Affordable Housing for the 1990's

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National housing policy begins with the New Deal,¹ perhaps because the Depression was the first time that poor housing and

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I wish to thank George Lefcoe, Daniel Mandelker, Henry McGhee, and Roberta Youmans for helpful comments. I also appreciate the contributions of my research assistant, Alice Curtiss. I wish to express special appreciation for the work of Morton Schussheim, Senior Research Specialist on Housing in the Economics Division of the Congressional Research Service, and of his colleagues Grace Milgram, Barbara Miles, Jane Gravelle, and Charles Welborn, whose work has greatly influenced my own thinking. Of course, all the mistakes are mine.

₁. The New Deal was ushered in at a time when the Depression had pushed the number of unemployed to 15 million people. NATIONAL ASS'N OF HOME BUILDERS, HOUSING AMERICA—THE CHALLENGES AHEAD 30 (1985) [hereinafter NAHB].

Before the New Deal, it is difficult to discern any coordinated national housing policy. At the state and local level, housing policy was primarily a subset of community development policy. Organizations such as the New York Society for Improving the Conditions of the Poor and individuals such as Jacob Riis brought the conditions of tenement dwellers to public attention before the turn of the century. Welborn, Housing and Community Development, in CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, HOUSE COMM. ON BANKING, FIN. & URBAN AFFAIRS, 98TH CONG., 1ST SESS., HOUSING—A READER 151, 151-52 (Comm. Print 1983) [hereinafter Hous1ng-A READER].

At the national level, federal activity included an 1892 study of slum conditions in cities with populations over 200,000; a substantial public housing effort to provide shelter for shipyard and defense plant workers during World War I (all of the produced units were sold to the private sector at the close of the war); and the construction by the Hoover administration's Reconstruction Finance Corporation of a 1573-unit low income apartment complex called "Knickerbocker Village" in New York City on the eve of the New Deal. D. JUDD, THE POLITICS OF AMERICAN CITIES 260-61 (2d ed. 1984). The Hoover administration also sponsored the Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1430, 1430b-1440, 1442-1449 (1982 & Supp. IV 1986)), shoring up savings and loan institutions that specialized in financing home mortgages for the middle class. See D. JUDD, supra, at 129.

The New Deal approach to low income housing was crafted out of the work of the Housing Division of the Public Works Administration (PWA) (using low interest federal loans to induce the private sector to engage in renovation, slum clearance, and construction of low income housing) and the United States Emergency Housing Corporation (USEHCO) (directly financing and constructing low income housing beginning in 1933, then working through locally chartered public housing authorities to avoid federal exercise of the power of eminent domain). Id. at 261-62. The United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437-1437n (1982 & Supp. III 1985)), designed to build low income housing and clear slums through a combination of federal funding, local public housing authority (LPHA) sponsorship,
homelessness hit mainstream people in large numbers. The disruption of mortgage lending and a rash of mortgage foreclosures short-circuited home ownership for the middle class. Lower income renters lived in substandard housing characterized by crowding, lack of private toilet facilities, lack of running water, and the need for major repairs.

The New Deal erected an entire financial system to facilitate home ownership for Americans who could not otherwise afford it, and a system of public housing for those who could not afford private enterprise, was the cornerstone of New Deal housing policy for the poor. D. Judd, supra, at 262. Between 1937 and 1945, the United States Housing Administration, created by the 1937 Act, and its successor, the Federal Public Housing Authority, constructed almost 170,000 units of low income public housing. Id. at 264. The New Deal approach to middle income housing is set forth infra note 4.

2. See NAHB, supra note 1, at 30 (more than 1.5 million home mortgage foreclosures and defaults).

3. In 1940, crowding was defined as more than 1.5 persons per room. Milgram, The Rationale for Assisted Housing, in HOUSING—A READER, supra note 1, at 98, 99.

4. Federal policy for protecting and then promoting middle class housing centered on the insulation of home mortgage financing from commercial lending. Miles, Housing Finance: Development and Evolution in Mortgage Markets, in HOUSING—A READER, supra note 1, at 45, 48. Although the Federal Deposit Insurance Corporation (FDIC) was set up to protect investments in commercial banks, and the Federal Reserve Board was set up to stabilize the entire financial system, the role of savings and loan institutions (S & L's) in home mortgage financing was sheltered by a special subsystem, under the general stewardship of the Federal Home Loan Bank Board (FHLBB). The FHLBB was created by the Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1430, 1430b-1440, 1442-1449 (1982 & Supp. IV 1986)), and had power to both fund and regulate the activities of the S & L's. See Miles, supra, at 48.

The FHLBB, initiated not by Roosevelt but by Hoover, was initially capitalized at $125 million. This sum financed the establishment of the FHLBB and twelve regional banks as a reserve system for the S & L's. NAHB, supra note 1, at 30. Federally chartered S & L's received significant capital incentives and tax deductions in exchange for their pledge to make home mortgage lending a substantial part of their portfolio. Id.; see Home Owners' Loan Act of 1933, Pub. L. No. 73-43, 48 Stat. 128 (codified at 12 U.S.C. §§ 1424, 1461-1462, 1464-1466a, 1468 (1982 & Supp. IV 1986)).

The New Deal broadened and strengthened this financial system by adding insurance for S & L depositors, whose deposits gave S & L's the funds needed to engage in mortgage lending. This insurance fund, the Federal Savings and Loan Insurance Corporation (FSLIC), was established by the National Housing Act, Pub. L. No. 73-479, tit. IV, §§ 401-407, 48 Stat. 1246, 1255-61 (1934) (codified at 12 U.S.C. §§ 1724-1730 (1982 & Supp. IV 1986)). The Federal Housing Administration (FHA), established by the National Housing Act, Pub. L. No. 73-479, tit. I, §§ 1-5, 48 Stat. 1246, 1246-47 (1934) (codified at 12 U.S.C. §§ 1701-1703, 1705 (1982 & Supp. IV 1986)), promoted and insured long-term, low interest home mortgages, steering home mortgage finance away from the short-term balloon note instruments that had precipitated a rash of foreclosures in the opening days of the stock market crash. Miles, supra, at 48. The Federal National Mortgage Association (FNMA), established in 1938 by the FHA pursuant to its delegated authority under the 1934 Act, acted as a "purchaser of, and thus a guaranteed source of funds for, any FHA-insured loan made by private lenders." Id. at 48. This basic system was significantly modified in 1944 when the Veterans' Administration guaranteed no-
ford to own their own home despite federal intervention. The New Deal's housing agenda was mixed with other agendas, however—the need for jobs, the need to shore up financial institutions, and the need to dramatically upgrade the housing stock. In the fifty years since then, these other agendas have either been met, more efficient techniques have been identified to achieve them, or the agendas have simply been discarded. Without the support of other goals, home ownership for the middle class and subsidized housing for the poor have proven increasingly difficult to justify—and fund—in an age of government fiscal austerity.

Today's housing problems do not seem as extreme as those of the Depression era, but the cause remains the same—the gap between what people earn and what it costs to purchase or rent housing. Substandard housing is no longer as widespread as it was during the first years of the Depression; rather, the lack of affordable housing is the central problem for housing policy today. The lack of affordable housing has also ominously climbed the socioeconomic ladder, and the gap between consumer income and housing cost is constantly widening. At the same time, the federal government's involvement in housing has been decreasing ever since the New Deal.

Although federal assistance to middle class home ownership and lower income rental housing has been decreasing for decades, it is the Reagan administration that has been most closely associated with taking the federal government out of the housing business. As one of its key initiatives, the Reagan administration deregulated the savings and loan institutions that were the cornerstone of the housing market.

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6. Today's standards of housing habitability are higher than those of the 1940's. For housing to be considered habitable today, it must include hot as well as cold running water, be in a better condition of repair and less crowded (one person per room rather than 1.5 persons per room). By these higher standards, 5.3 million households in 1983 occupied housing that was substandard due to plumbing or state of repair, and 1.5 million additional households occupied housing that was substandard due to overcrowding. Milgram, supra note 3, at 99-100. The number of homeless persons has been estimated at between 250,000 and 3,000,000 people. See infra note 165 and accompanying text.

7. Approximately 9.7 million households paid more than 30% of their income for shelter that was not crowded or otherwise substandard. Milgram, supra note 3, at 101.

8. The percentage of income spent on housing has risen steadily since World War II for all families regardless of income. Id. at 100-01. In 1950, 30.8% of renters paid over 25% of their income in rent. In 1980, 32.7% of such households paid at least 35% of their income in rent. Moreover, 51.6% had rent-income ratios greater than 1:4. Id.
nerstone of federal housing policy for the middle class since World War II. The administration has also massively cut various subsidized housing programs aimed at low and moderate income groups. As a result, the housing industry is depressed, while many middle income persons cannot afford to own their own homes and some lower income persons cannot afford housing at all.9

This Article examines the history of national housing policy and the factors that will influence its future. Part I discusses the role of capital costs in influencing housing policy. Part II summarizes the changes that have occurred in housing policy in the last fifty years. Part III studies how local- and state-level institutions have reacted to these changes. Finally, Part IV predicts the future of national housing policy, focusing particularly on local efforts.

I. THE PLACE OF CAPITAL COSTS IN CONTEMPORARY HOUSING PRICE: A POLICY PROBLEM

The cost of housing is a function of the price of land, materials, capital, labor, and industry organization.10 The two elements of housing cost that have shown the greatest increase as a percentage of overall housing costs since 1949 are the cost of capital and the cost of land.11

Labor costs have not increased as a percentage of the cost of housing production since 1970.12 Surprisingly, the percentage has even decreased somewhat because of emerging trends toward preassembly of modular units and the use of more unskilled workers for assembly at the site.13 The cost of materials as a percentage of overall housing cost has also remained fairly stable, primarily as a result of the use of new technologies, new substances in place of wood, and standardized, preassembled...

9. Middle income households are finding it increasingly difficult to purchase housing because of rising construction and capital costs. See generally infra notes 20 and 51-67 and accompanying text. Conditions for renters have also worsened. See generally infra notes 147-60 and accompanying text. On the problems of homelessness, see infra notes 165-74 and accompanying text.
10. Schussheim, Housing: An Overview, in HOUSING—A READER, supra note 1, at 12, 15. A larger, more concentrated industry can achieve economies of scale and other efficiencies. See NAHB, supra note 1, at 111.
12. Id. at 34.
13. See id.; NAHB, supra note 1, at 117-18.
Small builders, materials suppliers, and construction workers have not embraced these innovations, however.\(^{16}\) Local governments closely regulate such materials as well, further limiting their use.\(^{16}\) Finally, established homeowners often oppose inexpensive housing per se, as they feel it depresses property values, or competes with their own homes on the market when they wish to sell.\(^{17}\)

Unlike the cost of labor and materials, the cost of land has risen as a percentage of total housing cost since 1949. This increase is primarily attributable to higher site preparation costs due to stringent environmental and land use controls.\(^{18}\) So costly and arduous is the process of complying with these controls that larger builders have begun to subcontract out site preparation to small entrepreneurs who are struggling to stay in business.\(^{19}\)

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14. NAHB, supra note 1, at 16; Saltojanes, supra note 11, at 35; see NAHB, supra note 1, at 116-19.

15. Schussheim, supra note 10, at 15. To the contrary, extensive use of the new technologies is positively associated with large-scale builders, a concentrated industry, and a relatively homogeneous range of consumer preferences for housing.

The National Association of Home Builders divides builders into three groups: large developers (100 dwelling units per year or more), medium builders (26-100 units per year), and small builders (less than 26 units per year). Large developers build on a large scale, using assembly line technology and less skilled workers. In 1982, they built 9.7% of the housing in the United States (up from 7.4% in 1978). Medium builders, who build on their own land and sell to the public, built 17.6% of the housing in 1982, down from 19.7% in 1978. NAHB, supra note 1, at 111. Small builders engage primarily in remodeling, rehabilitation, and subcontracting to the larger builders, especially for site preparation. See id.

The large multifamily developers have significantly increased their activity in the United States, but so have the small general contractor/subcontractors. The middle-range general contractors are the ones being squeezed out; they are not large enough to compete for capital or utilize economies of scale to match the large builders, yet are not flexible or versatile enough to compete for remodeling or subcontracting work with small builders. Id. at 111-12. On the whole, the industry is much less concentrated than other large American industries, and certainly less than its Japanese counterpart, for example. Sheridan, Made in Japan, BUILDER, Jan. 1986, at 228-33. The likely result of the varying factors affecting the organization of production and the cost of materials is a mixture of craft work and assembly line techniques, and a stabilizing of the cost of construction. Schussheim, supra note 10, at 15.


17. Id. at 15-16.

18. Exclusionary zoning drives up the price of land, making it difficult to produce an affordable housing package, closing suburban housing and land markets to low and moderate income families. See Davidoff & Davidoff, Opening the Suburbs: Toward Inclusionary Land Use Controls, 22 SYRACUSE L. REV. 509, 519 (1971).

In contrast, positive action by state and local legislatures can harness the development process itself to actually reduce the cost of housing. See McDouggall, From Litigation to Legislation in Exclusionary Zoning Law, 22 HARV. C.R.-C.L. L. REV. 623, 630-31, 635-39, 642-50 (1987) (set-aside techniques); see also discussions of “linkage” techniques infra notes 200-11 and accompanying text.

19. NAHB, supra note 1, at 111.
The cost of capital, however, is the factor that has increased the most since 1949 as a percentage of overall housing cost. Most of the increase can be attributed to tax deductions for mortgage interest and fluctuating interest rates due to changes in housing credit markets. Capital costs have become increasingly important as the government has subsidized private home ownership through tax deductions for mortgage interest payments. These deductions have encouraged consumers to pay far more for owner-occupied housing, drastically inflating the price of housing for owners and renters alike, and further widening the gap between income and housing price.

II. FEDERAL HOUSING POLICY: FROM ROOSEVELT TO REAGAN

The problem of affordable housing—the gap between income and housing price—can be addressed by reducing housing cost (the supply side) or increasing consumer buying power (the demand side). Both techniques have been used, with varying degrees of success, during the fifty-year period that marks the height of national consciousness regarding this issue.

At the national level, middle income homeowners have been the focal point of public policy. This Part will discuss techniques for facilitating middle income home ownership that range from supply-side mortgage insurance and secondary market activity to demand-side mortgage interest payment deductions. Supply- and demand-side techniques for facilitating low and moderate income rental housing will also be discussed.

20. See Saltojanes, supra note 11, at 35.
21. See infra notes 272-74 and accompanying text.
24. Other supply-side subsidy methods include: federal purchase of privately originated mortgages; below market interest rate mortgages achieved through direct federal loans or payment of all or part of the debt service on a private loan; financing based on tax exempt bonds; and tax savings to housing investors through rapid depreciation or "low income housing tax credits." Milgram, supra note 3, at 104-06.
A. Supply-Side Techniques: The Roosevelt Legacy

1. Middle class housing on the supply side—Because housing is usually too expensive an item to be purchased outright, the structure and functioning of capital markets for mortgage financing has proven central to the program of providing home ownership opportunities to the middle class. As a result of various governmental subsidies, home mortgage financing today represents about twenty percent of the Nation's investment capital, the largest single use of investment capital in the economy.26 Because housing starts are very sensitive to the interest rate, the large share of investment capital devoted to financing middle class home ownership causes a grave instability in general capital markets. The financial crises of the early 1930's demonstrate that the economic instability associated with housing finance can jeopardize the entire economy.26

The New Deal sought to counter this dangerous volatility by segregating housing finance from general capital markets. The federal government also committed substantial funds for subsidizing the housing capital market and set up an extensive regulatory system for housing finance. Policy objectives other than the provision of housing—economic stabilization and rationalization of capital movement on a regional and national basis—played a major role in federal housing policy of the time.27 These various objectives were pursued through the Federal Home Loan Bank Board (FHLBB) and affiliated agencies, a system of federal support for and regulation of savings and loan banks that engaged primarily in home mortgage lending. The FHLBB tinkers with the secondary mortgage market, which draws in investment capital to "bail out" primary lenders.

a. The FHLBB and its affiliates—From 1932 to 1947, the government established six major organizations to aid housing:

25. Miles, supra note 4, at 45.
26. On October 24, 1929—"Black Tuesday"—prices on the New York Stock Exchange collapsed, leading to an economic downturn that caused unemployment to increase from 3.2% to 23.6% by 1932. D. Judd, supra note 1, at 128. The average income of employed persons decreased 42.5% from 1929 to 1933. Id.

Financial panics drastically curtailed lenders' ability to hold deposits, prompting drastic disintermediation. Outstanding mortgages (often with terms as short as five years) were called in to cover withdrawals, precipitating foreclosures. Because private mortgage insurers at the time could not cover foreclosure losses of that magnitude, they also went under. Miles, supra note 4, at 47-48. Twenty-five percent of all homes were foreclosed in 1932, and more than 1000 homes were lost daily in early 1933. D. Judd, supra note 1, at 129.

27. Milgram, supra note 3, at 98.
The Federal Home Loan Bank Board (FHLBB), the Federal Savings and Loan Insurance Corporation (FSLIC), the Federal Housing Administration (FHA), the Federal National Mortgage Association (FNMA), the home financing division of the Veteran's Administration, and the Housing Home Finance Agency (HHFA). The FHLBB, established in 1932 by President Hoover, but restructured by Roosevelt during the first year of his administration, was the cornerstone of New Deal strategy. In 1933, it began chartering federal savings and loan institutions (S & L's) to serve the home mortgage financing market. Deposits in S & L's were insured by the FSLIC under the same Act that established the FHA.

