.* at 1198–1200. Housing advocates have frequently focused on supply more than geography, *see, e.g.*, *id.*, but in my view a greater focus on geography is required because increased, but segregated, affordable housing supply creates less equality and larger traps for vulnerable citizens.

[54] Section 901 of the Housing and Urban Development Act of 1968 "declares that it is the policy of the United States to encourage the widest possible participation by private enterprise in the provision of housing for low or moderate income

as part of the 1986 Tax Reform Act,[55] has been the most successful of the private-sector programs. For many years, the LIHTC has been the largest federal program to finance the development and rehabilitation of affordable rental housing for low-income households.[56] The

families." Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 901, 82 Stat. 476, 547 (1968) (current version at 42 U.S.C. § 3931). The 1968 Act added § 236 to the National Housing Act in order to cause the formation of partnerships as vehicles for private investor participation in providing affordable housing. *Id.* at 498, 82 Stat. at 549. I.R.C. § 167(k) provided accelerated depreciation deductions as a tax incentive for affordable housing investment. I.R.C. § 167 (2006). This Article takes no position on the question of whether direct governmental subsidy or indirect subsidy through privatization is the better approach.

[55] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189 (1986) (codified as amended at I.R.C § 42 (2006)).

[56] As a "tax expenditure program," the LIHTC can be equated with a direct governmental subsidy. *See* Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Loss-Income Housing Credit*, 38 VILL. L. REV. 871, 913 (1993). Tax expenditures are defined as revenue losses resulting from provisions of the federal tax laws allowing special exclusions, exemptions or deductions from gross income or that provide a special credit against taxes, a preferential tax rate or a deferral of tax liability. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 299 (1974) (codified at 2 U.S.C. § 622(3) (1988)). The LIHTC can be viewed as a governmental expenditure in the form of foregone tax receipts to accomplish social policy. *See* Kaye, *supra*, at 879–83. Some have argued that the tax expenditures are a poor method for achieving social policy. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 146 (1973) (arguing that some tax expenditure provisions relate to experimental programs); Bernard Wolfman, *Federal Tax Policy and the Support of Science*, 114 U. PA. L. REV. 171, 184 (1965) (noting that tax expenditures are an inefficient method of supporting science). Others argue that the tax expenditures generate lower transactional costs than direct governmental spending programs and therefore can be relatively efficient. *See* Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975–76 (1986). See also Kaye, *supra*, for a discussion of the LIHTC as a tax expenditure program. The general approach for determining the amount of tax expenditures is to first identify various exclusions (such as I.R.C § 103 exclusion for interest on state and local government bonds), deductions (such as I.R.C § 170 deduction for charitable contributions), deferrals (such as the deferral of income on employer contributions to pension plans), and credits (such as the LIHTC and I.R.C. § 45D New Markets Tax Credit) that are seen as departures from a neutral

program focuses on affordable housing's supply side—that is, it creates incentives for private business entities and individuals to rehabilitate existing housing and to create new rental housing for low-income persons.[57] From its inception, in 1987, to 2003, the LIHTC program produced nearly 1.3 million units of affordable housing.[58] Although unit production was slower in the program's earlier years, assuming the average production of approximately 100,000 housing units per year continues, the LIHTC program will have produced an estimated 1.8 million units of affordable housing by the end of 2010.

Contained in the Internal Revenue Code's lengthy and intricate

concept of income taxation (i.e., one that does not contain these departures), and then to determine the cost of these special provisions, and finally to attribute these costs to various budget functions. 2 U.S.C. § 622(3) (2006). The tax advantages of home ownership, which accrue to whites more than to minorities, are the largest federal housing subsidies. *See* Roisman*, Teaching*, *supra note* 41.

[57] Supply-side programs are important because, simply stated, geographic mobility requires the availability of housing of appropriate size, cost, and quality in areas that have a desirable racial and class composition. *See* Stephanie DeLuca, *Neighborhood Matters: Do Housing Vouchers Work?*, BOSTON REV. (Jan./Feb. 2008) [hereinafter DeLuca, *Neighborhood Matters*], http://bostonreview.net/BR33.1/deluca.php. In order for new housing to be developed, there must be interested developers, accessible money, and receptive local regulatory environments. *Id.* Although the LIHTC program does not presently reach the regulatory arena, it has demonstrated that appropriate economic incentives can stimulate developers and money. *Id.* The LIHTC program differs from many prior federal housing programs in that it focuses on indirect production through tax subsidies rather than production through direct spending subsidies. *Id.*

[58] JILL KHADDURI ET AL., ABT ASSOC. INC., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED NEIGHBORHOODS? (2006), *available at* http://www.abtassociates.com/reports/khadduri_[6]_PRRAC_LIHTC_report_revised_07282006.pdf.

section 42, the LIHTC program allows investors owning qualifying residential rental property to claim tax credits annually over a ten-year credit period.[59] In order to increase the affordable housing supply without appropriating funds for that purpose, Congress has given the private sector a financial incentive for building and rehabilitating low-income rental housing in the form of a dollar-for-dollar credit against income taxes otherwise payable. Without tax incentives or other governmental subsidies, the private sector would have little economic incentive to invest capital in low-income housing; by itself, the real estate investment provides insufficient return because the rental income is limited, which makes positive cash flow and property appreciation infrequent.[60]

[59] *Id.* § 42(a) (explaining that tax credits are available for each taxable year in credit period); *id.* § 42(f)(1) (listing the credit period as a period of ten taxable years).

[60] *See* Sharon Hom, *Does Real Estate Syndication Provide a Viable Financing Strategy for Low Income Housing?*, 50 BROOK. L. REV. 913, 915 (1984) (stating that the marketplace, without governmental intervention, has not been a viable mechanism for developing more affordable housing). In 1986, Senator Packwood justified the LIHTC based on the fact that tax incentives, rather than cash flow or residual appreciation, were the motivation for private investment in affordable housing:

> In the instance of low-income housing, it indeed does not appreciate in value and indeed the rents are fixed. And if we are to have low-income housing in this Nation for the very poor or those close to very poor, we might as well realize the marketplace itself cannot afford to provide it.

Other federal programs, such as the Section 8 Housing Choice Voucher Program, focus on affordable housing's demand side and only affect supply indirectly by inducing greater tenant demand.[61]

> Therefore, if we do not have some incentive, whether it is a Government appropriation program or a Government tax incentive, there will be no low-income housing. . . .

132 CONG. REC. S8132-02 (daily ed. June 23, 1986) (statement of Sen. Packwood).

[61] Section 8, added in 1974 to the Housing Act of 1937, authorizes tenant-based housing subsidies under the aegis of the Department of Housing and Urban Development. HUD.gov, Housing Choice Voucher Program (Section 8), http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g01GUID.pdf [hereinafter HUD.gov, Section 8]. Demand-side programs, including the Housing Choice Voucher Program under Section 8, focus on making housing subsidies available to qualifying tenants and only indirectly influence the supply of affordable housing. *See* Michael H. Schill, *Race, the Underclass and Public Policy*, 19 LAW & SOC. INQUIRY 433, 453 (1994) (arguing that existing remedies for housing discrimination rely too much on providing housing vouchers when an increased supply of affordable housing outside of inner-city areas would more effectively disperse the inner-city poor).

Tenant-based programs generally do not take geographic considerations into account, and have rarely been used for racial desegregation and poverty dispersal. *See* DeLuca, *Neighborhood Matters, supra* note 57. However, there have been several programs, such as the Chicago-based Gautreaux program and HUD's Moving to Opportunity program, in which families receiving Section 8 vouchers were not permitted to use the vouchers in certain neighborhood or with certain landlords. *Id.* Instead, the families were either assigned to units in more advantaged areas or they were required to select housing in communities that have a permitted racial composition or poverty threshold. *Id.* Recent studies indicate that the Gautreaux program, which arose as a result of the United States Supreme Court's 1976 ruling in *Gautreaux*—a case filed by public housing residents against the Chicago Housing Authority and the U.S. Department of Housing and Urban Development alleging racially discriminatory practices in selecting locations of Chicago's of public housing projects—was successful in helping public-housing families relocate to safer and more integrated neighborhoods. Hills v. Gautreaux, 425 U.S. 284, 292 (1976) (accepting the concept of "inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation"); *see* DeLuca, *Neighborhood Matters*, *supra* note 57; James E. Rosenbaum & Stephanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility Programs*, 41 IND. L. REV. 653 (2008); *see also* John A. Powell, *Living and Learning: Linking Housing and Education*, *in* IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY

(John A. Powell et al. eds. 2001); LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000) (examining the social and legal issues behind the Gautreaux lawsuit and exploring the lives of the individual families who participated in the Gautreaux program). For a history of the *Gautreaux* case, see ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006).

The Moving to Opportunity ("MTO") program was created and funded in the 1990s, and was defined as a social experiment. John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 127, 134 (Xavier de Souza Briggs ed., 2005). Public housing residents in five cities were allowed to apply for a housing voucher that would allow them to rent only in census tracts with a less than 10% poverty rate. *Id.* at 157. The recipients of these vouchers also received housing counseling. *Id.* at 139. However, unlike the Gautreaux program, one MTO control group did not contain a racial component to the movers' choices, and many participants in MTO continued to live in minority communities. *Id*. at 157. Another control group received Section 8 vouchers without geographic restrictions or housing counseling; this group could continue to live in public housing or seek new housing in high poverty areas. *Id.* Although there were some significant successes, the MTO program did not result in increased economic self-sufficiency or better educational outcomes. *Id.* at 127.

DeLuca's *Neighborhoods Matter* notes several distinctions between the more successful Gautreaux program and the less successful MTO program, concluding that it is necessary to consider carefully the possibilities and limits of residential mobility strategies. DeLuca, *Neighborhood Matters, supra* note 57. Also, housing mobility may be a necessary but insufficient lever for improving the lives of families trapped in poor inner-city neighborhoods. *Id.* Additional tools might include employment support transportation assistance, educational assistance (including assistance in determining and making school choices), and other social services. *See* FISS, A WAY OUT, *supra* note 38. There has been criticism of the MTO program's effect on neighborhoods receiving MTO tenants, suggesting that it may be necessary to appropriately disperse low-income families to avoid causing such neighborhoods to reach a "tipping point" with respect to increased crime and reduced property values. *See* Robert A. Solomon, *Building a Segregated City: How We All Worked Together*, 16 ST. LOUIS U. PUB. L. REV. 265 (1997) (discussing "tipping points" in the context of affordable housing in New Haven, Connecticut); *see also* Hanna Rosin, *American Murder Mystery*, 301 ATLANTIC (July/Aug. 2008), *available at* http://www.theatlantic.com/doc/200807/memphis-crime (examining the link between crime rates and Section 8 housing data). Some have argued that the focus of demand-side subsidies on very low-income families, while reflecting that governmental commitment to the most vulnerable members of society, have increased local opposition to dispersing low and moderate income housing serving other populations. *See* EDWARD G. GOETZ, CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA (2003). In addition, attention

The Section 8 program allows private landlords to receive a direct governmental subsidy equal to the difference between what a low-income tenant can afford (based on 30% of income) and the fair market rent established by HUD.[62] There are two existing Section 8 programs: a project-based program in which landlords agree to rent units only to low-income households, and a voucher program in which eligible tenants receive vouchers and then search for landlords willing to rent units to them.[63] The Section 8 program often works in conjunction with the LIHTC program: some LIHTC project tenants subsidize their rents with Section 8 vouchers, and some LIHTC landlords obtain project-based Section 8 assistance.[64] LIHTC project

needs to be paid to the neighborhoods from which families depart in order that remaining residents do not unduly suffer from the loss of those intrepid enough to make a move. DeLuca, *Neighborhood Matters, supra note* 57. In my view, similar considerations must be taken into account when designing supply-side policies, including those using LIHTC.

