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LOW INCOME HOUSING TAX CREDITS AND THE DANGERS OF PRIVATIZATION

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*Javon T. Henry**

INTRODUCTION

Current federal affordable housing policy is ineffective because it is being used as a business platform to attract economic development instead of improving the quality of affordable housing. The low-income housing tax credit program (LIHTC or the Credit) is the largest national low-income affordable housing program.¹ The federal government enacted LIHTC, which is found in § 42 of the Internal Revenue Code (Code), to stimulate the involvement of the private sector in affordable housing by enticing real estate developers with tax credits in exchange for the construction of low-income housing units.²

However, a problem has arisen with regard to where developers locate these affordable housing units.³ Federal guidelines require that states allocate tax credits in a manner that facilitates cycles of poverty and maintains economic and racial segregation.⁴ The LIHTC program requires states to give

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¹ I.R.C. § 42(g)(1)(A); NAT'L MULTIFAMILY HOUS. COUNCIL, LOW-INCOME HOUSING TAX CREDIT (LIHTC) 1 (2018), [https://www.nmhc.org/uploadedFiles/Advocacy/Issue_Fact_Sheet/LIHTC%202015-1\(3\).pdf](https://www.nmhc.org/uploadedFiles/Advocacy/Issue_Fact_Sheet/LIHTC%202015-1(3).pdf). "At its peak, the LIHTC program generated approximately 140,000 jobs and \$1.5 billion in state and local tax revenues annually; it has financed nearly 2.8 million apartments and served 13.3 million residents since its inception in 1986." *Id.*

² See H.R. REP. NO. 99-841, at 4173 (1986) (Conf. Rep.).

³ See discussion *infra* Part III.A.

⁴ See discussion *infra* Part II.B.

preference to qualified census tracts (QCT),⁵ which are areas with high levels of concentrated poverty.⁶ Consequently, LIHTC units are frequently built in high-poverty neighborhoods.⁷ Confining low-income housing developments to areas already plagued by poverty limits a tenant's ability to achieve economic and racial integration.⁸

Section 3608(d) of the Fair Housing Act⁹ (FHA) mandates that all federal agencies with regulatory authority over financial institutions administer housing programs “in a manner [that] affirmatively . . . further[s] [fair housing].”¹⁰ Under § 3613 of the FHA, an injured party can make a claim that a housing program was administered in a manner that resulted in a disparate impact.¹¹ However, after *Texas Department of Housing and Community Affairs v. Inclusive Communities Project (ICP)*,¹² the Supreme Court made it difficult for litigants to survive the pleading stages for disparate impact claims to hold private developers accountable to fair housing requirements.¹³ The Supreme Court allows private developers to use business decisions as a legitimate justification for placing affordable housing units in

⁵ I.R.C. § 42(m)(1)(A)(i), (B)(ii)(III).

⁶ *Id.* § 42(d)(5)(B)(ii) (defining “qualified census tracts”).

⁷ See discussion *infra* Part IV.B.

⁸ See generally Katherine M. O’Regan & John M. Quigley, *Accessibility and Economic Opportunity*, in *ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER* 437 (José A. Gómez-Ibáñez et al. eds., 1999) (discussing the impact location can have on employment). Scholars agree that the quality of a neighborhood contributes to a person’s quality of life and economic opportunity. See *id.* at 454–55. A study conducted by O’Regan found that residential location can explain ten to forty percent of the observed outcomes of racial differences in youth employment. *Id.* at 458. Another study demonstrates that children growing up in low-income neighborhoods perform poorly compared to children growing up in higher-income neighborhoods. Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 *AM. J. SOC.* 353, 384 (1993).

⁹ Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968) (codified at 42 U.S.C. § 3601).

¹⁰ 42 U.S.C. § 3608(d) (2012); see also 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale) (discussing how one of the purposes of the act is to replace ghettos with “truly integrated and balanced living patterns”).

¹¹ 42 U.S.C. § 3623(a)(1)(A); accord *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 116 (2009) (using 42 U.S.C. § 3613 as the mechanism for asserting a disparate impact claim against a creditor).

¹² See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015). This case will be discussed *infra* Part IV.B.

¹³ See generally *Inclusive Cmty.*, 135 S. Ct. at 2507.

areas that are contrary to fair housing goals.¹⁴ In other words, private developers are provided a loophole when it comes to compliance with the Fair Housing Act.

The federal government did not always rely on the private sector to create affordable housing.¹⁵ The federal government originally provided affordable housing by way of public housing, which was subsidized through federal funds and managed by local housing authorities.¹⁶ Unfortunately, public housing has a long history of racial discrimination, poor management, and minimal financial support.¹⁷ The failure of public housing has made it easy for Congress to step away from state-controlled public housing and to look to the private market to provide affordable housing.¹⁸ The Supreme Court also supported this transition to the private market, as illustrated by *Gautreaux v. Chicago Housing Authority*.¹⁹ In that case, the Court concluded that housing authorities can further fair housing efforts by relying on the private market with Section 8 of the Housing Act of 1937, which authorizes a voucher program to subsidize a private provision of public housing.²⁰

LIHTC builds on *Gautreaux* and represents another step towards the exclusive reliance on the private sector to provide affordable housing.²¹ With this transition, the federal government has passed the responsibility onto private parties—developers, real estate agents, contractors, and banks—to decide where affordable housing properties will be built.²² This is important

¹⁴ See *id.* at 2522–23.

¹⁵ See discussion *infra* Part I.

¹⁶ See discussion *infra* Part I.

¹⁷ See discussion *infra* Part I.

¹⁸ See discussion *infra* Part IV.B.

¹⁹ *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

²⁰ See *id.* at 303–06 (discussing the benefits of using the Section 8 program as a remedy); see also 42 U.S.C. § 1437f(o) (2012).

²¹ See discussion *infra* Part IV.

²² See discussion *infra* Part II; see also Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1361–63 (2013) (discussing how the “government should structure its contractual relationships with the private sector”). Private entities escape legal accountability measures imposed on public entities, such as electoral approval, due process, and

because the area where one lives significantly influences one's overall quality of life, job opportunities, and education.²³ Meanwhile, the Fair Housing Act mandates that the government take a nondiscriminatory approach.²⁴ Private entities are not held to the same standard as the government because the Court's decision in *ICP* made it feasible for private developers to circumvent fair housing requirements.²⁵

This Note seeks to explain how the evolution of federal housing policy has shifted from an exclusively public system of subsidized affordable housing to an increasingly privatized industry with the LIHTC. As federal housing policy has shifted from purely public to mostly private, so has the discriminatory effect of federal and state housing policy of federal and state agencies.²⁶ The public-private transition has not only made racial discrimination more likely, but made it more difficult to identify as well.²⁷ *Gautreaux* and *ICP* capture the essence of that struggle. Ultimately, this Note proposes that we swing the pendulum back towards a robust "public" approach to affordable housing in order to reduce discrimination and segregation as well as eliminate the barriers to relief imposed by the Court in *ICP*.

This Note proceeds as follows: Part I provides an overview of public housing and its history. This section further examines the key reasons to why public housing has failed. Part II describes the structure of Section 8 and LIHTC. Part III argues that the *Gautreaux* case helped set the stage for transitioning to relying on the private sector to provide affordable housing. Part IV then argues that the full transition to relying on the private market with LIHTC has only permitted racial segregation and the Court in *ICP* has

sunshine laws. *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Mino eds., 2009).

²³ WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 56 (2d ed. 2012). By placing minorities in areas that have few advantages, private developers are allowing minorities to remain in poverty. *Id.*

²⁴ Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968) (codified at 42 U.S.C. § 3601).

²⁵ *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2524 (2015). This Supreme Court case is discussed *infra* Part IV.B.

²⁶ *See* discussion *infra* Part IV.A.

²⁷ *See* discussion *infra* Part IV.B.

only made it difficult for plaintiffs to survive the pleading stages of litigation. Lastly, Part IV proposes the solution of switching back to state-controlled affordable housing where the state housing authorities use the tax credits.

I. OVERVIEW OF PUBLIC HOUSING

Before LIHTC and Section 8, public housing was the main form of subsidized low-income housing in the United States.²⁸ As the oldest form of low-income housing, public housing evokes many negative attributes because of its various failures over the years.²⁹ To begin, in order to rectify the current reliance on the private sector, we need to understand public housing and where housing authorities have gone wrong with operating public housing buildings.

During the Great Depression of the 1930s, many Americans were in poverty.³⁰ President Franklin Delano Roosevelt created the New Deal to respond to the country's economic downturn.³¹ As part of the last section of the New Deal, the Housing Act of 1937³² created the first set of public housing projects.³³ The Housing Act of 1937 authorized State Housing Authorities³⁴ (Authorities or PHAs) to issue bonds to finance the

²⁸ See *infra* Part II.A–B (discussing when the new affordable housing policies were enacted).

²⁹ Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. POVERTY LAW & POL'Y 35, 36 (2002).

³⁰ Brian G. Gilmore, *What Are the Poor Doing Tonight?: Incorporating Social Justice into the Law School Ethos*, 15 SEATTLE J. SOC. JUST. 357, 367 (2016) (discussing the meaning of poverty and poverty during the Great Depression).

³¹ Gail Radford, *The Federal Government and Housing During the Great Depression*, in FROM TENEMENTS TO THE TAYLOR HOMES 104 (John F. Bauman et al. eds., 2000).

³² United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888.

