

## HOUSING RESOURCE BUNDLES: DISTRIBUTIVE JUSTICE AND FEDERAL LOW-INCOME HOUSING POLICY

*John J. Infranca* \*

### INTRODUCTION

Less than one in four income-eligible households receives some form of rental assistance from the federal government.<sup>1</sup> In contrast with other prominent public benefit programs—including Temporary Aid to Needy Families (“TANF”) and unemployment insurance—no time limit is placed on the assistance provided through the Department of Housing and Urban Development’s (“HUD”) three major sources of rental assistance:<sup>2</sup> public housing, housing choice vouchers, and Section 8 project-based rental assistance.<sup>3</sup> Recipients of federal rental assistance can continue to re-

---

\* Assistant Professor of Law, Suffolk University Law School. Thanks to Vicki Been, Erin Braatz, Nestor Davidson, Ingrid Gould Ellen, Tim Iglesias, and Patrick Shin for comments and suggestions at various stages. Earlier versions of this article were presented at the NYU Furman Center for Real Estate & Urban Policy’s Fellows Workshop, the 2013 Association for Law, Property and Society Annual Meeting, the Suffolk Law School Junior Faculty Workshop, and the Touro Law Center Faculty Workshop. Michael O’Brien provided helpful research assistance.

1. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA’S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS* 7 (2013) [hereinafter *AMERICA’S RENTAL HOUSING*]; see also Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 *UCLA L. REV.* 983, 1003 (2010) (citing Edgar O. Olsen, *Housing Programs for Low-Income Households*, in *MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES* 365, 394 (Robert A. Moffitt ed., 2003)) [hereinafter Olsen, *Housing Programs for Low-Income Households*] (observing that only 30% of qualified renters with incomes below the poverty level receive any form of federal housing aid); Editorial, *The Affordable Housing Crisis*, *N.Y. TIMES*, Dec. 5, 2012, at A30.

2. This article uses the phrase “rental assistance” to refer only to assistance provided through these three programs. The phrase “housing assistance” is used to refer more broadly to all forms of federal support for housing. Of most importance for this article’s analysis, the latter term includes the three rental assistance programs as well as the Low-Income Housing Tax Credit (“LIHTC”) and the Home Mortgage Interest Deduction (“HMID”).

3. See *infra* Part I.D. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which replaced the Aid to Families with Dependent Children program with TANF, imposed a lifetime maximum of sixty months assistance for families receiving

ceive benefits as long as they satisfy eligibility requirements.<sup>4</sup> Two of the most prominent forms of rental assistance—housing choice vouchers and public housing—typically have long waiting lists that are frequently closed to new applicants.<sup>5</sup>

---

TANF. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 408(a)(7), 110 Stat. 2105, 2137 (1996) (codified as amended at 42 U.S.C. §§ 608(a)(7)(A) (2012)). States may, however, exempt a family from the time limit in cases of hardship, so long as no more than 20% of recipient families receive an exemption. 42 U.S.C. §§ 608(a)(7)(C)(i)–(ii). The unemployment insurance system provides a combination of federal and state benefits that differ by state, but in all states there is some limit on the maximum period of time one is eligible to receive unemployment compensation. *See Policy Basics: How Many Weeks of Unemployment Compensation are Available?*, CENTER ON BUDGET & POLICY PRIORITIES, [http://www.cbpp.org/files/PolicyBasics\\_UI\\_Weeks.pdf](http://www.cbpp.org/files/PolicyBasics_UI_Weeks.pdf) (last updated Mar. 2, 2015). In contrast with these programs, the federal Supplemental Security Income Program provides an entitlement benefit—targeted to individuals who are elderly, blind, or disabled and have little income and few assets—to all individuals who qualify and does not impose time limits on receipt. *See* CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE SUPPLEMENTAL SECURITY INCOME (SSI) PROGRAM 1 (2014), available at <http://www.cbpp.org/files/1-10-11socsec.pdf> (“SSI has guaranteed a minimum level of income to those who qualify.”). Finally, the largest federal anti-poverty program, the Earned Income Tax Credit (“EITC”), operates quite distinctly from these benefit programs. Like many tax credits, there is no limit on how many years an individual may receive the EITC. *See* 26 U.S.C. § 32 (2014).

4. Public housing, housing choice vouchers, and Section 8 project-based rental assistance account for approximately 90% of the five million households who receive federal rental assistance. *See* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: FEDERAL RENTAL ASSISTANCE 1–3 (2013) [hereinafter FEDERAL RENTAL ASSISTANCE], available at <http://www.cbpp.org/files/PolicyBasics-housing-1-25-13RA.pdf>.

5. *See, e.g.,* Olsen, *Housing Programs for Low-Income Households*, *supra* note 1, at 394 (“There are long waiting lists to get into subsidized housing in all localities, and the length of the waiting list understates excess demand in many localities because housing authorities often close their waiting lists when they get sufficiently long.”); MID-AM. INST. ON POVERTY OF HEARTLAND ALLIANCE FOR HUMAN NEEDS & HUMAN RIGHTS, NOT EVEN A PLACE IN LINE 2007: PUBLIC HOUSING & HOUSING CHOICE VOUCHER CAPACITY AND WAITING LISTS IN ILLINOIS 2 (2007), available at <http://www.wowonline.org/ourprograms/fess/stateresources/documents/NotEvenaPlaceinLineIL.pdf> (reporting that, as of 2006, the waiting lists at forty-two of seventy-five Public Housing Authorities (“PHAs”) in Illinois that provided housing vouchers were closed to new applications); Lolly Bowean, *As CHA Saved, Residents Waited; Report: Millions in Housing Funds Stashed in Bank*, CHI. TRIB., July 30, 2014, at C1 (discussing report that the Chicago Housing Authority held reserve funds of over \$400 million while voucher and public housing waiting list of more than 40,000 families remained closed for over five years); Mireya Navarro, *On Public Housing Wait List, Position Unknown*, N.Y. TIMES, July 24, 2013, at A1 (reporting that although 227,000 households are on waiting list for public housing in New York City, only 5400 to 5800 units become available each year); *Housing Authority Officials Overloaded with Applications*, FORT-WAYNE J. GAZETTE (Mar. 30, 2014), <http://www.fortwayne.com/apps/pbcs.dll/article?AID=/20140330/NEWS/320142140> (reporting that when the Fort Wayne, Indiana Housing Authority, which provides 200 to 300 new vouchers each year, opened its Housing Choice Voucher waiting list for the first time in four years it received more than 8000 applications in three days). Lengthy waiting lists for housing assistance are not a recent phenomenon. *See* U.S. DEP’T OF HOUS. & URBAN DEV., WAITING IN VAIN: AN UPDATE ON AMERICA’S RENTAL HOUSING CRISIS ii–vi (1999) (discussing lengthening waiting times for public housing, particularly in larger PHAs and major cities); William C. Nussbaum,

The fact that only a small share of eligible individuals receive benefits, but these individuals are able to retain their rental assistance for as long as they remain eligible, appears to contradict basic principles of horizontal equity—which call for similarly situated persons to be treated equally.<sup>6</sup> Writing over twenty years ago, Professor Michael Schill observed that “[u]ntil housing assistance becomes an entitlement, any method of providing subsidized housing will violate the norm of horizontal equity.”<sup>7</sup> Expressing a similar concern, Professor Robert Ellickson remarks that “[t]he fact that all other major welfare programs are designed to avoid . . . haphazard outcomes highlights the gravity of the horizontal inequity of all current methods of housing assistance.”<sup>8</sup> In addition, individuals who obtain rental assistance frequently have higher incomes than those denied assistance, raising vertical equity concerns.<sup>9</sup> Economists Amy Crews Cutts and

---

Comment, *Public Housing: Choosing Among Families in Need of Housing*, 77 NW. U. L. REV. 700, 700 (1983) (“Throughout the country, the number of families seeking public housing vastly exceeds the number of available units.”). However, waiting lists may slightly overstate demand for housing assistance because a household may be on the waiting lists of multiple PHAs. NAT’L LOW INCOME HOUS. COAL. RES. NOTE #04-03, A LOOK AT WAITING LISTS: WHAT CAN WE LEARN FROM THE HUD APPROVED ANNUAL PLANS? (2004), available at <http://nlihc.org/sites/default/files/04-03WaitingLists.pdf>.

6. In legal scholarship, the concepts of horizontal and vertical equity are most frequently invoked in the evaluation of tax policy. See, e.g., R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967) (defining horizontal equity to mean “people in equal position should pay equal amounts of tax” and vertical equity to mean “people in unequal position should pay different amounts related in a meaningful fashion to difference in position”); James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 135–36 (2012) (defining horizontal equity “to mean that equals should be treated alike” and vertical equity “to mean that an appropriate distinction should be made in the treatment of people who are not alike”).

7. Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 539 (1993) (“Public housing has long been subjected to criticism because it lacks horizontal equity. Housing assistance in the United States is not an entitlement; some have likened it to a lottery.”); see also John M. Quigley, *Just Suppose: Housing Subsidies for Low-Income Renters*, in REVISITING RENTAL HOUSING: POLICIES, PROGRAMS, AND PRIORITIES 300, 309 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008) [hereinafter Quigley, *Just Suppose*] (noting “egregious failure of the current system of historically evolving housing subsidy programs—the horizontal inequity accorded to similarly situated, otherwise identical, households”); William G. Grigsby & Steven C. Bourassa, *Section 8: The Time for Fundamental Program Change?*, 15 HOUSING POLY DEBATE 805, 811 (2004) (“The federal government’s overall low-income housing assistance effort lacks horizontal equity.”).

8. Ellickson, *supra* note 1, at 1004.

9. See BARRY L. STEFFEN ET AL., U.S. DEP’T OF HOUSING & URB. DEV., OFFICE OF POLY DEV. & RES., WORST CASE HOUSING NEEDS 2011: REPORT TO CONGRESS 30 (2013). There are 108,000 households with incomes over 120% of the Area Median Income (“AMI”) receiving housing assistance even as 8.1 million households with incomes under 30% of AMI do not. *Id.*; see also Olsen, *Housing Programs for Low-Income Households*, *supra* note

Edgar Olsen assert that “[n]o coherent justification” has been provided for the lack of horizontal and vertical equity in current low-income housing programs.<sup>10</sup> As they argue, “no one has attempted to explain why we should offer assistance to some, but not other, families with the same characteristics, and no one has provided a persuasive argument for denying assistance to the poorest families while providing it to otherwise identical families whose income is twice as large.”<sup>11</sup> This lack of horizontal and vertical equity, they contend, fails to conform to plausible tax payer preferences.<sup>12</sup> Given that “under current rental subsidy policies, more than 70 percent of households below the poverty line are not served, and more than 40 percent of the households that are served are not in poverty,” economist John Quigley declared this structure “indefensible.”<sup>13</sup> The lack of horizontal and vertical equity has not only been decried in academic circles. President Nixon, in a 1973 address to Congress, described federal housing policy as “highly inequitable,” emphasizing the failure to treat “those in equal circumstances equally,” and the arbitrary provision of housing to a few select families.<sup>14</sup> The recent Bipartisan Policy Center Housing Commission of 2013 shared these concerns, declaring that “[w]e do not believe our nation’s most impoverished families should be subject to a lottery system or spend years on a waiting list to obtain access to federal rental assistance.”<sup>15</sup>

---

1. at 393 (“Because participants whose income rises above the upper limits applicable for admission into the program are rarely terminated, because exceptions to the limits are allowed in some cases, and because some programs have higher upper income limits, many households with higher incomes receive housing subsidies under means-tested housing programs.”).

10. Amy Crews Cutts & Edgar O. Olsen, *Are Section 8 Housing Subsidies Too High?*, 11 J. HOUSING ECON. 214, 235 (2002).

11. *Id.*

12. *Id.*; see also EDGAR O. OLSEN, HAMILTON PROJECT, BROOKINGS INST., GETTING MORE FROM LOW-INCOME HOUSING ASSISTANCE 2 (2008) [hereinafter OLSEN, LOW-INCOME HOUSING ASSISTANCE] (contending that “the nonentitlement nature of the current system is inconsistent with plausible assumptions about taxpayer preferences” and arguing “for a transition to an entitlement housing assistance program that relies exclusively on tenant-based assistance”).

13. Quigley, *Just Suppose*, *supra* note 7, at 310 (internal citations omitted).

14. See *infra* notes 62–63 and accompanying text. A 1973 report by HUD prepared in advance of President Nixon’s address to Congress discussed the issue of equity in greater detail. See U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 87–89 (1974) [hereinafter HOUSING IN THE SEVENTIES], available at <http://www.huduser.org/Publications/pdf/HUD-968.pdf>.

15. ECON. POLICY PROGRAM, HOUS. COMM’N, BIPARTISAN POLICY CTR., HOUSING AMERICA’S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY 88 (2013) [hereinafter BIPARTISAN HOUS. COMM’N OF 2013]; see also *id.* at 85 (criticizing an “inequitable system

Increasing rent burdens exacerbate the detrimental effects of the inequitable distribution of rental assistance.<sup>16</sup> The multiple policy goals that rental assistance is enlisted to advance can further worsen these inequities even as they create additional tensions. The General Accounting Office (“GAO”), in a 2012 review of the voucher program, noted how HUD policies that encourage voucher recipients to obtain housing in low-poverty neighborhoods can increase subsidy costs because as rents in these more expensive neighborhoods rise, the household contribution remains constant, and a higher subsidy must be provided to make up the difference.<sup>17</sup> These concerns echo those the GAO voiced a decade earlier:

The overriding goal of the federal housing programs we reviewed is to house the poor. However, the housing programs have additional goals—vouchers provide mobility and neighborhood choice, and production programs have additional goals, from creating new affordable units, to meeting the needs of the elderly or persons with disabilities, to promoting community development. Whether the benefits derived from these additional goals justify the programs’ additional costs is a major housing policy question.<sup>18</sup>

The Bipartisan Housing Commission of 2013 similarly identified “a tension between the goal of lowering costs and achievement of other policy objectives, such as improving access to neighborhoods of opportunity.”<sup>19</sup>

---

in which housing subsidies are allocated by lottery or through ever growing waiting lists”).

16. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 457 (2011) (“Allowing housing costs to crowd out other necessities exacerbates the inequities between the large majority of low-income people receiving no major housing subsidies and the minority that do.”). John Quigley makes a similar point in arguing that

[a]ffordability is clearly the most compelling rationale for polices [sic] subsidizing rental housing. The high cost of rental housing, relative to the ability of low-income households to pay for housing, means that these households have few resources left over for expenditures on other goods—food, clothing, medicine—that are also necessities.

Quigley, *Just Suppose*, *supra* note 7, at 309.

17. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-300, HOUSING CHOICE VOUCHERS: OPTIONS EXIST TO INCREASE PROGRAM EFFICIENCIES 14 (2012) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE, HOUSING CHOICE VOUCHERS] (discussing how federal targeting requirements and local preferences for serving “hard-to-house” and homeless individuals can increase per-unit subsidy amounts).

18. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-76, FEDERAL HOUSING ASSISTANCE: COMPARING THE CHARACTERISTICS AND COSTS OF HOUSING PROGRAMS 33 (2002) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL HOUSING ASSISTANCE].

19. BIPARTISAN HOUS. COMM’N OF 2013, *supra* note 15, at 99. Scholars have also highlighted this and related tensions. Discussing the Gautreaux program in Chicago, James

Concerns about expanding the reach of federal rental assistance are particularly relevant as budgets are placed under increasing strain. Federal budget sequestration led to substantial cuts in voucher assistance.<sup>20</sup> The concerns that sequestration has raised are only the latest indications of the substantial pressure on all forms of federal rental assistance. Since the 1990s, the nation's supply of public housing has been shrinking<sup>21</sup> and the number of vouchers fell by approximately 150,000 between 2004 and 2006.<sup>22</sup> Between 2007 and 2009 there was a 20% increase in households with "worst case needs" for rental housing—those renters who either pay half their income for housing or who live in severely substandard housing and do not receive rental assistance.<sup>23</sup> Although funding for Housing Choice Vouchers increased over the past decade, the program's ability to reach additional households remained constrained by the combination of higher rents and lower incomes.<sup>24</sup> Following a brief decline during the recent housing downturn, rents are again rising faster than infla-

---

Rosenbaum observes, "[T]here is a tradeoff between seeking to move the maximum number of people to better housing and seeking to move people to only the right kinds of places." James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL'Y DEBATE 231, 256 (1995). Analyzing the specific tension between the dictates of the FHA and a statutory preference for siting LIHTC developments in low-income neighborhoods, Myron Orfield notes that "the deep legal and philosophical contradiction in the United States between civil rights guarantees—particularly the duty to affirmatively further fair housing—and state and federal low-income housing policy." Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1753 (2005) (arguing that fair housing duty should take priority before other policy considerations).

20. Douglas Rice, *New Report Documents Growing "Crisis of Affordability" for Renters*, *Off the Charts Blog*, CENTER ON BUDGET & POL'Y PRIORITIES (June 30, 2014, 3:59 PM), <http://www.offthechartsblog.org/new-report-documents-growing-crisis-of-affordability-for-renters/> ("[T]he number of families using Housing Choice Vouchers, the most common form of federal rental assistance, fell by more than 70,000 in 2013 due to across-the-board sequestration cuts."); see also Michael Laris, *Budget Cuts Threaten to Upend Fairfax Man's Fragile Existence*, WASH. POST, Apr. 22, 2013, at B01 (discussing the denial of assistance for 150 individuals and families in Fairfax County, Virginia due to loss of \$2.5 million in federal funds).

21. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 197 (3d ed. 2015) [hereinafter SCHWARTZ, HOUSING POLICY] ("Although this new public housing often offers higher quality accommodations than what stood before, there are fewer units than before and access to this housing is more restricted. If this trend continues, public housing will become decreasingly available to the lowest income families with the greatest need for affordable housing.")

22. *Id.* at 261.

23. BIPARTISAN HOUS. COMM'N OF 2013, *supra* note 15, at 82–84. The number of individuals with worst case housing needs grew by 18% between 2001 and 2007. *Id.* at 84.

24. AMERICA'S RENTAL HOUSING, *supra* note 1, at 8.

tion, even as renter incomes decline.<sup>25</sup> The number of very low-income households, who lack rental assistance and pay more than half of their income for housing, increased by 43% between 2007 and 2011.<sup>26</sup>

To focus solely on the distribution of rental assistance and the disparities between those who receive benefits and those who remain on waitlists is to assume that the direct recipients of rental assistance are its only beneficiaries. However, rental assistance might be thought of instead as a means of serving broader and more diffuse public policy goals, such as eliminating concentrations of poverty or encouraging economic or racial integration. The Housing and Community Development Act of 1974, which instituted the precursor to the present Section 8 Housing Choice Voucher program, identified a broad set of objectives that included reducing segregation of income groups, promoting more diverse and vital neighborhoods, revitalizing deteriorating neighborhoods, aiding lower-income families in “obtaining a decent place to live,” and “promoting economically mixed housing.”<sup>27</sup> Only one of these goals—aiding families in obtaining a decent place to live—reflects a focus on individual recipients rather than the broader public. Placing time limits on individual benefits or reducing benefit amounts in the pursuit of a more equitable distribution of assistance might imperil the advancement of broader objectives. From this perspective, the distribution of rental assistance among individual recipients is only of importance to the extent this distribution furthers certain programmatic goals. Questions of equity and distributive justice are secondary if not irrelevant.

Given increasingly limited resources and the growing demand for rental assistance, difficult decisions must be made regarding how to satisfy the range of, at times conflicting, programmatic goals. Although for at least four decades legal scholars, economists, public policy experts, and politicians have denounced the

---

25. WILL FISCHER & BARBARA SARD, CTR. ON BUDGET & POL'Y PRIORITIES, CHART BOOK: FEDERAL HOUSING SPENDING IS POORLY MATCHED TO NEED, TILT TOWARD WELL-OFF HOMEOWNERS LEAVES STRUGGLING LOW-INCOME RENTERS WITHOUT HELP (2013) [hereinafter FISCHER & SARD, CHART BOOK], available at <http://www.cbpp.org/cms/?fa=view&id=4067>.

