Equitably Housing (Almost) Half a Nation of Renters

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INTRODUCTION

Across America, the rent is too damn high.[1] The country's population of renters is growing faster than the supply of available rental units.[2] Rental vacancies are

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1. "Rent is too DAMN high!" was the slogan popularized by habitual fringe New York Governor and U.S. Presidential candidate Jimmy McMillan and his self-named "Rent is Too Damn High Party." RENT IS TOO "DAMN" HIGH, http://www.rentistoodamnhigh.org (last visited Oct. 18, 2016). McMillan recently announced his retirement from politics. Julia Zorthian, *Founder of the "Rent Is Too Damn High" Party is Leaving Politics*, TIME (Dec. 10, 2015), http://time.com/4144527/rent-is-too-damn-high-jimmy-mcmillan-leaving-politics.

2. The current state of housing market problems involving inadequate, expensive rental housing is discussed in the Joint Center for Housing Studies of Harvard University's most recent annual report. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2015, at 30–32 (2015) [hereinafter STATE OF THE NATION'S HOUSING 2015]; *see also infra* Part I. The country's increasing rental demand is both predictable and predicted. *See* Arthur C. Nelson, *The New Urbanity: The Rise of a New America*, 626 ANNALS AM. ACADEMY POL. & SOC. SCIENCE 192 (2009) (forecasting that the current shift into rental households will be "the most remarkable change in America's built environment since the end of World War II"). Professor Arthur Nelson of the University of Utah predicts that half of all homes built between now and 2030 will have to be rental units to meet this growing demand. *Id.*; *see also* Arthur C. Nelson, *Demographic Outlook*, 68 URB. LAND 196, 197 (2009); Arthur C. Nelson, *Catching the Next Wave: Older Adults and the "New Urbanism,"* 33 J. AM. SOC'Y ON AGING 37, 39, 41 (2010).

reaching new lows, and rental rates are reaching new highs.[3] Millions of former homeowners have lost their homes in foreclosure and, due to today's much tighter mortgage underwriting realities, will not realistically re-enter the ranks of owner-occupants.[4] For a number of reasons—variety of incomes, different stages in life, and a range of personal preferences and lifestyles—homeownership is not for everyone. And yet federal government housing policy has consistently prioritized homeownership over renter-specific issues, such as affordability, rental supply, and distribution.[5] State and local housing assistance programs are shockingly insufficient to meet ballooning needs. Reallocation of focus and funds at the federal level, however, could help grow the supply of rental housing and provide renters at all income

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3. Josh Miller, *Eye on Housing: Rental Vacancy Rate at 20 Year Low*, NAT'L ASS'N HOMEBUILDERS (Jan. 29, 2015), http://eyeonhousing.org/2015/01/rental-vacancy-rate-at-20-year-low; NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2015, at 4 (2015) [hereinafter OUT OF REACH], http://nlihc.org/sites/default/files/oor/OOR_2015_FULL.pdf; ROBERT R. CALLIS & MELISSA KRESIN, U.S. DEP'T COMMERCE, U.S. CENSUS BUREAU, RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE FOURTH QUARTER 2014 (2015) [hereinafter U.S. CENSUS BUREAU], www.census.gov/housing/hvs/files/qtr414/currenthvsprees.pdf.

4. Approximately 4.5 million families lost their homes to foreclosure between September 2008 and May 2013. CORELOGIC, CORELOGIC NATIONAL FORECLOSURE REPORT 2 (2013), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-may-2013.pdf. Lenders' underwriting standards have significantly tightened since the Foreclosure Crisis. Although the Consumer Financial Protection Bureau and the Dodd-Frank Act have called for more responsible credit standards in residential mortgage lending, most analysts believe that "the pendulum has swung too far from the excesses of the pre-bust era, and today's credit box is tighter and more restrictive than underwriting practice and experience justify." BIPARTISAN POLICY CTR., HOUSING AMERICA'S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY 29 (2013) [hereinafter HOUSING AMERICA'S FUTURE], http://bipartisanpolicy.org/library/housing-americas-future-new-directions-national-policy.

5. *See* WILLIAM APGAR, RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY 4 (2004), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w04-11.pdf; *see also infra* Part II.

levels a realistic chance of occupying quality and affordable rental housing, even in a "high opportunity neighborhood."[6]

To help create a more renter-friendly alternative to the "American Dream of homeownership,"[7] the government must first reorient its myopic housing policy focus away from an over-emphasis on building homeownership.[8] It must free up government funds for use in support of affordable rental

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6. The term "High Opportunity Neighborhood" comes from the "Moving to Opportunities" experiment conducted between the late 1960s and 2015. *See* MARGERY AUSTIN TURNER ET AL., URBAN INST., BENEFITS OF LIVING IN HIGH-OPPORTUNITY NEIGHBORHOODS: INSIGHTS FROM THE MOVING TO OPPORTUNITY DEMONSTRATION (2012), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412648-Benefits-of-Living-in-High-Opportunity-Neighborhoods.PDF. This major, decades-long housing mobility experiment was sponsored by the U.S. Department of Housing and Urban Development (HUD), building on earlier academic studies. *Id.* at 1. The study followed 4600 low-income families with children who lived in the most disadvantaged neighborhoods across the country. Families were randomly assigned into one of three groups, and the members of the test group were given housing vouchers that could only be used to move to a "high opportunity neighborhood." *Id.* A "high opportunity neighborhood" for purposes of the Moving to Opportunity experiment was defined as a neighborhood with poverty rates below 15% and labor force participation rates above 60%, with more than 20% of adults having completed college. *Id.* at 2. The neighborhood was also by definition predominantly (more than 70%) non-Hispanic white, and there were more than 200,000 low-wage jobs located within five miles of the tract centroid. *Id.*

7. The "American Dream" has long been connected to homeownership. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., HOMEOWNERSHIP AND ITS BENEFITS: URBAN POLICY BRIEF NO. 2 (1995), https://www.huduser.gov/publications/txt/hdbrf2.txt; U.S. DEP'T OF HOUS. & URBAN DEV., THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM (1995), www.globalurban.org/national_homeownership_strategy.pdf (explaining how "[e]xpanding homeownership will strengthen our nation's families and communities, strengthen our economy, and expand this country's great middle class" and speaking of "[r]ekindling the dream of homeownership for America's working families"); *see also* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U.L. REV. 329 (2009) (detailing ways that federal tax policies attempt to grow homeownership).

8. "Having a place to call home is a signature component of the American dream." Matthew Johnson, *Stepping Up: How Cities Are Working to Keep America's Poorest Families Housed*, URBAN INST. (June 16, 2015), http://www.urban.org/features/stepping-how-cities-are-working-keep-americas-poorest-families-housed; *see also infra* Part II.

housing.[9] In addition, government funds and agency efforts should be carefully allocated to increase the availability of housing assistance and government gap funding of affordable housing as well as to encourage private investment in the supply of affordable rental housing.[10]

Part I of this Article discusses the origins and impacts of our widening gap between supply of and demand for affordable rental housing. Part II advocates that federal housing policy should change its primary emphasis from building homeownership to supporting the development of affordable rental options. Part III explores ways that the federal government could act to encourage development of an adequate and de-concentrated supply of rental units for all income levels.

I. BE IT RENTED OR OWNED, THERE'S NO PLACE LIKE HOME

America's population of renters is large and rapidly growing larger.[11] Not only is the population of the country growing—expected to reach 334 million by 2020 and 416 million by 2060—but the percentage of this population that rents rather than owns their home is growing as well.[12] The country's homeownership rate, for the first time in decades, has fallen below 64%, and only 55.5% of the country's

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9. *See infra* Part II. Integrated neighborhoods of owners and renters also require removal of land use barriers to locating rental occupied homes near owner-occupied homes. *See* Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease a Home*, 49 REAL PROP. TRUST & EST. L.J. 203, 221–24 (2014).

10. *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 5 (2010) [hereinafter 2010 HARVARD HOUSING STUDY]; JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 20, 22–23 (2008) [hereinafter 2008 HARVARD HOUSING STUDY]*; see also infra* Part III.

11. "2014 marked the 10th consecutive year of robust renter household growth" which "puts the 2010s on track to be the strongest decade for renter growth in history." STATE OF THE NATION'S HOUSING 2015, *supra* note 2, at 25.

12. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 2 (2015).

housing units are currently owner-occupied.[13] The drop in homeownership naturally means that more households are renting, and the recent, dramatic increase in renter households is expected to grow even more dramatically in the decades to come.[14] Renters are more likely to be younger (or older), to be minorities or immigrants, and more likely to be unmarried.[15] As a whole, however, the renter population is an incredibly diverse group.[16] Minority households and low-income households are disproportionately renter households.[17]

The demographics of our country are profoundly changing during this generation, and these changes are "transforming the country and our housing needs."[18] Members of the "Baby Boom" generation are moving out of

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13. *Quarterly Residential Vacancies and Homeownership, Third Quarter 2016*, U.S. CENSUS BUREAU (Oct. 27, 2016, 10:00 AM), http://www.census.gov/housing/hvs/files/currenthvspress.pdf.

14. Demand for rental housing is growing, and that the trend will continue as those under 35 years of age form households of their own. *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 22 (2013), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf.

15. *Housing Vacancies and Homeownership (CPS/HVS), Table 17: Homeownership Rates for the United States, by Age of Householder and by Family Status: 1983 to 2013*, U.S. CENSUS BUREAU, http://www.census.gov/housing/hvs/data/ann13ind.html (follow "Homeownership Rates by Age of Householder and Family Status for the United States" hyperlink under "Detailed Tables") (last visited Dec. 7, 2016); *see also* Lewis M. Segal & Daniel G. Sullivan, *Trends in Homeownership: Race, Demographics, and Income*, 22 ECON. PERSP. 53, 53–57 (1998).

16. APGAR, *supra* note 5, at 3.

17. *Id.* at 23; *see Housing Vacancies and Homeownership (CPS/HVS)*, *supra* note 15; *see also* Segal & Sullivan, *supra* note 15; Thomas P. Boehm & Alan M. Schlottmann, *The Dynamics of Race, Income, and Homeownership*, 55 J. URB. ECON. 113, 114–15 (2004).

18. HOUSING AMERICA'S FUTURE, *supra* note 4, at 7, 15–25; *see also* ROLF PENDELL ET AL., BIPARTISAN POLICY CTR., DEMOGRAPHIC CHALLENGES AND OPPORTUNITIES FOR U.S. HOUSING MARKETS (2012), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412520-Demographic-Challenges-and-Opportunities-for-U-S-Housing-Markets.PDF.

their prime homeownership years, retiring and downsizing.[19] Even though a large percentage of baby boomers are currently homeowners (larger than any other age group), and even though many of these homeowners intend to age in place (at least in the short term), as the Baby Boom population continues to age and as the economic challenges of being on a fixed income continue to create housing affordability problems for seniors, more will move into smaller units or assisted living and senior housing developments.[20]

Although "Generation X" is entering what traditionally would be prime homeownership years,[21] homeownership for Americans in their 30s and 40s was hit hard by the Foreclosure Crisis and has been falling ever since.[22] A high percentage of the members of this generation first became homeowners during the boom years before the Crisis, and thus were more likely to have overpaid for their homes and have taken out risky mortgages.[23] Members of Generation X

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19. The U.S. Census Bureau defines the "Baby Boom" generation as including individuals born between 1946 and 1964. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, THE BABY BOOM COHORT IN THE UNITED STATES: 2012 TO 2060, at 2 (2014), https://www.census.gov/prod/2014pubs/p25-1141.pdf.

20. STATE OF THE NATION'S HOUSING 2015, *supra* note 2, at 1, 5, 13. "Paying too much for housing leaves seniors with inadequate income to pay for medications, healthy food, and other necessities." HOUSING AMERICA'S FUTURE, *supra* note 4, at 19.

21. George Masnick, of the Harvard Joint Center for Housing Studies, defines this generation (which he calls the "baby bust") as including individuals born between 1965 and 1984. George Masnick, *Defining the Generations*, HARVARD JOINT CTR. FOR HOUS. STUDIES (Nov. 28, 2012), http://housingperspectives.blogspot.com/2012/11/defining-generations.html.

22. *See* WEI LI & LAURIE GOODMAN, URBAN INST., COMPARING CREDIT PROFILES OF AMERICAN RENTERS AND OWNERS 16 (2016), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000652-Comparing-Credit-Profiles-of-American-Renters-and-Owners.pdf; *see also* Shane Ferro, *Gen X Is the Most Screwed Generation When It Comes to Real Estate*, HUFFINGTON POST (Mar. 30, 2016), http://www.huffingtonpost.com/entry/gen-x-screwed-real-estate-housing-crisis_us_56fad298e4b0143a9b497c9c.