³³ Radford, *supra* note 31, at 110. During the Great Depression, suburban construction of private housing stopped. *Id.* at 107. Working-class and middle-class families were losing their homes because they became unemployed. *Id.* To address this economic downturn, the federal government enacted the New Deal Policy, which created the Housing Act of 1937. *Id.* at 110. “The program replaced a much smaller New Deal initiative that financed the development of low-income housing as part of a broader effort to support public works.” ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 163 (2014).

³⁴ The state created organization is referred to as a “public housing agency” by the Housing Act of 1937. United States Housing Act of 1937 § 2(11), 50 Stat. at 889. This paper shall use the term “housing

development of public housing.³⁵ The federal government paid the interest on these bonds.³⁶ PHAs used tenants' rent to pay for operational costs.³⁷ Since its inception in the 1930s, however, PHAs were set up for failure, primarily attributable to the structure of the program itself, methods of tenant selection, cost restrictions, compounding financial limitations, and the racial discrimination that is inherent in federal housing policy.³⁸

A. Public Housing

Federal public housing policy paired local housing authorities with the federal government. Public housing properties are owned and managed by “quasi-governmental local public housing authorities.”³⁹ PHAs entered into contracts with the federal government called Annual Contribution Contracts.⁴⁰ Under the terms of these agreements, PHAs agreed to administer public housing pursuant to federal rules and regulations in exchange for federal funding.⁴¹ States created PHAs largely to capitalize on this new source of federal funding.⁴²

Public housing provides assistance to low-income families.⁴³ To be eligible for public housing programs, families must meet certain income

authorities” to refer to all state and local government entities authorized to engage in the development or operation of public housing.

³⁵ SCHWARTZ, *supra* note 33, at 163.

³⁶ *Id.* at 163–64.

³⁷ *Id.* at 164.

³⁸ MAGGIE MCCARTY, CONG. RESEARCH SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 9 (2014), <https://fas.org/sgp/crs/misc/R41654.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* PHAs are required to create an annual plan that must include information regarding housing needs in the community, application information, financial resources, and policies. *Id.* at 11.

⁴² *Id.* at 9. States decided how members of the authority are selected, whether they are appointed by the governor or mayor or are elected. *Id.* The state also decides what type of housing policy they work on (e.g., federal public housing or state and local affordable housing) or whether they can act as affordable housing developers. *Id.*

⁴³ *Id.* at 17.

standards.⁴⁴ To qualify, families generally must be at or below eighty percent of the area median income (AMI) when they apply for housing.⁴⁵ Eligible tenants are required to pay rent that is no more than thirty percent of their adjusted gross income.⁴⁶

Public housing comes in a variety of different sizes and types.⁴⁷ The most common form is smaller-scale housing such as townhouses, row houses, walk-up, garden-style detached, semidetached homes, and scattered site housing.⁴⁸ Meanwhile, high-rise and mixed developments account for less than one-quarter of all public housing.⁴⁹

B. Tenant Selection

PHAs' selection criteria are important because they receive their budget from the rent that they charge tenants, and the budget is used to cover operational expenses.⁵⁰ Thus, if PHAs select tenants who cannot meet their operational costs, then PHAs will need to locate other funding sources or reduce operating costs.⁵¹ Again, the federal government agreed it would pay the building costs, and the state, through their PHAs, would use the rents to cover operational expenses.⁵² PHAs are limited to charging tenants a maximum of thirty percent of their income.⁵³ If PHAs select middle-income tenants, as opposed to lower-income tenants, then they will have a larger budget to cover expenses.⁵⁴ Beginning in the 1930s, the tenants selected to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 19.

⁴⁷ *Id.* at 26.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 9.

⁵¹ *Public Housing*, NAT'L HOUS. LAW PROJECT, <https://www.nhlp.org/resource-center/public-housing/> (last visited Apr. 16, 2019).

⁵² MCCARTY, *supra* note 38, at 9.

⁵³ *Id.* at 19 (discussing thirty percent limit on rent).

⁵⁴ *Id.*

live in public housing only got poorer.⁵⁵ Because of this change, PHAs are having a difficult time meeting their operational costs as originally stipulated with the federal government.⁵⁶

Originally, public housing was created to provide adequate housing for middle-class workers who were made homeless by the Great Depression.⁵⁷ Real estate agents and bankers expressed their concerns about public housing because they thought “renting from the government might prove so attractive that the urge to buy one’s own home will be diminished.”⁵⁸ They feared that public housing would interfere with their private enterprises because it would ultimately remove a large segment of the population from the private housing market.⁵⁹ To garner support for public housing, advocates agreed that tenants should be selected in a manner that does not compete with the private housing market.⁶⁰ Accordingly, public housing began by only housing families in the lower end of the financial spectrum.⁶¹ Because PHAs were limited to only targeting families with lower incomes, they received less money to cover financial costs, which later resulted in PHAs’ general difficulty with financing operational costs.⁶²

Many PHAs entered financial deficits or relied entirely on federal subsidies in order to continue operations.⁶³ Over the course of time, the demographics of public housing tenants became increasingly impoverished and disproportionately comprised of racial and ethnic minorities.⁶⁴ Many white families were moving out of public housing because they could get a home in the suburbs through the Fair Housing Act’s and the GI bill’s home

⁵⁵ SCHWARTZ, *supra* note 33, at 167.

⁵⁶ *Id.*

⁵⁷ See Radford, *supra* note 31, at 110.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ SCHWARTZ, *supra* note 33, at 167.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

loan programs.⁶⁵ Meanwhile, these home loans were not available to racial and ethnic minorities because of discriminatory policies embedded in the programs.⁶⁶ As a result, PHA tenants were comprised of society's poorest.⁶⁷ The median income of public housing residents fell from 57% of the national median in 1950 to 41% in 1960, to 29% in 1970, and to less than 20% by the mid-1990s.⁶⁸ As tenants became poorer, PHAs were receiving less money, while operational costs were increasing.

As the cost for maintaining public housing buildings increased and revenue received from rent decreased, federal subsidies became the main source of funding for public housing.⁶⁹ The operational costs increased rapidly and the rent pool decreased as tenants became poorer.⁷⁰ Some local agencies responded by charging higher rents that were unaffordable to many residents.⁷¹ The federal government placed a cap on rents and began directly subsidizing operational costs as well as capital costs.⁷² Public housing came to a standstill because it strongly relied on limited taxpayer dollars.⁷³

⁶⁵ Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOC. PERSP. 291, 309–10 (2000).

⁶⁶ *Id.*; see also Alexis C. Madrigal, *The Racist Housing Policy that Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/> (discussing how “the FHA explicitly refused to back loans to black people or even other people who lived near black people”).

⁶⁷ SCHWARTZ, *supra* note 33, at 168.

⁶⁸ *Id.*

⁶⁹ *Id.* at 177.

⁷⁰ *Id.*

⁷¹ Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 764 (2015). At the national level, even Secretary of Housing and Urban Development Ben Carson proposed to triple public housing rent. Hannah Natanson, *Ben Carson Says He's Raising Rents to Put Poor Americans to Work. But in the District, the Majority Are Either Elderly, Disabled or Already at Work.*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/local/social-issues/ben-carson-says-hes-raising-rents-to-put-poor-americans-to-work--but-in-the-district-the-majority-are-either-elderly-or-disabled-or-already-work/2018/07/13/b85866a0-8127-11e8-b658-4f4d2a1acef1_story.html?utm_term=.13179a2073e8.

⁷² Lee, *supra* note 71, at 764.

⁷³ *Id.*

C. Cheap Build with a Short Sight

The minimal financial support the federal government initially provided resulted in higher future operational costs for PHAs.⁷⁴ The reason for this minimal financial support is due to the fact that Congress placed a cap on the amount of federal funding that could be spent on building public housing.⁷⁵ The 1937 Fair Housing Act set a maximum of \$5,000 per unit or \$1,250 per room in cities with a population of at least 500,000 and \$4,000 per unit or \$1,000 per room elsewhere.⁷⁶ Proponents of private real estate interests viewed public housing as a threat to their businesses.⁷⁷ In order to quickly respond to the mass poverty of the 1930s, public housing advocates compromised and agreed to spend below the federal maximum.⁷⁸ An average of thirty percent below the maximum was spent on public housing units during that time.⁷⁹ Because of this reduced funding, many of the projects were built in a manner that was not durable.⁸⁰ These public housing buildings contained a bare minimum of amenities: “closets were shallow and without doors, plaster walls were eschewed for cinderblocks. In many high-rise projects, elevators skipped every other floor; buildings lacked enclosed lobbies. Common spaces were kept to a bare minimum.”⁸¹

Cheap construction, however, resulted in abnormally high maintenance costs that could not be recouped via rental income.⁸² Now many PHAs are either in debt or cities simply elected to destroy their public housing buildings instead of maintaining them.⁸³

⁷⁴ *See id.*

⁷⁵ SCHWARTZ, *supra* note 33, at 172.

⁷⁶ *Id.*

⁷⁷ *See* Radford, *supra* note 31, at 110.

⁷⁸ *Id.* at 112.

⁷⁹ *Id.* at 112–13.

⁸⁰ *See id.*

⁸¹ *Id.* at 113.

