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The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers

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This Article uncovers a critical disjuncture in our system of providing affordable rental housing. At the federal level, the oldest, fiercest debate in low-income housing policy is between project-based and tenant-based subsidies: should the government help build new affordable housing projects or help renters afford homes on the private market? But at the state and local levels, it is as if this debate never took place.

The federal government (following most experts) employs both strategies, embracing tenant-based assistance as more cost-effective and offering tenants greater choice and mobility. But this Article shows that state and local housing voucher programs are rare, small, and limited to special populations. States and cities almost exclusively provide project-based rental assistance. They move in lockstep despite disparate market conditions and political demands: project-based spending overwhelmingly predominates in both high- and low-rent markets and in both liberal and conservative states. States have done so across decades of increased spending. This uniform subnational approach suggests an unhealthy federalism—neither efficient nor experimental.

This Article further diagnoses why states have made this unusual choice, identifying four primary culprits: (1) fiscally-constrained states use project-based models to minimize painful cuts during recessions; (2) incomplete federal housing subsidies inadvertently incentivize project-based spending; (3) the interest groups involved in financing and constructing affordable housing are relatively more powerful subnationally; and (4) rental assistance's unusual, lottery-like nature elevates the value of visible spending over cost-effectiveness.

Finally, this Article points the way toward reform, offering two paths forward. Taking a federalist perspective allows for a new understanding of federal housing

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statutes. Better cooperative models—expanding either the federal or state role in providing affordable housing—could accept states' limitations in providing rental assistance and exploit their strengths.

Introduction

The oldest, fiercest debate in low-income housing policy is between project-based and tenant-based subsidies: should the government help build new affordable housing units or provide vouchers to help renters afford existing homes on the private market?[1] One leading observer described this fight

1. Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 Geo. J. on Poverty L. & Pol'y 1, 4 (2009) ("The basic divide in the

as "the most polarizing and enduring policy controversy in the annals of government-assisted housing," concerning "the direction of True North" and "perched on the very summit of housing policy, the grandest of grand strategies."[2] The choice between tenant-based and project-based subsidies has been at the center of every debate over federal rental assistance, from the creation of public housing in the New Deal through today's negotiations over the Biden administration's signature infrastructure proposals.[3] It has been the subject of the federal government's most rigorous policy experimentation. The debate has cut across partisan and ideological lines, scrambling coalitions and creating strange bedfellows in Congress and at the Department of Housing and Urban Development (HUD).[4] And in fifty states and countless cities across the country, it is as if this debate had never taken place.

The federal government—having declared a truce in this decades-long fight—strikes a rough balance between project-based and tenant-based subsidies. But states and cities invest almost exclusively in project-based strategies. This is a remarkable departure from federal practice. Perhaps more remarkably, given the diversity of political and housing-market conditions across the country, it is a near-uniform one. Project-based spending prevails in red states and blue states; in high-rent and low-rent housing markets; in the Sun Belt, Rust Belt and on the coasts; and in rural and urban areas. Never has a state adopted vouchers as its preferred housing strategy—as both the Reagan and Clinton administrations did and as many experts on the left and right have recommended for decades. Subnational governments have consistently expanded their involvement in affordable housing since the 1980s, when the federal government nearly abandoned its own commitment to providing low-income housing. This era has seen an "ascendant role for state and local governments" in affordable housing

housing arena involves demand-side subsidies, particularly what are now called Housing Choice Vouchers, versus supply-side subsidies, which can include a variety of upfront capital or long-term operating subsidies."); *see also* Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. Rev. 983, 987 (2010) ("A nation's decisions on the mixing of project-based and tenant-based housing aids affect the form of its metropolitan areas, the mobility of its households, and the welfare of its renters."); Alex F. Schwartz, Housing Policy in the United States 7 (4th ed. 2021) (classifying housing subsidies into these two categories).

2. Louis Winnick, *The Triumph of Housing Allowance Programs: How a Fundamental Policy Conflict Was Resolved*, Cityscape: J. Pol'y Dev. & Rsch., Sept. 1995, at 95, 95, 100–01.

3. *See id.* at 101; Caitlin Reilly, *Democrats Hope to Expand Housing Vouchers on Infrastructure Bill*, Roll Call (July 1, 2021, 7:00 AM), https://rollcall.com/2021/07/01/democrats-hope-to-expand-housing-vouchers-on-infrastructure-bill [perma.cc/8XE5-77W5] (describing competing proposals, project-based and tenant-based, for expanding rental assistance).

4. Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 Hous. Pol'y Debate 489, 499 (2000).

policy.[5] Yet across this four-decade span, in every state and city, the dominance of project-based approaches has barely been contested.

This Article uncovers the surprising divergence of states and cities from the federal government's example and from policy analysts' best recommendations. Social scientists and legal scholars have long debated the policy merits of tenant-based and project-based subsidies.[6] But none have observed that, those merits notwithstanding, states' and cities' policy calculus consistently comes out differently. Existing scholarship does not take an institutional perspective.[7] This Article, in contrast, treats the provision of rental assistance as a joint enterprise, structured not only by considerations of efficiency or equity but by how responsibility is allocated across three levels of government. Relying on a range of sources, including interviews with current and former housing officials from both the state and local levels, it also diagnoses why states have made this unusual choice.[8] The state and local embrace of project-based rental assistance is not merely a pervasive policy choice arrived at independently by different governments. It is an outcome structured by law: both the particulars of federal housing programs like the Low-Income Housing Tax Credit (LIHTC) and the larger arrangements of fiscal federalism.

This outcome is perverse. While intending to empower states, the federal government instead, and inadvertently, forecloses states from pursuing an often-preferred approach to providing affordable housing. Different places have markedly different housing needs; they should have different housing strategies as well. Moreover, all of the nation's housing assistance programs need improvement—sometimes dramatically. But the states, which once helped pioneer new forms of rental assistance, no longer play an important role in improving voucher policy. Identifying and understanding states' distinct and shared affordable housing strategy makes clear: our joint federal-state-local system simply isn't working as well as it should.

Improving (and expanding) rental assistance—including state and local programs—is an urgent task. It deserves the benefits of a healthier federalism.

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5. *Id.* at 490.

6. *See infra* Section I.B; *see also, e.g.*, John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. Rich. L. Rev. 1071 (2015); Ellickson, *supra* note 1; Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. Chi. L. Rev. 497, 524–40 (1993).

7. *Cf.* Yonah Freemark & Justin Steil, *Local Power and the Location of Subsidized Renters in Comparative Perspective: Public Support for Low- and Moderate-Income Households in the United States, France, and the United Kingdom*, 37 Hous. Stud. 1753 (2022) (discussing need for more "attention to the relationship between national and local powers" and "structure of local governance" in studying subsidized housing).

8. Because these interviews were conducted entirely "off the record," and because individual officials' claims are often readily traceable to the particular context of their city or state, I do not directly cite these interviews in this Article. Nevertheless, these interviews informed this Article throughout.

Though the federal government spends tens of billions of dollars annually to subsidize rental housing, this sum is widely acknowledged to be insufficient: only one in five eligible households actually receives any benefit.[9] And the number of households unable to afford rent has risen dramatically in recent decades.[10] Housing is the largest expense for most families, and one in four renters spend half their income on housing.[11] Yet good, affordable housing transforms lives. Housing affordability determines what is left for basic necessities like food and transportation and a minimum of discretionary spending—as sociologist Matthew Desmond explained, "the rent eats first."[12] Housing quality and stability affect every aspect of a family's well-being, from health to education, and are the foundation for economic security. The location of housing shapes the arc of economic opportunity for children, a household's exposure to crime and to policing, and the very air they breathe. Building a better and broader rental assistance system is also an urgent racial equity issue. Around 65 percent of households already receiving HUD assistance are headed by people of color.[13] Sixty-two percent of low-income renters spending more than half their income on rent—those who most need assistance—are people of color.[14]

Given the stakes, state participation in the national endeavor of providing affordable rental housing should be as effective as possible: both in providing limited funds to tenants and, ideally, spurring improvement in the larger system of rental assistance. This Article, by identifying the constraints on state and local rental assistance, points the way toward reform. Federalism today operates primarily through statutorily created policy frameworks, not freestanding constitutional relationships.[15] Accordingly, fostering innovation, local tailoring, and state autonomy

9. *See generally* Corianne Payton Scally, Samantha Batko, Susan J. Popkin & Nicole DuBois, Urb. Inst., The Case for More, Not Less (2018), https://www.urban.org/sites/default/files/publication/95616/the_case_for_more_not_less_1.pdf [perma.cc/9KUN-MC6L].

10. Joint Ctr. for Hous. Stud. of Harvard Univ., America's Rental Housing 2020, at 4 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf [perma.cc/4H9T-TJG8].

11. *Id.* at 26.

12. Matthew Desmond, Evicted 302 (2016).

13. *Program Participation Data Dashboard – HUD Rental Assistance*, Ctr. on Budget & Pol'y Priorities, https://apps.cbpp.org/program_participation/#table/112/hud-rental-assistance [perma.cc/9K5U-RK9F] (last updated Feb. 28, 2022).

14. *Majority of Low-Income Renters with Severe Cost Burdens Are People of Color*, Ctr. on Budget & Pol'y Priorities, https://www.cbpp.org/majority-of-low-income-renters-with-severe-cost-burdens-are-people-of-color [perma.cc/QVX5-L5DQ].

15. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534, 542 (2011); *see also* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 Va. L. Rev. 953, 969 (2016) (asserting importance to federalism of executive branch within those statutory frameworks).

requires close attention to states' precise role within those statutory schemes. Recognizing that (and why) states do not provide tenant-based assistance allows for a new perspective on federal housing statutes. Federal law—either through greater national provision of rental assistance or through this Article's proposal for a more cooperative program along the lines of Medicaid—can be reworked to accept states' limitations in providing rental assistance and to empower them to play a better role.

This Article proceeds in four parts. Part I tells the story of low-income rental assistance from the perspective of federal policymaking. The nation's affordable housing strategy was originally entirely project-based: first, though not only, as public housing. Over time, a coalition spanning the Left and the Right built an intellectual case for tenant-based assistance, which proved politically dominant from the 1970s through the 1990s. Project-based subsidies have regained a more prominent role in recent decades—appropriately, as they offer their own important advantages. Yet research has consistently shown vouchers to be more cost-effective and to improve tenant choice and mobility. Federal policy properly retains a sizable role for project-based subsidies, but vouchers never relinquished their victories in Washington or among intellectuals.

Part II turns to the states, where that standard narrative is turned upside down. Though state and local housing spending has increased consistently for decades, Part II demonstrates that subnational voucher programs are rare and small, dwarfed by the scale of state project-based tools. Vouchers are generally limited to specialized populations, like people facing homelessness or with long-term disabilities, or to emergencies where speed matters. Some of the jurisdictions most active in providing affordable housing, like California and New York City, have no general population voucher program at all. This is not what a federalist system should offer; the participation of states and cities has generated little variation, experimentation, or contestation despite the real need for these federalism values.[16] Accordingly, Part II situates these findings as a case study of how federalism operates within one corner of the welfare state. In doing so, it shows how these outcomes are not adequately explained by generic scholarly accounts of federalism not specific to housing.[17]

16. Throughout this Article, I use "federalism" to mean how the allocation of powers and interactions between national and state governments in a particular shared policy space promote or inhibit traditional federalism values (or how they should), not any set of judicial doctrines. I use "fiscal federalism" to describe the allocation of financial resources and powers between levels of government, in contrast to regulatory powers.

17. My approach follows what William Buzbee has deemed "contextual" federalism analysis in environmental law: treating federalism dynamics as highly particular to historical context, statutory schemes, and specific objects of regulation and redistribution. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. Env't L.J. 108, 114 (2005).

Next, Part III explains why states have diverged from the federal government's established approach to rental assistance. The reason is not that a state-provided voucher would be less useful to tenants than a federal voucher (a city-operated voucher, in contrast, might be). The advantages of tenant-based assistance hold at the subnational level. Its absence is a pathology of federalism—a failure of policy design—not a healthy choice generated by the political system. I identify four primary culprits. First, states' fiscal exposure to recessions encourages them to avoid ongoing spending commitments for affordable housing, even at considerable cost. Project-based models allow for upfront spending. The building itself serves as a durable asset providing long-term benefits across fiscal cycles. Second, federal housing spending effectively incentivizes project-based spending, with the incomplete subsidies provided by LIHTC serving as a quasi-matching program for state funds. Not all state spending is "stacked" with federal funds, but enough is to tilt the playing field. Third, state politics favors project-based spending: in states' more pork-barrel political environments, where watchdogs like the media and the administrative state are relatively weaker, interest groups like the construction industry have more sway. Fourth, each of these factors is exacerbated by the most unusual feature of rental assistance: whether tenant-based or project-based, only a tiny fraction of eligible households receive it. Structuring welfare spending as a lottery reduces the pressure for cost-effectiveness while enhancing the political value of making spending visible.

Finally, Part IV offers suggestions for reform. The constraints on states and cities are real, and simply urging them to reconsider their rental assistance strategies will have limited success. Instead, a federalist perspective—appreciative of how law has structured state power in providing affordable housing to be neither experimental nor efficient—points toward the need for national reform. It provides new support for expanding national provision where the states have shown themselves to fall short, deepening certain federal housing subsidies and broadening others. This perspective underscores the shortcomings of recurring calls to convert federal housing assistance into block grants, which might be spent inefficiently on an all-project-based strategy. And as a more federalist alternative to national provision, Part IV imagines a new model for rental assistance, shaped as a federal matching program akin to Medicaid. A Medicaid-for-Housing approach could encourage tailoring to local conditions, experimentation with alternative models, and coordination with state power over land use regulation and social services. Today's rental assistance system plays to states' weaknesses; it is time to exploit their strengths.

* * *

Before proceeding, some important caveats are in order. First, while research is increasingly clear that vouchers often outperform project-based subsidies, it is equally clear that project-based subsidies are a critical tool

of housing policy, especially for neighborhood revitalization. I do not attempt to pinpoint where either tool should be preferred. This Article's recitation of the merits of vouchers is meant to support a more modest claim: tenant-based assistance is valuable in almost all housing markets. Relatedly, I do not mean to suggest that the federal voucher program as currently constituted is perfect: far from it. Its flaws—from decades-long waiting lists to rampant discrimination against voucher holders (and the subsequent reconcentration of poverty) to unevenly enforced housing quality standards—are well-rehearsed and urgently demand reform.[18] But project-based affordable housing has its own issues.[19] For this Article, what matters is their relative performance (and perhaps their susceptibility to improvement, including through federalist dynamics).[20]

Second, this Article limits its analysis to subsidies for affordable rental housing. Subnational governments also support homeownership, as does the overwhelming majority of federal housing spending (most importantly through the mortgage interest deduction).[21] Homeownership subsidies are generally targeted at middle- or high-income households and raise their own distinctive questions about the state–federal relationship in housing.[22] Rather than compare apples to oranges, I examine only rental assistance.

18. *See, e.g.*, Alana Semuels, *How Housing Policy Is Failing America's Poor*, Atlantic (June 24, 2015), https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650 [perma.cc/353M-AB23]; Philip Tegeler, Housing Choice Voucher Reform: A Primer for 2021 and Beyond (2020), https://prrac.org/pdf/housing-choice-voucher-reform-agenda.pdf [perma.cc/TY42-GPRM]. Eva Rosen's sociology of Housing Choice Voucher recipients in Baltimore provides a rich portrait of vouchers' transformative potential and shortcomings. Eva Rosen, The Voucher Promise (2020). Additionally, Priscilla Ocen has shown how even after a "successful" housing search—where voucher recipients manage to rent apartments in racially integrated, middle-class communities—voucher holders may still face intense harassment and discrimination. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540, 1579–81 (2012).

19. Indeed, many of them are the same: the concentration of poverty, poor oversight leading to poor housing quality, and unfair systems for allocating benefits. *See* Ellickson, *supra* note 1, at 996–1008.

20. For similar reasons, I focus on comparisons between actually existing tenant-based and project-based programs. While there are recent ambitions for new "social housing" models that may perform differently, *see, e.g.*, People's Action, A National Homes Guarantee (2019), https://ppls.ac/HGBB [perma.cc/T6XH-XAAE], one cannot compare an unrealized ideal to a messy reality.

21. *See* Will Fischer & Barbara Sard, Ctr. on Budget & Pol'y Priorities, Chart Book: Federal Housing Spending Is Poorly Matched to Need (2017), https://www.cbpp.org/sites/default/files/atoms/files/12-18-13hous.pdf [perma.cc/6YG8-QMBF]. These disparities were reduced by tax reforms in 2017, but hardly eliminated. Michael J. Novogradac, *Once Again, Homeownership Gets Far More Tax Subsidies than Rental Housing*, Novogradac J. Tax Credits, July 2018, at 1, 1.

22. *See* Fischer & Sard, *supra* note 21.

Third, this Article accepts the political status quo in housing assistance for the last century: that the government ought to help low-income families secure affordable homes.[23] It does not consider whether housing assistance instead ought to be converted to a less paternalistic cash benefit or, conversely, eliminated entirely.[24] Whether housing is appropriately provided as an in-kind benefit is a worthwhile question—but so too is understanding our established systems for providing that in-kind benefit. Especially now, as Congress debates including transformative investments in affordable housing in its infrastructure packages—with competing project-based and tenant-based proposals[25]—and states continue to expand their role in housing assistance,[26] the difficult programmatic questions internal to housing policy are important in their own right.

I. Rental Assistance: The View from Washington

A. The Rise of Vouchers in Federal Housing Policy

Federal rental assistance began as public housing.[27] By the end of the twentieth century, however, vouchers had become, by far, the largest HUD program.[28] Scholars declared the policy battle firmly settled in vouchers' favor. Since then, project-based subsidies' political fortunes and intellectual reputation have improved somewhat, and a rough equilibrium has held for years. This history of contestation and settlement situates vouchers within today's system of rental assistance and shows tenant-based assistance's policy advantages and cross-ideological appeal. It sets the political and intellectual baseline from which state and local policy has diverged.

Since the beginning of federal rental assistance during the New Deal, tenant-side subsidies—variously labeled as vouchers, rent certificates, or rent supplements—have been put forward as the alternative to project-based strategies. Originally, vouchers were the conservative counter to the public housing created by the 1937 Wagner-Steagall Housing Act,[29]

23. Likewise, this Article accepts the basic terms of American fiscal federalism and does not consider broad fiscal equalization or revenue-sharing schemes not tied to particular programmatic areas. *See* Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 Calif. L. Rev. 1531, 1537 (2020).

24. *See* Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 Cornell L. Rev. 878, 878–81, 891–93 (1990); Zachary Liscow, *Redistribution for Realists*, 107 Iowa L. Rev. 495, 556–57 (2022).

25. *See* Reilly, *supra* note 3.

26. Gary Warth, *Gov. Newsom Proposes $12 Billion to House California's Homeless*, L.A. Times (May 11, 2021, 6:55 PM), https://www.latimes.com/california/story/2021-05-11/california-governor-proposes-12b-to-house-states-homeless [perma.cc/ZRK5-SHXX].

27. Schwartz, *supra* note 1, at 7.

28. Robert Collinson, Ingrid Gould Ellen & Jens Ludwig, *Reforming Housing Assistance*, 686 Annals Am. Acad. Pol. & Soc. Sci. 250, 254 fig.1 (2019).

29. Pub. L. No. 75-412, 50 Stat. 888 (1937).

championed by the Chamber of Commerce and the real estate industry.[30] But tenant-side assistance was repeatedly rejected by federal policymakers—from liberal "housers" to the moderate Eisenhower administration to "Mr. Republican" Robert Taft—through the 1930s, '40s, and '50s.[31] Vouchers would not have achieved the slum-clearance and neighborhood-planning goals of the urban renewal era and were seen as too intrusive to administer, too difficult to ration, and an unearned subsidy to bad landlords.[32]

But over the second half of the twentieth century, liberals began to join conservatives in supporting tenant-side rental assistance.[33] Catherine Bauer, one of the architects of the nation's public-housing program, endorsed rental certificates in 1958 as a means of deconcentrating "difficult" tenants.[34] During the Kennedy and Johnson administrations, congressional liberals and Robert Weaver—the first African American cabinet secretary and first leader of HUD—experimented with rent subsidy pilots and ways of allowing public housing tenants to live in existing, private housing.[35] Meanwhile, conservatives in Congress attacked those Great Society experiments as "block busting" integrationist efforts—a measure of the cross-ideological cleavages at play.[36]

By the 1970s, tenant-based assistance was seen to offer an array of advantages over project-based subsidies, each of which is still cited today. Most importantly, the housing market had changed. For most low-income renters, the problem was decreasingly housing quality and increasingly housing affordability.[37] Building new apartments offered clear advantages when existing apartments lacked heat and indoor plumbing, but a voucher is a more direct response to the challenges of spending half one's income on rent.[38] And as white flight plagued many cities, there was a large, existing stock of housing to utilize; vouchers could help bring capital to neighborhoods facing decline. Slum clearance was out, and preservation was in, making vouchers far more attractive.

30. Alexander von Hoffman, *History Lessons for Today's Housing Policy: The Politics of Low-Income Housing*, 22 Hous. Pol'y Debate 321, 357 (2012).

31. Orlebeke, *supra* note 4, at 502.

32. Winnick, *supra* note 2, at 101.

33. This gradual shift came during an era when the federal government's commitment to building housing was considerable; at its Great Society height, the federal government intended to build twenty-six million housing units in ten years. Carl A. S. Coan, Jr., *The Housing and Urban Development Act of 1968: Landmark Legislation for the Urban Crisis*, 1 Urb. Law. 1, 13 (1969); *see also id.* at 1 (quoting President Johnson describing the 1968 legislation as among the ten most important laws in the nation's history).

34. von Hoffman, *supra* note 30, at 357–58.

35. *Id.*; *see also* Lawrence M. Friedman & James E. Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. Pa. L. Rev. 611, 614, 616 (1968); Wendell E. Pritchett, Robert Clifton Weaver and the American City 257–59 (2008).

36. Pritchett, *supra* note 35, at 302.

37. Winnick, *supra* note 2, at 97.

38. Rosen, *supra* note 18, at 8–9.

At the same time, there was widespread dissatisfaction with the existing project-based models. Public housing was perceived as creating pathological concentrations of intense poverty, while programs that subsidized private affordable-housing development were tarred by scandal and proving unexpectedly costly.[39] In both cases, racism first shaped (and sabotaged) the programs, then defined the public's perception of the homes and neighborhoods that those programs created.[40] Vouchers, proponents hoped, could provide housing more cheaply and provide tenants with more choice of where to live, including in white and high-income neighborhoods. Not all of these aspirations for the voucher program were fully vindicated, of course. But as project-based affordable housing became increasingly stigmatized—and market-oriented policy approaches grew in popularity—the arguments for vouchers proved increasingly persuasive.