26. Editorial, *The Affordable Housing Crisis*, N.Y. TIMES, Dec. 5, 2012, at A30.

27. Pub. L. No. 93-383, tit. II § 8(a), 88 Stat. 633, 662 (1974) (codified as amended at 42 U.S.C. § 1437f (2006)); see *id.* tit. I. § 101(c), 88 Stat. at 634–35 (identifying the broad set of objectives for the Housing and Community Development Act of 1974).

inequities in existing rental housing policy, no one has provided a detailed analysis of the specific ways in which this policy departs from norms of distributive justice and of how it might be made more equitable. While proposals have been put forth for programmatic reforms, these reforms have not been linked to a normative account of what would constitute an equitable distribution of rental assistance.

This article moves the conversation beyond simply decrying inequities in federal rental assistance policy and instead carefully analyzes that policy in light of specific theories of distributive justice. Drawing on the philosophical literature, it outlines five accounts of distributive justice, and then analyzes the specifics of existing policy and their effects on benefit distribution in light of those theories. This article then proposes a new structure for all forms of federal housing assistance,<sup>28</sup> which would allow recipients to choose among a set of “housing resource bundles.” This approach satisfies the requirements of distributive justice while indirectly enabling federal housing policy to continue to embrace a plurality of programmatic goals.

Questions of equity are not the sole considerations that should shape the structure of rental assistance. Nonetheless, as legal philosopher Ronald Dworkin observed, “even those who do not think that equality is the whole story in political morality usually concede that it is part of the story, so that it is at least a point in favor of some political arrangement.”<sup>29</sup> In a similar vein, HUD’s 1974 report, *Housing in the Seventies* noted that, although “almost any housing assistance program—indeed, virtually any program of assistance to anyone—will have some inequities,” there remains a need to address the question of “whether alternative housing programs or alternative policies for addressing the low income problem will perform better or more poorly in terms of the

---

28. See *supra* note 2 (explaining and contrasting use of terms “housing assistance” and “rental assistance”).

29. Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFFS. 185, 187 (1981) [hereinafter Dworkin, *Equality of Welfare*]; see also Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO L. REV. 773, 779 (2011) (“Theories of justice may be a little too abstract for the taste of those who are used to line-item consideration of some quite concretely specified rights, but their *raison d’être* is the consideration of competing claims and interests in a distributive context in which it is understood that not everyone can get what they want or even what we ideally would like to secure for them.”).



equity criteria.”<sup>30</sup> With these considerations in mind, this article brings a more sophisticated analysis of specific equity criteria to bear on debates over federal affordable housing policy.

The article proceeds in three parts. The first part begins by reviewing the history of federal rental assistance policy and highlights changes in program priorities, their effects on the distribution of assistance, and tensions between stated priorities. Part I concludes by briefly discussing prior critiques of existing housing policy and proposed reforms. Part II analyzes existing federal rental assistance policy in light of four theories of distributive justice—equality of welfare, desert theory, equality of resources, and the Rawlsian difference principles—as well as Amartya Sen’s capability approach. This article evaluates how each framework might suggest reforms and considers the extent to which these theories align with the stated goals of federal housing programs. The final section of Part II briefly addresses whether there are justifications for treating rental assistance differently from other public benefit programs. A companion paper will explore the extent to which rental assistance should be understood as a distinct property interest that may justify certain distributional inequities. Finally, Part III argues that existing housing policies should be reformed to better accord with an equality of resources theory and certain concerns highlighted by the capability approach. Specifically, this article suggests that “housing resource bundles,” a limited menu of bundles of housing resources of equal value, would provide for a more equitable distribution of finite benefits while advancing broader programmatic goals.

The final section of Part III reveals an additional virtue of the housing resource bundle approach: it provides a mechanism for incorporating the home mortgage interest deduction—the largest source of federal support for housing<sup>31</sup>—into the distributional analysis and the proposed reforms. The mortgage interest deduction skews the distribution of all federal housing assistance—both direct subsidies and tax expenditures—towards higher income households.<sup>32</sup> Distributing only rental assistance through housing resource bundles would achieve a more just distribution among

---

30. HOUSING IN THE SEVENTIES, *supra* note 14, at 89.

31. MAGGIE MCCARTY ET AL., CONG. RESEARCH SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 1 (2008).

32. See *infra* Part II.C (discussing distribution of HMID).

those low-income individuals eligible for this assistance. Attaining a more equitable distribution of all federal housing assistance, however, requires incorporating the mortgage interest deduction into the housing resource bundle approach.

## I. HISTORY AND GOALS OF FEDERAL RENTAL ASSISTANCE

Federal rental assistance falls into two broad categories: tenant-based and project-based assistance. Recipients of tenant-based assistance through the Section 8 Housing Choice Voucher program must find and rent a privately-owned unit that satisfies program standards.<sup>33</sup> Recipients may move to a new unit and retain assistance, however doing so can prove challenging in practice.<sup>34</sup> In contrast, project-based assistance—including both public and government-assisted housing, but excluding privately owned housing (“project-based Section 8”)—attaches to the unit itself and a household typically loses assistance when it moves.<sup>35</sup> Housing Choice Vouchers (often referred to simply as “Section 8 vouchers”), project-based Section 8, and public housing—the major federal rental assistance programs that HUD administers—share three important similarities: they target a significant portion of assistance towards extremely low-income (“ELI”) households (those earning less than 30% of the area median income (“AMI”)), recipient households pay at least 30% of their income toward rent, and the programs typically have very long waiting

---

33. The Housing Choice Vouchers program is the largest federal program providing housing assistance to low-income persons. *Introduction to the Housing Voucher Program*, CENTER ON BUDGET & POLY PRIORITIES, <http://www.cbpp.org/files/5-15-09hous.pdf> (last updated May 15, 2009). As of 2008, HUD devoted about 40% of its budget to tenant-based rental assistance. NAT'L LOW INCOME HOUS. COAL., FY 2010 BUDGET CHART FOR SELECTED PROGRAMS (2009).

34. OLSEN, LOW-INCOME HOUSING ASSISTANCE, *supra* note 12, at 7. HUD has proposed a rule that would change the regulations governing public housing agency consortium, with the goals of improving administrative efficiency and locational choice for eligible households. Streamlining Requirements Applicable to Formation of Consortia by Public Housing Agencies, 79 Fed. Reg. 40,019, 40,020 (July 11, 2014) (to be codified at 24 C.F.R. pt. 5 and 943); *see also* Andrew Jordan Greenlee, *A Different Lens: Administrative Perspectives on Portability in Illinois' Housing Choice Voucher Program*, 21 HOUSING POLY. DEBATE 377, 378 (2011) (drawing on qualitative interviews to analyze how administration of voucher portability at PHA level affects voucher recipient mobility).

35. *See Project Based Vouchers, Frequently Asked Questions*, U.S. DEP'T OF HOUS. & URB. DEV., [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_9157.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9157.pdf) (last visited Apr. 3, 2015); CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: SECTION 8 PROJECT-BASED RENTAL ASSISTANCE 1–2 (2013), *available at* <http://www.cbpp.org/cms/?fa=view&id=3891>.

lists.<sup>36</sup> As of 2013, these programs together subsidized approximately 4.4 million housing units: 2.4 million through Housing Choice Vouchers, 1.2 million through public housing, and 840,000 through project-based Section 8.<sup>37</sup>

Understanding how the current mix of federal rental assistance programs developed and the often divergent policy goals they are enlisted to serve will help inform the evaluation of existing programs in light of distributive justice concerns and the potential of particular reforms.<sup>38</sup> Accordingly, the first section of this part reviews the history of federal rental assistance, focusing on the development of HUD's three main rental assistance programs: public housing, Housing Choice Vouchers, and project-based Section 8. The second section reviews current income targeting and benefit distribution by income level for these three programs. The third section broadens the discussion to consider two other major federal programs: the LIHTC and the HMID.

The final section of this part reviews a representative sample of proposed reforms to existing rental assistance programs. These proposals set the stage for the article's central discussion, an evaluation of the current allocation of rental assistance resources from the perspective of four theories of distributive justice and the capability approach and a subsequent critique of broader federal housing assistance policy, including the LIHTC and HMID. In the course of this analysis in Part II, and in the more detailed discussion of this article's proposed housing resource bundle approach in Part III, the article occasionally returns to these proposals and explains how this approach better accords with principles of distributive justice while also furthering many of the broader policy goals that rental assistance is enlisted to serve.

---

36. MCCARTY ET AL., *supra* note 31, at 24; *see also* Olsen, *Housing Programs for Low-Income Households*, *supra* note 1, at 379 ("Since the 1974 Housing Act, public housing, Section 236, and all variants of Section 8 have had a common set of income limits.").

37. *See Picture of Subsidized Households 2013*, U.S. DEP'T OF HOUSING & URB. DEV., <http://www.huduser.org/portal/datasets/picture/yearlydata.html> (last visited Apr. 3, 2015) [hereinafter *Picture of Subsidized Households 2013*].

38. *Cf.* Quigley, *Just Suppose*, *supra* note 7, at 300, 311–12 (proposing, as ideal, transformation of existing housing assistance programs into entitlement that operates akin to food stamps or EITC and discussing "importance of history" and "path dependency of policy").

A. *The Evolution of Public Housing, Project-Based Section 8, and Housing Vouchers*

1. The 1930s and 1940s: The Introduction of Public Housing

The federal government introduced rental assistance for low-income households—in the form of public housing—through the Housing Act of 1937.<sup>39</sup> The Act sought to “remedy the acute shortage” of adequate housing and encourage infrastructure investment during a period of high unemployment.<sup>40</sup> At the time of its creation “[a] primary purpose of the public housing program was to act as an employment program to stimulate the construction industry, with housing as a secondary goal.”<sup>41</sup> The Housing Act of 1949 expanded this assistance and declared the oft-quoted goal of providing “a decent home and a suitable living environment for every American family.”<sup>42</sup> The Act declared a national housing policy that included “community development” and “the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas.”<sup>43</sup> In addition to alleviating the shortage of housing for specific families, it sought, through the provision of adequate housing, to contribute “to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.”<sup>44</sup>

These evolving early programmatic goals reveal a dynamic tension in federal housing policy between individual assistance and community, or place-based assistance.<sup>45</sup> The housing industry’s

---

39. BIPARTISAN HOUS. COMM’N OF 2013, *supra* note 15, at 85. *See generally* Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894–96 (1990) (providing a short history of public housing).

40. Quigley, *Just Suppose*, *supra* note 7, at 301 (internal quotation marks omitted).

41. Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 548 n.186 (2007) (citing LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 104–06 (1968)); *see also* EUGENE J. MEEHAN, PUBLIC HOUSING POLICY: CONVENTION VERSUS REALITY 171 (1975) (“The major concerns built into the legislation had to do with the construction of housing and not the provision of housing-in-use, with the latent function of construction in eliminating slums and providing employment and not the satisfaction of the need for shelter.”).

42. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended at 42 U.S.C. § 1441 (2012)); *see also* BIPARTISAN HOUSING COMM’N OF 2013, *supra* note 15, at 85–86; BIPARTISAN MILLENNIAL HOUS. COMM’N, MEETING OUR NATION’S HOUSING CHALLENGES 22–23 (2002) [hereinafter BIPARTISAN MILLENNIAL HOUS. COMM’N].

43. 42 U.S.C. § 1441.

44. *Id.*

45. *See* Nestor M. Davidson, *Reconciling People and Place in Housing and Community*

contribution towards full employment and the broader economy is no longer a central component of debates over rental assistance policy—particularly given the move away from housing production towards demand-side subsidies. Nonetheless, rental assistance policy remains a prominent vehicle for furthering broader social and economic goals.<sup>46</sup> Pursuit of these goals can frequently exacerbate the inequities created by an unequal distribution of benefits.<sup>47</sup>

## 2. The 1950s and 1960s: Private Housing Markets, Mobility, and Tensions Between Income Targeting and Integration

The development of public housing for low-income households remained a major focus of federal rental assistance throughout the 1950s.<sup>48</sup> The Housing Act of 1959 sought to complement this housing by providing incentives for private developers to build housing for low- and moderate-income households.<sup>49</sup> This led to the creation of the HUD in 1965.<sup>50</sup> In the 1960s, the federal government began permitting PHAs—the local entities that administer public housing—to rent privately owned units for tenants, a precursor to housing vouchers.<sup>51</sup> By allowing recipients to live in a range of privately-owned units, rather than housing developed specifically for low-income renters, these program changes “opened up new opportunities for both geographic mobility and economic—perhaps even racial—integration.”<sup>52</sup>

As operating and maintenance costs rose and resident income declined over the course of the 1960s, many public-housing residents were spending nearly three-quarters of their income on rent and utilities.<sup>53</sup> In 1969, to alleviate these burdens, Congress

---

*Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2009).

46. *See id.* at 10.

47. *See id.*

48. *See* MCCARTY ET AL., *supra* note 31, at 3.

49. *See id.*

50. Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965) (codified at 42 U.S.C. § 3532 (2012)).

51. BIPARTISAN MILLENNIAL HOUS. COMM'N, *supra* note 42, at 23.

52. *See* Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489, 502–03 (2000) (discussing the Section 23 Leased Housing program introduced in 1965); *see also* Lawrence M. Friedman & James E. Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. PA. L. REV. 611, 612, 614 (1968).

53. BIPARTISAN HOUS. COMM'N OF 2013, *supra* note 15, at 86.

adopted an amendment that limited tenant rents in public housing to 25% of a tenant's income.<sup>54</sup> This amendment served to "codify[] an income-based rent structure in federal housing programs."<sup>55</sup> Income-based rent structures remain a prominent component of federal rental assistance and govern the determination of rent levels for the three programs under discussion.

During this same period, the Housing and Urban Development Act of 1968 reemphasized the provision of housing to families with the lowest incomes. The Act declared that the administration of housing programs "designed to assist families with incomes so low that they could not otherwise decently house themselves" must give "the highest priority and emphasis . . . to meeting the housing needs of those families for which the national goal has not become a reality."<sup>56</sup> Yet in the same year the Fair Housing Act ("FHA") placed new emphasis on ending racial discrimination in housing. As the FHA's legislative history makes clear, its proponents intended that it would not only expand individual residential choice, but would also "foster racial integration for the benefit of all Americans," partly through the operation of HUD programs.<sup>57</sup> The FHA requires that HUD administer its programs in a manner that affirmatively furthers the policy of providing "fair housing throughout the United States."<sup>58</sup>

Applying this provision in a 1970 case challenging an urban renewal program, the United States Court of Appeals for the Third Circuit described "a progression in the thinking of Congress" from a minimal requirement in 1949 that HUD "act neutrally on the issue of racial segregation," through a demand in 1964 "to prevent discrimination in housing" due to planning decisions, and on to the 1968 Act's requirement "to act affirmatively to achieve fair housing."<sup>59</sup> Given the potential tensions between fair housing goals and prioritizing assistance to the lowest-

---

54. *Id.* ("The Brooke Amendment that established the 25 percent of income limit is responsible for the income-based rent structure that exists to this day in federal housing programs.")

55. MCCARTY ET AL., *supra* note 31, at 4.

56. Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (1968) (codified at 12 U.S.C. § 1701t (2012)).

57. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 2.3. Congressman Ryan stated that the law's goals included "achiev[ing] the aim of an integrated society." 114 Cong. Rec. 9591 (1968).

58. 42 U.S.C. §§ 3601, 3608(d)(e)(5) (2012).

59. Shannon v. HUD, 436 F.2d 809, 816 (3d Cir. 1970).

income eligible households, it is not surprising that a 1974 HUD report tentatively noted: “[a]lthough the subsidy programs have somewhat different and overlapping target groups, it nevertheless *appears to be Congress’ intent* that, taken as a whole, these programs should serve equitably the housing needs of lower income households.”<sup>60</sup> While more equitably serving the needs of lower-income households accords with a concern with distributive justice, the role that distributive justice should play in allocating benefits becomes less clear when fair housing and other policy priorities move to the forefront.

### 3. The 1970s and 1980s: Priorities Shift from Supply-Side to Demand-Side Programs

In 1973, the Nixon administration imposed a moratorium on subsidies for housing production.<sup>61</sup> In an address to Congress that same year, Nixon criticized the quality of public housing developments, while asserting this was not the only problem with federally-assisted housing: “Our present approach is also highly inequitable. Rather than treating those in equal circumstances equally, it arbitrarily selects only a few low income families to live in Federally supported housing, while ignoring others.”<sup>62</sup> Nixon argued that direct cash assistance would be the most equitable and efficient means of achieving the “goal of a decent home for all Americans.”<sup>63</sup> As Nixon’s address highlights, the shift from a focus on subsidies for production towards demand-side housing subsidies occurred in the context of increasing concern for the distributional fairness of federal rental assistance.

Soon after Nixon’s address, the Housing and Community Development Act of 1974<sup>64</sup> amended the Housing Act of 1937 to cre-

---

60. HOUSING IN THE SEVENTIES, *supra* note 14, at 97 (emphasis added).

61. Orlebeke, *supra* note 52, at 489.

62. Richard Nixon, *Special Message to the Congress Proposing Legislation and Outlining Administration Actions to Deal with Federal Housing Policy*, AM. PRESIDENCY PROJECT (Sept. 19, 1973) [hereinafter Nixon, *Special Message to Congress*], available at <http://www.presidency.ucsb.edu/ws/?pid=3968>. Nixon’s message drew upon a report by HUD entitled “Housing in the Seventies.” See HOUSING IN THE SEVENTIES, *supra* note 14.

63. Nixon, *Special Message to Congress*, *supra* note 62.

64. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 633–34 (1974) (codified as amended in scattered sections of 42 U.S.C.). As the Senate Committee Report on the Act explains, “Section 8 provides for continuation, on a modified basis, of the leased housing assistance program now set forth in Section 23 of the United States Housing Act.” S. REP. NO. 93-693, *reprinted in* 1974 U.S.C.C.A.N. 4273, 4314.

ate the precursor to the Section 8 voucher program,<sup>65</sup> known as the Section 8 Existing Housing Certificate Program.<sup>66</sup> In addition to “aiding lower-income families in obtaining a decent place to live,” the 1974 Act’s stated objectives included “promoting economically mixed housing.”<sup>67</sup> The new program was intended “as a more flexible means of delivering rental housing assistance to the lowest-income households by focusing on rental subsidies to or on behalf of tenants rather than subsidies directly paid to developers.”<sup>68</sup> The program assisted those with incomes up to 80% of AMI.<sup>69</sup> It relied on an income-based structure and paid the difference between 25% of a tenant’s income and the fair market rent (“FMR”).<sup>70</sup> The tenant contribution was later raised to 30% of income, the current standard.<sup>71</sup> In the early 1980s, the federal government introduced the freestanding voucher program, which differed in two important ways from the Section 8 Existing Housing Certificate Program.<sup>72</sup> The new program paid the difference between 30% of a recipient’s income and a set payment standard.<sup>73</sup> A household was permitted to pay more than 30% of their income

---

65. BIPARTISAN MILLENNIAL HOUS. COMM’N, *supra* note 42, at 23.

66. SCHWARTZ, HOUSING POLICY, *supra* note 21 at 227.

67. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified at 42 U.S.C. § 1437f(a) (2012)).

68. BIPARTISAN HOUS. COMM’N OF 2013, *supra* note 15, at 86.

69. SCHWARTZ, HOUSING POLICY, *supra* note 21, at 228. As Casey Dawkins observes, “The original income-targeting goals of the Section 8 Program were modest.” Casey J. Dawkins, *Income Targeting of Housing Vouchers: What Happened After the Quality Housing and Work Responsibility Act?*, 9 CITYSCAPE 69, 71 (2007). However, a 1975 amendment targeted assistance towards lower-income families, adding a requirement that 30% of all assistance go to families with very low incomes (“VLIs”), incomes of less than 50% of the AMI. *Id.*

70. Fair market rent means the rent, including the cost of utilities (except telephone), as established by HUD, pursuant to this subpart, for units of varying sizes (by number of bedrooms), that must be paid in the market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities.

