PRRAC
Poverty & Race Research Action Council

Racial Justice in Housing Finance:
A Series on New Directions

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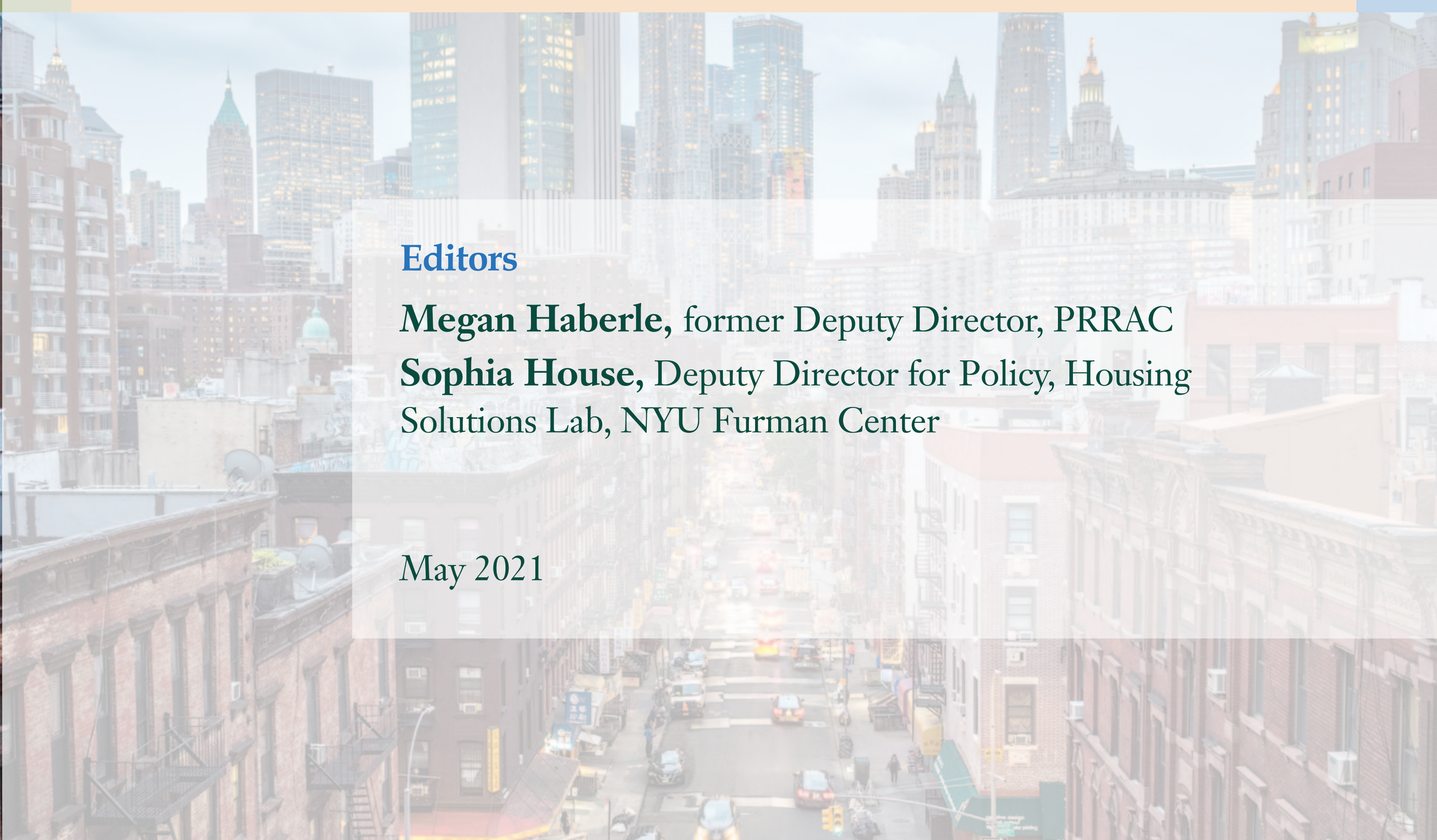

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PART I.
Introduction

Introduction

By **Megan Haberle**, former Deputy Director, Poverty & Race Research Action Council and **Sophia House**, Deputy Director for Policy, Housing Solutions Lab, NYU Furman Center

Housing in American communities is, for too many people, unaffordable, unstable, and segregated. This series examines these crises in the context of the housing finance system—the ways in which both government and the private sector fund, lend, and insure in the housing sphere. The assumptions of neoliberalism have long guided and constrained the parameters of housing policy, and housing finance in particular. The related crises of affordability, eviction, and segregation and systemic racism in housing require new approaches.

Our finance system as a whole (the market undergirded by the government and its regulatory frameworks) is largely designed in the interest of profit-making and support for enterprise, with other social considerations an afterthought. While some parts of the housing finance system are geared toward answering the need for broader housing security, community investments, or equitable access to wealth-building, these have generally been treated as secondary concerns in the system's operation. Little attention has been paid in this sphere to the problem of racial segregation. But new paradigms are emerging in both the scholarly[1] and political realms.[2] A new presidential administration and Democratic control of Congress present the opportunity to ask what we should strengthen, reform, or leave behind from our current housing finance system.

In this series, we invite experts from research, advocacy, and government to consider how housing finance can begin to move beyond the constraints of racial capitalism and domination[3] to further the creation of more just and equitable housing systems. The enclosed essays speak from a range of diverse viewpoints to explore how housing finance can be harnessed towards the ends of residential integration, equitable investment, and housing security, rather than purely for profit. Our authors offer ideas across a spectrum of proposed reforms. They describe how aspects of our current housing finance system derive from, or fail to correct for, our deep history of structural racism; they propose concrete steps toward re-engineering our current regulatory structure and housing programs to better advance equity, including addressing the particular harms of racial segregation; and they argue for expanded social housing and other visionary reforms.

1 The Law & Political Economy (LPE) Project and affiliated scholars, for example, have dedicated substantial work to the subject (see generally Aber, 2020), most recently a conference dedicated to "Democracy Beyond Neoliberalism." Likewise, two recent reports by the Roosevelt Institute (Konczal et al, 2020; Wong, 2020) offer critiques of and roadmaps for moving beyond neoliberalism.

2 See, for example, the American Housing and Economic Mobility Act Of 2021 introduced by Senator Elizabeth Warren, and the Homes for All Act introduced by Representative Ilhan Omar in 2019.

2 As Monica Bell (2020) observes: "Segregation entails uneven geographic distribution of ethnic groups across a coherent geographic area (separation), and the movement of marginalized ethnic groups into identifiable and stigmatized enclaves (concentration), in order to establish and reproduce hegemonic racial hierarchy (subordination), to control and economically exploit disadvantaged groups, and hoard social and political opportunity for advantaged groups (domination)."

Contributions to this volume document how the federal government has channeled resources (for many decades explicitly) toward racialized wealth building and has engineered and supported segregation. The government can create, or replace, private markets (for mortgages, for example); through the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac and otherwise, it also supplies public capital directly to private interests. The government also plays a substantial role in shaping housing markets' behavior by serving as an insurer and risk mitigator, and by setting industry norms. Most infamously, the federal government codified racist lending and appraising practices in underwriting standards for HOLC loans in the Home Owner's Loan Act and in the FHA's loan standards for insured home mortgages.

As scholars elsewhere have also described, for years, segregation was the law of the land (Rothstein, 2017), and the flow of capital followed its terms. Well into the twentieth century, the government refused to insure loans to Black customers, or even loans to homes in neighborhoods with Black homeowners, while subsidizing and facilitating home lending for white households (Baradaran, 2017). As Keeanga-Yamahtta Taylor (2019) documents, beginning in the 1970s, housing finance policy shifted (and private sector eagerly embraced) to predatory inclusion (Taylor, 2019). When the FHA reversed its stance on insuring home loans, it did not open access to Black customers on the same terms; instead, it made home financing a more predatory bundle of goods, turning risky home loans into assets that financial institutions were eager to peddle to Black customer (Taylor, 2019; Baradaran, 2017; Satter, 2010). The advent of securitized mortgages increased the payoff for predatory extraction from segregated communities of color (Rugh and Massey, 2010). The racialized harms of subprime lending reached a crisis point in the Great Recession, which decimated wealth in Black communities.

The consequences of residential segregation are "widespread and pernicious" (Besbris, Faber, and Korver-Glenn, this volume). Although the dynamics of segregation have changed, people of color continue to be more likely to live in neighborhoods with higher poverty and with unequal access to schools, services, and jobs (Ellen and Steil, 2019). Efforts to combat segregation have not been as forceful as the private and public forces that created and reinforce it. The result has been stark racial disparities in homeownership, wealth, resource distribution, and financial and housing stability in the context of widespread segregation and racialized valuation of property.

The first set of essays in this series thus offers an early glimpse into how we got here, what is at stake, and how we might move forward. Carolina Reid compellingly points out the need to repair past harms and shows how moral failures of past housing policies have disproportionately locked Black homeowners (and renters) out of wealth-building and other economic opportunities. Taking reparations as a starting point, Reid argues that "it is not enough to end discrimination, rather, the role of the federal government should be to repair past harms and affirmatively support investments in Black homeownership and communities," and offers guiding principles for this approach. Henry-Louis Taylor, Jr. connects these critiques to racialized and racist land valuation systems and calls both for the revitalization of majority-Black neighborhoods and for "a radical residential mobility strategy aimed at dismantling the land value system and disrupting the market forces that drive it." Henry Korman provides a telling overview of the federal government's historical and contemporary role in housing finance, including the ways regulatory structures perpetuate our still-living legacy of government-backed segregation.

The next set of essays examines several of the building blocks of our current housing finance system, offering specific ideas for meaningful reform. Dan Immergluck makes the case for a robust Federal Housing Administration (FHA) that provides affordable, low down-payment mortgages to families with lower wealth or credit scores, and for a robust and equitable secondary market that will improve upon the current GSEs. Josh Silver describes the importance of the Community Reinvestment Act and details how federal agencies might harness the CRA to promote integration. Documenting the pervasiveness of discriminatory real estate practices today, Max Besbris, Jacob Faber, and Elizabeth Korver-Glenn show the failures of the real estate industry to self-regulate as well as the deficiencies of the current enforcement system's reliance on victims of discrimination to sustain burdens of proof. They propose expanding data collection and increasing transparency using mechanisms similar to the Home Mortgage Disclosure Act (HMDA)) to fortify fair housing enforcement. From the Consumer Financial Protection Bureau (CFPB), Patrice Ficklin and Charles Nier explore the potential use of Special Purpose Credit Programs as raciql equity tools.

A third set of essays considers the implications of radically reconsidering the relationship between housing and the market. Essays by Phil Tegeler and Krystle Okafor explore different dimensions of the role of social housing in a new housing future. Tegeler considers the benefits of increasing investments in social housing, including long-term affordability, stability for renters, protection from speculation for communities, and "more democratic control over housing resources." Considering HUD's rental housing programs, Tegeler also asks whether, as an immediate move, we can expand public and community ownership of affordable housing within existing housing programs. Okafor suggests that Community Land Trusts are "an opportunity to ameliorate the harms of today's housing regime, operationalize movement principles, and reinvigorate HUD." Oksana Mironova argues for decommodification, noting that "moving toward decommodification would require an interlocking system of complementary policies." And Tara Raghuveer concludes the set with a challenge from the People's Action campaign for a national Homes Guarantee: "We live in the richest country in the history of the world, and so we can and we must guarantee that everyone has a home."

A final trio of essays takes a focused look at one piece of the housing finance landscape, the Low-Income Housing Tax Credit. In this set, we return to a focus on specific reforms to a program that is deeply enmeshed with the private sector, but still offers room for improvement in its equity performance through better regulation and more targeted state and local initiatives. A significant source of affordable housing production, LIHTC nonetheless raises deep concerns among advocates about its role in perpetuating segregation. Peter Kye writes about the need for federal reforms to the program's legislative and regulatory structure to prevent it from further exacerbating segregation and poverty concentration. Darryn Mumphery addresses how state-level initiatives, including by state housing finance agencies, can complement those much-needed federal reforms. Matthew Murphy and Adam George explore further how federal and state actors can administer the LIHTC program to address segregation, focusing on the specific problem of development costs and the need for projects to "pencil out."

In many ways, these essays expose the enormity of the project of housing finance reform. Housing finance is underpinned by assessments of risk and value that have not escaped their racist origins, and many essays in this series grapple, in different ways, with the question of whether and how we can take those threads out of the fabric. But our authors also offer steps forward that policymakers can take action on immediately to reform the GSEs, the CRA, the real estate industry, and more. Equally importantly, these essays offer a vision of what housing finance might look like beyond the constraints of neoliberalism, and challenge us to consider the possibilities that the current political moment might unlock. Already, we can see these ideas beginning to take clearer shape on the national stage, thanks to the hard work of many—and we hope to see new legislative proposals, federal administrative initiatives, and state and local commitments that will bring us closer to a new, more just reality.

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PART II.
Structural Racism in Housing Finance: Understanding the System to Change the System

Moving Towards a Reparations Agenda in Housing: The Federal Government and the Black/White Homeownership Gap

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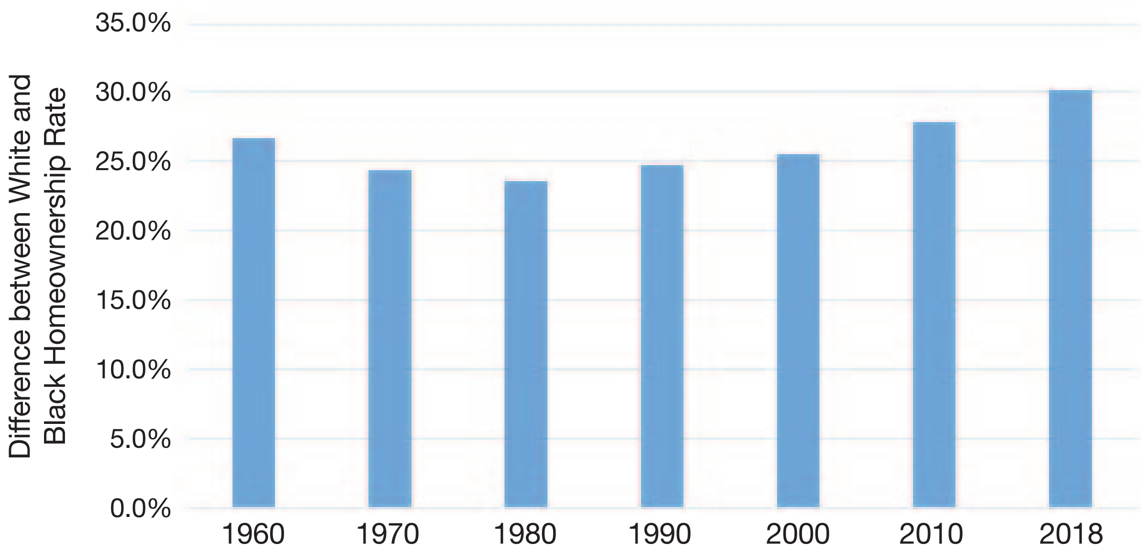
This piece was adapted from a longer report, *Crisis, Response, and Recovery: The Federal Government and the Black/White Homeownership Gap*, published by the Terner Center for Housing Innovation in March of 2021.

Introduction

Today, the median non-Hispanic white household holds almost $190,000 in wealth—7.8 times that of the median Black household ($24,100) (Bhutta et al., 2020). While the drivers of the racial wealth gap are complex, disparities in access to homeownership, as well as in the financial benefits that homeownership confers, play a key role in shaping this inequality (Shapiro et al., 2013; Shapiro, 2017). In 2018, only 42 percent of Black households owned a home, compared to 73 percent of non-Hispanic white households, a gap larger than in 1968, before discrimination was legally outlawed.

THE BLACK/WHITE HOMEOWNERSHIP GAP, 1960 - 2018



Source: Laurie Goodman, Jun Zhu, and Rolf Pendall (2017). "Are Gains in Black Homeownership History?" The Urban Institute, accessed online at https://www.urban.org/urban-wire/are-gains-black-homeownership-history.

The federal government has played an outsized role in promoting policies that have historically discriminated against Black individuals in housing and mortgage markets (Coates, 2014; Rothstein, 2017; Taylor, 2019). Anti-Black racism formed the basis for policies such as redlining, racial covenants, and segregation in public housing, and laid the foundation for the expansion of homeownership, wealth and privilege for non-Hispanic whites at the expense of Black families and neighborhoods. The legacy of these practices endures, and continues to shape and structure contemporary racial stratification in profound ways (Desmond, 2017; Faber, 2020; Massey, 2008; Oliver & Shapiro, 2006).

While housing scholars have long been aware of these dynamics, I would argue that the last decade has also thrown into sharp relief the failures of federal public policy to repair these harms. Certainly, overt forms of *de jure* discrimination have been tempered by critical laws such as the Fair Housing Act of 1968 and the Equal Credit Opportunity Act of 1974. But the fact that Black-white homeownership gap is no smaller than it was prior to these reforms speaks to the need to re-imagine federal homeownership policy. In addition, the foreclosure crisis and the recovery that followed point to the limitations of a government system that not only failed to regulate "bad actors," but also perpetuated racialized narratives of who was "deserving" of aid and the unwavering belief that private actors—such as mortgage servicers and investors—were the best placed to provide aid to hard-hit borrowers and communities. As I detail in *Crisis, Response, and Recovery: The Federal Government and the Black/White Homeownership Gap*, these failures of government led to a deeply uneven recovery for Black homeowners and communities, widening not only the racial wealth and homeownership gap, but also fueling gentrification and displacement pressures in some Black communities.

In this brief, I lay out two principles that could guide a renewed federal commitment to redressing the Black-white homeownership gap and investing in Black households and communities in the same way the FHA invested in white households and communities seventy years ago. As such, it takes the idea of "reparations" as its starting point; it is not enough to end discrimination, rather, the role of the federal government should be to repair past harms and affirmatively support investments in Black homeownership and communities. Specifically, I am arguing that the federal government prioritize policies that reduce racial inequality in housing and credit markets even if they incur higher costs (Steil, 2018). "Race-neutral" policies, or those that calculate cost-benefits without attention to racial differences in who benefits and how, are insufficient.

But I'm also not speaking to the full set of conditions necessary to achieve reparations for Black individuals and communities.[1] Indeed, one important caveat is that the policies outlined below are meant to address just a small piece of a larger racial equity agenda. Racial inequality—including access to homeownership and its financial returns—is produced by a much broader system of structural racism that shapes not only housing but also tax policy, labor market vulnerability, social service provision, criminal justice, and education.[2] In addition, the federal government has long underinvested

1 There are ongoing, rich discussions of what a reparations agenda would truly look like. But at a minimum, reparations as a concept rooted in international law includes five key components: Cessation/Assurance of Non-Repetition, Restitution and Repatriation, Compensation, Satisfaction, and Rehabilitation. The Movement for Black Lives makes it clear that reparations cannot be achieved simply through "acknowledgment or an apology" or "investment in underprivileged communities." (M4BL: Movement for Black Lives, n.d.).

2 Tax policies in particular compound inherited privilege, pointing to the need for progressive tax reform that favors renters, lower-income households, and people of color.

in rental housing. A racial equity agenda must entail broad-based investments in rental housing affordability, focusing on both demand and supply side subsidies (Terner Center for Housing Innovation, 2021). Yet who has access to homeownership, and in what neighborhoods, remains a central axis by which racial inequality is produced and sustained. So while expanding access to sustainable homeownership for Black families may only be a small step toward greater racial justice, it remains an important one.

Expanding Access to Homeownership

The first guiding principle is to stop "controlling for credit scores" (assuming that they objectively assess risk) and instead acknowledge that the way our housing finance system assesses and prices risk underpins the long-term repercussions of redlining and the cumulative disadvantage Black and other households of color face in the mortgage market (Rugh et al., 2015). Black borrowers have a significantly lower median FICO score compared to non-Hispanic white borrowers, but these disparities are shaped as much by differences in parental wealth as by individual behaviors (Green & Nelson, 2021). In addition, studies have consistently shown that Black borrowers are more likely to be denied a mortgage, receive a loan with a higher interest rate, and face greater constraints to refinancing to a lower cost product (Bartlett et al., 2019; Bayer et al., 2016; Lambie-Hanson & Reid, 2018; Reid et al., 2017). These differences have material consequences even when Black households are able to access homeownership: Researchers have estimated that the average interest rate for Black homeowners is 33 basis points higher than for non-Hispanic white homeowners, translating into an extra $743 in mortgage interest costs a year (Aronowitz et al., 2021).

Failing to confront these disparities head on means that the system will continue to produce unequal outcomes. The rise of Fintech lending and the use of big data, as well as new credit scoring algorithms, all have the potential to exacerbate these gaps (Bartlett et al., 2019; Fuster et al., 2020). At a minimum, the Biden/Harris Administration should leverage the authority of the Consumer Financial Protection Bureau to ensure that algorithms used to predict credit risk include expanded data on consumer payments (e.g., utility payments), increase the transparency and quality of credit score calculations, and leverage their authority under the Equal Credit Opportunity Act and Fair Housing Act to pursue disparate impact cases.

However, undoing the inherited disadvantage of past discriminatory housing policies will require new programs in which the federal government explicitly helps Black borrowers overcome those disadvantages (Rice, 2020). Down payment programs—while important in overcoming collateral constraints for some first-time homebuyers—aren't sufficient on their own. Ultimately, reducing the racial homeownership gap will require more affirmative credit programs that extend lower-priced and sustainable mortgage access to Black households and communities. The Community Reinvestment Act (CRA) is an example of such an affirmative obligation, and should be modernized to increase its effectiveness at redressing racial inequalities (Chakrabarti et al., 2009). For example, one critical reform would be to prevent banks from receiving CRA credit for lending to high-income borrowers in low- or moderate-income neighborhoods, which can further gentrification and displacement pressures

Photo Credit: Billy Penn

Home for Sale

especially in higher-cost markets (Reid, 2020). This would at least minimize the ongoing harm and wealth extraction that is happening in some Black communities.

But CRA could also be leveraged alongside public funding to affirmatively expand access to homeownership for Black households in responsible ways. For example, the Community Advantage Program, a joint effort of the Ford Foundation, Fannie Mae and Self-Help Credit Union, used a $50 million grant as a credit enhancement, which leveraged $4.74 billion in financing for low-interest rate mortgages to nearly 52,000 low-income homeowners across the country (Quercia et al., 2011). While the serious delinquency rate for these loans during the height of the foreclosure crisis was higher than that for prime loans (10 percent compared to 5 percent for prime fixed-rate loans), it was substantially lower than those for prime adjustable-rate loans, subprime fixed-rate loans, and subprime adjustable-rate loans (Quercia & Riley, 2017). Given the growth and increased capacity of the community development finance industry, a new federal fund to provide similar credit enhancement capacity to expand this program and bring the number of assisted households to scale could be significant in mediating inequalities in access to credit and homeownership. Another potential remedy would be to look to the Veteran Administration's underwriting practices, including their loan-to-value and residual income requirements, to better assess and mitigate risk while extending credit to borrowers who don't qualify for a conventional loan (Goodman et al., 2014).

The federal government has other tools at its disposal as well. For instance, the Equal Credit Opportunity Act includes a provision for Special Purpose Credit Programs (SPCPs) that would allow a targeted lending program on the basis of a protected class such as race or national origin without violating other federal antidiscrimination statutes, such as the Fair Housing Act (Ficklin and Nier, this volume; Hayes, 2020). The government-sponsored enterprises (GSEs) have a long history of developing underwriting guidelines and products, making investments and developing partnerships that have safely expanded credit to underserved communities. They also have this mandate under their "Duty to Serve" obligations, which requires taking affirmative steps to reach out to communities traditionally underserved by the housing finance market (Levitin & Ratcliffe, 2014). Duty to Serve obligations, coupled with public funds to subsidize mortgage programs for lower-income and lower-wealth households, could help to overcome the different "starting line" for households with limited assets or lower credit scores. To reach Black families, FHA or GSE could explore neighborhood based preferences, or work through CDFIs that serve Black and other communities of color. While more work is needed to identify which products may be the most beneficial for Black and other lower-wealth households, both the FHA and the GSEs are uniquely positioned to analyze data and evaluate pilot programs to identify potential responsible, scalable models.

Policymakers also need to place greater emphasis on post-purchase interventions and supports. There is increasing evidence that income volatility and risk among lower-income households is growing substantially, suggesting that even prudent financial decisions will not protect these families from the vagaries of the current market-based economy (Hacker, 2006). Lower-income homeowners have smaller financial cushions with which to withstand the impact of negative life events, such as unemployment or serious illness, or to meet unanticipated repair costs; by virtue of their limited housing choices, they are also more likely to buy houses in need of repair. Research has shown that access to savings to cover 2-3 months of mortgage payments leads to lower default rates than equity support through down payment assistance (Farrell et al., 2019). Structuring an insurance or savings program—or even a matched "post purchase" Individual Development Account that would set money aside for home improvements or shortfalls in mortgage payments funded in part by a share of the monthly loan payments—could help improve the sustainability of homeownership, especially for Black homeowners who may face greater precarity in the labor market (Reid, 2014).

Addressing Racial Segregation

Expanding and sustaining homeownership for Black households is critical, but as both Ta-Nahesi Coates (2014) and Keeanga-Yamahtta Taylor (2019) argue, expanding access to credit and homeownership for Black households within the context of a deeply segregated housing market merely sets up recurring opportunities for capital to extract wealth from Black communities. This was true in the 1970s when FHA first opened up lending to Black households (Taylor, 2019), as well as in the 2000s when the persistence of a racially segregated "dual mortgage market" led to a concentration of subprime lenders targeting Black neighborhoods with predatory lending products and practices (Reid et al., 2017). Black homeowners were twice as likely to be in foreclosure as a result, and were also more likely to see investors purchase foreclosed homes in their neighborhoods, shifting who benefited from

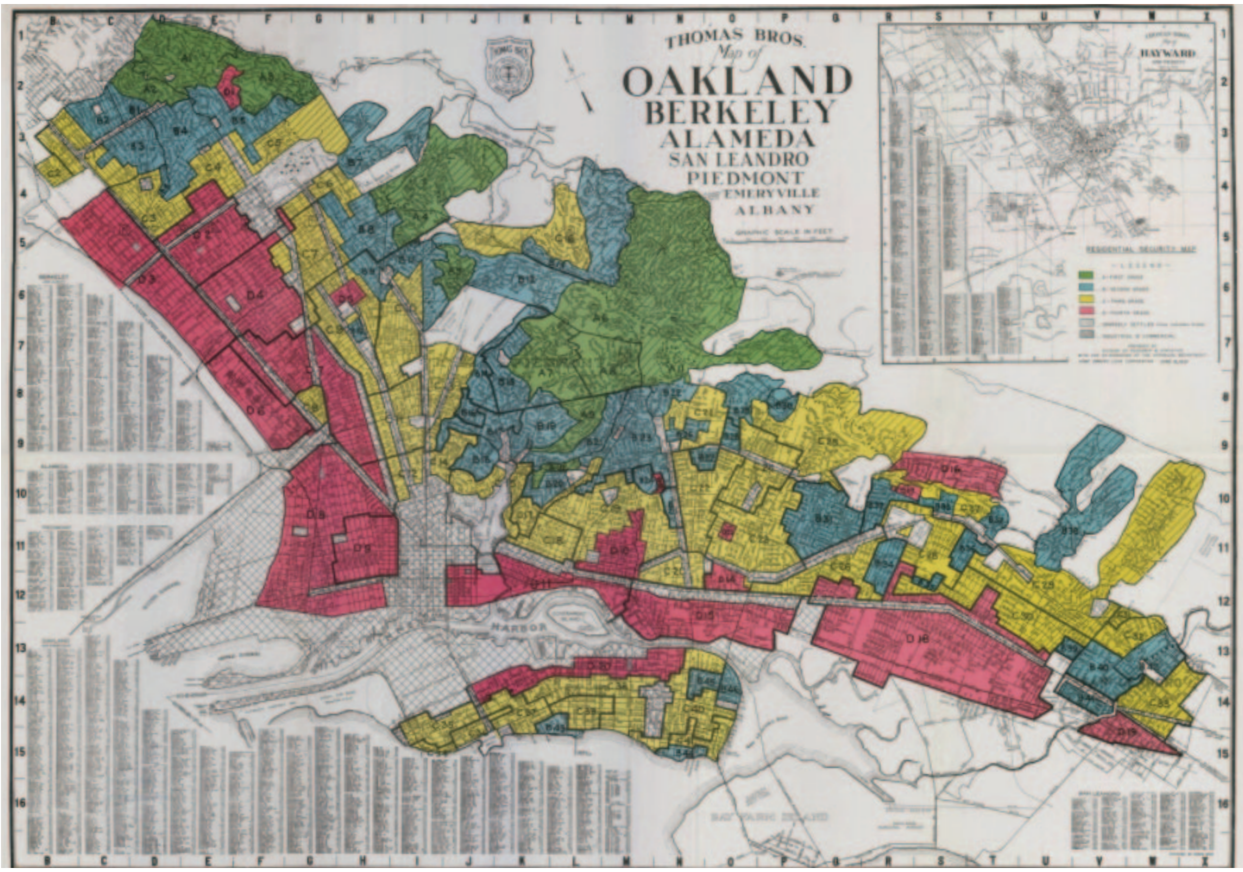


Photo Credit: Courtesy of Carolina Katz Reid

Oakland Redlining Map

the recovery. As such, addressing racial segregation is a key second principle on which to build federal investments in Black homeownership. The Administration has already taken important steps in that direction, recommitting to implementing and strengthening the Affirmatively Furthering Fair Housing (AFFH) rule and the disparate impact standard.[3] More broadly, the Administration should strengthen enforcement of existing anti-discrimination statutes and institute strong leadership committed to fair housing at HUD and at the CFPB.

However important it remains to strengthen and enforce anti-discrimination laws and combat exclusionary zoning, fair housing means more than providing Black families with the opportunity to live in more places; it also means investing in Black communities for the residents who are currently there (Pattillo, 2008). For too long, housing policy has reinforced the legacy of redlining by focusing on the deficiencies of Black neighborhoods, rather than on the structures that produced them (Goetz, 2018; Goetz et al., 2020; Slater, 2013). Lower resources, appraisals, and outcomes in majority Black

3 See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/. As of April 2021, the Administration has submitted two rules that would effectively reinstate AFFH and disparate impact standards from the Obama administration. See https://www.bloomberg.com/news/articles/2021-04-13/biden-to-restore-two-obama-era-fair-housing-rules.

neighborhoods are a product of systemic racism and devaluation, not individual deficiencies, so focusing on integration through mobility and greater access to majority white neighborhoods alone fails to address the larger barriers to racial equality. While "place-based" policies are more complicated and harder to evaluate than "people-based" interventions (O'Connor, 1999), the federal government should substantially expand its investments in community development. This is particularly important given the ways in which gentrification, displacement, and the suburbanization of poverty are creating new patterns of racial exclusion (Desmond & Shollenberger, 2015; Ellen & Torrats-Espinosa, 2019; Elliott-Cooper et al., 2020; Kneebone & Berube, 2013). Without intentional efforts to both open up exclusionary neighborhoods (urban and suburban) as well as invest in community development and the preservation of affordable housing in lower-income neighborhoods, housing policies may just lead to a reshuffling of who lives where, without tackling the systemic racism that produces spatial inequality.

