STRUCTURAL INEQUALITY AND THE NEW MARKETS TAX CREDIT

MICHELLE D. LAYSER† & ANDREW J. GREENLEE, PH.D.††

ABSTRACT

The New Markets Tax Credit ("NMTC") is a federal tax incentive used to promote investment in low-income neighborhoods. Many of these neighborhoods are home to historically marginalized communities. However, very few minority-led institutions participate in the NMTC program. This Article provides the first theoretical and empirical exploration of the underrepresentation of minority-led institutions in the NMTC program. Based on original interviews with representatives of Community Development Entities ("CDEs"), investors, borrowers, and consultants who participate in the NMTC program, this Article describes the "NMTC ecosystem," a complex, relationship-driven network of NMTC program participants who influence decision-making and create opportunities for success within the NMTC program. The Article demonstrates that within the NMTC ecosystem, minority-led CDEs face structural barriers to entry similar to those that exist in purely private markets, such as unequal access to professional networks and lack of track records. Troublingly, those barriers are intensifying with time.

The underrepresentation of minority-led CDEs in the NMTC program undermines its capacity to promote equitable economic development. To remedy that problem, this Article proposes that the Treasury should increase transparency and guidance in its administrative process, engage institutional intermediaries to aid minority-led CDEs, and relax requirements that chill participation among minority-led CDEs. These insights and prescriptions have relevance well beyond the context of the NMTC. In many domains,

† Associate Professor, University of San Diego School of Law. This article has benefited from thoughtful comments from Larry Alexander, Kevin Cole, Miranda Perry Fleischer, Herbert Lazerow, Maimon Schwarzschild, and participants at the USD Law Faculty Colloquium, the Santa Clara University Faculty Workshop Series, the 2023 Critical Tax Conference, and the 2023 American Bar Association Tax Section Midyear Meeting.

†† Professor, University of Illinois Department of Urban & Regional Planning. Emma Walters, a Ph.D. candidate in Urban and Regional Planning at the University of Illinois, participated as a researcher for this study.

regulators have adopted measures that aim to promote equitable community development. This Article's findings and reform recommendations thus have important implications for the broader universe of place-based regulatory policies, including for the many other tax incentive programs that aim to promote equity and reduce economic marginalization.

TABLE OF CONTENTS

Introduction 803
I. The NMTC and Community Economic Development 810
    A. A Brief History of Discrimination in Housing and Credit Markets 810
    B. An Introduction to the New Markets Tax Credit 814
    C. Privatization, Gentrification, and the NMTC 816
II. Decisions and Decision-Makers 820
    A. The Decisions: How Choices Affect Outcomes 820
        1. *Statutory Design and Program Flexibility* 820
        2. *Funding Choices and Outcomes* 823
    B. The Decision-Makers: Underrepresentation of Minority-Led CDEs 826
    C. An Open Question 828
III. Inside the New Markets Ecosystem: An Empirical Account 831
    A. Empirical Design 831
    B. Decisions, Relationships, and Barriers to Entry 836
        1. *Factors that Impact Project Selection.* 836
        2. *The Professional Networks that Fuel NMTC Deals* 844
        3. *Barriers to Entry for Minority-Led CDEs* 850
IV. Removing Barriers to Equitable Economic Development 855
    A. Sources of Structural Inequality in the NMTC Ecosystem 855
    B. Reform Proposals 860
        1. *Increase Guidance and Transparency* 860
        2. *Engage Institutional Intermediaries* 862
        3. *Relax Experience-Based Criteria* 865
    C. Implications for Other Federal Incentives 866
Conclusion 866

INTRODUCTION

The United States has a long history of discrimination in real estate and financial markets,[1] the effects of which have manifested in persistently distressed neighborhoods and racial income and wealth disparities.[2] Equitable economic development strategies aim to reverse these trends through investment in low-income neighborhoods, with the goal of "inclusive growth—where everyone has equal access to opportunity and where strategies and programs are implemented to compensate for past discrimination."[3] Broadly speaking, equitable economic development is an intentional approach to community economic development, which includes initiatives to support operating small businesses, workforce development, nonprofit expansions, real estate rehabilitation, affordable housing, and similar investment in low-income communities.[4] The federal government regularly uses tax incentives and other subsidies to promote community economic development.[5] But do these incentive programs promote *equitable* economic development?

An initial response may be that it depends on the incentive. For example, many antipoverty and urban law experts prefer the design of the New Markets Tax Credit ("NMTC")[6] over that of a newer tax

---

1. *See* Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 692 (2010); Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOCIO. 329, 330–31 (1990).

2. *See generally* PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013) (describing how severe racial inequality has resulted in decreased economic equality and mobility across racial and ethnic groups); Patrick Sharkey, *Neighborhoods, Cities, and Economic Mobility*, 2 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 2, 159, 160–61 (2016) (summarizing studies and concluding that "[t]he common conclusion reached . . . is that the effect of neighborhood disadvantage on cognitive and academic outcomes is more severe if disadvantage is significant, experienced over long periods of a family's history"); Amy Minzner, *Measuring the Effectiveness of Equitable Economic Development Strategies*, FOUND. REV., Dec. 2020, at 21–22 (explaining how the "racial wealth gap divide . . . [is a] mutually reinforcing consequence[] of structural racism . . . .").

3. Minzner, *supra* note 2, at 23.

4. *See id.* at 23–24; Patience A. Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693, 705–06 (2013).

5. *See* Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 759–63 [hereinafter Layser, *Pro-Gentrification Origins*] (describing the current landscape of place-based tax incentives).

6. I.R.C. § 45D.

preference called Opportunity Zones.[7] Though both laws are used to subsidize investment in low-income neighborhoods, awards made within the NMTC program are subject to substantially more regulatory oversight.[8] The NMTC is a capped tax credit program, actively administered by the Community Development Financial Institutions Fund ("CDFI Fund").[9] NMTC allocations are awarded annually via a competitive application process.[10] Researchers frequently assume the NMTC's competitive allocation process helps produce more equitable outcomes than it would without such oversight.[11]

---

7. Early analyses of Opportunity Zones investment suggest that the tax preference is primarily used to subsidize real estate investment and that such investment is rarely intended to address the needs of low-income residents in targeted communities. *See, e.g.*, Patrick Kennedy & Harrison Wheeler, Neighborhood-Level Investment from the U.S. Opportunity Zone Program: Early Evidence 43 (Apr. 13, 2022) (unpublished manuscript), https://patrick-kennedy.github.io/files/Kennedy_Wheeler_OZ_2022.pdf [https://perma.cc/9599-C4Z7]; DAVID WESSEL, ONLY THE RICH CAN PLAY: HOW WASHINGTON WORKS IN THE NEW GILDED AGE 1–9, (2021). *But see* Tracy A. Kaye, *Ogden Commons Case Study: A Comparative Look at the Low-Income Housing Tax Credit and Opportunity Zone Tax Incentive Programs*, 48 FORDHAM URB. L.J. 1067, 1100 (2020) (describing anecdotally how one Chicago Opportunity Zone investment created jobs and benefited residents of the Ogden Commons project). Many antipoverty advocates and legal scholars have argued that these outcomes are inequitable and potentially harmful to low-income communities. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82, 92 (2020); Brandon M. Weiss, *Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers*, 110 CALIF. L. REV. 179, 182 (2022).

8. According to critics, the NMTC's administrative procedures create significant compliance burdens that slow development, restrict project pipelines, and stifle the program's potential impact. *See* Siri Bulusu, *How a Tax Perk Can Turn a Paper Mill into a Fish Farm (Podcast)*, BLOOMBERG TAX, at 06:58–08:51 (May 10, 2019, 4:45 AM), https://news.bloombergtax.com/daily-tax-report/how-a-tax-perk-can-turn-a-paper-mill-into-a-fish-farm-podcast [https://perma.cc/226L-EER2]. For these reasons, the Opportunity Zones law was consciously designed to have less oversight and fewer restrictions on project eligibility than the NMTC program. *See id.*, at 08:40–09:45.

9. DONALD J. MARPLES, CONG. RSCH. SERV., RL34402, NEW MARKETS TAX CREDIT: AN INTRODUCTION 3–4 (2022).

10. *See id.*; Richard C. Hula & Marty P. Jordan, *Private Investment and Public Redevelopment: The Case of New Markets Tax Credits*, 10 POVERTY & PUB. POL'Y 11, 17 (2018) ("The application process has become increasingly competitive.").

11. *See, e.g.*, Hilary Gelfond, *Opportunity Zones: Driver of Economic Development or Domestic Tax Shelter for the Rich?*, KENNEDY SCH. REV. (Sept. 10, 2019), https://ksr.hkspublications.org/2019/09/10/opportunity-zones-driver-of-economic-development-or-domestic-tax-shelter-for-the-rich [https://perma.cc/3JES-YH7B] (noting that "it is unclear how much of the funds invested in [Opportunity Zones] will actually benefit residents" due to a lack of guardrails in the Opportunity Zones program, and stating that "[i]n contrast, under the NMTC, Treasury Department regulations require that tax-credit recipients apply for the credit (rather than automatically receive it), and then officials evaluate whether companies should get the credit based on the quality of their plans to add benefit to the community"); Blake Stocke, *Turning Over Stones: Advocating for Stronger Reporting Requirements for Opportunity Zones*, 66 ST. LOUIS U.

Our review of existing work on the NMTC suggests that the competitive application process does improve outcomes for low-income communities relative to what their outcomes would be without such administration. For example, the CDFI Fund has pushed participants toward projects located in more distressed communities than they may otherwise select, and it has forced participants to strive for measurable outcomes related to the program's social mission.[12] In many cases, the CDFI Fund's administrative policies impose heightened requirements relative to the tax statute, further ensuring that the program supports mission-driven investment.[13] These findings from existing literature provide empirical support for proposals that would reform other place-based tax incentive programs, such as the Opportunity Zones law, to require more active administration by federal regulators.

However, this simple conclusion may overstate the equity-based case for active administration of place-based tax incentive programs. Based on approximately twenty-five hours of original interviews with representatives of Community Development Entities ("CDEs"), investors, borrowers, and consultants who participate in the NMTC program, this Article describes the "NMTC ecosystem," a complex, relationship-driven network of NMTC program participants who influence decision-making and create opportunities for success within the NMTC program. Our empirical evidence points to several barriers to sustaining diverse representation among decision-makers in this ecosystem, which ultimately impacts program outcomes. Within the NMTC ecosystem, minority-led CDEs face structural barriers to entry similar to those that exist in purely private markets, such as unequal access to professional networks and lack of track records. Those barriers are intensifying with time. The underrepresentation of minority-led CDEs in the NMTC program undermines its capacity to promote equitable economic development. Furthermore, evidence

L.J. 387, 400–01 (2021) (explaining that "the CDFI Fund evaluates CDE applications based upon four criteria: business strategy, capitalization strategy, management strategy, and community impact," and "collects data to evaluate economic and societal outcomes," and arguing that in this way "the CDFI Fund administers the policy goals of the program to ensure it meets its mission to expand economic opportunity for those who need it" (citations omitted)).

12. *See* MARPLES, *supra* note 9, at 6.

13. *See* Richard C. Hula & Marty P. Jordan, *Private Investment and Public Redevelopment: The Case of New Markets Tax Credits*, 10 POVERTY & PUB. POL'Y 11, 16 (2018) (noting that these requirements were intended by Congress to "result in the creation of jobs and material improvement in the lives of residents of low-income communities" (quoting I.R.S., NEW MARKETS TAX CREDIT 1 (May 2010))).

from stakeholders within the NMTC ecosystem indicates that institutional decision-making and leadership may directly impact which projects to fund and where to fund them.

This Article makes at least three significant contributions to the tax and urban law literatures. The first two are theoretical contributions. First, it contributes to the tax theory literature by identifying a new pathway by which tax systems may reinforce structural inequality. In recent years, the topic of structural inequality has attracted increased attention from scholars and policymakers. Tax scholars documenting the ways that tax systems reinforce racial income and wealth disparities include Dorothy Brown,[14] Phyllis Taite,[15] Richard Winchester,[16] Goldburn Maynard,[17] Francine Lipman, [18] Jeremy Bearer-Friend,[19] and others.[20] However, most analyses of

---

14. *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH (2021) (describing the compounding racialized disadvantages for Black taxpayers).

15. *See generally* Phyllis C. Taite, *Inequality by Unnatural Selection: The Impact of Tax Code Bias on the Racial Wealth Gap*, 110 KY. L.J. 639 (2021) (describing the impact of the tax system on suppressing wealth creation and economic mobility for minority taxpayers).

16. *See generally* Richard Winchester, *Homeownership While Black: A Pathway To Plunder, Compliments of Uncle Sam*, 110 KY. L.J. 611 (2021) (describing the creation of a predatory shadow capital market for Black homebuyers, due in part to federal policies blocking access to bank capital).

17. *See generally* Goldburn P. Maynard Jr., *Biden's Gambit: Advancing Racial Equity While Relying on a Race-Neutral Tax Code*, 131 YALE L.J.F. 656 (2021) (describing how the provisions of the American Rescue Plan Act could advance racial equity); Goldburn P. Maynard Jr. & David Gamage, *Wage Enslavement: How the Tax System Holds Back Historically Disadvantaged Groups of Americans*, 119 KY. L.J. 665 (2021) (conceptualizing the gap between ideals of equality of opportunity within political culture and provisions of the tax system).

18. *See generally* Francine J. Lipman, *How To Design an Antiracist State and Local Tax System*, 52 SETON HALL L. REV. 1531 (2022) (providing a framework for analysis and reform of the U.S. tax system using principles of antiracism).

19. *See generally* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019) (describing how principles of colorblindness in tax data work against accountability and transparency).

20. *See generally* Michelle Lyon Drumbl, *#Audited: Social Media and Tax Enforcement*, 99 OR. L. REV. 301 (2021) (describing equity implications of the use of social media data in tax enforcement); Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1 (2018) (describing increased tax burdens placed upon low-income and childless workers in the Earned Income Tax Credit program); Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915 (2018) (describing the feedback loops in the mortgage interest deduction and the Low-Income Housing Tax Credit program, which reinforce white flight and exacerbate racial segregation); Gladriel Shobe, *Subsidizing Economic Segregation through the State and Local Tax Deduction*, 11 U.C. IRVINE L. REV. 539 (2020) (describing the positive feedback loops in state and local tax deductions, which encourages wealthy taxpayers to segregate on the basis of income).

structural inequality in tax systems have focused on aspects of individual income taxation.[21] Our research explains how business tax incentives used to fight poverty indirectly through neighborhood improvement may also reinforce structural inequality.

Second, this Article contributes to the urban law literature about equitable economic development by identifying a mechanism by which policy interventions may reinforce traditional power structures. Community economic development strategies "emerged to develop, support, and promote community-based economic development initiatives designed to generate and maintain wealth within specific neighborhoods through direct community engagement."[22] Community economic development initiatives are typically transactional in nature, leading some scholars to theorize that they create opportunities to engage both high- and low-income community stakeholders to achieve equitable community development.[23] This Article does not challenge those theories, but it does highlight their limitations in the context of government-sponsored approaches to community economic development. Overall, our findings suggest that the competitive application processes used to administer some government subsidies can affect interorganizational relationships in ways that reinforce existing power structures.

The third contribution is empirical. This Article presents original data about the NMTC program that have important implications for evaluating the NMTC program and many other community development tax incentives. Notably, the Low-Income Housing Tax Credit ("LIHTC"),[24] which is the largest federal subsidy for new affordable-housing construction, has a structure similar to the NMTC. Like the NMTC, the LIHTC is a capped tax incentive program. State housing finance agencies and local housing authorities allocate tax credits to developers via a competitive application process like the one

21. For example, some recent scholarship has focused on how the Earned Income Tax Credit ("EITC") exposes taxpayers to heightened tax-compliance obligations and enforcement audits. *See, e.g.*, Drumbl, *supra* note 20, at 326; Francine J. Lipman, *Access to Tax Injustice Symposium: Tax Advice for the Second Obama Administration*, 40 PEPP. L. REV. 1173, 1189 (2012). For this reason and others, some experts have even proposed "progressive tax procedures" that employ rules that vary depending on taxpayers' income. *See generally* Joshua D. Blank & Ari Glogower, *Progressive Tax Procedure*, 96 N.Y.U. L. REV. 668 (2021).

22. Crowder, *supra* note 4, at 705.

23. *E.g.*, *id.*

24. I.R.C. § 42.

studied here.[25] It is possible that some of our observations about the NMTC program are applicable to the LIHTC program as well. Meanwhile, as mentioned above, several advocates for Opportunity Zones reform have pushed for more active regulation of the new Opportunity Zones tax preference. This reform proposal is based on the theory that regulatory oversight would help produce better outcomes for low-income communities.[26] While this study lends some support to that argument, it also exposes the limitations of the NMTC model.

This Article proceeds as follows. Part I introduces the NMTC and provides a brief history of the tax incentives to place it in the context of theories about equitable community development. Part II reviews existing legal and empirical literature about the NMTC. The existing literature demonstrates that the NMTC is a flexible law that confers significant discretion upon program participants to choose the types and locations of projects. Relatedly, participants' investment decisions affect program outcomes. For these reasons, we argue that the most equitable outcomes depend on diverse representation among decision-makers. The identity of decision-makers has received little attention from researchers, but existing literature suggests that minority-led CDEs are underrepresented in the NMTC program.[27] This raises the question as to why this is the case, and, more generally: What are the barriers to equitable economic development through the NMTC program?

The Article then turns to answering that open question in the literature. Part III draws on original qualitative data to describe the

25. *See* MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 1 (2023).