Housing and Urban Development Rule, 24 C.F.R. § 888.111(b) (1999). An FMR is annually calculated for each market using a methodology outlined at 24 C.F.R. § 888.113(a).

71. Charles L. Edson, *Affordable Housing—An Intimate History*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 10 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011). Initially, the required household contribution was 15% for large families or those with exceptional medical or other expenses and between 15% and 25% for other families. See DANILO PELLETTIERE, NAT’L LOW INCOME HOUS. COAL., GETTING TO THE HEART OF HOUSING’S FUNDAMENTAL QUESTION: HOW MUCH CAN A FAMILY AFFORD? 3–4 (2008).

72. SCHWARTZ, HOUSING POLICY, *supra* note 21, at 228.

73. *Id.*



to obtain a more expensive unit or could realize some of the savings for a unit that rented for less than the payment standard.<sup>74</sup>

In addition to this expansion of demand-side assistance during the 1970s, the Housing and Community Development Act of 1974 instituted the project-based Section 8 program, which “[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing” provided financial assistance “to existing, newly constructed, and substantially rehabilitated housing.”<sup>75</sup> The legislation introducing the program required that at least 30% of assisted families, at the time of initial renting, must qualify as very low-income households.<sup>76</sup> Since 1983 there has been no new funding of project-based Section 8 contracts for either new construction or rehabilitation.<sup>77</sup> However, the program continues to support approximately 840,000 households.<sup>78</sup> Although it served to increase the supply of housing, project-based Section 8 differed from public housing in that, like tenant-based vouchers, it enlisted the private market in providing housing and enabled the deconcentration of assisted households.

#### 4. The Quality Housing and Work Responsibility Act of 1998: Reducing Concentrations of Poverty and Increasing Local Control

In 1998, the Quality Housing and Work Responsibility Act (“QHWRA”)<sup>79</sup> merged the certificate and voucher programs into the current Housing Choice Voucher program.<sup>80</sup> The new name reflected a programmatic emphasis on enabling recipients to choose

---

74. Edson, *supra* note 71, at 18; SCHWARTZ, HOUSING POLICY, *supra* note 21, at 228; see also U.S. DEP’T OF HOUS. & URBAN DEV., SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 5–6 (2000) [hereinafter A LOOK BACK AFTER 30 YEARS], available at <http://www.huduser.org/portal/publications/pubasst/look.html> (“If a family rented at less than the payment standard, it would keep some or all of the savings.”).

75. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 662 (codified as amended at 42 U.S.C. § 1437f (2012)).

76. See 42 U.S.C. § 1437f (c)(7) (2012) (repealed Oct. 21, 1998).

77. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, STATE OF NEW YORK CITY’S SUBSIDIZED HOUSING: 2011, at 31 (2011), [hereinafter NEW YORK CITY’S SUBSIDIZED HOUSING], available at [http://furmancenter.org/files/publications/SHIP\\_FINAL.pdf](http://furmancenter.org/files/publications/SHIP_FINAL.pdf).

78. See *supra* note 37 and accompanying text.

79. Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, 112 Stat. 2461, 2518 (1998) (codified at 42 U.S.C. § 1437f (2012)).

80. SCHWARTZ, HOUSING POLICY, *supra* note 21, at 228.

the location where they use their assistance to obtain housing.<sup>81</sup> The QHWRA established many of the current features of both public housing and voucher programs. Housing authorities are permitted to set payment standards at 90% to 110% of FMR, and as high as 120% of FMR under certain circumstances, a change designed to enable beneficiaries to move to higher opportunity locations where units are likely to be more expensive.<sup>82</sup> A participant can spend more than this standard, but they must then pay the full difference between the rent and the standard, plus 30% of his income.<sup>83</sup> FMRs are typically set at the fortieth percentile of the area median rent for “standard quality rental housing units.”<sup>84</sup> The FMR is raised to the fiftieth percentile in more expensive metropolitan areas.<sup>85</sup> HUD can approve “exception payment” standards outside these ranges at the request of a PHA.<sup>86</sup> A recent controversy involving the Chicago Housing Authority’s use of “exception payments” for high cost apartments revealed some payments as high as 300% of the FMR.<sup>87</sup> Assuming identical in-

---

81. See SUSAN J. POPKIN ET AL., URBAN INST., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES 15 (2004).

82. A LOOK BACK AFTER 30 YEARS, *supra* note 74, at 11; see also U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 7420.10G, at 7-2 (2001), available at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/forms/guidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook).

83. 42 U.S.C. § 1437f(c)(1) (2012); see also U.S. GOV’T ACCOUNTABILITY OFFICE, HOUSING CHOICE VOUCHERS, *supra* note 17, at 4. If a household’s rent is less than the applicable payment standard, the monthly assistance they receive

shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:

- (i) 30 percent of the monthly adjusted income of the family.
- (ii) 10 percent of the monthly gross income of the family.
- (iii) If the family is receiving payments for welfare assistance from a public agency and a part of those payments, adjusted in accordance with the actual housing costs of the family, is specifically designated by that agency to meet the housing costs of the family, the portion of those payments that is so designated.

42 U.S.C. § 1437f(o)(2)(A). If rent exceeds the payment standard, the monthly assistance is equal to the payment standard less the greater of the three amounts listed. *Id.* § 1437f(o)(2)(B).

84. 24 C.F.R. §§ 888.113(a)–(b) (2014).

85. *Id.* §§ 888.113(c)(i)–(iii).

86. PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., Notice PIH 2013-18 (HA), REVISION FOR REQUESTS FOR EXCEPTION PAYMENT STANDARDS FOR PERSONS WITH DISABILITIES AS A REASONABLE ACCOMMODATION (2013), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2013-18.pdf>.

87. Alby Gallun, *CHA ‘Supervoucher’ Program Sparks Federal Probe*, CRAIN’S CHI. BUS. (Aug. 5, 2014), <http://www.chicagobusiness.com/realestate/20140805/CRED03/140809923/cha-voucher-program-prompts-federal-probe> (reporting increase in approval of new

comes, a recipient using a voucher in an expensive location with a higher payment standards and a more generous calculation of the FMR, will receive a significantly larger sum of assistance than a recipient living in a less-expensive location.

The QHWRA also permitted voucher holders to move with a voucher anywhere in the United States<sup>88</sup> and—of particular interest in terms of benefit distribution—it declared that ELI households (earning less than 30% of AMI) must receive 75% of the vouchers issued by a public housing authority each year.<sup>89</sup> The QHWRA changes mandate that a higher share of assistance be directed towards lower-income households while allowing PHAs to spend more on those households, potentially reducing the total number of households served. Additional changes to both vouchers and public housing were designed to reduce concentrations of poverty within public housing.<sup>90</sup>

Finally, the QHWRA eliminated federal preferences, which directed assistance towards those paying more than 50% of their

---

exception payments from seven in 2011 to 364 in 2014); *see also* Bovean, *supra* note 5, (reporting that “super vouchers” account for “less than 2 percent of [CHA’s] portfolio”).

88. 42 U.S.C. § 1437f(r)(1) (2012).

89. *Id.* § 1437f(n)(b)(1); *see also* 24 C.F.R. § 983.251(c)(6) (“Not less than 75 percent of the families admitted to a PHA’s tenant-based and project-based voucher programs during the PHA fiscal year from the PHA waiting list shall be extremely low-income families. The income-targeting requirements at 24 C.F.R. 982.201(b)(2) apply to the total of admissions to the PHA’s project-based voucher program and tenant-based voucher program during the PHA fiscal year from the PHA waiting list for such programs.”). To qualify for Section 8 project-based assistance, a household must have an income that does not exceed 80% of the AMI. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO PUBLIC HOUSING, 2 (2013), *available at* <http://www.cbpp.org/files/policybasics-housing.pdf>. At least 40% of units in each development that become available in a given year must be filled by a household with an income no greater than 30% of AMI. *Id.*

90. SCHWARTZ, HOUSING POLICY, *supra* note 21, at 168; *see also* Dawkins, *supra* note 69, at 70 (discussing legislation’s focus on reducing poverty concentration in public housing, encouraging self-sufficiency, and increasing flexibility). The federal government pursued a number of additional initiatives in the 1990s aimed at deconcentrating poverty or furthering racial integration. SCHWARTZ, HOUSING POLICY, *supra* note 21, at 247. These efforts, which were given reduced priority during the second Bush administration, included most notably the Moving to Opportunity Demonstration Program and Hope VI. Moving to Opportunity was launched in 1993 as an experiment with the goal of measuring the impact of increased mobility and improvements in neighborhood opportunities on low-income residents of public housing. *Id.* at 248. Volunteer program participants were randomly assigned to three groups, one of which remained in public housing or project-based Section 8 housing, one of which received Section 8 vouchers to be used anywhere, and a treatment group that received vouchers that could only be used in low-poverty neighborhoods. *Id.* at 248–49; *see also* POPKIN ET AL., *supra* note 81, at 14 (“A central premise of HOPE VI—and of the broader public housing transformation effort that began in the 1990s—was that the overconcentration of profoundly poor, nonworking households was a major contributor to the high levels of social problems in distressed public housing.”).

income towards rent, living in substandard housing, experiencing homelessness, or who were involuntarily displaced.<sup>91</sup> This granted PHAs greater flexibility in establishing local preferences to guide tenant selection, although they remain bound by the requirement that 75% of vouchers and project-based units must go to ELI households.<sup>92</sup> A 2000 report by HUD's Office of Policy Development and Research, evaluating how the QHWRA affected the discretionary authority of PHAs noted that even though the QHWRA granted substantial discretion to establish policies—particularly regarding tenant selection—to meet specific local priorities, it required PHAs “to weigh and reconcile competing program objectives.”<sup>93</sup> Many housing authorities simply chose tenants based on date and time of application, feeling “that it would be wrong and arbitrary to endorse one local preference category over another.”<sup>94</sup>

### B. *Current Income Targeting and Distribution*

As the preceding history reveals, the federal government gradually shifted a greater share of rental assistance—through the three major programs—towards lower-income households. In 1973, the precursor to Housing Choice Vouchers assisted those with incomes up to 80% of AMI and imposed no requirement that a share of this assistance be targeted towards lower-income households. This changed in 1975 with the introduction of a requirement that 30% of assistance go to VLI households, those

---

91. 42 U.S.C. § 1437f(o)(6)(A)(ii) (2012) (“Each system of preferences established pursuant to this subparagraph shall be based upon local housing needs and priorities, as determined by the public housing agency using generally accepted data sources, including any information obtained pursuant to an opportunity for public comment as provided under section 5A(f) and under the requirements applicable to the comprehensive housing affordability strategy for the relevant jurisdiction.”); *see also* DEBORAH J. DEVINE ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., *THE USES OF DISCRETIONARY AUTHORITY IN THE TENANT-BASED SECTION 8 PROGRAM: A BASELINE INVENTORY OF ISSUES, POLICY, AND PRACTICE 1* (2000). The regulations governing local preferences for public housing selection are at 24 C.F.R. § 960.206.

92. As Bruce Katz and Margery Austin Turner note in discussing ways to improve administration of the voucher program, “[L]ocal PHAs have considerable discretion over how the voucher program operates within their jurisdiction.” BRUCE KATZ & MARGERY AUSTIN TURNER, BROOKINGS INST., *INVEST BUT REFORM: STREAMLINE ADMINISTRATION OF THE HOUSING CHOICE VOUCHER PROGRAM 2* (2013); *see supra* note 89 and accompanying text.

93. DEVINE ET AL., *supra* note 91, at ix.

94. *Id.* at 7.

earning less than 50% of AMI.<sup>95</sup> The shift of assistance towards lower-income households became more dramatic with the QHWRA in 1998. Currently 75% of new vouchers and project-based Section 8 units in a given locale must go to ELI households, those with incomes under 30% of AMI.<sup>96</sup> To further the goal of greater economic integration within public housing projects, only 40% of public housing residents within a PHA must be ELI, a percentage that may be reduced if more than 75% of a PHA's vouchers are directed towards this segment of households.<sup>97</sup> In reality, the targeting requirements in the QHWRA did not radically alter the national profile of program recipients, as "[t]he nation as a whole was already meeting the 75-percent ELI target before the enactment of QHWRA and has continued to meet that goal since."<sup>98</sup>

HUD's annual *Picture of Subsidized Housing* reports data on the demographics of households receiving assistance through public housing, the Housing Choice Voucher program, and project-based Section 8, as well as other HUD programs.<sup>99</sup> As the data in Table 1 indicates, over 90% of the assistance provided through these three programs nationwide goes to VLI households and between 72% and 76% of the households served by each program are ELI. However, a study of administrative records from 1997 to 2005 found that on the local level many PHAs were not yet meeting the targeting goals in the QHWRA.<sup>100</sup> Moreover, as Table 2 reveals, all three programs serve a smaller share of all

---

95. See *supra* note 69.

96. According to the Center for Budget and Policy Priorities, as of early 2013, 70% of assisted households were ELI. FEDERAL RENTAL ASSISTANCE, *supra* note 4, at 2. Currently, at a minimum, to be eligible to receive a voucher a family must be a "low-income family" (earning 80% or less of the AMI) that either (1) is "very low-income" (earning 50% or less of the AMI), (2) previously received public housing or Section 8 assistance, (3) was displaced from certain federal housing projects, (4) is a "nonpurchasing tenant of certain homeownership programs," or (5) meets eligibility criteria set by a public housing authority. LOUISE HUNT ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., SUMMARY OF THE QUALITY HOUSING & WORK RESPONSIBILITY ACT OF 1998, at 16 (1998), available at <http://www.hud.gov/offices/pih/phr/about/titlev.pdf> (summarizing 42 U.S.C. § 1437f(o)(4)).

97. See HUNT ET AL., *supra* note 96, at 6.

98. Dawkins, *supra* note 69, at 90.

99. *Picture of Subsidized Households 2013*, *supra* note 37.

100. See Dawkins, *supra* note 69, at 70, 90 (reviewing HUD "administrative records for all households receiving housing choice vouchers from 1997 through 2005 to determine if the income-targeting goals of QHWRA are being met at the national and local levels" and concluding that while most are in compliance with goals, nearly 40% are not).

individuals in the lowest income group, those earning under \$5000, than those in most of the higher income brackets.

Table 1: Income of Recipient Households<sup>101</sup>

	Household Income, Percentage of Local Median	Percentage of Recipients Who Are Very-Low Income (< 50% of AMI)	Percentage of Recipients Who Are Extremely-Low Income (<30% of AMI)
Public Housing	25%	91%	72%
Housing Choice Vouchers	22%	96%	76%
Project-based Section 8 (New Construction/Substantial Rehabilitation)	24%	96%	73%

Table 2: Percentage of Households Receiving Assistance, by Household Income<sup>102</sup>

Household Income Bracket	\$1-\$4,999	\$5,000 - \$9,999	\$10,000-\$14,999	\$15,000-\$19,999	\$20,000 or more
Public Housing	17%	32%	20%	12%	19%
Housing Choice Vouchers	14%	30%	24%	14%	17%
Project-based Section 8 (New Construction/Substantial Rehabilitation)	11%	34%	29%	15%	11%

### C. Other Major Federal Housing Assistance Programs

Part II focuses on the distributive fairness of the current allocation of rental assistance resources among individuals eligible to receive public housing, Housing Choice Vouchers, and project-based Section 8. Part III broadens this analysis to consider two other major programs through which the federal government provides housing assistance. Both programs are administered by the

---

101. *Picture of Subsidized Households 2013*, *supra* note 37.

102. *Id.*

IRS rather than HUD and—unlike the three HUD programs—they do not target assistance towards ELI households. The LIHTC program is the largest federal program currently supporting the development of low-income rental housing.<sup>103</sup> However, it primarily serves households with higher incomes than those in the HUD-administered programs. The HMID, the most substantial source of federal support for housing is available to any homeowner but disproportionately assists higher income households.<sup>104</sup>

Part III will argue in more detail that any attempt to achieve a more just distribution of the federal resources allocated towards the provision of housing must take both these programs into account and would demand substantial reform and reallocation. At the same time, there are practical reasons to focus first on the three HUD rental assistance programs: They share the specific purpose of providing direct rental assistance to low-income households, they have similar benefit structures and income-targets, they are all spending programs administered by HUD, and, as discussed further below, reforming the HMID in particular is a contentious proposition. With these practical and political constraints in mind, the analysis in Part II looks first at the allocation of rental assistance resources among individuals eligible for the three HUD program and proposes reforms that would create a more equitable distribution of the scarce resources allocated to rental assistance. Part III then relaxes these constraints and takes a hard look at the reforms to the LIHTC and the HMID that a true commitment to the equitable distribution of all federal housing assistance would demand.

### 1. The Low-Income Housing Tax Credit

The Tax Reform Act of 1986 introduced the LIHTC, through which the IRS allocates tax credits to state housing agencies.<sup>105</sup> These credits are then given to developers of affordable housing, who sell the credits to investors to raise capital for a project.<sup>106</sup> LIHTC projects must either rent at least 20% of units to house-

---

103. Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 811 (2014).

104. NEW YORK CITY'S SUBSIDIZED HOUSING, *supra* note 77, at 42.

105. Tax Reform Act of 1986, Pub. L. No. 99-514 § 252, 100 Stat. 2085, 2189 (codified at 26 U.S.C. § 42 (2006)).

106. NEW YORK CITY'S SUBSIDIZED HOUSING, *supra* note 77, at 42.

holds with incomes at or below 50% of AMI or 40% of units to households at or below 60% of AMI.<sup>107</sup> Rents are set at no more than 30% of the target population's monthly income and must remain at affordable levels for a minimum of fifteen years.<sup>108</sup> Unlike HUD's rental assistance programs, rents are not set at a percentage of the specific tenant's income and vary with income if a household receives assistance from another program: "As a result, the poorest households occupy relatively few LIHTC units."<sup>109</sup> LIHTC residents on average have higher incomes than households residing in the three programs discussed in the prior section.<sup>110</sup>

State and local governments exercise significant control over the LIHTC program through annual Qualified Allocation Plans ("QAPs"),<sup>111</sup> which establish the criteria that guide the allocation of LIHTC credits within a jurisdiction. However, the applicable federal statute requires that a QAP, in addition to considering local conditions when determining housing priorities, must give preference to projects: (1) "serving the lowest income tenants"; (2) "obligated to serve qualified tenants for the longest periods"; and (3) "located in qualified census tracts . . . and the development of which contributes to a concerted community revitalization plan."<sup>112</sup> Qualified census tracts are low-income areas that either have poverty rates above 25% or where more than half of households have incomes below 60% of AMI.<sup>113</sup> Hence, rather than directing assistance towards communities with higher opportunity

---

107. Low Income Housing Tax Credit, 26 U.S.C. § 42(g)(1) (2006).

108. OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 2-3 (2014).

109. Olsen, *Housing Programs for Low-Income Households*, *supra* note 1, at 374. Tax credits are often combined with other sources of financing to achieve rent levels low enough to serve the lowest-income households. Orlebeke, *supra* note 52, at 513. However, not all of the subsidies the LIHTC provides go towards a reduction in tenant rents. See Richard K. Green, *Thoughts on Rental Housing and Rental Housing Assistance*, 13 CITIESCAPE 39, 49 (2011) ("The fraction of the government subsidy that goes to renters depends on the size of the discount a renter receives. This discount varies considerably from one market to the next.")

110. See MEGAN BOLTON ET AL., NAT'L LOW INCOME HOUS. COAL., THE ALIGNMENT PROJECT: ALIGNING FEDERAL LOW INCOME HOUSING PROGRAMS WITH HOUSING NEED 3 (2014) (noting that ELI households are more typically served by HUD programs than by LIHTC and that LIHTC was not designed to serve these households).

111. ED GRAMLICH, NAT'L. LOW INCOME HOUS. COAL., QUALIFIED ALLOCATION PLAN 3, available at <http://nlihc.org/sites/default/files/2014AG-259.pdf>

112. 26 U.S.C. § 42(m)(1)(B) (2006).

