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## THREE PRINCIPLES FOR FEDERAL HOUSING POLICY

*David J. Reiss\**

The federal government has a bewildering array of housing programs funded with tens of billions of dollars every year. In the broadest strokes, these include

- the Federal Housing Administration (“FHA”), which provides mortgage insurance on loans made by FHA-approved lenders;
- the Government National Mortgage Association, which insures mortgage-backed securities (“MBS”) backed by federally insured or guaranteed loans;
- the Federal National Mortgage Association (“Fannie Mae”), Federal Home Loan Mortgage Corporation (“Freddie Mac”) and the Federal Home Loan Bank System, which issue MBS and invest in mortgages and mortgage-related products;
- Project-Based Rental Assistance, which provides supply-side funding to increase the stock of affordable housing;
- Section 8 Housing Vouchers, which delivers demand-side subsidies to individuals and families seeking housing in the private market;
- Disabled Housing; and
- HOPE (Housing Opportunities for People Everywhere) VI Grants, which replaces dysfunctional public housing projects with mixed-income housing and vouchers.

The Department of Housing and Urban Development added “a new Energy Innovation Fund to catalyze private sector investment in the energy efficiency of the Nation’s housing stock” as well as a “a new Choice Neighborhoods Initiative to make a range of transformative investments in high-poverty neighborhoods where public and assisted housing is concentrated.” See OFFICE OF MANAGEMENT AND BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA’S PROMISE at 74 (2009), available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/fy10-newera.pdf>. Indeed, each new administration, whether Democratic or

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\* This article is based in large part on David Reiss, *First Principles for An Effective Federal Housing Policy*, 35 BROOKLYN J. INT’L L. 795 (2010). Thanks to Hanna Robinson for excellent research assistance.

Republican, makes its own additions to the federal housing edifice. HUD's most recent Strategic Plan, for instance, incorporates an extraordinarily broad range of goals, including improving health, child development and economic security outcomes for various populations. HUD, HUD STRATEGIC PLAN FY 2010-2015 (2010).

On top of these direct expenditures on housing, the federal government makes hundreds of billions of dollars more in tax expenditures. "Tax expenditures" refer to "those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §3(3), 88 Stat. 297, 299 (1974) (codified as amended at 2 U.S.C. §622(3)). For instance, a mortgage interest deduction reduces income subject to taxation by an amount equal to a taxpayer's mortgage interest payments in order to encourage investment in housing. The other significant housing-related tax expenditures are the

- deductibility of state and local property tax on owner-occupied homes;
- capital gains exclusion on home sales;
- exclusion of net imputed rental income;
- exception from passive loss rules for certain rental loss;
- credit for low-income housing investments; and
- accelerated depreciation on rental housing.

The Tax Policy Center estimates that tax benefits to homeowners in 2005 amounted to \$147 billion, while direct aid to renters amounted to \$41 billion in the same year. Adam Carasso et al., *The Trend in Federal Housing Tax Expenditures*, TAX NOTES, Feb. 28, 2005, at 1081. The greatest benefits for homeowners accrue to the wealthy, with 72 percent of all the income tax benefits accruing to those making more than \$75,000 per year, while only a negligible amount goes to those making less than \$40,000 per year. Adam Carasso, *Who Receives Homeownership Tax Deductions and How Much?* Tax Notes, Aug. 01, 2005 (using FY2004 data).

Given the size of federal housing expenditures (not to mention state, county and municipal programs), it is unsurprising that housing's regulatory web is also immense and intricate, including as it does:

- the newly-created Federal Housing Finance Agency;

- the newly-created Consumer Financial Protection Bureau;
- the Department of Housing and Urban Development;
- the Federal Reserve Board;
- the Federal Trade Commission;
- the Office of the Comptroller of the Currency; and
- the National Credit Union Administration.