26. Michelle Layser has argued that a justification for tax incentives that target investment to low-income areas ("place-based tax incentives") is to reduce the geographic inequality experienced by residents of neighborhoods that are experiencing deprivation. *See generally* Michelle D. Layser, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, 74 TAX L. REV. 1 (2020) [hereinafter Layser, *Geographic Inequality*] (analyzing the potential and limitations of place-based tax incentives to benefit low-income communities). Layser has further argued that active administration of place-based tax incentives can help produce community-oriented outcomes that benefit low-income residents. *Id.* at 39.

27. *See* MARTIN D. ABRAVANEL, NANCY M. PINDUS, BRETT THEODOS, KASSIE BERTUMEN, RACHEL BRASH & ZACH MCDADE, URB. INST., NEW MARKETS TAX CREDIT (NMTC) PROGRAM EVALUATION: FINAL REPORT 60 (2013), https://www.urban.org/sites/default/files/2022-05/412958-new-markets-tax-credit-nmtc-program-evaluation.pdf [https://perma.cc/F4QQ-3SJN] (noting that, of the less than half of CDEs that reported data on minority ownership, only three indicated minority ownership or control).

dynamics of the NMTC ecosystem. It identifies internal and external factors that influence CDEs' decisions, and it describes the interorganizational relationships that fuel the NMTC program. Together, this Part paints a picture of a niche and highly competitive industry dominated by the largest, most experienced CDEs and their teams of consultants. It also reveals several barriers to entry faced by minority-led CDEs, which are underrepresented in the NMTC ecosystem. Part IV analyzes the data and argues that unequal access to interorganizational networks is an important source of structural inequality in the NMTC ecosystem. Drawing on theory about hybrid public-private markets, this Part argues that power dynamics in the NMTC ecosystem are similar to those in private markets.

Minority-owned businesses have traditionally struggled to access mainstream markets.[28] In fact, the very purpose of CDEs is to serve as financial intermediaries to help combat discrimination in financial markets.[29] Yet within the NMTC program, minority-led CDEs themselves have struggled to break into the NMTC ecosystem. Based on these insights, Part IV provides several recommendations for reform. These include: increased guidance and transparency about CDFI Fund priorities, the engagement of institutional intermediaries to certify minority CDEs and facilitate relationship building, and the relaxation of experience-based criteria as applied to minority-led CDEs.

Together, this Article's findings and reform recommendations have important implications for the broader universe of place-based regulatory policies, including for the many other tax incentive programs that aim to promote equity and reduce economic marginalization. In October 2022, the Treasury Department convened its first-ever formal Advisory Committee on Racial Equity to help "advance racial equity in the economy and address acute disparities for communities of color."[30] The new Committee's role is to identify and

---

28. Timothy Bates, *Minority Business Access to Mainstream Markets*, 23 J. URB. AFFS. 41, 44 (2001).

29. *See* MARPLES, *supra* note 9, at 2; ABRAVANEL ET AL., *supra* note 27, at 9–10 (noting that, among other reasons, initiatives like NMTCs are premised on correcting market failures like disinvestment in distressed urban areas due to "past discriminatory commercial, personal, mortgage, and small business lending practices").

30. Press Release, U.S. Dep't Treas., Treasury Department Announces Inaugural Members of Formal Advisory Committee on Racial Equity (Oct. 4, 2022), https://home.treasury.gov/news/press-releases/jy0991 [https://perma.cc/K43L-KZWS].

review economic policies, including tax laws, that adversely impact people of color.[31] The NMTC program is one that urgently demands the Committee's attention. Therefore, this Article concludes with a call for the Treasury and the CDFI Fund to collect data relevant for further study of the equity impacts of the NMTC and similar tax incentive programs.

I. THE NMTC AND COMMUNITY ECONOMIC DEVELOPMENT

This Article provides a behind-the-scenes look at the NMTC industry. It offers insights based on the first-person perspective of professionals who spend their careers working on NMTC transactions and, in some cases, the accounts of borrowers who successfully received NMTC funding. Later parts of this Article will explain our empirical methodology and tell participants' stories. It will analyze key themes within theoretical frameworks that help understand the dynamics of the NMTC industry, and it will describe the potential and limitations of the NMTC law to advance equitable economic development. But first, it is helpful to have some background about the law itself. After all, a key finding in our research—elaborated below—is that even within the niche world of community economic development, not many people know about the NMTC.

A. A Brief History of Discrimination in Housing and Credit Markets

Any analysis of today's community economic development policies should begin by looking backward. Early in the twentieth century, more than four million Black Americans began to migrate from the South to relocate in the North.[32] In response, local governments enacted laws to prevent Black migrants from settling freely in their cities.[33] These discriminatory laws included racial zoning ordinances, such as those that forbade people of color from buying homes in neighborhoods with a specified percentage of white residents.[34] Racial zoning ordinances were short-lived. In 1917, the

31. *See id.*

32. Ellora Derenoncourt, *Can You Move to Opportunity? Evidence from the Great Migration*, 112 AM. ECON. REV. 369, 369–70 (2022).

33. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 70–72 (1917).

34. *See, e.g.*, *id.* (reviewing a racially discriminatory zoning ordinance enacted by the city of Louisville, Kentucky).

Supreme Court held that the zoning laws were an unconstitutional violation of due process.[35]

However, the Court's decision did not stop the use of legal tools to enforce neighborhood segregation. In the intervening decades between *Buchanan v. Warley*[36] and *Shelley v. Kraemer*,[37] white homeowners responded to the decision by adding racially restrictive covenants to their deeds.[38] Racially restrictive covenants typically prohibited owners from selling their property to people of color.[39] Unlike public zoning laws, racially restrictive covenants rested on private law: in 1926, the Court held that the covenants laid beyond the scope of constitutional protection because no state actor was involved with their creation.[40] Meanwhile, beginning in the mid-1920s, real estate boards helped collect pledges from homeowners in existing subdivisions, "stating that none of the owners or their successors would sell or rent to minority members," and record the petition documents.[41]

In the 1930s and 1940s, financial institutions began to use residential security (so-called redlining) maps to restrict access to credit in areas where Black residents lived—in the segregated neighborhoods that were created by decades of legally sanctioned discrimination like racial zoning and restrictive covenants.[42] A consequence of restricted credit in those neighborhoods was disinvestment, whereby existing owners abandoned properties, newcomers were unable or unwilling to invest, and even commercial

---

35. *Id.* at 82.

36. Buchanan v. Warley, 245 U.S. 60 (1917).

37. Shelley v. Kraemer, 334 U.S. 1 (1948).

38. *See, e.g.*, *id.* at 5–7; Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 544, 548 (2000).

39. *See, e.g.*, *Shelley*, 334 U.S. at 5–7.

40. Corrigan v. Buckley, 271 U.S. 323, 330–31 (1926).

41. Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 232 (2022).

42. Frances E. Werner, William M. Frej & David M. Madway, *Redlining and Disinvestment Causes, Consequences, and Proposed Remedies*, 10 CLEARINGHOUSE REV. 501, 501–03 (1976). These maps, initially produced by the Federal Home Owners Loan Corporation ("HOLC"), were designed to guide the targeting of federal loan-restructuring efforts by systematically analyzing "housing quality, proximity to industry, and the characteristics of a neighborhood's residents," where "[t]he presence of immigrants, poor households, and non-White racial groups were considered detrimental to a neighborhood's assessment." Daniel Aaronson, Jacob Faber, Daniel Hartley, Bhashkar Mazumder & Patrick Sharkey, *The Long-Run Effects of the 1930s HOLC "Redlining" Maps on Place-based Measures of Economic Opportunity and Socioeconomic Success*, 86 REG'L SCI. & URB. ECON. 1, 2 (2021) (citation omitted).

establishments closed their doors.[43] In 1948, the Court held in *Shelley v. Kraemer* that it was unconstitutional for judges to enforce racially restrictive covenants,[44] but use of those covenants persisted, as did other discriminatory real-estate practices.[45] Neither racially restrictive covenants nor financial redlining was illegal until the enactment of the Fair Housing Act of 1968 ("FHA").[46]

Enacted just days after the assassination of Dr. Martin Luther King Jr., the FHA prohibits discrimination against protected classes, including race-based discrimination.[47] Broadly, the FHA prohibits discrimination in the sale and rental of residential real property, lending, and brokerage services.[48] Examples include refusing to sell to a buyer on account of race, steering, discrimination in loan terms, and redlining.[49] In theory, the FHA was intended to finally end housing discrimination, including discrimination by financial institutions.[50] Nevertheless, researchers continue to observe race-based discrimination in mortgage lending today, more than fifty years after the enactment of the FHA.[51] Meanwhile, the cumulative effects of a

43. *See id.*; Massey, *supra* note 1, at 345.

44. *Shelley*, 334 U.S. at 23. Note that *Shelley* did not overrule *Corrigan v. Buckley*, and private racially restricted covenants remained legal (but unenforceable) after the Court's decision. *Id.* at 8–9 (noting that "[n]othing in the opinion of this Court, therefore, may properly be regarded as an adjudication . . . of [validity of] the private agreements . . . , but of the judicial enforcement of those agreements").

45. Carol M. Rose, *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants* 27–29, (Ariz. Legal Studies, Discussion Paper No. 13-21, 2013), https://ssrn.com/abstract=2243028 [https://perma.cc/9ZNQ-8J9L].

46. *Id.* at 1–2. Note that the *Shelley* Court was careful to reaffirm its earlier holding that the private covenants themselves lay beyond the reach of the Constitution. *Shelley*, 334 U.S. at 9.

47. *See History of Fair Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [https://perma.cc/5NU2-P7MH]; Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 193 (2017).

48. *See* 42 U.S.C. §§ 3604, 3605(a), 3606.

49. 42 U.S.C. § 3604; *see also Bank of Am.*, 581 U.S. at 200–01 (discussing cases that addressed forms of housing discrimination covered by the Fair Housing Act).

50. *See* Jim Eggleston, *Mortgage Discrimination: Eliminating Racial Discrimination in Home Financing Through the Fair Housing Act of 1968*, 20 ST. LOUIS U. L.J. 139, 142–44 (1975) (describing how, although the Fair Housing Act prohibited the "outright denial of mortgage credit on the basis of race," institutional discrimination continued).

51. *See generally* Marsha J. Courchane & Stephen L. Ross, *Evidence and Actions on Mortgage Market Disparities: Research, Fair Lending Enforcement, and Consumer Protection*, 29 HOUS. POL'Y DEBATE 769 (2018).

century of housing discrimination have manifested in persistently distressed neighborhoods and racial income and wealth disparities.[52]

Against this backdrop, community economic development strategies "emerged to develop, support, and promote community-based economic development initiatives designed to generate and maintain wealth within specific neighborhoods through direct community engagement."[53] Common community economic development initiatives include small-business financing, workforce development, nonprofit expansions, real-estate rehabilitation, and affordable housing.[54] However, these initiatives have often focused on "improving a city or neighborhood's overall prosperity without considering who specifically would benefit from or be harmed by them."[55] As a result, community economic development strategies are sometimes criticized on the basis that the development initiatives often benefit higher-income individuals, and the projects do not necessarily improve conditions for low-income residents.[56]

For this reason, many experts have advocated for more intentional approaches to community economic development aimed at achieving more equitable outcomes.[57] "Equitable economic development" has been defined as "a system of relationships and strategies that foster conditions for broadly inclusive growth—where everyone has equal access to opportunity and where strategies and programs are implemented to compensate for past discrimination."[58] Thus, an important theme in the equitable economic development literature is the importance of inclusive strategies that "expand beyond government agencies, employers, workforce development providers, business leaders, and familiar community-based organizations to includ[e] residents or grassroots organizations that represent them."[59] Nevertheless, government agencies, employers, and members of

52. SHARKEY, *supra* note 2, at 165; Minzner, *supra* note 2, at 23; Aaronson et al., *supra* note 42, at 2.

53. Crowder, *supra* note 4, at 705. *See generally* Roger A. Clay Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 257 (2009).

54. Crowder, *supra* note 4, at 705; Clay & Jones, *supra* note 53, at 257.

55. Minzner, *supra* note 2, at 24.

56. *See generally* Layser, *Pro-Gentrification Origins*, *supra* note 5.

57. *See, e.g.*, Layser, *Geographic Inequality*, *supra* note 26, at 5; Crowder, *supra* note 4.

58. Minzner, *supra* note 2, at 23.

59. *Id*. at 24.

business communities continue to drive most community development initiatives.[60] Many—if not most—community development projects are supported by government subsidies, including tax incentive programs.[61] One of these subsidies is the New Markets Tax Credit.

B. An Introduction to the New Markets Tax Credit

The NMTC is a federal tax incentive that was introduced through the Community Renewal Tax Relief Act of 2000.[62] The purpose of the NMTC is to subsidize the activities of Community Development Entities.[63] CDEs, like other community development financial institutions, specialize in lending to borrowers that may otherwise struggle to access credit markets, including lending for investment in low-income communities and mission-based projects.[64] Many CDEs lean heavily on government subsidies to help fund their lending, and the NMTC is one such government subsidy.[65] Superficially, the law is simple: the NMTC provides tax credits that encourage investment in low-income communities.[66] In practice, every NMTC transaction involves multiple levels of participation—from financial investors, to CDEs acting as financial intermediaries, to downstream borrowers—as well as significant regulatory hurdles and ongoing compliance obligations.[67]

Every NMTC transaction begins with a CDE application to the Community Development Financial Institutions Fund, which is a federal regulator within the Treasury Department.[68] Under the statute, the CDFI Fund is tasked with allocating an annually capped amount of

---

60. *Id.*

61. HOUSING AND COMMUNITY DEVELOPMENT EXPENDITURES, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/housing-and-community-development-expenditures [https://perma.cc/2H4D-699K].

62. Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified in I.R.C. § 45D).

63. SB FRIEDMAN DEV. ADVISORS, NEW MARKETS TAX CREDIT (NMTC) PROGRAM SUMMARY 1 (2018), https://sbfriedman.com/sites/default/files/download/NMTC%20Guide%202018_1.pdf [https://perma.cc/4UU7-H8GH].

64. *See* I.R.C. § 45D(c); MARPLES, *supra* note 9, at 2.

65. MARPLES, *supra* note 9, at 1.

66. SB FRIEDMAN DEV. ADVISORS, *supra* note 63, at 1.

67. *Id.*

68. *Id.* at 1, 4.

NMTCs among eligible CDEs.[69] Each year, the CDFI Fund releases an application and solicits proposals from CDE applicants who then compete for NMTC awards.[70] Successful CDEs receive a specified amount of tax credits that will pay out over a seven-year period—but there is a catch.[71] Under the law, the CDEs are not the tax credit claimants: the tax credits will be claimed by their investors.[72] The NMTC statute specifies that, subject to certain conditions, "a taxpayer who holds a qualified equity investment" can claim a tax credit equal to a percentage of that investment.[73] In lay terms, the "taxpayer" is the investor, and their "qualified equity investment" is their contribution to a CDE that has received an NMTC award.

Technically, the NMTC investors do not invest directly in low-income neighborhoods, or in any single project. They invest in a CDE that holds portfolios of loans extended to various downstream borrowers. Downstream borrowers might include, for example, an operating business, a commercial or housing developer, or a community-facilities developer with projects in a low-income community. Under the NMTC law, the CDE must use "substantially all" of the cash it receives from the investor "to make qualified low-income community investments."[74] In other words, once a CDE has received funding from the NMTC investor, it uses that capital to make investments that meet the statutory requirements. The CDEs' investments almost always take the form of loans to a "qualified active low-income community business."[75] To qualify, such borrowers must derive significant income from, and own property in, a "low-income community."[76] Low-income communities include census tracts where the poverty rate is at least 20 percent, or where the median family income does not exceed 80 percent of the metropolitan-area median

69. I.R.C. § 45D(f)(2) (requiring that the tax credits be allocated by the Secretary of the Treasury Department). The program is jointly administered by the IRS and the CDFI Fund, both of which are departments within the Treasury. ABRAVANEL ET AL., *supra* note 27, at 2. The application process is administered by the CDFI Fund. *See id.*

70. MARPLES, *supra* note 9, at 3–4.

71. *Id.* at 3.

72. *Id.*

73. I.R.C. § 45D(a).

74. I.R.C. § 45D(b).

75. John Sciarretti & George Barlow, *Pairing NMTCs with Opportunity Zone Incentives*, 9 NOVOGRADAC J. TAX CREDITS, Apr. 2018, at 2, https://www.novoco.com/periodicals/articles/pairing-nmtcs-opportunity-zone-incentives [https://perma.cc/2HK8-6SLM].

76. I.R.C. § 45D(d)(2)(A)(i).

family income (or, in the case of rural tracts, the statewide median family income).[77]

Stated more simply, CDEs that receive NMTC awards from the CDFI Fund are eligible to raise tax-motivated capital investment to finance loans to businesses and developers with projects in low-income communities. The tax credits reduce upstream investors' tax burdens, but they also help CDEs raise the capital needed to fund low-interest-rate loans to downstream borrowers that wish to pursue projects in low-income communities.[78] While CDEs typically collect a fee ranging from 2 to 5 percent of the transaction, most are driven by a mission to serve as intermediaries for investments in low-income communities. As such, the NMTC is an important public subsidy for private community economic development initiatives. But why subsidize community economic development at all? As the next Section will explain, an important justification for today's economic development subsidies is to reverse the detrimental impacts of past discrimination in housing and financial markets, which includes structural discrimination through the legal system.

