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Community Development Finance and Economic Justice

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I. Introduction

On the rugged coast of Maine in 1978, an emerging community development organization called Coastal Enterprises, Inc. (CEI) helped secure financing to successfully rebuild a fish storage and processing plant that had been destroyed by fire.[1] Founded a year earlier, the organization began as a modest effort to create and preserve jobs in Maine's natural resources industry and rural small business sector. It was modeled on the community development corporation (CDC), a form of nonprofit entity that emerged in the civil rights era of the 1960s and proliferated primarily in disadvantaged urban neighborhoods in the years to follow. In contrast to the dominant *urban* CDC model, CEI worked in the rural setting of Maine and focused its housing and job-creation efforts in small towns and in the state's natural resources sectors of fish, farms, and forests.

In the four decades since its inception, CEI has grown from a CDC into a sophisticated community development financial institution, consisting of several corporate entities and driving multi-million dollar transactions in distressed rural regions in Maine and nationally. With a half a billion dollars now under its management, CEI's total investment activity has exceeded 1.3 billion dollars and has leveraged over twice that amount in capital from banks, foundations, and other sources. CEI presents a microcosm of the evolution of community economic development over forty years and its robust use of complex legal and financial tools in urban and rural America today.

This chapter reflects on the history of community economic development, community development financial institutions, and their relationship with law and legal scholarship. Part II places CEI in the wider context and history of community development finance and of the dramatic expansion in tax credit financing. Part III explores the implications of this trend for sustainability and local accountability, underscoring the distinction between community organizing and community development and some distancing of community development from its activist origins. Part IV mines connections between community development practice and the legal academy, from the proliferation of law school transactional clinics to an emergent body of applied scholarship that impacts policy and strategy in community economic development.

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[1] Sophie Nelson, *The Visionary Practitioner: Behind Coastal Enterprises, Inc.*, ME. MAGAZINE, Sept. 2015, https://themainemag.com/people/2807-the-visionary-practitioner-behind-coastal-enterprises-inc/ (featuring Ron Phillips, founder of CEI, who stepped down as CEO in 2016 after 38 years). Throughout this chapter, references to CEI include its subsidiary for-profit entities, including CEI Capital Management LLC, Bright Community Capital, and CEI Ventures Inc. Accounts here of CEI are drawn in part from my conversations with senior staff and directors and from my engagement on the CEI board of directors from 2006 to 2017.

II. Evolution of Community Economic Development

A. Recent History

The Coastal Enterprises Inc. story is a window into the recent history of community-based economic development and finance and suggests a rural complement to this volume's theme of revitalizing the urban core. A local, Maine-based community development corporation born in the 1970s is a complex institution today. CEI has expanded and diversified its portfolio, assembling capital from numerous sources to provide and leverage financing for small and medium-sized businesses, affordable housing, and community facilities such as child care or health care centers. It has financed roughly 2,700 businesses, creating or preserving thousands of jobs and affordable housing units. In dozens of larger projects in Maine and throughout the nation, CEI has structured multi-million dollar financing packages for industrial development, manufacturing facilities and equipment, renewable energy, sustainable forestry and agriculture, and construction of research, cultural, and commercial facilities. Its business advising programs have counseled over 50,000 aspiring entrepreneurs and enterprises, and the organization has developed expertise in particular industries and sectors. It is active in policy research and development and collaborates with kindred institutions to advocate for state and federal policies to increase opportunity for underserved populations. CEI's 2017 strategic plan emphasizes outcomes, not simply in volume of activity but in the quality of jobs created or improved, environmental sustainability of the enterprises it advises and finances, and measurable prosperity shared by residents of low-income communities.[2]

At its core, CEI remains a nonprofit community development corporation that provides technical assistance and financing, not otherwise available, to small and emerging businesses. It works with community partners, banks, religious and philanthropic institutions, industry and trade associations, advocacy groups, and state and federal government agencies for capital investment and supportive policies. It runs programs tailored for particular constituencies, populations at risk, and entrepreneurs, including business planning and start-up assistance for women business owners and Maine's growing immigrant population. Underlying all of these efforts is CEI's touchstone of a "triple bottom line" – economic benefit to communities in need, equitable social impact, and environmental sustainability.

Traditional economic development, historically and today, encompasses a wide range of public policy and government programs, urban and regional planning, infrastructure development, industry incentives, support for small businesses, and housing development. *Community* economic development (CED) adds elements of accountability to and participation by a wider range of local stakeholders, especially those ordinarily excluded from centers of wealth and power, and implicates an advocacy role in public policy. It reflects an ethic of social entrepreneurship, using the tools of business and finance to develop affordable housing, jobs, and business opportunities for low- and moderate-income people. It taps market forces and capital for goals beyond profit, such as creating stable quality jobs, driving change in distressed regions,

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[2] *See* CEI, http://www.ceimaine.org/ (last visited June 21, 2018); *see also* COASTAL ENTERPRISES, INC., FROM CIVIL RIGHTS TO SUSTAINABLE SOLUTIONS (2003); *cf. infra* note 52 (citing additional resources on workforce development and job quality).

providing opportunities for education and advancement, and building capacity for sustainable institutions.[3] Community development *finance* is one aspect of community economic development, a transactional subset that has grown in scale and complexity since the 1980s.

Legal scholar William Simon discusses several core themes of CED in his 2001 book, *The Community Economic Development Movement*.[4] First is the principle of the "community as beneficiary of economic development" – positing community members as "residual claimants" on the proceeds of development.[5] Second is the principle of "community as agent" of economic development, implicating an entrepreneurial role for local institutions and evidenced by a profusion of legal entities and their various combinations.[6] Another theme is constraint on property rights – in some cases arising from the charitable purposes and non-distribution constraint of nonprofit organization actors, in other cases a product of conditions attached to socially targeted financing, or sometimes based upon internal charter restrictions as in limited equity housing cooperatives or worker cooperatives. Finally, there is the imperative of local participation or "induced mobilization" – a condition for certain public and philanthropic support, in some cases a community organizing complement to development, and, arguably, a key part of the "community" in CED.[7]

Economic development and, indeed, community economic development have long been a part of the American social and economic fabric and the subject of research, scholarship, and public policy. We can trace this history to a time well before the start-up of CEI and at least back to a period of widespread social activism and political reform in the 1890s and early 20th century. Workplaces were the site of ferment and creativity, from labor organizing to union engagement in worker cooperative development and in banking.[8] Many efforts at that time aimed at addressing the downside of industrialization and challenges of urbanization, including the settlement house movement and assimilation of new Americans in densely populated cities, and intentional strategies among African-American leaders to increase minority business participation.[9] Without recounting the full panoply of 20th century community development policies and practices, this section provides some historical context for the thread of community

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[3] *See* WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT (2001); *see also* Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897 (1993). *See generally* ROBERT O. ZDENEK & DEE WALSH, NAVIGATING COMMUNITY DEVELOPMENT: HARNESSING COMPARATIVE ADVANTAGES TO CREATE STRATEGIC PARTNERSHIPS (2017).

[4] SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT.

[5] *Id.* at 76-78.

[6] *Id.* at 113.

[7] *Id.* at 143, 168.

[8] *See* JOHN CURL, FOR ALL THE PEOPLE: UNCOVERING THE HIDDEN HISTORY OF COOPERATION, COOPERATIVE MOVEMENTS, AND COMMUNALISM IN AMERICA 86-110 (2009)*; see also* Peter Pitegoff, *Unions, Finance, and Labor's Capital*, *in* UNIONS AND PUBLIC POLICY: THE NEW ECONOMY, LAW, AND DEMOCRATIC POLITICS 65, 67 (Lawrence G. Flood ed., 1995).

[9] *See* Roger A. Clay, Jr. & Susan R. Jones, *What is Community Economic Development?*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 3-12 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009) (presenting a concise history of community economic development, including reference to the turn-of-the-century dialogue and debate between Booker T. Washington and W.E.B Du Bois over strategies for African-American economic and political advancement).

development finance, leading eventually to today's proliferation of tax credits, expanded bank engagement, and increased scale. While a signature attribute of community economic development is local initiative and control, it is also intertwined with serial federal and state policies that have provided government funding and have increasingly leveraged private sector capital.