Starting in the early 1970s, Congress embraced tenant-based rental assistance. It funded the Experimental Housing Allowance Program (EHAP), a multi-year study of demonstration voucher programs, which was "the largest housing program experiment the federal government has ever undertaken."[41] EHAP's results, though hotly contested, suggested that vouchers worked well to reduce rent burdens for recipients, without inflating rents market-wide, even as they generated few improvements in housing quality and none in racial integration.[42] And even before EHAP's results were in, Congress enacted the Section 8 program as part of a sweeping 1974 reorganization of federal housing assistance.[43] For the first time, vouchers were a part of the federal rental assistance toolkit, where, subject to periodic tinkering, they remain today.[44]

Initially, Section 8 included both tenant-based and project-based subsidies, and the relative prominence of each strategy waxed and waned over the following decades—still without a fully fixed partisan or ideological valence. Both the Ford and Carter administrations emphasized housing production.[45] The Reagan administration, in turn, fully embraced vouchers—and backed a total end to production subsidies—as a conservative ideological project. By the Clinton administration, liberals had "reclaimed" vouchers as a tool that could simultaneously support incomes, deconcentrate poverty, and revive distressed urban neighborhoods.[46] These more left-leaning goals were never entirely separable from the era's racialized

39. Winnick, *supra* note 2, at 97–98.

40. *See, e.g.*, Arnold R. Hirsch, Making the Second Ghetto (3d ed. 2021); Keeanga-Yamahtta Taylor, Race for Profit (2019).

41. von Hoffman, *supra* note 30, at 367.

42. Winnick, *supra* note 2, at 108.

43. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633.

44. 42 U.S.C. § 1437f(o).

45. von Hoffman, *supra* note 30, at 364; Orlebeke, *supra* note 4, at 504.

46. von Hoffman, *supra* note 30, at 364–66.

"welfare reform" politics. Still, the renaming of "Section 8" as the "Housing Choice Voucher" (HCV) program in 1998 reflected this "new goal of promoting geographic opportunity through residential choice."[47]

By the 1990s, housing policy experts had converged on a rough consensus that housing vouchers were a valuable, often superior, form of housing assistance.[48] As one leader in the field stated (somewhat hyperbolically), the fight between project-based and tenant-based housing assistance was over: "Settlement there has been. It is beyond doubt . . . that the battle has gone substantially and seemingly permanently in favor of a household-targeted strategy."[49] The more sedate Urban Institute, summarizing expert opinion of the day, explained that "[d]emand-side subsidies make the most sense when affordability is the greatest housing problem to be resolved. And the evidence is convincing that this is indeed the case—in most housing markets and for most types of units."[50] These experts saw many remaining roles for project-based affordable housing, including helping rebuild abandoned inner-city neighborhoods, serving special-needs populations like the homeless or disabled, and increasing housing supply in particularly tight markets.[51] But under ordinary circumstances, vouchers appeared preferable.[52] Support for vouchers remained cross-ideological: a preference for tenant-based assistance can still be found among liberals and conservatives today.[53]

The seeming victory of vouchers among intellectuals was never fully reflected in federal policy. Vouchers continue to grow in importance every year. But project-based assistance still makes up a majority of federal rental assistance. Funding for new project-based Section 8 and public housing developments was cut off in 1983.[54] However, three years later, Congress

47. Rosen, *supra* note 18, at 14.

48. Ellickson, *supra* note 1, at 984.

49. Winnick, *supra* note 2, at 95. Winnick, among other things, led the Ford Foundation's investments in housing for decades. Alan S. Oser, *Louis Winnick, Housing Expert, Dies at 85*, N.Y. Times (July 30, 2006), https://www.nytimes.com/2006/07/30/nyregion/30winnick.html [perma.cc/G9PW-2ZEL].

50. Margery Austin Turner & Veronica Reed, Urb. Inst., Housing America 7 (1990).

51. *See, e.g.*, Winnick, *supra* note 2, at 117.

52. Of course, any consensus has its dissenters. *See, e.g.*, Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 Geo. L.J. 53, 74–75 (2011); Chester Hartman, *Housing Allowances: A Critical Look*, 5 J. Urb. Affs. 41 (1983).

53. *See, e.g.*, *Expanding Housing Vouchers*, Ctr. on Budget & Pol'y Priorities, https://www.cbpp.org/research/resource-lists/expanding-housing-vouchers [perma.cc/27ZY-2Q8E] (liberal think tank); Task Force on Poverty, Opportunity, and Upward Mobility, A Better Way 18 (2016), https://www.novoco.com/sites/default/files/atoms/files/ryan_better_way_poverty_policy_paper_060716.pdf [perma.cc/A6FH-3CN8] (Republican Party).

54. Housing & Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209, 97 Stat. 1153, 1183.

created the Low-Income Housing Tax Credit, providing a new mechanism for supporting affordable housing development.[55] That tax subsidy, which sits outside HUD's portfolio, has grown substantially since its creation—arguably, well beyond what its creators envisioned[56]—and now supports 2.2 million housing units.[57] Including legacy public housing and project-based Section 8 units, the major project-based federal housing programs assist roughly 3.5 million housing units, while vouchers cover 2.5 million units.[58]

Moreover, the pendulum has swung back toward project-based housing strategies since the 1990s.[59] Congress's newest low-income housing program, the National Housing Trust Fund—a relatively small block grant program that was created in 2008 and began disbursing funds in 2016—is project-based.[60] More recently, the Left has reembraced "social housing," with activists and legislators calling for millions of new units of publicly controlled affordable housing.[61] But vouchers, too, have gained renewed attention;[62] most notably, both Joe Biden's and Bernie Sanders's 2020 campaign platforms called for universalizing the federal voucher program.[63] In short, federal policymakers continue to see a role for both project-based

55. Tax Reform Act of 1986, Pub. L. 99-514, § 252, 100 Stat. 2085, 2198. LIHTC's administration is complex, but in short, it funds affordable housing construction by providing private developers of low-income rental housing a tax credit that can be sold to investors. Core terms of the program are set forth in the federal tax code, but the program is administered by states, which have substantial discretion in allocating credits.

56. Brad Stanhope, *Tax Shelters, Floor Fights, Deals, Negative Reactions: Remembering the Dawn of the LIHTC*, Novogradac J. Tax Credits, Oct. 2016, at 1.

57. Collinson et al., *supra* note 28, at 253.

58. *Id.* at 256 tbl.1. In dollars, the federal government spent $12 billion on legacy project-based rental assistance, $7 billion on public housing, $7 billion on LIHTC, and $18 billion on vouchers in 2014. Cong. Budget Off., Federal Housing Assistance for Low-Income Households 2 (2015), http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing-onecolumn.pdf [perma.cc/ZWQ2-WJ6R].

59. Ellickson, *supra* note 1, at 994–95.

60. Katie Jones, Cong. Rsch. Serv., R40781, The Housing Trust Fund (2016). The National Housing Trust Fund joins two other federal block grants that can be used for affordable housing: the larger Community Development Block Grant, which covers non-housing spending as well, and the flexible HOME Investment Partnerships Program. *See infra* Section II.B.3 & note 172.

61. Kriston Capps, *Should Biden Go Big on Public Housing?*, Bloomberg CityLab (Dec. 8, 2020, 12:09 PM), https://www.bloomberg.com/news/articles/2020-12-08/how-public-housing-could-boost-economic-recovery [perma.cc/U28B-9C76].

62. Much of the credit here goes to Matthew Desmond, who endorsed universal vouchers in his prize-winning book *Evicted*, dramatically elevating the issue. Desmond, *supra* note 12, at 308–12.

63. Matthew Yglesias, *Bernie Sanders's Housing-For-All Plan, Explained*, Vox (Sept. 19, 2019, 1:30 PM), https://www.vox.com/2019/9/19/20873224/bernie-sanders-housing-for-all [perma.cc/A8QB-YA9M]; Matthew Yglesias, *Joe Biden's*

and tenant-based rental assistance. The prioritization of those strategies continues not to fall cleanly on a Left–Right spectrum.

This balance mirrors international practice. European countries also make extensive use of tenant-side rental assistance. In France, over half of renters receive a housing allowance, as do nearly half of renters in the UK and one-fifth of German and Swedish renters.[64] Thus, while the American voucher program certainly stems from a market-oriented intellectual tradition, it is not solely an artifact of America's distinctively neoliberal approach to welfare or housing policy.[65] Rather, tenant-based assistance has proven useful across diverse political and legal regimes, including those with considerable state roles in the housing market and expansive welfare states.

As this history shows, the federal government has struck a balance between project-based and tenant-based subsidies. The precise terms of that balance are always contested, but it has been decades since Congress or HUD has seriously reconsidered the basic forms of rental assistance.[66] Today, most accept a significant role for both supply- and demand-side housing strategies.

B. The Relative Merits of Vouchers: The State of the Research

Vouchers have become firmly ensconced in federal policy and elite policy thinking, but have they lived up to their promise? The answer is a qualified yes: not always, and never fully, but their purported benefits relative to project-based subsidies do materialize in practice.

Undoubtedly, vouchers benefit their recipients (this is unsurprising, given how important housing is to social outcomes and that rent subsidies

Surprisingly Visionary Housing Plan, Explained, Vox (July 9, 2020, 11:30 AM), https://www.vox.com/2020/7/9/21316912/joe-biden-housing-plan-section-8 [perma.cc/SN8M-WJ9W].

64. Michael Carliner & Ellen Marya, Joint Ctr. for Hous. Stud. of Harvard Univ., Rental Housing: An International Comparison 20 tbl.3 (2016), https://www.jchs.harvard.edu/sites/default/files/media/imp/international_rental_housing_carliner_marya.pdf [perma.cc/MU97-4EKB]. France and the UK spend roughly ten times more of their GDP on tenant-based housing allowances than the United States does. *Id.* at 26.

65. *Cf.* Gøsta Esping-Andersen, The Three Worlds of Welfare Capitalism (1990).

66. The George W. Bush administration proposed block granting a vast array of welfare programs, from Head Start to Medicaid, and including housing vouchers. However, these proposals were not housing-specific and went nowhere. *See* Kenneth Finegold, Laura Wherry & Stephanie Schardin, Urb. Inst., Block Grants: Details of the Bush Proposals (2004), http://webarchive.urban.org/UploadedPDF/310990_A-64.pdf [perma.cc/BT8L-7YV7]; Nat'l Council on Disability, A Medicaid Block Grant Program 14 (2013), https://ncd.gov/sites/default/files/NCD_BlockGrant_ReportApr10FINAL508_0.pdf [perma.cc/Z5WS-734G]. The 1995 HUD Reinvention Blueprint, which proposed fully voucherizing federal housing assistance, was arguably the last time the fundamentals of federal rental assistance were seriously rethought. Orlebeke, *supra* note 4, at 515.

are near substitutes for cash). In a randomized experiment, researchers found that receiving a voucher "nearly eliminated" homelessness: whereas 45 percent of low-income families without vouchers had been forced to stay with a friend or relative, in a shelter, or on the street during a one-year period, just 9 percent of voucher holders had done so.[67] The same study showed that a voucher reduced overcrowding by half, allowed recipients to move to better neighborhoods and to avoid repeat moves thereafter, and freed up cash for necessities like food.[68] In turn, the housing and economic stability provided by a voucher can unlock a host of other social goods for families.[69] Qualitative research shows how "[t]he lives of the voucher holders . . . [are] indelibly changed when they receive[] a housing voucher": securing an affordable home allows people to finally move off their sisters' couch, escape violent living situations or the sites of past trauma, or reclaim custody of their children.[70] And for every year that teenagers spend receiving a housing voucher, their adult earnings increase by 2.6 to 4.7 percent.[71]

For purposes of this Article, though, the question is not whether vouchers benefit their recipients but how they compare to project-based assistance. Here, the evidence is positive—including greater cost-effectiveness and more tenant choice—but not uniform. As social scientists continue to better understand the effects of federal housing assistance, the merits of vouchers appear increasingly robust yet increasingly qualified. What is clear is that tenant-based housing assistance outperforms project-based subsidies under the right conditions.

The relative cost-effectiveness of vouchers—in terms of the basic cost to provide a tenant shelter—is well established. A slew of influential studies from the 1970s and 1980s consistently found subsidized housing

67. Michelle Wood, Jennifer Turnham & Gregory Mills, *Housing Affordability and Family Well-Being: Results from the Housing Voucher Evaluation*, 19 Hous. Pol'y Debate 367, 381 (2008).

68. *Id*. at 384, 390, 402; *see also* Joint Ctr. for Hous. Stud. of Harvard Univ., America's Rental Housing: Evolving Markets and Needs 32 (2013), https://www.jchs.harvard.edu/sites/default/files/jchs_americas_rental_housing_2013_1_0.pdf [perma.cc/GRC4-PFZN]; Desmond, *supra* note 12, at 303.

69. *See* Enter. Cmty. Partners, Impact of Affordable Housing on Families and Communities (2014), https://homeforallsmc.org/wp-content/uploads/2017/05/Impact-of-Affordable-Housing-on-Families-and-Communities.pdf [perma.cc/MJ6D-MSVP].

70. Rosen, *supra* note 18, at 23–25.

71. Fredrik Andersson et al., *Childhood Housing and Adult Earnings: A Between-Siblings Analysis of Housing Vouchers and Public Housing* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22721, 2018), https://www.nber.org/system/files/working_papers/w22721/w22721.pdf [perma.cc/L769-H4E2]. The study (which also found beneficial effects on future incarceration rates) found that both public housing and housing vouchers improved future earnings and that the differences between the two were not statistically significant. *Id.* at 5, 20. The effects may be heterogeneous by race and gender; for example, non-Hispanic Black girls benefitted most from vouchers, while Hispanic girls benefitted most from public housing. *Id.* at 20.

more expensive to build and operate than private housing paid for with a voucher.[72] More recent research confirms that basic conclusion and has allayed concerns about methodology and timing.[73] Indeed, researchers are unanimous on this point. No one believes project-based subsidies to be outright cheaper than tenant-based subsidies.[74]

However, recent research by urban planner Lan Deng comparing the cost-effectiveness of federal vouchers to LIHTC—today, the most significant federal subsidy for new affordable housing construction—complicates the story. While Deng confirmed that vouchers were cheaper than LIHTC in each metropolitan area she studied, the degree varied significantly. In San José, LIHTC housing was just 2 percent more expensive than a voucher; in Boston and Atlanta, it cost more than double.[75] The relative cost of vouchers depended on a variety of factors, including the tightness of the regional housing market, tenant incomes, local public housing authorities' (PHAs') decisions about payment standards, and—most importantly—whether the state prioritized cheaper suburban development or more expensive urban revitalization projects with their LIHTC allocations.[76] Deng's findings should come as no surprise. LIHTC costs themselves are highly variable: the median cost of constructing a new LIHTC unit ranges from $126,000 in Texas to $326,000 in California and can rise to $739,000.[77] Thus, simplistic stories about the efficiency of vouchers nationwide should be avoided. Vouchers may be dramatically cheaper than new construction—or nearly cost-competitive.

The size of vouchers' cost-effectiveness advantage is critical to any cost-benefit analysis because project-based subsidies bring their own benefits. Affordable housing development provides positive spillovers in lower-income neighborhoods, especially where those developments reduce disamenities (or "blight") or serve higher-income tenants.[78] One important recent study found that in low-income neighborhoods, LIHTC

72. Schill, *supra* note 24, at 900–01.

73. U.S. Gov't Accountability Off., GAO-02-76, Federal Housing Assistance: Comparing the Characteristics and Costs of Housing Programs (2002); Lan Deng, *The Cost-Effectiveness of the Low-Income Housing Tax Credit Relative to Vouchers: Evidence from Six Metropolitan Areas*, 16 Hous. Pol'y Debate 469 (2005).

74. David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 Wash. U. L. Rev. 1823, 1856 (2006); *cf.* Kirk McClure, *Housing Vouchers Versus Housing Production: Assessing Long-Term Costs*, 9 Hous. Pol'y Debate 355 (1998) (arguing, in support of project-based subsidies, only that cost advantage of vouchers is smaller than generally believed).

75. Deng, *supra* note 73, at 471.

76. *Id.* at 500.

77. U.S. Gov't Accountability Off., GAO-18-637, Low-Income Housing Tax Credit: Improved Data and Oversight Would Strengthen Cost Assessment and Fraud Risk Management 20 & n.38 (2018).

78. Amy Ellen Schwartz, Ingrid Gould Ellen, Ioan Voicu & Michael H. Schill, *The External Effects of Place-Based Subsidized Housing*, 36 Reg'l Sci. & Urb. Econ. 679, 703

projects increased nearby housing values while increasing diversity and reducing crime.[79] Positive spillovers from subsidized housing are hardly universal—poorly designed projects or those which create extreme concentrations of poverty may harm the surrounding area[80]—but well-planned projects can help neighborhoods in addition to residents. These are benefits to weigh quite seriously. Vouchers, in contrast, are designed not to change the existing built environment, and so do not generate large spillovers.[81]

Vouchers' other critical advantage over project-based subsidies—that tenants are empowered to choose their own homes and neighborhoods—has also been borne out, but only incompletely. The ability to exercise control over where you live is immensely valuable. At the level of choosing an individual home, the federal voucher program has provided that ability.[82] Indeed, voucher holders use this choice not only to move to a given location but also to move away from hard-to-fix problems: a bad landlord, a school where a child is being bullied, or neighborhood violence.[83]

Vouchers' ability to provide recipients with a broad choice of neighborhoods, however, has been more disappointing.[84] When families use vouchers to move to low-poverty neighborhoods, the benefits can be substantial, especially for younger children: new research shows such moves increase children's adult earnings by 31 percent.[85] However, the voucher program does an insufficient job of allowing such moves. Granted, voucher holders live in much better neighborhoods than recipients of older project-based

(2006). New York City's municipal housing program in the 1980s and 1990s was so successful that it generated more in new tax revenue than the city paid in subsidies. *Id.*

79. Rebecca Diamond & Tim McQuade, *Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low-Income Property Development*, 127 J. Pol. Econ. 1063, 1065 (2019) (using data on all LIHTC-funded projects nationwide).

80. *See* Mai Thi Nguyen, *Does Affordable Housing Detrimentally Affect Property Values? A Review of the Literature*, 20 J. Plan. Literature 15, 23–24 (2005).

81. Changing the mix of tenants in existing buildings can affect the neighborhood. *See* George C. Galster, Peter Tatian & Robin Smith, *The Impact of Neighbors Who Use Section 8 Certificates on Property Values*, 10 Hous. Pol'y Debate 879, 912 (1999).

82. Rosen, *supra* note 18, at 109 (observing a new kind of self-sufficiency for voucher recipients, beyond pecuniary benefits).

83. *Id.* at 210–11.

84. *E.g.*, Deborah Thrope, *Achieving Housing Choice and Mobility in the Voucher Program: Recommendations for the Administration*, 27 J. Affordable Hous. & Cmty. Dev. L. 145, 145 (2018); Barbara Sard, Ctr. on Budget & Pol'y Priorities, How to Promote Housing Integration and Choice Through the Section 8 Voucher Program (2008), https://www.cbpp.org/sites/default/files/atoms/files/10-6-08hous-testimony.pdf [perma.cc/AK6T-M88S].

85. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 Am. Econ. Rev. 855, 857 (2016). The same research, reevaluating the famous "Moving to Opportunity" experiment, shows that children in high-opportunity areas are more likely to go to college and less likely to become single parents. *Id.*

subsidies.[86] Voucher holders also live in slightly better neighborhoods than other poor renters.[87] But voucher holders still live in markedly worse neighborhoods than the average renter.[88] And vouchers do no better at promoting economic integration than LIHTC.[89] Moreover, these mobility benefits are distributed inequitably: white voucher holders are twice as likely to live in low-poverty neighborhoods as Black or Hispanic voucher holders.[90] Both program design and landlord discrimination limit vouchers' potential for integration.

As with cost, local conditions and the details of program administration drive great variation in locational outcomes. For example, landlord behavior varies considerably across regions, with 14.8 percent of landlords in the Washington, D.C. area refusing to rent to voucher holders, compared to a high of 78 percent in Fort Worth.[91] Such source-of-income discrimination dramatically restricts the usefulness of a voucher. But state and local bans on source-of-income discrimination can, in turn, significantly improve locational outcomes for voucher holders.[92] Other interventions, like changing the voucher subsidy formula to pay landlords more in high-rent neighborhoods[93] or offering voucher holders customized counseling and

86. As of 2000, around one-fifth of voucher holders lived in neighborhoods with a poverty rate greater than 30 percent, compared with roughly half of project-based Section 8 residents and two-thirds of public housing residents. Deborah J. Devine, Robert W. Gray, Lester Rubin & Lydia B. Taghavi, U.S. Dep't of Hous. & Urb. Dev., Housing Choice Voucher Location Patterns 33 (2003), https://www.huduser.gov/publications/pdf/location_paper.pdf [perma.cc/83Z8-DRB8].

87. Rolf Pendall, *Why Voucher and Certificate Users Live in Distressed Neighborhoods*, 11 Hous. Pol'y Debate 881, 904–05 (2000); Martha M. Galvez, What Do We Know About Housing Choice Voucher Program Location Outcomes? 5 (2010), https://www.urban.org/sites/default/files/publication/29176/412218-What-Do-We-Know-About-Housing-Choice-Voucher-Program-Location-Outcomes-.PDF [perma.cc/6EQE-BDK5].

88. Pendall, *supra* note 87, at 905; John D. Landis & Kirk McClure, *Rethinking Federal Housing Policy*, 76 J. Am. Plan. Ass'n 319, 333 (2010).

89. Ingrid G. Ellen, Keren M. Horn & Katherine M. O'Regan, *Poverty Concentration and the Low Income Housing Tax Credit: Effects of Siting and Tenant Composition*, 34 J. Hous. Econ. 49, 51 (2016). There is greater variation in poverty rates in LIHTC locations, however, and poor tenants are more likely to live in LIHTC properties in high-poverty areas. *Id.* at 51, 53.

90. Rosen, *supra* note 18, at 21.

91. Mary Cunningham et al., U.S. Dep't of Hous. & Urb. Dev., A Pilot Study of Landlord Acceptance of Housing Choice Vouchers, at xii tbl.ES.3 (2018), https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf [perma.cc/DEL8-3K9E].

92. Lance Freeman, U.S. Dep't of Hous. & Urb. Dev., The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes, at viii (2011), https://www.huduser.gov/publications/pdf/Freeman_ImpactLaws_AssistedHousingRCR06.pdf [perma.cc/TG3H-B4FZ].

93. Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80567 (Nov. 16, 2016) (codified at 24 C.F.R. pts. 888, 982, 983, 985 (2022)); Samuel Dastrup, Meryl

support,[94] can dramatically shift where voucher holders live. One particularly strong mobility program in Seattle raised the share of voucher-holding families moving to high-opportunity neighborhoods from 15.1 percent to 53 percent, a remarkable result.[95] In other words, vouchers can be administered to restrict or enhance mobility, and must do so differently across diverse housing markets.[96] But under certain conditions, vouchers can be a powerful tool to promote access to opportunity—the tenant-based model is well matched to this task.

Finally, tenant-based assistance may outperform project-based approaches for families exiting homelessness—a population for whom project-based subsidies were traditionally considered preferable.[97] In a randomized experiment performed by HUD, long-term vouchers helped families with children avoid returning to homelessness far more than project-based transitional housing programs, which provide apartments and intensive social services for a few years.[98] After three years, voucher holders also experienced fewer family separations, better child behavior, and greater

Finkel, Kimberly Burnett & Tanya de Sousa, U.S. Dep't of Hous. & Urb. Dev., Small Area Fair Market Rent Demonstration Evaluation, at xv–xvii (2018), https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Evaluation-Final-Report.pdf [perma.cc/YB6H-4XXD].

94. Andrea Juracek et al., Housing Mobility Programs in the U.S. (2018), https://prrac.org/pdf/mobilityprogramsus2018.pdf [perma.cc/AL8Y-TKKD]; Dionissi Aliprantis, Hal Martin & Kristen Tauber, *What Determines the Success of Housing Mobility Programs?* (Fed. Rsrv. Bank of Cleveland, Working Paper No. 20–36, 2020).