C. Privatization, Gentrification, and the NMTC

The CDFI Fund allocated the first round of New Markets Tax Credits in 2001.[79] The new community economic development program was, in many respects, the Clinton Administration's response to two major trends in urban development that had emerged since the mid-1980s.[80] The first was a steady march toward privatization.[81] The political climate in the United States and Europe overwhelmingly favored market-based solutions to poverty.[82] In the context of

77. I.R.C. § 45D(e)(1).

78. SB FRIEDMAN DEV. ADVISORS, *supra* note 63, at 1.

79. MARPLES, *supra* note 9, at 1.

80. *See* Layser, *Pro-Gentrification Origins*, *supra* note 5, 784–88.

81. Hula & Jordan, *supra* note 13, at 12.

82. In the United States, this preference can be seen most clearly in the major expansion of the Earned Income Tax Credit during the 1980s and 1990s. *See generally* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-based Welfare Reform*, 108 HARV. L. REV. 533 (1995) (documenting the expansion of the EITCA); Grant D. Jacobsen, *Market-based Policies, Public Opinion, and Information*, 189 ECON. LETTERS 1, 1 (2020) (citing the EITC as an example of a market-based policy). Today, the EITC, which was relatively novel when it was introduced, has since become the country's largest federal cash-based welfare program. Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. LEGIS. 67, 70 (2013) (noting that refundable tax credits like the EITC were "an option

affordable housing and community development, the preference for market-based approaches is most clearly seen in the Low-Income Housing Tax Credit program, which began in 1986.[83] During the 1980s and 1990s, the federal government ceased to fund new public housing—and demolished some previously constructed public housing—and replaced it with privately constructed affordable housing financed with the LIHTC.[84] The NMTC was introduced shortly thereafter to support private community economic development more generally.

A second trend in the 1990s and early 2000s, which is reflected in the academic literature of the period, was increasing attention to the relationship between place and poverty.[85] Mixed-income housing, and neighborhood gentrification more generally, emerged as favored

---

only used once before 1986," but the EITC has since become "the federal government's largest anti-poverty endeavor"). An alternative to direct tax transfers, the EITC provides a wage supplement to low-income workers in the form of refundable tax credits. *See* I.R.C. § 32; David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1024 (2003) (characterizing the EITC as a "wage supplement"). In doing so, the program provides a powerful work incentive to those who may otherwise opt out of the labor market, while ultimately relying on private markets to create employment opportunities for the poor. *See* Diane Whitmore Schanzenbach & Michael R. Strain, *Employment Effects of the Earned Income Tax Credit: Taking the Long View*, 35 TAX POL'Y & ECON. 87, 87, 89 (2021). *But see* Alstott, *supra* note 82, at 547 (arguing that the EITC "does not necessarily increase work effort among the poor, and may actually reduce it").

83. *See* Hula & Jordan, *supra* note 13, at 14 (describing the EITC as a program "using public subsidies to leverage private investment in low-income communities"); I.R.C. § 42; MARK P KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 1 (2023).

84. The LIHTC was introduced as a supply-side alternative to direct public housing, and it continues to be the primary subsidy for affordable-housing development today. Michael D. Eriksen & Stuart S. Rosenthal, *Crowd Out Effects of Place-Based Subsidized Rental Housing: New Evidence from the LIHTC Program*, 94 J. PUB., ECON. 953, 954 (2010) ("[T]he Low Income Housing Tax Credit (LIHTC) program came into being as an alternative to public housing and also to offset the reform's removal of other tax benefits for owners of rental housing." (citation omitted)); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 877–78 (describing the purpose and historical context for the LIHTC). Though the EITC and LIHTC are radically different programs with different roles within the federal safety net system, both programs reflect enduring preferences for privatization and market-based strategies to deliver public benefits—preferences that persist today.

85. Hula & Jordan, *supra* note 13, at 15. For example, one article from this period notes,

> In addition to expanding private investment and restructuring public agencies to act like and collaborate with private businesses, the third reform contributing to contemporary redevelopment policies was an emphasis on *place*. Federal development programs typically focus efforts on spatially defined communities rather than on the low-income individuals living within those communities.

Id. (emphasis in original).

strategies to combat poverty.[86] Scholars set forth several theories to support mixed-income approaches, ranging from cultural and social theories to political economic theories.[87] The NMTC program began at the peak of this era in urban thought, at roughly the same time that Professor "Richard Florida published a popular book that presented gentrification, fueled by the so-called 'creative class,' to the public as a pro-social solution to urban decline, and some legal scholars began to defend gentrification as providing economic, political, and social benefits to the poor."[88]

These two trends, toward privatization and gentrification, are reflected in the NMTC, which is designed to nudge private markets toward capital investment and revitalization of low-income communities. In that regard, the NMTC is the same as other community development policies adopted during that period.[89] But in another respect, the NMTC arguably stands apart from other market-based antipoverty laws: the NMTC can—and should—be understood as a direct effort to reverse the impacts of past discriminatory legal frameworks. Writing shortly after the launch of the program, law professor Roger Groves observed:

> Importantly, the low-income definition captures not only financial poverty, but also the lack of access to capital—a pervasive problem in perpetuating poverty. It is therefore clear that NMTC program envisions primary assistance to a "target population," and that target population is those who have suffered the effects of poverty. It is only that group within the community who has lacked historic access to capital. If Congress had intended to target the financially well healed, it would have expanded the definition, instead of limiting it to those who have a lacked access to capital.[90]

---

86. *See* Robert J. Chaskin & Mark L. Joseph, *'Positive' Gentrification, Social Control and the 'Right to the City' in Mixed-Income Communities: Uses and Expectations of Space and Place*, 37 INT'L J. URB. & REG'L RSCH. 480, 481 (2012) (describing "mixed-income development as a response to concentrated urban poverty" and the "controversy" surrounding this approach).

87. *See generally* Mark L. Joseph, Robert J. Chaskin & Henry S. Webber, *The Theoretical Basis for Addressing Poverty Through Mixed-Income Development*, 42 URB. AFFS. REV. 369 (2007) (examining the theories underlying mixed-income development).

88. Layser, *Pro-Gentrification Origins*, *supra* note 5, at 787.

89. Hula & Jordan, *supra* note 13, at 12–13.

90. Roger M. Groves, *The De-Gentrification of New Markets Tax Credits*, 8 FLA. TAX REV. 213, 221 (2006).

Based on this observation and others, Groves argued that "Congress intended each party to the transaction . . . [to be] a mere conduit to the delivery of equity capital to existing low-income community residents, not new entrants without the economic need."[91] Groves recommended reforms to help ensure that core residents are the primary beneficiaries of the program, as opposed to residual beneficiaries reliant on benefits that "are at best trickled down."[92] Of particular concern to Groves were qualitative accounts that NMTC allocations during the first four rounds had been used to fund "movie theatres, performing art centers for opera, symphony and ballet, hotels like the Marriott Inn with connected convention centers, museums, upscale commercial office[s], retail outlets, and even tourist centers."[93] Such projects were predictable, given the privatized approach and contemporary preference for gentrification strategies. However, Groves argued that these types of projects "appear to be designed primarily for those already with the very access to capital that the low-income residents lack."[94]

Favoring more equitable economic development goals, Groves called for the "de-gentrification" of the NMTC and proposed multiple program changes to ensure that the benefits of the NMTC flow to low-income residents.[95] His proposals included narrowing the categories of eligible downstream loan recipients, increasing CDE mission clarity, adding criteria for identifying "low-income communities," increasing accountability, and introducing safeguards to ensure that benefits flow to low-income residents.[96] The Internal Revenue Service subsequently issued regulatory guidance in 2011 to interpret provisions as permitting NMTC projects that serve "targeted populations" (even if the project is not located in a low-income census tract), but Congress has made no significant amendments to the NMTC statute, which remains substantially identical to its original form.[97] As a result, the NMTC statute has continued to permit a wide range of eligible projects and

91. *Id.*

92. *Id.* at 220.

93. *Id.* at 225.

94. *Id.*

95. *See generally id.* at 239–54 (providing a series of proposals to ensure that the benefits of the NMTC flow to low-income residents).

96. *Id.*

97. This is not to say that the NMTC program itself has remained unchanged, however. As explained below, the CDFI Fund has made several changes to the application process over the years—changes that merit research to understand their impact. *See infra* Part II.C.

locations without providing guidance or constraints regarding what qualifies as a direct benefit to existing low-income residents.

II. DECISIONS AND DECISION-MAKERS

In this Part, we review the empirical literature about NMTC program outcomes. The Part argues that the flexible statutory design has placed substantial power in the hands of program participants to shape outcomes through their choices about which projects to fund and where to fund them. The literature review demonstrates that the NMTC has successfully subsidized many projects that benefit low-income communities, but it has also subsidized more controversial ones. In other words, NMTC program outcomes depend crucially on *decisions* about which projects to fund, and where to fund them. Ultimately, this Article will argue that the NMTC program cannot reach its full potential as an equitable economic development tool unless it engages a more diverse population of participants in the decision-making process that lies at the heart of New Markets.

A. *The Decisions: How Choices Affect Outcomes*

1. *Statutory Design and Program Flexibility.* A hallmark feature of the NMTC program is its flexibility. The statute places very few restrictions on the types of projects that are eligible for funding, assuming a project is located in an eligible census tract.[98] As a result, program participants have chosen to fund "wide-ranging projects that include commercial, industrial, retail, manufacturing, and mixed uses, as well as the development of community facilities such as schools, arts centers, and museums."[99] The two most comprehensive studies of NMTC project types have been produced by researchers at the Urban Institute. The first report, produced in 2013, found that the most common type of NMTC project in the early years of the program was office space (15 percent of projects), followed by retail (14 percent), "mixed-use projects" (12 percent), and manufacturing (13 percent).[100]

---

98. *See* MARPLES, *supra* note 9, at 3–4 (describing the NMTC allocation process as being without explicit type restrictions and as being limited to "low-income" census tracts).

99. Brett Theodos, Christina Stacy, Daniel Teles, Chris Davis & Ananya Hariharan, *Place-Based Investment and Neighborhood Change: The Impacts of New Markets Tax Credits on Jobs, Poverty, and Neighborhood Composition*, 62 J. REG'L SCI. 1092, 1093 (2022) [hereinafter Theodos et al., *Place-Based Investment and Neighborhood Change*].

100. ABRAVANEL ET AL., *supra* note 27, 40 tbl.4.1.

Of the retail projects funded with the NMTC, "34 percent were large malls, 27 percent were smaller shopping centers or large department stores, 17 percent were restaurants, 11 percent were small independent retail projects, and the remainder consisted of retail projects of an unspecified nature."[101]

The second report was an updated study published in 2021. That report similarly found that in the period from 2001 to 2017, retail, manufacturing and food processing, and office space were among the most common project types.[102] However, other frequently funded categories of projects included healthcare facilities, schools and child care, services for vulnerable populations, market residential, and community facilities.[103] In an independent survey of NMTC project types, Professor Michelle Layser found that "the NMTC has often been used to support a variety of impact-investment projects, including community facilities like YMCAs; nonprofit activities like soup kitchens, youth centers, and job training sites; and, sometimes, housing (always with an affordable component)."[104] Together, these studies paint a picture of an extremely flexible tax incentive program that leaves significant discretion to participants about how to use the tax credit allocations.

NMTC program participants also have significant discretion about *where* to pursue projects. Here, too, the statute is extremely flexible. The statutory definition of "low-income community" is broad,[105] and "in high-poverty cities like Chicago, a large portion of tracts qualify for the incentive."[106] For this reason, Layser has argued that the NMTC probably targets places that are not experiencing significant distress.[107] Other researchers have drawn similar conclusions. Researchers at University of California, Davis used statistical analyses to describe "the

101. *Id.* at 39.

102. BRETT THEODOS, CHRISTINA PLERHOPLES STACY, DANIEL TELES, CHRISTOPHER DAVIS & ANANYA HARIHARAN, URB. INST., WHICH TYPES OF PROJECTS RECEIVE NEW MARKETS TAX CREDIT FUNDING? 4 fig.1 (2021), https://www.urban.org/sites/default/files/publication/103956/which-types-of-projects-receive-new-markets-tax-credit-funding_0.pdf [https://perma.cc/43LG-JH7J].

103. *Id.*

104. Michelle D. Layser, *Nonprofit Participation in Place-Based Tax Incentive Transactions Symposium: A Taxing War on Poverty: Opportunity Zones and the Promise of Investment and Economic Development: Essays*, 48 FORDHAM URB. L.J. 1131, 1133 (2020).

105. I.R.C. § 45D(e).

106. Layser, *Geographic Inequality*, *supra* note 26, at 48.

107. *Id.*

association between [tracts'] program eligibility for [the NMTC] in 2018 and gentrification status based on neighborhood change between 2000 and 2018 in over 450 U.S. cities."[108] They found that a "non-trivial percentage[] of gentrifying tracts were eligible for NMTC . . . program funding."[109] That said, "being eligible does not guarantee that a neighborhood receives any funding, and if it does, it also does not determine how much investment dollars a neighborhood receives and the types of projects that are developed. Investors and local program administrators have significant control over these decisions."[110]

At least two studies have analyzed NMTC project investment patterns *among* eligible census tracts. The first is a nationwide study by the Urban Institute, which concluded that "[t]racts that have NMTC projects are, on average, more economically distressed than eligible tracts that do not," and "[a]mong eligible places, projects are overrepresented in neighborhoods with more Black residents (but not more Asian or Hispanic residents) and underrepresented in neighborhoods with more white residents."[111] The second study, by Layser, used spatial-analysis methods to analyze NMTC investment patterns in the twenty cities with the highest amount of NMTC investment.[112] Layser found that "in many cities, NMTC allocations have flowed to areas that exhibit at least one of two variables predictive of gentrification: high vacancy rates and rent increases."[113]

Both studies provide evidence that the spatial targeting associated with the NMTC has potential to bring capital to communities experiencing both disadvantage and disinvestment. However, there are some important methodological caveats to note. Importantly, the spatial analysis in Layser's study relied on data on projects that

---

108. Noli Brazil & Amanda Portier, *Investing in Gentrification: The Eligibility of Gentrifying Neighborhoods for Federal Place-Based Economic Investment in U.S. Cities*, 58 URB. AFFS. REV. 1234, 1236 (2022).

109. *Id.* at 1266.

110. *Id.* at 1241.

111. BRETT THEODOS, CHRISTINA PLERHOPLES STACY, DANIEL TELES, CHRISTOPHER DAVIS & ANANYA HARIHARAN, URB. INST., WHERE DO NEW MARKETS TAX CREDIT PROJECTS GO? 13 (2021) [hereinafter THEODOS ET AL., NEW MARKETS], https://www.urban.org/sites/default/files/publication/103995/where-do-new-markets-tax-credit-projects-go_0.pdf [https://perma.cc/7WCE-GQWG].

112. *See* Michelle D. Layser, *Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives*, 12 U.C. IRVINE L. REV. 163, 168, 185 (2021) (explaining the twenty-city cutoff as those with the highest number of NMTC projects suited for spatial analysis).

113. *Id.* at 190.

received allocations prior to 2010,[114] while the Urban Institute study included data through 2017.[115] Though the Urban Institute report concluded that the location patterns appeared relatively stable over time,[116] it is nevertheless possible that the different results in these two studies are attributable to the time periods studied. It is also possible that the different results in these studies reflect other differences in sampling (nationwide versus case study), different methodology (statistical analysis versus spatial analysis), or the different variables studied. Further analysis of NMTC project locations would be necessary to fully understand the siting patterns. Nonetheless, the findings in these studies suggest that at least some NMTC investment targeted distressed communities—but not all of it.

The flexible statutory design of the NMTC program provides substantial deference to local actors to determine what forms of capital investments are made, arguably in response to local need and with the substantial vetting conducted via the application process. However, this flexibility makes it difficult to directly interpret how well investments represent the change desired directly by community members, and whether investments catalyze other desired neighborhood changes. Case studies provide some locally generalizable insight, and spatial analysis provides a broader sense of where investments matter. Neither of these approaches, however, provides substantial insight into how NMTC projects organize institutional and human capital and leverage financial capital to promote equitable economic development.

2. *Funding Choices and Outcomes.* Ultimately, these project-funding choices affect how the program stands to impact low-income communities. Research suggests that NMTC investment has the potential to reduce poverty in targeted census tracts. Professor Matthew Freedman has used quasi-experimental statistical analysis to study the impact of NMTC investment in low-income communities.[117] Freedman found "modest benefits associated with subsidized investment targeted at low-income neighborhoods."[118] Specifically,

114. *Id.* at 184.

115. *See* THEODOS ET AL., NEW MARKETS, *supra* note 111, at 4.

116. *Id.* at 11.

117. Matthew Freedman, *Teaching New Markets Old Tricks: The Effects of Subsidized Investment on Low-Income Neighborhoods*, 96 J. PUB. ECON. 1000, 1013 (2012).

118. *Id.* at 1000.

Freedman concluded that "[p]overty and unemployment rates fall by statistically significant amounts in tracts that receive NMTC-subsidized investment relative to similar tracts that do not."[119] In a separate study, published as a graduate student dissertation, a researcher at Georgia State University reaffirmed Freedman's poverty-reduction finding using spatial analytics, and he additionally observed positive impacts on local home values.[120]

However, research also suggests that the downstream outcomes of the NMTC program are linked to the types of projects that are funded in a census tract.[121] For example, one study found that the tax credits had a positive effect on "the number of new businesses and the number of employees hired" in the retail industry, but NMTC-eligible tracts also "experienced declines in employment at new wholesale and transportation firms."[122] Another study found that hotel projects are associated with the most new businesses.[123] In addition, healthcare services, offices, and services for vulnerable populations were "associated with at least 20 firms per project."[124] Ultimately, the researchers concluded that "[w]e find that NMTC projects are associated with increases in the number of businesses, jobs, and income and decreases in poverty rates for the project types where we expect them."[125] The researchers expressed some doubt that declines in poverty rates reflected economic mobility among low-income residents, speculating that the decline in poverty rate may be explained by in-migration of college-educated residents.[126] However, they noted that displacement of preexisting residents appeared to be minimal.[127]

---

119. *Id.*

120. Michael Henderson, The Locational Patterns and Socioeconomic Effects of the New Markets Tax Credit and Low Income Housing Tax Credit in Distressed Metropolitan Census Tracts 121 (Apr. 30, 2018) (Ph.D. dissertation, Georgia State University) (on file with Georgia State University).

