

SHELTERING THE RICH OR HOUSING THE POOR? THE STORY OF THE LOW
INCOME HOUSING TAX CREDIT ©

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“No society can be flourishing and happy of which by far the greater part of the numbers are poor and miserable.” – Adam Smith

INTRODUCTION

The story of the Low Income Housing Tax Credit’s (“LIHTC”) emergence and longevity has mostly gone untold. How one small provision of the Tax Reform Act of 1986 fundamentally altered affordable housing policy, produced large reductions in corporate tax liability, and funneled private capital into low income housing developments, is a bit of an anomaly. Evidence suggest the results of the LIHTC were unlikely the intentions behind the program. The debate on the Senate floor of the 99th Congress suggests the LIHTC was a solution to inequitable issues raised by the Economic Tax Recovery Act of 1981 (“ERTA”).

However, due to the innovative acumen of several community development nonprofits, the LIHTC was transformed into a program that relieved large corporations of tax liability through syndication, funneled private capital into low-income housing, and benefited nonprofit community developers. The uniquely situated beneficiaries of the LIHTC yielded diverse support from constituents who generally shared no mutual interests, resulting in overwhelming political support and a politically entrenched affordable housing policy. This article seeks to explain how this happened, and to further highlight some of the LIHTC’s policy weaknesses.

Expenditures on housing in excess of 30% of a family’s income are deemed to be “unaffordable.”² There are nearly 43.2 million renter households in the nation today,³ with

¹ ADAM SMITH, THE WEALTH OF NATIONS 110 (Random House, Inc. 2003) (1776).

² *Affordable Housing*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Oct. 23, 2016), http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/.

³ References of this sort used throughout the paper are referring to the United States.

roughly 10.4 million considered to be extremely low-income, meaning they earn 30% or less of the area median income (AMI).⁴ According to a recent study conducted by the National Low Income Housing Coalition, the rental housing market consists of 5.8 million affordable housing units for extremely low-income households.⁵ Which means, of the 10.4 million extremely low-income households, roughly 4.6 million of them are forced into housing that is not affordable (i.e. their payments for housing exceed 30% of their monthly income). Moreover, some studies have found the affordability problem for low-income households to be worse than these figures suggest.⁶ The Joint Center for Housing Studies of Harvard University recently found nearly 80% of extremely low-income households spent more than 30% of their income on housing, and nearly two-thirds of them paid more than 50% of their income on housing.⁷ These studies suggest the low-income housing market is undersupplied with affordable housing options.

Today, the supply-side tax subsidy known as the LIHTC⁸ serves as the government's largest federal program to combat the lack of affordable housing, and to fund the production of rental housing for low-income households.⁹ In short, the LIHTC is a non-refundable tax credit that

⁴ Christine Serlin, *Report: Affordable Housing Units Lacking for Extremely Low Income Households*, AFFORDABLE HOUSING FINANCE (Oct. 22, 2016), http://www.housingfinance.com/policy-legislation/report-only-31-affordable-rental-units-available-for-every-100-extremely-low-income-households_o.

⁵ NATIONAL LOW INCOME HOUSING COALITION, *THE GAP: THE AFFORDABLE HOUSING GAP ANALYSIS 2016 2* (2016), http://nlihc.org/sites/default/files/Gap-Report_print.pdf. The study found 2.6 million of those affordable units are occupied by higher-income households, leaving only 3.2 million affordable units' available rental units for extremely low-income households, yielding a shortage of 7.2 million affordable units available for extremely low-income families. *Ibid.*

⁶ Barry Zigas, *Learning From the Low Income Housing Credit: Building a New Social Investment Model*, COMMUNITY INVESTMENT DEVELOPMENT REV. 47, 48 (2013).

⁷ *Ibid.*

⁸ The LIHTC's journey begins at the federal level. The Treasury allocates the credit to states in proportion to state population (in 2012 states received \$2.20 per capita, with a minimum allocation of \$2,525,000). State Housing Finance Agencies (HFA) administer the program. HFAs come up with a qualified allocation plan (QAP), which articulates the guidelines and focuses of the HFA in allocating the credits to developers. Low income housing developers then apply for the credits by emphasizing their projects compatibility with the QAP. Developers of new construction projects are eligible to receive a tax credit equal to 9% of the projects "qualified basis" (the qualified basis is generally the construction costs of the project, and does not include the cost of land acquired for the project). The credit is then distributed on a 10-year payment schedule, which generally means 90% of the qualified basis is refunded through the tax credit. However, because credit payments are not made until the project is complete and units are rented to qualified tenants, developers struggle with start-up financing for projects. Thus, most developers sell the credits in exchange for equity in their project to generate startup funding for the project. This process is known as syndication. *See generally*, MARK P. KEIGHTLEY, CONG. RESEARCH SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT (2013).

⁹ Kristen Niver, *Changing the Face of Urban America: Assessing the Low-Income Housing Tax Credit*, 102 VIRGINIA L. REV. ONLINE 48, 49 (2016); CONGRESSIONAL BUDGET OFFICE, *THE STATUS OF FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS: PRESENTATION FOR THE COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES* (2015). *See*

allocates dollar for dollar credits to qualified developers for the production and operation of qualified affordable housing projects.¹⁰ The LIHTC is codified in s42 of the Internal Revenue Code,¹¹ and the Department of the Treasury's Internal Revenue Service administers and enforces the tax laws in the LIHTC program.¹² The Service allocates credits to state housing agencies,¹³ which in turn issue the credits to owners of qualifying properties which provide affordable housing to low-income tenants.¹⁴

This article seeks to tell the story of the LIHTC's birth, rise, and sustained political popularity. By examining the political, economic, and historical context of the LIHTC's enactment and solidification, the article teases out the unique path of a relatively unknown tax credit, to the nation's fourth highest corporate tax expenditure.¹⁵ Ultimately, the article argues the corporate windfall created by the LIHTC was unlikely fully grasped or intended by the 99th Congress. Further, due to the unique array of benefits the LIHTC produced for low-income housing, corporations, and nonprofits, the LIHTC gained immense political popularity, which substantially contributed to the LIHTC's growth over the past 30 years.

The LIHTC was initially enacted as a temporary measure of the Tax Reform Act of 1986,¹⁶ but was later made permanent by the Omnibus Budget Reconciliation Act of 1993.¹⁷ The LIHTC

also, Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2004).

¹⁰ I.R.C. s42.

¹¹ *Ibid.*

¹² U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOW INCOME HOUSING TAX CREDIT [HTTP://PORTAL.HUD.GOV/HUDPORTAL/HUD?SRC=/PROGRAM_OFFICES/FAIR_HOUSING_EQUAL_OPP/LIHTCMOU](http://portal.hud.gov/hudportal/hud?src=/program_offices/fair_housing_equal_opp/lihtcmou) (2016).

¹³ I.R.C. s42(h)(3), (7).