The FHA was created in 1934 to operate independently of, but in association with, the FHLBB system. The FHA provided home mortgage insurance. FHA insurance spread the risk of mortgage default across the taxpaying public and correspondingly reduced the risk taken by the lender. The FHA was chartered to facilitate home ownership, encourage uniformity among lending institutions, and upgrade housing stock.

28. The FHLBB was established by the Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1430, 1430b-1440, 1442-1449 (1982 & Supp. IV 1986)), and along with its 12 regional banks constituted a reserve system for the Nation's S & L's. The system required restructuring and recapitalization by the time of the New Deal, primarily because it was not undertaken in the context of overall economic reform. NAHB, supra note 1, at 31; Miles, supra note 4, at 48; see supra note 4.


30. See supra note 29.

31. National Housing Act, Pub. L. No. 73-479, tit. I, § 1, 48 Stat. 1246, 1246 (1934) (codified at 12 U.S.C. §§ 1701-1703 (1982 & Supp. IV 1986)). The Federal Home Owners Loan Corporation (HOLC) was created as a subsidiary of FHLBB with an initial capitalization of $400 million. The HOLC enabled debtors to transform their obligations from the popular short-term balloon note devices (rarely covering more than 50% of the purchase price of the home), to the long-term, low interest, low down payment instrument that was the cornerstone of New Deal home ownership policy. The HOLC received $2.0 billion in lending authority to purchase delinquent mortgages, and thousands of home owners were saved from foreclosure of their houses. During the HOLC's most active period, it held 15% of all mortgage debts. When the HOLC was dissolved in 1951, it showed a $14 million profit. NAHB, supra note 1, at 31.

32. Conventional lenders require private mortgage insurance (PMI) on any home mortgage transaction in which the loan to value ratio is greater than 90%. One hundred and twenty-one billion dollars of such insurance was in force in 1982 alone. Miles, supra note 4, at 61.
Ten years later, the Servicemen’s Readjustment Act of 1944 established another government housing organization, the Veterans’ Administration (VA). The VA offered federally guaranteed home mortgages, with no down payments, to ten million veterans.

Finally, in 1947, the government consolidated its various housing programs under HHFA, the forerunner of the Department of Housing and Urban Development (HUD). New Deal financing structures—FHLBB, FHA, VA, HHFA—facilitated, channeled, and directed the tremendous housing demand that existed at the close of World War II and transformed the United States from a nation of renters to a nation of home owners, contrary to housing tenure patterns throughout the world. Housing starts surged from 326,000 in 1945 to one million in 1946.

Savings and loan banks, federally chartered by the FHLBB, provided the principal source of mortgage lending for middle class homeowners of the post-war era. Federal law insulated the S & L’s from competition with commercial banks and gave the S & L’s access to advances of funds from regional Federal Home Loan Banks. At the same time, other regulations restricted S & L’s investment opportunities. As a result, the S & L’s eschewed risk and devoted a substantial portion of their funds to home mortgage lending.

The early programs’ successes were not without their costs. The FHA’s early years were marred by the agency’s support for racially restrictive covenants, which suburban developers adopted to protect property values, and by its refusal to insure mortgages originating from black areas, which encouraged inner city redlining. The VA mortgage program, oblivious to the out-
standing contribution black veterans had made to the war effort, followed the same discriminatory practices as the FHA. FHA and VA discriminatory practices skewed the great spurt of housing production and suburbanization of the late 1940's and the 1950's, resulting in a rigid pattern of metropolitan segregation that persists today.

b. The secondary mortgage market—The secondary mortgage market provides a means by which loans originated by S & L's and mortgage banks can be sold to investors, freeing the primary lenders to originate more mortgages. Mortgages are traded individually on the secondary market or can be pooled. In the latter case, securities based on the pool are traded on the market rather than the mortgages themselves. In either case, loans originating in areas where the demand for credit exceeds the supply can be traded on the secondary market to areas where the supply of credit (in the form of deposits) exceeds demand.

After initial experimentation with wholly private secondary mortgage associations, Congress chartered the FNMA in 1938, the first public institution of this type, to rationalize capital motion between regional housing markets. The FNMA, originally likely to do so without FHA insurance. See R. Shiffman, Citizen Involvement in Housing and Community Development 6 (Nov. 16, 1985) (unpublished paper).

38. This spurt resulted from returning veterans' demand for family space; productive capacity developed for war, newly devoted to peacetime purposes, which led to new jobs and increased housing needs; banks' need for new investment opportunities; and defense department directions to protect essential industry from nuclear attack by dispersal beyond the urban perimeter. Id. at 8-9. The shift of industry was also facilitated by new technology mandating spread out factories for assembly line techniques. Population increases followed the decentralization of industrial jobs to the suburbs. D. Harvey, Social Justice and the City 61 (1973).

Ironically, by the 1970's, fuel shortages and new technology permitting personnel and productive capacity to be protected from nuclear attack combined to reverse the centrifugal force attached to these factors. R. Shiffman, supra note 37, at 8. Recentralization will make metropolitan areas less dependent on imported oil, for example. The civil rights movement also removed some of the racial barriers and tension that made urban living unpalatable a generation before. Id. at 8.


40. The FHA insures mortgage pools as well as individual mortgages. Under such arrangements, the payment rate and principal amount, in addition to the mortgage, are insured. Miles, supra note 4, at 61.

41. Investors are provided with a certificate guaranteeing participation in a percentage of the value of the pool and the income generated by it. Miles, supra note 4, at 51-52.

42. Id. at 46.

43. Id. at 50.

44. The FNMA guaranteed the purchase of any FHA-insured loan, thus contributing to uniformity of clauses in mortgage instruments. Id. at 48. The FNMA was chartered pursuant to the Act of July 1, 1938, Pub. L. No. 80-864, 62 Stat. 1206 (codified as
chartered to handle FHA-insured mortgages, has gone through a number of transformations since then. In 1948, the FNMA was given responsibility for processing VA-guaranteed loans. In 1954, the FNMA was partly privatized, in response to the growing strain on the federal budget occasioned by its operations. 

In 1968, Congress assigned the FNMA’s “special assistance” functions of managing and liquidating certain subsidized mortgages that had been created in the 1960's to a newly-formed secondary market association, the Government National Mortgage Association (GNMA). The FNMA was further privatized as a result, becoming a federally-sponsored, semiprivate, stockholder-owned corporation. In its new privatized form, the FNMA continued to trade FHA and VA loans in the secondary market and also to manage or liquidate the “seasoned” mortgage loans that it had in its portfolio as of 1968. In 1970, Congress allowed the FNMA to add conventional mortgages to its portfolio, though it was restricted to mortgage amounts thought to correspond with the upward limits of moderate income housing. Congress established the Federal Home Loan Mortgage Corporation (FHLMC) at the same time it loosened the FNMA's portfolio limits. The FHLMC facilitated S & L’s resort to the secondary market by accepting conventional mortgages regardless of principal amount.


45. Miles, supra note 4, at 49. The FNMA was federally chartered as a mixed public-private company, using separate accounts to segregate its “special assistance” functions for subsidized housing from its more profitable secondary mortgage market operations. Id. The reorganization was accomplished pursuant to the Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590 (codified as amended at 12 U.S.C. § 1703 (1982 & Supp. IV 1986)). Miles, supra note 4, at 49.

46. See Miles, supra note 4, at 50-51. The FNMA was partitioned into the FNMA and the GNMA to facilitate a rationalization of the secondary mortgage market, particularly with respect to the activities of S & L’s and mortgage bankers. The Housing and Urban Development Act of 1968, Pub. L. No. 90-448, tit. III, §§ 301-318, 82 Stat. 476, 505-513 (codified in scattered sections of 12 U.S.C.), accomplished the split. In 1974, the GNMA itself was altered; it became authorized to purchase $7.5 billion worth of mortgages to pump capital into the housing market via a “tandem plan” that survived until 1980. Milgram, supra note 3, at 105-06. For a general discussion of GNMA securities, see Fernslee, supra note 22, at 698-99.

47. NAHB, supra note 1, at 34-35.


49. “Moderate” income housing meant housing that did not exceed a $100,000 purchase price. Id.

50. The FHLMC is a “pooling” mechanism, buying conventional mortgages and issuing securities based on its loan portfolio.
c. Disintermediation and S & L failure: Prelude to the Reagan years—A crisis buffeted the New Deal home financing system beginning in the late 1960’s—disintermediation. The term has been called a "splendid neologism" by Professor Mandelker,1 and signifies the loss by S & L's of their position as financial intermediaries between their depositors and persons wishing to finance the purchase of a home (hence "dis-intermediation"). By the 1960's, the centrality of the S & L's as the cornerstone of federal housing policy for the middle class began to be challenged by mortgage bankers.2 Increasing fluctuations in interest rates11 had undermined the S & L's ability to intermediate—that is, to draw in funds from depositors4 at a low interest rate6 and relend to home purchasers at higher rates. Because so much of their business was mortgage lending, many S & L's faltered or went under completely.

During the last years of the Carter administration and the early years of the Reagan administration, disintermediation and the resultant problems of S & L's were dealt with by a one hundred and eighty-degree turn from New Deal pol-


52. Mortgage bankers originated FHA- and VA-approved mortgages and sold them to the FNMA. They thus used the secondary market as a partial buffer against fluctuating interest rates. S & L's, in contrast, tended to hold their mortgages and service them rather than resell them on the secondary market. S & L's resorted to the secondary market only to replenish reserves. Miles, supra note 4, at 50-51. They also generally dealt in conventional rather than FHA or VA loans, which limited their access to the secondary market. Id. at 50.

53. Interest rates have fluctuated partly by design, as the Federal Reserve Board tightens and loosens monetary policy by increasing and decreasing the discount rate (the interest rate the Board charges on loans to financial institutions). Interest rates have been decreased to stimulate the domestic economy and increased to stimulate foreign investment. Paradoxically, the former strategy is needed to get the economy out of a slump, but the latter is necessary to finance our trade and budget deficits as long as the economy is in a slump. Berry, Greenspan—A Man Aware of Feasibility, Wash. Post, June 14, 1987, at D1, col. 4, D3, col. 1. Sharp declines in the dollar exchange rate on the international market in April 1987 led to surges in long-term interest rates and caused the Fed to tighten monetary policy. See id. at D3, col. 2. A dollar declining in value on the international market, combined with high interest rates, creates inflation (inflation might reduce the trade deficit, however). Id. at D3, col. 4 (quoting Alan Greenspan, Chairman, Federal Reserve Board).

54. The depositors abandoned the S & L's because of higher rates available from instruments such as money market mutual funds. See Meyerson, Deregulation and the Restructuring of the Housing Finance System, in CRITICAL PERSPECTIVES IN HOUSING 68, 70-71 (R. Bratt, C. Hartman & A. Meyerson eds. 1986).

icy—deregulation. One phase of deregulation was to make S & L's more competitive with commercial banks and mutual funds as candidates for public savings. A variety of short-term investment instruments were authorized to make S & L's more attractive loci of savers' deposits despite rising interest rates. These instruments were generally more attractive to investors, as they provided higher interest rates and shorter terms than those that S & L's had previously offered.

Though these instruments brought in deposits, their high rates and short terms required interest payments that were incompatible with the S & L's long-term, low interest mortgages that still comprised the bulk of their portfolios. At the same time, new mortgages were difficult to sell because of prohibitively high interest rates. In an effort to make mortgages with higher interest rates more palatable to the housing consumer, a variety of exotic mortgage instruments were permitted, all of which served to pass the higher risks prevalent on the market to the borrower.

At the same time, the general process of deregulation allowed S & L's to make riskier investments to generate the high interest rates demanded by the new savings instruments and to behave more like commercial banks. Few S & L's were prepared for

56. The money market certificate, a 26-week, $10,000 certificate with interest rates pegged to six-month U.S. treasury bills, was introduced in 1978 to compete with money market mutual funds. Miles, supra note 4, at 52. The All Savers Certificate, featuring tax exemption for interest payments up to $2000, was introduced in 1980 to facilitate S & L's competition for savers' deposits. Unfortunately, the certificate's one-year term meant that deposits would not be available long enough to cover home mortgage lending. I.R.C. § 128 (1986); Miles, supra note 4, at 52. Accounts permitting a negotiable order of withdrawal (i.e., interest-bearing checking accounts), were authorized by the FHLBB on December 1, 1980. Id. at 53.

57. The federal law setting maximum permissible interest rates was also repealed. Meyerson, supra note 54, at 74.

58. Variable rate mortgages were authorized on July 1, 1979. Miles, supra note 4, at 53 n.24. Renegotiable rate mortgages were authorized on April 30, 1980. Id. By 1974, the FHA was authorized to offer graduated payment mortgages—the size of monthly payments, low at the start, and increasing to a higher level that remains steady over the life of the mortgage. NAHB, supra note 1, at 35. Adjustable rate mortgages were authorized in April 1981. Miles, supra note 4, at 53 n.24. Balloon note mortgages were authorized in October 1981. Id. Balloon note mortgages are reminiscent of the type that brought the industry down in 1929. When banks refused to refinance the balloons, mortgagees responded with default, and the banks responded with foreclosure.

the competition or the pressure, however, and they began to dash themselves between the rocks of disintermediation and disastrous investments. By 1981, both the home ownership and mortgage lending industries were in deep trouble—seventy-five percent of all S & L's were unprofitable. Because deregulation deconstructed many of the barriers that insulated housing from commercial lending, the failure of the S & L's threatened to take the whole financial market under, in a replay of the scenario of 1929.

The FSLIC, established to head off threats to the economic system at large posed by S & L instability, proved unable to keep up with the precipitous increase in S & L failures after 1980. The FHLBB drew heavily on FSLIC funds to close down many sick S & L's or merge them with healthier thrifts. As a result, the FSLIC's resources were taxed severely. Congress reacted to the crisis and passed a bill that recapitalized the FSLIC.

The gap in home mortgage finance left by the exit of the S & L's might be addressed, though probably not filled, by a combination of mortgage bankers originating mortgages for pension funds, insurance companies, and secondary market associations. Regulations restricting pension fund activity in residential mortgage lending are being lifted to facilitate the funds' entry into the field. Their participation would most likely be at the secondary market stage, via mortgage-backed securities. Because the funds have capital available and can commit for long periods of time, they would seem to be good candidates to take over some part of the S & L's role. It is doubtful that the pension funds will be able to fill entirely the gap left by the exit of the S & L's, however.

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61. Miles, supra note 4, at 54; see also Meyerson, supra note 54, at 70-72.
62. See infra notes 234-47 and accompanying text.
63. Miles, supra note 4, at 58.
64. Such securities are being issued by the FNMA, the GNMA, and the FHLMC. There is talk of establishing private secondary mortgage institutions, but securities of secondary market institutions have typically not been attractive on the market without some form of government guarantee. Miles, supra note 4, at 52.
65. Crutsinger, Housing Starts Fall Again in May, Wash. Post, June 17, 1987, at F3, col. 1, F3, col. 1; see also supra note 53.

In the short term, the situation has been partially alleviated by the Federal Reserve Board's (Fed) loosening of the money supply. This helps by bringing down interest rates, but brings about more inflation. Such measures by the Fed cannot continue if the value of the dollar keeps falling relative to the currency of other developed nations, however.
The Reagan administration has sought not to regulate the role of mortgage credit in the economy but rather to reduce the centrality of the role of housing mortgages in the financial system as a whole. The present administration appears to view reliance on housing for economic growth and stability as unjustified. The Republican program has rather been to attempt to merge housing finance with general capital markets, and to eliminate subsidy and regulation in all financial sectors. Deregulation, however, has not only accelerated the flow of capital out of the housing mortgage market but significantly weakened the entire financial system as well.

2. Supply-side techniques for low and moderate income housing— Providing new housing at upper income levels using existing techniques has proven tremendously expensive and drives up the cost of housing for sale or rent throughout the market. Moreover, arguments that new construction at upper income levels trickles down to the poor have been strongly rebutted since the 1950’s, partly because the number of lower income families is greater than the number of upper income families and also because the chain of housing unit exchange between affluent homeowners and housing consumers in lower income and minority groups is lengthy and fragmented.

The consequence of these structural problems is that either affordable housing for low and moderate income persons must

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67. Meyerson, supra note 54, at 92-93. See also infra notes 144-45, 175-85 and accompanying text for a discussion of the severe overextension of the Federal Savings and Loan Insurance Corporation resulting from widespread S & L failures.

68. The annual cost of mortgage interest deductions alone is nearly $30 billion per year. The cost was $29.3 billion in fiscal year 1981, for tax savings to 22 million income households. By fiscal year 1983, the total cost had increased to $36.1 billion. Nine-tenths of these savings go to households with incomes over $20,000 per year. Milgram, supra note 3, at 107-08.


70. Breaks in the chain occur because of submarkets that are racially and/or economically segregated. Most new housing since World War II has been constructed in the suburbs, virtually inaccessible to the poor. Id. at 47.