Another mobility program came to the public's attention in Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005). In *Thompson*, the district court held that HUD violated the Fair Housing Act by failing to take adequate actions to disestablish the vestiges of past discrimination in the City of Baltimore's public housing policies. *Id.* at 422. The court's remedy included the award of 2,000 vouchers for use in high opportunity neighborhoods in the Baltimore region. *See* Florence W. Roisman, *Affirmatively Furthering Fair Housing Markets: The Baltimore Public Housing Desegregation Decision*, 42 WAKE FOREST L. REV. 333 (2007).

[62] HUD.gov, Section 8, *supra* note 61.

[63] *Id.*

[64] *Id.*

owners may not discriminate against Section 8 tenants.[65]

The following overview of the LIHTC program focuses on two distinct aspects of the program. Part II-A analyzes those parts of the program that could be said to employ "cooperative federalism"; evidenced by the relationships between the federal government, state governmental agencies, local governmental officials, and real estate developers in selecting developments that will be constructed or rehabilitated with low-income housing tax credits. The analysis reveals that the federal government has given state governmental entities the authority to allocate low-income housing tax credits without sufficient instruction and guidance concerning which national priorities are to be served by the LIHTC program. The analysis goes on to show that state allocating agencies are required to consider the input of local officials without regard to whether that input constitutes "not-in-my-backyard" ("NIMBY") behavior.[66] Finally, the analysis demonstrates that because the LIHTC program essentially privatizes the nation's affordable housing supply, the ultimate decisions concerning housing development and tenant make-up are largely unsu-

[65] The Housing and Community Development Act, I.R.C. § 42(h)(6)(B)(iv) (2006).

[66] *See* discussion *infra* Part III.

pervised at the developer/owner level. This multi-level structure can be dysfunctional, and more federal guidance is needed for the LIHTC program to meet the goal of allowing greater residential desegregation. Part IV of this Article discusses potential programmatic changes.

Part II-B considers the economic structure of the LIHTC program through a discussion of how credit amounts are determined and how credits are used. Part III discusses the effect of the LIHTC program on housing desegregation, considering several studies that demonstrate that the LIHTC has had insufficient integrative impact on housing desegregation. This Part also sets the stage for a discussion in Part IV concerning potential programmatic and statutory changes that could create incentives for housing integration by allowing an increased economic benefit for developments that have a desegregating impact.

A. COOPERATIVE FEDERALISM AND LOW-INCOME HOUSING TAX CREDIT ADMINISTRATION AND COMPLIANCE MONITORING

"Cooperative federalism" is shared authority between federal

and state agencies.[67] Cooperative federalism frequently leaves state agencies with wide discretion to implement broad federal policy goals.[68] It is a familiar feature in several regulatory regimes, including the Medicaid Act and many environmental programs.[69] Cooperative federalism can be compared with "dual federalism" or "dual sovereignty," in which state agencies enforce only state laws in the agencies' own local policy-making sphere, leaving the broader sphere of federal policy and law enforcement to the national government.[70] An advantage of cooperative federalism is that it allows "democratic experimentalism"[71] by setting forth a basic federal

[67] *See, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815-16 (1998).

[68] *Id.* at 826; Phillip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 728 (2003) [hereinafter Weiser, *Cooperative Federalism*]; *see also* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 669 (2001) [hereinafter Weiser, *Constitutional Architecture*] (explaining that state programs have been left with "important discretion").

[69] Weiser, *Cooperative Federalism*, *supra* note 68, at 728.

[70] *See* Hills, *supra* note 67, at 815.

[71] *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) [hereinafter Dorf & Sabel, *Democratic Experimentalism*] (describing democratic experimentalism as "a new form of government . . . in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems").

framework while still allowing state experimentation.[72] The benefits of cooperative federalism fall into four categories: (1) respecting state interests and autonomy; (2) facilitating local participation and greater accountability for public policies; (3) allowing local experimentation and interstate competition; and (4) relying on local agency economies and efficiencies (rather than creating a national bureaucracy).[73] Cooperative federalism presumably works best when there is no optimal uniform strategy that can be imposed on a federal level. In such cases, state experimentation can theoretically result in a "race to the top," as states pragmatically experiment and ultimately devise one or more optimal solutions to policy problems.

In other cases, however, cooperative federalism raises a line-drawing problem; if we are committed to having both state governmental agencies with certain powers and a national government with limited but supreme powers, where do we draw the line between the two? How much autonomy should be given to the states? How much authority should be left in the national government in order to assure that state agencies adhere to national policy? How much

[72] Weiser, *Cooperative Federalism*, *supra* note 68, at 729; *see* Dorf & Sabel, *Democratic Experimentalism*, *supra* note 71, at 267.

[73] Weiser, *Cooperative Federalism, supra* note 68, at 729.

guidance should the national government give the states in their exercise of power? How much should the national government incentivize states to achieve national priorities? These questions are particularly difficult when the state powers are derived from federal law, as with the LIHTC program.

1. Tax Credit Allocations

The involvement of state and local governments in LIHTC allocation and compliance makes the LIHTC program a strong example of cooperative federalism. Tax credits are generally available only to projects that receive an LIHTC allocation from the responsible state allocating agency.[74] Each state, in turn, is allowed to make annual credit allocations in an aggregate amount equal to the sum of the following: the greater of $1.75 per capita or $2,000,000[75]; the amount of unused credit ceiling for the prior year; the amount of credit allo-

[74] I.R.C. § 42(h)(1)(A) (2006) ("The amount of credit . . . for any taxable year with respect to any building shall not exceed the housing credit dollar amount allocated to such building . . . ."). Alternatively, projects that are substantially financed with the proceeds of certain tax-exempt bonds do not require a credit allocation. *Id.* § 42(h)(4)(B) (requiring that 50% or more of aggregate basis of land and building be bond financed for exception). The LIHTC program is not an entitlement program available to all qualifying taxpayers. *See id.* § 42 (setting out provisions requirement for availability).

[75] These amounts are subject to cost-of-living adjustments according to § 42(h)3(H)-(I). In 2009, the cost-of-living adjustment increased the credit ceiling to the greater of $2.30 per capita or $2,665,000. Rev. Proc. 2008-66, 2008-45 I.R.B. 1107 § 3.07 (relevant provisions not amended).

cation returned from unsuccessful projects during the year; and the amount allocated to the state from a pool of unused credit ceiling from all states during prior years.[76]

State allocating agencies decide which developers and developments get low-income housing tax credits. Credit allocations are made on a competitive basis, and allocations are constrained only by a broad planning requirement that they be made pursuant to a state-approved "qualified allocation plan" ("QAP").[77] The QAP requirement is designed to make allocation decisions transparent and responsive to public input by using selection criteria that are "appropriate to local conditions."[78] QAP contents have a level of political accountability that comes from the requirement that each QAP be

[76] *Id.* § 42(h)(3).

[77] *Id.* § 42(m)(1)(A)(i) (stating that the LIHTC amount is zero unless the amount was allocated pursuant to qualified allocation plan approved by governmental unit of which allocating agency is part). There typically is much more demand for a credit allocation than there is a supply of credits to allocate, and because there is competition for LIHTC allocations, federal and state governmental agencies can engineer credit allocations to create public benefit. Steve Gold et al., *Making Tax Credits Work for the Disabled*, 148 NHI (Winter 2008), http://www.nhi.org/online/issues/148/taxcreditsfordisabled.html.

[78] *Id.* § 42(m)(1)(B)(i). These criteria must consider project location, housing needs, project characteristics, sponsor characteristics, any special needs of the tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership. *Id.* § 42(m)(1)(C). Like the QAP allocation preferences discussed below, there are no federal guidelines concerning how these considerations should be balanced. *See id.*

approved by the governmental unit of which the agency is a part (typically, the state's governor).[79] The LIHTC sets forth several broad allocation preferences: QAPs are required to give preference to projects serving the lowest income tenants; projects obligated to serve low-income tenants for the longest time periods; and projects located in "qualified census tracts" ("QCT"s) if those projects contribute to a concerted community revitalization plan.[80] There are no federal guidelines concerning the weight to be given to each of these preferences, or how state allocation agencies should balance these preferences against other considerations, such as market studies, financial feasibility, and the developer's readiness to proceed.[81] The QAP selection criteria must also include project location, housing needs characteristics, project characteristics, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual

[79] I.R.C. § 42(m)(1)(A)(i).

[80] *Id.* § 42(m)(1)(B)(ii). Qualified census tracts are census tracts designated by HUD in which, for the most recent year for which census data are available on household income in such tract, either at least 50% of households have an income that is less than 60% of the area median gross income, or the poverty rate is at least 25*%. Id.* § 42(d)(5)(B)(ii)(I) (revealing that is a stated statutory preference for projects located in areas of relatively deep poverty). Transactions substantially financed by bonds, *see id.* § 42(m)(1)(D) (explaining LIHTC's application to bond projects), do not need a credit allocation, and therefore, do not compete with other projects for an allocation.

[81] *See id.*

tenant ownership.[82] Again, there are no federal guidelines concerning the balancing of these criteria. Though made without such federal guidance, the allocation decisions of local agencies are final. In addition, the credit amount allocated to a project may not exceed the amount that the allocating agency determines "is necessary for the financial feasibility of the project and its viability as a low-income housing project during the [ten-year] credit period."[83]

In addition to satisfying the credit allocation requirements described above, state allocating agencies must also notify the local chief executive officer ("CEO," i.e., the mayor) that a low-income housing project will be located within the CEO's jurisdiction, and must provide the CEO with a reasonable opportunity to comment on the project.[84] Again, there is no statutory or regulatory guidance concerning how the allocating agency should take the CEO's comments into account; however, it is likely that state allocating agencies, which are public—and therefore political—entities, would take negative commentary from a public official seriously. Furthermore, credits are only available after a disinterested party conducts a "com-

[82] *Id.* § 42(m)(1)(C).
[83] *Id.* § 42(m)(2)(A).
[84] *Id.* § 42(m)(l)(A)(ii).

prehensive market study of the housing needs of low-income individuals in the area to be served by the project" at the developer's expense.[85] The focus on the "needs of low-income persons in the area to be served by the project" likely means that projects will not be located in geographic areas that do not already have low-income persons; rather, they will be located in areas with an abundance of such persons.[86]

2. Extended Low-Income Housing Commitments

The LIHTC statute attempts to foster long-term affordability by mandating an "extended low-income housing commitment" between the project owner and the state allocating agency.[87] An extended low-income housing commitment is an agreement that requires the project owner to maintain, at a minimum, a specified "applicable fraction" of low-income housing units to total housing units during the relevant time period.[88] Extended low-income housing commit-

[85] *Id.* § 42(m)(1)(A)(iii).
[86] *See id.* § 42(m)(l)(A)(ii).
[87] *Id.* § 42(h)(6)(A).
[88] *Id.* § 42(h)(6)(B)(i). The "applicable fraction" equals the smaller of the "unit fraction" or the "floor space fraction." *Id.* §§ 42(c)(1)(A), (c)(1)(B). In the "unit fraction," the numerator is the number of low-income units in the building and the denominator is the number of residential rental units (whether or not occupied) in the building. *Id.* § 42(c)(1)(C). In the "floor space fraction," the numerator is the total floor space of the low-income units in the building and the denomi-

ments also prohibit LIHTC developments from refusing to lease to a prospective tenant because the tenant holds a Section 8 rental voucher.[89] Such commitments apply during an "extended use period," which begins on the first day of the statutorily mandated fifteen-year compliance period and ends on either the date specified in the agreement, or fifteen years after the close of the fifteen-year compliance period, whichever is later.[90]

Notwithstanding this minimum thirty year term, the extended use period terminates on the last day, if at all, specified by the allocating agency in the agreement if the allocating agency is unable to present the project owner with a "qualified contract" for the acquisition of the low-income portion of the building by a person who will continue to operate the building as low-income housing.[91] The ability to terminate the agree-

nator is the total floor space of all residential rental units in the building. *Id.* § 42 (c)(1)(D).

[89] *Id.* § 42(h)(6)(B)(iv).