In the 1930s, in the aftermath of the Great Depression, President Franklin D. Roosevelt's "New Deal" policies signaled a sea change in federal policy and an array of economic development programs both urban and rural. From the Tennessee Valley Authority building dams and bringing electric power to rural areas, to public housing projects and massive public employment initiatives, the New Deal harnessed the resources of the federal government and created new agencies to address multiple social problems. Underlying these initiatives was a federal government taking at least a modicum of responsibility for the welfare of its citizens, allocating federal funds to economic development, and foreshadowing subsequent growth in community development finance. The New Deal, though, was an essentially top-down administrative structure.[10] Unprecedented in its historic impact and its establishment of the modern administrative state, and with material effect on the lives of people in need, the New Deal had a mixed record of local accountability and engagement of local constituents in decision-making – key elements in *community* economic development.

Such a top-down approach to federal economic development policies continued in the 1950s on the heels of World War II. The National Housing Act of 1949 gave rise to a period of "redevelopment" that has been widely criticized for destructive effects on the ground and insensitivity to local residents. With a putative goal of supporting local revitalization efforts in distressed inner-city neighborhoods, this redevelopment or "urban renewal" often saw wide areas (blighted or not) taken by eminent domain, existing structures demolished, and low-income neighborhoods giving way to private development or to construction of the new U.S. Interstate Highway system.[11] Racial inequities, apparent earlier in the New Deal, persisted in the post-war era as development of public housing projects, for instance, tended further to perpetuate racial segregation in urban areas. [12]

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[10]Alexander von Hoffman, *The Past, Present, and Future of Community Development in the United States*, *in* INVESTING IN WHAT WORKS FOR AMERICA'S COMMUNITIES 10, 12-13 (N. Andrews, et. al, eds., 2012).
[11] *Id*. at 14-15.
[12] The Federal Housing Authority, created in 1934 to regulate a mortgage insurance system and stabilize the housing market following the Great Depression, expressly identified and red-lined poor and minority neighborhoods as too risky for lenders. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); *cf.* John Eligon et al., *Program to Spur Low-Income Housing is Keeping Cities Segregated*, N.Y. TIMES, July 3, 2017 (describing how the contemporary Low-Income Housing Tax Credit program disproportionately locates affordable housing development in minority urban communities, thus continuing to reinforce racial segregation).

The 1960s and 1970s witnessed a surge of anti-poverty measures, in both public policy and grassroots activity that influenced such policy.[13] The "War on Poverty" of President Lyndon Johnson's administration included the Economic Opportunity Act of 1964, the Model Cities program, and a wide range of community action agencies subsidized in part by the federal government, while the Ford Foundation's Gray Areas program in selected cities promoted community development. Although successful in generating local activity in pre-school learning, job training, health counseling, housing, and other neighborhood improvement, this period arguably suffered from atomization and a lack of coordination.[14] Community action agencies that sought to maximize participation, a stated objective of federal policy, were perceived by some local leaders as a threat to the political status quo. This generated pushback, imposition of greater control by local government officials, and pressure on many community action agencies to emphasize social services rather than activism.

In the mid-1960s, racial tensions spiked in many large cities with violent confrontations and urban unrest. A National Advisory Commission on Civil Disorders (the "Kerner Commission") shined a light onto the destructive impact of racial segregation and concentrated poverty and triggered federal policy changes. With leadership from then New York Senator Robert Kennedy, the Economic Opportunity Act was amended in 1966, adding a "Special Impact Program" to fund community development ventures. Two years later, the Fair Housing Act – Title VIII of the Civil Rights Act of 1968 – sought to correct longstanding housing policies that perpetuated racial segregation and to prevent red-lining, then a widespread banking practice that deprived predominantly minority neighborhoods of needed access to loans.[15] These policy initiatives were accompanied by an explicit turn to the private sector – national corporations, banks, and developers – to finance housing and job development in distressed neighborhoods. Large philanthropic institutions, too, joined in this nascent community development financial push, with nine foundations collaborating in the creation of the Cooperative Assistance Fund in 1967 to invest in minority enterprises and the Ford Foundation taking a lead in targeted grants and loans ("program related investments") for social enterprise.[16]

The Housing and Community Development Act of 1974 signaled a shift in federal funding for local development to more diffuse revenue sharing and the Community Development Block Grant (CDBG) program. It combined more than a half-dozen housing and neighborhood

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[13] The civil rights movement, welfare rights advocacy, and direct-action community organizing were important drivers in the War on Poverty and in subsequent policy initiatives, and in the evolution of community economic development. *See infra* notes 58-61 and accompanying text.

[14] Von Hoffman, *The Past, Present, and Future of Community Development in the United States* at 16-20. The Small Business Administration (SBA), created by Congress in 1953 to support development of small business with direct loans and loan guarantees, a decade later launched an Equal Opportunity Loan Program to assist applicants living below the poverty line. U.S. SMALL BUSINESS ADMINISTRATION, http://www.sba.gov/about-sba/what-we-do/history (last visited June 21, 2018).

[15] *See* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (Gregory D. Squires, ed., 2018).

[16] Von Hoffman, *The Past, Present, and Future of Community Development in the United States*. S*ee also* Peter Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993).

improvement programs, each with particular dictates on local use of funding, into a single grant program administered by the U.S. Department of Housing and Urban Development. The Act concentrated federal funding in discretionary block grants to local governments. Within broad parameters, including a nominal requirement of public participation, local authorities had wide discretion in use of the funds, a portion of which were and continue to be applied to community development activities. Despite inefficiencies and a lack of consistent focus, and threatened with elimination by the Trump administration, the CDBG program continues for now as an essential source of funding for community development initiatives.[17] The 1974 Act also created the federal Section 8 housing program, with subsidies for renters contributing to a growth in private low-income housing development.

Arguably in reaction to drawbacks of previous top-down approaches and coinciding with the curtailment of many War on Poverty programs, the 1970s and 1980s saw robust and widespread local activism to influence land use planning and public investment. This period witnessed growth in the volume of institutions and the variety of legal forms focused on local development. As illustrated by the CEI narrative, the community development corporation emerged as a foundational entity for locally based economic development. A CDC is typically a tax-exempt nonprofit organization chartered to revitalize particular disadvantaged neighborhoods by engaging in affordable housing and small business development, planning and advocacy, education and job training, or social services. The origin of CDC as a term of art is often attributed to the 1966 amendments to the Economic Opportunity Act to support community development corporations, followed by formation of dozens of early CDCs and the high-profile creation of the Bedford Stuyvesant Restoration Corporation in Brooklyn as a model. In subsequent decades, CDCs grew significantly in number and scale with substantial philanthropic funding, federal government support, and new state agencies for community development. Ancillary public policies enabled nonprofit CDCs to engage substantially in development, including IRS Revenue Rulings that expressly ruled community-based economic development to be a tax-exempt charitable purpose.[18] Today, close to 5,000 CDCs operate in urban and rural areas throughout the United States.

The proliferation of CDCs was accompanied by the emergence and growth in the late 20th century of other community development institutions – regional housing development organizations, consumer cooperatives, land trusts, microenterprise funds, worker cooperatives, employee stock ownership plans, credit unions, community loan funds, community development venture capital organizations, and even community development banks. A common attribute across this landscape is a sort of "institutional hybridization," crossing boundaries among conventional enterprise forms, and integration of social and economic purposes. Thus, nonprofit CDCs increasingly pursued their goals through subsidiary or affiliated for-profit enterprises. Various forms of social enterprise proliferated, essentially re-making business corporations into

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[17] Brett Theodos et al., *Taking Stock of the Community Development Block Grant*, URB. INST. Apr. 2017.

[18] *See, e.g.*, Rev. Rul. 74-587 (ruling, inter alia, that a CDC designed to stimulate economic development in minority and low-income urban communities, support inner-city enterprises, and focus on community needs, qualified for tax exemption under I.R.C. § 501(c)(3)).

catalysts for community change or even into more democratic institutions in their own right.[19] Community development organizations in this period connected with public and private entities in creative and sometimes complex legal structures, foreshadowing the emergence of more sophisticated community development finance.

B. Community Development Finance

Finance and financial transactions have been a critical component of community economic development throughout its history. CDCs and other local institutions assemble capital – from foundation grants and program related investments, socially responsible investors and investment funds, bank loans, and government subsidies – and deploy this capital in support of housing and business development not otherwise driven by conventional market forces. In the context of cutbacks in antipoverty programs during the administration of President Richard Nixon and a push toward privatization of government functions during the Presidential administrations of Ronald Reagan and George H.W. Bush, the notion of market-based antipoverty approaches garnered bipartisan political support. This market orientation, shared by the subsequent administration of President Bill Clinton, gained ever greater purchase among community development leaders and practitioners as a politically viable strategy fueled in part by availability of federal support.