⁸² *Id.*

⁸³ *Id.*

D. Racial Discrimination

The United States racially discriminated against minorities in public housing.⁸⁴ The housing agencies kept races separate by building public housing for whites and different public housing for blacks.⁸⁵ The Housing Act of 1949 continued the building of public housing and introduced slum clearance, which was formally known as urban redevelopment.⁸⁶ Urban redevelopment aimed to renovate cities by demolishing dilapidated houses and building parks, new houses, and roads.⁸⁷ The Housing Act of 1949 provided loans for slum clearance.⁸⁸ Deteriorating buildings were supposed to be replaced, but this was not commonly practiced because localities had the option of switching to commercial development.⁸⁹

Local municipalities used urban redevelopment to clear black slums and then moved some blacks into “high-rise, high density public housing.”⁹⁰ However, through this process, many people who were displaced were not rehoused.⁹¹ The Housing Act of 1954⁹² reinstated urban redevelopment under the guise of “urban renewal.”⁹³ The slum clearance got worse.⁹⁴ Local authorities often cleared slums without offering alternative living

⁸⁴ John I. Stewart, Jr., Comment, *Racial Discrimination in Public Housing: Rights and Remedies*, 41 U. CHI. L. REV. 582, 582 (1974).

⁸⁵ See generally Mittie Olion Chandler, *Public Housing Desegregation: What Are the Options?*, 3 HOUSING POL’Y DEBATE 509 (2010).

⁸⁶ Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413; see also SCHWARTZ, *supra* note 33, at 164 (showing that due to World War I, public housing was put on an approximately fifteen-year hiatus).

⁸⁷ Housing Act of 1949 § 110, 63 Stat. at 420.

⁸⁸ BRUCE F. BERG, *NEW YORK CITY POLITICS: GOVERNING GOTHAM* 93 (2007).

⁸⁹ *Id.* at 93.

⁹⁰ See *id.* at 92.

⁹¹ See *id.* at 93 (“While the hope was that for every deteriorating housing unit cleared, a new unit of low- or moderate-income housing would be built to replace it, this did not occur.”).

⁹² Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590 (1954).

⁹³ Alexander Von Hoffman, *The Lost History of Urban Renewal*, J. URBANISM 282 (2008).

⁹⁴ *Id.*

arrangements or they rehoused inhabitants in high-rise public housing projects, which are considered ghettos today.⁹⁵

These high-rise buildings were built for minorities. General Grant Houses (Grant Houses), located uptown in Morningside Heights of New York City near Columbia University, is a historic example of a public housing project that was built on a racial foundation.⁹⁶ Grant Houses were built in 1957.⁹⁷ One of the reasons why Grant Houses were built was to dissolve racial boundaries in the neighborhood.⁹⁸ However, Columbia University used the Housing Act of 1949 to structure how the area of Morningside Heights would look.⁹⁹ Morningside Heights was going through a racial transformation; black people moved to the northern edge of Morningside Heights from Harlem and Puerto Ricans were moving to the southern part of Morningside Heights.¹⁰⁰ Columbia University was concerned that the area would become blighted.¹⁰¹

Grant Houses served as a means to block off Harlem from Morningside Heights.¹⁰² The project stretched from West 123rd street to West 133rd street.¹⁰³ Within the process of building Grant Houses, 36,000 people were displaced because they could not conform to the area's plan.¹⁰⁴ After the construction, the area became too expensive for low-income people.¹⁰⁵ The

⁹⁵ See *id.* at 295–96.

⁹⁶ THEMIS CHRONOPOLOUS, SPATIAL REGULATION IN NEW YORK CITY: FROM URBAN RENEWAL TO ZERO TOLERANCE 8–15 (2011).

⁹⁷ *Id.* at 15.

⁹⁸ *Id.* at 11–13.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 9–10.

¹⁰¹ *Id.* at 11.

¹⁰² *Id.* at 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

building of the new Grant Houses did not create enough units to replace all the minorities they displaced.¹⁰⁶

Moreover, statistics demonstrate that there is a racial divide by income. In 2010, 66% of the residents were not white.¹⁰⁷ In public housing located in high poverty areas: 41% percent are black, 40% are Hispanic, and 10% are white.¹⁰⁸

II. PRIVATE-PUBLIC AGREEMENT

Between 1937 and the 1970s, public housing was the primary vehicle through which the federal government provided affordable housing to low-income families. Starting in the 1970s, many cities began removing their high-rise public housing buildings and replacing them with programs that relied entirely on the private market.¹⁰⁹ The U.S. Department of Housing and Urban Development (HUD) stated that \$26 billion was needed to repair the nation's aging public housing buildings after years of mismanagement.¹¹⁰ From a policy standpoint, it appeared the best solution was to remove government subsidized housing and to transition to utilizing the private sector with Section 8 housing vouchers and, later, the LIHTC program.¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ NAT'L LOW INCOME HOUS. COAL., HOUSING SPOTLIGHT: WHO LIVES IN FEDERALLY ASSISTED HOUSING? 3 (2012), <https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ See 24 C.F.R. § 971.7(b) (2006); see also Stephanie Garlock, *By 2011, Atlanta Had Demolished All of Its Public Housing Projects. Where Did All Those People Go?*, CITYLAB (May 8, 2014), <https://www.citylab.com/equity/2014/05/2011-atlanta-had-demolished-all-its-public-housing-projects-where-did-all-those-people-go/9044/> (discussing the removal of project housing in Atlanta).

¹¹⁰ U.S. DEP'T OF HOUS. & URBAN DEV., RENTAL ASSISTANCE DEMONSTRATION (RAD): TOOLKIT #1: WHY RAD? A RENTAL ASSISTANCE DEMONSTRATION (RAD) OVERVIEW 1 (2013), <https://www.hud.gov/sites/documents/TOOLKIT1WHYRAD.PDF>.

¹¹¹ See *infra* Part III.B.

A. Section 8

The Housing Voucher Program, commonly referred to as Section 8, allows a person to find publicly subsidized housing in the private market.¹¹² The voucher recipient is generally required to pay approximately thirty percent of their adjusted monthly income toward rent and utilities and the voucher would pay the remaining rent.¹¹³ These vouchers were envisioned as a way “for poor urban minorities to escape the social ills of the city and move to the suburbs.”¹¹⁴ As opposed to uprooting blacks and placing them in high-rise, project-based housing, housing vouchers were intended to allow recipients to leave inner cities by finding a home in the suburbs.¹¹⁵

B. Low-Income Housing Tax Credits

As a matter of policy, Congress has encouraged the private market to provide affordable housing with the assistance of federal subsidies.¹¹⁶ Congress stated that “it is the policy of the United States to encourage the widest possible participation by private enterprise in the provision of housing for low or moderate income families.”¹¹⁷ Accordingly, Congress created the LIHTC program to encourage developer and private investor involvement in the creation of low-income housing rental units.¹¹⁸

Through the LIHTC program, the government trades tax credits for temporary affordable housing units.¹¹⁹ LIHTC housing, however, bases the

¹¹² Many believed that housing vouchers open the door for people to move into better neighborhoods, which will avail those people to better jobs and education. *See* BRUCE KATZ ET AL., RETHINKING LOCAL AFFORDABLE HOUSING STRATEGIES: LESSONS FROM 70 YEARS OF POLICY AND PRACTICE 32 (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/housingreview.pdf>.

¹¹³ *See* 42 U.S.C. § 1437f(o)(2) (2012). The Section 8 low-income housing program comes in two different forms—the voucher program and the project-based Section 8—which are managed by housing authorities. CTR. ON BUDGET & POLICY PRIORITIES, SECTION 8 PROJECT-BASED RENTAL ASSISTANCE 2 (2017), <https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13PBRA.pdf>. The project-based Section 8 program is a rental subsidy that is attached to a particular apartment in a house that is privately owned. *Id.* Under the Housing Voucher Program, the government provides low-income family recipients with a portable rental subsidy. *See* 42 U.S.C. § 1437f(o)(2), (r).

¹¹⁴ These vouchers, however, are not perfect. It is difficult to find a landlord willing to participate. Kate Giammarise, *For Those with Section 8 Vouchers, Finding Suitable Housing Difficult*, PITTSBURGH POST-GAZETTE (June 20, 2016, 12:00 AM), <http://www.post-gazette.com/local/city/2016/06/20/Millions-in-Pittsburgh-housing-voucher-funding-not-going-to-vouchers/stories/201605060194> (discussing how voucher recipients are losing vouchers because they cannot find landlords). The Housing Vouchers are underutilized. *Id.* (discussing how in 2013, the City of Pittsburgh underused 1,500 to 2,000

rent on objective needs and not subjective needs.¹²⁰ Specifically, PHAs calculate the rent based on a local area's median income in which the project is located rather than adjusting it to affordable based on a tenant's actual income.¹²¹ To qualify for the credits, a developer must submit an application to its respective state housing authority.¹²² In that application, the developer must provide a "qualified low-income housing project," which must qualify under one of three income-based tests.¹²³ The first test, called the 20-50 Test, is if at least 20% of the units are occupied by individuals who make no more than 50% of AMI.¹²⁴ The second test, known as the 40-60 Test, is if at least 40% of the units are occupied by individuals who make no more than 60% of AMI.¹²⁵ The third test, referred to as the Income Averaging Test, was added by Congress in 2018 and it allows applicants to average the income of tenants: the test is satisfied if at least 40% of tenants have an average income

vouchers). See *National and State Housing Fact Sheets & Data*, CTR. ON BUDGET & POLICY PRIORITIES, <https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data> (last updated Mar. 1, 2019) (showing that in 2016, nationally only 89% of vouchers were used, New York City only used 88% of its vouchers, and Chicago only used 87.7% of vouchers).