[90] *Id.* § 42(h)(6)(D) (explaining the calculations for an extended use period, the minimum of which is 30 years).

[91] *Id.* § 42(h)(6)(E)(i)(II). If this allocating agency mandates a term in the agreement, its inability to present a qualified contract does not terminate the extended use period before the end of the agreed-upon term. *Id.* A qualified contract is a bona fide contract to acquire (1) the non-low-income portion of the building for fair market value and (2) the low-income portion of the building for an amount not less than the applicable fraction multiplied by the sum of (a) the outstanding debt secured by the building, plus (b) the investor equity investment in the building increased by, (c) the cost of living adjustment, and other capital contributions, reduced by (d) cash distributions from the project. 26 U.S.C. § 42(h)(6)(F) (2009). State agencies have one year after the owner submits a written request to obtain a

ment after the statutorily mandated fifteen-year compliance period theoretically allows a building's owner to change affordable housing into market-rate housing, or be bought out by a third-party purchaser.

3. Compliance Monitoring

In addition to making allocations, state allocating agencies are responsible for compliance monitoring of LIHTC developments.[92] State agencies are required to (a) make sure building owners follow record-keeping and record-retention requirements; (b) receive income and rent certifications from building owners (including a certification that the LIHTC buildings are available for use by the general public); and (c) undertake compliance reviews and project inspections.[93] Noncompliance is reported to the federal government, presumably triggering an Internal Revenue Service (IRS) review and potential tax audit.[94] The monitoring provisions do not mandate that the state credit agencies obtain information concerning tenant makeup of LIHTC projects; nor do the provisions mandate that the

qualified contract. *See id.* § 42(h)(6)(I). I am unaware of any circumstances where a state agency has provided a qualified contract to the owner.

[92] I.R.C. §42(m)(1)(B)(iii) (2006) (stating that an allocation plan is not qualified unless it contains a procedure that the state agency will follow to monitor noncompliance with § 42 and to notify the IRS of noncompliance.).

[93] 26 C.F.R. § 1.42-5(a)(2) (2009).

[94] *See id.* §1.42-5(e).

agencies monitor fair housing compliance of LIHTC projects, except to the extent that such compliance comes under the "general public use" rubric.[95] The law contains a terse definition of "general public use":[96]

> A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD).[97]

Because the low-income housing credit program involves a complex relationship between federal tax law and local administrative agencies, reform of the program to encourage increased geographic desegregation of affordable housing also needs to take this relationship into account. This is discussed further in Part IV of this

[95] *See id.*

[96] Regulations state that the general public use requirement means that the housing unit must be leased in a manner consistent with federal policy governing nondiscrimination. *Id.* § 1.42-9(a). Although the IRS appeared to take the position that the general public use requirement means that the housing must be available to anyone (for example, housing preferentially targeting agricultural workers would not qualify), *see* INTERNAL REVENUE SERVICE, COMPLIANCE MONITORING AND MISCELLANEOUS ISSUES RELATING TO THE LOW-INCOME HOUSING CREDIT 11 (1999), www.irs.gov/pub/irs-regs/td8859.pdf, Congress took a somewhat more moderate approach in 2008 legislation. *See* IRC § 42(g)(9) (clarification of general public use requirement).

[97] 26 C.F.R. §1.42-9(a) (2009). The general public use requirement is discussed in greater detail, *infra* Part IV-A(1). It is worth noting at this point that the general public use requirements address "non-discrimination," but do not affirmatively mandate actions to eliminate historic housing segregation. *See id.* §1.42-9 (2009). In the compliance context, this makes sense because building owners, acting alone, are not the correct focus for eliminating societal patterns of housing discrimination.

Article.

B. ECONOMIC STRUCTURE OF THE LOW-INCOME HOUSING TAX CREDIT PROGRAM

Low-income housing tax credits are available for certain "qualified low-income buildings," defined as buildings that are part of a "qualified low-income housing project," throughout a fifteen-year credit compliance period.[98] The compliance period is designed to mandate long-term affordability.[99] A "qualified low-income housing project" is a project for residential rental property in which either (a) at least 20% of the units are rent-restricted and occupied by individuals and families whose income is 50% or less of area median gross income

[98] I.R.C. § 42(c)(2) (2006). The compliance period is the fifteen-year period beginning with the first taxable year of the credit period. *Id.* § 42(i)(1). The credit period is the ten-year period during which all or a preponderance of the tax credits are received. *Id.* § 42(f)(1). It credit period begins with the taxable year in which the building is placed in service or at the taxpayer's election, the next succeeding taxable year. *Id.* Thus, there is a somewhat odd conceptual structure in which credits are available on an accelerated ten-year basis for buildings that must remain in compliance with tenant income and rent restrictions for fifteen years. *See id.* In the event a building ceases to comply with the tax credit requirements or has a reduced qualified basis before the end of the fifteen-year compliance period, a portion of the credits are recaptured. *Id.* § 42(k). Furthermore, the fifteen-year compliance period generally forces investors to remain part of the LIHTC partnership for fifteen years. *See id.* § 42(h)(6)(d)(ii)(II).

[99] Other long-term affordability mandates include the requirement that LIHTC project owners enter an extended low-income housing commitment with the state allocating agency, and the requirement that such agencies allocate low-income housing tax credits in a manner that gives preference to projects obligated to serve low-income tenants for the longest periods. *See id.* § 42(h)(6)(B) (extended low-income housing commitment); *see also id.* § 42(m)(1)(B)(ii)(II) (preference for projects obligated to serve qualified tenants for longest periods).

(the "20-50 test") or (b) at least 40% of the units are rent-restricted and occupied by individuals and families whose incomes are 60% or less of area median gross income (the "40-60 test").[100] To be rent restricted, the tenant's annual gross rent for the unit cannot exceed 30% of the imputed income limitation for the unit.[101] The 40-60 test is used far more frequently than the 20-50 test.[102]

[100] *Id.* § 42(g)(1).

[101] *Id.* § 42(g)(2). Thus, rent generally is capped at 18% (30% of 60%) of area median gross income. *See id*. Rents at or near the rent limit generally are affordable only for households with incomes close to the 60% level. *See* Florence Wagman Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1016 (1998) [hereinafter Roisman, *Mandates Unsatisfied*]. Because the poverty line nationally is about 30% of area median gross income, one cannot say that LIHTC project tenants are, by definition, poor people. However, because owners of LIHTC developments cannot refuse to rent to a prospective tenant holding Section 8 vouchers, and because the federal government subsidizes housing leased to voucher holders up to a fair market rent level, voucher-holding families can often afford to rent in LIHTC developments. I.R.C. § 42(h)(6)(B)(iv) (2006). This effectively means that LIHTC developments have the capacity to be "mixed-income" housing with some tenants having incomes close to 60% of area median gross income and other voucher-holding tenants having considerably lower incomes. *See id.* The imputed income limitation is determined by assuming that one person lives in a studio unit and 1.5 persons live in each bedroom in a unit containing separate bedrooms. *Id.* § 42(g)(2)(C). Thus, a two bedroom unit is assumed to house a family of three, and rent restriction requirements are based on the area median gross income of a three-person family, irrespective of whether more or fewer people actually occupy the unit. *See id.* The income limitations, on the other hand, are based on family size. *See id.* Thus, for example, if a three bedroom apartment is occupied by a family of five, the determination of whether the family is income qualified is based on area median gross income for a five-person family, and maximum rent is based on a hypothetical 4.5 person family. *See id.* Section 8 and similar rental subsidies do not count in computing the tenant's gross rent. *Id.* §42 (g)(2)(B)(i).

[102] In my experience, all LIHTC-eligible low-income housing projects are at least 40% occupied by low-income persons; therefore, there is no reason to elect the 20-50 test, which reduces the population that can occupy the unit and lowers the maximum rent that can be charged by 33%.

Assuming that a building is a qualified building, the tax credit available for each taxable year in a ten-year credit period is determined by multiplying the building's "qualified basis" by an "applicable percentage."[103] Historically, the applicable percentage has been defined as the percentage that will yield, over the credit period, a present-value credit amount of either 30% of a building's qualified basis (the "30% present-value credit") or 70% of a building's qualified basis (the "70% present-value credit").[104] The 30% present-value credit is available for the acquisition costs of existing buildings that are then substantially rehabilitated,[105] and for the costs of new construction and substantial rehabilitation of existing buildings that are federally subsidized.[106] The 70% present-value credit is available for the costs of new construction and substantial rehabilitation that

[103] *Id.* § 42(a).

[104] *Id.* § 42(b).

[105] *See id.* § 42(d)(2)(B)(iv) (stating no acquisition credit is allowed unless a rehabilitation credit is allowable by reason of I.R.C. § 42(e)); *id.* § 42(e)(1) (rehabilitation expenditures meeting the minimum expenditure threshold are treated as a separate, new building).

[106] *Id.* §§ 42(b)(1)(B), 42(b)(2)(B)(ii). Under § 42(e), substantial rehabilitation expenditures for an existing building can be treated as a separate new building. *Id.* § 42(e). Federal subsidy occurs when the proceeds of any tax-exempt bond obligation are used for the building or its operation. *Id.* § 42(i)(2). Prior to August 2008, federal subsidy included the use of "below-market federal loans" with respect to a building or its operations. A below-market federal loan is a loan funded in whole or in part with federal funds, if the interest rate payable by the building's owner is less than the applicable federal rate established by I.R.C. § 1274.

are not federally subsidized.[107] The applicable percentages are established monthly by the Treasury Department.[108]

In 2008, Congress amended the LIHTC statute to provide a flat 9% applicable percentage for newly constructed and rehabilitated, non-federally subsidized buildings placed in service after July 2008 and before December 31, 2013.[109] The present-value arrangement continues to apply to tax credits for acquisition, and for newly constructed and rehabilitated federally subsidized buildings. Beginning in 2014, the present-value calculation will once again apply to all buildings.

A building's "qualified basis"[110] equals its "eligible basis" (i.e., its acquisition, construction, or rehabilitation costs)[111] multiplied by an "applicable fraction" equivalent to the portion of the building

[107] *Id.* §§ 42(b)(1)(B), 42(b)(2)(A).

[108] *Id.* § 42(b). By way of example only, the credit percentage in December 2008 was 3.36% for the 30% present-value credit. Rev. Rul. 2008-53, 2008-2 C.B. 1231. As noted, from August 2008 until December 31, 2013 the credit for non-federally subsidized new buildings, including substantial rehabilitation, is 9%. *See* I.R.C. § 42(b)(2).

[109] *See* I.R.C. § 42(b)(2).

[110] I.R.C. § 42(c).

[111] More specifically, "eligible basis" is defined generally as the building's adjusted basis as of the close of the first year of the ten-year credit period. *Id.* §§ 42(c)(1), 42(d)(1)–(2)(A). There are a series of other rules for computing eligible basis, most of which are beyond the scope of this Article. *Id.* § 42(d)(2)(D). However, several of these special rules are important to this Article and are discussed *infra* Part IV.

leased to low-income individuals and families.[112] The applicable fraction concept is designed to link the amount of tax subsidy to the actual use of the building for housing low-income individuals and families.[113] For example, assuming a $10 million "eligible basis" (e.g., construction costs) for a non-federally subsidized, new building in which all the residential units will be rented to low-income persons, the applicable fraction would be one over one, and the "qualified basis" would be $10 million. Further assuming that the credit percentage for the building is 9%, the building's owner would receive low-income housing tax credits of $900,000 per year for ten years, for an aggregate of $9,000,000 in tax credits.

New and substantially rehabilitated buildings located in three types of geographic areas are eligible for an enhanced credit through a 30% eligible basis increase (the "130% basis step-up").[114] Using the foregoing example, a building with a $10 million eligible basis would have a $13 million eligible basis if located in one of these ar-

[112] *See supra* notes 88, 91.

[113] *See id.* § 42(c). The combination of the 20-50 test or the 40-60 test and the applicable fraction concept allows part of a qualified building to be leased to higher-income, non-qualifying tenants and thereby enables mixed-income residential housing. *See id.* §§ 42(c), (g).