There is a lot to build on and invest in. The last twenty years have seen the emergence of strong, mission-driven and community-based organizations that are developing innovative strategies for building and preserving affordable housing. Especially with the likely long-term repercussions of COVID-19 in lower-income and communities of color, the federal government could play a vital role in ensuring that mission-driven entities have access to funding and technical assistance to ensure that the recovery doesn't merely benefit those with access to liquid capital. Although there is still a lot of uncertainty about whether we will see an increase in foreclosures in coming years, it is critical that we situate mission-driven entities—as opposed to large-scale investors—in a position to compete for foreclosed homes and apartments. For example, a governmental backstop (for example through FHA or the GSEs) or guarantee could be made available to mission-driven entities in exchange for long-term restrictions on rents (Galante, 2020). Others have proposed the creation of a "Social Housing Development Authority," which could acquire distressed properties and then convey them to nonprofit housing organizations, tenant groups, or other mission-driven groups (Baiocchi & Carlson, 2020). These efforts could be coupled with a rethinking of how to implement community preference policies as a way to counter disparate patterns of displacement (Goetz et al., 2020).

In addition, the federal government should create new funds designed to expand community land trusts and cooperative ownership models. To date, these have been limited in scale due to lack of funding and technical capacity, but they have the potential to build wealth and sustain affordability over the long-term. Just as in the 1960s, when federal grant support spurred neighborhood initiative, HUD or Treasury should develop a flexible grant program to help build that local capacity. The bold vision—and strong fiscal response to the COVID-19 pandemic—put forward by the Biden-Harris administration shows that we can deploy federal funds when there is the political will. In cities across the country, community-led initiatives have been organizing to develop and sustain cooperative models of land ownership and housing, yet often these are under-funded in comparison to established models such as LIHTC production. In addition, the consolidation of the community development field—coupled with its increased reliance on complex financial instruments—has led to significant innovation, but it has also precluded community based organizations from accessing capital, as funders and private capital favor larger, established organizations. We should continue to invest in LIHTC and CDFIs, but there are both structural inequalities in the system and limits to debt funded projects that mean that these models don't always work to address racial equity (Gambrell et al., 2020). Investing in Black leadership and organizations—and allowing them to chart their own vision for housing, land and ownership—will go a long way towards spurring policies that would help shift both resources and power to Black communities (Steil, 2018).

Conclusion

The Biden-Harris Administration has made racial equity one of its top priorities, recognizing that systemic racism continues to shape contemporary access to opportunity. This attention to racial inequality is long overdue, and is relevant to multiple policy domains, including social and labor market policies, criminal justice, and education. Yet housing remains a central axis by which racial inequality is produced and sustained, and until the federal government develops a set of policies that affirmatively invests in Black households and communities, the broader goal of racial equality is unlikely to be achieved. The current political and economic moment—in which we are confronting a global pandemic, the threat of climate change, and the urgency of the Black Lives Matter movement—must be leveraged to transform the structures that continue to cement and exacerbate racial inequalities in housing and other sectors. While undoing the legacy of racial discrimination will not be easy, Ta-Nehisi Coates (2014) may have said it best when he wrote, "as surely as the creation of the wealth gap required the cooperation of every aspect of the society, bridging it will require the same."

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Land Values and the Enduring Significance of Racial Residential Segregation

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The life chances of many African Americans are tied to their experiences in underdeveloped central city neighborhoods. The implication of living in these Black spaces is reflected in a provocative question posed by the historian Carol Anderson in her book, *Eyes on the Prize*, which I paraphrase: How could the Civil Rights Movement leave in its wake a nation where schools are more segregated than ever, where Black workers are stuck in low-income jobs, where racial residential integration is a dream deferred, where most Black children live in poverty, where significant health disparities exist between the races, and where Blacks comprise 32% of American prisoners but only 13% of the population? (Anderson, 2003).

I theorize that African Americans have made minimal socioeconomic advancements since the Civil Rights Era because of racial residential segregation, and that ending racial residential segregation will require dismantling the land value system that undergirds it. Residential segregation is more than the separation of Blacks and whites in geographical space. It is a *market-driven system* of denying African Americans equal and equitable access to education, jobs, incomes, wealth, and other critical services and experiences that bolster their life's opportunities and outcomes (Sampson, 2012; Hall, 2005). For this reason, researchers that study neighborhood effects have convincingly argued that neighborhood-based social determinants produce undesirable health and socioeconomic outcomes among Blacks (Sewell, 2016; Reskin, 2012; Pager & Shepherd, 2008). Consequently, African Americans cannot make significant socioeconomic progress without simultaneously dismantling this racist system of residential segregation and turning their neighborhoods into great places to live, work, play, and raise a family.

The Systemic Structural Racism Framework

Persistent racial residential segregation is an American paradox. The nation has celebrated the ideal of inclusivity, residential integration, and social mobility since dismantling Jim Crow racism in the 1960s. Yet, despite the passage of the Civil Rights Act of 1964, the Fair Housing Act of 1968, the Housing and Urban Development Act of 1968, and the outlawing of redlining, restrictive covenants, and discrimination in the rental and sale of housing, residential segregation endures, continuing to define whiteness and frame storylines about Blackness (Massey, 2020). Why does residential segregation persist despite efforts to end it?

Discussion of residential segregation typically defaults into narratives about government housing policies, individual preferences, and discriminatory practices (Imbroscio, 2020; Rothstein, 2017). I want to take a different approach by situating residential segregation within market dynamics, systemic structural racism, and social class inequality. The intent is to shift the conversation away from "state blaming" and individual whites' actions, and refocus it on the markets and systems that produced these segregated outcomes (Imbroscio, 2020). Of course, the government played a critical role in establishing and sustaining the policy framework that led to the emergence of a mass homeownership system basic on racism. However, narrative focus on "failed government" often deemphasizes the government's partnership with the private sector and decenters the leading role of real estate brokers, appraisers, mortgage bankers, insurance companies, builders, and others that turned government into their willing puppets. Building on Keeanga-Yamahtta Taylor's *Race for Profit* (2019), this approach centers the private sector while concurrently stressing government complicity.

The systemic structural racism framework is critical to understanding how market dynamics interact with state systems to produce residential segregation. Structural racism here refers to institutions merged into systems that operate to bring about undesirable socioeconomic and health outcomes for Blacks and people of color (Bonilla-Silva, 2021). Although institutions and systems' operations are unique, they nevertheless work interactively to generate policies, programs, and activities that produce unwanted social, economic, cultural, and political outcomes for Blacks (Gibbons, 2016).

Operating within this market-driven structural racism framework, education, labor, housing, and land valorization systems interactively function to push Blacks into low-value, marginalized, and underdeveloped neighborhoods. For example, the failure of *resource-depleted schools* that often service the Black community reduces Black success in the labor market. At the same time, whites have a competitive edge because of their access to *resource-rich schools* with an abundance of extracurricular activities. Blacks are the perpetual losers in this rigged labor market competition. The resulting low incomes force them to search for housing in the most underdeveloped residential settlements in a metropolis (Lipsitz, 2011; Gibbons, 2016).

Residential segregation trapped many Blacks in these marginalized neighborhoods. The sociologist Patrick Sharkey (2013) argues that residents of these neighborhoods are *stuck in place*. Based on a longitudinal study of African Americans in Chicago over four decades, beginning in 1968, Sharkey concludes that residential mobility does not exist for most Blacks. Roughly three-quarters of all Black children who grew up in the 1970s and 1980s in underdeveloped Chicago neighborhoods were still poor and living in the same type of localities in 2008. These Blacks did move—but their new neighborhoods were no different from the ones they left behind. As Sharkey puts it, *they were stuck in place*.

A racist land valorization system produces these racially segregated neighborhoods (Imbroscio, 2020; Gibbons, 2016; Reardon and Bischoff, 2011). The real estate appraiser Frederick M. Babcock invented this land value system based on the intertwining of race, place, economics, and culture; he formulated the theory in his influential 1932 textbook, *The Valuation of Real Estate*, before joining the Homeowners Loan Corporation (HOLC) as its chief underwriter in 1936.

Babcock urged realtors to analyze the *future histories* of neighborhoods when appraising them. He based these "future histories" on the prevailing racist views of white America. According to Babcock's theory, the mere presence of Blacks in a neighborhood triggered its decline (Metzger, 2000). Later, the

Home Owners' Loan Corporation (HOLC) tested Babcock's theory by studying neighborhood conditions in 239 U.S. cities. Trainers gave the HOLC fieldworkers extensive instructions on how to carry out their confidential survey of neighborhoods. They gathered information on the kinds of structures located in the community, including data on the type, age, condition, and value of housing units. The fieldworkers paid particular attention to the demographic features of a neighborhood: they wanted to know the race, ethnicity, occupation, and income of the community residents and those people who might potentially move into the area, especially the possibility of Blacks, immigrants, or other "low-grade populations" (Metzger, 2000). Based on these variables, they projected the "future history" of each neighborhood. Fieldworkers then assigned a color-coded grade to each residential area in the city, coding highly desirable neighborhoods green (best) and blue (still desirable). In contrast, they coded declining communities yellow, with the red (hazardous) districts denoting slum areas at the point of no return—hence the term "redlining."

Land value thus is not an autonomous ontological feature of the city-building process but a system that reflects prevailing social values and biases. Babcock played to the racist sentiments of whites in developing a land value method that systematized both racism and the commodification of the owner-occupied house into a wealth-producing vehicle. Therefore, he structured a mortgage risk system in which proximity to Blacks determined housing value (Taylor, 2019). Babcock argued that neighborhoods had life cycles and Black presence in a community signaled the onset of decline. In this system, as the percent of whites and social class exclusivity—*measured in terms of median household income and percent of the population with a college degree*—increases, so do home values and the wealth-producing capacity of that residential area. In contrast, as the percent of Blacks and social class inclusivity increases, the house value and wealth-producing power of that residential district decreases. These residential districts are scattered across a land value continuum, and where a community falls along this continuum will determine its housing values, amenities, hedonic features, and access to quality goods and services (Taylor, 2021; Taylor, 2020).

This land value system structured an urban residential environment characterized by neighborhood inequality and settlements in which Blacks and whites lived in separate and unequal neighborhoods. A public-private partnership created the strategic framework for *de facto* residentially segregated communities during the Depression era. These racially segregated neighborhoods structured relations among the government, the white masses, and Black people. Thus, on the eve of the Second Great Migration of African Americans to urban centers, the government and its private-sector allies had already created a new method of residentially segregating Blacks. In this system, white racism and economic advantage are inextricably bound together. This interconnectivity drives the residential segregation process and continually reinforces a culture infused with racial stereotypes and biases.

Black Neighborhoods and Predatory Development

Our story does not end here. Blacks pay a heavy price for being segregated in residential spaces. Scholars typically conceptualize Black communities as disadvantaged, poor, or sites of disinvestment and concentrated poverty; I conceptualize these Black neighborhoods as underdeveloped places characterized by predatory economic activities; the social theorist Noliwe Rooks terms this exploitation *segrenomics* (Rooks, 2017). A high rent wall traps Blacks in these underdeveloped sites, where outsiders own and control the land, housing, and institutions (Taylor, 2021; Reardon and Bischoff, 2011). These socio-spatial units become the site of oppression, exploitation, and contestation because Blacks have limited housing and shopping options.

In these settings, segrenomics dominate. Predatory landlords generate hyper-profits in Black neighborhoods by delaying or postponing maintenance and charging high rents (Desmond, 2016). Neighborhood merchants overcharge them for goods and services (Caplovitz, 1967). Local governments fail to maintain streets and sidewalks, neglect publicly-owned vacant lots, and refuse to enforce existing housing and building codes vigorously. Concurrently, residents are often the target of excessive fines and ticketing for municipal revenue-generating purposes (Lipsitz, 2011).

Meanwhile, greedy bankers and realtors turn the Black community into a golden goose of profitability through the use of subprime loans, mass foreclosures, and other unscrupulous home finance methods that bilk homebuyers of millions (Taylor, 2019). When Blacks become homeowners, they discover that their house values appreciate at a much lower rate than in white communities. All too often, the Black owner-occupied house is more of a cultural artifact than a vehicle of wealth production (Taylor, 2021A). These underdeveloped and marginalized Black residential districts are stigmatized, their oppressive and exploitative conditions normalized, and the masses controlled through mass police arrests and lethal force. According to the *Washington Post*, the police kill Blacks at more than twice the rate of whites (Washington Post, 2021).

Undergirding the residential segregation paradigm is the seeming impossibility of radically transforming these underdeveloped Black socio-spatial units. Based on the work of Robert E. Park, Ernest K. Burgess, and the Chicago School of Sociology, the default goal of urban planners and policymakers became "integration" (Merriman, 2015; Lal, 1990; Kulkick, 1980). Blacks have always favored "integration," not because of an affinity for whites but because of the high levels of residential development found in white spaces. `Policymakers, however, refused to enforce fair housing laws because residential segregation undergirded a land valuation system that favored the powerful. White homeowners resisted racial residential integration because segregation rewarded them economically and provided them with privileges and a competitive edge in the educational and labor markets (Rothstein, 2017). That is why more than sixty years after the 1954 *Brown v. Board of Education* Supreme Court decision outlawing school segregation, and more than fifty years after the Fair Housing Act outlawed housing discrimination, America is still a highly segregated society. According to the St. Louis Federal Reserve Bank, the White-Non-White dissimilarity index for most American cities remains high, especially in metros with large African American populations.[1]

1 The dissimilarity index ranges from 0 to 100. It measures the percentage of the non-whites in a county that would have to change census tracts to equalize the racial distribution between Blacks and whites across all tracts in the country.

Disrupting Predatory Development and the Land Valorization System

The Biden administration has an opportunity to reverse the racist neoliberal approach that has so far characterized housing and urban policy by restoring the social contract, reestablishing the federal government's commitment to protecting people by constructing an authentic social safety net, dismantling racial residential segregation, and aggressively fighting racism and social injustice. Concurrently, practitioners, activists, and policymakers must base strategies for solving the Black underdeveloped neighborhood problem on five interacting realities. First, neighborhood stigmatization normalizes the oppressive and exploitative conditions found in Black communities, justifies the dismantling of public housing, and rationalizes the neglect of underdeveloped communities by local government. Second, residential segregation traps Blacks in these underdeveloped neighborhoods. Third, Blacks are disproportionately renters and lack ownership and control over the land, houses, and institutions in their communities (Taylor, 2019). Fourth, whites resist integrating their neighborhoods because they benefit—economically and socially—from racial residential segregation. Lastly, neighborhood inequality results from a land valuation system that increases land values in white neighborhoods by reducing land value in Black communities. This land value system drives racial residential segregation. Therefore, dismantling the American land value system and ending predatory economic practices are necessary for building a just society based on racial and class equity.

The underdevelopment of Black neighborhoods results from metropolitan neighborhood inequality and must be attacked at that scale (Taylor, 2019). The federal government can play a significant role in this strategy. The government must reaffirm its commitment to *integrating* the suburbs by constructing low-income housing projects in upscale white suburban communities and withholding federal dollars to municipalities that block such projects. Second, the federal government must reinstate *categorical* funding for local projects designed to transform underdeveloped neighborhoods and integrate the suburbs. The federal government must also direct categorical funding to community land trusts and other cooperative approaches to community development. In this way, the federal government can partner directly with local non-profits, thereby eliminating the brokering role of the local government.

The disruption of predatory development and the valorization system requires two interactive strategies. The first strategy features a people-centered neighborhood *recreation* and *development* plan *systematizing* community ownership and control over the land, housing, and institutions in Blacks communities. This project must pursue collective ownership, build community wealth, and emphasize developing political power. Acquiring control over neighborhoods but leaving the municipal government (city and county) untouched will significantly limit the neighborhood movement. Thus, these neighborhood-based political actions should include radical electoral politics and building alliances with other community groups across the urban metropolis. The purpose of progressive control of local government control is to build authentic municipal partnerships with the people and forge collective approaches to urban development (Taylor, 2021A).

Concurrently, it is necessary to imbue Black space with a culture supporting and reinforcing the collective approach to community development. The goal is to pursue participatory democracy, communal ownership, and shared equity to inform the transformation of Black communities into great places to live. This strategy also includes developing various forms of collective ownership in communities to stabilize neighborhoods by increasing rental housing quality while lowering its cost through decommodification. The community land trust is the most vital tool in this quest for communal ownership. It must be pursued with other forms of collective ownership, including limited equity cooperatives, deed-restricted houses, and condominiums, along with a cultural framework that supports a collective way of life. Finally, I want to stress that the *recreation* and *development* strategy involves remaking the institutions and programs serving the Black community, including schools and policing.

The second strategy uses a *radical residential mobility* scheme to enable Blacks to move to other parts of the metropolis. Existing residential mobility stratagems, built on HUD's tenant-based subsidy programs, focus on moving people into "opportunity neighborhoods" without necessarily restructuring those communities or altering their racist culture (Sampson, 2011). Radical residential mobility, in contrast, is not about "race mingling" or merely living next door to whites, but it is about a process of changing white-dominated neighborhoods so they can accommodate and meet the needs of the Black newcomers, as well as other people of color (Lipsitz, 2011). It is an anti-racist residential inclusive strategy that operates at a broader scale than existing mobility programs. It requires the deep cultural and structural transformation of white neighborhoods to disrupt the land value system and recreate the community to meet the cultural, social, and physical needs and desires of the Black and colored newcomers. This restructuring requires eliminating the culture of white supremacy and mitigating market dynamics.

The abundant neighborhood effects literature indicates that *Blacks will never get free* if they live in stigmatized, marginalized, and undeveloped neighborhoods, plagued by the activities of predatory entrepreneurs and complicit anti-Black government officials. The Black community is now the epicenter of systemic structural racism *and* contestation over neighborhood development. Therefore, to get free, Blacks must transform the communities where they live *and* eliminate racial residential segregation across the metropolis. The progressive urban strategy must center both urban neighborhood development and the integration of suburban communities. Following David Harvey (2012), this strategy *must* also include the quest to remake city and county government by transmuting them into a Rebel City anchored by anti-racism, social entrepreneurship, and mixed economic approaches to development (Taylor, 2021A).

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Biden's Executive Order on Racial Equity: Don't Forget that Federal Regulation of the Financial System Must Affirmatively Further Fair Housing

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The origin story of the modern financial regulatory structures that govern the use of private finance for housing and community development is one of racial segregation, racial discrimination, and racial disenfranchisement that persist to the present day.[1] It is time to leverage these mechanisms for racial justice.

Within days of taking office, the Biden administration issued two presidential policy statements addressing the role of federal leadership in the implementation of "racially discriminatory housing policies that contributed to segregated neighborhoods" and the creation of "[e]ntrenched disparities in our laws and public policies, and in our public and private institutions" that highlight the "unbearable human costs of systemic racism." The first of these, Executive Order 13985, instructed all agencies of the federal government to conduct equity assessments to determine "whether underserved communities and their members face systemic barriers in accessing benefits and opportunities" and to "develop plans to promote equitable delivery of government benefits and equitable opportunities."[2]

This is not the first time a presidential administration has owned up to the consequences of racialized federal housing and community development policies. In 1962, Executive Order 11063 said that "discriminatory policies and practices based upon race, color, creed, or national origin now operate to deny many Americans the benefits of housing financed through Federal assistance and as a consequence prevent such assistance from providing them with an alternative to substandard, unsafe, unsanitary, and, overcrowded housing."[3] Thirty years later, in 1994, another presidential memorandum observed that "racial and ethnic segregation, both in the private housing market and in public and assisted housing, has been well documented. Despite legislation (the Fair Housing Act) and Executive action (Executive Order No. 11063), the divisive impact of housing segregation persists in metropolitan areas all across this country." The same administration issued the first-ever presidential order to implement the mandate that "all executive departments and agencies…administer their programs and activities relating to housing and urban development (including any Federal agency

1 For some of the most recent of the extensive documentation, *see*, Mehrsa Baradaran, The Color Of Money: Black Banks and The Racial Wealth Gap (Belknap Press, 2017) and Richard Rothstein, The Color Of Law: A Forgotten History of How Our Government Segregated America (Liverwright Publishing Corp., 2017)

2 Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (January 25, 2021 and Memorandum of January 26, 2021, *Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, 86 Fed. Reg. 7487 (January 26, 2021).

3 Executive Order 11063, *Equal Opportunity in Housing*, 27 Fed. Reg. 11527 (November 24, 1962).

having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes" of the Fair Housing Act (also known as Title VIII).[4]

HUD defines the duty to further fair housing to require "meaningful actions that…address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."[5] Over the decades, interagency federal engagement in fair housing has largely been directed at prohibiting discrimination in the sale and rental of housing as well as in single-family mortgage lending. HUD has served as the laboring oar of the government's fitful efforts to carry out the duty to further fair housing and dismantle federally-created racial segregation and racial disparities, either as a defendant in civil rights litigation or in devolving (or not) the duty to further fair housing to HUD grantees like state and local governments and public housing agencies.

Largely lost in HUD's back-and-forth policymaking on furthering fair housing is the role that private capital and the federal agencies that regulate the financial system played in establishing and still play in maintaining the "entrenched disparities" that result in "the unbearable human costs of systemic racism." Federal regulation of the financial system is structured not only to promote safety and soundness, but also to steer private capital towards social objectives. Private capital did not need federal leadership to learn how to discriminate; nevertheless, the massive government intervention in the financial system originating in the Great Depression of the 1930s utilized federal regulatory power to systemically leverage private capital to establish segregation and exclude households of color from the social benefits flowing from a regulated financial system.

The tools used by federal financial regulators to create the modern features of racial inequity are still in use today by the Treasury Department, the Federal Reserve, the Federal Home Loan Bank (FHLB) system, the Office of Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA), the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC). As the Biden administration carries out its equity assessments, it might do well to consider how these mechanisms can be used to actively enlist private capital in dismantling racial inequity in the same way capital was government's partner in making racial inequity:

Government Supply of Capital to Private Interests. Regulators intervene directly in housing and community development markets, providing capital to private interests through regulatory structures,

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4 See Memorandum of January 17, 1994, *Federal Leadership of Fair Housing*, 59 Fed. Reg. 8513 (February 22, 1994); Executive Order 12892, *Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing*, 59 Fed. Reg. 2939 (January 20, 1994). For the duty under Title VIII to further fair housing, *see* 42 U.S.C. § 3608(d).

5 24 C.F.R. § 5.152(a).

most often at times of distress, but at other times as well. The FHLB system and Fannie Mae were funded with federal contributions to prop up a failing single-family housing finance system. Both institutions were established for the purpose of creating liquidity in the mortgage markets and flowing public capital to private interests, all in service of a segregated home lending system. Their role in the nationwide system of redlining and racial segregation is well known. The racial disparities and the racial wealth gap created by this public-private partnership persist.[6] It bears reminding that Fannie Mae and Freddie Mac were both saved in 2008 from defaulting on the guarantees made to buyers of their mortgage-backed securities by preferred stock purchase arrangements with the Treasury. As the government-sponsored enterprises (GSEs) emerge from receivership, and as policymakers consider the long outstanding questions about the future role of the GSEs, it is crucial to insist that they also play a role in undoing the generational harms caused by their racialized origins.

Protecting Private Interests through Guarantees. Government guarantees facilitate the flow of capital to affordable housing and community development, such as single-family and multifamily mortgage insurance from the Federal Housing Administration (FHA), the Rural Housing Service, and the Veteran's Administration. Federal mortgage insurance is credited with creating a dual, racially segregated housing market; an "upper tier," which subsidized "the transition to homeownership among its segregated and virtually all-white clientele" and a "bottom rung," consisting of public housing and low-rent FHA-insured housing designed to serve primarily Black households affected by urban renewal activities targeted at demolishing integrated and Black neighborhoods.[7] Continuing racial disparities in homeownership are the modern version of the dual housing market. High-cost, non-standard loan products and FHA-insured home loans today function as the lower tier of a new type of dual home mortgage market, serving a disproportionate share of borrowers of color who remain excluded from the lower cost conventional mortgage system served by Fannie Mae, Freddie Mac, and conventional lenders.

Another common framework involves federal guarantees of payment on bonds issued by local, state, or federal agencies. The Depression-era FHLB subsidiary, the Home Owner's Loan Corporation (HOLC), purchased distressed Depression-era mortgages with the proceeds of interest-bearing bonds repayment of which was guaranteed by the Treasury Department. HOLC is known for drawing the redlining maps relied on by FHA and other lenders. A third type of guarantee permits the pledge of proceeds of a future government grant or contract as collateral for a loan of private funds. Pledges were part of the public housing financing scheme in the U.S. Housing Act of 1937, which authorized the U.S. Housing Authority to make loans to local public housing agencies that were secured in part

6 *See, e.g., Explaining the Black-White Homeownership Gap A Closer Look at Disparities across Local Markets* (Urban Institute, October 2019, available at: https://www.urban.org/sites/default/files/publication/101160/explaining_the_black-white_homeownership_gap_a_closer_look_at_disparities_across_local_markets_0.pdf (last visited April 22, 2021).

7 Hirsch, Arnold J., *"The Last and Most Difficult Barrier:" Segregation and Housing Policy in The Eisenhower Administration, 1953-1960* (Poverty & Race Research Action Council, March 2005), available at https://www.prrac.org/pdf/hirsch.pdf, last visited May 13, 2019.

federal contracts for annual contributions to operating costs. The origin story of public housing is one of racial segregation. Pledges also supplied a mechanism for raising private capital for urban renewal in the Housing Act of 1949, and the racialized activities they spawned. All of these tools remain in use through programs including the Community Development Financial Institutions Fund's Bond Guarantee Program; HUD's rules permitting housing authorities and subsidized private owners to pledge public housing operating funds and project-based Section 8 rental subsidy as loan collateral; and the Section 108 loan guarantee program, under which HUD is authorized to guarantee repayment of obligations issued by participating jurisdictions secured by future payments of annual Community Development Block Grants.

Replacing or Creating Private Markets. The regulatory system sometimes creates new institutions or uses existing agencies to replace a failed market or create a new market. The single-family and multifamily rental mortgage insurance programs administered by the FHA replaced a collapsed state-regulated private mortgage insurance industry. At its origin, Fannie Mae recreated a failed secondary mortgage market by purchasing and selling FHA-insured mortgages. Fannie Mae was initially chartered only after Congress's repeated failure to induce private incorporation of national mortgage associations. Later, with the privatization of Fannie Mae and the chartering of Freddie Mac, the GSEs birthed the mortgage-backed securities market. Private label securities quickly followed, along with the flow of private capital to racially identified subprime home loans. A federal equity assessment must come to terms with and reverse the realities of the racialized markets created through these institutions.

Private Privileges. Federal banking laws create chartering rights and regulatory relief, and the privilege to carry out certain activities in support of specific social goals, including affordable housing and community development goals. National banks may be limited in the underwriting or purchase of securities, but the limitations do not apply to trading in the kinds of government-issued bonds first utilized to create the racialized dual homeownership and rental housing system, including mortgage-backed securities issued by the FHLB, Fannie Mae, and Freddie Mac; bonds issued by public housing agencies secured by annual contributions contracts; loans secured by Section 8 housing assistance payments contracts; FHA-insured loans; and housing finance agency private activity bonds that support a range of social objectives, including the financing of affordable housing. Under federal standards, national banks are permitted to make investments "designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families."[8] Permitted public welfare investments include Low-Income Housing Tax Credit (LIHTC) equity contributions. Regulatory privileges for financial institutions are also tied to satisfactory performance under the Community Reinvestment Act (CRA). The use of these and similar tools with outcomes that perpetuate segregation and racial inequity persists. For example, the failure of Treasury and the OCC to hold banks accountable for racial segregation in the LIHTC program is continuing source of

8 12 U.S.C. § 338a.

controversy.[9] OCC's overhaul of CRA standards during the Trump Administration is now the subject of litigation for the way it abandons the statutory purpose of reversing racial redlining in order to facilitate investment in low and moderate income, racially identified geographies and promote access by low and moderate income people, including borrowers of color, to banking services and credit.

Tax Benefits. There are hundreds of individual and corporate tax benefits throughout the Internal Revenue Code, with a value measured in the trillions of dollars. The use of bonds to fund housing market and bank stabilization efforts where dividends are exempt from taxation dates to the Depression-era bonds and debentures issued by HOLC, the FHA, the U.S. Housing Authority, the FHLB, FDIC, and Fannie Mae, all of whom are responsible for the racially identified dual housing market. Tax-exempt bonds remain a significant feature of present-day housing and urban renewal initiatives, including bonds issued by the GSEs and housing finance agencies.

Credits against taxes are also used to leverage private capital for housing and community development purposes. The LIHTC program has a tax expenditure value of about $9.9 billion for fiscal year 2020, making it the largest source of financing for affordable housing in the nation. Another significant credit against federal taxes for community development is the New Market Tax Credit (NMTC) program. NMTC are allocated to leverage investments in "qualified active low-income community businesses" located in high-poverty census tracts, or in activities that serve "target populations" of low-income people. The Internal Revenue Code also permits deductions from income for interest paid on loans and allows for accelerated depreciation of residential real estate, both of which improve the financial bottom line of property owners and offer an additional incentive to investments in housing.

Leading the Private Market. Regulated financial institutions often lead existing, private markets by setting industry norms. The best example is in the Depression-era creation of the priority, long-term, self-amortizing home mortgage, first in the Federal Home Loan Bank Act, then in setting standards for HOLC loans in the Home Owner's Loan Act, and finally in loan standards established by FHA for insured home mortgages. Fannie Mae and the creation of Freddie Mac have a similar, present-day impact on conventional mortgage lending. The GSEs are credited with establishing national norms for "conforming mortgages," and for developing national single-family and multifamily underwriting standards. It bears repeating that redlining, lending discrimination, the dual housing market, and the dual mortgage market are among the racial norms set by regulators.

By leading the market, regulators also facilitate liquidity via the secondary mortgage market. The interaction between lending norms and securities transactions is evident in the concept of a "qualified mortgage" and related risk retention standards for mortgage-backed securities. The effect of the qualified mortgage requirements is to set national standards for non-predatory conventional mortgage

9 *See Inclusive Communities Project v. Dept. of Treasury*, 946 F.3d 649 (5 Cir. 2019) and the related petitions for rulemaking filed with OCC and Treasury, available at https://www.inclusivecommunities.net/video-2021-petitions/ (last visited April 23, 2021).

loans and for high-quality, economically advantageous mortgage-backed securities. The GSEs provide another example of leading the market. GSE charters direct the enterprises to carry out secondary mortgage market purchases of mortgages on housing for low- and moderate-income families. The mandate is effectuated through housing goals established for the GSEs by their regulator, the FHFA, including goals for the purchase of single-family mortgages targeted at low-income and very low-income families, and households that reside in low-income areas, and a "multifamily special affordable housing" goal for the purchase of loans for rental housing for low-income and very low-income families. Among other requirements, housing goal activity must address the needs of "underserved markets," in part by assisting "primary lenders to make housing credit available in areas with concentrations of low-income and minority families."

Consumer Protection. Consumer and investor protection is a crucial component of the regulatory system. The most prominent consumer laws originate with the recommendations of the 1968 Kerner Commission Report, which decried the extensive financial exploitation of people of color. Enforcement of laws including the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act are consolidated in the Consumer Financial Protection Bureau (CFPB). Banking regulators like the Federal Reserve, the OCC, and the FDIC remain responsible for supervision of bank compliance with consumer protection laws. The Department of Housing and Urban Development (HUD) remains responsible for enforcing the Fair Housing Act. Some financial institutions, like insurance companies (which invest heavily in housing), remain outside the federal consumer protection framework.