113. *Id.* §§ 42(m)(1)(C)(ii), (d)(5)(B)(ii)(I) (2006).



(better schools and employment prospects, safer neighborhoods, etc.), this preference for qualified census tracts directs funding towards units in less-advantaged communities.<sup>114</sup>

For the three HUD rental assistance programs the amount of subsidy allocated to a particular household can be determined by calculating the difference between 30% of the recipient's income and the rent for the unit they inhabit.<sup>115</sup> Given the structure of the LIHTC program—which instead sets rents at a percentage of a target population's income—it is more difficult to determine the precise amount of financial assistance allocated to a particular household. In addition, developers rely on a range of additional funding sources in order to develop properties. Individuals who live in LIHTC units often receive other forms of rental assistance.<sup>116</sup> Due to this combination of funding, “the costs and benefits of the LIHTC program are harder to isolate” than they are for other affordable housing programs.<sup>117</sup> The practical challenges of determining the value of individual benefits, the distinct and locally-determined policy priorities of the LIHTC program, and the complex administrative structure of the LIHTC create challenges, for any attempt to link units in LIHTC developments with the three HUD programs into a single distributive scheme.

## 2. The Home Mortgage Interest Deduction

No discussion of the distribution of federal housing assistance can fail to acknowledge the largest source of government support for housing: the HMID.<sup>118</sup> Although it faces substantial criticism

---

114. See generally Orfield, *supra* note 19, at 1750 (discussing tension between statutory preference for siting LIHTC development in low-income neighborhoods and requirements of the FHA).

115. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud/hudportal/HUD?src=/program\\_offices/public\\_indianhousing/programs/hcv/about/fact\\_sheet#6](http://portal.hud/hudportal/HUD?src=/program_offices/public_indianhousing/programs/hcv/about/fact_sheet#6) (last visited Apr. 3, 2015).

116. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? 3 (2012) [hereinafter FURMAN CTR., WHAT WE CAN LEARN]; Brian Coate, *Closing the Gap: Soft Funding Options for LIHTC Projects*, LANCASTER POLLARD (Dec. 13, 2013), <http://www.lancasterpollard.com/NewsDetail/TCI-Nov-2013-Dec-2014-hsg-closing-the-gap-for-LITHIC-projects>.

117. FURMAN CTR., WHAT WE CAN LEARN, *supra* note 116, at 7.

118. MCCARTY ET AL., *supra* note 31, at 1 (“The federal government’s largest housing program, however, is arguably the mortgage interest deduction, which is not targeted to lower-income households, but is available to all homeowners who pay mortgage interest and itemize their deductions.”).

from economists, the HMID has been described as “America’s favorite itemized deduction”<sup>119</sup> and the “most sacred tax break in the code.”<sup>120</sup> As currently structured the HMID operates as “an upside-down subsidy—the greater the need, the smaller the subsidy.”<sup>121</sup> It does little to promote homeownership among lower-income individuals and is substantially more generous to higher-income individuals. The average tax savings for twenty-five- to thirty-five-year-old homeowners with more than \$250,000 in income is \$7077.<sup>122</sup> In comparison, homeowners with incomes of \$40,000 to \$75,000 save an average of \$592 annually.<sup>123</sup> Those with incomes under \$40,000 are able to reduce their tax bills by an average of only \$208.<sup>124</sup>

Given the size of the HMID, approximately 75% of federal housing-related expenditures—if we include both direct spending and subsidies through the tax code—is directed towards homeownership.<sup>125</sup> More than half of all housing benefits go to households with incomes over \$100,000.<sup>126</sup> The Joint Committee on Taxation estimates that these households receive three-fourths of the combined value of the mortgage interest and property tax deductions.<sup>127</sup> In fact, the 20 million households with incomes of \$20,000 or less receive a smaller share of federal housing expenditures than the five million households with incomes that exceed

119. Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1348 (2000).

120. Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 234–35 (2010) (quoting JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 246 (1987)).

121. Mann, *supra* note 119, at 1361.

122. James Poterba & Todd Sinai, *Tax Expenditures for Owner-Occupied Housing: Deductions for Property Taxes and Mortgage Interest and the Exclusion of Imputed Rental Income*, 98 AM. ECON. REV. 84, 85, 89 (2008).

123. *Id.* at 85.

124. *Id.*

125. BARBARA SARD & WILL FISCHER, CTR. ON BUDGET AND POLICY PRIORITIES, RENTER’S TAX CREDIT WOULD PROMOTE EQUITY AND ADVANCE BALANCED HOUSING POLICY 1 (2013), available at <http://www.cbpp.org/files/7-13-12hous.pdf>.

126. *Id.*; see also Peter Dreier, *The New Politics of Housing: How to Rebuild the Constituency for a Progressive Federal Housing Policy*, 63 J. AM. PLAN. ASS’N 5, 9 (1997) (“In fact, mortgage interest deductions for those earning over \$100,000 are a sum greater than the entire HUD budget.”) (quoting Iglesias, *supra* note 41, at 559). *But see The Facts Ad: Defending the Mortgage Interest Deduction*, NAT’L ASS’N REALTORS, <http://www.scribd.com/doc/78537527/The-Facts-Ad-Defending-the-Mortgage-Interest-Deduction> (last visited Apr. 3, 2015).

127. FISCHER & SARD, CHART BOOK, *supra* note 25.

\$200,000.<sup>128</sup> In 2010, the average household in the lower-income group received an expenditure of \$1471, compared with benefits valued at \$7014 for households in the more affluent cohort.<sup>129</sup> Unlike the rental assistance programs directed towards low-income households, tax expenditures<sup>130</sup> for homeownership are an entitlement; all who qualify receive this assistance.

The HMID skews federal housing policy towards higher-income households. Writing over forty years ago, Stanley Surrey, a law professor and Assistant Secretary of the Treasury for Tax Policy who introduced the term “tax expenditure,” noted that the HMID diverted government spending away from addressing “the woefully inadequate supply of decent housing.”<sup>131</sup> Although there were efforts to reform or eliminate the deduction following World War II, growing popular support pushed these off the table.<sup>132</sup>

As discussed in Part III, any attempt to reform federal housing policy to better accord with the most relevant conceptions of distributive justice demands radical reforms to the HMID. Part II first focuses more narrowly on the distribution of rental assistance through the three primary HUD programs. As noted earlier, these programs share similar benefit structures and comparable target populations.<sup>133</sup> They also serve 4.4 million households and deny assistance to three times as many households that satisfy eligibility requirements.<sup>134</sup> As such, while moving towards a

---

128. *See id.* (considering expenditures for mortgage interest and property tax deductions, Housing Choice Voucher, Section 8 Project-Based, Section 202, and Section 811 programs).

129. *Id.*

130. What constitutes a “tax expenditure” is the subject of much debate. In its simplest form, a tax expenditure represents a government spending program administered through the tax laws. *See* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957 n.1 (2004); *see also* Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1158. Stanley Surrey, a law professor and Assistant Secretary of the Treasury for Tax Policy, who introduced the term “tax expenditure,” argued in the late 1960s that federal housing tax policies, which gave the most significant subsidies to the wealthiest taxpayers, created an inequitable and “upside-down result utterly at variance with usual expenditure policies.” Ventry, *supra* note 120, at 264 (quoting STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 37 (1973)); *see also* Thuronyi, *supra*, at 1158 n.18.

131. Ventry, *supra* note 120 at 264 (quoting SURREY, *supra* note 130, at 294). Surrey argued that that federal housing tax policies, which gave the most significant subsidies to the wealthiest taxpayers, created an inequitable and “upside-down result utterly at variance with usual expenditure policies.” *Id.* at 264 (quoting SURREY, *supra* note 30, at 122).

132. *Id.* at 252–74.

133. *See supra* notes 33–37 and accompanying text.

134. *See supra* note 36 and accompanying text.

more equitable distribution of the benefits provided through these three programs will not address all of the vertical and horizontal equity issues that the federal housing programs raise, it will affect a substantial number of the most vulnerable households and help inform subsequent reflection on the roles of these other programs within the broader matrix of federal housing policy.

#### D. *Proposed Reforms of Existing Rental Assistance Programs*

Proposals to reform existing rental assistance programs fall into two broad categories. Some suggest reducing the cost of housing provision or of program administration. Others recommend changes to the rules governing selection and eligibility of beneficiaries.

Reflecting the former approach, the high costs of providing supply-side, project-based assistance (both privately owned subsidized housing and public housing) has led some to suggest a gradual phasing out of these forms of assistance in order to free up more money for arguably less-expensive vouchers.<sup>135</sup> Proponents contend that this would allow the transformation of benefits into an entitlement available to all who qualify.<sup>136</sup> Other proposals seek to reduce administrative costs. Economist Edward Glaeser suggests that housing vouchers be administered as a tax credit for every eligible low-income family, based on the difference between their income and documented rent.<sup>137</sup> He contends that such an approach “could radically reduce administrative costs, enhance mobility and increase fairness.”<sup>138</sup> Similarly, John Quigley proposed, as an ideal program design, transforming existing housing subsidies into an entitlement program that would operate akin to food stamps or the EITC.<sup>139</sup> Quigley emphasized the

---

135. See U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL HOUSING ASSISTANCE, *supra* note 18, at 17 (“We estimate that, in the same general location, it costs more, on average, to provide one- and two-bedroom units under each of the production programs than it does under the voucher program.”).

136. OLSEN, LOW-INCOME HOUSING ASSISTANCE, *supra* note 12, at 5.

137. Edward Glaeser, *If HUD Must Close, Let's Keep its Best Programs*, BLOOMBERG BUS. (Apr. 23, 2012), <http://www.bloomberg.com/news/2012-04-23/if-hud-must-close-let-s-keep-its-best-programs.html>.

138. *Id.*

139. Quigley, *Just Suppose*, *supra* note 7, at 309. The EITC reduces benefits less slowly than income rises, so as to avoid creating a disincentive to work. See John J. Infranca, *The Earned Income Tax Credit as an Incentive to Report: Engaging the Informal Economy Through Tax Policy*, 83 N.Y.U. L. REV. 203, 211–17 (2008) (explaining program structure).

potential for such a program to reduce existing inequities but acknowledged that the path dependence of current program structure rendered such changes unlikely.<sup>140</sup>

In contrast, the latter set of reform proposals focuses on determinants of household eligibility and on more direct changes to the distribution of benefits among eligible households. Proposals to change the rules governing selection and eligibility include imposing work preferences or requirements,<sup>141</sup> reducing the amount of benefits,<sup>142</sup> placing time-limits on the receipt of assistance,<sup>143</sup> or stepping up, over time, the percentage of a household's income that must be paid towards rent (thereby reducing the amount of the subsidy received).<sup>144</sup> Still others recommend lowering the income level at which individuals qualify for assistance to a level at which it would be feasible to provide assistance to all eligible individuals. Along these lines, the Bipartisan Housing Commission

---

140. Quigley, *Just Suppose*, *supra* note 7, at 309–12. In other work Quigley proposed a low-income rental housing subsidy administered by the IRS, noting that, in addition to potential savings in administration, “[u]sing the tax code to support low-income renters may . . . further national goals of equity in the tax treatment of housing by the federal government.” John M. Quigley, *Rental Housing Assistance*, 13 CITYSCAPE 147, 151 (2011) [hereinafter Quigley, *Rental Housing Assistance*].

141. BIPARTISAN MILLENNIAL HOUS. COMM’N, *supra* note 42, at 5 (recommending “several measures to move assisted families up and out of assisted housing units, over time, through a combination of work requirements and supportive services, enabling them to increase their incomes and freeing up the housing units for other, currently unassisted families”). The Commission expressly recommended adding work requirements modeled on welfare reform. *Id.* at 50–52.

142. See Cutts & Olsen, *supra* note 10, at 238. Part II of this article returns to Cutts and Olsen’s proposal in discussing equality of welfare. See *infra* notes 163–65 and accompanying text.

143. Over the years various proposed voucher reform acts have included mandatory time limits. These proposals have gained little traction. For example, Representative Gary Miller of California proposed an amendment to the Section 8 Voucher Reform Act of 2007 that would have limited Section 8 assistance to 84 months, with an exception for elderly and disabled individuals and the possibility for a hardship exception. See KATHY CASTOR, PROVIDING FOR CONSIDERATION OF THE BILL (H.R. 1851) TO REFORM THE HOUSING CHOICE VOUCHER PROGRAM UNDER SECTION 8 OF THE UNITED STATES HOUSING ACT OF 1937, H.R. REP. NO. 110-227, pt. 3, at 10–11 (2007) (Gary Miller, Sec. 6: Time Limitation on Assistance). The amendment was not agreed to by voice vote. FINAL VOTE RESULTS FOR ROLL CALL 625, available at <http://clerk.house.gov/evs/2007/roll625.xml>; CLERK.HOUSE.GOV (July 12, 2007, 9:27 PM). *Final Vote Results for Roll Call 625*, available at <http://clerk.house.gov/evs/2007/roll625.xml>. An effort in 2012 to impose a five year limit and a work requirement also failed. Section 8 Reform, Responsibility, and Accountability Act of 2012, H.R. 4145, 112th Cong. §§ 2, 3, 4, 5 (2012).

144. BIPARTISAN MILLENNIAL HOUS. COMM’N, *supra* note 42, at 44 (suggesting as incentive for seeking employment, setting rents at 30% of income in first year of assistance and then gradually stepping up the share of income that goes towards rent in subsequent years).

of 2013 recommended shifting voucher assistance from continuing to serve households with incomes up to 80% of AMI towards serving only households with incomes that do not exceed 30% of AMI, but providing assistance to all eligible households with such incomes.<sup>145</sup>

Despite their persistence, some of these ideas have encountered difficulties when put into practice. A number of housing agencies imposed time limits during the early stages of the Moving to Work Demonstration, with the goal of encouraging self-sufficiency.<sup>146</sup> The Moving to Work program provided housing agencies with flexibility in administering vouchers and other federal housing programs, enabling them to introduce new initiatives, particularly those aimed at employment and self-sufficiency or at increasing recipients' housing choices.<sup>147</sup> All of these PHAs "largely abandoned time limits" although some continued to consider "mandatory minimum rents or subsidies that decreased over time, regardless of a household's income."<sup>148</sup>

Despite this record, strong interest in time limits and other reforms remains. A recent *Wall Street Journal* article reported that President Obama's 2014 budget proposal included a call for "substantial expansion" of the Moving to Work Demonstration to allow PHAs to create additional incentives for residents to become financially independent, including by instituting time limits and work requirements.<sup>149</sup> While the leaders of some housing authori-

---

145. BIPARTISAN HOUS. COMM'N OF 2013, at *supra* note 15 at 90. This proposal would cost an estimated \$22.5 billion annually. *Id.*

146. There is no conclusive evidence of the effect of Moving to Work on resident self-sufficiency, due in part to the lack of consistent data collection. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-581, RENTAL HOUSING ASSISTANCE: HUD DATA ON SELF-SUFFICIENCY PROGRAMS SHOULD BE IMPROVED 29 (2013) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, RENTAL HOUSING ASSISTANCE]; see also APPLIED REAL ESTATE ANALYSIS, INC. & THE URBAN INST., THE EXPERIENCES OF PUBLIC HOUSING AGENCIES THAT ESTABLISHED TIME LIMITS POLICIES UNDER THE MTW DEMONSTRATION; 27 (2007) (finding "limited evidence that exists suggests a mix of outcomes" for housing assistance recipients).

147. U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING CHOICE VOUCHERS *supra* note 17, at 7.

148. *Id.* at 38 (citing APPLIED REAL ESTATE ANALYSIS, INC. & THE URBAN INST., *supra* note 146). In addition, some have criticized these proposals on the grounds of a lack of evaluation of their effectiveness. See generally BARBARA SARD & WILL FISCHER, CTR. ON BUDGET & POL'Y PRIORITIES, BIPARTISAN LEGISLATION WOULD BUILD ON HOUSING VOUCHER PROGRAM'S SUCCESS BUT WORTHWHILE REFORM BILL HOLDS RISKS FROM EXPANDED DEREGULATION AUTHORITY 2 (2007); MARGERY AUSTIN TURNER, URBAN INST., STRENGTHS AND WEAKNESSES OF THE HOUSING VOUCHER PROGRAM (2003).

149. Jennifer Levitz, *Public Housing Agencies Push to Impose Time Limits, Work Re-*

ties expressed support for such changes, asserting they would enable them to serve more people, housing advocates asserted the changes would force individuals to prematurely lose rental assistance and simply cycle families back onto the waiting list.<sup>150</sup> Abandoning time limits because they are perceived to have failed in encouraging self-sufficiency does not address the question of whether they might succeed in addressing inequities in benefit distribution. More broadly, although experiments with time limits and other reforms may reveal their effects, by itself the study of program experience “cannot resolve the issues of basic fairness and balancing hardships that are raised by such proposals.”<sup>151</sup> Part II explores these questions of basic fairness in depth.

## II. EXAMINING HOUSING ASSISTANCE IN LIGHT OF DIFFERENT THEORIES OF DISTRIBUTIVE JUSTICE

Although federal low-income rental housing policy is often dismissed as inequitable, there has been no sustained analysis of exactly how existing policy violates specific understandings of distributive justice. This analysis begins by framing the scope of the inquiry that follows, including a discussion of whose interests should be considered when assessing the distribution of housing assistance. There has been much debate in the philosophical literature regarding the specific element of an individual’s condition that should be the focus of concern for those who seek greater equality.<sup>152</sup> Part II examines arguments in favor of distribution on the basis of equality of welfare, desert, and equality of resources, as well as the Rawlsian difference principle, which favors a distribution that prioritizes not equality but rather the maximum welfare of the worst off individual. It also considers the capability

---

*quirements for Aid Recipients*, WALL ST. J. (May 6, 2013), <http://www.wsj.com/articles/SB10001424127887323820304578410382522144560> (noting five-year time limit for housing vouchers in Tacoma, Washington and proposed time limits in San Mateo, California, San Antonio, and Alaska).

150. *Id.*

151. ROD SOLOMON, BROOKINGS INST. METRO. POLICY PROGRAM, PUBLIC HOUSING REFORM AND VOUCHER SUCCESS: PROGRESS AND CHALLENGES 48 (2005).

152. See, e.g., Richard J. Arneson, *Opportunity for Welfare, Priority, and Public Policy*, in GLOBALIZATION, CULTURE, AND THE LIMITS OF THE MARKET: ESSAYS IN ECONOMICS AND PHILOSOPHY 177, 181 (Steven Cullenberg & Prasanta K. Pattanaik eds., 2004) (“The major divide in the equality-of-what debate is resources versus welfare. Although deep, the divide is unclear.”); Norman Daniels, *Equality of What: Welfare, Resources, or Capabilities?*, 50 PHIL. & PHENOMENOLOGICAL RES. 273, 277 (1990); Amartya Sen, *Equality of What?*, in THE TANNER LECTURE ON HUMAN VALUES 197 (1980) [hereinafter Sen, *Equality of What?*].

approach, which does not provide a complete theory of distributive justice, but instead calls for a substantive reframing of the information bases used to evaluate specific policies.<sup>153</sup>

In the course of presenting each of these frameworks, this part discusses how well existing rental assistance policy advances a given theoretical approach and evaluates how each theory might inform potential reform. It also considers the extent to which each theory's conception of the proper aim of distributive justice aligns with the goals and purposes of federal rental assistance programs, as revealed in Part I, and the potential for practical reforms to existing programs that would implement these theoretical commitments. The discussion that follows inevitably entails certain simplifications of the theories under discussion, which will be made clear as necessary.

#### A. *Framing the Analysis*

There are three caveats to note at the outset. First, as currently structured, federal housing policy clearly fails to satisfy any plausible theory of distributive justice. This is true even if we focus solely upon distribution among eligible beneficiaries of rental assistance, but is, as noted, even more apparent if we look more broadly at the federal government's support for housing through the mortgage interest deduction and other housing policies. The inequitable distribution of rental assistance specifically is partly due to the myriad policy goals this assistance is enlisted to serve—which include many worthy, but expensive, objectives. Nonetheless, there are specific ways in which federal rental assistance policy shows concern for some of the normative principles discussed in this part. Accordingly, what follows highlights these instances and uses them as starting points to think more systematically about how rental assistance policy and housing assistance policy more generally can be reformed to better accord with distributive justice concerns.