Trying to derive a principled understanding of federal housing policy in the face of such enormous expenditures and extraordinary complexity is no easy task. In fact, it is even difficult to provide a generally accepted definition of “housing policy.” At its broadest, it can refer to government efforts to shape “the dynamic relationships between housing markets and economic, demographic, and social trends.” The Joint Center for Housing Studies of Harvard University, <http://www.jchs.harvard.edu/aboutus/index.html>. More typically, however, housing policy refers to government efforts to increase housing affordability.

Identifying possible first principles for a field as complex as housing policy is difficult. By “principle,” I mean a rationale that is widely accepted to justify a particular policy. By “first principle,” I mean a rationale that is fundamental to the policy that it is meant to justify. In other words, a “principle” may treat housing policy as a means to another policy end, whereas a “first principle” treats housing policy as an end in itself.

From one useful perspective, housing policy may be described as reflecting five broad “housing ethics.” Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007). The use of the term “ethics” is substantively similar to my use of the term “principles.” But such “ethics” are intended to be more descriptive, while my “principles” are intended to be used as tools of evaluation.

With this caveat in mind, the iteration of the five ethics is useful because they do reflect many of the broadly held intuitions that we have about housing policy. The five ethics identified are:

1. Housing as an Economic Good;
2. Housing as Home;
3. Housing as a Human Right;
4. Housing as Providing Social Order; and
5. Housing as One Land Use in a Functional System.

The “Housing as an Economic Good” ethic treats housing as any other commodity and asks how government policies will distort the functioning of the market for housing. The “Housing as Home” ethic explores the impact of policy on personal liberty, privacy and security. The “Housing as a Human Right” speaks to how a policy furthers the goal of making decent housing available to all. The “Housing as Providing Social Order” ethic speaks to how a housing policy will impact the community as it currently exists. And the “Housing as One Land Use in a Functional System” ethic speaks to how a policy will impact the broader society, in particular the infrastructure, education and workforce sectors.

These five housing ethics are a useful survey of housing policy generally, but the “Housing as an Economic Good” and the “Housing as a Human Right” ethics play a greater role in *federal* housing policy in particular. Given the historic role that the states play in land use, law enforcement and landlord/tenant law, it is not surprising that the federal government is not nearly as involved in implementing the other three ethics.

The “Housing as an Economic Good” ethic is embedded throughout all federal housing policy discussions. Many past programs have come to be criticized for their unintended distortions of the housing market, which can reduce the supply and affordability of housing in the long-term even if they reduce the cost of housing in the short term. Rent control is the most commonly discussed example of a policy with a negative unintended distortion of the housing market, with economists nearly universal in their judgment that rent control ultimately reduces the supply of rental housing, particularly for low-income families, thereby increasing the aggregate cost of such housing. While very popular with those in rent regulated units, the policy has fallen out of favor as it appeared that rent regulation did not keep down rents generally but, rather, just for those in rent regulated units.

The affordability aspect of the “Housing as a Human Right” ethic is also thoroughly imbued in housing policy debates. This ethic is typically more of the guiding force behind federal *rental* housing policy than federal *homeownership* policy.

Somewhat surprisingly, largely missing from current discussions of housing policy is what appears to me to be a completely separate sixth housing ethic or principle: “Housing as a Bulwark of Democracy.” Reaching back at least as far as the time of Jefferson, the idea of the yeoman farmer who owns his homestead, is financially self-sufficient and acts the part of a democratic citizen is central to America’s vision of itself. I will argue below that it is fundamental to an understanding of

federal housing policy. Perhaps it is so deeply ingrained in the broader American ethic that it does not particularly surface in debates regarding housing policy.

To clearly identify the first principles of housing policy, we must first ask whether there are goals of housing policy that are goods in themselves, and we must distinguish them from those that are means to other ends. For example, if a goal is to ensure that Americans live in safe, well-maintained and affordable housing, such a goal would be a good in itself. On the other hand, if a goal of a particular housing policy is to promote economic efficiency, then such a housing policy goal would be a means to a more general end.