¹⁴ I.R.C. s42(h).

¹⁵ See Committee for a Responsible Budget Report, available at <http://www.crfb.org/blogs/tax-break-down-low-income-housing-tax-credit>.

¹⁶ Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

¹⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

resembled the free-market ideology of the Reagan administration at the time,¹⁸ and further solidified the policy shift in public housing towards privatization and market-based solutions.¹⁹ One of the key market-based attributes of the LIHTC, and arguably the most important,²⁰ is the affordable housing developer's ability to sell credits to private investors in exchange for equity financing for qualified projects, a process known as syndication.²¹ This process allows investors to claim tax credits while simultaneously enjoying additional tax benefits that stem from affordable housing projects, primarily, passive-loss write-offs against income from an ordinary trade or business.²² What is fascinating, is that during the congressional debates over the LIHTC, congress explicitly denied individual investors the benefits of passive-losses, and failed to discuss or consider how corporations may benefit from the LIHTC through passive-losses.²³ Further, corporations claimed roughly 95% of credits in 2014, yielding close to 7

¹⁸ Prior to the LIHTC, the government, generally, acted as a direct party in an affordable housing transactions (either through directly subsidizing production or directly subsidizing rental payments). See United States Housing Act of 1937, Pub. L. No. 93-383; Housing Act of 1949, ch. 338, 63 Stat. 413; Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451; Housing and Urban Development Act of 1969. The LIHTC introduced a mechanism that eliminated direct government spending on affordable housing through the issuance of tax credits. Tax credits could be purchased through syndication, and in turn generated funding for affordable housing production. The elimination of direct government intervention in affordable housing transactions can be seen as a move toward a free market approach, where government now indirectly intervenes through tax credit allocation. "The genius of a market economy, freed of the distortions forced by government housing policies and regulations that swung erratically from loving to hostile, can provide housing far better than Federal programs." REPORT OF THE PRESIDENT'S COMMISSION OF HOUSING VII (1982).

¹⁹ See Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POLICY REV. 203, 205 (1988). See generally, National Housing Law Project, *The Subsidized Housing Handbook*, ch. 2, 2-1-2-33 (1982).

²⁰ See What Works Collaborative, *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives*, JOINT CENTER FOR HOUSING STUDIES 3 (2009).

²¹ See Mihir Desai et. al., *Investable Tax Credits: The Case of the Low Income Housing Tax Credit*, HARVARD KENNEDY SCHOOL OF BUSINESS FACULTY WORKING PAPER SERIES 3 (2008). Syndicators are business entities, which act as middle-men or brokers between low-income housing developers and investors. See Ballard, *supra* note 7, at 218. Typically, an investor partnership is formed (in LLP form) between a syndicator and the investors. *Ibid.* The investors are limited partners contributing equity (bearing only the liability of their investment), and the syndicator is the general partner, managing the partnership (bearing the liability of the partnership). *Ibid.* The investor partnership then enters into a partnership with the developer as a limited partner (while the developer acts as the general partner and manager of the partnership). *Ibid.* In this LLP agreement, 99% of the developer's tax credits are distributed to the investor partnership (and then to the investors), a portion of the equity contributed by investors is distributed to the syndicator for the brokering services, and the remaining equity is distributed to the developer for the financing of the project. *Ibid.*

²² *Ibid.* See also, What Works Collaborative *Supra*, note 16. Investments in affordable housing projects are deemed to be "passive activities." See I.R.C. s469(c)(2). Outside of individuals, closely held corporations, and professional service corporations, all other entities may use losses generated from passive investments used to offset income generated from a trade or business. See I.R.C. ss469(j)(1)-(2); Stearns, *supra* note 17, at 212.

²³ Doug Guthrie & Michael McQuarrie, *Privatization and Low-Income Housing in the United States Since 1986*, in 14 RESEARCH IN POLITICAL SOCIOLOGY: POLITICS AND THE CORPORATION 15, 30 (Harland Prechel ed., 2005).

billion in tax expenditures.²⁴ Undeniably, corporate America yields substantial benefits from the low income-housing tax credit; benefits that individuals were explicitly denied.

Part I of this article examines the political and historical backdrop of the LIHTC's birth. As the LIHTC was not an isolated, sporadic measure, the policy and historical landscape of the 70's and early 80's is of particular relevance in explaining the birth of the LIHTC.²⁵ Part II investigates the legislative process of the LIHTC's emergence and teases out the congressional intent behind its enactment. Part III explores the rise of the LIHTC, much of which can be attributed to the unique support it gleaned from affordable housing advocates, corporations, and non-profit organizations.²⁶ Lastly, Part IV examines some of the most recent difficulties with the LIHTC, and exposes the LIHTC's dependency upon corporate investors.

I. HISTORICAL BACKDROP OF THE LIHTC

The enactment of the LIHTC was part of a fundamental shift in the view of Government's role in society.²⁷ The Reagan administration, heavily influenced by the noble prize winning economist Milton Friedman,²⁸ viewed Government intervention as the problem, not the solution.²⁹ The deeply held convictions of the Reagan Administration spurred a wave of legislative action in the 80's, which sought to lower taxes, deregulate markets, and foster market-based solutions through competition and privatization.³⁰ Thus, one may easily be lead to believe, and justifiably so, the birth of the LIHTC was simply the manifestation of these free market ideals. However, the birth of the LIHTC involved a culmination of different factors. To fully grasp the birth of the LIHTC, one should take a brief look at the political and legislative history of affordable housing in the United States.

²⁴ *The Tax Break-Down: The Low Income Housing Tax Credit*, COMMITTEE FOR A RESPONSIBLE BUDGET BLOG (Nov. 7, 2013), <http://crfb.org/blogs/tax-break-down-low-income-housing-tax-credit>

²⁵ See Guthrie, *supra* note 21.

²⁶ See Guthrie, *supra* note 21; Desai, *supra* note 19. See generally Ballard, *supra* note 7.

²⁷ See President Reagan's Housing Commission Report, *supra* note 14. See also, Stearns *supra* note 17.