71. For the Census Bureau, typical “very low income persons” belong to four-person households with incomes that are 50% or less of the median income for the Standard Metropolitan Statistical Area (SMSA) in which they live. “Low income persons” are in four-person households with incomes that are between 50% and 80% of the median income for their SMSA, and “moderate income persons” are in four-person households that have incomes that are between 80% and 100% of median income for their SMSA. “Middle income persons” are in four-person households with incomes higher than 100% of SMSA median income, with the average income of a four-person family in this category being about 120% of SMSA median income. In 1983, 22.9 million people—27% of all households—had very low income, 15.5 million (18%) had low income, and 8.8 million
be directly introduced into the housing supply through an expanded program of public or publicly assisted housing construction, or the incomes of such persons must be supplemented. Supply-side policies have included direct government construction (public housing), direct governmental loans (section 202 of the Housing Act of 1959), assistance in debt service (GNMA tandem mortgages, sections 235 and 236), and below market interest rates secured by federal insurance or guarantees (section 221(d)(5)).

Housing problems at lower income levels involve a wide range of social problems such as racial and economic integration, job creation, and urban blight. Some policy objectives point toward new construction, others toward demand subsidies, and still others toward subsidies at different levels—reaching more or fewer citizens, of greater or lesser income. Policies may also conflict—racial desegregation may conflict with the development of affordable housing, for example. Demand subsidies themselves may have the side effect of inflating rents in the absence of stringent rent controls. Such conflicts make the passage of comprehensive housing legislation difficult, as a policy that feeds the ox of one group gores the ox of another. Only in times of great social attention to housing issues and in times of relative prosperity is it possible for comprehensive housing legislation, such as the Housing and Urban Development Act of 1968, to be passed.

(10%) had moderate income. Forty-five percent of the population is middle income or higher according to these statistics, a somewhat reassuring figure until we note that the national median income is only $27,500. Thus 55% of the population makes less than $27,500 per year. See generally NATIONAL Ass'N OF HOME BUILDERS, LOW- & MODERATE-INCOME HOUSING 1-2 (1986) [hereinafter NAHB II].


73. Milgram, Housing the Urban Poor: Urban Housing Assistance Programs, in HOUSING—A READER, supra note 1, at 114, 116 [hereinafter Milgram, Housing]; Milgram, supra note 3, at 105-06.

74. Milgram, Housing, supra note 73, at 115-16. For example, new construction is required for large families or the handicapped, or for developing integrated housing in segregated areas. Id.

75. Id. (e.g., the only economically feasible development sites in a particular municipality for low income housing might lie in a black neighborhood).

a. **Public housing**— Where national will and national resources are limited, housing policy is less ambitious. The national government first experimented with direct production of housing during World War I, when the units were constructed for the use of workers in wartime industry. The experiment was not long lasting, however, as all the units were sold on the private market as soon as the war was over. 77 The next large-scale effort was introduced during the Depression, by the United States Housing Act of 1937. 78 The United States Housing Authority (USHA), established by the 1937 Act to administer the development of public housing, built on the earlier experiences of the Reconstruction Finance Corporation, which made four percent loans to limited dividend corporations, the National Recovery Administration, which had its own subsistence housing program, the Public Works Administration, and the Federal Emergency Relief Administration, which experimented with new towns and greenbelt communities. 79

The primary purpose for which the 1937 Act was passed was not housing but job creation. 80 Housing construction seemed a logical way to employ people, as the Nation’s housing stock was marred by major disrepair and lack of essential facilities. Shelter advocates, blight-fighters, and those concerned with stimulating employment merged into an uneasy coalition to get the 1937 Act passed over the objection of conservative business interests. 81 In deference to political and constitutional objections, local housing authorities, not the federal government, took on the task of developing, constructing, and managing public housing. 82

Under the public housing system, local housing authorities (LHA’s) borrowed construction funds from the federal government 83 and committed themselves to repay the debt from the proceeds of tax-exempt bonds issued with the full faith and credit of the federal government. 84 The housing was then developed, constructed, and managed by the LHA’s, which used pro-

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77. See generally supra note 1.
79. R. Shiffman, supra note 37, at 5-6; see supra note 1.
80. Milgram, Housing, supra note 73, at 121.
81. Legislation was opposed by the Chamber of Commerce, realtors, home builders, and savings and loan institutions, which called instead for housing certificates. See D. Judd, supra note 1, at 263.
82. See, e.g., United States v. Certain Lands, 78 F.2d 684 (2d Cir. 1935).
83. Initially, the United States Housing Authority lent the construction funds; now the Department of Housing and Urban Development does so. Milgram, Housing, supra note 73, at 121.
84. Id. at 121-22. Public housing is now financed by “up-front” grants.
ject rents to cover operating expenses. The bond debt was ser-
viced by the federal government with funds issued pursuant to
an annual contributions contract, which now comprises the prin-
cipal vehicle by which the USHA (now part of HUD) regulates
LHA’s operation of public housing.85

Working people buffeted by the Depression were the first to
occupy public housing; in fact it was for this group that public
housing was conceived. After World War II, however, opportuni-
ties for home ownership and jobs in the suburbs opened up to
many such people. Income ceilings for continued occupancy in
public housing also propelled upwardly mobile persons out of
public housing and into the private sector. Federal regulations
required that project tenants’ incomes be twenty percent below
that needed to purchase decent housing on the private market,
to ensure private developers a comfortable margin from compe-
tition by public housing.86 Not only did projects become reserva-
tions for the exclusively low income groups, but so-called “mod-
erate” income groups, caught in the twenty percent gap between
the public and the private sector, could not find affordable hous-
ing at all. More and more, public housing became the living
quarters of minorities and the poor who were left behind after
waves of suburbanization that took place between 1944 and
1960.87

Early public housing projects were built on a very large scale
to provide fuel, utilities, and other economies. When public
housing became “housing of last resort” for low income people
and those displaced by slum clearance and urban renewal,88 the
large scale of the projects also meant a concentration of people
with social problems, some rather extreme.89 With tenant

85. In 1984, outstanding federal obligations in this regard amounted to $20 billion.
Id. at 122. Local authorities also make payments by waiving property taxes. Id.
86. Id. at 123. To this day, however, the private homebuilding industry is reluctant to
support subsidized or public housing and considers the FHLBB system and federal tax
incentives to be the prime focus of its housing policy. See Will Emerging Consensus
Policy Be Enough to Restore Housing as a National Priority?, HOUSING AFF. LETTER,
Mar. 27, 1987, at 1, 2 [hereinafter Emerging Consensus Policy].
87. The result of the federal income ceilings was to make public housing strictly
lower class housing, a departure from the European model and a measure that doomed
American public housing to become sites of concentrated social problems. D. JUDD, supra
note 1, at 298 & n.21. Milgram, Housing, supra note 73, at 123.
88. For a general discussion on the selection of tenants for public housing, see Com-
ment, Public Housing: Choosing Among Families in Need of Housing, 77 NW. U.L. REV.
700 (1982).
89. D. JUDD, supra note 1, at 276 (income limits and urban renewal relocation policies
combined to make public housing a racially segregated institution for low income black
and hispanic families); see also Milgram, Housing, supra note 73, at 123-24 (at worst,
public housing was populated by criminals and drug addicts; at best, by “undisciplined,
problems increasing, maintenance becoming more expensive, and tenant income held at low levels, public housing throughout the country incurred operating deficits; essential services suffered, and deterioration and expenses increased.\textsuperscript{90} Granting operating subsidies to projects in difficulty became a regular practice, and these subsidies climbed to one billion dollars per year by fiscal year 1982.\textsuperscript{91} Public housing development that now takes place is either rehabilitation of existing units or small scale new construction.\textsuperscript{92}

\begin{itemize}
  \item \textit{b. Assisted housing— Direct housing production is an expensive and government-intrusive supply-side technique.}\textsuperscript{93} The
\end{itemize}

fatherless families" with little income and social problems including joblessness, poor education, and poor health).

90. Public housing has languished since the Nixon administration, when public housing starts declined from 104,000 in 1970 to only 19,000 in 1974. D. Judd, \textit{supra} note 1, at 277.


92. Youmans Interview, \textit{supra} note 91.

93. Ironically, subsequent efforts by the federal government to back out of direct housing production led to supply-side programs that were less government-intrusive but much more costly.

These efforts were presented programmatically as amendments to the National Housing Act of 1949.

(a) § 221 \textit{Housing for Moderate Income and Displaced Families}

Section 221(d)(3)

The requirements to be eligible for insurance under this act included that the mortgage be executed by a mortgagor which was a public body or agency, cooperative, limited dividend cooperative, private nonprofit corporation, or other mortgagor approved by the Secretary. 12 U.S.C. § 1715l(d)(3) (1982 & Supp. IV 1986).

Section 221(d)(5)

The mortgage also was required to bear interest at a rate to be agreed on by the mortgagor and mortgagee and to provide for payment, repairs, payment of taxes, foreclosure proceedings, etc. The interest rate was to be not lower than three percent per year or the annual rate determined by the Secretary. \textit{Id.} § 1715l(d)(5) (1982 & Supp. IV 1986).

(b) § 235 \textit{Home Ownership for Lower Income Families}

This section simply established a program of home ownership assistance by making mortgage amortization payments to mortgagors on behalf of home owners who qualified for assistance. \textit{Id.} § 1715z(a)(1) (1982). Assisted home owners paid a minimum of 20% of their income for mortgage amortization. \textit{Id.} § 1715z(c)(1) (1982 & Supp. IV 1986). Mortgage amortization payments to mortgagees on behalf of the home owner covered the difference between amortization at the FHA-insured interest rate and the amortization at an interest rate of one percent. \textit{Id.} § 1715z(c)(2) (1982). Preference was given under the section to families likely to be displaced without such assistance. \textit{Id.} § 1715z(a)(1) (1982).

(c) § 236 \textit{Rental and Cooperative Housing for Lower Income Families}

To reduce rentals for lower income families, this provision authorized the Secretary to make mortgage amortization payments to mortgagors holding mortgages meeting the requirements of the section. These payments were made on behalf of owners of rental housing projects designed for lower income tenants. \textit{Id.} § 1715z-1(a) (1982 & Supp. IV 1986) Assisted renters paid the owner a minimum of 25% of their income for rent. \textit{Id.} §
government first attempted to reduce the cost of producing subsidized housing and to eliminate the direct involvement of a public instrumentality with the Housing Act of 1959.94 Section 202 of the Act provided below market interest rate loans to non-profit corporations (rather than local housing authorities) to develop housing for the elderly and handicapped.95 These corporations constructed 45,000 units before an executive order by President Nixon in 1973 suspended the program along with all other contemporaneous federal housing programs.96 When section 202 was revived by Congress in 1974, its reach was limited by excluding elderly and handicapped persons who were not low income.97

The next step was to replace direct loans with loan insurance. Section 221 of the National Housing Act, established by legislative amendment in 1961, was a mortgage insurance program analogous to that of the FHA.98 The section 221 program was directed at multifamily rental housing for displaced and moderate income persons, rather than single-family housing for middle income owner occupants. This program included features that distinguished it from FHA insurance, however. Section 221(d)(3) carried a government agreement to purchase section 221(d)(3) mortgages on moderate income rental properties immediately after they were originated, making the program very close to a di-
rect federal loan both in concept and expense. Section 221(d)(5) established a program of below market interest rate mortgages for owners of apartments renting to families with incomes below the median for the standard metropolitan statistical area. Developers constructed 400,000 rental units under the auspices of section 221.

The next step was taken with the Housing and Urban Development Act of 1968, a piece of legislation spurred by urban riots. The 1968 Act expanded the federal government's financial commitment in the short run, but further reduced its structural involvement in housing supply. Not only had the government now retreated from direct housing construction and direct mortgage lending, but the automatic purchase of section 221 loans was superseded by a commitment to assist in mortgage interest payments only. The 1968 Act proposed that twenty-six million new units of housing be produced over ten years, six million of the total to be subsidized for low and moderate income persons by the federal government. The government was committed to aid nonprofit sponsors only by servicing the mortgage debt in an amount sufficient to reduce the interest rate to three percent, not by purchasing the mortgage or by making the loan itself. Section 235 was added to the National Housing Act to establish a low down payment (as low as $200), below market interest rate (as low as three percent) home ownership loan program for moderate income families. Section 236 created a multifamily rental program for families falling into the twenty percent gap between public and private housing. Both programs were suspended during the 1973 moratorium, however, and the housing gap identified in 1968 was not filled. Of the assistance programs originated in the 1960's, only section 236 was

99. Milgram, Housing, supra note 73, at 125.
101. NAHB, supra note 1, at 33.
103. The Kerner Commission declared that lack of affordable housing was one of the key factors in the riots of the 1960's. National Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 80-81 (1968).
106. See supra note 96.
revived, in emasculated form, by the Housing and Community Development Act of 1974.\textsuperscript{107}

Sections 221(d)(3), 235, and 236 combined to produce 2.7 million units of assisted housing in the ten years after 1968—a great, but very expensive, achievement.\textsuperscript{108} Assisted housing production fell short of the original six million unit goal, but this shortfall was arguably caused in part by the 1973 moratorium.\textsuperscript{109} Assisted housing starts had actually increased between 1970 and 1973.\textsuperscript{110}

\textbf{B. Demand-Side Techniques}

Supply-side techniques to house both middle income and lower income Americans have fallen on hard times since the advent of national housing policy in the 1930's. This Article now turns to an investigation of the fate of demand-side techniques during this same period.

\textbf{1. Tax deductions for middle income persons—} The largest single subsidy to middle class home ownership—indeed to all housing, regardless of income class or tenure pattern—is a demand-side subsidy.\textsuperscript{111} The subsidy, a deduction from federal taxes for interest paid on home mortgage loans, artificially

\textsuperscript{107} Pub. L. No. 93-383, tit. II, §§ 201-213, 88 Stat. 633, 653-76 (codified as amended in scattered sections of 12 U.S.C. & 42 U.S.C.). Section 236 mortgages for multifamily housing have been further leveraged by the activities of the GNMA on the secondary mortgage market. For a discussion of the role of the GNMA vis-a-vis other secondary mortgage market institutions such as the FNMA and the FHLMC, see supra notes 46-50 and accompanying text. See also Fox v. HUD, 532 F. Supp. 540, 541-42 (E.D. Pa. 1982).

Proceeding in the public sector, and without the desirable portfolio of the FNMA and the FHLMC, the GNMA sought to make its loans more attractive on the secondary market by pooling them and issuing so-called “pass-through” certificates, or “Ginnie Maes.” Ginnie Maes carry a full faith and credit federal guarantee that debt service payments will be met in a timely fashion, regardless of the fate of the primary mortgage investments underlying the security. Investors take no responsibility for origination, servicing, or risk of loss. The Ginnie Maes are actually less risky than the underlying primary loans, and the Ginnie Maes have become fairly attractive on the securities market despite relatively low yields. See generally Miles, supra note 4, at 88.

\textsuperscript{108} Milgram, Housing, supra note 73, at 128 (federal budget outlays increased to $1.0 billion by 1972 and were increasing at the rate of $0.5 billion per year).

\textsuperscript{109} Only 59,000 new units were constructed under section 235, for example. Id. at 129.

\textsuperscript{110} See Administration Housing Moratorium Comes Under Fire, 29 CONGRESSIONAL QUARTERLY INC., 1973 ALMANAC 428, 430 (quoting James T. Lyon, Secretary of the Department of Housing and Urban Development).