23. *See* LI & GOODMAN, *supra* note 22, at 16.

are correspondingly more likely to have lost or be at risk of risk losing their homes, and many have already joined or will eventually join the ranks of former-homeowner renters.[24]

The "Echo Boom" or "Millennial Generation" exerts a very strong influence on housing trends in the United States.[25] On average, Millennials have been delaying independent household formation by moving home or in with roommates after college and by staying single (and childless) longer.[26] This younger segment of the American population has shown both a more pronounced preference for renting and a greater financial inability to become homeowners.[27] More than 69% of Millennials rent their homes compared with 36.4% of all householders in the country.[28] The preference for rental housing, and the inaccessibility or delay of Millennial homeownership, "contributes to the high demand for rental housing that is driving rent increases in many metro areas across the country."[29] In addition, the

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24. *See id.*

25. This generation includes "[t]hose born between 1981 and 1995." HOUSING AMERICA'S FUTURE, *supra* note 4, at 7. According to the Harvard Joint Center for Housing Studies, this generation is a bit broader, including individuals born between 1985 and 2004. Masnick, *supra* note 21; *see also* A. Mechele Dickerson, *Millennials, Affordable Housing, and the Future of Homeownership*, 24 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 435, 436 (2016), http://www.americanbar.org/content/dam/aba/images/affordable_housing/publication/journalaffordhouselaw/2015/AH%2024-3_06Dickerson.pdf, ("The millennials [were] born between 1980 and the mid-2000s.").

26. *See* STATE OF THE NATION'S HOUSING 2015, *supra* note 2, at 5, 13, 17, 18.

27. *Id.* at 2; LEIGH GALLAGHER, THE END OF THE SUBURBS: WHERE THE AMERICAN DREAM IS MOVING 158 (2013); *c.f.* HOUSING AMERICA'S FUTURE, *supra* note 4, at 10. (indicating that "[m]illions of Americans continue to see homeownership as a critical cornerstone of the American Dream" and that "[t]his sentiment is especially strong within the growing Hispanic community").

28. NAT'L HOUS. CONFERENCE & CTR. FOR HOUS. POLICY, PAYCHECK TO PAYCHECK: A SNAPSHOT OF HOUSING AFFORDABILITY FOR MILLENNIAL WORKERS (2015) [hereinafter PAYCHECK TO PAYCHECK]. Notwithstanding affordability hurdles, over 65% of Millennials hope to become homeowners within five years. *Id.*; *see also* M. LEANNE LACHMAN & DEBORAH L. BRETT, URBAN LAND INST., GENERATION Y: AMERICA'S NEW HOUSING WAVE (2011).

29. PAYCHECK TO PAYCHECK, *supra* note 28, at 5; *see* Marine Cole, *Housing Recovery Leaves Millennials Out in the Cold*, FISCAL TIMES (May 4, 2014),

racial and ethnic makeup of our country is changing. Compared to earlier generations, a much higher percentage of Millennials are non-white, and, as a whole, America is becoming more and more diverse.[30] These changes make affordable rental housing and residential integration increasingly critical issues for each of the country's demographic groups.

Growing demand for rental housing outpaces supply. As fewer and fewer people buy homes, rental demand increases and rental markets "rapidly tighten."[31] In 2014, as the country's homeownership rate dropped to its lowest rate in twenty years, the national rental vacancy rate fell to a twenty-plus year low of 7%.[32] In some places, such as in Oregon, rental vacancy rates are less than 1%.[33] In nine of America's eleven largest cities there has been double-digit growth in the percentage of renters since 2006.[34] The adequacy of rental housing supply is threatened not only by low quantity of new units, but also by the loss of existing units. Much of the nation's rental housing is old and deteriorating and requires rehabilitation to remain usable. Furthermore, over the past few decades, many multifamily affordable rental buildings have been converted into

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http://www.thefiscaltimes.com/Articles/2014/05/04/Housing-Recovery-Leaves-Millennials-Out-Cold.

30. Joel Kotkin, *The Changing Demographics of America*, SMITHSONIAN (Aug. 2010), http://www.smithsonianmag.com/40th-anniversary/the-changing-demographics-of-america-538284/?no-ist ("The U.S. minority population, currently 30 percent, is expected to exceed 50 percent before 2050. No other advanced, populous country will see such diversity.").

31. OUT OF REACH, *supra* note 3, at iii.

32. Miller, *supra* note 3; OUT OF REACH, *supra* note 3, at 4; U.S. CENSUS BUREAU, *supra* note 3.

33. OUT OF REACH, *supra* note 3, at iii.

34. OUT OF REACH, *supra* note 3, at 4; *see also* INGRID GOULD ELLEN & BRIAN KARFUNKEL, NYU FURMAN CTR. & CAPITAL ONE, RENTING IN AMERICA'S LARGEST METROPOLITAN AREAS (2016), http://furmancenter.org/files/NYU_Furman_Center_Capital_One_National_Affordable_Rental_Housing_Landscape_2016.pdf.

condominiums or market-rate rentals.[35] Since 2001, "[o]ver 12.8% of nation's supply of low-income housing, or 650,000 units, ha[s] been permanently lost from the stock of affordable rental housing . . . due to conversion . . . demolition, or obsolescence."[36]

Supply inadequacies in rental housing across most income levels have exacerbated housing affordability problems.[37] Already, for decades, the United States has been struggling with an acknowledged "crisis" in rental housing affordability.[38] The median asking rate for rentals is now higher than ever before, having nearly doubled in the past two decades.[39] "Unlike trends in earlier years, rents are rising nationwide, with many mid-sized metropolitan areas such as Denver, CO experiencing rents rising on par or faster than larger metropolitan areas such as San Francisco, CA."[40] Some of the fastest-growing rental markets in January 2015 were mid-sized cities, including Denver, CO; Kansas City,

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35. *Preserving Affordable Rental Housing: A Snapshot of Growing Need, Current Threats, and Innovative Solutions*, EVIDENCE MATTERS, Summer 2013, at 1, 4–5.

36. Affordable Rental Hous. A.C.T.I.O.N., *The Case for Expanding the Low-Income Housing Tax Credit*, AFFORDABLE HOUSING TAX CREDIT COALITION [hereinafter *Expanding LIHTC*], http://www.taxcreditcoalition.org/wp-content/uploads/2015/12/Revised-Need-Document.pdf (last visited Oct. 29, 2016).

37. Rental markets are tight, particularly at the low end, and new construction has not kept up with demand. The inadequacy of supply of rental units, particularly rental units that are affordable, has caused rents to skyrocket over the past several years, doubling the inflation rate and, in 2014, increasing at the fastest rate since 2008. *See* STATE OF THE NATION'S HOUSING 2015, *supra* note 2, at 2, 3 fig.3.

38. *See generally* JOHN I. GILDERBLOOM & RICHARD P. APPELBAUM, RETHINKING RENTAL HOUSING 3, 7–8 (1988).

39. U.S. CENSUS BUREAU, *supra* note 3, at 2.

40. OUT OF REACH, *supra* note 3, at 6; *see also* Kris Hudson, *Smaller Cities Led Way in Rent Increases in 2014*, WALL STREET J. (Jan. 5, 2015), http://www.wsj.com/articles/smaller-cities-led-way-in-rent-increases-in-2014-1420519636.

MO; Nashville, TN; and Portland, OR.[41] Rental rates for apartments "have risen nationally for 23 straight quarters."[42] On average, rents went up 15.2% between end of 2009 and mid-2014.[43] Rapidly rising rents outpace wages, which have become fairly stagnant for most Americans.[44] "Expanding and preserving the supply of quality, affordable housing is essential to any strategy to end homelessness, poverty, and economic inequality."[45]

Affordable units are nearly as costly to build as luxury units (same or similar construction and land acquisition costs), and they offer far less rental income return on investment. In some ways, affordable units are even costlier to develop in terms of regulatory compliance and land use approvals, and in terms of financeability.[46] As a result, even though the market has naturally responded to the growing demand for rental housing by starting to build more rental units, most newly constructed rental housing has been high-end, luxury apartments.[47] Building luxury rental units does increase supply, but only for the top echelon of renters, and higher rental rates for new luxury units actually "puts

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41. OUT OF REACH, *supra* note 3, at 6; Diana Olick, *High Rents Trickle Down to Smaller Cities*, CNBC (Feb. 20, 2015), http://www.cnbc.com/2015/02/19/high-rents-trickle-down-to-smaller-cities.html.

42. OUT OF REACH, *supra* note 3, at 4.

43. *Id.*; Robbie Whelan, *Apartment Rents Are Rising Steadily and Quickly*, WALL STREET J. (Oct. 1, 2014), www.wsj.com/articles/apartment-rents-are-rising-steadily-and-quickly-1412220601.

44. Lawrence Mishel, et al., *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), http://www.epi.org/publication/charting-wage-stagnation.

45. OUT OF REACH, *supra* note 3, at 1; *see also* ELLEN & KARFUNKEL, *supra* note 34.

46. OUT OF REACH, *supra* note 3, at 5; *see* STATE OF THE NATION'S HOUSING 2015, *supra* note 2, at 33. Difficulties in financing affordable housing development are increased when capital subsidies dry up because of government budgetary cuts. *See* OUT OF REACH, *supra* note 3, at 5.

47. PAYCHECK TO PAYCHECK, *supra* note 28; Laura Kusisto, *Rents Rise Faster for Midtier Apartments than Luxury Ones*, WALL STREET J. (Aug. 16, 2015), http://www.wsj.com/articles/rents-rise-faster-for-midtier-apartments-than-luxury-ones-1439769468.

upward pressure" on the rental rates of existing units.[48] "Analysts expect that each year over the next decade, an average of over 400,000 new renter households will enter the rental housing market and that the majority of these will be low-income."[49] Based on the current rate of additional affordable rental units and the growing need for rental housing, the gap between rental housing supply and demand will continue to grow, rents will continue to rise, and housing affordability will become increasingly out of reach.[50]

Along with income inequality, the number of low- and extremely low-income renters has grown significantly in recent years.[51] In 2013, close to one out of every four of the nation's renter households was an extremely low-income (ELI) household.[52] Those approximately 10.3 million ELI renter households struggle with various "economic challenges" including "lagging wages, inconsistent job growth, and the rising cost of living."[53] As the number of ELI renters has increased, the supply of rental housing affordable to these lowest-income renters has stagnated. Thus, "in 2013, for every 100 [ELI] renter households, there were just 31 affordable and available units."[54] We need 8.2 million more affordable rental homes for ELI households

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48. PAYCHECK TO PAYCHECK, *supra* note 28; Kusisto, *supra* note 47.

49. *Expanding LIHTC*, *supra* note 36.

50. *Id.*; *see* ELLEN & KARFUNKEL, *supra* note 34.

51. *See* URBAN LAND INST. & ENTERPRISE, BENDING THE COST CURVE: SOLUTIONS TO EXPAND THE SUPPLY OF AFFORDABLE RENTALS 8 (2014), http://uli.org/wp-content/uploads/ULI-Documents/BendingCostCurve-Solutions_2014_web.pdf (pointing out that "as of 2011 there were 12.1 million extremely low-income renters, an increase of 2.5 million since 2007").

52. OUT OF REACH, *supra* note 3, at 5–6; Nat'l Low Income Hous. Coal., *Affordable Housing is Nowhere to be Found for Millions*, HOUSING SPOTLIGHT, Mar. 2015, at 1, 2.

53. OUT OF REACH, *supra* note 3, at 1.

54. *Id.* at 5. An extremely low-income household is defined as a household earning less than 30% of the Area's Median Income. *Id.*

than we currently have.[55] The lack of affordable options means that ELI households pay an inordinately high percentage of their income on housing: 75% of them (7.8 million) spend more than 50% of income on housing.[56] On average, ELI households can afford to spend, at most, $509 in monthly rent.[57] To make matters worse, over the past decade, 13% of units that had rented for less than $400 per month have been removed from the housing stock.[58]

The affordable rental-housing crisis creates the greatest harm to those at the lowest income levels, but it affects renters across the spectrum. Today's market rents are "out of reach" for many workers, and "the number of renters spending more than they can afford on housing is unacceptably high and growing."[59] The total number of households spending more than 50% of their income and/or living in severely inadequate housing is up 49% since 2003.[60] This means that, "[a]n unprecedented 11 million renter households—more than one in four of all renters in the U.S.—spend more than half of their monthly income on rent."[61] There is not a single state in which a minimum wage full-time worker earns enough to afford a one-bedroom apartment at fair market rent.[62] A worker in America today needs to earn an hourly wage of $19.35 just to afford the

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55. Affordable Rental Hous. A.C.T.I.O.N., *Building Affordable Housing Communities Using the Low-Income Housing Tax Credit* 5 (Spring 2015), www.taxcreditcoalition.org/wp-content/uploads/2015/03/Housing-Credit-Ed-Deck-March-2015-ver-14-3.pdf; *see also* OUT OF REACH, *supra* note 3, at 7 (estimating the gap in extremely low-income housing at 7.1 million units).

56. OUT OF REACH, *supra* note 3, at 5–6; *see also* Nat'l Low Income Hous. Coal., *supra* note 52, at 2.

57. OUT OF REACH, *supra* note 3, at 6.

58. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 4.

59. HOUSING AMERICA'S FUTURE, *supra* note 4, at 7; *see also* OUT OF REACH, *supra* note 3, at 1–2.

60. *Expanding LIHTC*, *supra* note 36.

61. *Id.* (emphasis removed); *see also* OUT OF REACH, *supra* note 3, at iii.