Second, there is an undeniable challenge in trying to translate theories of justice into specific policy recommendations. This may be because these theories often deem the proper subject of justice to be a more holistic and systemic consideration of the broad

---

153. See *infra* notes 229–98 and accompanying text.



structures of society.<sup>154</sup> Theories may simply fail to provide principles sufficiently specific to indicate particular policies<sup>155</sup> or they may demand perfect information regarding a law's effects on rather far-flung issues and people.<sup>156</sup> Most decisionmakers will be unable to ascertain a law's impact on so broad of scale, or will be constrained with regards to which laws and institutions they exercise control over. Despite these concerns, evaluating federal housing policy in light of theories of distributive justice will help clarify the choices that are already being made and how more equitable choices can be made in the future—even if the ideal distribution remains elusive. At the very least a clearer articulation of how housing policy accounts for distributive concerns, even if imperfectly, should strengthen the political legitimacy of existing programs.

Third, the varying goals ascribed to federal rental assistance suggest a range of ways to define the beneficiaries of this assistance. Goals such as eliminating concentrations of poverty, increasing access to opportunity, encouraging integration, and furthering community development,<sup>157</sup> broaden the scope of whose

154. Waldron, *supra* note 29, at 803 (ascribing this view to Rawls). In framing his topic of social justice Rawls states that “the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” JOHN RAWLS, A THEORY OF JUSTICE 7 (1971). In *Justice as Fairness: A Restatement*, Rawls notes that for purposes of his theory, distributive justice refers to the basic structure of “society as a fair system of social cooperation over time.” JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 50 (2001). He contrasts this with the subject of this article's inquiry, which he frames as “allocative justice”—the “problem of how a given bundle of commodities is to be distributed.” *Id.*; see also Vicki Been, *What's Fairness Got to Do with It?: Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1048 (1993) (noting that Rawls's theory of justice “addresses the design of fair institutional structures, not the fairness of individual distributional choices”).

155. Waldron, *supra* note 29, at 803. (“In Rawls's theory and in other theories of justice there is considerable distance between the models that the theory uses and the principles that it generates, on the one hand, and particular policy recommendations, on the other.”).

156. Waldron distinguishes socioeconomic rights—which focus on narrow areas of policy—from justice, declaring that

what the Rawlsian theory generates, regarding what is required in the way of (say) education will emerge from a process in which both the competition between education and other demands on resources and the relation between the impact of educational arrangements and the impact of other arrangements on people's life prospects have been properly considered together.

*Id.* at 803–04.

157. See BIPARTISAN HOUS. COMM'N OF 2013, *supra* note 15, at 11, 52 (“While rental assistance is usually categorized as a social program designed to help meet the basic needs of low-income families, it is also a large-scale investment in the physical infrastructure of our communities. By closing the gap between the cost of owning and operating decent

interests must be considered when analyzing the distributive impact of a particular housing policy.<sup>158</sup> These goals partly frame rental assistance as a public good and not simply an individual benefit.<sup>159</sup> On this account the potential beneficiaries could, for example, include all individuals within a certain distance of assisted housing. This perspective, it must be conceded, differs from the typical perception of assisted housing units—which communities often fight to exclude.<sup>160</sup> Yet some recent research indicates that subsidized housing can positively affect neighboring property values (although this effect may be more pronounced in neighborhoods with lower property values overall).<sup>161</sup> Similarly, if integration is truly a public good then those benefited will include not only those coming into a community and making it more integrated, but also those already living in the community. Considering this broader range of potential beneficiaries adds substantial complexity to an analysis of the fairness of any existing or proposed distribution. Providing a fuller account of rental assistance as a public good and of how the interests of “indirect beneficiaries” of this assistance might be weighed is beyond the scope of this article. As such, what follows focuses on the direct beneficiaries of rental assistance: the individuals the distribution of this limited resource most affects. Part III argues that the proposed housing resource bundle approach not only best provides for the most equitable distribution among direct recipients, but also better serves many of the broader concerns identified.

---

housing and the rent that extremely low-income tenants can afford to pay, rental assistance programs sustain a valuable component of our physical infrastructure that otherwise would be jeopardized.”)

158. Even more broadly, the simple goal of providing decent housing to individual households can be said to benefit individuals beyond the direct recipients of housing. If this housing furthers self-sufficiency it should benefit the broader society by reducing demands on public funds or by strengthen the overall economy by means of higher rates of employment.

159. Along these lines, New Jersey case law recognizes public housing as a use that “inherently serves the public good” so as to satisfy the showing of a “special reason” required to obtain a use variance. *Saddle Brook Realty v. Twp. of Saddle Brook Zoning Bd. of Adjustment*, 906 A.2d 454, 460 (N.J. Super. Ct. App. Div. 2006).

160. See, e.g., Joseph Berger, *An Affordable Housing Project Faces Opposition in Wealthy Chappaqua*, N.Y. TIMES, Feb. 18, 2014, at A18.

161. See, e.g., Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?*, 26 J. POL'Y ANALYSIS & MGMT. 257, 257–58 (2007) (finding that federally subsidized housing does not typically reduce neighboring property values and in some instances increases property values); Amy Ellen Schwartz et al., *The External Effects of Place-Based Subsidized Housing*, 36 REGIONAL SCI. & URB. ECON. 679, 680 (2006).

## B. *Theories of Justice*

### 1. Equality of Welfare

Under a distributive theory focused on equality of welfare “goods are distributed equally among a group of persons to the degree that the distribution brings it about that each person enjoys the same welfare.”<sup>162</sup> Defining “welfare” can prove contentious. It may be understood objectively, such as the fulfillment of certain fundamental needs. Or it may be understood subjectively, based on the satisfaction of individual preferences.<sup>163</sup> A subjective understanding can lead to challenges of accounting for expensive tastes and preferences, the satisfaction of which might demand substantially more resources.<sup>164</sup> In an article critiquing the equality of welfare approach, Ronald Dworkin acknowledges its “immediate appeal,” which “lies in the idea that welfare is what really matters to people, as distinct from money and goods, which matter to them only instrumentally, so far as they are useful in producing welfare.”<sup>165</sup>

In a limited sense the general structure of the primary forms of rental assistance (public housing and both forms of Section 8) reflect some concern with equality of welfare, at least among those fortunate enough to receive assistance. The programs are designed to provide recipients with housing that meets certain minimum standards of quality but that does so without providing equal resources (in terms of the amount of financial assistance) to individual recipients. More specifically, rental assistance resources are allocated among recipients to provide each recipient

---

162. Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 82 (1989) [hereinafter Arneson, *Equality and Equal Opportunity*]; see also Dworkin, *Equality of Welfare*, *supra* note 29, at 186 (stating that equality of welfare “holds that a distributional scheme treats people as equals when it distributes or transfers resources among them until no further transfer would leave them more equal in welfare”).

163. See Arneson, *Equality and Equal Opportunity*, *supra* note 162, at 82; (“I take welfare to be preference satisfaction.”); Daniels, *supra* note 152, at 277.

164. See Dworkin, *Equality of Welfare*, *supra* note 29, at 189. Some egalitarian theorists argue not for equality of welfare itself, but rather in favor of “equal opportunity for welfare,” a perspective this article returns. See Arneson, *Equality and Equal Opportunity*, *supra* note 162, at 84–87.

165. Dworkin, *Equality of Welfare*, *supra* note 29, at 207. Earlier in the same text, Dworkin observes that “the concept of welfare was invented or at least adopted by economists precisely to describe what is fundamental in life rather than what is merely instrumental. It was adopted, in fact, to provide a metric for assigning a proper value to resources: resources are valuable so far as they produce welfare.” *Id.* at 188.

with housing at (or above) a specified standard and at a cost to the recipient of no more than 30% of income.<sup>166</sup> The payment standard for a program can be increased in a given locale with high housing costs, ostensibly to ensure that the assistance provided is sufficient to attain this minimum standard of housing quality.<sup>167</sup> Rental assistance programs are designed to operate, as David Super notes, as “functional entitlements.”<sup>168</sup> They adjust, based on a recipient’s income and local rents, to guarantee that the assistance provided “will meet some qualitatively definable need of its beneficiaries.”<sup>169</sup>

This is, of course, a simplified understanding of equality of welfare as it assumes a uniform and apersonal conception of welfare—provision of housing units of basically equal (or at least some minimum) quality—without consideration of the individual preferences and tastes (potentially refined and expensive) that affect actual welfare. Nonetheless, if we consider what has historically been emphasized as one of, if not the, primary goals of housing assistance policy—providing “a decent home and a suitable living environment for every American family”<sup>170</sup>—there is an implicit concern, at least within the set of direct recipients of assistance, with equality of welfare insofar as an assumed preference for adequate housing is an important component of welfare and a fundamental need.<sup>171</sup> In addition, historic changes in federal rental assistance policy have likely had a positive effect on the subjective welfare of recipients. The shift towards demand-side subsidies, in the form of vouchers, enable a voucher recipient to better express their preferences (albeit constrained by the pool of available and eligible units and of landlords willing to accept a voucher) through their choice of a particular unit and a particular locale versus an individual receiving a specific public housing unit.<sup>172</sup>

---

166. See *supra* notes 82–83 and accompanying text.

167. *Id.*

168. David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 657 n.109 (2004).

169. *Id.* at 655.

170. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended at 42 U.S.C. § 1441a (2012)); see also BIPARTISAN HOUS. COMM’N OF 2013, *supra* note 15, at 85–88; BIPARTISAN MILLENNIAL HOUS. COMM’N, *supra* note 42, at 22–23.

171. This depends upon reading “suitable living environment” to refer to conditions within a housing unit, rather than the neighborhood environment.

172. See Ellickson, *supra* note 1, at 999 (noting that vouchers are likely to be superior

Of course, our focus is not equality only among the one in four eligible individuals who receive assistance. Once we take a step back from current recipients, we see a substantial failure to achieve equality of welfare—whether measured objectively or subjectively—among all those eligible for rental assistance (and an even more glaring failure if we consider the distribution of all forms of housing assistance). One can debate whether the scarcity of resources for rental assistance specifically is simply due to a lack of political will.<sup>173</sup> However, if one accepts as fixed the total resources allocated towards rental assistance, a deeper commitment to equality of welfare—understood in a simplified fashion as providing all eligible households with housing of similar quality at the cost of an equal percentage of their income—would demand a shift towards substantially smaller sums of assistance for individual recipients.

There have been suggestions of reform along these lines in the economics and policy literature. Amy Cutts and Edgar Olsen suggest reducing HUD's FMRs, which would substantially lower the maximum subsidy available, allowing for the same budget "to serve many additional families."<sup>174</sup> Their analysis finds that the minimum rent necessary to obtain a housing unit that meets program standards regarding space and condition is substantially less than the FMR in eleven cities studied.<sup>175</sup> Although they acknowledge that some families may choose not to participate in the program if the subsidy is reduced, Cutts and Olsen contend that reducing the FMR will serve more families and that "a higher fraction of the budget will go to the poorest families."<sup>176</sup>

Another option would be to impose stringent time limits. A lifetime limit on the number of years an individual can receive assistance, without more, would eventually achieve equality of welfare among those eligible by simply shrinking the pool of eligible

---

to project-based assistance "in placing assisted tenants in dwellings whose locations and designs suit their preferences").

173. See Grigsby & Bourassa, *supra* note 7, at 812 (contending that failure to transform housing assistance over the prior three decades into an entitlement "is less a reflection of fiscal constraints than of a lack of political interest.").

174. Cutts & Olsen, *supra* note 10, at 228.

175. *Id.* at 222, 224–75 tbl.2.

176. *Id.* at 234. Along these lines, France provides a less-generous form of housing assistance as an entitlement. Ellickson, *supra* note 1, at 987 (citing Anne Laferrère & David Le Blanc, *Housing Policy: Low-Income Households in France*, in *A COMPANION TO URBAN ECONOMICS* 159, 165 (Richard J. Arnott & Daniel P. McMillen eds., 2006)).

households until the number remaining can all receive assistance. But this hardly seems a triumph of distributive justice, particularly if those individuals' housing needs remain unmet.

If distribution is patterned on some objective measure of welfare—such as “a decent home and a suitable living environment”<sup>177</sup>—it furthers only one of the goals of federal rental assistance. To move away from an objective understanding of equality of welfare, and more seriously consider individual subjective preferences, would demand substantial administrative costs in order to evaluate the welfare of individual recipients. Such a task—to the extent it is even possible—is beyond the expertise of those who administer housing programs.<sup>178</sup> Accordingly, even if equality of welfare is a proper concern of distributive justice in an ideal state, it does not provide practical guidance for distributing resources through the hands of a limited government agency.

## 2. Desert-Based Theories

Desert-based principles of distributive justice allocate resources based upon a particular basis of desert. Potential bases may include the effort expended by individuals in some particular activity or the value of the contribution an individual's work activity makes to society.<sup>179</sup> The determination of what constitutes a legitimate desert-basis typically depends upon a prior consideration of “external goals and values—goals and values which *cannot* be found by an examination of the concept of desert itself.”<sup>180</sup> Contemporary desert-principles emphasize the importance of goals such as raising the collective standard of living, or “social product,” and accordingly, “only activity directed at raising the social

---

177. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended at 42 U.S.C. § 1441a (2012)).

178. Comparisons of individual welfare will, as Dworkin notes, often simply be indeterminate. See Dworkin, *Equality of Welfare*, *supra* note 29, at 191.

179. These approaches to distribution have a lineage that goes back to Aristotle, but more directly descend from John Locke's theory of property. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 201–02 (1990); see also Julian Lamont & Christi Favor, *Distributive Justice*, in *STAN. ENCYCLOPEDIA OF PHIL.* (Edward N. Zalta ed., 2013), available at <http://plato.stanford.edu/archives/spr2013/entries/justice-distributive/>.

180. Julian Lamont, *The Concept of Desert in Distributive Justice*, 44 *PHIL. Q.* 45, 47 (1994).

product will serve as a basis for deserving income.”<sup>181</sup> On this account the valuing of higher living standards motivates the decision to reward productive activity.<sup>182</sup>

Engagement in paid employment is a standard example of a socially productive activity. With this as a desert-basis we might invoke the principle of desert to inform the allocation of rental assistance in two broad fashions: through a preference for households that simply satisfy, without regard to the intensity of their activity, the desert principle<sup>183</sup> or through a change to the benefit structure that imposes time limits but provides an exception for those engaged in work or who satisfy some other metric of desert.<sup>184</sup> With regards to the former, PHAs are expressly allowed to implement a preference for working families when administering their waiting list for both Public Housing and Housing Choice Voucher programs.<sup>185</sup> However, emblematic of the programmatic

181. Lamont & Favor, *supra* note 179.

182. As Julian Lamont frames it, if an increase in the social product is what is valued, then “it is *because* people have contributed to society’s happiness that they deserve *X*. The fact that giving them *X* may also have the effect of maximizing happiness in the long run does not enter into the justification.” Lamont, *supra* note 180, at 61–62. To frame the matter in the inverse, as Lamont notes, would be to adopt a utilitarian analysis focused on social utility. *Id.* at 60 (“[T]o say ‘S deserves X because giving it to him would be in the public interest’ is simply to misuse the word ‘deserves.’”) (quoting JOEL FEINBERG, *DOING AND DESERVING* 81 (1970)).

183. Somewhat along these lines, Alan Zaitchik provides a defense of effort as a basis for desert in *On Deserving to Deserve*. He first distinguishes what he terms “competitive cases” and “noncompetitive cases.” Alan Zaitchik, *On Deserving to Deserve*, 6 PHIL & PUB. AFF. 370, 379 (1977). In the case of the latter, the amount of a good that one person receives will not adversely affect the amount that anyone else can receive. Given an unlimited supply of the good an individual who satisfies some minimal and standard condition would automatically deserve the good. *Id.* at 381. Zaitchik proposes an egalitarian desert-for-effort theory that, rather than award shares according to *relative* desert, as an Aristotelian might, would instead give an equal share to everyone who simply satisfies the minimal conditions necessary to deserve a share: “[A]nyone who has made an effort deserves to be a participant in the distributive game and is worthy of having his needs met.” *Id.* at 385. However, given that housing assistance is not, as currently funded, a good in unlimited supply, this approach would not be workable.

184. In fact, a significant share of housing assistance beneficiaries is employed. Sixty-six percent of non-elderly and non-disabled HCV households either worked in 2010 or had worked recently. BARBARA SARD & THYRIA ALVAREZ-SANCHEZ, *CTR. ON BUDGET & POLICY PRIORITIES, LARGE MAJORITY OF HOUSING VOUCHER RECIPIENTS WORK, ARE ELDERLY, OR HAVE DISABILITIES: HIGHER HOUSING COSTS DRIVE LONGER STAYS FOR WORKING FAMILIES* 5–6 (2011), available at <http://www.cbpp.org/files/12-2-11hous.pdf>. An additional 11% of households received assistance through a state TANF program that imposes work requirements on most adult recipients. *Id.* at 6. As of 2010, “88 percent of all voucher households were elderly, disabled, working (or recently worked), or likely to be subject to a work requirement under the Temporary Assistance for Needy Families (TANF) program.” *Id.* at 1.

185. U.S. DEP’T OF HOUS. & URBAN DEV., PUB. & INDI. HOUS., NOTICE PIH 2011-33, USE

tensions outlined in Part I, any preference policy must be pursued in a manner that does not increase minority concentration, and a PHA must simultaneously continue to target assistance towards ELI households and promote poverty deconcentration and income mixing in public housing.<sup>186</sup> The second possibility would be to impose time limits on the receipt of benefits, coupled with an exception that allows households with earned income to receive benefits indefinitely, but subject to paying a higher percentage of their earned income towards rent. Along these lines, at least one local agency participating in the Moving to Work Program instituted a rent structure that gradually increases the percentage of household income paid towards rent, with the stated goal of promoting self-sufficiency among recipients.<sup>187</sup> Reforming the structure of rental assistance to promote self-sufficiency is different, however, from invoking a desert principle to reward work.<sup>188</sup> However, the same policy may serve as both a reward for desert and an incentive for future behavior.<sup>189</sup>

A study by HUD of how PHAs used their discretion to set preferences for receipt of voucher benefits revealed that some conception of desert informed the preferences that certain PHAs choice.<sup>190</sup> While some PHAs imposed preferences for working indi-

---

OF WORK PREFERENCES AS A PUBLIC HOUSING WAITING LIST MANAGEMENT TOOL AND AS A LEASE PROVISION FOR CERTAIN PUBLIC HOUSING BUILDINGS 1–2 (2011) [hereinafter USE OF WORK PREFERENCES]. A working family preference must also be given to a family “if the head and spouse or sole member is age 62 or older, or is a person with disabilities.” *Id.* (citing 24 C.F.R. § 960.206(b)(2) (2014)).

186. USE OF WORK PREFERENCES, *supra* note 185, at 4–5. Moreover, preferences must be set aside if they have an impermissible fair housing effect, such as by perpetuating segregated housing patterns or act as a barrier to affirmatively furthering fair housing. *See* *Davis v. New York City Hous. Auth.*, 278 F.3d 64, 71 (2d Cir. 2002) (evaluating impact of preference on existing requirements for desegregation of developments); *Comer v. Cisneros*, 37 F.3d 775, 795 (2d Cir. 1994) (same); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 40 (D. Mass. 2002) (same).

187. U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING CHOICE VOUCHERS, *supra* note 17, at 31. In years 1 and 2, households paid 27% of their gross income towards rent, in years 3 and 4, they paid the greater of 29% of income or \$100, and in subsequent years they paid the greater of 31% of income or \$200. *Id.* According to the GAO, as a result of this structure “households receive more subsidy in the first 2 years, but pay more rent over time than under current rent structure.” *Id.*

188. *Lamont & Favor*, *supra* note 179. (“Payments designed to give people incentives are a form of entitlement particularly worth distinguishing from desert-payments as they are commonly confused.”).