121. Theodos et al., *Place-Based Investment and Neighborhood Change*, *supra* note 99, at 1112.

122. Kaitlyn Harger & Amanda Ross, *Do Capital Tax Incentives Attract New Businesses? Evidence Across Industries from the New Markets Tax Credit*, 56 J. REG'L SCI. 733, 735 (2016).

123. Theodos et al., *Place-Based Investment and Neighborhood Change*, *supra* note 99, at 1106.

124. *Id.* at 1106–08.

125. *Id.* at 1112.

126. *Id.* at 1094.

127. *Id.* at 1105.

Somewhat unsurprisingly, these studies suggest that different types of projects will have different impacts on targeted communities. Layser has argued that tax incentives like the NMTC "can help reduce geographic inequality in . . . targeted areas by improving neighborhoods for the benefit of existing communities, while minimizing risk of displacement," but only if they successfully (1) target neighborhoods that are *experiencing* geographic inequality and (2) subsidize the types of projects that are most likely to reduce those inequities.[128] For example, if a neighborhood suffers from unemployment because it is too far from jobs, then job-creating projects may help alleviate distress in that area. Despite substantial need, development of affordable housing (without creation of jobs) may create more housing opportunity but may exacerbate distress in that area. More research would be necessary to evaluate how different types of NMTC projects impact places with different characteristics. Nevertheless, existing research clearly links impact to different types of projects, suggesting that participants' decisions about which projects to fund (and where) affect program outcomes.

* * *

In sum, the empirical literature suggests that the NMTC has the capacity to benefit low-income communities, but the program's impact depends crucially on which projects CDEs choose to fund and where those projects are located. Significantly, because it permits a wide range of eligible investments, the NMTC program "confer[s] significant power to private market participants to select which projects will be funded."[129] Thus, it is essential to understand *who* participates in the NMTC market and why they make the decisions that they do. This question is particularly important to evaluate the program within equitable economic development frameworks that emphasize the importance of engaging community stakeholders, including minority and low-income stakeholders who have traditionally lacked access to credit markets. The next Section reviews the—notably scant—literature about which CDEs receive NMTC awards.

---

128. Layser, *Geographic Inequality*, *supra* note 26, at 5.
129. *Id.* at 34.

B. The Decision-Makers: Underrepresentation of Minority-Led CDEs

The identity of the CDEs that receive NMTC awards has received considerably less attention in the literature than the topics described above, despite its potential to drive outcomes and its importance to achieving equitable economic development. The most comprehensive analysis of CDE awardees was produced, once again, by researchers at the Urban Institute.[130] Their analysis of allocations from 2001 to 2019 found that the largest share of allocations—58 percent—went to Community Development Financial Institutions and mission lenders.[131] Smaller shares of NMTCs have been awarded to for-profit financial firms (17 percent), governmental entities (12 percent), for-profit nonfinancial institutions (8 percent), and nonprofit nonfinancial institutions (6 percent).[132]

Significantly, the report found that different types of CDEs have funded different types of projects.[133] "CDFIs and mission lenders are big funders of forest, agriculture, mining, and quarry; retail; energy, water, waste, and sewage; health care services; schools and child care; community facilities; and services for vulnerable populations," and nonprofit nonfinancial institutions were more likely to develop affordable housing.[134] In contrast, for-profit financial institutions were more likely to invest in other CDEs, while "[f]or-profit nonfinancial CDEs are most likely to fund market-rate residential housing and community facilities."[135] In short, it is clear from the Urban Institute report that the identity of the CDEs that receive awards matters—different types of CDEs make different decisions about which projects to fund, thereby affecting program outcomes. However, one important piece of analysis is notably missing from the report: data about minority-led CDEs.

---

130. *See generally* BRETT THEODOS, CHRISTINA PLERHOPLES STACY, DANIEL TELES, CHRISTOPHER DAVIS, PRASANNA RAJASEKARAN & ANANYA HARIHARAN, URB. INST., WHICH COMMUNITY DEVELOPMENT ENTITIES RECEIVE NMTC FUNDING? 4 (2021), https://www.urban.org/sites/default/files/publication/103960/which-community-development-entities-receive-nmtc-funding_0.pdf [https://perma.cc/2UT2-4M2X] (analyzing NMTC allocations by CDE type).

131. *Id.* at 4.

132. *Id.*

133. *Id.* at 6.

134. *Id.*

135. *Id.*

An earlier report by the U.S. Government Accountability Office ("GAO") had found that minority-led CDEs were significantly less likely to receive an NMTC award than their nonminority counterparts.[136] An analysis of NMTC allocations from 2005 to 2008 showed that nonminority CDEs that applied for NMTCs received 27 percent of the allocations they applied for, whereas minority CDEs were only successful 9 percent of the time.[137] The GAO noted that this disparity could impact program outcomes, as "[r]epresentatives from several minority-owned entities . . . indicated that minority CDEs and other locally based, community lending organizations may have a better understanding of the economic conditions and availability of capital in the communities they serve than other investment organizations serving those same communities."[138]

To understand these disparities, the GAO interviewed representatives at twenty-five CDEs to identify barriers to entry for minority-led CDEs.[139] They found that the most frequently cited challenges faced by minority CDEs included: first, difficulty demonstrating the capacity to deploy the amount of capital requested and to complete projects with significant community impact; second, difficulty demonstrating a track-record of successful investment in low-income communities; and third, high transaction costs that disproportionately burden smaller CDEs.[140] The director of the CDFI Fund responded to the GAO report, stating that while she agreed with the reports' statistical conclusions, she did "not believe that this lower success rate is attributable to any biases in the application review or selection process."[141] She attributed the disparities to the facts that:

136. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-536, NEW MARKETS TAX CREDIT: MINORITY ENTITIES ARE LESS SUCCESSFUL IN OBTAINING AWARDS THAN NON-MINORITY ENTITIES 30 (2009) [hereinafter GAO REPORT], http://www.gao.gov/new.items/d09536.pdf [https://perma.cc/U9B8-6K7Q] ("Our analysis indicates . . . minority status is associated with a lower probability of obtaining an [NMTC] allocation.").

137. *Id.* at 10.

138. *Id.* at 9.

139. CDFI Fund guidelines state that to qualify as minority-owned, a CDE must be more than 50 percent owned or controlled by members of a minority ethnic group. In the case of a for-profit entity, this would entail more than 50 percent of CDE owners belonging to a minority group. In the case of a non-profit entity, this would entail more than 50 percent of the board of directors belonging to a minority group or that the executive director or managing member belong to a minority group. *Id.* at 8.

140. *Id.* at 19–20.

141. *Id.* at 58.

relatively few minority-led CDEs had applied for awards; "[m]inority CDEs tend to be smaller, and smaller CDEs as a class do not fare as well"; and minority CDEs often do not apply in multiple rounds, placing them at a disadvantage.[142]

The GAO analysis was "not sufficient to conclude whether any actions taken or not taken by the Department of the Treasury, including possible bias, contributed to minority CDEs receiving proportionally fewer allocations than non-minority CDEs."[143] However, the GAO expressed some skepticism about the CDFI Fund's explanations, noting that "although minority CDEs submitted relatively few applications, their success rate was still lower than non-minority CDEs . . .[, and] when controlling for the size of NMTC applicants, minority status was associated with a lower probability of receiving an allocation."[144] For these reasons, the GAO recommended that Congress consider directing the CDFI Fund to "explore options for providing technical assistance in applying for and using NMTC allocations to minority CDEs."[145] Following the report, the CDFI Fund "conducted an intensive and highly regarded training targeted to minority- and Native-owned CDEs, which helped increase the number of awards to minority applicants."[146] Nevertheless, from 2017 to 2019, minority-led CDEs still only won 14 percent of allocations.[147] Meanwhile, the GAO's report was the last dedicated study of minority-led CDEs' participation in the NMTC program.

C. An Open Question

Plenty has changed since 2008, when the GAO wrote its report. Three changes in particular make it essential to revisit questions about how well the NMTC promotes equitable economic development. First, the financial crisis of 2008 and 2009 increased the urgency for effective, equitable community development programs. The financial crisis was precipitated by widespread residential-mortgage defaults that set off a ripple effect in derivative markets and led to the collapse of major

142. *Id.*

143. *Id.* at 31.

144. *Id.*

145. *Id.* at 29–30.

146. Annie Donovan, *Dismantling Structural Racism in Community Development Finance*, IMPACTALPHA (Aug. 11, 2020), https://impactalpha.com/dismantling-structural-racism-in-community-development-finance [https://perma.cc/9N7H-FV3W].

147. *Id.*

financial institutions, ultimately triggering a prolonged recession. Though foreclosures were widespread, minority communities were particularly impacted because many Black and Latino borrowers had entered into so-called "subprime" mortgages that contained less favorable loan terms—and higher interest rates—than traditional mortgages.[148]

The higher rates of defaults among minority borrowers, many of whom lived in racially segregated communities, meant that many foreclosures were clustered in low-income neighborhoods.[149] In turn, the high proportion of abandoned properties in minority neighborhoods further depressed property values in those neighborhoods. Though most of the country eventually recovered from the recession, the recovery was uneven, and many minority neighborhoods continue to show signs of distress.[150] The persistent distress in low-income communities was a motivating factor when the Opportunity Zones tax incentive was introduced in 2017 to promote investment in low-income communities, and it is a reason why the NMTC program has continued to draw bipartisan support in a deeply polarized Congress. In fact, the size of the program was recently expanded from $3.5 billion per year for years 2010 through 2019 to $5 billion per year for years 2020 through 2025.[151]

Second, recent events have shined a renewed spotlight on racial inequality in the United States, including structural inequality. When police officer Derek Chauvin murdered George Floyd, a forty-six-year-old Black man, in 2020, the violent tragedy spurred protests in major cities and reinvigorated the Black Lives Matter movement.[152] Scholars and advocates have also turned their attention to structural

---

148. *See generally* DAN IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET (2009) (discussing how deregulation and disintermediation within the banking industry led to an increase in subprime and predatory lending, which disproportionately targeted low-income and minority borrowers).

149. *Id.*

150. Austin Harrison & Dan Immergluck, *Housing Vacancy and Hypervacant Neighborhoods: Uneven Recovery After the U.S. Foreclosure Crisis*, 45 J. URB. AFFS. 1469, 1469–71, 1481–83 (2023).

151. I.R.C. § 45D(f)(1).

152. The Black Lives Matter movement began in 2013 after the earlier shooting death of Black teenager Trayvon Martin by civilian neighborhood watchman George Zimmerman. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory [https://perma.cc/89N3-JC5J].

inequality beyond policing. In the context of tax law, Professor Dorothy Brown's recent book *The Whiteness of Wealth* highlights ways that Black Americans are harmed by the tax system and ways that seemingly neutral tax laws tend to reinforce income and wealth disparities.[153] Professor Francine Lipman has proposed "antiracist" reforms to tax law,[154] and Professor Jeremy Bearer-Friend has called for greater racial data transparency with respect to race in taxation.[155] These are just a few voices within a growing choir of academics researching structural inequality within tax law. The Biden administration has responded by creating the first Treasury Advisory Committee on Racial Equity to help identify areas of law, including tax law, that reinforce structural inequality.[156] Research on structural inequality in the NMTC program is relevant to the committee's efforts.

Third, the NMTC application has changed over time, rendering the GAO study outdated. In the early years of the program, applicant CDEs had the option of including specific project proposals or more general pipeline descriptions, and they could provide relatively vague descriptions of intended impacts. More recently, the CDFI Fund has moved away from specific project proposals, but it has heightened its track-record requirements.[157] The CDFI Fund now requires more specific impact metrics and explicitly prioritizes applicants that propose projects in highly distressed communities, such as food deserts or medically underserved communities. There are good reasons to think that these changes may affect the types of projects that are funded through the NMTC or the places where they are located, but without empirical research, one can only guess how these changes may impact lending decisions—or how they may affect minority-led CDEs.

* * *

For these reasons, the remainder of this Article will revisit questions about structural inequality in the NMTC program. The next

153. *See* BROWN, *supra* note 14.

154. *See* Lipman, *supra* note 18 (proposing reforms such as antiracist legislative-voting tax policies).

155. *See* Bearer-Friend, *supra* note 19, at 46.

156. *See* U.S. DEP'T OF TREAS., TREASURY ADVISORY COMMITTEE ON RACIAL EQUITY, https://home.treasury.gov/about/offices/equity-hub/TACRE [https://perma.cc/6YU8-KBPW].

157. Brad Stanhope, *It's Not Supposed To Be Easy: Measuring NMTC Impact Analysis*, 11 NOVOGRADAC J. TAX CREDITS, Mar. 2020, at 3, https://www.novoco.com/periodicals/articles/its-not-supposed-be-easy-measuring-nmtc-impact-analysis [https://perma.cc/3KR7-5JJG].

Part presents new empirical data about NMTC program dynamics. It shows that changes to the NMTC program over time have probably helped nudge CDEs to invest in prosocial projects in distressed communities, but there are still significant limits to equitable economic development through the NMTC. Most significantly, minority-led CDEs face significant barriers to entry that have become more entrenched with time. These dynamics may impact downstream outcomes by affecting the types of projects that are funded and the neighborhoods that are served. Moreover, even if it is assumed that many nonminority-led CDEs fund projects with positive community impacts, the persistent failure to bring diverse voices to the table is itself an example of structural inequality within the tax system—and a significant limitation on the capacity for equitable economic development through the NMTC.

III. INSIDE THE NEW MARKETS ECOSYSTEM: AN EMPIRICAL ACCOUNT

A. Empirical Design

This Article draws on a series of original, semistructured interviews conducted with NMTC institutional stakeholders to identify specific challenges that NMTC program participants face when seeking NMTC financing. As described below, our primary research method was a grounded-theory approach, whereby theory was derived from the data collected. However, our interview questions were guided by theoretical and conceptual frameworks rooted in equitable economic development principles.[158] As such, we were particularly interested in understanding the factors that affected participants' decisions about which NMTC projects to fund, communication and power dynamics among stakeholders, and representation of diverse voices. As discussed above, theories of equitable economic development point to participation by diverse stakeholders, including members of affected communities, as important for producing equitable outcomes.[159]

---

158. A theoretical framework draws on existing theories that frame the study and asks, "How does this theory shape the study?" Omolola A. Adeoye-Olatunde & Nicole L. Olenik, *Research and Scholarly Methods: Semi-Structured Interviews*, 4 J. AM. COLL. CLINICAL PHARMACY 1358, 1362 (2021). A conceptual framework "answers, 'Why is this research important?' and 'How does it contribute new knowledge?'" *Id.*

159. Norman Krumholz, *Equitable Approaches to Local Economic Development*, 27 POL'Y STUDS. J. 83, 91 (2005).

Under a grounded-theory approach, the "data collection and analysis are iterative, in that early data analysis informs subsequent data collection."[160] Our interview guide reflected this theoretical framework, but the semistructured interview format allowed us to adjust to the "natural flow of conversation for each unique interview."[161] In other words, the interviews were structured to touch on key areas of inquiry, but the precise flow of conversation was directed by the interview participants. This conversational interview format allowed us to discover new avenues for inquiry as participants provided insights we did not anticipate. Ultimately, this approach allowed us to further develop both theory and further avenues for inquiry based upon the data collected.

We used a purposive sampling method to recruit interview participants. Purposive sampling is a nonrandom sampling method in which participants are selected "based on meeting certain criteria of interest."[162] As with any research, "the trustworthiness of study findings relies heavily on sample participants' knowledge of the subject matter."[163] For this reason, we limited our sample to professionals with direct experience with the NMTC program. Since our goal was to understand the dynamics at play in the NMTC industry, we chose interview subjects with different roles. Though most interview participants were professionals affiliated with large national CDEs or smaller regional CDEs, our sample also included upstream investors, downstream borrowers, and consultants. This approach allowed us to strike a balance "between representing individuals with the most knowledge of the subject matter and those who can provide different perspectives."[164] Our goal was to collect data that could be triangulated across multiple perspectives to gain greater insights about the program dynamics.

To recruit participants, we drew from lists of contacts of recent participants at NMTC conferences, contact information from LinkedIn, and names that were provided to the CDFI Fund as the points of contact associated with NMTC awards. We recruited potential participants via emails that described our screening criteria,

160. Adeoye-Olatunde & Olenik, *supra* note 158.

161. *Id.*

162. *Id.* at 1361.

163. *Id.*

164. *Id.*

with an initial goal of recruiting twenty-five to thirty participants. In qualitative research, a sample size is considered "to be sufficient when there are no new codes or themes . . . generated from data collection; commonly referred to as theoretical or thematic saturation."[165] We reached saturation after twenty-four participants, and our final sample included nine large CDEs, five small CDEs, six investors, two borrowers, and two consultants.[166] Of the participants we interviewed, roughly half were working for institutions that had a regional or local focus, and the other half were working for institutions focused nationally. Five participants worked for entities whose missions focused specifically on minority populations or racial justice, and three entities focused on solely rural populations. Drawing upon the variation observed across this sample of interviewees, our study provides important insights into what factors participants believe determine their success under the program. Further, these insights make it possible to analyze dynamics that may create barriers for newcomers.