Transparency. Public access to information about regulated activities also promotes social goals. The Home Mortgage Disclosure Act (HMDA) requires lenders to report detailed information to CFPB about home mortgage loan applications to permit the public and government officials to determine whether lenders are serving the "housing needs of the communities and neighborhoods in which they are located." HMDA data continues to illuminate ongoing racial disparities in loan denials, disproportionate reliance by borrowers of color on non-bank, FHA-insured financing, or non-conventional subprime loans.[10] The CRA requires that regulators make available to the public non-confidential sections of the written community reinvestment evaluations required by the law.

Based on reports submitted by financial institutions, regulators also prepare disclosure statements showing the number and amount of loans for low-, moderate-, middle- and upper-income geographies within an assessment area. Disclosure reports, along with the public portions of CRA evaluations, are posted on the internet. The OCC also makes bank public welfare investment reports publicly available. SEC risk retention requirements include disclosure standards that protect investors, but also have the potential to produce HMDA-like data showing the geographic characteristics of residential mortgages making up asset-backed securities, creating at least the possibility of illuminating the kinds of racial disparities associated with predatory mortgage-backed securities and fortifying enforcement of the Fair

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10 *Residential Mortgage Lending in 2016: Evidence from the Home Mortgage Disclosure Act Data*, Federal Reserve Bulletin (November 2017).

Housing Act's prohibition on discrimination in the secondary mortgage market. SEC rules require only disclosure of mortgage location by two-digit ZIP code, which are regional and do not make it possible to map assets based on concentrations of poverty or people of color.

Conclusion

Compare President Biden's broadly worded Executive Order 13985 to two more prescriptive executive orders that marked the beginning and the end of the Trump administration. Trump's Executive Order 13772 became the basis for a series of Treasury Department policy actions that eroded fair housing protections within the federal financial regulatory structure. These included weakening the enforcement activities of the Consumer Finance Protection Bureau (CFPB), watering down reporting requirements for private label mortgage backed securities (including the kind of securities that led to the predatory lending and financial crises of 2008); stalling the implementation of improvements to the Home Mortgage Disclosure Act reporting requirements; OCC's relaxation of CRA standards; regulatory relief from fair housing liability for discriminatory lending for lenders relying on "big-data" and underwriting algorithms; and relief for property insurers from Fair Housing liability. Additionally, in April 2019, the Trump White House issued a presidential memorandum for the overhaul of Fannie Mae and Freddie Mac, and a redoubled focus of HUD single-family insured lending on a second-tier market targeted at low- and middle-income borrowers.[11]

The presidential memorandum that accompanied Biden's Executive Order 13985 instructed HUD to reverse those actions under its control comprising the Trump administration's attack on the agency's fair housing rules. The directive is laudable. However, the Trump presidential memorandum still has life in it. On May 4, for example, the Federal Housing Finance Agency issued final rules required by the Trump memorandum providing for Fannie Mae and Freddie Mac resolution planning in the event of a future receivership. The final rules disregard the GSE's statutory affordable housing goals and the duty to serve underserved markets. And while the Federal Reserve and the FDIC rejected the OCC's approach to revising CRA regulations, until all three regulators are aligned on a common approach to CRA compliance, the banking industry will operate under an inconsistent regulatory regime.

A Biden administration "whole of government equity agenda" will be incomplete if it fails to focus on the long partnership between private capital and the regulators on achieving social goals. That collaboration proved highly effective at cementing in place residential segregation, the extraction of wealth from racially identified places and households of color, and the maintenance of dual, segregated credit, finance, and housing systems. The "whole of government and capital" effort that established those conditions has yet to be replicated in a comparable effort to dismantle them. Legislation recently reintroduced by Elizabeth Warren in the Senate is an example of a proposal to bend the mechanisms of financial regulation a bit toward racial justice. Among other things, the bill would create a homebuyer

11 *See* Executive Order 13772, *Core Principles for Regulating the United States Financial System*, 82 Fed. Reg. 9965 (February 8, 2017) and Presidential Memorandum of March 27, 2019, *Federal Housing Finance Reform*, 84 Fed. Reg. 12479 (April1, 2019).

down payment assistance program targeted at communities subjected to racial redlining and borrowers of color deprived of equal access to credit. It would also substantially expand the scope of the CRA, codify CRA standards that open racially identified and low-income geographies to investment, and award CRA credit for activities that promote racial integration.[12] The proposal is a good starting place for similar initiatives by regulatory agencies utilizing all available tools that carry out social aims in the deployment of private capital.

The Title VIII mandate to further fair housing is a government-wide statutory obligation. That includes the federal financial regulators, and it means turning the mechanisms of the financial regulatory system and private capital away from sustaining the racial disparities they created and towards redress of racial inequity.

12 S. 1368, 117th Cong. (2021), American Housing and Economic Mobility Act Of 2021.

PART III.
Improving Our Toolkit: Recommendations for Better Governance

Shifting the Burden of Proof to the Discriminators: A Proposal for Real Estate Industry Data Collection

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More than half a century after Civil Rights Era legislation made housing discrimination illegal, substantial racial inequalities in housing opportunity persist (Pattillo, 2013; Taylor, 2019). While 75% of non-Latino white Americans own homes, Black and Latino homeownership rates are 44% and 49%, respectively (United States Census Bureau, 2021). When Blacks and Latinos do own homes, those homes tend to be worth far less than white-owned homes and the mortgages they take to purchase their homes tend to be more expensive, contributing to a growing racial wealth gap (Faber, 2018; Faber & Ellen, 2016; Howell & Korver-Glenn, 2020; Sewell, 2016; Shapiro, 2017). Housing affordability stressors also fall disproportionately on people of color, who are more likely to experience residential instability (e.g., eviction and foreclosure), crowding, and rent stress (Desmond, 2016; Desmond & Gershenson, 2017; Faber & Rich, 2018; Hall et al., 2018; Rosen, 2020; Solari & Mare, 2012).

Both a cause and consequence of housing inequality, residential segregation persists as well (Krysan & Crowder, 2017). The typical white American lives in a neighborhood that is 78% white, while the neighborhoods in which Black and Latino Americans live are approximately 50% same-race.[1] Segregation is most extreme in metropolitan areas with large non-white populations, suggesting that these national averages may understate the experience of segregation for the typical person of color (Jargowsky, 2018; Logan & Stults, 2011).

The consequences of housing inequality and racial segregation are widespread and pernicious. Residents of whiter neighborhoods live in higher-quality housing stock, are exposed to less pollution and environmental toxins, and tend to live longer, healthier lives (Nuru-Jeter & LaViest, 2011; Woo et al., 2019). Children growing up in whiter neighborhoods tend to attain more education, are exposed to less violence, and are more likely to be upwardly economically mobile (Chetty & Hendren, 2018; Peterson & Krivo, 2010; Quillian, 2014; Sharkey, 2013). Through processes of exclusion and exploitation, segregated non-white neighborhoods tend to have fewer community organizations, lower

1 Author's calculations based on 2014-2018 American Community Survey data. Census tracts were used as neighborhoods.

quality schools, less employment opportunity, and less effective political representation, and their residents are generally stigmatized relative to residents of white neighborhoods (Besbris et al., 2015; Quillian & Pager, 2001; Sampson, 2012; Sharkey & Faber, 2014; Small & McDermott, 2006).

Housing inequality is self-replicating (Krysan & Crowder, 2017; Logan, 2016). For example, the dramatic racial inequalities in subprime lending during the early twentieth century were facilitated by residential segregation (Been et al., 2008; Hwang et al., 2015; Hyra et al., 2013; Rugh et al., 2015). Racial isolation then concentrated subsequent foreclosures during the Great Recession in communities of color (Chan et al., 2013; Dwyer & Lassus, 2015; Rugh, 2015; Rugh & Massey, 2010). And in addition to disproportionately destroying home equity and homeownership among Black and Latino Americans (Faber & Ellen, 2016; Rugh, 2015), the foreclosure crisis likely increased segregation (Hall et al., 2015), thereby making communities of color more vulnerable to housing market exclusion and future economic crises (Faber, 2018).

Discrimination is one key mechanism that maintains segregation and spatial inequality more generally. Such discrimination limits non-white residents' access to housing, neighborhoods (especially white neighborhoods), and resources. Despite discrimination's illegality, our own research as well as numerous studies conducted by fair housing advocates, journalists, and other scholars have revealed various ways in which the real estate industry—implicitly and explicitly—perpetuates and even profits from the unequal treatment of homeseekers by race/ethnicity. For example, while outright denial of service to Black and Latino homeseekers has declined, real estate agents[2] continue to share less information about available units with people of color and "steer" homeseekers of color away from predominantly or increasingly white neighborhoods (Galster & Godfrey, 2005; Oh & Yinger, 2015; Quillian et al., 2020). Real estate agents also shape the housing market to the detriment of people of color through practices such as avoiding work in Black and Latino neighborhoods, cultivating same-raced professional networks, and price discrimination and manipulation (Besbris, 2020; Besbris & Faber, 2017; Ihlanfeldt & Mayok, 2009; Korver-Glenn, 2021).

Despite repeated, significant evidence of discriminatory practices, real estate agents—who participate in nearly 90% of residential property transactions in the U.S.—have largely been asked to regulate themselves. Predictably, this has proven inadequate. Investigations of real estate licensing reveal training to be woefully deficient. Beyond being told they are not to mention race or neighborhood demographics to clients, agents are required to know very little about fair housing and even less about segregation (Besbris, 2020; Korver-Glenn, 2021). Brokerages rarely provide additional training once agents are contracted and recent evidence shows that even when agents have been documented engaging in discriminatory practices, they often face no consequences from their brokerages (Choi et al., 2019; New York State Senate, 2021). More importantly, there has been no redress for those harmed in those situations.

2 We use the term "real estate agents" to refer to licensed real estate agents and real estate brokers as well as (un)licensed salespeople who work in real estate brokerages.

Arguably the largest obstacle preventing major reform of the real estate industry in response to continued discrimination is the longstanding legal requirement that the burden of proof lies on victims. That is, individual clients must prove that a real estate agent would have shown them different homes or shared different information if clients were of a different race—a near impossible task for individual consumers. Indeed, how would a client ever know that their race or ethnicity played a role in how they were treated, let alone prove it? While valuable, current models for uncovering and proving discrimination (e.g., paired audit testing) are impossible to do on a large scale because they expensive and time consuming. Government agencies and housing advocacy organizations could never, for example, audit every real estate firm. Given how difficult it is for individual consumers to identify discrimination in the housing market and, simultaneously, the overwhelming empirical evidence of pervasive discrimination, we propose shifting the burden of proof to the real estate industry itself. Put simply, real estate agents and firms must be required to prove that they do not discriminate.

We believe this policy goal can be accomplished somewhat easily through new reporting requirements for the industry. Specifically, agents should provide information on every prospective or current client they interact with, including client race, ethnicity, gender, age, household composition, nativity, and current address. It is key that these rules also require agents to report the outcomes of their interactions with buyers and sellers. For buyers—as well as renters—agents should report information on the properties discussed and shown, including listing price, address, and square footage, as well as the amount of any offer made by a buyer, and, if the property was purchased, the final price. These agents should also report information on the mortgage loan, banker, or lender recommendations they made to buyers. For sellers, agents should report on all offers received. Agents should be required to treat all prospective leads equally (e.g., phone, internet, and in-person contacts) and provide documentation of whether and how they followed up with each prospect. In addition to client sociodemographic characteristics, brokerages should report the characteristics (e.g., race, gender) of their own agents. This reporting infrastructure is critical to understanding the scale, scope, and impact of racial discrimination and could also serve as a place where agents can confidentially report bias of their colleagues.

Regarding feasibility, policy models for antidiscrimination reporting requirements already exist. For example, the Home Mortgage Disclosure Act (HMDA), originally passed in 1975 to shed light on the mortgage industry, requires lenders to provide information on every mortgage applicant including race/ethnicity, gender, income, characteristics of the requested loan, and the application's outcome. With millions of records each year, HMDA has become the primary data source for those studying racial inequality and disparate treatment in the American mortgage market. Since January 2018, companies in Iceland have been required to prove to the government that they pay men and women equally or face daily fines (Domonoske, 2018). Initial evidence has shown that this first-in-the-world policy has been effective in combating gender inequality (Wagner, 2021). As of this writing, the New York State Legislature is considering a bill similar to what we have proposed based on our own testimony in a hearing on housing discrimination (New York State Senate, 2021). Moreover, most municipalities already require brokerages to file deed transfers and final sales prices, meaning real estate agents and brokers are already reporting some data. At the federal level, the Department of

Housing and Urban Development, which already investigates housing discrimination, could collect data on real estate agents and their clients and enforce anti-discrimination laws.

This type of intervention not only has the potential to better identify where discrimination by real estate agents is more or less prevalent but will also enable the state to remunerate victims in a systematic way. For example, these data could be used to measure the cost of a specific firm's discriminatory practices by comparing treatment of Black and white clients. This cost could then be collected as a fine and put towards fair housing enforcement or repaid directly to the clients who were mistreated. This is of particular importance given the long history of exclusion and exploitation of communities of color by the real estate industry (Jackson, 1985; Hisch, 1983; Kendi, 2017; Sugrue, 1996; Taylor, 2019), which a growing body of evidence has connected to contemporary racial inequality (Aaronson et al., 2018, 2021; Faber, 2020).

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Racial Justice and the Mortgage Market: Recommendations to the Biden Administration Regarding the Future of the GSEs

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Homeownership is the dominant housing tenure for white America, in which almost three out of four households own their own home.[1] But this is not the case for Black America, in which more than one-half of households are renters. The difference between white and Black homeownership rates has generally persisted, growing significantly in the wake of the subprime crisis. By 2018, the white-Black homeownership gap reached over 30 percentage points, its highest level in 50 years (McCargo and Choi, 2020). Black homeownership fell more than 5 percentage points following the subprime crisis. The racial difference in homeownership rates is a key contributor to the racial wealth gap, in which median white household wealth is almost eight times median Black wealth (Bhutta et al., 2020).

Although homeownership is not necessarily the best tenure choice for any one household at any one time, homeowners in the U.S. generally benefit from favored treatment in their local housing markets. While affluent homeowners benefit from the federal mortgage interest deduction, for lower-to-middle-income households the largest advantages to homeownership tend to be the greater housing stability and security it provides; the ability to fix most future housing costs (via long-term, fixed-rate mortgages) and avoid unpredictable rent increases; and the capacity to leverage a modest amount of forced savings into an asset that can provide some critical wealth-building over time. In many parts of the U.S., being a renter means being subject to a landlord-friendly rental market with few tenant protections and no rent stabilization laws.

In many metropolitan areas, rental housing is disproportionately concentrated in a relatively small number of neighborhoods. As of 2018, neighborhoods with high levels of rental housing (over 80 percent rental) had a median household income of less than half those with high owner-occupancy levels (over 80 percent ownership), with mixed-tenure neighborhoods falling in the middle (Joint Center for Housing Studies, 2020). Given this segregation by tenure within many metropolitan areas, the ability to choose between buying a home and renting may also provide families with a greater variety of neighborhood options, including those where rental housing is relatively scarce (Immergluck, 2015; Levitin, 2020).

Of course, homeownership entails financial risks that must be considered seriously. On the other hand, in most cases, especially after the regulatory changes adopted in the Dodd-Frank Act, mortgage

1 The homeownership rate for non-Hispanic white households was 73.7% in the first quarter of 2020. It was 44.0% for Black households. https://www.census.gov/housing/hvs/files/currenthvspress.pdf. Note, the Census Bureau's estimates of homeownership rates after the first quarter of 2020 are generally considered not reliable due to COVID-19 issues.

borrowers are far better protected from being rapidly displaced via foreclosure than tenants are from eviction, and low down-payment programs can reduce the amount of savings that homeowners need to put at risk.

For homeownership to be accessible in a racially just way, discrimination (including both disparate treatment and disparate impact) in access, pricing, and terms must be minimized. One way to ensure this is through rigorous enforcement of fair lending laws and the Community Reinvestment Act. But there are two additional necessary components to providing a fair and just system of housing finance: 1) a robust Federal Housing Administration (FHA) that provides affordable, low down-payment mortgages to families with less wealth and lower credit scores; and 2) a large, robust, and equitable secondary market that will improve upon the current government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac and that maintains a strong and central federal role in housing finance. This paper focuses primarily on the latter, especially in the context of single-family mortgage finance. While not a subject of this paper, any future federally-backed secondary market must also play a critical role in providing financing for affordable rental housing.[2]

Black Wealth, White Wealth

Differences in homeownership rates are a major contributor to the Black-white racial wealth gap. There is a paradox here because, although homeownership comprises a greater share of the Black wealth than it does white wealth, white families have historically benefited from larger home values and often greater wealth accumulation via homeownership than Black families (McCoy and Choi, 2020; Perry et al. 2018). Historically, appreciation rates of Black-owned homes have often lagged those of white-owned homes, especially when spanning the 2007-2011 subprime crisis, which hit Black neighborhoods especially hard (Immergluck et al., 2019). On top of this, subprime lending, risk-based pricing, and other features of racialized mortgage markets left many Black homeowners with high-cost, often predatory loans, which frequently turned what otherwise could have been beneficial home purchases into disasters (Immergluck, 2011a).

Despite the median white homeowner's having approximately double the home equity that the median Black homeowner had in 2019 ($130,000 vs. $66,800), home equity comprises nearly 60 percent of the net worth of Black homeowners, while comprising only 43 percent of the net worth of white homeowners (McCargo and Choi, 2020). Thus, access to affordable homeownership can be critical to the wealth prospects of Black households.

The bottom line in terms of the impact of homeownership on the racial wealth gap is perhaps best summarized by some findings of a 2016 study from the Institute for Assets and Social Policy and Demos. Sullivan et al. (2016) estimated that, if racial and ethnic disparities in homeownership rates were eliminated, the Black-white wealth gap would shrink 31 percent. They also estimated that, if the

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2 For more discussion of the GSE's roles in the financing of multifamily rental housing, see J. Griffith and A. Jakabovics (2017).

financial returns to homeownership were equalized for Black and white homeowners, this would decrease the racial wealth gap by another 16 percent.

Notwithstanding the critical impact that differences homeownership can have on the racial wealth gap, it is important to note that the evidence suggests that most homeowners are not motivated by expected financial returns when choosing to buy a home.[3] Many, if not most, are seeking a sense of control over their home, including an ability to resist displacement by market forces or landlord whims and to plan on a more predictable housing future.

Racial Disparities in Housing Finance

Historically, Black homeowners have often faced higher mortgage costs and worse financing options than white owners. Both historically and recently, predatory financial practices such as contract-for-deed selling have targeted Black neighborhoods and communities (Immergluck, 2018; Satter, 2009). Predatory home finance has often thrived in more heavily segregated metropolitan areas (Hyra et al., 2013).

During the subprime boom, Black homeowners were more likely to receive higher-cost, higher-risk loans (Bayer et al., 2018; Faber, 2013). These loans often featured predatory, risk-inducing terms, including prepayment penalties, yield-spread premiums, and balloon payments. While regulation following the subprime crisis reduced the incidence of predatory and toxic loan products, risk-based pricing, where borrowers with lower credit scores and lower down-payments pay higher interest rates, continues to be widely used by the GSEs.

When Black mortgage applicants receive higher-cost mortgages than white borrowers, regardless of the cause, it creates at least four types of possible problems. First, pushing some applicants over maximum debt-to-income thresholds will result in more Black families' being denied homeownership altogether. Second, the financial rate of return on homeownership will be reduced for Black families. Related to this, buying a home may become financially unwise as compared to renting a comparable home. And finally, the higher cost of the loan may actually increase the risk of default and foreclosure (Levitin, 2020).

In fact, targeting Black and Latinx borrowers with subprime loans led to these groups being disproportionately harmed by foreclosure during the foreclosure crisis (Reid et al., 2017). The geographical clustering of subprime lending also meant that vacant, foreclosed homes accumulated in many Black neighborhoods harming not just the borrowers themselves but entire neighborhoods, depressing local property values and pushing many homeowners into negative equity (Immergluck, 2015; Raymond, 2018).

3 Drew and Herbert (2012) and other research on surveys suggests that financial reasons are typically not the ones given as the top reasons for buying versus renting. In Fannie Mae's National Housing Survey, the top four cited reasons for wanting to buy were nonfinancial vs. financial, including "provides good place to raise children," "provides a safe place to live," "can have more space for family," and "have control over living space."

Due to legacies of discrimination and systemic disadvantage in credit, housing, labor and other markets, Black households tend to have lower credit scores than white households (McCargo and Choi, 2020). In addition, over one in five Black consumers is "credit invisible," that is, lacking a credit score, compared to only 12 percent of white consumers. And, on top of these differences, lower earnings, less secure employment, and less access to generational wealth are important barriers to affordable homeownership.

Extremely tight mortgage markets in the wake of the subprime crisis meant that millions fewer Black families were able to buy a home than could have if mortgage markets had been functioning normally (Goodman et al., 2015; Immergluck et al., 2019). This occurred precisely when it would otherwise be a particularly good time to purchase a home, while home values were low and about to begin a more than eight-year run of appreciation. As a result, the collapse of an under-regulated and heavily-privatized mortgage market slammed Black homeowners and neighborhoods on the way down; afterwards, too many Black households were locked out of the benefits of the broad national recovery (Immergluck et al., 2019; McCargo and Choi, 2020)

Institutionalizing a Strong Federal Role in Housing Finance

From its creation in 1938 through to the late 1960s, Fannie Mae was not a "government sponsored" private enterprise, but a government agency, and later a corporation owned jointly by the federal government and private investors. Then, faced with political pressures over budget deficits growing as a result of the Vietnam War, Johnson effectively privatized Fannie Mae, turning it into a "government-sponsored" private firm. Shortly afterwards, Freddie Mac was created in the same government-sponsored enterprise (GSE) model.

The GSEs purchase mortgages from mortgage lenders, including banks and mortgage companies, and then package them into mortgage-backed securities, providing a key source of liquidity to the mortgage market. Because the loans they purchase comprise such a large share of all home loans, they effectively set loan pricing and terms for a large number of homebuyers and homeowners. While the GSEs functioned generally adequately over the next twenty-five years or so, they found themselves losing market share to unregulated, Wall Street-driven private-label securitization (PLS) that fueled the subprime booms of the late 1990s and 2000s. This subprime lending surge wreaked havoc on Black and Latinx borrowers and neighborhoods. After the federal government poured hundreds of billions into rescuing the two firms and buttressing the housing market, Fannie and Freddie recovered.

Over the last decade, speculators in Fannie and Freddie stock have lobbied for the firms to be recapitalized and then released back into private ownership and control (also known as "recap and release"), which would bring them a huge windfall. After years of frustration under the Obama Administration, speculators thought they had found their champion when the Trump Administration appointed the libertarian Mark Calabria to head of the Federal Housing Finance Agency. Calabria set a clear goal of "recap and release," which fit his ideological view that the federal role in the housing market should be minimized. Fortunately, some in the Treasury Department were less convinced of the wisdom of this direction (Layton, 2021).

So what should happen to Fannie Mae and Freddie Mac? First, it is important to recognize that nothing would do more damage to both the soundness of the housing market and to the affordability and fairness of housing finance than releasing Fannie and Freddie into the private market. As Adam Levitin and Susan Wachter (2020) have put it:

> The combination of releasing the GSEs from conservatorship, hamstringing them with excessive capital requirements, and the loosening of underwriting standards is a recipe for disaster. It would unleash the "private label" Wall Street securitization machine that financed the junk mortgages of the housing bubble. Rolling back underwriting requirements enables Wall Street to return to dodgy mortgage products, and releasing the GSEs from conservatorship will create an uneven regulatory playing field that favors Wall Street.

The COVID-19 crisis has amplified the importance of maintaining a strong federal role in housing finance. Because the GSEs and the FHA, together, command such a dominant share of outstanding mortgages, federal policymakers were able to institute widespread mortgage forbearance programs very quickly and require servicers to offer borrowers the option to move their missed payments to the end of their loan terms. Meanwhile, in the rental market, the federal footprint is much smaller. The CARES Act eviction moratorium covered less than one-third of the rental market and so was much less effective.

During the Obama Administration, housing industry groups and generally centrist think tanks developed a number of proposals for the future of the GSEs. Most involved various complex forms of hybrid privatization, relying on different mechanisms of mortgage-backed securities issued by private players together with some form of government-backing in case of catastrophic failure. The main proposal that reached the Senate in 2014 was the Housing Finance Reform and Taxpayer Protection Act of 2014, better known as "Johnson-Crapo" (U.S. Senate, 2014).

Johnson-Crapo died in the Senate, due in part to opposition from progressives. As Ellen Seidman of the Urban Institute put it:

> …the breadth of progressive opposition to Johnson-Crapo as negotiations came down to the wire came as something of a surprise. People asked why the focus was on bringing in private capital and protecting investors, rather than on ensuring that Americans are well-housed… What would this kind of reform do to access and to the price of mortgages? That's an important issue not only for those potential homebuyers, but also for the economy, and our society as a whole. (Parrott et al., 2014)

This response is telling. The dominant discussion of the future of the GSEs by think tank specialists and housing finance insiders has frequently seemed remarkably disconnected from the concerns of the housing needs and finances of lower-to-middle-income families and, especially, families and communities of color. Despite the greater focus on racial equity in recent discussions of housing policy, this remains a major problem.[4]

After the failure of Johnson-Crapo, and recognizing the desire among progressives to cement a stronger federal role in housing finance, some of the architects of early hybrid-privatization proposals moved to advocating a different approach, one that had been proposed years earlier (Immergluck, 2011b). Parrott et al. (2016) argue that a government-owned corporation structure offered the best path forward for Fannie and Freddie, arguing that this structure eliminates "too-big-to-fail" risk by taking the key market infrastructure out of the private market. With the government as the gatekeeper in the secondary market, smaller lenders will also be assured a level playing field compared to larger firms. Moreover, housing the operation in a government-owned corporation eliminates the need to create elaborate incentives to encourage private firms to do what they may not view as profit-maximizing.

Government ownership, via a government corporation, offers the advantages of government authority, centralization, standardization, and transparency. At the core of this corporation's charter should be the purpose of enabling affordable homeownership and rental housing for families of all means. Given the entrenched legacies of racial discrimination in housing markets and housing finance, the new entity should also be charged with reducing racial and ethnic disparities in access to mortgage credit, loan pricing, and homeownership rates.

At the heart of the government ownership model lies the ability to create a more just housing finance system where Black homeowners do not pay what amounts to a racial legacy tax in the mortgage market. This means reducing, and ideally eliminating, "risk-based pricing," where borrowers with lower credit scores or who can only afford lower down-payments pay significantly higher interest rates than borrowers with higher credit scores and more wealth. The increased charges such borrowers pay are referred to as "loan-level price adjustments" (LLPAs) and can be substantial, potentially increasing one's interest rate by well over 50 percent.[5]

There is some modest cross-subsidization in the GSEs currently, where lower-wealth and lower credit-score borrowers benefit from the higher profits made on loans to higher-wealth, higher credit-score borrowers, but it is far from sufficient and may not be targeted as well as it might be. Almost 90 percent of the existing cross-subsidies in the GSEs benefit "broad, middle-of-the-market borrowers," while a much smaller share go to lower down-payment, moderate- and higher-credit-score borrowers (Stegman and Cooperstein, 2019). These modest cross-subsidies come from other types of loans, especially cash-out refinance loans and loans to non-owner-occupant investors.

4 For example, in a recent 8,000-plus-word paper on the future of the GSEs from the Federal Reserve Bank of Kansas City, there is not one mention of the words "Black," "race," "racial," "minority/ies," "inequality," or "wealth" (Rappaport, 2020).

5 Fannie Mae's loan-level pricing matrix can be found at https://singlefamily.fanniemae.com/media/9391/ display.

There is clearly room to increase cross-subsidies from cash-out refinance and investor loans or from the borrowers with higher credit scores and greater wealth. This will allow LLPAs to be reduced or even eliminated. However, the ability to cross-subsidize requires that the government maintain a large footprint in the overall mortgage market, and efforts to reduce this footprint by investment bankers and market fundamentalist ideologues must be resisted. Such measures would drastically debilitate a more equitable housing finance system. If the new government corporation is only allowed to serve smaller borrowers, or owner-occupied properties, for example, it will have less ability to provide affordable loans to borrowers who could otherwise suffer high levels of risk-based pricing.

The racially disparate impacts of risk-based pricing are clear. By making raising effective interest rates, LLPAs directly reduce the financial benefit to homeownership precisely for those folks who are already less affluent. Moreover, as Adam Levitin (2020) writes:

> LLPAs may appear race-neutral, but their structure compounds existing racial wealth disparities. Because LLPAs are higher for low-down-payment mortgages, they fall more heavily on borrowers with less savings for a down payment. And because LLPAs are more costly for borrowers with worse credit scores, they fall disproportionately on those with low and moderate incomes, who are in turn disproportionately minorities. This creates a vicious circle: Because of the racial wealth gap, LLPAs are more likely to exacerbate the racial homeownership gap, which further reinforces the racial wealth gap.

The Importance of Maintaining a Strong Federal Housing Administration

The FHA has been a critical tool to providing access to homeownership to lower-wealth and lower-credit-score households, including many first-time homebuyers and borrowers of color. Two thirds of FHA loans go to first-time homebuyers (compared to 20 percent of GSE loans) (U.S. Department of Housing and Urban Development, 2020). More than a third of FHA loans go to minority homeowners, compared to 22 percent of GSE loans. As risk-based pricing by the GSEs has increased, FHA loans have become even more important because, for borrowers with lower credit-scores and/or lower down-payments, the LLPAs imposed by the GSEs can often get quite large, making the mortgage-insurance charged by the FHA a more affordable option. An FHA borrower buying a $250,000 house would typically pay less than $200 a month in insurance premiums. For borrowers with low credit scores or low down payments, this could be substantially less expensive than the combination of private mortgage insurance premiums and LLPAs on a comparable GSE loan.

The FHA has also proven itself to be a critical source of countercyclical home finance, especially for Black borrowers and neighborhoods. During the subprime crisis, the agency's market share soared from less than 4 percent to approximately 25 percent within just a couple of years (U.S. Department of Housing and Urban Development, 2020). If not for the FHA, the home buying market in many Black neighborhoods, which had contracted a great deal, would have shut down completely and for a longer period of time. The Biden Administration should work to strengthen and modernize the operations of the FHA. It should resist efforts to shrink the market footprint of the FHA in any way that could reduce its financial reserves over the long run.

Notwithstanding the importance of maintaining a strong FHA, it is critical to make the GSE circuit of mortgage finance more equitable and to institutionalize such equity, avoiding the risk that a system of mortgage markets rigidly segmented by race will seriously worsen racial wealth and housing inequality.

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The Use of Special Purpose Credit Programs to Promote Racial and Economic Equity

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Introduction

The COVID-19 pandemic slowed the pace and vector of our social lives, clearing mental and emotional space for our nation to reckon with the blithe lynching of Mr. George Floyd. The visualization of such cruelty, caught on camera, highlighted the fact that systems and behaviors can, and often do, threaten the well-being of African Americans and many others in our society. Among other effects, the nature of Mr. Floyd's murder and compelling power of the ensuing calls for social justice catalyzed billions of dollars in commitments by lenders to close the "racial inequality gaps,"[2] "advance inclusive economic recovery,"[3] "promote racial, ethnic, and gender equity,"[4] "advance racial equity,"[5] "boost economic opportunity,"[6] "end systemic racism and support economic empowerment of African Americans and low- and moderate-income communities,"[7] "address social and economic inequities,"[8] and "support economic opportunity initiatives."[9]

1 This essay does not constitute legal interpretation, guidance, or advice of the Consumer Financial Protection Bureau. Any opinions or views stated by the authors are the authors' own and may not represent the Bureau's views.