Over time, focus on the market and financial transactions grew more ascendant in the CED arena, from proliferation of community development loan funds to the emergence of community development banks and tax credit financing. A succession of federal policy initiatives reflected and helped to drive private market investment in community economic development. From the Community Reinvestment Act to the Low Income Housing Tax Credit and eventually the New Markets Tax Credit, local development organizations increasingly turned to evolving intermediary institutions with capacity, sophistication, and scale to tap new sources of capital.

Reflecting a shift in emphasis through the 1990s, CEI and some comparable organizations began to identify not just as community development corporations but as *community development financial institutions* (CDFIs). The notion of finance as central to the function of a CDC was hardly new, for CDCs acting as developers necessarily negotiated financing for their projects, raised funds for operations, and launched community development loan funds. But, advocates helped craft public policies and programs to more effectively tap private investment. CDFIs emerged as financial intermediaries to access, assemble, and channel financing to CDCs and other organizations engaged directly in economic development on the ground. The distinction in roles – CDC as developer and investor, and CDFI as financing entity with a focus on lending – is not always precise, particularly in the case of hybrid institutions like

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[19] SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT at 195-217. *See, e.g.*, David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1983).

CEI that are engaged in both roles. Nonetheless, a cohort of emerging CDFIs essentially helped build a new policy framework and practice to advance their social enterprise mission, complementing and in some cases helping to fuel CDC activity.[20]

The Community Reinvestment Act (CRA),[21] initially enacted in 1977 during the administration of President Jimmy Carter, later re-emerged as a factor in the growth of CDFIs. The CRA addresses how banks meet credit needs in low- and moderate-income neighborhoods in their lending areas. Its original justification included a perceived mismatch between deposits from local neighborhoods on the one hand and lending activity elsewhere on the other, at the expense of meeting local credit needs. It also aimed to discourage continued bank red-lining.[22] Federal bank regulatory agencies evaluate how banks meet the goals of the CRA and issue performance ratings that are among the factors in approval of proposed bank mergers. The importance of the CRA with respect to community development was magnified in 1989 when it was revised to require public disclosure of CRA ratings and in subsequent years when the Act and related regulations expanded CRA opportunities for a wider range of public welfare investments in targeted communities. These modifications in the CRA enabled CDCs to gain greater access to banking capital and to call the attention of banks to local needs. Through the 1990s and into the new millennium, the CRA helped fuel the growth of community development financial institutions, which increasingly served as intermediaries between CDCs and banks seeking favorable CRA ratings.

While the CRA applies to all federally insured depository institutions, a small subset of community development banks adopted lending policies expressly geared to local development. Most prominent among community development banks was the South Shore Bank (later re-named Shorebank), founded in 1973 in Chicago and identified publicly in the 1990s by President Bill Clinton as a model for community banking.[23] Despite later difficulties and ultimate demise in 2010, the South Shore Bank was influential in giving greater definition, prominence, and momentum to community development finance.

Concurrently, a handful of national institutions emerged as a bridge between private capital and hundreds of local development organizations.[24] In 1978, Congress established the

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[20] JAMES GREER & OSCAR GONZALES, COMMUNITY ECONOMIC DEVELOPMENT IN THE UNITED STATES: THE CDFI INDUSTRY AND AMERICA'S DISTRESSED COMMUNITIES (2017) at 48-49 (characterizing the CDC model as a key building block of the CDFI movement), and at 77-86 ("A Brief History of the CDFI Movement").

[21] 12 U.S.C. § 2901–2908 (2012).

[22] DARRYL E. GETTER, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT, CRS Report for Congress (Jan. 7, 2015). Grassroots advocacy was and continues to be instrumental in the utility of the CRA, now reflected for example by the National Community Reinvestment Coalition. *See* NATIONAL COMMUNITY REINVESTMENT COALITION, http://www.ncrc.org/ (last visited June 22, 2018).

[23] GREER & GONZALES, COMMUNITY ECONOMIC DEVELOPMENT IN THE UNITED STATES at 94. *See also* RASHMI DYAL-CHAND, COLLABORATIVE CAPITALISM: REFORMING URBAN MARKET REGULATIONS at 75-76 (overview of Shorebank).

[24] Von Hoffman, *The Past, Present, and Future of Community Development in the United States*. *See generally* LOCAL INITIATIVES SUPPORT CORPORATION, http://www.lisc.org/ (last visited May 28, 2018); HOWARD E. COVINGTON JR., LENDING POWER: HOW SELF-HELP CREDIT UNION TURNED SMALL-TIME LOANS INTO BIG-TIME CHANGE (2017).

Neighborhood Reinvestment Corporation (still operating today as NeighborWorks America) to provide technical assistance to neighborhood housing organizations and to operate a secondary market for high-risk loans. In 1980, the Ford Foundation took the lead in creating the Local Initiatives Support Corporation (LISC) to assist and support CDCs with loans, grants, and technical assistance. In short order, it assembled millions of dollars from corporations, foundations, and federal agencies. LISC continues to operate today on a national scale and launched "Rural LISC" in 1995 to expand its reach to include rural communities throughout the nation. The Center for Community Self-Help in North Carolina grew from a local community development organization supporting worker-owned companies in the 1980s to, in subsequent decades, a national advocate for responsible lending, a billion dollar national credit union family, and a lender to numerous housing and job development projects. Other national institutions added momentum, including the Enterprise Foundation (now re-named Enterprise Community Partners), founded in 1982 to support low-income housing development.

A notable element of the shift toward community development finance was promotion and implementation of federal (and some state) tax credit programs to leverage private investment for affordable housing and enterprise development. After enactment of the Tax Reform Act of 1986, CEI and a growing number of nonprofit (and for-profit) developers began to make use of Low Income Housing Tax Credits (LIHTCs) authorized by the Act to support development of affordable housing.[25] In the subsequent decade, a cohort of CDFIs and others advocated for a new federal program to support not just affordable housing but broader enterprise and economic development. The Riegle Community Development and Regulatory Improvement Act of 1994, sponsored by U.S. Senator Don Riegle of Michigan, created the Community Development Financial Institutions Fund (CDFI Fund) as a program of the U.S. Department of Treasury. Its statutory purpose was to promote economic revitalization and community development in distressed neighborhoods, and it codified in federal law for the first time the term "community development financial institution."[26] In enacting the Riegle Act, Congress acknowledged widespread poverty in urban, rural, and Native American communities. The Act found explicitly that "community development financial institutions have proven their ability to identify and respond to community needs for equity investments, loans, and development services."[27] It authorized funding to "certified" CDFIs that in turn would make use of their enhanced liquidity to raise and invest additional capital in targeted communities. Close to a thousand CDFIs are certified by the CDFI Fund today.

In the late-1990s, banks began to emerge as the dominant lenders to CDFIs, channeling substantial new capital investment for community development. Senator Don Riegle also co-sponsored the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which eliminated certain geographic restrictions on banks, allowing bank holding companies to acquire banks in any states and banks to merge across state lines. This legislation paved the way for a wave of bank mergers, resulting in formation of larger national banks with extensive branch networks operating in multiple states. It also provided that an interstate bank must receive a separate CRA rating for each state in which it has a branch and required that, before any

[25] Low-Income Housing Credit, 26 U.S.C. § 42 (2012).
[26] Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. § 4701 (2012).
[27] *Id.*

expansion, the bank must undergo a review of its CRA compliance.[28] The 1994 establishment of the CDFI Fund and subsequent growth of CDFIs were boosted significantly by the concurrent changes in banking regulation and, consequently, substantial increase in CRA investments by banks.