²⁸ Gregg Ip & Mark Whitehouse, *How Milton Friedman Changed Economics, Policy, and Markets*, THE WALL STREET JOURNAL (2006), available at <http://www.wsj.com/articles/SB116369744597625238>

²⁹ THE HERITAGE FOUNDATION <http://www.heritage.org/initiatives/first-principles/primary-sources/reagans-first-inaugural-government-is-not-the-solution-to-our-problem-government-is-the-problem> (last visited Oct. 23, 2016). "Government is not the solution to our problem; government is the problem." *Ibid.*

³⁰ See generally Stearns, *supra* note 17, at 205-06; Ip, *supra* note 25.

i. AFFORDABLE HOUSING FROM THE BEGINNING

It is important to note, from the beginning, political actors have seized upon the opportunities afforded by dilemmas in affordable housing to accomplish various political goals.³¹ Some scholars suggest the LIHTC program is just another example of such political rhetoric.³² As early as 1892, the federal government has been expending resources to combat the lack of affordable housing.³³ However, conscious legislative action to address issues of affordable housing needs was not taken until 1937, when the United States Housing Act of 1937 was enacted.³⁴ The pronounced objective of the Act was to “correct the acute shortage of decent, safe, and sanitary housing for lower income families.”³⁵ However, the statutory preamble lists job creation as the Act’s first purpose.³⁶ The Act’s method for providing affordable housing was the creation of the United States Housing Authority, which distributed federal funds directly to states and localities for construction and operation of low-rent projects.³⁷ The program enjoyed moderate success up until the end of World War II.³⁸ Upon the return of post-war veterans, public housing suffered a severe shortage.³⁹ This led to the Housing Act of 1949, which substantially expanded the production of public housing,⁴⁰ and promoted a vision of providing a “decent home and suitable living environment” for all American families.⁴¹

³¹ See Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUSING 194 (2011). “[A]ffordable housing is not deemed to be an end in itself, but a way to serve another purpose—for example, the house defense workers during the world wars, to create jobs during the Depression, to provide an antidote to civil unrest in the 1960s, or to stimulate the economy in today’s Great Recession.” *Ibid.*

³² See Guthrie, *supra* note 21, at 44-45.

³³ See Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUSING 194 (2011). In 1892, congress authorized \$20,000 for a federal investigation of slum conditions, and in 1908 President Theodore Roosevelt appointed the President’s Housing Commission to investigate the need for decent housing for low-income Americans and recommend federal aid, although nothing arose out of this effort. *Ibid.*

³⁴ United States Housing Act of 1937 (Wagner-Steagall Act), Pub. L. No. 93-383, 88 Stat. 653, 42 U.S.C. s1437 (2016). The Act provided the statutory structure for public housing, and initially funded public housing through direct housing assistance to local public housing agencies for the construction and operation of public housing facilities. See Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAWYER 869, 896 (2004).

³⁵ United States Housing Act of 1937, ch. 896, 50 Stat. 888.

³⁶ United States Housing Act of 1937, Pub. L. No. 93-383, 88 Stat. 653, 42 U.S.C. s1437 (2016).

³⁷ Stearns, *supra* note 17, at 205.

³⁸ Edson, *supra* note 29, at 196.

³⁹ *Ibid.*

⁴⁰ Housing Act of 1949, ch. 338, 63 Stat. 413, 42 U.S.C. s 1441 (2016).

⁴¹ *Ibid.*

In 1965, the Housing and Urban Development Act was enacted, creating the Department of Housing and Urban Development (HUD) to administer public housing.⁴² By the mid-60's, in part due to the development of the modern mortgage finance system and rising real income levels, home ownership became much more attainable. This resulted in many middle-class families moving out of public housing only to be replaced by single-parent households, many of whom were on welfare.⁴³ Because public housing authorities (PHA) had to charge rent to cover operating expenses, and much of public housing was now occupied by low-income tenants, rents jumped to 60-70% of tenants' income, imposing heavy costs burdens on low-income tenants.⁴⁴ In response, Congress capped tenants' rent at 25% of income.⁴⁵ In turn, PHA's suffered severe revenue deficits, which necessitated federal payment of operating subsidies.⁴⁶ As PHA's operating expenses increased, these subsidies posed grave budgetary issues for HUD, ultimately leading to declining budgets.⁴⁷

During the late-1960's, tensions were extremely high within urban communities, in part due to the deplorable conditions of public housing projects.⁴⁸ The assassination of Dr. Martin Luther King Jr. in April of 1968, sparked large-scale urban riots, which only fueled the fire of public unrest.⁴⁹ In response, President Lyndon B. Johnson appointed two commissions in order to propose remedies to stifle rising tensions.⁵⁰ One of Congress' responses to the Kaiser Commission's⁵¹ recommendations was the Tax Reform Act of 1969 ("TRA69").⁵² The act sought to encourage affordable housing production through the use of tax devices such as rapid depreciation, the ability to deduct construction interest during the construction period, a five-year write-off for rehabilitation expenses, and liberalized recapture rules.⁵³ These tax benefits were specifically allowed for affordable housing projects, alone. However, in effect, Congress

⁴² Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451, 12 U.S.C. s 1701, Sec. 101 (2016).

⁴³ Edson, *supra* note 29, at 196.

⁴⁴ *Ibid.* at 196.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* Senator Edward Brooke of Massachusetts initiated, and brought to fruition these subsidies. See Housing and Urban Development Act of 1969 (Brooke Amendment), 42 U.S.C. s 1521 (2010).

⁴⁷ Edson, *supra* note 29.

⁴⁸ *Ibid.* at 199.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at 204.

⁵¹ *Ibid.* at 199. The Kaiser Commission was chaired by "famed industrialist" Henry Kaiser. *Ibid.*

⁵² *Ibid.* at 204.

⁵³ *Ibid.*

merely opened the door for wealthy investors to use affordable housing as a means to reduce taxable income.⁵⁴ This type of manipulation ultimately contributed to the enactment of the Tax Reform Act of 1986,⁵⁵ which sought to eliminate the use of certain programs, like the TRA69 affordable housing policy, as a means of eradicating tax liability.⁵⁶ Congress' noble intentions ultimately planted the seeds for the single largest corporate windfall in the last quarter-century.⁵⁷

II. SETTING THE STAGE FOR THE LIHTC

During the 1970's, many cities faced an urban housing crisis.⁵⁸ Public housing projects built in the 1950's and 1960's were in serious decay, and the effects of a budget crisis were immediate.⁵⁹ Further, the privatization-incentives created by the Tax Reform Act of 1969 lead to fraud, poor quality, high costs, and racial and economic segregation in the public housing market.⁶⁰ In response to these challenges, the Nixon administration heavily promoted what became the Section 8 rental assistance program in 1974.⁶¹ In response to heavy lobbying by labour unions, housing advocates, and the housing industry, congress added project-specific, new construction and rehabilitation components to Section 8 of the Housing and Community Development Act of 1974.⁶² These combined direct subsidies⁶³ for affordable-housing rental-payments and construction, with tax devices such as accelerated depreciation schedules under certain

⁵⁴ See generally Stanley S. Surrey, *The Tax Reform Act of 1969—Tax Deferral and Tax Shelters*, 7 BOS. COLL. INDS. & COMM. L. REV. 307, 308 (1971).

⁵⁵ See Guthrie, *supra* note 21, at 29.

⁵⁶ See Edson, *supra* note 29, at 205. See also, Zigas, *supra* note 5; Guthrie, *supra* note 21, at 29.

⁵⁷ Guthrie, *supra* note 21, at 26.

⁵⁸ *Ibid.* at 27

⁵⁹ *Ibid.*

⁶⁰ Zigas, *supra* note 5, at 48.