\textsuperscript{111} On federal subsidies to middle income housing (including tax subsidies) and tax treatment of low income housing development, see Hoeftlich & Malloy, supra note 23, at 659-63. See also discussion of low income housing tax credits infra note 118.
boosts middle class buying power in owner-occupied housing. Moreover, this subsidy becomes more valuable as income increases.\textsuperscript{112}

The mortgage interest deduction skews national investment drastically toward owner-occupied housing—at the expense of investment in more socially productive uses.\textsuperscript{113} Such a policy would be considered an impermissible extravagance in most of the developed, let alone underdeveloped, world. The Tax Code since World War II has constantly been revised to undo such skewing by making investment in industry more attractive relative to investment in owner-occupied housing.\textsuperscript{114} As a result of such changes in the law, the after-tax return on owner-occupied housing has declined significantly since 1950 compared to investment in business or industry.\textsuperscript{115} Today, it is no longer clear that owner-occupied housing is heavily favored by tax subsidies relative to capital investment in business or industry.\textsuperscript{116} The Tax

\[\text{112. Schussheim, supra note 10, at 21 (in 1982, the average tax reduction for middle income home owners in the$20,000 to $30,000 income range was $600, but $3500 for taxpayers with incomes over $100,000). Only 37\% of American households itemize deductions, while 67\% are owner-occupiers. B. Bartlett, Federal Income Tax Reform: Resuming the Battle 11 (Report of Heritage Found. Dec. 30, 1986). It has been estimated that removal of all special tax breaks for homeownership would allow for a 10\% across the board reduction in tax rates. Thus the majority of owner-occupiers would benefit by elimination of the deduction rather than being hurt by it. Id.}\]

\[\text{113. Home ownership is treated for tax deductions as if it were a business but not treated as a business when it comes to taxing its value. The key is to recognize that the enjoyment of owner-occupied housing is, in effect, the enjoyment of value created by ownership. Elsewhere in the tax system, value created by ownership of a business asset is taxed at ordinary income rates. The Tax Code presently makes interest paid for money to buy a home deductible from taxable income, just as a business might deduct similar interest payments used to purchase a business asset. Although the income of such a business would be taxed, however, the enjoyment-value, or "imputed income" generated by ownership of a home, is not taxed. Gravelle, Tax Subsidies to Housing 1953-83, in HOUSING-A READER, supra note 1, at 73, 73; see, e.g., B. Bartlett, supra note 112, at 10-11 (deduction for home mortgage interest encourages excessive home ownership at the expense of using capital for business investment, thereby reducing United States productivity and international competitiveness).}\]

\[\text{114. Note that the Tax Reform Act of 1986 has initiated a schedule by which capital gain rates will be increased steadily over the next three years, a policy which will deleteriously affect investment in housing and business assets alike. Pub. L. No. 99-514, 100 Stat. 2085, 2216-19 (codified at I.R.C. 1(j) (1986)); see also Schussheim, U.S. Housing: Problems and Prospects, in Report Prepared for the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, Jan. 29, 1987, at CRS-9 (Congressional Research Paper).}\]

\[\text{115. Gravelle, supra note 113, at 87-88.}\]

\[\text{116. Increases in corporate taxes resulting from the Tax Reform Act of 1986 will simply restore the corporate share of federal taxes to their pre-Reagan levels—13\% of all taxes. Corporate taxes made up only 8.5\% of all tax revenues in 1985. Low Income Hous. Information Serv., Low Income Housing Round-up, Jan. 1986, at 3. In the 1950's and 1960's, corporate taxes made up 20\% of all federal taxes, and even after a round of corporate tax cuts, held at 15\% of all federal taxes. Id.}\]
Code has also made investment in tax-free accumulation of wealth through various pension plans increasingly attractive relative to investment in owner-occupied housing.\(^{117}\)

With rapid depreciation write-offs for investment in low income housing already eliminated,\(^{118}\) the largest single item of federal subsidy to the nonindustrial private sector—the deduction for home mortgage interest payments—is an attractive target in the game of "balance the budget."\(^ {119}\) Although well-publi-

\(^{117}\) Independent Retirement Accounts (IRA's) in particular are attractive alternatives to investment in owner-occupied housing, although at the same time they are ironically regarded by S & L's as a source of funds for mortgage lending. Gravelle, supra note 113, at 94.

\(^{118}\) Changes in tax laws inhibiting low income housing development are contained in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. I, § 111, 98 Stat. 494, 631-32 (1984) (codified at I.R.C. §§ 168(j), 7701(e) (1986)). See Comment, Low-Income Housing Under the New Conservatism: Trickle Down or Dry Up?, 26 SANTA CLARA L. REV. 461, 462 n.8 (1986). For example, the rapid depreciation write-offs provided by § 167(k) of the Internal Revenue Code of 1954 to investors in low income housing projects, such as those developed under § 221(d)(3) and § 236 of the National Housing Act of 1934, have been drastically limited. I.R.C. § 167(k)(2) (1986). Under the old law, investment vehicles called real estate syndications were assembled to insulate limited partners from development risk while allowing pass-through of tax write-offs. These vehicles were very popular in the days of high tax rates. The program was phased out then temporarily revived in 1980 by the Accelerated Cost Recovery System (ACRS). ACRS was established to restore tax shelter syndications as a way of developing low income rental housing, but this (as well as other "passive" losses) was drastically cut by the Tax Reform Act of 1986. See I.R.C. § 167 (1986). Surviving tax incentives are low income housing tax credits, id. § 42, and tax-exempt mortgage revenue bonds, id. § 143. See Callison, New Tax Credit for Low-Income Housing Provides Investment Incentives, 66 J. TAX'N. 100 (1987).

The new low income housing investment tax credit of the Tax Reform Act of 1986 is focused on making a stricter correlation between the subsidies given and the number of units in a project that house low income tenants. Specifically required by the act are: (1) a minimum number of units in a project that houses low income tenants, (2) a limited rent to be charged to those tenants, and (3) a direct relation to be established between the subsidy given and units available.

The credit itself is a general business credit to be claimed in equal amounts over a ten-year period. The amount equals the product of the taxpayer's qualified basis in the property and the applicable credit rate. The qualified basis is determined by multiplying the eligible basis of the property by the lesser of the fraction of the number of low income units in the project over total units or the amount of floor space of low income units over the floor space of all units. This computation provides a basis that directly relates the credit given to the amount of space occupied by the low income tenant.

The applicable credit rate is a more complex determination. Depending upon whether the project is federally subsidized or not, the credit rate is determined such that the aggregate credit amounts to a percentage of the basis attributable to low income units. For nonfederally subsidized projects the percentage is 70% and for federally subsidized projects the percentage is 30%. See generally I.R.C. § 42 (1986); infra note 275.

\(^{119}\) President Reagan's commitment to maintain defense spending and lower taxes, despite his severe slashing of domestic programs, has created a monumental deficit in the American economy—the National Debt has climbed to one trillion dollars since he took office in 1980. The housing budget has taken the biggest cuts, reduced by 50% from its 1979 level. Every housing program conceived since 1933, with the exceptions of public housing and section 202 housing for the elderly and handicapped, has been eliminated.
cized skirmishes over this deduction have been fought, and always lost by its opponents, the very phenomenon of tax rate reduction is rendering the deduction less important to the taxpayer and the government.

Since 1969, declining tax rates have made the deduction for home mortgage interest payments less attractive to middle class persons while the value of the standard deduction has increased relatively and in absolute terms for low and moderate income persons. The Tax Reform Act of 1986 reduces the highest marginal tax rate to twenty-eight percent beginning in 1988. At marginal tax rates of twenty-five percent or less, the standard deduction is a superior tax-saving vehicle to itemized deductions for home mortgage interest, and the home owner who elects to itemize deductions foregoes the standard deduction. By 1980, the average American who did not own his or her own home gained no tax advantage by itemizing. Thus, the value of tax subsidies has gone down as the standard deduction has increased and as tax rates have decreased. These trends have made the tax subsidy valuable to an increasingly smaller, more affluent sector of the population.

Emerging Consensus Policy, supra note 86, at 1. Current thinking on Capitol Hill, as evidenced by the revised Graham-Rudman-Hollings Balanced Budget Law signed into law by the President on September 29, 1987, holds that to balance the budget without raising taxes, both defense and domestic spending must be cut; if only one is cut, taxes cannot be cut as well. The result of this formula, at the very least, is that even though tax rates are unlikely to be raised again, tax loopholes will be closed and tax deductions reduced or eliminated.

120. A Heritage Foundation report demonstrates that only a small percentage of home owners actually itemize. See B. Bartlett, supra note 112. The top tax bracket decreased from 89% for 1954 to 70% in 1966 and to 50% in 1981. Gravelle, supra note 113, at 83.

121. Gravelle, supra note 113, at 92.

122. The average American earns less than $27,500 per year (55% of the population). See supra note 71.

123. The new tax code significantly increased the highest standard deduction from $3760 in 1987 to $5000 in 1988. The law also pegs the deduction in future years to inflation, so it will rise steadily. I.R.C. § 63(e)(2)(A) (1986).

124. Even before these changes, taxpayers making $100,000 per year or more seemed to benefit most from the deduction for mortgage interest payments. Schussheim, supra note 10, at 21. Changes effected by the Tax Reform Act of 1986 will make it less attractive as a tax matter for even middle income persons to own their own homes. See, e.g., supra note 123 (increase in size of standard deduction when coupled with a decrease in overall tax rate reduces the marginal utility of itemizing deductions rather than choosing a standard deduction). Deductions for home mortgage interest payments are the largest single item deduction for most taxpayers. Many middle income persons cannot afford home ownership without a tax subsidy attached. The presence or absence of mortgage interest deductions is dispositive in the decision to own or rent. Gravelle, supra note 113, at 92-93.
Home ownership is becoming a luxury rather than a tax shelter. The huge financing charges now associated with home ownership are no longer supportable at marginal tax rates of twenty-five percent or less. As the tax rates drop further, the financing industry may well be faced with a rash of defaults.

2. **Transfer payments for lower income persons**—The lack of affordable housing at low and moderate income levels, just as at higher income levels, is a function of the disparity between housing cost and consumer resources. Supply-side remedies are costly, though the cost is small when compared to the expense of mortgage interest deductions.\(^{128}\) Perhaps for this reason, techniques to bolster consumer buying power for lower income persons, rather than supply-side production techniques, have become increasingly popular among policymakers.\(^{126}\)

Assisted housing projects, like public housing, often have had difficulty meeting operating expenses.\(^{127}\) Although the federal government has subsidized construction in the past, the gap between tenant income and the rent needed for operating expenses continues to increase due to inflation and a variety of other factors. Such circumstances have compelled the federal government to move to the demand side by supplementing the incomes of tenants of assisted housing rather than continuing to expend large sums in housing production.\(^{128}\)

Some section 236 projects proved very difficult to manage; as operating costs increased and tenant rents stayed the same, some section 236 projects defaulted on their mortgage loans.

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125. *See infra* notes 111-12 and accompanying text.

126. For a discussion of § 23 housing leasing, see *infra* note 130 and accompanying text. For a discussion of § 8 housing, see *infra* note 132 and accompanying text.

Housing assistance payments are direct cash transfers targeted to low income individuals. Milgram, *supra* note 3, at 109. Moderate income persons have been excluded from such transfers in the name of efficiency even though the transfers are less costly than supply-side subsidies. The only programs aimed at moderate income consumers were the supply-side programs of the 1960's and early 1970's—§§ 221(d)(3), 235, 236. *See supra* note 93.

127. *See infra* notes 129-30 and accompanying text.

128. Devices to bolster buying power usually take the form of a supplemental payment made to the tenant's landlord, but in some cases payments are made directly to the tenant. Such transfer payments have been increasingly targeted to the low end of the lower income spectrum, however, to reduce the number of subsidized persons and, hence, the costs. Combinations of all methods—supply- and demand-side—are often needed to reach lower income individuals. Milgram, *Housing, supra* note 73, at 116-17. For example, § 236 supply-side subsidies and § 8 demand side subsidies are often combined. *Id.* Because of the time involved in housing construction and rehabilitation, and in locating suitable units in the existing stock, housing production tends to lag behind capital authorizations—in some cases for several years—creating the well-known "pipeline" effect. *See id.* at 120.
prompting FHA foreclosure. The section 23 public housing leasing program, designed to provide scattered site and lower public housing, was also used to help section 221(d)(5) projects, and later, section 236 projects, stay afloat by filling vacancies. The funds came from LHA annual contributions contract awards, enabling the LHA’s to lease section 221(d)(5) and section 236 units for tenants of public housing. The next step toward the demand side was taken in 1965, when rent supplements were established to pay section 221(d)(5) and section 236 project managers the difference between the contract rent and twenty-five percent of a tenant’s income.

Section 8, the closest thing to an exclusively demand-side technique established before the Reagan administration, was created by the Housing and Community Development Act of 1974. Section 8 funds could be used for direct payments to landlords of existing housing but could also be used to service

130. Milgram, Housing, supra note 73, at 126-27 (discussing § 23 public housing leasing program created by the Housing and Urban Development Act of 1965); see also id. at 127 (HUD ruling counting newly constructed units as “existing” for the purposes of the subsidy enabled § 23 to be used as a means of supply-side housing production). One hundred seventy thousand units were built under this ruling before § 23 was suspended under the Nixon moratorium. NAHB, supra note 1, at 34. Section 23 was replaced by § 8 rental housing assistance through the 1974 Housing Act. For a description of § 8, see infra note 132.

Section 236 projects also benefited from some operating subsidies (supply side). See, e.g., Allen, 689 F.2d at 595 n.2 (considering the “troubled projects” operating subsidy, 12 U.S.C. § 1715z(1)(a) (1982)). Those projects that could not be saved by rent supplements, deep subsidy, or operating subsidy were foreclosed. See supra note 129 and accompanying text; see also Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984) (describing HUD programs to avoid “precipitous” foreclosure of § 236 project by mortgagees, to take assignments of § 236 project mortgages from mortgagees, and to make temporary assistance payments to mortgagees on a § 236 project mortgagor’s behalf).

132. Pub. L. No. 93-383, tit. II, § 8, 88 Stat. 633, 663 (codified at 42 U.S.C. § 1437f (1982 & Supp. III 1985)). Under § 8, HUD is authorized to make payments to owners and prospective owners of existing dwellings to assist lower income families in finding a place to live. Section 8, an amendment to the United States Housing Act of 1937, is essentially designed as an adjunct to or substitute for public housing. Section 8 was a very successful program, producing more low income housing in five years than public housing has produced in 40 years. 50th Anniversary of the 1937 Housing Act: History as Inspiration for the Future, HOUSING AFF. LETTER, June 19, 1987, at 9, 10 [hereinafter 50th Anniversary]; see supra notes 97, 126, and 130. For further discussion of § 8, see Landrieu & McGrew, HUD: The Federal Catalyst for Urban Revitalization, 55 TUL. L. REV. 637 (1981).

133. This decreased the LHA’s role a step beyond § 23 leasing, in which the LHA, not the subsidized family, entered into a lease with the owner. Interview with Diane
debt for the construction of new housing or the substantial rehabilitation of existing dwellings. In either event, the payments were made by the local HUD office. Section 8 entails regulation by local HUD officials of maximum rent levels paid (thirty percent of the tenant’s income) and minimum standards of habitability. Officials are empowered to deny funds where the regulations are not heeded. The program has been increasingly targeted towards the very low income in recent years.

Section 8 was expected to reduce federal outlays, but the two million units for which section 8 reservations were made apparently did not cut costs enough to suit the administration. By fiscal year 1983, the Reagan administration had phased out the new construction and substantial rehabilitation programs and had begun a practice of issuing section 8 “existing housing” contracts for very short terms, two to five years, instead of the fifteen year average that was characteristic of the Carter administration.

The Reagan administration has recently proposed lessening the federal contribution even more, by further narrowing the range of tenants served and transforming section 8 into a demand-side program entirely, by using housing voucher certificates to make payments directly to tenants. The President’s


Advance commitments for subsidy payments could be used by developers seeking conventional financing or financing by state housing mortgage finance agencies (such as those existing in Virginia). See, e.g., Atkins v. Robinson, 545 F. Supp. 852 (E.D. Va. 1982). Such projects, however, were never favored over § 8’s existing (or even substantial rehabilitation) housing programs (subsidies for one million units of existing and substantially rehabilitated housing, out of a total of 2.2 million units, were planned as of 1984). Milgram, Housing, supra note 73, at 131. Both existing and rehabilitation programs have the virtue of recycling existing housing stock and allegedly broadening consumer choice. Id. Section 8 existing and substantial rehabilitation programs have allegedly operated to discourage dispersal of low income and minority tenants outside of their existing communities, however. See, e.g., Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391 (2d Cir. 1982).

“Very low income” refers to persons whose income is 50% or less of the median income for the standard metropolitan statistical area. See supra note 71.

Milgram, Housing, supra note 73, at 131. Half of these units are occupied by the elderly.

See, e.g., City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987) (suit to reverse President’s impoundment of § 8 funds).

Dorius Interview, supra note 133.

Milgram, Housing, supra note 73, at 134-37. Housing vouchers are a direct payment to tenants to augment their bidding power for private housing. Without rent control and housing code enforcement, however, housing vouchers can cause rents to in-
Commission on Housing in 1983 recommended that housing vouchers, targeted to the very lowest income consumers, be substituted for all other forms of low and moderate income housing assistance, on the grounds that the problem was not supply, but rather affordability, and that supply-side subsidies to foster new construction were unnecessary, inappropriate, and unduly expensive. New construction, under this proposal, would become more a responsibility of local government, executed with some federal assistance through community development block grants, the guidelines for which would be altered to include housing development as a permissible use for the funds. The results of a 1983 voucher experiment sponsored by the administration were used to support arguments that this approach was feasible.

C. The Current State of Affordable Housing

Housing credit markets have changed significantly since the New Deal. From the 1960's to the late 1970's, housing, both "private" and assisted, had a high social priority. Prior to the Reagan era, for example, S & L's, the cornerstone of middle class

crease and quality to deteriorate—people simply pay more for the inadequate housing in which they already live. Fair housing regulation is also necessary to ensure that vouchers do not perpetuate housing segregation. See id. at 135, 137.

An experiment by the Equal Housing Access Project in 1984 found that large minority families had particular difficulty in finding suitable housing with vouchers. Youmans Interview, supra note 91.

140. In 1982, the President's Commission on Housing articulated the analytical framework of Reagan's agenda: (1) fiscal responsibility and monetary stability, (2) deregulated housing markets, (3) reliance on the private sector, (4) minimize federal intervention on the local level, (5) stay in the business of housing the poor, (6) direct programs toward people rather than structures (demand subsidy rather than supply subsidy), and (7) assure maximum housing choice. The President's Comm'n on Hous., Report of the President's Commission on Housing xviii (1982) [hereinafter Commission Report].

The 1977 annual housing survey reported that more than 62% of very low income renters paid more than 30% of their incomes for rent while only 19% occupied substandard housing. Commission Report, supra, at 11; see also Milgram, Housing, supra note 73, at 136.