CEI and other advocates envisioned and pressed for enactment of a new tax credit program, comparable to the LIHTC, but for business, industrial, and commercial development in distressed communities rather than exclusively for housing. Congress enacted the Community Renewal Tax Relief Act of 2000, which created the New Markets Tax Credit (NMTC).[29] This legislation authorized the CDFI Fund to administer tax credits to stimulate investment and economic growth in low income urban neighborhoods and rural communities that lack access to the patient capital needed to support and grow businesses, create jobs, and sustain healthy local economies. CEI created a wholly owned for-profit subsidiary, CEI Capital Management, LLC (CCML), which served as a vehicle for using the new tax credit to leverage financing for community-based economic development. Today, CCML is one of the largest allocatees of New Markets Tax Credits in the nation – and the largest serving primarily rural America -- and has utilized these credits to leverage several billion dollars of investment in transactions in disadvantaged communities nationwide.[30]

An entire industry of lawyers, finance specialists, accountants, and others has grown to implement and administer complex community development financial mechanisms, including tax credit transactions, and a sector of CDFIs has amassed experience in serial transactions. Evolving from its origin as the National Association of Community Development Loan Funds founded in 1986, the Opportunity Finance Network (OFN) today is a national network of over 200 CDFIs investing in low-income, low-wealth, and other disinvested communities. About 100 of these CDFIs (including most of the largest) are monitored and rated by Aeris, an information service launched by OFN in 2004 that provides data analysis and assessment of CDFIs to support investors' due diligence. The national CDFI Coalition has been the locus of policy advocacy for the field since 1992. It was instrumental in creating the federal CDFI Fund and played a role (with a kindred NMTC Coalition formed in 1998) in establishing and sustaining the New Markets Tax Credit program. NeighborWorks America, formed initially by Congress in 1978, has evolved to assist and evaluate community development financial institutions today.[31]

The world of community development finance has witnessed dramatic growth in scale and complexity and notable tools tapping private investment. Community development financial

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[28] Patrick Mulloy & Cynthia Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. LEGIS. 255 (1995) (recounting the history of geographical restrictions on American banks and changes under the Riegle-Neal Act).
[29] New Markets Tax Credit, 26 U.S.C. § 45D (2012).
[30] *See* COASTAL ENTERPRISES, INC., http://www.ceimaine.org/investing/cei-capital-management/ (last visited June 21, 2018).
[31] *See* OPPORTUNITY FINANCE NETWORK, http://ofn.org/ (last visited May 28, 2018); AERIS, http://aerisinsight.com/ (last visited May 28, 2018); CDFI COALITION, http://www.cdfi.org/about-cdfi-coalition/history/ (last visited May 28, 2018); NEIGHBORWORKS, http://www.neighborworks.org/ (last visited May 28, 2018); NMTC COALITION, http://nmtccoalition.org (last visited May 28, 2018).

institutions have become intermediaries between private sector resources and grassroots initiatives, making expansive capital sources more accessible to CDCs, local developers, social entrepreneurs, and other local constituents. Federal incentives such as the Low-Income Housing Tax Credit and the New Markets Tax Credit have created robust private sector financing regimes and have been vehicles for investment of billions of dollars in disadvantaged communities.

From a policy perspective, this leveraging of substantial private investment has proven successful as measured by private dollars spent and affordable housing units built, jobs created or retained, and commercial enterprise in selected areas. But to the extent that policy-makers perceive these programs as a substitute rather than a complement to more direct federal antipoverty measures, the result is arguably fewer policy initiatives – from a higher minimum wage and direct wage or housing subsidies, to job training or educational benefits and enhanced Medicaid coverage – that would raise the floor more expansively for the working poor and build a safety net for others in need. An apparent distancing of community development finance from the civil rights and grassroots origins of CDCs gives rise to continuing tensions. CEI seeks to address this issue by serving as a hybrid organization with both CDFI and CDC functions, attributes, and attitudes.

C. Tax Credit Transactions

The longstanding theme of private sector engagement in community development took shape increasingly around tax credits in the 1990s and since. Creation of the LIHTC in 1986 triggered growth in tax-favored finance transactions by enabling nonprofit CDCs like CEI (and for-profit developers) to tap private investment for affordable housing development. Driven in part by the tax incentive, banks and corporations substantially increased their investment in affordable housing transactions by using the LIHTC.[32] The turn to market mechanisms to alleviate poverty continued through the Clinton era, including designation in 1993 of selected low-income neighborhoods as "empowerment zones" with employers receiving tax incentives for hiring area residents and a menu of other tax benefits.

When the Riegle Act[33] created the CDFI Fund in 1994, it underscored the expanding finance thread in community development. It defined CDFI to include not only for-profit community development banks and community development credit unions (essentially, depository cooperatives), but also non-depository entities including nonprofit community development loan funds, micro-enterprise loan funds, community development venture capital

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[32] Low-Income Housing Credit, 26 U.S.C. § 42 (2012). Federal funding programs for housing development continued to leverage private investment in the years following the 1986 creation of the Low Income Housing Tax Credit. In the early 1990s, the federal HOME Investment Partnership Program was authorized to provide grants to state and local governments for affordable housing development, and the federal HOPE VI program provided additional funding to replace distressed public housing projects with redesigned mixed-income housing. *See* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT (Rochelle E. Lento & Tim Iglesias eds., 2nd ed. 2013) (including a thorough chronology and analysis of federal policies for financing affordable housing development).
[33] Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. § 4701 (2012).

funds, and, of course, CDCs. The function of CDFIs in complex finance transactions took a significant step forward with authorization in 2000 for the CDFI Fund to administer New Markets Tax Credits, with a scope of activity well beyond the LIHTC's affordable housing mission.[34] Selected CDFIs and other intermediary organizations have used the NMTC to stimulate investment and economic growth in targeted communities to grow businesses, create jobs, and sustain local economies.

Administered by the IRS, the LIHTC through tax expenditure has become the largest source of public subsidy for production and rehabilitation of affordable rental housing. Since enactment in 1986, the LIHTC has been the mechanism to finance over two million affordable rental units in more than 28,000 developments. In 2016 alone, its cost in forgone tax revenue was about eight billion dollars.[35] Similarly, the NMTC, jointly administered by the IRS and the CDFI Fund, has awarded around 45 billion dollars in tax credit authority for community-based business and economic development, leveraging substantial private sector investment in low-income communities.[36]

LIHTC and NMTC transactions are highly technical and require specialized and multi-disciplinary professional expertise. In the LIHTC program, the IRS allocates federal tax credits to state housing credit agencies based upon relative population. In a competitive process, nonprofit and for-profit developers apply to the state housing agencies for allocation of federal tax credits to reduce financing cost of affordable housing development projects. Criteria for these allocations are published in each given state's Qualified Allocation Plan and reflect priorities such as location, impact on meeting affordable housing needs, and capacity of the project sponsor. The tax credits serve as an incentive for private investors, ordinarily banks or corporations. Typically, the developer will form a limited partnership or limited liability company (LLC) with one or more investors through which it can provide these investors with tax credits in return for up-front equity investment. The developer or sponsor, often a nonprofit CDC, serves as the general partner with management authority and a minimal ownership interest. The investor or investors serve as limited partners, with substantial ownership interest but no management authority. The investors claim the tax credits over a ten-year period, passed through the limited partnership or LLC, to offset other taxable income. Certain rules to ensure that the housing remains affordable to low-income residents stay in place for 15 years, violation of which can subject the investor to risk of IRS recapture of the credits. The housing property must remain affordable for 30 years, although the tax credit investor does not risk recapture in the latter half of this 30-year period. LIHTC transactions become substantially more complicated when a

[34] New Markets Tax Credit, 26 U.S.C. § 45D (2012); c*f*. Carol Steinbach, *The CDC Tax Credit: An Effective Tool for Attracting Private Resources to Community Economic Development*, BROOKINGS INST. Aug. 1, 1988 (analyzing results of a pilot program of tax credits for CDCs, a precursor to the NMTC a decade later).

[35] *The Effects of the Low-Income Housing Tax Credit (LIHTC)*, RESEARCH BRIEF (NYU Furman Center), May 2017.