¹¹⁵ See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 538 (2007). It was easier to use already existing housing to implement low-income housing with housing vouchers than to build a whole new project building. Many communities opposed having such low-income housing in their "backyard." OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., "WHY NOT IN OUR COMMUNITY?" REMOVING BARRIERS TO AFFORDABLE HOUSING 3 (2005), <https://www.huduser.gov/portal/Publications/wnioc.pdf> (described as "NIMBY," not in my backyard syndrome).

¹¹⁶ Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 901, 82 Stat. 476, 547.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Treas. Reg. § 1.42-1T(a)(2) (as amended in 2004); see also I.R.C. § 42(b)(1)-(2), (m).

¹²⁰ See Treas. Reg. § 1.42-1T(a)(2).

¹²¹ *Id.*

¹²² *Id.* § 1.42-1T(d)(8)(i).

¹²³ I.R.C. § 42(e)(2). Private developers seeking to be allocated credits will make a proposal and submit it to their respective HCA. Treas. Reg. § 1.42-1T(a)(2). The HCA will then make a decision based on which proposal scored the highest.

¹²⁴ I.R.C. § 42(g)(1)(A).

¹²⁵ *Id.* § 42(g)(1)(B).

of no more than 60% of AMI so long as no tenant has income of more than 80% of AMI.¹²⁶

LIHTC provides two different levels of tax benefits.¹²⁷ The tax benefits can be for either 30% (4% credit)¹²⁸ or, more competitively, 70% (9% credit)¹²⁹ of the eligible costs of a low-income housing project.¹³⁰ Both the 4% and 9% credit benefits are distributed over a ten-year period.¹³¹ In return, the developer has to ensure affordable housing units for a minimum of fifteen years.¹³² The following is an example of LIHTC tax benefits:

Consider a new affordable housing apartment complex with a qualified basis of \$1 million. Since the project involves new construction it will qualify for the 9% credit and generate a stream of tax credits equal to \$90,000 (9% x \$1 million) per year for 10 years, or \$900,000 in total. Under the appropriate interest rate the present value of \$900,000 stream of tax credits should be equal to \$700,000, resulting in 70% subsidy. The subsidy is intended to incentivize the development of affordable housing that otherwise may not be financially feasible or attractive to alternative investments.¹³³

The Internal Revenue Service (IRS) allocates the federal tax credits to state housing credit agencies (HCAs) based on each state's population.¹³⁴ The HCAs are responsible for directly allocating the credits to private

¹²⁶ MARK P. KEIGHTLEY, CONG. RESEARCH SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 3 (2019), <https://fas.org/sgp/crs/misc/RS22389.pdf>.

¹²⁷ I.R.C. § 42(b)(1)(B).

¹²⁸ *Id.* § 42(b)(1)(B)(ii).

¹²⁹ *Id.* § 42(b)(1)(B)(i). Even though they are referred to as the 4% and 9% credits, the amount of the credit varies based on whatever amount gets them to 30% or 70%. See KEIGHTLEY, *supra* note 126, at 1.

¹³⁰ I.R.C. § 42(b)(1)(B)(i). 4% and 9% is the way the 30% and 70% tax credits are referred to in practice. KEIGHTLEY, *supra* note 126, at 1. It means that “[e]ach year, for 10 years, a tax credit equal to roughly 4% or 9% of a project’s qualified basis (cost of construction) is claimed.” *Id.* 4% and 9% is just a faster way to calculate how much a developer is receiving over the ten year period.

¹³¹ *Id.* § 42(f)(1).

¹³² *Id.* §§ 42(i)(1), (j)(1). If the project fails to comply with the LIHTC rules during the 15-year compliance period, the IRS can recapture credits. *Id.*

¹³³ KEIGHTLEY, *supra* note 126, at 1–2.

¹³⁴ I.R.C. § 42(h)(3).

developers.¹³⁵ Based on the required federal “selection criteria,”¹³⁶ each HCA creates their own “Qualified Allocation Plan” (QAP)¹³⁷ in keeping with the state’s priorities for the desired type, location, and ownership of affordable housing.¹³⁸ QAPs vary because each state has freedom in structuring their allocation process and each state also has its own unique housing needs.¹³⁹ Most HCAs apply a scoring system in which a proposal will need or require a specific amount of points to satisfy a category.¹⁴⁰

There is an increased credit for “qualified census tracts”¹⁴¹ (QCTs) and “difficult development areas”¹⁴² (DDAs). In addition, § 42(m)(1)(B)(ii) of the Code requires HCAs to create a QAP that gives a preference to:

1. “[P]rojects serving the lowest income tenants.”¹⁴³
2. “[P]rojects obligated to serve qualified tenants for the longest periods.”¹⁴⁴
3. “[P]rojects which are located in a qualified census tract . . . and the development of which contributes to a concerted community revitalization plan.”¹⁴⁵

¹³⁵ *Id.* § 42(m)(1)(A)(i).

¹³⁶ *Id.* § 42(m)(1)(C).

¹³⁷ *Id.* § 42(m)(1)(B).

¹³⁸ *Id.* § 42(m)(1)(C). HCAs must annually submit a QAP explaining how the credits will be evaluated. *See id.* § 42(m)(1)(B)(iii).

¹³⁹ *See id.* § 42(m)(1)(B)(i).

¹⁴⁰ The Code provides some examples of factors such as project location, housing needs, sponsor characteristics, and public housing waitlist. *See id.* § 42(m)(1)(C).

¹⁴¹ *Id.* § 42(m)(1)(B).

¹⁴² *Id.* § 42(d)(5)(iii)(I).

¹⁴³ *Id.* § 42(m)(B)(ii)(I).

¹⁴⁴ *Id.* § 42(m)(B)(ii)(II).

¹⁴⁵ *Id.* § 42(m)(B)(ii)(III).

A QCT is a location in which “50 percent or more of the households have an income which is less than 60 percent of the area median income,” as designated by the Secretary of HUD.¹⁴⁶

After a developer is successful in this competitive application process, the developer has two options: it can directly claim the tax benefits on its income tax return, or it can sell the tax credits to private investors.¹⁴⁷ If the developer chooses to sell the credits, it can raise hard money to finance the construction expense rather than taking out a loan to finance the construction costs.¹⁴⁸ The price of these credits depends entirely on supply, demand, and risk assessments.¹⁴⁹

III. AFFIRMATIVELY FURTHER FAIR HOUSING AND PRIVATIZATION

The Fair Housing Act of 1968 was created to respond to the history of explicit racial housing discrimination in rental and the sale of houses.¹⁵⁰ This legislation placed a duty on HUD entities and all other agencies involved in

¹⁴⁶ *Id.* § 42(d)(5)(B)(ii)(I).

¹⁴⁷ *Id.* § 42(b)(1) (“The percentages prescribed by the Secretary for any month shall be percentages which will yield over a 10-year period”); see Sarah Pickering, Note, *Our House: Crowdfunding Affordable Homes with Tax Credit Investment Partnerships*, 33 REV. BANKING & FIN. L. 937, 951–52 (2014) (discussing the actual process for how tax credits are sold).

¹⁴⁸ *Id.* at 946–47.

¹⁴⁹ The prices for the credits have fluctuated depending on a variety of factors. In 2016, the tax credits were reportedly sold for over \$1.00 each. Donna Kimura, *LIHTC Prices Climb and Climb: Syndicators Report First-Half Results, Look Ahead to Rest of 2016*, AFFORDABLE HOUS. FIN. (Aug. 16, 2016), <http://www.housingfinance.com/finance/lihtc-prices-climb-and-climb>; see also *LIHTC Pricing Trends*, NOVOGRADAC, <https://www.novoco.com/resource-centers/affordable-housing-tax-credits/data-tools/lihtc-pricing-trends> (last visited Apr. 7, 2019). In 2008, the tax credit value decreased substantially. See Tom Daykin, *Dropping Demand for Tax Credits Hits Apartment Projects*, MILWAUKEE J. SENTINEL (Dec. 16, 2009), <http://archive.jsonline.com/news/watch/79342762.html>; see also KEIGHTLEY, *supra* note 126, at 5 (showing the Tax Cuts and Jobs Act is anticipated to decrease the value of the credits).

¹⁵⁰ Federal law recognizes that people should not be limited in living opportunities on account of race. See, e.g., *Shelly v. Kraemer*, 334 U.S. 1 (1948); see also 42 U.S.C. § 3608(d) (2012) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 821 (3d Cir. 1970) (“Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with . . . national housing policy.”).

the administration of housing policies to take proactive measures to advance racial integration.¹⁵¹ The ability of FHA to adequately address and remedy inequities in the provision of fair housing has been informed by, and at times delayed by, a series of cases addressing fair housing in Chicago that began before—and concluded decades after—the enactment of FHA.¹⁵² Beginning as a suit filed by a group of black public housing tenants against the Chicago Housing Authority,¹⁵³ the *Gautreaux* litigation is important because the Supreme Court set the stage for how the duty to affirmatively further fair housing can be achieved. The results in *Gautreaux* were also informed by the holdings of two other cases: *Shannon v. United States Department of Housing and Urban Development*¹⁵⁴ and *Milliken v. Bradley*.¹⁵⁵ Ultimately, the outcome was that the private sector can be used to provide fair housing.