2 Press Release, Citigroup Inc., *Citi Launches More Than $1 Billion in Strategic Initiatives to Help Close the Racial Wealth Gap* (Sept. 23, 2020), www.citigroup.com/citi/news/2020/200923a.htms.

3 Press release, BMO, *BMO Commits $5 Billion to Advance Inclusive Economic Recovery in the U.S.* (Nov. 10, 2020), https://newsroom.bmo.com/2020-11-10-BMO-Commits-5-Billion-to-Advance-Inclusive-Economic-Recovery-in-the-U-S.

4 Press Release, Am. Express, *American Express Announces $1 Billion Action Plan to Promote Racial, Ethnic and Gender Equity for Colleagues, Customers and Communities* (Oct. 29, 2020), https://about.americanexpress.com/all-news/news-details/2020/American-Express-Announces-1-Billion-Action-Plan n-to-Promote-Racial-Ethnic-and-Gender-Equity-for-Colleagues-Customers-and-Communities/default.aspx.

5 Press Release, JPMorgan Chase & Co., *JPMorgan Chase Commits $30 Billion to Advance Racial Equity* (Oct. 8, 2020), https://www.jpmorganchase.com/news-stories/jpmc-commits-30-billion-to-advance-racial-equity www.jpmorganchase.com/news-stories/jpmc-commits-30-billion-to-advance-racial-equity.

6 Press Release, Huntington Bancshares, *Huntington Announces $20 Billion Community Plan to Help Boost Economic Opportunity Throughout its Seven- state Footprint* (Sept. 1, 2020), http://huntington-ir.com/ne/news/hban09012020.pdf.

7 Press Release, PNC, *PNC Commits More Than $1 Billion To Help End Systemic Racism and Support Economic Empowerment of African Americans and Low- And Moderate-Income Communities* (June 18, 2020), https://pnc.mediaroom.com/2020-06-18-PNC-Commits-More-Than-1-Billion-To-Help-End-Systemic-Racism-And-Support-Economic-Empowerment-Of-African-Americans-And-Low-And-Moderate-Income-Communities.

8 Press Release, U.S. Bank, *U.S. Bank to rebuild in Minneapolis; Announces multiple investments and initiatives to address social and economic inequities* (June 5, 2020), https://www.usbank.com/newsroom/stories/us-bank-to-rebuild-in-minneapolis-announces-multiple-investments-and-initiatives-to-address-social-and-economic-inequities.html.

9 Press Release, Bank of Am., *Bank of America Announces $1 Billion/4-Year Commitment to Support Economic Opportunity Initiatives* (June 2, 2020), https://newsroom.bankofamerica.com/press-releases/bank-america-announces-four-year-1-billion-commitment-supporting-economic.

These historic financial commitments to equity and racial and social justice have sparked interest in a 45-year old provision of the Equal Credit Opportunity Act (ECOA) that authorizes Special Purpose Credit Programs (SPCPs), which are defined as "credit assistance program[s]" for economically or socially disadvantaged consumers and commercial enterprises.[10] SPCPs allow non-profit and for-profit organizations wide latitude in designing credit assistance programs that both increase access to credit and provide favorable terms and conditions to economically disadvantaged groups. SPCPs represent a significant and unheralded tool to address historical injustices and continuing systemic racism in the credit markets and, more broadly, in racial wealth inequity. We hope that SPCPs are an idea whose time has finally come.

Racial Wealth Inequity and its Historical Underpinnings

Given its enormous impact on a variety of life opportunities, including education, housing, employment, social capital, and intergenerational transfers, the single best measure of racial inequity is wealth. The Federal Reserve recently released updated racial wealth data from its 2019 Survey of Consumer Finance finding that African American households had a mean of $24,100 in total wealth accumulation. In comparison, non-Hispanic white households had a mean of $188,200 in total wealth accumulation.[11] The enormous racial wealth gap not only harms African Americans but has broader ramifications across the entire economy impacting all Americans. For example, one industry study estimated that closing racial gaps in wages, housing, lending opportunities, and access to higher education would contribute an additional $5 trillion to American GDP over the next five years.[12]

In the United States, the single most important means of accumulating wealth for most families is homeownership, and owning a home is an even greater component of wealth composition for African American families. In fact, home equity represents 57% of the net worth of Black households compared to just 41% of the net worth of white households.[13] However, at the end of 2020, the homeownership rate gap between African Americans and whites stood at 30.4 percent,[14] and the gap has consistently exceeded 25 percent throughout the twentieth century. Closing the racial homeownership gap will thus play an important role in narrowing the racial wealth gap. One study of Survey of Income and Program Participation (SIPP) data collected in 2011 concluded that eliminating

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10 121 Cong. Rec. 16,743; 94th Cong., 1st Sess. (June 3, 1975) (the ECOA "states that a person may not be denied credit because of his race, but economically or socially disadvantaged people may be given preferential treatment in the granting of credit without the lender being in violation of the law").

11 Board of Governors of the Fed. Reserve Sys., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

12 Citi, *Closing the Racial Inequality Gap: The Economic Cost of Black Inequality in the U.S.*, 7 (Sept. 2020), https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D.

13 Michael Neal & Alanna McCargo, *How Economic Crisis and Sudden Disasters Increase Racial Disparities in Homeownership*, Urban Institute (June 2020).

14 Federal Reserve Bank of St. Louis, *Homeownership Rate for the United States: Black or African American Alone* (Feb. 2, 2021), https://fred.stlouisfed.org/series/BOAAAHORUSQ156N.

disparities in homeownership rates and equity appreciation would alone reduce the median racial wealth gap by nearly 50 percent.[15]

Since few people have the financial resources to purchase a home without obtaining financing, a key step to achieving homeownership is fair and equitable access to credit. Unfortunately, African Americans and other minorities have faced a long history of discrimination and economic exclusion in obtaining credit or the increased cost of credit for home purchasing. Such credit discrimination by both governmental and private actors was driven by the odious notion that property value was inextricably tied to race. In other words, the fact that properties were owned by, or even located near, African Americans had a negative impact on their valuations and thereby increased credit risk. This legacy persists to this day.[16]

Perhaps the most well-known example of lending discrimination is the notorious practice of redlining whereby lenders refused to provide credit to minority neighborhoods.[17] While discrimination by private financial institutions was widespread, the practice of redlining was institutionalized by the Home Owners' Loan Corporation (HOLC), established in 1933 to address the problem of rising home foreclosures during the Great Depression. Because HOLC was financing properties in default and foreclosure, it introduced standardized appraisals to measure risk for its loans. In 1935, the HOLC conducted a City Survey Program to appraise the level of real estate risk in hundreds of cities across the United States. HOLC distributed and collected surveys from local real estate professionals and lenders that included explicit questions regarding racial composition of neighborhoods, "infiltration" and "detrimental influences" such as "Negroes." Based on the survey information, HOLC created color-coded residential security maps that indicated the relative riskiness of different neighborhoods. The first geographic category (A) was coded green and described those areas as "new, homogenous, and in demand as residential locations in good times and bad," consisting predominantly of "American business and professional men." The second category (B) was coded blue and covered stable neighborhoods that were still desirable. The third category (C) was coded yellow and defined areas that were "definitely declining." Finally, the fourth category (D)—colored red—denoted "hazardous" neighborhoods "in which the things taking place in [yellow] areas have already happened…characterized by detrimental influences of a pronounced degree, undesirable populations or an infiltration of it."[18]

15 Amy Traub, Catherine Ruetschlin, Laura Sullivan, Tatjana Meschede, Lars Dietrich, and Thomas Shapiro, *The Racial Wealth Gap: Why Policy Matters*, 11-14 (2015), https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D.

16 *See* Michela Zonta, *Racial Disparities in Home Appreciation: Implications of the Racially Segmented Housing Market for African Americans' Equity Building and the Enforcement of Fair Housing Policies* (July 15, 2019), https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/. .

17 *See generally* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1985); Charles Nier, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. Pa. J. L. & Social Change 131 (2007-2008); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

18 Jackson, 197-98.

In making these classifications, HOLC relied on "notions of ethnic and racial worth" commonly utilized by private real estate professionals and lenders.[19] As a result, most neighborhoods with heavy minority populations, including in many large northern cities, were coded red and thereby "redlined." While HOLC did make loans in red and yellow areas, it directly placed the federal government's seal of approval on the linkage between real estate value and race and, consequently, prompted private industries' institutionalization of the HOLC's racially discriminatory policies.[20]

Perhaps the greatest impact of HOLC was on the lending practices of the Federal Housing Administration (FHA). The FHA was formed in 1937 to promote "sound home financing on reasonable terms, and to exert a stabilizing influence on the mortgage markets."[21] The FHA's primary role was to insure private lenders against potential losses from mortgage lending and thereby make possible lending with low down payments or longer loan terms. The FHA required an "unbiased professional estimate" as a prerequisite to any loan guarantee to ensure that the value of the property would exceed the outstanding mortgage debt. Acting on HOLC's rating system, the FHA developed even more elaborate guidance on race and real estate value for its appraisers in its Underwriting Manual. It stated: "if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes." Further, the Manual warned of the dangers of "infiltration of inharmonious racial groups and nationality groups." To prevent such "infiltration" the Manual recommended "subdivisions regulations and suitable restrictive covenants as an excellent method to maintain neighborhood stability."[22] In short, the entire FHA appraisal process was based on the premise that racial segregation was necessary to ensure property values.[23]

Significantly, the FHA's actions were adopted by private financial institutions that institutionalized the discriminatory appraisal process as well as the practice of redlining. This combination of governmental and private policies effectively precluded mortgage lending to African American borrowers. Overall, between 1930 and 1960, "fewer than one percent of all mortgages in the nation were issued to African Americans."[24] Such discrimination drove lower homeownership rates among African-American families in comparison to white families by either excluding them from mortgages entirely or by forcing them to turn to more expensive alternatives, such as installment contracts. Given the historical legacy of discrimination and its continuing impact, racial homeownership and wealth gaps will not be eliminated, or even significantly reduced, without sustained efforts by governmental and private actors. By providing access to credit on favorable terms and conditions, SPCPs represent one potentially powerful restorative tool in the struggle to redress credit discrimination and racial inequity.

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19 *Id.* at 199.

20 Amy Hillier, *Redlining and the Home Owners' Loan Corporation*, 29 Journal of Urban History 394, 398 (2003).

21 Jackson, 203.

22 *Id*. at 208. Rothstein, 65-66.

23 Melvin Oliver & Thomas Shapiro, *Black Wealth White Wealth: A New Perspective on Racial Inequality* 18 (1995).

24 Daniel Kirp, et al., *Our Town: Race, Housing and the Soul of Suburbia* 7 (1995).

Special Purpose Credit Programs

Congress enacted the ECOA in 1974, initially prohibiting discrimination in credit on the basis of sex or marital status.[25] Two years later, Congress expanded the prohibition against discrimination in credit transactions to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Federal Consumer Credit Protection Act.[26] At the same time, under section 701(c) of the ECOA, Congress clarified that it does not constitute discrimination under the ECOA for a creditor to refuse to extend credit offered pursuant to an SPCP.[27] ECOA and Regulation B, its implementing regulation, describes three types of SPCPs:

(1) Credit assistance programs expressly authorized by federal or state law, which must be for the benefit of an "economically disadvantaged class of persons."

(2) Any credit assistance program offered by a non-profit organization, which must be for the benefit of its members or the benefit of an "economically disadvantaged class of persons."

(3) A SPCP offered by a for-profit organization, which must be (i) established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than other applicants;[28] and (ii) established and administered pursuant to a written plan that identifies the benefiting class of persons and sets forth procedures and standards for extending credit pursuant to the program.[29]

As Regulation B makes clear, there are different requirements for SPCPs depending on whether the creditor is non-profit or a for-profit organization. For non-profit organizations, such as credit unions or community development financial institutions, a SPCP need only consist of a credit assistance program that benefits either its members or an "economically disadvantaged class of persons." In contrast to the requirements applicable to for-profit organizations, Regulation B and its official interpretation do not explicitly require a written plan or any evaluation of the non-profit organization's customary standards of creditworthiness upon a class of persons.

Furthermore, Regulation B and its official interpretation provide that a SPCP offered by non-profits and for-profit organizations may require participants to possess one or more common characteristics, such as race, national origin, or sex.[30] By permitting the consideration of a prohibited basis such as race, national origin, or sex in connection with a special purpose credit program,

25 *See* Pub. L. 93-495, sec. 701(a), 88 Stat. 1500, 1521 (1974).

26 *See* ECOA Amendments Act, Pub. L. 94-239, sec. 701(a), 90 Stat. 251, 251 (1976).

27 *See* Pub. L. 94-239, sec. 701(c)(3), 90 Stat. 251, 251 (1976).

28 *Id.* Official commentary provides that a determination that the program will benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms can be based on "a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies." 12 C.F.R. § 1002.8(a)-5. Comment 8(a)-5 also provides that a bank could review Home Mortgage Disclosure Act (HMDA) data along with demographic data for an assessment that there is a need for a SPCP for low-income minority borrowers.

29 12 C.F.R. § 1002.8(a).

30 12 C.F.R. § 1002.8(c)

Congress protected a broad array of programs "specifically designed to prefer members of economically disadvantaged classes" and "to increase access to the credit market by persons previously foreclosed from it."[31] Congress provided examples of such programs, including government-sponsored housing credit subsidies for the aged or the poor and programs offering credit to a limited clientele such as credit union programs and educational loan programs.[32]

Using Historical and Societal Data to Establish Special Purpose Credit Programs

A for-profit creditor that wishes to establish an SPCP must make the determination that its program meets the requirements set forth in 701(c)(3). In designing an SPCP, the creditor must, among other requirements,[33] determine that the program "will benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms."[34] Despite the promise of SPCPs, creditors have used them only sparsely. When queried, for-profit financial institutions have cited regulatory uncertainty as a key obstacle to the use of SPCPs.[35] While the Consumer Financial Protection Bureau (CFPB) has received questions about multiple aspects of the requirements for for-profit SPCPs, a frequent request has been for more clarity about the factual predicate required to determine that an SPCP "will benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms."[36]

Regulation B provides creditors with guidance for developing compliant SPCPs, noting that this determination can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies.[37] The Official Interpretations to Regulation B provide two examples: first, "a creditor might design new products to reach consumers who would not meet, or have not met, its traditional standards of creditworthiness due to such factors as credit inexperience or the use of credit sources that may not report to consumer reporting agencies";

31 S. Rep. No, 94-589, at 7, reprinted in 1976 U.S.C.C.A.N. 403, 409.

32 *See id.*

33 Regulation B sets forth compliance standards and general rules for SPCPs offered by for-profit organizations, including a requirement that the program be established and administered pursuant to a "written plan," extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit, and not be administered with the purpose of evading the requirements of the ECOA or Regulation B. 12 C.F.R. § 1002.8.

34 12 C.F.R. § 1002.8(a)(1).

35 Many comments to the CFPB's Request for Information on the Equal Credit Opportunity Act and Regulation B from a variety of external stakeholders, including both consumer and civil rights advocates and industry representatives, indicate that special purpose credit programs may be one way to promote fair and responsible access to credit, but that there is a need for further guidance on compliant implementation of these programs. 85 Fed. Reg. 46600 (Aug. 3, 2020).

36 *See e.g.,* NewsByte, American Bankers Association, *CFPB Provides ABA-Advocated ECOA Guidance* (Dec. 21, 2020), https://bankingjournal.aba.com/2020/12/cfpb-provides-aba-advocated-ecoa-guidance/#_ga=2.108467648.379428225.1614646671-1787348309.1599686058.

37 Official Interpretations, 12 C.F.R. pt. 1002 (supp. I), § 1002.8, ¶ 8(a)-5.

second, "a bank could review [HMDA] data along with demographic data for its assessment area and conclude that there is a need for a special purpose credit program for low-income minority borrowers."[38]

In December 2020, the CFPB issued an Advisory Opinion, which is an interpretive rule (IR) to clarify the guidance set forth in Regulation B, in the "hope that broader creation of special purpose credit programs by creditors will help expand access to credit among disadvantaged groups and will better address special social needs that exist today."[39] The CFPB's IR stated that for-profit organizations may rely on a wide range of research or data to analyze whether a SPCP is needed to benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms. The IR states that for-profit creditors may rely on research or data that are already in the public domain, such as HMDA and "other governmental or academic reports and studies exploring the historical and societal causes and effects of discrimination."[40] For-profit institutions can use the type of historical and societal evidence cited above, as well as their own research, to establish compliant SPCPs.

For example, a for-profit lender could rely upon historical evidence of redlining, such as the HOLC residential security maps, to focus on those minority neighborhoods that HOLC coded red and designated "hazardous."[41] The lender could connect this historical evidence with an evaluation of current HMDA data or other sources of information regarding the current availability and cost of credit in these same neighborhoods to demonstrate a program "will benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms."[42] If a lender makes such a determination, the SPCP could offer relaxed underwriting guidelines, down payment assistance, reduced interest rates, or other favorable terms and conditions to the designated class of persons in such neighborhoods.[43] By providing access to credit on favorable terms, an SPCP could address racial inequities created by historical redlining of minority areas and its continuing legacy. Such investments in minority neighborhoods could increase homeownership or home appreciation rates and have a broader impact on the racial wealth gap.

38 *Id*.

39 Kathleen L. Kraninger, CFPB Director, *Consumer Financial Protection Bureau Issues Advisory Opinion to Help Expand Fair, Equitable, and Nondiscriminatory Access to Credit* (Dec. 21, 2020), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-advisory-opinion-to-help-expand-fair-equitable-and-nondiscriminatory-access-to-credit/.

40 Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs, 86 Fed. Reg. 3762 (Jan. 15, 2021), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

41 *See* Robert Nelson et al., *Mapping Inequality: Redlining in New Deal America,* American Panorama, Digital Scholarship Lab, University of Richmond (2018), https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58.

42 *See* Daniel Aaronson, Daniel Hartley, & Bhashkar Mazumder, *The Effects of the 1930s HOLC "Redlining" Maps*, Federal Reserve Bank of Chicago, WP 2017-12 (Revised Aug. 2020).

43 *See* Relman Colfax PLLC and National Fair Housing Alliance, *Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem* (Nov. 2020), https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

Conclusion

Promoting the use of SPCPs is a central priority for the CFPB's efforts to "take bold and swift action on racial equity."[44] Creditors implementing special purpose credit programs are encouraged to discuss this essay, the IR, or any aspect of these programs with the CFPB or other regulators. The CFPB looks forward to staying engaged with non-profits, lenders, state and local regulators, academics, consumer advocates, and civil rights groups to advance the use of this valuable tool on behalf of "economically disadvantaged" groups and in the broader struggle to address racial wealth inequity.

44 David Uejio, CFPB Acting Director, *The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable* (Jan. 28, 2021), https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/.

CRA Could Do a Better Job Promoting Integration

By **Josh Silver**, Senior Advisor, Policy, National Community Reinvestment Coalition

Introduction

As originally conceived, the Community Reinvestment Act (CRA) was not intended to promote desegregation. It was not designed to encourage white people to move into minority neighborhoods or vice versa, nor was it focused on helping low-income people to move into affluent areas. Rather, the Act was geared toward channeling private sector capital, specifically bank financing, to revitalize low- and moderate-income (LMI) neighborhoods.[1]

Congress passed CRA in 1977 as an antidote to redlining.[2] Banks would take deposits from working-class neighborhoods and communities of color but refuse to lend in them. Redlining precipitates or accelerates neighborhood decline since residents cannot obtain loans to buy or repair homes or start and expand small businesses. To reverse decline and discrimination, Congress imposed an affirmative obligation on banks to serve the credit needs of communities, including and particularly LMI neighborhoods.[3]

The dollar amounts of lending stimulated by CRA to LMI borrowers and neighborhoods have been impressive. By rating banks and holding them accountable for lending and investing in LMI neighborhoods, CRA has leveraged trillions of dollars into LMI census tracts. Since 1996, CRA-covered banks have made more than $2.5 trillion in small business and community development loans in LMI tracts.[4] From 2009 through 2018, CRA-covered banks made more than $2.3 trillion on home loans to LMI borrowers or LMI tracts.[5]

While the focus of CRA has been on revitalizing LMI neighborhoods, it can also be helpful in desegregating neighborhoods. Over the years, the federal agencies implementing the law have developed guidance encouraging banks to pursue mixed-income housing opportunities and also to finance developments that are located in gentrifying neighborhoods but that do not displace LMI

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1 Silver, Josh. (2018). *The Community Reinvestment Act: How it Can Promote Integration and Prevent Displacement in Gentrifying Neighborhoods. In Facing Segregation: Housing Policy Solutions for a Stronger Society*, Metzger, M. W., Webber, H, (Eds). Oxford University Press.

2 CRA, P.L. 95-128, 91 Stat. 1147, title VIII of the Housing and Community Development Act of 1977, 12 U.S.C. § 2901 *et seq.*

3 Silver, Josh (2019). The purpose and design of the Community Reinvestment Act (CRA): An examination of the 1977 hearings and passage of the CRA. *National Community Reinvestment Coalition*. https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/

4 Authors calculations using data from: *Community Reinvestment Act: Aggregate Reports*. Federal Financial Institutions Examination. https://www.ffiec.gov/craadweb/national.aspx.

5 National Community Reinvestment Coalition (NCRC) data tool. National Community Reinvestment Coalition. https://www.ncrc.org/treasureCRA/.

residents. However, the guidance has not been effectively implemented in the CRA's accountability tool, the CRA exams.

CRA is an income-based law that requires banks to meet credit and deposit needs of communities, including LMI communities. Because the statute does not explicitly mention the racial composition of neighborhoods, the agencies designed CRA exams that measure and rate bank lending, investing, and services to LMI borrowers and communities only. The fair lending part of the CRA exam probes for evidence of discrimination. If discrimination is found, a bank can be downgraded, depending on the breadth and severity of the discrimination. CRA exams have not been regarded as tools to foster racial integration, likely because CRA performance measures have yet to include assessing lending by race of borrower or neighborhood.

Because of the income focus of CRA, most of this commentary will be focused on how to use CRA exams to promote income integration, but will also offer some thoughts about how it could be used to promote racial integration. The commentary will describe trends in segregation as well as CRA's current efforts to promote integration; case studies of CRA exams; and recommendations for improving CRA's effectiveness in promoting integration.

The recommendations will include how to change performance measures on CRA exams to promote integration and how to tie CRA more explicitly to the fair housing planning requirements promulgated by the Department of Housing and Urban Development (HUD). The federal banking agencies - the Federal Reserve Board (Board), the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) - are in the midst of updating CRA regulations so consideration of integration and CRA is timely. If CRA reform proceeds carefully and designs effective performance measures on CRA exams, it could both increase lending in formerly redlined neighborhoods and promote integration.

CRA's current approach to combating segregation is timid and cumbersome

Concentrated poverty, as defined by census tracts with large percentages of impoverished residents, has increased in the United States since 2000. Jargowsky (2013) reported that it surged from 1970 to 1990, decreased in the 1990s, and rose again in the 2000s. This study also noted that 71 million people, or one-fourth of the US population, resided in neighborhoods with poverty rates of at least 20 percent.[6] An increase in concentrated poverty is not the only factor intensifying segregation by race and income. Neighborhood gentrification can also exacerbate segregation if LMI renters can no longer

6 Jargowsky, Paul A. (2013). Concentration of Poverty in the New Millennium: Changes in Prevalence, Composition, and Location of High-Poverty Neighborhoods. Report. New York: Century Foundation and Rutgers University Center for Urban Research and Education. 1-3. https://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf

afford rent and are replaced by middle- and upper-income residents, or when LMI renters re-congregate in poorer neighborhoods, intensifying segregation in those communities.

Studies show that gentrification has increased slightly in recent years.[7] Fourteen percent of low-income census tracts across the country experienced an increase in income from 2000 through 2014, but income grew in just 9 percent of these tracts from 1980 through 1990.[8] Couture and Handbury found that gentrification has been most prevalent in the 50 largest metropolitan areas of the country. From 2000 to 2010, a majority of those areas saw rapid growth in the number of young professionals, and more of the growth occurred in urban neighborhoods than in suburban ones.[9]

Income-based or racial-based segregation intensifies through increases in impoverished communities and in gentrifying neighborhoods in which displacement occurs. CRA reform should seek to increase integration in these communities.

As the CRA has been implemented through bank exams, the Act's main approach to combating poverty and the concentration of poverty has been to facilitate bank lending, investing, and services in LMI neighborhoods. Indeed, moving success stories have documented the role of CRA-motivated affordable housing and economic development initiatives in helping to revitalize neighborhoods.[10] However, efforts under the CRA have not focused on combating concentrated poverty by lending in a pro-integrative manner—for example, in ways that help poor people move into middle-income neighborhoods or that facilitate middle-income households' moves into poorer neighborhoods.

Although CRA has motivated banks to increase their lending and investing in LMI neighborhoods significantly, there is room for more forceful reforms. While beyond the scope of this paper, CRA reform can address CRA grade inflation and decreasing coverage of loans made beyond branch networks. Effective CRA reform can promote more bank lending and investing that can, in turn, facilitate reinvestment in LMI neighborhoods and promoting integration in middle- and upper-income neighborhoods.[11]

7 Ellen, Ingrid Gould, and Ding, Lei. (2016). "Advancing Our Understanding of Gentrification." Cityscape 18 (3): 3–8. https://www.huduser.gov/portal/periodicals/cityscpe/vol18num3/guest.pdf.

8 Ibid.

9 Couture, Victor, and Handbury, Jessie. 2017, Revised 2019. "Urban Revival in America, 2000 to 2010." National Bureau of Economic Research. Working Paper 24084. https://www.nber.org/system/files/working_papers/w24084/w24084.pdf.

10 Office of the Comptroller of the Currency (OCC) produces a publication called Community Developments. This publication covers a variety of topics and CRA success stories. Several issues are available at https://www.occ.gov/publications/publications-by-topic/community-affairs/index-ca-publications.html#cdi.

11 For an overview of CRA reform being undertaken by the federal bank agencies and the issues involved, see the NCRC Treasure CRA website at https://www.ncrc.org/treasureCRA/. This site contains an initial analysis of the Board's CRA reform proposals as well as NCRC's formal comment letter regarding the Board's proposals.

The Interagency Question and Answer document has the most explicit discussion of integration efforts under CRA, but it falls short

The federal agencies that regulate banks (OCC, FDIC and Board) have taken initial steps to promote desegregation, but so far these steps have not spurred significant pro-integrative lending and investing such as creating affordable housing in middle- and upper-income neighborhoods. The agencies developed an interagency question and answer (Q&A) document with items on mixed-income housing and gentrifying neighborhoods.[12] The document guides federal CRA examiners, banks, community organizations, and others in the interpretation and use of the CRA. The effectiveness of the Q&As in guiding CRAs is limited, however, by their complexity and lack of clarity on the importance of promoting integration.

The evaluation criteria in the lending, investment, and service tests assess the extent to which bank activities are innovative and responsive to community needs. These criteria could be applied more explicitly in the Q&A about mixed-income housing and gentrification to indicate that activities that desegregate neighborhoods (while avoiding displacement) are considered innovative and responsive to community needs.

One item from the Q&A document (quoted below) discusses how CRA exams consider mixed-income housing. This Q&A is important because generally a bank receives credit for affordable housing that provides all of its rental units for LMI households. However, the objective of integration can include financing a housing development that is not consistent with the CRA regulation's primary purpose definition of "community development" under which 50% or more of the benefits accrue to LMI households.[13] In the example below, 10 percent of the units were set aside for LMI households, the total financing was $10 million, and the bank could count $1 million as a community development loan:

> *What is meant by the term "primary purpose" as that term is used to define what constitutes a community development loan, a qualified investment, or a community development service?*
>
> …An activity involving the provision of affordable housing also may be deemed to have a "primary purpose" of community development in certain other limited circumstances…In such cases, an institution may receive pro rata consideration for the portion of such activities that helps to provide affordable housing to low- or moderate-income individuals. For example, if an institution makes a $10 million loan to finance a mixed-income housing development in which 10 percent of the units will be set aside as affordable housing for low- and moderate-income individuals, the institution may elect

12 Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment, 81 Fed. Reg., 48506, 48553–54 (July 25, 2016) (to be codified at 12 C.F.R. pts. 25, 195, 228, 345). https://www.govinfo.gov/content/pkg/FR-2016-07-25/pdf/2016-16693.pdf

13 81 Fed. Reg. at 48530.

> to treat $1 million of such loan as a community development loan. In other words, the pro rata dollar amount of the total activity will be based on the percentage of units set-aside for affordable housing for low- or moderate-income individuals.[14]

As this example illustrates, the difficulty is that this guidance fails to encourage development of mixed-income housing. A bank might decide to devote the entire $10 million loan to housing for LMI people in a distressed neighborhood and have the whole sum considered on its CRA exam, instead of the $1 million. Such guidance might even be counterproductive because, in a number of circumstances, promoting income mixes in distressed neighborhoods may be necessary to desegregate them. Mixed-income housing can help to break the intergenerational cycle of concentrated poverty in such areas while (if done right) avoiding displacement.

A potential fix is to add guidance that, in evaluating compliance with CRA exam requirements, the exam will consider the entire amount of a loan for development of mixed-income housing if it helps to desegregate the surrounding neighborhood (while also providing sufficient LMI-affordable units), not just the amount of the loan that finances units for LMI households. Under this scenario, a floor should be established specifying a certain percentage (such as 30% of the units) must be for LMI households.[15]

The Q&A document also specifically addresses how bank financing in gentrifying neighborhoods should be considered on CRA exams:

> *Under the lending test applicable to small, intermediate small, or large institutions, how will examiners evaluate home mortgage loans to middle- or upper-income individuals in a low- or moderate-income geography?*
>
> A5. Examiners will consider these home mortgage loans under the performance criteria of the lending test...Examiners could view home mortgage loans to middle-income individuals in a low-income geography very differently. For example, if the loans are for homes or multifamily housing located in an area for which the local, state, tribal, or Federal government or a community-based development organization has developed a revitalization or stabilization plan (such as a Federal enterprise community or empowerment zone) that includes attracting mixed-income residents to establish a stabilized, economically diverse neighborhood, examiners may give more consideration to such loans, which may be viewed as serving the low- or moderate-income community's needs as well as serving those of the middle- or upper-income borrowers. If, on the other hand, no such plan exists and there is no other evidence of

14 Ibid.

15 The CRA regulations and Q&A offer no explicit definition of mixed income housing but a 40 percent threshold is mentioned in a Q&A as an illustrative example. Perhaps a lower percentage such as 30 percent could be used in the case of integrating neighborhoods. See item A3, 81 Fed. Reg. at 48553–4.

> governmental support for a revitalization or stabilization project in the area and the loans to middle- or upper-income borrowers significantly disadvantage or primarily have the effect of displacing low- or moderate-income residents, examiners may view these loans simply as home mortgage loans to middle- or upper-income borrowers who happen to reside in a low- or moderate-income geography and weigh them accordingly in their evaluation of the institution.[16]

Item A5 suggests that CRA examiners would not give favorable consideration to lenders financing large-scale middle- and upper-income developments in overheated markets if such developments would result in the displacement of the LMI residents of gentrifying neighborhoods. In contrast, the guidance offers favorable consideration to banks for promoting mixed-income housing in such neighborhoods. It also indicates that examiners would give favorable consideration if the bank's financing and activities were part of a neighborhood plan developed by the government or a nonprofit, or were consistent with such a plan.