189. *Id.*

190. DEVINE ET AL., *supra* note 91, at 8; *see also* Josh Leopold, *The Housing Needs of Rental Assistance Applicants*, 14 CITYSCAPE 275, 277 (2012) (noting that most common preferences were for employed applicants, local residents or workers, involuntarily displaced individuals, and domestic violence victims).



viduals in order to “support . . . upward mobility,” this was often coupled with a preference for individuals who are already working or, as framed by one PHA, for “help[ing] people who help themselves.”<sup>191</sup>

Although using desert as a distributive basis accords with the stated motivations for the preferences that certain PHAs established, it does not provide a suitable basis for the allocation of rental assistance benefits. A few objections arise. First, measuring desert can prove difficult even if there is broad agreement on the desert basis. If the desert-basis is effort expended in work, an individual’s earnings, which may provide the easiest metric, are not necessarily a perfect measure of desert. Earnings may measure productivity, but to measure effort one would at least need to consider the number of hours worked, if not also some measure of how demanding the work itself is.<sup>192</sup> Even if hours of work is deemed a worthy proxy, one might ask whether commuting hours—typically a larger share of the day for lower-waged workers forced to live in less expensive locales—should be added or whether hours should be deducted for jobs with ample idle time. Second, the distinction between productivity and effort gets at a key issue in the philosophical literature on desert, the question of the voluntariness of any particular desert-basis. Proponents of other theories of distributive justice reject desert principles on the grounds that these approaches simply provide for distribution based on the arbitrary allocation of natural assets. John Rawls, for example, contended that because “no one deserves his place in the distribution of native endowments,” nor the superior character that drives him to cultivate these abilities, individuals have no valid claim to a greater share of benefits on the basis of desert.<sup>193</sup> For these and other reasons, while desert plays an important part in people’s commonsense attitudes towards public

---

191. See DEVINE ET AL., *supra* note 91, at 8–9 (“The philosophy of one small PHA in the West is that preferences should be designed to help people who help themselves, and it is for this reason that they maintain a preference for those who are working.”).

192. See Lamont, *supra* note 180, at 57.

193. RAWLS, A THEORY OF JUSTICE *supra* note 154, at 104. Rawls does acknowledge that one may be entitled to certain things—in order to further expectations that will elicit one’s efforts, given the existing rules of an established social scheme. *Id.* at 103. This does not, however, imply that one *deserves* these things in the first place. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 71 (2d ed. 1998); see also *id.* at 88 (“For Rawls, the principles of justice aim neither at rewarding virtue nor at giving people what they deserve, but instead at calling forth the resources and talents necessary to serve the common interest.”).

policy and the stated motivations for certain proposed reforms to housing policy,<sup>194</sup> the concept has little importance in contemporary liberal theory.<sup>195</sup>

More practical objections also exist. Desert-based principles also fail to provide a complete theory for determining the distribution of assistance.<sup>196</sup> Although they might provide a means for allocating benefits among able-bodied working adults, they do not offer a clear principle for allocation among children, elderly, and disabled individuals, three groups that comprise a substantial share of rental assistance beneficiaries.<sup>197</sup> In addition, unlike the EITC, which rewards earned income by providing individuals with a refundable credit when they file their tax returns at the end of the year,<sup>198</sup> the distribution of rental assistance cannot easily respond to changes in a desert-basis such as work.<sup>199</sup> Housing cannot simply be granted and taken away, like a tax credit, in response to past behavior. In sum, desert should not play the primary role in determining the proper distribution of rental assistance.

### 3. Equality of Resources

A third approach to distributive justice focuses on the sum of resources expended on each individual rather than some measure, such as welfare, of the outcome of that allocation. A distributive theory that endorses equality of resources seeks to establish equality by distributing or transferring resources “so that no further transfer would leave [people’s] shares of the total resources

---

194. Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 301 (1992).

195. Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CALIF. L. REV. 965, 965–66 (2000).

196. Lamont & Favor, *supra* note 179.

197. *See id.*; FEDERAL RENTAL ASSISTANCE, *supra* note 4, at 1–2 (finding that people who are elderly, disabled, or members of households with children received roughly 90% of federal rental assistance benefits).

198. *See* IRS, *Earned Income Tax Credit, Questions and Answers*, <http://www.irs.gov/Individuals/EITC,-Earned-Income-Tax-Credit,-Questions-and-Answers> (last visited Apr. 3, 2015) (describing the EITC).

199. *See* U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 7-1, 7-3 (2013), *available at* <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/43503c7HSGH.pdf> (describing how HUD recipients are subject to an annual recertification process in order to continue receiving their rental assistance benefits).

more equal.”<sup>200</sup> One strength of this approach is that “[u]nder equality of resources . . . people decide what sorts of lives to pursue against a background of information about the actual cost their choices impose on other people and hence on the total stock of resources that may fairly be used by them.”<sup>201</sup> Its primary exponent, Ronald Dworkin, emphasized the compatibility of equality of resources with private ambition: “If government succeeds in securing for each citizen a genuinely equal share of resources to use as he wishes in making his life successful according to his lights, then once again his choices will give effect to rather than corrupt what government has done.”<sup>202</sup> Using equality of resources as a norm for distributing rental assistance would provide greater personal choice for the recipients of assistance, enabling them to set their own priorities for how best to use rental assistance, but leaving them responsible for the outcomes of those choices.

There is one important proviso. On Dworkin’s account “the resources devoted to each person’s life should be equal,” assuming, however, “that people enter the market on equal terms.”<sup>203</sup> An individual “born with a serious handicap” is said to possess fewer resources than others, which—in pursuit of equality of resources—justifies compensation to remedy this unfairness.<sup>204</sup> In addition, although the subsequent distribution of resources can be sensitive to individual ambition, the distribution of resources subsequent to initial allocation cannot be affected by individual endowments or “differences in ability of the sort that produce income differences in a laissez-faire economy among people with the same ambitions.”<sup>205</sup> To this end, Dworkin advocates “a scheme of redistribution . . . that will neutralize the effects of differential talents, yet preserve the consequences of one person choosing an occupation, in response to his sense of what he wants to do with his life, that is more expensive for the community than the choice

---

200. Dworkin, *Equality of Welfare*, *supra* note 29, at 186.

201. Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 288 (1981) [hereinafter Dworkin, *Equality of Resources*].

202. RONALD DWORKIN, *LAW’S EMPIRE* 299 (1986); *see also* Dworkin, *Equality of Resources*, *supra* note 201, at 311 (arguing that distribution of resources at given moment must be allowed to “reflect the cost or benefit to others of the choices people make so that, for example, those who choose to invest rather than consume, or to consume less expensively rather than more, or to work in more rather than less profitable ways, must be permitted to retain the gains that flow from these decisions”).

203. Dworkin, *Equality of Resources*, *supra* note 201, at 289.

204. *Id.* at 302.

205. *Id.* at 311.

another makes.”<sup>206</sup> Perfectly disaggregating the roles of talent and ambition in the accumulation of any one person’s relative wealth is impossible, and Dworkin instead spends considerable time suggesting ways to develop a scheme of redistribution that approximately accounts for the role of talent and other individual endowments.<sup>207</sup> Our subject here is once again not an ideal theory, nor is it the distribution of all resources across a society. Nonetheless, there are important insights to be gleaned from Dworkin’s theory.

Assuming a simplified version of the theory, which does not account for differential talent but does account for handicaps, equality of resources would call for eliminating the income-based approach that currently governs the allocation of rental assistance, and instead providing all recipients of federal rental assistance with a sum of resources of the same monetary value. This would mean that individuals in higher-priced locales or with lower incomes would not receive a more significant sum of resources than other recipients, nor would those who remain in assisted housing for a longer period of time continue to draw resources indefinitely.

Reforming rental assistance to distribute benefits in accord with a theory of equality of resources could be done by providing recipients with a choice among a set of bundles of assistance—all of which represent the same total sum of resources. Recipients could choose a higher benefit for a shorter period of time; or a smaller benefit for a longer period of time; or a gradual scaling down of benefits over time, on the expectation that their income will increase. Available bundles might include the option of allocating some share of an individual’s assistance towards resources, such as mobility assistance and housing counseling, which have proven effective at aiding individuals in moving into housing in neighborhoods with better opportunity.<sup>208</sup> This approach would al-

---

206. *Id.* at 312–13.

207. *Id.* at 313–15.

208. See FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, AN OVERVIEW OF AFFIRMATIVE MARKETING AND IMPLICATIONS FOR THE WESTCHESTER FAIR HOUSING SETTLEMENT 12–13, 21–24, 30–32 (2011) [hereinafter AN OVERVIEW OF AFFIRMATIVE MARKETING], available at [http://furmancenter.org/files/publications/Furman\\_Center\\_Review\\_of\\_Affirmative\\_Marketing.pdf](http://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf) (discussing examples of mobility assistance and housing counseling). Such counseling can include the provision of information regarding a potential community, which can help to alleviate what Patrick Sharkey has termed “cognitive constraints” on housing choice, which comprise “individuals” mental perceptions and un-

low individuals to decide how much of their resources to devote to a form of insurance against homelessness or job loss, and how much to expend on the possibility of gaining access to greater opportunity.

The equality of resource theory's sensitivity to individual ambition aligns well with the Housing Choice Voucher program's stated goal of providing recipients with access to better opportunities through greater choice regarding the neighborhood and specific housing unit on which they use their voucher resources. At the same time, equality of resources emphasizes that individuals are responsible for the consequences of their choices with regards to how they use their resource allocation. That is not a perspective often considered in discussions of housing choice. This article further discusses the possible structure and potential challenges for a bundle of resources approach to rental assistance, as well as additional issues of compensating for differences in individual endowments (rather than ambition) in Part IV.

#### 4. The Difference Principle

The difference principle, most commonly associated with the work of John Rawls, permits inequality in the distribution of goods when such inequality provides a greater benefit to the least advantaged members of society.<sup>209</sup> In *A Theory of Justice*, Rawls states the difference principle, the second of his two principles of justice, in these terms: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>210</sup> As

---

derstandings of which communities are possible residential destinations. Patrick Sharkey, *Residential Mobility and the Reproduction of Unequal Neighborhoods*, 14 *CITYSCAPE* 9, 17 (2012).

209. See SANDEL, *supra* note 193, at 70 ("Rawls's way is not to eradicate unequal endowments but to arrange the scheme of benefits and burdens so that the least advantaged may share in the resources of the fortunate. This is the arrangement that the difference principle seeks to achieve."); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877, 880 (1976) ("[E]conomic assets must be distributed so as to maximize the position of the worst-off segment or poorest class in society. To put the point in another way, income and wealth are to be distributed equally except insofar as unequal distribution will give the poorest group more in the long run than they would have under complete equality, by virtue of the effect of incentives on overall economic prosperity.")

210. RAWLS, *A THEORY OF JUSTICE*, *supra* note 154, at 302. The first principle of justice, which takes priority over the second principle, states that "[e]ach person is to have an

Jeremy Waldron has observed, “In general the Difference Principle is too abstract to generate, by itself, any particular case for welfare provision.”<sup>211</sup>

Nonetheless, putting Rawls’s broader theory of justice aside for a moment, this article simply borrows the powerful intuition that inequalities should be allowed only on the condition that they are arranged to the benefit of the least advantaged. There are insights to be gleaned from considering how the general idea underlying the difference principle might inform the allocation of rental assistance. The idea is that inequality might be permitted in order to create incentives for greater productive activity, which will expand the overall pot of resources and render the worst-off individuals better off. In this vein, one might contend that individuals denied benefits due to limited funds will be better off in the long run, if those given more generous assistance now, in order to move to higher opportunity areas, obtain better employment and higher incomes, which leads to increased tax revenue and, eventually, an increase in funding for housing benefits. This is a tremendously attenuated and contingent perspective.<sup>212</sup> It is contingent on a sufficient increase in incomes and tax revenues to substantially increase the rental assistance available to those currently denied assistance.<sup>213</sup> Moreover, the mixed success of voucher recipients who have moved to higher opportunity neighborhoods makes it evident that the inequalities created by providing more generous assistance to certain recipients does not, in the long term, benefit those denied assistance.

The more plausible assumption behind providing vouchers that allow individuals to move to more expensive locales with better

---

equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.” *Id.*

211. Waldron, *supra* note 29, at 789 n.45; see also RAWLS, A THEORY OF JUSTICE, *supra* note 154, at 76 (“If it is asked in the abstract whether one distribution of a given stock of things to definite individuals . . . is better than another, then there is simply no answer to this question.”). Yet while Rawls initially focuses on ideal theory, he later observes that “the idea of a well-ordered society should also provide some guidance in thinking about nonideal theory, and so about difficult cases of how to deal with existing injustices.” RAWLS, JUSTICE AS FAIRNESS, *supra* note 154, at 13.

212. This would also only justify inequality that favors individuals able to be work. It would not justify inequality that shifts additional resources to those who are worse off due to a physical disability that precludes work. *Cf.* Sen, *Equality of What?*, *supra* note 152, at 204 (contending that the difference principle would give an individual disadvantaged due to disability “neither more nor less” on basis of disability).

213. *Cf. id.* at 203–04.

employment prospects is that by enabling those individuals to achieve self-sufficiency, limited resources will be freed up to serve individuals currently waiting for assistance.<sup>214</sup> However, this is not an account that accords with the idea behind the difference principle, which is that inequalities may be allowed in order to reward productive behavior and increase overall prosperity and the total sum of resources, to the benefit of the worst off. The difference principle ultimately provides a critique of existing assistance on the grounds that inequalities—in the form of a higher payment standard or more absolute resources being directed toward individuals who move to more expensive neighborhoods believed to afford greater opportunity—should only be allowed if there is sufficient evidence that this leads to a net societal benefit that improves the position of the worst-off (by providing more vouchers to those currently without assistance).

## 5. The Capabilities Approach

The capability approach, developed most significantly by Amartya Sen, but also embraced by Martha Nussbaum and others, is neither a complete theory of justice, nor a theory of distributive justice specifically; it instead provides a distinct framework and set of metrics for thinking about justice and related issues.<sup>215</sup> Sen contrasts his approach, which focuses on “actual choice” among “feasible alternatives” for advancing justice, with “most modern theories of justice, which concentrate more abstractly on the ‘just

---

214. It is also a partial motivation for the Family Self-Sufficiency program, discussed *infra* at notes 264–66 and accompanying text. The New America Foundation has argued for an expansion of the Family Self Sufficiency program, specifically noting that by enabling families to achieve self-sufficiency the program holds promise for freeing up limited resources to assist additional families. HANNAH EMPLÉ, NEW AMERICA FOUNDATION, ASSET-ORIENTED RENTAL ASSISTANCE: NEXT GENERATION REFORMS FOR HUD’S FAMILY SELF-SUFFICIENCY PROGRAM 1 (2013); *see also* Jayme Fraser, *Housing Program Promises to Open Door to Self-Sufficiency*, HOUS. CHRONICLE (Mar. 16, 2014), <http://www.houstonchronicle.com/news/politics/houston/article/Housing-program-promises-to-open-door-to-5323093.php> (discussing how the FSS program run by the Houston Housing Authority “frees up voucher funds for the thousands of needy families on its waiting list by helping current clients build a better life”).

215. *See* Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 2003 FEMINIST ECON. 33, 34; *see also* Ingrid Robeyns, *The Capability Approach*, in STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta, ed., 2011), available at <http://plato.stanford.edu/archives/sum2011/entries/capability-approach/> (“The capability approach specifies what should count for interpersonal evaluations and thus provides an important aspect of a theory of social or distributive justice, yet more is needed.”).

society.”<sup>216</sup> Sen frequently invokes the concept of opportunity, a term that is central to discussions of housing vouchers, particularly in the years since the Moving to Opportunity program. As he writes, “The capability approach is particularly concerned with correcting [the] focus [in John Rawls’s theory] on means rather than on the opportunity to fulfil ends and the substantive freedom to achieve those reasoned ends.”<sup>217</sup>

The capability approach shifts the evaluation of individual well-being and interpersonal comparison from measures of welfare and resources to functionings and capabilities as the proper metrics:

*Functionings* represent parts of the state of a person—in particular the various things that he or she manages to do or be in leading a life. The *capability* of a person reflects the alternative combinations of functionings the person can achieve, and from which he or she can choose one collection.<sup>218</sup>

Capabilities provide “the relevant informational base” for evaluating particular policies, rather than welfare or resources.<sup>219</sup>

Capability is “a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles).”<sup>220</sup> The capability approach focuses on the freedom of individuals to live lives “they have reason to value.”<sup>221</sup> It is “inescapably pluralist” and thereby

216. AMARTYA SEN, *THE IDEA OF JUSTICE* 8–9 (2009) [hereinafter SEN, *THE IDEA OF JUSTICE*]; see also Robeyns, *supra* note 215 (“[Sen] . . . is averse of building a well-defined theory of justice but rather prefers to investigate how real-life unjust situations can be turned into more just situations, even if perfect justice is unattainable.”).

217. SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 234. Sen critiques the “exalted place” that Rawls grants to the primary goods as a metric, on the grounds that it fails to acknowledge the personal and environmental factors affecting different people, which can result in “widely varying opportunities to convert general resources (like income and wealth) into capabilities—what they can or cannot actually do.” *Id.* at 261.

218. Amartya Sen, *Capability and Well-Being*, in *THE PHILOSOPHY OF ECONOMICS* 270, 271 (Daniel M. Hausman ed., 3d ed. 2008) [hereinafter Sen, *Capability and Well-Being*]. In an earlier work Sen provided a slightly different definition of the first term: “[F]unctionings’ . . . reflects the various things a person may value doing or being.” AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75 (1999).

219. Sen, *Capability and Well-Being*, *supra* note 218, at 271; see also SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 231 (“In contrast with the utility-based or resource-based lines of thinking, individual advantage is judged in the capability approach by a person’s capability to do things he or she has reason to value.”).

220. SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 218, at 75; see also Sen, *Capability and Well-Being*, *supra* note 218, at 273 (“[H]uman capabilities constitute an important part of individual freedom.”).

221. SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 218, at 85.



broadens “the range of our evaluative reasoning.”<sup>222</sup> This sensitivity to a plurality of values resonates with the goals ascribed to federal rental assistance. Housing Choice Vouchers, to the extent that they enable recipients to exercise individual choice in selecting the unit and neighborhood in which they will reside, aid recipients in achieving the capability to live out a plurality of values through their residential choices.

According to Sen, the freedom to make choices of this kind is valuable for two distinct reasons. First, greater freedom expands an individual’s alternatives and the opportunities to achieve the objectives they personally value.<sup>223</sup> Second, “the *process* of choice itself” and the ability to freely act may be valuable to an individual.<sup>224</sup> This latter point provides a reason to pause and consider how truly free a household is when deciding how to use housing resources, particularly vouchers. Households face structural obstacles—such as housing discrimination, landlords who will not accept vouchers, and a lack of affordable housing where vouchers might be used in a given locale—as well as personal challenges. From the perspective of a capabilities approach, equality of resources “falls short because it fails to take account of the fact that individuals need differing levels of resources if they are to come up to the same level of capability to function.”<sup>225</sup> Sen argues that resources are merely useful as means to some other end. Therefore, if one assumes some congruence between resources and capability, “why not put equality of resources in its place as a way of getting to equality of the capability to achieve . . . ?”<sup>226</sup> While of normative interest for a determination of the ultimate ends of a concern with equality, it is not clear that the chosen resolution of this question of priority would alter our analysis of the ideal structure of rental assistance.

---

222. *Id.* at 76–77.

223. SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 228; *see also* Sen, *Capability and Well-Being*, *supra* note 218, at 278 (“[F]reedom may have intrinsic importance for the person’s well-being achievement. Acting freely and being able to choose may be directly conducive to well-being, not just because more freedom may make better alternatives available.”). There is also, an important distinction between capability in the form of “well-being freedom,” the freedom “to advance one’s own well-being,” and “agency freedom,” which enables one to advance “whatever goals and values a person has reason to advance.” SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 288–89.

224. SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 228.

225. Nussbaum, *supra* note 215, at 35.

226. SEN, *THE IDEA OF JUSTICE*, *supra* note 216, at 265.

Moreover, there remains the need to balance a desire for perfect equality, regardless of our metric, with the practical challenges of distributing benefits through a national system of rental assistance administered by local entities. While trying to match resources to individual recipients in a way that achieves precisely equal levels of capability may be administratively impossible, the capability approach's concern with the differing abilities of individuals to "convert resources into actual functioning"<sup>227</sup> can be partially addressed through exceptions from time limits or benefit reductions for elderly and disabled recipients of rental assistance.<sup>228</sup> A more challenging question is how to equitably respond to communities that have been subject to particular histories of discrimination and might merit special resources to correct these injustices and their detrimental effects on individual capabilities. For both issues, the capabilities approach, argued in more detail in Part IV, calls for exceptions and additional resources under the same circumstances as equality of resources.

### C. *Existing Recipients and Property Interests*

The discussion so far has not addressed a question that is of particular concern for the principle of equality of welfare: Does the termination of existing benefits impose a greater loss of welfare on an individual than the denial of benefits? In any particular case, this may require an evaluation of the alternatives available to individuals. More generally, however, it calls for consideration of whether existing recipients of rental assistance have some stronger claim to continued benefits than eligible non-recipients. Distinguishing between existing beneficiaries and potential beneficiaries is not only relevant for equality of welfare. The loss of rental assistance may affect the resources available to an individual or their capabilities differently than the denial of such assistance. This is attributable in part to the role of rental assistance in enabling an individual to obtain and remain in a particular unit of housing that, over time, becomes less of a fungible resource and more of a personal property interest.

---

227. Nussbaum, *supra* note 215, at 35.

228. None of the housing agencies that imposed time limits pursuant to authority under the Moving to Work program applied those limits to disabled or elderly households. See APPLIED REAL ESTATE ANALYSIS, INC. & THE URBAN INST., *supra* note 146, at 5.

Margaret Radin, in the context of residential rent control, has argued that it makes sense to favor current tenants over those who are new to the market and lack a personal connection to property.<sup>229</sup> The intuition that drives a preference for current residents is that an individual who has resided in a particular space for a significant time finds their identity and personality “intertwined” with that space.<sup>230</sup> It is no longer simply a fungible property interest with solely exchange value, but instead possesses certain personal value. Similarly, C. Edwin Baker, in discussing the relationship between property rights and other constitutional liberties, distinguishes the welfare and personhood functions of property, their respective contributions to individual well-being, and the legal support each merits: “Generally, protection of claims to generic types of resources adequately serves the welfare function. In contrast, the personhood function characteristically requires protection of specific, unique objects or spaces.”<sup>231</sup>

In a companion article, the author of this article plans to develop an understanding of rental assistance as something more than the “new property” articulated by Charles Reich<sup>232</sup> and embraced by the Supreme Court in *Goldberg v. Kelly*,<sup>233</sup> leading to enhanced procedural due process protections for a range of public benefits. The notion of public benefits as “new property” focuses on the welfare function of property and the role of generic forms of property in furthering individual well-being.<sup>234</sup> Rental assistance, however, operates in a different manner than TANF, food stamps, Social Security, and other government assistance. Rental assistance is tied closely to a particular housing unit—not only in the

---

229. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 365 (1986) (“A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others.”); see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 993–94 (1982) (arguing that “the intuition that the leasehold is personal” has contributed to common law developments granting greater rights to tenants).

230. See C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 747 (1986).

231. *Id.*

232. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

233. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.”).

234. See Reich, *The New Property*, *supra* note 232, at 733.

obvious situations of public housing and project-based Section 8, but also for housing vouchers because a recipient must identify a unit whose owner is willing to accept a voucher and must confirm it meets the required quality standards.<sup>235</sup> Although individuals can move to a new unit with their voucher, doing so is often quite challenging in practice.<sup>236</sup> When the rent for a particular unit rises, the voucher, which determines a household's contribution towards rent based not on the unit's rent, but rather a set percentage of the recipient's income, operates so as to ensure that the household can continue to reside in that particular unit.<sup>237</sup> As such, the loss of rental assistance will, for most recipients, mean not only the loss of some fungible sum of money, but also a high likelihood of the loss of a particular home to which they have a personal connection. Accordingly, the recognition and protection of personhood claims "might require inegalitarian and possibly unjust distributions."<sup>238</sup> The companion article will further develop a normative account of rental assistance that situates this assistance within broader legal and theoretical understandings of property. This account will aim to inform the determination of when and how divergence from distributive justice principles might be justified so as to protect the distinct property interests of current rental assistance beneficiaries.<sup>239</sup> For now, this inquiry

---

235. See *supra* note 33 and accompanying text.

236. See *supra* note 34 and accompanying text.

237. See Radin, *Residential Rent Control*, *supra* note 229, at 366 ("Part of the stability of context associated with the home could be stability of the proportion of one's income required to maintain it.")

238. Baker, *supra* note 230, at 762–63 ("The differences between the nature of welfare and personhood claims suggest that the state could not and should not guarantee the fulfillment of all personhood claims on resources. The importance of the personhood function of property may, however, justify a constitutional requirement that the state treat claims to property serving this function with special concern and generally in a more accommodating fashion than it treats claims to property valued, for example, primarily for its exchange value."); see also D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 257 (2006) ("[Radin] . . . argues that the possession of homes should be favored against competing interests on the basis of an intuitive view that people become personally connected to their homes.")

239. Concepts of personhood are not the only basis for linking housing assistance with more traditional forms of property. As Eduardo Peñalver has argued, the role of private ownership in securing individual freedom by providing a place where one is free to do as one pleases is as much a product of personal privacy as it is of property ownership: "Renters, for example, can enjoy substantial privacy without owning the property in which they enjoy it." Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1930–31 (2005). To the extent that housing assistance plays a necessary and direct role in providing recipients with the privacy of a rental unit—and all the broader benefits attributed to such privacy—this provides an additional reason for understanding housing assistance as a form of property somewhere between traditional conceptions of private property and

will be put to the side and turn to a further elucidation of the normative prescriptions suggested by distributive justice theory.

### III. TOWARDS A MORE PRINCIPLED FEDERAL HOUSING ASSISTANCE POLICY

In an ideal world, federal rental assistance would take the form of an entitlement along the lines suggested by the Bipartisan Policy Center's Housing Commission, which proposed making assistance available to all households with incomes below 30% of AMI.<sup>240</sup> However, in the absence of political support for increasing HUD's funding for rental assistance to a level sufficient to provide broader assistance an issue of scarcity arises. In a world of limited resources it is not enough to simply decry existing housing programs as inequitable. Scarcity—regardless of its cause—instead demands careful consideration of what a more just distribution of this finite benefit would look like. As discussed in Part I, there have been a number of proposals in the legal, policy, and economics literature—as well as legislative proposals—to reform the structure of federal housing assistance.<sup>241</sup> My contention is that before delineating specific reforms we must first take a step back to evaluate how this assistance might be more equitably distributed among eligible recipients. To that end, this part begins by extensively outlining the implications of the analysis in Part II if applied solely to the allocation of existing resources among eligible beneficiaries of the three primary HUD rental assistance programs. The analysis then expands to consider how the housing resource bundle approach can inform a more thorough reform of all federal housing policy—including in particular the LIHTC and the HMID—to better accord with principles of distributive justice.

#### A. *Prioritizing the Provision of Housing*

With the exception of desert-based theories, the approaches to distributive justice discussed in Part II support the conclusion that federal rental assistance funding (particularly for Housing

---

“new property.”

240. BIPARTISAN HOUS. COMM'N OF 2013, *supra* note 15, at 89. An analysis performed on the Commission's behalf by Abt Associates estimates that this additional coverage would cost \$22.5 billion annually. *Id.* at 90.

241. *See supra* Part I.D.

Choice Vouchers, project-based Section 8, and to a lesser extent public housing) should be shifted even further towards serving a greater share of the lowest income households. Such a shift would also better conform to plausible conceptions of taxpayer preferences<sup>242</sup> and the core purpose of affordable housing policy—providing affordable housing. If the resources allocated to HUD’s rental assistance programs remain at the present level and the allocation of this assistance is to accord with norms of distributive justice, then the goals of providing access to higher opportunity neighborhoods and furthering economic and racial integration must be subsidiary to efforts to expand the number of households served. More specifically, these efforts should only be sustained to the extent they can be done without adversely affecting the numbers of households served.

There is an additional reason for focusing federal rental housing policy on the goal of serving a larger share of eligible households, at the expense of these other goals. Quite simply, federal rental assistance, as currently structured, has either failed to advance these additional goals or has achieved successes too minor to justify the distributional inequities they exacerbate. Robert Ellickson made an analogous point in critiquing mixed-income housing programs, drawing attention to recent studies that “suggest that the benefits of social integration are seldom as great as advocates of mixed-income projects suppose.”<sup>243</sup> As such, he contends that social integration alone provides insufficient justification for the high cost of producing mixed-income housing.<sup>244</sup> Although “the Housing Choice Voucher program was . . . created, in part, to help low-income households reach a broader range of neighborhoods and schools,” voucher recipients instead “are locating near lower-performing schools than are poor families in general.”<sup>245</sup> Similarly, while the Moving to Opportunity program led

---

242. See *supra* note 12 and accompanying text. A 1973 HUD review of housing assistance reported data showing substantially stronger public support for government assistance to house low-income families than for similar assistance to moderate-income families. HOUSING IN THE SEVENTIES, *supra* note 14, at 88 (“In a recent survey of attitudes towards Federal Government assistance, the public supported governmental help for housing for low income families by a margin of 68 percent to 12 percent, while rejecting similar assistance to families of moderate income by 59 percent to 27 percent.”).

243. Ellickson, *supra* note 1, at 985.

244. *Id.*

245. KEREN MERTENS HORN ET AL., MACARTHUR FOUND., HOW HOUSING MATTERS: HOUSING CHOICE VOUCHER HOLDERS ARE NOT REACHING HIGHER-PERFORMING SCHOOLS 1–2 (2014) [hereinafter HOW HOUSING MATTERS]; see Keren Mertens Horn et al., *Do Hous-*

to initial improvements in participating families' neighborhoods, these improvements "faded quickly, due to moves back to high-poverty neighborhoods and rising poverty in the destination neighborhoods of experimental group families."<sup>246</sup> The program's effects on parents have been minimal.<sup>247</sup> As for children, there have been slight positive effects in school performance and sense of safety among girls, but neutral or less promising effects for boys, including an increasing likelihood to commit property crimes.<sup>248</sup>

Existing voucher policy is not the sole cause of this reality. It is attributable in part to the interaction between the preferences of recipients and structural obstacles—including discriminatory

*ing Choice Voucher Holders Live Near Good Schools?*, 24 J. HOUSING ECON. 109, 110 (2014); see also Kirk McClure, *Deconcentrating Poverty with Housing Programs*, 74 J. AM. PLAN. ASS'N 90, 91 (2008) (finding, based on analysis of HUD administrative datasets, that "[h]ousing vouchers supplied to households are not helping renters move to low-poverty areas any more effectively than are current project-based subsidies"). Writing immediately before the housing market downturn, Kirk McClure found that "at the most general level, the project-based . . . [LIHTC] program is deconcentrating low income households into low-poverty areas more effectively than the household-based [Housing Choice Voucher] program . . ." *Id.* at 95. More recently, Horn, Ellen, and Schwartz found that LIHTC households gain access to better schools than Housing Choice Voucher recipients, but noted, as discussed above, that the LIHTC "serves slightly better off families, who might have found their way to higher-performing schools had they been given a voucher." HOW HOUSING MATTERS, *supra*, at 2–3.

246. PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 134 (2013) [hereinafter SHARKEY, *STUCK IN PLACE*] (citing studies from 1928 to 2008 analyzing the ghetto concept). See generally LISA SANBONMATSU ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION*, at v (2011) (finding that ten to fifteen years after initial enrollment, Moving to Opportunity participants lived in safer and lower poverty neighborhoods and experienced improved health, but had no improvements in educational, employment, and income outcomes when compared to a control group).

247. SHARKEY, *STUCK IN PLACE*, *supra* note 246, at 145. However, researchers did find significant improvements in parents' sense of safety in their neighborhood, mental health, and levels of obesity. *Id.* at 145.

248. *Id.* at 145; see Ellickson, *supra* note 1, at 1012–15 (reviewing studies that "cast doubt on the traditional view that economic integration gives rise to significant social benefits"); see also Michael R. Diamond, *De-Concentrating Poverty: De-Constructing a Theory and the Failure of Hope* 3 (Georgetown Public Law and Legal Theory Research Paper No. 12-155, 2012) ("On the practical level, studies have shown repeatedly that many of the hoped-for fundamental benefits of de-concentration have not been achieved."). Michael Diamond criticizes programs that are focused on the involuntary deconcentration of poverty on the grounds that—even assuming those relocated achieved the supposed benefits—the programs only serve a small fraction of those households living in neighborhoods of concentrated poverty. *Id.* at 4; see Edgar O. Olsen, *Pursuing Poverty Deconcentration Distracts from Housing Policy Reforms That Would Have a Greater Effect on Poverty Alleviation*, 16 CITYSCAPE 135, 136 (2014) ("The best evidence suggests that the benefits to low-income households of living in a low-poverty neighborhood are small.").

rental practices and landlords unwilling to accept vouchers—that prevent voucher holders from moving closer to higher performing schools. A number of factors besides neighborhood quality—including proximity to social support networks and familiarity with an existing neighborhood—also contribute to the locational preferences of low-income residents.<sup>249</sup> This article’s proposed changes, however, would not affect either of these factors. The structural obstacles are simply beyond the scope of this article and the changes proposed. As for individual preferences, the bundle approach would better enable those who would prefer to move to better neighborhoods (or those that would at least entertain the possibility) to have access to a set of resources—depending on how individual bundles are designed—that would provide more robust support for such a move, albeit subject to the possibility of a shallower or more finite subsidy. I turn now to a more detailed discussion of the proposed housing resource bundles model of distributing assistance.

## B. *Housing Resource Bundles as a More Equitable Rental Assistance Policy*

### 1. Housing Resource Bundles Further Explained

The analysis in Part II suggests that the equality of resources theory and the capability approach most closely align with the stated goals of federal rental assistance and provide the most practical and policy relevant guidelines for a more equitable distribution of these benefits. Housing is itself a resource, providing stability and security and enabling individuals to pursue life goals they choose for themselves and their families. Repackaging rental assistance as a set of housing resource bundles would pro-

---

249. See Kimberly Skobba & Edward G. Goetz, *Mobility Decisions of Very Low-Income Households*, 15 CITYSCAPE 155, 166 (2013); *id.* at 167 (“The constraints faced by these families and the reliance on interpersonal sources of information and support meant that neighborhood concerns were mostly irrelevant, both in their search for housing and in their evaluation of that housing. When neighborhoods were important to the participants of this study, it was for the ways in which they did or did not enable the families to fulfill other basic needs. That is, the availability of transportation, affordable and accessible grocery shopping, and proximity to friends and family were listed as frequently as crime and safety as the important aspects of neighborhood.”); see also Ellickson, *supra* note 1, at 1015 (citing Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 737 (2001)) (noting that “most African Americans state in surveys that they prefer to live in a neighborhood that is mostly African American”).



vide an administratively feasible mechanism for more equitable distribution of this discrete resource while creatively furthering a range of programmatic goals. Recipients of rental assistance would choose a set of bundles comprised of an equal total sum of resources (measured by total cost). Resources included in a bundle would all be directed towards either housing itself or other resources related to obtaining and maintaining housing. Recipients would be given a finite menu of bundles to choose from, which might include a higher rental benefit for a shorter period of time, a smaller benefit for a longer period of time, or a gradual scaling down of benefits over time (based on the expectation that their income will increase). Certain bundles would include the option of allocating some share of an individual's assistance towards resources, such as mobility assistance<sup>250</sup> and housing counseling,<sup>251</sup> which have proven effective at aiding individuals in moving into housing in neighborhoods with better opportunities. The bundle of resources approach would provide individuals with the freedom to select sets of resources that best align with their own goals and expand their capabilities, while still potentially furthering additional programmatic goals beyond the provision of adequate housing, including economic and racial integration, access to opportunity, and movement towards self-sufficiency.<sup>252</sup> However, in keeping with the broader goal of more equitably distributing fi-

---

250. A recent study of recipients of Moving to Opportunity and Welfare to Work vouchers found that participants with access to a vehicle found housing in safer neighborhoods with lower poverty and were more likely to find employment than those without a vehicle. ROLF PENDALL ET AL., URBAN INST., DRIVING TO OPPORTUNITY: UNDERSTANDING THE LINKS AMONG TRANSPORTATION ACCESS, RESIDENTIAL OUTCOMES, AND ECONOMIC OPPORTUNITY FOR HOUSING VOUCHER RECIPIENTS i–iii (2014); *see also* AN OVERVIEW OF AFFIRMATIVE MARKETING, *supra* note 208, at 12–13 (discussing how providing access to vehicles has proven particularly helpful for encouraging mobility among participants in housing mobility program established in the Baltimore area).

251. *See* McClure, *supra* note 245, at 96 (“Intensive placement counseling of assisted households appears to be a valuable component of any effort seeking to deconcentrate poverty.”).

252. Along these lines, Zachary Bray argues that “in requiring assisted low-income families to find their own housing on the rental market after empowering them with vouchers, Section 8 is designed to enhance the dignity and autonomy of its recipients, while reducing any social stigma that may attach to visible project-based assistance.” Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1135–86. One might question the extent to which, in practice, the search for housing with a Section 8 voucher enhances dignity and reduces social stigma. Nonetheless, it is evident that the choice provided through vouchers, even if seriously constrained, grants recipients greater autonomy than project-based assistance. Allowing individuals to choose not only where to use their housing assistance, but also how that assistance will be structured and what additional resources and support they will receive would only further enhance individual autonomy.

nite resources, individuals would obtain only one bundle during their lifetime (although they need not use all of the resources in their bundle at once, but could instead use it at separate points throughout their life).<sup>253</sup>

In addition to ensuring that recipients receive an equal sum of resources, the resource bundle approach will provide recipients with the freedom to choose the specific bundle of resources that will afford them the means to best promote the ends they desire or pursue the goals they value.<sup>254</sup> One person may value the quality of housing less than another individual and choose a bundle with a smaller monthly benefit that ensures assistance for a longer period of time, thereby obtaining greater security against the future loss of housing. Another person might value the potential for greater opportunity and desire the set of resource that will best enable him or her to move to a better neighborhood and to move towards greater self-sufficiency. As such, the process of choosing a set of bundles will also provide an individual with a greater sense of ownership over the resources they select.

If we assume no changes to current funding levels and no changes to the number of eligible, but underserved, households, time limits would be necessary to ensure a more equitable distribution of HUD's rental assistance resources. Providing a choice of bundles, including phase outs of assistance or a longer term of assistance at a lower amount, could mitigate some of the potentially harsh effects of imposing time limits on particular households.<sup>255</sup> As noted earlier, there is empirical evidence indicating that a substantial reduction in the maximum subsidy available to participating households would still provide sufficient funds to ob-

---

253. It would also be possible to allow individuals to go to the back of a waiting list for bundles if they have exhausted their initial bundle.