141. See Milgram, Housing, supra, at 137, for a discussion of housing development block grants. Housing development block grants are similar to community development grants, but are used to finance new construction or substantial rehabilitation of residential property.

142. The President's Commission on Housing recommends the consumer-oriented housing assistance grant as the cornerstone of the Reagan administration housing policy. Nolon, supra note 22, at 250; see also supra notes 139-40.

143. "Private" housing is a misnomer describing housing that is government assisted through indirect subsidies, such as tax deductions for home mortgage interest and the operation of such agencies as the FNMA on the secondary mortgage market.
home ownership, enjoyed a protected status vis-a-vis commercial banks. This status has recently been eroded.

In the early 1980's, inflation and soaring interest rates played havoc with S & L's that had invested heavily in low-yield, long-term, fixed-rate mortgages.\footnote{144} Congress passed legislation authorizing the S & L's to diversify their assets, take more risks, and loosen their links to housing.\footnote{145}

Deregulation of the nation's S & L's has made the housing industry even more vulnerable to fluctuations in interest rates, however. Some S & L's have emerged stronger and more competitive, but many more have been crippled or destroyed. Furthermore, deregulation of S & L's means that all housing consumers, including those of middle income, compete for capital with nonhousing consumers; commercial concerns; industry; and federal, state, and local government.

In addition to these factors, the value of tax deductions for mortgage interest has changed significantly. Middle income housing consumers investigating the option of home ownership, particularly first time buyers, must now weigh carefully acquisition costs, interest rates, utility charges, the deductibility of expenses, and expected capital gains. The availability of funds for housing increasingly depends directly on the state of the economy and those federal fiscal and monetary policies that affect interest rates.\footnote{146} Direct government actions are impeded by pressures to balance the budget as well as a declining economy. As a

\footnote{144} This particular mortgage device was initiated during the Depression under the Roosevelt administration as a way of preventing the financial crises occasioned by short-term mortgages with balloon notes, which had contributed to the stock market crash when banks refused to refinance them. A complex administrative and regulatory structure was set up to facilitate financial recovery and stability, the most important institutions being the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation. See supra note 4 and accompanying text. The FSLIC has been tapped to the limit by recent bank failures and a law was recently passed to recapitalize the FSLIC as a consequence. See infra notes 235-47 and accompanying text.


\footnote{146} Federal policy in the tax and program financing areas is being based upon the assumption that other lenders—mutual savings banks, commercial banks, life insurance companies, mortgage pools, and secondary market facilities—will take a larger role in housing finance, filling the "credit gap." Meyerson, supra note 54, at 85-86. But see supra note 65 and accompanying text.
result, the government has found it difficult to finance the production of housing needed by the entire population while carrying the staggering cost of subsidizing private ownership of owner-occupied housing.

With lower income housing, the problem is even greater—new construction is virtually closed as an option, and housing rehabilitation, the remaining alternative, is greatly curtailed by most projects' inability to compete with other investment opportunities.147 The gradual withdrawal of the government from subsidized housing for lower income groups has taken place over thirty years. From public housing to subsidized housing, from direct loans to mortgage amortization, from payments to landlords to payments to tenants, from long-term subsidy contracts (fifteen years) to short-term subsidy contracts (three to five years), the pattern has been clear. The government has withdrawn first from construction, then from lending, and finally from regulation.

Added to the structural withdrawal of the federal government from housing are several immediate problems which exacerbate the shortage of funds for affordable housing. First, the supply of low income housing is dwindling while the number of people who cannot afford market rate housing is increasing. Second, the institutions that support middle income home ownership are in an extremely weakened state.

1. **Low income housing**— The subsidized multifamily housing of the 1960's was built by private developers pursuant to twenty-year mortgage contracts under Federal Housing Act sections 221 and 236, which required the owners to rent to persons of moderate income at prices they could afford. Those contracts are beginning to expire, and many of the multifamily dwellings in question are in "gentrifying" neighborhoods, where there is considerable demand for their use at market rates.148 Within the next fifteen years, more than half of the 600,000 privately-

147. This is particularly true after the demise of tax syndications premised on the availability of "passive" losses. See supra note 118 and accompanying text.

148. See, e.g., Jordan, Settlement Reached In Arlandria Suit, Wash. Post, June 16, 1987, at B1, col. 6 (describing the settlement reached between developers renovating low income housing for resale at market rents and the low income tenants they threatened to displace in the Arlandria Neighborhood, in Alexandria, Virginia. In this Arlandria dispute, HUD agreed to furnish 348 § 8 vouchers and certificates and the city agreed to furnish between $300,000 and $500,000 in rent subsidies. The developers, John Freeman and Conrad Cafritz, in an out of court settlement, agreed to set aside 68 apartments in the 275-unit complex at issue where the rent subsidies could be used. For a reported opinion on plaintiff's standing, see Brown v. Artery Organization, 654 F. Supp. 1106 (D.D.C. 1987).
owned, federally subsidized apartments in the nation could be freed from the regulatory restraints that ensure their continued use as low and moderate income housing under sections 221 and 236.  

It is clearly in the interest of the owners of such housing to refinance their mortgages, evict their moderate income tenants, and create market rate multifamily dwellings. It is difficult to see how this process can be averted without additional, arguably unconstitutional, restrictions being placed on the private property rights of these owners. Any action will certainly require compensation of such owners or renewed subsidies for the multifamily projects, or both. At the same time, the Reagan administration has made several efforts to sell section 221(d)(3) and section 236 mortgages on the open market, further reducing the protection of low income project residents. Most efforts have been rejected by Congress or stalled by public interest lawsuits, however.

The other problem, alluded to above, is that the subsidized housing of the 1970's established in section 8 of the United States Housing Act (new construction, substantial rehabilitation, and existing housing programs) involved fifteen- and twenty-year contracts between the federal and local governments, through which the federal government provided funds to subsidize the purchasing power of low income tenants in private


150. See infra note 184; see also Brown, 654 F. Supp. at 1117.

151. HUD is proceeding to sell $500 million worth of low income rental housing mort­gages at discounts as great as 20% off unpaid balances. Some of the mortgages in question are federally insured loans that HUD took over after the property owners defaulted, and others are loans made by the Department in order to sell properties it had taken back after previous defaults. In most cases, low income residents of the buildings will not be protected against rent increases after the sales. Mariano, *supra* note 149, at D7, col. 3.

152. The House Subcommittee on Housing and Community Development urged the GNMA to refrain from selling subsidized mortgages until a solution to the problem of tenant displacement has been found. Four hundred ten million dollars of § 221(d)(3) mortgages was involved. *Hovic Panel Backs Delay in GNMA Loan Sale*, *Housing Aff. Letter*, May 1, 1987, at 8.

153. One such lawsuit was brought by the National Housing Law Project (NHLP) in the United States District Court for the Northern District of California, asking the court to issue a temporary restraining order preventing the evictions. Sale of the mortgages would have removed the buildings from HUD's regulatory oversight and tenants would have lost important protections that they now enjoy because of federal involvement with the property. Telephone interview with Catherine Bishop, Attorney for the National Housing Law Project, Washington, D.C. The NHLP successfully sued for a restraining order in federal district court in California. Walker v. Pierce, 665 F. Supp. 831 (N.D. Cal. 1987).
housing that met federal standards. Since the beginning of the Reagan administration, the section 8 new construction and substantial rehabilitation programs have been eliminated and contracts for section 8 existing housing have been issued for increasingly shorter periods. As a result, outstanding contracts for section 8 housing are either expiring or are on very short terms, and a massive outpouring of funds will soon be necessary to maintain existing commitments.

The federally subsidized housing programs of the 1980's, offered to replace those of the 1960's and 1970's, rest on housing voucher contracts with local governments. The voucher program is similar to section 8, but there are two important differences. First, the quality of housing is not monitored and a higher percentage of the tenant's income is available for rent. It was recently revealed that low income tenants are paying unacceptably high rents under this program, often for substandard accommodations. Second, voucher contracts are for very short terms, making them unsuitable as anchors for long-term mortgage financing for the development of low income housing. Congress has halted further expansion of the voucher program, and will return to the section 8 program in the interim.

Public housing, the oldest and most durable of the subsidized programs, has foundered on social problems endemic to its locations in depressed, inner city neighborhoods. Efforts to integrate such housing have been challenged by the Reagan administration, and efforts to locate public housing in better neighborhoods have failed except for experiments in such cities as Baltimore, Maryland, and Newport News, Virginia. Congress has generally stymied efforts by the Reagan administration

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154. Dorius Interview, supra note 133.
155. Id.
156. See supra note 139.
158. See supra note 89.
159. HOUSING AFF. LETTER, July 24, 1987, at 8.
160. The option of tenant management and ownership of existing public housing may be worth pursuing. The Housing and Community Development Act of 1987 conceives of a public housing sale program whereby a residential management corporation (RMC) may purchase public housing units as co-ops or under other ownership forms. The RMC would first have to demonstrate its ability to manage the property for at least three years, with resale price restrictions required. Public housing projects could also simply be converted to tenant management, with RMC's receiving operating subsidies and modernization funds ordinarily available to local housing authorities. The decreasing viability of privately owned, assisted housing has increased the importance of the existing public
to sell existing public housing units, but tenant abuse, lack of maintenance, and lack of funds have taken their toll on existing public housing and little more is being built.

2. Middle income housing— The amount of affordable housing for middle income persons has declined primarily due to interest rate increases, but also due to local growth controls and reductions in the viability of income tax deductions for home mortgage interest payments. S & L’s, the mainstay of the home mortgage finance industry, have been severely buffeted by disintermediation and unwise investments. The FSLIC, which shores up these institutions, is on the verge of bankruptcy. The Federal Home Loan Bank Board, responsible for pruning inefficient S & L’s, is hampered in this endeavor by the scarcity of FSLIC funds with which to ease sick S & L’s out of business. The result is that the S & L’s that are in trouble sink deeper and healthy S & L’s seek to leave the system, join the Federal Deposit Insurance Corporation, and become commercial banks. Generally speaking, pension funds, insurance companies, and other institutions that might conceivably bridge the resulting home financing credit gap have not moved into the breach.

3. The Reagan “revolution” in national housing policy

The Reagan housing agenda has been “to reduce federal spending and housing regulation, transfer authority to states and localities, emphasize private initiatives and provide needy families with direct payments, in the form of housing vouchers, to find their own housing.” These goals have been realized; housing starts are down to Depression levels and federal funds for housing have been cut seventy percent since 1980. Market conditions, tax reform, and budget cuts over the past six years have eliminated nearly all new construction of housing for the poor.

The effect of the Reagan housing program is graphically illustrated by the growth in the number of homeless persons during his administration to a figure unparalleled since the Depression.

housing stock that provides shelter for 1.35 million families. P. Clay, At Risk of Loss 15 (1987).

161. For a brief overview of federal housing policy in the early 1980’s, see Brownstein & Love, Cracks in the Foundation of Federal Assistance to Housing, 10 J. LEGIS. 297 (1983); Special White Center Project, Federal Budget Cuts in Housing: Is There No Place Like a Decent Home?, 10 J. LEGIS. 457, 467-69 (1983).

162. NAHB, supra note 1, at 37; see supra note 139.

163. Interest rates, which spiraled upward in the early 1980’s, have already begun to rise again as the value of the dollar falls against the currency of healthier economies. For a discussion of the economic changes of the 1980’s, see Comment, supra note 118, at 462-67 (1986). See also supra notes 51-67 and accompanying text.

164. Mariano, supra note 149, at D7, col. 3.
The lack of affordable housing is the single most important factor in a variety of causes of homelessness. The lack of affordable housing has become more extreme, primarily because of reductions in federally assisted housing programs, but also because of such diverse factors as exclusionary zoning, gentrification, and other factors include massive deinstitutionalization of mental patients as part of a community "mainstreaming" effort that never got off the ground, rising inflation and unemployment, social service cutbacks, and the Reagan administration's aggressive trimming of social service eligibility lists. In the last 20 years, hundreds of thousands of patients have been deinstitutionalized to receive treatment from community mental health centers. These facilities have not materialized in sufficient numbers to accommodate the need, often as a result of community opposition. Many deinstitutionalized patients reach the streets with no shelter, job training, or counseling services.

Inflation and unemployment were partially caused by historic transformations in American industry and the economy. Unemployment soared between 1979 and 1983 from 5.8% to 9.5%. Business movements into high technology have transformed industrial workers into unskilled people in need of retraining. From 1970 to 1980, 38 million jobs were permanently lost due to deindustrialization of our economy.

Some of the cutbacks in social services eligibility lists were achieved by reexamining client eligibility in programs such as social security insurance, disability insurance, Aid to Families with Dependent Children, and food stamps. According to the Congressional Budget Office, the poverty rate in 1982 was 15%—its highest in 18 years—up from 11.4% in 1978; this added approximately eight million people to the ranks of the poor. Budget reductions, plus the removal of beneficiaries through aggressive eligibility rechecking, pushed many poor people out into the streets. The absence of a fixed address can, in itself, result in disqualification from some social programs. The lack of a place to prepare food and the chaotic lifestyle of the homeless can also complicate securing federal assistance.

Public Housing, § 8 Leased Housing, § 101 Rent Supplements, and § 236 Rental Housing are examples of programs that have been cut or eliminated during the first seven years of the Reagan administration. Dorius Interview, supra note 133. Public housing operating subsidies and § 202 loans for the elderly and handicapped are prime candidates for keeping poor people from becoming homeless. HOMELESS REPORT, supra note 165, at 22. Yet, while homelessness increased, HUD appropriations dropped from $1.3 billion in 1979—four years after § 8 was adopted—to $636 million in fiscal year 1984. Id. at 23.

Conversion of single room occupancy (SRO) hotels to condominiums is a direct link to homelessness and gentrification. HOMELESS REPORT, supra note 165, at 6. The National Housing Law Project estimates that 2.5 million dwelling units have been lost due to revitalization projects. An additional 500,000 units are lost every year due to conversions, abandonment, inflation, arson, and demolition. Id. at 3; see also Tuttle, Jacobs & Stipp, Recent Developments in Housing and Community Development, 17 URB. LAW. 797, 801-02 (1985).
increased demand for rental units by middle income persons pushed out of the housing ownership market. 170

Homelessness will increase as the low income housing stock deteriorates and federal programs for assisted housing and social service continue to shrink. 171 New policies to produce affordable housing within modern budget constraints must respond to the problem of homelessness. 172 Possible sources of initiative include state and local governments and voluntary organizations. 173 In fact, the Reagan administration's housing cutbacks in general seem to have been made upon the assumption that local government and community organizations would pick up the slack. There is some limited precedent for this view. 174

III. REACTION AND RESPONSE AT THE LOCAL LEVEL

Rapid urbanization and population growth accompanying the industrial revolution of the late nineteenth century first created intense demand at the local level for housing. 175 Before the states stepped in during the early Depression years, local governments had tried, and failed, to deal with housing problems. Before local governments got involved, charitable organizations of the early 1900's vainly but courageously confronted slum conditions, the harsh negative fallout of urbanization. Such charitable organizations were themselves developments that followed earlier efforts by voluntary organizations which served a certain faith or ethnic group. 176

A number of states experimented with housing production initiatives after World War I, including New York177 and Califor-
nia. State governments also attempted to deal with the housing crisis of the Depression before calling in the federal government for assistance. Although the Depression made it necessary for the states to call on the federal government for a nationally coordinated policy and for national resources, there has always been an impulse to return the problem to the local level, where the connections between housing and community development seem clearest. Housing must be considered in the context of infrastructure, employment, transportation, amenities, social and physical environment, and neighborhood life. All are matters of community concern because all interrelate in systemic and organic fashion, particularly at the local level. The following discussion explores historical and present techniques available to state and local governments and to voluntary organizations seeking to play a role in producing affordable housing.

A. Federalism in National Housing Policy

The United States Housing Act of 1937, connecting slum clearance with the development of public housing, was the first federal statute to make the connection between housing and community development an explicit one in a program aimed at state and local government. The Act initiated a program of massive federal intervention to provide decent, affordable housing for the working poor, using local housing authorities for implementation. The Housing Act of 1949 linked a decent home with a suitable living environment for the middle class and gave localities broader powers to connect housing and environment at


179. D. Judd, supra note 1, at 133-34.

180. See, e.g., Welborn, supra note 1, at 151-52 (citing an 1856 report of the New York Society for Improving the Conditions of the Poor, which detailed the negative impact of slums and slum life on the surrounding community); see also D. Judd, supra note 1, at 33-34 (noting community-wide dangers of fire, pestilence, disease, lack of safe water supply, and lack of sanitation in crowded, low income, immigrant neighborhoods of large cities during the Industrial Revolution).

181. Welborn, supra note 1, at 152. The United States Housing Act of 1937, Pub. L. No. 75-412, § 10(a), 50 Stat. 888, 891-92 (codified at 42 U.S.C. § 1437h (1982)) required a unit of slum housing to be eliminated for each unit of public housing created. This connection, however, was made partly to appease private housing suppliers who feared government competition. D. Judd, supra note 1 at 264.
all economic levels. The Localities were authorized to engage in slum clearance and, through amendments in 1954, to engage in redevelopment activities known as "urban renewal." The 1954 Urban Renewal amendments laid the blueprint for exercises not only in slum clearance, but also in land assembly for planned housing and community redevelopment.