[114] *Id.* § 42 (d)(5)(C)(i). The 130% basis step-up is not available with respect to federally-subsidized buildings or the acquisition costs of existing buildings. *Id.* §§ 42(d)(2)(i)–(ii), 42(d)(5)(A).

eas, and the owner would receive a credit of $1,170,000 per year for ten years. The first type of buildings eligible for the 130% basis step-up are those located in "qualified census tracts," which are census tracts designated by the Department of Housing and Urban Development ("HUD") and in which either (1) at least 50% of the households have incomes that are less than 60% of area median gross income or (2) a poverty rate of at least 25%.[115] The qualified census tract concept is designed to encourage investment and housing development in high poverty areas.[116] As noted below, this concept has

[115] *Id.* § 42(d)(5)(C)(ii)(I). The second type of building eligible for the 130% basis step-up are those located in a "difficult development area," *id.* § 42(d)(5)(B)(i), which is "any area designated by the . . . [HUD] as an area which has high construction, land or utility costs relative to area median gross income." *Id.* § 42(d)(5)(B)(iii)(I). In Colorado, for example, difficult development areas often are high-income mountain communities.–The third type of building eligible for the 130% basis step-up are buildings "designed by the State housing credit agency as requiring the increase in credit . . . in order for such building[s] to be financially feasible." I.R.C. § 42(d)(5)(B)(v). While this can be accomplished on a building-by-building basis, there is, at present, no information concerning how state allocating agencies have responded to this grant of discretionary authority.

[116] The qualified census tract concept derives from the community development goal of encouraging investment in low-income communities, thus "making separate equal." *See* Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together,* 41 IND. L. REV. 555, 557 (2008) (noting the 1968 Kerner Commission report declaring that the country was "moving toward two societies, one black, one white—separate and unequal; stating that the progressive fair housing and community development movements "have seemed to operate in parallel universes and, at worst, have reflected tension and even conflict that belie their common commitment to social and racial justice[,]" and arguing that this is a false dichotomy that must be overcome). These issues predate the 1968 Fair Housing Act. *See* THURSTON CLARKE, THE LAST CAMPAIGN: ROBERT F. KENNEDY AND 82 DAYS THAT INSPIRED AMERICA 258–60 (2008) (comparing Eugene McCarthy and Robert Kennedy's urban plans); ARTHUR ARTHUR MEIER

been controversial, with some housing advocates arguing that it contributes to racial and class segregation in housing.

The typical owner of a LIHTC project is a limited partnership (or limited liability company) with a nonprofit or for-profit entity as general partner (or managing member) and a tax-paying investor as limited partner (or non-managing member). In such partnerships, the limited partnership invests in LIHTC housing with the expectation of

SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 745–49 (1978) (discussing Kennedy's Bedford-Stuyvesant plan). For a historian's perspective, see SUGRUE, URBAN CRISIS, *supra* note 38, at 181–209; s*ee also* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Program*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005) (noting that the most important low-income housing development programs are largely unregulated from a civil rights perspective; stating that this reflects a growing emphasis on community revitalization strategies (upgrading the places where disadvantaged people are already living) while efforts to promote residential integration (changing where people can and do choose to live) have faced repeated and seemingly intractable obstacles); Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310, 329 (Xavier de Souza Briggs ed., 2005) ("The public conversation in America has ignored, and well-intended policy debates tend to muddle, a crucial distinction. Framed as a question of strategy, the distinction is this: Should we emphasize reducing *segregation* by race and class (through what I term 'cure' strategies), or should we emphasize reducing its terrible *social costs* without trying to reduce the extent of segregation itself to any significant degree (via 'mitigation' strategies). Put differently should we invest in changing where people are willing and able to live, or should we try to transform the mechanisms that link a person's place of residence to their opportunity set? . . . For ethical and practical reasons, it is hard to imagine choosing one strategy, always and everywhere, instead of the other. . . ."). In a more positive vein, although building subsidized housing in high-poverty neighborhoods may initially heighten poverty concentration, it can be argued that over time there will be a lessening of poverty concentration as neighborhoods improve and higher-income people move into them. In this view, the LIHTC program is a tool for both neighborhood revitalization and neighborhood integration.

receiving tax credits for ten years and obtaining tax deductions and tax losses through depreciation.[117] The ownership entity is taxed as a partnership, permitting 99.99% of the tax credits, and 99.99% of the tax losses, to pass through to the investor-limited partner or non-managing member.[118] Using the previous example, the investor-limited partner with a 99.99% interest in a limited partnership owning a newly constructed, non-federally subsidized building with a $10 million qualified basis would receive $899,910 in tax credits per year, and $8,999,100 in aggregate tax credits over the ten-year credit period.[119] Low-income-housing tax credits offset federal income taxes on a dollar-for-dollar basis, and therefore have considerable investment value to taxpaying corporations and, to a limited extent, individuals.[120]

[117] Residential rental housing generally is depreciated on a straight-line basis over 27.5 years. 26 U.S.C. § 168(b)(3)(B) (2006) (declaring that the "depreciation method shall be the straight line method" for residential rental housing); *id.* § 168(c) (stating the applicable recovery periods).

[118] *Id.* §702(a) (stating that partners must "take into account separately [their] distributive share of partnership's [tax items]"). Due to at-risk limitations and passive activity loss limitations, the typical investor is a widely held C corporation. I.R.C. § 49 (2006) (stating the at-risk rules); I.R.C. § 469(a)(1) (disallowing passive activity losses); I.R.C. § 469(a)(2)(B) (disallowing passive activity losses for any closely held C corporations).

[119] If the building is in a 130% basis step-up area, the investor would receive $1,169,883 credits per annum and $11,698,830 credits over ten years.

[120] Passive activity loss, and the rules contained in I.R.C. § 469, limit the usefulness of LIHTCs for individual taxpayers.

Investors contribute capital to the LIHTC project's owner entity in exchange for an interest in the entity and the resulting tax benefits. The typical ratio of investment to credit has varied significantly over time and is based both on market factors, such as the credit supply and demand and the after-tax benefits of alternative investments, and deal-specific factors, such as the timing, risk, and cost of the investment. Assuming, for example, that an investor agrees to make a capital contribution of eighty cents for each tax credit dollar to be received, the $8,999,100 in tax credits from the above example would provide a $7,199,280 capital contribution.[121] Assuming that there are $1 million of non-creditworthy expenditures on the project (for land and other costs) in addition to the $10 million construction costs, the LIHTC investment will pay for all but $3,800,720 of the project costs. The remaining expenses are typically covered by permanent

[121] If the building is in a 130% basis step-up area, the investment would be $9,360,000. The investment typically comes in over time with some funding at closing, some during project construction, some at project completion, and some at project economic stabilization. Generally, the later the investor funding, the larger the investment because early investment without a concomitant reduction in the amount paid causes a reduced rate of return, and because early investment increases the investor's construction risk. Thus, in LIHTC deals there may be a need for funds to bridge the tax credit investment, and, in addition, developer fees may be deferred beyond the construction period in order to match the investment and project cash flow.

debt financing and general-partner capital contributions.[122] Because the permanent debt required for the project is reduced by equity contributions, less rent is required to service the debt—thereby allowing restricted rents to low-income persons.[123]

As stated, the LIHTC program is contained in a long, convoluted, and conceptually difficult section of the Internal Revenue Code, I.R.C. § 42. The remainder of this Article will focus on whether the LIHTC program encourages development of integrated housing and, having concluded that it does not, discusses thoughts for reform in order to achieve such a goal.

III. EFFECT OF THE LIHTC PROGRAM ON HOUSING

[122] In the case of a building in a 130% basis step-up area, credits would pay for all but $1,640,000 of project costs. Permanent debt financing can include "hard" debt (payment made in fixed amounts over a loan term) and "soft" debt (because "soft" debt is frequently from local governmental sources in which current payment depends on the existence of positive cash flow).

[123] The tax credit subsidy alone reduces rents only to a moderate level, and families generally can afford renting tax credit units only if they have incomes between 40% and 60% of area median gross income. *See* Kathryn P. Nelson, *Whose Shortage of Affordable Housing*?, 5 HOUSING POL'Y DEBATE 401, 402 (1994) ("Unless they have additional subsidies, LIHTC occupants must have incomes between 40[%] and 60[%] of the median to avoid severe rent burdens, and research shows that families who occupy such units do have incomes in that range."); Roisman, *Mandates Unsatisfied*, *supra* note 101, at 1016. Additional subsidies are required to serve lower income populations including the homeless that lack income to pay LIHTC-based rent. *See id.* at 1018–19. Most LIHTC projects have other subsidies, such as rental assistance and other governmental loans and grants. *See* GENERAL ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 40 (1997) (estimating that more than 60% of LIHTC projects received an additional subsidy). My experience indicates that this 60% number is, if anything, understated.

DESEGREGATION

The LIHTC program is a tax program under the auspices of the Treasury Department and the IRS, rather than a federal appropriations program under the auspices of HUD. Perhaps because of this distinction, the LIHTC program has received less attention than other federal housing programs in both fair-housing compliance and in LIHTC's use as a tool to promote racial and economic integration. Notwithstanding a relative paucity of data concerning the impact of the LIHTC on racial integration, several studies conclude that the LIHTC program has had only a small integrative impact.

The most extensive study on the geographic placement of LIHTC projects was funded by the Brookings Institute ("the Brookings study") and tracked the location and neighborhood characteristics of housing projects that were financed with low-income housing tax credits and placed in service from 1990 to 2000.[124] The Brook-

[124] LANCE FREEMAN, BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S 5 (2004), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2004/04metropolitanpolicy_freeman/20040405_Freeman.pdf; *see* Paul Jargowsky, Author & Director, Bookings Inst., Presentation at the Brookings Event: Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s (May 19, 2003), *available at* http://www.brookings.edu/speeches/2003/0519demographics_jargowsky.aspx (fol-

ings study analyzed several different characteristics of LIHTC project placement, including neighborhood demographics and economic stability.[125] In particular, the Brookings study analyzed the racial composition of neighborhoods containing LIHTC housing units and found that these neighborhoods contained disproportionate shares of black residents[126]; while blacks made up only 15% of total metropolitan residents in 2000, blacks accounted for 26% of the population in LIHTC neighborhoods.[127] Also, "blacks made up 34% of [the] population in central-city LIHTC neighborhoods, more than double their proportion in suburban LIHTC neighborhoods (15 percent) . . .

low "Power Point Presentation" hyperlink) (noting a dramatic, albeit regionalized, decline in the 1990s in the number of high-poverty neighborhoods, their population and the concentration of the poor in these neighborhoods, but also finding indication that poverty rose in older suburbs of many metropolitan areas and attributing the change to an "excellent economy" in the 1990s); George C. Galster, *Consequences From the Redistribution of Urban Poverty During the 1990s: A Cautionary Tale*, 19 ECON. DEV. QUARTERLY 119, 119–25 (2005) (noting that the share of metropolitan populations living in neighborhoods with moderate levels of poverty rose in the 1990s, and arguing that the redistribution of poverty may portend intensified social problems because more neighborhoods will be pushed over poverty thresholds when concentrated poverty generates negative external effects for each neighborhood).

[125] *See* FREEMAN, *supra* note 124.

[126] *Id.* at 6. The proportion of a neighborhood that is Asian or Hispanic does not relate strongly to the location of LIHTC units, other than with respect to Hispanics in the West. *Id*. at 7. The study also found that 58% of metropolitan LIHTC units were built in central-city neighborhoods, despite the fact that only 38% of metropolitan residents live in those neighborhoods. *Id*. at 6.