As we seek to identify what is unique to housing policy, we can set aside goals that treat housing as a means to a more general end. This does not mean that we ignore them in our policy discussions, just that we ignore them as we attempt to systemize our thinking about housing policy as a distinct field. As such, I reject “Housing as an Economic Good” as a candidate for a first principle of federal housing policy, at least in its purest form. I also reject straightforward income redistribution as a candidate because a housing policy intended to achieve that end would see housing as a mere means to that general redistributive end.

What then are the aims of housing policy? The answer to this is not immediately clear. Many assert that a fundamental goal of housing policy is to assist Americans to live in a safe, well-maintained and affordable housing unit. Such a view would be consistent with a rights-based view of “Housing as a Human Right.” Another similar, but more modest, expectation is that housing policy should promote a specialized form of income redistribution that ensures that the income transferred is consumed in increased housing. This view may be derived from the “Housing as an Economic Good” ethic in its recognition that the political decision to redistribute funds should be made within a market framework. Finally, one might argue that homeownership and stable housing is fundamental to the American notion of citizenship. And, indeed, that is how many politicians have approached the question, applying the “Housing as a Bulwark of Democracy” ethic. There are, of course, many other principles that impact housing policy debates but I will limit this discussion to these three broad and widely-held ones.\*

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\* There are additional rationales for certain housing policies that are clearly not first principles of a housing policy, but rather are parallel goals, ones that reflect other branches of broader social policy. It is not surprising that quite a few other social policies are enmeshed with housing policy, given the size of the housing sector and its role in the economy. The most important are:

*Safe, Well-Maintained and Affordable Housing.* Let us start with the principle that Americans should live in well-maintained, safe and affordable housing. What does that mean? What is the actual function of housing? Many consider it to be as fundamental as food and clothing as it addresses basic survival needs. The right to adequate housing is enumerated in the United Nation’s “Universal Declaration of Human Rights,” and closer to home, the U.S. Congress has enshrined the “goal of a decent home and a suitable living environment for every American family” as part of its national housing policy. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25, § 1, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); 42 U.S.C. §1441 (2011) (setting forth 1949 Congressional declaration of national housing policy).

Our discussion of what “safe, well-maintained and affordable housing” is cannot end there, however, as the concept of “well-maintained” and “safe” housing has changed over time. Reaching back at least as far as Jacob Riis’s *HOW THE OTHER HALF LIVES*, society has taken an interest in implementing government programs that attempt to raise the minimum standard of decent housing for all. Francesco Cordasco, *Introduction to JACOB RIIS, HOW THE OTHER HALF LIVES*, at i, vi, (Garrett Press 1970) (1890). The advocacy of Riis and others led to the Tenement Housing Law of 1901, which was “the first major advance in the fight against the tenement slum.” *Id.* at viii. Over time the quality of the housing stock has improved because of increases in the standard of living as well as the implementation of construction and housing codes that aimed to preserve housing and protect consumers.

As the housing stock has improved, the meaning of “safe” and “well maintained” housing has also evolved. Whereas indoor plumbing could not be taken for granted 100 or even 50 years ago, it can now. And while inadequacies remain for too many Americans in terms of dangerous wir-

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1. ending segregation and other racial inequities which are present in the housing market;
  2. increasing socio-economic diversity;
  3. promoting green construction practices and energy efficiency;
  4. promoting community and economic development; and
  5. preventing sprawl and promoting Brownfield (environmentally contaminated property) development.

There are also some subordinate principles of housing policy that relate to the size of the housing sector, particularly the mortgage and construction industries, and its importance to the overall economy. These subordinate principles are clearly means to other ends. For instance, finance industry representatives argue for policies that stabilize the mortgage markets, also noting the impact that the mortgage industry has on the health and stability of the overall economy. See David Reiss, *First Principles for An Effective Federal Housing Policy*, 35 *BROOKLYN J. INT’L L.* 795 (2010) for a more extended discussion of these other principles.

ing, poor heating, vermin infestation and exposure to lead paint and mold, as a whole, physical housing conditions have seen a transformation for the better.