However, item A2 below adds the point that developing middle- and upper-income housing would receive little weight in the CRA exam if the neighborhood needed LMI housing and the bank was not financing such housing:

> *Will activities that provide housing for middle-income and upper-income persons qualify for favorable consideration as community development activities when they help to revitalize or stabilize a distressed or underserved nonmetropolitan middle-income geography or designated disaster areas?*
>
> A2. An activity that provides housing for middle- or upper-income individuals qualifies as an activity that revitalizes or stabilizes a *distressed* nonmetropolitan middle-income geography…if the housing directly helps to revitalize or stabilize the community by attracting new, or retaining existing, businesses or residents…The Agencies generally will consider all activities that revitalize or stabilize a *distressed* nonmetropolitan middle-income geography…but will give greater weight to those activities that are most responsive to community needs, including needs of low- or moderate-income individuals or neighborhoods. Thus, for example, a loan solely to develop middle- or upper-income housing in a community in need of low- and moderate-income housing would be given very little weight if there is only a short-term benefit to low- and moderate-income individuals in the community through the creation of temporary construction jobs.[17]

One problem with this Q&A item is that all neighborhoods could be considered to be in need of LMI housing. Specifying that an analysis of performance context (local economic conditions and

16 81 Fed. Reg. at 48538.

17 81 Fed. Reg. at 48526–7.

demographic composition) will be used to determine whether the neighborhood is one in which prices and rents are increasing rapidly; middle- and upper-income developments in such neighborhoods are unlikely to alleviate shortages of housing or housing cost burdens for LMI residents in the short or medium term would provide needed nuance. The guidance in this item should not discourage banks from providing financing for middle- and upper-income housing in neighborhoods that can benefit from it but should instead caution against an exclusive focus on middle- and upper-income housing (as opposed to mixed income housing discussed above) in overheated and rapidly gentrifying markets.

In general, the Q&As need to be better harmonized so that they are clearer and do not discourage mixed-income housing while warning that banks will not receive credit for middle- and upper-income housing in census tracts undergoing significant levels of gentrification.[18]

CRA exams do not explicitly promote integration in gentrifying neighborhoods

A National Community Reinvestment Coalition (NCRC) survey investigated how often the CRA Q&A guidance on gentrification is employed in CRA exams. In identifying the banks whose exams would be included, NCRC identified 10 of the largest banks (by asset size) with recent CRA exams and 14 large metropolitan areas experiencing gentrification.

Since not all of the banks operated in each metropolitan area selected by NCRC, the survey ended up with a sample of 63 metropolitan areas. The survey of exams identified just three projects involving investments or community development lending in gentrifying neighborhoods: a housing investment by HSBC Bank USA, National Association in Manhattan; an economic development investment by U.S. Bank, National Association in Seattle; and a Capital One, National Association construction loan for low-income housing in a gentrifying area of Northern Virginia. The CRA exams for those banks did not adequately describe the context of two of the three projects for which banks received favorable consideration. HSBC Bank USA, N.A.'s investment was laudable, but the CRA exam's description offered little detail on the project's scope, noting only that the $50 million investment in Manhattan Plaza "helped to preserve 1,688 units of affordable housing in the Hell's Kitchen area of Manhattan" and that "[t]enants' rents are subsidized by HUD's Section 8 and New York's Mitchell-Lama programs."19 The full scope of the bank's effort and of its responsiveness to a need—preserving affordable housing and integration—would have been more clearly indicated if the CRA exam had fully described the gentrification occurring in the neighborhood.[20]

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18 NCRC has developed a method for identifying gentrifying tracts. Also, median price levels can be compared across census tracts and banks would not receive credit for housing for middle- and upper-income housing in LMI tracts or gentrifying LMI tracts if such housing was above median price levels.

19 OCC. 2012. *Community Reinvestment Act Performance Evaluation. Evaluation of HSBC Bank USA, N.A. OCC.* 18. http://www.occ.gov/static/cra/craeval/nov13/24522.pdf

20 Schulz, Dana. (2015, April 30). "Hell's Kitchen, Once the 'Wild West,' Now Undergoing Rapid Gentrification." *6sqft*. https://www.6sqft.com/hells-kitchen-once-the-wild-west-now-undergoing-rapid-gentrification/.

The description of U.S. Bank National Association's Seattle investment was even less detailed, describing "[f]our NMTC [New Market Tax Credit] investments totaling more than $50 million to renovate a nine-acre historic district in downtown Seattle, which is home to 250 small owner-operated businesses, 100 seasonal farmers, and 200 arts and craft vendors."[21] The project involved helping smaller businesses remain and thrive in an areas near Seattle's downtown. The location led NCRC to classify the area as a site of gentrification. As described above, the most intense gentrification pressures often occur in neighborhoods near downtown areas.

The Capital One, National Association CRA exam provided the most detailed of the three descriptions:

> In June 2010, CONA [Capital One, National Association] provided a $7.6 million loan to fund the construction and permanent financing for a 90-unit affordable housing property in Arlington, VA. All of the units will be affordable to low- and moderate-income families earning up to 60% of area median income.… The construction of this housing development addresses an important community need.…the development is located in the growing Ballston corridor, which has seen the loss of many affordable units to rapid urbanization and conversion of rental units to high-end, for-sale condominiums.[22]

Nevertheless, the discussion does not explain the full significance of promoting integration within a changing neighborhood. Contrary to the guidance in the CRA Q&A document, it also does not describe whether Capital One, National Association's investment was part of a government or nonprofit plan for the area.

The exams should highlight responsive, innovative, and complex financing projects in gentrifying neighborhoods. In addition, the exams should identify the relevant CRA Q&A items in cases that involve such projects.

CRA exams are ineffective at promoting mixed-income housing in distressed neighborhoods

NCRC's second survey assessed the consideration given in CRA exams to banks for mixed-income housing developed as part of efforts to desegregate neighborhoods and reduce concentrated poverty. NCRC selected 10 large banks and reviewed the CRA exam descriptions of their activities in 20 metropolitan areas with large concentrations of poverty (the metropolitan areas with the highest percentage of poor people living in census tracts with more than 40 percent of residents in poverty). From this pool, NCRC identified 56 bank-metropolitan area combinations for our sample.

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21 OCC. 2012. *Community Reinvestment Act Performance Evaluation. Evaluation of U.S. Bank National Association*. OCC. 68. https://www.occ.gov/static/cra/craeval/jul16/24.pdf

22 OCC. 2011. *Community Reinvestment Act Performance Evaluation. Evaluation of Capital One, National Association*. OCC. 27-28. http://www.occ.gov/static/cra/craeval/feb12/13688.pdf

The survey identified a few instances in which CRA exams gave favorable consideration to banks for mixed-income housing. Only two of 56 surveyed metropolitan areas, or just 3.6 percent, featured affordable housing projects with mixed-income housing. In some of the projects, a small percentage of units was set aside for middle- or upper-income households. For example, a Citibank, N.A. CRA exam conducted by the OCC in 2010 described an affordable housing project in Philadelphia. The project consisted of 73 units, and 71 of those were reserved for LMI households.[23] Although the percentage of units reserved for non-LMI households was very small, it was included because the examiner appeared to be probing for mixed-income housing.

The second case in the survey is from the 2012 CRA exam of U.S. Bank National Association. The exam describes an affordable housing project in Milwaukee: "A $20.5 million construction loan to finance the development of a 140-unit mixed income housing project, located in a moderate-income census tract. Of the 140 units, 121 will be restricted to families with incomes at varying levels (30–60%) of the area median income."[24]

As this survey reveals, mixed-income housing projects are rarely noted in CRA exams; when they are, descriptions are cursory. By failing to indicate the importance of the projects in terms of reducing concentrations of poverty, desegregating neighborhoods, or making projects more financially feasible by using the rents of non-LMI households to cross-subsidize the rents of LMI households, examiners' descriptions do not forcefully promote pro-integrative housing projects.

Updating the CRA regulations provides an opportunity to promote integration

The comment period on the Federal Reserve Board's Advance Notice of Proposed Rulemaking (ANPR) on possible changes to the CRA regulation recently ended in February.[25] The ANPR did not propose specific changes to the CRA regulation, but included several ideas the Board floated for the public's review and response. In the summer of 2020, the Office of the Comptroller of the Currency (OCC) issued a final CRA rule that most community groups and banks believed was damaging to CRA.[26] Banks and community groups have asked the OCC to rescind its final rule and encouraged both the OCC and the third bank regulator, the Federal Deposit Insurance Corporation (FDIC), to join the Board in an interagency rulemaking process.

23 OCC. (2010). *Community Reinvestment Act Performance Evaluation: Evaluation of Citibank, N.A.* OCC. 80. https://www.occ.gov/static/cra/craeval/jul10/1461.pdf

24 OCC. 2012. *Community Reinvestment Act Performance Evaluation. Evaluation of U.S. Bank National Association.* OCC. 75. https://www.occ.gov/static/cra/craeval/jul16/24.pdf

25 Federal Reserve Board. (2020) Advance Notice of Proposed Rulemaking (ANPR), Community Reinvestment Act, Regulation BB, Docket No. R-1723, RIN 7100-AF94. Federal Register, Vol. 85, No. 202. https://www.federalregister.gov/documents/2020/10/19/2020-21227/community-reinvestment-act

26 NCRC. (2020). Analysis of the OCC's Final CRA Rule. https://ncrc.org/analysis-of-the-occs-final-cra-rule/

The Board did not propose any specific ideas to promote integration, but did ask how CRA could be used to address racial inequities. While the ANPR did not address integration, it contained other proposals that could be used to promote integration.

First, the ANPR proposed a qualitative scoring system referred to as impact scores.[27] Retail lending, services, and community development financing would have quantitative measures such as the percent of loans to LMI borrowers. In addition, the Board asked whether impact scores should be used to measure the degree to which retail lending or community development financing was innovative or responsive to needs. Impact scores could have a numerical scale of 1 to 3 that would assign a value to a bank's products or community development financing.[28] For example, if an affordable housing project discussed above integrated a community by race and/or income, it could receive a higher impact score. If the qualitative criteria became a meaningful part of CRA exams, capable of affecting a bank's final rating, impact scores could effectively promote integration.

Second, the ANPR asks whether bank financing in accordance with a public sector plan should be recognized by CRA.[29] If a bank participates in a government plan that promotes integration, this should indeed be recognized through higher impact scores. The federal Affirmatively Furthering Fair Housing (AFFH) rule implemented during the Obama Administration required state and local jurisdictions receiving HUD funding to develop plans to affirmatively further fair housing. This requirement could also include development of plans to promote integration in gentrifying or distressed neighborhoods.[30]

In 2018, during the Trump Administration, HUD first suspended and then rescinded the AFFH rule promulgated by HUD during the Obama Administration. The Biden administration has moved to reinstate Obama-era protections. A reinvigorated AFFH requirement, if tied explicitly with CRA in either the regulation or implementing guidance, could leverage a significant amount of bank financing of affordable housing and economic development in an integrative manner.

Third, the existing interagency Q&A document should be revised in the manner suggested above to more effectively promote integration. In addition, the agencies should produce and disseminate best practices manuals that highlight how bank financing can combat segregation and help integrate neighborhoods. These best practices would be culled from future CRA exams that more clearly describe pro-integrative lending and investing.

27 85 Fed. Reg. at 66442 (proposed October 19, 2020).

28 Ibid.

29 85 Fed. Reg. at 66448 (proposed October 19, 2020).

30 The rule defines "affirmatively furthering fair housing" as "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." US Department of Housing and Urban Development. 2015. *AFFH Rule Guidebook. Vers. 1*. Department of Housing and Urban Development, https://www.nhlp.org/wp-content/uploads/HUD-AFFH-Rule-Guidebook-Dec.-2015.pdf.

Fourth, if CRA exams consider lending and community development in communities of color more explicitly, exams could also increase their attention to combating bank practices that intensify segregation, such as partnering with realtors that violate fair housing requirements by steering racial minorities to communities of color.

Conclusion

When Congress passed CRA, the intention was to end redlining and encourage banks to reinvest in communities of color and working class communities. However, the federal agencies are now in the process of revising the CRA regulations and examination procedures. This presents a significant opportunity to revise CRA so that it more effectively promotes integration. Breaking down segregation and promoting integration would accord with a central goal of CRA, which is to respond to community needs. A series of steps—including narrative in CRA exams extoling and detailing integrative projects; better formulation of qualitative measures; and clearer guidance regarding integration—would bolster CRA's effectiveness in promoting diversity in neighborhoods.

PART IV.
Moving Beyond the Market: Community Ownership and the Right to Housing

What Can HUD do to Support Community Ownership and Control of Rental Housing?

Philip Tegeler, Executive Director, Poverty & Race Research Action Council[1]

Introduction

The movement to shift more of our housing resources out of the private for-profit market and into the social housing sector has gained momentum in recent years, in the face of growing housing insecurity, unsustainable rent burdens, expanding homelessness, and gentrification pressures in many American cities. The benefits of expanding the social housing sector include built-in protections from profit-motivated rent increases and eviction, long term affordability, protection from predatory speculation in disinvested communities,[2] and more democratic control over housing resources. As the Right to the City Alliance succinctly framed the issue, this vision is "rooted in the belief that housing is a human right, not a commodity to maximize profits."[3]

The most exciting proposals to expand our social housing sector involve massive new direct funding support for public and community-controlled housing—like recent calls for social housing funds in New York City,[4] Representative Omar's "Homes for All Act,"[5] and related social housing development proposals.[6] But on a smaller scale, can we also expand public and community ownership of affordable housing within our existing program investments in low-income housing? Many of our current assisted housing programs benefit for-profit developers and owners, but this dependence on the private market is not inevitable, and we believe that inroads can be made to shift a significant portion of existing housing funding to the social sector. Some of these shifts can be made locally at the city or public housing authority level, some can be implemented by HUD in funding notices and guidance, and others may need regulatory or even statutory adjustments. This paper will cover most of HUD's rental housing programs, including the Housing Choice Voucher program, Project-Based

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1 We appreciate the helpful input and comments received from Ellen Lurie Hoffman and Moha Thakur of the National Housing Trust, Chris Schildt and Kalima Rose of PolicyLink, Ed Gramlich of the National Low Income Housing Coalition, Vincent Reina, Philip Garboden, Eva Rosen and Andy Mott. Thanks also to Caroline Doglio, PRRAC Policy Intern, for all of her helpful research assistance, and to Jessica Mugler, a PRRAC Law & Policy Intern, for her background research on Project-Based Rental Assistance. A version of this paper was released as a PRRAC Policy Brief in April 2021.

2 *See* Henry Louis Taylor, Jr. "Land Values and the Enduring Significance of Racial Residential Segregation," *Poverty & Race* (Jan-Apr 2021).

3 Homes for All Campaign of the Right to the City Alliance, *Communities Over Commodities: People-Driven Alternatives to an Unjust Housing System* (March 2018).

4 Sarah Holder, "Staking New York City's Future on Social Housing," *Citylab* (January 29, 2021), https://www.bloomberg.com/news/articles/2021-01-29/a-plan-to-boost-public-housing-in-post-covid-nyc.

5 H.R.5244 - Homes for All Act of 2019, https://www.congress.gov/bill/116th-congress/house-bill/5244/text.

6 See Gianpaola Baiocchi and H. Jacob Carlson, *The Case for a Social Housing Development Authority*, Urban Democracy Lab at the NYU Gallatin School (November 2020); *Communities Over Commodities*, supra note 2; James A. Crowder Jr., Chris Schildt, and Rick Jacobus, *Our Homes, Our Communities: How Housing Acquisition Strategies Can Create Affordable Housing, Stabilize Neighborhoods, and Prevent Displacement* (PolicyLink, May 2021)

Rental Assistance, the National Housing Trust Fund, the HOME program, the Community Development Block Grant program, and the Rental Assistance Demonstration (the main public housing redevelopment program at HUD). We also point out that these programs are all subject to HUD's "affirmatively furthering fair housing" mandate, which encompasses principles of both racial equity and racial integration.

A building developed by the H Street Community Development Corporation, Washington, DC. Photo source: H Street Community Development Corporation

Before exploring these federal programs, we should clarify what we mean when we refer to public and community ownership and control. For purposes of this policy exploration, we define the social housing sector as inclusive not only of community land trusts and related tenant cooperative models, but also more traditional public sector and non-profit ownership and management of housing by public housing authorities, non-profit housing developers, churches, state housing agencies, and community development corporations.[7]

Other definitions of social housing expand to include publicly-supported housing in the private for-profit sector.[8] While we recognize that the distinction is sometimes difficult, we exclude for-profit housing from our definition—and we also recognize the wide range of "community" responsiveness in the non-profit housing sector.[9]

Our collective experience of the 2008 foreclosure crisis, and the massive private buy-up of homes and neighborhoods that followed, teaches that any serious effort to support community acquisition of distressed rental housing in the current crisis must involve significant, flexible public funding that can municipalities and community-based non-profits can access quickly to compete with private capital.[10] Nonetheless, traditional HUD funding streams can and should play a supporting role in expanding the social housing sector during the coming recovery.

7 This definition is in keeping with the late Michael Stone's framing of social housing. *See* "Social Ownership," in *A Right To Housing*, Rachel Bratt, Michael Stone and Chester Hartman, editors (Temple University Press 2006). *See also* Rachel G. Bratt, "The Quadruple Bottom Line and Nonprofit Housing Organizations in the United States," 27 *Housing Studies* (2012). Bratt estimates that there are approximately five million housing units in the social housing sector, or about five percent of total U.S. housing units, based on Stone's definition and initial estimates.

8 Peter Dreier estimates the total subsidized housing share (including both non-profit and for-profit) to be less than 4% of the total U.S. housing stock. "Why America Needs More Social Housing," *The American Prospect* (April 16, 2018). *Cf.* Oksana Mironova and Thomas J. Waters, "Social Housing in the U.S.," Community Service Society (February 2020).

9 The Community Service Society has also produced an excellent typology of how "decommodified" different types of publicly-supported housing in New York City are. *See* Oksana Mironova and Thomas J. Waters, "How Social Is That Housing?" Community Service Society (Feb. 2020).

10 *See generally*, Heather MacDonald, "Managing the consequences of financial crisis: a long view of housing disposition," 22 *Housing Policy Debate* 201-218 (2012); Rachel G. Bratt, "Challenges for Nonprofit Housing Organizations Created by the Private Housing Market," *Journal of Urban Affairs* (Feb. 2009).

The following discussion is intended as an initial policy exploration, which we hope will prompt policymakers to consider moving a greater proportion of their publicly funded housing assets out of the private market and into some form of community ownership and control.

The Housing Choice Voucher Program

The Housing Choice Voucher program is the largest low-income housing program in the U.S., but surprisingly little is known about the ownership status of properties where tenants use their vouchers. HUD maintains no data on the proportion of vouchers in non-profit vs. for-profit buildings. There are a significant number of smaller "mom and pop" owners participating in the program, including property owners of color.[11] But it is reasonable to assume that a large share of vouchers are being used in properties owned by large for-profit owners.[12]

How could the HCV program assist in supporting an expanded social housing sector and encouraging community control or ownership of rental housing?

- **Prioritizing project basing of HCVs in non-profit and community-controlled buildings**: Public Housing Authorities (PHAs) are permitted, under HUD rules, to enter into multi-year voucher contracts for units in specific buildings, which can then be used to house eligible families. HUD limits the percentage of Housing Choice Vouchers that can be "project-based" in this way to 20% of the agency's overall vouchers (with a higher cap for project basing units in low-poverty neighborhoods).[13] There are no rules barring PHAs from prioritizing such project-based contracts for non-profit owners or other community-controlled housing. HUD would, however, need to waive the limit on the percent of HCVs that can be project-based, if the PHA is already near its limit.[14] As just one example, Burlington, Vermont has successfully used project-based and portable Housing Choice Vouchers to support rental housing managed by its community land trust.[15]

- **Using vouchers to support direct PHA or community acquisition of rental housing**: The King County Housing Authority has been acquiring existing rental housing for

11 These conclusions are supported by some recent local studies, including Eva Rosen, *The Voucher Promise* (Princeton University Press, 2020); Philip Garboden, Eva Rosen, Stefanie DeLuca and Kathryn Edin, "Taking Stock: What Drives Landlord Participation in the Housing Choice Voucher Program," *Housing Policy Debate* (October 2018). However, HUD does not record data on the race or ethnicity of owners of HCV properties, and HUD data on the size of owners participating in the HCV program has not been systematically analyzed.

12 *See, e.g.,* Hyojung Lee, "Who Owns Rental Properties, and is it Changing?" Joint Center for Housing Studies (August 18, 2017). As noted above, data on the size of HCV owners is maintained by HUD but has not been systematically analyzed.

13 24 C.F.R. Part 983.

14 This particular concept has not been proposed by HUD, but see related proposed regulations at 85 Fed. Reg. 63664 (October 8, 2020).

15 See Tom Angotti, *Community Land Trusts and Low-Income Multifamily Rental Housing: The Case of Cooper Square, New York City* (Lincoln Institute of Land Policy Working Paper, 2007) at pp. 8-10.

decades used its "Moving to Work" (MTW) funding flexibility[16] along with county bond funds.[17] As the program has been implemented in King County, once a property is acquired, the housing authority simply becomes the landlord, using the HCV program to gradually fill units as existing tenants move on. This same approach can be used by a non-MTW agency, as recently demonstrated by the Austin Housing Authority, which partnered with a community-based non-profit to acquire and convert existing rental housing using a commitment of voucher funds.[18] Wider use of this approach can be supported with funding from local housing bonds, like the recent bond issues in Atlanta and San Francisco.[19] This approach could also be pursued for single family homes, in markets where HCV payment standards would support the debt service on the home purchase.[20]

- **Leveraging the Section 8 homeownership program and project-based vouchers to support tenant-opportunity-to-purchase acquisitions of housing**: This approach could work in buildings where a significant number of families have vouchers, and could contribute to the long term financial sustainability of the building. Vacant units in such properties could be targeted for project-based vouchers to further support the acquisition.[21]

- **Begin reporting ownership status of HCV landlords**: The current lack of data distinguishing for-profit from non-profit ownership of HCV properties makes it impossible to gauge progress on this metric either nationally or at a local PHA level.

Project-Based Rental Assistance

Project-Based Rental Assistance (PBRA) encompasses a group of older Section 8 and mortgage assistance programs administered by HUD under long-term renewable contracts with private owners. PBRA contracts are between HUD and private owners, although administration of the contracts is

16 Department of Housing and Urban Development, "Moving to Work." https://www.hud.gov/mtw.

17 The King County Housing Authority has used its MTW flexibility to acquire housing in high opportunity areas. *See* Peter Kye, Michael Mouton & Megan Haberle, *Developing Opportunity: Innovative Models for Strategic Housing Acquisition* (PRRAC and the National Housing Trust, October 2018), available at https://prrac.org/pdf/prrac_nht_housing_acquisitions_report.pdf.

18 See Jared Brey, "Austin Housing Authority Buys Private Apartments to Rent to Section 8 Tenants," *Next City* (July 23, 2019).

19 "Statement on Passage of Mayor Keisha Lance Bottoms' $50 Million Housing Bond Order" (January 4, 2021), https://www.atlantaga.gov/Home/Components/News/News/13545/; Brandon Duong and Lillian M. Ortiz, "Where Voters Supported Affordable Housing," *Shelterforce* (November 25, 2020).

20 The single family investment company High Opportunity Neighborhood Partners has launched a private sector version of this approach, targeted to serving families with Housing Choice Vouchers: https://highopportunities.com/.

21 Since such properties are likely to be in poorer neighborhoods, HUD may need to add an exception to the current limits on the percentage of project-based vouchers in the limited case of tenant purchase of rental housing. *But see* "A Cautionary Note," below.

often delegated to state or local governments or PHAs.[22] PBRAs represent the third largest subsidized housing resource in the country, after the Housing Choice Voucher program and the Low-Income Housing Tax Credit program.

To help preserve the stock of affordable housing, HUD allows PBRA funding to be transferred to another property from a PBRA project that opts out of the program or that HUD terminates.[23] To the extent that existing owners opt out of the PBRA program (or are terminated), there is an opportunity for transfer to community control, since a large majority of current owners are for-profit entities.[24]

For PBRA projects with expiring or terminated contracts, HUD can approve the transfer of the PBRA contract to another project under HUD's "Section 8(bb)" transfer authority.[25] HUD also allows transfers of assistance where a PBRA project becomes physically obsolete or economically non-viable. Projects that are physically obsolete or economically nonviable can transfer funds to a receiving property under transfer of assistance authority given to HUD through appropriations bills.[26] Property owners can establish physical obsolescence through property condemnation, an eminent domain taking, needing capital repairs that are financially nonviable, or failing physical inspection scores—either a Real Estate Assessment Center ("REAC") score of 30 or below or multiple, consecutive REAC scores below 60.[27] Alternatively, property owners may establish economic non-viability using a market analysis or vacancy rates.[28] One group of PBRA developments, originally developed under the Section 202 program, are protected with an explicit requirement of nonprofit ownership, but other PBRA properties do not.

Under these scenarios, there are two opportunities for public or non-profit community acquisition of PBRA properties and subsidies from for-profit entities:

- **The first opportunity** is through a shift to public control of the PBRA subsidy when a transfer of assistance is required, most commonly when an owner repeatedly fails

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22 This delegation arrangement has not necessarily led to improved oversight of the program. *See* Molly Rockett, "Private Property Managers, Unchecked: The Failures of Federal Compliance Oversight in Project-Based Section 8 Housing," 134 *Harvard Law Review Forum* 286 (2021).

23 42 U.S.C. § 1437f (bb)(1).

24 The Public and Affordable Housing Research Corporation (PAHRC) estimates that only 32% of 16,267 PBRA properties are owned by non-profits, accounting for 23% of total units. An additional 6% of properties are listed as "multiple" ownership. *See* National Housing Preservation Database, https://preservationdatabase.org/.

25 *See* 42 U.S.C. § 1437f(bb)(1); U.S. Department of Housing and Urban Development, Notice H-2015-03, "Transferring Budget Authority of a Project-Based Section 8 Housing Assistance Payments Contract under Section 8(bb)(1) of the United States Housing Act of 1937" (2015), *available at* https://www.hud.gov/sites/documents/15-03HSGN.PDF.

26 HUD Approval of Requests for Transfers of Multifamily Housing Project-Based Rental Assistance, HUD-Held or Insured Debt, and Income-Based Use Restrictions, 82 Fed. Reg. 16,963, 16,964 (Mar. 31, 2015), *available at* https://www.federalregister.gov/documents/2015/03/31/2015-06776/hud-approval-of-requests-for-transfers-of-multifamily-housing-project-based-rental-assistance.

27 *Id.* at 16,965.

28 *Id.*

inspection (through the REAC inspection process) or where an owner is no longer financially viable or is debarred from ownership for some other reason. At this point, HUD may approve a transfer of the PBRA assistance to a different property with another owner. If HUD indicates a preference for transfer of the subsidy from a for-profit to a non-profit community-based property, this can be a gateway for increased community control.

- **The second opportunity**—the opportunity for a community-based non-profit to purchase the PBRA property—can come at any time, but is also most likely either at the time of a transfer of assistance, when an existing owner may looking for a buyer (or may be forced by HUD to sell), or in the years preceding the expiration of the long term subsidy period, when the owner may be contemplating a sale.[29] However, this option would require some type of notice to tenants and community based non-profits prior to the sale, and a community- or tenant opportunity to purchase rule, backed by a community acquisition fund.[30] The prospects for transfer from for-profit to non-profit ownership could be enhanced by the financial participation of state Housing Finance Agencies, which oversee and manage the PBRA program for HUD in 32 states and Puerto Rico.[31]

Burlington Land Trust rental housing, Vermont.
Photo source: Champlain Housing Trust

The Housing Trust Fund

The National Housing Trust Fund (HTF) is a block grant program to states primarily for the development of rental housing for extremely low-income families. The HTF was established in 2008 and is funded through small assessments on new business coming through Fannie Mae and Freddie Mac. It is a relatively small but growing program—$248 million in 2019, $326.4 million in 2020, and $711 million in 2021—and it may expand further if it is included in the proposed infrastructure bill.

The Housing Trust Fund statute, 12 U.S.C. § 4568(c)(9), indicates that "eligible recipients" of HTF funds may be either a "for-profit entity or a nonprofit entity." However, this language does not

29 According to the Lincoln Institute, almost 590,000 units were or will be eligible to exit the PBRA program between 2017 and 2026 due to expiring contracts and contract renewals. Many of these properties, furthermore, will have multiple exit points over the next decade after signing short-term contracts. Vincent Reina, *The Preservation of Subsidized Housing: What We Know and Need to Know 9* (Lincoln Land Institute 2018), available at https://www.lincolninst.edu/sites/default/files/pubfiles/reina_wp18vr1.pdf. Many of these properties are in higher opportunity areas.

30 It is unclear whether HUD could impose a TOPA requirement on an existing PBRA contract, but a new notice requirement would certainly be permissible, and could be combined with state or local community acquisition funds.

31 National Council of State Housing Agencies, "State Housing Finance Agencies (HFAs) Serving As Performance-Based Contract Administrators (PBCAs) Active Portfolios" (2021), https://www.ncsha.org/wp-content/uploads/PBCA-List-by-State-HFA-and-History.pdf.

seem to be intended to preclude a preference for nonprofits, either in the HUD regulations or in state allocation plans. Rather, it appears to be intended to distinguish the HTF from other programs that have strict non-profit restrictions or setasides, like the Section 202 program, or the HOME program (below).

- **In the upcoming proposed rulemaking for the Housing Trust Fund, HUD should instruct states to include a preference for community or nonprofit ownership in their annual allocation plans.**[32]

- **State housing finance agencies can also include preferences for community- or non-profit ownership of HFT funded projects in their annual HTF allocation plans, to further ensure long term affordability.**

The Home Program

The HOME Investment Partnerships Program is a smaller ($1.35 billion) block grant program administered primarily by states and city governments, funding both rental housing development and low- and moderate-income homeownership.[33] Like the old Section 202 program, the HOME program has a specific requirement that funds be invested in certain non-profit housing organizations ("Community Housing Development Organizations-CHDOs"),[34] though unlike Section 202, the minimum requirement is set at only 15% of each jurisdiction's allocation.

In practice, the HOME allocation of funds to CHDOs is higher than the 15% minimum, averaging slightly higher than 20% nationally. It is possible that HOME funds also go to other types of non-profit housing developers that do not satisfy the geographic restrictions of CHDOs, but this data is not reported in the national HOME database.

- **Because the wording of the HOME statute is so open-ended, requiring only that "the jurisdiction shall reserve *not less than* 15% percent of such funds for investment only in housing to be developed, sponsored, or owned by community housing development organizations" (42 U.S.C. §12771), HUD could elect to require a higher percent in its HOME regulations (24 C.F.R. §92.300), or Congress could simply increase the required percentage to 50% (or higher) in the annual HOME appropriations language.**[35]

32 This recommendation was echoed in Right to the City's report, *Communities Over Commodities: People-Driven Alternatives to an Unjust Housing System* (March 2018), at p 63.

33 *See generally* National Low Income Housing Coalition, *Advocates Guide 2020*. HOME began in 1990 as part of the Cranston-Gonzalez National Affordable Housing Act. 42 U.S.C. § 12701 *et seq;* 24 C.F.R. § 92.