[127] *Id.* at 7. In comparison, blacks represented 38% of the population in neighborhoods with other federally assisted housing. *Id.* At the high end of the spectrum, blacks made up more than half of LIHTC neighborhoods in Chicago, even though they represented only one-fifth of residents metro-wide. *Id.*

."[128] In contrast, suburban LIHTC neighborhoods contained about four times more white residents than black residents.[129] According to the study's author, these patterns highlight "the fact that blacks are the most spatially isolated minority group [and] suggest . . . that federal housing programs such as the LIHTC do not mitigate that outcome."[130]

The Brookings study also reported that neighborhoods containing LIHTC projects were more economically disadvantaged than other metropolitan neighborhoods.[131] From 1990 to 2000, "LIHTC units were built in poorer neighborhoods, neighborhoods more likely to contain concentrated levels of poverty[,] and in neighborhoods with median incomes about $10,000 lower than the metropolitan average in 2000."[132] LIHTC neighborhoods also exhibited lower house values and homeownership rates than other metropolitan neighborhoods.[133] Overall, LIHTC neighborhoods had "more poor people, fewer homeowners, and less valuable housing than metropolitan

[128] *Id.* at 10.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 8.
[132] *Id.* at 8.
[133] *Id.* at 9. LIHTC neighborhoods also experienced larger declines in poverty and similar increases in home values when compared to other metropolitan neighborhoods. *Id*.

neighborhoods generally."[134]

At the same time, the Brookings study found that LIHTC neighborhoods fared better than neighborhoods with other types of federally subsidized housing. During the 1990s, the poverty rate in neighborhoods with LIHTC units was 10% lower than the poverty rate in neighborhoods with other federally subsidized housing, and the median household income was $9,000 higher.[135] Nonetheless, a significant disparity existed between central city and suburban LIHTC neighborhoods. During the ten-year period from 1990 to 2000, approximately 58% of all metropolitan LIHTC units were located in central cities.[136] "The poverty rate in central city LIHTC neighborhoods [was] 24%, twice as high as in suburban LIHTC neighborhoods, and median income [was] roughly $13,000 lower."[137] Approximately one in seven central city LIHTC units was located in a high-poverty neighborhood[138]—five times the proportion of suburban LIHTC units located in high-poverty neighborhoods.[139]

[134] *Id.*
[135] *Id.* Blacks accounted for 38%of the population in neighborhoods with other federally assisted housing developments. *Id*. at 7.
[136] *Id.* at 6.
[137] *Id.* at 10.
[138] *Id.*
[139] *Id.*

Another study, completed by Abt Associates in 2006 ("the Abt study"), analyzed LIHTC units with two or more bedrooms, placed in service between 1995 and 2003, and located in metropolitan areas with populations greater than 250,000.[140] The Abt study reported results similar to those in the Brookings study: 34% of all metropolitan family LIHTC units were in neighborhoods with low poverty rates; 29% were in neighborhoods with 10–20% poverty rates; and 37% were in neighborhoods with greater than 20% poverty rates.[141] By comparison, 58% of the U.S. metropolitan population lives in census tracts with 0–10% poverty rates; 24% of the U.S. metropolitan population lives in census tracts with 10–20% poverty rates; and 18% of the U.S. metropolitan population lives in census tracts with more

[140] KHADDURI, *supra* note 63, at 4; *See also* KATHLEEN G. HEINTZ ET AL., ABT ASSOCIATES INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE (1996) (documenting the results of HUD-sponsored efforts to collect information about LIHTC projects and presenting analysis of the characteristics and locations of tax credit projects based on data collected). The Khadduri Abt study-focuses on larger metropolitan areas, because poverty concentration and racial separation are found in such areas. *Id*. Because no data distinguishes family LIHTC units from other units, the Abt study used the number of bedrooms as a proxy for family size, and assumed that units with two or more bedrooms were family units. *Id.* Even this was imperfect, as unit size data was missing for 14% of LIHTC projects. *Id.*

[141] *Id.* at 6.

than 20% poverty rates.[142] The Abt study found that while the number of family units produced by the LIHTC program in low- and moderate-poverty neighborhoods within large metropolitan areas increased between 1995 and 2001, that number dropped slightly in 2002 and 2003.[143] Also, "almost two thirds (64.8%) of the LIHTC family units in low- and moderate-poverty locations within large metropolitan areas [were located] in the suburbs."[144] Roughly 73% of units in neighborhoods with poverty rates of 10% or less were located in the suburbs.[145] Finally, "[a]lmost 90% of the LIHTC units in census tracts with poverty rates less than 10% [were located] in tracts where more than half of the population identifie[d] . . . as white, non-Hispanic,"[146] and almost 60% were in tracts where less than 25% of the population identified as belonging to a minority group.[147] This can be compared with census tracts with LIHTC family units and poverty rates of 10–20%, where almost 40% of units were in neighborhoods where a majority of the residents identified as

[142] *Id.* at 5. Including non-metropolitan units, approximately 34 % of family units were located in low-poverty areas. *Id.* at 7. Low-poverty neighborhoods were defined as having a less than 10% poverty rate. *Id.*

[143] *Id* at 8.

[144] *Id.*

[145] *Id.* at 9.

[146] *Id.* at 10.

[147] *Id.*

members of a minority group.[148] The Abt study does not contain similar data for census tracts with poverty rates greater than 20%, but one can extrapolate from other data and conclude that such tracts might reflect a greater minority population.

The Abt study demonstrated that 22% of all LIHTC units built in metropolitan areas between 1995 and 2003 were family units in census tracts with poverty rates of 10% or less.[149] Drawing from this, the author of the study concluded that the LIHTC program has "enormous *potential* to provide opportunities for low-income families to live in solid, middle-class neighborhoods."[150] However, the Abt study further states that it is unknown how much of this potential is realized, because LIHTC housing built in low-poverty areas may not be accessible to families with poverty-level incomes.[151] Furthermore, the Abt study notes that the racial and ethnic composition of LIHTC developments is unknown, because such data has not been collected.[152] Thus, it could be the case that a substantial number of

[148] *Id.*
[149] *Id.* at 21.
[150] *Id.* at 21.
[151] *Id.* at 22. Instead, such units theoretically could be rented to persons with incomes just below the 60% limit, because two or more bedroom units could theoretically be occupied by households without children.
[152] *Id.*

multi-bedroom LIHTC units in low-poverty suburbs are occupied by non-minority tenants with incomes at nearly 60% of area median gross income.[153]

The most current data on LIHTC unit locations mirrors the patterns discussed above.[154] LIHTC units are still more likely than other rental units to be located in minority neighborhoods, and the most recent HUD information shows that nearly 43% of all LIHTC units are in neighborhoods with over 50% minority populations.[155] The number increases to 60% for LIHTC units located in central cities.[156] To put that number in context, approximately 31.5% of all rental units are located in neighborhoods with over 50% minority populations.[157]

Further, according to HUD data, approximately 45% of LIHTC projects placed in service in 2005 were built in central cities, 32%

[153] Although colloquial in nature, my own observations support this conclusion.

[154] HUD's LIHTC Database's most recent information is from 2007. For more information, see HUD.gov, Access to LIHTC Data, http://www.huduser.org/portal/datasets/lihtc.html#data (follow "http://lihtc.huduser.org/" hyperlink under "Access LIHTC Data").

[155] CARISSA CLIMACO ET AL., ABT ASSOC., INC., HUD NATIONAL LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2005 at 19 (2007), *available at* http://www.huduser.org/Datasets/lihtc/tables9505.pdf.

[156] *Id.* Approximately 29 % of suburban LIHTC units were in majority minority neighborhoods. *Id.* at 19 tbl.22.

[157] *Id.*

were built in suburbs, and 23% were built in non-metropolitan areas.[158] Thus, roughly 58% of metropolitan LIHTC projects placed in service in 2005 were located in the central city and 42% were located in the suburbs.[159] The numbers for LIHTC housing units are similar. Approximately 51% of all LIHTC units placed in service in 2005 were built in the central city, 36% were built in the suburbs and 13% were built in non-metropolitan areas.[160] It follows that roughly 59% of LIHTC units placed in service within metropolitan areas in 2005 were located in central cities and 41% were located in suburbs.[161]

LIHTC units are also more likely to be located in neighborhoods where more than 30% of the population is below the poverty line. Over 20% of all LIHTC units are in high-poverty neighborhoods.[162] Furthermore, over 34% of LIHTC units located in central cities are in

[158] *Id.* at 12 tbl.14. In comparison, in 2000, roughly 41% of LIHTC projects were located in the central city, 34% were located in the suburbs, and 24% were located in non-metro areas. *Id.*

[159] These numbers are based on the percentages given *supra* note 158. Metropolitan projects represented roughly 77% of all LIHTC projects placed in service in 2005. *Id.* at 2-3 (combining 2005 projects in central city and suburban areas).

[160] CLIMACO ET AL., *supra* note 155 at 12 tbl.14. By comparison, in 2000, roughly 46% of LIHTC housing units were located in the central city, 40% were located in the suburbs, and 14% were located in non-metro areas. *Id.*

[161] *See id.*. These numbers are based on the percentages given *supra* note 160. Metropolitan housing units represented roughly 87% of all LIHTC units placed in service in 2005. *Id.*

[162] CLIMACO, *supra* note 155, at 19 tbl.22.

high-poverty neighborhoods,[163] compared to approximately 21% of all central-city rental units and approximately 12% of all rental units.[164] In addition, central city LIHTC neighborhoods stand in stark contrast to LIHTC suburban neighborhoods, in which only approximately 6% of LIHTC units are located in neighborhoods where over 30% of the people live below the poverty line.[165]

The placement of LIHTC housing varies largely among states; Utah, New Hampshire, New York, Wisconsin, Delaware, Nebraska, and Colorado "have made the greatest efforts to provide opportunities for families with children to live in low poverty neighborhoods"[166]; while Illinois, South Carolina, Kentucky, Pennsylvania, Connecticut, Massachusetts, Idaho, Arizona, and the District of Columbia "place small fractions of their LIHTC family housing in census tracts in which fewer than 10% of all people are poor."[167] Additionally, the study notes that many states are worse at offering racial integration with LIHTC units: "Quite a few states place less than a quarter of their LIHTC family housing in large metropolitan areas in

[163] *Id.*

[164] *See id.*, 9% of LIHTC units that are not in qualified census tracts are in neighborhoods with more than 30% of the population below the poverty line. *Id.*

[165] *Id.*

[166] KHADDURI ET AL., *supra* note 58, at 22.

[167] *Id.*

census tracts with less than the average minority population rate for the metropolitan area."[168]

Commentators cite several reasons why LIHTC units are placed in areas where there are disproportionate numbers of minorities and people living below the poverty line. The author of the Brookings study argues that "[a] perception of greater need in central cities, NIMBY-ism, and exclusionary zoning in the suburbs probably all contribute to this pattern."[169] Also, the LIHTC program itself favors placement of units in low-income neighborhoods. As noted in Part II-A, the program has a statutory preference for projects located in "qualified census tracts."[170] The LIHTC statute also directs state housing agencies to develop QAPs which give "preference in allocating housing credit dollar amounts" to projects built in qualified census tracts ("QCTs").[171] Combined with the social factors mentioned above, this preference contributes to the ongoing pattern of state

[168] *Id.* A recent study conducted in connection with Dallas litigation indicates that LIHTC units represent a far higher proportion of Dallas rental units where whites are a small proportion of the population—over 50% of the Dallas LIHTC units lie in the 0% to 9.9% white decile, compared with approximately 21% of all rental units, and 1% of LIHTC units are located where the white population is over 90%. Only approximately 8% of LIHTC units were in majority white Dallas neighborhoods, compared with 35% of all rental units.

[169] FREEMAN, *supra* note 124, at 6.

[170] *See supra* notes 115-117 and accompanying text.

[171] *See supra* notes 78–84 and accompanying text.

agencies and developers locating tax credit housing in high-minority, high-poverty urban areas.

