

THE LOW-INCOME HOUSING TAX CREDIT IN NEW JERSEY: NEW OPPORTUNITIES TO DECONCENTRATE POVERTY THROUGH THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

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INTRODUCTION

The federal Low Income Housing Tax Credit¹ (LIHTC) program has produced over one million rental housing units from 1995 to 2005, most of which are affordable to low-income tenants.² Developers of low-income rental housing apply for federal income-tax credits to subsidize their affordable housing units through a competitive process administered by the states.³ Recent litigation in New Jersey, Connecticut, and Texas has challenged the ways in which states allocate these credits.⁴ The issues in those cases concern the obligations of the states to administer the LIHTC in ways

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1. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (1986).

2. ABT ASSOCS. INC., HUD NATIONAL LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2005 1–9 (2007), available at <http://www.huduser.org/Datasets/lihtc/tables9505.pdf>.

3. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1778 (2005).

4. See *Inclusive Cmty. Project, Inc. v. Tex. Dep't. of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935, at *2 (N.D. Tex. Dec. 11, 2008); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, No. (X02)CV030179515S, 2004 WL 113560, at *1 (Conn. Super. Ct. Jan. 5, 2004); *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

that further national fair housing goals, as articulated in the Federal Fair Housing Act.⁵ The Fair Housing Act requires public agencies to act in a manner affirmatively to further fair housing.⁶ Generally speaking, this requires agencies covered under the statute to not only refrain from racial discrimination, but also to take affirmative steps to encourage integration.⁷ However, the LIHTC statute seemingly betrays those ideals by requiring that state LIHTC administrators give preference to developers who plan to site their low-income housing in communities that are already destabilized by a concentration of poor residents and a lack of economic and educational opportunities.⁸

5. 42 U.S.C. §§ 3601–3609 (2006). This Note discusses aspects of the Federal Fair Housing Act as well as parts of New Jersey’s Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2008). Federal law recognizes that people ought not to be limited in their opportunities to live in a community on account of race, *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948), but does not recognize a right to reside in any community regardless of economic status, *see Wincamp P’ship v. Anne Arundel County*, 458 F. Supp. 1009, 1027 (D. Md. 1978). New Jersey recognizes an obligation on the part of every municipality to use their zoning powers to create the opportunities for low-income housing in accordance with each municipality’s fair share.

Defining precisely “national fair housing goals” is beyond the scope of this Note. It is assumed, for present purposes, that fair housing constitutes a housing market where people are limited as to the specific homes that they may inhabit because of economic limitations and not because of racial factors, but are not limited to specific communities or neighborhoods for economic or racial reasons.

For some examples of state and federal commitments to fair housing, *see* 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”); 42 U.S.C. § 3608(d) (“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 the national housing policy.”); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 727–28 (N.J. 1975) (“The presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.”).

6. *See Shannon*, 436 F.2d at 816.

7. *See South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 882–83 (7th Cir. 1991) (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)) (recognizing the dual obligations of non-discrimination and integration on agencies covered by the Federal Fair Housing Act).

8. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2006).

The LIHTC allocation practices of many states maintain existing concentrations of poverty by giving priority to development proposals for low-income housing in census tracts that are already occupied by a high percentage of low-income families.⁹ The result is that LIHTC units are frequently constructed in low-income, high-poverty neighborhoods where families find greater difficulty overcoming a lack of both educational and labor opportunities.¹⁰ This makes housing integration, whether measured economically or racially, more difficult to achieve and significantly limits the opportunities available to LIHTC families.¹¹

By denying low-income families more opportunities to leave inner-city communities in favor of better schools and safer neighborhoods, states are squandering an opportunity to break the cycle of intergenerational poverty. In support of that proposition, one study of the effects of concentrated poverty and housing mobility found that children who move out of the inner city and into suburban middle-class communities have better life outcomes than their inner-city peers.¹²

Concerns about LIHTC allocations in high-poverty communities have become particularly salient in New Jersey, where, in 2003, the Fair Share Housing Center (Fair Share)¹³ brought suit against the New Jersey Housing and Mortgage Finance Agency (HMFA) in order to challenge the legality of the state's 2002 and 2003 LIHTC allocation plans.¹⁴ This Note argues that *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan (In re 2003)* was wrongly decided and that, at any rate, the decision should not be treated as binding precedent since the original justifications for *In re 2003* no longer apply.¹⁵ In addition, this Note presents some suggestions for how housing finance agencies (HFA) can improve their siting of LIHTC units from a fair housing perspective. While

9. Orfield, *supra* note 3, at 1780.

10. *See generally id.* at 1759–61.

11. For an account of how location and the concentration of poverty can affect one's life outcome, see PETER DRIER, JOHN MOLLENKOPF & TODD SWANSTROM, *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* 2–3 (2005).

12. *See* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 170–71 (2000) (noting that suburban movers, as compared to city movers, were more likely to attend college and find employment with benefits).

13. Fair Share is a nonprofit organization promoting fair housing in New Jersey. *See* Fair Share Housing Center, *Our Mission*, <http://fairsharehousing.org/about> (last visited Apr. 7, 2010).

14. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

15. *Id.* at 1.

the focus of this Note is on problems specific to New Jersey, much of this analysis is applicable to the LIHTC program nationally.

In re 2003 was brought by Fair Share and local chapters of the National Association for the Advancement of Colored People (NAACP) in the Camden area to challenge the HMFA's plan to allocate low-income housing tax credits to developments located in high-poverty areas.¹⁶ Fair Share's appeal of the HMFA's administrative action brought the case directly to New Jersey's Appellate Division.¹⁷ Fair Share argued that the HMFA had failed to affirmatively further fair housing in its LIHTC allocation plan. The plaintiff also claimed that the HMFA's practices violated the *Mount Laurel* doctrine¹⁸—a state constitutional guarantee particular to New Jersey that prevents municipalities from using their land-use power to exclude low-income housing.¹⁹ Although the appellate division affirmed the HMFA's proposed allocation plan,²⁰ it also found that the HMFA "has a duty to administer its housing and financing programs in a manner affirmatively to further [fair housing]," despite the defendant's position that it was under no such duty.²¹ The court's finding that the duty to affirmatively further fair housing applies to the state housing finance agency has elicited recent attention from legal commentators.²²

However, in the time since the New Jersey State Appellate Division found in favor of the HMFA, the legal and economic context of the *In re 2003* decision has changed, due largely to recent changes in the law brought on by the federal Housing and Economic Recovery Act of 2008²³ and amendments to New Jersey's Fair Housing Act,²⁴ as well as drastic changes in the real estate market.²⁵

16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. See generally *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (1975).

20. *In re 2003*, 848 A.2d at 6.

21. *Id.* The duty to affirmatively further fair housing is explained fully in Part II.B.1.

22. See, e.g., Carol Necole Brown & Serena M. Williams, *The Houses That Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans*, 34 *FORDHAM URB. L.J.* 689, 711–13 (2007); Orfield, *supra* note 3; Seema Ramesh Shah, Note, *Having Low Income Housing Tax Credit Qualified Allocation Plans Take into Account the Quality of Schools at Proposed Family Housing Sites: A Partial Answer to the Residential Segregation Dilemma?*, 39 *IND. L. REV.* 691, 701–06 (2005).

23. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

24. See N.J. Pub. L. 2008, ch. 46 (2008).

More tax credits will be available in 2009 than previously.²⁶ However, obtaining funding to begin construction projects has been exceedingly difficult; construction lending was “virtually shutdown” after the market collapsed in the fall of 2008.²⁷ Further, new restrictions on New Jersey municipalities by the state legislature banned the use of Regional Contribution Agreements (RCA).²⁸ Accordingly, some towns may have to increase the amount of land that is zoned for medium- or high-density affordable housing developments. One possible result of an increase in such zonings is that affordable housing development could become cheaper since there would be more opportunities to develop affordable housing in the suburbs than previously.

This Note argues that *In re 2003* was not only wrongly decided, but that these changes in the law and within the market have negated the court’s principal justifications for its legal conclusions in the case. Since those justifications are no longer operative, the legal claims Fair Share presented in the case should come out differently now. Because the New Jersey HMFA and other housing finance agencies have been able to rely on *In re 2003* to defend the practice of siting LIHTC units in high-poverty, low-opportunity areas, this point demands consideration. So, where Myron Orfield argues that *In re 2003* was wrongly decided,²⁹ this Note argues that not only was *In re 2003* wrongly decided, but that it should not be binding or persuasive to the state courts because of the vastly changed circumstances in which New Jersey, in particular, and all states now find themselves. This position should be tempered, however, by the realization that an HFA’s allocation plan changes every

25. David Streitfeld, *Recovery Signs in Housing Market Stir Some Hope*, N.Y. TIMES, July 29, 2009, at A1.

26. The Housing and Economic Recovery Act of 2008 granted a temporary increase in the availability of low-income housing tax credits. 122 Stat. 2654.

27. Alan Zibel, *Commercial Real Estate Woes Grow*, ASSOCIATED PRESS FINANCIAL WIRE, Jul. 9, 2009, available at http://www.google.com/hostednews/ap/article/ALeqM5gfl_ByDjrZfdJHz-tEb9cJUNPONwD99B68U00.

28. Regional Contribution Agreements, as explained in Part II.E, allowed New Jersey municipalities to fulfill half of their *Mount Laurel* obligation to provide affordable housing by paying a less affluent municipality to site affordable housing within the borders of the receiving town. By banning RCAs, the state is effectively forcing some towns that relied on them to fulfill their obligations to accommodate opportunities for affordable housing within their own borders. See N.J. Pub. L. 2008, ch. 46 (discontinuing use of RCAs and creating a new housing rehabilitation program to replace it); see also, e.g., Matt Jackson, *More Special-Needs Housing is Possible*, TOWN J. (Allendale, N.J.), Jul. 23, 2009, <http://www.northjersey.com/news/51446002.html>.

29. Orfield, *supra* note 3, at 1753–54.

year, and one plan that does little to affirmatively further fair housing may be replaced the next year with a more enlightened plan.

A secondary observation offered by this Note is that there are a number of opportunities for state finance agencies across the nation to ameliorate existing siting problems. HFAs can and should adopt LIHTC allocation plans that consider the siting effects of LIHTC units. This is not to say that LIHTC units should never be located in pockets of concentrated poverty, but rather that the existing practice in some states of placing them mostly in high-poverty areas is wrong-headed and illegal.

Part I of this Note will provide an explanation of how the LIHTC is administered and some of the potential problems that can result. Part II examines the fair housing literature and argues that class integration is one of the most important ways to create viable paths for intergenerational social mobility. Part III focuses on the LIHTC litigation that took place in New Jersey, then makes the case that Fair Share's argument—that the state had failed to meet its duty to affirmatively further fair housing—should be looked upon more favorably given the court's reliance on state policy that has since changed and a high-priced market that is now significantly weaker. Part IV offers suggestions for how the HMFA and other state agencies could overcome some of the current obstacles to fair housing in the LIHTC program.

I. HOW THE LOW-INCOME HOUSING TAX CREDIT WORKS

A. *The Basics*

LIHTCs are meant to induce developers to construct low-income housing units. Created by Congress in the Tax Reform Act of 1986,³⁰ the program allows a real estate developer or investor to pay less money in income tax.³¹ The tax credits are claimed over a ten-year period.³² There are two standards by which a building can be deemed a "qualified low-income housing project" and comply with

30. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (1986).

31. U.S. DEP'T OF HOUS. & URBAN DEV., HOW DO HOUSING TAX CREDITS WORK?, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/work.cfm> (last visited Apr. 8, 2010) ("Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years.").

32. *Id.*; see also 26 U.S.C. § 42(b)(2)(B) (2006).

the LIHTC program.³³ The first standard requires that at least 20% of the residential units be affordable to and occupied by individuals who earn no more than 50% of the area median income (AMI).³⁴ The alternate standard requires that at least 40% of the units be affordable to and occupied by individuals who earn no more than 60% of AMI.³⁵

There are two different funding levels available through the LIHTC. For many new developments, the total tax credit amounts to 70% of the value of the affordable housing units.³⁶ Alternatively, credit amounting to 30% of the value of the affordable units can be used to construct or rehabilitate any other building that meets the affordability standards mentioned above.³⁷ Whether the credit pays 70% or 30% of the value of the affordable units created, the tax credits are stretched over a ten-year period, and the percentage of the credit that can be claimed each year by a developer or tax credit investor is set by Treasury Department regulations.³⁸ The initial “compliance period”—the period of time during which a building owner must keep the units affordable—lasts for fifteen years³⁹ but is automatically extended by the statute, usually for another fifteen years⁴⁰ if certain conditions are not met.⁴¹ That additional, automatic obligation is referred to as the “extended use period.”⁴²

The LIHTC differs from many other federal tax credits in that simply claiming the credits on an income-tax return is not enough; the credits must first be allocated to the individual or company by a

33. 26 U.S.C § 42(g)(1).

34. § 42(g)(1)(A).

35. § 42(g)(1)(B).

36. § 42(b)(1)(B).

37. *Id.*

38. The yearly amounts that are claimed as tax credits—designated percentages of the building’s value—add up to the total percentage of the value that the tax credits offset over 10 years. §42(b)(2)(B).

39. § 42(i)(1).

40. § 42(h)(6)(D)(ii).

41. § 42(h)(6)(E)(i).

42. § 42(h)(6)(E)(i). However:

[A]n Owner may request termination of the extended use period[;] . . . [§ 42(h)(6)(E)(i)(II)] provides HMFA a one-year timeframe within which to present a buyer willing to a) maintain the property as low-income and b) purchase the property for a qualified contract (“QC”) amount. In the event that the building owner requests termination and HMFA is unable to present a buyer within a year, the extended use period is terminated.