95. Peter Bergman et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26164, 2020), https://www.nber.org/papers/w26164 [perma.cc/B2JJ-6M5T]. Partly in response to these findings, Congress provided funding for new mobility demonstration programs in 2019. *See* Section 8 Housing Choice Vouchers, 85 Fed. Reg. 42890, 42890–91 (July 15, 2020) (describing Congress's mobility demonstration appropriations).

96. The same is true for project-based subsidies. Notably, the underlying dispute in the Supreme Court's landmark *Inclusive Communities* decision, which upheld the availability of disparate impact liability under the Fair Housing Act, concerned whether Texas should use its LIHTC allocation to better promote desegregation. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 526, 545–46 (2015); *see also* Ingrid Gould Ellen et al., U.S. Dep't of Hous. & Urb. Dev., Effect of QAP Incentives on the Location of LIHTC Properties (2015), https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf [perma.cc/G6KT-LB2Q] (studying importance of these state decisions to integration).

97. *See* Ellickson, *supra* note 1, at 995 n.59.

98. Daniel Gubits et al., U.S. Dep't Hous. & Urb. Dev., Family Options Study, at xxix–xxx (2016), https://www.huduser.gov/portal/sites/default/files/pdf/Family-Options-Study-Full-Report.pdf [perma.cc/UF69-K5L9]. The programs that HUD studied were not entirely apples-to-apples, however; notably, the vouchers provided longer-term subsidies.

food security.[99] Vouchers were also cheaper per month.[100] HUD concluded from its experiment that homelessness is usually a problem of housing affordability, best addressed with tenant-side subsidies. The experiment undermined claims that formerly homeless people need special interventions in dedicated housing developments.[101]

Vouchers are not always superior to project-based strategies, which have their own benefits. There is no formula pinpointing exactly when affordable housing construction is preferable to tenant-based solutions; rather, it depends. Moreover, the choice between project-based and tenant-based subsidies isn't either/or. In practice, the strategies are complementary. For example, the production of LIHTC developments expands rental opportunities for voucher holders.[102]

Even so, existing research shows that vouchers offer distinct advantages over project-based housing assistance.[103] Vouchers are generally cheaper and can open up a wider range of neighborhoods than project-based assistance. These advantages should be exploited. The optimal system of housing assistance probably gives tenant-based assistance a meaningful role almost everywhere and the dominant role in some markets. But in state and local governments' housing spending, vouchers play almost no role at all.

II. Rental Assistance: The View from the States

Although tenant-side subsidies are an essential element of the federal government's approach to rental assistance, they are almost an afterthought at the state and local levels. Even as subnational spending on housing assistance has grown steadily for decades, state- or local-level housing voucher programs are few in number, small in size, and limited in scope.

A. The Growing Role of States and Cities in Subsidizing Housing

For decades, rental assistance was primarily a federal obligation. States and local governments helped administer federal programs—particularly through PHAs, which are usually locally controlled entities created pursuant to state law that exist primarily to administer federal housing programs—but had little discretion over those programs and spent few of

99. *Id.* at xxx.

100. *Id.* at xxxi.

101. *Id.* at xxxiii. For certain chronically homeless individuals, permanent supportive housing is still considered the best intervention. *See* U.S. Interagency Council on Homelessness, The Evidence Behind Approaches that Drive an End to Homelessness 2 (2017), https://www.usich.gov/resources/uploads/asset_library/evidence-behind-approaches-that-end-homelessness.pdf [perma.cc/26M7-8GLH].

102. Anne R. Williamson, Marc T. Smith & Marta Strambi-Kramer, *Housing Choice Vouchers, the Low-Income Housing Tax Credit, and the Federal Poverty Deconcentration Goal*, 45 Urb. Affs. Rev. 119, 121 (2009).

103. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. Pa. L. Rev. 541, 609 (2008).

their own funds on housing.[104] But beginning in the 1980s, states and cities entered the field of affordable housing—and have never left.[105] The spur for state involvement was federal retrenchment.[106] The Reagan administration's domestic spending cuts hit housing particularly hard, resulting in a 74 percent reduction in the number of households receiving housing assistance from HUD.[107] In response, states entered the arena. States spent nearly five times more on housing and community development in 1990 than in 1980.[108] The number of state housing programs more than quadrupled during the Reagan years.[109] Notably, states' entry into affordable housing policy during the 1980s and 1990s coincided precisely with vouchers' moment of greatest intellectual dominance.

Subnational involvement in housing has outlasted the Reagan retrenchment that precipitated it. In fact, state and local spending has continued to rise year after year, with a sustained dip only after the 2009 financial crisis slammed subnational budgets.[110] In 2017 dollars, per capita state and local spending on housing and community development rose from $62 in 1977 to $116 in 1990, $134 in 2000, and $196 in 2010.[111] Only one state (Alaska) spent less in 2017 compared to 1980.[112] Forty-four out of 51 states (including Washington, D.C.) spent more—often much more—in 2017 than in 1990.[113] These amounts are small as a percentage of total state and local spending. But state housing spending is widely understood to be increasingly important: "[t]he federal government has increasingly ceded to state and local governments responsibility for developing and funding their housing programs."[114]

State housing spending is not limited to high-income families or homeownership programs (though states are heavily involved in supporting

104. Margaret M. Brassil, The Creation of a Federal Partnership 11 (2010). States and cities always played the primary role in many other aspects of housing policy, including the critical areas of landlord-tenant law and land use regulation. *See id.*

105. *Id.* at 2; David J. Erickson, The Housing Policy Revolution 25–28 (2009).

106. Edward G. Goetz, *Potential Effects of Federal Policy Devolution on Local Housing Expenditures*, Publius, Summer 1995, at 99, 102.

107. *Id.* at 101.

108. *Id.* at 102 (explaining that states spent $621.6 million in own-source revenue in 1980 and $2.9 billion in 1990, with additional sums at the local level).

109. Corianne Payton Scally, *The Past and Future of Housing Policy Innovation: The Case of US State Housing Trust Funds*, 27 Hous. Stud. 127, 127 (2012); *see also* Erickson, *supra* note 105, at 45–51.

110. These statistics were generated using the Urban Institute's interactive online tool, which relies primarily on U.S. Census data. *State and Local Finance Data: Exploring the Census of Governments*, Urb. Inst., https://state-local-finance-data.taxpolicycenter.org/pages.cfm [perma.cc/39K8-CWVW] (raw output data on file with author).

111. *Id.*

112. *Id.*

113. *Id.*

114. Schwartz, *supra* note 1, at 265. *See generally* Brassil, *supra* note 104.

homebuying). One common mechanism for providing state and local housing assistance is housing trust funds, which provide dedicated funds for affordable housing.[115] Forty-seven states and Washington, D.C. operate housing trust funds, as do more than 700 cities and counties (the programmatic details vary considerably from place to place).[116] These trust funds usually target spending to low-income households, according to one survey, and often target the very lowest-income households.[117] Another twenty-four states provide their own state equivalents of LIHTC: these range from arch-conservative states like South Carolina and Oklahoma to bright blue Massachusetts and California.[118]

Undoubtedly, liberal states spend far more, and far more redistributively, on housing than do conservative states. And all state housing spending is dwarfed by federal expenditures; state programs are also less targeted toward the very-lowest-income households than is federal spending.[119] But states have become players in affordable housing policy and appear likely to remain so for the foreseeable future.

B. The Dominance of Project-Based Housing Strategies at the State and Local Level

1. State and Local Housing Voucher Programs

Despite this rapid increase in state spending on housing, states use housing vouchers sparingly and, unlike the federal government, almost never for the general low-income population. A 2014 compilation of all state-funded housing assistance programs, other than "capital" programs for new construction or rehabilitation, shows that they are overwhelmingly narrowly targeted.[120] Most provide specialized assistance to those with serious men-

115. Mary E. Brooks, *Housing Trust Funds: Seeking Security in Housing Finance*, 5 J. Affordable Hous. & Cmty. Dev. L. 55, 55 (1995).

116. Housing Trust Fund Project, *What Are Housing Trust Funds?*, Cmty. Change, https://housingtrustfundproject.org/our-project/about [perma.cc/L8JG-XMJ6].

117. Housing Trust Fund Project, *Income Targeting*, Cmty. Change, https://housingtrustfundproject.org/htf-elements/income-targeting [perma.cc/BUE6-Q7B6].

118. *State LIHTC Program Descriptions*, Novogradac, https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/state-lihtc-program-descriptions [perma.cc/L6KV-KWDA].

119. Schwartz, *supra* note 1, at 301.

120. Rachel Bergquist, Emily Cooper, Kevin Martone & Melany Mondello, Tech. Assistance Collaborative, State Funded Housing Assistance Programs (2014), https://www.tacinc.org/wp-content/uploads/2020/02/State-Funded-Housing-Assistance-Report.pdf [perma.cc/G6X8-KCEU].

tal illnesses,[121] house older youths transitioning out of the foster system,[122] or offer temporary or one-time assistance to those facing homelessness.[123] These programs can be invaluable, but they are not efforts to provide housing assistance to the larger low-income population.

Only four states use own-source dollars to operate long-term voucher programs for the general population[124]: Connecticut, Massachusetts, New Jersey, and Hawaii, along with Washington, D.C.[125] Some of these programs have existed for decades; some are relatively new. But all of these programs are notably small. Hawaii's program served just 200 households in 2012: practically a rounding error (though not for those 200 households).[126] Massachusetts's program shrank by three-quarters from the mid-1990s through the 2000s. It is now being transitioned into a primarily project-based program for the formerly homeless.[127]

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121. These are generally connected to supportive housing programs and often are funded by Medicaid or tied to obligations under *Olmstead v. L.C.*, 527 U.S. 581 (1999). *See, e.g.*, Bergquist et al., *supra* note 120, at 30 (Delaware); *id.* at 35 (Georgia); *id.* at 43 (Iowa). Approximately one-third of state rental assistance programs are for people with serious mental illness. *Id.* at 6.

122. *E.g.*, Bergquist et al., *supra* note 120, at 25 (California); *id.* at 96 (Washington).

123. *E.g.*, *id.* at 40 (Illinois); *id.* at 79 (Pennsylvania).

124. Here, I do not count an unusual, though significant, program in New York. In New York, cash assistance (welfare) was divided into two primary components: funds for food and other necessities and funds for shelter. Decades of litigation over the adequacy of the welfare system's shelter allowance led—under close court supervision—to the shelter allowance adopting many features of a voucher-like system in New York City. *See* Jiggetts v. Grinker, 553 N.E.2d 570 (N.Y. 1990) (establishing right to adequate shelter allowance); Stipulation and Order of Settlement, Tejada v. Roberts, No. 453245/2015 (N.Y. Sup. Ct. Sept. 12, 2017) (setting forth program's current terms). Moreover, these allowances support a substantial number of low-income households (over 12,000). Michael Gartland, *Hochul Combats Homelessness with New Housing Voucher Plan*, N.Y. Daily News (Dec. 10, 2021, 4:55 PM), https://www.nydailynews.com/news/politics/new-york-elections-government/ny-hochul-hope-to-reduce-homelessness-new-housing-voucher-plan-20211210-2h5l7b62krb4lnu5pehb3ywpy4-story.html [perma.cc/V8JT-3EHT]. However, the program's status as a component of cash assistance, the narrow eligibility for the program (it is limited to recipients of cash assistance with minor children who are homeless or presently facing eviction), its judicial creation, and its limited portability leave it different-in-kind from the programs at issue in this Article. *See* Stipulation and Order of Settlement, *supra*, at 16–24. Its unique history and judicial implementation leave it unaffected by (and unable to teach much about) the forces at issue; it stands essentially outside the normal budgeting and political processes. If anything, it shows that tenant-based assistance might have a *more* prominent role but for those processes.

125. Conn. Gen. Stat. § 8-345 (2021); 760 Mass. Code Regs. § 49.00 (2017); Haw. Rev. Stat. § 356D-151 (2015); N.J. Stat. Ann. § 52:27D-287.1 (West 2021); D.C. Code § 6-226 (Supp. 2022).

126. Bergquist et al., *supra* note 120, at 37.

127. Massachusetts's program provides around 2,000 vouchers and funds around 3,000 project-based units. In 1990, however, it provided more than 15,000 vouchers and

These state voucher programs are tiny compared to state spending on project-based housing assistance. In 2020, D.C.'s Local Rent Supplement Program, only around half of which goes toward a local voucher program,[128] was budgeted at $8.4 million.[129] The same budget provided $116 million to a Housing Production Trust Fund, $25 million to public housing rehabilitation, and $15 million to preserve affordable housing units.[130] Vouchers add up to a tiny fraction of D.C.'s housing strategy. Massachusetts spent about $130 million on its state rental assistance program in fiscal year 2022, with about 40 percent of that being tenant-based.[131] But it also provided another $85 million that year to support public housing,[132] enacted a bond bill authorizing $1.8 billion in spending on housing production over five years in 2018,[133] and added another $150 million for housing revitalization in 2021.[134] Even the largest state voucher programs are far less extensive than state project-based subsidies.

Though small, these state-funded programs can be important. Connecticut, for example, has used its state voucher program—which currently provides around 6,400 vouchers at a time, structured like slightly-less-generous Housing Choice Vouchers—to tactically support other state initiatives.[135] By filling gaps in federal programs, state vouchers helped

supported almost 6,000 project-based units. Since the mid-2000s, almost all new vouchers have been allocated to households facing homelessness. Ann Verrilli, Citizens' Hous. & Plan. Ass'n, The Massachusetts Rental Voucher Program 3, 8–9 (2009), https://www.chapa.org/sites/default/files/qwert_2_0.pdf [perma.cc/7NV8-YMDK]; *see also* Mass. Dep't of Hous. & Cmty. Dev., MRVP Administrative Plan 15–16 (2017), https://www.mass.gov/doc/mrvp-administrative-plan-2017/download [perma.cc/R4W6-PG4K].

128. D.C. Fiscal Pol'y Inst., The Local Rent Supplement Program (2016), https://www.dcfpi.org/wp-content/uploads/2016/04/16-04-LRSP-Brief.pdf [perma.cc/9XRE-KSC3].

129. Gov't of D.C., FY 2020 Approved Budget and Financial Plan 1–2 (2019), https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DC_OCFO_Budget_Vol_1_0.pdf [perma.cc/Y95W-35QH].

130. *Id.*

131. *Governor's Budget: Department of Housing and Community Development*, Mass.gov, https://budget.digital.mass.gov/govbudget/fy23/appropriations/housing-and-economic-development/housing-and-community-development?tab=historical-budget [perma.cc/M4LR-DMCR]; *see also* Verrilli, *supra* note 127 (providing split).

132. *Governor's Budget: Department of Housing and Community Development*, *supra* note 131.

133. *$1.8 Billion Housing Bond Bill Signed into Law*, Citizens' Hous. & Plan. Ass'n (May 31, 2018), https://www.chapa.org/housing-news/18-billion-housing-bond-bill-signed-into-law [perma.cc/YY9D-CVLE].

134. Brittney Franklin, *Governor Signs Economic Development Bond Bill*, Mass. Mun. Ass'n (Jan. 21, 2021), https://www.mma.org/governor-signs-economic-development-bond-bill [perma.cc/C5Q3-2H5E].

135. Conn. Dep't of Hous., Department of Housing Rental Assistance Program and Section 8 Housing Choice Voucher Program (2021), https://portal.ct.gov/-

Connecticut become the first state to end chronic homelessness among veterans[136] and sharply reduce the homelessness rate statewide.[137] Connecticut also follows the more common pattern of using state-funded vouchers to support social service delivery, coordinating spending with health care, foster care, long-term care, and prisoner reentry programs (notably, these schemes blur the project-based–tenant-based line).[138] Because housing stability is so important, Connecticut has argued that housing these groups ultimately saves the state money by preventing hospitalizations, shelter stays, and incarcerations.[139]

State-run voucher programs have also been important historically. In a classically federalist story of iterative policy development, the federal Section 8 program was partially modeled on Massachusetts's rental assistance program. Massachusetts began offering state-funded rental assistance in 1966. At first, its program mirrored a federal program allowing public housing authorities to lease private units for their tenants, but it soon expanded into a more tenant-driven, voucher-style model.[140] When Massachusetts's civil rights director joined HUD,[141] he brought the concept with him, seeding it in demonstration projects and pitching it to Congress.[142] In paradigmatic "laboratories of democracy" fashion, Massachusetts's policy experimentation laid the groundwork for federal intervention at scale.

At the local level, there are also a handful of similar voucher programs meant to provide ongoing assistance. Charlottesville, Virginia, for example, began providing locally funded vouchers to its residents in 2018.[143] Charlot-

/media/DOH/Department-of-Housing-Rental-Assistance-Programs-report-sfy-21.pdf [perma.cc/N3GZ-CHPR].

136. Julia Bergman, *What Does It Mean That Connecticut Has Ended Veteran Homelessness?*, Day (Feb. 29, 2016, 9:21 PM), https://www.theday.com/article/20160228/NWS09/160229185 [perma.cc/XX8V-UYP9].

137. Kyle Constable, *Homelessness Fell 24% in Three Years. How Did Connecticut Do It?*, CT Mirror (June 21, 2017), https://ctmirror.org/2017/06/21/homelessness-fell-24-in-three-years-how-did-connecticut-do-it [perma.cc/8V98-BURZ].

138. Conn. Dep't of Hous., *supra* note 135.

139. Constable, *supra* note 137.

140. Verrilli, *supra* note 127, at 11.

141. That Massachusetts's voucher program was championed by the state's civil rights office rather than its housing agency speaks to the variety of ideological ends, including integration, that vouchers have served.

142. Anne Kim, *The Monthly Interview: The Man Who Reinvented Public Housing*, Wash. Monthly (June 30, 2016), https://washingtonmonthly.com/2016/06/30/the-monthly-interview-the-man-who-reinvented-public-housing [perma.cc/2A7G-KF8S]. Furthering the federalist story, one of vouchers' early advocates in Congress was Senator Edward Brooke—another liberal Massachusetts Republican. This concept entered federal policy through administrative, state, and partisan pathways.

143. Emily Hays, *Rental Assistance Program Offers Hope, As Well As Challenges*, Charlottesville Tomorrow (Apr. 8, 2018, 5:10 PM), https://www.cvilletomorrow.org/articles/charlottesvilles-rental-assistance-program-has-beg [perma.cc/QZA7-T2R6].

tesville's program tracks the federal voucher system—essentially expanding the pool of vouchers—although, unlike federally assisted households, locally funded voucher holders must try to find housing within city limits at first.[144]

Probably the largest program is New York City's "City Fighting Homelessness and Eviction Prevention Supplement" (CityFHEPS), the latest in a series of voucher programs—none surviving more than a few years—that the city has used to combat homelessness.[145] Past programs experimented with various approaches to length of eligibility (ranging from two to five years), work requirements, and payment standards; CityFHEPS has attempted to overcome landlords' resistance to renting to formerly homeless households by paying landlords large signing bonuses.[146] Like those past programs, CityFHEPS is limited to people in shelters or at immediate risk of homelessness.[147] Until recently, though, the program's low payment standards and ongoing discrimination against voucher holders meant that only a tiny fraction of voucher recipients actually found apartments: in 2019, just 178 of the 4,118 families with CityFHEPS vouchers found housing each month.[148] A 2021 increase in payment standards is hoped to allow thousands more families per year to use city vouchers—potentially transforming the scope of the program moving forward.[149]

Many local governments also offer emergency rental assistance—often one-time payments meant to wipe out rent arrears—to prevent evictions

144. *Id.* Washington, D.C.'s program similarly requires vouchers be used in the District. D.C. Fiscal Pol'y Inst., *supra* note 128, at 2.

145. Thomas J. Main, Homelessness in New York City 155–56, 178–81, 188–89 (2016); N.Y.C. Dep't of Soc. Servs., CityFHEPS Frequently Asked Questions for Clients in the Community (2022), https://www1.nyc.gov/assets/hra/downloads/pdf/cityfheps-documents/dss-7r-e.pdf [perma.cc/VH2B-DPDF].

146. N.Y.C. Dep't of Soc. Servs., CityFHEPS Frequently Asked Questions for Landlords and Brokers 1 (2022), https://www1.nyc.gov/assets/hra/downloads/pdf/cityfheps-documents/dss-8j-e.pdf [perma.cc/WY4Q-X4XT].

147. N.Y.C. Dep't Soc. Servs., *supra* note 145; N.Y.C. Dep't Soc. Servs., CityFHEPS Frequently Asked Questions (For Residents of Department of Homeless Services or Human Resources Administration Shelters or Those Experiencing Street Homelessness) (2021), https://www1.nyc.gov/assets/hra/downloads/pdf/cityfheps-documents/dss-7n.pdf [perma.cc/ZR2J-LKHU].

148. Courtney Gross, *NY1 Investigation: Housing Vouchers for Homeless People Routinely Denied by Landlords*, NY1 (Jan. 27, 2021, 7:23 PM), https://www.ny1.com/nyc/all-boroughs/homelessness/2021/01/27/housing-vouchers-for-homeless-routinely-denied-by-real-estate-industry [perma.cc/S2LS-Y4N9].

149. N.Y.C. Local Law No. 71 (May 27, 2021) (codified at N.Y.C. Admin. Code § 21-145 (2022)); *New York City Council Preliminary Budget and Oversight Hearings: Hearing Before the Comm. on Gen. Welfare*, 2021 Sess. 3 (N.Y.C. 2021) (testimony of Jessica Yager, Women in Need), https://winnyc.org/wp-content/uploads/2021/03/Win-Testimony-for-3.17.21-GWC-Hrg1.pdf [perma.cc/9D7N-WDZM].

and homelessness.[150] Such programs are invaluable anti-homelessness tools but conceptually distinct from efforts to address a long-term inability to pay rent. They are not a substitute for voucher-style ongoing assistance—that type of program remains rare at the local level.

2. State and Local Project-Based Rental Assistance

The paucity of state and local tenant-based assistance stands in contrast to the scale of project-based spending. California encapsulates this dynamic, showing a remarkable increase in housing spending, carried out overwhelmingly through project-based subsidies. The state's 2019–2020 budget appropriated more than $2 billion in new state funds for housing and homelessness.[151] The entire sum was allocated either to project-based subsidies, including the state low-income housing tax credit, or to grants for local governments.[152] Indeed, while the state's housing department operates an alphabet soup of overlapping project-based subsidies, it has no voucher program whatsoever.[153]

Similar pictures emerge at the local level. New York City's primary tenant-based program, CityFHEPS, was budgeted at $184.6 million in the 2020 fiscal year, an impressive sum.[154] But this is dwarfed by the city's project-based spending. On the homelessness side alone, the city spends over $2 billion annually on shelters, which are arguably a form of project-based assistance, and then hundreds of millions more on supportive housing.[155]

150. *See, e.g.*, *Eviction Prevention Programs*, Loc. Hous. Sols., https://localhousingsolutions.org/housing-policy-library/eviction-prevention-programs [perma.cc/723K-CARF].

151. *See The 2019–20 Budget: California Spending Plan, Housing and Homelessness*, Legis. Analyst's Off. (Oct. 17, 2019), https://lao.ca.gov/Publications/Report/4102 [perma.cc/34UW-7VLW].

152. *Id.*

153. *Programs: Active—Funding Next 12 Months*, Cal. Dep't of Hous. & Cmty. Dev., https://web.archive.org/web/20211122120859/https://www.hcd.ca.gov/grants-funding/active-funding/index.shtml [perma.cc/7QX7-N9PN]. Other agencies do provide specialized tenant-based programs, such as the Department of Social Services' program for people over 18 in the foster system. *See* Bergquist et al., *supra* note 120, at 24–25.