[36] COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND, https://www.cdfifund.gov/about/Pages/default.aspx (last visited May 28, 2018). The NMTC is a 39% credit – that is, an investor in a NMTC transaction is eligible to receive a tax credit, realized over seven years, in the amount of 39% of its qualified investment.

syndicator combines multiple investors to form an investment fund involving a number of housing projects.[37]

Steps in a LIHTC transaction typically span two years, more or less, with the sponsor receiving a fee in exchange for development services and for taking the risk of lead-time work in advance of the tax credit allocation. Site selection and eventual real estate purchase option, initial assessment of the costs and hurdles ahead, and other due diligence is followed by local approvals from the municipality or other governing authority. At this stage, the developer might also negotiate tax increment financing (TIF), whereby the local government agrees to return to the developer as a partial rebate of property taxes an amount reflecting the increased property taxes arising from the new development. The sponsor then submits an application to the state housing credit authority, for both a tax credit allocation and a loan. If the application is successful, the housing authority issues a notice to proceed (with conditional allocation of credits), and the sponsor enters an extended use agreement to restrict its property to comply with the program requirements. Full architectural plans and updated pro forma financial statements accompany legal documentation for a construction loan, project construction, and eventual permanent financing and occupancy. This cursory description understates the legal complexity of such a transactional process, which might include well over 150 separate documents – for organization of legal entities, tax credits, and syndication; for construction loan, tax credit investment, and permanent financing; for title, survey, construction, environment, zoning, and other property matters; and for numerous opinions of counsel with a range of assurances and certifications.[38]

A NMTC transaction is similarly complex. The CDFI Fund certifies specially designated "community development entities" (or CDEs) to use tax credits to raise private capital for qualified low-income community investments, typically business and commercial real estate projects. CDEs compete roughly on an annual basis for a share of the year's total NMTC allocation. A CDE that receives an allocation of NMTCs through this competitive process then works to obtain investment from a bank or other for-profit investor in exchange for tax credits channeled through an LLC or limited partnership structure. The CDE in turn typically makes loans to "qualified active low-income community businesses." The tax credits, which the investor realizes over seven years, essentially allow for a lower interest rate for the community business or project. Like the LIHTC, many NMTC transactions involve syndication or multiple investors in a special investment fund and multiple or special-purpose CDEs. Deals are often layered with other tax credit programs, including state-level programs parallel to the federal

[37] *Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks*, REPORT (Community Developments Insights), Apr. 2014. In a certain category of affordable housing transactions, developers make use of tax-exempt Private Activity Bonds in conjunction with the LIHTC to attract further private investment. *See, e.g.*, Michael J. Novogradac, *Financing Affordable Housing: LIHTCs and Tax-Exempt Bonds Offer Options for Investors and Brokers* (CCIM Institute - https://www.ccim.com/cire-magazine/articles/financing-affordable-housing/?gmSsoPc=1).
[38] Descriptions here of steps in tax credit transactions are drawn in part from John Kaminski of the Portland, Maine, law firm Drummond Woodsum, who worked through a simulated LIHTC transaction, and from Charlie Spies and Tom Dolan of CEI Capital Management LLC, who worked through a simulated NMTC transaction, with my Economic Development Law class at the University of Maine School of Law in 2017.

NMTC program in more than a dozen states.[39] An intermediary organization like CEI ordinarily holds a number of potential projects in waiting and in varying states of progress, lists them as illustrative in its application for NMTC allocations, and selects the most viable or compelling projects for development if and when it receive a tax credit allocation.

Deployment of NMTCs enabled CEI to scale up dramatically through its subsidiary CEI Capital Management LLC. In a wide-ranging approach to building assets, CEI has deployed program-related investments from national foundations and loans from banks large and small, and has raised capital through its own private offering of fixed-income debt securities to individuals and institutions seeking community investment opportunities with positive social impact. CEI also has formed a series of venture capital subsidiaries to invest in emerging job-generating companies and as a complement to other CEI financing initiatives. A new subsidiary added in 2017, Bright Community Capital, focuses on environmental sustainability. It invests equity, debt, and tax equity in non-residential solar projects in low- and moderate-income communities.

III. **Sustainability and Accountability**

A. Scaling Up

Jeremy Nowak, former board chair of the Federal Reserve Bank of Philadelphia, frames two distinct phases in the evolution of CDFIs. A "proof of concept" phase began in the 1970s and continued through the 1990s, followed by a "steady growth" stage since 1999.[40] The first of these two phases was characterized, with some exceptions, by relatively small community-based lending institutions relying primarily on grants and loans from foundations, high-wealth individuals, and religious institutions. The critical innovation during this period of community development finance was to develop credible lending and risk management practices and to connect higher-risk borrowers with social investors; to "demonstrate the capacity to make loans and repay investors" and to "negotiate . . . a practical space between markets and public purpose."[41]

The second phase of CDFI growth witnessed a sea change in financial scale. While foundation support continued, the federal government increased its use of public grants for community development finance, triggered by the 1994 creation of the CDFI Fund, amplified by

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[39] *New Markets Tax Credits: Unlocking Investment Potential*, REPORT (Community Developments Insights), June. 2013. For an explanation of a basic New Markets Tax Credit transaction, see Herbert F. Stevens, *New Markets Tax Credits, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS at 161-69. In addition to state-level New Markets Tax Credit programs in a number of states, historic tax credit programs exist at both the federal and state level to support preservation of historic buildings.

[40] Jeremy Nowak, *CDFI Futures: An Industry at a Crossroads*, OPPORTUNITY FINANCE NETWORK, Mar. 2016.

[41] *Id.* at 8.

the subsequent development of the NMTC program, and coupled with further growth and momentum in use of the LIHTC. In particular, direct capital placements in CDFIs by the U.S. Department of Treasury – essentially unencumbered funds available for equity and for operations – boosted CDFIs to a scale much greater than typical community development loan funds capitalized primarily by debt. Foundation and government grants created an equity base for CDFI expansion and leverage, putting them in a position to capitalize on the tremendous growth of community reinvestment by banks since the late 1990s.

Today, the notion of "impact investing" labels a new generation of socially responsible capital allocation by banks, pensions, mutual funds, foundations, endowments held by universities and religious organizations, wealth managers, and individuals. Ron Phillips, CEI's founder and former CEO, argues that impact investors today present tremendous potential for investment in community development organizations.[42] So-called "philanthrocapitalism" has captured the imagination of some extremely wealthy and high-profile figures.[43] A 2015 survey of private investors conducted by J.P Morgan and the Global Impact Investing Network counted $60 billion in impact investments worldwide, and major asset management firms have increased their attention to impact investing.[44]

Although just a small fraction of total private investments, impact investing received a regulatory boost from President Barack Obama's administration that potentially will increase participation by foundations and pensions. In September 2015, the IRS issued a notice that foundations may dedicate mission-investments aligned with their charitable purposes, even if these investments fail to offer the highest return, lowest risk, or greater liquidity which, prior to the ruling, risked imposition of additional excise tax.[45] A month later, the U.S. Department of Labor (DOL) issued an interpretive bulletin rescinding a 2008 ruling that subjected "economically targeted investments" by pension funds to additional scrutiny, a rule that chilled pension investments that considered social impact rather than simply risk and return. The bulletin clarified that social, environmental, and governance issues should be considered as factors directly influencing risk and return. Although the DOL back-pedaled on this issue in 2018, pension funds still have the capacity and authority for impact investing, provided there is no

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[42] Ronald Phillips, *Impact Investing and Community Development*, 25 ME. POL'Y REV. 63 (2016) (tracing the origin of the term "impact investing" to the Rockefeller Foundation's post-recession gathering of thought leaders a decade ago in Bellagio, Italy); *see also* Antony Bugg-Levine, *Future of Community Development: How CDFIs Can Best Ride the Impact Investing Wave*, *in* INVESTING IN WHAT WORKS FOR AMERICA'S COMMUNITIES; Ellen S. Seidman et al., *Making Sure There is a Future – Capitalizing Community Development Financial Institutions*, URB. INST., May 2017.

[43] *See, e.g.*, John Cassidy, *Mark Zuckerberg and the Rise of Philanthrocapitalism*, THE NEW YORKER, Dec. 2, 2015; Eric Franklin, *Philanthrocapitalism: Exacerbating the Antidemocratic, Paternalistic, and Amateuristic Nature of Philanthropy*, LEGAL STUDIES RESEARCH PAPER (UNLV William S. Boyd Sch. L.), Dec. 2016; David Rieff, *Philanthrocapitalism: A Self-Love Story*, THE NATION, Oct. 1, 2015.

[44] Michael Etzel, *New Regulations Boost Social Impact Investing*, STAN. SOCIAL INNOVATION REV., Dec. 17, 2015; *see* GLOBAL IMPACT INVESTING NETWORK, http://thegiin.org/about/ (last visited June 22, 2018). *See also* Shena R. Ashley & Joycelyn Ovalle, *Investing Together: Emerging Approaches in Collaborative Place-Based Impact Investing*, URB. INST., May 2018.

[45] Internal Revenue Service, Notice 2015-62, regarding application of I.R.C. § 4944.

adverse effect on risk and return on pension investments.[46] With about nine trillion dollars in pension assets, even modest changes by fund managers might materially affect the level of impact investing overall.