Notwithstanding the foregoing, there appear to be several factors that skew the percentages of LIHTC units placed in impacted areas. First, low-income housing tax credits are available for both newly constructed buildings and for buildings that are acquired and then rehabilitated. Buildings that are rehabilitated are, by definition, located where existing housing stock is located, and, therefore, where existing tenant populations are located. Although rehabilitated central-city housing projects do not contribute to geographic desegregation, it would be incorrect to state that they contribute to increased neighborhood segregation. In addition, at least one commentator has concluded that newly constructed housing units are being placed in relatively low-poverty census tracts.[172]

Second, other federal programs have an effect on LIHTC unit location. For example, the HOPE VI program replaces obsolete public housing with mixed-income, mixed-use, and mixed-tenure (i.e.,

[172] *See* Kristopher M. Rengert, *Comment on Kirk McClures, "The Low-Income Housing Tax Credit Goes Mainstream and Moves Into Suburbs*," 17 HOUSING POL'Y DEBATE 473, 473–490 (2006)("By and large, the program seems to be placing LIHTC new construction in low-poverty tracts in at least roughly the same proportion as all LIHTC units, and most states are placing a disproportionate share of their LIHTC new construction units in low-poverty tracts.").

rental and ownership) projects.[173] Although the ultimate outcome of the HOPE VI program is a reduction in the number of low-income households in an area, the HOPE VI program leverages other resources such as low-income housing tax credits.[174] Because the LIHTC units tend to be located in low-income census tracts, the LIHTC units also replace a considerably larger number of public housing units.[175] Looked at from one perspective, the LIHTC units are located in high-poverty areas; but, looked at from another perspective, the net result may be a reduction in concentrated poverty.[176] The Brookings and Abt studies failed to take this into account.

Another study notes that there are reasons why building a disproportionate share of LIHTC units in high-poverty neighborhoods may not necessarily exacerbate the long-term isolation of the poor.[177] First, many LIHTC-project residents may not be poor; some devel-

[173] *See* Mark Shelburne, *Critiquing the Critique: Analyzing a Report of the Housing Credit Program*, 33 CAROLINA PLANNING J. 37, 39 (2008) (noting that the Louisville, Kentucky HOPE VI program replaced over 700 units of public housing with approximately 300 LIHTC units).

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Ingrid Gould Ellen et al., *Siting, Spillovers and Segregation: A Re-examination of the Low-Income Housing Tax Credit Program*, *in* HOUSING MARKETS AND THE ECONOMY: RISK, REGULATION, AND POLICY (Edward L. Glaeser & John M. Quigley eds., 2009).

opments include market-rate units and the incomes of low-income tenants may be higher on average than tenants in other forms of subsidized housing.[178] Unfortunately, the data here is sparse. Second, LIHTC projects may improve distressed neighborhoods and make them more attractive to higher income individuals and families.[179] Again, however, the data is sparse. The study also concludes that the typical metropolitan LIHTC unit was constructed in a census tract where the poverty rate was 4.5% lower than the poverty rate of neighborhoods in which the typical poor resident lived, thereby indicating that the LIHTC program shows no clear push toward increased concentration or segregation of the poor.[180] The study also notes regional disparities—LIHTC units are far more likely to be located in high-poverty areas in the Northeast and Midwest and far less likely to be so located in the South.[181] The study further finds, based on data from only one jurisdiction, that LIHTC developments can provide positive spillover effects for revitalizing high-poverty neighborhoods, but the study notes that more comprehensive analysis is

[178] *Id.* at 9–10. *See* FREEMAN, *supra* at note 124, at 6–8 (noting that the LIHTC program does better at providing integrated units than does traditional public housing).

[179] Supra n. 202 at 12

[180] Ellen et al., *supra* note 177, at 12–13.

[181] *Id.* at 13.

needed.[182] The study concludes that there is little evidence that the LIHTC program is exacerbating poverty concentration.[183] Furthermore, there is some evidence that the program is helping to deconcentrate poverty by providing poor and near-poor households greater access to low-poverty neighborhoods.[184] However, the study's conclusion that the LIHTC program does not appear to be causing "negative spatial effects" is not the same as the conclusion that the program is leading to significant increases in geographic desegregation. The study's conclusion points to a need for programmatic changes if the program is to assist in achieving a more just society.[185] The remainder of this Article discusses potential programmatic changes that specifically address that need.

IV. CHANGES TO THE LIHTC PROGRAM THAT WOULD ENCOURAGE HOUSING DESEGREGATION

Although the LIHTC program has been successful in providing low-income individuals and families with affordable housing options, the program has done little to alter this country's existing seg-

[182] *Id.* at 16–25 (construction of LIHTC units in high-poverty census tracts is, if anything, associated with poverty reduction.).

[183] *Id*. at 29-30.

[184] *Id.* at 29–30.

[185] *Id.* at 30. The study's authors also reach this conclusion, and state that it is hard to justify the current statutory preference for qualified census tracts. *Id.*

regative housing patterns. This Part moves forward on the premises that (1) housing desegregation is an important tool for obtaining school desegregation and thus, a more just society; and (2) the country's largest affordable-housing production program is not adequately answering the call for housing desegregation. This leaves us asking: what can be done to change the LIHTC program in order to encourage greater housing integration? As this Part explains, certain programmatic changes would enable the LIHTC to achieve greater neighborhood integration. There are two possible solutions: The first approach requires the federal government to alter the cooperative federalism structure by asserting national housing policy supremacy. The second approach changes the economic structure of the LIHTC program in order to encourage development of, and investment in, affordable housing in high-income areas.

A. AMELIORATING THE EFFECT OF COOPERATIVE FEDERALISM AND STATE AUTONOMY

A first set of programmatic changes would assert a more dominant federal role in site selection for LIHTC-financed developments by requiring state allocating agencies to take racial and economic factors into account when making LIHTC allocations, and by limit-

ing the amount of the state credit ceiling that can be allocated to affordable housing projects in qualified census tracts and to rehabilitation projects. These changes would mandate the collection and analysis of racial and economic data concerning tenants in LIHTC-financed developments. This move to a more robust federal role in the cooperative federalism system is dictated by the requirements of social justice enunciated in *Brown*[186]; the statements of federal housing policy contained in the Fair Housing Act[187]; the federal nature of the LIHTC tax subsidy[188]; the failure of the existing cooperative structure to achieve desegregative ends[189]; and the fact that an enhanced federal mandate is not an unfunded mandate because state agencies charge fees for the allocation and compliance monitoring processes.

1. Congress Should Make the LIHTC Program Expressly Subject to Civil Rights Laws, and Treasury Regulations Should Specify What State Credit Agencies and Developers Must Do to Satisfy Such Laws

Professor Florence Roisman has articulately demonstrated that

[186] *See supra* note 9.

[187] *See supra* Part II for a discussion of FHA; *see also* discussion *infra* Part IV-A(1).

[188] *See* discussion of federal role in creating residential segregation *supra* Part I.

[189] *See* discussion of LIHTC program's successes and shortcomings *supra* Parts II and III.

the Fair Housing Act, contained in Title VIII of the 1968 Civil Rights Act, applies to the U.S. Treasury Department and the LIHTC program.[190] In doing so, Roisman also argues that the Act gives the Treasury a duty to act "affirmatively to further" both nondiscrimination and integration goals.[191]

Section 3608 of the Fair Housing Act requires all executive federal departments and agencies to administer housing programs "in a

[190] The Fair Housing Act prevents governmental agencies from in any way "mak[ing] unavailable a dwelling to any person or discriminate with respect to terms, conditions, privileges, services or facilities because of race, color, national origin or other protected status." Roisman, *Mandates Unsatisfied*, *supra* note101, at 1031. In particular, the Act mandates that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes." 42 U.S.C. § 3608(d) (2006) (with respect to federal agencies); *id.* § 3608(e)(5) (with respect to HUD). Because the Treasury Department is a federal agency, Roisman argues that the "affirmative furtherance" provision of the Fair Housing Act extends to it and, therefore, to its administration of the LIHTC program. Roisman, *Mandates Unsatisfied*, *supra* note 101, at 1029–33 (arguing that the LIHTC program, as administered, produces "separate and unequal housing"); *see also* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005) (stating the FHA has an affirmative duty to foster integration, and arguing that "the government should prioritize locating low-income housing in places with strong schools, economic opportunity, and plentiful local resources"). Powell, *Reflections*, *supra* note 39, at 618–21 (stating that states focus more on socioeconomic integration than on racial integration and commenting on a state-by-state review of integration efforts).

[191] Roisman, *Mandates Unsatisfied*, *supra* note 101, at 1026–1029 ("The caselaw teaches that the 'purposes' and 'policies' of Title VIII are dual: to eschew discrimination and to promote integration."); *see* NAACP v. Sec'y of Hous. and Urban Dev., 817 F.2d 149 (1st Cir. 1987) (holding HUD liable for, in part, not using its power [under the Urban Development Action Grant program] to provide adequate desegregated housing).

manner *affirmatively to further* the purposes of [fair housing.]"[192] This duty can be viewed as part of a requirement that the federal government take affirmative steps to reverse its own discriminatory actions that contributed to racially biased housing. Statutory phrases such as "affirmatively to further" and "fair housing" are vague, which allows regulatory agencies and courts to interpret the language in a manner that recognizes the structural complexity of the residential segregation problem. In addition, by placing an affirmative duty on federal agencies to remedy the effects of past housing discrimination, the Fair Housing Act mitigates the need to prove intentional discrimination.[193] Thus, the "affirmatively to further" provisions of the Fair Housing Act can be viewed as both empowering, and requiring, the federal government to act in a manner that creates desegregated communities. The LIHTC program presents difficult challenges because it represents a localization and privatization of federal affordable-housing initiatives, and because it moves affordable housing from a housing program to a tax subsidy. In light of these chal-

[192] 42 U.S.C. § 3608(d) (emphasis added).

[193] *See* Thompson v. HUD, 348 F. Supp. 2d 398, 524 (D. Md. 2005) (remedy ordered despite the fact that the court failed to find that HUD intentionally discriminated).

lenges, it is critical that the federal government, in this case the Treasury Department, take steps to appropriately regulate this new model so that the legislative commands of the Fair Housing Act are met.

Concerns that LIHTC allocations are contributing to racially segregated neighborhoods—or are insufficiently contributing to neighborhood desegregation—have led to both regulatory pronouncements and Fair Housing Act litigation. On the regulatory front, some efforts to bring the LIHTC program into conformity with the Fair Housing Act commenced late in the Clinton administration. The Treasury Department, the Justice Department, and HUD issued a Memorandum of Understanding, dated August 11, 2000, committing the three departments to coordinate activities and share civil rights enforcement information, in connection with the LIHTC program.[194] Unfortunately, the Bush administration shelved this effort, and little progress has been made over the last eight years. The Obama ad-

[194] The three agencies agreed to coordinate their activities in connection with LIHTC properties for which there are Fair Housing Act compliance issues, to engage in interagency technical assistance and training, to train state housing agencies concerning fair housing, to cooperate in research concerning LIHTC properties, to cooperate in removing unlawful barriers to Section 8 tenants, to cooperate in enhancing syndicator practices in connection with the LIHTC program, and to meet annually to discuss emerging civil rights issues and new compliance methods in the LIHTC program.

ministration should make it a priority to reissue the memorandum and then act on it in a manner that both ensures Fair Housing Act compliance in the LIHTC program and, more broadly, causes the LIHTC program to become a tool for neighborhood desegregation.