A. *Gautreaux* Overview

In *Gautreaux*, a group of black public housing residents (Plaintiffs) claimed that HUD and the Chicago Housing Authority’s (CHA) tenant selection and placement policies were unconstitutional because they intentionally located public housing at sites intended to maintain racial separation and neglected to select sites that would advance racial integration.¹⁵⁶ The district court denied CHA’s motion to dismiss, concluding that the Plaintiffs “[had] the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects

¹⁵¹ 42 U.S.C. §§ 3601–3609 (2012). “The duty to ‘affirmatively further’ fair housing . . . [stems] partially [from the] resistance [to] HUD [policies]—which at the time was the primary federal source for affordable housing funds—[by] local housing authorities [who] built public housing projects anywhere other than in poor, racially segregated neighborhoods.” Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1766–67, 1771 (2005). The Fair Housing Act of 1968 was created to directly undo harms caused by racial and social isolation. *Id.*

¹⁵² Orfield, *supra* note 151, at 1771–73.

¹⁵³ *Id.*

¹⁵⁴ 436 F.2d 809 (3d Cir. 1970).

¹⁵⁵ 418 U.S. 717 (1974).

¹⁵⁶ *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582, 583 (N.D. Ill. 1967).

themselves.”¹⁵⁷ In 1969, the district court granted summary judgment in favor of the Plaintiffs.¹⁵⁸ The court found that CHA violated both the Equal Protection Clause of the Fourteenth Amendment and pre-FHA civil rights acts¹⁵⁹ by building public housing and using race to place tenants in those developments.¹⁶⁰ The Court reached this conclusion based on uncontested evidence demonstrating that the public housing system was racially segregated: four of the duplexes had a majority of white residents and were located in white suburbs, while the rest of the units had a majority of black residents and were located in black neighborhoods.¹⁶¹

In the appeal of a companion lawsuit against HUD, the Seventh Circuit found HUD was also liable for knowingly assisting in racially discriminatory public housing practices by restricting access to financial assistance.¹⁶² When this reached the Seventh Circuit, FHA had been enacted, *Shannon* was in the courts, and the lower courts were discussing the duty to affirmatively further fair housing.¹⁶³ *Shannon* is particularly important because the court held that HUD must take racial and socioeconomic data into consideration in housing plans to affirmatively further fair housing, and then later deemed a color-

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 913–14 (N.D. Ill. 1969) (filed prior to FHA enactment). *See generally* 42 U.S.C. §§ 1981, 1983 (2012).

¹⁶⁰ *Gautreaux*, 296 F. Supp. at 913–14.

¹⁶¹ *Hills v. Gautreaux*, 425 U.S. 284, 288 (1976).

¹⁶² *Gautreaux v. Romney*, 448 F.2d 731, 733 (7th Cir. 1971).

¹⁶³ Orfield, *supra* note 151, at 1771. In *Shannon*, black and white residents claimed that planned public housing was being located in areas with high concentrations of poverty and would further concentrate poor black tenants, which would lead to resegregation. *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 811–12 (3d Cir. 1970). The Court held that HUD had a duty to further fair housing. *Id.* at 816. Furthermore, the court clarified that FHA bars HUD from funding a project that further segregates a neighborhood. *Id.* at 820. The court clarified that HUD must take racial and socioeconomic data into consideration in planned housing, and noted that a color-blind approach would be impermissible. *Id.* at 820–21. Although the court gave HUD discretion to determine how to consider such factors, the court suggested that HUD should consider the racial and economic demographics of a neighborhood, school quality, and past and current practices of local authorities. *Id.* at 19. The court also provides the following dicta which nullifies that duty: “[The court is not] suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case may be made for rebuilding of a racial ghetto.” *Id.* at 822. *Shannon* was adopted in other opinions. *See generally* NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987) (stating that Title VIII imposes a duty on HUD that is more than simply refraining from discrimination).

blind approach impermissible.¹⁶⁴ In *Gautreaux*, the Seventh Circuit discussed segregation as a pressing concern in Chicago.¹⁶⁵ The Seventh Circuit stated white flight and black concentration are “the most serious domestic problem[s] facing America today.”¹⁶⁶

The Seventh Circuit further affirmed the implementation of a “comprehensive plan.”¹⁶⁷ This plan guided placing some of the new public housing units in the suburbs outside of Chicago, even though the discrimination took place within the geographical boundaries of the City of Chicago.¹⁶⁸ On appeal to the Supreme Court, both HUD and CHA again argued that the ruling in *Milliken* would bar implementation of a comprehensive plan as a remedy.¹⁶⁹

In *Milliken*, the Supreme Court reversed the Sixth Circuit’s approval of metropolitan-wide relief in school desegregation (Milliken Plan).¹⁷⁰ The Milliken Plan would have required fifty-four schools in Detroit’s metropolitan area to consolidate in a manner that would remedy racial discrimination in the operation of the public schooling system.¹⁷¹ Unlike *Milliken*, the Supreme Court in *Gautreaux* first noted that HUD and CHA clearly violated the Constitution.¹⁷² Because of this violation, HUD and CHA were required to formulate a solution that would provide the greatest possible degree of relief.¹⁷³ Second, the Supreme Court further stated that “[t]he

¹⁶⁴ *Shannon*, 436 F.2d. at 821.

¹⁶⁵ *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930, 938–39 (7th Cir. 1974).

¹⁶⁶ *Id.* at 938.

¹⁶⁷ *Id.* at 936.

¹⁶⁸ *Id.*

¹⁶⁹ *Hills v. Gautreaux*, 425 U.S. 284, 291–92 (1976).

¹⁷⁰ *Milliken v. Bradley*, 418 U.S. 717, 745 (1974). In *Gautreaux*, 503 F.2d at 935–36, the Seventh Circuit found that *Milliken* was distinguishable from public housing in Chicago. Unlike local schools, public housing was not “deeply rooted [in the] tradition of local control; rather, public housing is a federally supervised program with early roots in federal statutes.” *Id.* Housing discrimination had been prohibited for more than a century, by federal law. *Id.*

¹⁷¹ *Milliken*, 418 U.S. at 722–23.

¹⁷² *Gautreaux*, 425 U.S. at 296.

¹⁷³ *Id.* at 299.

relevant geographic area for purposes of the respondents housing option is the Chicago Housing Market and not the Chicago City limits.”¹⁷⁴ The Supreme Court, in affirming the lower court’s *Gautreaux* remedy, declared that the metropolitan area remedy must be “consistent with and supportive of” federal housing policy, including the duty to affirmatively further fair housing.¹⁷⁵

In 1981, about fifteen years after the original suit, these decisions led to a metropolitan consent decree between HUD and the Plaintiffs.¹⁷⁶ The consent decree created Gautreaux Assisted Housing Program (GAHP) and divided Chicago into three areas: general (less than 30% minority population), limited (30% or more minority population), and revitalizing (areas with more than 30% minority populations that are undergoing redevelopment).¹⁷⁷ The agreement involved the placement of up to 7100 persons in assisted units in the general and revitalized areas.¹⁷⁸ GAHP also used Section 8 vouchers created by Congress in 1974.¹⁷⁹

B. Saga of the Gautreaux Remedy

The Supreme Court’s decision in *Gautreaux* supported reliance on the private market to mend the Housing Authority’s past acts of discrimination.¹⁸⁰ The Supreme Court’s decision established the scope of

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 301–02.

¹⁷⁶ See *Gautreaux v. Landrieu*, 523 F. Supp. 665, 666–68 (N.D. Ill. 1981).

¹⁷⁷ *Id.* at 668–69. An area may be designated revitalizing if it is:

- (1) undergoing visible redevelopment or evidences impending construction;
- (2) located along the lakefront;
- (3) scheduled to receive Community Development Block Grant Funds;
- (4) accessible to good transportation;
- (5) an area with a significant number of buildings already up to code standards;
- (6) accessible to good shopping;
- (7) located near attractive features, such as [a] lake or downtown;
- (8) free of an excessive concentration of assisted housing;
- (9) located in an area which is not entirely or predominantly in a minority area and
- (10) not densely populated.

Id. at 671.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Gautreaux*, 425 U.S. at 301–02.

relief by providing a framework for the method in which the lower district court and/or parties could resolve the issue of racial discrimination.¹⁸¹ The Court discussed two remedies: (1) the placement of public housing in areas that are consistent with the Fair Housing Act¹⁸² and (2) utilizing the private sector to build low-income housing with Section 8.¹⁸³ Although the Court laid the groundwork for both a public and a private remedy, it appeared to regard the latter as the more enticing of the two options.¹⁸⁴

In addressing the first option, using public housing in a way that furthers desegregation with the metropolitan-wide plan, the Court concluded that such relief could potentially be used.¹⁸⁵ The opinion spent time explaining that such a remedy would be plausible and would not be contrary to any preceding case.¹⁸⁶ But, most importantly, the Court did not conclude that the lower court was required to adopt the public housing plan and the Court devoted no more time to discussing that option.¹⁸⁷

The Court then turned to discussing how the private sector could be used to reduce discrimination in public housing.¹⁸⁸ The Court emphasized the changes that had taken place in federal low-income housing policy.¹⁸⁹ Congress had just enacted the Section 8 Rent Subsidy Program in 1974 and relocated its funding dramatically from public housing programs and into the Section 8 Program.¹⁹⁰ The Section 8 program was a move toward privatizing low-income housing.¹⁹¹

¹⁸¹ *Id.* at 303–06.

¹⁸² *Id.* at 304–06. A plan similar to the plan created in earlier litigation.

¹⁸³ *Id.* at 296.

¹⁸⁴ *Id.* at 305–06.

¹⁸⁵ *Id.* at 305.