Because of the economic and social mixture of communities that could legally be served through urban renewal statutes, a fundamental issue in community development became "Which community is being served, and who represents it?" a telling question when set against the background of persons excluded from political participation by income, social class, and racial origin. Between 1949 and 1974, an ongoing tension existed between community development for the middle class and community development for the poor, as municipal officials sought to attract middle class persons back from the suburbs by building attractive edifices atop the rubble of "cleared" slum neighborhoods. Relocation of businesses and individuals displaced by urban redevelopment—whether of the "urban renewal" clearance type or the revitalization that has prompted gentrification—have thus become matters of intense public concern. Such problems point toward the need for "maximum feasible participation" of all groups in the community in any newly initiated development process, and the heightening of professional ethics and standards regarding advocacy planning.

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184. Gentrification is a term used in land development to describe a trend whereby previously "underdeveloped" areas become "revitalized" as persons of relative affluence invest in homes and begin to "upgrade" the neighborhood economically. This process often causes the eviction of the less affluent residents who can no longer afford the increasingly expensive housing in their neighborhood. Gentrification is a deceptive term which masks the dire consequences that "upgrading" of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change.


185. Welborn, supra note 1, at 152; see, e.g., Otero v. New York City Hous. Auth., 484 F.2d. 1122 (2d. Cir. 1973) (contesting racial quotas restricting the number of blacks and hispanics in an integrated public housing project as attempt to "gentrify" project).
1. Community Development Block Grant (CDBG) funds and the Housing Assistance Plan— The Housing and Community Development Act of 1974\(^{186}\) revived the local role in the production of affordable housing, essentially dormant since the Depression. The 1974 Act vastly increased the discretion afforded local government in the allocation and use of federal funds. The Act recognized that urban government, to rest on a sound financial base, must balance service to the poor with outreach to the middle class, and struck a compromise:\(^{187}\) localities were required to provide for the housing needs of low and moderate income people as a condition of receiving CDBG program funds.\(^{188}\) The compromise was framed in Title I of the Act. Title I required local government recipients of CDBG funds to prepare a housing assistance plan (HAP).\(^{189}\) Pursuant to the HAP, the locality must project housing need for eligible low and moderate income families residing in or expected to reside in the community. The HAP is perhaps the clearest statutory connection between housing opportunities for the poor and overall community development objectives.\(^{190}\) In the absence of fair housing or other objectives,\(^{191}\) the local government’s view of housing development as expressed in the HAP is authoritative,

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\(^{187}\) Decent housing for the poor was linked to community development and economic opportunity, so as to create an attractive environment for the return of the middle class. Welborn, supra note 1, at 155.

\(^{188}\) The Community Development Block Grant Program consolidated all federal programs such as urban renewal, model cities, and the like, and increased the power of localities to employ federal funds for community redevelopment. The categorical grant programs that CDBG replaced entailed a much greater degree of federal intervention and control. Model cities, urban renewal, and other such categorical grant programs were administered directly by the local office of HUD, not local government officials. For a discussion of community development block grants, see Williamson, Community Development Block Grants, 14 Urb. Law. 283 (1982).

\(^{189}\) By requiring local governments to study and honor their housing assistance needs, the HAP requirement of the 1974 Housing Act instituted a limitation on local autonomy. Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, § 103(d), 92 Stat. 2080, 2083 (codified as amended at 42 U.S.C. § 5304 (1982 & Supp. III 1985)). As such, the HAP became a bone of contention among local government, the federal government, and fair housing advocates, as difficult issues of housing need identification and resource allocation were confronted in the context of overall community development. See, e.g., NAACP v. Town of Huntington, 668 F. Supp. 762 (E.D.N.Y 1987).

\(^{190}\) Welborn, supra note 1, at 156.

and HUD must respect it when granting or denying requests for subsidies from private sponsors of low income housing.192

2. Housing Development Action Grants—The Housing Development Action Grant (HODAG) program, which originated in 1983, transfers capital from federal to state and local government for new construction and rehabilitation of multifamily rental housing.193 The grant is modeled after the highly successful Urban Development Action Grant. Recent legislation would reauthorize HODAG at nearly $100 million to build or substantially rehabilitate 5000 dwelling units.194 States receiving HODAG funds could determine their use—for shallow or deep subsidies; for public housing; for private, assisted housing; for the needs of the homeless; and so forth.195 Funds could be used by local governments to rehabilitate properties foreclosed for tax arrearages or could be paid directly to neighborhood-based, non-profit developers.196

3. State use of mortgage revenue bonds—State and local governments in the 1970’s used mortgage revenue bonds to provide below market interest rate home mortgages primarily to young, first time home buyers. States used tax-exempt bonds to fill the gap left when President Nixon withdrew the federal government from the field of subsidized housing in 1973.197 Since that time, many more states have begun to use mortgage revenue bonds, especially for the development of multifamily housing.198 Authority to issue such bonds as tax-exempt capital-rais-


194. The Housing and Community Development Act of 1987 provides $150 million for housing development action grants in fiscal year 1988. A program entailing further deregulation, the Housing Development Block Grant, is now contemplated by the administration. Local government recipients would be subject only to outstanding law regarding fair housing, environmental protection, and the like. Block grants could not support new construction without being leveraged by debt financing, however. See Milgram, Housing, supra note 73, at 133.

195. 50th Anniversary, supra note 132, at 10.


198. Id.; see also NAHB, supra note 1, at 36. The attractiveness of these bonds as sources of development capital increased dramatically in the context of the rising mortgage rates in the late 1970’s.
ing vehicles has so far been permitted by Congress for short periods only, with a sunset provision ending the option after a few years.\textsuperscript{199}

4. \textit{Linkage and the "builder's remedy" harnessing the local development process}— Linkage programs are based on the assumption that upper-status employees of major businesses associated with downtown redevelopment may bid up the price of inner city housing, causing gentrification or, if they live in the suburbs, impose unacceptable burdens on highways, mass transit, and commuter railroad facilities. Linkage thus requires businesses to share in some of the costs that their development imposes on the urban social and physical environment, either through cash payments or by incorporating low and moderate income housing units as part of commercial development.\textsuperscript{200} San Francisco, the first American city to adopt such a plan, limits office production via floor area ratios and height maxima and assesses developers for housing, transit, park space, child care, and various other community amenities.\textsuperscript{201} Linkage techniques have also been used, with mixed results, in Santa Monica\textsuperscript{202} and Boston.\textsuperscript{203} A linkage program is also on the drawing board in Washington, D.C.\textsuperscript{204}

Linkage is an important and innovative tool for harnessing and regulating the effects of large scale development on the transportation, employment, and housing systems of urban areas. The analogue in the suburban context is called the "builder's remedy" in New Jersey, or the "mandatory set-aside" in other jurisdictions.\textsuperscript{205} It has generally worked better in the


\textsuperscript{200} The basic analogy is to subdivision exactions. See McDougall, \textit{The Revitalizing City}, 15 \textit{RUTGERS L.J.} 667, 686 & n.149 (1984).

\textsuperscript{201} The plan is administered by the San Francisco Office of Housing Production Programs in the Department of City Planning. Lewis, \textit{San Francisco's Bold Attempt to Regulate Growth}, Wash. Post, June 13, 1987, at E1, col. 6.

\textsuperscript{202} In Santa Monica, developers are required to contribute up to 12\% of project replacement costs for affordable housing, transit, employment, and community amenities such as day care. Keating, \textit{Linking Downtown Development to Broader Community Goals}, \textit{AM. PLAN. A.J.}, Spring 1986, at 133, 136.

\textsuperscript{203} Boston's program was initiated in 1983, modeled after San Francisco's ordinance. The program is implemented by the Boston Redevelopment Authority. Fees based on a project's square footage are paid monthly to a housing trust fund for development of affordable housing elsewhere; alternatively, the developer may provide the requisite affordable units in lieu of paying his fees. \textit{Id.} at 136-37.


suburbs, where the nexus between the need for low and moderate income housing and the development of market rate housing is clearer and developers are more eager to build, regardless of conditions.  

Linkage has been challenged by developers, who assert the absence of a nexus sufficient to support regulation between their businesses and the gentrification difficulties projected. In addition, linkage is challenged as ultra vires the standard zoning enabling act, and as an unconstitutional taking of private property without just compensation. The latter view has been given considerable force by the recent Supreme Court decision in Nollan v. California Coastal Commission, holding that government regulation of beachfront property was excessive and amounted to an impermissible taking. Justice Scalia, for the majority, stressed the need for a closer examination of the connection between expressed public purposes for land use regulation and the means of achieving the articulated goal. Thus, the municipality must prove both a legitimate purpose and an acceptable means for achieving it. Many linkage programs would not pass muster under this test.

B. The Role of Citizen-Initiated Community Development

The role of voluntary organizations in the formulation of housing policy reached a height in 1911, when the National Housing Association (NHA) was formed. The NHA faded from importance during the Depression, however, as the federal government adopted many of the programs it advocated. Today, modern community organizations can look upon the years since that time and call upon a rich history of struggle for civil rights and for community empowerment in the context of federal...
eral antipoverty\textsuperscript{214} and model cities programs,\textsuperscript{215} as well as battles against urban renewal,\textsuperscript{216} housing segregation, and environmental pollution. These organizations, having survived program cutbacks and political repression during the Nixon administration, emerged sophisticated and energetic.

1. \textit{Community development organizations—} The pre-Nixon generation of community development corporations was exemplified by such major organizations as the Bedford-Stuyvesant Restoration Corporation (BSRC).\textsuperscript{217} The BSRC placed community activists in collaboration with professionals familiar with the complex maze of federal and private financing techniques.\textsuperscript{218} In association with organizations of this stature, voluntary community organizations such as churches, block clubs, and settlement houses began to experiment with nonprofit sponsorship of low and moderate income housing.

When austerity emerged as national policy in the late 1970's, the high level of technical and political capability that community organizations had developed was very useful in their efforts at self help. On shoestring budgets, neighborhood organizations embarked on projects providing all manner of community services—health care, housing, child care, surplus food, small parks, and community cleanup.\textsuperscript{219} Some projects succeeded; others failed. Community organizations also battled with downtown in-

\textsuperscript{214} The antipoverty program attempted to foster maximum feasible participation of the poor. The model, developed during the Kennedy administration, bypassed local government, where Kennedy was not strong, and went directly to the inner city communities where he was strong. R. Shiffman, \textit{supra} note 37, at 11. Inevitably, confrontations between local citizen groups and local politicians resulted. These confrontations (and some scandals) facilitated the redirecting of housing resources; conceptions of how the funds should be used (from "employment" to "service") reflected the new reality. President Johnson's modification in 1966—the Model Cities program ("demonstration cities")—funded citizen groups with federal dollars that were channeled through local governments. \textit{Id.} Johnson, unlike Kennedy, was connected with regular party leadership and big city mayors. \textit{Id.}

\textsuperscript{215} The goal of the model cities program was to coordinate development under the wide variety of categorical grants available at the time—jobs, health, housing, and urban redevelopment. NAHB, \textit{supra} note 1, at 34.

\textsuperscript{216} Before the struggles against urban renewal, the poor had been wards of political machines or supplicants for private charity, relinquishing control over their own lives in exchange for aid. Some tenement movements antedate this period, however. R. Shiffman, \textit{supra} note 37, at 300.


\textsuperscript{218} Sviridoff, \textit{supra} note 217, at 5-6.

\textsuperscript{219} Telephone conversation with Alice Shabekoff, Director of the Community Information Exchange, Washington, D.C. (Nov. 11, 1987) [hereinafter Shabekoff Interview].
terests over highways, pollution, and gentrification. Some organizations won; others lost. The most adaptable of these organizations survived and continued their work despite the lack of federal support.220

These “second generation” community development organizations are smaller, leaner, more indigenous, and more in tune with the specific agenda of their local communities than their predecessors, which were more closely tied to downtown and the corporate sector. Weaned from the need for large federal subsidies,221 able to depend to a large extent on volunteers,222 these organizations are free to protect their communities in ways never possible under the antipoverty program, the Model Cities, or the Community Development Corporation (CDC) statutes. In this respect, second generation community development organizations resemble the early self help groups of the late nineteenth century, which were knit together by ethnicity or religious belief. Many are surprisingly sophisticated in their technical knowledge of housing and community development, from financing to environmental issues.223 The work of these second generation community development corporations has been aided by, among others, the Local Initiatives Support Corporation (LISC) of the Ford Foundation and James Rouse’s Enterprise Foundation.224

220. R. Shiffman, supra note 37, at 22; Sviroff, supra note 217, at 7 (noting that diminution of federal role has pressed the private sector and state and local governments into service with spotty but promising results).

221. Fee for service contracts from local municipalities provide some measure of support, though this is hardly a “subsidy.” R. Shiffman, supra note 37, at 28.

222. The Comprehensive Employment Training Act bridged the distance between complete federal subsidy and the volunteer model. See id.

223. Shabekoff Interview, supra note 219; see also Mott, The Neighborhood Movement at a Crossroads, YOUTH POL’Y, Dec. 1986, at 3, 5. Community organizations demonstrate an increased sophistication and willingness to deal with city hall (necessary for development permits, CDBG funds, tax-foreclosed properties, and the like), and a heightened ability to tap banks and corporations for small loans for the residential and commercial revitalization of their neighborhoods.

224. Rouse’s well-known entrepreneurial efforts include Baltimore’s Inner Harbor, Boston’s Faneuil Hall, and New York’s South Street Seaport. See Guenther, Real Estate, Wall St. J., Nov. 26, 1986, at 3, 5. Community organizations demonstrate an increased sophistication and willingness to deal with city hall (necessary for development permits, CDBG funds, tax-foreclosed properties, and the like), and a heightened ability to tap banks and corporations for small loans for the residential and commercial revitalization of their neighborhoods. Found in 1982 by James Rouse, The Enterprise Foundation provides funding and technical assistance to local nonprofit housing corporations for rehabilitating or constructing housing for households with incomes of $10,000 or less. It is currently working with 49 groups in 23 cities to help the local groups formulate city-wide solutions to housing problems. In doing so, it seeks models of housing finance and community development that can be replicated elsewhere. See also Cohen, Captain Enterprise, BALTIMORE MAG., Apr. 1987, at 78 (chronicling James Rouse’s entry into low income housing development after retiring from large-scale commercial development).
On the national level, such organizations have also united to lobby the federal government for accountability in housing and community development.\textsuperscript{225}

2. The community reinvestment movement—Second generation CDC's have had considerable success in shaking loose funds and technical assistance from local financial institutions, especially with the assistance of the Community Reinvestment Act of 1977 (CRA).\textsuperscript{226} Use of the CRA requires a good deal of financial sophistication, a sophistication that a number of these organizations have also developed over time.

The CRA requires banks to meet all service needs extant in the community in which they function. For example, if savings deposits are accepted, mortgages must be accepted as well. Banks are prohibited by law from defining community service areas in such a way as to exclude minority or low income neighborhoods. Banks and other financial institutions can lose important privileges if they disobey the law, and periodic review of institutional activity provides a time and a place at which community advocates can exert pressure to see that the law is observed.\textsuperscript{227} This review and enforcement process considers complaints made by citizens who feel that they have been disserved by illegal bank practices. Complaints are also heard whenever banks apply for exercise of various privileges under the banking laws. To anticipate community objections, many banks have be-


\textsuperscript{227} Federally chartered S & L's must make public the sites where they lend for home purchase and improvement. 12 U.S.C. § 2801-2811 (1982 & Supp. IV 1986). The statute's effectiveness has been reduced, however, as S & L's leave the housing mortgage business and their place is taken by mortgage banking corporations that do not require capital transfers from the federal government and hence are not covered under the statute. The Housing and Community Development Act of 1987 expands coverage to include such institutions. Blakely, House Panel OKs $17.7 Billion Housing Plan, 45 CONG. Q. WEEKLY REP. 843, 843 (1987). Amendments to the bill when it was in conference provided for a permanent extension of HMDA coverage of private mortgage companies that were affiliates of bank and S & L holding companies (about 2000 institutions), lowering of the company income threshold at which an institution was required to report under HMDA, and the inclusion of commercial lending practices within the purview of the Act. Id. at 844.
gun to develop affirmatively community reinvestment projects in conjunction with local community development organizations.  

Although federal enforcement of the CRA has been lax under the Reagan administration, hopeful signs of state-level innovations in the CRA arena are beginning to surface. State CRA’s might flourish regardless of the tenor of national housing policy. State CRA’s have been passed to structure state government negotiations with out-of-state banks seeking entry into their jurisdictions. Massachusetts has its own state CRA, for example. Local governments are able to use the CRA inventory of tools to monitor lending, challenge financial institutions, and develop reinvestment programs, and they can condition local subsidies to businesses and financial institutions upon performance and community reinvestment. They have not moved aggressively in this area, however, perhaps out of fear that financial institutions will leave the vicinity.

In summary, the federal government is withdrawing from subsidizing housing for all citizens, regardless of income, and directing capital expenditures to “competitive” industry instead. As the federal government recedes from the picture, the focus of housing policy has shifted to state and local government and to the efforts of private, nonprofit community organizations and corporations. As the Reagan administration comes to a close, certain limited options may reemerge at the national level, however.