⁶¹ *Ibid.* This program provides tenants with housing vouchers, which subsidizes the difference in qualified section 8 housing unit's fair-market rent and 30% of the qualified tenant's income. See Edson, *supra* note 29, at 202.

⁶² Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (Aug. 22, 1974). See also, Guthrie, *supra* note 21. The Section 8 housing project served as the first major demand-side subsidy, where the lack of affordable housing was attacked from the angle of the tenant, providing rental assistance in hopes that more producers would enter the market in response to demand, and prices would lower. *Ibid.* See generally Stephen Malpezzi & Kerry Vandell, *Does the Low Income Housing Increase the Supply of Housing?*, 11 J. OF HOUSING ECON 360 (2002).

⁶³ The subsidies came in the form of direct government spending, where the public housing authority would pay qualified lessors the difference between fair market rent and 30% of qualified tenants income. Guthrie, *supra* note 21.

programs.⁶⁴ The subsidies for the construction of new affordable housing projects proved to be particularly relevant in the birth of the LIHTC. As the Reagan administration actively promoted the repeal of these direct subsidies in the early 1980's, the construction of new affordable housing units fell substantially.⁶⁵ From 1980 to 1985, construction of new affordable housing projects fell by almost 100 thousand units, with no evidence of a decreasing demand for affordable housing.⁶⁶

I. COMMUNITY REINVESTMENT ACT OF 1977

In addition to the many issues swirling around public housing in the 1970's, strong evidence suggested banks were redlining⁶⁷ low-income areas, due to the riskiness of such investments.⁶⁸ In 1977, Congress responded to lenders redlining practices by enacting the Community Reinvestment Act (CRA), which mandated that banks invest resources in the local communities in which they operate.⁶⁹ Further, financial institutions CRA records were considered when regulators reviewed applications for deposit facilities or mergers.⁷⁰

The CRA was enacted to channel resources into the inner cities where banks had operations. However, the act was relatively ineffective in its early years: prior to the implementation of the LIHTC.⁷¹ Bank's lending practices remained unchanged, and CRA credits were mainly received through grants and charitable donations to local non-profits.⁷² However, upon the LIHTC's enactment, financial institutions were permitted to receive CRA credits through investments in

⁶⁴ See *Ibid.*; Edson, *supra* note 29, at 201-02. The Reagan Administration's elimination of Section 8 subsidies for construction and rehabilitation in 1983 brought the production of affordable housing to a halt, and set the stage for the LIHTC. Guthrie, *supra* note 21, at 21.

⁶⁵ See Stearns, *supra* note 17, at 206.

⁶⁶ See National League of Cities, A Time to Build Up: A Survey of Cities About Housing Policy, *reported in* 14 Hous. & Dev. Rep. (BNA) 801 (Feb. 23, 1987).

⁶⁷ Redlining is the practice of denying a creditworthy applicant a loan for housing in a certain neighborhood even though the applicant may otherwise be eligible for the loan. The term refers to the practice of mortgage lenders of drawing red lines around portions of a map to highlight sectors or neighborhoods in which they do not wish to make loans. See CONSUMER COMPLIANCE HANDBOOK, Federal Fair Lending Regulations and Statutes: Fair Housing Act of 1968, available at, https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf.

⁶⁸ Guthrie, *supra* note 21, at 22.

⁶⁹ The Community Reinvestment Act of 1977, 12 U.S.C.A. s 2901 (West 2016).

⁷⁰ Desai, *supra* note 19, at 15.

⁷¹ Guthrie, *supra* note 21, at 22.

⁷² *Ibid.*

LIHTC projects.⁷³ Which lead banks to change their lending practices, and funnel resources into low-income communities through investments in low-income housing.

Congress' attempt to manipulate lending practices through the CRA did not go in vain. In fact, as the next section demonstrates, solely due to the LIHTC, the CRA has proven to be quite successful.⁷⁴ Because CRA credits may be received through investing in LIHTC projects, banks are incentivized to invest in qualified low-income housing projects in their communities.⁷⁵ The ability to receive CRA credits through LIHTC investments has proven to be quite an effective incentive amongst financial institutions⁷⁶ and illuminates the unforeseen, but important, role the CRA has played in the LIHTC program.

However, the CRA's effect on the LIHTC does raise potentially inequitable effects. Because LIHTC credits can be sold, market prices of credits are determined through supply and demand. In communities with multiple lenders, the need for CRA credits creates competition amongst lenders, which drives demand for the LIHTC and increases its market price.⁷⁷

However, in communities with only one lender, essentially no competition exists in the pricing of the LIHTC, which results in low market prices for the credit.⁷⁸ This results in major discrepancies in the amount of financing that developers are able to obtain in exchange for credits, solely by virtue of the number of lenders in the community.⁷⁹

II. ECONOMIC RECOVERY TAX ACT OF 1981

The Economic Recovery Tax Act of 1981 (ERTA) is one of the important pieces of legislation to set the stage for the birth of the LIHTC. With President Reagan taking office in 1981, the policy agenda toward public housing and government, as a whole, shifted dramatically. The

⁷³ *Ibid.* at 22.

⁷⁴ *See generally* Desai, *supra* note 19, at 25.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 42. A study conducted in 2004 found finance, insurance and holdings companies made up 83% of the corporations claiming LIHTC's. *Ibid.*

⁷⁷ *See generally*, Zigas, *supra* note 5. Investors are able to purchase LIHTCs at a discount (\$1 of credit = €80 purchase price, thus an investor spends €80 to reduce tax liability by \$1). *See generally*, Desai *supra* note 19. The higher the market price, the closer developers get to receiving equity equal to the full value of tax credits received, and thus, are able to funnel more resources into the construction of the low-income housing project. *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 54.

administration believed the public sector had failed in its attempts to provide public housing, and the private sector was a much better suited avenue through which the efficient production of affordable housing could be achieved.⁸⁰

The Economic Recovery Tax Act of 1981 precipitously cut many federal programs, including those that funded the construction and rehabilitation of low-income housing.⁸¹ The Reagan Administration believed in a supply-side approach to economic policy: by reducing taxes to incentivize production (increase supply), you could generate lower prices and thus more consumption.⁸² ERTA is a reflection of this supply-side approach.

One of the mechanism's ERTA used to increase the supply of low-income housing was the enactment of the "passive loss" provision, which allowed individual investors to offset ordinary income with losses from "passive activities."⁸³ The tax code defines "passive activities" as activities which involve the conduct of a trade or business, and those in which the taxpayer does not "materially" participate.⁸⁴ Further, any rental activity is deemed "passive activity," which includes investments in rental real estate.⁸⁵ Some scholars have argued the main idea behind the "passive loss" provision was to allow individuals a deduction for the depreciating value of rental property and nominal interest expenses.⁸⁶ Further, ERTA introduced the accelerated cost recovery system (ACRS), which substantially reduced the taxable life of rental real estate by shortening its depreciation schedule.⁸⁷ With these changes in effect, the high inflationary and interest rate environment of the early 1980's allowed investors to rapidly depreciate rental real estate, and enjoy large deductions from highly leveraged property,⁸⁸

⁸⁰ Stearns, *supra* note 17, at 205.