62. OUT OF REACH, *supra* note 3, at 1.

average priced two-bedroom rental unit.[63] In thirteen states and the District of Columbia, the housing wage has risen above $20 per hour.[64]

The 53 million Millennials currently attempting to form households as they come of age find it increasingly difficult to afford housing because of a combination of a tight job market, flat or declining real wages, ballooning student loan debt, and increasingly high rental rates.[65] These Millennials, who currently make up about one third of the country's workforce, are far less likely to be able to afford homeownership than were members of prior generations when they were in their twenties.[66] The National Housing Conference and the Center for Housing Policy reported that Millennials "have difficulty finding housing they can afford," whether rental or owned.[67] The study found that not only can the majority of Millennials ill afford homeownership; most must pay in excess of 30% of their income as rent.[68] In some areas, the percentage of income necessarily devoted to rent can approach three times that affordability threshold. For example, in Los Angeles, a cashier would have to pay more than 75% of her paycheck "just for housing."[69] And "the gap

63. *Id.*

64. *Id.*

65. PAYCHECK TO PAYCHECK, *supra* note 28. This study defines "Millennials" as adults who were born after 1980. *See id.* at 2; *see also* Dickerson, *supra* note 25, at 436.

66. *See id.* at 2.

67. *Id.* at 1. The study defines affordable rentals as a rental rate that is no more than 30% of income and defines affordable home as a home that will require a mortgage payment of no more than 28% of income if a 10% down payment is paid at closing. *Id.* at 2. The study found that "[h]ouseholds that spend more than 30 percent of their income on housing are often forced to cut back on other essentials, such as food, healthcare or childcare, or to live in substandard housing or overcrowded conditions." *Id.* at 5; *see also* MAYA BRENNAN ET AL., NAT'L HOUS. CONFERENCE, THE IMPACTS OF AFFORDABLE HOUSING ON EDUCATION: A RESEARCH SUMMARY (2014), http://media.wix.com/ugd/19cfbe_c1919d4c2bdf40929852291a57e5246f.pdf.

68. *See generally* PAYCHECK TO PAYCHECK, *supra* note 28.

69. PAYCHECK TO PAYCHECK, *supra* note 28, at 3.

between what people earn and the price of decent housing continues to grow."[70]

Our affordable housing crisis is caused by a combination of factors, including "increased demand for rental units," government budget cuts, "years of stagnating income at the low end of the economic spectrum," and loss of supply from the rental housing stock.[71] Low-income renters face additional and more intense challenges as the affordability of housing decreases. When lower income renters spend more on housing, they may be unable to spend enough for food, healthcare, childcare, and other essentials. "In both rural and urban America, renters are affected by the affordable housing shortage, with 49% having a cost burden [paying more than 30% of income on housing], and 27% with a severe cost burden [paying more than 50% of income on housing]."[72]

To date, government responses to the affordable rental crisis have been insufficient. In 2008, the federal government established the National Housing Trust Fund (NHTF) "to address the need for additional affordable housing."[73] The NHTF purportedly created "a dedicated pool of funding" to be used to create additional units for "the lowest income, most vulnerable households" (90% for rental only and 75% of that amount for designated ELI households).[74] Although desperately needed, the NHTF was immediately rendered impotent when Congress suspended its funding in 2008.[75] The suspension of funding continued through 2014. Finally, starting January 1, 2015, Congress permitted funding to be

70. OUT OF REACH, *supra* note 3, at 1.

71. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 4.

72. OUT OF REACH, *supra* note 3, at 6 (explanatory information in brackets taken from Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55).

73. OUT OF REACH, *supra* note 3, at 7. "The [N]HTF was established under Title I of the Housing and Economic Recovery Act of 2008, Section 1131 (Public Law 110–289)." *Housing Trust Fund*, HUD EXCHANGE, https://www.hudexchange.info/programs/htf (last visited Dec. 7, 2016).

74. OUT OF REACH, *supra* note 3, at 7.

75. *See id.*

approved for the NHTF.[76] Over the course of calendar year 2015, $120 to $300 million was slated to be allocated to the NHTF, but even if that funding was made (and it is it not yet clear that it was), it would not be sufficient to cover the growing unmet need for housing assistance.[77] The National Low Income Housing Coalition has recently proposed modest changes to the mortgage interest tax deduction that would generate enough new revenue to take NHTF to scale.[78] To date, however, a reduction in the mortgage income tax deduction has proved to be a political non-starter.

Federal housing assistance programs help approximately five million households afford housing, but only one-fourth of eligible households receive housing assistance.[79] In 2013, "[t]here were an estimated 7.7 million unassisted very low-income renters with worst case housing needs."[80] Furthermore, supply of federally subsidized housing is shrinking because subsidy contracts are expiring.[81] Lack of sufficient federal housing assistance to cover needs means that there are long (and sometimes closed) waiting lists for public and assisted housing.[82] For example, "[a]fter the Chicago Housing Authority opened its waiting list for new residents for the first time in several years, 80,000 city residents applied for assistance in a single

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76. *Id.*

77. *Id*. The first NHTF dollars are now available. *National Housing Trust Fund*, NAT'L LOW INCOME HOUSING COALITION, http://nlihc.org/issues/nhtf (last visited Oct. 29, 2016). "During 2015, States will begin developing their [N]HTF Allocation Plans and solicit input from their constituents and submit these plans to HUD along with their 2016 Annual Acton [sic] Plans. HUD anticipates that grantees will receive their [N]HTF allocations by summer 2016." *Housing Trust Fund*, *supra* note 73.

78. OUT OF REACH, *supra* note 3, at 7.

79. HOUSING AMERICA'S FUTURE, *supra* note 4, at 10–11; *see also* OUT OF REACH, *supra* note 3, at iii (noting that "only 25 percent of eligible households receive housing assistance").

80. *Expanding LIHTC*, *supra* note 36.

81. OUT OF REACH, *supra* note 3, at 5.

82. *See* OUT OF REACH, *supra* note 3, at 5.

day."[83] In Boston, the Massachusetts Rental Voucher program issued only seventy-three new vouchers, for which over 10,000 city residents competed.[84] Because state allocating agencies annually receive more than twice as many applications for Housing Credit as is available, only one quarter of the households eligible for assistance receive it.[85]

Furthermore, most affordable rental housing options are geographically clustered in impoverished, majority-minority neighborhoods, further entrenching racial housing inequality and its related social injustices. The propensity for affordable housing to be located in minority neighborhoods is well known and was one of the cited justifications for the U.S. Department of Housing and Urban Development's (HUD) new Affirmatively Furthering Fair Housing Rule.[86] Concentrating affordable housing in high-poverty neighborhoods keeps populations segregated by income, and this leads to disparate neighborhood opportunities offered to the poor and to the rich. It also perpetuates *de facto* housing

83. *Id.*; *see also* Lolly Bowean, *Chicago Housing Authority Opens Wait Lists for Public Housing, Vouchers*, CHI. TRIB. (Oct. 27, 2014, 7:22 PM), http://www.chicagotribune.com/news/ct-cha-waiting-list-met-1028-20141027-story.html.

84. OUT OF REACH, *supra* note 3, at 5; *see also* Katie Johnston, *Demand Soars for Affordable Housing in Boston Area*, BOS. GLOBE (Nov. 28, 2014), https://www.bostonglobe.com/business/2014/11/28/demand-for-affordable-housing-soars/hCb4RSkLTbpqdMJR1eCYTI/story.html.

85. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 5.

86. *See generally An Overview of HUD's Proposed Affirmatively Furthering Fair Housing Rule*, FAIR HOUSING COUNCIL OF OR., http://fhco.org/learning-resources/downloads/category/7-affh (last visited Oct. 7, 2016). Debby Goldberg, Vice President of the National Fair Housing Alliance, explained that, "[w]e have a history of putting affordable housing in poor communities." Tim Devaney, *Obama Making Bid to Diversify Wealthy Neighborhoods*, HILL (June 11, 2015, 6:00 AM), http://thehill.com/regulation/244620-obamas-bid-to-diversify-wealthy-neighborhoods. The Brookings Institute, nearly a decade earlier, also highlighted the problem that "a substantial share of the affordable rental stock is concentrated in distressed, high-poverty neighborhoods." Bruce Katz & Margery Austin Turner, *Rethinking U.S. Rental Housing Policy: Build on State & Local Innovations*, BROOKINGS INSTITUTION, https://www.brookings.edu/wp-content/uploads/2016/06/PB_Housing_Katz.pdf (last visited Oct. 29, 2016).

segregation by race. Nevertheless, there has historically been tension between fair housing advocates arguing for inclusion and affordable housing advocates claiming that the paramount concern is creating more affordable housing units, even if these are located in low-income neighborhoods.[87] Finding a way to create a greater quantity of affordable housing options located within lower-poverty neighborhoods is the only way to address both rental affordability and neighborhood segregation housing concerns.

II. HOUSING POLICY AND THE OWNER/RENTER DIVIDE

A defensible housing policy must prioritize support of affordable rentals at least as much as homeownership. There are compelling fairness and stability problems in a housing system that forces people to choose between affordable housing and quality neighborhoods with accessible employment options and decent quality education.[88] To achieve an integrated supply of rental homes at all income levels and in all locations, government policies and priorities must shift.

Historically, and increasingly in the past few decades, our society and government policies have deliberately rewarded and promoted homeownership as the preferable housing choice, justifying subsidies by claiming that homeownership grows individual well-being and achieves

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87. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1753 (2005) (explaining "the deep legal and philosophical contradiction in the United States between civil rights guarantees—particularly the duty to affirmatively further fair housing—and state and federal low-income housing policy" and arguing that fair housing duty should take priority before other policy considerations); *see also* John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. RICH. L. REV. 1071, 1137 (2015) (advocating for equality and utilization of the "bundle of resources approach" to achieve this end).

88. HOUSING AMERICA'S FUTURE, *supra* note 4, at 10.

broader civic goals.[89] Property owners traditionally have been favored over renters in a variety of contexts, including historic property requirements for voting and holding public office, past and present tax policies specifically benefitting owners but not renters, and existing local land use policies that limit access of renters to high-opportunity neighborhoods.[90] The government's policy preference for homeownership reflects the "ideology of property" that justifies preferential treatment of owners, over mere occupiers, based on a view that owners are better citizens and therefore more deserving.[91] Until the Foreclosure Crisis, the vast majority of economic and social science research supported this centerpiece of U.S. housing policy, namely that encouraging homeownership is a proxy for and a means to achieve a wide variety of positive social outcomes, "including household wealth, savings and investment behavior, mobility, labor force participation, urban spatial structure, residential segregation, home maintenance, political and social activities, health, self-esteem, education and other children-related outcomes."[92] The research did not, however, adequately justify treating homeownership as the correct, necessary, or only means to these ends.[93]

The government promotes homeownership in both direct and subtle ways. The government-created secondary residential mortgage market is one of the biggest policy-driven contributors to increased homeownership in America. The government-sponsored secondary mortgage market increases the supply of residential mortgage capital and decreases the cost of residential mortgage capital, allowing

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89. *See* APGAR, *supra* note 5, at 4.

90. *Id.* at 16.

91. *See* Donald A. Krueckeberg, *The Grapes of Rent: A History of Renting in a Country of Owners*, 10 HOUSING POL'Y DEBATE 9, 9–10 (1999); *see generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–94 (1985).

92. APGAR, *supra* note 5, at 4.

93. *See id.* at 37–38.

more people to leverage the purchase of a home. The National Housing Act of 1934 led to the creation of the Federal Housing Administration (FHA) and the Federal National Mortgage Association (now officially known as "Fannie Mae" or just "Fannie").[94] By 1970, Fannie and its sibling entity, the Federal Home Loan Mortgage Corporation ("Freddie Mac" or just "Freddie") developed into privately funded, publicly regulated, "government sponsored enterprises" (GSEs).[95] The GSEs were charged with promoting housing options for Americans, and they did this by purchasing qualifying residential mortgage loans to pool and securitize in order to create mortgage capital market liquidity. The GSEs also provide capital support for multifamily housing projects.[96] The GSEs have been most active and visible in their homeownership-promotion role, and over the course of a couple decades, the "robust secondary market for mortgages" which they created "markedly changed the nature of the U.S. residential

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94. Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (1970). For details on the structure and purposes of Fannie Mae and Freddie Mac, see Robert Van Order, *Understanding Fannie and Freddie*, RICHARD'S REAL EST. & URB. ECON. BLOG (July 31, 2008), http://real-estate-and-urban.blogspot.com/2008/07/robert-van-order-on-fannie-and-freddie.html.

95. Van Order, *supra* note 94; Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U.L. REV. 1489 (2011) [hereinafter Boyack, *Laudable Goals*].

> Previously, in 1968, Fannie Mae had been split into a "private" corporation (Fannie Mae) and a publicly financed institution with explicit government guaranty of repayment of securities (Government National Mortgage Association or Ginnie Mae). Ginnie Mae bought and securitized mortgages which were made to government employees or veterans (such mortgages also being guaranteed by the government). In addition to Fannie Mae and Freddie Mac, there are twelve Federal Home Loan Banks (the FHLBs, sometimes called the "mini-GSEs"). These banks perform similar functions as Fannie Mae and Freddie Mac (providing funds to originating lending institutions).