34 Department of Housing and Urban Development, "HOME CHDO." https://www.hudexchange.info/programs/home/topics/chdo/#policy-guidance-and-faqs.

35 Note, however, that Congress created some flexibility in the allocation of HOME funds to CHDOs in recent budget appropriations, permitting release of CHDO-earmarked funds for other HOME eligible uses where a jurisdictions failed to commit funds after two years. *See* National Low Income Housing Coalition, *Advocates Guide 2020*. It would be well

The HOME program received a one-time $5 billion boost in the American Rescue Plan Act of 2021, with a focus on relieving homelessness.[36] These funds may be used for, inter alia, the "acquisition and development of non-congregate shelter units, all or a portion of which may be… converted to permanent affordable housing…" Although the minimum expenditure for CHDOs is waived for this tranche of funds, this new appropriation is a significant opportunity for states and localities to support community based non-profit acquisition of buildings to be used for rental housing.

Community Development Block Grants

The Community Development Block Grant (CDBG) program, also a state and local block grant program, can be used for a wide variety of housing and community development activities to benefit low-income families. The program is not primarily a housing production program, but it includes multiple opportunities to support community based non-profit housing organizations, including housing acquisition and rehabilitation. CDBG funds are generally expended on non-profits, small landlords, or individual homeowners.

Additionally, if a jurisdiction chooses to use CDBG funds for new housing construction, those funds *must* be given to a community-based nonprofit (defined as a Community Based Development Organization or CBDO).[37] CDBG funds spent on housing rehabilitation have no such limitation.

- **Because the CDBG program is an entitlement program, distributed by formula, HUD can do little to prioritize acquisition or steer housing funds to community-based non-profit organizations, beyond the priorities already listed in the statute and regulations.** However, HUD would do well to clarify for grantees that CDBG funds can be used for acquisition of private rental housing[38] by community based non-profits,[39] and set out examples of community acquisition funds that would qualify under the statute. HUD should also remind grantees that new housing development by CBDOs is an eligible use of CDBG funds,[40] a fact that is sometimes overlooked by local governments.

- **Congress, of course, is free to add priorities for CDBG expenditures in annual appropriations bills, including funding setasides for use by community-based nonprofits for the acquisition of private rental housing – or the establishment of a community acquisition fund for the same purpose.**

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within the spirit of the original HOME legislation for HUD to limit such reallocations to other community based non-profit organizations.

36 H.R. 1319, §3205, https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319enr.pdf.

37 24 C.F.R. §570.204(c).

38 42 U.S.C. § 5305(a)(1).

39 42 U.S.C. § 5305(a)(15).

40 24 C.F.R. § 570.204.

Public Housing and the Rental Assistance Demonstration

The Rental Assistance Demonstration (RAD) facilitates refinancing and reinvestment in public housing by shifting the funding source to a predictable monthly income stream based on local Section 8 payment standards.

In spite of the strong legal guarantees for long-term affordability and public use of RAD properties, much of the criticism of the RAD program has emphasized the potential harms of "privatization" of public housing. In the case of public housing, there are a number of legal protections designed to preserve public control. PHAs can transfer ownership either to a PHA-affiliated non-profit, an unaffiliated non-profit, or, in some cases, to a for-profit developer. A large number of RAD conversions have been to public housing authority-affiliated non-profits, with continuing PHA oversight, and the RAD program guidance already requires significant continuing ownership/control for public housing conversions in most cases.[41]


Tenant-owned cooperative with affordable housing units in Washington, DC. Photo source: Mi Casa, Inc.

- **Public housing preservation**: Implementing a public housing RAD conversion with a *PHA-affiliated non-profit* keeps the property in the social sector, and gives the PHA continued responsibility and connection to the development and its residents. HUD should incorporate an even stronger requirement for non-profit ownership in its RAD guidance documents, with a focus on community oversight and control.[42]

Alternative Features

In addition to explicit regulatory priorities for community-based non-profits, preferences could also be included in Notices of Funding Availability (NOFAs) for future HUD competitive grant programs,

41 See *Guidance & Sample Language for RAD Ownership/Control* (HUD, 2017), available at https://www.radresource.net/output.cfm?id=ogcownership.

42 In San Francisco, tenants' rights groups gained even stronger guarantees of community control in the housing authority's request for proposals than were included in the RAD guidance: "Respondents must be community-based non-profit entities with experience developing housing for low-income households in San Francisco, either individually or in joint-venture with other entities (including faith-based) for development and ownership purposes. The ownership entity may be a limited partnership with a for-profit entity only if Low-Income Housing Tax Credits and tax exempt bond financing is used to finance rehabilitation." San Francisco Housing Authority, Request for Qualifications - Rehabilitation, Recapitalization, and Transfer of Ownership of Existing Housing Developments (Jan. 31, 2014), at 2. *See* National Housing Law Project, *An Advocate's Guide to Public Housing Conversions Under Component 1 of the Rental Assistance Demonstration* (January 2016).

highlighting features of ownership and management that are more likely to involve community ownership and control.[43] These types of criteria are best illustrated by the community-facing language of the CDBG and HOME programs, which grew out of a movement in the 1980s for more meaningful community control in community development investments.[44] For example, the criteria for Community Based Development Organizations (CBDOs) in the CDBG program include the requirement that a CBDO "maintains at least 51 percent of its governing body's membership for low- and moderate-income residents of its geographic area of operation," and "has as its primary purpose the improvement of the physical, economic or social environment of its geographic area of operation."[45]

Likewise, the criteria for non-profit CHDOs in the HOME program (originally proposed by the Center for Community Change) emphasize "accountability to low-income community residents," including "maintaining at least one-third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representative of low-income neighborhood organizations…providing a formal process for low-income program beneficiaries to advise the organization in its decisions…and [h]as a history of serving the community within which housing to be assisted with HOME funds is to be located."[46]

A Cautionary Note

Allocation preferences for community-based non-profits may raise fair housing concerns, since the geographic catchment areas of these organizations tend to be focused on low-income neighborhoods. Shifting more public funding to community-facing non-profit organizations is valuable for these neighborhoods, but consistent with HUD's responsibility to affirmatively further fair housing,[47] and related site and neighborhood standards,[48] such policies should also be balanced with investments in areas with greater opportunities for families and children, including communities where low-income families have been traditionally excluded. Until more nonprofits move into these higher-cost rental markets, HUD may need to continue to support the for-profit housing sector as part of its fair housing mandate.

43 *See* Homes for All Campaign of the Right to the City Alliance, *Communities Over Commodities: People-Driven Alternatives to an Unjust Housing System* (March 2018).

44 The CDBG reforms during the Carter Administration were strongly influenced by a broad coalition called the Working Group for Community Development Reform, which included the Center for Community Change, the National Low Income Housing Coalition, National People's Action, the National Council of La Raza, the Conference of Catholic Bishops, the League of Women Voters, the Leadership Conference for Civil Rights, the National Center for Urban Ethnic Affairs, the National Urban League, and legal services and other groups.

45 24 C.F.R. § 570.204(c).

46 24 C.F.R. § 92.2(8).

47 42 U.S.C. § 3608.

48 *See generally, Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD's Site & Neighborhood Standards as Applied to the Low Income Housing Tax Credit* (PRRAC, Kirwan Institute, and The Opportunity Agenda, October 2011).

Towards the Black Commons: Meeting the Moment With Community Land Trusts

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It's Time for a Return to Ambition at HUD

At the federal level, anti-poverty policy has been an afterthought for at least the past two decades. President Obama built "ladders of opportunity" and provided affordable healthcare and President Bush marketized education to rectify the "soft bigotry of low expectations," yet neither president prioritized urban and social policy as many twentieth century executives did (Silver, 2016). Among contemporary administrations, President Clinton's best expressed a comprehensive anti-poverty agenda, but its track record is uneven, if not poor. Moving to Opportunity demonstrated the potential of fair housing, yet, in many respects, efforts like HOPE VI and Temporary Assistance for Needy Families were antithetical to a solidaristic vision of material security (Chetty, Hendren, & Katz, 2016; Mannix & Freedman, 2013; Duryea, 2006). In their efforts to solve public problems, these 1990s programs privatized them with problematic market-oriented solutions. The issues that animated the Kerner Commission are no longer examined and tackled as a coherent whole.

During the decades of the "New Deal Order," U.S. urban and social policy was far from perfect. There was, however, a shared understanding that the federal government could advance racial justice through urban investment; that poverty, not merely middle class "kitchen table issues," was worthy of discussion; that formal equality could be paired with substantive equality; and that cash and in kind assistance had an enduring role in the safety net. Much has changed. A collection of kludgy, insufficient tools, backed by underwhelming "interagency coordination" and exploitable "cross-sector partnerships" carries the day. The vivid truth-telling of the Kerner Commission and the redistribution of the Great Society have yielded to technocratic, defanged pragmatism.

The racial and economic injustices of 2020 underscore the continued relevance of urban and social policy. Reinvigorating the U.S. Department of Housing and Urban Development ("HUD") to address these injustices will take bold ideas. Decommodification and rights-based approaches to housing, the foci of other essays in this series, are instructive for HUD's new leadership, as is the Black freedom struggle (House & Okafor, 2020). Consider community land trusts ("CLTs"), a mode of land tenure with roots in the Civil Rights Movement that pairs shared ownership of land with individual ownership of improvements. CLTs present an opportunity to ameliorate the harms of today's housing regime, operationalize movement principles, and reinvigorate HUD.

Community Land Trusts Blend Decommodification and Community Wealth Building

CLTs have three defining characteristics: trusteeship, use rights, and community control (Meehan, 2013). Title to a CLT's land is placed in trust with a nonprofit organization that manages the land for the benefit of the surrounding community. Ground leases enable CLT members to cultivate gardens, start small businesses, and build affordable homes while retaining full ownership of that which they have created. CLTs' tripartite board structure, in which leaseholders, local residents, and community leaders collaborate to operate the trust, ensures democratic decision making from a diversity of stakeholders determines communities' futures.

CLTs allow for decommodification, freeing land from the whims and cruelty of the market. Much of the U.S. property regime is premised on land's exchange value, fostering opportunities to enclose, hoard, and sell land to accumulate and circulate capital (Logan & Molotch, 2007). By contrast, CLTs emphasize land's use value, holding land for perpetual enjoyment as a place to live, work, and play. When land is untethered from the market through tenures like CLTs, it can be employed for a multitude of socially beneficial ends. In this sense, CLTs can be implements of both urban and social policy. As urban policy implements, they repurpose sites of disinvestment and neglect, plant flags in areas of neighborhood change, and create space for local experimentation. As social policy implements, they complement typical tax and transfer programs by empowering low-income populations to ingeniously define and meet their own needs (Ela, 2018).

CLTs are also a vehicle for community wealth building. Another guiding premise of the CLT model is that land value — here defined as a landlord's economic rent — is communally generated, so land's ownership and operations must be communal too (Davis, 2010). People residing in shared equity homes on CLT land often sell and realize profit from appreciation, though the land itself remains affordable for the long-term. People who own properties and businesses in disinvested communities where CLTs often operate benefit from the stability that CLTs confer even if they have no formal involvement with the trust. CLTs support their communities in other ways too: beautifying distressed properties and increasing quality of life; slowing the tide of exclusionary gentrification and shielding residents from predatory lending; making space for recreation, relationship building, and even skills training; and establishing a base for community organizing. When CLTs are rewarding and remunerative for members and neighbors alike, they promote broad-based economic and social inclusion.

Community Land Trusts Invoke Black Freedom Dreams

Collective land ownership has been a mainstay in the Black freedom struggle. In the 1960s, Malcolm X remarked that "Land is the basis of freedom, justice, and equality," while Frantz Fanon observed that only land could bring Black people the "bread and dignity" that they needed to thrive. Community land trusts came to embody the practical application of these politics.

Black women were central to the development of modern experiments in common property. With New Communities, Inc., Shirley Sherrod founded one of the nation's first CLTs in 1968, when she and her husband Charles Sherrod established a 5,700-acre farm where Black families lived and stewarded the land under long-term ground leases (Davis, 2010). Fannie Lou Hamer's Freedom Farm Co-op employed a similar model in order to address racism and poverty simultaneously — applicants paid a

$1 membership fee and could then build family homes on land “owned by their friends and brothers” (Nembhard, 2014). Sherrod and Hamer championed cooperative economic development in an era when Black people faced limited access to credit and housing opportunity.

The racism and poverty that Hamer lamented remains embedded in the U.S. landscape. Due to decades of discriminatory housing policy and predatory lending, Black Americans trail white Americans in home ownership, the primary vehicle for intergenerational wealth transfer, yet lead in evictions, a trauma that disrupts school and work (Hepburn, Louis, & Desmond, 2020). During the COVID-19 pandemic, Black households were more likely to report being behind on rent than their white counterparts (Greene & McCargo, 2020). Prior to the pandemic, Black households were more likely to experience rent burden than white households were (Greene & McCargo, 2020). Though Americans across racial lines struggle to bridge the gap between housing costs and wages, the persistent racial inequities in housing outcomes merit special attention.

As permanent affordability tools, CLTs can foster the housing stability that has eluded many Black households. During the Great Recession, another crisis that disproportionately impacted Black families, mortgage delinquency and foreclosure rates were much lower in resale-restricted CLT homes than in market-rate, owner-occupied housing (Thaden, 2011). In theory and practice, CLTs hold promise for Black Americans.

Community Land Trusts Have Long-Term Capital Needs and Other Limitations

CLTs are often utilized to provide affordable homeownership opportunities to low- and moderate income households through a shared appreciation model (Miller, 2013). When a buyer purchases a home on land controlled by a CLT, the trust retains ownership of the land, while the buyer is the home’s sole owner. The buyer is bound by resale restrictions within their ground lease, deed, or mortgage documents. Typically, the resale restrictions stipulate that the home may be sold for only the original purchase price plus a specified percentage of its appreciated value, keeping the cost low for future buyers. Resale restrictions also establish income eligibility limits for potential buyers.

As nonprofit housing providers, CLTs incur many of the costs that are typical in the affordable housing space. They are responsible for expenses related to land acquisition, property maintenance, property taxes, and program administration. Subsidies are often required to make homeownership feasible for low-income buyers. Ground lease, resale, and membership fees are seldom enough to cover all of a CLT’s project and operating costs.

CLTs draw from a diversity of funding streams, both public and private. Local inclusionary zoning requirements and density bonuses can sponsor affordable units (Local Housing Solutions, n.d.). CLTs often solicit federal funding from the HOME Investment Partnership program, for affordable homeownership initiatives, and from the Community Development Block Grant program (“CDBG”), for neighborhood revitalization initiatives (Davis, 2010). Some savvy CLTs generate income from developer fees and other real estate-related activities, but most are beholden to external funders and their requirements (Blumgart & Axel-Lute, 2016). In a 2018 survey, the CLT convener Grounded Solutions found that the most prevalent CLT funding stream was individual and corporate donations, with 65% of respondents drawing from them in the past three years, followed by local foundations (53%), HOME (40%), and CDBG (33%) (Grounded Solutions Network, 2018).

Reliance on external funding can diminish CLT's emphasis on community control (DeFilippis et al., 2017). If CLTs engage funders who will only sponsor designated activities or who extend onerous reporting requirements, they may be unable to operate as the syndicate of "friends and brothers" that Fannie Lou Hamer envisioned. Community organizing may be deprioritized by funders focused on closing the affordable unit gap. Funders' dictates may crowd out opportunities for lessees and local residents to chart a course for CLTs' operations. It is therefore critical for stakeholders to pursue new, unrestricted funding streams and to advance CLT models that foster housing stability without losing sight of the democratic decision-making and cooperative economics that fueled CLTs' early years.

Community Land Trusts are Imperfect Racial Equity Tools

As their roots in the Civil Rights Movement suggest, CLTs can promote equitable development. They may be harnessed to address exclusionary gentrification and "organized abandonment," advancing racial equity (Gilmore, 2007). The Democracy Collaborative estimates that there are over 225 active CLTs across the United States, many of which operate in communities of color (Green, 2016).

Seattle's Africatown Land Trust is working to stem the tide of displacement. Africatown is pursuing homeownership and small business incubation in the hopes that these strategies will anchor Seattle's Black population amidst the tech-driven housing cost boom (Scruggs, 2020). In an effort to undo decades of extractive development, residents of Buffalo's historically Black Fruit Belt community have founded a CLT that resists speculation through an inside-outside strategy (Doig, 2020). By working inside the system and engaging power brokers, the Fruit Belt CLT negotiated a three-year moratorium on the sale of vacant lots. By working outside the system and engaging residents, the CLT fund-raised for land acquisition and mounted community campaigns to build public trust. Fruit Belt is now on track to create 50 new units of affordable housing in 2022 (Fruit Belt Community Land Trust, 2021). Dudley Neighbors, Inc., a Boston CLT, launched in 1988 to counter white and capital flight (Davis, 2010). After organizing an "urban redevelopment corporation," an entity with eminent domain authority under Massachusetts law, Dudley condemned and rebuilt vacant properties in the Roxbury and North Dorchester neighborhoods, transforming sites of arson and illegal dumping with community-based placemaking.

Despite the utility of CLTs in preventing displacement and jumpstarting revitalization, CLTs are still imperfect racial equity tools. There is an inherent tension between CLTs' permanent affordability protections and asset building, a perennial goal of anti-poverty policy. With their resale restrictions, CLTs are an accessible entrée to homeownership, yet limiting resale prices also limits sellers' equity.

Homeownership units on CLT land are not as valuable an asset as those bought and sold at the prevailing market rate. Moreover, CLTs do not rectify residential segregation. Anti-poverty policy has long been torn between fair housing and community development — whether to expand access to high opportunity areas or to reinvest in low-opportunity areas. CLTs, as tools for community wealth building and economic self-determination, are well-suited for the latter purpose. Pursuing the former, and thus fulfilling the potential of Moving to Opportunity, will take other policy tools.

CLTs, then, are not a cure-all. They can mitigate neighborhood disinvestment and insecure short-term tenancies, both of which disproportionately impact Black people, but they are poorly positioned to reverse the racial wealth gap. The pervasive legacy of housing discrimination and related state violence has yielded a collection of distinct, yet related policy problems. Undoing this legacy will require a suite of reparative strategies.

Reinvigorating Anti-Poverty Policy Will Require New Modes of Social and Economic Ordering

CLTs embody many of the highest ideals held by Black thinkers and doers, housing activists, progressive policymakers, and the housing and community development field at large. They provide for the individual by providing for the collective, fostering mutuality and reciprocity. They promote ownership and wealth creation, fostering choice and self-determination. They rely on democratic governance, fostering community control and public participation. When they are employed for homeownership, CLTs can stanch displacement and disinvestment. CLTs are thus a protean intervention, one that can help spur a new approach to urban and social policy.

It is an opportune time for the Biden administration to redouble HUD's commitment to the CLT model. The exigencies of the COVID-19 pandemic, particularly the looming "eviction apocalypse," have laid the turpitude of urban housing markets bare, while simultaneously providing an opportunity to reimagine public policy. Expanding the Low-Income Housing Tax Credit and slackening exclusionary zoning, not unlike the market-oriented reforms of the 1990s, are an inadequate fix for a housing crisis with roots in centuries-old oppression and exploitation. A dedicated, unrestricted CLT funding stream at the national level could demonstrate a commitment to investing public monies in models that reconfigure our housing regime through community control of land and housing.

Yet CLTs alone are not enough to counteract the longstanding racial inequities in housing outcomes, nor are they sufficient for addressing the marginalization of the multiracial working class within today's housing market. CLTs are an opportunity to reform housing provision with a new institution; they must be coupled with redistribution through subsidies and social housing, regulation through rent control and habitability protections, and repair through initiatives that work toward equitable access to and control of land. To be successful, urban policies must redress both the problems within a place and the institutional arrangements that produce those problems.

We are no longer in an "urban crisis," a euphemism popular among academics and public officials for the concentrated poverty and social ills that followed the Great Migration, but its component parts remain; they have morphed, dispersed, and reappeared (Katz, 2012). Problems once confined to "inner cities" have now sprawled across various populations and geographies. The housing question, once considered an inevitable part of the social order and later better understood as a function of discrimination, is now understood a consequence of widening gaps — the gap between wages and rents and the gap between the number of "affordable" units and the number of people who need them. Certain dilemmas of the urban crisis, like how to best balance fair housing and community development, remain unsettled. The antecedents of the urban crisis, including the U.S. housing regime's foundation of racialized dispossession and exclusion, are unchanged (Ramírez, 2020). The complexities of racial injustice, urban development, and economic hardship are ever present. They demand new tactics, ones that marry the clear-sightedness of social movements with the vim and vigor of the Great Society.

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How Can the U.S. Decommodify Housing?

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Introduction

Over the past few years, the United States has seen a resurgence of ambitious organizing around housing issues. Decades of deregulation and austerity have created the conditions for perpetual eviction and homelessness crises, while devolution of responsibility over housing provision to private actors has decimated state capacity to address housing needs. Groups like Housing Justice for All in New York State, Inquilinxs Unidxs Por Justicia in Minneapolis, and Moms 4 Housing in California, as well as national campaigns such as the People's Action's Homes Guarantee, are pushing legislators to abandon time-limited, market-driven solutions. Instead, organizers have called for a reorientation of housing policies toward decommodification, a shift that would redefine housing as a public good, while diminishing the impact of market pressures.

In this brief, I first situate housing commodification in the U.S. context and describe how race shapes the housing market. I then discuss the government's role in expanding housing commodification in recent decades. Finally, I outline an interconnected typology of policy proposals toward housing decommodification, including the expansion of social (or non-speculative) housing models; regulatory measures that protect tenants and defend Black, Indigenous and people of color (BIPOC) community wealth; and taxation policies that disincentivize housing speculation.

The racist construction of land value

Housing commodification—the process by which its economic value is elevated above all other uses—was fundamental to the establishment of the U.S. as a nation-state (Madden & Marcuse, 2016). The violent enclosures of land held in common by Indigenous people through organized violence, federal policy, and early court decisions were necessary precursors to commodification (Jenkins, 2017). Land enclosure and its subdivision for the extraction of economic value—often through the forced labor of enslaved Black workers–followed a racial logic. As Katherine McKittrick observes, "native reservations, plantations, and formal and informal segregations are just some of the ways the lands of no one were carved up to distinguish between and regulate the relations of indigenous, nonindigenous, African, and colonial communities" (McKittrick, 2013). Relationships between space and race were written into law, as seen in the racial zoning laws, redlining practices, and racially restrictive covenants in the early 20th century, and came to define how land was valued by private market actors such as lenders, developers, realtors, and landlords. Far from being neutral entities, the American housing market thus developed as "a reflection of our values" with "race…at the very center" (Illing, 2020).

The modern real estate industry professionalized in the early 20th century, institutionalizing racial logic within the U.S. housing market. The "racist theory of value" marking Black households as a risk to land values was explicitly written into manuals that standardized the property appraisal process (Taylor, 2019; Markley, 2020). The National Association of Real Estate Boards threatened to revoke memberships of realtors "disrupting patterns of racial homogeneity," while professional property assessment guidelines warned of "infiltration of inharmonious racial groups" (Taylor, 2019). When the federal government created the modern mortgage system in the 1930s, it codified existing racist market rationalizations, especially anti-Blackness, into federal housing and lending policy through redlining (Imbroscio, 2020). Underwriting guidelines for the Federal Housing Administration (FHA) were shaped by the real estate professionals enforcing the existing racist market logic. Federally insured thirty-year mortgages allowed white households to benefit from the commodity value of their homes and neighborhoods, which were coded as less risky than homes inhabited by non-white households (Taylor, 2019; Gibbons, 2018). The federal government thus expanded access to homeownership to a broad swath of white households, while denying similar benefits to households of color.

Redlining was common practice across the mortgage lending sector until the 1970s, when it was outlawed by the federal government. But, as Keeanga-Yamahtta Taylor (2019) documents, its abolition did not end racist practices within the U.S. housing market. Race-based exclusion from the lending and housing sectors was appended with predatory inclusion practices, which targeted Black households with government-supported financial products that were set up to fail, while generating massive profits for lenders, realtors, and developers.

Has housing become more commodified?

The extent to which housing is treated as a commodity has historically expanded and contracted (Madden & Marcuse, 2016). Over the past few decades, the pendulum has swung towards greater commodification as the government championed austerity, deregulation, and withdrawal from housing provision, thus creating a favorable environment for speculative investment. The shift from exclusion to predatory inclusion occurred as the federal government, under the Nixon administration, embraced market-driven policies that supported Black homeownership programs in urban neighborhoods because they both reinforced racist market logic and privatized the responsibility for housing provision.

Deep cuts to social safety net spending, including housing programs, accelerated under the Reagan administration. In 1981, a spokesperson for the U.S. Department of Housing and Urban Development (HUD) made clear that “the whole attitude that the federal government can solve all the housing problems of this country—those days are over” (Shashaty, 1981). The administration cut the HUD budget by three-quarters by 1988, especially targeting direct subsidy programs like public housing (Goodman, 2004). At the same time, the Reagan administration introduced indirect housing subsidies

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that transferred public wealth to the financial sector, while obscuring government involvement from view, like the Low-Income Housing Tax Credit (LIHTC)—a program Alyssa Katz (2018) has described as "a better-than-nothing gimmick that helps the poor by rewarding the rich." The shift from direct subsidies to indirect, time-limited tax credits that depend on complex financial relationships between corporate investors and affordable housing developers paved the way for the development of a highly profitable and commodifiable affordable housing industry.

While slashing federal housing assistance, the Reagan administration also loosened mortgage lending regulations, further opening up the housing sector for speculative investment. Under the banner of deregulation, the administration also sidelined enforcement of anti-discrimination laws hard won by civil rights organizers, including the Fair Housing Act of 1968, which provides the legal basis for challenging racist lending and real estate practices. The Reagan administration described its drive to "unleash the free market" through budget cuts and weakening regulation over the lending and real estate sectors in race-neutral terms. But these federal rollbacks were a revanchist drive against gains made by organizers and other advocates in the previous decades.

After Reagan, subsequent Republican and Democratic administrations continued to champion austerity and deregulation, while relying on market-driven solutions to fix social problems like evictions and homelessness—problems caused, in part, by austerity and deregulation. For example, in the years following the 2008 foreclosure crisis, Fannie Mae and Freddie Mac created a pilot program through which large investors could easily purchase and convert empty foreclosed homes into rental properties. The large financial firms that ultimately bought up over 200,000 of these properties had been heavily invested in the predatory subprime mortgage market in the lead up to 2008 (Semuels, 2019). Similarly, in the years leading up to the financial crisis, high cost cities like New York, large investors aggressively entered the rental market in high cost cities like New York, buying hundreds of thousands of units from local landlords, speculating on future property value growth by overloading buildings with unsustainable debt (Fields & Uffer, 2016; Madden & Marcuse, 2016). After the market crashed, some of the same corporate landlords continued to purchase rental buildings, now at a major discount, and sometimes with major subsidies from the city (Hornbach, Mironova, Stein, & Udell, 2021). The same dynamics are in play in aggressive investment in mobile home communities (Kolhatkar, 2021).

When legislative and policy conditions allow property owners to focus solely on profit maximization, the social uses of housing suffer. On the individual level, having an investor-landlord (whether a large multinational corporation or a small investor) puts tenants at greater risk for unjust evictions and rent hikes, coupled with diminished levels of maintenance (Samuels, 2019; Fields & Uffer, 2016). On the societal level, austerity and deregulation leads to housing instability, displacement, and homelessness.

What does decommodification look like?

In recent years, housing organizing has put pressure on federal, state, and local governments to undo decades of destructive policies and shape more equitable housing futures with housing decommodification as a central goal. These initiatives elevate the social value of housing above its economic value and redefine housing as a public good such as mass transit or libraries. For example, campaigns like the People's Action's Homes Guarantee are pushing for a housing system where every person in the U.S. is housed. Greater levels of social equality can be achieved by reducing segregation by race and income; restructuring policies that differential privileges based on housing tenure, privileging homeowners above renters and the unhoused; and granting residents greater levels of control over their homes. Decommodification policies can move the U.S. housing system toward these extremely ambitious goals.

Functionally, moving toward decommodification would require an interlocking system of complimentary policies. These should include subsidy programs supporting the expansion of social (or non-speculative) housing, regulations that protect renters and address racial discrimination in housing, and taxation polices and other enforcement mechanisms that limit speculation. Below, I outline examples of local and federal policies that would move the U.S. housing sector toward decommodification.

Non-speculative housing

One way the federal and local governments can promote decommodification is by deploying resources—money and land—toward the preservation and expansion of social housing models in the U.S. "Social housing" can be a somewhat elusive term, but serves as a useful umbrella for a variety of non-speculative housing models—public housing, nonprofit-managed rentals, and privately-run, limited-equity cooperatives on land stewarded by community land trusts—that shield homes from market pressures (Mironova & Waters, 2020). These models differ from the dominant contemporary modes of affordable housing programs in the U.S., which yield time-limited social benefits in the form of below-market units that are quickly privatized, transferring the benefit of the initial public investment to the developers and investors.

A core component of non-speculative housing models is perpetual public or nonprofit stewardship, which acts as a decommodification mechanism. Through a commitment to permanent affordability and ongoing operational support, owners (whether they are a public housing authority, a nonprofit, or a resident-led cooperative) do not face a financial incentive to raise rents, nor do they need to do so to raise money for repairs. These models reduce the financial risk of property ownership and discourage speculation, which is driven by investors betting on projections of quickly increasing rent rolls or underlying property values in order to take on risky debt. Depending on the model, homes operated as social housing are either fully shielded or less vulnerable to this type of predatory investment (Thaden & Rosenberg, 2010).

While social housing models exist in the U.S., they represent a small part of the housing market. In Austria and France, more than a third of rented apartments exist somewhere on a decommodification continuum, while in the Netherlands it is almost three quarters (Sethmann, 2017). American public housing – the largest non-speculative housing program undertaken by the U.S. government – has been relentlessly decimated and is both severely underfunded and curtailed from expansion by the Faircloth Amendment, a Clinton-era provision that limits the development of new public housing. A commitment to decommodification must at the foremost include sufficient federal funding to preserve the U.S.'s 1.1 million public housing apartments. A number of federal proposals aim to do this, including Representative Nydia Velázquez's (2021) Public Housing Emergency Response Act, which would allocate $70 billion for capital repairs and Representative Alexandria Ocasio-Cortez's Green New Deal for Public Housing Act (2019), which would commit up to $172 billion over ten years to green retrofits.

Beyond preservation, a commitment to decommodification must be grounded in a broader federal housing program supporting the development of non-speculative housing models. In 2019, the People's Action's Homes Guarantee campaign called for the development of 12 million homes outside of the speculative housing market that balances the complementary goals of "improving housing quality and security in disinvested communities, preventing displacement in gentrifying areas, and expanding access to historically exclusionary, predominantly white areas with many amenities" (People's Action, 2019). The related Homes for All Act, introduced by Representative Ilhan Omar, would authorize the construction of 12 million new public and social housing units, while making public housing a mandatory part of the federal budget, thus making it more difficult to defund. A proposal from the Urban Democracy Lab would create a new agency to acquire and rehabilitate housing that has become distressed during the course of the pandemic, channeling it toward social housing development (Baiocchi & Carlson, 2020).