154. The Council of the City of New York, Report of the Finance Division on the Fiscal 2020 Preliminary Plan, the Preliminary Ten-Year Strategy for Fiscal 2020–2029, Fiscal 2020 Preliminary Capital Commitment Plan, and Fiscal 2019 Preliminary Mayor's Management Report for the Department of Social Services/Human Resources Administration 32 (2019), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/03/069-HRA2020.pdf [perma.cc/223W-SJET].

155. *See id.* at 35; N.Y.C. Indep. Budget Off., Governor's Budget Would Add to the City's Rising Share of Homeless Shelter Costs 2 (2019), https://ibo.nyc.ny.us/iboreports/governors-budget-would-add-to-citys-rising-share-of-homeless-shelter costs-fopb-march-2019.pdf [perma.cc/HTE3-XDYM]. A bit over half of shelter spending comes from city funds. *Id.*

And CityFHEPS is only an anti-homelessness program.[156] For the broader population of low- and moderate-income households struggling with housing affordability, the city has budgeted $8.1 billion in capital funds over eight years for its Housing New York program, which builds and preserves affordable housing.[157] Housing New York has no tenant-based component.

In San Francisco, another expensive, supply-constrained housing market, the city spent nearly $200 million a year on affordable housing production pre-COVID.[158] But the Mayor's Office of Housing and Community Development lists only one small city-run rental assistance program—a program for people with HIV that is largely federally funded.[159] That office points tenants seeking rental assistance to the federal government and private charities.[160] As in New York City, San Francisco provides additional, targeted rental assistance through a separate homelessness prevention system.[161]

These patterns are not limited to high-rent, slow-growth cities on the coasts. In Atlanta, for example, the mayor's Housing Affordability Tracker lists thousands of units' worth of new affordable housing construction and rehabilitation as part of a $1 billion city campaign; the campaign is entirely

156. *See supra* note 147 and accompanying text. Conceptually, the difference between general population housing programs and anti-homelessness programs is thin. "Housing" programs commonly give priority to homeless households; homelessness policy often favors a "housing first" approach. The dichotomy originated from outdated, paternalistic conceptions of homelessness as having causes distinct from housing unaffordability. *Cf.* Main, *supra* note 145, at 95 (discussing the development of the "paternalistic paradigm). Even so, these policy areas tend to be treated as distinct by all levels of government. Separate agencies respond to separate policy conversations with separate programs. This Article attempts to acknowledge these distinctions without accepting their validity.

157. *See* Bill de Blasio, City of New York, Housing New York: Final Report 5–6 (2022), https://www1.nyc.gov/assets/hpd/downloads/pdfs/about/hny-final-report.pdf [perma.cc/E9EF-C994].

158. S.F. Plan. Dep't, Affordable Housing Funding, Production, and Preservation 8 (2020), https://default.sfplanning.org/plans-and-programs/housing/affordability-strategy/HAS_Affordable%20Housing%20White%20Paper_Final.pdf [perma.cc/G65K-6ZG4].

159. *Plus Housing Program*, City and Cnty. of S.F., https://sfmohcd.org/plus-housing[perma.cc/VGM7-43SG].

160. *Rental Programs*, City and Cnty. of S.F., https://sfmohcd.org/rental-programs [perma.cc/6FS3-56NZ].

161. *Targeted Homelessness Prevention*, S.F. Dep't of Homelessness & Supportive Hous., https://hsh.sfgov.org/services/the-homelessness-response-system/problem-solving/eviction-prevention-services [perma.cc/5CB3-QV4J]. In fiscal year 2015–2016, San Francisco spent $29 million on all forms of eviction prevention and rental assistance, compared to $39 million on shelter and transitional housing and $111 million on supportive housing. *HSH Budget*, S.F. Dep't of Homelessness & Supportive Hous., https://hsh.sfgov.org/about/budget [perma.cc/P3SY-6VY6].

project-based.[162] Put simply, it is rare for cities to provide tenant-based rental assistance—especially for the general low-income population—and rarer still for it to be provided at a meaningful scale.

3. The Use of Federal Block Grants for Tenant-Based Rental Assistance

State and local governments' preference for project-based spending is not limited to their own revenues. Even when using federal funds, subnational governments heavily favor project-based assistance. Under the HOME Investment Partnerships Program block grant, the federal government provides state and local governments with relatively flexible funds to provide low-income housing assistance.[163] These funds can be used for project-based or tenant-based assistance (or homeownership) and are centrally tracked, providing a clear window into state and local priorities.[164] Tenant-based assistance is not among those priorities. Between the HOME program's creation in 1990 and 2020, 58 percent of HOME funds went to rental programs.[165] But just 3 percent of total funds went to tenant-based rental assistance.[166]

Most states don't use any HOME funds at all for tenant-based assistance. Of the forty states whose 2018 HOME spending was collected by the National Council of State Housing Agencies, twenty-five spent nothing on tenant-based assistance; another six spent less than 5 percent of their block grant.[167] Only a few states spend meaningful shares of their HOME grants on tenant-based assistance.[168] These states are generally relatively small and rural.[169] Among these states, there is wide variation in how tenant-based programs are administered. Maine, the state that spends the

162. *Housing Affordability Tracker*, City of Atlanta, GA, https://www.atlantaga.gov/government/mayor-s-office/projects-and-initiatives/affordable-housing-dashboard [perma.cc/E82G-J64U]. Not all of this is city money. Atlanta's goal is to spend $500 million from private sources and $500 million from "[c]ity-controlled public sources." *Id.*

163. *Home Investment Partnerships Program*, U.S. Dep't of Hous. & Urban Dev., https://www.hud.gov/program_offices/comm_planning/home#:~:text=The%20HOME%20Investment%20Partnerships%20Program,or%20homeownership%20or%20providing%20direct [perma.cc/CKZ2-CGU5].

164. *Id.*; *see* 24 C.F.R. § 92.508 (2022). If anything, the use of HOME funds should be biased *toward* tenant-based rental assistance, compared to own-source spending. *See supra* Section II.B.3.

165. Katie Jones, Cong. Rsch. Serv., R40118, An Overview of the HOME Investment Partnerships Program 17 (2021).

166. *Id.* at 19.

167. Nat'l Council of State Hous. Agencies, State FHA Factbook 198–99 (2018).

168. *Id.*

169. Of the states in the N.C.S.H.A. data, the five that spend the highest share of their HOME funds on tenant-based assistance are Maine, Hawaii, Kansas, Arkansas, and Oregon. Id. Hawaii is heavily urbanized, but its tenant-based program focuses on rural needs. *See* Haw. Hous. Fin. & Development Corp., Draft Annual Action Plan 37 (2019), https://dbedt.hawaii.gov/hhfdc/files/2019/03/DRAFT_PY2019-AAP.pdf [perma.cc/3E8A-Q5DX].

highest percentage of its HOME funds on tenant-based rental assistance (49.4 percent), uses those funds exclusively for rapid rehousing of people facing homelessness.[170] Arkansas, the state that spends the highest absolute sum on tenant-based rental assistance ($4.6 million, or 26.8 percent of its block grant), instead expects subgrantees to create programs mirroring the federal voucher program.[171] But states like Maine and Arkansas are the exceptions. When using federal funds, just as when operating their own independent programs, states overwhelmingly prefer to build housing.[172]

4. Indirect State and Local Supports for a Project-Based Affordable Housing Model

So far, this Section has examined state and local spending on affordable housing. But a focus on dollars actually understates the subnational emphasis on project-based approaches to affordable housing. Cities and states have a slew of programs that support affordable housing production off-budget.

Many local governments have adopted inclusionary zoning programs, in which new residential construction must set aside units as affordable housing.[173] Inclusionary zoning programs do not directly expend public funds. But they can be analogized to an off-budget, in-kind tax on development: an indirect public investment in project-based affordable housing.[174] These programs are widespread. Over 850 jurisdictions have some

170. Nat'l Council of State Hous. Agencies, *supra* note 167, at 198–99; Me. State Hous. Auth., State of Maine Consolidated Plan 94 (2019), https://www.mainehousing.org/docs/default-source/policy-research/federal-funds/2020-2024-consolidated-plan.pdf?sfvrsn=19978e15_4 [perma.cc/9FH3-VN4R].

171. Nat'l Council of State Hous. Agencies, *supra* note 167, at 198–99; Ark. Dev. Fin. Auth., Home Program Operations Manual 7-1 (2018), https://d38t1cionx51tx.cloudfront.net/gn35jmdo596g9ke48rs3cnzt8l9r?d=&e=pdf [perma.cc/H5SL-C7SM].

172. The Community Development Block Grant is substantially less flexible as a funding source for rental assistance, making it a far less useful window into state and local discretion. Still, it shows an even starker spread. C.D.B.G. funds generally may be used only for short-term rental assistance or for long-term rental assistance provided by certain community-based organizations. *See* 24 C.F.R. §§ 570.204, 570.207(b)(4) (2022). In the 2019 fiscal year, short-term "subsistence payments" (including, but not entirely, rental assistance) accounted for 0.19 percent of C.D.B.G. allocations and long-term rental assistance just 0.03 percent of the total. In earlier years, those numbers were even smaller. *CDBG Activity Expenditure Reports: All CDBG Disbursements*, U.S. Dep't of Hous. & Urb. Dev., https://www.hudexchange.info/programs/cdbg/cdbg-expenditure-reports [perma.cc/J3L2-Q3BP].

173. Jenny Schuetz, Rachel Meltzer & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. Am. Plan. Ass'n 441, 441 (2009).

174. *See* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. Cal. L. Rev. 1167, 1170 (1981).

inclusionary zoning policy.[175] And they can be significant; in Washington, D.C., inclusionary zoning produces hundreds of affordable units a year.[176] In some Southern California municipalities, inclusionary zoning contributed as many affordable housing units as LIHTC, the federal government's primary affordable housing production program.[177]

Property tax incentives are also commonly used to encourage below-market-rate housing.[178] In New York City, for example, tax expenditures for affordable housing cost about $2.3 billion in foregone revenue annually.[179] In contrast, the city's more tenant-based property tax exemptions, targeting low-income seniors and people with disabilities, total less than $360 million a year.[180] States like California, Texas, and Florida (and many others) offer property tax breaks for certain affordable housing projects.[181] Tax incentives are far less frequently offered to support tenant-based assistance, although Illinois and Virginia each offer programs to encourage landlords in low-poverty neighborhoods to rent to voucher holders.[182]

A small number of states also encourage affordable housing production through anti-exclusionary zoning statutes. These, too, generally operate within a project-based model.[183] Massachusetts law provides affordable housing developers privileges to override local zoning in towns where

175. Kriti Ramakrishnan, Mark Treskon & Solomon Greene, Urb. Inst., Inclusionary Zoning: What Does the Research Tell Us About the Effectiveness of Local Action? 1 (2019), https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf [perma.cc/8EE7-4NXX]. However, in many states, local governments are preempted from enacting inclusionary zoning. Richard Schragger, State Preemption of Local Laws: Preliminary Review of Substantive Areas 11–12 (2017), https://www.abetterbalance.org/wp-content/uploads/2017/08/State-Preemption-of-Local-Laws.pdf [perma.cc/ZG57-6YTU].

176. D.C. Dep't of Hous. & Cmty. Dev., Inclusionary Zoning Fiscal Year 2018 Annual Report 3 (2019), https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/page_content/attachments/FY%202018%20Inclusionary%20Zoning%20Annual%20Report_0.pdf [perma.cc/8CQU-G6LF].

177. Vinit Mukhija, Lara Regus, Sara Slovin & Ashok Das, *Can Inclusionary Zoning Be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties*, 32 J. Urb. Affs. 229, 242 (2010).

178. *Tax Abatements or Exemptions*, Loc. Hous. Sols., https://www.localhousingsolutions.org/act/housing-policy-library/tax-abatements-or-exemptions-overview/tax-abatements-or-exemptions [perma.cc/3R9S-5X82].

179. Tax Pol'y & Data Analytics Div., Dep't of Fin., Annual Report on Tax Expenditures 7 (2021), https://www1.nyc.gov/assets/finance/downloads/pdf/reports/reports-tax-expenditure/ter_2021_final.pdf [perma.cc/M7Y9-7M32].

180. *Id.* at 32–41. These figures include subsidies for owned and rented units.

181. Cal. Rev. & Tax. Code § 214(f) (West 2009); Tex. Tax Code Ann. §§ 11.181, 11.182, 11.185 (West 2013); Fla. Stat. § 196.1978 (2022).

182. 35 Ill. Comp. Stat. § 200/18-173 (2020); Va. Code Ann. § 58.1-439.12:04 (Supp. 2022).

183. I thank Chris Elmendorf for this insight.

less than 10 percent of the housing stock is set aside as affordable.[184] Only housing subsidized by programs that "assist the construction" of low- or moderate-income housing qualify, not housing used by subsidized tenants.[185] In other words, Massachusetts assesses how many units in each town receive project-based subsidies and facilitates the construction of more subsidized projects in towns without enough. Likewise, California requires localities to plan for how to build enough housing to meet regional needs at each of four income bands.[186] Compliance requires the new construction, rehabilitation, or preservation of housing units in each band.[187]

These anti-exclusionary zoning statutes demonstrate the focus of state government on project-based affordable housing production. A different model might consider tenant-based assistance in its assessment of exclusion or its remedies for exclusion. Connecticut does the former, though not the latter. Under that state's anti-exclusionary zoning statute, a unit occupied by a federal voucher holder counts toward a town's affordability target.[188] Arguably, this paints a more accurate picture of economic diversity and housing affordability, though it carries other drawbacks.[189] Whether including tenant-based assistance in anti-exclusionary zoning schemes is normatively desirable is outside the scope of this Article. This discussion of anti-exclusionary schemes is meant to show how entrenched a project-based conception of affordable housing is in state law. Mobility and the potential for desegregation have always been among vouchers' purported advantages. Yet, at the state level, even the leading housing programs designed to promote desegregation take a project-based approach.

5. Renewed Interest in State and Local Housing Vouchers

All that said, in recent years, subnationally funded housing vouchers appear to be gaining popularity—both before and, for quite different reasons, during the COVID-19 crisis. The shape of these plans demonstrates state and local awareness of tenant-based housing assistance—especially in the face of seemingly intractable affordability problems—but also the difficulties in actually creating and sustaining such programs. It remains to be seen whether the massive (but temporary) influx of federal funds for emergency rental assistance prompts change.

Before COVID, cities and states were beginning to explore tenant-based assistance in response to continued challenges with housing affordability.

184. Mass. Gen. Laws ch. 40B, § 21 (2020).

185. *Id.* § 20.

186. Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 Hastings L.J. 79, 103 (2019).

187. *Id.*

188. *See* Conn. Gen. Stat. § 8-30g(a)(3) (2021).

189. The availability of project-based affordable housing is more directly related to local land use controls than is the prevalence of voucher holders, and it may better measure public exclusionary practices.

Boston's experience is illustrative. In early 2020, the mayor announced plans to pilot a new housing voucher program, similar to Section 8, and funded at $5 million (out of a $100 million city commitment to affordable housing that year).[190] At first, Boston was open to both tenant-based and project-based models.[191] But after a year of planning, the city chose to prioritize project-based subsidies. The program will primarily deepen affordability levels at already-subsidized projects, improving access for the most vulnerable households.[192]

At the state level, too, top legislators from both parties were pushing for new housing voucher programs but falling short. In Utah, the Republican co-chair of the state Commission on Housing Affordability introduced legislation creating a voucher program, but the legislature ultimately enacted only the project-based piece of his bill.[193] In New York, the Democratic chair of the Senate housing committee introduced legislation to create a state Section 8 analog, initially funded at hundreds of millions of dollars.[194] COVID-related budget deficits, though, forced New York to put off these ambitions.[195] Once the state's budget was on firmer footing in 2021, the governor rejected the voucher proposal.[196]

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190. Press Release, Boston Mayor's Office, First City-Funded Voucher Program Created For Rental Housing (Jan. 7, 2020), https://www.boston.gov/news/first-city-funded-voucher-program-created-rental-housing [perma.cc/ZNM7-JRB6]; Jared Brey, *Philly and Boston Will Help Some Low-Income Tenants Pay Rent*, NextCity (Jan. 28, 2020), https://nextcity.org/urbanist-news/philly-and-boston-will-help-some-low-income-tenants-pay-rent [perma.cc/FE89-8HNW].

191. *Id*.

192. Press Release, Boston Housing Authority, City of Boston Rental Voucher Program Launches (Feb. 2, 2021), https://www.boston.gov/news/city-boston-rental-voucher-program-launches [perma.cc/XX32-LVK8].

193. Affordable Housing Amendments, ch. 241, 2020 Utah Laws 1768; Tony Semerad, *New Utah Housing Bill Would Put $35M into Rental Assistance and More Low-Income Apartments*, Salt Lake Trib. (Feb. 27, 2020, 12:10 AM), https://www.sltrib.com/news/2020/02/09/new-utah-housing-bill [perma.cc/G2M7-V3WW]; Connor Richards, *Polygamy, Abortion and More: A Quick Wrap-Up of This Year's Utah Legislature*, Standard-Examiner (Mar. 19, 2020), https://www.standard.net/news/government/polygamy-abortion-and-more-a-quick-wrap-up-of-this/article_420de0ae-3b02-5378-b2ad-f0b32d930b94.html [perma.cc/3BCX-RE5B].

194. Michael Gartland, *NY Lawmakers Introduce Bill to Create New Housing Vouchers for the Poor*, N.Y. Daily News (Feb. 4, 2020, 6:14 AM), https://www.nydailynews.com/news/politics/ny-housing-vouchers-homeless-albany-kavanagh-20200204-ifov5ece7fbzvowdlzps4sogne-story.html [perma.cc/S8HE-YF99].

195. *See* Emma Whitford, *NY Senator Floats Temporary COVID-19 Rental Vouchers*, Law360 (Apr. 6, 2020, 6:02 PM), https://www.law360.com/articles/1260800/ny-senator-floats-temporary-covid-19-rental-vouchers [perma.cc/4JAM-36KP].

196. Sadef Ali Kully, *NYS Budget on Housing: Rent Relief Victory, Disappointment on NYCHA and Homelessness*, CityLimits (Apr. 14, 2021), https://citylimits.org/2021/04/14/nys-budget-on-housing-rent-relief-victory-disappointment-on-nycha-and-homelessness [perma.cc/8YXJ-DEWX]. Instead, New York created a rent

COVID itself sparked the creation of hundreds of state and local tenant-based programs, mostly federally funded. In emergencies, tenant-based solutions can be more attractive than project-based strategies; there simply isn't time to wait for the planning, permitting, and construction of new buildings. Facing mass economic dislocation, Congress responded by providing funds to keep people in their homes. From 2020 through 2022, more than $50 billion dollars of federal funds flowed to state and local rental assistance programs.[197] That emergency assistance was rolled out scandalously slowly, though, and even by March 2022, just $26 billion had actually made it to households.[198] Weak state capacity in this space and unnecessarily onerous eligibility requirements left too many tenants unable to access the relief they were promised.

These emergency rental assistance programs, however, are different-in-kind from the ongoing programs that are the focus of this Article: they are temporary relief programs, not intended to be permanent features of the welfare state.[199] Most federal funds are targeted at paying down rent arrears; they can be used prospectively only if all back rent is cleared, and even then, only for three-month increments.[200] The goal is to help renters get past an exceptional moment of disruption—one for which renters cannot be deemed at "fault"—without creating a new social insurance program.

Even so, disaster relief has always driven the American welfare state's development.[201] And while most COVID-era rental assistance programs will not last, the experience has already persuaded at least one state, Washington, to create a new permanent rental assistance program.[202]

supplement program that is "designed to fail": it requires counties to opt in, sets the payment standard too low for landlord participation, and tasks an inexperienced agency to run it. The expectation is that the vouchers will be "unusable." Akash Mehta, *Homelessness Priorities Won't Make the State Budget, Lawmakers and Advocates Say*, N.Y. Focus (Apr. 3, 2021), https://www.nysfocus.com/2021/04/03/havp-honda-homelessness-budget-negotiations [perma.cc/KYU8-GUGS].

197. Grant A. Driessen, Libby Perl & Maggie McCarty, Cong. Rsch. Serv., R46688, Emergency Rental Assistance Through the Coronavirus Relief Fund (2021) (identifying $46.5 billion in dedicated rental assistance funds); Vincent Reina et al., COVID-19 Emergency Rental Assistance (2021), https://nlihc.org/sites/default/files/HIP_NLIHC_Furman_Brief_FINAL.pdf [perma.cc/2B4R-TVP3] (tallying $3.9 billion in unrestricted state and local aid used for rental assistance). Additional sums have been provided through federal housing programs.

198. White House, Advancing Equity through the American Rescue Plan (2022), https://www.whitehouse.gov/wp-content/uploads/2022/05/ADVANCING-EQUITY-THROUGH-THE-AMERICAN-RESCUE-PLAN.pdf [perma.cc/3GY2-GZ4K].

199. Of the first generation of COVID programs, sixty percent capped assistance at three months or less of rent. Reina et al., *supra* note 197, at 6.

200. U.S. Dep't of Treas., Emergency Rental Assistance Frequently Asked Questions 7 (2021), https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf [perma.cc/X922-8635].

201. *See* Michele Landis Dauber, The Sympathetic State 12 (2013).

202. Act of May 10, 2021, ch. 215, 2021 Wash. Sess. Laws 1459.

Under legislation enacted in May 2021, Washington plans to raise around $146 million annually in dedicated funding for housing; about one-third of that would go to tenant-based assistance.[203] The state's experience with rental assistance during COVID convinced legislators of the program's need and feasibility.[204] The COVID emergency likewise helped spur New York City's expansion of its local voucher program.[205] Change could be afoot, but it is too soon to say whether these efforts will prove successful or sustainable or whether other states and cities will follow suit.

Exceptional circumstances and recent ambitions notwithstanding, though, subnational governments overwhelmingly embrace project-based strategies for housing investment. States and cities build buildings. They do so when using their own revenues and when using federal funds, and they do so in tight and loose housing markets. Where states and localities use vouchers, it is in small programs and usually for narrow populations with special needs. They have chosen a strikingly different strategy from that of the federal government.

C. Housing Vouchers as a Federalism Puzzle—And Problem

The relative absence of state and local housing vouchers is not a happy story for federalism. State rental assistance strategies do not exhibit classic federalism values like policy diversity, innovation, dissemination, and contestation.[206] But neither does their convergence reflect a national settlement around best practices or political consensus. Quite the opposite: whatever consensus exists leans away from project-based rental assistance.

Why? Conditions should be ripe for federalism. Not only the fifty states but hundreds of local governments are active in providing affordable housing. They do so under different political conditions: bright red and bright blue states each subsidize housing. They do so across market conditions: in unaffordable coastal metros, in struggling Rust Belt cities, and in Sun Belt sprawl. They do so in regions with more and less segregation, more and less landlord discrimination against voucher holders, and where federal housing programs are administered with very different effect.[207] Few would expect these places to adopt the same rental assistance strategies.

Nor should they. In some places, there is ample rental housing; in others, immense scarcity. In some, rents are low enough that project-based

203. Brandon Block, *Washington State Creates Permanent Rental Assistance Program*, Olympian (Apr. 30, 2021), https://www.theolympian.com/news/politics-government/article251012524.html [perma.cc/5WZQ-XRU9].