Id. at 1495 n.19 (citations omitted).

96. *See infra* Section III.B.

mortgage system and increased market liquidity and capital available for home financing."[97]

Federal capital support for mortgage lending, first through various government programs such as FHA mortgage insurance and the GI Bill, and then also through the activities of the GSEs, has been a critical contributing factor in growing homeownership in the United States,[98] although recently the public cost and benefit of maintaining the GSEs has been intensely debated.[99] The GSEs' secondary market purchases were funded by private capital, and their salutatory effects in the market were intended to be tax and budget-neutral, but because of the government's implicit (and later explicit) guaranty of Fannie and Freddie solvency, private profit in the boom times ended up being funded through socialized losses (taxpayer bailout) when the market

97. Boyack, *Laudable Goals*, *supra* note 95, at 1495–508.

98. See *id.* at 1499; U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES: HOMEOWNERSHIP (2011), http://www.census.gov/hhes/www/housing/census/historic/owner.html. A significant portion of homeownership increase from the 1940s to the 1960s was due to the GI Bill and veterans' administration loans, offered to soldiers returning from World War II and, later, Korea and Vietnam. *See, e.g.*, Daniel K. Fetter, *How Do Mortgage Subsidies Affect Home Ownership? Evidence from the Mid-Century GI Bills*, 5 AM. ECON. J.: ECON. POL'Y 111 (2013). The GSEs had greater impacts in the 1970s through today.

99. *See* Boyack, *Laudable Goals*, *supra* note 95, at 1527–31. In terms of both market share and actual dollars, GSE securitized debt is huge. In 2006, the GSEs held at least $4.3 trillion in mortgage debt, according to James Lockhart, Director of the regulatory oversight agency OFHEO. *Hearing Before the Fin. Crisis Inquiry Comm'n*, 111th Cong. 1 (2010) (statement of James Lockhart, Director, Federal Housing Finance Agency) [hereinafter James Lockhart Statement], https://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0409-Lockhart.pdf. Professor Anthony Sanders of George Mason University and Member of Mercatus Center's Financial Markets Working Group highlighted that the combined debt load for Fannie Mae, Freddie Mac, and the Federal Home Loan Bank stood at $8 trillion in 2010. *See Housing Finance—What Should the New System Be Able to Do? Part I—Government and Stakeholder Perspectives: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. (2010) (statement of Anthony B. Sanders, Professor of Finance, George Mason University), http://mercatus.org/video/housing-finance-reform.

crashed.[100] In the wake of the Foreclosure Crisis, policy debates raged about the future of the GSEs.[101] The issue has not yet been resolved.

Saving Fannie and Freddie was critical to salvaging the U.S. economy and protecting American homeowners and renters alike.[102] After the Foreclosure Crisis, private mortgage capital dried up, and GSE mortgage capital funds served as the essential lifeblood of the mortgage market. The GSEs, together with the FHA, have funded or subsidized funding for more than 90% of single-family residential mortgage loans in the years since the Crisis.[103] It was the existence of government-supported mortgage funding that helped homeownership in this country to increase about

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100. *See* Boyack, *Laudable Goals*, *supra* note 95, at 1518–27. "Instead of public support paying for a public good (increased market liquidity), taxpayer funds ended up being allocated to prop up individual market players." *Id.* at 1520; *see also Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs: Hearing Before H. Comm. on Fin. Servs.*, 110th Cong. (2008) (statement of Herbert M. Allison, President and CEO, Fannie Mae) (testifying on the GSE's post-bailout goals); Robert Van Order, *Privatization Won't Reduce Risk*, N.Y. TIMES (March 8, 2011, 2:17 PM), http://www.nytimes.com/roomfordebate/2011/03/07/should-fannie-and-freddie-be-disssolved/privatization-wont-reduce-risk ("That is the paradox of guarantees. They produce incentives to take on too much risk, as they did with Fannie and Freddie after 2004 and with the savings and loans in the 1980s, but they also limit systemic risk and panic. It's hard to have one without the other.").

101. *See* Boyack, *Laudable Goals*, *supra* note 95, at 1527–31.

102. *See id.* at 1521–27. "Rescuing Fannie Mae and Freddie Mac in 2008 was necessary to keep the residential mortgage market machinery from grinding to a halt and to mitigate the impact of the crash on homeowners and homebuyers." *Id.* at 1526. *But compare* Paul Krugman, *Fannie, Freddie, and You*, N.Y. TIMES (July 14, 2008), http://www.nytimes.com/2008/07/14/opinion/14krugman.html (arguing that Fannie and Freddie were not significantly to blame for the foreclosure crisis and the subsequent GSE bailout), *with* Bill Mann et al., *The People Responsible for Fannie Mae and Freddie Mac*, MOTLEY FOOL (Sept. 10, 2008, 12:00 AM), http://www.fool.com/investing/dividends-income/2008/09/10/the-people-responsible-for-fannie-mae-and-freddie-.aspx (claiming that Fannie and Freddie were major contributors to the "widespread gross financial misconduct" that led to the crisis).

103. HOUSING AMERICA'S FUTURE, *supra* note 4, at 8.

twenty-three percentage points from 1940–2000.[104] And it was the existence of government-supported mortgage funding that allowed the purchase and sale of residential real estate to continue in the aftermath of the 2008 Foreclosure Crisis.

Another key, and likely more quantifiable, way that the government encourages homeownership is through tax subsidies. Homeowners enjoy a variety of tax benefits, including the mortgage interest deduction. The mortgage interest tax deduction represents a federal subsidy of homeownership costs, to the tune of approximately $80 billion a year.[105] If homeownership were less central to federal housing policy, then savings from reducing this huge tax subsidy could be applied towards growing and diversifying affordable rental housing.[106] For example, the National Low Income Housing Coalition pointed out that even a small change to the mortgage interest tax deduction would free up enough revenue to fully fund the heretofore resource-starved National Housing Trust Fund.[107]

Making homeownership the primary housing policy priority in lieu of ensuring the adequacy of rental housing has, in several ways, imposed huge costs on the country. Public funds that could otherwise be applied to reduce

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104. *See supra* note 98 and accompanying text; *Historical Census of Housing Tables: Homeownership*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/housing/census/historic/owner.html (last visited Oct. 30, 2016).

105. The Joint Committee on Taxation estimated that the cost of the mortgage interest tax deduction in 2016 would represent a $79.2 billion tax expenditure in 2016. STAFF OF JOINT COMM. ON TAXATION, 113TH CONG., REP. NO. JCS-1-13, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, at 33 (Comm. Print 2013); *see also* Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction Is Ripe for Reform*, CTR. ON BUDGET & POL'Y PRIORITIES (June 25, 2013), http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform.

106. "A portion of any revenue generated from changes in tax subsidies for homeownership should be devoted to expanding support for rental housing programs for low-income populations in need of affordable housing." HOUSING AMERICA'S FUTURE, *supra* note 4, at 12.

107. *MID Reform*, NAT'L LOW INCOME HOUSING COALITION, http://nlihc.org/unitedforhomes/proposal (last visited Oct. 22, 2016).

poverty and to help the most financially and socially vulnerable segments of society have instead been allocated to upper-middle income families and have been used to create incentives for homeownership even in particular personal situations where homeownership did not make financial sense. Back in 2004, William Apgar of Harvard's Joint Center for Economic Studies predicted that homeownership incentives would eventually have an adverse effect on the most vulnerable segments of the population.

As William Apgar notes:

> When families take on debt that they are unable to repay, homeownership does not build wealth, but rather diverts scarce resources away from meeting other pressing needs. In the worst case scenario, lower-income homeowners may become trapped in declining neighborhoods with little access to employment, good quality schools or social services and equally limited potential for price appreciation. In these situations, all too often the dream of homeownership becomes the nightmare of a financially devastating foreclosure.[108]

This nightmare has indeed come true for many low-income and minority Americans who became homebuyers during the housing boom. Housing policies need to adjust to reflect the lessons that were taught so compellingly in 2007 and 2008.

Furthermore, compelling societal goals justify a recalibration of policy aims toward creating "access to decent and affordable housing" in a suitable living environment for all Americans.[109] Quality housing—be it rental or owner-occupied—is a more justifiable policy aim than universal promotion of homeownership that not only excludes an

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108. APGAR, *supra* note 5, at 6.

109. *Id.* at 1, 4–5. "By overstating the potential benefits of homeownership, today's policy makers risk diverting resources away from more effective means of addressing many of the most critical problems that continue to confront low-income and low-wealth households." *Id.* at 4.

increasingly large segment of the population, but also increases the likelihood of adverse economic outcomes for many vulnerable homebuyers.[110]

III. PUBLIC STRUCTURES TO ENCOURAGE PRIVATE INVESTMENT RENTAL HOUSING

It will take money to increase the supply of rental housing and ensure that adequate rental housing remains affordable to all segments of society. As demand for rental housing increases, of course, market forces encourages the growth of rental housing supply. Investors are abundantly aware of today's increasing demand for rental housing, and savvy market players are already making and taking creative efforts to share in profits from this growing sector. Private developers have been creating luxury rental projects, and private equity has been pouring into Wall Street-created investment pools backed by single-family homes intended for rental.[111] The forces of supply and demand still work, but there are barriers to a purely market answer to the affordable housing crisis.

One barrier to a private, market resolution is that the cost of new construction and rehabilitation outweighs rents that the lowest-income Americans are able to pay.[112] One way to engage more private investment in affordable housing is to drive down associated costs, such as the cost of zoning and other regulatory approvals.[113] Another way to engage more private investment is to use tax credits and other

110. APGAR, *supra* note 5, at 5 (writing in 2004 that "[t]oday, many low-wealth and low-income families are being "pushed" into homeownership, not necessarily because they fully appreciate the implications of their choices, but because they perceive (or rather hope) that homeownership in and of itself will help them achieve a better life"). Apgar also accurately foretells that for many low-income households, the choice to become a homeowner "is a risky and potentially costly mistake." *Id.* at 6.

111. *See infra* Section III.B.

112. *See* Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 12–13.

113. *See* APGAR, *supra* note 5, at 27–29.

government-structured or sponsored financings to increase available equity capital and reduce the cost of debt.[114] The government also can (and does) intervene to fund the gap between what people can pay and what landlords must receive as rent.[115] This Article focuses on government efforts to grow the supply of affordable housing rather than on the government's demand-side housing assistance such as tenant-based and project-based housing vouchers.

Although most government-enabled funding for rental housing has been applied in the context of multifamily rentals, recently, private capital has targeted the acquisition, development, and rental of scattered single-family sites—perhaps because demand for this particular housing type has been increasing the most rapidly in recent years.[116] Increases in private investment in the rental sector, however, has done little to lower rental rates because (a) rental supply has not adequately increased to meet ballooning demand, and (b) private investment in rental housing is (understandably) clustered at the highest end of the market. There remains a very real need for active government involvement in rental housing to channel

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114. Streamlining applicable affordable housing program requirements can, and should, be prioritized to reduce regulatory compliance costs so that the programs can maximize funding allocation to actual creation of affordable housing. *See infra* Section II.A.

115. Rental prices are constrained by people's income. Already, a significant percentage of households in America are spending so much on housing that there is very little left for food, healthcare, and other essentials. *See* OUT OF REACH, *supra* note 3, at 6. If incomes are not going to rise to allow people to pay higher prices for rentals, then housing assistance payments must be available so that lower-income renters can afford decent shelter.

116. *See* Ryan Kurth, *Single-Family Housing—The Fastest Growing Component of the Rental Market*, 2 FANNIE MAE DATA NOTE 2 (March 2012), http://www.fanniemae.com/resources/file/research/datanotes/pdf/data-note-0312.pdf ("From 2005 to 2010, single-family units as a share of renter-occupied stock grew from 30.8 percent to 33.5 percent, which was the largest increase among all rental property types."); *see also* Brenton Hayden, *Who is the Modern Day Tenant? Census Bureau Has New Data*, BIGGER POCKETS, https://www.biggerpockets.com/renewsblog/2013/01/12/modern-day-tenant (last updated Nov. 14, 2014).

private investment into growing the supply of affordable housing. In addition, thoughtful government involvement can control the locations and rental parameters of affordable housing options in a socially positive way.

Current federal government programs that help create and preserve affordable rental housing supply include the Low Income Housing Tax Credit (LIHTC),[117] the HOME Investment Partnerships Program,[118] and Community Development Block Grants (CDBGs).[119] Property-based Section 8 rental assistance and Housing Choice Vouchers impact supply of affordable housing, albeit in a different, less direct, way.[120] Section 8 assistance takes the form of either project-based vouchers, used to pay landlords the gap between affordable rents and a landlord's necessary return on investment, as well as Housing Choice Vouchers that tenants can use to fund the shortfall between rents they can pay and rents that landlords require. Over 5 million people in 2.2 million low-income families use housing assistance vouchers.[121] These programs are valuable and likely should be expanded to better incentivize private capital investment in affordable housing, but they contribute to rental price

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117. *Low Income Housing Tax Credit*, U.S. DEP'T HOUSING & URB. DEV., https://www.huduser.gov/portal/datasets/lihtc.html (last visited Oct. 22, 2016).