IV. Towards a New National Housing Policy

Generally speaking, the problem of affordable housing for the 1990’s is what it has been since the 1930’s—the gap between people’s incomes and the cost of housing. Because the economic
class structure of our society is not likely to be dramatically reworked, it is doubtful that we will see an increase in the size of the group capable of renting or buying decent, safe housing without benefit of subsidy. By the same token, because the housing industry is unlikely to be dramatically restructured through use of modular and prefabricated housing, the price of constructing and rehabilitating housing will probably not decrease. The housing finance industry is unlikely to prove capable of providing construction and mortgage loans at significantly lower interest rates without regulation or subsidy or both. Local governments are unlikely to give up growth controls without a fight, though the Supreme Court’s recent landmark decision in First Evangelical Lutheran Church v. Los Angeles County 231 may make such growth controls less stringent.

In a time of national austerity and a correlative indifference to the problems of minorities and the poor, only modest undertakings can be contemplated. Which of the varying social problems of low, moderate, and middle income persons that are related to the lack of affordable housing have the highest priority? Which should be sacrificed if their inclusion in a policy package for affordable housing pushes the total cost too high? 232 With respect to the issue of affordable housing considered in isolation, how far can subsidies be stretched? How many households should be served, at what income levels, and at what level of expenditure for each? 233

Whatever the answers to these questions may be, it is clear that a substantial infusion of funds would be necessary to significantly increase the availability of affordable housing, a particularly difficult endeavor, politically and economically, in an era of extraordinary structural budget deficits. The first order of business is not to increase the availability of such housing, but to preserve the affordable housing that presently exists. This priority has been made more difficult by the policy of the Reagan administration to use housing as the principal target for domestic spending cuts.

The next order of business is to begin a process of experimentation, backed with sufficient funding, to develop a range of housing alternatives wide enough to suit the variety of markets and communities where affordable housing is needed. Such al-

231. 107 S. Ct. 2378 (1987) (holding ordinance prohibiting construction in a flood plain area a constitutionally impermissible "taking").
233. Id.
ternatives would present different mixtures of participation by federal, state, and local governments, combined with participation by civic and community organizations. Once such models have been developed, the funds necessary to support them must be provided by reducing expenditures on other federal budget items or by raising new federal revenues, or perhaps both. The following is an overview of pending legislation, a presentation of some models available for addressing the problem at the state and local level, and a discussion of possible funding mechanisms at the federal level.

A. New Legislation

Two recently passed pieces of legislation address the housing problem. The first focuses on the crisis in the S & L industry. The second directly tackles some significant housing problems.

1. The Competitive Equality Banking Act of 1987 — The FSLIC has been taxed severely by the increase in S & L failures caused by disintermediation and deregulation. A very important federal legislative initiative regarding home ownership has therefore been the recapitalization of the FSLIC through the Competitive Equality Banking Act of 1987. The new law authorizes $3.75 billion in new borrowing authority per year to refinance the FSLIC. In the FSLIC's fifty-three year history, public funds have never been used to guarantee S & L

234. In addition to the Competitive Equality Banking Act of 1987 and the Housing and Community Development Act of 1987, the President has also signed into law the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987), authorizing one billion dollars for programs aiding the homeless.


236. Id. § 302, 101 Stat. at 590 (to be codified at 12 U.S.C. § 1436). The money will be raised by means of a complex borrowing arrangement, whereby the twelve regional federal home loan banks provide three billion dollars to a new Financing Corporation, which will in turn use these funds to purchase $2.2 billion in zero-coupon treasury bonds with thirty-year payouts, (similar to savings bonds, with interest deferred until maturity) and also issue $10 billion in bonds for sale to private investors. Id. § 302, 101 Stat. at 587. The bond debt will be serviced by member S & L's through deposit levies assessed by the FHLBB and by about $800 million in payouts from the treasury bonds. This recapitalization plan was adopted as an alternative to a proposed savings and loan industry plan involving thinner capitalization of the FSLIC and lower assessments on FHLBB member banks. The conference committee considered this plan inadequate because insufficient funds were provided to improve the FSLIC's condition. Blakely, Bailout of S & L Insurance Fund Approved by Senate Banking, 45 CONG. Q. WEEKLY REP. 473 (1987). The new law is also an alternative to a proposed FHLBB plan to borrow $750 million from the United States Treasury to help deal with insolvent S & L's and to pay off depositors. See id. at 473.
The FSLIC bailout was considered particularly necessary because of the economic recession in western farm and oil states that reduced the value of real estate underlying regional S & L's mortgage portfolios. The FSLIC currently uses yearly assessments on member S & L's deposits to insure the $890 billion worth of deposits in all three thousand S & L's. Its reserves are now only $1.9 billion—$23 billion below the amount needed to close the more than 300 insolvent S & L's across the country. Because the FSLIC does not have the money to shut these S & L's down and pay off their depositors, the S & L's remain in operation—taking the system six million dollars in the red each day.

The Act originally authorized the spending of five billion dollars over two years, but the price tag was increased in response to the worsening condition of the S & L's. In response to pressure from industry representatives who argued that S & L's damaged by local recessions will recover in time, however, the law also limits the ability of the FHLBB to close down failing S & L's in states such as Texas, in which regional recessions are in progress. The FSLIC will also be given greater discretion to refuse to classify S & L's as "troubled" or to restructure bad loans. Moreover, an appeals procedure will be established for thrifts that dispute FSLIC appraisals of their assets. These various limitations on FHLBB power will reduce short-term outlays (as the fund must be drawn upon to finance the closing of an S & L and the bailing out of its depositors), but long-term costs could increase (as S & L's that fail in the future will have become that much more damaged in the interim). On the other

237. Blakely, supra note 236, at 473.
239. Id.
240. Id.
244. Id.
245. The effect of the new law remains to be seen. If interest rates continue to rise, disintermediation and consequent S & L failure will increase. The United States, because of low productivity and savings rates has become both a debtor and a net importer nation. Foreign investment is thus needed to finance both our trade deficit and our federal budget deficit, and if the Federal Reserve keeps interest rates low by loosening monetary policy, this financing source will diminish. Id.
hand, healthy S & L's that desire to leave the FHLBB system must wait a year to do so. This may restrain the larger S & L's from leaving the system to escape increased FSLIC fees.

2. The Housing and Community Development Act of 1987—Congress recently passed a major housing bill— the Housing and Community Development Act of 1987. Unlike housing bills cleared by the House in the past, the Act cleared the Senate due to the new Democratic majority. In today's budget-cutting atmosphere, the passage of a housing bill that did no more than retain existing funding levels would be a major achievement. Voting patterns made it unlikely that Congress could have overridden a veto of a stronger bill.

The Act warrants examination as it addresses a number of important issues that will no doubt be addressed again in 1989 if political administrations change. The most important of these issues include: preventing the displacement of low income ten-

Higher interest rates, on the other hand, reduce housing starts. Housing construction fell for the third consecutive month in May 1987, following interest rate increases in April stemming from attempts by the Fed to stop the decline of the dollar on the international market. Forecasts for housing starts for 1987 thus had to be revised down to 1.6 million new units, a decline of 200,000 units compared to the 1.8 million units built in 1986. Id.

Foreigners worry that a drop in the value of the dollar relative to their own currencies will cause them to lose money. In April 1987, the Fed responded to such fears by increasing interest rates, thereby making investments in the United States more attractive. Higher interest rates provide a cushion against losses due to a dollar devaluation. It will be very difficult for the Fed to reduce interest rates without "knocking the props out from under the dollar," however, and causing our currency to engage in "free fall" on the international market. Crutsinger, Housing Starts Fall Again in March, Wash. Post, June 17, 1987, at F3, col. 1.


249. Congress watered the bill down significantly to avoid a presidential veto. For example, the Nehemiah grant program is now a two year demonstration project and housing development provisions contain "sunset" clauses that cause them to expire in two years. See Housing Bill Approval Highlights 1987, HOUSING AFF. LETTER, Jan. 1, 1988, at 1, 2.

ants from existing subsidized projects,251 Community Development Block Grants (CDBG),252 and public housing.253

The Act requires that mortgagors under HUD-subsidized programs such as section 221(d)(3) and section 236 notify HUD and the tenants at least one year before prepaying the mortgages and freeing themselves from income ceilings for project residents.254 It also creates a new direct loan program to prevent default in less successful section 221(d)(3) and section 236 housing projects. It also provides for nearly 40,000 section 8 subsidized housing certificates.

Under the Act, seventy-five percent of CDBG funds are to be used for the benefit of low and moderate income persons. No CDBG funds are to be used for projects that displace low and moderate income persons; citizens must be permitted to participate in all phases of a project, at all levels, and plans would be required from localities to ensure such participation. The funding level of the CDBG program is scheduled by the Act to continue at three billion dollars.255 Finally, the law requires that any economic development initiatives undertaken with CDBG funds must consider the needs of low and moderate income persons, and must not be used for displacement.256

The Act provides $1.5 billion for operating subsidies to public housing projects. It will also build 5000 units of public housing and provide five million dollars for child care in public housing projects.257 New construction will be permitted to replace demolished units, but HUD will have discretion to substitute section 8 existing housing certificates for demolished units as well. In the House committee's view, public housing has become more important as privately constructed assisted housing has come to seem less viable.258

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252. Id. §§ 502, 509, 510, 133 Cong. Rec. at H12,081.
253. Id. §§ 122, 123, 133 Cong. Rec. at H12,054-57.
254. The Housing Community Development Act of 1987 requires that the administration sell subsidized properties with restrictions that keep rents low. Id. § 181(F)(2), 133 Cong. Rec. at H12,064.
255. Id. § 501(a), 133 Cong. Rec. at H12,079.
256. Id. § 502(b), 133 Cong. Rec. at H12,080.
257. Id. § 118, 133 Cong. Rec. at H12,051.
258. Dorius Interview, supra note 133.
B. Towards an Omnibus Housing Act of 1989

The legislation will stem the worst of the decline in federal involvement in housing, but will still fall short of what is necessary to stabilize the market for affordable housing. Thoroughgoing reform and a restructuring of federal housing policy effort is needed, not only to repair the damage done during the last seven years but also to orient national housing policy to modern realities. These realities include a structural budget deficit, caused by our unwillingness to cut both domestic and defense spending or increase taxes, either of which is necessary to tame the deficit; imbalances in our international trade and financial positions, including a decline in "competitiveness"; and shifting demographics in our population.

The Senate Banking, Housing, and Urban Affairs Committee, now under Democratic control, is a prime location for new federal initiatives in affordable housing. Under the leadership of Senator Alan Cranston, the committee has scheduled hearings to be held in February 1988, in preparation for major housing legislation.\(^{259}\) At present, the committee is taking scrupulous care to avoid giving the impression that they favor a particular approach, as they wish to create a bill that will achieve the broadest possible consensus on housing direction for the nation. This approach will ensure the development of a bill that is likely to pass. It will also create a housing consensus that should assist the Democratic party in the 1988 national elections, and create a network of housing thinkers and doers set to implement whatever recommendations are finally accepted. Thus, the result of the 1973 Nixon moratorium on new housing production—the shattering of a preexisting bipartisan coalition for housing—may finally be reversed.\(^{260}\)

\(^{259}\) The ensuing description of the housing initiatives being undertaken by Senator Cranston's committee is based on a telephone interview with Donald Campbell, Senator Cranston's Chief of Staff for Housing Issues, Washington, D.C. (July 30, 1987).

\(^{260}\) Telephone interview with Professor Langley Keyes, Department of Urban Planning, Massachusetts Institute of Technology (July 30, 1987) [hereinafter Keyes Interview]. The Committee has issued invitations to organizations and institutions in the fields of both market rate and assisted housing to submit comments for a committee print that will be issued in September. These comments will in turn supplement a series of twenty papers to be delivered by various experts in a series of conferences to be held in October 1987 in Washington, D.C. The conference is being arranged by the Department of Urban Planning of the Massachusetts Institute of Technology (MIT), and is being funded by the Ford Foundation, the Robert Wood Johnson Foundation, and the FNMA Foundation. In the meantime, James Rouse of the Enterprise Foundation and David Maxwell of FNMA are pulling together a network of housing developers, munici-
The committee is looking for a bill that will articulate a clear set of themes of manageable proportions. Clearly, the proposals coming out of the committee will not accept the severely reduced funding levels for housing established by the Reagan administration as their base line, and will go beyond vouchers and tinkering with the FNMA. By the same token, the themes of the new legislation will be clearly distinguished from the initiatives associated with past Democratic administrations. It is unlikely that we will again see a program at the scale of section 236 or section 8 new construction without a significant tax increase. Further, the states will be encouraged to maintain the expanded role that they have undertaken during the Reagan years, even though the federal government's role in housing policy will increase relative to its role under the present administration.

C. Some Models for Affordable Housing Development

There are a variety of models for the development of affordable housing. Most require that both the supply of housing and the demand for it be subsidized to close the gap between income and affordability. A full discussion of any specific model is beyond the scope of this Article, but three models will be summarized below. The first two depend upon public or community officials, and low income housing advocates to prepare recommendations based on the MIT papers. These recommendations will focus on both market rate housing affordability and the provision of low and moderate income housing, and will be presented to the Committee in December. Id.

261. Id. Senator Cranston favors legislation that will expand homeownership, particularly for first-time and low-income buyers, and "provide a stable environment for private investors, financial institutions" and others in the housing industry . . . [New legislation] must also help low income Americans "afford decent housing" by preserving existing apartment buildings and providing "construction incentives" for development of housing for groups who need it most, such as the handicapped, elderly, and large families. Mariano, supra note 250, at E2, col. 1.

262. For a general discussion of housing for the homeless, see Tuttle, Jacobs & Stipp, supra note 169. See also Homeless Symposium, 31 WASH. U.J. URB. & CONTEMP. L. 137 (1987).

The prime obstacle to the development of these models would be local building codes and growth controls. Some companies might be interested in joint ventures with Japanese housing companies that have pioneered in this area, much as American automakers have joint ventures with Japanese industrialists. According to Ed Quinn of the Enterprise Foundation, the products of the Cardinal Company of Baltimore, Md., are "state of the art" in manufactured housing, and Cardinal is comparable to Japanese companies in capability. Telephone interview with Ed Quinn, Enterprise Foundation (Aug. 3, 1987); see Peirce, Filling the Vacuum in Housing Policy, Wash. Post, June 20, 1987, at F11, col. 2 (summarizing the position of James Rouse, who suggests that construction costs
initiatives. The third depends more directly upon the private sector.

1. Community development or local public housing?—The first model is the community development, "sweat-equity project," in which the cost of housing is reduced by nonunion labor, less expensive materials, and the use of housing stock that has been reclaimed at low cost from properties foreclosed for failure to pay local property taxes or federally subsidized mortgages, or simply abandoned.263 Such projects have in the past been undertaken under the aegis of the Community Development Corporation Act264 or the Urban Homesteading Program.265 They are also envisioned to be part of programs such as the Nehemiah Housing Grant.266

263. According to the National Association of Home Builders, these public-private projects have succeeded where many 1970's federal projects failed:

One common feature is a high degree of tenant involvement, through sweat equity, use of community-based tradesmen, orientation programs, and designs that promote socialization and community involvement. Another feature . . . is a departure from the middle-class standards that were characteristic of the relatively expensive Section 8 construction in favor of the minimal amenities viewed as necessary by low-income households.

NAHB II, supra note 71, at 86.


266. The distinctive feature of the Nehemiah Project is its large scale—involving thousands of mass-produced homes, using cost-saving building design, construction, and materials, on a large parcel of land available at little or no cost from the municipal government. See NAHB II, supra note 71, at 94. The Housing Community Development Act of 1987 proposes to duplicate the Nehemiah experiment on a somewhat smaller scale so that the program is suitable for small as well as large cities. The essential concept of a project large enough to achieve significant economies of scale and "turn a neighborhood around" remains, however. See H.R. 4 Rep., supra note 196, at 95-98; see also S. 825, 100th Cong., 1st Sess., 133 Cong. Rec. H12,047, H12,088-89 (daily ed. Dec. 21, 1987) (discussing tit. VI, §§ 601-613 of the Act).

Some other examples of community-based projects include: (1) a $200 million public-private partnership to renovate substandard housing in Chattanooga, Tennessee, underwritten by Rouse's Enterprise Foundation, Peirce, One City's Plan to Eliminate Slums, Wash. Post, June 13, 1987, at E4, col. 2; (2) the community-based housing supply program of the National Low-Income Housing Coalition (a legislative proposal granting federal funds to community organizations to finance technical assistance, start-up funding, seed-money loans and grants, and advances for predevelopment costs), Low Income Hous. Information Serv., Low Income Housing Round-up, May 1987, at 2; (3) and the South Atlanta Land Trust (a community organization acting as a broker for mortgage funds to renovate a depressed inner city neighborhood, leveraging its activities with
Because these projects involve existing housing, growth controls should not add to their cost. Interest rates for construction loans will be high, but construction costs can be substantially reduced using the methods specified. Assuming that the type of properties specified should be available to community organizations at little or no cost, interest rates for funds to finance the purchase of such properties will not be as large a factor. The higher the return that federal and local governments seek to gain by transferring such properties, however, the more the interest rates for funds to finance purchases will add to the overall cost of such housing.\(^{267}\) Even so, project purchase and construction costs can be reduced by below market interest rate funds available through state issuance of mortgage revenue bonds (the income from which is deductible for federal income tax purposes).\(^{268}\)

The second model is public housing or assisted housing developed by state or local government, without direct federal financing or subsidy on the supply side and without federal constraints as to design and location. The principal contribution of the federal government in the development of such housing is to provide tax exemption for the income from mortgage revenue bonds. Tax-exempt status for state mortgage revenue bonds is essential if the states are to raise the money necessary to execute such projects.\(^{269}\)

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CDBG funds from the City of Atlanta), Low Income Hous. Information Serv., Low Income Housing Round-up, Dec. 1986, at 1, 5.