On the litigation front, attempts to force state allocating agencies to comply with fair housing requirements have generally been unsuccessful. In *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan*,[195] four public interest organizations challenged the validity of a qualified allocation program approved by the New Jersey Housing Mortgage Finance Agency. The plaintiffs alleged that the credit agency failed to consider racial and other demographic information in developing its plan, and thereby violated the Act by allocating low-income housing tax credits to areas with high percentages of minority residents.[196] The court rejected this argument, and ruled that the agency's duty to promote racial integration and fair housing does not override the agency's overall mission to promote the rehabilitation of urban areas and encourage

[195] 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004).
[196] *Id.* at 10.

more affordable housing opportunities for residents in those areas.[197] The court held that the agency's primary focus in allocating low-income housing tax credits should be on economic status within qualified census tracts, not racial composition.[198]

The plaintiffs also argued that the credit agency violated state constitutional guarantees, specifically those guarantees relating to equal protection and a thorough and efficient public education, because the plan funded housing in urban areas where the public schools already had a high percentage of minority students.[199] The court held that the agency had no jurisdiction over public education; rather, the agency's obligation was to administer the LIHTC program in a manner consistent with the congressional mandate to locate projects in qualified census tracts: the agency was not obligated to allocate tax credits to non-urban areas.[200] The court also rejected the plaintiffs' argument that the plan violated the Fair Housing Act by having a disparate impact on racial minorities.[201] The court concluded that, even if the plaintiffs had shown that the agency's actions

[197] *Id.* at 15.
[198] *Id.*
[199] *Id.* at 20.
[200] *Id.* at 21.
[201] *Id.* at 18–19.

had a disparate racial impact, the plan was justified because it furthered the legitimate governmental interest of creating low-income housing, and because there were not less discriminatory alternatives.[202] The decision "placed a stamp of approval on the state housing agency's minimal effort to promote integration, leaving one to believe that the 'affirmatively to further' fair housing mandate was meaningless to the court."[203]

In another recent case, a neighborhood organization challenged the administration of the LIHTC by the Connecticut Housing Finance Authority, alleging that the agency violated its duty to "'affirmatively further fair housing'" when it "fail[ed] to develop a system to assess and prevent racial segregation in the administration of the LIHTC program . . . ."[204] The court held that the agency lacked

[202] *Id.* at 19.

[203] Seema Ramesh Shah, Note, *Having Low Income Housing Tax Credit Qualified Allocation Plans Take Into Account the Quality of Schools at Proposed Family Housing Sites: A Partial Answer to the Residential Segregation Dilemma?*, 39 IND. L. REV. 691, 705 (2006). Current litigation against the Texas Department of Housing and Community Affairs raises similar issues. Inclusive Cmtys. Project, Inc. v. Dep't of Hous. and Cmty. Affairs, No. 308-CV-0546-D, 2008 WL 5191935 (N.D. Tex. Dec. 11, 2008) (alleging that TDHCA wrongfully uses race and ethnicity as a factor in allocating low-income housing tax credits, and thereby perpetuates housing segregation).

[204] Asylum Hill Problem Solving Revitalization Assoc. v. King, No. (X02)CV030179515S, 2004 WL 113560, at *2 (Conn. Super. Ct. Jan. 5, 2004), *aff'd*, 890 A.2d 522 (Conn. 2006). *But cf.* Inclusive Cmtys. Project, Inc., 2008 WL

standing because it was not a private resident that would benefit from the laws' enforcement.[205] The court also stated that there was no indication that the federal or state fair housing laws created a private right of action.[206]

The case law, though sparse, indicates that it will be difficult to change LIHTC allocation practices through litigation; therefore, change is more likely to be achieved through legislation and regulation. As noted above, in order for residential rental housing to be eligible for low-income housing tax credits, the housing must be available for use by the general public.[207] Treasury regulations provide that, "[a] residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD)."[208] Rois-

5191935 (concluding that plaintiffs had standing in the *Inclusive Communities Project* litigation).

[205] *Asylum Hill,* 2004 WL 113560 at *6 n.6.,

[206] *E.g.*, *id.* at *6, 9.

[207] 26 C.F.R. § 1.42-9(a) (2009).

[208] *Id*. Although the regulation recognizes the significance of fair housing law to the LIHTC program, the regulation has two drawbacks. First, it does not specifically refer to and fails to embrace the tenets of the Fair Housing Act. Second, the regulation refers to only the Act's nondiscrimination prong and not to the Act's integration prong. Indeed, some of Treasury's recent informal interpretations of the general public use requirement have been counterproductive. At several points in the last two years, IRS officials have informally stated their belief

man suggests that the Treasury regulations governing the LIHTC program should be amended in three respects: first, the Treasury regulations should specifically acknowledge the authority of Title VIII and its mandate to affirmatively further racially integrated housing;[209] second, the Treasury regulations should specify what state credit agencies must do to satisfy civil rights obligations;[210] and

that the requirement means that LIHTC housing may not target anyone, and that it must be available equally to anyone who walks into a renting office. Such an interpretation would mean, for example, that LIHTC housing in high income areas cannot be targeted at persons with Section 8 vouchers moving from low-income areas, thereby preventing the use of the LIHTC program directly to encourage neighborhood integration. Recent legislation may ameliorate some of the affect of this approach by providing that a LIHTC project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences favoring tenants who are "members of a specified group under a Federal program or State program or policy that supports housing for such a specified group . . . ." (Housing and Economic Recovery Act 2008, Pub. L. No. 110-289, § 3004 (g)(9)(B)) (2008). Although the Fair Housing Act presumably is a Federal program supporting housing for particular groups, the Treasury Department should implement the new legislation through specific regulations.

[209] Roisman, *Mandates Unsatisfied*, *supra* note 101, at 1032, states that Treasury should amend its LIHTC regulations to specify that all LIHTC housing is subject to Title VIII, and that all housing credit agencies and developers must comply with the statute and regulations promulgated thereunder. She also notes that the regulations should contain affirmative obligations to further Title VIII purposes. She notes that such obligations are particularly important because Title VIII obligations come from a different legislative source that the LIHTC program, and "it is likely that many people who are experts about § 42 of the Internal Revenue Code are not familiar with the provisions of Title VIII." *Id.* My personal observations bear this out.

[210] Roisman suggests that the regulations should require that housing credit agencies certify their compliance with Title VIII, and that they affirmatively further its purposes; that nondiscrimination and desegregation be affirmative priority goals for housing credit agencies; that housing credit agencies be required to establish procedures for enforcing the prohibition against discrimination on the basis of Section 8 vouchers; that housing credit agencies assess and oversee implementation of developers' affirmative marketing plans; that housing credit agencies col-

third, the Treasury regulations should specify what developers must do to satisfy civil rights obligations.[211] Also, Myron Orfield suggests that housing credit-agencies should be required to develop "concerted revitalization plans" to place LIHTC projects in places with strong schools, economic opportunities, and ample resources.[212] In this regard, it is critically important that state allocating agencies collect, and state and federal agencies analyze, data on the race, income, and family status of applicants to, and occupants of, LIHTC housing. Without this data, which has been missing for the twenty years of the LIHTC program's existence, it is impossible for legislative and regulatory bodies to determine whether the fair housing aspects of the

lect, assess and report relevant information; and that housing credit agencies be required to train developers concerning their civil rights obligations. *Id.* at 1033–1041. In addition, Roisman suggests that Treasury regulations should require housing credit agencies to disqualify developers who violate fair housing laws and that housing credit agencies should be required to mandate that each project "affirmatively further" fair housing. *Id.* at 1040–42.

[211] Roisman suggests that Treasury regulations should mandate annual developer compliance certifications; that developers applying for Low-income housing tax credits should describe the racial and ethnic characteristics of the area in which the project will be located; and that developers should be required to report on the racial, ethnic, Section 8, and other characteristics of the project's actual tenants so that the state housing credit agencies can determine whether a violation exists. *Id.* at 1047–48.

[212] Orfeld, *supra* note 190, at 1796–1802. *See also* Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353, 372 (2006) (suggesting that state agency compliance with allocation plans be monitored and that "measures" be enacted to promote low-income housing in mixed-income and mixed-race neighborhoods).

LIHTC program are being realized, and what the best practices are for realizing integrative goals. Because the Treasury Department has not promulgated regulations since the inception of the LIHTC program, Congress should mandate that the Treasury Department promulgate regulations as soon as possible.

2. Revise Qualified Allocation Plan (QAP) Requirements

Basing allocations on the income level of tenants already located in a particular area has had the perverse result of propagating poverty and segregation in LIHTC neighborhoods. Congress could reverse this trend, however, by amending the QAP requirements to encourage neighborhood desegregation through LIHTC project location. In particular, Congress should amend QAP criteria to require that an intended project's proximity to better-performing, high quality schools be a high priority in allocating low-income housing tax credits to family projects. Additionally, allocating agencies should be required to take into account the availability of entry-level jobs and access to public transportation when making LIHTC allocations. As between projects in high-opportunity neighborhoods, allocation priority should be given to those that construct larger, multi-bedroom units. Finally, allocation set-asides, which might not entirely count

against the annual state credit ceiling, should be made for projects that either obtain project-based Section 8 assistance or maintain units for tenants with Section 8 vouchers.

Numerous state QAPs already contain provisions that might encourage racial desegregation through LIHTC projects. Such provisions include siting requirements that call for placing family housing outside segregated neighborhoods and create incentives to house very-low-income and large families; approval plans that eliminate "public support" requirements for suburban LIHTC developments; allocation criteria that encourage access to LIHTC projects by new families (i.e. families from outside the jurisdiction where the project is located) that hold section 8 vouchers or are on public housing working lists; site requirements that promote affirmative marketing and outreach requirements (including transportation assistance and employment services); and mandates that require racial and demographic reporting.[213] However, it appears that there is little comprehensive fair-housing planning in state QAPs. Thus, federal and state

[213] SARAH BOOKBINDER ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM (2008), *available at* http://prrac.org/pdf/BuildingOpportunity.pdf (discussing various state plans).

policymakers should consistently evaluate which aspects of state QAPs appear to foster integrated housing, and should implement those aspects on a national level. There must be coherent racial and demographic data, however, in order to determine which experiments in the state allocation laboratories bear fruit.

3. Eliminate the Public-Official Comment Requirement

As noted above, low-income housing tax credits are not available unless the state housing credit-agency notifies the chief executive officer (e.g., the mayor) of the local jurisdiction in which the proposed LIHTC project will be located. The state housing credit agency must also provide the CEO with the opportunity to comment.[214] There are generally two types of comments—positive and negative. Local officials are political people elected by local residents, and therefore, when residents engage in "NIMBYism," local officials will likely follow suit. Housing credit-agencies may respond to negative comments, such as "there is no need for affordable housing here," by refusing to allocate to projects in jurisdictions that engage in NIMBYism. Furthermore, some state QAPs require local governments to approve particular types of LIHTC projects. These

[214] 26 U.S.C. § 42(m)(1)(A)(ii) (2006).

provisions effectively allow local governments to opt-out of LIHTC housing, and lead to a concentration of such housing in areas with higher poverty levels and QAPs that contain concentrated-minority provisions. Unless a developer reasonably believes that its project will garner positive local support, it is unlikely that the developer will expend resources to engage in predevelopment activities or seek an LIHTC allocation. Thus, because requiring approval by local officials can undermine the integrative potential of LIHTC project sites, the LIHTC statute should be amended to eliminate the local official notification and comment requirement, and states should not be allowed consider local NIMBY-ism during the allocation process.

4. Modify the Market-Study Requirement

As noted above, state housing credit-agencies are required to receive and consider a "comprehensive market study of the housing needs of low-income individuals *in the area to be served by the project* . . . ."[215] If the term "area" is defined narrowly, there will be no housing needs in high-income areas, and market studies will eliminate LIHTC developments in those areas. Although the market study requirement is useful to prevent unnecessary LIHTC projects, Con-

[215] 26 U.S.C § 42(m)(1)(A)(iii) (2006) (emphasis added).

gress or the Treasury Department should clarify that "area" should be read broadly (for example to mean a metropolitan area), so that LIHTC projects can be developed in high-income communities.

5. Limit the Use of Qualified-Census-Tract Designation

As noted above, the location of an LIHTC project in a qualified census tract ("QCT") provides two substantial benefits. First, the 130% basis step-up rule provides greater tax credits to QCT projects, which, in turn, generates greater investment by, and return to, investors in a partnership that owns a QCT project. Developers therefore have a financial incentive to locate projects in QCTs because greater investment and lower debt allows for quicker payment of developer fees. Second, state QAPs are required to give preference to projects that are located in QCTs where the development of the project "contributes to a concerted community revitalization plan."[216] Thus, the credit allocation process has a significant bias toward projects located in QCTs, and developers who must expend substantial resources in attempting to obtain an allocation—and whose livelihoods may depend on allocation receipt—are wise, fiscally, to seek projects located in QCTs over other projects.