⁸¹ Guthrie, *supra* note 21, at 28.

⁸² See HISTORY CHANNEL, <http://www.history.com/this-day-in-history/reagan-signs-economic-recovery-tax-act-erta> (last visited Oct. 23, 2016).

⁸³ See Guthrie, *supra* note 21, at 29.

⁸⁴ I.R.C. s 469(c)(1).

⁸⁵ I.R.C. s 469(c)(2). See also, James R. Follain et al., *Understanding the Real Estate Provisions of Tax Reform: Motivation and Impact*, 40 NAT. TAX J. 363, 364 (1987).

⁸⁶ See Guthrie, *supra* note 29; Stearns, *supra* note 17, at 366.

⁸⁷ See DONALD L. BARTLETT ET AL., AMERICA: WHO REALLY PAYS TAXES 232 (1994).

⁸⁸ High interest rates lead to high interest payments on debt, and thus, higher leveraged rental projects lead to very high interest expenses. See generally, Follain, *supra* note 74, at 365-66. These very high interest expenses mostly lead to early losses in rental housing projects, which could be deducted from the taxpayer's ordinary income: the taxpayer was not restricted to only use passive losses to offset passive gains. *Ibid.* The combination of accelerated depreciation, which allowed depreciation deductions to offset ordinary income, and high interest expenses, allowed investors in affordable rental housing to offset their ordinary income substantially. *Ibid.*

generating massive “taxable losses” from passive activity.⁸⁹ These losses allowed wealthy investors to off-set taxable income from other activities, and essentially eliminate their tax liability.⁹⁰

Congress quickly realized the host of problems ERTA created.⁹¹ With projected Treasury losses of \$162 billion over a six-year period,⁹² and public outrage over the inequitable burdens of taxation,⁹³ the stage was set for the Tax Reform Act of 1986, and the birth of the Low Income Housing Tax Credit.

III. EMERGENCE OF THE LIHTC

The LIHTC was enacted as a temporary measure of the Tax Reform Act of 1986.⁹⁴ Contrary to popular belief, the LIHTC was unlikely enacted, exclusively, to increase the supply of affordable housing. In June of 1986, the LIHTC was debated on the Senate floor.⁹⁵ The congressional record reveals that much of the debate over the LIHTC concerned whether individual investors should have access to LIHTCs and be able to offset ordinary income with passive losses, as permitted by ERTA.⁹⁶ Furthermore, the record reveals that congressmen and the general

⁸⁹ See Follain, *supra* note 74, at 365-66.

⁹⁰ *Ibid.*

⁹¹ See Guthrie, *supra* note 21, at 29.

⁹² Follain, *supra* note 74.

⁹³ See Guthrie, *supra* note 21. To exemplify this point, Senator Robert Packwood (R-OR), then chair of the Senate Finance Committee, testified in the introduction of the Tax Reform Act of 1986, stating: “On the individual income tax [referring to ERTA], the principle thing we did was severely limit the benefit of so-called tax shelters . . . What very wealthy individuals would do is invest in properties, usually real estate but not always, that generated paper losses. They would offset the paper losses against their regular income. This would reduce their regular income, their taxable income, down to zero. They paid no taxes. Everyone in this Chamber has gone home and had this question put to them—these poor people making \$15 or \$16,000 a year. ‘Senator, I don’t mind paying my fair share, but why don’t they pay something?’ . . . 844 Americans last year made over \$1 million and paid no taxes. That, justifiably, galls the average taxpayer who is making \$15,000 a year and paying \$1,000 in taxes. This bill closes those loopholes.” Legislative day of Wednesday, September 24, 1986, 99th Cong. 2nd Sess., 132 Cong Rec S 13782, Vol. 132(129).

⁹⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

⁹⁵ Bernard D. Jr.; McDermott Reams, Margaret H. *Tax Reform 1986: A Legislative History of the Tax Reform Act of 1986: The Law, Reports, Hearings, Debates and Related Documents* (Inc 1987).

⁹⁶ As Senator Mitchell (D-ME) argued: “As I believe Senator Packwood is aware, low-income housing is different from other real estate. Low-income housing does not provide cash-flow from rents, or the promise of appreciation on sale. Investors are attracted instead by the return they can receive by offsetting their tax liability from other income. This was the understanding they had when they undertook, the investment [referring to investors post ERTA, who invested in affordable housing solely for the tax benefits of passive losses]. Many thousands of investors throughout the country are now in the position of having entered into commitments to provide equity payments in limited

public were disgruntled over the lack of vertical equity ERTA seemed to facilitate through the passive loss provision.⁹⁷ Moreover, the overarching purpose of the Tax Reform Act of 1986 (TRA86) was to create a fairer, more efficient, and simpler tax code through the elimination of tax loopholes.⁹⁸ Thus, it is reasonable to infer, the overarching purpose of TRA86 bled into the inception of the LIHTC.⁹⁹ Which is evidenced by much of the congressional debate over the LIHTC revolving around tax shelters for individual investors and ERTA's "passive loss" provision.¹⁰⁰

In 1985, the Reagan administration proposed a comprehensive tax reform plan, which effectively eliminated the long-standing preferential treatment low-income housing properties enjoyed.¹⁰¹ In light of this threat, housing interest groups from all sides of the political spectrum lobbied congress in attempts to preserve these benefits.¹⁰² Low-income housing advocates, lead mainly by the National Low Income Housing Coalition, pushed a "preserve and reform" agenda in attempts to preserve the focus on low-income housing while simultaneously eliminating the immense tax breaks enjoyed by wealthy investors under prior programs.¹⁰³ In contrast, the Local Initiative Support Corporation (LISC) and the Enterprise Foundation, two non-profit organizations active in the promotion of affordable housing, took a different position in their lobbying efforts.¹⁰⁴ Testifying before the House Ways and Means Committee, Mitchell Sviridoff (President of LISC) and James Rouse (Chairman of the Enterprise Foundation) both

partnerships for low income housing on which they will not be able to take their anticipated [passive] losses under the committee amendment [which proposed the LIHTC and restricted individual investors from offsetting ordinary income with passive losses]." *Legislative History of the Tax Reform Act of 1986*: P.L. 99-514 : 100 Stat. 2085 : Oct. 22, 1986. (1986).