A robust expansion of social housing cannot take place without a major funding commitment from the federal government. Local government buy-in is nevertheless extremely important, as city and state agencies will ultimately be responsible for implementation and ongoing oversight. Further, local and state governments can also channel their own resources toward social housing. Some program examples include local and state-owned public land targeting, distressed and tax foreclosed housing transfers, and taxation schemes that privilege social over speculative housing development.

Defense of BIPOC community wealth

A true commitment to addressing racist exclusion and predatory inclusion would work in tandem with a government commitment to social housing expansion. The fragmentation of the housing market by race is profitable for actors across the housing sector, including landlords, lenders, assessors, and realtors. It is an active driver of housing speculation in the U.S. (Taylor, 2019; Satter, 2010). Active legal enforcement of the Fair Housing Act and the Affirmatively Furthering Fair Housing (AFFH) rule, as well as an expansion of the Home Mortgage Disclosure Act (HMDA) and the Community Reinvestment Act (CRA) would help limit racist speculative practices.

Further, periods of rapid housing speculation in the U.S.– including the gentrification of cities like Los Angeles, New York, and Chicago – have often been rooted in "racial disparities in the defense of *wealth*: the relative ability to defend wealth from expropriation, whether through violence, state-sanctioned seizure, and sometimes both" (Jenkins, 2017). Government support for mechanisms that defend BIPOC community wealth, including support for Black-owned financial institutions (Movement for Black Lives) and Indigenous-led land trusts can act as decommodification mechanisms (Singh, 2019).

Tenant protections

Deregulation has made single family rentals and apartment buildings highly attractive assets for speculative investment(Fields & Uffer, 2016; Madden & Marcuse, 2016). Increased financial sector oversight and regulation are necessary step to disincentivizing speculation. At the same time, increased government intervention in the housing market on behalf of tenants can help challenge commodification by limiting the extraction potential of any individual house or apartment building. For example, the federal government could push for removal of the rent control preemption laws currently on the books in 37 states. Local and state governments can support organizing efforts for rent control and just cause eviction protection ordinances that are currently underway in states like Illinois and cities like Philadelphia (Chew & Treuhaft, 2019).

All levels of government can give tenants more power over what happens to their homes during real estate transactions or foreclosures. For example, Rep. Ilhan Omar's Rent and Mortgage Cancellation Act (2021) would require landlords to provide notice when their properties go up for sale and establish an affordable housing acquisition fund. Cities and states can create their own acquisition funds and give tenants the right of first refusal when their buildings go into foreclosure or up for sale. Washington D.C. already has a right of first refusal law on the books and current organizing efforts for similar laws are underway in California, Massachusetts, and New York (Gilgoff, 2021).

More broadly, tenants and homeless people have been at the front of decommodification struggles across the U.S., ranging from building-level challenges to speculative business practices by individual landlords to city and state-wide campaigns for more housing resources. Policies that support organizing and resident leadership development—including legally defined tenants' rights, decriminalization of homelessness, and dedicated funding for education, technical assistance, and organizing—would broadly bolster decommodification struggles.

Taxation

In addition to deploying its regulatory powers, government can also use taxation to curb some of the worst real estate investment practices. By taxing investor behaviors associated with speculation, the government can make these activities less profitable, and thus less attractive. Some examples include: warehousing and vacancy taxes, which tax vacant apartments or unused land held off the market; flip taxes, which discourage quick property sales; out of state transaction taxes, which discourage absentee landlords; and land value uplift taxes, which tax appreciation associated with social and economic changes in a neighborhood, rather than material improvements to a property (Homes Guarantee, 2020). Governments can also tax all-cash transactions and pied-a-terre apartments where the ultra-wealthy park their wealth.

Conclusion

A major commitment to decommodification is a long-term goal that requires redefining the public sector's role in housing provision and stewardship, a vision for which local and national groups are organizing. While the U.S. is today politically and economically far from this re-definition, with the Biden-Harris administration unlikely to embrace an abandonment of market-oriented solutions on its own, local and national groups are organizing for coalescing around a transformative housing vision.

Reflecting on the Lincoln, Roosevelt, and Johnson presidencies, Bob Master writes that it was "a combination of crisis and mass movements that transformed these presidents, pushing them to enact far-reaching policies that were unimaginable at the beginning of their tenures" (Master, 2020). A well-organized mass movement focused on racial and economic justice may be able to push the Democratic party toward policies that address public housing's capital backlog, increase funding for nonspeculative housing models, hold racist lenders and landlord accountable, or enact stronger tenant protections. The scale of the pandemic's impact makes the need for such a vision even more pressing.

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The Campaign for a National Homes Guarantee

Tara Raghuveer, Homes Guarantee Campaign Director, People's Action; Director, KC Tenants

The Homes Guarantee is based on a simple premise: We live in the richest country in the history of the world, and so we can and we must guarantee that everyone has a home.

The Homes Guarantee is a campaign that aims to transform housing from commodity to public good, and to guarantee housing as a human right once and for all. This is a simple premise, but one that is complicated by a conspiracy of profiteers. This has stifled our imagination, leaving us to believe that housing is a commodity, not a right, and that it must be delivered by the private market. The Homes Guarantee offers a fundamental critique of a system that commodifies one of our most basic needs, our homes, while proposing an alternative: housing guaranteed as a public good, prioritizing people over profits.

Leaders like Tiana Caldwell, Vernell Robinson, David Zoltan, and Jermain Abdullah are among the many visionaries—including tenants, public housing residents, and unhoused people—who first demanded a Homes Guarantee based on their lived experiences with market failure:

- Tiana is the descendant of slaves, the granddaughter and daughter of veterans who did not benefit from the G.I. Bill. She grew up in poverty in Parsons, Kansas. Tiana was diagnosed with ovarian cancer in spring 2018 and forced to make an impossible choice between receiving cancer treatments and paying rent. Tiana chose to live, and her landlord evicted her. Her family became homeless, spending between $300 and $500 every week to live in a hotel for six months.

- Vernell is a public housing resident in Far Rockaway, Queens. Vernell survived Superstorm Sandy and experienced undrinkable water and mold after the storm worsened the city's already-crumbling public housing.

- David was injured on a job, lost a leg, and discovered that less than one percent of all apartments in Chicago, where he lives, are both affordable and accessible to people with disabilities. He eventually found an accessible place to live, but it costs him $1050 per month. His monthly disability check is only $950.

- After Jermain left prison, he lived in a homeless shelter for three years. The shelter was filthy, the roof leaked, and roaches crawled on the sink and toilet seats. To Jermain, the shelter felt like prison all over again.

These stories are not isolated or extreme, but rather very typical outcomes of America's systemic and racialized housing emergency. In 2021 workers earning minimum wage cannot afford a twobedroom apartment in any county —urban, suburban, or rural —in the United States (National Low Income Housing Coalition, 2018). Twelve million households pay over fifty percent of their income towards rent (Joint Center for Housing Studies, 2019). Only one in five households that qualifies for federal housing assistance receives it (Scally et al., 2018). America has betrayed public housing communities through decades of racist disinvestment and neglect; too often, residents face a brutal choice between appalling conditions or rehousing promises that are insufficient—less affordable, far away—or simply never materialize (National Housing Law Project, 2002). Millions of families and individuals experience homelessness, living doubled up with friends, in their cars, or on the streets (Center for Budget and Policy Priorities, 2019). Millions more live one medical bill or flat tire away from homelessness (Ellen et al., 2020; Desmond, 2012).

America's land and housing policy, since the earliest days of this settler state, has been built on theft, extraction, and exclusion. As explored by Cedric Robinson (1983) in Black Marxism, racial capitalism refers to a racialism that "permeate[s] the social structures emergent from capitalism." Essentially, race is fundamental to capitalism. Racial capitalism is a system built on race and class in which wealthy people, who are overwhelmingly white, gain wealth, profit, and power from the exploitation and oppression of working class and poor people. Our housing system is one of the clearest expressions of American racial capitalism.

The harm brought by this system has grown all the more pronounced during a deadly pandemic and corresponding economic crisis. Before the possibility of widespread vaccine distribution, housing was the best option for virus prevention and treatment. Government officials and public health agencies told us to keep ourselves and our neighbors healthy by staying home. But for many tenants and unhoused people, that was never an option. For others, sheltering in place provided tenuous protection at best, as people lost work and fell behind on rent. Tenants accrued rental debt, landlords sued for possession of property, and people were forced to the streets.

In September 2019 grassroots leaders, many from organizations affiliated with People's Action, and policy experts released **a briefing book** that described the Homes Guarantee, including demands for the federal government to:

- Build 12 million social housing units and eradicate homelessness;
- Reinvest in existing public housing;
- Protect renters and bank tenants;
- Pay reparations for centuries of racist housing policies; and,
- End land and real estate speculation and de-commodify housing.

To achieve scaled investment, fundamentally intervene in the private housing market, and avoid patchwork state policies, it is our view that most, if not all, of these steps must involve the federal government. States and localities can take steps towards a Homes Guarantee by pursuing municipal social housing, passing tenant protections, regulating speculators, and more, but the transformation of housing from commodity to guaranteed public good requires federal intervention.

Fully realized, this proposal would guarantee homes for all. Rents would be set based on tenants' needs and real construction and maintenance costs to local governments, rather than speculative market prices. Land would be stewarded by and on behalf of everyday people instead of financialized by developers and landlords. A Homes Guarantee would offer both reparative and proactive approaches, including restorative justice to communities impacted by decades of discriminatory housing policy, as well as investments that slash carbon emissions and support resiliency against ongoing climate breakdown.

SOCIAL HOUSING: The Homes Guarantee calls for Congress to pass legislation that would build 12 million new social housing units—rental units provided below market rates (Gowan and Cooper, 2019)—over the next ten years. Rents are charged according to either real costs-based or income-based formulas. Social housing is permanently removed from the private market: in some cases, it can be owned and operated by municipal governments or nonprofit housing providers. In other cases, as with limited-equity cooperatives, land trusts, or mutual housing associations, residents may own a stake in their homes at subsidized rates, and they cannot sell them for exorbitant profit. Models for social housing exist in several other countries and can serve as a basis for designing an American program (Gowan and Cooper, 2019). Twelve million homes is a necessary target, and one that is viable, based on the scale of large social housing programs around the world (Joint Center for Housing Studies, 2019).

ANTI-RACIST ZONING: Racism—in the form of redlining, racially restrictive covenants, exclusionary zoning, segregation based on race and income, and other forms of explicit and implicit discrimination—has shaped American housing and neighborhoods. The Homes Guarantee argues that new, thoughtfully-sited social housing can offer a corrective for centuries of harm. A federal "social housing zoning law" would both eliminate exclusionary zoning and facilitate social housing by preempting state and local governments from restricting social housing developments. The federal government should incentivize PHAs and municipalities to develop social housing or, where local partners are uncooperative, work directly with nonprofit developers and CLTs. The distribution of social housing units should ultimately "reflect a balance among the complementary goals of improving housing quality and security in disinvested communities, preventing displacement in gentrifying areas, and expanding access to historically exclusionary, predominantly white areas with many amenities" (People's Action, 2019).

PUBLIC HOUSING: There are approximately 1.1 million public housing units in the United States, providing housing to over two million people (National Low Income Housing Coalition, 2019).

Existing public housing units require more than $70 billion in physical improvements to remedy dilapidation and poor conditions (Vock, 2019). Moreover, 66% of public housing residents are people of color. Congress's failure to adequately fund ongoing maintenance and repairs in public housing thus represents a major driver of racialized housing inequality, and disproportionately denies people of color the right to a safe and healthy living environment. A Homes Guarantee requires a recommitment to public housing, beginning with the repeal of the Faircloth Amendment, which prohibits new public housing construction, as well as a multi-billion-dollar reinvestment in existing public housing. Congress should fund these initiatives at a level of at least $30 billion annually for the next five years, for a total investment of $150 billion. Funding should go first to clearing the current backlog in repairs, and then toward a major renovation and capital improvement program that includes investments in basic infrastructure, accessibility, weatherization, and climate resiliency.

TENANT PROTECTIONS: A federal Homes Guarantee means that every household in the United States—whether they rent or own—has a dignified and affordable home. Today, both renters and owners are subject to the instability of underregulated and predatory industries that cause evictions, displacement, and foreclosure. A fully realized Homes Guarantee asserts a new balance of power between renters and property owners, and between owners and lenders. A National Tenants' Bill of Rights is critical to a Homes Guarantee and must apply to all tenants—no matter their income, where they live, what kind of housing they live in, or what land they live on. A National Tenants' Bill of Rights should include universal rent control, national right to lease renewal (or "good cause eviction"), a ban on source of income discrimination, a right to counsel in eviction proceedings, an enforceable right to truly affordable and accessible housing, and the right to organize and collectively bargain. Additionally, Congress should invest in a $200 billion Community Control and Anti-Displacement Fund that would provide grants to local governments for anti-displacement initiatives, supporting local efforts to regulate exploitative developers, re-house people who have been displaced, and support alternative ownership models.

REPARATIONS: The United States has never addressed the brutality of Native genocide and removal, and slavery, and their enduring legacies; our housing and land ownership systems remain deeply racialized. A Homes Guarantee on its own is not enough to establish equal footing among communities that have been affected by this legacy. Even so, a Homes Guarantee must make every effort to repair the racist ground on which current housing policy stands, and to provide a measure of redress for the physical and economic violence that our government and private actors have perpetuated through the housing market. Reparative policies could include (but are not limited to) principal cancellation or reduction, grants and zero-interest loans to Black and brown communities, return of public lands to Indigenous hands.

DECOMMODIFICATION: Speculation is the process of buying land or housing with the intention of using it as an investment vehicle rather than as a place to live. While communities fight for the right to safe, accessible, sustainable, and permanently affordable housing, investors see the markets for housing and land as an arena in which to park capital and accumulate more wealth. As long as speculation of land and real estate is commonplace, and housing is commodified, the housing and rental markets will continue to be unstable and predatory. A Homes Guarantee must end land and real estate speculation. Congress should investigate the practices of speculators across the country, including big and small corporate entities that shield owners from accountability to tenants, municipalities, and federal regulators. Federal tax structures should also be directed towards de-incentivizing speculation and its negative community impacts.

PEOPLE'S HOUSING COMMISSION: Congress should create a People's Housing Commission, including representatives from Congress and the White House; tenants of private rental housing, manufactured housing, public housing, and other subsidized housing; people experiencing homelessness; nonprofit developers; public housing authorities; fair housing advocacy groups; legal service providers; state and municipal government; and other relevant, non-corporate stakeholders. The Commission should conduct a people-centered housing needs assessment. The needs assessment should jumpstart a move away from defining "affordability" in relation to Area Median Income (AMI), and introduce a new measure of affordability defined by tenant need, not by what the market will allow.

A GREEN NEW DEAL: A Homes Guarantee must be understood as a critical component of a Green New Deal, and every housing intervention within the Homes Guarantee must also be a climate intervention. Prioritizing working class and racialized communities means leveraging investments in social housing and working class neighborhoods to achieve these outcomes, and to ensure that benefits go first to those who have borne the greatest brunt of pollution, climate harms, and economic disinvestment.

The grassroots team behind this campaign believes that the Homes Guarantee is not a radical idea— it's an economic, political, and moral necessity. Its vision is big and bold, on purpose. It will require a fundamental restructuring of our society and our economy. As Tiana Caldwell said in December 2020, "We need to update this vision, because a lot has changed since we first proposed the Homes Guarantee. But, thankfully, we don't have to go back to the drawing board. We basically just need to make this vision even bigger, even bolder to account for the more acute catastrophes caused by COVID."

A new presidential administration and Democratic control of the Senate present an opportunity to forge a new path ahead, to a more just future. This is not a time for dancing around the edges. This is not a time for incrementalism. This is the time for overhauling the system that has caused such harm, and transforming it into a system that can heal by guaranteeing the dignity brought by a stable home. Congress can start by passing an enforceable National Tenants' Bill of Rights, a key stepping stone to correct the power imbalance in today's housing market.

How do we get to a Homes Guarantee? There is no shortage of clarity on the problems at hand or good proposals to solve them. Instead, the main obstacle between us and a Homes Guarantee is lacking political will. In today's economy, and in today's political reality, a Homes Guarantee seems impossible. But organizing is about creating the conditions to change what is possible.

We—the tenant movement and those committed to a Homes Guarantee—must dream big, and we must be disciplined in our focus to build the people power we will need to win this world we deserve. On a fundamental level, that means meeting people where they're at and inviting them into public life, moving from personal pain to collective rage and then to public power.

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PART V.
Fair Housing for Publicly-Funded Production: A Nuts and Bolts Look at LIHTC Reform

How the Federal Government Can Promote Fair Housing in the LIHTC Program

By **Peter Kye**, Law and Policy Associate, Poverty & Race Research Action Council

The Low-Income Housing Tax Credit (LIHTC) program is a critical source of federal funding for producing and preserving affordable housing in the United States. Since LIHTC was first authorized in 1986, it has helped put over 3.2 million housing units into service between 1987 and 2018. Over seven million low-income households currently live in units financed by LIHTC. Today, LIHTC is the single largest program for developing affordable housing across the nation.

Unlike other federal housing programs, LIHTC operates through the tax code and is administered jointly by the U.S. Department of the Treasury and state housing finance agencies. The Internal Revenue Service (IRS) allocates tax credits to states, and state housing finance agencies (HFAs) use qualified allocation plans (QAPs) to outline the criteria used to select which projects will be awarded tax credits. HFAs often establish preferences in QAPs to further policy goals, such as serving particular populations or targeting development in specific locations.

Owners or developers of a project typically partner with investors who receive tax credits in exchange for equity to finance construction. Selling tax credits to investors allows developers to borrow less money for construction and charge lower rents. Once a project has been completed, LIHTC properties are subject to affordability requirements. LIHTC rents cannot exceed 30% of the area median income. Additionally, owners must either 1) rent at least 20% of units to tenants who make no more than 50% of the area median income; 2) rent at least 40% of units to tenants who make no more than 60% of area median income; or 3) rent at least 40% of units to tenants making an average of no more than 60% of area median income.[1] New LIHTC projects are required to remain affordable for 30 years, though some states impose longer affordability requirements.[2]

Despite the LIHTC program's important role in producing and preserving affordable housing units, its administration and design has long raised fair housing concerns. The large scale of the LIHTC program means that it has a significant impact on the siting of affordable housing development; LIHTC siting decisions ultimately determine where many low-income families live throughout the United States. The program could thus be a vehicle for helping families find housing in lower-poverty neighborhoods that are rich in opportunity and for reducing residential segregation. Unfortunately, in practice, LIHTC investment instead often perpetuates entrenched patterns of concentrated poverty and racial segregation.

The need to address these fair housing concerns has become even more urgent. The ongoing pandemic has led to housing and economic crises that have devastated families and exacerbated

1 Rev. Rule 2020-4: Section 42. Low-Income Housing Tax Credit

2 The Urban Institute, The Low-Income Housing Tax Credit: How it Works and Who it Serves

longstanding disparities. Moreover, a renewed movement for racial justice over the past year has prompted a national reckoning with the effects of systemic racism and how to advance equity, including in housing. As a new administration and a new Congress begin to address these challenges, housing policy must be a top priority. Now is the time for strong administrative and legislative action to improve the LIHTC program and enhance its ability to help families. This essay lays out key fair housing challenges facing the LIHTC program and offers a set of strategic federal legislative and administrative recommendations to make LIHTC a more forceful response to segregation.

Key Issues with LIHTC

A fundamental problem with LIHTC is the federal government's failure thus far to provide sufficient civil rights guidance, oversight, and enforcement for the program. The Treasury Department has not issued sufficient civil rights regulations or guidance for LIHTC, including regulations under Title VI of the Civil Rights Act and the Fair Housing Act. For example, Treasury's Final Rule issued in 2016 implementing Title VI does not include LIHTC. Treasury regulations do not safeguard against segregation, despite the legal mandates of Title VIII (as well as Title VI). Insufficient data about tenants in LIHTC properties and a lack of enforcement mechanisms also weaken civil rights protections. The lack of civil rights oversight of LIHTC stands in stark contrast to the regulatory regime around housing assistance programs that are administered by the Department of Housing and Urban Development (HUD). While HUD programs also have problems with ongoing poverty concentration, those programs have guardrails in place such as site selection standards, affirmative marketing requirements, and others.

Additionally, in its current form, LIHTC does not do enough to provide low-income families with access to integrated, well-resourced communities, instead concentrating family units in poorer, racially segregated neighborhoods. The Treasury Department also fails to ensure meaningful access to that portion of LIHTC units that are located in areas of opportunity by requiring appropriate tenant selection and marketing.[3] These issues in the LIHTC program reinforce patterns of residential segregation and lock out many families from opportunity. The legislative and regulatory structure of LIHTC must be revisited to improve access to opportunity.

Geographic concentration

Compared to other rental units, LIHTC properties are disproportionately sited in neighborhoods that have higher levels of poverty and are racially segregated.[4] LIHTC units, relative to the rental housing market as a whole, are also more likely to be located in neighborhoods with more pollution,

3 Poverty & Race Research Action Council. (*2004).Civil Rights Mandates in the Low-Income Housing Tax Credit (LIHTC) Program*. http://www.prrac.org/pdf/crmandates.pdf

4 Fischer, W. (2018). *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*. Center on Budget and Policy Priorities. https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor; Poverty & Race Research Action Council. (2004). Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program. http://www.prrac.org/pdf/crmandates.pdf

higher crime, and weaker labor markets.[5] Moreover, LIHTC units are more likely to be located in areas with lower-performing schools.[6] In addition, there are noticeable disparities among LIHTC residents: poor residents are more likely than nonpoor residents to live in disadvantaged areas and tenants of color are more likely to live in disadvantaged areas than white tenants, especially in racially segregated metropolitan areas.[7] These disparities in neighborhood conditions can have a profound effect on educational attainment and economic success for children.[8] A growing body of research has found that living in high-poverty areas with lower-performing schools and higher levels of crime can lead to negative long-term outcomes for children.[9] The current structure of the LIHTC program leads to unbalanced development in many areas and may thus actually help perpetuate deeply entrenched patterns of residential segregation and disadvantage.

The LIHTC program requires all state agencies that award tax credits to develop a Qualified Allocation Plan (QAP). A QAP outlines the eligibility criteria and priorities that are used to determine how to distribute tax credits. QAPs are key to the implementation of the LIHTC program and help to influence siting patterns for LIHTC developments.[10] Yet, many state QAPS do not adequately take fair housing concerns into consideration. Indeed, some QAPs exacerbate segregation by giving considerable weight to local opinion about potential development, often preventing LIHTC units from being constructed in areas with opportunity due to local opposition.[11] Reforming QAPs is an important way to improve the program's ability to increase equity and access to opportunity, but federal regulatory and legislative reforms are needed as well. The IRS has largely failed to exercise oversight of HFAs and declined to regularly review QAPs[12] Its failure to monitor QAPs and issue rules overseeing QAPs helps contribute to residential segregation.[13] The Treasury Department has also not

5 Ellen, I.G., Horn, K.M., & Kuai,Y. (2018). Gateway to Opportunity? Disparities in Neighborhood Conditions for Low-Income Housing Tax Credit Residents. *Housing Pol'y Debate 28* (4) 572-591. https://doi.org/10.1080/10511482.2017.1413584

6 Ellen, I.G., & Horn, K. (2018). Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance. https://www.prrac.org/pdf/HousingLocationSchools2018.pdf

7 Ellen, Horn, & Kuai. (2018). Gateway to Opportunity? Disparities in Neighborhood Conditions for Low-Income Housing Tax Credit Residents. *Housing Pol'y Debate 28* (4) 572-591.

8 Chetty, R., Hendren, N., & Katz, L.F. (2016). The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment. *American Economic Review*, 106(4), 855–902. https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20150572

9 Mazzara, A., & Knudsen, B. (*2019).Where Families with Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas*. Center on Budget and Policy Priorities & Poverty and Race Research Action Council. https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers

10 Ellen, I.G., & Horn, K.M. (2018). *Points for Place: Can State Governments Shape Siting Patterns of Low-Income Housing Tax Credit Developments?*.https://furmancenter.org/files/Can_State_Governments_Shape_Siting_Patterns_of_LIHTC.pdf

11 Poverty and Race Research Action Council. (2015). *Building Opportunity II: Civil Rights Best Practices in the Low Income Housing Tax Credit Program (2015 update*). http://www.prrac.org/pdf/BuildingOpportunityII.pdf.

12 United States Government Accountability Office (2015). Joint IRS-HUD Administration Could Help Address Weaknesses in Oversight. https://www.gao.gov/assets/gao-15-330.pdf

13 Daniel, M. M., & Beshara, L. B. (2008, March 12). Re: petition for rulemaking involving 26 C.F.R. § 1.42-17 Qualified Allocation Plan. https://prrac.org/pdf/IRS_Petition_for_Rulemaking.pdf

issued any specific site selection or affirmative marketing requirements for the LIHTC program.[14] The LIHTC statute does direct states to prioritize projects in Difficult to Develop Areas (DDAs) which have higher construction costs and tend to be lower-poverty neighborhoods. However, the statute also directs states to prioritize development in qualified census tracts (QCTs), which are areas with a high-concentration of low-income households, as long as the development contributes to a concerted community revitalization plan (CCRP). This CCRP requirement is often disregarded in practice. In addition, developers are awarded basis boosts – increasing the tax credit value of the property – for any developments in QCTs, regardless of whether they are accompanied by a CCRP.

The statute does not provide guidance on how to reconcile the ability and incentives to develop in QCTs with the Fair Housing Act's goals of deconcentrating poverty and promoting integrated communities and state approaches to projects in QCTs vary widely.[15] In practice, the lack of federal civil rights guidance in the LIHTC program has helped contribute to the concentration of LIHTC units in racially segregated areas with high levels of poverty that do not have a meaningful revitalization plan.

Lack of Access to Housing in High-Opportunity Areas

Another area of concern is the fact that even when LIHTC development takes place in high-opportunity areas, especially in suburbs, it often remains inaccessible to low-income families. Unlike other federal housing programs, there are no federal regulations governing affirmative marketing strategies and tenant selection in LIHTC. Affirmative marketing includes practices such as special outreach efforts to underrepresented communities and are important to help historically marginalized groups such as low-income families of color, people with limited English proficiency, and Section 8 Housing Choice Voucher (HCV) holders find out about housing options, especially in neighborhoods that are unfamiliar to them.[16] Along with affirmative marketing, nondiscriminatory tenant selection can help to foster diverse communities and ensure equal access to housing. A range of tenant selection procedures such as waitlist management and screening criteria can directly influence the demographics of LIHTC developments. Without these practices, there is a risk that many low-income households of color will not have meaningful and equal access to LIHTC units and that the program will not realize its potential to help foster diverse integrated communities.

Recommendations for Federal Administrative Action

Both Treasury and HUD must take action to incorporate stronger civil rights protections into the LIHTC program. The following are several recommendations to help ensure that the LIHTC program is administered in a way that will improve access and reduce segregation.

14 Poverty & Race Research Action Council. (*2004).Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program.* http://www.prrac.org/pdf/crmandates.pdf

15 Poverty and Race Research Action Council. (2015). *Building Opportunity II: Civil Rights Best Practices in the Low Income Housing Tax Credit Program (2015 update).* http://www.prrac.org/pdf/BuildingOpportunityII.pdf.

16 Haberle, M, Gayles,E & Tegeler, P(2012). *Accessing Opportunity: Affirmative Marketing and Tenant Selection in LIHTC and Other Housing Programs*

Civil Rights Mandates

Under the affirmatively furthering fair housing (AFFH) provision of the Fair Housing Act, all federal housing programs—including LIHTC—are required to advance the goals of the Act by actively taking steps to address and eliminate housing discrimination and segregation. However, the Treasury Department has no regulations or guidance to implement the duty to affirmatively further fair housing. Treasury should explicitly recognize that it has a duty to AFFH and review its policies to ensure that the LIHTC program is operating in a way that affirmatively furthers fair housing.

Additionally, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs and activities, whether by intent or by a seemingly neutral policy or practice. Although the Treasury issued a final Title VI rule in 2017, it did not explicitly include LIHTC in the list of programs covered by the rule.[17] The significance of the LIHTC program and the risk of noncompliance in the program should prompt Treasury to revise the rule to explicitly incorporate LIHTC.

Reducing Geographic Concentration

Segregation in the LIHTC program is also the result of a regulatory framework that does not do enough to consider how siting practices can affect access to opportunity. In order to meet its AFFH responsibilities and increase geographic balance in the program, Treasury should issue detailed guidance regarding the siting of LIHTC units, similar to how HUD issues site and neighborhood standards for publicly supported housing. These standards should go beyond the current HUD standards, however, and take opportunity metrics into account in order to allocate tax credits equitably across a region and achieve balanced development.[18] Current HUD standards are designed to prevent housing construction in racially concentrated neighborhoods but are not applied consistently and do not address specific scenarios such as gentrifying areas where families face displacement. LIHTC siting standards that incorporate opportunity metrics looking at different dimensions of opportunity can be applied consistently on a regional level, permit housing investment in gentrifying neighborhoods that are not yet racially integrated, and help more LIHTC residents access high-opportunity areas.

Treasury can also do more to make sure that state QAPs do not contribute to segregation. The Department could adopt a rule to fully monitor and supervise state QAP plans to ensure compliance with fair housing laws. Such a rule could also require states to incorporate site selection criteria that prioritizes balanced geographic distribution and other fair housing concerns in order for their QAPs to be approved by the IRS.

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17 31 C.F.R. §22 (2017).

18 Tegeler,P. Korman, H., Reece,J., & Haberle, M. (2011). *Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD's Site & Neighborhood Standards as Applied to the Low Income Housing Tax Credit.* https://prrac.org/pdf/OpportunityandLocationOctober2011.pdf

Importantly, the Treasury Department can also issue more detailed guidance on concerted community revitalization plans. Section 42 of the IRS code requires QAPs to give a preference in LIHTC allocation to "projects which are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan (CCRP)."[19] However, too many state HFAs either do not follow the statutory requirement, do not define what constitutes a CCRP, or do not identify the components of a CCRP. This leads to wide variation in state practices regarding LIHTC development in QCTs. In 2016, the Treasury Department released a notice acknowledging the importance of an actual community revitalization plan, and suggested that the Department might consider setting guidelines in the future.[20]

The absence of a meaningful definition of CCRPs risks concentrating LIHTC investment in high-poverty areas that exacerbates racial segregation and the negative effects of concentrated poverty. The Treasury Department should follow up on its 2016 Notice and issue guidance that defines CCRPs and provides threshold criteria to be used for assessing CCRPs. For example, a CCRP should describe the resources that have been committed to it, set clear geographic boundaries, and include both housing and non-housing development.[21] Defining each component of a CCRP and establishing clear criteria can help states evaluate CCRPs and ensure that LIHTC projects in QCTs will meaningfully further fair housing and community development goals.

Although HUD does not directly administer LIHTC, it does play a significant role in site selection for the program. HUD is in charge of identifying QCTs and DDAs, and has significant discretion in defining these areas. DDAs are areas with high land, construction, and utility costs relative to the area median income and, like QCTs, receive preferences for tax credits. HUD currently uses a fairly rigid set of criteria for DDAs but should also use opportunity metrics linked to development cost and incomes within metropolitan areas in order to designate DDAs to incentivize development in high-opportunity areas.