118. *HOME Investment Partnership Program*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home (last visited Oct. 22, 2016).

119. *Community Development Block Grant Program—CDBG*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Oct. 22, 2016).

120. *See Policy Basics: Section 8 Project-Based Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/research/housing/policy-basics-section-8-project-based-rental-assistance (last updated June 1, 2015); *Project Based Section 8 Rental Assistance*, NAT'L COUNCIL ST. HOUSING AGENCIES, https://www.ncsha.org/advocacy-issues/project-based-section-8-rental-assistance (last visited Dec. 7, 2016); *Housing Choice Vouchers*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Oct. 22, 2016).

121. *Policy Basics: Housing Choice Vouchers Program*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/research/housing/policy-basics-the-housing-choice-voucher-program (last updated Sept. 29, 2015).

increases or, at the very least, do not exert a downward pressure on prices the way that increasing the supply would. Therefore, it is critical to provide more government tax credit incentives and gap funding for affordable housing developments that will grow the housing supply. Government efforts to grow affordable housing supply through tax credits and gap funding is discussed in Section III.A.

In addition to addressing the need to expand current government efforts to grow affordable housing supply, Section III.B explains why Fannie Mae and Freddie Mac (the GSEs) should expand their role with respect to investment in affordable housing throughout the country, particularly by re-defining rental projects to which their funding could be allocated, looking beyond large, multi-family buildings. The GSEs could possibly expand capital availability for rental housing development by creating more variety of government-sourced or pooled debt initiatives, such as asset-backed securitization structures for scattered site rentals. These structures could marshal widespread investment support for affordable rental housing, much as forward-looking players in the private sector have begun to do for market and above-market scattered site rentals. If properly designed and managed, securitization of rental housing mortgages could better attract private investment funds and apply these to grow affordable housing. Involvement of the GSEs, furthermore, could help ensure that rental housing is produced and maintained for all income levels, and that a wide variety of rental options are available in all neighborhoods, including neighborhoods that are "high opportunity" locations.

A. *Tax Credits and Gap Funding for Affordable Housing Development*

Developing real estate is expensive. The costs associated with real estate development include acquisition of land, construction of improvements, and the variety of regulatory compliance/permitting involved at all stages of development. Renting at below-market rates reduces an owner's ability to recoup these costs. One study estimated that land development costs would have to be reduced by 28% to make it profitable for the private sector to create affordable housing.[122] Incomes cannot stretch to allow lower-income individuals to pay much more for housing, and landlords cannot make a profit by charging much less. Because rental rates are necessarily constrained by incomes, the government must step into the gap to help fund the creation of affordable rental housing so that lower rents can be charged. The two primary methods that the government currently employs to increase and subsidize private investment in affordable housing are tax credits and gap funding. If employed correctly, the combination of tax incentives and gap funding can make private investment in affordable rental projects profitable.

The LIHTC uses tax policy to encourage the production of affordable rentals.[123] The LIHTC was created by the Tax Reform Act of 1986 and gives "[s]tate and local LIHTC-allocating agencies the equivalent of nearly $8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households."[124] States receive low-income housing tax credits equivalent to $2.35 per person (in 2016), to be distributed in accordance with the state's housing finance agency's tax credit program.[125] The high demand for the limited number of available credits and the shortage of affordable housing units likely justifies

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122. *See* Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 6.

123. *See About the Low-Income Housing Program*, ENTERPRISE, http://www.enterprisecommunity.com/financing-and-development/low-income-housing-tax-credits/about-lihtc (last visited Oct. 22, 2016).

124. *Low Income Housing Tax Credit*, *supra* note 117.

125. OFFICE OF U.S. SENATOR MARIA CANTWELL, ADDRESSING THE CHALLENGES OF AFFORDABLE HOUSING & HOMELESSNESS: THE HOUSING TAX CREDIT 4 (2016) [hereinafter CANTWELL], https://www.cantwell.senate.gov/imo/media/doc/Senator%20Cantwell%20LIHTC%20Report.pdf.

doubling or even tripling the amount of tax credits available for low-income housing development.[126]

The LIHTC has leveraged nearly $100 billion in private investment capital, financing the development of almost 2.9 million affordable rental homes.[127] During each year from 1995 to 2014, an average of approximately 1420 projects and 107,000 rental units were brought into service because of incentives provided by the LIHTC.[128] Without the LIHTC virtually no affordable rental development would happen: it is a key financing source in almost every affordable rental project.[129]

The LIHTC provides tax credits to investors who build, lease, and maintain affordable housing units throughout a fifteen-year compliance period.[130] Housing qualifies as affordable housing for purposes of the LIHTC if rents are affordable (no more than 30% of income) and units are rented to persons who earn under 60% of the area's median income (AMI).[131] Generally speaking, most of the actual residents of LIHTC units earn even less than this threshold—nearly one-half are below 30% of the area's AMI.[132]

Market real estate developments are 60–90% debt financed, but majority-debt financing for affordable housing would be economical only if construction costs drastically fell.[133] Affordable housing development is typically only 10–

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126. State LIHTC agencies routinely receive applications at a rate double or triple the number of available allocations annually. *Id.*

127. *Id.* at 4–5.

128. *Low Income Housing Tax Credit*, *supra* note 117.

129. *See* Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 6, 11–13.

130. *About the Low-Income Housing Program*, *supra* note 123. To qualify, rental units must be self-contained (have their own kitchen and bath). JOE BIBER, CSH, FINANCING SUPPORTIVE HOUSING WITH TAX-EXEMPT BONDS AND 4% LOW-INCOME HOUSING TAX CREDITS 3 (2007), http://www.csh.org/wp-content/uploads/2012/01/Report_financing-withbondsand-litch_1012.pdf.

131. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 2.

132. *Id.* at 3.

133. *See id.* at 8–10.

30% hard debt financed.[134] The remainder of necessary development funds comes from equity investment and soft debt (gap funding through government programs, discussed *infra*).[135] The LIHTC creates an incentive for equity investment that acts as a substitute for debt.[136]

Even though the raw number of the LIHTC tax credits available did not decline in, during, and after the Financial Crisis, affordable housing development was periodically constrained during the years prior to 2016 by falling Low-Income Tax Credit rates.[137] In 1986, the Housing Credit rate was set at 9% for new construction and substantial rehabilitation, and at 4% for acquisition of affordable units, but these rates were not fixed, rather, they were to fluctuate according to a formula related to federal borrowing rates. The 4% credit is less competitive, but creates a smaller investment incentive.[138] The 9% LIHTC units are more commonly used for more expensive supportive housing (housing combined with services, for example for seniors), but 9% credits are more limited in number, and it is more competitive to obtain the 9% credits.[139] After the Foreclosure Crisis, low-income housing tax credit rates dipped to historic lows—what had been 9% fell to 7.5%, and what had been 4% dropped to 3.2%.[140] Decreasing rates meant 15–20% less housing credit equity became available to finance any given

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134. *Id.* at 9.

135. *Id.* at 10.

136. *Id.* at 9.

137. David Black et al., *Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks*, OFF. COMPTROLLER CURRENCY 21 n.69, 24, https://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf (last revised Apr. 2014).

138. Tax-exempt bonds frequently make up the difference in necessary equity for these projects. *See* BIBER, *supra* note 130, at 2, 5, 7–9.

139. *See id.* at 2; Black, *supra* note 137, at 10.

140. *See Low-Income Housing Tax Credit Rates*, AFFORDABLE RENTAL HOUS. A.C.T.I.O.N., https://static1.squarespace.com/static/566ee654bfe8736211c559eb/t/56b8b2c2d51cd40ee3924d2a/1454944963109/Housing+Credit+rate+handout.pdf (last visited Oct. 21, 2016).

project, making affordable housing both more expensive and less likely to be developed.[141] After several Congressional efforts that temporarily propped up Housing Credit rates,[142] Congress finally passed the Protecting Americans from Tax Hikes Act of 2015, making the 9% (and 4%) minimum LIHTC rates permanent.[143]

The permanent increase of credit rates to 9% (and 4%) was a significant way to ensure continued investment in affordable housing. An example can illustrate why. Imagine that a sample property with 88 units (22 units at 40% AMI, 34 units at 50% AMI, and 32 units at 60% AMI) costs $16.8 million to build, with $13.8 million of that cost qualifying for housing credit.[144] A 9% rate would bring in $1.24 million in annual credits to the project, creating incentives for $11.78 million in private investment (assuming the current rate of

141. *See id.*

142. In the Housing and Economic Recovery Act of 2008 (HERA), Congress established a minimum 9% rate and simplified state administration of the program. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3002(a)(2), 122 Stat. 2654, 2879 (2008). This 9% rate was extended through 2013 in the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 302, 126 Stat. 2313, 2328 (2013), and again in the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 112, 128 Stat. 4010, 4014 (2014); *see also* Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 11.

143. Protecting Americans from Tax Hike Act of 2015, Pub. L. 114-113, § 131, 129 Stat. 2242, 3040, 3055; *see also* Emily Cadik, *ACTION Campaign Applauds Congress for Making Permanent the Minimum 9 Percent Low-Income Housing Tax Credit Rate*, AFFORDABLE RENTAL HOUSING A.C.T.I.O.N. (Dec. 18, 2015), http://rentalhousingaction.org/blog/2016/1/23/action-campaign-applauds-congress-for-making-permanent-the-minimum-9-percent-low-income-housing-tax-credit-rate. The bipartisan legislation was introduced in the House (H.R. 2029) and was passed in both the House and Senate with amendments before being signed by President Obama; both the House and Senate Appropriations Committees published reports. *See H.R. 2029—Consolidated Appropriations Act, 2016*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2029/text (last visited Oct. 16, 2016); *see also* House Ways & Means Comm., Tax Reform Working Grp. on Real Estate, *Statement of the A Call to Invest in Our Neighborhoods (ACTION) Campaign for the Record*, AFFORDABLE RENTAL HOUS. A.C.T.I.O.N. (Apr. 9, 2013), http://waysandmeans.house.gov/UploadedFiles/ACTION_Campaign_WG_Comments.pdf.

144. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 10.

$0.95 tax credit price per credit dollar).[145] Holding everything else constant and merely dropping the housing credit rate to 7.47% (as the housing credit rate did in February 2015, for example), would reduce the amount of annual housing credits to the project to only $1.03 million, meaning that only $9.79 million of equity investment would be made available—a reduction of 17%.[146] This would reduce the housing credit value by $2 million, and that shortfall would have to be made up somewhere else (A smaller project? Fewer affordable units?).[147]

The Protecting Americans from Tax Hikes Act of 2015 stabilized the LIHTC rates, but even more could be done to improve effectiveness of the program. Because investors apply for tax credits at a rate of two to three times greater than the number of credits available, increasing the volume of available credits could easily grow affordable housing supply. Even just increasing available credits by 50% would allow 350,000–400,000 additional affordable units to become available over ten years.[148] Such an increase is justified. After all, Congress has not increased the volume of available credits for decades even though the population of renters has been growing at an increasing rate. In addition, because the government controls the program, it could use the tax credit as a vehicle to break up concentrations of poverty, perhaps by mandating that recipients locate LIHTC projects in better neighborhoods. Increasing the number of LIHTCs available and adding a location requirement could allow not only for an increasing quantity of affordable rental units to be

145. *Id.*

146. *Id.*

147. This example is taken from the tables and charts included in *Building Affordable Housing Communities using the Low-Income Housing Tax Credit*. *Id.* at 10.

148. *The ACTION Campaign Calls on Congress to Expand the Low-Income Housing Tax Credit*, AFFORDABLE RENTAL HOUSING A.C.T.I.O.N., https://static1.squarespace.com/static/566ee654bfe8736211c559eb/t/56fa94a92eeb8164e0b750f1/1459262634073/ACTION+Sign-On+Letter+to+Expand+the+Housing+Credit+-+Mar+2016+Final.pdf (last visited Oct. 21, 2016).

produced, but also could increase the number of affordable housing units located in better quality neighborhoods.[149] Increasing the employment of LIHTCs in high-opportunity neighborhoods would be a key way to increase neighborhood integration, because projects in higher-cost markets often require more financial support to be feasible than do projects in neighborhoods of concentrated poverty.[150] This integration component is a vital next step in affordable housing which must be made available in various high-opportunity neighborhoods to be sustainable and create more equitable outcomes.[151] De-concentration of LIHTC housing would lead to de-concentration of poverty and integration of minority households.[152]

The government could also expand the positive effect of the LIHTC by allowing credits to be used more flexibly, in integrated market/affordable developments, for example. The Brookings Institute suggested that the LIHTC could be used not only to promote development of more affordable housing units, but also to help create vibrant integrated "revitalizing communities" and "opportunity-rich communities."[153] Development flexibility could also be channeled to integrate affordable rental units in high-opportunity neighborhoods. For example, LIHTCs could also be made available for the acquisition, rehabilitation, and rental of scattered site single-family homes (following the recent Wall Street trend) and two to four unit small rental

149. *See An Overview of HUD's Proposed Affirmatively Furthering Fair Housing Rule*, *supra* note 86, at 2, 7, 10, 14; Devaney, *supra* note 86; Katz & Turner, *supra* note 86, at 2; Orfield, *supra* note 87, at 1753, 1789–91; *see also* Infranca, *supra* note 87, at 1137.