¹⁸⁶ *Id.* at 292–95. The Court distinguished the *Milliken* case, which would bar such a remedy. *Id.*

¹⁸⁷ *Id.* at 294–96.

¹⁸⁸ *Id.* at 304–05.

¹⁸⁹ *Id.* at 303–04.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

The Court embraced the private Section 8 approach and presented it as a better option for the lower court to consider as a remedy.¹⁹² The Court observed that the Section 8 program both enlarged HUD’s role in “the creation of housing opportunities” and “largely replaced the older federal low-income housing programs.”¹⁹³ As a result, many cities began removing their stock of public housing units.¹⁹⁴ Section 8 was the central point of the Court’s discussion.¹⁹⁵ “[T]he Court’s decision planted a seed that developed into a housing program for low-income Black families to move throughout the Chicago metropolitan area.”¹⁹⁶ On remand, lawyers for the plaintiff and HUD arrived at an agreement that incorporated using the private market.¹⁹⁷ They decided to use the Section 8 vouchers to distribute affordable housing fairly and followed the Supreme Court’s lead in utilizing the private market.¹⁹⁸

C. Section 8 Housing Vouchers and Implementation of Gautreaux Remedy

In *Gautreaux*, the parties agreed to employ Section 8 as a remedy.¹⁹⁹ The first placement of families in the suburbs was successful.²⁰⁰ In that group, HUD moved 4500 black families out of the inner city.²⁰¹ A majority of them moved into suburban and predominantly white neighborhoods.²⁰² These suburbs offered improved employment opportunities and a better

¹⁹² *Id.* at 303–05.

¹⁹³ *Id.* at 303.

¹⁹⁴ *Id.* at 304.

¹⁹⁵ *See generally id.*

¹⁹⁶ Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago’s Privatization Program*, 12 N. ILL. U. L. REV. 589, 611 (1992).

¹⁹⁷ *Id.* at 611–12.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 591–92.

²⁰⁰ Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J.L. & SOC. POL’Y 110, 113–14 (2006).

²⁰¹ Rubinowitz, *supra* note 196, at 619.

²⁰² Duncan & Zuberi, *supra* note 200, at 113.

education.²⁰³ Twenty-two years later, results showed intergenerational success and families were still living in neighborhoods with similar poverty rates.²⁰⁴ Children were more likely to graduate from high school, attend college, and go on to be employed.²⁰⁵

Also, the children placed in the suburbs with their mothers, who were old enough to live on their own in the 1990s, continued to reside in neighborhoods that had lower poverty rates and were more integrated than the ones that they originally lived in.²⁰⁶ Most of the families were moved from areas where the poverty rate was about 40% to areas with the poverty rate of about 16%.²⁰⁷ As of the late 1990s, many of these families were living in similar poverty rate areas of about 18%.²⁰⁸ In terms of neighborhood racial demographics, in the 1990s, these families remained in areas that were not predominantly black.²⁰⁹

However, the second set of families that were placed in suburbs did not experience similar results.²¹⁰ These voucher holders moved to neighborhoods with poverty rates as low as 13%,²¹¹ and about half of these voucher holders moved to neighborhoods with poverty rates of 27%.²¹² As a result of the Section 8 placements, the voucher holders transitioned originally from neighborhoods with a racial demographic of 80% black to 11% black.²¹³ Half

²⁰³ *Id.* at 116.

²⁰⁴ *Id.* at 113–14.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 114. The Housing Authority of Chicago has been criticized for replacing vertical ghettos with horizontal ghettos. Steve Bogira, *Separate, Unequal, and Ignored*, CHI. READER (Feb. 10, 2011), <https://www.chicagoreader.com/chicago/chicago-politics-segregation-african-american-black-white-hispanic-latino-population-census-community/Content?oid=3221712>.

²¹¹ See Duncan & Zuberi, *supra* note 200, at 114.

²¹² *Id.*

²¹³ *Id.*

of those that moved ultimately returned to predominantly black neighborhoods with average poverty rates of about 61%.²¹⁴

Research on the voucher program at a national level reveals that Section 8 voucher recipients are not moving to better neighborhoods.²¹⁵ Studies attribute the limitation of housing vouchers to local-market-level factors and individual families.²¹⁶ At the local level, families encounter the tightness of the local housing market, spatial distribution of affordable housing, and discrimination in the housing market.²¹⁷ At the individual family level, families may choose to stay in neighborhoods with concentrations of poverty or clusters of the same race.²¹⁸ For example, a family may stay in a poor neighborhood because it is where they have established social networks.²¹⁹ Despite this data, because Section 8 housing yielded some positive outcomes, Congress indicated that the private market might be the best solution for deciding how the federal government should enact affordable housing policy.²²⁰

IV. TRANSFER OF DISCRIMINATION

As foreshadowed by the *Gautreaux* remedy, the federal government has transitioned to reliance on the private sector to create affordable housing with LIHTC.²²¹ Similar to the manner in which public housing was built in a way that perpetuated racial discrimination, LIHTC housing credits are being

²¹⁴ *Id.*

²¹⁵ Sandra J. Newmann & Ann B. Schnare, “. . . *And a Suitable Living Environment*”: *The Failure of Housing Programs to Deliver on Neighborhood Quality*, 8 HOUSING POL’Y DEBATE 703, 711 (1997); see also OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANTS AND NEIGHBORHOOD WELFARE 33 (2003), https://www.huduser.gov/publications/pdf/location_paper.pdf.

²¹⁶ OFFICE OF POLICY DEV. & RESEARCH, *supra* note 215, at 33.

²¹⁷ Duncan & Zuberi, *supra* note 200, at 114.

²¹⁸ *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUS. & URBAN DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Apr. 15, 2019).

²¹⁹ *Id.*

²²⁰ OFFICE OF POLICY DEV. & RESEARCH, *supra* note 215, at 85–86.

²²¹ *Id.*

distributed in a way that continues racial segregation.²²² Because LIHTC is operated through the private market and because the Supreme Court in *ICP* allowed Housing Authorities (HAs) and private investors to legitimize placement decisions with a business purpose justification, HAs and private investors are insulated from fair housing mandates.²²³

A. The LIHTC Approval Process Fails at Furthering Fair Housing

As auspicious as the Court in *Gautreaux* may have discussed utilizing the private market to produce low-income housing,²²⁴ LIHTC is not furthering FHA fair housing goals based on a statutory interpretation.²²⁵ LIHTC prioritizes building units in QCTs,²²⁶ which are areas with high levels of poverty already in place.²²⁷ The preference for building in these QCTs leads developers to locate LIHTC-funded developments in a manner that maintains segregation.²²⁸

Between 1995 and 2009, there was a national increase in the percentage of credits being allocated in high-poverty QCTs.²²⁹ In 1995, 20.6% of LIHTC projects were built in high-poverty qualified areas.²³⁰ By 2003, LIHTC projects built in QCTs accounted for 34.8% of all LIHTC developments.²³¹

²²² John Baber, *Thank You Sir, May I Have Another: The Issue of the Unsustainability of Low Income Housing Tax Credits and Proposed Solutions*, 4 U. BALT. J. LAND & DEV. 39, 47–50 (2014).

²²³ See discussion *infra* Part IV.A.

²²⁴ See *Hills v. Gautreaux*, 425 U.S. 284, 303–04 (1976).

²²⁵ See I.R.C. § 42(d)(5)(B)(ii)(I).

²²⁶ *Id.*

²²⁷ See Office of Policy Dev. & Research, *Qualified Census Tracts and Difficult Development Areas*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.huduser.gov/portal/datasets/qct.html> (last visited Apr. 7, 2019).

²²⁸ See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., NEW LOW-INCOME HOUSING TAX CREDIT PROPERTY DATA AVAILABLE 6 (2011), <https://www.huduser.gov/portal/Datasets/lihtc/topical9509.pdf>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

The rate increased to 38.1% in 2009.²³² According to a study done by the Fair Housing Justice Centre in New York, 77% of the LIHTC units developed in New York City were located in minority neighborhoods and only 8% of low-income units were developed in areas with more than 80% non-Hispanic whites.²³³ Furthermore, 70% of LIHTC housing units were approved in areas of either high or extreme poverty concentration, with more than half of the units in areas with extreme poverty.²³⁴

The IRS recognized that placing LIHTC projects in QCT's risks exacerbating concentrations of poverty.²³⁵ In an attempt to minimize these effects, the IRS issued Notice 2016-77, which states that a project will not qualify unless it is both located in a QCT and its development contributes to a "concerted community revitalization plan."²³⁶ The notice also stated that the Department of Treasury did not provide a definition for "concerted community revitalization plan" for states to apply.²³⁷ Without further clarity from the IRS, HAs are forced to prioritize allocating the credits to sites in impoverished racial enclaves.²³⁸

B. Inclusive Communities and the Changed Pleading Standard

The discriminatory effects resulting from private-sector public housing programs are now more difficult to remedy because the Supreme Court has made it increasingly difficult for litigants making disparate impact claims that survive the pleading stages of litigation.²³⁹ On the one hand, in *Inclusive*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See generally I.R.S. Notice 2016-77, 2016-2 C.B. 914.

²³⁶ *Id.* The IRS noted that "[p]lacing LIHTC projects in qualified census tracts risks exacerbating concentrations of poverty." *Id.*

²³⁷ *Id.*

²³⁸ The IRS is currently working on defining "concerted community revitalization plan." *Id.* It is important to note the answer to this question is the threshold between revitalization and gentrification.