204. *Id.*

205. Claudia Irizarry Aponte, *Boost to Skimpy Low-Income Housing Vouchers Leaves Formerly Homeless at Risk of Return to Shelters*, City (Aug. 23, 2021, 9:42 PM), https://www.thecity.nyc/2021/8/23/22638835/housing-voucher-boost-formerly-homeless-shelters [perma.cc/8APV-UDJV].

206. Heather K. Gerken, *Federalism 3.0*, 105 Calif. L. Rev. 1695, 1720 (2017).

207. *See supra* notes 91–96.

spending effectively subsidizes market-rate rentals.[208] In some communities, affordable housing is more politically palatable than market-rate construction (making project-based subsidies useful in expanding rental opportunities); in others, affordable housing projects are politically toxic. Housing markets are distinctly local.[209] Without many normative assumptions, we can say, as a matter of federalism, that states should vary in their mix of tenant-based and project-based housing assistance, and that, as a matter of housing policy, they should be able to provide somewhat more tenant-based assistance, given that model's benefits. That neither is especially true indicates something amiss.[210]

Moreover, federalism's experimentalist virtues are badly needed. No one would describe any of the federal rental assistance programs as perfect, to put it generously. Just within the voucher program, there are serious questions about the program's fundamental goals (should vouchers push families with children to high-opportunity neighborhoods?) and about its core programmatic design (should subsidies be flat or vary with rent? Should they be paid to landlords or tenants?). There is immense need for improved practices on the nitty-gritty of administration: how to recruit landlords, manage waitlists, and facilitate voucher holders' apartment searches. States once served as generative sites for national policymaking around rental assistance.[211] More robust state engagement today could dramatically improve policymaking on questions big and small. Indeed, in the few cases where states or cities have adopted their own voucher programs, there has been a real appetite for experimentation.[212]

Thus, as a case study in federalism,[213] rental assistance illustrates how federalism can fall far short of its promise. Precisely why federalism falls short here, though, is not adequately captured by existing theories of federalism.[214] Neither state independence nor state interdependence has pro-

208. *See* Richard K. Green, *Thoughts on Rental Housing and Rental Housing Assistance,* 13 Cityscape: J. Pol'y Dev. & Rsch., no. 2, 2011, at 39, 49–50.

209. *See* Vicki Been, *City NIMBYs*, 33 J. Land Use & Env't L. 217, 218 (2018).

210. Gluck and Huberfeld note the "theoretical muddle" at the core of many federalism debates, especially those about statutory design: is federalism meant to serve constitutional values, like state autonomy, or substantive policy outcomes? Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 Stan. L. Rev. 1689, 1694 (2018). Here, *neither* value is being served.

211. *See supra* notes 142–144 and accompanying text.

212. *See infra* notes 273–276.

213. The need for more federalism case studies is a common refrain. *See* Andrew Hammond, *Welfare and Federalism's Peril,* 92 Wash. L. Rev. 1721 (2017); Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 Tulsa L. Rev. 427, 435 (2013).

214. This Article does not attempt a complete portrait of federalism in housing or even subsidized housing. Examining tenant-based rental assistance can, necessarily, provide only a fragmentary perspective on that larger question. LIHTC has its own federalist structures, for example, which have been somewhat better explored. *See, e.g.*, Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 Ind. L.J. 915, 963–67 (2018);

moted federalism values, contrary to two leading schools of federalists, even as housing spending has avoided fiscal federalism scholars' worst predictions of state-led retrenchment. The causes of this dysfunction are specific to housing.

One standard narrative casts state independence, whether protected by the courts or the political process, as the linchpin for federalism and state policymaking.[215] On this telling, federalism requires "negative space," free from federal power, within which states can act.[216] But in affordable housing policy, states have ample space to act independently: states have, as Ernest Young has put it, "meaningful things to do."[217] Most low-income households receive no federal rental assistance.[218] State programs helping fill that gap are, formally, freestanding acts of state sovereignty, unstructured by direct federal controls. But within this space, at least over the tenant-based/project-based axis, there is no flourishing of federalism values: no innovation, no contestation, and seemingly no actual autonomy to make a different choice.

But neither has state participation in the joint enterprise of providing rental assistance supported federalism values. A growing school of federalism scholars considers states' integration into national governance—as implementers of federal statutory schemes and sites for national political conflict—to be key sources of state power and generators of federalism values.[219] Not so here. States have dived into the formerly federal project of subsidizing housing, but on the critical tenant-based or project-based question, it is difficult to see the "policymaking benefits associated with redundancy, administrative overlap, joint regulation, and mutual dependence."[220] The states are not serving as a staging ground for national debates over the proper form of rental assistance,[221] and they do not provide democratically

Ingrid Gould Ellen & Keren Mertens Horn, *Points for Place: Can State Governments Shape Siting Patterns of Low-Income Housing Tax Credit Developments?*, 28 Hous. Pol'y Debate 727 (2018). And states' role in providing rental assistance is interwoven with their roles in the homeownership market, in homelessness policy, and in land use—each of which has its own intergovernmental arrangements. While even this fragment of housing policy's federalism is worth understanding, my primary intent here is to underscore that states' lack of tenant-based assistance is anomalous and needs explanation.

215. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Federalism All the Way Down*, 124 Harv. L. Rev. 4, 14–16 (2010).

216. *Id.* at 16.

217. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 52 (2004) (emphasis omitted).

218. *See* Scally et al., *supra* note 9.

219. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L.J. 1889, 1914 (2014).

220. *Id.* at 1902 & n.85 (collecting sources).

221. *But cf.* Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L.J. 1920, 1955 (2014). On some affordable housing issues, states do play this role. One relevant example concerns the

generative conflict and contestation.[222] Though Congress has attempted to enlist the states to serve as innovators and generators of policy variation,[223] most explicitly through the HOME block grant,[224] on this issue, it has not worked. If much contemporary scholarship shows how the state–federal relationship need not be "zero-sum"[225]—how it can serve both state and federal aims—rental assistance provides a reminder that a non-zero-sum relationship can be negative rather than win-win.[226]

Nor is this a standard story of fiscal federalism. The canonical accounts of fiscal federalism suggest that states and cities cannot or will not sustain redistributive spending. Without federal action, the standard narrative goes, devolution of redistributive programs will always tend toward retrenchment rather than more useful forms of variation.[227] Whatever federalism's benefits for regulatory programs, it works poorly for redistribution.[228] But that account of federalism is equally inapplicable to rental assistance. State involvement in rental assistance has not been a story of retrenchment. States have expanded their spending on affordable housing year after year, and they have even opted for the more expensive method of doing so.

Indeed, the debate over project-based and tenant-based assistance ought to be a particularly promising place to see laboratories of democracy at work in a redistributive spending program, despite fiscal federalism's pressures toward austerity. For most welfare programs—especially those that provide cash or close substitutes—the central questions are how generously to spend and on whom. Devolution and retrenchment are difficult to disentangle, for any state discretion can create horizontal inequities and undermine the program's substantive goal of providing coverage.[229] After

regulatory question of whether landlords may refuse to accept housing vouchers as rent. *Compare* N.Y. Exec. Law § 296(2-a)(a) (McKinney Supp. 2022) (prohibiting source-of-income discrimination), *with* Tex. Loc. Gov't Code Ann. § 250.007 (West Supp. 2021) (barring local governments from prohibiting source-of-income discrimination).

222. *Contra* Gerken, *supra* note 215, at 47; Bulman-Pozen, *supra* note 15, at 998.

223. Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 St. Louis U. L.J. 1045, 1055–56 (2015).

224. *See infra* note 304.

225. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 4 (2011).

226. *See, e.g.*, Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. Chi. L. Rev. 1083, 1088 (2018).

227. Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 Yale L.J. 1344, 1345–46 (1983); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. Econ. Literature 1120, 1121 (1999); *see also* Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 Colum. L. Rev. 552, 553–54 (1999) (adding analysis of suburban and urban political dynamics).

228. David A. Super, *Rethinking Fiscal Federalism*, 118 Harv. L. Rev. 2544 (2005).

229. *See, e.g.*, Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. Rev. 1680, 1684–85 (2020).

all, federalism valorizes, or at least accepts, policy variation, while the very purpose of a safety net is to provide a uniform floor of public provision. But in housing assistance, the question of how to subsidize housing has been as hotly contested as how much to subsidize housing. There should be room for federalism freed (slightly) from debates over the proper scope of the welfare state. Yet there is not.

In rental assistance, the shift toward state involvement diminished federal capacity without serving state autonomy or enervating national politics.[230] Understanding why requires an analysis of the particulars of housing: the statutes governing it and even its physical nature as an object of redistribution. If federalism today exists primarily within federal statutory schemes, no general institutional arrangement guarantees a flourishing of federalism values.[231] Federalism is contingent, and sometimes fragile. To diagnose the dysfunction within rental assistance's federalism, the next Part turns to the specifics of housing law and policy.

III. Explaining the Divergence

What explains the divergence in state and federal policy? Why did the intellectual ascendance of tenant-based rental assistance go unheeded at the state and local levels? And more to the point, why is the dominance of project-based assistance so uniform at the state and local levels? With fifty states, and many more cities, investing in affordable housing—some to the tune of billions of dollars—why have none given vouchers a predominant role in their policy strategy?

The answer is not that states have simply made a different policy choice in response to different political preferences or economic conditions. (In contrast, cities really are more poorly placed to make full use of tenant-based strategies.) Rather, law structures states' choices, inadvertently denying them full policy autonomy and discretion. States are pulled toward project-based spending as a way to avoid the spending constraints of fiscal federalism and by hidden incentives built into LIHTC, the largest federal housing production program. Those incentives are further supported by the more transactional politics of state government, which

230. Instead, policymaking around rental assistance has recently been most generative when it has least involved the states-as-states. *See* Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. Davis L. Rev. 1119, 1177–82 (2018) (describing federally led experimentation and innovation, including through HUD and PHAs). Two leading innovations, mobility programs and small-area fair market rents, were each developed within the federal system through the settlement of litigation against HUD and PHAs and through HUD demonstration programs. Sara Aronchick Solow, Note, *Racial Justice at Home: The Case for Opportunity-Housing Vouchers*, 28 Yale L. & Pol'y Rev. 481, 509, 513–17 (2010); Establishing a More Effective Fair Market Rent (FMR) System, 80 Fed. Reg. 31332, 31333–34 (proposed June 2, 2015).

231. *Cf.* William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 Wm. & Mary Env't L. & Pol'y Rev. 1, 65–66 (1997) (describing inherent instability and context-sensitivity of federalist arrangements).

disfavor tenant-based models and the strange, lottery-like structure of housing assistance.

A. State Project-Based Spending Is Driven by Legal Constraints, Not Policy Disagreement

At the outset, it is important to rule out three important reasons why the states might have chosen a different rental assistance strategy than the federal government. The divergence does not reflect unique partisan or ideological conditions at the federal level. Nor does it reflect the smaller geographic jurisdictions of state government (though at the local level, it might). And finally, it does not reflect states' perception that the federal government has saturated the market for vouchers or that their need is disproportionately for additional project-based funds. Most states would welcome more federal vouchers. In other words, the lack of subnational housing vouchers is not a policy determination, made independently in fifty states, that such vouchers would lack merit. On a level playing field with the federal government, at least some states would embrace a tenant-based strategy. But law pushes them in another direction.

1. States' Partisan and Ideological Coalitions

The federal government's use of vouchers does not reflect some exceptional political coalition assembled only under special conditions. The partisan and ideological environment that gave rise to vouchers has been recreated repeatedly in the states.

At the federal level, tenant-based assistance originated on the market-oriented Right as an alternative to project-based assistance. Though vouchers were subsequently embraced by liberals concerned with efficiency, poverty deconcentration, and racial integration, vouchers' greatest political breakthroughs came during eras of conservative ascendance in Washington: under Nixon and Reagan, and then after the Gingrich revolution in Congress.[232] Conservatives never managed to end federal housing assistance altogether, but they left their mark on its form. This equilibrium, perhaps, never held in a world of increasingly polarized blue or red states.

But even in the coastal states most focused on subsidizing housing, there was no shortage of Republican governance during the period when vouchers took off federally[233] (nor, for that matter, of the kind of technocratic, neoliberal Democratic politics that leans more toward vouchers[234]). California had a Democratic governor for only four years between 1983 and

232. *See supra* Section I.A.

233. *See* Nat'l Conf. of State Legislatures, Partisan Composition of State Legislatures 1990–2000 (2022), https://www.ncsl.org/documents/statevote/legiscontrol_1990_2000.pdf [perma.cc/2JEW-42EG]; Nat'l Conf. of State Legislatures, Partisan Composition of State Legislatures 2002–2014 (2022), https://www.ncsl.org/documents/statevote/legiscontrol_2002_2014.pdf [perma.cc/M8Q7-SUYT].

234. *See* Lily Geismer, Don't Blame Us (2015).

2010;[235] New York had a Republican governor from 1995 through 2006;[236] and in Massachusetts, only a single Democrat has served as governor since 1991.[237] These were precisely the years when vouchers were most dominant intellectually and when states stepped into affordable housing provision.[238] If housing vouchers were simply the product of how right-of-center politicians compromised with liberal legislators, then late in the twentieth century, the states would had have them.

Nor are these state-level political coalitions so ideologically distinct from their federal equivalents: both housing officials and elected politicians regularly move between the two levels of government. Yet even when there are direct intellectual and personal connections between the federal and state policymaking processes, the idea of tenant-based assistance somehow doesn't translate. When serving as HUD Secretary, for example, Andrew Cuomo was a strong supporter of the federal voucher program, even winning an expansion in the number of vouchers after years without new subsidies.[239] However, when serving as Governor of New York, Cuomo changed his tune, touting the superiority of project-based housing—and going as far to suggest that vouchers perpetuate poverty.[240] This is not to say that Cuomo himself changed his mind. Where you sit is where you stand, as the saying goes—and sitting in state government leads to different results.

2. State Geographies

Vouchers' utility does not depend on their being administered nationwide.[241] Tenant-based assistance provided within state geographies would be essentially as effective. As such, states' smaller geographic scale also fails to explain the lack of state-level vouchers.

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235. *Former Governors - California*, Nat'l Governors Ass'n, https://www.nga.org/former-governors/california [perma.cc/DQS4-7ZYB].

236. *Former Governors - New York*, Nat'l Governors Ass'n, https://www.nga.org/former-governors/new-york [perma.cc/JE4W-CMCE].

237. *Former Governors - Massachusetts*, Nat'l Governors Ass'n, https://www.nga.org/former-governors/massachusetts [perma.cc/SYB8-P5H4].

238. *See supra* Section I.A.

239. *Remarks by HUD Secretary Andrew Cuomo, FY 2001 Housing Voucher Press Conference Call*, U.S. Dep't Hous. & Urb. Dev.: Archives (Jan. 6, 2000), https://archives.hud.gov/remarks/cuomo/speeches/hvouch01.cfm [perma.cc/PWF4-2FQY]; Michael Grunwald, *Cuomo Launches Anti-Poverty Campaign*, Wash. Post (May 29, 1999), https://www.washingtonpost.com/wp-srv/politics/govt/admin/stories/cuomo052999.htm [perma.cc/UTG5-J872].

240. Gartland, *supra* note 194.

241. The Housing Choice Voucher program itself is only incompletely national. Vouchers are provided by local, state, and regional PHAs. Vouchers can be "ported" across PHAs, but the process is administratively cumbersome. *See* Tegeler, *supra* note 18, at 10–11.

First, vouchers' superior ability to promote choice and mobility is not meaningfully different at the state level. Even within a single neighborhood, different families may wish to live on this block or that, the first floor or the third, or in a building with laundry rather than larger apartments. Vouchers allow households to make these choices for themselves—and do so whether state or federally administered. Vouchers' capacity to expand housing choice into more and higher-opportunity neighborhoods are also roughly equivalent (though not identical) at the state level. Most voucher moves are within a metropolitan area, not to new regions,[242] and intraregional mobility is generally what voucher proponents are concerned about.[243] Almost all state level programs could foster mobility on this level.[244]

Likewise, tenant-based assistance's relative cost-effectiveness does not disappear at the subnational level. In the aggregate, of course, that is unremarkable. But theoretically, the states most heavily invested in housing assistance—high-rent, tightly zoned, liberal states on the coasts—might also be the ones where market conditions most favor project-based solutions (including as a tool to increase housing supply[245]). However, the data do not support this argument: vouchers are not uniformly less cost-effective in these areas. In part, because both market rents and construction costs are higher in high-cost jurisdictions, vouchers often retain their cost-efficacy advantage even in tight markets.[246] The relative cost-effectiveness of a voucher compared with LIHTC is greater, for example, in Atlanta than Boston but greater in Boston than Cleveland.[247]

242. *See, e.g.*, John Park & Kyle Shelton, Rice Univ. Kinder Inst. for Urb. Rsch., Housing Choice Voucher Mobility in Houston 15 (2019), https://kinder.rice.edu/sites/default/files/documents/KI%20Research%20Report%E2%80%93Housing%20Choice%20Voucher%20Mobility%205.pdf [perma.cc/A6VV-96RZ] (fewer than 10 percent of moves by Houston-area HCV recipients were to locations over 20 miles away).

243. *See, e.g.*, Bergman et al., *supra* note 95; Aliprantis et al., *supra* note 94. *But see* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 Yale L.J. 78, 105–07 (2017) (criticizing mobility initiatives and research emphasis on intraregional moves over interregional moves).

244. In regions that cross state lines, a state-run voucher would provide modestly less choice than the federal program. A New York voucher system might let recipients move to New York City, Long Island, or Westchester—but not New Jersey.

245. Evidence is mixed as to how much project-based subsidies actually increase housing supply, as opposed to crowding out unsubsidized development. There is also clear geographic variation, as would be expected given local zoning's importance to housing supply. *See* 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 (2010); Todd Sinai & Joel Waldfogel, *Do Low-Income Housing Subsidies Increase the Occupied Housing Stock?*, 89 J. Pub. Econ. 2137 (2005).

246. Deng, *supra* note 73, at 499–503.

247. *Id*. at 471.

The pattern of which states have, in fact, adopted voucher programs reflects this reality. If states' preference for project-based subsidies were primarily a response to tight local housing markets, the (few, small) state-run voucher programs should emerge in lower-rent, less-regulated states. But the states with their own voucher systems—Massachusetts, Connecticut, New Jersey, and Hawaii, along with Washington, D.C.—contain some of the most supply-constrained housing markets in the country.[248] All states predominantly use project-based subsidies, but when states fund vouchers at all, it's not because they have loose housing markets.

Notably, the calculus for local governments is different here. A municipal voucher has built-in disadvantages: specifically, less capacity to support regional mobility. Most cities will be resistant to spending their own (scarce) tax dollars on vouchers used outside city limits, subsidizing another town's resident and another town's landlord. But a voucher usable only within city limits cannot provide recipients access to suburban locations—limiting recipients' ability to choose a different school system or employment opportunity—and can less effectively desegregate the region. Some cities attempt to chart a middle course. Charlottesville, for instance, requires its local voucher holders to try finding a home within the city before searching in the surrounding county.[249] But however cities strike that balance, municipal borders force local voucher systems to make difficult tradeoffs. States, though, don't face this dilemma. Jurisdictional scale helps explain local resistance to tenant-based rental assistance, but not states' preference for project-based spending.

3. State Demand for Vouchers

States' attitudes toward federal vouchers provide a final piece of evidence that their aversion to tenant-based rental assistance is a policy distortion, not a policy preference. States want more federal vouchers—sometimes even above federal funds for project-based development. They just don't want to provide their own vouchers. States believe that tenant-based assistance is a valuable tool in making housing affordable, but they cannot effectively wield that tool.

Federal law gives state and local actors two mechanisms to convert voucher funding into project-based subsidies. But they rarely use those mechanisms—usually, they still prefer federal tenant-based assistance. First, PHAs can convert a fraction of their federal vouchers into "project-based vouchers," a hybrid subsidy attached to a specific unit (existing or new), but which allows the assisted family to subsequently move and

248. *See* Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Market: Evidence from a New Wharton Index* 61 tbl.5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26573, 2019), https://doi.org/10.3386/w26573.

249. Hays, *supra* note 143.

receive a tenant-based voucher.[250] Most PHAs do not use this option at all, and fewer than one-fourth of the number of vouchers that could be project-based are.[251] Second, the Moving to Work demonstration program allows select PHAs to shift funds freely across federal rental assistance programs. These PHAs, though, provide essentially the same share of tenant-based vouchers (compared to project-based options) as PHAs without that funding flexibility.[252] Subnational housing officials operating within the federal rental assistance system don't systematically prefer a marginal affordable unit to a marginal voucher.

This underscores the fact that states and cities aren't overly concerned that vouchers—or additional vouchers—are bad housing policy. They don't feel that the market has been flooded with vouchers, and they don't worry that vouchers push up rents for unassisted households or that there aren't additional landlords willing to rent to voucher holders. States and cities like housing vouchers. Under the right conditions, they even like them more than project-based subsidies. The policy advantages of housing vouchers hold at the state level, and states can recognize that.

Yet states, almost as a rule, cannot embrace those policy advantages. Fiscal and political incentives relentlessly pull them toward project-based housing spending, preventing states from adopting housing strategies they might (and sometimes should) otherwise prefer.[253]

B. Project-Based Spending as an Adaptation to Fiscal Federalism

As the previous section demonstrated, a state-funded voucher, once provided to a low-income household, is essentially as good as a federally funded voucher. But the strictures of fiscal federalism leave states far less equipped to provide those vouchers in the first place. Tenant-based assistance is the kind of ongoing, redistributive expenditure that is most difficult for subnational governments to sustain across the fiscal cycle. In contrast, project-based assistance better matches states' fiscal limits—even

250. 42 U.S.C. § 1437f(o)(13).

251. Barbara Sard, Vouchers: Project-Based Vouchers 1 (2014), https://nlihc.org/sites/default/files/2014AG-162.pdf [perma.cc/X92N-UFKW]. Only about 500 of the 2,300 PHAs that administer a voucher program use PBVs at all. These numbers may change due to the Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 782, which reformed the PBV program.

252. Martha M. Galvez, Ruth Gourevitch & Benny Docter, *A Picture of Moving to Work Agencies' Housing Assistance*, 22 Cityscape: J. Pol'y Dev. & Rsch., no. 3, 2020, at 9, 15.

253. In addition to the incentives discussed below, some off-budget state affordable housing programs adopt a project-based strategy to leverage state power over land and development processes; rather than spend directly, states use regulatory powers to generate affordable units. However, this is less important than it might appear. These off-budget programs could be reconfigured to incorporate tenant-based strategies. Many inclusionary zoning programs, for example, already allow developers to pay into a housing fund rather than build affordable units on-site; that fund could support tenant-based or project-based strategies.

where it is more expensive—because it allows them to pay for housing up front. Housing has its own distinctive, material nature as an object of redistribution—buildings last for decades. This fact lets states spend and redistribute more freely with a project-based model. Fiscal federalism indeed constrains states' ability to provide affordable housing, but it does not do so uniformly.

It is a core tenet of fiscal federalism that states and cities are relatively poorly positioned, compared to the federal government, to engage in redistributive spending.[254] They are generally subject to balanced budget requirements, which limit spending capacity and can provoke sharp spending cuts during recessions.[255] Precisely when more residents need assistance, states and cities can least afford it. Subnational governments' ability to redistribute is further hemmed in by interjurisdictional competition; states, and especially cities, risk losing mobile residents and firms to their neighbors if they do not provide attractive packages of taxes and services.[256] How much capital flight truly threatens states and cities is hotly contested, but it certainly affects smaller jurisdictions more than bigger ones and weighs heavily on the minds of state and local officials.[257] Fiscal federalism's limits on subnational redistribution should not be overstated: states and cities can and do spend on low-income residents.[258] But they cannot match the federal government's fiscal capacity.