150. CANTWELL, *supra* note 125, at 4, 7. These concepts are endorsed in HOUSING AMERICA'S FUTURE, *supra* note 4, at 92, 99, 103.

151. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY & MOELIS INST. FOR AFFORDABLE HOUS. POLICY, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? 2–4, 7–8 (2012).

152. *See id.*

153. *See* Katz & Turner, *supra* note 86, at 11–12. "Revitalizing communities" referred to communities with "the broadest possible mix of incomes." *Id.* at 12.

operations, and it is simpler and more politically feasible to integrate single-family rental units in high-opportunity neighborhoods than it would be to build large multi-family rental buildings in those neighborhoods.[154] Senator Maria Cantwell, one of the authors of the 2015 Protecting Americans from Tax Hikes Act, recently introduced legislation that would "[e]xpand LIHTC allocation by 50 percent" and "[p]romote broader income mixing in LIHTC projects."[155] Senator Cantwell, also suggests that states should be given more flexibility "in financing projects targeting homeless individuals and extremely low-income families."[156]

To date, the LIHTC has not focused on this qualitative aspect of affordable housing and has stressed quantity over locality; however, broadening the LIHTC in these ways could increase the quantity of affordable housing available, and providing either more location-targeted requirements or, conversely, allowing states the flexibility to pursue fair housing goals through design and application of tax credits could increase the quality of such housing in terms of the ever-important location, location, location.[157]

Tax credits alone are usually not enough to encourage adequate private investment in affordable housing, particularly housing that is affordable to extremely low-income renters. There are several ways that the government supports additional financing to supplement the LIHTCs, including having Fannie or Freddie provide conventional

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154. *See* Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. (forthcoming 2016).

155. CANTWELL, *supra* note 125, at 6–7. This legislation is endorsed by the report, "Housing America's Future." HOUSING AMERICA'S FUTURE, *supra* note 4, at 11.

156. CANTWELL, *supra* note 125, at 7.

157. *See An Overview of HUD's Proposed Affirmatively Furthering Fair Housing Rule*, *supra* note 86, at 2, 7, 10, 14; Devany, *supra* note 86; Katz & Turner, *supra* note 86, at 2; Orfield, *supra* note 87, at 1753, 1789–91; *see also* Infranca, *supra* note 87, at 1137.

loans for multifamily projects, using federal programs to source soft/gap financing, and raising funds through the issuance of tax-exempt (or taxable) bonds. Federal gap financing is discussed below, and GSE finance is discussed in Section III.B. Bond financing is in some ways preferable to conventional financing under GSE programs, because GSE financing usually involves "shorter maximum terms to maturity, more restrictive amortization requirements, higher minimum debt-service coverage ratios and higher loan-to-value thresholds than are applicable to bond-funded loans."[158] Additional funding, whether through bonds or soft financing or even the GSE programs, may help make housing more accessible to extremely low-income tenants.

Tax-exempt bonds play an important role in financing about 40% of LIHTC developments.[159] Local bonds used with federal housing credits have financed the development of over 3 million affordable homes, and are particularly useful in funding higher-cost developments, such as supportive housing for seniors.[160] Tax-exempt bonds have a lower interest rate and come with tax credits,[161] but the federal government caps their availability.[162] Taxable bonds are

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158. JUSTIN COOPER, ORRICK, MULTIFAMILY RENTAL HOUSING: FINANCING WITH TAX-EXEMPT BONDS, 3 n.1 (2010), https://www.orrick.com/Insights/2010/06/Multifamily-Rental-Housing-Financing-With-Tax-Exempt-Bonds (follow "Download attachment" hyperlink).

159. *See* BIBER, *supra* note 130, at 2–3, 5; COOPER, *supra* note 158, at 28.

160. *See* MICHAEL A. SPOTTS, ENTERPRISE, GIVING DUE CREDIT: BALANCING PRIORITIES IN STATE LOW-INCOME HOUSING TAX CREDIT ALLOCATION POLICIES 4 (2016); BIBER, *supra* note 130.

161. "Because interest paid on tax-exempt debt is exempt from federal (and often state) income tax, investors require less interest than they would from taxable debt to produce the same after tax return." COOPER, *supra* note 158, at 3–4.

162. The "volume cap" for tax-exempt bonds imposed by the IRS Code in 2015 is the greater of $100 *per* state resident or $301,515,000. *IRS Publishes Housing Credit and Bond Caps for 2015*, NAT'L COUNCIL STATE HOUS. AGENCIES (Nov. 3, 2014), https://www.ncsha.org/blog/irs-publishes-housing-credit-and-bond-caps-2015. Volume cap figures are published by the IRS on an annual basis. *See id.* All eligible projects (housing, infrastructure, etc.) must compete for this financing. BIBER, *supra* note 130, at 3. Tax-exempt bond funding is also constrained by the

uncapped, but have higher interest rates and cannot be used together with tax credits.[163] Only local public (or perhaps quasi-public) agencies, such as the state Housing Finance Agency or city housing or redevelopment agencies, can issue tax-exempt bonds for multi-family rental housing.[164]

In addition to local bond funding, federal grant programs, such as the HOME Investment Partnerships and the CDBG Programs provide funding to supplement LIHTC-inspired equity investment in affordable housing developments. The HOME Program provides formula grants to participating jurisdictions for them to use (often in conjunction with local non-profits) in funding acquisition, building, and rehabilitation of affordable housing.[165] "HOME is the largest Federal block grant to state and local governments designed exclusively" for use in support of affordable housing.[166] Participating jurisdictions must provide twenty-five cents of value for each federal dollar used.[167] HOME grants could also be tailored to promote integration of affordable rental units in lower-poverty neighborhoods. Once again, this might work better if affordable housing development could think outside the (big) box of large apartment complexes and consider funding smaller 2–4 unit buildings and single-family rental options.

The CDBG program provides communities with development resources. Under this program, annual grants are allocated to larger cities to help in the development of "a suitable living environment" for low- and moderate-income

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"95/5 Requirement" that mandates at least 95% of bond proceeds be allocated to costs incurred after the bond issuance. *Id.* In addition, only 25% of bond proceeds can be allocated to acquisition costs. *Id.*

163. *See id*. at 2.

164. *Id*. at 3.

165. Some grants also may be used to provide direct rental assistance to low-income renters. *HOME Investment Partnership Program*, *supra* note 118.

166. *Id.*

167. *Id.*

households.[168] The CDBG works with the Neighborhood Stabilization Program, targeting the neighborhoods that were the "hardest hit" by the Foreclosure Crisis in order to rehabilitate homes and revitalize the neighborhood.[169] Metropolitan cities with at least 50,000 people and urban counties of 200,000 or more are entitled to funding under the CDBG program, and smaller non-entitlement localities may receive funds that have been allocated to states for distribution.[170] In order to obtain funding under these grants, the grantee must first develop a plan that provides for citizen participation in the community, with a particular emphasis on citizenship participation by low/moderate income residents in slum or blighted areas.[171] Traditionally, the CDBGs have been only allocated to blighted areas, but in order to create more integrated housing options, the program could be expanded to apply to affordable housing creation within non-blighted areas, especially in "neighborhoods of opportunity."

Although federal grants could (and should) do more to improve the quality of location for affordable housing developments that they support, arguably the biggest problem in gap funding by the government is that there simply is not enough of it. A decade ago, housing analysts called upon the government to expand the availability of gap funding and private equity capital incentives, indicating that it was critically important to expand the supply of affordable rental housing across the nation.[172] Unfortunately, during the past decade of economic recession, federal funding for housing affordability grants programs (and other housing assistance, such as voucher programs), was slashed rather than augmented. Instead of increasing grant funding in

168. *Community Development Block Grant Program—CDBG*, *supra* note 119.

169. *Id.*

170. *Id.*

171. *See id.*

172. *See* Katz & Turner, *supra* note 86, at 14.

response to increasing rental demand, grants and soft financing through the HOME and CDBG programs is growing even scarcer.[173] For example, funding for HOME Programs has been cut 44% since 2011.[174]

Today, gap funding is inadequate to keep up with growing demand for new units and necessary rehabilitation, let alone make up for the recent budget crisis years that caused the supply shortfall to worsen. Funding needs to be sufficient both to build new affordable rental units and maintain and renovate the numerous affordable housing units that are older and rapidly deteriorating.[175] For example, the Center for Budget and Policy Priorities estimates that $26 billion is immediately required to adequately rehabilitate and maintain existing public housing.[176] Proposed legislation, such as the Housing Opportunities Through Modernization Act of 2016, would try to address the supply shortfall and the dire and unmet need for affordable housing renovation by giving local agencies greater flexibility in the use of public funds.[177]

Another deficiency in current government tax credit and grant programs concerns the type of housing to which the programs apply. Affordable housing grant and tax credit programs typically subsidize larger properties and projects,

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173. Affordable Rental Hous. A.C.T.I.O.N., *supra* note 55, at 13.

174. *Id.*

175. *See* APGAR, *supra* note 5, at 3.

176. *See Bipartisan Housing Bill Would Cut Costs, Reduce Homelessness, and Improve Access to High-Opportunity Neighborhoods*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/sites/default/files/atoms/files/hotma-factsheet_-_final.pdf (last visited Nov. 15, 2016).

177. *Id.* The House of Representatives unanimously passed the Housing Opportunities Through Modernization Act (H.R. 3700) in February 2016. *Id.* If it passes the Senate and is signed into law, the Act will be the first major authorizing federal legislation affecting voucher and public housing programs since the Quality Housing and Work Responsibility Act in 1998. Will Fischer, *Housing Bill Unanimously Passed by House Would Build on Effectiveness of Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES http://www.cbpp.org/research/housing/housing-bill-unanimously-passed-by-house-would-build-on-effectiveness-of-rental (last revised Feb. 17, 2016).

not smaller ones.[178] It is challenging for owners of smaller rental properties to obtain adequate capital to maintain the units. This is one reason why scattered single-family rentals are being funded through the private market, even though multifamily housing projects are often funded with government participation and input. Again, a complete picture of the affordability conundrum for rental housing must acknowledge that it is not just a question of how many units are available, and how much rental charges will be, but also where the rental options are located and the housing type being offered for rent.

B. *Expanding the Rental Market Role of the GSEs*

Fannie Mae and Freddie Mac are famous for the pivotal role they have played in encouraging homeownership, but Fannie and Freddie also provide critical support for multifamily rental housing development.[179] The GSEs are the primary lender for multifamily housing developments. For example, in 2008, Fannie Mae and Freddie Mac provided funding for 84% of all mortgage loans secured by multifamily rental buildings.[180] In 2014, the GSEs provided over $57 billion of funding for multi-family loans, although this amount was well below the 2007 GSE multi-family funding amount of $67 billion.[181] In terms of market share, however, the GSE's once dominant position has recently fallen to just under 30% of all multi-family mortgage originations.[182]

GSE-funded mortgage loans to multifamily housing projects do not represent direct government aid—rather,

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178. APGAR, *supra* note 5, at 26.

179. Boyack, *Laudable Goals*, *supra* note 95, at 1491–93.

180. *See* Nick Timiraos, *Fannie, Freddie Woes Hurt Apartments*, WALL STREET J., Nov. 18, 2009, at C1; *Housing Finance Reform: The Multifamily Perspective*, NAT'L MULTI HOUSING COUNCIL [hereinafter NMHC PERSPECTIVE], http://content.aristotle.com/NAA/GSE_2011-07.pdf (last updated July 2011).

181. KARAN KAUL, URBAN INST., THE GSES' SHRINKING ROLE IN THE MULTIFAMILY MARKET 3 (2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000174-The-GSEs-Shrinking-Role-in-the-Multifamily-Market.pdf.

182. *Id.* at 4.

they are a government-structured channeling of private investment capital into certain investments, much in the same way as Fannie and Freddie channel capital into the single-family residential mortgage market by purchasing, pooling, and securitizing prime loans. The GSEs stabilize home mortgage capital, and have contributed to America's residential mortgage capital flows being, arguably, the most consistent in the world.[183] Fannie and Freddie play such a dominant role in residential mortgage financing that non-governmental mortgage finance providers, such as banks, pension plans, and life insurance companies, have historically focused on purely commercial projects rather than multifamily residential developments.[184] In the rental market, the GSEs play a less visible but still vitally important role. Fannie and Freddie attract and allocate investment to multifamily mortgage loans, contributing to the production of millions of units of market-rate rental housing.[185]

Fannie's and Freddie's homeownership promoting role came under fire during the Foreclosure Crisis in 2008 when the government placed both of the GSEs into conservatorship because of losses related to home mortgage loans. Post-Crisis proposals called for termination of the GSEs, but generally neglected to consider Fannie and Freddie's contribution to

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183. *See* NMHC PERSPECTIVE, *supra* note 180; Boyack, *Laudable Goals*, *supra* note 95, at 1492–93; Letter from Douglas M. Bibby, President, Nat'l Multi Housing Council, Douglas S. Culkin, President, Nat'l Apartment Ass'n & David S. Schless, President, Am. Seniors Housing Ass'n, to Hon. Timothy F. Geithner, Secretary, U.S. Dep't of the Treasury & Hon. Shaun Donovan, Secretary, U.S. Dep't of Hous. & Urban Dev. (July 21, 2010), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.170.8695&rep=rep1&type=pdf.