N.J. HOUS. & MORTGAGE FIN. AGENCY Y15 PROPERTIES, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/y15properties.html> (last visited Apr. 12, 2010).

state housing finance agency.⁴³ The agency, in turn, has a limited number of LIHTCs to allocate.⁴⁴ Real estate developers and non-profits interested in creating or rehabilitating affordable housing units make development proposals to their state's housing finance agency in order to request the tax credits.⁴⁵ If the tax credits are not allocated to that project and another subsidy source is not found, the project may be financially infeasible. Often, the project is put on hold in order to apply for the credits again the next year.⁴⁶

Many state HFAs evaluate the proposals on a points system.⁴⁷ The proposals are graded according to each state's regulatory standards, as expressed in their Qualified Allocation Plan (QAP).⁴⁸ The proposals must also meet federal statutory requirements.⁴⁹ In some years, the competition for the credits can be fierce.⁵⁰ In 2007,

43. § 42(m)(1)(A)(i).

44. § 42(h)(3)(H).

45. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 LOW INCOME HOUSING TAX CREDIT FINAL CYCLE RESERVATION LIST, http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008finalcycle_reservationlist.pdf; N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 LOW INCOME HOUSING TAX CREDIT SPRING ROUND RESERVATION LIST, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008%20Spring%20Cycle%20Reservation%20List.pdf>. This is not to say, however, that the bidding process for those funds is not competitive.

46. For example, Linden Lake Senior Housing and Milville Senior lacked sufficient points to get the tax credit in 2005, NEW JERSEY 2005 COMPETITIVE CYCLES, http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2005_rankings.pdf (last visited Apr. 8, 2010); both developments reapplied in 2006, when Milville Senior Housing succeeded in obtaining the credit, NEW JERSEY 2006 COMPETITIVE CYCLES, http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2006_spring_cycle_rankings.pdf (last visited Apr. 8, 2010).

47. See Megan J. Ballard, *Profiting From Poverty: The Competition Between For-Profit And Nonprofit Developers For Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 231 n.95 (2003).

48. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 15 (N.J. Super. Ct. App. Div. 2004).

49. See generally § 42(m).

50. See Ballard, *supra* note 47, at 213. In New Jersey, for instance, a single point can mean the difference between getting the credits or not in a ranking system that allows more than 100 points maximum. Bendix Anderson, *Tax Credits & Tax Exempt Bonds: A State-By-State Preview*, AFFORDABLE HOUSING FINANCE, Dec. 2007, <http://www.housingfinance.com/ahf/articles/2007/dec/NEWJERSEY1207.htm> (last visited Apr. 8, 2010).

Note that even in 2008, in the middle of a real estate market crash, competition for the credits in New Jersey has left most eligible applicants empty-handed, suggesting that the need for credits may actually be increasing as the market weakens. See NEW JERSEY 2008 SPRING CYCLES, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/Spring%20Cycle%20Rankings%207-1-08%20TCC.pdf> (last visited Apr. 12, 2010).

New Jersey developers applied for \$47.9 million in LIHTCs while the state had only \$19.9 million in total credits available.⁵¹

Each state expresses its own policy preferences through the development of an annual QAP. Because states have a significant amount of freedom to effectuate their preferences,⁵² QAPs vary in the extent to which they encourage developers to locate their projects in low-poverty areas.⁵³

B. *The Qualified Allocation Plan and the Siting of LIHTC Units*

Each state must release a yearly QAP that explains the bases on which LIHTC proposals will be evaluated.⁵⁴ Each QAP dictates what building and neighborhood attributes will be favored in that state's LIHTC allocations. Criteria like proximity to public schools and public transportation are common neighborhood attributes that are given preference.⁵⁵

Some regions locate most of their LIHTC units in high poverty areas. For instance, in the Newark, New Jersey Primary Metropolitan Statistical Area (PMSA), 86.7% of the LIHTC units built for low-income families are in census tracts that exceed a 10% poverty rate.⁵⁶ By comparison, in the Wilmington-Newark, Delaware PMSA, only 25% of similar LIHTC units are located in census tracts that exceed a 10% poverty rate.⁵⁷ This trend occurs despite the fact that the Wilmington-Newark PMSA and the Newark, New Jersey PMSA

51. See Anderson, *supra* note 50. It is interesting, however, that although there are far more applications for the tax credits than there is money available, New Jersey has not allocated all of the tax credits that are available to it. This Note offers no explanation as to why this is, other than the possibility that some funding cycles may be overfunded while others may be underfunded.

52. JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, REPORT BY THE URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 1 (2002), available at <http://www.huduser.org/Publications/pdf/AnalysisQAP.pdf>.

53. POVERTY & RACE RESEARCH ACTION COUNCIL, PERCENTAGE OF FAMILY LIHTC UNITS IN LOW-POVERTY NEIGHBORHOODS (2006), available at <http://www.prrac.org/pdf/LargeMetrosLowPovLIHTC.pdf> [hereinafter PRRAC REPORT] (presenting percentages of LIHTC units in poverty areas for large metropolitan areas).

54. 26 U.S.C. § 42(m)(1).

55. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.15(a)(11)(i) (2009)), available at http://nj.gov/dca/hmfa/biz/develop/lowinc/2009_proposedqap.pdf (setting forth the point system for the family cycle).

56. PRRAC REPORT, *supra* note 53.

57. PRRAC REPORT, *supra* note 53. This comparison will hold true for quite a large number of other PMSAs that other commentators may want to study.

have similar poverty rates.⁵⁸ Other New Jersey PMSAs have fared even worse and sited anywhere from 97% to 100% of their LIHTC units in middle- and high-poverty areas.⁵⁹

One barrier cited by the New Jersey HMFA to creating a QAP that does more to encourage low-income housing development in high-opportunity areas is the existence of the Qualified Census Tract Preference.⁶⁰

C. *The Qualified Census Tract Preference*

Section 42 (m) (1) (B) (ii) of the federal tax code requires that a QAP give preference in allocating housing credit dollar amounts among selected projects to:

- (I) projects serving the lowest income tenants,
- (II) projects obligated to serve qualified tenants for the longest periods, and
- (III) projects which are located in *qualified census tracts* . . . and the development of which contributes to a concerted community revitalization plan.⁶¹

A qualified census tract is an area “in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income.”⁶² From 1995 to 2005, there has been a steady increase in the percentage of LIHTC units being built in the high-poverty qualified census tracts (QCT).⁶³

When poor families looking for affordable housing are given no other options than to rent an apartment in a high-poverty area, then children in those families will suffer the consequences of

58. U.S. CENSUS, POPULATION AND HOUSING PROFILE: NEWARK, NJ PMSA, <http://www.census.gov/acs/www/Products/Profiles/Single/2003/ACS/Narrative/385/NP38500US56025640.htm> (last visited Apr. 8, 2010) (10% rate for Newark PMSA); U.S. CENSUS, WILMINGTON-NEWARK PMSA STATISTICS, <http://censstats.census.gov/data/MD/395249160.pdf> (last visited Apr. 8, 2010) (9.3% rate (summation of figures) for Wilmington-Newark PMSA). While the data are derived from different years, they still offer a useful point of comparison.

59. See PPRAC Report *supra* note 53, at 4–5. Atlantic-Cape May PMSA has none of its family units in tracts below 10% poverty. *Id.* At 4. Jersey City has 2.4%. *Id.* Bergen-Passaic has 0.3%. *Id.* However, the Trenton PMSA has a rate of 49.2%. *Id.* at 1.

60. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2004).

61. 26 U.S.C. § 42(m)(1)(B)(ii) (2006).

62. § 42(d)(5)(ii)(I).

63. In 1995, 19.5% of LIHTC units nationwide were built in QCTs. By 2002, LIHTC units in QCTs accounted for 27.1% of all LIHTC units. The rate of increase grew even steeper after 2002, and in 2005, 38.8% of all LIHTC units were located in QCTs. ABT ASSOCIATES, INC., *supra* note 2, at 16.

growing up in concentrated poverty while the adults continue to miss out on better employment opportunities in more desirable locations.⁶⁴

One very important factor in determining whether developers can construct affordable housing beyond the confines of low-opportunity areas is how much money the developer can get up front for selling the rights to a tax credit.⁶⁵

D. *The Market for Low-Income Housing Tax Credits*

Once a developer is awarded an LIHTC, it can be claimed on the developer's income-tax returns to directly offset, on a dollar-for-dollar basis, the amount of income tax for the developer.⁶⁶ Also, rather than claiming the tax credits, the developer may sell them to investors who may use the tax credits themselves. If the credits are sold, the developer then receives cash that can be used immediately to cover some of the construction costs. The price of the tax credits on the secondary market—determined by supply, demand, and assessment of risk—is very important when determining whether the LIHTC program alone is sufficient to subsidize construction or whether the developer has to go to other federal programs to supplement financing.⁶⁷ Further, developers tend to be more attracted to the LIHTC program and are better able to site the developments in suburban areas when the price of the tax credits is high.⁶⁸ If the developer must also apply for other affordable housing programs, then she will also be bound by their conditions, thereby limiting what she can do in terms of siting and accommodating mixed-income tenants, two available strategies for avoiding high-poverty concentration. For instance, federally subsidized building grants have their own requirements and application processes.⁶⁹ Additionally, special permission is required to combine multiple subsidy programs.⁷⁰

64. *See infra* Part II.

65. Kirk McClure, *The Low-Income Housing Tax Credit Program Goes Mainstream and Moves to the Suburbs*, 17 *Hous. Pol'y Debate* 419, 432 (2006).

66. Ballard, *supra* note 47, at 218.

67. In 2005, many investors were paying about eighty cents or more per dollar of tax credit. McClure, *supra* note 65, at 429-30.

68. *Id.* at 432.

69. U.S. DEP'T OF HOUS. & URBAN DEV., THINGS YOU SHOULD KNOW ABOUT COMBINING LIHTC WITH MF PROJECT-BASED SECTION 8, Jan. 1, 2010, <http://www.hud.gov/local/shared/working/r10/mf/sect8tips.cfm?state=wa> (last visited Apr. 23, 2010).

70. *Id.*

Because of the recent economic downturn, the LIHTC program faces a new challenge. The demand for tax credits has decreased significantly.⁷¹ As a result, developers must sell their tax credits for less money, thereby making the LIHTC program a less effective means for offsetting the costs of building affordable housing.⁷² To help overcome the problem of low demand, the American Recovery and Reinvestment Act of 2009 (Stimulus Act)⁷³ created a system whereby states can convert some of their tax credit allocations into grants for developers, thus giving the developers cash rather than having to depend on the increasingly troubled market for tax credits.⁷⁴ The Stimulus Act limits the LIHTC grants to 2009 and 2010.⁷⁵ It remains to be seen whether Congress will make the grants a permanent feature of the LIHTC program or whether they are peculiar to the economic crash of 2008 and 2009.

As explained above, the LIHTC program is administered differently by each state.⁷⁶ This is significant because the way each state administers the program, through their QAPs, has a real effect on where LIHTC units are located.⁷⁷ The next section discusses the importance of location for low-income families.

II.

PLACE MATTERS⁷⁸

A. *State-Sanctioned Apartheid: Government's Role in Concentrating Poverty*

It is not the case that American cities were always racially segre-

71. Tom Daykin, *Dropping Demand for Tax Credits Hits Apartment Projects*, JSONLINE, Dec. 16, 2009, <http://www.jsonline.com/newswatch/79342762.html>.

72. *Id.*

73. Pub. L. No. 111-5, 123 Stat. 115 (2009).

74. *Id.* § 1602.

75. *Id.*

76. *See supra* Part I.B.

77. *See generally* GUSTAFSON & WALKER, *supra* note 52.

78. I would be remiss were I not to acknowledge that the title of Part II is a reference to Peter Drier, John Mollenkopf and Todd Swanstrom's seminal work. *See* DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 2–3 (“[T]his book’s central thesis: place matters. Where we live makes a big difference in the quality of our individual lives. The functioning of the places where we live also has a big impact on the quality of our society. The evidence shows that places—neighborhoods, cities and suburbs, and regions—are becoming more unequal. Economic classes are becoming more distant and separate from each other as the rich increasingly live with other rich people and the poor live with other poor people. Over time, the poor have become concentrated in central cities and distressed inner suburbs, while the rich live mostly in exclusive central-city neighborhoods and outer suburbs. The rising economic segregation has

gated.⁷⁹ Prior to the Fair Housing Act, the federal government made conscious efforts to encourage white flight into the suburbs and discourage Black homeownership.⁸⁰ This background is important to providing the context for subsequent government efforts to remedy residential segregation.

In 1896, the Supreme Court announced the “separate but equal” doctrine in *Plessy v. Ferguson*,⁸¹ wherein the court articulated a view of segregation that assumed the natural preference of people to live separately from other races.⁸²

The *Plessy* opinion marked a period in which residential segregation began to take on epidemic proportions.⁸³ Further, *Plessy* misunderstood or ignored the fact that many of America’s racial prejudices did not emerge organically among private citizens. Rather, they were promulgated through a variety of colonial-era laws that established a racial hierarchy that had not previously existed.⁸⁴ According to Massey and Denton’s work on the subject of residential racial segregation, before 1900 “blacks were more likely

produced negative consequences that range from reinforcing disadvantage in central-city neighborhoods, to heightening the cost of suburban sprawl, to speeding the deterioration of central cities and inner suburbs. It would be bad enough if this trend resulted simply from individuals and households making choices in free markets, but it does not. Federal and state policies have favored suburban sprawl, concentrated urban poverty, and economic segregation. Only new politics for metropolitan governance that level the playing field and bring all parts of the metropolis into a dialogue with each other can stop the drift toward greater spatial inequality.”).

79. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 20 (1993) (“[B]efore 1900 African Americans could be found in most neighborhoods of northern cities. Although Blacks at times clustered on certain streets or blocks, they rarely comprised more than 30% of the residents of the immediate area; and these clusters typically were not spatially contiguous.”).

80. See generally Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 *YALE L.J.* 188 (2005).

81. 163 U.S. 537 (1896).

82. *Id.* at 551–52 (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”).

83. See generally MASSEY & DENTON, *supra* note 79, at 17–42.

84. See generally john a. powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 *L. & INEQUALITY* 99, 105–12 (1997).

to share a neighborhood with whites than with other blacks.”⁸⁵ This is not to say that Blacks enjoyed equal treatment, but merely points out that residential segregation is not necessarily a natural or permanent phenomenon. In fact, Massey and Denton argue that with the exception of African Americans, no ethnic or racial group in American history has ever lived in a set of neighborhoods that are “exclusively inhabited by members of one group” where “virtually all members of that group live.”⁸⁶ Despite American popular culture’s collective memory of ethnic ghettos—like the Jewish lower-east side of Manhattan, Irish South Boston, or the Italian North Ward of Newark—historically none of these ethnic enclaves ever featured that degree of ethnic or racial isolation.⁸⁷

Segregation and its effects on the opportunities of racial minorities increased through much of the late nineteenth and twentieth centuries.⁸⁸ In 1890, the index of Black isolation in Newark, New Jersey—where 100% would be complete segregation—was at about 4%.⁸⁹ By 1930, that number jumped to 23%.⁹⁰ Some of that spike is probably explained by Black migration to northern cities from the south⁹¹ and, despite the jump in the 1930s, was not particularly high. But by 1970, the isolation index in Newark had reached 78% and approached 90% in Chicago, Atlanta, and Washington.⁹²

One cause of residential segregation in northern cities were steering efforts by realtors to prevent Black families from moving in.⁹³ Of course, even if a realtor would allow the property to be sold to a Black family, there were other obstacles preventing them from moving into middle-class, white neighborhoods. Federal and

85. Measured by the index of dissimilarity—the percentage of one group who would have to move from a neighborhood in order to achieve group representations at the same level as the geographic area as a whole—Blacks and European immigrants between 1850 and 1860 had similar rates of segregation. MASSEY & DENTON, *supra* note 79, at 17–22.

86. *Id.* at 18–19.

87. *Cf. id.* (asserting that no other ethnic group, save for African Americans, has ever lived in a set of neighborhoods that are inhabited exclusively by members of that group).

88. *Id.* at 48.

89. STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 266, 288 (1980).

90. *Id.*

91. *See* MASSEY & DENTON, *supra* note 79, at 43.

92. *Id.* at 48.

93. One survey of real estate agents in Chicago from the 1950’s found that 80% of realtors refused to sell property to Blacks if that property was located in a white neighborhood. *Id.* at 50.

state policies restricting minority access to capital and homeownership opportunities are well-documented.⁹⁴ Federal legislation that funded much of the early public housing development specifically considered and rejected a requirement that public housing be desegregated.⁹⁵

One federal policy in particular that exacerbated racial segregation involved banking regulations. Banks relied heavily on the Federal Housing Administration's (FHA) loan guarantees,⁹⁶ and the FHA, in turn, developed extensive underwriting criteria, determining which loans could be guaranteed by the federal government. One such criterion was that "if a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values."⁹⁷ The FHA refused to insure loans that were not covered by racially restrictive covenants and were not in racially homogenous neighborhoods.⁹⁸

In neighborhoods where residents were categorically denied government-backed mortgages, home prices plunged.⁹⁹ The demand for homes that could not be financed through a home loan was low.¹⁰⁰ Blacks who would accept living in racially isolated

94. See, e.g., Gordon, *supra* note 80.

95. Henry Korman, *How the Proposed Hope VI Reauthorization Ignores the Severe Distress of Racial Segregation*, 17 J. AFFORDABLE HOUS. & COMM. DEV. L. 353, 354 (2008) ("Fearing that authorization and funding for public housing would be defeated by segregationists in the Senate, supporters chose a path of 'let us get the housing now and the desegregation later.' The anti-segregation amendment was defeated. The lack of a civil rights requirement in the 1949 Act provided the justification for federal housing officials and communities in every region of the nation to engage in slum clearance and public housing development for the deliberate purpose of creating segregated neighborhoods in order to contain Black citizens in discrete, highly concentrated locations. Public housing segregation had a purpose beyond that of achieving racial separation in assisted housing. It created higher levels of racial segregation throughout the entire housing market of many metropolitan areas.") (some quotations omitted).

96. See DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 121 (noting that one-third of all private housing in the 1950s was financed with FHA or Veteran's Administration help).

97. Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOCIOLOGICAL PERSPECTIVES 291, 307 (2000).

98. *Id.*

99. Cf. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1309-11 (1994).

100. See *id.*

neighborhoods still faced barriers to homeownership because of an inability to get mortgages.¹⁰¹ The low home prices created disincentives to maintain the properties, and neighborhoods faced cycles of deterioration and decrepitude.¹⁰²

After centuries of legal apartheid, the *Plessy* decision, and a federal policy of denying homeownership opportunities to minorities while expanding those opportunities to white families, the United States government began to reverse tack.

B. *The Government's Role in Expanding Equality*

In 1954, *Brown v. Board of Education* came as an explicit refutation of "separate but equal."¹⁰³ The Court finally acknowledged what was obvious to millions of victims of discrimination: that segregation was harmful to those who were excluded from mainstream America.¹⁰⁴ Famed constitutional scholar Charles L. Black, Jr., may have best expressed the obviousness of the inequality inherent in segregation when defending the *Brown* decision from its critics: "The Court that refused to see inequality in this cutting off would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact."¹⁰⁵

1. The Fair Housing Act and the Duty to Affirmatively Further Fair Housing

The Federal Fair Housing Act of 1968 came in response to explicit racial discrimination in the real estate market.¹⁰⁶ The Act, as amended, limits the ability of people to refuse to rent or sell a home because of a person's race, color, religion, sex, familial status, national origin, or handicap status.¹⁰⁷ The Act also prevents real estate brokers from doing the same.¹⁰⁸ Important to this discussion

101. See DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 121–22 (noting that between 1946 and 1959 Blacks received less than 2% of all FHA loans).

102. See Schill & Wachter, *supra* note 99, at 1309–11.

103. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

104. See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 425–26 (1959).

105. *Id.* at 426.

106. See Brian Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1620–21 (2007).

107. 42 U.S.C. § 3604 (2006).

108. § 3605(a) ("It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or

about the LIHTC, the Fair Housing Act requires that “[a]ll 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.*”¹⁰⁹ The opening section of the Act provides some indication of those purposes: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”¹¹⁰

The Third Circuit took a leading role in defining the Department of Housing and Urban Development’s (HUD) duty to affirmatively further fair housing in *Shannon v. United States Department of Housing & Urban Development*.¹¹¹ The decision arose out of a suit to enjoin HUD from providing mortgage guarantees to an apartment development in East Poplar, Philadelphia.¹¹² Residents in the area contended that “the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income Black residents.”¹¹³ They further alleged that “HUD had no procedures for consideration of and in fact did not consider its effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole.”¹¹⁴

It is important to note the area of land that the *Shannon* court considered. HUD breaks the United States down into 363 Metropolitan Statistical Areas (MSA).¹¹⁵ These MSAs can include adjoining counties and can represent a single area of administration for HUD.¹¹⁶ Yet, rather than looking at whether HUD considered the effect of its action on the MSA or the United States as a whole, the *Shannon* court considered the effects on the nearby neighborhood

conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”).

109. § 3608(d) (emphasis added).

110. § 3601.

111. 436 F.2d 809 (3d Cir. 1970); Orfield, *supra* note 3, at 1769.

112. *Shannon*, 436 F.2d at 811; Orfield, *supra* note 3, at 1769.

113. *Shannon*, 436 F.2d at 811–12.

114. *Id.* at 812.

115. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB BULL. NO. 08-01, UPDATE OF STATISTICAL AREA DEFINITIONS AND GUIDANCE ON THEIR USES 3 (1999), available at <http://www.whitehouse.gov/omb/bulletins/fy2008/b08-01.pdf>. Note that in addition to the 363 Metropolitan Statistical Areas, there are also 577 Micropolitan Statistical Areas, which are areas that “have at least one urban cluster of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.” *Id.*

116. See *Hills v. Gautreaux*, 425 U.S. 284, 299 n.15 (1976).

and municipality.¹¹⁷ The court's focus on a smaller area was relevant in light of the discussion in Part III of this Note, which argues that the *In re 2003* court should have looked for discriminatory intent within the different individual regions of the state instead of only considering LIHTC siting in the state as a whole.¹¹⁸

The *Shannon* court held that “[i]ncrease or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.”¹¹⁹ Yet, it qualified its pronouncement by denying that desegregation, as a goal of national housing policy, must prevail in every case.¹²⁰ HUD attempted to defend itself by asserting that it had not taken part in any discriminatory action.¹²¹ In response, the court recounted a history of legislative developments whereby HUD's duties had changed from having none in regards to race, to a duty to refrain from discriminating, and finally to a duty to affirmatively promote fair housing in the context of race.¹²²

The FHA was instrumental in putting obligations on state and federal agencies to take steps to ameliorate residential segregation.

117. *Shannon*, 436 F.2d at 811–12.

118. In *Shannon*, HUD administered its program on an MSA level, but the court scrutinized its actions for the effect at the neighborhood level and at the municipal level. 436 F.2d at 811–12. However, the LIHTC program is administered on a state-wide basis, and the *In re 2003* court looked at concentration of units on a state-wide basis. 848 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2004). This Note argues that the *In re 2003* court should have looked at how LIHTC units are allocated within smaller areas, such as county, MSA, or even region, similar to what the *Shannon* court did when looking at HUD's funding activities.

119. *Shannon*, 436 F.2d at 821.

120. *Id.* at 822 (“[N]or are we 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 the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.”).

121. *Id.* at 820.

122. *Id.* at 816 (“Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary . . . could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed . . . to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.”).

However, post-*Brown* residential segregation cases emerged even before the Fair Housing Act of 1968.¹²³ *Gautreaux v. Chicago Housing Authority*,¹²⁴ where plaintiffs asserted violations of the Equal Protection Clause of the Constitution¹²⁵ and Title VI of the 1964 Civil Rights Act,¹²⁶ came to be a model for bringing suit against a local government for its public housing siting practices.

2. *Gautreaux v. Chicago Housing Authority* and *Gautreaux v. HUD*

The *Gautreaux* plaintiffs alleged that the Chicago Housing Authority (CHA) had not only steered public housing applicants to certain housing projects based on their race, but that CHA had selected public housing sites “almost exclusively within neighborhoods the racial composition of which was all or substantially all Negro at the time the sites were acquired,”¹²⁷ a practice that was “maintaining existing patterns of urban residential segregation by race in violation of the Fourteenth Amendment.”¹²⁸ In a companion suit, *Gautreaux v. Romney*, the plaintiffs implicated HUD by alleging that it was aware of the Chicago Housing Authority’s discriminatory practices and that it continued to fund construction of segregated public housing in Chicago anyway.¹²⁹

The plaintiffs prevailed against the Chicago Housing Authority and entered into a consent decree with HUD.¹³⁰ HUD’s remedy for supporting Chicago’s discriminatory practice became *Gautreaux*’s now-famous legacy. The *Gautreaux* Assisted Housing Program used Section 8 vouchers—federally subsidized coupons that

123. See, e.g., *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (denying the Chicago Housing Authority’s motion to dismiss and allowing plaintiff to move forward with claim that the agency “selected sites deliberately or otherwise, for public housing projects . . . for the purpose of, or with the result of, maintaining existing patterns of urban residential segregation by race in violation of the Fourteenth Amendment”).

124. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

125. U.S. CONST. amend. XIV, § 1.

126. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

127. *Gautreaux*, 265 F. Supp. at 583.

128. *Id.*

129. *Gautreaux v. Romney*, 448 F.2d 731, 737 (1971), *aff’d*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

130. The original remedy from the district court called for 700 public housing units to be constructed in census tracts of low “non-white” concentration. See *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 738–39 (1969). It also prevented Chicago from initiating any other public housing projects until 75% of the 700 units had been constructed. *Id.* at 738. This was referred to as the “scattered-site remedy,” as it also required that the new public housing be scattered through many census tracts, rather than built all in one high-rise project. *Id.*

can be used to offset the cost of rent for low-income families—to help relocate many public housing families to mostly white suburbs outside of Chicago.¹³¹ These families faced serious obstacles upon arriving in their new environments, including some blatantly racist encounters in their new neighborhoods, but many thrived and became prime examples in favor of housing mobility.¹³²

High school dropout rates among Gautreaux children dropped significantly compared to their inner-city peers.¹³³ Gautreaux children were also significantly more likely to attend college.¹³⁴ While hardly a flawless experiment in housing mobility, the Gautreaux children “were more likely to be (1) in high school, (2) in a college track, (3) in a four-year college, (4) in a job, (5) in a job with benefits, and (6) not outside of the education and employment systems” compared to other Section 8 families who remained in inner-city Black enclaves.¹³⁵

Despite *Gautreaux*'s purported success, some commentators have questioned whether dispersing low-income families throughout middle-income communities has created new problems.¹³⁶ But whether or not Gautreaux-type mobility programs can end intergenerational poverty, it is clear that concentrated poverty has very real human effects. Thus, even if programs to move the poor out of the ghetto would not resolve all of the issues surrounding intergenerational poverty, programs that continue to concentrate the poor into the same failing communities are likely harmful regardless. The next section describes the effects on those living in concentrated poverty.

131. See generally LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

132. See *id.* at 96–99 (describing incidents of near or actual racial violence).

133. *Id.* at 164 (“[F]or those seventeen years of age or younger, a higher percentage of city youth dropped out of high school than did suburban youth (20 percent in the city versus less than 5 percent in the suburbs).”).

134. *Id.* at 165 (“Fifty-five of the Gautreaux youth were age eighteen or older when they were interviewed. In this group, the rate of college enrollment was significantly higher for students in the suburban sample than for city students (54 percent versus 21 percent).”).

135. *Id.* at 171.

136. See Hanna Rosin, *American Murder Mystery*, *THE ATLANTIC MONTHLY*, July 2008, at 40, 54 (questioning whether mobility programs cause more harm than good), available at <http://www.theatlantic.com/doc/200807/memphis-crime>. But see POLICE CRIME STATISTICS (2010), <http://www.cityofmemphis.org/framework.aspx?page=218> (showing that crime has risen in some categories but lowered in others). The data presented by the City of Memphis does not suggest the same sort of rampant crime spree that the article suggests.

C. The Human Effects of Concentrated Poverty

The history of racial segregation and its relationship to intergenerational poverty is well documented.¹³⁷ Living in poverty has serious health consequences, aside from the obvious material discomforts of living in substandard conditions. In some of the poorest communities, residents are beset with unacceptably high rates of tuberculosis, AIDS, lead paint poisoning, and asthma.¹³⁸ It is worth mentioning that in the United States most poor people live outside areas of concentrated poverty.¹³⁹ In 2000, only 12% of individuals living in poverty lived in a census tract where the poverty rate was over 40%.¹⁴⁰ There are two stories behind this statistic. The first is the tremendous need for services for people living outside of the traditional urban centers that are envisioned as the most deserving of low-income housing assistance.¹⁴¹ The second is the especially dire circumstances of the poor who do live in concentrated poverty. It is not sufficient to only focus on strategies to improve the ghettos; the people living in concentrations of poverty need opportunities to exit the ghettos.

Jobs in central cities for non-professionals are harder to come by and pay less than jobs typically available in surrounding suburban communities.¹⁴² Without opportunities to live outside of the central city, families looking for safer neighborhoods with better schools will find that the jobs they desire are well beyond their reach since many of these families rely on public transportation to commute to their places of employment.¹⁴³ This situation exemplifies the long-standing debate between urban-revitalization advocates and housing-mobility advocates.¹⁴⁴

For instance, Fair Share attempted to convince the *In re 2003* court that “community revitalization” strategies were not valid

137. See, e.g., MASSEY & DENTON, *supra* note 79, at 1–82.

138. Lead paint poisoning can be common in older apartment buildings and can cause brain damage and development disabilities in children. Asthma is sometimes caused by cockroach droppings, found in many of the apartments in the neighborhood. See DREIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 7.

139. *Id.* at 28.

140. *Id.*

141. This would of course bolster the argument that LIHTC units should be more evenly dispersed.

142. See DREIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 66–71.

143. Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 *Geo. J. ON POVERTY L. & POL'Y* 155, 164–65 (2005).

144. See Orfield, *supra* note 3, at 1751–53.

methods to ameliorate racial segregation.¹⁴⁵ That argument failed.¹⁴⁶ The competing claim, and the one more often made by state and local governments, is that urban revitalization is the key to ameliorating poverty.¹⁴⁷ Commentators like John A. Powell¹⁴⁸ have noted that the urban-suburban divide misses much of the nuance within the cycle of poverty.¹⁴⁹ Rather than thinking of housing mobility in terms of urban versus suburban, he posits that it is more helpful to think in terms of opportunity versus isolation. The search for high-opportunity over low-opportunity areas sometimes comes out differently than the old urban-suburban divide.¹⁵⁰

For example, the Moving to Opportunity program (MTO) was established by Congress to test the *Gautreaux* hypothesis, that giving housing voucher recipients opportunities to move outside of their isolated inner-city environments would improve their ability to lead safe and productive lives.¹⁵¹ The results of the ensuing study did show some gains for the participants and their children, but the results were limited and even negative for MTO families in a few categories.¹⁵² However, there is also a concern that the program focused too much on getting the families to leave *poverty*, and not enough on making sure that they were *moving to opportunity*.¹⁵³

Some researchers suggest that LIHTC units are more likely to be built in suburban and low-poverty areas than other project-based affordable housing programs.¹⁵⁴ However, the results of these studies do not lead to the conclusion that current LIHTC allocations are focused on high-opportunity areas. The research merely sug-

145. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re 2003*), 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

146. *Id.* at 6.

147. *Id.* at 9.

148. The reader should note that Powell's name is intentionally not capitalized. *See supra* note 84.

149. *See* John A. Powell, *Opportunity Based Housing*, 12 WTR J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 188, 188 (2003).

150. *See id.*

151. *See* ALEXANDER POLIKOFF, WAITING FOR *Gautreaux*: A Story of Segregation, Housing, and the Black Ghetto 258–65 (2006).

152. John Goering, Judith D. Feins & Todd M. Richardson, *A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results*, 13 J. HOUS. RESEARCH 1, 23 (2002).

153. *Id.* (noting that some children who moved out of poor neighborhoods in the MTO program continued to attend the same schools that they had attended while living in high-poverty neighborhoods).

154. *See, e.g.*, LANCE FREEMAN, THE BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990s 5 (2004), *available at* http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf.

gests that in a panoply of bad siting practices among affordable housing programs, LIHTC is less bad than other programs. Further, in specific regions, especially in New Jersey, placement of LIHTC buildings in high-poverty neighborhoods and cities far outpaces the national average.¹⁵⁵ New Jersey consistently ranks poorly in terms of LIHTC placement in high-opportunity areas.¹⁵⁶

III.

IN RE 2003 SHOULD NOT BIND FUTURE COURTS

In light of the fact that *where* people live affects *how* people live, *In re 2003* has serious repercussions for the people living in LIHTC units. The recognition that HFAs ought to do more to affirmatively further fair housing and integration would go a long way towards deconcentrating poverty and may even replicate some of the benefits accrued to participants in the Gautreaux Program. And because of a significant change in the facts upon which the New Jersey Appellate Division relied, the *In re 2003* decision lacks the persuasive force that it might have carried when it was initially decided. The *In re 2003* court relied on state laws that have since been repealed, like New Jersey's Regional Contribution Agreement program, as proof that the HMFA's policies were consistent with the state's fair housing policies.¹⁵⁷ Further, the court recognized that a change in market conditions could necessitate a change in the HMFA's financing of affordable housing.¹⁵⁸ For these reasons, the Court's justifications for the HMFA's action ring hollow, and *In re 2003* should not be considered precedential in future LIHTC litigation.

This section first outlines the reasoning of the *In re 2003* court and argues that the case was wrongly decided.¹⁵⁹ Next, this section explains some of the changes in the law and the facts of the LIHTC

155. See PRRAC REPORT, *supra* note 53; FREEMAN, *supra* note 154, at 8.

156. See PRRAC REPORT, *supra* note 53.

157. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re 2003*), 848 A.2d 1, 21 (N.J. Super. Ct. App. Div. 2004) (“[S]tate policy, as indicated by the allowance of RCAs, and HMFA’s own statutory mandate to assist urban areas, encourage a substantial level of funding to urban areas.”).

158. *Id.* at 15 (“What is clear from this legislative scheme is that HMFA’s overriding mission is to foster, through its financing and other powers, the construction and rehabilitation of housing, particularly affordable housing, in order to address needs caused by various social factors, including changes in market conditions.”).

159. For scholarship that focuses more heavily on a sensible application of the Fair Housing Act to the administration of New Jersey’s low-income housing tax credits, see Orfield, *supra* note 3.

market that could lead a court to conclude that *In re 2003* is not binding for new legal challenges to New Jersey's QAP.

A. *Summary of the In re 2003 Decision*

In the year it was promulgated, the Fair Share Housing Center challenged the validity of New Jersey's 2003 Qualified Allocation Plan.¹⁶⁰ The plaintiffs—including the Camden County NAACP, the Burlington County NAACP, and the Camden County Taxpayers Association¹⁶¹—claimed that “because the 2003 QAP funds affordable housing in urban areas with a high percentage of minority residents, it encourages racial segregation in violation of the Federal Fair Housing Act, 42 U.S.C.A. §§ 3601 to 3609.”¹⁶² This claim centered on the Fair Housing Act's requirement that funding agencies act in a manner “affirmatively to further” fair housing.¹⁶³ Fair Share urged the court to apply this duty to the Internal Revenue Service, which administers the LIHTC program nationally, and to the HMFA, which administers it locally.¹⁶⁴

While the HMFA argued that the LIHTC statute required a preference for funding high-poverty areas,¹⁶⁵ Fair Share argued that the statute also required other preferences, namely that QCTs have “a concerted community revitalization plan” that the HMFA chose to ignore.¹⁶⁶ Fair Share claimed that the 2003 plan violated the state's *Mount Laurel* doctrine,¹⁶⁷ antidiscrimination laws,¹⁶⁸ Ad-

160. *In re 2003*, 848 A.2d at 5.

161. Additional appellants Camden County NAACP, the Burlington County NAACP, and the Camden County Taxpayers Association were joined as plaintiffs after the initial appeal of the 2003 QAP had already been filed. *Id.* at 6.

162. *Id.* at 5.

163. 42 U.S.C. § 3608(d) (2006) (“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.”).

164. Appellant's Brief on Appeal at 42, *In re Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan*, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2004) [hereinafter Appellant's Brief].

165. *In re 2003*, 848 A.2d at 20.

166. Appellant's Brief, *supra* note 164, at 42; *see also* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2006).

167. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 724 (N.J. 1975) (“[E]very such municipality must . . . make realistically possible an appropriate variety and choice of housing . . . [I]t cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity . . .”).

168. N.J. STAT. ANN. § 10:5 (West 2007).

ministrative Procedure Act,¹⁶⁹ and its constitutional prohibition of public school segregation.¹⁷⁰ The plaintiffs pushed for a ruling from the court that would prevent any LIHTC allocations in high-poverty, predominantly minority census tracts.¹⁷¹

Fair Share lost the case. Its appeal of the adoption of the 2003 Qualified Allocation Plan was dismissed by the New Jersey Appellate Division,¹⁷² which had original jurisdiction,¹⁷³ and certiorari was subsequently denied by the New Jersey Supreme Court.¹⁷⁴

New Jersey's QAP has changed since 2003, however. One rule was passed, for instance, that disallows allocating credits to more than two projects in the same municipality.¹⁷⁵ This rule prevents over-allocation to Camden and Newark, two of New Jersey's poorest cities. But unfortunately it does nothing to stop developers from allocating credits in cities adjacent to Newark that also have high concentrations of poverty.¹⁷⁶

Further, in 2009, the HMFA began to loosen some of the restrictions on combining LIHTCs with inclusionary zoning programs, where cities and towns provide zoning easements in exchange for a certain percentage of affordable units in a build-

169. § 52:14B.

170. This argument rests on New Jersey's prohibition of public school segregation and the requirement that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools." N.J. CONST. art. VIII, § IV, cl. 1.

171. As amicus curiae, the New Jersey Institute for Social Justice and partner organizations took a middle approach. The Institute's position was that "federal and state civil rights law do apply to the LIHTC," but HMFA should not be precluded from allotting many LIHTCs to urban areas. Orfield, *supra* note 3, at 1788–89.

172. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 6 (N.J. Super. Ct. App. Div. 2004).

173. See N.J. R. Ct. 2:10-5 ("The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.").

174. *In re* N.J. Hous. & Mortg. Fin. Agency, 861 A.2d 846 (N.J. 2004).

175. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.4(c) (2009)), available at http://nj.gov/dca/hmfa/biz/development/lowinc/2009_proposedqap.pdf.

176. For example, compare the individual poverty rates in the cities of East Orange (19.2%), Orange (18.8%), and Irvington (17.4%) with the state-wide individual poverty rate of 8.5% and Newark's individual poverty rate of 9.7%. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, <http://censtats.census.gov/data/NJ/1603419390.pdf> (East Orange), <http://censtats.census.gov/data/NJ/0603401313045.pdf> (Orange), <http://censtats.census.gov/data/NJ/0603401334450.pdf> (Irvington), <http://censtats.census.gov/data/NJ/04034.pdf> (New Jersey), <http://censtats.census.gov/data/NJ/395345640.pdf> (Newark).

ing.¹⁷⁷ This was important progress that allows a developer to expand the available subsidies to her project, thereby increasing the likelihood of overcoming high development costs in high-opportunity areas. However, neither of these developments do anything to “affirmatively further” fair housing. They merely lift some of the barriers to building LIHTC units in high-opportunity areas that the HMFA had previously erected.

B. State Housing Finance Agencies’ Duty to Affirmatively Further

The New Jersey Appellate Division accepted that the “affirmatively to further” duty applied to the HMFA in administering the LIHTC.¹⁷⁸ However, the court ruled that the HMFA had met that duty and was quick to point out a tension between what the HMFA was statutorily empowered to do, and the sort of “affirmative furthering” that Fair Share and others were looking for.¹⁷⁹ According to the court, when the HMFA adjusted its Qualified Allocation Plan in response to the Fair Share Housing Center’s comments—by getting rid of urban set-asides for the tax credits as well as creating mixed-income set-asides to promote mixed-income developments—those adjustments went far enough to affirmatively further racial integration.¹⁸⁰

The court distinguished the HMFA as a funding agency, rather than a siting agency, which the court understood to mean that the HMFA is neither empowered nor obligated to “steer projects from one neighborhood . . . to another based on the racial composition of the neighborhood or municipality”¹⁸¹ Instead, the HMFA is bound by the statutory authority that the LIHTC statute had given it, in congruence with the authority granted to the HMFA by the

177. Unlike previous QAPs, the 2009 QAP allowed density bonuses in all of the available tax credits when the developer can show that the project could not otherwise be built. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.12(a) (2009)), available at http://nj.gov/dca/hmfa/biz/devel/lowinc/2009_proposedqap.pdf.

178. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 10 (N.J. Super. Ct. App. Div. 2004) (“HMFA has a duty to administer its housing and financing programs in a manner affirmatively to further the policies of Title VIII.”).

179. *Id.* at 14–15 (“Title VIII may require the agency to administer its tax credit program so as to achieve a condition in which individuals of all races have equal housing-market choices But achievement of that goal, by focusing primarily on the racial composition of a relevant housing locale, may compromise [the] HMFA’s fundamental mission.”) (citations omitted).

180. *Id.* at 9, 20.

181. *Id.* at 14.

state legislature.¹⁸² The federal LIHTC statute required that the state give preference to applications where the proposed development would be located in a “qualified census tract.”¹⁸³ The court’s failure to recognize the tremendous influence that state housing finance agencies wield in siting decisions by developers who apply for the tax credits misses the critical innovation of cases like *Gautreaux v. Romney* and *Shannon v. United States Department of Housing & Urban Development*.¹⁸⁴ In both cases, those courts rejected HUD’s contention that a “funding agency” is not responsible for the racially discriminatory site selections by those who HUD funds.¹⁸⁵ State funding agencies are no different from HUD in this regard; they should be held to account for their funding decisions. It is indeed true that the HMFA cannot choose particular sites, but the agency is well aware that through its QAP, it can approve federal funding for developments that exacerbate existing racial concentrations.

The *In re 2003* court observed that the state legislature created the HMFA with a mission to: “[a]ssist in the revitalization of the State’s urban areas.”¹⁸⁶ The court cited the HMFA’s enabling statute in concluding that HMFA has duties to the state that it must fulfill, and that its duty to affirmatively further fair housing cannot waive existing state duties, such as assisting in “the revitalization of the State’s urban areas.”¹⁸⁷ Conspicuously absent from the court’s analysis, however, was any mention of the HMFA enabling statute’s mission to “[s]timulate the construction, rehabilitation and improvement of *adequate* and affordable housing in the State so as to increase the number of opportunities for adequate and affordable housing in the State for New Jersey residents, including particularly New Jersey residents of low and moderate income.”¹⁸⁸

The court seemed to pick and choose which of the HMFA’s statutory mandates to pay attention to. It is unclear how low-income housing that is intended for families to live in can be “adequate” when it is located in high-crime areas with poorly performing schools and significant racial isolation. That is not to

182. *Id.* at 14–15.

183. *Id.* at 15 (internal quotation marks omitted).

184. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971), *aff’d*, *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); *see also* Orfield, *supra* note 3, at 1767.

185. *Romney*, 448 F.2d at 737–41; *Shannon*, 436 F.2d at 821.

186. *In re 2003*, 848 A.2d at 17 (quoting N.J. STAT. ANN. § 55:14K-2(e)(4) (West 2001)).

187. *Id.*

188. N.J. STAT. ANN. § 55:14K-2(e)(2).

say that the HMFA has a statutory obligation to build exclusively in low-poverty areas, but the term “adequate” does suggest that the HMFA should consider factors like school performance, crime rates, and employment opportunities when it funds low-income housing developments. The conclusions drawn by the court in *In re 2003* find mutually exclusive conflicts where none exist, and yet completely ignore concrete mandates by the state legislature to provide adequate housing. The court stated that it is the federal legislation that prevents HFAs from taking a more active role in integrating communities:

HMFA’s power to allocate low-income housing tax credits is circumscribed by 26 U.S.C.A. § 42(m)(1)(B) and (C). Under that statute, the agency is required to adopt a QAP that establishes specific selection criteria and preference standards that will guide it in the allocation of tax credits to competing housing sponsors, local agencies and private developers.¹⁸⁹

However, a report funded by the Department of Housing and Urban Development points out what is clear to any reviewer of the many different state QAPs: “The federal code allows states the flexibility to assess needs, identify preferences, and establish policies for the allocation of tax credit resources.”¹⁹⁰ Other reports have shown the great disparities in LIHTC siting within high-poverty areas among the states, finding it worst in the Northeast.¹⁹¹ It may well be the case that the LIHTC statute forces states to give some preference to high-poverty areas, but it is by no means the case that the statute requires the kind of wholesale low-opportunity siting that is prevalent in much of New Jersey, particularly some of the MSAs within the northern half of the state.

In resisting Fair Share’s approach to administering the LIHTC, the HMFA also raised concerns that they would be constitutionally barred from intentionally giving LIHTC preferences to proposals in predominantly non-minority areas.

B. Considering Race in LIHTC Allocations

The *In re 2003* court confirmed that race-conscious tax credit preferences could potentially pose constitutional problems.¹⁹² This was one more reason why the court felt that the HMFA had gone as

189. *In re 2003*, 848 A.2d at 15.

190. GUSTAFSON & WALKER, *supra* note 52, at 1.

191. See PRRAC REPORT, *supra* note 53.

192. *In re 2003*, 848 A.2d at 17.

far as it could go in furthering fair housing.¹⁹³ Race-conscious government action is always subject to strict scrutiny.¹⁹⁴ Courts must look to whether the race-conscious action is “narrowly tailored” to achieve a “compelling government interest.”¹⁹⁵ Many judges and scholars have treated the narrow tailoring test as if it is fatal to all government sponsored programs that take race into account.¹⁹⁶ However, the Supreme Court has deliberately pointed out that strict scrutiny is not fatal in fact, but is merely intended to flush out government policies whose ends may not be justified by their means.¹⁹⁷ In *Adarand Constructors, Inc. v. Peña*, Justice O’Connor attempted to “dispel the notion that strict scrutiny is strict in theory,

193. *Id.*

194. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995).

195. *Id.* at 227 (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”). For a more recent articulation of the Supreme Court’s jurisprudence on race-conscious government action, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (finding a voluntary plan for achieving racial balance in public schools to be an unconstitutional violation of the Equal Protection Clause).

196. See *Parents Involved*, 551 U.S. at 833–34 (Breyer, J., dissenting) (“Today’s opinion reveals that the plurality would rewrite this Court’s prior jurisprudence, at least in practical application, transforming the ‘strict scrutiny’ test into a rule that is fatal in fact across the board.”); *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (“Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (“To require the government, on that account, to meet the most exacting standard of review—a standard that has been called strict in theory and fatal in fact—would be inconsistent with Congress’s large powers to make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”) (quotations and citations omitted); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”) (purportedly the first instance of the use of the phrase “strict in theory and fatal in fact”); Nicole Love, Note, *Parents Involved in Community Schools v. Seattle School District No. 1: The Application of Strict Scrutiny to Race-Conscious Students Assignment Policies in K–12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 120 (2009) (“The [*Parents Involved*] Court’s application of strict scrutiny adopted the jurisprudence of ‘strict in theory, but fatal in fact’ from affirmative action cases and applied it to race-conscious assignment policies.”).

197. See *Adarand*, 515 U.S. at 235.

but fatal in fact. The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”¹⁹⁸ The Court later proved that statement when it permitted racial considerations by the admissions department of a public university’s law school in *Grutter v. Bollinger*.¹⁹⁹

An empirical study of the application of strict scrutiny found that 30% of all such cases result in the government action surviving the review.²⁰⁰ When looking only at “suspect class discrimination,” which would include a race-conscious policy for housing developments, the rate is 27%, hardly a signal that any race-conscious government action is doomed to fail in the courts.²⁰¹ Admittedly, this study of strict scrutiny gives low odds of success for state agencies.²⁰² However, while only 14% of strict scrutiny challenges to state agency action survive, the study used a sample of only fourteen applications of strict scrutiny of state agency action.²⁰³

Despite the fact that race-conscious government policies are not bound to fail, some attempts at racial integration in affordable housing have failed the narrow tailoring test. Two well-known examples are the Dallas Housing Authority’s proposed public housing projects in Mesquite, Texas and the Starrett City apartments in Brooklyn, New York City.

1. *Walker v. Mesquite*

In 1987, the Dallas Housing Authority (DHA) and HUD entered into a consent decree to remedy past and current discrimination in the siting and administration of their public housing projects.²⁰⁴ The DHA had an intentional practice whereby

198. *Id.* at 237 (quotations and citations omitted).

199. 539 U.S. 306, 328 (2003).

200. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 796 (2006).

201. *Id.* at 815.

202. Winkler writes that state agencies lose strict scrutiny challenges in all but 14% of cases. *Id.* at 818.

203. *Id.*

204. *Walker v. City of Mesquite*, 169 F.3d 973, 976 (5th Cir. 1999) (“The consent decree addressed the plaintiff class’s challenge under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 to the purposeful racial discrimination and segregation within DHA’s public housing programs. The defendants were DHA and HUD. The City of Dallas was joined as both a defendant to the lawsuit and a party to the consent decree in 1989.”) (footnotes omitted).

“[v]irtually all non-elderly public housing units were constructed in minority areas of Dallas.”²⁰⁵

The DHA “repeatedly violated the consent decree,” and in 1992 it was vacated by the district court on a motion for summary judgment by the plaintiffs.²⁰⁶ The district court found in favor of liability against the DHA and ordered that it demolish its West Dallas project, infamous as “one of Dallas’s worst slums.”²⁰⁷ In place of that blighted project, the DHA was to construct new public housing units, subject to the restriction that they all be located in areas that had a poverty rate of less than 13% and that were “predominantly white.”²⁰⁸

Homeowners in the town of Mesquite challenged the DHA and HUD plan on the grounds that the district court’s order to construct public housing “is not narrowly tailored because it requires that the new units be constructed in predominantly white areas.”²⁰⁹ On appeal, the Fifth Circuit inquired as to whether the order was narrowly tailored “to remedy the vestiges of past discrimination and segregation within Dallas’s public housing programs.”²¹⁰ The court determined that the DHA could not consider the race of the residents of a particular neighborhood when choosing sites for public housing.²¹¹

2. *United States v. Starrett City Associates*

Located in Brooklyn, New York, Starrett City was the largest housing development in the United States, made up of “46 high rise buildings containing 5,881 apartments.”²¹² An agreement between the developers of Starrett City and the New York City Board of Estimates created a “racially integrated community,”²¹³ and as part of the deal the Starrett developers intended to maintain racial quotas for Starrett City tenants that would help to alleviate local concerns about white flight.²¹⁴ The United States government chal-

205. *Id.* at 976 n.4 (“In 1994, of DHA’s approximately 6,400 public housing units, 6,100 were in minority areas and 300 were in predominantly white areas.”).

206. *Id.* at 977.

207. *Id.* at 976; *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 912 F.2d 819, 821 (5th Cir. 1990).

208. *Walker*, 169 F.3d at 977–78.

209. *Id.* at 978.

210. *Id.* at 980.

211. *Id.* at 987.

212. *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1098 (2d Cir. 1988).

213. *Id.* (quoting *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 670 (E.D.N.Y. 1987)).

214. *Id.*

lenged the plan for violations of the Fair Housing Act.²¹⁵ On review, the Second Circuit held that the integration plan did violate the Fair Housing Act, despite the defendant's argument that the duty to affirmatively further fair housing required it to take steps to encourage integration.²¹⁶ The court noted that race-conscious policies should be an attempt to remedy a past wrong and be temporary in nature, rather than a permanent policy.²¹⁷

3. Applying *Starrett City* and *Walker* to *In re 2003*

In reliance on *Starrett City Associates*, the *In re 2003* court noted that race-conscious tax credit preferences would warrant strict scrutiny analysis for equal protection compliance.²¹⁸ The court's concern about potential race-conscious regulations seemed to confuse the requirement that race-conscious policies be "narrowly tailored to achieve a compelling state interest"²¹⁹ for a complete ban on the use of race-conscious policies at all. If it can be established that the HMFA has an obligation to stimulate the construction of adequate housing and that such housing cannot, by definition, be constructed in places of racial isolation, failing schools, and violent street corners, then the only impediment to race-conscious integration in the LIHTC is the constitutional limitation on race-conscious policies. Assuming that avoiding racial isolation constitutes a compelling interest, that limitation only requires that the plan be narrowly tailored.²²⁰

Important lessons can be learned from *Walker* and *Starrett City*. For instance, how a compelling government interest is defined becomes an important factor in determining whether a race-conscious policy is narrowly tailored. In the *Walker* case, the compelling interest arose out of claims of discrimination against the DHA, HUD, and eventually the City of Dallas itself.²²¹ All parties in the case agreed that remedying past discrimination was a compelling gov-

215. *Id.* at 1097.

216. *Id.* at 1100–01.

217. *Id.* at 1101–02.

218. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 16–17 (N.J. Super. Ct. App. Div. 2004).

219. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

220. The idea that integration is a compelling state interest is not so far-fetched. Justice Kennedy noted in the *Parents Involved* case that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." *Id.* at 783 (Kennedy, J., concurring).

221. *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999).

ernment interest, but the court was bound to considering whether the plan to build in predominantly white areas was narrowly tailored to that particular end.²²² *Starrett City* limited its analysis to whether the racial quota violated the Fair Housing Act, and therefore did not implicate strict scrutiny.²²³ Both cases illustrate potential problems that an HFA could run into if it makes race-conscious allocation plans; but, they also underscore specific objections to such plans, such as the use of a quota system, rather than using race as one of many factors that could easily be adapted to the LIHTC application process.

4. Applying *Starrett City* and *Walker* to Future LIHTC Administration

With these observations in mind, LIHTC administrators might be able to adopt a race-conscious policy by (1) advancing a government interest in avoiding racial isolation, rather than focusing on remedying past discrimination; (2) using such a consideration as merely a preference, rather than a quota or rigid requirement for LIHTC construction; and (3) placing no racial limitations on the characteristics of the tenants themselves.

After the government defines its interest, a court has to look at whether the plan is narrowly tailored to that interest. Claiming an interest in remedying past discrimination, as in the *Walker* case, appears to open up a defendant to findings by the court that it could have or should have used vouchers and tenant-based housing programs to accomplish that end. On the other hand, preventing racial isolation, assuming that it is considered a compelling governmental interest, might survive strict scrutiny if the states adopt measures such as the ones discussed below,²²⁴ and if they merely give integrated LIHTC proposals a slight boost in consideration, rather than being completely determinative of whether or not a proposal would receive tax credits. Of course, it is not as though the HMFA would necessarily *have* to consider race in its QAP anyway. Economic characteristics of a neighborhood are also important factors for creating more opportunities for people.

C. *Fair Share's* Mount Laurel Claim

Fair Share advanced a claim against the HMFA for violating New Jersey's state constitution and the state supreme court's doc-

^{222.} *Id.*

^{223.} *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099–1100 (2d Cir. 1988).

^{224.} *See infra* Part IV.

trine that economic exclusion is impermissible.²²⁵ Another way to avoid the problems raised by the HMFA regarding strict scrutiny would be for the HMFA to focus on the *Mount Laurel* doctrine, New Jersey's constitutional guarantee of class-based equality in housing opportunities.

The *Mount Laurel* doctrine is an interpretation of the New Jersey Constitution that, among other things, prevents municipalities from issuing land use regulations in a way that might exclude low- and moderate-income families.²²⁶ The *Mount Laurel* plaintiffs alleged that the town of Mount Laurel, New Jersey, had wielded its land use regulatory powers unlawfully to exclude low- and moderate-income people.²²⁷ The New Jersey Supreme Court concluded that,

every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.²²⁸

The plaintiffs in *In re 2003* argued that the *Mount Laurel* doctrine requires the HMFA to take action to open up LIHTC opportunities in mixed-income and mixed-race communities.²²⁹ The *In re 2003* court rejected this argument, stating that the *Mount Laurel* doctrine is about municipalities using land use regulations to exclude people on the basis of class, while the HMFA is neither a municipality nor can it directly make siting decisions about LIHTC buildings.²³⁰

The *In re 2003* plaintiffs argued that the HMFA's allocation plan was the same steering of low-income people into low-income

225. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 6 (N.J. Super. Ct. App. Div. 2004).

226. More specifically, the *Mount Laurel* doctrine compels New Jersey's municipalities to create a realistic opportunity for affordable housing units to be built. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 415 (N.J. 1983); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 724 (N.J. 1975).

227. See *Mount Laurel I*, 336 A.2d at 728. One of the most interesting facets of the *Mount Laurel* story is how the Court rested its decision on the basis of economic status rather than racial or ethnic status.

228. *Id.* at 724.

229. *In re 2003*, 848 A.2d at 22.

230. *Id.* at 22–23.

communities that was explicitly at issue in the *Mount Laurel* cases.²³¹ The *In re 2003* court rejected that argument by adhering strictly to the language of the *Mount Laurel I* opinion without relying on the state constitution's guarantees that the *Mount Laurel I* court had depended on to find equal rights for the plaintiffs in that case.²³² The *In re 2003* court left the administration of the *Mount Laurel* doctrine to the Council on Affordable Housing—the state agency created to help municipalities fulfill their *Mount Laurel* obligations.²³³

The *In re 2003* court seemed to forget how the fundamental legal underpinnings of the *Mount Laurel* doctrine came about in the first place. The *Mount Laurel I* court held that (1) the zoning power is an exercise of the state police power; (2) state police powers must “promote public health, safety, morals or the general welfare”; and (3) Mount Laurel's exclusionary zoning practices did not meet that requirement because they failed to consider the needs of the low-income citizens that are affected by the town's zoning practices.²³⁴ Thus, rather than thinking of the *Mount Laurel* doctrine as narrowly as the *In re 2003* court did—as a ban on using the zoning power to exclude low-income people—it would have been more appropriate to view Fair Share's *Mount Laurel* claim as an allegation that the HMFA was exercising the state police power in a way that did not protect all of New Jersey's residents equally.

D. Discriminatory Impact and a New Denominator Problem

In order to determine Fair Share's claim about racial discrimination in HMFA's allocation plan, the *In re 2003* court considered “whether the 2003 QAP has a discriminatory impact because it harms the community generally by the perpetuation of segregation,” but made this inquiry with the premise that “the relevant community is the entire State.”²³⁵ The court correctly noted that the “HMFA has a duty to implement the low-income housing tax credit program so as to create further opportunities to racial minorities to move to all areas of the State.”²³⁶ The court also noted that “the 2003 QAP does not represent a violation of that duty because,

231. See generally *Mount Laurel II*, 456 A.2d at 390; *Mount Laurel I*, 336 A.2d at 713.

232. *In re 2003*, 848 A.2d at 22–25.

233. *Id.* at 24.

234. *Mount Laurel I*, 336 A.2d at 725–26.

235. *In re 2003*, 848 A.2d at 20.

236. *Id.*

as earlier stated, it does provide housing opportunities in suburban areas.”²³⁷

Although the court was wrong to define the relevant community as the entire state, it is hard to fault the court for assuming it should be so. After all, the plaintiffs were challenging a state agency’s plan to administer a state-wide program. However, the relevant communities examined should have been far more localized, perhaps at a county level or MSA level. Recall the discussion of the *Shannon* decision, above.²³⁸ In that case, the *Shannon* court pointed out HUD’s failure to consider its project’s impact on the surrounding community, rather than HUD’s effect on the demographics of the entire nation. Here, in *In re 2003*, the court should have looked at smaller areas in order to determine whether there were discriminatory impacts. Even with the exceptionally large New York-Newark Consolidated MSA, New Jersey spans more than one single MSA. The court should have considered the location of LIHTC units within particular MSAs located within New Jersey. If it had, it would have found that Atlantic-Cape May PMSA has 100% of its family units in high poverty areas; Jersey City has over 97%; and Bergen-Passaic has over 99%.²³⁹

MSAs are designed to reflect the commuting patterns and economic relationships within a given area.²⁴⁰ In other words, MSAs are meant to roughly outline a region where people live, work, and shop. As reflected in the MSA boundaries throughout New Jersey, the housing market in the northern part of the state is not the same as in the southern part of the state. Thus, when a court looks at the state as a whole and finds both suburban development and urban development, it may discover a different story when looking at the developments constructed in one MSA versus another. On a scale that more accurately reflects housing and commuting choices, the MSA, LIHTC allocations look very concentrated in some areas.

Throughout most of the history of the LIHTC, the vast majority of northern New Jersey LIHTC units have been in cities with very high rates of poverty.²⁴¹ Far from simply reflecting a preference for qualified census tracts, the LIHTC in the state has become a program for building low-income housing in high-poverty areas of Newark, Patterson, and Jersey City PMSAs in northern New

237. *Id.* at 20.

238. *See supra* Part II.B.1.

239. PRRAC REPORT, *supra* note 53.

240. U.S. DEP’T. OF HOUS. & URBAN DEV., GLOSSARY, http://www.huduser.org/glossary/glossary_m.html (last visited Apr. 8, 2010).

241. PRRAC REPORT, *supra* note 53.

Jersey.²⁴² It is true that many LIHTC projects are built in southern cities like Camden, Atlantic City, and Trenton,²⁴³ however those MSAs feature a smaller percentage of their LIHTC units being located in high-poverty areas than the Northern MSAs do.²⁴⁴

A court convinced by this observation would, of course, have to acknowledge that the HFA is culpable as a funding agency in the same way that HUD has been recognized as a culpable funding agency in cases like *Walker v. City of Mesquite*,²⁴⁵ *Gautreaux v. Romney*,²⁴⁶ and *Shannon v. United States Department of Housing & Urban Development*.²⁴⁷ One potential difference is that an HFA theoretically does not know the locations of the sites that it will fund before it makes rules that will result in the sites being funded. However, they do know that the rules that they promulgate will affect where developments are sited, and they know that taking greater care to develop LIHTC in high-opportunity areas would affirmatively further fair housing.

E. Changed Circumstances

While there are a great many reasons why *In re 2003* could have been decided in Fair Share's favor, to some extent it is of little use to lament what could have been. However, a lot has changed since 2003. The housing market has changed, and so has a key state policy.

The *In re 2003* court noted Fair Share's contention, articulated in the writings of David Rusk,²⁴⁸ that New Jersey's tax credit allocations to projects located within urban areas had the same deleterious effects for which Regional Contribution Agreements (RCA)

242. *Id.*

243. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 SPRING RESERVATION CYCLE, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008%20Spring%20Cycle%20Reservation%20List.pdf>; see also PRRAC REPORT, *supra* note 53.

244. PRRAC REPORT, *supra* note 53.

245. 169 F.3d 973 (5th Cir. 1999).

246. 448 F.2d 731 (7th Cir. 1971).

247. 436 F.2d 809 (3d Cir. 1970); see also *supra* Part III.B.

248. David Rusk is an "independent consultant" on urban policy. According to his website, he is an:

author, speaker, and consultant on urban policy. [His] basic theme is how urban sprawl, racial segregation, and concentrated poverty interact and impact a region's growth patterns, social equity, and quality of life. A former mayor of Albuquerque and state legislator, [he favors] regional strategies, particularly growth management, mixed-income housing, and tax base sharing. David Rusk, <http://www.gamaliel.org/DavidRusk/default.htm> (last visited Apr. 8, 2010).

were known.²⁴⁹ RCAs are agreements in which a suburban town and an urban municipality trade affordable housing units for cash.²⁵⁰ Specifically, the suburb pays cash, and the city builds low-income units within its own borders. The suburb's *Mount Laurel* obligation to create affordable housing opportunities, then, is considered satisfied on a per unit basis.²⁵¹

Under the administration of the Council on Affordable Housing, New Jersey's municipalities are assigned "*Mount Laurel* obligations" whereby they are required to submit a plan to meet their fair share of the expected demand for affordable housing within their region.²⁵² These obligations are intended to overcome what Justice Pashman, in his concurring opinion in *Mount Laurel I*, called

two distinct but interrelated practices: (1) the use of the zoning power by municipalities to take advantage of the benefits of regional development without having to bear the burdens of such development; and (2) the use of the zoning power by municipalities to maintain themselves as enclaves of affluence or of social homogeneity.²⁵³

That concern—that suburban communities are in a position to take advantage of the benefits of regional development while avoiding its costs—comes out of the tendency of New Jersey municipalities to encourage affluent residents to move in, while discouraging classes of people who are more likely to bring about higher social service costs.²⁵⁴

One of the most onerous of these costs is public education for poor families with multiple children.²⁵⁵ Public schools in New Jersey are primarily funded through local property taxes,²⁵⁶ and for every child attending the school, a cost is borne by the school district.²⁵⁷ These costs are offset more easily when property taxes re-

249. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

250. Harold A. McDougal, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 666 (1987).

251. *Id.*

252. *Id.* at 680; see generally *supra* Part III.C.

253. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 736 (N.J. 1975) (Pashman, J., concurring).

254. Lee Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1267–68 (2006).

255. See *Mount Laurel I*, 336 A.2d at 723.

256. *Id.*

257. One source puts the average cost of each public school student in New Jersey at \$10,000 per student. See Debra Nussbaum, *Reining in Special Education*, N.Y. TIMES, Aug. 31, 2003, at 14NJ.1.

turn a significant amount of revenue per child. If one child lives in a single house with seven bedrooms, on five acres of land, near a golf course, the property taxes on that house are likely to cover the cost of educating that child. On the other hand, if five children live in one apartment with two or three bedrooms, on less than an acre of land, next door to another identical apartment with analogous families, then the property taxes paid to the landlord through rent and passed on to the city through taxes are unlikely to provide an adequate amount of money to cover the expenses of the education of these five children.²⁵⁸ This is without even considering the fact that low-income students often have special needs that incur even higher costs than the average middle-class student.²⁵⁹

The benefits that Justice Pashman referred to are those of living near a city that provides business and employment opportunities, as well as police protection, fire protection, cultural institutions, recreational areas, and transportation hubs.²⁶⁰ Suburban towns are thereby incentivized to avoid the costs of servicing the poor, but are nonetheless dependant on the urban centers to which the poor are relegated.²⁶¹ It is a system where wealthy people get the benefits of living near a city, without having to share the expenses of running a city; the urban poor, conversely, share the benefits of the city but are compelled to pay for it through taxes and rents.²⁶²

258. At a cost of \$10,000 per student, a low-income family would have to pay \$50,000 for each of thirteen years of school (kindergarten through twelfth grade) for a total of \$650,000. With the average property taxes in even the most taxed towns—e.g., Millburn, where N.J.’s average property tax levy was \$17,146, *see New Jersey Property Taxes*, THE STAR-LEDGER, <http://www.starledger.com/str/indexpage/taxes/taxseg.asp?frmtown=46380> (last visited Apr. 8, 2010)—it would take thirty-seven years at that tax level just to pay for the education of five children. In Newark, the average property tax levy was \$4,268 in 2007. *New Jersey Property Taxes*, THE STAR-LEDGER, <http://www.starledger.com/str/indexpage/taxes/taxseg.asp?frmtown=51000> (last visited Apr. 8, 2010). Thus it would take 152 years to pay back the costs of public education for five children.

259. Molly McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1351 (2004). The cost of educating a special needs student in New Jersey is said to range from \$20,000 to \$100,000. Nussbaum, *supra* note 257, at 14NJ.1.

260. *See* McDougal, *supra* note 250, at 671.

261. *Id.* at 671 n.47 (“[A] number of functions necessary to support life—an economic base, transportation network, various services—are located elsewhere in the region.”).

262. *See* Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL’Y & L. 471, 512 (1998) (“What is remarkable about these exclusionary measures is that localities are employing the powers of government to improve, purportedly,

After the *Mount Laurel* decisions purportedly sought to end the practice of allowing affluent suburbs to reap the benefits of a metropolitan area, without bearing any of the burdens of the region, it is puzzling that RCAs were ever created in the first place. An RCA is a voluntary agreement between two municipalities to trade some portion of a town's *Mount Laurel* obligation—an obligation to zone for, but not necessarily create affordable housing²⁶³—in exchange for funding for low-income housing. For example, Newark, the state's largest city, might enter an agreement with another New Jersey town, for example Parsippany, to build one hundred affordable housing units in Newark. Parsippany, a high-growth middle-class suburb, would pay Newark to offset the cost of constructing the units. Prior to 2008, New Jersey's Fair Housing Act,²⁶⁴ a codification of the *Mount Laurel* doctrine, treated the exchange as if the suburb had met its *Mount Laurel* obligation to create affordable housing opportunities.²⁶⁵ Parsippany would have been deemed to have met some portion—up to 50%²⁶⁶—of its *Mount Laurel* obligation, and the receiving city would have gotten funding to build affordable housing. Everybody wins, except for the low-income families who were supposed to have a realistic opportunity to live in the suburb, according to the state constitution.

In *In re 2003*, Fair Share conflated RCAs—and their potential to trap low income families and their children in failing school districts—with LIHTCs located in the same communities where RCA units were constructed.²⁶⁷ In other words, Fair Share argued that the 2003 plan for allocating tax credits would result in low-income siting that is more or less identical to the siting of RCAs, which have been abysmal failures in bringing “redevelopment” to poor communities and instead have only harmed children who rely on public education in those communities.²⁶⁸ But, the *In re 2003* court relied on the state's approval of RCAs as proof of legislative approval of

the lives of the affluent at the expense of the less affluent, beyond what would have occurred in a free market system.”).

263. See McDougal, *supra* note 250, at 686.

264. N.J. STAT. ANN. §§ 52:27D-301–:329.19 (West 2008).

265. McDougal, *supra* note 250, at 681.

266. *Id.*

267. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

268. *Id.* at 9–10.

urban development as the dominant plan for promoting fair housing.²⁶⁹

As a result of their poor track record, in the spring of 2008, New Jersey passed a law banning RCAs.²⁷⁰ The legislature had concluded:

The transfer of a portion of the fair share obligations among municipalities has proven to not be a viable method of ensuring that an adequate supply and variety of housing choices are provided in municipalities experiencing growth. Therefore, the use of a regional contribution agreement shall no longer be permitted²⁷¹

Conversely in 2003, the appellate division had read the existence of RCAs as proof of a state policy favoring urban, low-income housing developments. This development has two major implications for potential LIHTC litigation.

First, the court's reliance on RCAs as proof positive of a state policy favoring urban LIHTCs is now misplaced. Surely, the use of RCAs was not the only factor that led the court to believe that urban siting of LIHTC was permissible, but the change to New Jersey's Fair Housing Act should lead the court, if asked to reconsider the issue, to conclude that the state's policy is not necessarily one that favors the HMFA's reading of its obligations. This development coupled with the argument above regarding the HMFA's mandate to create adequate housing, could be enough to convince the court to reconsider *In re 2003* in light of the amendments to the state FHA, along with the appellate division's clear misreading of the HMFA's statutory obligations to create adequate housing.

Second, without RCAs, New Jersey municipalities will continue to have *Mount Laurel* obligations to create opportunities for affordable housing without an easy way to shirk their duty. This should create an increased supply in land that can be zoned for the development of affordable housing. High-opportunity areas will have the same fair share obligations that they had previously, without any way to fulfill that obligation other than through actually allowing affordable housing to be built in their town. Whereas before, a town could fulfill half of its obligation through units that are outside of the town's borders, that option is no longer available. While the 2003 case lamented that demand for credits in the sub-

269. *Id.* at 21 (“[S]tate policy, as indicated by the allowance of RCAs, and HMFA’s own statutory mandate to assist urban areas, encourage a substantial level of funding to urban areas.”).

270. *See* N.J. STAT. ANN. § 52:27D-329.6(a) (West 2008).

271. *Id.*

urbs were exceptionally low,²⁷² a sinking real estate market and a greater availability of affordable housing opportunities within good neighborhoods could increase the feasibility of low-income rental units in high-opportunity areas, where well-performing schools and access to well-paying jobs are more prevalent.

IV.

NO SHORTAGE OF IDEAS FOR IMPROVEMENT

A. *Ending the Qualified Census Tract Preference*

The federal LIHTC statute allows HFAs to favor poverty-stricken areas for tax credit allocation through the Qualified Census Tract preference (QCT preference).²⁷³ The result is that people who are most likely to live in low-income units are relegated to the inner cities where school quality is lowest and neighborhoods are already the most densely populated.²⁷⁴ One possible solution to the problem is to get rid of the QCT preference entirely.

As a matter of good policy, the QCT preference leaves much to be desired. There is already a natural push towards developing low-income units in high-poverty areas because of the price of land even without a statutorily mandated preference for such developments. Getting rid of the preference would be unlikely to cause the end of inner-city LIHTC development. But the qualified census tract preference is equally harmful in its legal ramifications. By requiring such a preference, the *In re 2003* court was able to point out the tension between an HFA's duty to administer the LIHTC program in a manner to affirmatively further fair housing policies and the LIHTC's requirement that the preference be given to sites that often are racially segregated from the rest of the state.²⁷⁵ Once the tension was recognized by the court, it was inclined to defer to the agency even when the agency's practices led to more segregation.²⁷⁶ The result is a de facto nullification of the duty to further fair housing.²⁷⁷

It is doubtful that Congress intended for the LIHTC to operate without the traditional duty of its administering agencies to adopt fair housing practices.²⁷⁸ Yet, if that preference were stripped from

272. *In re 2003*, 848 A.2d at 20.

273. *Id.* at 15–16.

274. *Id.*

275. *See id.* at 17.

276. *See id.* at 10–11.

277. *See Orfield, supra* note 3, at 1803–04.

278. Professor Orfield notes that the QCT preference was not debated or discussed by Congress before passing the provision. *Id.* at 1778 n.209.

the LIHTC enabling statute, these units would continue to be built in many of the same areas, although with a greater potential for some to be built in middle-income areas. Further, by stripping the preference, there may be a signaling effect to developers that their suburban project proposals might be more favorably received. Putting an LIHTC proposal together costs a developer's resources in time and money. Whether the preference is great or small, as long as developers know that their chances of getting the credits are less when their proposal is sited outside of a qualified census tract, those who weigh the costs and potential benefits of an LIHTC application should be less likely to spend the time and money to even make the proposal. A change in the QCT preference would mean that the average return on investment for the cost of creating a suburban proposal could increase, thereby making it more likely that developers will attempt affordable development in low-poverty communities.

B. Moving Beyond the Mobility/Revitalization Dichotomy

Instead of relying on low-income housing construction to revitalize an existing ghetto—as the HMFA had asserted it was trying to do²⁷⁹—it might make more sense to use the tax credits in places that already are in the process of renewal, as an anchor and a hedge against gentrification. In many places it will be difficult to tell the difference between a government attempting to improve a blighted area and a government simply riding the rising tide in a neighborhood that is already seeing improvement. It is sometimes hard to tell whether “revitalization,” however defined, causes development, or whether development causes revitalization. However, one way to turn this ambiguity into a clear policy preference is to factor opportunity indicators into the LIHTC yearly rankings.²⁸⁰

A recent study at the Furman Center for Real Estate and Urban Policy suggests that the construction of an LIHTC building actually causes some increase in surrounding property values.²⁸¹ At first glance, this might bolster claims by state administrators that LIHTC

279. See *In re 2003*, 848 A.2d at 10.

280. How to define these opportunity indicators is beyond the scope of this Note, but one idea that has gained support in the fair housing community has been school performance. See Orfield, *supra* note 3, at 1797; Shah, *supra* note 22, at 711–18.

281. Ingrid Gould Ellen & Ioan Voicu, *The Impact of Low Income Housing Tax Credit Housing on Surrounding Neighborhoods: Evidence from New York City* 3–4 (Furman Ctr. for Real Estate & Urban Policy, Working Paper 07-02, 2007), available at <http://furmancenter.org/files/ImpactofLowIncomeHousingcombined.pdf>.

buildings are part of a plan to revitalize urban areas that, in the long-term, will desegregate the community.²⁸² Even assuming that increased property values are caused by LIHTC construction, the question remains whether an increase in property value translates into any tangible benefit to local renters. Property values in high-poverty Bedford-Stuyvesant, Brooklyn may be higher than property values in affluent exurban New Jersey, but in that case, property values tell us nothing about the quality of the public schools. Crime rates, in this example, may have no relationship to property values. There are numerous reasons to be skeptical that an increase in property values in areas that have higher than average poverty rates actually means that the neighborhood has improved the life-chances of its inhabitants, who largely rent their homes from landlords that own the property—landlords who, for obvious reasons, *do* benefit from an increase in property values.

Further, it is unclear whether the LIHTC might have crowded out a more desirable use for the property.²⁸³ In other words, if the goal is revitalization of an urban center, it might be the case that a brand new LIHTC building will be an improvement, but it does not necessarily mean that another developer might not have preferred to build market-rate units that could have had more of a positive impact on urban revitalization while immediately inviting a change in the racial composition of a segregated neighborhood.

Competition between government programs could amount to inefficient subsidies where a developer could have chosen between an inclusionary zoning project or LIHTCs. New Jersey's 2009 QAP changed the state's previous absolute ban on combining inclusion-

282. The HMFA said:

Revitalization of our cities can address the racial segregation Fair Share decries. Urban revitalization programs, including programs that replace dilapidated low-income housing with mixed income housing, should promote integration in the long run and make our cities vibrant communities for people of all races and economic means. Attractive and safe new housing, combined with the demolition of old, high-rise public housing and the incorporation of commercial uses, is the first step. Upgrade of housing stock in cities, combined with commercial endeavors, should spark eventual gentrification and the return to the cities of higher-economic people of all races.

In re 2003, 848 A.2d at 10 (quoting the HMFA's comments on the 2003 QAP, 35 N.J.R. 3311).

283. *Cf. Ellen & Voicu, supra* note 281, at 5 ("In choosing sites for new housing, for instance, developers might have simply picked winners (neighborhoods with growth potential). If so, then what we interpret as positive LIHTC impacts might simply be a continuation of these prior trends.")

ary zoning with LIHTCs.²⁸⁴ Nonetheless, extra burdens remain on developers who wish to take advantage of a town's inclusionary zoning program and apply for LIHTCs. A developer may not combine the two programs "unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units despite the density bonus and the affordable units are developed contemporaneously with the commercial or market rate residential units."²⁸⁵ Because of the burden of having to show that the project is not possible without both subsidies, a development that might have used a nearly infinite resource—a town's ability to rezone and allow bigger buildings to be occupied by more tenants in exchange for a percentage of the building being affordable housing—may instead be pressured to accept the tax credits, a finite resource that generally requires that the project be located in a high-poverty area in order to be viable in the competitive bidding process.

Too many programs have accepted urban revitalization over mobility. It has become increasingly unbelievable that revitalization is as effective a tool for urban policy as its frequency would imply. Instead, it seems merely politically convenient for suburban politicians addressing "not in my backyard" (NIMBY) concerns and for urban politicians expected to "bring home the bacon." In other words, revitalization is more politically palatable than mobility policies, but in no sense is it clear that revitalization is superior.²⁸⁶ Cities across the country have been tearing down their public housing projects because of concerns about the conditions within those buildings.²⁸⁷ It is not at all clear that new buildings—buildings with the same concentrations of low-income people and racial minorities as the projects that are being demolished—will perform any better merely because they are privately owned rather than public. Certainly, revitalization is an important component of improving the availability of opportunities for people, but there is a real dan-

284. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.12(a) (2009)), available at http://nj.gov/dca/hmfa/biz/develop/lowinc/2009_proposedqap.pdf.

285. *Id.* The Code further instructs the New Jersey HMFA to adopt the standards promulgated by the Department of Community Affairs for similar types of projects seeking balanced housing funds. *Id.*

286. See Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 499–500 (1994).

287. For an excellent account of one famous example, see SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 238–80 (2002).

ger that revitalization is over-utilized simply because it is easier to accomplish on a political level.

On the other hand, just because housing mobility has a proven track record for creating opportunities for many people does not mean that mobility should be the only goal of housing policy.²⁸⁸ Also, there is no evidence that moving to a better neighborhood will help every family that makes such a move.

The *In re 2003* court, the HMFA, and Fair Share Housing all erred by falling into this revitalization versus mobility dichotomy, but it was only the court that constructed a narrow ruling justified primarily by rejecting a mobility model in favor of revitalization.²⁸⁹

Whether LIHTC development is a burden on or a boon to low-income neighborhoods invites a continuation of the old, tired debate between proponents of urban revitalization and proponents of Gautreaux-style mobility programs. But perhaps the mobility/revitalization dichotomy is obsolete. Ideally, both approaches should be taken together.

Instead of thinking about either a Qualified Allocation Plan that favors rebuilding inner cities, or thinking about a Qualified Allocation Plan that favors suburban construction, states should be developing plans that, among other things, are designed to contribute to revitalization where revitalization is already beginning to happen while also creating real opportunities for housing choice among residents who do not live in revitalizing neighborhoods. In other words, if we are to do both revitalization and mobility, then it may be possible, in some cases, to do both at the same time if affordable housing programs can get creative about building rental units in the sorts of communities that actually show promise in terms of revitalization and would represent real alternatives for people living in highly concentrated areas of racial isolation and poverty.

Rather than making the case for times when revitalization works or making the case that mobility is the superior policy for

288. Indeed, this was also an observation in *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 822 (3d Cir. 1970) ("Nor are we suggesting that desegregation of housing is the only goal of national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto."), but the *In re 2003* court's interpretation of "instances where a pressing case may be made for the rebuilding of a racial ghetto" makes *Shannon* essentially toothless, since as long as the agency can claim to believe that urban revitalization will help inner-city residents, it has met the burden established by the *In re 2003* court. See *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 12 (N.J. Super. Ct. App. Div. 2004).

289. *In re 2003*, 848 A.2d at 15–18.

fostering integration, policymakers should be creating opportunities for developers to both build low-income units where affordable units are currently scarce, as well as build well-constructed and safe housing in areas where quality housing is scarce.

C. *Looking to School Performance*

Some commentators have suggested using the credits with an eye toward the performance of public schools that service the community where the low-income units are built.²⁹⁰ The idea is to give extra “points” to a developer’s LIHTC application when the project would be located in a public school district that can both support the predicted increase in students as well as provide them with an adequate education.

Fair Housing’s claim against New Jersey’s HMFA included charges that the siting of the state’s LIHTC units in urban enclaves amounted to a guarantee that children who would live in those buildings would receive an inadequate education.²⁹¹ This was not to be the first serious challenge to New Jersey’s educational system via its constitutional guarantee of an equal opportunity to receive an education.²⁹² In the *Abbott* cases, students of low-income municipalities successfully challenged the state’s funding formula that put poorer school districts at a financial disadvantage.²⁹³

Other states have also found themselves on the losing end of “inadequate education” claims.²⁹⁴ In Connecticut, *Sheff v. O’Neil* involved a successful challenge to the quality of public education given to the children of Hartford on the basis of its inequality in terms of educational opportunities when compared to children throughout the rest of the state.²⁹⁵

290. See, e.g., Shah, *supra* note 22, at 711–18.

291. *In re 2003*, 848 A.2d at 16.

292. The Court addressed constitutionality of the school system under the Public School Education Act of 1975, N.J. STAT. ANN. § 18A:7A-1 to -52, under the New Jersey Constitution’s “Thorough and Efficient” Clause. *In re 2003*, 848 A.2d at 16.

293. *In re 2003*, 848 A.2d at 16 (“We again face the question of the constitutionality of our school system. We are asked in this case to rule that the Public School Education Act of 1975 violates our Constitution’s thorough and efficient clause. We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient.”) (citations omitted).

294. See, e.g., Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50 (N.Y. 2006) (deferring to New York’s education spending estimates).

295. See *Sheff v. O’Neil*, 678 A.2d 1267, 1281 (Conn. 1996) (“[T]he existence of extreme racial and ethnic isolation in the public school system deprives school

Given New Jersey's mandate that children be given a "thorough and efficient" public education,²⁹⁶ inquiring as to the quality of schools where a low-income housing tax credit unit would be built only seems to make sense.²⁹⁷ The HMFA has given points for proximity to schools, presumably with the assumption that this would confer some benefits to children of low-income families.²⁹⁸ On the other hand, by giving points for low-income developments that are close to schools, the HMFA is merely increasing its existing preference for urban LIHTC developments. In New Jersey's cities, public schools are numerous and are often within walking distance of their students' homes.²⁹⁹ Conversely, in suburbs, which are associated with more opportunities for children and adults, public schools are not necessarily within walking distance for many of their students.³⁰⁰ Yet, the relative quality of the suburban schools is far beyond the quality of those in the inner city.³⁰¹ A preference for quality schools makes sense; preference for nearby schools does not.

D. Collecting Tenant Data

In the recently passed Housing and Economy Recovery Act of 2008, Congress mandated that each state agency allocating low-income housing tax credits

shall furnish to the Secretary of Housing and Urban Development, not less than annually, information concerning the race,

children of a substantially equal educational opportunity and requires the state to take further remedial measures." For an excellent account of that litigation and the issues that it raises, see SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2007).

296. N.J. CONST. art. VIII, § 4, cl. 1.

297. The *In re 2003* court did not deny that children had this constitutional right; it merely noted that it was not HMFA's task to bring that right to fruition. *In re 2003*, 848 A.2d at 21.

298. PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.15(a)(11)(i) (2009)), available at http://www.nj.gov/dca/hmfa/biz/devel/lowinc/2009_proposedqap.pdf.

299. Newark alone has about ninety public schools within its city limits. See Newark Public School Directory 2009–2010, <http://www.nps.k12.nj.us/schools.html> (last visited Apr. 8, 2010).

300. As a counterexample, the Township of Roxbury has only eight schools, serving a town that is about twenty-two square miles. See Roxbury Schools, <http://www.roxbury.org/schools.html> (last visited Apr. 8, 2010); Map of Roxbury, <http://www.roxburynj.us/documents/Maps/Parks%20Map.pdf> (last visited Apr. 8, 2010).

301. Only 39% of Newark public school students can read at the "proficient" level or above, while the state average is 57%. N.J. DEP'T OF EDUC., NEW JERSEY STATE REPORT CARD, <http://education.state.nj.us/rc/rc09/dataselect.php?c=13;d=3570;s=170;lt=CD;st=CD&datasection=all> (last visited Apr. 8, 2010).

ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the United States Housing Act of 1937 or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency.³⁰²

In the coming years, this will open up new opportunities for fair-housing advocates to evaluate the effectiveness of the LIHTC program and to find out who the LIHTC program serves. This change in the law could also signal a new national attention to potential problems in LIHTC siting.

E. Rethinking Regionalism

How we define the spaces that are studied has a tremendous impact on the conclusions that might be drawn from any research in the housing and urban policy field. As argued above, LIHTC administrators and the courts should take a more localized view of where LIHTC units are constructed. In the southern part of New Jersey, many LIHTC units are built in diverse towns outside of Camden and Trenton.³⁰³ Yet, in the northern part of the state, very few of the middle-class Newark suburbs build any LIHTC units that are not intended exclusively for senior citizens.³⁰⁴ Of course, this is not meant to suggest that Camden and Trenton do not have more than their fair share of LIHTC units. However, it does seem that there is more of a balance in southern New Jersey.

Looking at the problem state-wide does not tell the whole story. For instance, a court seeing ten suburban units and twenty urban units can make a determination that the HFA's administration of LIHTCs does not concentrate poverty. But if looking at a smaller area that more accurately reflects how people really make housing choices, it may be the case that there are ten LIHTC buildings in Essex County, New Jersey, all ten of which are in Newark. In other words, even if there are LIHTC units being built in middle-income, integrated communities in the southern part of the state, these do not constitute a viable housing choice for families with social and economic ties to the northern part of the state where few such integrated LIHTC units exist.

302. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2875, 122 Stat. 2654 (2008).

303. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2005 SPRING RESERVATION CYCLES, http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/20059_awardees.pdf (last visited Apr. 8, 2010).

304. *Id.*

Other commentators have suggested that using the area median income (AMI) as a measure of affordability disadvantages the very poor in regions of the country where the average income is very high.³⁰⁵ Removing the QCT preference would likely be the most direct way of leveling the field and creating opportunities to build low-income units in mixed-income neighborhoods. Changing to a national median income, however, would be problematic. Advocates for that approach cite Marin County as a place where the AMI is very high.³⁰⁶ As of 2009, AMI for the San Francisco-Oakland-Fremont MSA, where Marin County is located, reaches \$91,900.³⁰⁷ In the New York, Northern New Jersey, Long Island, NY-NJ-PA, MSA, where both New York City and Newark are located, the AMI is \$74,600. The argument by proponents of a national median income are that since places like Marin County have such high AMIs, “low-income housing” can be occupied by people who are not the most in need of affordable housing options.³⁰⁸

They are right that using AMI as it is currently structured is not the best way to ensure affordable housing access for people who need it most. However, a national median income would cause as many problems as it solves. First, there is the problem of applying a national median income in areas where the cost of living is very low. The Department of Housing and Urban Development (HUD) publishes the Estimated Median Family Income each year. For 2008, the estimated median was \$61,500 per family.³⁰⁹ In many parts of Mississippi, area median income is at or below \$42,000; that is only

305. See, e.g., David Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL’Y 537, 556 (1998) (arguing that the lack of incentive to charge rents below minimum levels will leave rent-restricted units unaffordable for low-income families); Shilesh Muradlihdhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353 (2006) (arguing that low-income housing tax credit does not meet the needs of low-income households and may actually promote housing segregation and discrimination).

306. Cohen, *supra* note 305, at 556.

307. FANNIE MAE, AREA MEDIAN HUD INCOME, <https://www.efanniemae.com/sf/refmaterials/hudmedinc/hudincomeresults.jsp?STATE=CA> (last visited Apr. 8, 2010).

308. Cohen, *supra* note 305, at 557.

309. DEP’T OF HOUS. & URBAN DEV., NOTICE PDR-2008-01, ESTIMATED MEDIAN FAMILY INCOMES FOR FISCAL YEAR 2008 1 (2008), http://www.huduser.org/datasets/il/i108/Medians_2008.pdf (last visited Apr. 8, 2010).

68% of the national median.³¹⁰ While it is true that families in Marin County who make more than the national median but less than the area median might qualify for affordable housing when they are, in fact, wealthier than the average American, it is also true that families in Mississippi who earn more than the area median but less than the national median currently do not qualify for most affordable housing programs. If the national median was the measure for determining a family's housing-assistance needs, then the median family in rural Mississippi would necessarily qualify, despite their being of "average" income in their area. This, of course, does not even take into account the vast differences in housing prices between places like San Francisco-Oakland-Fremont MSA, where the median price of a single family home was \$777,300 at the end of 2007, and the Gulfport-Biloxi MSA, where it was \$150,400.³¹¹ Families making the national median income in these two areas will clearly have very different abilities to afford adequate housing. Thus, using a national average income seems a very bad idea.

F. Keeping the Price of the Tax Credits High

In 2006, Kirk McClure was celebrating the LIHTC program's evolution into a viable tool to bring developers to low-poverty suburbs.³¹² He wrote that the program was "increasingly attractive to developers in markets that were previously underserved by housing assistance programs—namely, the low-poverty suburbs."³¹³ Central to McClure's analysis was a strong market for the tax credits.³¹⁴ According to his research, tax credit investors paid about forty-five cents on the dollar for tax credits when the program first began in the late eighties, representing an estimation by investors that the tax credits were risky and therefore not worth paying a high price.³¹⁵ A lack of demand for a relatively new commodity could also explain the low price. However, by 2005 that had changed, and investors were paying "80 cents or more per dollar of tax credit," giving them a much lower yield.³¹⁶

310. FANNIE MAE, AREA MEDIAN HUD INCOME, <https://www.efanniemae.com/sf/refmaterials/hudmedinc/hudincomeresults.jsp?STATE=MS> (last visited Apr. 8, 2010).

311. NAT'L ASS'N OF REALTORS, MEDIAN SALES PRICE OF EXISTING SINGLE-FAMILY HOMES FOR METRO. AREAS 2-3 (2010), [http://www.realtor.org/Research.nsf/files/MSAPRICESF.pdf/\\$FILE/MSAPRICESF.pdf](http://www.realtor.org/Research.nsf/files/MSAPRICESF.pdf/$FILE/MSAPRICESF.pdf) (last visited Apr. 8, 2010).

312. McClure, *supra* note 65, at 419.

313. *Id.*

314. *Id.* at 428-32.

315. *Id.* at 428.

316. *Id.*

Since 2009, the price for tax credits plummeted.³¹⁷ When the price of tax credits gets very low, the amount of money that investors pay the developers for their tax credits barely covers the costs of development.³¹⁸ Low tax credit prices mean a threat to the viability of new LIHTC proposals since the developer will either have to receive more credits to help offset development costs or abandon plans that otherwise would have been profitable. McClure's research suggests that when LIHTC prices get very low, LIHTC development in the suburbs suffers.³¹⁹

The American Recovery and Reinvestment Act of 2009³²⁰ contains provisions that attempt to alleviate the current problem of low tax credit prices. Section 1602 of the Act provides states with an opportunity to use grants to finance low-income rental housing, rather than relying exclusively on tax credits.³²¹ In order to receive a Section 1602 grant, the developer is required to go through the same process that the LIHTC program would otherwise require.³²² However, instead of having to find investors to buy the credits at a deep discount in today's market, the developer can benefit directly from the grant. This provision is temporary,³²³ although it could conceivably be extended. Whether it would be a good idea to make a provision like this permanent is beyond the scope of this Note, but it is certainly a topic worth considering.

CONCLUSION

The LIHTC statute was designed to give the states a lot of leeway in administering the program.³²⁴ It encourages each state to prepare an allocation plan that will best meet its goals and needs. However, many states have failed to recognize the need for the LIHTC program to affirmatively further fair housing.³²⁵ This is a

317. Daykin, *supra* note 71.

318. McClure, *supra* note 65, at 428–32.

319. *Id.* at 428–32.

320. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

321. *Id.* § 1602.

322. *Id.*

323. *Id.*

324. *See supra* Part I.B.

325. *See Inclusive Cmty. Project, Inc. v. Tex. Dep't. of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935, at *2 (N.D. Tex. Dec. 11, 2008); *Asylum Hill Problem Solving Revitalization Assoc. v. King*, No. (X02)CV030179515S, 2004 WL 113560, at *1 (Conn. Super. Ct. Jan. 5, 2004); *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

significant shortcoming and needs to be remedied. Residential racial segregation was made possible, if not created, by actions of the federal government.³²⁶ The government should, therefore, play a role in ameliorating the problem. The federal FHA attempts to accomplish that, but the New Jersey court failed to recognize the federal FHA's applicability to LIHTC administration.

One quick improvement to the LIHTC program could come from the federal government itself. Getting rid of the Qualified Census Tract preference would make it harder for states to justify their predisposition to award LIHTCs in high-poverty, racially-isolated areas.

The states should take steps to ensure that low-income housing tax credits are awarded to developers who propose affordable housing units in high-opportunity areas. The states also have to look at their allocation plans in terms of regions that accurately reflect realistic housing choices. For instance, high-opportunity locations in South Jersey may not be realistic destinations for those living in inner-city Newark.

State agencies can move beyond looking at whether an area is within a QCT. They could also look at whether a high-poverty area is improving or whether a moderate-poverty area is declining. Another idea is to look less at proximity to public schools and more at the quality of public schools. The new requirement from the Housing and Economic Recovery Act of 2008 that states collect tenant data will help to better evaluate whether some of these ideas work. The Act itself also reflects a shift in values and recognition that the racial composition of low-income housing is important.

In New Jersey, HMFA should not rely on *In re 2003*. The banning of RCAs, and the appellate division's reliance on facts that are no longer applicable should serve as ample warning to the HMFA and other LIHTC administrating agencies that the duty to affirmatively further may be taken more seriously by the courts the next time around.

LIHTC development in the next year or so will be difficult to predict. The conventional wisdom is that real estate development on the whole has come to a screeching halt. Another view is that the government's commitment to fund the LIHTC at high levels will make some otherwise undevelopable projects suddenly viable. With development costs, like land acquisition, dropping, but LIHTC funding going higher than ever before, it is quite possible that LIHTC projects could buck the trend. There is simply no good

326. See *supra* Part II.A.

way of knowing right now. Whether LIHTC development continues unabated, or whether LIHTC development takes years to reach pre-2008 levels, state agencies must take the initiative to create opportunities for low-income families, and must take notice of the potential consequences for maintaining residential segregation.