Nowak describes a third phase of "capital transformation" potentially emerging now in community development finance, primarily among the largest of CDFIs. This represents a further shift in identity and scale with greater recognition by and access to conventional capital markets.[47] A trend among the largest few dozen CDFIs in recent years has been geographical expansion, operating in a multi-state or national arena and hence diminished focus on place. One driver of this trend is national banks engaged in interstate banking and seeking to maximize reach in their multiple CRA target areas by investing in CDFIs. Other drivers are the imperatives of sustainability in any successful financial institution – gaining efficiencies through scale, mitigating risk through diversification, accessing a larger volume of deals to increase liquidity, or specializing in products that can be replicated in multiple markets.[48]

Although less connected to a particular locale, these larger CDFIs often work on projects through and in conjunction with locally based, less well-healed, and smaller CDCs and CDFIs. It is through these collaborations, in part, that larger CDFIs can maintain some community focus, encouraging local accountability and reducing risk by relying on a local partner to understand the politics and culture of the region, to know and monitor local project players, and to provide needed technical assistance at the grassroots. "Translation" of complex transactions and attention to local needs and values is facilitated by collaborators on the ground.

The increased scale of CDFI operations, while presenting challenges to local participation and accountability, is also an important factor in sustainability. Scale expands access to private capital, and CDFIs have managed to grow and tap private capital at a time of shrinking public expenditures. Even as Congress has reduced funding for other programs, CDFIs as a trade group constitute a strong lobby and thus far have managed to preserve the federal tax credits so critical to their work. The LIHTC has been impressive in its stability and resilience. The NMTC faces greater uncertainty, but it too benefits from bipartisan support. In late 2014 with support from the Obama administration, the NMTC received a five-year renewal to remain in effect until 2019, although it is still dependent upon annual fiscal allocations by Congress. Both of these tax credits survived passage of the so-called Tax Cuts and Jobs Act, a major overhaul of tax law in late 2017. But impacts of this legislation on tax credit financing for affordable housing and community development finance are subtle and still unfolding. A substantial reduction in

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[46] U.S. Dep't of Labor, Interpretive Bulletin 2015-01, regarding application of the Employee Retirement Income Security Act of 1974, §§ 403, 404. *Cf.* Field Assistance Bulletin No. 2018-01, U.S. Dep't of Labor (Employee Benefits Security Administration), https://www.americanbenefitscouncil.org/pub/b9d6b6e9-9702-485f-0654-f1eac0ff79e2 .

[47] Nowak, *CDFI Futures: An Industry at a Crossroads*.

[48] *Id.* S*ee also* Michael Swack, et al., *CDFIs Stepping into the Breach: An Impact Evaluation – Summary Report*, CARSEY SCH. PUB. POL'Y, UNIV. OF NEW HAMPSHIRE, Aug. 2014 (detailing both the relatively limited scope and the potential for growth in CDFIs).

corporate tax rates, for instance, might combine with other changes in the tax law to reduce investor demand and thus reduce the volume of affordable housing production.[49]

CEI grapples with balancing its local focus and its national reach. It has evolved as a hybrid institution – a local institution serving and grounded in Maine, while extending its expertise nationally in rural development. The parent nonprofit is primarily engaged with Maine institutions, through its platform of housing finance and business lending, technical assistance, and related policy analysis and advocacy, coupled with national policy engagement. Much of CEI's activity around the nation is through subsidiary entities.

The CEI "family of enterprises" has come a long way since its origin as a local nonprofit CDC and looks very different today than it did in the 1970s. To manage its wide-ranging programs and growth in scale, CEI is staffed by close to 90 employees and bolstered by engaged volunteers serving on boards and committees of the parent entity and its subsidiaries. It continues to innovate, adapting to a changing context in the market, in sources of finance, in public policy, and in community needs. Its story is one of reinvention, adding new programs and entities from time to time and spinning off others. Its social justice mission, however, has remained consistent throughout its existence – to create quality jobs, environmentally-sustainable enterprises, and shared prosperity. So, too, the evolution of community economic development has seen policy and politics, legal framework, technique, and context change significantly, with the touchstone of economic justice at its core.

B. "Community" in Community Development Finance

Limitations of community economic development have been well documented – from scattershot neighborhood projects in the urban core to inadequate attention to rural poverty, from multi-cultural and racial insensitivities to overly vague claims of empowerment. Fealty to philanthropic and public funders arguably reinforces resistance to confronting powerful conventional institutions. Impact on structural inequalities and segregation is modest at best. Professionalization of the field can distance organizations from their local constituents.[50] Many practitioners avoid or intentionally address and moderate these limitations in practice. But,

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[49] *See* Alyssa Katz, *The Harm to Affordable Housing*, THE AMERICAN PROSPECT, (Summer 2018), http://prospect.org/article/harm-affordable-housing. *See also* Michael Novogradac, et. al, *Tax Reform and Its Consequences for Affordable Rental Housing*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 107 (2018). In a throwback to Reagan-era "enterprise zones" and Clinton-era "empowerment zones," the 2017 tax act provides for designation of selected "opportunity zones" and offers a tax incentive for private investment in low-income communities. Taxpayers, for example, can defer capital gains tax on sales of property to the extent such gains are reinvested in a qualified opportunity zone. *Id.* at 118-121. *Cf.* Conor Dougherty, *Tax Overhaul Is a Blow to Affordable Housing Efforts*, N.Y. TIMES, Jan. 18, 2018.

[50] *See* Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 2 (2016); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice,* 54 STAN. L. REV. 399 (2001); Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994. C*f. Maine Forest-Based Communities as a Live Case Study*, CEI Capital Management LLC Rural Economies Form (June 2017) (addressing particular challenges facing rural economies in community development); SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT at 219-27.

awareness and documentation of these issues enables scholars and practitioners to measure expectations and success within defined boundaries – and to push against those boundaries for greater social impact.

The particular challenge of remaining accountable and accessible to local constituents persists in community development finance, especially with its growth in scale and its multi-layered financial structures. Revitalizing distressed urban and rural communities is the central mission driving many CDFIs. As previously noted, though, community economic development does not simply view the community as beneficiary of these efforts, but also as agent. The technical and transactional complexity of community development finance can overshadow the progressive goals that motivate many actors in the field. The policies and practices can distance CDFIs from the very constituents at their core and from the activist origins of community development corporations.

Practitioners in the field suggest a concrete upside to tax-credit transactions, in both discipline and accountability. Over time, LIHTC and NMTC transactions have become standardized, replicable, and dependable deal structures and thus more able to attract banks and private capital into community investment. Furthermore, banks, investors, developers, government agencies, and other parties to these transactions have a shared interest in a successful outcome – from preserving tax credits through the multi-year life of such deals to assuring repayment of private loans or public bonds. Accountability to one another and to the integrity of the deal is built into the transactional documents, while multiple parties have an interest in enforcing necessary compliance. From this perspective, the web of transactional accountability can be more effective than direct and binary grants or contracts. And, the transactions often have a community development entity at their core, helping to negotiate and enforce provisions for community benefits embedded in the transaction.

CEI and a number of other organizations require participants in their tax credit projects to commit to community benefit agreements. A community benefit agreement might stipulate, for example, targeted workforce training and job creation, scholarships for local low-income students, reduced rent in a newly constructed building, or certain labor and environmental standards. A CEI project in rural Baileyville, Maine, illustrates the application of such a mechanism. It used NMTCs to finance a retooling and expansion of St. Croix Tissue, a paper factory, and helped preserve jobs and create new jobs. A community benefit agreement associated with the investment successfully required St. Croix to hire a certain percentage of workers from low-income households and to implement a systematic program of employer-specific workforce training.[51] This focus on job *quality*, not just quantity, reflects a strategic trend among a number of community development organizations. Rather than simply counting and celebrating the *number* of jobs created and retained, these institutions seek to leverage jobs that provide a living wage, basic benefits, career- and wealth-building opportunities, and a fair and respectful workplace.[52]

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[51] Lori Valigra, *CEI Presents 'Opportunity Award' to St. Croix Tissue*, ME. BIZ (Mar. 15, 2017), http://www.mainebiz.biz/article/20170315/NEWS01/170319968/cei-presents-%27opportunity-award%27-to-st-croix-tissue.
[52] *See Moving Beyond Job Creation: Defining and Measuring the Creation of Quality Jobs*, INSIGHT AT PACIFIC COMMUNITY VENTURES Apr. 2016; *Public Policy and Investments in Quality Jobs: Ideas for*