²³⁹ See Steven Cummings, Note, Twiqbal, Inc.: *Finding Disparate-Impact Claims Cognizable Under the Fair Housing Act and Raising Serious Concerns in the Process*, 80 ALB. L. REV. 381, 384 (2016).

Communities, the Court recognized disparate impact under FHA for claims relating to the LIHTC.²⁴⁰ On the other hand, the Court also severely increased the difficulty in succeeding in disparate impact claims.²⁴¹

In 2008, ICP, a Texas-based nonprofit that helps low-income families obtain affordable housing, sued the Texas Department of Housing and Community Affairs (Department), the housing authority responsible for distributing tax credits.²⁴² ICP alleged that LIHTC was being administered in Texas in a manner that violates its duty to affirmatively further fair housing.²⁴³ The LIHTC projects were being approved in areas that maintained segregation.²⁴⁴ “As of 2013, 97% of non-elderly LIHTC units . . . were located in census tracts with more than 50% minority residents.”²⁴⁵ The plaintiffs relied on a HUD report, which states that from 1995 to 2006, 44% of the seven county metropolitan areas with LIHTC units were in tracts with a 50% minority population.²⁴⁶

After *ICP*, a plaintiff making a disparate impact claim must demonstrate a causal connection between the defendant’s policy and the alleged disparity, or the plaintiff must “produce statistical evidence demonstrating a causal connection” between the defendant’s policy and the discriminatory effect, in order to establish a *prima facie* case.²⁴⁷ The Court, however, limited potential liability by providing private developers and HAs protection in the form of a business justification.²⁴⁸ The Court specified that market factors that contribute to a community’s quality of life are substantial, legitimate, and

²⁴⁰ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

²⁴¹ *Id.* at 2523.

²⁴² *Id.* at 2508.

²⁴³ *Id.* at 2514.

²⁴⁴ *Id.*

²⁴⁵ Complaint at 17, *Inclusive Cmty. Project, Inc v. U.S. Dep’t of Treasury*, No. 3:14-cv-03013-D (N.D. Tex. 2014).

²⁴⁶ *Id.* at 14.

²⁴⁷ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2508.

²⁴⁸ *Id.* at 2518.

nondiscriminatory interests.²⁴⁹ The Court found that “[i]t would [otherwise] be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority might seem preferable.”²⁵⁰ Private developers must be given latitude to consider these market factors.²⁵¹ “Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture).”²⁵² Justice Kennedy even acknowledged the heightened standard, stating that “[i]t may . . . be difficult to establish causation because of the multiple factors that go into investment decisions.”²⁵³

These factors would make pleading disparate impact claims difficult because the defendant can either use the factors as an affirmative defense or as an attack on the plaintiff’s prima facie case.²⁵⁴ HUD issued a regulation interpreting the FHA to encompass a burden-shifting framework for adjudicating disparate impact claims.²⁵⁵ A plaintiff must first establish some prima facie showing of disparate impact.²⁵⁶ The plaintiff “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”²⁵⁷ If the plaintiff cannot demonstrate the causation requirement, then there is no liability.²⁵⁸ If the plaintiff succeeds in presenting a prima facie case, the burden then shifts to the defendant to “prov[e] that the challenged practice is necessary to achieve one or more substantial,

²⁴⁹ *Id.* at 2524.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 2449.

²⁵² *Id.*

²⁵³ *Id.* at 2523–24.

²⁵⁴ *Cummings*, *supra* note 239, at 383.

²⁵⁵ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2514 (citing Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013)).

²⁵⁶ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2514 (citing 24 C.F.R. § 100.500(c)(2) (2013)).

²⁵⁷ *Id.* at 2514–15 (citing 24 C.F.R. § 100.500(c)(1)).

²⁵⁸ *Id.*

legitimate, nondiscriminatory interests.”²⁵⁹ At this stage, the housing authority and the private developer can use the market factors to attack the plaintiff’s prima facie case.²⁶⁰ This framework makes identifying instances of unfair housing difficult because it will be difficult for a claimant to survive the pleading stage.²⁶¹

C. *Gautreaux in Light of ICP*

In *Gautreaux*, the Supreme Court assessed two types of public housing remedies: public housing and Section 8 low-income housing.²⁶² The Court did not mandate either option and deferred to the lower court to decide which option would work best for remedying past discrimination engaged in by state housing agencies.²⁶³ The Court presented Section 8 as an option primarily because federal policy was steering away from a robust role in public housing.²⁶⁴

The problem with public housing was that local suburban communities refused to have a large public housing project in their backyard.²⁶⁵ Granted, the Court could have simply ordered HUD and CHA to build the housing projects in the selected suburban neighborhoods, but such an order would not receive public favor and would have been contrary to the goal of FHA.²⁶⁶ The purpose of FHA is to undo the history of overt racial housing discrimination, which left black communities destitute.²⁶⁷ If the Court had forced the

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 2523.

²⁶² *Hills v. Gautreaux*, 425 U.S. 284, 303 (1976).

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ Andrew Wilford, *California NIMBYs Kill Effort to Make Housing Affordable*, AM. SPECTATOR (Jan. 15, 2019, 5:45 AM), <https://spectator.org/california-nimbys-kill-effort-to-make-housing-affordable/>.

²⁶⁶ *Id.* (discussing how neighborhoods argue against the building of affordable housing in their neighborhood). Section 3601 of FHA states “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”

²⁶⁷ Orfield, *supra* note 151, at 1763–64.

placement of public housing buildings in suburban communities, the low-income tenants may not have blended well with the community because the suburban community may not have wanted them there to begin with.²⁶⁸ The other option would have been placing blacks in suburban neighborhoods in moderate numbers.²⁶⁹ Using the private market to sprinkle blacks into different surrounding neighborhoods is easier than erecting a high-rise public housing building in a white upper- or middle-class neighborhood.

The federal government, then, increased its reliance on the private market by creating LIHTC.²⁷⁰ LIHTC is distinct from the Section 8 housing voucher program in two ways: LIHTC is primarily used by major corporations, while housing vouchers are feasible for both large corporations and smaller and individual landlords.²⁷¹ LIHTC also generally requires new construction or some sort of renovation, while voucher programs can be used on newly constructed buildings and existing housing units.²⁷²

When *ICP* made its way to the Supreme Court, the Court appeared to be more hesitant to apply the same disparate impact standard to the private entities and state housing agencies administering these private programs.²⁷³

²⁶⁸ It is known as mixed-income housing. See generally Erin M. Graves, *The Structuring of Urban Life in a Mixed-Income Housing "Community,"* 9 CITY & COMMUNITY 109 (2010). The idea is that placing someone with a lower socioeconomic status with higher socioeconomic status persons would enable that lower socioeconomic status person to rise up to middle-class status. *Id.* This is done by expanding the networks of the lower-income people, which will open them to new opportunities. *Id.* Scholars are split on the benefits of mixed-income housing. Compare Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1019–20 (2010), with Matthew Shiers Sternman, Note, *Integrating the Suburbs: Harnessing the Benefits of Mixed-Income Housing in Westchester County and Other Low-Poverty Areas*, 44 COLUM. J.L. & SOC. PROBS. 1, 2–3 (2010). If it is clear that the community does not want that part of the community in their neighborhood, they will likely be distant from the new lower-income residents, which would not achieve the goal of neighborhood integration. Melkorka Licea, 'Poor Door' Tenants of Luxury Tower Reveal the Financial Apartheid Within, N.Y. POST (Jan. 17, 2016, 1:48 PM), <https://nypost.com/2016/01/17/poor-door-tenants-reveal-luxury-towers-financial-apartheid/>.

²⁶⁹ See *Gautreaux*, 425 U.S. at 301–02.

²⁷⁰ I.R.C. § 42(g)(1)(A).

²⁷¹ CORIANNE PAYTON SCALLY ET AL., URBAN INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 13 (2018), https://www.urban.org/sites/default/files/publication/98758/lithe_how_it_works_and_who_it_serves_final_2.pdf.

²⁷² *Id.* at 8.

²⁷³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

In both Texas and Chicago, the statistics demonstrate that affordable housing was located in a manner that was discriminatory.²⁷⁴ In Chicago, with public housing, the Supreme Court did not dispute the validity of a remedy needed to fix the discrimination, after such proof was proffered.²⁷⁵ In Texas, with LIHTC, the Supreme Court did the opposite.²⁷⁶ The Court found legitimate business decisions to be valid reasons for surviving the pleading stages of disparate impact claims.²⁷⁷

The Court reasoned that it wanted to protect private investors “against abusive disparate impact claims.”²⁷⁸ The Court stated that, “if the specter of disparate impact litigation causes private developers to no longer construct or renovate housing units for low income individuals, then FHA would have undermined its own purpose as well as the free market system.”²⁷⁹ In other words, Justice Kennedy seemed concerned about potential disparate impact litigation and how it would dissuade private investors from creating low-income housing.²⁸⁰ Justice Kennedy laid out the framework for the justifications that a private investor or government agency that is administering credits might use to further protect private industry when undertaking to construct low-income housing:

²⁷⁴ *Id.* at 2514; *Gautreaux*, 425 U.S. at 287–88.

²⁷⁵ *Gautreaux*, 425 U.S. at 287–88.

²⁷⁶ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2524–25.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 2524.

²⁷⁹ *Id.* at 2523. The Court shares an example:

A plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of multiple factors that go into investment decisions about where to construct or renovate housing units.