The concept of “affordable” has also changed over time. As Edward L. Glaeser and Joseph Gyourko have noted, “a consensus seems to have arisen that housing becomes ‘unaffordable’ when costs rise above 30% of household income,” a consensus that serves as the basis for federal housing policy. EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY* at 29–32 (2008). But until the early 1980s, these very same federal programs set a 25% ceiling for housing costs for various federal programs.

In evaluating whether housing is safe, well-maintained and affordable in the context of contemporary American society, we then might view a primary function of housing to be to provide an environment where a person can enjoy “Life, Liberty and the pursuit of Happiness.” And indeed, leading right-to-housing activists use language that has echoes of Jefferson’s, with one “characterizing housing as the foundation for life and a launching pad which is fundamental to human development.” Iglesias, at 542 (summarizing views of Chester Hartman).

In sum, providing safe, well maintained and affordable housing has consistently remained a broadly-held principle of housing policy even if the standards for such housing has changed over time.

*Specialized Income Redistribution.* Another widely-held “first principle” of housing policy is that many low- and moderate-income households should receive a specialized form of income redistribution that ensures that the income transferred is consumed in increased housing. One of the main arguments in favor of such a specialized form of income redistribution is that low-income children benefit from policies that require their legal guardians to consume more housing (as opposed to other goods and services).

There are additional rationales for privileging housing expenditures over other household expenditures. First of all, housing is the largest budget item for all households, those of both renters and homeowners. Indeed, in 2005 housing expenses accounted for nearly 32% of all consumer spending by homeowners and nearly 36% for renters. Congress may believe that left to their own devices, people will under-consume housing as a proportion of their income in a manner which is bad for them or, perhaps, bad for their children and their communities. Thus, Congress may use subsidies and tax expenditures to encourage the greater consumption of housing.

Second, some argue that government policies must smooth out the impact of market forces. In particular, they argue that, given the strong commitment in the United States to a market economy as compared to other developed nations, tailored policies are a necessary palliative for households as they face the unexpected challenges posed by the economy.

Third, and particularly after the homelessness crisis that began in the 1980s, government has also taken a particular interest in preventing homelessness. While this increased interest developed against a backdrop of a long-term decrease in federal funding for low and moderate-income housing, recent initiatives have more directly addressed the housing situation of the neediest in society: the developmentally disabled; the mentally ill; very low-income families and individuals; and the elderly. Edward Glaeser and Joseph Gyourko rightly point out that policies that require low-income people to consume redistributed income on housing are paternalistic and unsupported by any studies that demonstrate that low-income households make particularly bad housing choices. GLAESER & GYOURKO, at 55. They also challenge the belief that many Americans under-consume housing. That being noted, there is no question that much of housing policy is premised on the notion that people—of all classes—should receive assistance in offsetting the large expense of housing.

This holds particularly true for renters as they tend to be quite a bit poorer than homeowners: in 2005, the median income of renter households was less than half that of owner-occupant households. John Quigley writes that

‘Affordability’ is clearly the most compelling rationale for policies [sic] subsidizing rental housing. The high cost of rental housing, relative to the ability of low-income households to pay for housing, means that these households have few resources left over for expenditures on other goods—food, clothing, medicine—that are also necessities. John M. Quigley, *Just Suppose: Housing Subsidies for Low-Income Renters*, in REVISITING RENTAL HOUSING: POLICIES, PROGRAMS, AND PRIORITIES 300, 308 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008).

As such, affordability rationales frequently predominate in the rental housing policy arena.

A variety of programs implement this principle. In addition to programs like housing vouchers that reduce household rent payments for low-income families, the federal government has also implemented a variety of initiatives to make housing more affordable and sustainable for

particular renters such as the special needs populations noted above. If members of these populations are not able to secure and maintain housing because of their inability to earn an income, some argue that society is responsible for providing needy members of these populations with affordable housing. This argument obviously reflects the “Housing as a Human Right” ethic.