[216] 26 U.S.C. § 42(m)(1)(B)(ii)(III).

Although some have argued that the QCT provision segregates low-income families,[217] the existence of the QCTs encourages investment in impacted neighborhoods and it should be retained.[218] However, Congress should moderate the potential of QCTs to divert investment away from non-QCT projects by amending the LIHTC statute to limit allocations for projects in QCTs. For example, the statute could be amended to provide that, in any year, of the total allocations, the percentage allotted to projects located in QCTs may be no more than the greater of (i) 25%; or (ii) the percentage of the state's population living in QCTs receiving allocations.[219] Such an amendment would permit necessary investment in high poverty areas, while preventing excessive investment in QCTs and forcing development in non-QCT neighborhoods. In addition, because each project in a QCT receives thirty percent more in allotments than the same project in a non-QCT, the development of projects in QCTs effectively reduces the number of units that can be developed in non-

[217] *See* Roisman, *Mandates Unsatisfied*, *supra* note 101, at 1020–22; Powell, *Reflections*, *supra* note 39, at 619.

[218] *See supra* note 116 and accompanying text.

[219] Research should be done to collect the correct percentages.

QCT areas.[220] Congress should amend the statute so that the additional LIHTC allotments, awarded to QCT projects as a result of the 130% basis step-up, do not count against the state allocation ceiling.

6. Limit the Use of Rehabilitation Credits

Although rehabilitation expenses are treated as "new" buildings for LIHTC purposes, rehabilitating the existing housing stock in central-city neighborhoods, for example, does little to change the demographic composition of the neighborhood, or enhance the resources available to its residents. New construction, on the other hand, can alter the demographic makeup of an area and lead to greater racial integration. But new construction generally takes place on undeveloped land, which central-city neighborhoods generally lack. Therefore, a limitation of 25% of the annual credit ceiling on LIHTC allotments dedicated to rehabilitation would encourage developers to shift resources into constructing new housing units in neighborhoods where land can be obtained, and would push affordable housing out from the central city.

[220] Credit allocation is a zero-sum game, and allocation to one project reduces available allocations to other projects. Therefore, an allocation increase to 130% of what would otherwise be allocated necessarily reduces allocations to other projects.

B. CHANGING THE ECONOMIC STRUCTURE OF THE LIHTC PROGRAM TO INCENTIVIZE HOUSING INTEGRATION

Another set of programmatic changes would enhance the relative economic value for developing and investing in LIHTC projects that serve the public interest of neighborhood integration. These changes could take numerous forms, including: creating "reverse" QCTs; accelerating the credit for project developed in high-income areas; clarifying that the General Public Use requirement; allowing credits for land acquisition in certain areas; raising the cap on developer fees; allowing units in high income areas to revert to market-rate housing after the fifteen-year compliance period; and by providing a right of first refusal to developers in reverse QCTs. Each of these possibilities is considered in turn.

1. Create "Reverse QCTs"

Congress should consider amending the LIHTC program to provide a basis step-up for buildings located in high-income census tracts. For example, there could be a 130% basis step-up for buildings located in census tracts where 50% or more of the residents have an income that is greater than 200% of the area median gross income

and in which poverty rates are below 10%.[221] As with the existing QCT basis step-up, this "reverse QCT" basis step-up would encourage housing developers to locate projects in "reverse QCTs." In addition, the LIHTC program should be amended to give priority in the credit allocation process to projects located in "reverse QCTs." Finally, Congress should consider eliminating the effect of the "reverse QCT" basis step-up on housing credit agencies' annual allocation authority[222] so that other valuable projects are not eliminated by another project's "reverse QCT" designation.

2. Accelerate the Credit for Projects Developed in High-Income Areas

As noted above, low-income housing tax credits are awarded over a ten-year credit period.[223] To the extent that the credit period is shortened, the rate of return and the amount of investment each in-

[221] Again, the numbers are illustrative only and research needs to be done to determine the correct number. In addition, consideration should be given to linking economic incentives with leasing priority for families that live in QCTs, perhaps requiring that LIHTC property owners work with nonprofit organizations that can provide moving assistance, job training, counseling, and other services.

[222] This can be accomplished by limiting the amount charged against the per capita allocation authority to the amount that would be charged without the basis step-up.

[223] I.R.C. § 42(a) (2010).

crease.[224] Therefore, Congress should consider encouraging LIHTC investment in high-income areas by shortening the credit period for low-income buildings located in those areas.

3. Clarify that the General Public Use Requirement Means Only that Owners Cannot Discriminate Against Protected Classes

As mentioned previously, the IRS has indicated its view that the "general public use" requirement means that LIHTC project owners cannot discriminate in favor of any prospective tenants.[225] Effectively, this "walk off the street" rule means that owners cannot discriminate in favor of tenants based on racial-minority status, disability, prior residence in a QCT, or other characteristics, but must treat all low-income persons identically. This view misunderstands the statute—which expressly provides that projects may employ "occupancy restrictions or preferences that favor tenants . . ." within these groups and others[226]—and obstructs the integrative potential of the LIHTC. Therefore, Congress or the Treasury Department should clarify that the general public use requirement allows projects to dis-

[224] This is a simple time-value-of-money concept. -Assuming $1,000,000 in aggregate low-income housing tax credits, $142,857 of tax credits per year for seven years is worth more on a present value basis than $100,000 tax credits per year for ten years.

[225] *See supra* Part II-A(3).

[226] I.R.C. § 42(g)(9).

criminate *in favor of* low-income persons on the basis of age, minority status, disability, and the like; it does not require that owners offer a level playing field to all comers.

4. Allow Credits for Land Acquisition in Certain Areas

As noted above, low-income housing tax credits are available for building acquisition, construction, and rehabilitation costs. Tax credits are not available for land acquisition and development costs, however. Undeveloped land in resource-rich, high-income areas could be particularly fertile ground for achieving integration because acquiring and developing the land for LIHTC program purposes could introduce new populations to the area. One method for encouraging LIHTC development in high-income areas, particularly where land costs are high, is to make tax credits available for land costs.

5. Raise the Cap on Developer Fees

State allocating agencies are prohibited from making LIHTC allocations in excess of the amount the "agency determines is necessary for the [project's] financial feasibility . . . ."[227] In making the feasibility analysis, an agency must consider the reasonableness of

[227] I.R.C. § 42(m)(2)(A).

the project's developmental costs.[228] State agencies have used this requirement to impose limitations on development fees that can be charged by project developers; the limit is generally 10% or 15% of development costs. Because developers will likely be required to take increased risks and undertake more development work in order to create an LIHTC project in a high-income area, the statute should be amended to allow increased developer fees for developments in those areas.

6. Allow Units in High-Income Areas to Become Market-Rate Housing After the Fifteen-Year Compliance Period

In order for a project to receive credits, the LIHTC statute requires that project owners and state credit agencies enter into an extended low-income housing commitment.[229] The commitment generally mandates that an LIHTC project continue to meet § 42 requirements for at least fifteen years after the fifteen-year tax credit compliance period expires.[230] This creates a thirty-year period in which the project owner's financial return on the LIHTC project falls short of what the owner could have received if the project were

[228] *Id.* § 42(m)(2)(B)(iv).
[229] I.R.C. § 42(h)(6).
[230] *Id.* § 42(h)(6)(D); *see also* discussion of extended low-income housing commitments, *supra* Part II-A(2).

leased on the open market. Congress should consider incentivizing development of affordable housing in high-income areas by eliminating the extended use requirement for projects located in "reverse QCTs."

7. Provide a Right of First Refusal to Developers in "Reverse QCTs"

The LIHTC statute presently allows tenants, governmental entities, and qualified nonprofit organizations to enter into a right-of-first-refusal agreement with a project owner to purchase an LIHTC development at the end of the fifteen-year compliance period for a minimum purchase price equal to the outstanding debt secured by the building, plus "all federal, state, and local taxes attributable to . . . [the] sale."[231] A right-of-first-refusal provision is typical in LIHTC transactions that involve 501(c)(3) nonprofit corporations as participants in the development and operation of LIHTC projects. The right of first refusal is a primary motivation for nonprofits participating in the development and operation of LIHTC projects, because it allows the nonprofit corporation to obtain ownership of the project after fifteen years at little or no out-of-pocket cost. To incentivize

[231] 26 U.S.C. § 42(i)(7).

developments in high-income areas, Congress should extend the right-of-first-refusal provision to for-profit developers of LIHTC housing located in "reverse QCTs."

V. CONCLUSION

In his famous 1962 essay, *Down at the Cross: A Letter From a Region in My Mind*, James Baldwin reflected on society's racial separation into two separate but unequal communities.[232] He concluded:

> When I was very young, and was dealing with my buddies in those wine- and urine-stained hallways, something in me wondered, *what will happen to all that beauty?* . . . Then when I sat at Elijah Muhammed's table and watched the baby, the women, and the men, and we talked about God's—or Allah's—vengeance, I wondered, when that vengeance was achieved, *What will happen to all that beauty then?* I could also see that the intransigence and ignorance of the white world might make that vengeance inevitable—a vengeance that does not really depend on, and cannot really be executed by, any person or organization, and that cannot be prevented by any police force or army: historical vengeance, a cosmic vengeance, based on the law that we recognize when we say "Whatever goes up must come down." And here we are, at the center of the arc, trapped in the gaudiest, most valuable, and most improbable water wheel that the world has ever seen. Everything now, we must assume, is in our hands; we have no right to assume otherwise. If we . . . do not falter in our duty now, we may be able, handful that we are, to end the racial

[232] *See generally* James Baldwin, Down at the Cross: Letter From a Region in My Mind, in THE FIRE NEXT TIME (Vintage Books 1993) (1963).

> nightmare, and achieve our country, and change the history of the world. If we do not now dare everything, the fulfillment of that prophecy, re-created from Bible in song by a slave, is upon us: *God gave Noah the rainbow sign, No more water, the fire next time!*[233]

Almost fifty-years later, America continues to be divided into separate but unequal communities. The mode of separation is frequently through residential segregation that affects school choice, job opportunities, and life prospects. This separation is structurally entrenched, and unwinding it requires critical discussion of individual choices on where to live and societal choices on how to structure meaningful communities. Although it is possible to connect the geographic desegregation issue to the broader question of whether residents in low-income, racially isolated communities prefer improvement of existing neighborhoods or movement into integrated neighborhoods, in my view this creates a false dichotomy. Existing neighborhood structures are the product of unjust public policies that created racial segregation,[234] and arguments for choice ring hollow when the choices themselves are the products of a dysfunctional system. Owen Fiss argues that the only remedy for the betrayal of

[233] *Id.* at 104 (emphasis added).
[234] *See e.g.*, *supra* note 38 and accompanying text.

egalitarian ideals, represented by segregated neighborhoods, is to recognize that these neighborhoods are themselves part of a structure of subordination, and to provide those who live in them with the opportunity to leave.[235] Fiss recognizes the human costs of changes of this magnitude, but states that such costs are inescapable if we are not to "condemn a sector of the black community to suffer in perpetuity from the devastating effects of our racial history."[236] I think that Fiss is correct.

In order to unwind the present system, it is critical to understand both the workings of the low-income housing tax credit program—because it is currently the most important federal program for creating affordable housing—and the effect of the program on neighborhoods. Once armed with this understanding, policymakers can then sculpt the LIHTC program into a tool to dismantle the underlying structure of geographic segregation. Although this Article offers several ideas for modifications, there are certainly many more workable changes that will develop when minds are put to the task. There

[235] Owen Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua Cohen, et al. eds., 2003).

[236] *Id.* at 3.

are practical and political challenges in making these changes, but the starting point is to recognize, as Baldwin puts it, that everything is in our hands, that the costs of failure are large, and that we must dare everything to achieve our country.[237]

[237] Baldwin, *supra* note 232, at 140.