We conducted the interviews over Zoom video conferencing during the period from October 2021 to January 2022. All interview participants consented to video and audio recording, and interview sessions typically lasted between forty to sixty minutes. In accordance with our iterative research method, we identified a preliminary list of themes after the first ten interviews. Our preliminary themes identified several barriers to equitable community development, including differences in ways that smaller and minority-led CDEs experienced the professional networks and compliance burdens associated with the NMTC. These thematic observations helped guide our conversations in the remaining interviews. After we completed all the interviews, we used Adobe Premiere Pro to transcribe the audio recordings, and we

---

165. *Id.*

166. Note that saturation is not directly described by sample size but depends instead on the consistency across themes and perspectives expressed within and between the groups that we interviewed. *See* Benjamin Saunders, Julius Sim, Tom Kingstone, Shula Baker, Jackie Waterfield, Bernadette Bartlam, Heather Burroughs & Clare Jinks, *Saturation in Qualitative Research: Exploring Its Conceptualization and Operationalization*, 52 QUALITY & QUANTITY 1893, 1895 (2018). Across multiple coders, we observed consistency in the thematic areas discussed in this Article. We assessed this at several points during the research to arrive at the determination that we had reached saturation. While ideally, we would have liked to have conducted additional interviews among representatives within non-CDE areas, we ultimately found across multiple touchpoints in our interview and analysis process that what we were hearing was substantially consistent across our interviewees, regardless of what institutional type they represented.

removed identifying details to preserve participants' anonymity. We then coded the transcripts using the coding software Dedoose.

"Coding is the process of identifying and labeling topics, similarities, and differences in the interview data (ie, quotes from participants)."[167] We used a combination of inductive and deductive coding methods to code the data. "Inductive coding is a bottom-up approach . . . [that] derives codes entirely from the data (eg, participant quotes)," and it "is a cornerstone in grounded theory."[168] Deductive coding, on the other hand, is a "top-down approach . . . [that] is commonly used when a theoretical or conceptual framework was applied to guide data collection."[169] The coding we rely upon for the empirical portion of this article is derived from inductive coding. We derived four primary codes that reflected major themes that emerged from the interviews: "application process," "building local markets," "challenges," and "diversity and representation." In addition, we applied subcodes to the "application process" and "challenges" codes that reflected significant subthemes relevant to our focus on equitable economic development.

Both authors and two research assistants contributed to the coding of interviews. To increase intercoder reliability, the authors coded several interviews in common and then developed coding memos to describe the pertinent codes that they identified.[170] After discussing and refining the coding schema, the authors then coded additional interviews independently but iteratively tracked the evolution of codes and subcodes throughout the coding process. Here, it is worth reiterating that thematic saturation is not directly described by sample size but depends instead on consistency across themes and perspectives expressed within and between the groups that are interviewed.[171] Across multiple coders, we observed consistency in the thematic areas discussed in this Article. We assessed this at several points during the interview phase to arrive at the determination that we had reached saturation. While ideally, we would have liked to have conducted

167. Adeoye-Olatunde & Olenik, *supra* note 158, at 1364.

168. *Id.*

169. *Id.*

170. *See* Cliodhna O'Connor & Helene Joffe, *Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines*, 19 INT'L J. QUALITATIVE METHODS 1, 2 (2020) (describing the benefits of intercoder reliability: "by increasing the consistency and transparency of the coding process, [intercoder reliability] can help provide confidence that specific efforts were made to ensure the final analytic framework represents a credible account of the data").

171. *See* Saunders et al., *supra* note 166.

additional interviews among representatives within non-CDE areas, we ultimately found across multiple touchpoints in our interview and analysis process that what we were hearing was substantially consistent across our interviewees, regardless of what institutional type they represented.

After coding the interviews, we analyzed the data to describe dynamics in the NMTC program that affect the laws' capacity to promote equitable economic development. The next Section describes the results of this qualitative study. Part IV then interprets our findings, arguing that the NMTC law creates a tax credit market that, in many ways, replicates inequitable power dynamics within purely private markets. These dynamics within the NMTC industry create barriers to full inclusion of diverse voices, ultimately limiting its capacity to advance equitable economic development. For reasons to be explained, some of these barriers can be attributed to the program's reliance on private market participants, but others can be attributed to features of the application process that create inequitable compliance.

Before turning to the results, some caveats are in order. For the reasons discussed above, we believe the interview data presented in this study are generalizable with respect to NMTC participants who are active in the NMTC program, including those who attend conferences hosted by major accounting firms. Our sample does not include representatives of CDEs that have not actively participated in the NMTC program, and it does not include perspectives from the CDFI Fund itself. Therefore, to the extent that our study focuses on barriers to entry, our analysis is limited to the perspective of participants who have successfully entered the program. As such, this study leaves room for further research into the experience of minority-led CDEs that have attempted to participate in the NMTC program but have failed to win allocations.

However, identifying minority-led CDEs that have failed to enter the NMTC program is difficult for two reasons. First, the CDFI Fund proactively releases information about organizations that receive tax credit allocations, but they do not release information about organizations that have been *denied* allocations. This information may be available through a Freedom of Information Act request, but such requests are often time consuming and challenged by firms seeking nondisclosure. Second, there is no publicly available information to specify which CDEs self-identify as minority-led, making it difficult for researchers to identify this group. In our study, a handful of CDEs self-described as minority-led CDEs. By this, the interview participants sometimes referred to their organizations' board composition or to individuals in leadership. We do not attempt to define "minority-led," and we have accepted the descriptions provided by the interview subjects. This Article now turns to a discussion of the study results.

B. Decisions, Relationships, and Barriers to Entry

As explained in Part II.A, the NMTC program is a deliberately flexible incentive, and participants' experiences with the program are extremely varied. The CDE participants' priorities varied with respect to the types of projects they fund and the types of populations they serve. Similarly, the types of community impact CDEs hoped to achieve varied by CDE. Nevertheless, several consistent, crosscutting themes emerged from the data with respect to funding priorities, interorganizational relationships, and perceptions of diversity and representation within the NMTC program. This Section elaborates on these themes and the key takeaways. The objective of this Section is to describe the dynamics of the NMTC program based on participants' first-person experiences. Part IV will analyze the interview data with a specific focus on how these dynamics create potential for—and barriers to—equitable economic development through the NMTC.

1. *Factors that Impact Project Selection.*

a. CDEs' Internal Missions. The most significant factor driving participants' choices about which projects to fund with NMTCs is the CDE mission. Every CDE participant, regardless of size or nonprofit status, described their CDE's mission. Some CDEs are predominantly focused on serving specific regions or communities (for example, rural communities,[172] minority communities,[173] or severely distressed census

172. *See* Zoom Interview with Participant No. 20211111DU (Nov. 11, 2021) (on file with authors) ("[W]e shoot for quality jobs in rural areas. Now, by coincidence, that is often met, we've had a manufacturing focus because those tend to be the jobs that are the, you know, the easiest to assemble in a rural area.").

173. *See* Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors). One participant said,

> We're looking for a business model[] that can produce that kind of sustained wealth and income. And the only thing we could come up with, given the natural resources available to [the targeted Native American community], was essentially using their ability to enter into joint ventures and business combinations with non-Indian businesses off reservation that could possibly be sponsored by them or joint venture by them . . . .

Id. Another noted,

tracts[174]), without clear preferences as to project type. Other CDEs specialize in specific types of projects—such as rehabilitation projects,[175] health centers,[176] healthy foods,[177] real estate,[178] or operating businesses[179]—and may not have a geographic focus. Investors, in turn, also have missions that impact their investment strategies. As one minority-focused CDE investor explained,

> *[I]n any given year, anywhere between, say, sixty-five and eighty different organizations receive tax credit allocations. And those organizations may be organized geographically to focus on a particular city or region [or] organizations may be focused on a particular issue like health care or the environment or education. And we focus on a demographic, so Native Americans or Hispanic populations . . . . And so, it really depends on the type of CDE as to what project type that we're going to be interested in focusing on.*[180]

> [A]nd then we send out what's called a Mission Fit questionnaire, which is a short series of, uh, I think it's like four or five questions that are—and each question has a number of different parts to it. And that's really just getting to the . . . organizational mission, . . . how it would work to reduce racial disparities or improve socioeconomic outcomes of individuals that are going to be served. Who is going to be served?

Zoom Interview with Participant No. 20211108RB (Nov. 8, 2021) (on file with authors).

174. *See* Zoom Interview with Participant No. 20210225WF (Feb. 25, 2021) (on file with authors) ("We're a little bit unique in that we only do deals that are in severely distressed census tracks.").

175. *See* Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors) ("So, almost all of our projects use the federal historic tax credit in addition to the New Markets Tax Credit.").

176. *See* Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors) ("So, at this point in time, I'm focused in on federally qualified health centers serving about thirty million low-income patients in all fifty states. Prior to that, I focused exclusively on hospitals.").

177. Zoom Interview with Participant No. 20210415LM (Apr. 15, 2021) (on file with authors) ("We always try to highlight a healthy foods project. That's partly to kind of . . . [because] our parent also applies for healthy food financing and initiative funds. And so, we like to have that cohesion.").

178. *See* Zoom Interview with Participant No. 20210225WF (Feb. 25, 2021) (on file with authors) ("So, that's why it does lend itself to more large, catalytic real estate projects for our role. Now, there are some CDEs, they'll do like operating businesses, and that's all they do. All we do is real estate.").

179. *See id.*

180. Zoom Interview with Participant No. 20210416LV (Apr. 16, 2021) (on file with authors); *see* Zoom Interview with Participant No. 20210402DG (Apr. 2, 2021) (on file with authors) ("But certainly with the events of last summer, . . . [our] investing activity over the last year has . . . been significantly targeted toward projects that . . . are providing clear benefits to either . . . minority communities or are minority-owned business ventures.").

b. CDFI Fund Priorities. In addition to CDEs' internal mission priorities, at least two external forces influence project selection and priorities. The first is perceived CDFI Fund priorities, which many CDE professionals assume is reflected in the annual tax credit application.[181] Though CDEs do not generally change their core mission to match CDFI Fund priorities, they do make smaller adjustments, which they believe will make their applications more competitive. A professional at a small, rural CDE explained:

> *So, you haven't been doing certain things in your business, you know, as a CDE that the application is asking about. You have to go back and say, all right, we're going to start doing that now because we got to get these points. . . . So, you got to write up a narrative on "Okay, well here's either how we do track it already or how we're going to track it now that we know that you're asking the question."*[182]

A particularly striking example cited by several CDEs was a question added to the application during First Lady Michelle Obama's healthy foods campaign:

> *The CDFI Fund added a question [about food deserts] to the application, which almost immediately changed behavior, if you will, in the industry. It became a priority for investors and CDEs to be seeking those types of opportunities. And if you would look at things over time, I'm sure [you would] see that data would show a rapid increase in the number of those than the number of groceries that were financed with New Markets shortly after those questions were added . . . to the application.*[183]

Another respondent at a large, national CDE described their organization's focus on projects in severely distressed census tracts in terms of CDFI Fund priorities, noting that "*approximately 80 percent of the allocation is now awarded to severely distressed versus simply eligible . . . [so] we do primarily look for eligibility that adds up to a severe distress level*."[184] Another investor commented that the CDFI Fund's increased attention to medically underserved communities and

181. *See, e.g.*, Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors) ("[T]hey don't have a stated certain one impact. They want this to create a lot of different impacts. And the way that they can drive that really is through the application and how they score the applications.").

182. Zoom Interview with Participant No. 20211111DU (Nov. 11, 2021) (on file with authors).

183. Zoom Interview with Participant No. 20210402DG (Apr. 2, 2021) (on file with authors).

184. Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors).

food deserts has made the program "*much more thoughtful over the years, such that, you know, the right kind of projects can get financed*."[185]

Statements like these suggest that CDFI Fund priorities have the potential to influence both the type and location of NMTC projects. For this reason, it is important to understand how CDEs understand CDFI Fund priorities. On the one hand, many CDE professionals expressed at least some uncertainty as to the CDFI Fund priorities. A common sentiment among CDE professionals was that lack of transparency in the application process makes it hard to know the CDFI Fund's allocation priorities. A respondent at a large national CDE complained,

> *I think there's a lack of transparency from the CDFI Fund and what they're really looking for and how they're scoring applications. If they want people to do something a certain way, publish . . . [a] scoring sheet so we know what you want. Like, it's like they're, you know, we're getting a final exam every year, but they only show you what the bell curve was. They never give you your paper back. And I just—I don't see what the value to that is.*[186]

Nevertheless, respondents do expect some types of proposals to be most likely to receive high scores from the CDFI Fund. The first are project pipelines with easily quantified community impacts—especially job creators. A respondent at a small rural CDE stated simply, "*I would say that job creation aligns very well with what they are trying to encourage.*"[187] A different regional investor expressed frustration, asking,

> *So what if you create a bunch of new jobs? If you can't get people into those jobs because they can't find childcare or don't have the training—those should be just as important as jobs. What we're hearing, the buzz*

185. Zoom Interview with Participant No. 20211207SN (Dec. 7, 2021) (on file with authors).

186. Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors). One participant stated,

> [Y]ou don't get any feedback on your application . . . . I mean, I don't know how anyone could really make heads or tails of, you know, you sort of go, okay, well our community benefits section in section two, you know, that's where we don't score very well. But why you didn't score very well?

Zoom Interview with Participant No. 20211108RB (Nov. 8, 2021) (on file with authors); *see also* Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors) ("And probably one of the best things would be is that we're more clear on really how the scoring does and what exactly your score was and how you scored on each answer. So, . . . that would be helpful—that is a question for bigger thinkers than me.").

187. Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors).

> *in the industry, is that a bunch of CDEs have moved away from answering anything but the jobs questions because they feel like that's the focus of the CDFI Fund.*[188]

None of the CDEs in our sample said that they have adopted job-creation priorities solely due to CDFI Fund priorities, but respondents often described community impacts in terms of qualitative stories and expressed uncertainty about how to translate those stories into quantitative metrics that would satisfy the CDFI Fund.[189] At minimum, our interviews suggest that CDEs make a significant effort to translate their own internal priorities into community-impact narratives that they believe will be legible to the CDFI Fund. At the extreme, at least some CDEs appear to actively adjust their internal missions to fit CDFI Fund priorities.

c. Proposed Pipelines and Project Timelines. So far, this Section has explained how CDEs' internal missions shape project priorities and how some CDEs further adjust their strategies in response to CDFI Fund priorities when they compete for funding. As this Section will explain, a second external force that significantly impacts project selection is the pre-development timeline. For context, prior to breaking ground, a developer must secure necessary approvals, fund their capital stacks, and hire contractors and employees.[190] A project is deemed "shovel ready" when the developer has secured all its funding sources, has obtained necessary permits, and has begun processes like

---

188. Zoom Interview with Participant No. 20211104KM (Nov. 4, 2021) (on file with authors); *see also* Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors) ("So, the focus of the New Market Tax Credit program . . . on counting single ones, the twos and threes, the minimum-wage jobs, and may look good in presentations to Congress but doesn't deal with the fundamental issues of poverty and wealth creation in these communities in my judgment.").

189. For example, one participant stated,

> [T]hey've placed a lot more emphasis on . . . all CDEs using similar methodologies with quantifying impacts. . . . So, I think that the . . . ability to not use your own data to be creative and tell your own story versus being very formulaic has, I won't say it's been a challenge. It's just hasn't been as it doesn't add as much color as we would like in trying to tell our story.

Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors).

190. *See* Tax Credit Tuesday, *How To Close NMTC Transactions Successfully in the Current Economic Climate*, NOVOGRADAC, at 8:28–21:15 (Sept. 20, 2022), https://www.novoco.com/podcast/sept-20-2022-how-close-nmtc-transactions-successfully-current-economic-climate [https://perma.cc/8X84-CFJ2].

appraisals or construction bids.[191] Regardless of whether a project will be funded through the NMTC,[192] it takes time to bring a project to the point at which it is "shovel ready."

In the NMTC context, the typical pre-development timelines are in tension with regulatory timelines—and this can impact project selection. NMTC applicants apply for tax credit allocations nearly a year before the tax credits—if awarded—will become available to investors. This delay has two important implications for project selection. First, the projects described in application pipelines[193] may not even exist by the time awards are announced,[194] forcing successful CDEs to search for replacement projects.[195] As a respondent at a large, national CDE recounted,

> *[L]ast year, the application was due November 16th. I started working on our pipeline really in depth in July, and we're not going to hear about that award until this July. And just so much can change, you know, even if you think about the year prior from that July to th[is] July, you know, COVID happened; who knows how many projects fell apart because of COVID, because of other reasons they find other financing.*[196]

For these reasons, the CDEs that we interviewed view the application pipeline as providing examples of the types of projects they expect to

---

191. *See id.*

192. The 2022 NMTC application asks CDEs to describe, in detail, their business strategies, community outcomes, management capacities, capitalization strategies, and histories of previous awards. MARPLES, *supra* note 9, at 4. CDEs complete these materials based upon portfolios of current information, which are likely to change between the submission of the applications and the awarding of NMTC credits.

193. We use the term *application pipeline* to describe the portfolio of potential projects, which CDEs may consider for inclusion or citation in their funding applications.

194. *See* Zoom Interview with Participant No. 20211130MP (Nov. 30, 2021) (on file with authors) ("I mean, a year and a half to two years, the projects wait. I mean, let's be realistic. That's not the same project that went into the application by the time the CDE gets the award and circles back.").