Id. Here, the Court is not holding private entities to the same standard that a government agency would be held to. *See id.* The private agency is allowed to use business reasons for not complying with FHA purposes. *See id.* The Court is also looking at LIHTC on a one-to-one basis as opposed to looking at it holistically. *See id.*

²⁸⁰ *Id.* at 2523.

Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities.²⁸¹

The disregard of business justifications would threaten America's laissez-faire economic system by jeopardizing private choice in deciding where to build and how to invest money.²⁸² Protecting the private market is a valid point. However, protecting the private market appears to outweigh providing fair housing,²⁸³ thus, we should consider swinging the pendulum back to the government to address public housing needs without furthering discrimination.

V. PROPOSAL

In order to reduce or eliminate discrimination in the provision of affordable housing, the pendulum should be swung back towards government control. State HAs should use tax credits to build and manage housing. Nothing in § 42 appears to prohibit states from applying for LIHTC tax credits.²⁸⁴ Although, some states may need to expand their HAs' power to allow them to build new affordable housing, which would then permit them to apply for credits. Nonetheless, state HAs should, at the least, compete for the credits against for-profit private developers and not-for-profit developers. As any private developer can, state HAs should be permitted to send applications to their respective state, which fleshes out how their proposal is most beneficial to achieve affordable housing. Then, similar to how private developers utilize the credits, the housing authority should be allowed to sell those credits to bankers and investors to raise funds to create affordable housing.

²⁸¹ *Id.*

²⁸² See generally David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217 (2009).

²⁸³ See *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2523.

²⁸⁴ See I.R.C. § 42. Section 42 focuses primarily on the eligibility of the proposed project and defers to the state to determine how and which projects should be chosen.

By reigniting state control over affordable housing, the state would have direct control over the location of affordable housing, and unlike private developers, states must locate housing in a way that affirmatively furthers fair housing.²⁸⁵ As established in *ICP*, it is very difficult to hold private developers to fair housing standards.²⁸⁶ After *ICP*, it will be difficult for a litigant to survive the pleading stages because private businesses are allowed to use business rationales as a justification for locating affordable housing in a discriminatory manner.²⁸⁷ Conversely, as demonstrated by *Gautreaux*, the government is legally required to comply with fair housing law and generally cannot assert a business rationale as justification for locating housing in a discriminatory manner.²⁸⁸ Moreover, because HAs may sell the credits to private investors, LIHTC will still achieve its goal of generating funding from the private sector. Most beneficial, states have the potential to maximize such funding as opposed to a private organization primarily concerned with generating profits.²⁸⁹

In planning and developing LIHTC projects, HAs should build rental units and strategically rent them out in a way that covers expenses, generates some profits, and offers a larger percentage of affordable housing units. Instead of providing housing to only those families that are truly in need, HAs should open the doors to higher earners.²⁹⁰ This type of mixed housing

²⁸⁵ 42 U.S.C. § 3608(d) (2012). This puts housing back into the democratic process.

²⁸⁶ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2523.

²⁸⁷ State governments can utilize their eminent domain powers, reserved by the Tenth Amendment, to select where to build affordable housing projects. Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 888–913 (2014) (discussing the ways in which eminent domain can be used to address affordable housing).

²⁸⁸ See *supra* Part III.A. On remand, the court dismissed the case because ICP was unable to point to a policy causing the racial disparity. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562, at *25 (N.D. Tex. Aug. 26, 2016). ICP was unable to establish that the “statistical disparity is caused by the defendant’s policy or policies, rather than by other factors.” *Id.* The court notes how many factors are taken into consideration based on the structure of LIHTC and how LIHTC is administered at the state level. *Id.* 25–31. Under state control, HAs would be selecting where to place LIHTC units. In the event of a HA illegally placing housing units, a litigant can easily point to the policy causing a desperate impact.

²⁸⁹ BERG, *supra* note 88, at 74–75 (discussing Port Authority as an example of successful government work).

²⁹⁰ William Julius argues that higher-income families being mixed with lower-income families provides a social buffer that opens lower-income families to more opportunities. WILSON, *supra* note 23,

would allow the housing authority to generate revenue, which can in turn be used to expand affordable housing to those who are in need and help middle-class families find fair and affordable housing. Ultimately, the long-term goal would be to create a self-sustaining housing authority that has its own ability to expand.

Many states call this type of free-market government entity a public authority.²⁹¹ For instance, New York City had the Empire State Development Corporation (ESDC).²⁹² ESDC was created by the state to stimulate New York's economy by financing and building projects.²⁹³ ESDC was allowed to do so by selling up to \$2 billion in bonds.²⁹⁴ ESDC also had the ability "to override local zoning and building ordinances as well as issue building permits."²⁹⁵ ESDC was responsible for the Javits Convention Center, the Marriott Marquis Hotel in Times Square, and Donald Trump's development of the Grand Hyatt Hotel.²⁹⁶ HAs would have low risk with the tax credits because they would not incur interest and repayment obligations associated with debt financing.²⁹⁷

One might argue that because we have a history of bad public housing, if we allow the same authorities to use tax credits, that bad housing history may continue.²⁹⁸ Government autonomy over public housing has failed in the past not because public housing cannot work, but due to improper management, cheap spending, and explicit racial discrimination.²⁹⁹ In its

at 56 ("[T]he exodus of middle- and working class families from ghetto neighborhoods removes an important 'social buffer' that could deflect the full impact of the kind of prolonged and increasing joblessness that plagued inner-city neighborhoods . . .").

²⁹¹ BERG, *supra* note 88, at 74–75 (discussing other special purpose authorities such as MTA and Port Authority).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Insanity is doing the same thing over and over again expecting a different result. This Note proposes that HAs need to adjust how they function.

²⁹⁹ *See supra* Parts I.B–D.

earliest iterations, public housing was founded on the idea of providing transient housing for the poor.³⁰⁰ The Chicago example is a prime example of mismanagement.³⁰¹ The Chicago Housing Authority operated under circumstances that curtailed its public housing endeavors.³⁰² The HAs did not carefully select tenants: “[s]ite selection was confined to black-occupied areas per the wishes of a racist city council, and high-rise projects were built with an overwhelming number of large apartments.”³⁰³ Moreover, the apartments were “tenanted strictly on the basis of eligibility and date of application with no concern about family stability or fitness to live in the community.”³⁰⁴ Consequently, Chicago’s public housing became housing of “last resort.”³⁰⁵

Opponents may also argue that state HAs are plainly not in the best position to build and manage housing.³⁰⁶ This Note argues to the contrary; it is possible for a state to operate public housing successfully if it addresses the persistent flaws in the way public housing is operated. Currently, many of the HAs that offer public housing either are encumbered by significant debt or demolished their public housing stock because of unmanageable debt obligations.³⁰⁷ State HAs have difficulties with their financing because of their long history of mismanagement and cheap infrastructure.³⁰⁸ For instance, in New York City’s public housing, the state estimates that it will cost about \$31.8 billion to fix the infrastructure, which was attributed to

³⁰⁰ See *supra* Part I.

³⁰¹ Jim Fuerst & Jane Sims, *The Misguided Efforts to “Reform” Public Housing in America*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. 285, 285 (2005).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Howard Husock, *How Public Housing Harms Cities*, CITY J., <https://www.city-journal.org/html/how-public-housing-harms-cities-12410.html> (last visited Apr. 15, 2019).

³⁰⁷ See Will Bredderman, *City on the Edge: The Problems, Policies, Politics and People of NYCHA*, THE OBSERVER (Apr. 28, 2015, 10:30 PM), <http://observer.com/2015/04/city-on-the-edge-the-problems-policies-politics-and-people-of-nycha/>. For instance, New York City Housing Authority is estimated to have a debt of \$762 million. *Id.* There is an extensive waiting list for Section 8 housing vouchers. *Id.*

³⁰⁸ See *supra* Parts I.B–D.

deteriorating and aging buildings.³⁰⁹ HAs can avoid such problems in the future if a well thought-out plan is used.

VI. CONCLUSION

The government has transitioned to relying on the private market to supply affordable housing and low-income residents are getting the short end of the stick.³¹⁰ Private developers prosper by getting credits, which decrease their building costs and give investors means of lowering their own tax bills.³¹¹ Meanwhile, these housing units are not located in areas that would allow tenants to end generations of poverty, even though low-income tenants receive units at an affordable rate.³¹² The placement of housing units in high-poverty census tracts generally leads to placing black tenants in neighborhoods that are primarily of the same race.³¹³ This Note's proposal of allowing HAs to utilize these credits will enable states to direct the placement of affordable housing in ways that would achieve the best results for low-income tenants. This solution would be a step towards the elimination of racial discrimination in public housing by ensuring that programs designed to subsidize low-income housing with taxpayer dollars are required to comply with the antidiscrimination standards of the FHA.

³⁰⁹ Luis Ferre-Sadurni, *What Will It Cost to Fix New York's Public Housing?*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/nyregion/nycha-public-housing-fix.html>.

³¹⁰ *See supra* Part II.

³¹¹ *See supra* Part II.B.

³¹² Even when cities have promoted mixed-income housing, private developers have constructed units to keep low-income tenants separate from higher-income tenants by providing separate entrances. Licea, *supra* note 268. This issue is known as the poor door. *Id.* Low-income tenants are completely separated from higher-income tenants. *Id.* Some buildings go so far as to create separate doors that do not provide low-income tenants with access to high-income tenant areas. *Id.*

³¹³ *See supra* Part IV.A.