Both the LIHTC and the NMTC programs favor applicants that can demonstrate local project approval and benefit. The federal CDFI Fund certifies community development entities to administer NMTC allocations. Criteria for certification include a primary mission to provide investment capital for low-income communities or persons and accountability to residents of such communities through representation on the community development entity's governing board or advisory board.[53] Acknowledging particular challenges in *rural* America, Congress in 2006 required that "non-metropolitan" areas receive adequate allocation of investments from the NMTC.[54] Allocations of federal LIHTCs are made (generally by state housing authorities) pursuant to a given state's Qualified Allocation Plan, which defines criteria for allocation priorities. By federal statute, these criteria give preference to projects appropriate to local conditions, serving low-income residents, and contributing to concerted community revitalization plans, and the allocating agency must give notice to the chief executive officer of the relevant local jurisdiction (e.g., mayor of a town) with an opportunity to comment.[55]

The impact of CDFIs depends to some extent on their commitment to providing projects with not just financial investment but also technical assistance and development services. Such services ordinarily include screening and assisting enterprises prior to financing, to assure that they have the capacity to succeed and to minimize default risk. Also critical is ongoing business consulting and financial training that accompany financing and further reduce the likelihood of default. CDFI collaboration with banks, foundations, and other local institutions in packaging multi-layered financing arrangements, as well as engagement with regional government and advocacy organizations with respect to public policies, all combine to facilitate buy-in by and accountability to a web of stakeholders.[56] Meaningful impact, of course, requires attention to many other aspects of revitalizing low-income communities and their residents, not simply doing deals, and requires connection with the resources of broader regional economies and with levers of power.[57]

Driven in part by external funding dictates and the availability of compelling tax incentives, many CDFIs are focused on transactions and organizational growth, arguably at the

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Policy Change, INSIGHT AT PACIFIC COMMUNITY VENTURES, Mar. 2017. For an in-depth examination and analysis of workforce development strategy and job quality, *see* Steven L. Dawson, *The Pinkerton Papers Job Quality Series*, THE PINKERTON FOUND., 2016-2017, http://www.thepinkertonfoundation.org/paper_type/job-quality-series (last visited June 27, 2018). *Cf.* PARAPROFESSIONAL HEALTHCARE INSTITUTE, which promotes quality jobs in home health care, https://phinational.org (last visited June 29, 2018).

53 I.R.C. § 45D(c)(1).

54 Tax Relief and Health Care Act of 2006, in extending and modifying the New Markets Tax Credit, added language to "ensure that non-metropolitan counties receive a proportional allocation of qualified equity investments . . . ." I.R.C. § 45D(i)(6). *See* Cynthia M. Duncan, *Community Development in Rural America: Collaborative, Regional, and Comprehensive*, *in* INVESTING IN WHAT WORKS FOR AMERICA'S COMMUNITIES.

55 I.R.C. § 42(m).

56 *See* Brett Theodos et al., *Scaling Impact for Community Development Financial Institutions*, URB. INST., June 2016.

57 *See* Ellen S. Seidman, *Integration and Innovation in a Time of Stress*, *in* INVESTING IN WHAT WORKS FOR AMERICA'S COMMUNITIES.

expense of more fundamental economic and social change and at the risk that finance chills activism. This tension is hardly new. Looking back, the civil rights movement and welfare rights advocacy in the 1950s and 1960s, and subsequent expansion in community organizing, amplified the tension between activism and economic development.[58] In some cases this advocacy was at odds with economic development initiatives, as in those urban renewal projects that destroyed neighborhood housing. In other instances, though, organizing and advocacy essentially created the political space that allowed for community development initiatives. Expressly coupled with community development, grassroots activism also grounded some of these efforts with greater local accountability.

Apparent here is a conceptual distinction between community *development* and community *organizing*, and a critical tension between the two. Community organizing emphasizes broadly based grassroots efforts, in low- and moderate-income and often minority communities, to confront institutions of power, public or private. These powerful governmental or corporate institutions, from an organizing perspective, hold responsibility to implement policies and programs. The mission of community organizing is to pressure these institutions to act responsibly, essentially bringing the political power of mobilized citizens to bear on assuring equitable treatment and results. In contrast, community development focuses less on confrontation and more on building capacity within community organizations to implement policies and programs. By internalizing the mechanisms and provision of business and social services, this development approach shifts responsibility for implementing policy and programs to community institutions. Recalling early tensions between direct action organizing and the emergence of CDCs in the 1960s and 1970s, community economic development today can be so tied into conventional financial and governmental institutions as to compromise its impact in confronting structural drivers of economic and political inequality. Fighting entrenched poverty requires advocacy for essential public benefits like health care and child care, living wage standards and supplements like the earned income tax credit, public transit, and opportunity for quality education, along with development of jobs and housing.[59]

There is a long history of difference and debate among community organizers and community development advocates.[60] Tension persists between institution-building and social change advocacy. But, borders between the two are often blurred, in rhetoric and practice, especially given overlapping constituencies, values, and goals. Community development practitioners cite themes of empowerment and social change in their work and indeed share these goals with other institutions engaged in organizing and advocacy. Emphasis on these themes, however, tends to invite criticism by measuring a community development institution's success against goals beyond its core practice.

Definitional clarity is important in measuring and evaluating impact. Community development and finance is essentially about bridging capital markets with community-based enterprise, about building community capacity and bringing business expertise to bear on urban

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[58] *See* Cummings, *Community Economic Development as Progressive Politics*.

[59] *See* Peter Edelman, *Our History with Concentrated Poverty*, *in* INVESTING IN WHAT WORKS FOR AMERICA'S COMMUNITIES.

[60] Mike Miller, *Can the Debate Be Resolved? Community Organizing vs. Community Development*, ORGANIZE TRAINING CENTER REPORT (2009), http://www.organizetrainingcenter.org/writings.html.

and rural revitalization, and about modeling and pushing for social responsibility in finance and banking. By this standard, CDCs and CDFIs have performed well, developed innovative financial tools, and demonstrated positive impact in selected locales. By also holding true to their explicit social purpose, many of these institutions have moderated their assimilation into the mainstream financial system and distinguished themselves from conventional banks.

Moreover, community economic development as a strategy need not stand alone. CDFI alliances or collaborations with kindred organizing and advocacy partners, and meaningful connection with social movements, can be a key ingredient in the character and sustainability of community development finance. The distinction between community organizing and community development is real, but the two can co-exist. In the best circumstances, creative collaboration between organizing and development can be a potent combination.[61]

IV. **Community Development Practice and the Legal Academy**

"Most law reviews do not contain cartoons," read the lead in a *The National Law Journal* article. "Then again, the Spring 1991 issue of the *Buffalo Law Review* . . . is not like most law reviews."[62] As a law professor then at the State University of New York (SUNY) at Buffalo, I oversaw publication of a symposium issue of the *Buffalo Law Review* entitled "Buffalo Change & Community."[63] It was an interdisciplinary take on the Buffalo political economy in the early years of SUNY-Buffalo's curricular and clinical program in community development law and affordable housing finance. The *National Law Journal* and others took notice of this unusual enterprise – a scholarly law journal addressing the urban challenges in its own community. A series of Buffalo-subject political cartoons by Tom Toles (then a syndicated artist at the *Buffalo News*, now at the *Washington Post*) helped to underscore the departure from traditional scholarship, to make it more accessible to a popular audience, and – with his Pulitzer Prize just months before publication of the law review – to heighten public attention. By design, research for the law journal issue helped to shape our law school work in western New York, including scholarship, curriculum, and clinical legal practice in regional community economic development – and one of just a handful of law school transactional clinics at that time.