*Housing as a Bulwark of Democracy.* While predominantly relating to homeownership (as opposed to rental) policy, the importance of this principle in American housing policy cannot be overstated. The centrality of homeownership to America’s vision of itself as a society of equal citizens reaches at least as far back as Jefferson’s idealized “yeoman farmer” and continued through to Lincoln’s Homestead Act of 1862, which granted 160 acres to settlers. Jefferson’s yeoman farmer was his ideal citizen because he was self-sufficient, earned his own keep, considered himself the equal of anyone else and jealously protected his liberty and unalienable rights.

America’s vision of itself as a nation of “yeoman farmers” transformed into that of a nation of “homeowners” in the 20<sup>th</sup> Century, when cities replaced self-sufficient farms as population centers. Accordingly, presidents as varied as Herbert Hoover, Lyndon Johnson, Bill Clinton and George W. Bush made homeownership a key element of their agendas. Indeed, the extraordinary lengths that the Bush and Obama administrations have taken to stabilize the housing market during the Great Recession, taking over the privately-held mortgage finance giants Fannie Mae and Freddie Mac and committing tens of billions of dollars to head off foreclosures, respectively, evidence the importance that both parties place on homeownership.

While a first principle of housing policy is to make people into better citizens by making them homeowners, the possible non-economic benefits of homeownership are not necessarily limited to the political sphere. As a result, homeownership policy has also been designed at times to encourage these other potential benefits.

There is a significant amount of scholarship that argues that there are a range of other non-economic benefits from homeownership. These include better outcomes for residents in education, health and employment. These also include increased civic engagement, as demonstrated through higher levels of volunteerism and participation in community activities. Thus, homeownership policy is often justified by the claim that it helps to achieve better outcomes regarding these non-economic benefits as well. The connection between homeownership and these non-economic benefits has not, however, been clearly demonstrated.

Isolating first principles helps us identify what is intrinsic to housing policy so that we may clearly analyze potential policy choices for housing specifically, as opposed to how they may contribute to some larger goal; in other words, it helps to ensure that housing policies have measurable housing outcomes. And imposing some analytic structure here is of key importance because federal housing policy is a morass. This exercise should help to ensure that monies spent to increase the supply and quality of housing are used efficiently.

In order to work through the morass, it is necessary to identify legitimate first principles of housing policy, then to evaluate housing programs to see whether they are designed to achieve goals consistent with some or all of those principles. Finally, it is necessary to evaluate the effectiveness of housing programs individually and taken together in order to ensure that they do not work at cross purposes. Such an exercise should help to clarify debates surrounding American housing policy as each new presidential administration seeks to put its own stamp on this field.

I have argued that the three first principles that inform federal housing policy are (i) allowing all Americans to live in a safe, well-maintained and affordable housing unit; (ii) providing a specialized form of income redistribution that ensures that the income transferred is consumed in increased housing; and (iii) incentivizing Americans to take on the key attributes of Jefferson's yeoman farmer: economic and social self-sufficiency as well as a jealous regard for one's liberty

A housing policy primarily guided by each of these three first principles would look very different from one guided by the other two. One guided by the first would emphasize providing housing options for very low-income households which would not be able to pay market rates for safe, well-maintained and affordable housing. One guided by the second would likely contemplate some kind of progressive housing subsidy for a range of low- and moderate-income households. And one guided by the third would seek to maximize the homeownership rate for the nation as a whole at whatever income levels are the most efficient for achieving that goal.

Obviously, these principles can all be present—and in tension with one another—within a particular housing policy initiative and across initiatives. In the United States, the typical approach is an often inefficient muddle of programs focused on competing principles. However, the goal of this article was not to argue that all housing programs can be rationalized into one coherent whole. This article has the much more li-

mitted goal of developing a more systematic approach to the evaluation of housing policy. We now have an answer to the question posed at the beginning of this article: what are the main goals of housing policy? With this rough outline in place, we can leave the development of a particular position on federal housing policy to a later day.