⁹⁷ As Senator Cohen (R-ME) remarked: "Mr. President, I want to express my support for the tax reform bill that is now being considered by the Senate [this bill proposed the LIHTC and restricted passive losses] . . . For too long, our Federal income tax system has been too complex and filled with esoteric provisions benefiting special interests. Over and over I have heard my constituents say that the tax system is unfair, that the wealthy are not paying taxes . . . While they dutifully pay their fair share of taxes, others use exotic write-offs, creative tax-shelters, and investment schemes, the vast majority of which are legal, to reduce their tax liability." *Legislative History of the Tax Reform Act of 1986*: P.L. 99-514 : 100 Stat. 2085 : Oct. 22, 1986. (1986).

⁹⁸ Bernard D. Jr.; McDermott Reams, Margaret H. *Tax Reform 1986: A Legislative History of the Tax Reform Act of 1986: The Law, Reports, Hearings, Debates and Related Documents* (Inc 1987).

⁹⁹ See generally, Edson, *supra* note 29, at 205; Guthrie, *supra* note 21, at 29.

¹⁰⁰ Guthrie, *supra* note 21, at 30.

¹⁰¹ Zigas, *supra* note 5, at 48. Elimination of accelerated depreciation, full deductibility of construction period interest, and special capital gains treatment. See Stearns, *supra* note 17, at 208.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ See Ballard, *supra* note 7, at 221. These nonprofits utilized preexisting tax benefits for housing rehabilitation by partnering with tax-paying entities that purchased their tax benefits. *Ibid.*

suggested if preexisting low-income housing tax benefits were eliminated, they be replaced by a new *investment tax credit*.¹⁰⁵ These lobbying attempts failed to gain much traction in the House of Representatives, but would later prove to be relevant when the LIHTC was debated in the Senate. The House approved a tax reform measure in 1985, which eliminated accelerated depreciation for most assets and made minor tweaks to existing tax subsidies for assisted housing. The House bill mentioned nothing about LIHTCs.¹⁰⁶

By the time the approved House bill arrived at the Senate, much concern had grown over the effect of such changes on real estate developers, and commentators suggested the bill would adversely affect the production of low-income housing.¹⁰⁷ In response, Senators crafted an amended tax reform bill to address both concerns.¹⁰⁸ Senate Finance Committee Chairman Robert Packwood (R-OR) is credited with first proposing the LIHTC.¹⁰⁹

On March 11, 1986, Senator Robert Packwood proposed an amended version of the House tax reform bill (H.R. 3838), with no mention of the LIHTC.¹¹⁰ However, a week later, Senator Packwood included the LIHTC in a draft submitted to the Finance Committee.¹¹¹ Scholars have argued that due to the LIHTC's complexity, it was simply infeasible to fully consider the ramifications of the Credit within the one-week period it was drafted,¹¹² which likely fostered the multiple modifications made to the Credit in the years following.¹¹³

The Congressional record makes clear the LIHTC was originally intended for individual investors,¹¹⁴ the same wealthy investors the "passive loss" provision of ERTA was aimed at.¹¹⁵ Further, when the LIHTC was first proposed, Congress made clear that investors should not be able to offset ordinary income with passive losses and receive low income housing tax credits

¹⁰⁵ See Comprehensive Tax Reform: Hearings Before the Comm'n on Ways & Means House of Representatives, 99th Cong. 99-45, pt. 5 of 9, 3761-62, 69 (1986).

¹⁰⁶ *Ibid.* See also, Tax Reform Act of 1985, H.R. 3838, 99th Cong. (1985); H.R. Rep. No. 99-426, at 152 (1985) (purposing greater depreciation deductions for low income rental housing).

¹⁰⁷ Ballard, *supra* note 7, at 220.

¹⁰⁸ *Ibid.* See also, S. Rep. No. 99-313 (1986).

¹⁰⁹ Stearns, *supra* note 17, at 209.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* "Packwood [was] . . . commonly known as 'an unabashed advocate of using the income tax to give incentives to private industry and to promote social action.'" *Ibid.*

¹¹² *Ibid.* at 209.

¹¹³ *Ibid.*

¹¹⁴ Guthrie, *supra* note 21, at 30.

¹¹⁵ *Ibid.*

simultaneously.¹¹⁶ This act of receiving the tax benefits from passive losses and LIHTCs, was referred to as “double-dipping,” which most Congressmen sternly opposed.¹¹⁷ However, some Congressmen argued that retrospectively limiting the “passive loss” provision would be financially detrimental and unfair to thousands of individual investors who invested in rental housing with the understanding of ongoing depreciation benefits.¹¹⁸ Ultimately, allowing wealthy investors the advantages of the passive loss provision and the LIHTC was not politically feasible.¹¹⁹ And the LIHTC effectively replaced the ERTA “passive loss” provision for individuals, estates, trusts, closely held corporations, and personal service corporations.¹²⁰ This was done through section 469 of the Tax Reform Act of 1986, which restricted certain entities abilities to use passive losses to offset ordinary income.¹²¹

At the center of the LIHTC and passive losses debate was the issue of whether wealthy individuals, who had invested in rental housing mainly on the basis of tax benefits generated from passive losses, would continue to make the same investments on the basis the LIHTC program.¹²² And after hundreds of hours of Congressional debate on the Senate and House floor, the prospect of corporations utilizing LIHTCs to lower tax liability was not discussed once.¹²³ In fact, upon the passage of the Tax Reform Act of 1986, the general consensus amongst most of Congress, the community development industry, and low-income housing advocates, was that the LIHTC would be used by wealthy individual investors.¹²⁴ So how did the LIHTC become the fourth highest corporate tax expenditure? And how did corporations receive a “double-dip” tax break that individuals were explicitly denied? Democratic Senator Bennett Johnson (D-LA) may provide some insight into these questions.

¹¹⁶ See generally, *Ibid.*; *Legislative History of the Tax Reform Act of 1986: P.L. 99-514 : 100 Stat. 2085 : Oct. 22, 1986.* (1986).

¹¹⁷ Guthrie, *supra* note 21, at 30.

¹¹⁸ See *Ibid.*; *supra* note 94.

¹¹⁹ *Ibid.* at 31.

¹²⁰ I.R.C. s 469(a)(2). See also, Stearns, *supra* note 17, at 212; Guthrie, *supra* note 21, at 31.

¹²¹ I.R.C. s 469.

¹²² Guthrie, *supra* note 21, at 31.

¹²³ *Ibid.*

¹²⁴ See generally, *Ibid.*

Although Senator Johnson's remarks were not made during the debate over the LIHTC, these remarks were made during the discussion of the passive activities section of TRA86.¹²⁵ Senator Johnson remarked: "Mr. President, I wish to confirm my understanding of the new so-called passive activity and credit rule . . . rental activity is per se classified as passive activity . . . [and] corporations may offset losses from passive activities against income from an active trade or business but not against portfolio income."¹²⁶ This statement suggests Senator Johnson was aware of the potential benefits corporations may receive from passive losses, if the LIHTCs were somehow sold to corporations. And given this statement was made on the Senate floor, it is reasonable to believe that other senators were aware of the windfall corporations stood to receive from passive losses; benefits that individuals were explicitly denied.