254. See *supra* note 223 (discussing the relevance of such freedom to the capability approach).

255. Non-elderly and non-disabled households receiving voucher assistance in 2010 received this assistance for a median period of forty-eight months. SARD & ALVAREZ-SANCHEZ, *supra* note 184, at 9. Longer periods of voucher assistance are correlated with higher-cost rental markets, so time limits coupled with an approach that presents a choice of bundles of equal resources (which would allow a recipient a longer period of support in a less expensive location) may lead more beneficiaries to move to lower-cost markets, potentially reducing the cost of providing those households with assistance. While 57% of non-elderly and non-disabled households living in the highest rent geographic areas received assistance for more than five years, in the lowest rent area, only 30% of recipients received voucher assistance for more than five years. *Id.*

tain housing that satisfies program standards.<sup>256</sup> In addition, a few communities have used grants through the Housing Opportunities for Persons with AIDS program to provide shallow, flat subsidies “designed to stretch out finite resources to serve a greater number of people.”<sup>257</sup> A program in Alameda County, California provided a shallow monthly subsidy, which was not based on household income, of \$225 each month to a single person in a one-bedroom unit.<sup>258</sup> Recipients of this support, on average, had been paying 68% of their monthly income on rent prior to receiving the subsidy and paid 42% of their income on rent with the subsidy.<sup>259</sup> Although they were moderately rent-burdened (paying more than 30% of their income on rent), after two years 96% of program participants were still in rental housing, a dramatically larger percentage than the 10% of individuals in a comparison group who remained stably housed.<sup>260</sup>

## 2. Bundles as Incentives Towards Self-Sufficiency

Specific bundles could be structured to create stronger incentives for self-sufficiency. Although many current recipients of rental assistance work,<sup>261</sup> the current benefit structure does not encourage work: “Because households are required to pay 30 percent of their gross income in rents, those who receive vouchers effectively pay a 30-percent marginal tax rate on income.”<sup>262</sup> Empir-

---

256. See *supra* notes 174–76 and accompanying text..

257. MARY CUNNINGHAM, JOSH LEOPOLD & PAMELA LEE, URB. INST., A PROPOSED DEMONSTRATION OF A FLAT RENTAL SUBSIDY FOR VERY LOW INCOME HOUSEHOLDS 12 (2014), available at <http://www.urban.org/UploadedPDF/413031-a-proposed-demonstration.pdf>.

258. *Id.* at 12–13 (citing Lisa K. Dasinger & Richard Speiglmán, *Homelessness Prevention: The Effect of a Shallow Rent Subsidy on Housing Outcomes Among People with HIV or AIDS*, 11 AIDS BEHAV. 128, 129–30 (2007)). In comparison, an individual receiving assistance through the voucher program, whose only income was Supplemental Security Income, would have received a subsidy of \$421 per month. *Id.* at 13.

259. *Id.*

260. *Id.* However, the authors of the underlying report “note that unobserved differences between the treatment and control groups, such as prior rental history, may help explain the stark differences in housing stability.” *Id.*

261. See SARD & ALVAREZ-SANCHEZ, *supra* note at 184, 5–6.

262. Green, *supra* note 109, at 51–52 (“All housing assistance programs produce implicitly high marginal tax rates, through clawbacks, that can discourage work.”). Despite the apparent disincentives for work created by current program structure, administrative data regarding the labor force attachment of Housing Choice Voucher recipients reveals that 66% of non-elderly and non-disabled Housing Choice Voucher households either worked in 2010 or had worked recently. SARD & ALVAREZ-SANCHEZ, *supra* note 184, at 5–6. An additional 11% of these households received assistance through a state TANF program that

ical studies failed to establish a consensus on whether existing rental assistance policy encourages or discourages self-sufficiency.<sup>263</sup> Nonetheless, in 1990, HUD introduced the Family Self-Sufficiency (“FSS”) program, which was designed to reduce potential work disincentives created by the formula used to set public housing and voucher rents.<sup>264</sup> Rather than divert increased wage earnings towards rent, the program—which is available to voucher recipients and public housing recipients—places increased earnings into an individual savings account, which can be drawn upon after certain education, training, or work-related goals are reached.<sup>265</sup> The FSS program also provides participants with additional assistance directed toward achieving self-sufficiency.<sup>266</sup> Although local PHAs work with assisted individuals

---

imposes work requirements on most adult recipients. *Id.* at 6.

263. Reviewing the available evidence as of 2002 regarding the effect of housing assistance on self-sufficiency, Mark Shroder concluded that “[h]ousing assistance is not persuasively associated with any effect on employment, positive or negative.” Mark Shroder, *Does Housing Assistance Perversely Affect Self-Sufficiency? A Review Essay*, 11 J. HOUSING ECON. 381, 383 (2002); see also Deven Carlson et al., *Long-Term Earnings and Employment Effects of Housing Voucher Receipt*, 71 J. URB. ECON. 128, 133, 135, 143 (2012) (using propensity score matching to compare voucher recipients in Wisconsin to non-recipients and finding a negligible effect of voucher receipt on work effort” but gains in quarters worked per year relative to the matched comparison group for recipients after six years). However, a subsequent paper reported that since Schroder’s review five rigorous studies provided support for the claim that housing assistance “may slow participants’ progress towards self-sufficiency” but concluded that “empirical work on the topic remains far from unanimous.” Larry A. Rosenthal, *A Review of Recent Literature on Housing Assistance and Self-Sufficiency*, 12 INST. OF BUS. & ECON. RES., Working Paper No. W07-008 (2007).

264. EMPLÉ, *supra* note 214, at 5–6 (2013); see Julián Castro, U.S. DEP’T OF HOUS. & URBAN DEV., *Family Self-Sufficiency (FSS) Program*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/fss](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/fss) (last visited Apr. 3, 2015) [hereinafter *Family Self-Sufficiency (FSS) Program*]. FSS services are provided via partnerships with local employers and service providers. *Id.* HUD does not fund these services, but does fund FSS program coordinators, who work with participants to obtain assistance in achieving self-sufficiency and oversee the escrow accounts. *Id.* at 9. The program was originally known as “Operation Bootstrap” and introduced in 1990 through the Cranston-Gonzalez National Affordable Housing Act. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 554, 104 Stat. 4079, 4085, 4225 (1990) (codified at 42 U.S.C. § 1437u (2012)); see EMPLÉ, *supra* note 214, at 6. Regulations governing the FSS program are found at 24 C.F.R. pt. 984 (2014).

265. Kirk McClure, *Section 8 and Movement to Job Opportunity: Experience After Welfare Reform in Kansas City*, 15 HOUSING POLY DEBATE 99, 108 (2004).

266. See *Family Self-Sufficiency (FSS) Program*, *supra* note 264. Participants execute a five-year FSS Contract of Participation that “specifies the rights and responsibilities of [the family and the Public Housing Authority] and the goals and services for the family.” *Fact Sheet: Family Self-Sufficiency (FSS) Program*, U.S. DEP’T OF HOUS. & URBAN DEV. (2014), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=fssfactsheet.pdf>. A participant is not required to exit rental assistance upon graduation from the FSS program, but the program clearly seeks to increase recipients’ rent contributions via increased earnings feasibly to enable recipients to leave the program. EMPLÉ, *supra* note

to coordinate services, those services are delivered by local third-party entities, resulting in a wide variation in programs.<sup>267</sup> Reliable tracking of FSS program participation and outcomes has proven challenging,<sup>268</sup> but HUD reported that in fiscal year 2011, nearly 3000 families successfully completed an FSS contract, with over half seeing increases in earnings, and approximately 20% of voucher households in the program no longer needing rental assistance upon completing their contracts.<sup>269</sup>

Using the FSS as a model, housing resource bundles might be designed to include similar services directed at achieving self-sufficiency—such as education, job training, and assistance finding and securing employment.<sup>270</sup> If assistance is distributed on the basis of equality of resources, then a recipient would receive a specific quantity of resources to access over the course of their lifetime, so achieving self-sufficiency would not necessarily free up additional resource for other potential beneficiaries. However, if a household truly becomes self-sufficient before using up all the resources in their bundle and never needs to draw upon that pool of resources again then at the end of that individual's life, additional resources will remain. Such success might inform future program budgets and—so long as all eligible recipients are not served—allow for the provision of assistance to a greater share of individuals. Alternatively, using a similar structure to FSS, an individual might be allowed to direct some of the resources they would receive as rental assistance into an escrow account that they can eventually access for other purposes, such as home ownership.

---

214, at 5.

267. EMPLÉ, *supra* note 214, at 7.

268. See U.S. GOV'T ACCOUNTABILITY OFFICE, RENTAL HOUSING ASSISTANCE, *supra* note 146, at 34 (finding that HUD lacks reliable data on program participation and therefore cannot effectively evaluate programs). HUD commissioned a national evaluation of the FSS program, which will be completed in 2018. EMPLÉ, *supra* note 214, at 14.

269. EMPLÉ, *supra* note 214, at 10. Hannah Emplé notes that despite the program's "conceptual attractiveness . . . , rigorous evaluation of the program's direct impact on participants is scarce." *Id.*

270. According to legislation creating the FSS program, the supportive services provided to a participating household "may include" child care, transportation, education, job training, substance abuse treatment and counseling, money management, household management, parenting skills, and "any other services and resources appropriate to assist eligible families to achieve economic independence and self-sufficiency." Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079, 4226–27 (1990) (codified at 42 U.S.C. § 1437u(c)(2) (1994)).

Existing FSS programs have found that a lack of employment opportunities for participants stymies efforts to move out of poverty.<sup>271</sup> The FSS relies upon fostering partnerships with local non-profits and an FSS coordinator who works with participants to access these resources.<sup>272</sup> The housing resource bundle approach, by allowing recipients to take their bundle of resources anywhere they are able to find housing, could encounter even greater challenges in the absence of the developed framework of support found in the FSS program. This concern might be addressed, however, by tying specific bundles to particular jurisdictions, within which a network of resources akin to those provided through the FSS program has been developed. These resources would be paid for through a portion of the funds in each participant's housing resource bundle.

### 3. Confronting Disparities in Capabilities and Specific Histories of Discrimination

Dworkin and Sen both raise concerns regarding the inequitable allocation of talents and of capabilities. They each reject the position that such factors should be allowed to lead to inequitable subsequent distributions of goods.<sup>273</sup> The proposed allocation of equal bundles of housing resources will not account for discrepancies in talents or capabilities. Precisely accounting for differences in talents and capabilities would prove impossible and beyond the expertise (and administrative feasibility) of housing agencies. Yet there are possibilities for taking account of certain factors analogous to disparities in talents or capabilities that historically have had pernicious effects on access to housing and to particular neighborhoods.

Imagine a specific housing resource bundle, the "opportunity bundle," that contains, in addition to a specific sum of rental assistance, a set of mobility and counseling resources designed to enable a move to a higher opportunity area and productive use of the opportunities that a locale provides. The ability of two individuals who select this opportunity bundle to achieve the same set of capabilities with that bundle will be affected by numerous

---

271. See EMPLÉ, *supra* note 214, at 16–17.

272. See *id.* at 7.

273. See Dworkin, *Equality of Welfare*, *supra* note 29, at 208; Sen, *Equality of What?*, *supra* note 152, at 217–18.

factors. As noted at various points above, there are multiple structural obstacles to the exercise of choice in housing markets. These include the effects of discrimination both on the market of potential housing available to a recipient of rental assistance and on a recipient's living situation prior to receiving assistance.

To remedy such specific, established instances of prior systematic discrimination, a local PHA should be allowed (and where necessary provided additional funds) to distribute assistance in a manner that deviates from a baseline of equality of resources. In such cases, providing enhanced bundles that are similar to the remedies provided in certain public housing desegregation cases would be justified.<sup>274</sup> Provision of such bundles could be understood not only as a form of corrective justice,<sup>275</sup> but also as a way to compensate for initial disparities in resources due to specific historic injustices. Two programs implemented as part of consent decrees in the context of fair housing litigation provide models for the types of prior practices that should merit such an exception.

Chicago's *Gautreaux* program grew out of a legal challenge to the creation and maintenance of racial segregation in the Chicago Housing Authority's developments.<sup>276</sup> Pursuant to a consent decree, the program placed African-American households in public housing on a waiting list for Section 8 housing certificates.<sup>277</sup> As vouchers became available individuals on the waiting list were offered the next available, unit, which could be in either a middle-income white suburb or a low-income black urban neighbor-

---

274. For a concise history of public housing desegregation litigation, see Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 336–46 (2007).

275. For a discussion of the relationship between distributive and corrective justice, see generally Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237–38 (Jeremy Horder ed., 2000).

276. Two separate class actions were brought by tenants and applicants for public housing against the Chicago Housing Authority and against HUD. See *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (upholding remedial order against HUD that extended beyond Chicago's municipal boundaries); *Gautreaux v. Chi. Hous. Auth.*, 436 F.2d 306, 313 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). A 1981 district court opinion detailed the "protracted post-judgment litigation" and reviewed the multiple legal decisions. *Gautreaux v. Landrieu*, 523 F. Supp. 665, 666–68 (N.D. Ill. 1981). See generally ALEXANDER POLIKOFF, *WAITING FOR GAUTREAU: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006); Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988).

277. Rosenbaum, *supra* note 19, at 232–33.

hood.<sup>278</sup> The *Gautreaux* program provided extensive help to participants in finding and visiting potential housing but little assistance after the move, resulting in an average program cost of only \$1000 per family.<sup>279</sup>

In a subsequent case in Baltimore, *Thompson v. United States Department of Housing and Urban Development*, a federal district court held that HUD had violated its duty, under the 1968 Civil Rights Act, “affirmatively to further” fair housing goals by failing “adequately to consider a regional approach to desegregation of public housing.”<sup>280</sup> The parties to the 2005 litigation had previously entered into a partial settlement in 1996, which established a mobility program that enables current or former residents of Baltimore City public housing (as well as individuals on the waiting list as of a specific date) to move to “opportunity neighborhoods”—those with lower levels of poverty than the regional average.<sup>281</sup> Program participants receive more substantial assistance than what was offered through the *Gautreaux* program, including housing search assistance, visits to units, financial literacy training, employment and transportation assistance, and post-move counseling for two years.<sup>282</sup>

Empirical studies of housing mobility programs targeted at households in particularly disadvantaged locales indicate that in these situations the provision of additional resources produces substantial positive effects. Reviewing studies of housing mobility programs since the 1970s, Patrick Sharkey states that “a tentative conclusion from the evidence available suggests that a residential mobility approach is most likely to succeed if it is focused on families in the most severely disadvantaged, violent neighborhoods across the country, and if it provides families with a sub-

---

278. *Id.* at 234. Under the terms of the consent decree establishing the program, the receiving suburbs were at least 70% white, but a small number of suburbs were excluded due to particularly high rents. *Id.* If a unit was in the suburbs, a household that preferred the city could refuse to accept it, but they were unlikely to rise to the top of the waiting list again. *Id.*

279. *Id.* at 259–60.

280. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 408 (D. Md. 2005). See generally Roisman, *supra* note 274, at 353–89.

281. LORA ENGD AHL, POVERTY & RACE RESEARCH ACTION COUNCIL, NEW HOMES, NEW NEIGHBORHOODS, NEW SCHOOLS: A PROGRESS REPORT ON THE BALTIMORE HOUSING MOBILITY PROGRAM 11–12 (2009), available at <http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf>.

282. *Id.* at 14–21 (discussing in detail the mobility assistance services provided), by the Baltimore Housing Mobility Program).



stantial and sustained change in environment.”<sup>283</sup> Along these lines, a 1995 study of the *Gautreaux* program found that 64% of those who moved to the suburbs were employed following the move, compared to an employment rate of just 51% for those who remained in the central city.<sup>284</sup> Summarizing multiple studies of the effects of the *Gautreaux* program, Sharkey notes:

Not only did parents who were relocated to the suburbs experience substantial benefits arising from economic opportunities that were not available within Chicago’s city limits, but the children in these “suburban” families started to show promising signs indicating future success. Children in families that moved to suburban apartments had substantially higher rates of high school completion, college attendance, and labor force participation than their counterparts who were assigned to apartments within Chicago.<sup>285</sup>

With these examples as a model, in situations where specific prior practices of discrimination and housing segregation have markedly and adversely affected the capacity of individuals to make use of an equal bundle of resources, limited divergence from the norm of equality should be permitted to remedy such prior inequities. Although this will not account for all inequities in initial resources, it provides a targeted and administratively feasible compromise that addresses an issue of particular salience in the context of housing.

### C. *Housing Resource Bundles as a More Equitable Housing Assistance Policy*

Broadening the scope of our distributional analysis to include all federal housing assistance reveals an additional virtue of the housing resource bundle approach: it can readily incorporate the HMID. As noted earlier, the HMID skews the distribution of all federal housing assistance—both direct subsidies and tax expenditures—towards higher income households.<sup>286</sup> It allocates substantially more resources to these higher income individuals.<sup>287</sup> As

---

283. SHARKEY, STUCK IN PLACE, *supra* note 246, at 139.

284. Rosenbaum, *supra* note 19, at 237.

285. SHARKEY, STUCK IN PLACE, *supra* note 246, at 98. Sharkey does note that “this evidence turned out to be somewhat less convincing than the early studies suggested, although most of the early conclusions from the research continue to be supported even in follow-up studies of Gautreaux families.” *Id.*; *see also id.* at 141–46 (providing more detailed discussion of *Gautreaux* and Moving to Opportunity Studies).

286. *See supra* Part II.C.2.

287. *Id.*

noted earlier, twenty-five- to thirty-five-year-old homeowners with more than \$250,000 in income save an average of \$7077 through the deduction.<sup>288</sup> Those with incomes under \$40,000 are able to reduce their tax bills by an average of only \$208.<sup>289</sup>

A commitment to distributing all federal housing assistance to provide for equality of resources would demand that the housing resource bundle approach be put in place for all citizens. Each individual would be limited in the total amount of housing assistance they could receive during their lifetime. All citizens would receive an equal sum of housing resources, either through direct rental assistance or a deduction of mortgage interest (or some combination). This would result in a substantial change in the allocation of resources, resulting in a more equitable distribution of all federal housing assistance. As noted earlier, at least two prominent economists have suggested integrating federal rental assistance into the tax code as a credit.<sup>290</sup> As John Quigley noted in making this suggestion, “Using the tax code to support low-income renters may . . . further national goals of equity in the tax treatment of housing by the federal government.”<sup>291</sup> The bundle of resources approach does not necessitate allocating all forms of housing assistance—including low-income rental assistance—through the tax code. Instead, one bundle could include a tax credit for homeownership while another could include a housing choice voucher. All that is needed is a valuation of each bundle that enables an equitable allocation. Approaching federal housing assistance from the perspective of equality of resources offers a practical mechanism for rendering these diverse forms of housing assistance more equitable and, most importantly, for highlighting and reforming the glaring inequities created by the HMID.<sup>292</sup>

---

288. Poterba & Sinai, *supra* note 122, at 88–89.

289. *Id.* at 85 tbl.1.

290. *See supra* notes 135–40 and accompanying text (discussing proposals by Ed Glaeser and John Quigley).

291. Quigley, *Rental Housing Assistance*, *supra* note 140, at 151.

292. *See supra* Part II.C.2. In contrast with the home mortgage interest deduction, incorporating the LIHTC into the bundle of resources approach would present more substantial practical challenges to implementation. It would require substantial changes to the LIHTC program’s income targeting, in order to align it with that of the HUD-administered rental assistance programs: calculation of the value of the benefit received by individual recipients; and a substantial reform of the administration of the LIHTC program in order to allocate these units in parallel with the HUD programs. *See supra* Part II.C.1.

## CONCLUSION

Federal housing assistance has been enlisted to serve a diverse set of goals, but its primary function remains the provision of a specific resource—housing. Although equality may not be “the whole story in political morality,” it should at least inform how we distribute limited resources. Shifting housing assistance towards a distribution that better approximates an equality of resources approach provides a means through which this specific resource can be allocated more equitably. It also provides recipients with greater freedom to make decisions that enable them to best pursue their personal goals, while indirectly furthering the secondary goals of federal housing policy. If we assume that the resources available for rental assistance will not increase, the bundle of resources approach provides a means to mitigate the potential hardships of the benefit reductions and time limits necessary to more equitably distribute limited financial resources. If we instead look more broadly at all federal housing assistance—including the home mortgage interest deduction—the bundle of resources approach provides a practical mechanism for achieving a more just distribution of the federal government’s support for housing.