Improving Access to LIHTC

Affirmative marketing includes a range of practices such as advertising in a wide range of media outlets, community outreach, providing information about neighborhood features, and targeting a broad geographic area to broaden the pool of potential applicants. When used effectively, affirmative marketing can help tenants learn about housing choices and be a key tool to help overcome past discrimination and exclusion from certain neighborhoods. Affirmative marketing is especially important to help attract a wider range of tenants to LIHTC developments that are located in areas of opportunity. Treasury can either incorporate HUD's affirmative marketing regulation or issue guidance on affirmative marketing specifically for LIHTC. Treasury could also consider requiring

19 26 U.S.C. § 42(m)(1)(B)(ii)(III)

20 IRS Notice 2016-77, https://www.irs.gov/pub/irs-drop/n-16-77.pdf.

21 PRRAC (2017). *Assessment Criteria for "Concerted Community Revitalization Plans: A Recommended Framework,"* available at https://prrac.org/pdf/PRRAC_CCRP_recommendations_3_14_17.pdf

HFAs to incorporate affirmative marketing into their QAPs and require developments to submit affirmative marketing plans as well as tenant selection plans. More guidance on nondiscriminatory tenant selection that provides information on what practices should be avoided and that suggests other nondiscriminatory practices would also be beneficial.

LIHTC property owners are prohibited from discriminating against applicants with Housing Choice Vouchers. In practice, however, this provision often goes unenforced and voucher holders continue to face discrimination in their housing searches. Treasury should issue guidance clarifying that owners must protect the rights of voucher holders. Treasury should also reaffirm that states are responsible for monitoring compliance with the nondiscrimination provision as part of their review and monitoring processes.

Data collection is also central to improving fair housing oversight. In 2008, Congress required state HFAs to submit certain demographic and economic information on LIHTC tenants to HUD. This includes information on race, ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments.[22] However, compliance with this provision has been incomplete. HUD does not release project-level data and only reports state-level data. Many states also report incomplete data. These gaps in data mean that we know less about households served by LIHTC than households served by other federal housing programs. To address this, HUD should release project-level data on the characteristics of LIHTC tenants. Although HUD collects data, Treasury should also do more to help fill in data gaps. For example, it should direct HFAs to report complete data and collect applicant data for each LIHTC site. Applicant data along with better occupancy data can help reveal how well the LIHTC program is serving different populations as well as the extent of segregation in the program. Such information is important to help determine how to expand access to opportunity and enforce civil rights protections.

Recommendations for Congressional Action

Congress can also take several measures to prioritize fair housing in the LIHTC program. Some states consider local approval or opposition as well as local contributions to a project as either a basic requirement to receive credits or as part of the point system in the QAP. These provisions act as a substantial barrier to LIHTC development in high-opportunity localities that often act in an exclusionary manner. Ultimately, this leads to less geographic balance in the siting of LIHTC projects as well as reduced housing choice for assisted households. The Treasury Department has already issued clear guidance that the Internal Revenue Code does not require or encourage local approval, and that such a practice has a discriminatory effect.[23] Congress should take the next step and amend the LIHTC statute to completely prohibit local approval and contribution provisions.

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22 42 U.S.C. § 1437z-8

23 Rev. Rul. 2016–29

Other reforms could help make the LIHTC program an effective tool to reduce segregation and improve access to opportunity, including stronger limits on LIHTC investment in high-poverty areas. This is especially needed as part of any LIHTC proposal that is designed to increase the number of extremely low-income households served by the program. The LIHTC program should serve more extremely low-income households but limits are needed to prevent concentrated poverty. Congress should ensure that state HFAs will award a basis boost – an increase in the amount of LIHTC credits a project is eligible for – to projects serving extremely low-income households in high-poverty census tracts (exceeding a 25 percent poverty rate) only if the developer can demonstrate that the project does not contribute to inadvertent overconcentration of extremely low-income households in that census tract. Congress should also ensure that any LIHTC development in a high-poverty census tract has a cap on the number of units serving extremely low-income households. Additionally, Congress could also act to establish statutory criteria to evaluate CCRPs instead of relying on guidance from Treasury.

Another way to better expand access to opportunity is to increase the ability of developers to access higher cost areas. This goal can be accomplished in part by raising the cap on the population of areas that can be designated as DDAs in 26 U.S.C. §42(d)(5)(B)(iii)(II). Raising the cap can help to incentivize LIHTC development in areas of opportunity and reduce concentrated poverty.

Conclusion

In sum, this essay recommends the following federal legislative and administrative reforms to further fair housing within the LIHTC program:

- Apply civil rights mandates to the LIHTC program, including guardrails to prevent segregation.
- Issue regulations and guidance to provide better oversight of QAPs and CCRPs to reduce geographic concentration of LIHTC units.
- Redefine DDAs to promote LIHTC development in high-opportunity areas.
- Provide regulations and guidance on affirmative marketing, tenant selection, and nondiscrimination against HCV holders to increase access to LIHTC in high-opportunity areas.
- Improve LIHTC data collection and oversight by releasing project-level data and taking action to require HFAs to submit all LIHTC data to HUD.
- Legislatively eliminate local approval and contribution requirements in QAPs; better define CCRPS; and increase the number of DDAs.

Reforms to the LIHTC program are long overdue and urgently needed to reduce residential segregation and increase access to opportunity for low-income families. Policymakers should take steps to ensure that LIHTC development is more geographically balanced, improve access to units located in areas of opportunity, and strengthen civil rights oversight and enforcement for the program. These steps can help ensure that the LIHTC program can better meet affordable housing needs while significantly expanding opportunity and promoting equity.

State HFAs, Affordable Housing, and Segregation: Existing Approaches and Areas for Growth

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Introduction

By administering rental assistance as well as leading housing development and preservation initiatives, state housing finance agencies (HFAs) provide avenues to affordable housing for many Americans to whom it would otherwise be inaccessible. The role they play is both distinct and vital: these agencies tend to service more borrowers of color than traditional bank loan services, they help disperse federal housing aid in times of crisis, and many are the primary administrators of federal rental housing development programs (About HFAs, 2020). Indeed, state HFAs were created for the express purpose of making affordable housing more accessible, particularly by providing financing options for low- to moderate-income homebuyers (Committee on Housing and Urban Development, 1974). Many state HFAs are also the administrators of the Housing Choice Voucher (HCV) program and the Low-Income Housing Tax Credit program (LIHTC) within the state they service.

HFAs can be invaluable resources to individuals seeking to secure and maintain affordable housing, but as I discuss below, reforms and better policy initiatives are needed in order for HFAs to remedy–rather than reinforce–longstanding problems of structural racism and housing segregation. While HFAs have been effective at providing affordability options for homebuyers and homeowners (FDIC.org, 2020), there has been little movement in the way these agencies administer federal affordable housing programs. Specifically, the administration of LIHTC calls out for practical changes that could work to further fair housing. In this brief I attempt to convey the progressive potential presented by HFA administration of LIHTC. I will first identify the way HFAs have addressed the issue of affordable housing through LIHTC and the concerns this approach raises. I then identify models of positive innovation in HFA affordable housing strategy by highlighting localized examples of adjustments to LIHTC administration. Finally, I suggest strategic adjustments to LIHTC administration that HFAs can implement to positively improve their impact in the affordable housing system (FDIC.org, 2020).

Existing Approaches to Affordable Housing: LIHTC Administration

There are two primary mechanisms through which state HFAs address affordable housing: by providing home loans at fixed or low interest rates and administering federal housing subsidy programs (primarily LIHTC). LIHTC is a tax credit program which allows the federal government to issue states tax credits for developers of affordable housing. HFAs will then take on the task of awarding those credits to the private developers. When the developers are awarded the credits, they then sell them to investors to fund the property (DuBois et al., 2018; Keightley, 2021).

Developers obtain LIHTC credits to build or rehabilitate affordable housing properties through an extensive and competitive process. Federal guidelines dictate the property must remain affordable for 30 years. States must also develop a Qualified Allocation Plan (QAP) each year to further determine eligibility. A QAP is a point-based plan for awarding LIHTC tax credits. It is created by the state agency responsible for allocating the tax credits – often the HFA. They are extremely important to the administration process because they act as a rubric for developers, setting minimum standards and metrics for consideration (Dubois et al., 2018).

HFAs are a component of the larger American housing infrastructure, thus these agencies are not exempt from the symptoms of this historically inequitable system. LIHTC is a popular program amongst developers and investors, and the level of competition it inspires means developers are highly incentivized to meet QAP standards and metrics in order to get the tax credit. While the program has been successful at creating a substantial amount of affordable housing, it has also raised concerns about the concentration of poverty and segregation (DuBois et al., 2018). Affordability is not permanent. Projects in high-poverty areas are incentivized, while projects in low-poverty areas are usually opposed by residents who claim that these developments will lower their property value and community reputation. These concerns are coupled with a lack of publicly available data about what happens after the credits are awarded (the demography of the tenants who inhabit these properties, the marketing strategies used to fill these properties, and what happens when the affordability timeline runs out).

Leveraging Existing Programs for Advancement: QAP Amendments

State actors, advocates, and housing organizers have recognized that the current administration of LIHTC may favor financial interests over renters' needs and fair housing objectives. In various states there are efforts to align the administration of LIHTC with the needs of vulnerable renters by amending QAPs, collaborating across sectors, prioritizing data, and pushing for zoning legislation that protects communities from over- or under-development. Organizers, legislators, and HFA employees have worked to create meaningful change by leveraging aspects of the current method of LIHTC administration in their own states. For example, the Pennsylvania Housing Finance Agency and the Georgia Housing and Finance Authority recently amended their QAPs to include a requirement that all LIHTC developments enact screening policies that do not violate the Fair Housing Act as well as "reasonable and non-discriminatory policies" around criminal background checks for tenants (Davenport, 2021; State of Georgia Qualified Allocation Plan, 2021).

In particular, the Georgia QAP mentions "overcoming barriers to access for people with disabilities, returning citizens, extremely low-income households, and individuals experiencing homelessness" as a goal of the Georgia Housing and Finance Authority. In terms of screening policies, the language of Georgia's QAP makes it clear that criminal background checks as restrictions to obtaining housing violate the Fair Housing Act "if the burden falls more often on renters or other housing market participants of one race or national origin over another." Such a clear and concerted effort to quell a common disparity in affordable housing administration is exemplary. HFAs can follow the examples of Pennsylvania and Georgia in their own QAPs by creating guidelines within the QAP that address common housing disparities in their own states. These changes can make the process of securing housing more accessible and less dehumanizing for potential tenants who may have backgrounds that make housing procurement especially difficult. By altering screening policies, HFAs potentially open housing opportunities to groups who are marginalized in the housing process because of criminal records, past evictions, or a lack of established credit history.

State and Local Government Support

State and local governments can be as effective as QAPs at bringing about small changes with large impacts in the administration of LIHTC by working outside of the tax program. State governments and HFAs can work together to address funding gaps left by LIHTC through state grant and loan programs. In Connecticut, the Competitive Housing Assistance for Multifamily Properties (CHAMP) program provides finding to developers that can be combined with LIHTC. These funds are to contribute to the creation of affordable multi-family housing, but also community and economic development (CHAMP, 2021). The state's Department of Housing administers this program, and thus can set the qualification factors for the money. This means Connecticut can give developers in the state extra support and incentive to build affordable housing, while also setting standards in addition to the QAP for developer responsibility. Such a program can give the state another avenue for ensuring that the unique needs of tenants in that area are met, local communities are not left behind in development, and developers are given the incentive to keep producing affordable housing in the state.

Expanding and Sustaining Fair and Affordable Housing Through LIHTC

HFAs must dedicate effort not only to producing affordable housing but to ensuring that renters have access to opportunity. Both renters' needs and future affordability must be considered during the tax credit award process. The goal of an HFA administering LIHTC should be the creation of an eligibility system that pushes developers to do all they can to provide affordable housing while providing residents with access to resource rich communities (including preservation of housing in gentrifying areas). Jobs, schools, transportation, air quality, and many other factors contribute to whether renters feel empowered or cast-aside by the agencies claiming to assist them.

Below, I have put forth suggestions for how state HFAs' administration of LIHTC can more effectively address segregation and concentrated poverty:

- **HFAs should collaborate with community organizers to advocate for legislation that protects affordable housing**. For example, legislation that limits exclusionary zoning practices can contribute to the development of areas of opportunity that have affordable housing and flourishing resources within the community.

- **HFAs should prioritize developers whose proposals include a plan for data collection and responsiveness to community opportunity and resource mapping.** LIHTC mapping can help state HFAs better plan their QAPs and more narrowly target their affirmative marketing. LIHTC mapping can also give state governments and HFAs a more accurate, realistic picture of affordable housing in their state. Points should be awarded to developers who lay out plans to collect data on how potential tenants are informed on vacancies in the property, as well as tenant income levels, socio-economic background, age, and employment status. These data collection practices can help HFAs determine the impact they are having on racial and income segregation.

- **HFAs must prioritize robust criteria for Community Revitalization Plan (CRP) preferences to ensure communities are not left without infrastructural support when construction on affordable properties is finished (Poverty and Race Research Action Council, 2021)**. Many HFAs do not commit to giving preference to projects as part of CRPs even though section 42 of the IRS requires it (Low-Income Housing Tax Credit, 2008). HFAs should develop revitalization plans that include investments in greenspace, food access, transportation access, and access to public goods like libraries. These projects would help to address some sources of racial inequality as access to greenspace and public goods is unequally distributed along racial and class lines (Nesbitt et al., 2019). These plans should be integrated into any plan to develop affordable housing. Incentive points should be awarded to developers who have created plans that include logistic pathways for the incorporation of these community investments.

- **HFAs should require clear, publicized affirmative marketing plans to reach those who need the information most.** The affirmative marketing plans implemented in most localities are often outdated and fail to ensure region-wide housing choice. In some cases, decades may go by without any significant changes to the affirmative marketing plan. Many HFAs have not updated these plans to reflect the needs or the demographics of the moment. In order to rectify and prevent this, HFAs should publish annual affirmative marketing plan requirements which are subject to a yearly analysis and evaluation. Additionally, affirmative marketing should help historically marginalized groups find out about housing options in neighborhoods that would be otherwise unfamiliar to them (Haberle, Gayles and Tegeler, 2012). These practices can help combat segregation as well as aiding families find areas of opportunity in places they did not know about.

- **HFAs should utilize QAPs to keep housing more affordable for longer periods of time and allocate portions of tax credits for resident services. HFAs** should also use the point system to create preferences that address a state's unique needs. There are more developers competing for tax credits than there are tax credits available, and states have fairly broad authority over their own QAPs. This means the QAP is versatile in its ability to address affordable housing concerns. HFAs must hold developers to standards that will benefit renters.

- **HFAs should establish site selection criteria that steers developers away from practices that facilitate segregation**. For example, some HFAs consider local opinion about potential development in the area when creating their QAPs. Assigning too much weight to those preferences often keeps new housing out of areas with opportunity. Furthermore, HFAs can develop site selection criteria that prioritizes balanced geographic distribution in their QAPs.

Conclusion

HFAs certainly contribute to affordable housing through programs beyond LIHTC, and, to be sure, many have worked hard to combat disparities caused by LIHTC administration. Nevertheless, the threat of growing poverty concentration and segregation, shrinking access to opportunity, and alienating renters who need affordable, accessible housing requires bolder action LIHTC did not singularly create these issues, and their resolution will require unique, long-term solutions that incorporate community development, targeted marketing, and collaboration between HFAs and the communities of people they serve. It is important LIHTC is treated as a tool to benefit renters and not simply an opportunity for developers to attain funding from investors. Progress on this front will require a shift in perspective, as well as consistent efforts to transform what is required of developers before and after the tax credit allocations.

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LIHTC Development in High-Cost Areas: Challenges and Potential Solutions

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Introduction

Almost all new income-restricted housing in the United States relies, in some way, on funding from the federal Low-Income Housing Tax Credit ("LIHTC"), making it by far the largest source of capital for affordable housing development in the country. Since its enactment in 1986, the program has funded the creation or preservation of roughly 2.3 million units of income-restricted housing.[1] While the program has been fairly successful in supplying affordable housing overall, most new LIHTC units are not located in the higher-cost areas of cities and their regions, leading to a dearth of affordable housing in so-called "high-opportunity areas."[2] Because LIHTC was not explicitly designed to create new housing in this specific neighborhood typology, the program is not currently equipped to overcome the costs of acquiring land and building in high-cost areas, shifting the onus onto states and localities to supply low-income housing using local resources on top of LIHTC. Often, LIHTC projects in high-cost areas simply do not "pencil out"—that is, proposed projects are unlikely to generate sufficient operating income to pay off the long-term debt needed to finance construction. The result is that most LIHTC units are not built in the high-cost neighborhoods within cities, and the high-cost towns and villages within regions.[3] This brief explores why LIHTC projects fail to pencil out in high-cost areas and suggests ways in which federal subsidies can be better targeted to encourage development in those areas.

Background

LIHTC provides 10-year federal tax credits in two forms, referred to as the "9%" and "4%" credits.[4] The tax credit, which sums to 10 years of discounted federal taxes, is often then bundled and

1 Corianne Payton Scally et al., *The Low-Income Housing Tax Credit: Past Achievements, Future Challenges* at v, Urban Institute (July 2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf.

2 The literature on housing mobility frequently refers to "high-opportunity" areas, sometimes interchangeably with "high-cost" areas. This essay addresses the barriers to LIHTC construction in high-cost areas (referring, generally, to areas with higher land costs). The term "high-opportunity" is broader and somewhat contested; some scholars and advocates have criticized it as equating opportunity with whiteness. *See* Edward G. Goetz, Anthony Damiano, & Rashad A. Williams, *Changing the Narrative and Playbook on Racially Concentrated Areas of Poverty*, in What Works to Promote Inclusive, Equitable Mixed-Income Communities (Mark L. Joseph & Amy T. Khare eds., 2020), https://case.edu/socialwork/nimc/sites/case.edu.nimc/files/2020-09/Goetz.WWV_.Changing%20the%20Narrative.2020.pdf. Fair housing advocates vigorously debate the extent to which affordable housing development should emphasize revitalization in areas of concentrated poverty or integration in higher-cost areas.

3 *See* Will Fischer, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*, Center on Budget and Policy Priorities (Aug. 28, 2018), https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor.

4 See 26 U.S.C. § 42(b).

sold to investors in one package. That sale generates equity for the construction of new housing. Within the LIHTC program, 9% credits create more tax credit equity than 4% credits and are made available on a competitive basis, while 4% tax credits are automatically generated when tax-exempt private activity bonds (PABs) are used to finance multifamily housing. The combination of tax-exempt investment from PABs and the 4% tax credits becomes a valuable financing package.

Developers seek construction financing for new housing projects for the same reason homeowners borrow money to purchase a new home: upfront costs are incredibly high, making financing a necessity to spread costs out over time. In determining whether to finance a new development, several actors analyze the short- and long-term financials of the project and its likely outcome. This analysis must show a sufficiently high likelihood of a certain minimum rate of return in order to make the project worthwhile, before they take on the risk of moving forward with the project. On specific projects, banks and state and local housing finance agencies (HFAs) must feel comfortable putting their reputation and credit rating on the line by providing financing, and investors must feel comfortable with the banks' and HFAs' actions. Additionally, loan insurers will only insure loans that fit a specific risk profile, and will not provide financing for projects unlikely to make money.

Land is a significant variable in the cost of developing new housing. Given their regulated, relatively low rents and (appropriately) conservative underwriting by government agencies, LIHTC developments thus become nearly impossible to fund in high-cost areas where land is expensive. While hard costs, which relate to the actual construction of a development, and soft costs, such as fees and professional services, do not vary within regions, land costs are market-based and vary substantially depending on location, even within a single market. Despite this, LIHTC specifically excludes land acquisition costs from subsidies because, unlike other eligible costs, land is not depreciable. As a result, given that the credit is insufficient for projects to pencil out in most high-cost areas, and because land is the key factor in varying costs across markets, the current structure of the LIHTC program is unlikely to be enough on its own to produce low-income housing in high-cost areas. Moreover, with no incentive to build where land is more expensive, developers are, if anything, actively incentivized to build in low-cost areas, where land is cheaper. For many cities, especially low-vacancy and high-cost areas like New York City, this is a tradeoff that local policymakers are willing to make, given that new affordable housing supply takes pressure off local rents. However, when jurisdictions do want to create new affordable housing in higher-cost areas, there are extremely limited resources available to help them accomplish this policy goal.

One of these resources is a basis boost for designated Difficult Development Areas (DDAs), which are areas that, by statute, are supposed to have higher land, construction, and utility costs relative to the area median income (AMI).[5] For projects in DDAs, LIHTC developers can increase their eligible basis by an additional 30% for new construction and rehabilitation costs.[6] A higher eligible basis allows

5 26 U.S.C. § 42(d)(5)(B)(iii).

6 *See id.*

developers to claim a higher LIHTC credit, as it ultimately increases the amount of tax credits allowed to be allocated over the 10-year period. The program provides the same 30% boost, however, for developments in low-income or high-poverty Qualified Census Tracts (QCTs),[7] where development costs are lower because land is relatively inexpensive. With identical boosts in both areas, along with some targeted incentives to develop in low-cost areas,[8] projects are much more likely to be financially viable in QCTs than in DDAs.[9]

LIHTC projects must also compete with market-rate developers, who may not face the same financial limitations or may make more aggressive assumptions. Private developers competing with LIHTC developers for the same land may be able to bid at higher prices. Every dollar between the market price and LIHTC rents must be subsidized in some form in order for LIHTC developers to compete. Private developers, who can build more lucrative market-rate housing, will also likely not face the same financing constraints and will be able to move more quickly to acquire land in the same markets.

Current Local Solutions

Because LIHTC is, in many instances, unlikely on its own to provide projects with enough of a subsidy to pencil out in high-cost areas, some states and localities have attempted to fill the gap.[10] New York City, for instance, has implemented inclusionary zoning to help reduce land costs, increased property tax exemptions to reduce the financing need, and used its own 4% tax credits to help create low-income housing in very high-cost areas. These incentives have helped build LIHTC projects that would not otherwise have been viable.

Several other states and local governments have tried to pair LIHTC with additional incentives to encourage affordable housing development in higher-cost areas. For instance, Georgia provides subsidies of up to $40,000 per unit for affordable housing projects located within the Atlanta Beltline.[11]

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7 A QCT is one with a poverty rate of 25% or higher, or in which 50% of residents have an income below 60% of the area median gross income. 26 U.S.C. § 42(d)(5)(B)(ii).

8 LIHTC also requires that states give preference to projects in areas with "Concerted Community Revitalization Plans," but provides little additional guidance as to what those plans should entail. *See Assessment Criteria for "Concerted Community Revitalization Plans:" A Recommended Framework,* Poverty & Race Action Council (Mar. 14, 2017), PRRAC_CCRP_recommendations_3_14_17.pdf.

9 Another major issue with DDAs is that they are geographically-designated ZIP codes. In many areas, ZIP codes are relatively wide swaths of land (especially relative to census tracts), making DDAs a fairly poor proxy for what might be considered "high-opportunity" areas.

10 There is some evidence that LIHTC does not even pencil out in low-cost areas, on its own. A recent Terner Center report examined 9% LIHTC deals in California from 2008-2019, and found that 11.5 percent of 9% LIHTC projects had fewer than four external sources of funding (including tax credit equity), with 80 percent of projects bringing together four to eight sources of funding. Nearly 10 percent of projects relied on more than eight funding sources. *See* Carolina Reid, *The Costs of Affordable Housing Production: Insights from California's 9% Low-Income Housing Tax Credit Program,* Terner Center for Housing Innovation, UC Berkeley. https://ternercenter.berkeley.edu/wp-content/uploads/2020/08/LIHTC_Construction_Costs_2020.pdf.

11 *See* Atlanta Beltline Affordable Housing Trust Fund Developer Grants, Atlanta Development Authority (2011), https://beltline.org/wp-content/uploads/2012/04/Atlanta-BeltLine-Affordable-Housing-Trust-Fund-Developer-Grants-Application.pdf.

Portland sets aside a percentage of its tax increment financing for projects in "Urban Renewal Areas" and provides additional tax exemptions for projects in growth areas or near transit.[12] Seattle has, for certain projects, allowed increased density for affordable housing projects, which can make those projects more cost-effective.[13] And Arizona has implemented a fund to provide financing for affordable housing development in areas near transit.[14]

Many states have made developing new affordable housing using LIHTC in high-cost areas a policy goal. In particular, several state housing agencies' have amended their qualified allocation plans (QAPs), which determine which projects receive LIHTC credits, to encourage development in "high-opportunity" areas. These states, including California, Georgia, North Carolina, and several others, allocate additional points to projects located in areas with access to specified amenities, including jobs, quality education, healthcare, and transit.[15] But while including a preference in QAPs provides an opportunity for developers to access LIHTC credits, it does not change the underlying economics of a deal. Without additional funding, many projects in these preferential areas will still fail to pencil out.

Opportunities for Change

The financial barriers to LIHTC development in high-cost areas may be surmountable if state and local governments are willing to spend more. However, the LIHTC program itself does little to encourage that investment, nor was the program originally designed to accomplish that specific goal. Unlike programs implemented under the Community Reinvestment Act,[16] LIHTC imposes no requirement to invest in particular areas. In other words, LIHTC does not obligate state housing finance agencies to spend a particular percentage of their tax-exempt bonds in DDAs (or in high-cost or high-opportunity areas, however defined). In the absence of affirmative federal obligations, local spending to encourage development in these areas has been relatively meager.

State and local governments also face little external pressure to encourage development in high-cost areas. States have some general federal obligations, chief among them the requirement under the Fair Housing Act to administer programs in a manner that affirmatively furthers fair housing.[17] But many of those requirements do not impose specific obligations on the LIHTC program. The Treasury

12 Todd Nedwick & Kimberly Burnett, *How Can the Low-Income Housing Tax Credit Program Most Effectively be Used to Provide Affordable Rental Housing near Transit?* 26, National Housing Trust (July 2014), https://www.prezcat.org/sites/default/files/How%20Can%20the%20LIHTC%20Program%20Most%20Effectively%20be%20Used%20to%20Provide%20Affordable%20Rental%20Housing%20near%20Transit.pdf.

13 *Id.* at 29.

14 *Id.* at 25.

15 *See Affordable Housing in High Opportunity Areas: An Overview of Demographic and Housing Characteristics* 3, Freddie Mac Multifamily Housing Trust, https://mf.freddiemac.com/docs/Affordable_Housing_in_High_Opportunity_Areas.pdf.

16 See 42 U.S.C. § 5305.

17 *See* Preserving Community and Neighborhood Choice, 24 C.F.R. §§ 5, 91, 92, 570, 574, 576, 903 (2020). The 1968 Fair Housing Act requires HUD grantees to affirmatively further fair housing, but HUD has discretion to determine what that means, and in 2020, HUD significantly weakened its requirements under the statute. *See id.*

Department does not include LIHTC in its current regulation implementing the Civil Rights Act of 1964 by prohibiting discrimination in federally funded programs.[18] HUD's 2015 Affirmatively Furthering Fair Housing regulation touched on the LIHTC program,[19] but did not take effect for state funding recipients before it was rescinded in 2020. A state housing finance agency may risk a disparate impact suit under the Fair Housing Act if it primarily finances projects in primarily low-opportunity areas.[20] But disparate impact cases are difficult to prove, given multiple legal hurdles, and promoting housing in high-cost areas through litigation is a patchwork solution, considerably less efficient as a policymaking strategy than a unified federal program.

Making the Transition

While at present LIHTC is often insufficient to make projects in high-cost areas financially feasible, several reforms could expand the possibilities of LIHTC development. First, tax credit allocating agencies could reform their QAPs to create separate pools of funding and competition in high- and low-cost areas. In other words, agencies could allocate set amounts of LIHTC credits to potential projects in specific regions within the state, rather than have all potential projects compete against each other for the same pool of money. The creation of this dedicated funding stream would help to ensure that a certain portion of LIHTC funding consistently goes to high-cost areas (although it might result in fewer units overall). Some states, such as Illinois and Washington, have taken some steps to create pools along these lines already;[21] broader adoption could improve LIHTC development in high-cost areas elsewhere.

Second, state and local governments could take steps to eliminate the root causes of high land costs. Breaking down zoning barriers by allowing denser development helps to decrease land costs by allowing developers to build more units per square foot of land. Rezonings could likewise facilitate new multi-unit projects in high-cost, high-opportunity areas currently zoned for single-family units; cities could also target city-owned properties for mixed-income housing development. Governments could take a more regional approach to LIHTC development, incorporating broader regional planning into their allocations. This could be done by imposing additional requirements on PABs, such as requiring that a certain percentage be spent on areas near high-performing transit or other amenities, or in areas with a dearth of affordable housing supply relative to the overall rental stock. The Biden administration has announced they will take a carrot approach to this issue;[22] one way to do this would be to reimburse cities for costs they incur to upgrade the infrastructure needed to develop new housing, especially in areas near regional transit systems.

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18 *See* Regulation Regarding Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Financial Assistance from the Department of the Treasury, 31 C.F.R. § 22 (2016).

19 *See* Affirmatively Furthering Fair Housing, 24 C.F.R. §§ 5, 91, 92, 570, 574, 576, 903 (2015).

20 *See* Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100 (2020).

21 Nedwick & Burnett, *supra* note 12, at 18.

22 For instance, in its American Jobs Plan, the Biden administration has proposed to provide additional funding to cities that take steps to eliminate exclusionary zoning. See *Fact Sheet: The American Jobs Plan*, The White House (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

Third, and along the same lines, localities could reform property tax regimes to offer more generous property tax benefits for affordable housing development in high-cost areas. This would lower the financing threshold necessary to begin a project and provide additional financial incentives that make it more likely that developers will have sufficient funds to move forward with a project. While this too shifts the cost to localities, jurisdictions may see financial benefits over the long term when exemptions expire, depending on program structure, while simultaneously taking steps towards becoming more economically integrated communities. On the other hand, the federal government could replace lost property tax revenue with grants to localities that use that property tax revenue to develop affordable housing.

Fourth, state and local governments could make their PABs more competitive and ensure that they are directed to higher-cost areas through competition. Currently, PABs are used at HFAs' discretion. Creating a more competitive process may, over time, steer more LIHTC development to higher rent areas, if prioritized. This would ensure that government investment in affordable housing is directed to the areas in which it would be most beneficial for future occupants.

There are also avenues for meaningful reform at the federal level. First, the Treasury Department, which administers LIHTC, could require housing finance agencies to create investment portfolio requirements, disclose neighborhood characteristics of investment areas, and set goals for more direct investment in higher-cost areas. Requiring an explicit focus on neighborhood characteristics in state investment plans could help agencies refocus their priorities to create more equitable LIHTC allocations. More broadly, the federal government could extend additional assistance for low-income housing development in high-cost areas. As a starting point, the government could provide higher tenant-based subsidies to be paired with low-income housing development in high-cost areas, or dedicated support for land acquisition for these developments.

Finally, Congress could pass legislation to authorize the Treasury Department to provide housing finance agencies with the authority to set the eligible basis in high-cost areas, expanding the DDA boost beyond 130, in designated areas. Again, allowing developers to claim higher credits would improve the financial outlook of potential projects and encourage further development in areas where developers could claim those expanded credits.

Conclusion

Currently, LIHTC projects are unlikely to pencil out in high-cost areas, primarily due to the high cost of land acquisition and limited incentives to build where it is more expensive to do so. Given the importance and scale of the program, this problem contributes to the affordable housing shortage in high-cost areas and furthers inequities in access to opportunity. This trend could change with the right package of state and federal incentives and obligations, allowing LIHTC to adapt, and become a more forceful engine of affordable housing development in high-cost areas as well as low-cost ones.

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