184. *See* CTR. FOR AM. PROGRESS, A RESPONSIBLE MARKET FOR RENTAL HOUSING FINANCE: ENVISIONING THE FUTURE OF THE U.S. SECONDARY MARKET FOR MULTIFAMILY RESIDENTIAL RENTAL MORTGAGES (2010) [hereinafter RENTAL HOUSING FINANCE], https://www.americanprogress.org/wp-content/uploads/issues/2010/10/pdf/multifamilyhousingreport.pdf.

185. NMHC PERSPECTIVE, *supra* note 180.

the multifamily rental market.[186] When concerns about inadvertent, adverse impacts to the rental market from winding up the GSEs did come up, government officials made assurances that winding down Fannie and Freddie would not necessarily mean the end of governmental capital support of multifamily rental development.[187] Everyone who recognized Fannie and Freddie's role in rental housing capitalization agreed that the loss of GSE support of multifamily rental capital would have been catastrophic.[188] Because the GSEs had not experienced losses in the multi-family sector, and because of the continuing critical need to encourage rental housing production, many industry experts remained confident that Fannie and Freddie would continue their role in providing capital to market-rate rental developments. For example, Richard Campo, CEO of Camden Properties Trust, stated "[t]he idea that the government is going to do something negative to affordable housing in this interim period . . . seems pretty far fetched."[189] In spite of Campo's assertion that government support of affordable rental housing was secure, however, government funding of affordable housing initiatives was gutted in the aftermath of

186. *See* Boyack, *Laudable Goals*, *supra* note 95, at 1495, 1506–07; s*ee, e.g.*, U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF HOUS. & URBAN DEV., REFORMING AMERICA'S HOUSING FINANCE MARKET: A REPORT TO CONGRESS 12 (2011) [hereinafter TREASURY/HUD REPORT], http://treasury.gov/initiatives/Documents/Reforming%20America's%20Housing%20Finance%20Market.pdf; Peter Lawrence, *Multifamily Finance: The Neglected Issue in the Fannie-Freddie Debate*, 2 J. TAX CREDITS 1, 1 (2011) ("[W]hat may get lost in this vigorous and consequential GSE debate is ensuring that a well-performing, highly liquid capital market for multifamily rental housing continues.").

187. *See* TREASURY/HUD REPORT, *supra* note 186, at 2.

188. *See id.* at 7. Had the GSEs not continued funding multifamily housing from 2008 to 2010, there would have been widespread foreclosures on performing apartment property loans as owners of these projects would have been unable to obtain capital to re-finance at maturity. *See generally* JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., MEETING MULTIFAMILY HOUSING FINANCE NEEDS DURING AND AFTER THE CREDIT CRISIS: A POLICY BRIEF 12–13 (2009) (warning that without loan purchases by Fannie Mae and Freddie Mac, "apartment transactions could come to a near standstill").

189. Timiraos, *supra* note 180 (alterations in original).

the Foreclosure Crisis and continues to suffer government budgetary shortfalls at every level today.[190]

Unlike federal aid programs that focus on significantly below-market housing that would be affordable to low- and extremely low-income renters, GSE support of multifamily development tends to grow the supply of rental units that are at-market or slightly below-market.[191] About 90% of the rental units financed through the GSE programs, however, have been affordable to families at or below median income.[192] The GSE lending and securitization models coupled with the low default rates for rental housing loans mean that the financing of such affordable units has not only been essentially tax and budget neutral to date, but has actually earned money for the government to use elsewhere.[193] Because of the federal deficit crisis, it is particularly helpful (and hopeful) to focus on efforts that increase the overall supply of rental housing without requiring a government subsidy,[194] and Fannie and Freddie

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190. *See supra* notes 140–143 and accompanying text.

191. This is by design: The GSE's multifamily rental finance role was envisioned to allocate private funds to provide housing to those who can afford to pay reasonable housing costs, freeing up governmental funds to provide subsidies to people who cannot. *See* Boyack, *Laudable Goals*, *supra* note 95, at 1506. "Fannie Mae and Freddie Mac developed expertise in profitably providing financing to the middle of the rental market, where housing is generally affordable to moderate-income families." TREASURY/HUD REPORT, *supra* note 186, at 20. The vast bulk of below-market housing costs, on the other hand, are provided through the FHA. *See* Anthony Pennington-Cross & Anthony M. Yezer, *The Federal Housing Administration in the New Millennium*, 11 J. HOUSING RES. 357 (2000).

192. *Fannie Mae, Freddie Mac & FHA: Taxpayer Exposure in the Housing Markets: Hearing Before the Comm. on the Budget H.R.*, 112th Cong. (2011).

193. "The multifamily portfolio has earned net revenues of $2 billion for the taxpayers since conservatorship." *Id.*

194. *See* RENTAL HOUSING FINANCE, *supra* note 184. Approximately 30 million of the 36.7 million rental units in America have not been subsidized by the federal government. *Id.* at 9; 2008 HARVARD BALANCING STUDY, *supra* note 10, at 12. Even so, the specter of un-affordability of housing hangs over rental housing as a whole, since renters spend a disproportionately higher share of their income to meet their housing needs. 2010 HARVARD HOUSING STUDY, *supra* note 10, at 27; *see also supra* Part I.

have been able to fund multifamily rental housing at little to no taxpayer cost, even during the Financial Crisis.[195]

Providing liquidity for market-rate multifamily rental mortgages may seem less related to housing affordability than direct aid to low-income tenants and their landlords, tax credits, and gap funding of low-income rental projects, but capital access does play a vital role in helping the housing market better respond to burgeoning rental demand nationwide. Increased flow of mortgage capital lowers the cost of producing rental units, and allows suppliers to respond more cost-effectively to housing consumers' demands. Lower costs and higher availability of capital for rental housing projects will help to naturally grow the supply of rentals, and increased supply will put downward pressure on prices, keeping market rents from getting too high. Because rental affordability is currently an issue for almost all renters—not only those at the lowest end of the income spectrum—this sort of market solution is a key aspect to solving the housing affordability puzzle.

Not only do the GSEs increase multifamily mortgage capital availability at little to no taxpayer cost on the front end, this is done with significantly less taxpayer risk on the back end because it is less likely that government funds will be expended in a bailout due to rental project mortgage defaults than due to owner-occupied mortgage defaults. To date, defaults in the multifamily rental sector have been extremely low; less than 1% of the GSE-guaranteed loans have defaulted.[196] One reason that the multifamily housing loan portfolios of the GSEs did not contribute to entity losses and taxpayer bailout even when home mortgage sectors were

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195. *See* RENTAL HOUSING FINANCE, *supra* note 184, at 10; *see also* Michael Stoler, *Fannie, Freddie, and the Multifamily Market*, N.Y. SUN (Sept. 18, 2008), http://www.nysun.com/real-estate/fannie-freddie-and-the-multifamily-market/86102 (explaining that the multifamily housing sector was "holding up the best" even at the height of the crisis, but that if the GSEs focused on their single family problems and ignored multi-family lending, that could change).

196. RENTAL HOUSING FINANCE, *supra* note 184, at 11–12; NMHC PERSPECTIVE, *supra* note 180.

plummeting is because multifamily rental projects remained well underwritten, even during the heyday of bad mortgages (2005–2007).[197] In addition, because a far lower percentage of multifamily loans are securitized (compared with securitized single-family home mortgages), a significant portion of multifamily loans remain in GSE portfolios, giving the companies more "skin in the game."[198] It is less necessary and more difficult to pool and securitize multifamily rental loans because they are individually bigger and more idiosyncratic than single-family residential mortgages.[199]

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197. One reason that rental properties in general have fared better during the housing crisis is that revenue-producing properties were usually subject to a different pricing methodology, namely stream-of-income method. Valuation based on the stream of income was linked to a less-manipulable variable, namely salary levels, and these provided some constraint in appraisals. The bubble did not grow as fast or as large in sectors where housing was priced according to the stream-of-income method, which meant the fundamentals upon which a loan was assessed and underwritten were more reliable and the loan less risky. For an in depth discussion of stream-of-income valuation and other more bubble-prone systems, see Andrea J. Boyack, *Lessons in Price Stability from the U.S. Real Estate Market Collapse*, 2010 MICH. ST. L. REV. 925, 932–36 (2010).

198. *See* INGRID GOULD ELLEN ET AL., IMPROVING U.S. HOUSING FINANCE THROUGH REFORM OF FANNIE MAE AND FREDDIE MAC: ASSESSING THE OPTIONS 6 (2010); NMHC PERSPECTIVE, *supra* note 180.

199. "Larger individual loans make the risk harder to spread through pooling (multifamily loan pools typically have fewer, larger mortgages), and lower uniformity of these transactions increases the costs of credit and collateral due diligence as well as the cost of pricing and underwriting the loans." Boyack, *Laudable Goals*, *supra* note 95, at 20. Commercial loans generally share these characteristics as well: they are larger, more idiosyncratic, and less uniform. In addition, there is no federal or quasi-federal agency guaranty for commercial loans, so all commercial mortgage lending operates outside the GSE sphere. This is why commercial lending lagged residential mortgage backed securitization both in terms of timing (starting later historically) and in terms of volume (lower amounts of CMBS). *See* Sophie Ahlswede & Tobias Just, *Commercial Real Estate Loans Facing Refinancing Risks: CMBS Only Part of a Growing Problem*, DEUTSCHE BANK RES. 7–9 (July 6, 2010), http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000259822.PDF. The only time CMBS volume represented significant market share was in the five to ten years prior to the housing crisis, suggesting it was fueled by over-speculation rather than stable investment capital choices. *See id.* at 8; *see also* John B. Levy, *CMBS Volume Hits Record High*, NAT'L REAL EST. INV. (Aug. 1, 2005), http://nreionline.com/commentary/cmbs-volume-hits-record-high. Global CMBS issuance hit its highest point ever in 2007 at a volume of $324 billion—five times the volume of 2000. Ahlswede & Just, *supra*, at 8. Then the CMBS market

Even though Fannie and Freddie have long played a key and cost-effective role in supporting affordable housing, their participation in the multifamily market has recently steeply decreased.[200] Some of this reduction was motivated, perhaps, by the Federal Housing Finance Agency (FHFA) Strategic Plan introduced in 2012 that mandated reduced volumes of lending in multiple sectors for both Fannie and Freddie, including lending in the multi-family market.[201] The Strategic Plan required each of Fannie and Freddie to cut their multifamily rental lending by at least 10%, supposedly in order to entice more private capital investment to support multifamily rental development.[202] In the wake of this regulatory mandated reduction, not only did multifamily mortgage volume fall by nearly 13%, but the aggregate loss of lending in three underserved segments of the rental market fell by much more—lending to projects involving subsidy-dependent targeted affordable multifamily housing, manufactured housing, and small multifamily projects suffered a combined reduction of 24% in 2013.[203] In 2014, the FHFA, which oversees the GSEs, took steps to exempt these underserved market segments from mandatory volume reductions for the GSEs; but nevertheless, the lending volume for these categories fell by another 15% that year.[204]

These recent reductions in the volume of GSE support of rental housing is rather alarming, especially considering the

plummeted over the following year to $25 billion in 2008—only about 10% of its value just the year before. *Id.* In 2008, however, CMBS volume fell dramatically. Al Yoon, *CMBS Volume Now Seen Plunging to Six-Year Low*, REUTERS (Apr. 3, 2008), http://www.reuters.com/article/mortgages-commercial-volume-idUSN0342726520080403; Jim Clayton, *P&Ls: Pricing, Liquidity and Leverage*, PREA Q., Winter 2009, at 46. Multifamily housing has not suffered from any such drop, however, since it has been—and is still—supported through GSE secondary market purchasing.

200. *See generally* KAUL, *supra* note 181.

201. *See id.* at 6–8.

202. *See id.* at 6.

203. *Id.*

204. *Id.* at 6–7.

increasing demand for rentals and the intensifying crisis in rental affordability.[205] Not only should the GSEs continue to play their critical role in providing capital liquidity to market multifamily rental projects, this role should be expanded. The volume of rental housing capital support must be augmented, not reduced, particularly in the context of affordable housing development.

In addition to robustly supporting multifamily rental development, Fannie and Freddie should lend to smaller rental projects as well. Under the FHA's definitions, "multifamily" means a structure with five or more residential units, and "single-family" lumps single-family homes in with duplexes and three- and four-unit dwellings.[206] GSE mortgage programs for rental projects focus almost exclusively on "multifamily" rentals. The "single-family" mortgages sponsored by the GSEs, on the other hand, usually require owner-occupancy. This means that there is virtually no GSE capital support for single-family rental homes, as well as rentals of units in two, three, or four-dwelling unit structures.