Both Mitchell Sviridoff and James Rouse, owners of nonprofit community development corporations, lobbied congress in efforts to get the Tax Reform Act of 1986 passed.¹²⁷ Further, Rouse and Sviridoff had close ties to the nonprofit and corporate community.¹²⁸ Thus, it may be reasonable to infer, Rouse and Sviridoff foresaw the opportunity to partner with corporations, which motivated their lobbying efforts. However, some evidence suggests it was not until early 1987 that individuals working within the community development industry realized that corporations would be much better suited for investment in LIHTC's than individuals.¹²⁹

In sum, it is unlikely Congress fully grasped the scope of corporate tax breaks created by Low Income Housing Tax Credit at the time of its enactment. It is even more unlikely Congress intended to create such beneficial tax breaks for corporations through enactment of the LIHTC. Although the legislative history of the LIHTC is a bit incongruous, the necessary inferences needed to conclude that congress engaged in backroom dealing to secretly grant corporations large tax breaks, are unsupported by the absence of corporate communities' involvement in the LIHTCs enactment. However, the birth of the LIHTC was unlikely a moment of rational bipartisan politics either. The Corporate welfare created by the LIHTC was likely an unintended

¹²⁵ 32 Legislative History of the Tax Reform Act of 1986: P.L. 99-514: 100 Stat. 2085 : Oct. 22, 1986. S13867 (1986) Senate Agreed to the Conference Report on H.R. 3838, September 27, 1986, pp. S13867-964

¹²⁶ *Ibid.*

¹²⁷ Ballard, *supra* note 7, at 221; Guthrie, *supra* note 21, at 33.

¹²⁸ Guthrie, *supra* note 21, at 34.

¹²⁹ Guthrie, *supra* note 21, at 35.

windfall, which gained quick political popularity due to the unique benefits that it provided to various constituency groups. This wide array of LIHTC beneficiaries likely explains the programs longevity.

IV. RISE OF THE LIHTC

The LIHTC was originally set to sunset in 1989.¹³⁰ In 1989, congress extended the program and continued to do so on a yearly basis until the end of 1992.¹³¹ In August of 1993, Congress voted to make the LIHTC permanent.¹³² And since then, the program has only picked up steam.

The LIHTC has generally been acclaimed as a “success;”¹³³ however, whether the program “crowds out” unsubsidized affordable housing units or concentrates poverty is still up for debate.¹³⁴ But one fact is undisputable. Politically, the program has been a success.¹³⁵ For the majority of the program’s life, it has enjoyed bi-partisan support with an increasing budget for credit allocations.¹³⁶

An array of factors have contributed to the rise of the LIHTC, however, the community-development industries’ quick innovation of intermediaries to underwrite and syndicate tax credits were likely the most critical factor contributing to the program’s success.¹³⁷ The first LIHTC deal was brokered by Ohio Capital in 1987, with corporate purchases by Exxon, Bank One and Standard Oil.¹³⁸ After proving to be successful, similar models were put in place by Enterprise Foundation, LISC, and Fannie Mae, and private resources began to flow into the program.¹³⁹ By 1989, the LIHTC consumed roughly a quarter of a billion dollars in tax

¹³⁰ Edson, *supra* note 29, at 206.

¹³¹ *Ibid.*

¹³² Revenue Reconciliation Act of 1993, Pub. L. 103-66, Aug. 10, 1993, 107 Stat. 416, 26 U.S.C. s 1.

¹³³ See Leviner, *supra* note 31, at 870; Edson, *supra* note 29, at 205; Zigas, *supra* note 5, at 50.

¹³⁴ See generally Micheal D. Eriskin et al., *Crowd Out Effects of Place-Based Subsidized Rental Housing: New Evidence From the LIHTC Program*, 94 J. OF PUB ECON. 953 (2010).

¹³⁵ See Desai, *supra* note 19, at 19; Guthrie, *supra* note 21, at 37.

¹³⁶ See generally, Edson *supra* note 29.

¹³⁷ See Guthrie, *supra* note 21, at 37.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

expenditures,¹⁴⁰ and corporations were fully aware of the LIHTC's potential.¹⁴¹

When the LIHTC came up for renewal in 1989, it had already gained substantial momentum amongst powerful interest groups – from corporations to nonprofits.¹⁴² Politically, the renewal was an easy decision for most congressmen. Conservatives, who were pushing for the “passive loss” provision to remain intact for the benefits of their wealthy investor constituents, found they had appeased a much wealthier and much more powerful constituency – the corporate community.¹⁴³ Democrats realized with declining HUD budgets, the LIHTC, which was funneling private resources into inner-city housing projects, was likely the most viable option in pushing for the production of affordable housing.¹⁴⁴ The collision of these two realizations and the benefits the LIHTC yielded for both parties' constituencies resulted in overwhelming bi-partisan support. With both sides of the isle mostly pleasing their constituencies, the LIHTC became fairly immune to political and academic assaults, which likely explains its continued existence.

The LIHTC would unlikely have succeeded in the absence of nonprofit community development organizations like the Enterprise Foundation and LISC, who quickly innovated to develop intermediary and syndication services for corporations to benefit from the credit. Without such services, the investments of wealthy individuals would unlikely have sustained the program, and the powerful interest groups of corporations would not have fought for the continuation of the program. Thus, the community development industry's ability to quickly innovate significantly contributed to the LIHTC's political success and the longevity of the program.

Once corporations realized the benefits of the LIHTC, another factor played into the sustainability of the program: the Community Reinvestment Act.¹⁴⁵ Banks are able to satisfy CRA requirements through investments in LIHTC projects.¹⁴⁶ Thus, banks are effectively able

¹⁴⁰ Desai, *supra* note 19, at 38.

¹⁴¹ Guthrie, *supra* note 21, at 37.

¹⁴² *Ibid.*

¹⁴³ See Christopher Howard, *Hidden Welfare State* (1997). See also, Guthrie, *supra* note 21, at 37.

¹⁴⁴ Guthrie, *supra* note 21, at 38.

¹⁴⁵ Guthrie, *supra* note 21, at 38.

¹⁴⁶ Desai, *supra* note 19, at 19.

to receive CRA credits and offset income from their business through investing in the LIHTC projects.¹⁴⁷ This likely explains why financial institutions make up roughly 80% of corporate, LIHTC claimants.¹⁴⁸ This benefit further contributes to the political dividends this program yields.

The LIHTC's contribution to the construction of affordable housing further contributes to its cause. Close to 3 million affordable housing units have been placed in service since the LIHTC's inception,¹⁴⁹ which gives politicians solid data to back their support for the program. However, just like any public policy, the LIHTC program is not without its problems and the bulk of these problems stem from demand for LIHTCs in the syndication market.