But the difficulties of sub-national redistribution do not hit tenant-based and project-based rental assistance identically. If each form of assistance were appropriated similarly—if housing assistance were like any other form of welfare spending—the pressures of fiscal federalism would affect them alike. Both can be equally redistributive, and neither is the kind of essential, keep-the-lights-on spending that easily avoids cuts during a recession. Housing, however, has a distinctive feature, one not shared by cash subsidies, food stamps, or healthcare: buildings are extremely durable. When governments build subsidized housing, those structures last decades, and generally, so does their affordable status.[259]

254. *See, e.g.*, sources cited *supra* note 227.

255. Super, *supra* note 228, at 2555. Cities and states have backdoor methods of smoothing spending, despite balanced budget requirements. *See, e.g.*, Erin Scharff, *Cities on Their Own: Local Revenue When Federalism Fails*, 48 Fordham Urb. L.J. 919, 937–39 (2021); Darien Shanske & David Gamage, *The Case for State Borrowing as a Response to the Current Crisis*, 97 Tax Notes State. 1337, 1140–41 (2020). However, these methods are limited and often costly.

256. Paul E. Peterson, City Limits (1981).

257. Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 Va. L. Rev. 1537, 1553–57 (2019) (summarizing and questioning conventional wisdom on capital flight).

258. Clayton P. Gillette, Local Redistribution and Local Democracy (2011).

259. *See* Michael C. Lens & Vincent Reina, *Preserving Neighborhood Opportunity: Where Federal Housing Subsidies Expire*, 26 Hous. Pol'y Debate 714, 718–20 (2016) (describing expiration and opt-out processes for project-based subsidies).

The durability of housing allows subnational governments to lock in the provision of affordable housing, despite the fiscal cycle. Spending on new construction in one year generates low-income assistance for years to come—without requiring additional, ongoing appropriations.[260] Accordingly, states and cities can spend more during periods of prosperity. Then, during recessions, they can ramp down spending on new projects while continuing to benefit from old expenditures. If structured correctly, a cut to project-based assistance affects only the pace of future production, not the benefits flowing to current tenants.

In fact, project-based assistance has been restructured over time to maximize these fiscal cycle benefits. Earlier forms of project-based assistance provided long-term subsidies on an ongoing basis.[261] Thus, like most other welfare spending, they required annual expenditures difficult to sustain during fiscal distress.[262] But many newer forms of project-based assistance are provided in large, upfront subsidies.[263] These subsidies are used to reduce project costs—especially borrowing costs—over the long term.[264] Most importantly, LIHTC—which, as discussed below, helps structure state and local affordable housing programs—works this way.[265]

Vouchers don't work like that. Tenant-based rental assistance is provided on an ongoing basis, subsidizing each month's rent. There is no prepayment. As a result, a voucher-based housing strategy is very vulnerable to budget cuts. After a point,[266] every additional cut to tenant-based assistance means another household loses their voucher and, almost by definition, their ability to afford their home. In turn, many will be forced to move to a cheaper apartment, to the couch of friends or family, or into homelessness.

260. *See* Erickson, *supra* note 105, at 89.

261. These included the Section 236 mortgage subsidy and project-based Section 8 program. *See* Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 Yale L. & Pol'y Rev. 263, 284–86, 285 nn.128–29 (2006).

262. *See* Orlebeke, *supra* note 4, at 497 (describing 1960s-era HUD programs as "easy to *start*" but leading to a "huge, scary budget 'uncontrollable' " in the future).

263. *See, e.g.*, Bill de Blasio, City of New York, Housing New York: A Five-Borough, Ten-Year Plan (2014), https://www1.nyc.gov/assets/housing/downloads/pdf/housing_plan.pdf [perma.cc/CUY5-SSV3]. Property tax abatements are an important exception. *See supra* notes 178–182.

264. *See* de Blasio, *supra* note 263, at 62.

265. Technically, developers receive tax credits over ten years, but developers consistently sell those credits to investors for up-front payments that secure long-term affordability. James E. Wallace, *Evaluating the Low-Income Housing Tax Credit*, New Directions for Evaluation, Fall 1998, at 43, 48.

266. *See* Ctr. on Budget & Pol'y Priorities, Possible PHA Strategies to Respond to a Funding Shortfall in the Housing Choice Voucher Program (HCVP) for 2013 (2013), https://www.cbpp.org/sites/default/files/atoms/files/Possible-PHA-Strategies-to-Respond-to-Funding-Shortfall-4-22-13-cb3.pdf [perma.cc/2S7Z-KUR8].

This is precisely what occurred in New York City after the last recession. In 2007, New York City and State partnered to create a voucher program, called Advantage, for families in homeless shelters.[267] Advantage, like other New York City experiments with rental assistance for the homeless, introduced new design features to the basic voucher model (including incentives for participants to build up savings and subsidy formulas that changed over time).[268] Advocates for the homeless and city officials sparred over the program's design and generosity, which bore some resemblance to "welfare reform," but both sides were enthusiastic about using tenant-based rental assistance as an anti-homelessness tool.[269] Just four years after Advantage was created, however, the state pulled its funding in response to the fiscal aftermath of the Great Recession; without the state's contribution, the city shuttered the program.[270] In the twenty-one months after the program ended, half of all families enrolled in Advantage returned to the shelter system. The city's homelessness rate spiked.[271] Similarly, Massachusetts's efforts at providing state-funded rental assistance were seriously disrupted by the state's 1990 fiscal crisis.[272]

As these examples show, tenant-based assistance is vulnerable during fiscal downturns, and cuts are felt immediately and painfully. States and cities, cognizant of the cyclical nature of their budgets, are rightfully hesitant to create a voucher system they cannot maintain. And landlords, too, distrust the stability of these vouchers, refusing to accept them or requiring higher payments to compensate them for the risk of a disappearing revenue stream.[273] Increasing tenant-based assistance in flush times, only

267. Main, *supra* note 145, at 178.

268. *Id.* at 178–79.

269. *Id.* at 179–80.

270. *Id.* at 180–81; John Surico, *De Blasio's Homelessness Reset: Advantage Lessons Learned*, Gotham Gazette (Apr. 4, 2014), https://www.gothamgazette.com/index.php/government/4938-de-blasio-homelessness-policy-advantage [perma.cc/8DG2-VTUC].

271. Scott M. Stringer, Off. of the N.Y.C. Comptroller, The Growing Gap 13 (2014), https://comptroller.nyc.gov/wp-content/uploads/documents/Growing_Gap.pdf [perma.cc/BN34-XTK6].

272. Verrilli, *supra* note 127, at 12. Litigation helped block many cuts to the program. *See* Woods v. Exec. Off. of Cmtys. & Dev., 583 N.E.2d 845 (Mass. 1992).

273. Jarrett Murphy, *Call for City to Lawyer-Up Against Landlords Who Shun Tenants with Vouchers*, CityLimits (June 3, 2019), https://citylimits.org/2019/06/03/call-for-city-to-lawyer-up-against-landlords-who-shun-tenants-with-vouchers [perma.cc/TN6B-8FCG]; Brooklyn Def. Servs., Housing Relocation Guide 10, https://bds.org/assets/files/Housing-Relocation-Guide.pdf [perma.cc/VX9S-GESX] (listing incentives for landlord participation); *see* Equal Rts. Ctr., Source of Income Discrimination in Housing 5–6 (2015), https://equalrightscenter.org/wp-content/uploads/soi-toolkit.pdf [perma.cc/H5K5-P4SV].

to withdraw it during the next crisis, is neither politically nor practically sustainable.[274]

These fiscal dynamics also help explain why many states and cities have embraced very short-term, one-shot, and emergency forms of rental assistance. These programs help prevent evictions and homelessness when households face moments of crisis by paying off rent arrears or offering a few months support for rent.[275] They do not create an ongoing funding obligation for state and local governments, nor do they induce strong reliance by assisted households. Short-term programs may be easier for subnational governments to create because they are easier for subnational governments to cut.[276]

Thus, states' use of project-based subsidies reflects a savvy adaptation to their own fiscal limitations.[277] As housing budgets expand and contract, it is easier to adjust the spigot of housing production than to cut off vouchers. States use project-based spending almost as a financing device, paying a premium to better control the timing of their spending and to provide assisted households with a long-term guarantee of continued assistance.[278]

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274. Operating from a different baseline, the political painfulness of cuts to tenant-based assistance *protects* federal voucher spending. Congress almost always provides sufficient funding to renew all existing housing vouchers. *See* Douglas Rice, *Sequestration Could Cut Housing Vouchers for as Many as 185,000 Low-Income Families by the End of 2014*, Ctr. on Budget & Pol'y Priorities (Nov. 6, 2013), https://www.cbpp.org/research/sequestration-could-cut-housing-vouchers-for-as-many-as-185000-low-income-families-by-the [perma.cc/M3J4-BNLF]. Instead, congressional cuts usually hit public housing, where the effects of deferred maintenance aren't felt until years later. Douglas Rice, *Chart Book: Cuts in Federal Assistance Have Exacerbated Families' Struggles to Afford Housing*, Ctr. on Budget and Pol'y Priorities (Apr. 12, 2016), https://www.cbpp.org/research/housing/cuts-in-federal-assistance-have-exacerbated-families-struggles-to-afford-housing [perma.cc/JLN7-ZLFC].

275. *See, e.g.*, *Eviction Prevention Programs*, *supra* note 150.

276. Just as importantly, federal Community Development Block Grants can usually fund emergency rental assistance but not ongoing rental assistance. 24 C.F.R. § 570.207(b)(4) (2022).

277. Where affordable housing construction is also intended to revitalize neighborhoods, it combines redistributive spending with the "developmental" spending that state and local governments tend to favor, Peterson, *supra* note 256, at 16, providing another way around the redistributive race to the bottom.

278. An example: Due to its homelessness crisis, California has recently invested heavily in extremely low-income housing, which requires ongoing operating subsidies in addition to capital subsidies. It has provided those subsidies by creating operating reserve funds for each development through the same bond issuances that funded construction. In other words, California pays debt service to turn ongoing revenue streams into bonds, then pays the proceeds back out for ongoing expenditures—the equivalent of taking out a mortgage to fund a savings account—at a cost of hundreds of millions of dollars. Whether or not this practice is advisable, it is striking; states will spend considerable sums to avoid annual appropriations for affordable housing. *See* Scott Graves, *Proposition 2: Should California Sell Bonds Backed by County Mental Health Funds to Develop*

This is arguably a reasonable investment, given the importance of housing stability.

To be clear, the fiscal cycle does not fully explain states' avoidance of tenant-based housing strategies.[279] While states' own-source spending is limited by fiscal federalism, their federally funded spending is less constrained.[280] Yet states also avoid using their HOME block grant funds for vouchers. If the only obstacle to state-funded voucher programs was the fiscal cycle, states should use federal funds for vouchers as much as possible. But they do not. States feel compelled to spend federal housing funds, as well as their own, on project-based assistance.

C. LIHTC, Subsidy Stacking, and Federal Incentives for Project-Based Assistance

The federal government provides only enough rental assistance to fund affordable housing for a small fraction of eligible households. This underfunding might seem to leave states and local governments with more discretion to design their own housing programs; the policy space is largely unoccupied, and within this space, the states can exercise complete sovereignty. But the different ways that the federal government underfunds rental assistance create an enormous gravitational force. States have a strong incentive to fill the gaps in federal project-based spending, especially those provided by the Low-Income Housing Tax Credit, without any parallel incentive for federal housing vouchers.

The Low-Income Housing Tax Credit provides a shallow subsidy compared to other federal housing programs. It is shallow in two senses. First,

Supportive Housing for Homeless Residents with Mental Illness?, Cal. Budget & Pol'y Ctr. (Oct. 7, 2018), https://calbudgetcenter.org/resources/proposition-2-should-california-sell-bonds-backed-by-county-mental-health-funds-to-develop-supportive-housing-for-homeless-residents-with-mental-illness [perma.cc/8CFZ-485K].

279. The common use of bonding to finance affordable housing production complicates the connection between the fiscal cycle and states' preference for project-based assistance. Bonding has many independent advantages as a financing tool, both political and pecuniary. It can strengthen the dynamics described in this Section, providing up-front funds for affordable housing development that are shielded from future budget cuts. But bonding also spreads those costs back out over the term of the bond. To the extent affordable housing is bond-financed, this provides funding predictability. However, it also lessens states' ability to time spending across the fiscal cycle. Additionally, bonding has variable political effects: in some states, capital spending is less politically visible than annual appropriations, while in others, it requires a public referendum. *See* Nat'l Ass'n of State Budget Officers, Capital Budgeting in the States 84–85 (2014), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Reports/Capital%20Budgeting%20in%20the%20States.pdf [perma.cc/7QK7-2C5F].

280. HOME funding levels are not entirely reliable—the amount is subject to annual appropriations—but they are steady enough. *See* Jones, *supra* note 165, at 10–11.

it does not necessarily provide housing for the very poorest households.[281] No LIHTC units need be set aside for extremely low-income households, while 40 percent of public housing units and 75 percent of vouchers are targeted at those families.[282]

Second, LIHTC does not always provide enough subsidy even to fully fund these shallower affordability levels. The value of LIHTC is market-driven: the tax credits generated by the low-income development are sold to investors, whose valuation of the credit varies by time and place.[283] Sometimes, they fetch a high enough price to fully compensate for the income restrictions of the program, and no further subsidy is needed.[284] But often, LIHTC developments need multiple additional subsidies to pencil out. Early in the program's history, more than two-thirds of LIHTC projects required additional subsidies.[285] The efficiency of LIHTC's administration and the price of tax credits have increased since then, but subsidy stacking remains common.[286] In California, LIHTC projects have generally required six funding sources in addition to LIHTC itself.[287] And even where the value of tax credits is high, additional subsidy is almost always required to achieve deeper affordability.[288]

281. A LIHTC project must set aside either 20% of its units for tenants at or below 50% of area median income (AMI), or 40% of its units for tenants whose incomes average to below 60% of AMI. 26 U.S.C. § 2(g)(1). In practice, nearly all units are affordable to households at 60% of AMI. Ellen et al., *supra* note 89, at 50.

282. 42 U.S.C. §§ 1437a(a)(1), 1437n(a), (b)(1), (c).

283. *See* Corianne Payton Scally et al., Urb. Inst., The Low-Income Housing Tax Credit 2 (2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf [perma.cc/P425-EK6L] (describing variations in tax credit prices during and after the Great Recession, in anticipation of 2017 tax reform, and across metropolitan areas—with recent lows of $0.60 invested per dollar of tax credit and highs of $1.06).

284. Kirk McClure, *The Low-Income Housing Tax Credit Program Goes Mainstream and Moves to the Suburbs*, 17 Hous. Pol'y Debate 419, 430–32 (2006).

285. Wallace, *supra* note 265, at 55; *see also* Michael A. Stegman, *The Excessive Costs of Creative Finance: Growing Inefficiencies in the Production of Low-Income Housing*, 2 Hous. Pol'y Debate 357 (1991) (criticizing complexity of early LIHTC deals and finding up to fifteen financing sources per deal).

286. *See, e.g.*, Ellickson, *supra* note 1, at 997; Enter. Cmty. Partners, An Investment in Opportunity 50 (2016), https://www.novoco.com/sites/default/files/atoms/files/enterprise_an-investment-opportunity_020416b.pdf [perma.cc/WF6D-DN34] ("In addition to the tax credits themselves, Housing Credit properties require additional sources of funding, such as grants or rental assistance.").

287. U.S. Gov't Accountability Off., *supra* note 77. Within California, LIHTC funding gaps are especially large in San Francisco, where the City contributes an average of $257,000 per affordable unit (or 37 percent of development costs). S.F. Plan. Dep't, *supra* note 158, at 15.

288. Roberto G. Quercia, William M. Rohe & Diane K. Levy, *A New Look at Creative Finance*, 11 Hous. Pol'y Debate 943, 965 (2000); Joint Ctr. for Hous. Stud. of Harvard Univ., Long-Term Low Income Housing Tax Credit Policy Questions 6 (2010),

LIHTC's incomplete subsidy structure drives state and local governments to supplement the federal tax credit. By providing gap financing or another form of additional subsidy, states can make a LIHTC project viable, or viable at a deeper level of affordability.[289] LIHTC acts almost as a matching grant in these contexts: state spending unlocks federal spending.[290] Given that LIHTC is the dominant federal program funding new affordable rental housing, it is particularly important to make LIHTC work. No state or city can afford to ignore the federal government's spending power, and leveraging LIHTC in this way is extremely attractive.[291] Moreover, LIHTC is not the only source of federal subsidy for project-based affordable housing that attracts state and local spending in this way, though it is the largest. Both Community Development Block Grants[292] and private-activity bonds[293]—neither of which is limited to spending on housing—can have similar effects.

Perversely, this system of "creative finance" may increase the overall costs of LIHTC-funded projects, even as it makes that spending appear more affordable to subnational governments.[294] Coordinating overlapping subsidy streams increases transaction costs, introduces multiple schemes of compliance review, and slows the entire development process,[295] although

https://www.jchs.harvard.edu/sites/default/files/long-term_low_income_housing_tax_credit_policy_questions.pdf [perma.cc/Z93J-7WG4] (observing that LIHTC was never designed to serve extremely low-income households).

289. S.F. Plan. Dep't, *supra* note 158, at 6 ("The ability to leverage federal and state sources is contingent on the availability of local subsidies.").

290. This goes beyond the so-called "flypaper effect." *See* Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190, 259 & n.261 (2001). Federal funds are not only "stick[ing] where they fall" but pulling more state funds to them.

291. de Blasio, *supra* note 263, at 62. ("Even when the City uses other programs, most affordable housing units are financed, at least in part, with LIHTC."). Most states expressly encourage this in their allocation of tax credits. Elizabeth Kneebone & Carolina K. Reid, Terner Ctr. for Hous. Innovation, The Complexity of Financing Low-Income Housing Tax Credit Housing in the United States 7 (2021), https://ternercenter.berkeley.edu/wp-content/uploads/2021/04/LIHTC-Complexity-Final.pdf [perma.cc/2GPY-TB7Y].

292. *See supra* note 172.

293. *See Increased Use of Multifamily Private Activity Bonds to Draw Down 4 Percent Low Income Housing Tax Credits*, Loc. Hous. Sols., https://www.localhousingsolutions.org/act/housing-policy-library/increased-use-of-multifamily-prvate-activity-bonds-to-draw-down-4-percent-low-income-housing-tax-credits-overview/increased-use-of-multifamily-private-activity-bonds-to-draw-down-4-percent-low-income-housing-tax-credits [perma.cc/723K-CARF].

294. *See* Stegman, *supra* note 285.

295. U.S. Gov't Accountability Off., *supra* note 77, at 20; Kneebone & Reid, *supra* note 291, at 14–15 (suggesting that complex financing structures increase LIHTC costs by "a couple hundred thousand" dollars and add over a year to development timelines).

it may also improve oversight.[296] Even as these global inefficiencies accumulate, however, putting state and local dollars into LIHTC projects is, from the state or local perspective, a bargain. They don't need to fund an entire low-income housing development, only close the gap.

Compare this to the Housing Choice Voucher program. Like LIHTC, the voucher program is dramatically insufficient. The vast majority of eligible households don't receive a voucher. Roughly sixty percent of housing authorities have closed their waitlists for receiving a voucher,[297] and those lists might open for only a week once in a decade.[298] The rationing of vouchers is arbitrary, unfair, and a striking departure from how most public benefits are provided.[299] But for those who ultimately receive a voucher, the subsidy is quite deep.[300] It provides the full amount needed for an extremely low-income household to afford an apartment without being rent-burdened.[301] Indeed, a federal voucher is generous even compared to tenant-side subsidies in Europe—an anomalous outcome for the usually stingy American welfare state.[302] Federal vouchers are hardly as generous as they could be.[303] But a Housing Choice Voucher is a subsidy designed to stand on its own.

As a result, states and cities have little incentive to top off a federal voucher. That supplemental spending won't unlock federal coffers or extend the voucher to a deeper affordability level. It could improve the quality and location of housing for voucher holders or connect voucher holders with nonhousing services. But such supplemental spending will have little effect on how many households, at whichever income levels, are assisted. To do that, states or cities would need to offer their own vouchers—and pay the entire cost of each.

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296. Mihir Desai, Dhammika Dharmapala & Monica Singhal, *Tax Incentives for Affordable Housing: The Low Income Housing Tax Credit*, 24 Tax Pol'y & Econ. 181, 194–95 (2010); Erickson, *supra* note 105, at xxi.

297. Rosen, *supra* note 18, at 104. Forty-four percent of applicants spend a year or more on a waiting list; one-fifth spend more than three years. *Id.*

298. *See, e.g.*, Yvonne Wenger, *Thousands Sign Up as City's Section 8 Wait List Opens for First Time in a Decade*, Balt. Sun (Oct. 27, 2014, 8:17 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-section-8-20141022-story.html [perma.cc/QR6H-HKWR]; Julia Wick, *The Waiting List for Section 8 Vouchers in L.A. Is 11 Years Long*, LAist (Apr. 3, 2017, 11:00 PM), https://laist.com/news/section-8-waiting-list [perma.cc/YK2Q-GRK6].

299. Infranca, *supra* note 6, at 1073–77.

300. Rosen, *supra* note 18, at 19.

301. Lee Anne Fennell offers the housing choice voucher as a quintessential example of a "lumpy" good. *See* Lee Anne Fennell, Slices and Lumps 168–71 (2019).

302. Carliner & Marya, *supra* note 64, at 24.

303. Vouchers could provide higher payment standards (or pay security deposits or insure landlords against damage) or be paired with mobility counseling to help households live in better apartments and neighborhoods. *See supra* notes 92–96 and accompanying text.

Thus, for states and cities, the relative cost-effectiveness of project-based and tenant-based subsidies appear flipped on their head. States can leverage project-based subsidies through LIHTC; for vouchers, they pay full freight. Without ever intending to, the federal government has created an enormous incentive for states to use project-based housing strategies.[304] Cities like Boston—which converted a plan to create tenant-based subsidies into one to supplement existing project-based housing subsidies[305]—have responded to that incentive.

The design of state subsidy schemes reflects this incentive. Many states, for example, have created their own low-income housing tax credits. Often, these are expressly intended to supplement the federal LIHTC. Colorado uses its state tax credit exclusively to supplement the federal LIHTC.[306] Massachusetts law requires that state tax credits be allocated to as many qualified federal LIHTC projects as possible.[307] Moreover, the HOME block grant is considered a particularly useful tool for closing funding gaps at LIHTC developments.[308] The structure of LIHTC explains why, despite the dynamics of fiscal federalism described in the previous section, states use both their own revenues and federal funds for project-based affordable housing.

304. There is no indication that Congress considered LIHTC's effect on states' decisions to use project-based or tenant-based housing subsidies. LIHTC's legislative history "is scant." Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 Yale L. & Pol'y Rev. 203, 209 (1988). The provision was inserted into the enormous 1986 tax reform package, and even its drafters misunderstood the impact that LIHTC would have; upon enactment, it was expected to be inconsequential. Stanhope, *supra* note 56, at 1. Nor did the 1989 task force, whose recommendations guided LIHTC's modern form, suggest that Congress was trying to restructure state priorities in this way. Report of the Mitchell Danforth Task Force on the Low-Income Housing Tax Credit 14 (1989). In contrast, the HOME block grant program, enacted the following year, was expressly designed to increase state spending on favored categories of project, especially vouchers. Jill Khadduri, *New Matching Requirements for Housing Programs: Intergovernmental Conflict and the National Affordable Housing Act of 1990*, Pub. Budgeting & Fin., Winter 1992, at 3, 7–8.