For a discussion of Tax Reform Act of 1986 restrictions on the activities of charitable organizations that might affect the development activities of community development corporations, see Comment, supra note 118, at 467-93.

267. Some states are beginning to subsidize housing more extensively rather than less. NAHB II, supra note 71, at 86 (describing increased state subsidies including rehabilitation grants and loans, tax incentives, mortgage insurance programs, and direct interest rate subsidies such as the SHARP program in Massachusetts).

268. According to a survey done by the National Association of Home Builders "public-private" partnership housing projects are distinguished by a number of features including multiple layers of subsidy from federal, state, and local governments and from private sources, relaxation of restrictive regulations, use of innovative building techniques (thanks to relaxed building codes) and more spartan designs. Such projects cannot be duplicated on a large scale without significant infusions of federal money. NAHB II, supra note 71, at 85-86. James Rouse's Enterprise Foundation, however, has packaged low income housing without federal subsidy that rents for $267 per month, including utilities, affordable to a family of four earning $10,500 per year. Cohen, supra note 224, at 114.

269. Note that counties and other subdivisions of state and local governments can independently contract with HUD for the development of federally funded public housing. See Fernsler & Tuttle, supra note 174, at 687 (citing Newbury v. Geauga City MHA, 732 F.2d 505, 510 (6th Cir. 1984)). For state use of tax-exempt financing, see Fernsler, supra note 197, at 429-34.
2. The mixed income private development—The third model is the mixed income housing development, constituted as a rental, cooperative,\footnote{270} condominium, or land trust, in which middle income persons are given incentives to purchase or rent in proximity to low and moderate income persons for a kind of “mainstreaming.”\footnote{271} A variation on this theme is the “linkage” program, in which commercial, office, or market rate housing development subsidizes low and moderate income housing through transfer payments or by incorporating low and moderate income housing units into the development project itself.

This model is based on the assumption that federal support for single family home ownership must be reconsidered in light of the fact that the cost of owner-occupied housing drastically inflates the price of housing for all Americans, whether they own or rent.\footnote{272}

\footnote{270} For a discussion of cooperatives, see Tuttle, Jacobs & Stipp, \textit{supra} note 169, at 804-09. A variation on the cooperative is the “mutual housing association.” Housing (whether multifamily apartments, scattered-site single family houses, or rowhouses) is owned by the MHA and the “residents” receive a dwelling unit for life, which they can pass on to their children. Residents pay a one-time entrance fee of approximately $2500, and pay the equivalent of co-op lease and amortization charges during their tenure. The fees are used as equity for the MHA to develop more properties. MHA’s are the brainchild of the Neighborhood Reinvestment Corporation (NRC). Members of its Board of Directors include the Chairman of the FHLBB, the Secretary of HUD, and the Comptroller of the Currency. Interview with Beverly Hiegaard, Field Officer, Neighborhood Reinvestment Corporation, (Nov. 12, 1987) [hereinafter Hiegaard Interview]. NRC’s MHA demonstration was authorized by the Housing and Community Development Act of 1980, Pub. L. No. 96-399, tit. III, § 316, 94 Stat. 1614, 1645.

\footnote{271} For a discussion of undesirable tenants’ “due process” rights to admission, see Williams, \textit{The Future of Tenants’ Rights in Assisted Housing Under a Reagan Voucher Plan: An Analysis of Section 8 Existing Housing Cases}, 23 \textit{URB. LAW. ANN.} 3, 16-24 (1982).

\footnote{272} Each dwelling unit’s price includes its potential as a tax shelter, whether the purchaser can use it for this purpose or not. Owners can subsidize their monthly payments by means of the deduction for mortgage interest. The resulting inflated prices affect the entire housing market. \textit{See} Waite, \textit{The Shattered Dream of American Housing Policy—The Need for Reform}, 26 \textit{B.C.L. REV.} 655, 656, 688-90 (1985). There have been alternatives suggested that would give persons seeking permanent housing the opportunity to afford it without the astronomical cost of a traditional purchase. One such proposal is the long-term lease. \textit{See} Waite, \textit{The Long-Term Lease as an Alternative to Home Ownership: A Proposal}, 15 \textit{URB. LAW. ANN.} 199 (1978).

Professor Waite suggests such a mechanism would be a positive response to the financial, use, and social factors that are involved in purchasing property. These leases would require some minimal level of rent stabilization that would ensure the tenant some reasonable period of occupancy. The lease may also need to provide for an increase in the rent over time to give the landlord incentive to be a party to the lease. \textit{Id.} at 202.

Other issues would require specific attention in order to make such an agreement work. For example, the maintenance of the property might need to be guaranteed by performance bonds, insurance coverage, and rights of inspection by a designated third party. \textit{Id.} at 203. Also, improvements made by a tenant should be provided for in the lease to avoid materialmen’s and mechanics’ liens held against the landlord. \textit{Id.} at 204-
People are willing to pay inflated prices for housing because a large portion of these funds—interest payments—are tax-deductible. Federal tax deductions for home mortgage interest payments constitute the single largest federal housing subsidy. At an annual cost of thirty-one billion dollars, it dwarfs public housing, AFDC, and all assisted housing programs combined. This subsidy is a target for budget-cutting to finance defense spending\(^{273}\) and to obviate the need for a tax increase.\(^{274}\) Rather than simply diverting these funds to defense spending, however, the funds could be used to finance a program of tenure conversion that could be structured to encourage many Americans to pay rent to cooperatives, at a lower price than they now pay for owner-occupied or rental housing, while generally reducing the overall market price of housing.

Tax deductions for mortgage interest on private, owner-occupied homes could be phased out over a period of four years, with a tax-free rollover of equity in an owner-occupied home to membership in a cooperative chartered under certain regulations of federal, state, and local governments. The cooperative could qualify as a tax-free exit from home ownership if it demonstrates adherence to the fair housing laws and provides for a certain stipulated mix of income classes—perhaps five percent very low income, ten percent low income, twenty-five percent moderate income, and the remainder middle income or above. These percentages need to be made more specific to parallel the percentage of the population accounted for by each of these groups. A goal for each cooperative might be to absorb a number of persons from each income group roughly corresponding to the percentage of the population represented by each income group in the standard metropolitan statistical area in which the cooperative was located. Rents could be paid by each tenant on a sliding scale according to income. Section 8 certificates or housing

\(^{05}\) In addition, legislation may be required to relieve the landlord from an implied warranty of habitability. Id. at 207. Such an alternative is advantageous both to the tenant and the landlord by allowing the tenant a stable housing payment schedule as well as giving the landlord the same security of having a rental income for an extended period of time.

\(^{273}\) Note the remarks of Representative Barney Frank (D. Mass.) regarding new housing assistance legislation: "It is extremely aggravating for us to sit here pitting one low income program against the other, particularly when you look at the money we're wasting on that stupid S.D.I. [Strategic Defense Initiative] program." Blakely, supra note 227, at 843.

vouchers could make up the difference between thirty percent of the tenant's rent and the contract rent at the cooperative.

The cooperatives could be apartment buildings, public housing projects, renovated factories, vacant schools, or collections of single family homes. They could be in urban or rural areas; they could be new construction or existing housing (brought up to certain minimum standards by rehabilitation, if necessary). Rehabilitation and new construction would be financed partially by the thirty-one billion dollar tax subsidy, partly by low income housing credits[^275] and partly by mortgage revenue bonds[^276]. Using tax-foreclosure and federal mortgage-foreclosure properties, the subsidy of low income units by middle income renters (already in practice in such states as New Jersey),[^277] mortgage revenue bonds[^278], and low income housing credits[^279] and eliminating costly owner-occupied housing, the real price of housing could decrease for all Americans.

For those present owners who wish to own property regardless of the tax consequences, this proposal should allow them the advantages of an interest in their homes—a long-term lease with a cooperative, with representation on the cooperative's board—at a lower monthly after-tax payment than their present monthly mortgage note. The solution presented, of course, is not "socialism" in any form, but rather private, cooperative ownership[^280]. In addition, the benefits possible as a result of "mainstreaming" low and moderate income families—in terms of lessened social

[^275]: Low income housing credits are provided by I.R.C. § 42 (1986). See also Callison, supra note 118, at 100. See generally Sanders & Roady, How the New Tax Law Changes the Operating Rules for Real Estate Investments, 62 J. TAX’N 22 (1985).

[^276]: In keeping with this approach, the savings and loan industry would be gradually phased out and pension funds, insurance companies, corporations, and state and local governments would take its place as the principal source of nonfederal funds for financing the development of mixed income, multifamily housing development. See Peirce, supra note 262, at F11, col. 2 (attractive financial packages are created by blending below market rate loans, state subsidies, support of investors, community development funds, backing by such intermediaries as Rouse's Enterprise Foundation, and cheap acquisition of HUD, VA, or tax-foreclosed properties).

[^277]: McDougall, supra note 205, at 677. Note that such linkage and set-aside techniques might be jeopardized under the Nollan decision. See supra notes 208-11 and accompanying text.

[^278]: For state use of tax-exempt financing, see Fernsler, supra note 197, at 429-34. See also Note, Municipal Bonds—North Carolina Enters Housing Market—In re Housing Bonds, 19 WAKE FOREST L. REV. 931 (1983) (public purpose challenge to issuance of municipal revenue bonds for developing moderate income housing).

[^279]: See supra note 275 and accompanying text.

[^280]: The mutual housing association model, discussed supra note 270, is now being used in affluent communities such as Greenwich and Westport, Connecticut for the development of "moderate" income housing (in such communities, the price of a new home is nearly $300,000). Hiegaard Interview, supra note 270.
disorder, reduced problems of school desegregation, and the like—could be substantial.

D. Some Alternatives for Financing Affordable Housing

It is important to bear in mind that none of the models sketched in the previous section are susceptible to universal application. The sweat-equity project is only viable in low and moderate income communities in which significant community spirit, and probably a vital and long-standing community organization, are present. The local public housing and/or assisted project can only develop in areas where racial and ethnic polarization is not severe, and/or where there is a very special type of civic and political leadership for the municipality as a whole and possibly for the state.

Because of the diversity of models for the development of affordable housing which are likely to emerge, it is best that the federal government provide long-term demand-side funding to shore up local supply-side initiatives, occasionally making special supply-side grants to facilitate the development of these various alternatives in the localities to which they are best suited. A National Housing Trust Fund, modeled with the experience of the National Corporation for Housing Partnerships, the Neighborhood Reinvestment Corporation, and the Neighborhood Development Demonstration Program, would be a useful vehicle through which to funnel such monies. Perhaps a national competition could be instituted, in which funds would be allocated to the best demonstration projects in the first in-

281. See Nolon, supra note 22, at 275-82 (discussing housing allowances and cash transfer payments).

282. Vouchers could be provided for moderate income persons, see Hoeflich & Malloy, supra note 23, at 685-88, while section 8 subsidies could be provided to low income persons. Some changes in the federal tax system might also be in order. Id. at 688-89; see also Williams, supra note 271, at 3-56 (discussing voucher systems).

283. See 42 U.S.C. § 8101 (1982); see also Miles, supra note 4, at 55-60. For a description of NRC, see supra note 270.


285. HUD Assistant Secretary Robert Demery recently mentioned that he: envisions such a fund as the ultimate, long-term solution to spot shortages of rental housing and increasing the number of poor families receiving housing aid. Such a fund . . . would operate on the basis of a partnership between the federal and state/local governments. Funding would have to be off-budget, renewable and from a reliable source such as a fee or tax on property transfers. . . . A public/private board would oversee the fund.

50th Anniversary, supra note 132, at 10.
stance, in hope of stirring the creativity necessary to address the problem of affordable housing in its many dimensions.286 Here the experience of Urban Development Action Grants287 and Housing Development Action Grants288 could provide useful guidance.289 In the alternative, the financing program could be modeled after the Community Development Block Grant Program, basically adopting the CDBG formula for distribution of funds.290

In the area of market rate housing, sufficient funds would have to be voted to enable the FHLBB to close financially ailing S & L's. It is apparent that the funds approved by the new FSLIC Recapitalization law are insufficient to achieve this objective. Healthy S & L's would be deregulated and required to merge with the FDIC, and the FSLIC would be closed. Future financing for market rate housing would be confined to federal income tax deductions for cooperative mortgage interest payments, grants authorized to mixed income multifamily developments through the Housing Trust Fund, and secondary mortgage market activity by the FNMA and the FHLMC. The GNMA might also have a role to play in selling mortgages used to finance some of the projects described in Section IV(B), above.291

CONCLUSION: TOWARD HOUSING AS A SOCIAL AND COMMUNITY RESPONSIBILITY

The cost of capital for financing home ownership and for developing multifamily rental housing remains a significant problem that limits private, community, and government options for

286. Peirce, supra note 262, at F11, col. 1. The objective here would be to subsidize an experiment in order to encourage its duplication, but not overfund it so that money takes the place of the initiative upon which the project was based. It is a delicate balance. Keyes Interview, supra note 260.


288. See Nolon, supra note 22, at 257-74.

289. See generally Hoeftich & Malloy, supra note 23, at 684-85 (discussing federal coordination of national housing policy).

290. A proposed bill along these lines is presently being drafted for submission to the Senate Banking and Urban Affairs Committee by the National Low Income Housing Coalition.

291. For an interesting proposal regarding the involvement of the GNMA, see Mazer & Clancy, GNMA Collateralized Municipal Bonds—A Community Development Tool for the Future, 11 URB. LAW. 416, 416-23 (1979).
developing affordable housing. Nonetheless, federal, state, and local government, and voluntary community organizations still have important roles to play in facilitating the development of affordable housing for all segments of the population. Because of budget cuts and a decline in the international competitiveness of our economy, the federal government is unlikely to be able to do very much without drastically cutting defense spending or raising taxes. Defense spending is a function of cultural imperatives and the world balance of peace; taxes, once lowered, are unlikely to be raised again. Tax revenues to subsidize the development of low and moderate income housing could be generated, however, by eliminating the deduction for home mortgage interest payments, thus discouraging private home ownership, a wasteful use of social capital. This subsidy is larger than the cost of all other housing programs, including public housing, combined. Perhaps a transition provision could subsidize the homeowner's transition to the rental or cooperative market.

At the local level, the consequent rise in demand for cooperative and rental apartments among middle class persons leaving home ownership could be used to drive "linkage" and "set-aside" programs that would provide a certain minimum percentage of low and moderate income units in each new or substantially rehabilitated middle class multifamily building. Such requirements could also moderate trends toward wholesale displacement of less affluent persons when erstwhile home owners flood the rental market. States could facilitate this process by explicitly adopting legislation authorizing linkage techniques, and by providing housing mortgage finance funds to subsidize the development of new mixed income rental facilities. These funds could be generated from the sale of mortgage revenue bonds, the interest from which would remain tax deductible.

Community organizations might have a role to play in housing development strictly for low and moderate income people, though "mainstreaming" of these groups through linkage and set-aside programs is much to be preferred. Perhaps those organizations that have developed capability in producing low and moderate income housing could form joint-ventures with market rate builders to develop mixed income projects, lending their special expertise. Another important role for community organizations is on the demand side of the housing equation. Community organizations can make a real difference by engaging in economic and community development that raises the real and effective incomes of low and moderate income persons, not only by providing jobs but also by providing low cost, subsidized ser-
vices such as day care, transportation, health care, and assistance in public school curricula and instruction.

Although housing is local, and housing markets are local, policy coordination at the national level is still necessary, if only to even out the differences in resources and responses of the various states. The challenge to federal policy is to draft housing legislation that is flexible enough to allow a variety of models to flourish but strict enough to ensure that each state and community makes a real commitment to the development of affordable housing. The themes sketched in this section of the Article—a diversity of supply-side programs, coupled with federal subsidies on the demand side—are likely to be some of the themes pursued in any new legislation. Still to be explored are the relations between the problems of affordable housing and the welfare system on the one hand, and the tax system on the other. One important initiative may be for the staffs of the tax, housing, and human resources committees in both the Senate and the House to begin a dialogue with one another, to identify areas of overlap and areas of possible cooperation.292

Regardless of changes in political direction and administration that may occur on the national level, an important lesson of the Reagan years is the significant role that state and local governments and voluntary organizations can play in the development of affordable housing. The problem of affordable housing has a national as well as a local dimension, but it is the local level at which many of the most intractable aspects of the problem—problems of building and infrastructure deterioration, class and ethnic antagonism, and wasteful, exploitative practices of public and private institutions—are confronted. The local level properly remains the focus, even if a change in national administrations should make that a matter of choice rather than necessity.

292. Keyes Interview, supra note 260.