V. PROBLEMS WITH THE LIHTC

The market price of LIHTCs is driven by the demand for the credit from investors.¹⁵⁰ As mentioned above, investors are mostly made up of corporations. The demand function for the credit consists of three main components: (1) investors need to satisfy CRA credits;¹⁵¹ (2) the number of investors in a LIHTC market, which are subject to CRA requirements,¹⁵² and (3) the investor's need to shelter income from an active trade or business.¹⁵³ When the demand for LIHTCs falls, low-income housing developers are unable to exchange the credits for sufficient equity to complete low-income housing projects.¹⁵⁴ Thus, the entire LIHTC program hinges on the demand for LIHTCs in the syndication market.

¹⁴⁷ Guthrie, *supra* note 21, at 38; Desai, *supra* note 19, at 19.

¹⁴⁸ See generally Desai, *supra* note 19, at 42.

¹⁴⁹ *Affordable Housing*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Oct. 23, 2016), http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/.

¹⁵⁰ See generally, *Crowd Out Effects of Place-Based Subsidized Rental Housing: New Evidence From the LIHTC Program*, 94 J. OF PUB ECON. 953 (2010). See also, Zigas, *supra* note 75 (explaining the mechanisms of the LIHTC market price).

¹⁵¹ Zigas, *supra* note 5, at 54.

¹⁵² *Ibid.*

¹⁵³ See What Works Collaborative, *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives*, JOINT CENTER FOR HOUSING STUDIES 3 (2009).

¹⁵⁴ *Ibid.*

The first issue this demand function raises revolves around the CRA. As briefly discussed in section I, developers in markets, which have multiple lenders subject to CRA requirements, enjoy high demand for LIHTCs resulting in higher prices for LIHTCs and greater equity financing for low-income housing projects.¹⁵⁵ While this competition amongst lenders is beneficial in communities with multiple lenders; in communities with only one lender subject to CRA requirements, this lack of competition can substantially impair the construction of LIHTC projects.¹⁵⁶ That is, a developer in California who is awarded the same amount of LIHTCs as a developer in Alabama could receive twice the equity financing as the Alabama developer in exchange for the same amount of credits, simply due to California having more lenders subject to CRA requirements.¹⁵⁷ This dilemma ultimately hinders the production of affordable housing in those communities which do not have multiple lenders subject to CRA requirements.

A potential solution to this problem, is to allow lenders to receive CRA credits for investments in LIHTC projects, regardless of their geographic location.¹⁵⁸ This could potentially open up certain communities with few lenders to competition from lenders in different communities, thus driving up the price of LIHTCs, and yielding greater equity financing for the production of affordable housing. However, this solution seems to undermine the underpinning idea of the Community Reinvestment Act: influence lenders to invest resources into the communities they do business in.

Another issue with the LIHTC, is the programs elasticity to changes in investors income from a trade or business. This issue seems to be the most problematic. And the Great Crisis of 2008 exemplifies this point. During the crisis, the bulk of LIHTC investors went from generating substantial profits from their trade or business to sustaining massive losses.¹⁵⁹ Which meant investors did not need tax sheltering devices; due to the dissipation of their taxable income.¹⁶⁰

¹⁵⁵ See Zigas, *supra* note 75.

¹⁵⁶ Barry Zigas, *Learning From the Low Income Housing Credit: Building a New Social Investment Model*, COMMUNITY INVESTMENT DEVELOPMENT REV. 47, 54 (2013).

¹⁵⁷ *Ibid.*

¹⁵⁸ See generally, Zigas, *supra* note 75.

¹⁵⁹ See What Works Collaborative, *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives*, JOINT CENTER FOR HOUSING STUDIES 1 (2009).

¹⁶⁰ *Ibid.*

As a result, the market price for LIHTCs fell almost to zero.¹⁶¹ In turn, developers were stuck with credits they could not sell, which meant they could not finance the affordable housing projects the credits were intended to produce.¹⁶² This was such a problem that Congress created two programs as part of the American Recovery and Reinvestment Act of 2009: the Tax Credit Assistance Program (TCAP) and the Tax Credit Exchange Program.¹⁶³ TCAP was intended to provide gap financing for projects, and the Exchange Program was designed to help offset the drop in tax credit demand.¹⁶⁴ However, throughout the low interest rate and recessionary environment of the last eight years, the demand for LIHTCs has yet to fully rebound.

Some policy analysts suggest that, in order to revive demand for LIHTCs, the LIHTC should be refundable, passive loss rules should be modified to broaden the investor base and the Community Reinvestment Act should be expanded so that additional institutions are essentially forced into the market for LIHTCs.¹⁶⁵ Another approach is to amend the passive loss restrictions in §469, and restrict all investors from utilizing passive losses from LIHTC investments. This approach may produce a more neutral LIHTC market, and allow scarce resources to flow more efficiently to investors who value them most. The validity of these proposals are still up for debate, and the issue of LIHTC reform is ripe for further research.

VI. CONCLUSION

The birth of the LIHTC was likely the result of Congress attempting to replace the “passive loss” provision of the Economic Recovery and Tax Act of 1981. It is unlikely that Congress fully grasped the scope of the LIHTC, and the windfall it would create for corporations. Due to the ingenuity of several community development corporations, syndication firms were able to transfer LIHTCs to corporations. With corporations able to enjoy the benefits of LIHTCs,

¹⁶¹ *Ibid.* at 3. Investors’ demand for tax shelter devices, such as the LIHTC, fell substantially. Thus, the price investors were willing to pay to LIHTCs fell substantially.

¹⁶² See Barry Zigas, *Learning From the Low Income Housing Credit: Building a New Social Investment Model*, COMMUNITY INVESTMENT DEVELOPMENT REV. 47, 54 (2013).

¹⁶³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111.5, sec. 7001, s 111, 123 Stat. 115.

¹⁶⁴ Zigas, *supra* note 160.

¹⁶⁵ What Works Collaborative, *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives*, JOINT CENTER FOR HOUSING STUDIES 1, 5 (2009).

private resources funneling into low-income housing, and nonprofit community developers facilitating the syndication process, the LIHTC produced a unique group of beneficiaries. This unique group of beneficiaries also made up a politically important group of constituents for Democrats and Republicans, which substantially contributed to the longevity and popularity of the LIHTC program.

The LIHTC is subject to some systemic policy flaws, mainly the programs dependency upon corporate America's profitability. Due to the recent financial crisis, some of these systematic flaws have been revealed. Whether this policy should be systematically reformed should be thoughtfully considered. Research should be conducted to consider alternative methods for expanding the investor base for LIHTCs, specifically whether individual investors should be able to use passive losses in the same fashion as corporations currently do (i.e., potential revisions to I.R.C. s469). Or, to the contrary, whether all investors should be denied the benefits of passive losses from LIHTC projects. Ultimately, this policy is ripe for reform, but further research must be conducted to determine whether the policy should be remolded, or torn down and rebuilt.