305. *See supra* notes 190–192 and accompanying text.

306. Colo. Hous. & Fin. Auth., State Affordable Housing Tax Credit 2–8 (2021), https://www.chfainfo.com/getattachment/1a2c8835-e55d-4cfb-bd18-136ee6add356/2021StateAHTC-YE-Report.pdf [perma.cc/HF6E-2TFJ]; *see also* Mark O'Meara, *State LIHTCs and the Federal 4 Percent LIHTC*, Novogradac J. Tax Credits, Oct. 2019, at 1, 1–2.

307. Mass. Gen. Laws ch. 62, § 6I(b)(3) (Supp. 2021).

308. *See* Wallace, *supra* note 265, at 55. The National Housing Trust Fund (which cannot be used for tenant-based assistance) is also mostly used to supplement LIHTC. Nat'l Low Income Hous. Coal., Supplemental Update to *Getting Started*: NLIHC's Interim Report on States' Use of 2016 HTF Allocations (2019), https://nlihc.org/sites/default/files/Updated-Supplement-Getting-Started.pdf [perma.cc/9RRH-HB8Q].

But while stacking state subsidies with LIHTC is extremely common, it is not universal, even within state tax credit programs.[309] New York, for example, makes its state LIHTC available to projects with higher-income tenants than the federal program: it has chosen to support some developments that do not receive federal credits.[310] Nor are all housing programs tied to LIHTC in the first place. Most notably, New York City's famous "Ten Year Plan" —the largest local housing production program in the country's history—was created in 1985, during the window between the termination of all federal funding for new affordable housing construction and the creation of LIHTC.[311] And countless other programs operate independently of LIHTC.[312]

Once again, then, this explanation is only partial. LIHTC's need for subsidy stacking encourages states and local governments to target their spending at federally assisted projects. Meanwhile, tenant-based state spending would sit side-by-side with federal vouchers, not stacked on top. This pushes states to focus on project-based spending. But it does not explain the state spending that is both project-based and not stacked with federal funding.

D. Interest Groups and Ideology in State Politics

Vouchers may often be a more efficient mechanism for delivering rental assistance. But politics is politics,[313] and efficiency rarely rules the roost. State and local politics are more interest-group oriented and less closely monitored by watchdogs in civil society and administrative agencies than national politics. This favors project-based assistance, which involves subsidies to a larger and more diverse coalition of interest groups.

309. For a guide to state housing tax credits, see *State LIHTC Program Descriptions*, *supra* note 118.

310. N.Y. Pub. Hous. Law § 21(5) (McKinney 2016).

311. Michael H. Schill, Ingrid Gould Ellen, Amy Ellen Schwartz & Ioan Voicu, *Revitalizing Inner-City Neighborhoods: New York City's Ten-Year Plan*, 13 Hous. Pol'y Debate 529, 529–30 (2002).

312. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(16)(a) (McKinney 2017) (defining eligibility standards for "Affordable New York Housing Program" tax incentives, which would not qualify for LIHTC); *Program Profiles*, Nat'l Hous. Conf., https://www.nhc.org/policy-guide/tax-abatements-the-basics/program-profiles-ta [perma.cc/B6JZ-6NVK] (offering examples).

313. In the politics of affordable housing, race and racism are never far from the surface. However, it is not clear that racism—though pervasive in this area—pushes states to disproportionately choose project-based strategies. Racial discrimination drives opposition to—and stigmatization of—both affordable housing projects *and* vouchers. *See* Ocen, *supra* note 18. Theoretically, state politics, being more concerned with white, suburban, neighborhood politics, *see* Cashin, *supra* note 227, might favor project-based subsidies to use project siting to maximize local control over where poor people of color live. But vouchers, too, can be administered so as not to challenge segregation. Indeed, the federal government's modern project-based and tenant-based subsidies perform quite similarly on integration. *See supra* notes 84–90 and accompanying text.

From a purely cynical, interest-group-driven perspective on politics, project-based housing strategies are more attractive to politicians. Tenant-based assistance primarily provides pecuniary benefits to just two interest groups: voucher recipients and existing landlords. Given the relative powerlessness of the very poor in politics,[314] this leaves landlords as the main lobbying force with a direct financial interest in vouchers.[315] In contrast, project-based assistance brings in a much broader coalition of powerful actors. In addition to the future tenants, there are the development companies overseeing construction, the banks providing financing and the lawyers structuring deals, the contractors who build the housing, the construction unions representing their workers, and the for-profit and not-for-profit housing operators who specialize in affordable housing management.[316] Indeed, many point to the breadth of the project-based affordable housing coalition as the source of LIHTC's remarkable political resiliency.[317]

Even affordable housing operators have public-choice advantages over the similarly situated landlords who benefit from vouchers. Landlords, as a class, share the benefits of vouchers diffusely, and while some landlords specialize in renting to voucher holders, many landlords do not participate in voucher programs at all.[318] Accordingly, landlord associations may prioritize lobbying on other issues, like taxes or tenants' rights. In contrast, affordable housing developers and managers are a small group with a shared business model, reliant on public subsidy. They are better positioned to organize and will make lobbying for more subsidies a top priority.

Of course, if politics were merely a clash of self-interested trade associations, vouchers might never have been created in the first place. But politics is not that. Federal housing assistance was created thanks to committed advocates for low-income tenants, high-quality housing, and the health of American cities. The housing production coalition successfully rebuffed efforts to introduce tenant-based assistance through the 1960s but then could hold out no longer.[319] Vouchers became law thanks to a Left–Right coalition of civil rights advocates, housing bureaucrats looking to control costs, and market-oriented conservatives and economists.[320] For technocratic and ideological reasons alike, Congress and HUD officials

314. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale L.J. 546, 569–71 (2021).

315. *See* Jill Khadduri, *Should the Housing Voucher Program Become a State-Administered Block Grant?*, 14 Hous. Pol'y Debate 235, 255 (2003).

316. Ellickson, *supra* note 1, at 1016–17.

317. *E.g.*, Scally et al., *supra* note 283, at 8–9.

318. Philip M.E. Garboden, Eva Rosen, Stephanie DeLuca & Kathryn Edin, *Taking Stock: What Drives Landlord Participation in the Housing Choice Voucher Program*, 28 Hous. Pol'y Debate 979, 997–98 (2018).

319. von Hoffman, *supra* note 30, at 43–45.

320. *See generally supra* Section I.A.

considered vouchers good policy—and vouchers have been sustained because rigorous evaluations repeatedly bore that out. Today, the strongest advocates for the voucher program are advocates for low-income families, HUD officials, think tankers, and public housing authorities—not landlords.

At the state level, though, the political balance of power is shifted. Organized lobbies outgun public interest groups, even more than at the federal level.[321] Specific members of the housing production coalition, like the building trade unions, are especially powerful in state government.[322] And as Miriam Seifter has argued, the institutions that encourage more public-oriented lawmaking—like a strong media or an administrative state with sufficient data-collection and disclosure capacity—are atrophying at the state level.[323] Overall, there are far fewer institutions interested in (or able to push for) a more cost-effective, choice-enhancing, or integrationist housing strategy at the state and local levels. There are sound political reasons—in addition to fiscal ones—that advocates for low-income people often prefer to fight at the federal level.[324]

These dynamics are then self-reinforcing. The more that states provide project-based affordable housing, the stronger and more engaged the various stakeholders in that housing become. And in the absence of existing state voucher systems, there is no institutional base for voucher advocacy. At the state level, "affordable housing" effectively means project-based affordable housing provision, and advocacy organizes itself around that model.

The greater influence of interest groups in state and local housing policy is only on the margin, of course. Labor, finance, and real estate—these are lobbies that can do perfectly well for themselves federally. Conversely, states engage in plenty of policymaking that is public-minded, and not

321. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107, 137–40 (2018).

322. *See, e.g.*, Eliot Brown, *Construction Unions Stymie Low-Income Housing Plans in California, New York*, Wall St. J. (Aug. 28, 2016, 7:35 PM), https://www.wsj.com/articles/construction-unions-stymie-low-income-housing-plans-in-california-new-york-1472376601 [perma.cc/B53J-PHC4].

323. Seifter, *supra* note 321. As state legislatures move further toward uncompetitive, one-party control, these particular dynamics may dissipate, with partisan ideological networks playing a greater monitoring function. Or they could worsen, with transactional politics playing a still greater role. *Cf.* David Schleicher, *Welcome to New Columbia: The Fiscal, Economic and Political Consequences of Statehood for D.C.*, 23 Wm. & Mary Bill Rts. J. 89, 99–103 (2014) (connecting "distributive politics" and corruption to one-party governance and uncompetitive state and local elections); David A. Super, *States' Evolving Role in the Supplemental Nutritional Assistance Program*, *in* Holes in the Safety Net 173, 189–90 (Ezra Rosser ed., 2019) (examining shift from bureaucracy-led politics to the influence of ideological networks for nutrition assistance).

324. Weinstein-Tull, *supra* note 226, at 1122–24.

mere rent-seeking, including for low-income people.[325] State agencies are staffed by sincere and expert officials, and every state has its own networks of advocates for low-income people.[326] The political terrain of state politics may be less fertile for vouchers than for project-based assistance, but there is ample room for vouchers to take root. Still, the structure of state politics reinforces the immense fiscal incentives for providing housing assistance in a project-based form.[327]

E. Affordable Housing as Nonentitlement

Each of these factors is exacerbated by the peculiar nonentitlement structure of housing assistance. There is no expectation that all, or even most, eligible households will receive housing assistance, whether state or federal.[328] There never has been. Because the country's rental assistance programs are descended from the public housing program, rather than having originated as social insurance, scarcity has always been built into the system. Many public assistance programs exclude potential beneficiaries through restrictive eligibility requirements: income limits, work requirements, and even burdensome paperwork.[329] But very few, having already limited eligibility, then conduct outright lotteries, as rental assistance programs do routinely.[330] Rental assistance functions almost as an act of government largesse. This perspective affects budgeting, severing the normal relationships between spending and benefit levels.

For most programs, governments must make fundamental tradeoffs between total spending levels, the quality of the benefit provided, and eligibility. If, say, Illinois wants to provide more generous Medicaid benefits, it must either increase spending or reduce how many people are covered.

325. Earned Income Tax Credits, for example, redistribute with few direct beneficiaries other than their recipients and have spread widely across states, promoted by partisan and administrative networks. *See States and Local Governments with Earned Income Tax Credit*, IRS, https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/states-and-local-governments-with-earned-income-tax-credit [perma.cc/5QS2-G2DH].

326. Super, *supra* note 323, at 175–76.

327. David Schleicher has argued that the less ideological nature of subnational politics is itself a function of law. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & Pol. 419, 423 (2007).

328. Scally et al., *supra* note 283, at v.

329. Laura Reiley, *Some States Are Cutting Off Emergency Food-Assistance Programs and Making it Harder to Qualify*, Wash. Post (June 18, 2021, 6:00 AM), https://www.washingtonpost.com/business/2021/06/18/republican-states-restrict-snap-food-assistance-usda [perma.cc/C4GQ-JTGB].

330. M. Kathleen Moore, *Lists and Lotteries: Rationing in the Housing Choice Voucher Program*, 26 Hous. Pol'y Debate 474 (2016); Emily Badger, *These 95 Apartments Promised Affordable Rent in San Francisco. Then 6,580 People Applied*, N.Y. Times (May 12, 2018), https://www.nytimes.com/2018/05/12/upshot/these-95-apartments-promised-affordable-rent-in-san-francisco-then-6580-people-applied.html [perma.cc/62TN-FPA7].

If it wants to expand coverage to higher-income families, it must find the funds or offer less generous coverage. Given these tradeoffs, states have serious pressures to be cost-effective: every dollar comes out of somewhere.

But once eligibility changes from a guarantee of coverage to a chance to roll the dice, these trade-offs look very different. States have a fourth option: reduce the odds of receiving assistance. A state can offer high-quality benefits (well-designed apartments that are attractive to tenants and neighbors alike, with high levels of subsidy), to a broad spectrum of potential beneficiaries (from the poorest households through the middle class), while keeping to a manageable—and perhaps more importantly, fixed—budget. Rather than short beneficiaries, as usually happens with programs for the poor, housing programs can short eligible nonbeneficiaries.

This favors project-based housing subsidies. One of vouchers' core benefits is their cost-effectiveness: you get more housing for less money. But cost-effectiveness matters less when most people won't get a benefit at all. Project-based spending can maximize visible political benefits under these conditions: it can offer neighborhood revitalization to some, jobs and fees to others, and homes to still others. It can provide housing to moderate-income households before all low-income households get assisted.[331] In contrast, when most remain ineligible, tenant-based solutions are less politically advantageous. It is easier to notice the new affordable housing complex than the difference between a ten-year voucher waitlist and an eleven-year waitlist.

Tellingly, while states and cities eschew vouchers for their general housing assistance, they embrace vouchers far more for certain special populations: especially people with disabilities and people facing homelessness.[332] According to one count, one-third of state-funded housing assistance programs, excluding those for new construction, serve people with serious mental illness.[333] This should be counter-intuitive: one of project-based housing's most important advantages is the ability to combine services with housing to better assist precisely these populations.[334] But states and cities have distinct incentives for fiscal discipline when housing the homeless or the seriously disabled. States and local governments are financially responsible for supporting people with long-term disabilities and people facing homelessness: they pay a share of Medicaid costs, SSI costs and

331. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(16)(a)(ii)–(viii) (McKinney 2017) (subsidizing housing for households earning up to 130% of AMI); N.Y. Gen. Mun. Law §§ 699 to 699-c (McKinney 2021) (providing density bonus for housing for households earning up to 130% of AMI). In other words, rental assistance's problem with "vertical equity" stems from its nonentitlement nature.

332. Bergquist et al., *supra* note 120, at 6.

333. *Id.*

334. *See, e.g.*, Ellickson, *supra* note 1, at 995 n.59.

shelter costs, among others.[335] They have a strong fiscal motivation to house people cost-effectively—anyone left uncovered, they pay for out of another pot. States are often quite explicit about this motivation.[336] The prominence of vouchers in these contexts shows that if a state can't simply avoid paying for a person's housing, it will seek out a more cost-effective form of housing assistance.

Though the federal government also fails to fully fund housing assistance, the importance of housing's lottery-type provision is greater at the state and local levels. The federal government is never terribly constrained by cost-effectiveness as a purely fiscal matter. At the federal level, the push for cost-effective rental assistance came from civil society groups like the media, ideological advocates, and policy watchdogs within government—all weaker at the state level—and not from budget pressures per se. The federal government's budgetary limits are more political and less strictly fiscal. Put differently, the federal government shifts housing spending toward vouchers based on changing ideological coalitions; the states use vouchers to generate cost savings for other agencies.

Offering housing assistance as a lottery is unfair: the distribution of assistance is inherently, definitionally arbitrary. But it also severs the tie between the political determination of who is eligible for a benefit and the administrative need to actually assist those households, thereby reducing pressure to be cost-effective. Only where states are otherwise responsible for providing households with spending—that is, they must provide assistance one way or the other—do vouchers' cost-effectiveness come back into policymakers' consideration.

* * *

States favor project-based assistance for reasons both political and practical. They respond to the legal framework within which they operate in ways that are sometimes clever, sometimes realistic, and sometimes regrettable. This is primarily a story specific to housing: how housing's material qualities shift the usual dynamics of fiscal federalism and reward particular political constituencies, and how the interactions between federal housing programs inadvertently distort states' priorities.

It is also a story about federalism's drift. It appears paradoxical that federal law pushes states away from tenant-based rental assistance, even as the federal government itself embraces vouchers. But this paradox reflects

335. Public welfare expenditures are the second-largest category of own-source spending for state and local governments (after education) and the largest when including federal transfers. *Public Welfare Expenditures*, Urb. Inst.: State & Loc. Backgrounders (Mar. 20, 2022), https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/public-welfare-expenditures [perma.cc/5LZM-87NA].

336. *See, e.g.*, *supra* text accompanying notes 135–139.

the passage of time. The most important federal statutes now structuring state participation were enacted before states began meaningfully providing rental assistance.[337] At the time, Congress had little reason to seriously consider how its programs would affect state rental assistance—but times have changed around those programs.[338] The allocation of responsibility between levels of government cannot be set once and forgotten. A working federalism must be tended. How to do so for rental assistance is the subject of the next Part.

IV. Federalist Reforms for Rental Assistance: Two Paths Forward

Structural forces dissuade states and cities from operating their own tenant-based rental assistance programs at scale. As a result, the subnational role in providing rental assistance is stunted: states and cities serve primarily to supplement federal project-based spending. This reality clarifies the difficulties facing those advocates working hard to innovate with subnational voucher programs: they are fighting a steep, uphill (though hardly impossible) battle. Subnational governments should give tenant-based assistance a second look. But state and local tenant-based spending is, at best, unstable, always susceptible to being suddenly cut (like New York's Advantage program) or converted into project-based spending (like Boston's new voucher system). States and cities have reasons to act as they do.

As a result, this Section does not offer states and cities advice on how best to structure rental assistance.[339] Instead, it turns to changes in federal rental assistance as the path for improving states' policy options. Given the constraints facing states and cities, legal reform at the federal level is necessary to change this dynamic. As states' role in the shared project of providing affordable housing has expanded and changed, federal housing law's approach to federalism should change as well. This Section explores how a federalist perspective on rental assistance recasts existing debates over federal programs and how it might help us imagine a more vibrant and generative federalism for rental assistance. It offers two pathways for reform, each responsive to states' capacity and each (in its own way) an attractive option. Whether by expanding the federal role where states have proven themselves unable to provide federalism's benefits or by creating a new, more expressly cooperative framework for rental assistance, national reform can not only expand, but also reinvigorate, rental assistance.

337. *See supra* notes 104–109 and accompanying text. Federal rental assistance has been nonuniversal since the New Deal, while the Low-Income Housing Tax Credit was created in 1986. Stearns, *supra* note 304, at 204.

338. *Cf.* Buzbee, *supra* note 231, at 66 ("[O]ngoing changes in [federalist] relationships and interactions are inevitable.").

339. *Cf.* Ellickson, *supra* note 1, at 1021 (urging states to abandon project-based strategies).

A. Expanding the Federal Role in Rental Assistance

While fights over rental assistance have always addressed the housing-specific question of when to assist projects or tenants, as with all redistributive spending, they also take place on a familiar Left–Right axis. Liberals generally want to expand the federal safety net; conservatives want to cut programs and devolve them to the states. Examining the whole of our rental assistance system—its federal and state components together—offers new reasons, apart from one's normative priors about redistribution, to favor a stronger national role for rental assistance.[340]

In rental assistance, devolution has introduced precisely the problems—inflexibility and inefficiency—that it is purported to solve. Instead, expanding federal affordable housing spending might better support state autonomy. An expanded, or universalized, federal rental assistance system could free states and cities to focus on areas of their choice or competence, even as it makes rental assistance more generous and fair.

Most simply, a federalist perspective suggests the need for greater skepticism of block grants in the specific context of rental assistance. These proposals reemerge cyclically, especially on the Right, and call for block granting some or all of HUD's spending (LIHTC, as a tax expenditure, is usually not included).[341] The constant push toward block grants of various flavors has been a dominant trend in federal housing policy over recent decades.[342] And when adequately funded, block grants have a certain federalist logic to them, pairing the federal government's redistributive capacity with states' administrative apparatuses and local tailoring.[343]

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340. These debates are primarily normative, and this Article should not convince a committed welfare state skeptic to increase spending on the poor. But these debates also include technocratic aspects, focused on the effects of individual programs, and in this register, these findings may be persuasive.

341. *See, e.g.*, Finegold et al., *supra* note 66, at 1; Guy Gugliotta, *HUD Revamps Plan to Transform Public Housing, Reinvent Agency*, Wash. Post (Mar. 19, 1995), https://www.washingtonpost.com/archive/politics/1995/03/19/hud-revamps-plan-to-transform-public-housing-reinvent-agency/d0cd298a-6786-4f78-acd6-57221d8665fd [perma.cc/83VT-2VF3]. These proposals vary considerably in their details.

342. HOME is the purest block grant program, while the National Housing Trust Fund operates as a block grant limited to production subsidies. *See generally supra* Section II.B.3; Jones, *supra* note 60. Even LIHTC has features of a block grant, as each state is allocated a certain amount of tax credit which they have substantial discretion in awarding. Likewise, Congress recently expanded the Moving to Work program, which turns public housing and voucher funding into a quasi-block grant at the PHA level. *See Moving to Work Demonstration Program*, U.S. Dep't Hous. & Urb. Dev., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw [perma.cc/3ZJH-Z7Y6] (last updated June 29, 2022).

343. Indeed, block granting may appear especially promising for housing because federal rental assistance already resembles a block grant. It is already not an entitlement: through the appropriations process, spending is capped at artificial dollar amounts. Additionally, Congress has already taken steps to increase PHAs' discretion in administering

But this Article's findings suggest that further block granting federal rental assistance would not provide local discretion, at least over the critical question of tenant- or project-based spending. It would only heighten states' incentives to avoid vouchers. As HOME spending shows, states are no more able to spend their housing block grants on tenant-based assistance than they are able to spend their own funds.[344] Block granting federal rental assistance would likely extend the state-level imbalance between tenant-based and project-based assistance to the much larger pool of federal funds, leading to a systemic over-emphasis on production. The result would be fewer assisted households with less choice over their housing.[345]

Indeed, block granting would reinforce states' preference for project-based solutions. Among federal funds, block grants are considered especially vulnerable to future cuts.[346] This uncertainty would further encourage states to avoid ongoing, tenant-based expenditures which they might be forced to pull from families. Likewise, block granting would codify rental assistance's nonentitlement status. Assuming LIHTC remained in place, states would still leverage limited funds to stack subsidies.[347] Block grants are not the answer for rental assistance.

Even for conservatives, block grants offer an unappealing bargain: the same conservatives who advocate for block grants also tend to prefer tenant-based subsidies. If two predominant trends in housing policy over the last half-century—both led by the Right—are the shifts toward tenant-based subsidies and toward state control,[348] those trends stand in tension. Providing more unrestricted funds would not give states adequate space to

rental assistance. *See* Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. V, 112 Stat. 2461, 2518; *History of Moving to Work (MTW)*, U.S. Dep't Hous. & Urb. Dev., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/history [perma.cc/7XAT-WVB9] (last updated Jan. 27, 2022). Arguably, further block granting rental assistance would mostly provide PHAs additional administrative flexibility, not restrain benefits.

344. *See supra* notes 164–172 and accompanying text.

345. *Cf.* Khadduri, *supra* note 315, at 240 (arguing that "block grant" of rental assistance should not actually allow states to spend funds on project-based strategies).

346. *See* Joseph V. Jaroscak, Robert Jay Dilger & Julie M. Lawhorn, Cong. Rsch. Serv., R40486, Block Grants: Perspectives and Controversies 10 (2020).

347. That said, block granting *only* LIHTC is a more promising alternative, political realities notwithstanding. LIHTC is not well tailored to local housing market conditions, and in low-rent and high-vacancy regions, is particularly poorly targeted. Collinson et al., *supra* note 28, at 269. Allowing (or even requiring) states to cash out their LIHTC allocations for flexible spending on both project- and tenant-based assistance is an appealing reform. *Id.* at 269–70.