195. *See* Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors). This participant said,

> Now, the projects are real at the point in time you put your application in. How many of those projects are going to be real in six to eight months? Ten percent, 20 percent, 30 percent. So, when the allocation falls and the money hits the ground, there is a mad bazaar. It's a marketplace.

Id.

196. Zoom Interview with Participant No. 20210415LM (Apr. 15, 2021) (on file with authors).

fund.[197] If the descriptions are too vague, they may not receive funding.[198] But if the descriptions are too specific, they may struggle to find suitable "replacement" projects after their application projects fall from their pipeline. Ultimately, CDEs' funding options are constrained by the strategies set forth in their applications. The same respondent explained,

> *[T]he way the application works is you write your strategy. And . . . those things are just enabled. If we only did job creators, I don't think the CDFI Fund would look poorly on that. . . . [I]f we said we were just going to do job creators and then we funded a health center, they would say, "That's not within your strategy."*[199]

Accordingly, CDE respondents said the first criterion for replacement projects was alignment with the strategy they proposed to the CDFI Fund.[200] For that reason, the projects that are ultimately funded are likely to be substantially similar to those set forth in the application. This suggests that, in most cases, the fact that the application pipeline projects may cease to exist is inconsequential so long as comparable projects exist to be funded.

However, CDEs also described a second timing constraint that may affect the selection of replacement projects. CDEs are under time pressure to deploy their allocations quickly to remain competitive in future allocation rounds. This compresses the period in which CDEs must identify and fund the replacement projects. As a result, CDEs tend to prioritize shovel-ready projects over projects that may be less certain.[201] A regional investor explains,

197. *See* Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors) ("And in our application we give an example of projects, but they're just an example. But it's going to be a year and a half before we have any money to put into a project if we're successful. So that project more than likely might not be around.").

198. *See* Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors) ("Now, it kind of seems like they want you to say that you have a general pipeline, but they want you to give specifics like you have a discrete pipeline.").

199. Zoom Interview with Participant No. 20210415LM (Apr. 15, 2021) (on file with authors).

200. *See* Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors) ("And so, you know, we first look at deals that, you know, meet our baseline criteria."); Zoom Interview with Participant No. 20211130MP (Nov. 30, 2021) (on file with authors) ("[C]ommunity benefits are going to be the first thing that a community development entity responds to, and then they'll dig into the financial viability of the sponsor, of the financial viability of the project.").

201. *See* Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors) ("Once a project meets baseline criteria, then we look at other things like shovel-

> *We don't really have the comfort or the luxury of being patient with some of these projects because we have to get it out the door, because we want to talk about how we're already closing deals . . . when we apply again in October of '21 . . . So, you know, that's just kind of one of the realities, that the interest of the CDE is not as aligned with the interests of the projects, and that the CDE is kind of saying, "I have it now, everyone, it's ready now, I'll give it to you."*[202]

This comment suggests that, in some cases, investors and CDEs may feel pressured to move forward with shovel-ready projects that may not have been their ideal project based on community impacts. Here, it is worth reiterating that project selection is constrained by the proposals set forth in CDEs' applications to the CDFI Fund, and there is no reason to think that CDEs fund projects that are not aligned with their strategies. However, to the extent that multiple projects potentially align with a CDE's strategy, the most shovel-ready projects appear to have a competitive edge—regardless of whether they would otherwise produce the greatest community impact.

* * *

This Section has described three factors that impact project selection: CDEs' internal mission priorities, the CDFI Fund's priorities, and projects' pre-development timelines. All three of these factors impact program outcomes and can impact the extent to which the NMTC promotes equitable economic development. However, equitable economic development should not be judged solely on outcomes. A key insight from the literature is that process also matters. The NMTC's capacity to promote equitable economic development also depends on how well the program brings diverse voices to the table. In other words, *who* are the leaders driving CDEs' mission priorities? Are CDEs equally able to satisfy CDFI Fund priorities? Who are the parties at the negotiation table?

The rest of this Part will describe respondents' experiences in the NMTC ecosystem, which comprises teams of consultants, accountants, lawyers, CDEs, investors, developers, and community leaders. Ultimately, a CDE's success within the NMTC program—and its

---

readiness . . . . Can that deal close within, you know, a six-month time frame?"); Zoom Interview with Participant No. 20211130MP (Nov. 30, 2021) ("So projects that are more ready to move forward definitely have that opportunity of attracting the market's allocation.").

202. Zoom Interview with Participant No. 20210416PG (Apr. 16, 2021) (on file with authors).

ability to direct NMTC financing toward projects aligned with its mission—depends upon the strength of leaders' interorganizational relationships. Within the NMTC ecosystem, small, minority-led, and community-facing CDEs often struggle to compete. Meanwhile, a general lack of diversity and representation within larger CDEs and investor groups threatens to undermine the programs' potential to advance equitable economic development.

2. *The Professional Networks that Fuel NMTC Deals.* Under the NMTC law, CDEs act as financial intermediaries between tax credit investors and downstream borrowers. As such, the structure of the NMTC presupposes interorganizational relationships among financial investors, CDEs, and developers. However, these relationships—and other interorganizational relationships common in the NMTC ecosystem—are not a given. Rather, these relationships are actively cultivated by participants, who work to build local markets for the tax credits. A respondent from a small regional CDE described their market-building efforts, saying,

> *So, we are constantly out there trying to get information out about New Market Tax Credits. We are informing law firms. We try and reach out to CPA firms . . . a lot of bankers. You know, anybody who hears about projects, we'd like them to know about the potential for New Market Tax Credits. So, I do have a PowerPoint, and I go present it to all different kinds of people, to the Chambers of Commerce, economic development groups, or agencies.*[203]

Several other CDEs described similar efforts to raise awareness and build a market for the NMTC program.[204]

The resulting tax credit market is composed of the core players (for example, CDEs, investors, and developers) but also lawyers, accountants, community leaders, business leaders, and consultants. Communication across these stakeholders is often key to the successful

---

203. Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors).

204. *See* Zoom Interview with Participant No. 20211108RB (Nov. 8, 2021) (on file with authors) ("So, you know, we're kind of always talking to people about the New Markets Tax Credit, whether it be city officials or people that we're just sort of we come across . . . And we gave them sort of the New Markets one-on-one tutorial and passed along some information to them."); Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors) ("I do the presentations and the PowerPoints and there's the rolling of the eyes and you know, 'This can't be true. And if this program really works the way you say it does, I should have heard of it by now.' And lo and behold, they finally come around.").

deployment of NMTC allocations. One investor described their reliance on communication networks as follows: "*[I]t's not very straightforward to identify sponsors of projects, which is kind of . . . how I think about it on individual transactions. So . . . a decent amount of projects come our way from our relationships with people in the New Markets industry.*"[205] Another respondent who is a CDE leader described it as a "whisper" network:

> *So, of course if I'm looking for allocation, I'll whisper in all their ears, you know, "Hey, . . . any allocation you've heard that would consider a federally qualified health center, you know, in the state of 'fill in the blank,'" and . . . obviously they're hoping also to be considered to serve in the . . . legal role for the transaction.*[206]

Consultants are involved in all aspects of NMTC deals. They help with application preparation,[207] pipeline building,[208] project management,[209] and compliance monitoring.[210] Due to their outsized role in the NMTC program, the rest of this Section focuses on three key takeaways about CDEs' and investors' relationships with consultants. First, many CDEs report greater success when consultants help with the application process. Second, consultants and lawyers are a key part of the communication ecosystem that connects CDEs to investors and developers. Third, smaller and minority-led CDEs are less likely to use consultants due to the cost. Together, these findings

---

205. Zoom Interview with Participant No. 20210416PG (Apr. 16, 2021) (on file with authors).

206. Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors).

207. *See* Zoom Interview with Participant No. 20210401AG (Apr. 1, 2021) (on file with authors) ("[W]e have a question twenty-five list for them which is like where they get those community impact numbers. And so, we kind of help them go through that and we are filling them out.").

208. Zoom Interview with Participant No. 20210415LM (Apr. 15, 2021) (on file with authors) ("Then we also have relationships with consultants, so consultants will reach out to us. Or on the flip side, especially for the application, we'll reach out to consultants and say, 'What's on your plate?'").

209. Zoom Interview with Participant No. 20210416PG (Apr. 16, 2021) (on file with authors) ("There are also a growing number of consultants that specialize in representing projects, helping them to both, you know, attain financing, including New Market allocation, but also project manage[rs].").

210. One participant said,

> [W]e actually have someone that we've hired that is purely compliance focused. And she's the one who helps them track their dates, their requirements . . . any deadlines for the CDE, and she'll work with the client and the CDEs for that because that is a big part of it is that background work that will last for, you know, for years during this process.

Zoom Interview with Participant No. 20210401AG (Apr. 1, 2021) (on file with authors) (quoting a consultant).

reflect the outsized role that consultants play in the NMTC industry, whereby they influence which CDEs receive awards and what projects are included in pipelines. CDEs operating outside that ecosystem are at a distinct disadvantage.

a. Professional Networks and the Application Process. As explained above, many CDEs struggle to understand what makes for a strong NMTC application given the minimal feedback and low transparency of the CDFI Fund. Perhaps for this reason, many CDEs pay consultants to assist with the application process. One respondent at a large, regional CDE described the multiple levels of consultants that formed a team to prepare their application, saying,

> *[Y]ou've got to have a consultant to figure out how to get an application, to go tell you how this works. We have a consultant that helps us build the application. That consultant hired another consultant that we pay for that does the community calling and all of that to help develop the future impact we might be able to make. And then there's a third consultant . . . who writes the application, write the words in the application. So, we got three different firms we're paying to help us do one application, but we figured out hey, it worked.*[211]

Meanwhile, some smaller CDEs complained of "application bias" in favor of CDEs that can afford the most reputable consultants:

> *[T]here is definitely—let me call it application bias—but by that I mean technical bias at the grant review level. And so, for example, and I'll mention them by name, I am told on good authority that Baker Tilly, which is one of the very successful advisory firms in the business in the industry, has a success rate with applicants that is pretty much unmatched and unrivaled, at least in the last X number of years in terms of its clients.*[212]

Comments like these reflect the prevalence of consultants at the application-preparation stage, as well as the perception that CDEs that use consultants will be more successful. But consultants may do more than simply increase the likelihood of receiving an allocation: they also weigh in on impact strategies. For example, when asked why CDEs rarely use the "targeted populations" provisions (special provisions that allow CDEs to pursue projects that serve low-income communities

211. Zoom Interview with Participant No. 20211117WW (Nov. 17, 2021) (on file with authors).

212. Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors).

that are not located in an eligible census tract), one respondent said, "*I can tell you categorically it doesn't work. It hasn't happened. Not only that, the large intermediaries that I work with, like the Baker Tillys, the Novogradacs, and the CohnReznicks, actually discouraged their clients from trying.*"[213]

More often, the role of consultants is to help CDEs translate their intended impacts into language that will be compelling to the CDFI Fund.[214] More research would be necessary to determine the extent to which consultants increase applicants' success rates, but their centrality to the process is undeniable.

b. Communication Networks. Consultants' role in the NMTC program is not limited to the application stage. In fact, consultants arguably play an even larger role as key figures in the communication ecosystem that connects CDEs to investors and developers. Our research suggests that successful deployment of NMTC allocations often depends on strong communication networks, and, as one CDE respondent put it, "*There's a constant communication pathway going on between consultants, CDEs, equity investors, the lawyers get into the act.*"[215] A key function of consultants is to provide CDEs and investors with referrals to projects that may be suitable for their pipelines. For example, a respondent from a large CDE elaborated,

> *And so, you know, we collectively call that the New Markets ecosystem, and that ecosystem also includes the accountants. So, representatives from CohnReznick, Novogradac, Baker Tilly, and then the . . . lawyers. . . . So, we get calls all day, every day, calls, emails from everybody saying that, you know, "We have a project that needs allocation. Would you look at it?" And so really that's how we start to build pipeline, is really through our ecosystem.*[216]

213. *Id.*

214. Zoom Interview with Participant No. 20210401AG (Apr. 1, 2021) (on file with authors) ("So, we're kind of helping them figure out what are those impacts. And then kind of also estimating, if we're building this forty-thousand-square-foot building, how many people are you hiring from those hirings?").

215. Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors).

216. Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors); *see also* Zoom Interview with Participant No. 20210225WF (Feb. 25, 2021) (on file with authors) ("But you also probably have come across this in your research as a lot of consultants out there that work on behalf of CDEs to go out and identify allocation.").

Even when referrals are not obtained directly from consultants, they are often attributable to the "ecosystem" that the consultants help create.[217] CDEs and investors who are tapped into this relatively small, tight-knit group of key players are positioned to take advantage of what one investor described as a "snowball" effect:

> *[W]e've certainly noticed over our time that that allocation being made available in . . . certain places can create certain ecosystem of local consultants or developers or city officials or other organizations who, after a deal or two, understand how to leverage the program correctly for neighborhoods, and one opportunity starts to lead to the next.*[218]

Consultants also reach out to CDEs with potential projects, but several respondents noted that the projects are not always good fits for their missions.[219] In other words, consultants appear to be most influential in the local context, where they can leverage their relationships most meaningfully.

c. The Slanted Playing Field. This Article previously described how consultants help CDEs secure NMTC allocations by assisting with the application process and how they help CDEs deploy the tax credits by connecting them to suitable projects and investors. However, not all CDEs have the same access to consultants. On the one hand, our findings are generally consistent with the one investor's view that "*if anyone tells you that they don't use, you know . . . consultants, they're not telling the truth*."[220] On the other hand, several of the smaller CDEs

---

217. Zoom Interview with Participant No. 20210402DG (Apr. 2, 2021) (on file with authors) ("[W]e tend to . . . get referrals or find opportunities either through our CDE partnerships, through the networks or the ecosystems that are created . . . by attorneys, accountants, financial consultants that help folks put projects together . . . .").

218. *See id.*; Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors) ("I mean, New Markets, as you've probably found in your research, it's a pretty small web of people who are repeat players in the industry. And so, lawyers, accountants, consultants tend to be really well connected with each other through industry events and having done prior transactions together.").

219. Zoom Interview with Participant No. 20211117WW (Nov. 17, 2021) (on file with authors) ("[T]hese consultants, . . . they're throwing deals at you, you know, New Jersey to California. And of course, I'm not interested in anything in Arkansas and Mississippi, but, you know, . . . you're going to get deals thrown at you."). Another participant stated,

> So, I would say there are a lot of consultants. We certainly get a lot of emails, congratulatory emails, a lot of, "Would you look at our stuff?" And some of them we do have some interesting projects that when you talk to the communities, they really are projects that the community wants to see.

Zoom Interview with Participant No. 20211025LL (Oct. 25, 2021) (on file with authors).

220. Zoom Interview with Participant No. 20210416PG (Apr. 16, 2021) (on file with authors).

in our study reported that they do *not* use consultants to the same degree as their larger competitors or that they were unable to hire the "big" ones, such as Baker Tilly. In our study, the CDEs most likely to say they do not rely heavily on consultants were smaller CDEs that focused on serving specific, targeted communities (for example, racial minorities), and they tended to view themselves at a disadvantage relative to larger CDEs that do use consultants.

The main challenge that small CDEs face when hiring consultants is cost. One respondent from a small, regional CDE serving minority communities explains,

> *[O]ne of the things that [consultants have] been quite blunt about is they run big game. And I don't mean that in a negative way. I mean, they have technically gamed this very complex . . . application . . . and they charge very hefty fees for their work, but their success is unmatched and unrivaled. The smaller funds, we really couldn't afford them. So, our grant writers that we would hire are good, but they're independent, smaller.*[221]

Notably, this respondent's CDE does use consultants, but their comment suggests that they believe the smaller, independent consultants that represent their firm may be less connected than the consultants hired by their larger competitors. Another small regional CDE serving minority populations described a similar strategy:

> *I will be taking the lead on writing our application as I did 2020 with my colleagues. We do have sort of some, some strategic assistance . . . from third-party consultants. But um, it is not a situation where we hire a consultant, we don't hire Baker Tilly or we don't hire any of the other kind of firms . . . to sort of write the application, and we feed them information that they request. We—because we're so small, obviously application writing fees can be quite expensive.*[222]

At this point, it is important to reiterate that our purposive sample only included organizations that are *active* in the NMTC program. We drew from lists of participants at NMTC conferences hosted by major accounting firms (that is, consultants) specializing in tax credit transactions, and from contacts listed on *successful* NMTC application forms. If our respondents are correct that assistance from consultants increases success within the NMTC program and that consultants play an important role in deploying allocations, then it is unsurprising that

221. Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors).
222. Zoom Interview with Participant No. 20211108RB (Nov. 8, 2021) (on file with authors).

small CDEs in our sample tend to use consultants. More surprising is the fact that they continue to view themselves as distinctly disadvantaged because they cannot afford the *biggest* consultants in the field. Meanwhile, it is possible that small CDEs that are unable to access consultants *at all* are ultimately unable to break into the NMTC program (and, as a result, are not a part of our sample). The next Subsection, which reports our findings about diversity and representation in the NMTC program, lends some support to this interpretation.