Single-family rentals, including one-dwelling-unit homes as well as two- to four-unit houses, make up 53% of all rental units in the United States, 22.6 million units of housing.[207] By grouping one- to four-unit buildings into "single family" wherein owner-occupancy is key, the GSEs have ignored half of the rental market. These rather short-sighted groupings of housing types therefore end up shutting many rental options out from public financing, which

205. *See, e.g.*, FREDDIE MAC, MULTIFAMILY OUTLOOK 2016: EXECUTIVE SUMMARY 1, 5 (2016) (explaining that "[d]emand for multifamily rental housing was higher than expected in 2015, absorbing much of the newly completed supply," and that "[t]he multifamily sector performed better than anticipated in 2015 despite the large flow of new completions to the market").

206. APGAR, *supra* note 5, at 27.

207. DAN MAGDER & LAURIE GOODMAN, URBAN INST., SINGLE FAMILY RENTALS: A NEW APPROACH TO AFFORDABLE HOUSING 2 (2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000423-Single-Family-Rentals-A-New-Approach-to-Affordable-Housing.pdf.

perhaps explains why Wall Street has found such fertile ground for investment in single-family rentals.[208] Even though private investment in housing is desirable, public funding permits more control of rental rates and location and may help achieve fair housing objectives at the same time as affordable housing needs are addressed.

There is no logical reason why GSE financing programs for rentals should not be expanded to cover smaller scattered site rental projects of one to four units.[209] In fact, the GSEs could even do much better with respect to financing five to fifty unit buildings.[210] Smaller multifamily rental developments traditionally have struggled with more limited financing (in both the public and private sectors) simply because secondary market resale and securitization of these middle-sized idiosyncratic mortgages are more challenging and expensive.[211] Nevertheless, these sorts of projects are incredibly important in order to have neighborhoods that combine owner-occupancy options with rental options of all types and for all income levels. GSE use of securitization to support rental housing could, therefore, be improved and expanded (even if it requires a partial federal subsidy to do so).[212]

Wall Street has seized upon this gap in federally sponsored funding, recently targeting smaller rental projects

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208. *See infra* notes 194–196 and accompanying text.

209. *See* APGAR, *supra* note 5, at 27; *see also* MAGDER & GOODMAN, *supra* note 207, at 2–4.

210. *See id.*

211. *See id.*; CHRISTOPHER E. HERBERT, ABT ASSOCS., AN ASSESSMENT OF THE AVAILABILITY AND COST OF FINANCING FOR SMALL MULTIFAMILY PROPERTIES (2001), http://abtassociates.com/reports/01-024.pdf.

212. Apgar suggests that affordable housing finance go beyond project-specific financing and more aggressively use capital markets to raise funds by aggregating, pooling, and syndicating mortgage capital (perhaps both equity & debt). *See* APGAR, *supra* note 5, at 8. Apgar notes that aggregating and securitization can create efficiencies, noting that affordable housing projects are high performing/low risk investments. *See id.*

as untapped sources for new real estate investments.[213] Analysts now predict a near trillion-dollar single-family rental securitization market by 2019.[214] From 2012 to 2014 alone, private equity firms and institutional investors invested nearly $20 billion in rental real estate, acquiring over 200,000 single-family homes (mostly in foreclosure sales) to serve as assets backing securitized debt pools sold to investors.[215] If this structure sounds eerily familiar, it is because it is similar to the private label mortgage-backed securitization that funneled capital into residential mortgage markets and drove up home purchase prices creating a housing bubble during the first several years of the twenty-first century. Of course, this bubble was followed by the devastating Foreclosure Crisis in 2007–2008. In both mortgage-backed securitization (MBS) and single-family rental (SFR) securitization, mortgage-backed debt obligations are sold off to investors as securities, and the equity investment capital is used to acquire additional mortgage interests. In 2014 and 2015, however, title to collateral real estate was held by a Wall Street firm's subsidiary company rather than by thousands of individual homeowners, and instead of tens of thousands of individual loans secured by individual mortgages, there is typically one huge loan to the company, secured by thousands of

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213. *See* HOMES FOR ALL, RENTING FROM WALL STREET: BLACKSTONE'S INVITATION HOMES IN LOS ANGELES AND RIVERSIDE 15 (July 2014) [hereinafter RENTING FROM WALL STREET], http://homesforall.org/wp-content/uploads/2014/07/LA-Riverside-Blackstone-Report-071514.pdf.

214. *See* Kerri Ann Panchuk, *Single-Family Rental Securitization Market Boasts near Trillion-Dollar Potential*, HOUSING WIRE (Nov. 1, 2013), http://www.housingwire.com/articles/27772-single-family-rental-%20 securitization-market-boasts-trillion-dollar-potential.

215. *See* RENTING FROM WALL STREET, *supra* note 213, at 9; Sarah Edelman et al., *When Wall Street Buys Main Street: The Implications of Single-Family Rental Bonds for Tenants and Housing Markets*, CTR. FOR AM. PROGRESS (Feb. 27, 2014), https://www.americanprogress.org/issues/economy/reports/2014/02/27/84750/when-wall-street-buys-main-street-2.

mortgages on the individual properties it owns and rents out.[216]

Although the structure of SFR securitization is basically the same as pre-crisis MBS, in theory, SFR securitization should be less risky (in some ways) because a diversified corporate entity, rather than a collection of individual owners, holds the title to the collateral, and because the properties' collateral value derives from a rental income stream, not from a predicted resale value and appreciation gains. SFR securities have proved popular in the short term. In just two years since their creation, these SFR securitizations, have attracted more than $13 billion in investment dollars.[217]

The trend of Wall Street investment in, and securitization of, scattered-site rental properties could be either troubling or encouraging (or, ironically, both). On the one hand, some commentators decry the transfer of ownership from individual homeowners to corporate entities because this could represent a parallel transfer of wealth from households to financial institutions. On the other hand, transfer of ownership from homeowners who lost their homes in foreclosure is already, in most cases, a foregone conclusion, resulting from the bad loans made during the housing boom. A good case could be made that institutional investment purchase of these homes at foreclosure created a neighborhood benefit, because the alternative may well have been that foreclosing mortgage lenders would have taken title to these properties and would have continued to hold them as vacant post-foreclosure inventory (REO properties). Multiple vacant REO properties in a neighborhood are

216. *See* Laurie Goodman, *Single-Family Securitized Financing: A Blueprint for the Future?*, URBAN INST. (Jan. 17, 2014), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412992-Single-Family-Securitized-Financing-A-Blueprint-for-the-Future-.pdf.

217. Brian Honea, *Single-Family Rental Securitizations Surpass $13 Billion in Issuance in Just Two Years*, DS NEWS (Oct. 21, 2015, 3:36 PM), http://www.dsnews.com/news/10-21-2015/single-family-rental-securitizations-surpass-13-billion-in-issuance-in-just-two-years.

devastating to the entire community, including the non-defaulting homeowners.[218] If Wall Street investment in foreclosed homes prevents that reality, perhaps it is the lesser of two evils.[219]

Wall Street's SFR sector is new and notable and raises intriguing possibilities (good and bad), but to date, institutional investment in scattered site rentals remains very limited—a mere 2% of the existing single-family stock.[220] Even though this housing type provides some of the most affordable rental options in the market, the vast majority of single-family rentals are financed without institutional or public support. This leads to the conclusion that if capital access were improved for this sector, such housing types could become even more affordable to renters. Currently, however, neither the LIHTC nor GSE multifamily loans are available and allocated to single-family rentals.[221]

The GSEs have an important role to play in the market, occupying a place in between purely private Wall Street real estate investment structures and publicly funded housing assistance, tax credits, and grants. If properly structured, the GSEs could seize more control of rental placement and rental rates in their financed projects, because the capital provider role will give the GSEs (and the FHFA) a means to exert oversight over landlords. At the same time, this oversight need not be purchased with taxpayer funds, because GSE financing structures do attract private

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218. *See* Boyack, *A New American Dream for Detroit*, *supra* note 154, at 26–27.

219. Industry analysts have already started to grapple with the question of whether SFR Securitizations are a laudable or dangerous financial and societal development. *Compare* MAGDER & GOODMAN, *supra* note 207, *with* Yves Smith, *Hidden Bomb in Single-Family Rental Securitizations: Trigger Risk*, NAKED CAPITALISM (Sept. 2, 2014), http://www.nakedcapitalism.com/2014/09/hidden-bomb-rental-securitizations-trigger-risk.html.

220. MAGDER & GOODMAN, *supra* note 207, at 3.

221. MAGDER & GOODMAN, *supra* note 207, at 5. HUD's 223f multifamily loans and loans under the Community Reinvestment Act are likewise unavailable to single-family rental developments. *Id.*

investment. The GSEs could therefore even further enlarge private sector funding of housing.

Fannie and Freddie's investment in rental project mortgages can also work to ensure diversity on two levels: sources of funding and location of rental housing. GSE involvement in securitization ensures that many types and sizes of lenders (including neighborhood and community banks, credit unions, etc.) can access the secondary mortgage market.[222] The only way that such smaller lenders can realistically compete with Wall Street investment firms is through partnering with the GSEs, much as they do in the realm of single-family mortgage lending. In addition, Fannie and Freddie could, and likely should, promote efforts to de-concentrate the location of rental housing and encourage a wide variety of types of rentals in every residential neighborhood. In this way, the GSEs could help not only to address the growing rental population and the housing affordability crisis, but also make inroads in de-segregating housing across America.

CONCLUSION

America's rental housing is inadequate in terms of location, quality, and affordability. Based on the current "sweeping changes" in the country's demographics and

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222. HOUSING AMERICA'S FUTURE, *supra* note 4, at 8–9, (calling for greater private sector funding of housing and calling "the dominant position currently held by the government" capital "unsustainable"). The report advocates for "greater participation by risk-bearing private capital" and a "greater diversity of funding sources." *Id.* Interestingly, this report does not recommend an expanded securitization role for the GSEs, and in fact, advocates winding down Fannie and Freddie and replacing them with a wholly-owned government corporation that would provide a government guarantee backstop for owner and renter markets. *See id.* The report suggests that all mortgage-backed securitization should be privatized ("originators, issuers of securities, credit enhancers, and mortgage servicers—should be private-sector entities fully at risk for their own finances"), *id.* at 9, but this suggestion ignores the comparative disadvantage that smaller lenders (for both homeowner purchasers and rental projects) would have in comparison to Wall Street. Centralizing securitization in Wall Street in itself creates problems.

economy, these inadequacies are likely to grow.[223] Federal housing policies do not sufficiently consider and address the growing unmet needs of almost half of the nation's residents who rent, rather than own, their homes. This must change. Although homeownership remains an individual goal for many Americans, from a social policy standpoint, it is more pressing that the government allocate its primary efforts and funds toward improving universal adequacy of rental housing in terms of its quality, location, and affordability.

The federal government already plays a critical role in subsidizing the development of affordable rental housing, but these efforts would have to be quadrupled just in order to cover existing needs. The significant shortfall in affordable housing availability justifies diverting taxpayer support of homeownership—for example, from the $80 billion mortgage interest deduction subsidy—toward an expanded number of low-income housing tax credits and gap funding (as well as housing assistance vouchers). Expansion of federal affordable housing funding should simultaneously strive to de-concentrate poverty and increase neighborhood diversity.

Government support of rental housing can also occur through less expensive, more creative, structuring efforts, however, and there is no budgetary reason not to expand such efforts. Fannie Mae and Freddie Mac have long played a pivotal role in assembling and allocating private capital to multifamily rental projects, and this role has helped support the growth of rental housing supply. These efforts must continue at least until rental rates become affordable. In addition, GSE and other funding methods should be broadened to apply to more than large multifamily projects. Channeling public and private funding into other types of rental housing, including in particular scattered site single-family and two to four unit housing projects, would reduce costs associated with these dwellings and therefore improve rental affordability. More than half of the nation's rental

223. *See* Nelson, *The New Urbanity*, *supra* note 2, at 192 (calling the shift to rental households "as sweeping a change to America's metropolitan landscape as the half century after World War II").

units are outside of large multi-family projects, and these housing types should not be forgotten or ignored. For example, if the GSEs supported single-family rental housing at the secondary mortgage market level, capital costs for such housing would drop, as would the landlords' required rental rates.

Finally, growing the supply of affordable housing should be done in a way that specifically promotes fair housing goals as well. Currently, publicly subsidized housing is concentrated in high-density structures in low-income neighborhoods. If tax credits, grant funding, and GSE-supported lending were allocated preferentially to affordable rental housing located in high-opportunity neighborhoods, more affordable housing options would be located in such neighborhoods, helping to de-concentrate poverty and integrate populations in terms of both income and race.

Integration of rental housing into high-opportunity neighborhoods is fraught with political difficulties. Indeed, the Obama administration recently bemoaned the fact that "local barriers to housing development" have "intensified" over the past thirty years.[224] But zoning and other legal barriers to locating affordable housing in higher-income neighborhoods primarily focus on housing type (multifamily, for example), rather than rental rates or non-owner-occupant status. It would therefore be far easier to integrate single-family rentals into such communities than it would be to coerce these communities to accommodate new, large multifamily affordable housing developments. Broadening capital availability can therefore both increase the supply of rental housing as well as enable affordable housing to be located in less renter-concentrated neighborhoods. In addition, GSE and government involvement in rental housing development may permit government oversight to ensure fairness of rental terms and rates.

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224. THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf.