INCENTIVE, ENTITLEMENT, AND THE INEFFECTIVE SUBSIDIZATION OF THE HOUSING MARKET

Evelyn Hildebrand†

America is made of pilgrims and pioneers, men and women who dreamed, worked, and sacrificed for a chance to build a home. Lady Liberty guards a "golden door" leading to the land of opportunity: a land that is wide open, where there is space and room to build a new life.[1] Much of the American dream centers on home, a place of peace and security, a place for family and friends to gather, a place to "breathe free."[2] Beginning with the Declaration of Independence, moving through the growth of the nation and continuing to the present day, American government has recognized the importance of this ethos in American life.[3]

Over the past century, policy geared towards ensuring every American has a home has dramatically expanded.[4] The Tax Code catalyzed this expansion by offering deductions and credits for taxpayer behavior that comports with government policy promoting housing; this policy was initially articulated in the Housing Act of 1937.[5] The Low-Income Housing Tax Credit (LIHTC)

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† Evelyn Hildebrand is a third-year student at Ave Maria School of Law. Evelyn would like to thank her family and friends for supporting her along this journey, Shapiro for sharpening her brain, Professor Tenzer for early morning meetings and wise insight, Sarah for encouraging her to take Federal Taxation, and Kyle for reading the early stages of this work with compassion and a sense of humor.

1. EMMA LAZARUS, *The New Colossus, in* EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS 233, 233 (Gregory Eiselein ed., Broadview Press Ltd. 2002) (as inscribed on the Statue of Liberty in N.Y. Harbor) ("Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!").

2. *Id.*

3. *See* Franklin D. Roosevelt, President, United States of Am., State of the Union Message to Congress (Jan. 11, 1944) (transcript available at Franklin D. Roosevelt Library & Museum, https://fdrlibrary.org/address-text) ("We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all . . . [a]mong these are . . . [t]he right of every family to a decent home . . . . All of these rights spell security . . . . [W]e must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.").

4. *See* Howard Husock, *Public Housing and Rental Subsidies*, DOWNSIZING FED. GOV'T (Feb. 23, 2017), https://www.downsizinggovernment.org/hud/public-housing-rental-subsidies.

5. U.S. Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) ("It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring

and the proposed Rent Relief Act highlight the government's vested interest in housing.[6] The LIHTC subsidizes the construction and renovation of low-income housing by awarding tax credits to private developers who will build or maintain low-income housing.[7] The proposed Rent Relief Act would allow renters a refundable tax credit which would either reduce taxable income by the amount of rent paid, or provide a refund check in the amount of rent paid if the renter has no tax liability.[8]

Ultimately, both of these provisions are problematic. Since the inception of housing assistance in 1932, dozens of attempted solutions and billions of tax dollars have failed to summarily solve the affordable housing issue.[9] Many people struggle to make ends meet—many more already receive government subsidies, and yet are not moving out of dependency towards homeownership or financial independence.[10] Ironically, some policy makers argue that the reason for this failure is a lack of sufficient government funding.[11] The real reason for this large-scale failure is that current government policy ignores the connection between incentive and ownership.[12]

Part One of this paper explores the philosophical and political thought supporting the uniquely American conception of freedom, a conception which relies on the connection between ownership and incentive. Aristotle, Aquinas, Locke, and Blackstone laid a foundation which Thomas Jefferson and the Founders incorporated and built upon in framing the Declaration of Independence.[13] Understanding freedom in the American tradition requires a definitional paradigm shift, one which distinguishes ownership from entitlement. In marked contrast to the American conception of freedom, the socialist credo as articulated in the seminal *Communist Manifesto* explicitly

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unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.").

6. *See* Ed Gramlich, *Low Income Housing Tax Credits*, *in* NAT'L LOW INCOME HOUSING COALITION, THE ADVOCATE'S GUIDE: AN EDUCATIONAL PRIMER ON FEDERAL PROGRAMS AND RESOURCES RELATED TO AFFORDABLE HOUSING AND COMMUNITY DEVELOPMENT 5-30, 5-30 (2018), https://nlihc.org/sites/default/files/AG-2018/2018_Advocates-Guide.pdf; *see also Rent Relief Act of 2018*, KAMALA D. HARRIS: U.S. SENATOR FOR CAL., https://www.harris.senate.gov/imo/media/doc/One%20Pager%20-%20Rent%20Relief%20Act%207.19.pdf (last visited Jan. 15, 2020).

7. *See generally* I.R.C. § 42 (2020).

8. *See* Rent Relief Act of 2018, S. 3250, 115th Cong. (2018).

9. *See generally* NAT'L LOW INCOME HOUSING COALITION, OUT OF REACH: THE HIGH COST OF HOUSING (2018) [hereinafter OUT OF REACH], https://nlihc.org/sites/default/files/oor/OOR_2018.pdf.

10. *See generally id.*

11. *Id.* at iii, 6.

12. *See* Husock, *supra* note 4.

13. *See* GOTTFRIED DIETZE, IN DEFENSE OF PROPERTY 13–34 (Univ. Press of Am., Inc. 2d ed. 1995).

disavows incentive by committing to the demolition of private property.[14] Understanding and critiquing both intellectual traditions is critically important in framing effective housing policy.

Part Two analyzes the Low-Income Housing Tax Credit which allows developers to receive and trade tax credits in return for building and maintaining low-income housing.[15] Not only does the LIHTC cultivate a culture of opaque bureaucratic red tape as developers vie for limited tax credits, but the practical result is ultimately unsuccessful.[16] The LIHTC incentivizes the construction of very expensive, low-income housing—housing which would not be financially feasible without the credit.[17] Developers benefit while income caps assigned to low-income tenants create a disincentive that discourages tenants from increasing their income.[18] In addition to disincentivizing tenants from moving into better housing, the LIHTC is not financially viable, artificially existing underwater via a permanent government bailout.[19]

Part Three examines the Rent Relief Act, a proposed amendment to the Tax Code which would allow taxpayers to deduct or receive as a refund the amount of money spent on rent with certain limitations.[20] The provision counteracts the inculcation of a culture of personal fiscal responsibility by actively incentivizing reliance on a subsidy.[21] Since more of the subsidy is available where a renter spends a higher percentage of income on rent, the provision functionally encourages renters to move into more expensive housing because that housing qualifies for more of the available subsidy.[22] From an economic perspective, the predicted outlook of the proposed

14. *See* KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO: A MODERN EDITION 52 (Verso 1998) (1848).

15. I.R.C. § 42(a) (2020).

16. *See* FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y & MOELIS INST. FOR AFFORDABLE HOUSING POL'Y, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? 3 (2012) [hereinafter FURMAN & MOELIS BRIEF], http://furmancenter.org/files/publications/LIHTC_Final_Policy_Brief_v2.pdf.

17. *See Low-Income Housing Tax Credits*, NAT'L HOUSING L. PROJECT, https://www.nhlp.org/resource-center/low-income-housing-tax-credits/ (last visited Jan. 23, 2020).

18. *See id.*; *see also* I.R.S. Audit Tech. Guide 23092-001, at 4-17 (Jan. 2011), https://www.irs.gov/pub/irs-utl/lihc-form8823guide.pdf.

19. *See* Gramlich, *supra* note 6, at 5-36.

20. Rent Relief Act of 2018, S. 3250, 115th Cong. (2018).

21. *See* Alex Muresianu & Nicole Kaeding, *Senator Harris's Rent Relief Tax Credit Is a Well-Intentioned Misfire*, TAX FOUND. (July 25, 2018), https://taxfoundation.org/senator-harriss-rent-relief-tax-credit/.

22. *See* David S. Bieri & Casey J. Dawkins, *Amenities, Affordability, and Housing Vouchers*, 59 J. REGIONAL SCI. 56, 78 (2018).

provision is not promising.[23] Subsidization of the healthcare and education fields provides both a compelling comparison and a compelling caution against the passage of the proposed provision.[24]

Policy impacts people, but policy also relies on people. Every government policy relies expressly or implicitly on assumptions about human nature,[25] and both highlighted provisions are ineffective because they rely on faulty premises. For the formation of effective policy on the question of housing, policymakers have to focus on the relationship between owning private property and incentive.[26] The housing crisis is really a crisis of freedom—and until the relationship between incentive and the right to private property guides policy creation, the problem of housing will remain unsolved.

PART ONE: PRIVATE PROPERTY AND INCENTIVE

A. *The Intellectual Giants: Aristotle, Aquinas, Locke, and Blackstone*

The connection between incentive and the right to own private property is long held and deeply rooted in human history, tracing its way back beyond the Declaration of Independence, beyond Blackstone and Locke, to Aquinas and Aristotle.[27] In his book, *In Defense of Property*, Professor Gottfried Dietze summarizes Aristotle's view of private property as rooted in the natural law, rather than stemming from the ordination of a government because "private property is ordained by natural law and sanctioned by the ages."[28] Further, Aristotle articulated the connection between work and private property as the reward for that work: "in a communistic society men would have no incentive:

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23. *See* Jibran Khan, *Kamala Harris's Rent Subsidy Would Help Landlords, Not Renters*, NAT'L REV. (Aug. 1, 2018), https://nationalreview.com/2018/08/kamala-harris-rent-subsidy-would-go-to-landlords-not-renters/; Daniel J. Mitchell, *The Statist (And Senseless) Agenda of Kamala Harris*, TOWNHALL FIN. (Jan. 23, 2019), https://finance.townhall.com/columnists/danieljmitchell/2019/01/23/the-statist-and-senseless-agenda-of-kamala-harris-n2539920; Kyle Pomerleau, *Analysis of Sen. Kamala Harris's "LIFT the Middle-Class Act,"* TAX FOUND. (Oct. 24, 2018), https://taxfoundation.org/kamala-harris-tax-plan/; Tyler Cowen, Opinion, *Kamala Harris's Disappointing Economics*, BLOOMBERG (Jan. 22, 2019), https://www.bloomberg.com/opinion/articles/2019-01-22/kamala-harris-s-economic-plans-are-disappointing.

24. *See* Kevin D. Williamson, *Sneaky Inflation*, NAT'L REV. (Sept. 14, 2016), https://www.nationalreview.com/2016/09/inflation-government-subsidies-health-care-housing-education/.

25. *See* THE FEDERALIST NO. 51 (James Madison).

26. *See* Paul L. Poirot, *Property and Poverty*, THE FREEMAN, Feb. 1966, at 10–12, 15.

27. *See* DIETZE, *supra* note 13, at 12–31.

28. *Id.* at 13.

'That which is common to the greatest number has the least care bestowed upon it.'"[29]

In his philosophical and theological work, the *Summa Theologica*, Thomas Aquinas echoes Aristotle's treatment of private property as a natural right stemming from the natural law as opposed to a created one flowing from a government decree.[30] Often credited with baptizing Aristotle's philosophy, Aquinas relies on his reasoning frequently and, in this instance, Aquinas adopts Aristotle's argument: man's right to private property is natural because "man has a natural dominion over external things, because, by his reason and will, he is able to use them for his own profit, as they were made on his account."[31]

Beyond establishing that owning private property is a natural right, Aquinas argues that owning private property is not only natural, but "necessary to human life."[32] Owning private property gives man an incentive to work: "every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community."[33] Private ownership as opposed to communal ownership creates the cited incentive.[34] Further, private ownership of property creates a culture of order: "human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately."[35] Finally, where man has the right to private property, the stability of the state as a whole increases: "a more peaceful state is ensured to man if each one is contented with his own . . . . [Q]uarrels arise more frequently where there is no division of the things possessed."[36]

The benefits that Aquinas cites as flowing from the recognition of the natural right to own private property find further support in the later writings of John Locke.[37] In his *Second Treatise on Government*, Locke articulates a

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29. *Id.* (quoting ARISTOTLE, POLITICS Bk. II, Pt. III (B. Jowett trans.) (350 B.C.)).

30. *See* THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. II, Q. 66, Art. 1, (Fathers Eng. Dominican Province trans., Kevin Knight ed. 2d ed., 2017).

31. *Id.*

32. *Id.* Pt. II, Q. 66, Art. 2.

33. *Id.*

34. *See id.*

35. *Id.*

36. *Id.*

37. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 11 (Jonathan Bennet ed., Early Modern Texts 2017) (1690).

vision of private property as a God-given right because "God gave the world to Adam and his successive heirs."[38] The world belongs to man in common at first, but once man labors over the earth, he owns it.[39] Once a man owns property, that right is both God-given and inalienable:[40]

> Though men as a whole own the earth and all inferior creatures, every individual man has a property in his own person; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly *his*. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property.
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> He has removed the item from the common state that nature has placed it in, and through this labour the item has had annexed to it something that excludes the common right of other men: for this labour is unquestionably the property of the labourer, so no other man can have a right to anything the labour is joined to—at least where there is enough, and as good, left in common for others.[41]

Locke's description of the manner in which property becomes private builds on Aquinas and Aristotle because he agrees that the right to private property is natural to man.[42] However, Locke emphasizes the process by which a man comes to own property and can rightfully call that property his.[43] The process is work—and for Locke that work is integral to asserting ownership.[44] The work annexes or attaches something additional to the land,[45] something which was not present before, something which makes asserting a right to that land the unquestionable right of the laborer.[46]

A final formative thinker to consider in understanding the relationship between private property and incentive is William Blackstone and his famous

38. *Id.* (emphasis omitted).

39. *Id.*

40. *Id.*

41. *Id.* (emphasis omitted) (alterations omitted).

42. *See id.*

43. *See id.*

44. *Id.*

45. *See Annex*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/annex?src=search-dict-box (last visited Jan. 25, 2020).

46. LOCKE, *supra* note 37, at 11.

Commentaries on the Laws of England.[47] Blackstone articulated a definition of man's "own happiness," which conditioned man's happiness on obeying the natural law: "[f]or [the Creator] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former."[48] Connecting Locke with Blackstone, man's true and substantial happiness is best realized when he is free to work and then to own and enjoy the results of that work.[49]

B. *Locke's Philosophy of Private Property and the Declaration of Independence*

Locke's treatment of property is exactly the ethos which the Founders adopted in drafting the Declaration of Independence.[50] Part of the uniqueness of the Declaration of Independence was the Founders' decision to enshrine Locke's vision of man's natural right to property directly within the foundation of the new country.[51] The American conception of the right to property made property rights independent of the government's operation, not contingent upon it.[52] The famous words that Jefferson penned—"[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"—mean that the right to property is fundamentally independent of either government creation or government sanction.[53] Dietze argues that the Declaration of Independence "is, to a great extent, a document in defense of property"[54] because Jefferson incorporated Locke's defense of private property as a natural right in his use of the phrase "pursuit of happiness."[55] According to Dietze, "'pursuit of happiness' is thus nothing but a summary statement of the various Lockean ideas on the ethical purposes of private property."[56]

These threads of thought—Aristotle, Aquinas, Locke, and Blackstone—inform the unique ideal of freedom articulated in the Declaration of

47. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (William S. Hein & Co., 1992) (1765).

48. *Id.* at 40–41.

49. *Id.*

50. DIETZE, *supra* note 13, at 31.

51. *See id.* at 31–34.

52. *See id.* at 30–31.

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

54. DIETZE, *supra* note 13, at 31.

55. *Id.* at 31–32.

56. *Id.* at 32.

Independence which ultimately makes up the American dream.[57] Freedom for Americans means the chance not only to live in a home, but also to work for it and to own it.

C. *Socialism's Condemnation of Private Property Directly Contradicts the American Conception of Freedom*

Given the clear connection between incentive and ownership of private property, the American ideal of freedom and the socialist credo stand in stark contrast.[58] *The Communist Manifesto* states the goal driving both socialism and communism clearly and simply: "[t]he theory of the Communists may be summed up in the single sentence: Abolition of private property."[59] In place of private property, capital would be "converted into common property, into the property of all members of society."[60]

Leaving aside the question of governing this common property without effectively switching one ruling class for another, importing socialism into American society imports artificial class divides.[61] A foundational difference between socialism and American freedom is that equality is God-given and inherent.[62] Recognizing man's fundamental equality forms the foundation of American freedom.[63] Socialism operates from a credo of inequality, arguing that some are unequal because they have less.[64] Those in the proletariat class are doomed to slavery absent a class-wide revolt.[65] Such a revolt does not even promise freedom to the proletariat: it promises only to abolish "bourgeois individuality, bourgeois independence, and bourgeois freedom" in favor of common property and proletariat government.[66] There is no upward option; the upward option is intentionally destroyed:

> [f]rom the moment when labour can no longer be converted into capital . . . from the moment when individual property can no longer be transformed into bourgeois property . . . you say, individuality vanishes. You

57. *See id.* at 13–34.

58. *See* MARX & ENGELS, *supra* note 14, at 52.

59. *Id.*

60. *Id.* at 53.

61. *See* Ben Shapiro, *Karl Marx, You Were Wrong*, NAT'L REV. (May 2, 2018), https://www.nationalreview.com/2018/05/karl-marx-legacy-millions-murdered-enslaved-in-poverty/.

62. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

63. *See id.*

64. *See* Shapiro, *supra* note 61.

65. MARX & ENGELS, *supra* note 14, at 51–52.

66. *Id.* at 54.

> must, therefore, confess that by "individual" you mean no other person than the bourgeois, than the middle-class owner of property. This person must, indeed, be swept out of the way, and made impossible.[67]

Equal opportunity is not the same as equal outcome.[68] Incentive requires a willingness to work and the opportunity to receive the reward of that work.[69] Equal outcome eliminates incentive by killing that upward option.[70]

Dietze articulates the connection between motivation and private property, describing private property as "one of the major incentives to human action throughout history."[71] Absent that connection, the move towards socialism is a counterintuitive one because it creates a series of false incentives:

> The sick have conquered the healthy: social security, with benefits that are often out of proportion to needs, makes it less and less likely that the sick are eager to get healthy again and that they want to stay healthy for work. The lazy have conquered the diligent: unemployment compensation, having become more and more generous, makes it less and less likely that the unemployed are eager to get back to work, and that they do their best to stay in their jobs. The debtors have conquered the creditors: legislation having come to favor the debtor out of proportion to what is justifiable on humanitarian grounds, the debtor can take it easy in repaying his debt. To top it all, even work is being punished today: due to progressive taxation, the hardworking individual will have a tax cut that is out of proportion to the amount he would pay if he did not work so hard. These examples are only a few demonstrations of the fall of property in the twentieth century.[72]

The conundrum of housing can easily be added to Dietze's parade of horribles.

This past century has borne abundant witness to the evils of socialism as "ineffective, destructive and stunting to the human spirit."[73] Yet using the ethos of guaranteed equal outcome rather than a reliance on personal responsibility in drafting policy sends government towards the socialist credo:

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67. *Id.* at 54–55.

68. *See* Clarence Thomas, U.S. Supreme Court Assoc. Justice, Commencement Address at Hillsdale College: Freedom and Obligation (May 14, 2016), *in* 45 IMPRIMIS, May/June 2016.

69. *See, e.g.*, David M. Smick, *What Reaganomics Is All About*, WALL STREET J. (July 8, 1981), http://www.davidsmick.com/WSJ070881.pdf.

70. *See, e.g.*, Lawrence W. Reed, *The Role of Incentive*, FOUND. FOR ECON. FREEDOM (May 1, 1982), https://fee.org/articles/the-role-of-incentive/.

71. DIETZE, *supra* note 13, at 126.

72. *Id.* at 126–27.

73. Ben Shapiro, *Why Socialism Is on the Rise*, *in* AND WE ALL FALL DOWN (2018).

a credo antithetical to American freedom.[74] Depending on the course of treatment that the government chooses to adopt for framing housing policy in the coming years, the gap between incentive and ownership will only widen.[75] The LIHTC and the proposed Rent Relief Act blaze a trial further disassociating incentive from work and ownership. It is a dysfunctional direction.

PART TWO: THE LOW-INCOME HOUSING TAX CREDIT

In an article published by the National Low Income Housing Coalition (NLIHC) in the *2018 Advocates Guide*, titled *Low Income Housing Tax Credits*, senior advisor Ed Gramlich summarizes the LIHTC.[76] He describes the credit as a "program [that] encourages private investment by providing a tax credit: a dollar-for-dollar reduction in federal taxes owed on other income" with the functional ability to "support a variety of projects: multifamily or single-family housing; new construction or rehabilitation; special needs housing for elderly people or people with disabilities; and permanent supportive housing for homeless families and individuals."[77] Despite the commendable aspirations underwriting the LIHTC,[78] the credit has summarily failed to deliver its promised results.[79]

A. *How the Low-Income Housing Tax Credit Functions*

Created and codified in 1986 under section forty-two of the Tax Code, the LIHTC allocates tax credits to private developers who build or rehabilitate low-income housing.[80] The amount of the allocated credit depends on whether the building that will be used for low-income housing is being built or being rehabilitated and what quota of low-income tenants the developer contracts to

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74. *See* Shapiro, *supra* note 61.

75. *See* OUT OF REACH, *supra* note 9, at iii. In the Preface of *Out of Reach*, Senator and 2020 Democratic nomination hopeful Bernie Sanders calls for "a historic and sustained commitment to ensure that every family has an affordable place to live and thrive." *Id.* Senator Sanders' commitment unsurprisingly commits taxpayer money to "significantly expanding federal investments in affordable housing. . . ." *Id*.

76. Gramlich, *supra* note 6, at 5-30 to -37.

77. *Id.* at 5-30.

78. *See id.*

79. *See* Chris Edwards & Vanessa Brown Calder, *Low-Income Housing Tax Credit: Costly, Complex, and Corruption Prone*, CATO INST. (Nov. 13, 2017), https://www.cato.org/publications/tax-budget-bulletin/low-income-housing-tax-credit-costly-complex-corruption-prone#full.

80. *Low-Income Housing Tax Credits*, *supra* note 17.

maintain.[81] Because the credit facilitates the creation and maintenance of otherwise unprofitable housing, developers capitalize on the available credit by trading the credit with investors in return for capital.[82]

In terms of the actual operation of the LIHTC, section thirty-eight creates a general business credit offsetting federal tax liability[83] and part of that business credit is the LIHTC calculated under section forty-two.[84] The LIHTC is a yearly tax credit awarded to the owner of a "qualified low-income building" which is a building that is "part of a qualified low-income housing project" for a fifteen-year compliance period.[85] The amount of the tax credit is an applicable percentage of the building's qualified basis, and that figure depends on whether the building is being built or being rehabilitated.[86] For a new building, the applicable percentage is equal to 70% of the building's qualified basis and for a rehabilitated building, the applicable percentage is 30%.[87] The 30% and 70% figures translate into a 4% or 9% dollar-for-dollar credit awarded yearly over a ten-year period.[88] The use restriction and compliance periods tied to receiving the credit last beyond the 10-year timeframe: buildings that received credit allocations before 1990 were subject to a 15-year use restriction period and a 15-year compliance period.[89] Federal legislation expanded the use restriction for credits allocated after 1990 to a 30-year period.[90] After the 15-year compliance period passes, a low-income housing project no longer runs the risk of penalties for compliance problems or forfeiture of already allocated credits.[91]

Since allocation occurs at the state level,[92] states can require longer compliance periods or heightened use restrictions to award the tax credit, and state allocation agencies use an extended restriction period as a method for

81. *See* I.R.C. § 42(b)(1)(B)(i), (g)(1)(A)–(C) (2018).

82. *See* MARK P. KEIGHTLEY, CONG. RESEARCH SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 3–4 (2018), https://fas.org/sgp/crs/misc/RS2289.pdf.

83. I.R.C. § 38 (2020).

84. I.R.C. § 42(a).

85. I.R.C. § 42(c)(2)(A)(i)–(ii), (i)(1).

86. I.R.C. § 42(b)(1)(B)(i)–(ii).

87. *Id.*

88. I.R.C. § 42(b)(1)(B), (b)(2)(B).

89. U.S. DEP'T OF HOUSING & URBAN DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? xii (2012) [hereinafter HUD REPORT], https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf.

90. *Id.* at 37.

91. *Id.*

92. Gramlich, *supra* note 6, at 5-30.

choosing where to award the available credits.[93] Depending on the state, applicants who agree to a longer period could get preferred status and increase their probability of receiving the credit award.[94] The specific method of allocation at the state level turns on broad federal eligibility guidelines.[95] State allocation agencies decide the eligibility of a potential credit recipient by examining:

> (1) location; (2) housing needs; (3) public housing waiting lists; (4) individuals with children; (5) special needs populations; (6) whether a project includes the use of existing housing as part of a community revitalization plan; (7) project sponsor characteristics; (8) projects intended for eventual tenant ownership; (9) energy efficiency; and (10) historic nature.[96]

In terms of the Federal government's eligibility guidelines, a developer has to decide which tenant-income quota to adopt and maintain during the compliance period: either the 20-50 model, the 40-60 model, or the average income model.[97] Depending on the adopted quota, for a developer's project to be a "qualified low-income housing project" and therefore eligible for LIHTC allocation, the building's quota must remain at the elected model for the entire compliance period.[98] The 20-50 tenant income model is satisfied where "at least 20 percent of the units [are] rent restricted and occupied by households with incomes at or below 50 percent of AMI."[99] The 40-60 tenant income model is satisfied where "at least 40 percent of the units [are] rent restricted and occupied by households at or below 60 percent of AMI."[100] In both cases, AMI stands for "area median gross income."[101] The average tenant income model is a more fluid version of the 40-60, which is satisfied when "40 percent or more . . . of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit."[102] Setting the imputed income limitation requires that the "imputed income limitations . . . shall not exceed 60 percent of area median

93. *Id.* at 5-35.
94. *Id.*
95. *Id.* at 5-33 to -34.
96. *Id.* at 5-34.
97. I.R.C. § 42(g)(1)(A)–(C) (2020).
98. I.R.C. § 42(g)(1).
99. FURMAN & MOELIS BRIEF, *supra* note 16; *see also* I.R.C. § 42(g)(1)(A).
100. FURMAN & MOELIS BRIEF, *supra* note 16, at 2; *see also* I.R.C. § 42(g)(1)(B).
101. I.R.C. § 42(g)(1)(A)–(B).
102. I.R.C. § 42(g)(1)(C)(i).

gross income."[103] For a developer to retain awarded credits and not forfeit them back, the developer must ensure that the incomes of the residents within the qualifying building maintain the proportion initially elected for the entire compliance period.[104]

The practical result of awarding a yearly tax credit to developers who have put low-income housing into service is that developers sell the awarded tax credits to investors in return for the equity which the housing project will not produce directly.[105] The interrelationship between developer and investor is complex: the investor's bottom-line benefit from buying tax credits is a dollar-for-dollar offset of his own tax liability and the ability to write off project costs as deductions.[106] The deductions available to the investor because of the structured sale include "tax benefits related to any tax losses generated through the project's operating costs, interest on its debt, and deductions such as depreciation."[107] The investor can deduct project losses because of the partnership created in the context of tax credit sale: "[w]hen credits are sold, the sale is usually structured with a limited partnership between the developer and the investor."[108] Project losses become partnership losses that are tax deductible.

B. *Lack of Appropriate Oversight Ensuring Effectiveness Combined with a Lack of Susceptibility to Market Price Make the LIHTC a Financial Liability*

In terms of financial viability alone, the LIHTC is an incredibly expensive government investment.[109] According to the NLIHC's *2018 Advocate Guide*, the Joint Committee on Taxation reports government expenditures on the LIHTC as follows: "$9.2 billion in tax expenditures in 2016, rising to $9.6 billion in FY17, $10.1 billion in FY18, $10.6 billion in FY19, and $11.2 billion in FY20, with a total of $50.6 billion between FY16 and FY20."[110] By way of setting the stage in terms of expectation for performance, numbers within this

103. I.R.C. § 42(g)(1)(C)(ii)(II).
104. I.R.S. Audit Tech. Guide, *supra* note 18, at 1-1.
105. KEIGHTLEY, *supra* note 82, at 3.
106. *Id.* at 4.
107. *Id.*
108. *Id.*
109. *See* Gramlich, *supra* note 6, at 5-36.
110. *Id.*

range should require incredibly persuasive success to justify continuing to countenance the expenditure.[111]

Additionally, because LIHTC spending is tax-based, the expenditure does not receive the oversight attached to the appropriation process.[112] Tax-based spending is considered an expenditure because credits "grant special tax preferences to individuals or corporations for particular activities."[113] The result of tax-based spending is analogous to the result of appropriation-based spending: "[e]conomists consider most tax expenditures analogous to spending because the result often can be achieved through a targeted spending provision."[114] However, unlike the process of appropriation which requires yearly oversight and inquiry into the effectiveness of a particular government expenditure,[115] tax-based spending receives little to no oversight.[116]

According to a report published by the Tax Policy Center, titled *Evaluating Tax Expenditures: Introducing Oversight Into Spending Through the Tax Code*, tax-based spending has "never been subject to systematic oversight, let alone evaluations of whether [it is] achieving [its] intended goal."[117] As a result, Congress has no accountability requiring delivery of efficient or effective tax-based spending.[118] Unlike appropriation-based spending, tax-based spending receives "no annual review . . . , no program staff dedicated to tax expenditures' administration, no inspector general (IG) for tax expenditures, and no rigorous government evaluation of the effectiveness of most tax breaks."[119] Given that the LIHTC was passed in

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111. *See* William Voegeli, Address at Hillsdale College: The Case Against Liberal Compassion (Oct. 9, 2014), *in* 43 IMPRIMIS, Oct. 2014, at 2, 7, https://imprimis.hillsdale.edu/wp-content/uploads/2016/10/Imprimis-The-Case-Against-Liberal-Compassion-Oct-2014.pdf.

112. *See* I.R.C. § 42 (2020); BENJAMIN H. HARRIS ET AL., TAX POL'Y CTR., EVALUATING TAX EXPENDITURES: INTRODUCING OVERSIGHT INTO SPENDING THROUGH THE TAX CODE 2 (2018), https://www.taxpolicycenter.org/sites/default/files/publication/155429/evaluating_tax_expenditures_introducing_oversight_into_spending_through_the_tax_code.pdf.

113. HARRIS ET AL., *supra* note 112, at 2.

114. *Id.*

115. *See Federal Budget Glossary*, NAT'L PRIORITIES PROJECT, https://www.nationalpriorities.org/budget-basics/federal-budget-101/glossary/ (last visited Jan. 28, 2020) (defining Appropriation, Appropriations Bill, Appropriations Committees, Appropriations Process).

116. HARRIS ET AL., *supra* note 112, at 2.

117. *Id.*

118. *See id.*

119. *Id.*

1986,[120] a serious inquiry into the credit's actual effectiveness is long overdue.[121]

The LIHTC creates expensive low-income housing.[122] The red tape surrounding year fourteen "early release" is just one indication of the credit's financial insolvency.[123] Where a developer agrees to an extended period of eligibility, the IRS allows a developer an option for "early release" at year fourteen of the compliance period.[124] If the developer exercises this option for early release in an extended-use contract, the state's housing agency is responsible for finding a buyer willing to take on the property and maintain the applicable low-income tenant proportions for the remaining period of eligibility.[125] If the state housing agency cannot find a willing buyer, then the developer's obligation to maintain the low-income tenant percentage terminates.[126]

But LIHTC properties typically do not early release to outside buyers who then rent the building at market value.[127] For one thing, the price which the state agency charges a prospective buyer is set by the Code—and that price is artificially high: "[t]he IRS code specifies the price that a preservation purchaser must pay in a QC situation, and in most cases the price [is] far greater than market price."[128] Purchasers are unlikely to buy at above market price and as a result, where no purchaser can be found, "the property converts to market-rate and income and rent restrictions are removed."[129] The suggested solution proposed by the NLIHC is "requir[ing] LIHTC applicants to waive their right to a QC" or awarding "extra competitive points" to those developers willing to voluntarily waive their right to a QC.[130] For another thing, thanks to state bureaucracy, the effort it takes to sell at the fourteen-year point is not worth the return since rent in LIHTC housing is admittedly close to market-rate rent.[131]

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120. *Low-Income Housing Tax Credits*, U.S. DEP'T HOUSING & URBAN DEV. (May 24, 2019), https://www.huduser.gov/portal/datasets/lihtc.html.

121. *See* HUD REPORT, *supra* note 89, at 7.

122. Edwards & Calder, *supra* note 79.

123. Gramlich, *supra* note 6, at 5-35.

124. *Id.* at 5-35 to -36.

125. *Id.*

126. *Id.*

127. *See* HUD REPORT, *supra* note 89, at 49.

128. Gramlich, *supra* note 6, at 5-36.

129. *Id*.

130. *Id.*

131. *See* HUD REPORT, *supra* note 89, at xiv.

The fact that market-rate rent and LIHTC-rate rent are comparable points to another problem.[132] Since the allocated tax credit is a dollar-for-dollar offset, developers have an incentive to expand project costs in order to receive a larger credit.[133] In an article published by the Cato Institute collecting the results of several studies on LIHTC project costs, Chris Edwards and Vanessa Brown Calder conclude that "[d]evelopers have an incentive to inflate their estimates, and then as projects proceed there is little reason to revise costs downward."[134] Edwards and Calder also include the conclusions drawn by Michael Eriksen in an article published in the Journal of Urban Economics and titled *The Market Price of Low-Income Housing Tax Credits*.[135] According to Edwards and Calder, Eriksen's statistical analysis "suggests that LIHTC construction costs are about 20 percent more per square foot than for medium-quality market-based projects."[136] Yet the Department of Housing and Urban Development openly admits that "LIHTC units compete with market-rate units because rents are quite similar to market rents."[137] Even though the construction of LIHTC subsidized units is 20% more expensive per square foot than comparable market rate housing, the overall market rate rent of those subsidized units is the same. Apart from the widespread potential for fraud,[138] this lack of market rate susceptibility points to poorly spent Federal money.

C. *The LIHTC Disincentives Low-Income Tenants from Moving Towards Financial Independence Because Earning More Money Jeopardizes Housing Status*

One of the reasons that the LIHTC has proved ineffective in terms of providing housing solutions that effectively move tenants out of dependence and towards independence is built into the system's own infrastructure.[139] Because credits depend on properties meeting and maintaining very specific percentages of tenants in fixed income brackets, tenants who do not want to move out are disincentivized from earning more income.[140] So long as a

132. *See* Edwards & Calder, *supra* note 79.

133. *Id.*

134. *Id.*

135. Michael Eriksen, *The Market Price of Low-Income Housing Tax Credits*, 66 J. URB. ECON. 141 (2009).

136. Edwards & Calder, *supra* note 79.

137. HUD REPORT, *supra* note 89, at 3.

138. *See* Edwards & Calder, *supra* note 79.

139. *See* I.R.S. Audit Tech. Guide, *supra* note 18, at 1-1 (noncompliance can result in an IRS audit).

140. *See* Erik Whitton, *Acquisition Rehab—The Missing Manual*, SPECTRUM COMPANIES (Aug. 7, 2015), https://spectrumlihtc.com/file-maintenance/acquisition-rehab-the-missing-manual/.

household maintains its income at the rate and within the bracket it was in when the building initially qualified for the LIHTC, the household will not be encouraged to move out.[141] Even where the property owner renews or reapplies for LIHTC status for a second term, those households that were within their respective income brackets at the initial qualification stage may be grandfathered in, allowing the building to qualify in terms of income percentage compliance.[142]

Although a property owner attempting to rehabilitate or convert a property into an LIHTC qualified property may not overtly evict tenants, terminate leases, or refuse to renew leases without cause,[143] property owners have other means at their disposal for encouraging tenants who are over-income to leave.[144] Some of the methods of encouraging an over-income tenant to vacate include the following:

> [T]alk to over-income tenants about home ownership. Work with them to provide tools needed to qualify for a mortgage and choose a realtor. See if your state housing agency provides programs for prospective first time home buyers and set this up at your site. Offer ineligible tenants moving services from local companies, truck rentals, packing boxes, etc. Offer them other apartments in communities you manage they might qualify for. Offer cash in exchange for leaving the site.[145]

The fact that this advice comes from Spectrum LIHTC, a qualified compliance service that serves "as the authorized delegate for state housing agencies" in California, Connecticut, Hawaii, and Massachusetts along with American Samoa and the U.S. Virgin Islands indicates that this is standard operating procedure for property managers seeking to achieve compliance and obtain or retain LIHTC approval.[146] Coupled with the inequality of bargaining power separating a property manager from a low-income resident facing pressure to vacate,[147] the listed tactics create legitimate cause for concern.

Spectrum LIHTC's caveat cautioning that property managers seeking to maintain compliance must "[m]ake sure the household chooses to leave in a

141. *Id.*

142. *Id.*

143. I.R.S. Audit Tech. Guide, *supra* note 18, at 12-1 to -2.

144. Whitton, *supra* note 140.

145. *Id.*

146. *About Spectrum*, SPECTRUM COMPANIES, https://spectrumlihtc.com/about-spectrum/ (last visited Jan. 29, 2020).

147. *See* Whitton, *supra* note 140.

voluntary manner," coupled with the disclaimer that "some households may simply choose not to leave despite your best efforts" are unconvincing at best.[148] If an over-income tenant chooses not to vacate, the detriment the developer incurs is a serious one: "[i]n those cases [where the tenants choose not to leave], the unit is treated as an over-income non-qualified unit."[149] Where the state agency which oversees the continued compliance of the property identifies noncompliance, the property owner faces an IRS audit.[150] As outlined in *IRS Audit Technique Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition*, where a developer is noncompliant, the developer will receive a letter from the IRS indicating noncompliant status, warning against the inclusion of "any nonqualified low-income housing units when computing the tax credit under IRC § 42 and that the noncompliance may result in the recapture of previously claimed credits."[151] Since developers routinely bargain away credits in exchange for capital,[152] forfeiting those credits may not be possible. This structure makes ensuring the income compliance of tenants of paramount importance and creates a serious financial incentive for the property owner to ensure that over-income tenants leave.

Turning to the incentives affecting low-income tenants, low-income tenants must report their income to their property manager for purposes of calculating continued LIHTC compliance.[153] Generally, most forms of income that a tenant receives must be included in the calculation of income.[154] However, the juxtaposition between a property manger's incentive to make over-income tenants vacate to guard compliance status with the rule requiring tenants to report almost every form of income creates an adverse incentive for tenants: those tenants who do not want to be encouraged to leave have an incentive to underreport.[155]

Besides the incentive to underreport, a glaring exception to the reporting rule is the treatment afforded to section eight rental assistance and to food stamps, both of which do not have to be reported as income.[156] Allowing a loophole like this one gives tenants the incentive to qualify and receive food

148. *Id.*
149. *Id.*
150. I.R.S. Audit Tech. Guide, *supra* note 18, at 1-1.
151. *Id.*
152. *See* KEIGHTLEY, *supra* note 82, at 3.
153. I.R.S. Audit Tech. Guide, *supra* note 18, at 4-7.
154. *Id.* at 4-7 to -20.
155. *See id.* 4-7, 14-2.
156. *Id.* at 4-17, 4-21.

stamps and rental assistance to supplement their incomes without jeopardizing their low-income tenant status.

The treatment of the Resident Services Stipend demonstrates tenants' adverse incentive in miniature.[157] Resident services stipends are defined in the *IRS Audit Technique Guide* as "a modest amount received by a resident for performing a service for the owner, on a part-time basis, that enhances the quality of life in the LIHC [Low-Income Housing Credit] housing. Such services include . . . fire patrol, hall monitoring, lawn maintenance, and resident initiatives coordination."[158] Encouraging residents of an apartment building to improve and maintain the quality of the building they occupy is not the issue. The issue is the treatment of the compensation received for performing resident services: "[i]f the resident stipend exceeds $200 a month, the stipend is included in income. If the stipend is $200 or less, the stipend is excluded from income."[159] The only possible result that this structure can bring about is to encourage residents to perform resident services up to $200 because receiving any more compensation increases the income they have to report and might jeopardize the compliant status of their building.

What the resident services stipend demonstrates in miniature is that a tenant who has the opportunity to earn more income has no incentive to do so—the decision to earn more income is not tied to the possibility of more stability or gaining an interest in property.[160] Rather, the decision to earn more income is directly tied to the disincentive of moving out, without the assurance of a better or more stable home.[161] Providing an over-income tenant with packing boxes is a much easier and much quicker solution to a compliance issue than connecting a low-income family with a realtor who can help them obtain a mortgage.[162] Given that failing compliance has such harsh consequences for a developer, coupled with the fact that a property manager has no incentive to help a low-income family on the path to home ownership, the probability that the property manager will simply provide packing boxes to over-income tenants is almost certain.[163]

By way of a final coup de grace, the LIHTC has proved so ineffective that housing policy institutes suggest that to deliver and maximize results, the

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157. *Id.* at 4-20.
158. *Id.*
159. *Id.*
160. *See* Poirot, *supra* note 26, at 11–12.
161. *See generally id.* at 12, 15.
162. *See* Whitton, *supra* note 140.
163. *See id.*

credit should be *combined* with rental assistance.[164] In a brief published by the Modelis Institute for Affordable Housing, the authors admit that without the combination with rental assistance, the LIHTC is ineffective: "[o]n its own . . . [the LIHTC] does not reach a significant number of extremely low-income households without those households experiencing rent burdens. Rental assistance is currently an indispensable part of the equation to serve those households."[165] Rather than cutting their losses, the brief suggests that the solution which will solve the LIHTC's fundamental ineffectiveness is actually finding more funding from alternative avenues—and one such suggested avenue is funneling income from higher-income tenants to lower-income tenants, such that "income from higher rent units [could] subsidize rents of extremely low-income households within LIHTC projects."[166]

Funneling income from higher-income tenants to lower-income tenants sounds like socialist wealth redistribution;[167] low-income tenants would be further discouraged from earning more because that money would be funneled away to subsidize lower-income tenants. The fact that rental assistance must be "layer[ed]" with the LIHTC to produce results alone indicates that the flaws inherent in the LIHTC are not just a series of "administrative obstacles" which policy makers should attempt to "minimize."[168]

The solution to the LIHTC is not to provide or guarantee a better home to a low-income tenant who earns more income, because that kind of solution sidesteps the central issue plaguing both low-income tenants and credit recipients. And the solution is certainly not to couple rental assistance with the LIHTC to further federally underwrite a systemically flawed infrastructure. The central issue with the LIHTC is the artificial disconnect that the policy creates, a disconnect that divorces work and incentive from value and ownership. Rethinking the LIHTC would require placing that fundamental connection at the center of any proposed policy.

164. *See* FURMAN & MOELIS BRIEF, *supra* note 16, at 3–4.

165. *Id*. at 7.

166. *Id.*

167. *See, e.g.*, Interview by Llew Gardner, Thames TV, with Margaret Thatcher, Prime Minister of Eng., in London, U.K. (Feb. 5, 1976) (transcript available at https://www.margaretthatcher.org/document/102953) ("Socialist governments traditionally do make a financial mess. They always run out of other people's money. It's quite a characteristic of them.").

168. FURMAN & MOELIS BRIEF, *supra* note 16, at 7.

PART THREE: THE RENT RELIEF ACT OF 2018

In an apparently well-intentioned attempt to assist struggling Americans in the search for affordable housing, Senator Kamala Harris introduced the Rent Relief Act of 2018,[169] a bill heralded as "legislation [that] would help protect millions of families from losing their homes, by expanding benefits and opportunities for people who pay rent every month."[170] The gravamen of the proposed Act is to "amend the Internal Revenue Code of 1986 to allow for a credit against tax for rent paid on the personal residence of the taxpayer."[171]

A. *How the Proposed Rent Relief Act Would Function*

According to its text, the proposed tax credit would be available to those renters who pay "rent with respect to such residence in excess of 30 percent of the taxpayer's gross income for such taxable year."[172] The amount of the tax credit would be phased out depending on the amount of the taxpayer's gross income—where the taxpayer's gross income is up to $25,000, the applicable percentage, i.e., the amount of the credit, would be 100%.[173] As a taxpayer's gross income increases, the applicable percentage decreases, reduced to 25% for taxpayers whose gross income is "[o]ver $75,000, but not over $100,000" and ultimately zeroing out for taxpayers whose taxable income is "[o]ver $100,000."[174]

As defined in the proposed Act, rent includes utility bills: "any amount paid for utilities of a type taken into account for purposes of determining the utility allowance under section 42(g)(2)(B)(ii)."[175] The credit is limited by comparison to fair market rent: "there shall not be taken into account rent in excess of an amount equal to 150 percent of the fair market rent . . . applicable to the residence involved."[176] A modified tax credit would be available to taxpayers living in subsidized housing: "there shall be allowed as a credit against the tax imposed by this subtitle for such taxable year an amount equal to $^{1}/_{12}$ of the amount of rent paid by the taxpayer (and not subsidized under any

169. Rent Relief Act of 2018, S. 3250, 115th Cong. (2018).

170. Christian Britschgi, *New Kamala Harris Bill Asks Federal Taxpayers to Subsidize California's High Housing Costs*, REASON (July 20, 2018), https://reason.com/blog/2018/07/20/new-kamala-harris-bill-asks-federal-taxp.

171. S. 3250.

172. *Id.* at § 2.

173. *See id.*

174. *Id.*

175. *Id.*

176. *Id.*

such program) during the taxable year with respect to such residence."[177] Finally, the proposed tax credit would be refundable, meaning that a taxpayer could receive the amount of the tax credit as a refund check from the IRS even where the taxpayer had no tax liability.[178]

Supported by organizations including the NLIHC, the National Alliance to End Homelessness, and the National Fair Housing Alliance, the purpose of the bill as described by Senator Harris is to:

> [H]elp make rental housing more affordable for struggling households. The bill would create a new, refundable tax credit to put more money in the pockets of families at a time when renters' wages have remained stagnant and housing costs have increased rapidly. More and more Americans are finding it increasingly difficult to make it month to month.[179]

Albeit likely well-intentioned, Senator Harris's plan is a poor one.

B. *The Costly and Ineffective Subsidization of the Education and Health Insurance Markets Provides a Compelling Financial Argument Against the Passage of the Proposed Provision*

Increasing federal subsidization of the already pervasively subsidized housing market is a bad idea. Subsidization in other areas where the government has stepped in promising a more affordable result has spectacularly backfired.[180] Rising health care premiums in the wake of the Affordable Care Act (ACA) and rising college tuition in the wake of widely available federal student loans both bear witness to the adverse effects of apparently well-intentioned government action.[181]

In terms of healthcare, following the passage of the ACA, health insurance costs skyrocketed.[182] Because the federal government underwrote those increased costs, taxpayers receiving a government subsidy did not experience

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177. *Id.*

178. William Perez, *The Advantages of Refundable Tax Credits*, THE BALANCE, https://www.thebalance.com/refundable-tax-credits-3193462 (last updated Nov. 30, 2019).

179. *Rent Relief Act of 2018*, *supra* note 6.

180. Williamson, *supra* note 24.

181. *See id.*

182. *See* Cynthia Cox et al., *2017 Premium Changes and Insurer Participation in the Affordable Care Act's Health Insurance Marketplaces*, KAISER FAM. FOUND. (Nov. 1, 2016), https://www.kff.org/health-reform/issue-brief/2017-premium-changes-and-insurer-participation-in-the-affordable-care-acts-health-insurance-marketplaces/.

an increase in price—but they did not experience a decrease either.[183] Kaiser Family Foundation (KFF), a non-profit research organization dedicated to the non-partisan analysis of health policy, [184] graphed the results of the ACA's passage by comparing the 2016 and 2017 monthly health insurance premiums which a "40-year-old adult making $30,000 per year would pay" for the "second-lowest-silver plan."[185] KFF documented premiums before and after the allotted tax credit in all fifty states—and overwhelmingly, the insurance premium increased in 2017.[186] The taxpayer did not necessarily experience that increased cost, however, because the increase was covered by government subsidy.[187] Yet no significant saving translated from the subsidy through to the taxpayer.[188]

In forty-nine out of the fifty states, plus the District of Columbia, the health insurance premiums that the forty-year-old taxpayer would pay decreased from 2016 to 2017 by one dollar.[189] The premium paid in two states, Illinois and New Mexico, increased from 2016 to 2017.[190] On the one hand, most premiums paid by federally subsidized taxpayers did decrease by a fraction.[191] These marginal decreases effectively veiled the dramatic spikes that insurance companies were suddenly able to charge across the board—spikes underwritten by the ACA.[192] Meanwhile, pre-subsidy premiums increased—dramatically.[193] Barring four states where pre-subsidy premiums decreased by up to 4%, pre-subsidy premiums in the remaining forty-six states, plus Washington, D.C., increased; some premiums increased dramatically: by 23%, by 29%, by 40%, by 51%, by 67%, by 71%, and by 145%.[194] And all of those percentage increases were covered by federal subsidy.[195]

For the forty-year-old taxpayer receiving a federal subsidy in Oklahoma City, Oklahoma, the monthly premium the taxpayer owed in 2017 would be $207, a dollar less than monthly premiums from the previous year.[196]

183. *See id.*
184. *About Us*, KAISER FAM. FOUND., https://www.kff.org/about-us/ (last visited Jan. 30, 2020).
185. Cox et al., *supra* note 182.
186. *Id.*
187. *See id.*
188. *See id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *See generally id.*
193. *See id.*
194. *Id.*
195. *Id.*
196. *Id.*

However, the monthly price tag on the taxpayer's health insurance from 2016 to 2017 would have risen from $295 to $493.[197] That difference of $286 per month would be underwritten by the ACA.[198] At the end of the year, the taxpayer would have experienced a subsidy-induced saving of $12.[199] The government would have paid the taxpayer's health insurance company $3,432—$286 per month.[200] Because of vastly available federal subsidization, health insurance companies could rely on the availability of that subsidization in setting prices.[201] Taxpayers received no real benefit, and health insurance companies absorbed the extremely expensive subsidy.[202] Subsidization effectively increased health insurance coverage prices across the board.[203]

Similarly, for education, federal subsidization of tuition has driven college tuition prices up.[204] A Staff Report released by the Federal Reserve Bank of New York concludes that the widespread availability of federal money explains the rising cost of college tuition:

> [I]ncreases in borrowing limits generate tuition increases, with the latter finding that borrowing limit increases represent the single most important factor in explaining tuition increases between 1987 and 2010 at four-year institutions, explaining 40% of the tuition increase, while supply-side factors such as rising costs or falling state appropriations have much less explanatory power.[205]

The practical result of rising college tuition certainly does not benefit prospective college students; rather, the real beneficiaries are colleges that can increase tuition in step with available government subsidization: "in simple terms, colleges gain more than students from the government 'help.'"[206]

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197. *Id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See generally id.*

202. *See generally id.*

203. *See generally id.*

204. Taylor Kempema, *Does Research Show That Federal Student Aid Increases Tuition?*, BALLOTPEDIA: FACT CHECK (Aug. 14, 2017), https://ballotpedia.org/Fact_check/Does_research_show_that_federal_student_aid_increases_tuition%3F.

205. David O. Lucca et al., *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, FED. RES. BANK N.Y. STAFF REP. No. 733, at 5 (2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf?la=en.

206. Jeffrey Dorfman, *Democrats Proposed Rent Subsidy Would Enrich Landlords and Fleece Taxpayers*, FORBES (July 22, 2018), https://www.forbes.com/sites/jeffreydorfman/2018/07/22/democrats-proposed-rent-subsidy-would-enrich-landlords-and-fleece-taxpayers/#375299eac059.

Applying the principles of subsidization and increased market price to the Rent Relief Act, the future looks frightfully familiar.[207] In an article published by the Tax Foundation, authors Alex Muresianu and Nicole Kaeding compare the Act's effect with the increase in college tuition post-government subsidization, predicting that the "distortions" which the Act creates would drive housing prices up.[208] The distortion that a divorce from demand creates does not benefit the renter. Rather, the automatic result—albeit probably an unintended result—is an increase in rent: "the proposed rent subsidy will encourage landlords to increase rents, meaning the government help will make rent even more expensive."[209] The lodestone of this logic is a landlord's motivation to make a profit. A widely available subsidy means that the landlord can charge more for rent because he has a pool of people who can pay.

Any individual whose gross income is below $25,000 and whose applicable percentage of the proposed credit is 100% would be indifferent to the effect of increased rent because the amount paid is completely refunded.[210] However, as a taxpayer's gross income increases over the phase-in amount and the applicable percentage proportionately decreases, the phase-out creates an incentive to move into more expensive housing where the credit will foot the entire bill.[211] Additionally, people getting a portion of the full percentage would probably end up paying more rent: "higher-earning participants, only getting tax credits for 25 or 50% of each extra dollar of rent could end up paying more out of pocket thanks to rent increases."[212]

C. *The Proposed Provision Disincentivizes Fiscal Responsibility by Encouraging and Ensuring Widespread Dependence on Another Subsidy*

One of the predicted problems that Senator Harris's legislation will lead to is encouraging taxpayers to take advantage of the credit by moving into more expensive housing: "[t]he tax credit program would distort decision-making for renters towards choosing more expensive properties."[213] Moving into more expensive housing would change the percentage of the renter's income covering rent, which would change the renter's credit bracket: "[f]or

207. Muresianu & Kaeding, *supra* note 21.
208. *Id.*
209. Dorfman, *supra* note 206.
210. *See* Rent Relief Act of 2018, S. 3250, 115th Cong. (2018); *see also* Perez, *supra* note 178.
211. Dorfman, *supra* note 206.
212. *Id.*
213. Muresianu & Kaeding, *supra* note 21.

example, someone who currently spends just under 30 percent of their income on rent would have an incentive to move to a more expensive apartment where rent is above 30 percent of their income to qualify for the tax credit."[214]

The referenced 30% litmus test comes from the definition of affordability used in the NLIHC's annual report, *Out of Reach*.[215] To begin with, affordability as defined in the report, could only be a foregone conclusion.[216] NLIHC defines affordability using the 30% figure, stating that "affordability" is "consistent with the federal standard that no more than 30% of a household's gross income should be spent on rent and utilities. Households paying over 30% of their income are considered cost burdened. Households paying over 50% of their income are considered severely cost burdened."[217]

Yet, this 30% figure is at best a shaky foundation for building a tax credit upon because the figure originated as a method for comparing rent between regions.[218] Beyond limited application in a region comparison context, the 30% figure arbitrarily creates an unrealistic image since the reality is that "almost no one actually spends 30 percent of their income on rent."[219] An outdated regional rent comparison figure should not be a benchmark for making personal financial decisions—especially since there are good reasons to spend more than 30% on housing.[220] That choice does not deserve and should not equal an adoption of the label "cost burdened."[221] "The 'Out of Reach' report assumes that housing affordability looks like a person spending no more than 30% of their income renting out a two-bedroom home or apartment—which costs in the 40th percentile of area rent—all to themselves."[222] This is both simplistic and unrealistic.[223]

214. *Id.*

215. OUT OF REACH, *supra* note 9, at 1.

216. *See id.*

217. *Id.*

218. *See* Catherine New, *How Much Should I Spend on Rent? Ignore the "30% Rule,"* EARNEST (Sept. 17, 2015), https://www.earnest.com/blog/rent-and-the-30-percent-rule.

219. Christian Britschgi, *A New Report Exaggerates the Problem of Housing Affordability to Push Expensive Federal Interventions*, REASON (June 14, 2018), https://reason.com/2018/06/14/a-new-report-exaggerates-the-problem-of.

220. *Id.*

221. *See* OUT OF REACH, *supra* note 9, at 1.

222. Britschgi, *supra* note 219.

223. *See* CHRISTOPHER HERBERT ET AL., JOINT CTR. FOR HOUSING STUD., MEASURING HOUSING AFFORDABILITY: ASSESSING THE 30 PERCENT OF INCOME STANDARD 1, (2018), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Herbert_Hermann_McCue_measuring_housing_affordability.pdf; *see also* Chris Matthews, *Why Should You Only Spend 30% of Your Income on Housing?*, FORTUNE (Aug. 4, 2015), http://fortune.com/2015/08/04/housing-30-percent-rule.

What percentage of income an individual pays for rent depends in part on budgetary decisions that the individual must make: the 30% standard is a "general guideline" precisely because personal choice must factor into the equation.[224] An individual can choose to pay more than 30% of his or her income in rent because "some locations are much more expensive than others."[225] For example, the choice to live in New York City comes with a choice to pay a higher percentage of income in rent each month because, by comparison, "the costs of living in Phoenix, Arizona are much cheaper than living in New York City."[226] By the same token, the individual retains the ability to choose to spend his or her money differently. Michael Leonard of financial education company Well Kept Wallet advises simply that "[i]f you spend too much you might have to sacrifice in other areas of your life by cutting other expenses or maybe getting roommates."[227]

In an article titled *Amenities, Affordability, and Housing Vouchers*, David S. Bieri and Casey J. Dawkins conduct an in-depth analysis of the 30% rule, in the context of an individual choosing to pay more rent in return for the availability of more amenities.[228] The study concludes that the implementation of a standard figure that does not take into account "local differences in quality of life" to include wages and amenities available in a particular area ultimately delivers a "skewed" picture of affordability, with the practical result of "compensat[ing] households for living in nicer locations."[229] The availability of more amenities comes in lockstep with the choice to live in an area that has a higher cost of living—not adjusting the standard 30% figure to account for "localized amenity differentials" means building a housing policy "tilted toward larger metropolitan areas."[230]

Besides burdening all taxpayers with yet another bill, a further problem widespread rent subsidization creates is chronic, credit-created dependence.[231] Affordable housing is inaccessible without a government subsidy, *Out of Reach* concludes.[232] Given the title, this conclusion is unsurprising. To solve the problem and make housing affordable, housing advocates conclude

224. *See* Michael Leonard, *What Percentage of My Income Should Go Toward Rent?*, WELL KEPT WALLET (Apr. 20, 2018), https://wellkeptwallet.com/percentage-of-income-for-rent/.

225. *Id.*

226. *Id.*

227. *Id.*

228. Bieri & Dawkins, *supra* note 22.

229. *Id.* at 78.

230. *Id.*

231. *Cf.* Dorfman, *supra* note 206.

232. OUT OF REACH, *supra* note 9, at 6–8.

"[w]e must extend rental assistance and other housing benefits to the millions of low income families who need help to make ends meet, but who have been turned away because Congress refuses to fund these programs at the level needed."[233] In a housing market where every taxpayer receives a government subsidy in order to pay rent, a taxpayer who does not want to take a government subsidy will not survive because landlords depend on the universally available subsidy in setting rent prices.[234] This market "distortion[]" creates systemic reliance on government assistance—and there is no readily apparent route for weaning a region from this type of mass dependency.[235]

While the intention of the legislation may be to help those struggling to make ends meet, that goal is not met by funneling taxpayers into more expensive housing of their own choosing.[236] Even if the goal of the legislation were to enable taxpayers to live in better—i.e. more expensive—housing, the real problem is what happens to housing prices overall.[237]

The Rent Relief Act will fail to solve the affordable housing crisis because the Act is out of step with incentive. The subsidized housing created is "not low cost housing. It is high [cost] housing offered at low rent. And low rent is only possible because of government subsidies charged to all tax payers."[238] The predictable result of higher subsidization is higher rent—a causal relationship that rising college tuition and rising healthcare costs have conclusively established.[239] Ultimately, "[t]he tax credit will raise rents, higher rents will raise the cap, a higher cap will mean increased tax credits, increased tax credits mean more inflation in rents."[240] The result of this cyclical setup is a government-backed, taxpayer-funded cash drain with no ascertainable end date.[241]

233. *Id.* at iii.

234. *See* Dorfman, *supra* note 206.

235. *See* Muresianu & Kaeding, *supra* note 21.

236. *See id.*

237. *See id.*

238. Edward J. Pinto, *Market-Based Solutions Are the Only Way to Get Home Prices and Rents Back in Line*, AM. ENTERPRISE INST.: AEIDEAS (July 18, 2016), http://www.aei.org/publication/market-solutions-only-way-get-housing-back-in-line/ (internal quotations omitted).

239. *See* Williamson, *supra* note 24.

240. Dorfman, *supra* note 206.

241. *See id.*

CONCLUSION: HOUSING SUBSIDIZATION AND THE AMERICAN PSYCHE

Placing a deep value on owning a home is a uniquely American quality, a deeply engrained belief that Americans share and cherish.[242] George Bailey, the beloved hero of the Christmas classic *It's a Wonderful Life*, articulates this cherished ideal in an impassioned speech—a speech which is worth quoting at length because it identifies the same benefits that the government policy underwriting housing subsidization anchors on:

> But he did help a few people get out of your slums, Mr. Potter. And what's wrong with that? Why . . . Here, you're all businessmen here. Doesn't it make them better citizens? Doesn't it make them better customers? You . . . you said . . . what'd you say just a minute ago? . . . They had to wait and save their money before they even ought to think of a decent home. Wait! Wait for what? Until their children grow up and leave them? Until they're so old and broken-down that they . . . do you know how long it takes a working man to save five thousand dollars? Just remember this, Mr. Potter, that this rabble you're talking about . . . They do most of the working and paying and living and dying in this community. Well, is it too much to have them work and pay and live and die in a couple of decent rooms and a bath? Anyway, my father didn't think so. People were human beings to him, but to you, a warped, frustrated old man, they're cattle. Well, in my book he died a much richer man than you'll ever be![243]

Society benefits when people own homes.[244] The social benefit that results from increased home ownership necessitates asking why such good results flow from owning "a couple of decent rooms and a bath."[245]

The reason for the relationship between social stability and personal happiness rests on more than the shelter which a place to live provides. In an article titled *A Formula for Happiness* by Arthur Brooks, president of the American Enterprise Institute, the author links human happiness with four premises: "choosing to pursue four basic values of faith, family, community

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242. *See* Lawrence Yun, *Why Homeownership Matters*, FORBES (Aug. 12, 2016), https://www.forbes.com/sites/lawrenceyun/2016/08/12/why-homeownership-matters/#2696f80d480f.

243. IT'S A WONDERFUL LIFE (Liberty Films 1946) (alterations in original).

244. *See* William G. Gale et al., *Encouraging Homeownership Through the Tax Code*, TAX POL'Y CTR.: TAX NOTES 1171, 1177 (June 18, 2007), https://www.taxpolicycenter.org/publications/encouraging-homeownership-through-tax-code/full.

245. *See* IT'S A WONDERFUL LIFE, *supra* note 243.

and work is the surest path to happiness."[246] Work being characterized as a value which increases human happiness is uniquely American, a characterization that Brooks explains further: "[v]ocation is central to the American ideal, the root of the aphorism that we 'live to work' while others 'work to live.'"[247] The concept of the pursuit of happiness means more to the American psyche than unlimited or unrestricted freedom,[248] and this connection must inform the way that the government approaches questions of subsidization, especially the subsidization of the housing market. In further describing the uniquely American connection between happiness and work, Brooks quotes Frederick Douglass who "rhapsodized about [the] 'patient, enduring, honest, unremitting and indefatigable work, into which the whole heart is put,'" work which strikes "the bedrock of our culture and character."[249] Put succinctly by another great American jurist, "[i]n the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."[250]

A home is more than shelter. Brooks writes that "the secret to happiness through work is earned success," which can be assessed "in any currency you choose."[251] Even though Brooks does not quantify owning a home as one of the methods of measuring happiness, a home certainly qualifies as a physical symbol of the "earned success" which plays such a fundamental role in the measure of human happiness.[252] Reducing the conception of a home to just the shelter which it provides misses much of the point—shelter is important, but shelter is only a starting point.

The government's interest in ensuring life, liberty, and the pursuit of happiness rests on a conception of freedom and personal responsibility, one that Jefferson himself articulated when he wrote "the practice of morality [is]

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246. Arthur C. Brooks, *A Formula for Happiness*, N.Y. TIMES (Dec. 14, 2013), https://www.nytimes.com/2013/12/15/opinion/Sunday/a-formula-for-happiness.html?pagewanted=1&_r=0.

247. *Id.*

248. *See Letter from John Adams to Massachusetts Militia, 11 October 1798*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Feb. 2, 2020).

> We have no Government armed with Power capable of contending with human Passions unbridled by . . . morality and Religion. Avarice, Ambition . . . Revenge or Galantry, would break the strongest Cords of our Constitution as a Whale goes through a Net. Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.

249. Brooks, *supra* note 246.

250. Obergefell v. Hodges, 135 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting).

251. Brooks, *supra* note 246.

252. *See id.*

necessary for the well being of society."[253] For the Founders, virtue and morality meant personal responsibility.[254] Taking the pursuit of happiness out of that context compels the understandable impetus to try to provide the means of happiness to as many Americans as possible. Given the clear connection between happiness and home, large scale subsidization of the housing market has been introduced as the means to achieve the goal of providing widespread happiness.[255] However, subsidization has failed to solve the housing crisis because the real crisis at issue is a crisis of freedom. Government subsidization driven by the desire to provide or ensure an equal outcome—either in terms of housing, healthcare, or education—ignores the fabric and foundation of American life: freedom commensurate with personal responsibility.[256]

In a commencement address titled *Freedom and Obligation* and delivered at Hillsdale College in May of 2016, United States Supreme Court Justice Clarence Thomas described his childhood working and growing up on a farm to the graduating students.[257] His words link rights with responsibilities, a connection that clarifies the fundamental problem with the government's current approach to housing policy:

> One of the messages constantly conveyed in those days was our obligation to take care of the land and to use it to produce food for ourselves and for others. If there was to be independence, self-sufficiency, or freedom, then we first had to understand, accept, and discharge our responsibilities. The latter were the necessary (but not always sufficient) antecedents or precursors of the former. The only guarantee was that if you did not discharge your responsibilities, there could be no independence, no self-sufficiency, and no freedom.[258]

Freedom comes with obligation, responsibility, and work. Justice Thomas continues, pinpointing the problem with society's decision to put entitlement in the place of freedom:

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253. *Letter from Thomas Jefferson to James Fishback, Sept. 27, 1809*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/?q=thomas%20jefferson%20james%20fishback&s=1111311111&sa=&r=3&sr= (last visited Feb. 2, 2020).

254. *See id.*

255. *See* Roosevelt, *supra* note 3.

256. *See* Thomas, *supra* note 68.

257. *Id.*

258. *Id.*

> [O]ur era is one in which different treatment or different outcomes are inherently suspect. It is all too commonly thought that we all deserve the same reward or the same status, notwithstanding the differences in our efforts or in our abilities. This is why we hear so often about what is deserved or who is entitled.[259]

The pursuit of happiness as described in the Declaration means allowing individuals to choose to live in freedom, to choose to live good, moral, and just lives, to choose to work and to reap the rewards of that work.[260]

Leaving aside the compelling critique that the LIHTC is ineffective without being coupled with rental assistance, the LIHTC has failed because it cannot move low-income people towards success and independent stability. Instead, the credit's structure actually disincentivizes work while attempting to ensure the equal outcome of housing for all.[261] Likewise, the Rent Relief Act ignores how the incentive operates in the function of the free market and will lead the housing market down the same road that healthcare and education subsidization have both taken.[262] Access to healthcare, education, and housing are important to Americans; however, the only equal outcome well-intentioned government intervention, built on a structure of entitlement, can remotely ensure is prohibitively increased costs charged either directly or indirectly to the taxpayer. The question of housing is certainly an important one—and the answer lies in recognizing and rewarding work by crafting policy that understands the importance of personal responsibility. The housing market is no exception to the general rule: government can ensure equal opportunity, but it cannot and should not ensure equal outcome.

259. *Id.*

260. *See* BLACKSTONE, *supra* note 47, at 40. According to Blackstone, whose thought was influential at the time of the Founding, man's own true and substantial happiness required submission to the natural law: "[f]or [the Creator] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former." *Id.*

261. *See* I.R.S. Audit Tech. Guide, *supra* note 18, at 1-1.

262. *See* Williamson, *supra* note 24.