3. *Barriers to Entry for Minority-Led CDEs.* Most of the respondents in our sample were white, with the notable exception of a few respondents from small CDEs who self-identified as members of minority groups and cited racial justice among their CDEs' mission statements. However, the demographics of our sample were not necessarily unrepresentative. To our knowledge, there are no public data about the number of CDEs with minority leadership—let alone data about how many of those CDEs participate in (or attempt to participate in) the NMTC program—but the prevailing view among respondents was that minority-led CDEs are underrepresented in the NMTC program. One investor whose organization focuses on NMTC projects that serve racial minorities observed,

> *[T]he thing we've been focused on over the last few months and will be going forward and hope to see significant change on is the representation in the makeup of the CDE population and the lack of representation by person of color–led CDE[s]. Right now, I think it's like 14 to 17 percent of CDEs that are successful, or that's the amount of allocation going to CDEs led by persons of color. So, it's a very white-led industry with the intent to impact lower-income communities that are mostly populated by people of color. And that mismatch is something that we want to fix. So, getting representative leadership within New Markets is something that we're really focused on.*[223]

Another respondent, affiliated with a minority-led CDE serving a minority population, complained about losing to another applicant in the competition for tax credits, saying, "*And by the way, it's not a [minority] owned, operated, or sponsored organization. It's an organization that comes out of the LIHTC business, the Low-Income*

223. Zoom Interview with Participant No. 20210416LV (Apr. 16, 2021) (on file with authors).

Housing Tax Credit business, and had a lot of experience of that and then jumped in."[224]

Comments like these were not limited to CDEs with racial justice missions. Respondents from large CDEs that serve more general populations also seemed aware that lack of diversity is a problem, not only for the industry but also for their own organizations. One respondent at a large regional CDE described their recent transition to a "majority-minority board," noting, "*[T]hat emphasis was from the beginning, but it's just in the last few years kind of come to fruition for full board.*"[225] A representative at one large, national CDE described their own efforts to examine diversity and representation within their organization following the George Floyd shooting:

> *So, I think the—even before the George Floyd, . . . we as a company, we started to look really inward, but it really became more evident after George Floyd. And so, we were saying, you know, as a company, and this is outside of the New Market, you know, how—what are we doing to be a better corporate citizen? What does it look like from our hiring, our retention, our workforce development, who we're doing business with, where we're doing business, and the neighborhoods.*[226]

These statements reflect the lack of diversity and representation in the NMTC program that has existed since its early years but which the industry may be particularly concerned about given recent racial-justice social movements. What, then, are the barriers of entry to minority-led CDEs' participation in the NMTC program? Our findings suggest that the single, largest barrier to entry to the NMTC program—for minority organizations and otherwise—is lack of experience. First, a common sentiment among respondents was that NMTC awards are dominated by a small number of CDEs that have been in the industry for years[227] and that this dominance disadvantages minority-led CDEs and other newcomers.[228] As one respondent explained,

224. Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors).

225. Zoom Interview with Participant No. 20211117WW (Nov. 17, 2021) (on file with authors).

226. Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors).

227. Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors) ("[I]t's not supposed to be an oligarchy or a monopoly. There aren't supposed to be that. But obviously, over time, you know, clearly and this is, you know, everyone can see there are certain CDEs that have won collectively the vast majority of the . . . allocation.").

228. *See* Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors).

> *I think we are part of a group of some other CDEs who've been successful winners and CDEs who would like to win and have not. But I think the program is too mature right now to continue to have such a mismatch between CDEs who are winning allocation and CDEs who want to, especially around the minority CDE framework.*[229]

This Subsection explains why experience is so important to success within the NMTC program. Stated simply, to be competitive in the NMTC program, an organization needs to be established. CDEs that lack experience are likely to have less access to professional networks, a smaller capital base, and a lack of a track record. For the reasons explained below, all three are detrimental to diverse representation among NMTC participants.

a. Unequal Access to Professional Networks. For reasons described above, strong professional networks among CDEs, investors, consultants, advisors, and business communities are the fabric of the NMTC. Those networks are cultivated over time. Many of the CDEs in our sample have been active in the NMTC program since its early years, and respondents attributed some of their current success to the relationships they have built over time. For example, a respondent from a large CDE observed, "*[B]ecause our CDE has been around for a while and the fact that I've been in . . . the industry since inception, you build great relationships with not only the investors but other CDEs as well as the slew of consultants.*"[230] Another described their professional relationships in terms of familiarity, saying, "*So, it is . . . a little bit of 'all politics is local' feel to it, where people just sort of know each other and know what kind of projects CDEs like to do now, what their core bread and butter is, you know.*"[231]

The small CDEs in our sample that focused on historically marginalized groups generally reported the same strength of networks. For example, one respondent at a minority-focused CDE recalled,

> *[O]ur prior CEO was very well connected with, I mean, I call him his own World Wide Web. He just seemed to know everyone and everyone knew him and always knew that he was just looking for a new deal*

229. *Id.*
230. Zoom Interview with Participant No. 20211129TA (Nov. 29, 2021) (on file with authors).
231. Zoom Interview with Participant No. 20211108RB (Nov. 8, 2021) (on file with authors).

> *somehow to do something . . . . And so really, it's for us, it's all about connection.*[232]

But that CDE's experience may not be typical within the field. Speaking more generally, another respondent at a minority-facing CDE observed that "*there is definitely a dichotomy between the large Wall Street–facing institutional investment funds and organizations in the broadest sense, and us little guys, whether we're small native CDEs . . . or generally CDEs representing the Latino communities, the Black and brown communities*."[233]

In short, relationships are key to the NMTC, and smaller minority-led CDEs may have less ability to develop those relationships. This may be particularly true given the role of consultants in tying together various stakeholders. To the extent that smaller CDEs struggle to pay for consultants, as described above, they may struggle to break into the already established ecosystem surrounding the NMTC.

b. Small Capital Bases. Lack of experience is also associated with smaller capital bases. A respondent at one large CDE observed, "*[I]t seems like you've got to already have . . . [a large] size balance sheet in order to be considered for allocation as well as maybe some preexisting loans for low-income communities.*"[234] Another respondent from a small rural CDE noted that "*larger organizations are going to have an easier time putting up good scores based on big numbers than a smaller organization that serves a smaller service area*."[235] If these respondents are correct, then smaller CDEs, including minority-led CDEs, may struggle to compete due to smaller capital bases.

c. Lack of Track Records. Finally, the CDFI Fund's track-record requirements may create a barrier to entry for minority-led CDEs without a history of participation in the NMTC program. Under the requirements, CDEs must place their proposed pipelines in context with projects they have funded within the last five years.[236]

232. Zoom Interview with Participant No. 20220110LW (Jan. 10, 2022) (on file with authors).

233. Zoom Interview with Participant No. 20210225JF (Feb. 25, 2021) (on file with authors).

234. Zoom Interview with Participant No. 20211206DM (Dec. 6, 2021) (on file with authors).

235. Zoom Interview with Participant No. 20211111DU (Nov. 11, 2021) (on file with authors).

236. Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors) ("I have to compare [the proposed pipeline] to my track record. And I have fifteen years, you know, fifteen years of track record, but now maybe I'm only supposed to use five years.").

Respondents across the board expressed frustration with the CDFI Fund's relatively new, heightened track-record requirements. For CDEs with a history in the program, the requirement sometimes constrains the types of projects they can pursue.[237] For CDEs without experience in the program, including many minority-led CDEs, the lack of track record can serve as an absolute barrier to entry:

> *And so one of the challenges, the really the biggest challenge with minorities CDEs, is that . . . if they're not a prior awardee, they struggle to show a sufficient track record. And then when their application is scored, they're not able to compete well with the CDE that has a track record.*[238]

The same respondent noted that some minority CDEs have been able to establish a track record through partnerships with other CDEs,[239] but the CDFI Fund could do more to encourage those partnerships:

> *If the [CDFI Fund] . . . were to insert a question or reword a question or two in the application to incentivize CDEs to make those types of investments and to do it in a way where you as an applicant CDE are not penalized for going that route when you may have not done that in the past.*[240]

One implication of this respondent's suggestion is that the current track-record requirement presents not one, but two, barriers to entry. First, it prevents minority-led CDEs that lack a track record from meeting threshold requirements for participation. Second, if it stops established CDEs from investing in minority-led CDEs (because they

---

237. As one participant relayed,

> [T]hey have said, "Well, you can only use your past five years of history when you're talking about what your history is on projects." And so therefore, that makes me want to . . . look for a very certain kind of project to make sure it's in my five-year history, whether that's health care or something else, so that I'm not blocked out from doing that in the future.

Zoom Interview with Participant No. 20210211MB (Feb. 11, 2021) (on file with authors).

238. Zoom Interview with Participant No. 20210402DG (Apr. 2, 2021) (on file with authors); *see also* Zoom Interview with Participant No. 20210422MH (Apr. 22, 2021) (on file with authors) ("I think the way they evaluate track record skews pretty heavily towards the way you have to fill out the tables. And if you haven't done New Market's specific investing activity before, it can be hard to get credit.").

239. Zoom Interview with Participant No. 20210402DG (Apr. 2, 2021) (on file with authors) ("One of the ways . . . many emerging CDEs have gotten that track record is they've been recipients of investments from other CDEs that allow[] them to prove that out and to be positioned better when they make their own application.").

240. *Id.*

lack a track record in that type of investment), then it may also prevent minority-led CDEs from building that track record.

* * *

One final finding is worth noting before moving on. Several participants expressed a belief that the missions of minority CDEs may differ from the missions of CDEs that are currently active in the NMTC program. One investor told us, "*[I]n many cases . . . minority-led CDEs are going to be much better equipped on balance to really be able to understand what will most benefit minority communities.*"[241] In line with this prediction, one respondent, who identified as a Hispanic female, described how her approach to education projects derived from her own childhood experiences, noting that "*we take our personal experiences and then filter them down into a way that we can apply them*."[242]

Thus, this Part has presented several key findings about dynamics within the NMTC program that have the potential to support or hinder equitable economic development. Key findings that emerged from the data include the forces that influence project selection, the interorganizational relationships that operationalize the law, and barriers to entry for minority CDEs. The discussion below will elaborate on these findings, which reflect the dynamics of a mature tax credit ecosystem that favors the largest, most experienced, and best-resourced participants. In many respects, these dynamics replicate structural disadvantages in private markets—the very structural disadvantages that the NMTC program is supposed to combat.

IV. REMOVING BARRIERS TO EQUITABLE ECONOMIC DEVELOPMENT

A. Sources of Structural Inequality in the NMTC Ecosystem

As explained in Part II, over a decade ago, the GAO conducted a study using similar interview-based methods to identify the challenges minority CDEs face in New Markets. To reiterate their findings, the GAO found that minority CDEs reported: first, difficulty demonstrating the capacity to deploy the amount of capital requested

241. *Id.*
242. Zoom Interview with Participant No. 20220110LW (Jan. 10, 2022) (on file with authors).

and to complete projects with significant community impact; second, difficulty demonstrating a track record of successful investment in low-income communities; and third, high transaction costs that disproportionately burden smaller CDEs.[243] At the time, the CDFI Fund reacted defensively to the GAO's findings. They essentially responded that even if minority CDEs do experience such challenges, the root of those problems was not the CDFI Fund's administrative process, which the agency insisted was evenhanded. Despite this, the CDFI Fund implemented a training program for minority-led CDEs to help them navigate the application process. The disparities persisted. Why?

For reasons to be explained in this Part, our updated research on NMTC program dynamics suggests that the roots of minority-led CDEs' disadvantages in this tax credit program may run much deeper than their inability to navigate the application process itself.[244] Namely, the NMTC program has created a competitive, hybrid private-public market characterized by structural power dynamics similar to those observed in purely private markets. This finding is not only troubling in the context of the NMTC, but it could have far-reaching implications for community development tax incentives more generally. This Part draws on existing theory about public-private partnerships to analyze the NMTC ecosystem described above. For reasons to be explained, the NMTC ecosystem is an example of a hybrid market that is "neither public nor private" but has "elements of both."[245] It is useful to apply this hybrid market approach to better understand how CDFI Fund goals, not just for minority representation but also for economic development, may be counterbalanced, if not overwhelmed, by the influence of market forces and path dependency.

Recognizing the hybrid nature of such regulatory regimes "forces an analysis based more closely on the nature of the power being exercised, [and] the relative strength or bargaining power of those most directly affected by this power."[246] Professor Alfred C. Aman Jr. has identified three questions relevant to analyze hybrid markets like the

243. GAO REPORT, *supra* note 136, at 19–20.

244. The limitations of our study are discussed in Part III.A above.

245. Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1491 (2001). All tax-incentive approaches can be understood as private-public partnerships that rely on relationships between private market actors and the public sector.

246. *Id.*

one that the NMTC creates.[247] The first question asks, "[W]hat are the political values that the use of the [hybrid] market seeks to achieve?" [248] As explained in Part I, the NMTC arguably embodies several competing political values, which include commitments to privatization, gentrification strategies, and equitable economic development. That discussion does not need to be repeated here. Rather, this Part will proceed on the assumption that, for at least some policymakers, the intended goal of the NMTC is to promote *equitable* economic development, which must be evaluated in terms of both process and outcomes.

The second question asks, "[W]hat is the impact of the power exercised by entities involved in these markets on the individuals involved, be they customers, consumers, or citizens?"[249] Our research on NMTC program dynamics helps answer this question by drawing attention to: first, the extent to which interorganizational relationships are key to success at every stage of NMTC dealmaking; second, the ways that capital base and track-record requirements favor repeat players with past experience in the program; and third, the degree to which CDEs' individual missions influence decisions that affect outcomes. The first two findings are key to understanding why minority-led CDEs face structural disadvantages in the NMTC program. The third finding establishes the stakes—and it highlights the limits of the CDFI Fund's capacity to shape outcomes if the first two issues are not addressed.

Our research demonstrates that strong interorganizational relationships—among CDEs, investors, borrowers, consultants, and business leaders—increase the likelihood of success within the NMTC program. For CDEs, these relationships help build application pipelines, win allocation awards, connect to suitable investors, and deploy allocations to shovel-ready projects. Downstream, these relationships also help position potential borrowers who could benefit from NMTC financing. However, the centrality of interorganizational relationships has likely placed minority-led CDEs at a disadvantage since the early years of the program, and over time, that disadvantage has persisted. This is because minority-led businesses have traditionally lacked access to the kinds of professional networks that are necessary to succeed in New Markets.

247. *Id.* at 1488.
248. *Id.*
249. *Id.*

In a series of studies, urban affairs scholar Timothy Bates has documented the challenges minority business entities have faced in government procurement markets, noting that "status quo networks have traditionally not included minority businesses, and those established networks tend to be resistant to change."[250] In a study of minority-owned construction businesses, Bates and coauthor David Howell noted that "[m]inorities are often not members of the networks that control access to most construction work."[251] Their research described how lack of access to personal networks in the construction industry created barriers of entry for minority-owned firms, as "[e]ven skills acquisition . . . does not solve the problem of old-boy networks, where work is parceled out to in-group members."[252]

In other words, minority-led businesses often lack the relationships needed to access mainstream markets, including access to skilled labor and financing.[253] Somewhat ironically, the very existence of financial intermediaries like CDEs can be traced to the fact that minority businesses have traditionally lacked access to these mainstream business networks. "Institutional intermediaries" like CDEs were created to connect "two or more parties to bring about specific activities that otherwise could not happen."[254] As explained above, CDEs act as financial intermediaries to link mainstream investors to downstream businesses that may otherwise lack direct access to capital. An important purpose of CDEs is relationship building, presumably between downstream borrowers and upstream investors.

However, our research reveals that in the context of the NMTC program, this function may break down on two levels. First, minority-led CDEs themselves may lack the strength of networks, capital, and track records needed to participate in the NMTC program. Strong professional networks are key to success and participation in the NMTC program. Some CDEs draw on longstanding personal connections, but minority-led CDEs may lack these connections due to the historic exclusion of minority business leaders from professional

---

250. Bates, *supra* note 28.

251. Timothy Bates & David Howell, *The Declining Status of Minorities in the New York City Construction Industry*, 12 ECON. DEV. Q. 88, 89 (1998).

252. *Id.* at 96.

253. Mengyang Pan, James Hill, Ian Blount & Magnus Rungtusanatham, *Relationship Building and Minority Business Growth: Does Participating in Activities Sponsored by Institutional Intermediaries Help?*, 142 J. BUS. RSCH. 830, 830 (2022).

254. *Id.*

networks. In other cases, professional networks can be bought, as is the case when CDEs hire large consultants and firms that specialize in tax credit transactions. But minority-led CDEs may lack the resources to hire expensive advisors, particularly when they are smaller or less established. For these reasons, the lack of strong professional networks may create a barrier to entry for minority-led CDEs *even if* they have the skills necessary for success in the program. This finding may explain why disparities have persisted despite the CDFI Funds' efforts to train minority-led CDEs.

Moreover, our research suggests that if minority-led CDEs are unable to participate in the program, this will also have consequences for relationship building among community borrowers. CDEs' internal missions are the primary driver of decisions, and the lack of minority-led CDEs probably affects which projects are chosen, where they are located, and who in the business community is engaged. Our research suggests that CDEs actively work to build local markets by educating communities about the NMTC, and they work to build new networks among business leaders and community developers. Though nonminority-led CDEs can—and do—work to engage minority business leaders, a common perception among participants in our study was that engagement with minority and low-income communities may be more frequent and effective when minority-led CDEs are involved.[255] This type of relationship-building is key to achieving equitable economic development through the NMTC, as minority-owned construction businesses have traditionally struggled to break into the industry's "old-boy networks."

Furthermore, our research suggests that these barriers to entry may have grown more entrenched with time. CDEs that had the relationships needed to participate in the NMTC program in its early years now have the additional benefit of almost two decades' worth of additional relationship building within the niche world of NMTC financing. In contrast, CDEs that lacked those relationships in the early years now face multiple levels of disadvantage. Most obviously, they simply lack the longstanding relationships enjoyed by their more successful peers. In addition, their failure to break into the NMTC program early also prevented them from building the capital base and establishing the track records needed to compete for allocations. Outside the context of the NMTC, researchers have noted that

255. *E.g.*, *supra* notes 241–42 and accompanying text.

structural discrimination in mainstream markets, including through exclusion from professional networks, may limit the "size and scope" of minority-led businesses relative to nonminority-owned firms.[256] In the context of the NMTC, these consequences of past barriers to entry are compounded by the CDFI Fund's requirements that CDEs establish large capital bases and existing track records to compete for new NMTC allocations.[257]

* * *

Thus far, this Article has described how the hybrid marketplace for NMTCs recreates structural power dynamics that exist in private markets. We have argued that these dynamics limit the program's potential to promote equitable economic development. In analyzing hybrid markets like the NMTC, the third question asks, "[W]hat kinds of procedures are best to ensure the kind of public participation and transparency necessary for political legitimacy?"[258] Assuming that an important goal of the NMTC is to promote equitable economic development, then one way to ensure the political legitimacy of the NMTC is to implement reforms that increase the likelihood of equitable participation and outcomes. The next Section provides recommendations.

Our discussion of reforms is timely given that the most recent extension of the NMTC program's authorization, as part of the Consolidated Appropriations Act of 2021, will expire in 2025. While a natural target for these reform proposals is Congress, the Department of the Treasury, and ultimately the CDFI Fund, we also see an important role for CDEs and other ecosystem stakeholders in evolving the culture of how the NMTC is allocated and implemented.

B. Reform Proposals

1. *Increase Guidance and Transparency.* Equitable economic development has both outcome-oriented and procedurally oriented objectives, and both objectives are potential areas for reform. The empirical methods used in this study shed light on the processes at work in NMTC decision-making, but further research would be

256. Bates, *supra* note 28, at 41.
257. *See supra* note 157 and accompanying text.
258. Aman, *supra* note 245, at 1488.

required to link those decisions to specific projects and their impact on low-income communities. Nevertheless, our research on decision-making revealed at least three findings that are relevant to outcome-oriented reforms. First, the identities of CDEs affect their funding priorities. This means that changes to the mix of CDEs that receive funding—including an increase in minority-led CDEs—would likely change outcomes. Later parts of this Section will set forth recommendations that could help increase participation by minority-led CDEs.

A second finding was that *regardless* of the identity of the CDE, the CDFI Fund has the potential to nudge CDEs toward projects that meet its policy priorities. As explained in Part II above, most CDEs will not radically depart from their core missions to match the CDFI Fund's priorities, but our research provides significant evidence that many CDEs *do* make small adjustments in response to perceived agency priorities.[259] CDEs that participate in the NMTC program work hard to prepare what they believe will be a competitive application, and they take the CDFI Fund priorities into consideration when building their project pipelines.[260] For example, several participants attributed the industry's interest in medically underserved communities, food deserts, and severely distressed census tracts to a shift in CDFI Fund priorities that made projects in these areas more likely to receive funding. These findings should be encouraging to proponents of actively administered tax credit programs because they suggest that regulators can influence program outcomes.

However, a third finding was that NMTC program participants are often unsure about what the CDFI Fund has chosen to prioritize. This third finding reflects the limits of the CDFI Fund's influence under current practices. Though the CDFI Fund can influence participants' project priorities, its influence declines when participants are unable to accurately ascertain the agency's policy priorities. Virtually every participant in this study expressed an interest in receiving increased guidance from the CDFI Fund, including transparency about the competitive process. Currently, CDEs make guesses about CDFI Fund priorities based on the contents of application forms and changes made from year to year, but the CDFI Fund could increase its policy influence by clearly publishing statements about its funding priorities.

259. *E.g.*, *supra* note 218 and accompanying text.

260. *E.g.*, *supra* notes 216–17 and accompanying text.

In addition, the CDFI Fund should provide guidance and feedback to CDEs to help CDEs understand how their pipelines and impact metrics will be (or have been) scored, given the agency's priorities. The participants in this study generally understood how to report job-related metrics, but they were less sure how to quantify other types of community impact. Given the CDFI Fund's apparent interest in prioritizing medically underserved communities and food deserts, for example, it is likely that the agency's own policy priorities include impacts apart from job creation (for example, increased community health, access to affordable healthcare, or access to affordable grocery stores). So far, the CDFI Fund has encouraged CDEs to quantify community impacts, but it has not provided sufficient guidance as to *how* those impacts should be quantified or what specific outcomes the agency hopes to achieve.

Increased transparency in the application process would help ensure that CDEs' resources are used to build pipelines that are consistent with the agency's policy objectives. Here, it is worth noting that the NMTC program creates significant compliance burdens for CDEs, beginning with the pre-application stage.[261] Long before applications are due, CDEs work to build project pipelines that can be presented to the CDFI Fund in their applications. These "application pipelines" reflect significant investments of time and resources, as CDEs must identify projects, perform diligence to understand the projects' financial viability and likely impacts, and determine whether the project fits the CDE's mission. To the extent that CDEs expend considerable resources building application pipelines that are likely to be rejected because they do not fit that year's CDFI Fund priorities, the NMTC program is inefficient and counterproductive. For these reasons, at minimum, we recommend that the CDFI Fund publish annual statements to explain their current funding priorities, including information about how proposals will be scored. We also urge the CDFI Fund to reinstate efforts to provide feedback to both successful and unsuccessful NMTC applicants.

2. *Engage Institutional Intermediaries.* The primary focus of this Article has related to the NMTC decision-making process and, more specifically, understanding why minority-led CDEs may be underrepresented among program participants. The underrepresentation of minority-led CDEs may limit the capacity of

261. Bulusu, *supra* note 8.

the NMTC to promote equitable economic development by excluding participants whose perspectives may help achieve more equitable outcomes. As mentioned above, the CDFI Fund has attempted—unsuccessfully—to increase the success of minority-led CDEs through training. However, this Article has demonstrated that the barriers to entry for minority-led CDEs run deeper than skill development. To be successful in the NMTC program, minority-led CDEs must also overcome the effects of years of exclusion from professional networks. For this reason, we propose reform efforts that include relationship-building strategies.

Our research reveals a need for institutional intermediaries dedicated to connecting minority-led CDEs to the NMTC ecosystem and the CDFI Fund itself. Researchers have noted that, in emerging economies, institutional intermediaries are often used to support private entrepreneurs in obtaining public resources.[262] In that context, researchers have identified two pathways by which institutional intermediaries may help increase entrepreneurs' access to public resources: certification and capability-building.[263] Certification refers to "being selected by an intermediary" in order to signal "quality and status."[264] Capability-building refers to "education and connections that entrepreneurs gain via participating with an intermediary."[265]

The most promising pathway depends on whether the entrepreneurs have struggled to achieve "context relevance" or skill adequacy.[266] Some entrepreneurs with adequate skill capacities may nevertheless have low *context relevance* when they lack business connections and are not locally known.[267] In these cases, certification alone may be sufficient to signal their quality. For example, an entrepreneur who has demonstrated significant skill in one market may nevertheless be unknown—and might struggle to compete—in another market. Certification could help such entrepreneurs compete in the new market by signaling their quality. In other cases, the development

262. Daniel Erian Armanios, Charles E. Eesley, Jizhen Li & Kathleen M. Eisenhardt, *How Entrepreneurs Leverage Institutional Intermediaries in Emerging Economies To Acquire Public Resources*, 38 STRATEGIC MGMT. J. 1373, 1373 (2015).

263. *Id.* at 1376.

264. *Id.*

265. *Id.*

266. *Id.* at 1374.

267. *Id.* at 1377 fig.1.

of business networks may be a prerequisite to skill adequacy.[268] When entrepreneurs lack skill adequacy *and* are unknown in a market, then institutional intermediaries may need to provide *both* capability building (to help with relationship building) and certification (to signal quality).[269]

The research on institutional intermediaries in the context of entrepreneurship can be extended to the NMTC context. Namely, institutional intermediaries may help increase minority-led CDEs' access to NMTC funding. Our research suggests that at least some minority-led CDEs lack the niche business connections that are essential to participants' success. In the NMTC context, the lack of strong connections throughout the NMTC ecosystem is essentially a missing skill. Most CDEs that are active in the NMTC program use consultants to help facilitate these connections. However, it is likely that many minority-led CDEs, which tend to be smaller entities, lack the resources to hire consultants. Institutional intermediaries could use capability-building strategies to help minority-led CDEs make necessary connections.

In addition, minority-led CDEs may be "locally unknown" to the CDFI Fund in the sense that the agency increasingly relies on participants' track records within the NMTC context as evidence of their quality. Because minority-led CDEs have been underrepresented in the past, many lack that track record and may be viewed as an unknown quantity. Institutional intermediaries could help identify minority-led CDEs that would be particularly good candidates for NMTC financing, thereby performing a certification function. In that way, certification by an institutional intermediary may serve as an alternative to track-record requirements in the context of minority-led CDEs.

An existing institutional intermediary that may be able to perform these functions for minority-led CDEs is the Minority Business Development Agency ("MBDA"). The MBDA, which was established in 1969, "promote[s] growth of minority-owned businesses by mobilizing and advancing public- and private-sector programs, policy, and research."[270] The MBDA offers "customized business development and industry-focused services to provide greater access

268. *Id.*
269. *Id.*
270. Pan et al., *supra* note 253, at 831.

to capital, contracts and markets."[271] Following the 2009 GAO study described in Part II of this Article, the CDFI Fund indicated its intent to work more closely with the MBDA in order to increase participation by minority-led CDEs in the NMTC program.[272] However, the MBDA website contains no current references to the CDFI Fund or the NMTC program.[273] The only reference to the MBDA on the CDFI Fund's website is to a 2009 speech that expressed an intent to increase coordination between the agencies[274]—coordination that presumably never happened. Meanwhile, the underrepresentation of minority-led CDEs in the NMTC program has persisted. Given the potential for institutional intermediaries to help bridge this gap, this Article strongly recommends that the CDFI Fund and the MBDA work together to increase participation by minority-led CDEs.

3. *Relax Experience-Based Criteria.* In lieu of agency coordination to establish institutional intermediaries, which will take time and resources, we also recommend that the CDFI Fund relax its experience-based criteria to expand access to NMTCs for minority-led CDEs. This recommendation builds on recent theory set forth by Professors Joshua Blank and Ari Glogower, who have proposed that tax agencies adopt administrative procedures that take taxpayer characteristics into account.[275] Blank and Glogower have focused on taxpayer income levels to propose "progressive tax procedure[s]" that "tailor rules to the characteristics of the actors—their income, in particular—rather than to their activities."[276] In the NMTC context, the CDFI Fund could similarly relax track-record requirements for minority-led CDEs, which have traditionally been underrepresented in the NMTC ecosystem due to the structural barriers described in this Article. In addition, the CDFI Fund may also consider relaxing the track-record requirements for nonminority CDEs that intend to partner with minority-led CDEs. In doing so, the CDFI Fund could not

271. *Who We Are*, MINORITY BUS. DEV. AGENCY, https://www.mbda.gov/who-we-are/overview [https://perma.cc/QG3W-63NK].

272. Donna Gambrell, Dir., CDFI Fund, Financing Minority Businesses in Challenging Economic Times, Remarks at the National Capital Access Forum (Mar. 12, 2009), https://www.cdfifund.gov/speeches-and-testimony/17 [https://perma.cc/8V35-L2TE].

273. MINORITY BUS. DEV. AGENCY, https://www.mbda.gov [https://perma.cc/2QVT-DYYT].

274. Gambrell, *supra* note 272.

275. *See generally* Blank & Glogower, *supra* note 21 (proposing a progressive tax procedure with rules tailored to characteristics, such as income, rather than activities).

276. *Id.* at 671.

only expand access of NMTC funding to minority-led CDEs, but it could also help facilitate relationship building within the NMTC ecosystem. These would be the first steps to enable minority-led CDEs to establish the track records that are necessary to compete with repeat players in the NMTC program.

C. Implications for Other Federal Incentives

As mentioned earlier in this Article, the NMTC shares important similarities with other federal tax incentives, including the Low-Income Housing Tax Credit and Opportunity Zone programs. While the statutes driving these programs differ in their structure and implementation, these programs all seek to incentivize the investment of private capital in communities identified as being underserved, and they seek to competitively recognize development partnerships that demonstrate a capacity to address community needs. Similar to some of our observations of NMTC dealmaking, many successful LIHTC projects are driven by locally and nationally specialized developers, syndicators, and community development entities, who have cultivated the capacity to effectively compete for these projects. While, as we've demonstrated through our analysis of the NMTC program ecosystem, there may be great benefit to rewarding the continued success of proven players, there may be an equity cost, as reflected in which projects are funded, which communities get served, and by whom.

Our analysis provides a replicable template that could be applied to other community economic development ecosystems, including LIHTC and Opportunity Zones. While these programs are already the subjects of a wide variety of policy evaluation and research, the approach we present in this Article holds promise for bridging the gap between cross-sectional analyses focused on spatial patterns of project entry and impact, and project- or location-specific case studies that provide great depth of insight into individual developments. Examining the institutional ecosystem, its incentives, its disincentives, and the relationships between institutional actors offers important insights for evaluating stated program goals as well as the implications of how they are achieved and who achieves them.

CONCLUSION

The NMTC program was established in 2001 to provide a federal subsidy to community development entities that extend capital to borrowers in low-income communities. An important goal of the

NMTC program is to expand access to capital to areas that historically lacked such access due to longstanding discrimination in credit and housing markets. Yet the program's capacity to promote equitable economic development has been limited by a persistent underrepresentation of minority-led CDEs in the NMTC program. An early study of minority representation in the NTMC program speculated that CDFI Fund policies may disadvantage minority applicants, but the mechanisms were not well understood, and this Article is the first comprehensive study to revisit the issue.

This Article has provided an empirically grounded analysis of NMTC program dynamics based on original interviews with representatives of CDEs, investors, borrowers, and consultants who participate in the NMTC program. It has provided a behind-the-scenes look at the "NMTC ecosystem," a complex, relationship-driven network of NMTC program participants who influence decision-making, build local markets, and create opportunities for success within the NMTC program. In doing so, this Article has provided a new theory to explain the underrepresentation of minority-led CDEs in the NMTC program. Namely, the NMTC program has created a competitive market for tax credits that favors participants with the strongest, most established professional networks, or the resources to hire consultants to facilitate those relationships. Within the NMTC ecosystem, minority-led CDEs face structural barriers to entry similar to those that exist in purely private markets, where minority business leaders have traditionally struggled to access mainstream professional networks. Ultimately, the underrepresentation of minority-led CDEs in the NMTC program undermines the program's capacity to promote equitable economic development, as it excludes participants who could help achieve equitable outcomes.

For these reasons and others, we make three recommendations to reform the NMTC program for more equitable economic development. First, the CDFI Fund should increase guidance and transparency with respect to its policy priorities and application scoring methods. These steps could reduce inefficiency in the NMTC program by enabling CDEs to focus on project pipelines that are consistent with agency goals. Ultimately, these changes can help achieve more equitable outcomes. Second, the CDFI Fund should coordinate with the Minority Business Development Agency. The MBDA can serve as an institutional intermediary to help minority-led CDEs build relationships in the NMTC ecosystem and to help the CDFI Fund identify quality applicants despite their lack of track records. Third, until such agency coordination is established, the CDFI Fund can relax its experience-based criteria in ways that increase NMTC access for minority CDEs, thereby enabling them to build the relationships and track records necessary for their ongoing success in the program.

Finally, the Treasury and the CDFI Fund should collect and make accessible data relevant for further study of the equity impacts of the NMTC. This Article has provided important insights about structural inequality in the NMTC program based on qualitative interview data. We trace this inequality from which projects get funded all the way to which CDEs are able to assemble funding applications. However, we lacked access to external data about the board composition of existing CDEs, their rate of participation in the application process, and the number of awards they receive. Other relevant data would include specific details about CDEs' application pipelines, the specific projects funded, proposed impact metrics, and retrospective outcomes based on those metrics—all with specific attention to impact on minority populations. It may even include disclosures about which consulting and law firms have participated in dealmaking.

However, like most racial tax data, these external data are not readily available to private researchers. We are hopeful that this may change in the future. In January 2023, the Biden administration released the first-ever government report on the racial impact of select tax expenditure programs, but the available data do not yet include community development incentives like the NMTC.[277] The findings in this Article suggest that it would be fruitful for the Treasury to collect and release racial data related to business tax incentives like the NMTC, the Low-Income Housing Tax Credit, and other community development tax incentives. Such data are essential to evaluate these tax programs' impact on low-income communities and people of color, and it could help inform and produce more equitable economic development policies.

The hybrid market for community development projects leans increasingly heavily on the private sector and private capital to invest in historically disadvantaged people and places. The foundational question for this hybrid market remains—who is the primary beneficiary of investment activity in qualified low-income

277. Julie-Anne Cronin, Portia DeFilippes & Robin Fisher, *Tax Expenditures by Race and Hispanic Ethnicity: An Application of the U.S. Treasury Department's Race and Hispanic Ethnicity Imputation* 22–23 (Off. of Tax Analysis, Working Paper No. 122, 2023), https://home.treasury.gov/system/files/131/WP-122.pdf [https://perma.cc/M2G9-ZPLD].

communities? Is it existing residents who have borne the burden of disinvestment and disadvantage or investors who seek to strategically invest their capital in these places? We argue that changing outcomes "on the ground" requires a more fundamental and structural shift in our understanding of the institutions involved in the community development ecosystem. Engaging the question at hand requires a more holistic diagnosis of the feedback loops within program design and function that undergird structural inequality not only with respect to what projects get funded, but also which players are able to shape how those investments are made.