348. *See* Orlebeke, *supra* note 4, at 489–90; John R. Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 Urb. Law. 249, 282 (1982).

actually choose how to subsidize housing. There are few federalism benefits to involving the states merely for the sake of it.[349]

Instead, a federalist perspective shows how increasing federal housing subsidies could better give states real autonomy in designing rental assistance programs. More complete federal subsidies could reduce the distortions on state policy created by partial federal involvement in rental assistance. One way to do this would be by making LIHTC more generous. For example, one leading congressional proposal would provide additional tax credits to projects serving the lowest-income households.[350] If LIHTC developments could be funded with just the single subsidy source—including at deeper affordability levels—then states would not need to direct their own housing spending to closing LIHTC financing gaps. The current LIHTC system invites state participation, but only on the federal government's terms. Making the federal subsidy more self-contained might better allow states to go their own way.

A federalist perspective also strengthens support for universalizing the voucher program: guaranteeing a voucher for anyone eligible. Such proposals, in various flavors, have taken on new prominence recently.[351] There are clear advantages to universal vouchers. More people will get benefits, and they will do so more fairly—no more arbitrary lotteries and rationing. Expanded federal coverage also exploits the federal government's superior fiscal and redistributive capacity, especially during recessions: as incomes drop, rental assistance will increase (and provide automatic stimulus). These are the standard points in favor of national entitlement programs.

But the experience of state rental assistance programs described in this Article indicates that a universal housing voucher program is particularly appropriate. First, a universal voucher program would recognize states' particular difficulties with providing tenant-based assistance. It would accordingly assign that tool entirely to the national government. With vouchers mostly spoken for, states could build on that federal floor by providing additional project-based subsidies or developing programs for

349. Here, I do not classify benefits like offloading administrative costs to the states or allowing state officials to take credit for federal programs as federalism benefits per se. *Cf.* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 Yale L. & Pol'y Rev. 297, 322 (1996). These are benefits to politicians, not the public.

350. Moving Forward Act, H.R. 2, 116th Cong. § 90606 (2020).

351. *See* Desmond, *supra* note 12, at 308–14; *The Biden Plan for Investing in Our Communities Through Housing*, Biden Harris, https://joebiden.com/housing [perma.cc/VZ2T-PSRW]; Bipartisan Pol'y Ctr., Housing America's Future: New Directions for National Policy 89–90 (2013), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC_Housing-Report_web_0.pdf [perma.cc/522Y-777V] (recommending narrower eligibility for universal subsidies); Collinson et al., *supra* note 28, at 270–71 (recommending shallower universal subsidies).

middle-income families: precisely the programs they are best equipped to offer.[352]

Second, states' current approach to rental assistance makes clear that an entitlement to tenant-based assistance is warranted. The canonical arguments against federal entitlements are, among others, that they leave states without policy discretion and flexibility and that they encourage states to spend "irresponsibly."[353] But under the status quo, states flock around similar strategies—without much variation or practical discretion—and prefer the less thrifty form of housing assistance. The purported harms of a federal entitlement are already here; why not claim the benefits?

B. A Better Federalism for Housing: The Medicaid Model

As this Article has demonstrated, the federalism of rental assistance is not an especially healthy one: the federalism values of state experimentation, variation, and autonomy are in short supply. Yet the promise of federalism continues to peek through. State and local voucher systems, though few and small, still function as important sites for policy formation: whether it is New York City piloting short-term vouchers for the homeless, Connecticut integrating vouchers with its social service systems—or historically, Massachusetts helping inspire Section 8. Likewise, the fundamentally local nature of housing markets calls for the decentralization of rental assistance policy.[354] The proper mix of tenant-based and project-based subsidies (and the details of program design for each) should vary considerably across places that have different land use regimes, different stocks of rental housing, different patterns of racial segregation, and different economic trajectories. A rental assistance system should, ideally, promote tailoring policy to those local needs. Indeed, housing markets likely display a wider range of local conditions than almost any other object of redistribution.[355]

The federalism benefits of the status quo seem hardly worth preserving compared to the advantages of a fairer, more efficient universal rental assistance system. But there are virtues here that might be cultivated, and reasons to favor strengthening state capacity rather than giving up on it.

Even putting policy aside, developing better federalist models for rental assistance is a practical, political necessity. Congress rarely seeks to entirely

352. States might still wish to supplement the federal voucher program for ineligible households, such as those excluded because of immigration status.

353. Mashaw & Calsyn, *supra* note 349, at 298–99.

354. Decentralization does not require federalism, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 910–11 (1994), but even so, federalism is a leading mechanism for promoting decentralization.

355. *Cf.* Jerry L. Mashaw & Theodore R. Marmor, *The Case for Federalism and Health Care Reform*, 28 Conn. L. Rev. 115, 117 (1995) (grounding call for federalism in healthcare on different regional "demographic characteristics, political cultures, existing styles of medical practice, and appetites for medical services").

displace the states from shared policy spaces.[356] Notably, Congress chose to disburse much of its COVID-era emergency housing assistance through states and local governments—even though the states entirely lacked the capacity to launch these efforts effectively.[357] The result has been money unspent, with tenants and landlords alike left vulnerable.[358] Even when it should, today the federal government rarely takes full responsibility for administering new programs; it chooses to involve the states instead. Thus, when the political moment for expanding rental assistance crystallizes, the question may be how to structure the states' role, not whether to do so.

I thus imagine a new alternative for rental assistance—call it Medicaid-for-Housing.[359] This structure—an open-ended matching program for rental assistance, conditioned on a floor of universal access—would use the federal government's fiscal capacity to augment state experimentation and discretion over the form of rental assistance while still providing benefits more universally and equitably. A Medicaid model could also facilitate the improved coordination of rental assistance with other state policies, from social services to land use.

The goal of this proposal is not to endorse it over all potential alternatives (though it seems preferable to the status quo). Whether this is the best option depends on what else is on the table. Rather, this is an exercise in developing a federalist perspective on rental assistance. Medicaid-for-Housing offers one way of leveraging the state and federal governments' particular capacities in housing policy while harnessing federalism's political dynamism and ability to provide variation across diverse political communities and markets. Articulating such a program makes it easier—more concrete—to envision more, better housing federalisms.

Like other cooperative federalism programs, Medicaid-for-Housing would offer a voluntary bargain to the states.[360] In broad strokes, partici-

356. Gluck & Huberfeld, *supra* note 210, at 1717–18; Gerken, *supra* note 215, at 1701; Super, *supra* note 228, at 2576.

357. *See* U.S. Dep't of Treas., *supra* note 200; Jason DeParle, *Federal Aid to Renters Moves Slowly, Leaving Many at Risk*, N.Y. Times (Sept. 28, 2021), https://www.nytimes.com/2021/04/25/us/politics/rental-assistance-pandemic.html [perma.cc/2C3S-QVMP].

358. DeParle, *supra* note 357.

359. This shorthand is certainly not meant to import every detail of Medicaid—especially given Medicaid's many transformations since its creation. The analogy is meant only to provide an intuitive picture of one cooperative federalism structure, with its strengths and weaknesses. Nor is the Medicaid metaphor necessary. This proposal has much in common with suggestions from Nicholas Bagley and from Jerry Mashaw and Theodore Marmor for federalist approaches to health insurance outside the Medicaid framework. *See* Nicholas Bagley, *Federalism and the End of Obamacare*, 127 Yale L.J.F. 1, 19 (2017) (citing Mashaw & Marmor, *supra* note 355).

360. A direct mandate to states to spend their own funds on low-income housing assistance would violate the anti-commandeering doctrine. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476–77 (2018). A Medicaid-for-Housing program, though,

pating states would be required to provide rental assistance to all families up to a baseline eligibility standard, such that no eligible household need be rent-burdened or live in housing below a certain minimum quality standard. In return, the federal government would pay a substantial, but partial, share of the program's cost. States could employ any strategy they see fit to achieve the mandate of universal coverage and could expand eligibility beyond the federal floor. As a backstop, states could "buy in" to the federal voucher system, expanding coverage without reinventing the wheel. The federal match would be pegged not to actual state spending but to the estimated cost of providing federal vouchers to the state's covered population.

This system shares several critical advantages with existing proposals. Like a universal voucher program, it would leverage the federal government's fiscal capacity and cover everyone in participating states; indeed, the default path to compliance, if a participating state did nothing new, would be the universalization of the federal voucher program.[361] And like block grants, it gives states formal discretion over program design. But it would provide states real discretion by mitigating the forces skewing state rental assistance policy. Guaranteed federal funds would allow states to better maintain spending across the fiscal cycle, increasing comfort with open-ended spending commitments (just as Medicaid allows). The need to cover everybody would make cost-effectiveness more salient, and closing funding gaps for LIHTC developments would be the beginning, not the end, of state spending.

But Medicaid-for-Housing has its own, unique advantages as well. First, it redefines housing assistance in terms of the program's goal (affordable housing), not its spending level or its delivery mechanism. This offers ample incentives for state innovation without leaving too much room for state backsliding. States could serve families by universally distributing federal vouchers or developing their own alternatives. They could provide more project-based subsidies, to be sure, or craft their own voucher schemes. With creative administration,[362] states might even be permitted

should be well within the limits of Congress's Spending Clause power, as set forth in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012)—likely even if Congress ties existing housing funds to participation in the new program. Unlike Medicaid, federal housing assistance funds presently make up a small fraction of state budgets. Perhaps more importantly, most of those funds flow through independent PHAs and not states' own budgets. States would have a real, noncoercive choice about participation, and concerns about unfairly changing the terms of a cooperative program should be muted. *See generally* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause after* NFIB, 101 Geo. L.J. 861 (2013).

361. The program could be designed to minimize the risk of states opting out. For example, in states that did not participate, Congress could allow regional consortia to participate in their stead.

362. Likely, this would take the form of some kind of negotiated waiver. *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum. L. Rev. 265 (2013).

to reduce rent burdens outside the rental assistance framework by closing the gap between incomes and market rents. This could be done either by reducing rents—through increasing housing supply or directly imposing rent controls—or by increasing incomes, including through cash benefits. States could choose what they think is right for them: with different answers in red and blue states and tight and loose housing markets.

Medicaid-for-Housing further internalizes the benefits and costs of these alternative approaches to housing affordability. Constructing new, subsidized housing units is usually more expensive than offering a voucher, but it offers hard-to-quantify benefits as well: the revitalization of a distressed neighborhood, the integration of a high-income neighborhood, or the colocation of housing with supportive services.[363] Under Medicaid-for-Housing, states that want these benefits can pay for them; the price is the additional cost above a voucher. Conversely, if a state can reduce program costs—say, by reducing construction costs[364]—it would be financially rewarded. Cost internalization, this Article has argued, has shifted state housing spending for the disabled and homeless; it should do the same for general housing assistance.

This cost internalization could help align housing assistance policy with land use policy—something all too rare under our current allocation of responsibilities. Vouchers fiscalize the cost of high rents.[365] Vouchers cost more, and provide more, when rents are high—they cover the difference between actual rents and what a household can afford—so as rents increase, governments pay an on-budget price. But the federal government, which currently foots the bill, is essentially insensitive to this fiscal incentive, both because vouchers are not provided universally[366] and because of the federal government's immense fiscal capacity. Moreover, the federal government has limited powers to reduce rents.[367] The most

363. Some might even favor project-based models as a way to force improvements in buildings' environmental performance. *See, e.g.*, Paul Williams & Cea Weaver, Opinion, *Why Democrats Would Be Fools to Slash Biden's Housing Plan*, Politico (Oct. 5, 2021, 5:30 PM), https://www.politico.com/news/magazine/2021/10/05/biden-democrats-reconciliation-historic-housing-investments-515171 [perma.cc/P8QA-J78U].

364. *See* Hannah Hoyt, More for Less? An Inquiry into Design and Construction Strategies for Addressing Multifamily Housing Costs (2020), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_gramlich_design_and_construction_strategies_multifamily_hoyt_2020_3.pdf [perma.cc/3M7R-D9CZ].

365. *See* Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 Am. U. L. Rev. 1 (2016) (surveying literature but questioning importance of "fiscal illusion").

366. If the cost of vouchers rise, Congress can mitigate spending increases by not adding new vouchers.

367. This is as a descriptive matter, not a legal matter. Congress has the Commerce Clause authority to regulate rents. Morgan v. Sec'y of Hous. & Urb. Dev., 985 F.2d 1451, 1455 (10th Cir. 1993) (explaining that "the sale and rental of residential housing" affects interstate commerce, including through its effects on the allocation of housing and interstate relocation).

important policy levers governing market rents—whether loosening supply constraints like restrictive zoning or directly regulating rents—belong to state and local governments. Shifting the fiscal cost of rent burdens to states could create new fiscal pressure to control rents, including by curbing restrictive zoning.[368] (Imagine the different response under Medicaid-for-Housing if California watched Bay Area rents rise by 40 percent in just three years.)[369] On-budget costs help focus the legislative mind—they are money another interest group could spend or taxpayers could keep—and could help promote more affordable housing markets.[370]

This system also reinserts the states-as-states into the federal rental assistance system. Currently, most federal rental assistance is administered through local PHAs, while LIHTC and various block grants are administered by the states.[371] Medicaid-for-Housing would realign these programs, permitting better coordination.[372] It would also build state capacity to offer additional tenant-based rental assistance: capacity that the COVID experience has shown is badly lacking and, in an emergency, badly needed.

368. *See* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. Rev. 823, 848–855 (2019).

369. Hans Johnson & Marisol Cuellar Mejia, Pub. Pol'y Inst. of Cal., Housing 3 (2018), https://www.ppic.org/wp-content/uploads/r-118hjr.pdf [perma.cc/3TJS-FB2X].

370. The incentive structure would also properly reward states for past efforts to provide affordable housing. States with more preexisting affordable housing would need to provide less assistance to reach universality. However, if the state contribution is too low, this proposal might establish bad incentives, allowing high-rent states to shift the cost of their restrictive zoning onto federal taxpayers, including those in states with less restrictive policies. This could effectively subsidize exclusionary zoning.

371. Generally, more research is needed that understands public housing authorities as unusual special-purpose federalist institutions. PHAs are not easily, or meaningfully, classified as belonging to one level of government: they are generally independent, state-created, locally controlled bodies that exist at the federal government's behest to operate federal programs. *Cf.* Gluck & Huberfeld, *supra* note 210, at 1798 (discussing "blended entities" like health insurance exchanges that "are neither 'state' nor 'national' "). PHAs predate the significant involvement of the states-as-states in subsidizing rental housing, so while Congress often involves the states themselves in affordable housing programs, it has never had to do so. *Cf.* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 Harv. L. Rev. 1561, 1567 (2015); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1201 (1999) (describing the importance of such congressional choices of subnational partners). And PHAs' precise form is a historical accident—a congressional response to litigation during the brief window when the New Deal's legal revolution was underway but incomplete—making them particularly curious creatures. Schill, *supra* note 6, at 499 n.12.

372. For example, PHAs' geographic boundaries should not impede the use of vouchers at LIHTC developments statewide. At a minimum, data about the two programs should be coordinated—unlike the current state of affairs.

Moreover, states can develop new models for providing affordable housing that PHAs cannot.[373] Housing authorities lack meaningful independent revenues with which to supplement their federal allocations.[374] And even with the broadest waivers from federal housing statutes, housing authorities' jurisdictions are limited, whereas state jurisdiction is broader substantively (they can coordinate rental assistance with non-housing services and land use) and geographically (they can reach across the borders separating existing PHAs within a region). The states are thus better placed to coordinate rental assistance with other social services administered at the state level: already a site of state activity and one where further experimentation could prove especially valuable. Innovation within existing PHAs is a complement to state-level federalism, not a substitute.[375]

Weaving the states into a more robustly cooperative rental assistance framework may also offer political benefits.[376] Like Medicaid itself, this system would force the states into a lasting partnership with the federal government.[377] With aggregate costs for such a system on the order of $100 billion per year nationwide, states' share would represent real skin in the game.[378] Some states would finagle ways to reduce coverage and reduce their out-of-pocket costs; others would expand coverage to maximize the

373. PHAs have made enormous contributions, and the Moving to Work demonstration program—which grants select PHAs extensive waivers from federal law—can promote still more experimentation. Jill Khadduri, Melissa Vandawalker, Rebecca Cohen, Jeffrey Lubell, Abt Assocs., Innovations in the Moving to Work Demonstration (2014), https://housingcenter.com/wp-content/uploads/2017/09/innovations-in-the-moving-to-work-demonstration-report.pdf [perma.cc/96R4-Y8RK]. HUD should continue to build on MTW, encouraging successful innovations and shutting down failures, even in a more state-centered framework.

374. *Policy Basics: Public Housing*, Ctr. on Budget & Pol'y Priorities (June 16, 2021), https://www.cbpp.org/research/public-housing [perma.cc/LLS6-LNXS].

375. Jill Khadduri has persuasively argued that states should play a much-expanded role in administering federal rental assistance in order to overcome the fragmentation of local PHAs, coordinate housing with other social services, and tailor housing quality standards to local needs. Khadduri, *supra* note 315, at 246–54. For a contrary perspective, see Jamie Zembruski, *Block Granting the Housing Choice Voucher Program: A Perilous Choice for Recipients, Market Participants, and State Governments*, 13 J. Affordable Hous. & Cmty. Dev. L. 463, 475–76 (2004).

376. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1302 (2009) (discussing importance of "embed[ding] states in the federal regime and build[ing] the connective ties that bind state and federal officials").

377. *See* Gluck & Huberfeld, *supra* note 210, at 1796.

378. The Urban Institute estimates that expanding the federal voucher program to all eligible households pre-pandemic would cost around $62 billion. Mary K. Cunningham, *It's Time to Reinforce the Housing Safety Net by Adopting Universal Vouchers for Low-Income Renters*, Urb. Inst.: Urb. Wire (Apr. 7, 2020), https://www.urban.org/urban-wire/its-time-reinforce-housing-safety-net-adopting-universal-vouchers-low-income-renters [perma.cc/DUR9-MCD6]. Spending on existing vouchers was roughly $24 billion. *Advocates Secure Increased Funding in Final FY20 Spending Bill*, Nat'l Low Income Hous.

total federal contribution to their state.[379] These intergovernmental negotiations can produce generative frictions: with conflict can come closer attention, new actors with different motives, and fresh ideas.[380] PHAs are poorly suited to generate this kind of dynamic politics alone: they lack the political visibility of state governments[381] and are insulated from ideological and partisan coalitions.[382] As Jessica Bulman-Pozen has argued, the states can "imbue federal law with diversity and competition."[383]

Of course, this proposal is not without its—potentially serious—weaknesses. Given the inequities of our current housing system, a large increase in rental assistance could be a major force for improving racial (and income) equality, but in housing, the spatial elements of inequality must be attended to as well. By encouraging states to reduce per-household costs, a Medicaid-like system risks incentivizing states to further concentrate housing assistance in low-income, low-rent neighborhoods, entrenching segregation. Robust safeguards must guarantee mobility for voucher holders and the siting of affordable units in high-opportunity neighborhoods. As with all housing programs, this one must affirmatively further fair housing.[384] Likewise, a flood of new vouchers risks driving up rents—including for households above state eligibility limits—as more low-income households can afford higher rents.[385] Careful program design can ameliorate this issue.[386] Indeed, on this count, Medicaid-for-Housing might outperform a fully federalized universal voucher program by enlisting states to avoid undue rent increases, which they must pay a share of.

A Medicaid-for-Housing program would also face difficult questions about program details. How should the match rate be adjusted as market rents shift? How should occupancy and quality standards be set so that states don't comply by forcing low-income families into decrepit housing

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Coal. (Dec. 16, 2019), https://nlihc.org/resource/advocates-secure-increased-funding-final-fy20-spending-bill [perma.cc/Q6JB-GB86].

379. *Cf.* Super, *supra* note 323, at 179–80.

380. *See generally* Gerken, *supra* note 206.

381. *Cf.* Weinstein-Tull, *supra* note 226, at 1137 (describing the difficulty involved in having local governments implement federal rights); Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1749–50, 1763 (2005) (describing the importance of political visibility for federalism).

382. PHAs exhibit a strong form of what has been dubbed "picket fence federalism." Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 Stan. L. Rev. 1225, 1227 (2001).

383. Bulman-Pozen, *supra* note 221, at 1956.

384. 42 U.S.C. §§ 3608(d), 3608(e)(5).

385. Michael D. Eriksen & Amanda Ross, *Housing Vouchers and the Price of Rental Housing*, Am. Econ. J.: Econ. Pol'y, August 2015, at154, 154–55.

386. Collinson et al., *supra* note 28, at 274–75. Possibilities include providing flat subsidies so that renters have an incentive to economize, making subsidies "invisible" to landlords to reduce price discrimination, and pairing an expanded voucher program with mechanisms to increase the elasticity of housing supply.

or overcrowded conditions—all without encouraging discriminatory code enforcement? What discretion will states have to reduce benefits or impose eligibility conditions like work requirements? Like Medicaid itself, administration will be neither simple nor uncontested.

And, most fundamentally, Medicaid-for-Housing would, as a Spending Clause program, ultimately be optional for states. Some states—and depending on the politics of the moment, perhaps many—would opt out altogether, leaving in place the inadequate status quo.[387] If reforming rental assistance leaves housing politics too visible and controversial, federalism will become an ever-less-attractive strategy.

Depending on the political options on the table, the risks inherent in this kind of messy, constantly negotiated federalist scheme may not be worth it. Universal vouchers, for example, offer a simple, readily administered way to improve the rental assistance system—and one less readily undermined by hostile state governments. My argument is only that if federalism is the goal, this style of integrated governance better serves both federal and state ends than the status quo.[388] As providers of welfare spending, states have many weaknesses compared to the federal government. If they are to continue playing an ever-larger role in offering rental assistance, it is worth developing federalist arrangements that exploit their strengths. Affordable housing is too important to fall between the cracks of federalism. So long as the national government does not cover the field of subsidizing housing, it should at least ensure that states can effectively step in.

Conclusion

Vouchers empower low-income tenants, providing them the financial means and stability to afford a better home and the chance to choose that home for themselves—in their neighborhood or in a new one. They change lives. They are not the only tool to do so, and not always the right one, but tenant-based assistance plays an invaluable role in our social safety net, and it does so cost-effectively. As states spend tens of billions of dollars to provide their residents with affordable housing, they should have that tool in their toolkit. And yet, except in small and specialized programs or exceptional circumstances, they do not.

387. In the original Medicaid program, almost all states quickly opted in, but the last state, Arizona, declined to participate until 1982. Nicole Huberfeld, *Federalizing Medicaid*, 14 U. Pa. J. Const. L. 431, 445 n.69 (2011). As of July 2022, twelve states had not adopted the Obamacare Medicaid expansion. *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (July 21, 2022), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map [perma.cc/EJ4M-7TR8].

388. One more modest intervention into rental assistance's federalism would be to merge local PHAs into regional, state-run entities. That might help avoid the pathologies of local fragmentation and better integrate PHAs with the rest of state governance. *See* Stacy Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 Law & Contemp. Probs., no. 3, 2016, at 173, 178.

The forces pushing states and cities so uniformly toward project-based rental assistance were inadvertent creations of the federal government and understandable adaptations by subnational governments. But the federalism of rental assistance has been neglected, and now is languishing. Inadequate and incomplete federal programs have invited the states to step into the project of housing the nation. It is time to treat rental assistance as the joint endeavor that it is—and to fix it accordingly.