Fast forward to 2017, and we see the emergence and maturing of community development clinics alongside other outreach, civic engagement, and clinical practice by law students and faculty. Numerous law schools today house transactional clinics engaged in affordable housing finance, small business counseling, or community economic development, and legal scholarship increasingly addresses growth, innovation, and challenges in the field. A

[61] *See, e.g.*, INTERVALLEY PROJECT (IVP), http://www.intervalleyproject.org/ (last visited May 28, 2018) (explaining the InterValley Project, which is an organizing network of seven regional organizations that combine community organizing and development strategies); Greg LeRoy, *Making Economic Development Accountable*, *in* BUILDING HEALTHY COMMUNITIES; Barbara Bezdek, *Digging into Democracy: Reflections on CED and Social Change Lawyering After #OWS*, 77 MD. L. REV. ENDNOTES 16 (2018).
[62] Ken Myers, *SUNY Buffalo's Law Review: Spring 1991 Issue Looks Home*, NAT'L L.J., Aug. 19, 1991.
[63] 39 BUFFALO L. REV. 313 (Spring 1991).

discussion group on "Community Development Law and Economic Justice – Why Law Matters" at the 2017 annual meeting of the Association of American Law Schools marked this robust attention in the legal academy.[64] The event brought together legal scholars from across the nation and across generations. It presented an opportunity to assess an array of new law school initiatives and strategies in the field, and to give further definition to "community development law" at a fluid moment in its history.

Although community economic development is not lawyer-driven, law and lawyers are pervasive in the field and particularly in financial transactions. In the policy arena, lawyers play a pivotal role in translating innovative ideas and best practices into workable laws and regulations and in arguing for their enactment. Many legislators who pass these laws or government agency leaders who administer them are trained in the law, as are many staff and board members in CDFIs. With respect to legal practice, structuring and negotiating a LIHTC or NMTC transaction requires specialized skill and training and lawyers with deep expertise. The practice implicates corporate law, tax, securities, contracts, land use, real estate, intellectual property, environmental law, regulatory compliance, and more. The National Economic Development and Law Center – founded in 1969 in Oakland CA and still operating today as the Insight Center for Community Economic Development – was an early mover in practicing and shaping law in this realm. Along with direct legal assistance, it served as a back-up center for community development lawyers nationwide in the emerging field. Such legal expertise today is widely dispersed in private law firms, CDFIs, local development organizations, public agencies, and law schools.

The legal academy plays a role in sustaining and advancing the discipline of community development law, through research and scholarship and through clinical and classroom teaching. The proliferation of transactional clinics engaged in affordable housing and community development around the nation brings the resources of the academy to bear directly upon neighborhood revitalization efforts. Similar to other law school clinical programs in a wide range of disciplines, these development clinics have a multiplier effect. Beyond direct impact on the ground, they are sensitizing new generations of lawyers to the skills and values of community development law. Today, roughly 140 transactional clinics, broadly defined, operate in American law schools – about 25% of them with a community economic development, affordable housing finance, or social justice focus.[65] Parallel efforts in classroom courses contribute to educating

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[64] Peter Pitegoff, *Community Development Law, Economic Justice, and the Legal Academy*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 31 (2017) (introducing a symposium of ten short articles arising from the program on community development law and economic justice at the January 2017 annual meeting of the Association of American Law Schools).

[65] Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. UNIV. J. L. & POL'Y 85, 93 (2014) (examining and broadly defining "transactional" law school clinics to include, in addition to affordable housing and community economic development clinics: small business and entrepreneurship, microenterprise, nonprofit organization, intellectual property, and arts and entertainment clinics); *cf.* Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413 (2015); Praveen Kosuri, *"Impact" in 3D–Maximizing Impact through Transactional Clinics*, 18 CLINICAL L. REV. 1 (2011); Lynnise E. Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILLANOVA L. REV. 175 (2017).

future lawyers about the roles they might play in revitalizing distressed communities. Law school curricula include courses expressly about affordable housing and community development, nonprofit organizations, poverty law, and economic justice, and law professors integrate related content in more conventional courses like corporation law and professional responsibility.

Analysis and critique of community economic development law appeared early on in scholarly law journals and has increased over time with growth in the field. Legal scholars have the space and purpose to provide policy analysis and reflection. Their research can spotlight best practices and build upon innovations. Outside the fray of practice, scholars can take a long view, identify trends, chronicle advances, and bolster the field by constructing a theoretical foundation and public policy rationale. The legal academy has a role to play as a repository of knowledge and expertise and as a modest contributor to sustainability.

Critical scholarship can identify shortcomings in the field, help keep community development connected with its activist roots, and reinforce economic justice values. Scholars, for instance, have highlighted structural issues of the LIHTC, including the potential capture of substantial "residual value" in the coming years by private developers of affordable housing as LIHTC property use restrictions begin to expire.[66] Scholars also have done well at articulating a rationale and vision of a more politically engaged and advocacy approach to community economic development, at positioning it within broader progressive movements, and at chronicling examples in practice.[67] A 2007 symposium issue of the *California Law Review*, for instance, presented an expansive definition of community, way beyond contained geographical spaces or institutions.[68] It explored the subtlety of the lawyer's role and responsibility in community economic development, of lawyer accountability and deference, and of the importance of integrating legal capacity within organizational actors.[69]

An emergent body of applied scholarship is and must be grounded by narratives of and engagement with the evolving practices in community development and the law. In 1991, following enactment of the Low Income Housing Tax Credit program and growth of related legal practice, the American Bar Association established its Forum on Affordable Housing & Community Development Law.[70] A permanent organization with a mission of education and

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[66] Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL'Y REV. 521 (2016).

[67] *See, e.g.*, Cummings, *Community Economic Development as Progressive Politics* (accounts, for instance, of integrating community economic development with living wage campaigns, worker cooperative development, community benefit agreements, and sectoral development strategies). *See also* Haber, *CED After #OWS*; Bezdek, *Digging into Democracy*.

[68] William H. Simon, *Introduction: Lawyers and Community Economic Development*, 95 CALIF. L. REV. 1821 (Oct. 2007); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007).

[69] Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133 (2007).

[70] The American Bar Association, in addition to its large and wide-ranging practice-area Sections, creates smaller Forums to explore and monitor new areas of law as they emerge on a national scale. Other ABA

professional development, the Forum in short order assembled a national membership of and conversation among lawyers and law professors involved in affordable housing and community development and today reflects a membership of more than 3,000 lawyers. Academic members, although outnumbered by practitioners, have nurtured a legal educators group throughout the life of the Forum. In a further link to the legal academy, the Forum reaches out to law students, holds panel discussions at law schools, and sponsors a law student writing competition, in a concerted attempt to attract new lawyers to the field. Early on, it established the *Journal of Affordable Housing & Community Development Law*, with law professors and lawyers serving as editors on a rotating basis, engaging law students in the editorial process, and working with the ABA for publication. The journal, published in three issues per year, is an explicit connection between legal scholars and lawyers practicing in community development finance.[71] The only law journal devoted exclusively to affordable housing and community development law, it does well at bridging theory, policy, and practice.

Underlying goals and values in community economic development have remained consistent over the past several decades. The context, however, is continually changing. As demonstrated by the history of Maine-based CEI, the strategies and mechanisms of community development need to keep pace with changes in the economic landscape, most recently with the continuing impacts of the 2008 recession. Organizations like CEI monitor and, indeed, help craft legal and regulatory policies in development finance, and contend with new technologies, global trade, climate change and a fluid political economy. From growth in contingent employment and low-wage labor to emergence of a so-called gig economy,[72] from urban in-migration and gentrification to growing recognition of rural poverty, from extreme economic inequality and continued racial tensions to challenges faced by immigrants and sharp partisan divisions of the Trump era – community development practitioners and scholars have taken account and must continue to adapt as other issues inevitably arise. Research and practice in law schools can track and, in some cases, anticipate these changes and challenges. This academic enterprise in community development law is evolving in parallel with practice, including the growing sophistication and complexity in community development financial institutions and their legal innovations.

Attention in law schools to community development law suggests a valuable and promising track in the legal academy. Legal scholars and clinical professors are increasingly

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Forums include: Air & Space Law, Communications Law, Construction Law, Entertainment & Sports Industries, and Franchising.

[71] Professor Tim Iglesias of the University of San Francisco School of Law states: "The *Journal* offers the space where good-willed legal practitioners, policymakers, and academics . . . can foster mutual understanding and greater collaboration." Tim Iglesias, *Affordable Housing, Fair Housing and Community Development: Joined at the Hip, We Need to Learn to Walk Together*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 195, 199 (2017).

[72] *See, e.g.*, Steven Greenhouse, *On Demand, and Demanding Their Rights*, THE AMERICAN PROSPECT (Summer 2016) (on the gig economy, Uber, and a new chapter in American labor history); Steven Greenhouse, *The Whatchamacallit Economy*, N.Y. TIMES, Dec. 16, 2016; Harry Arthurs, *The False Promise of the Sharing Economy*, *in* LAW AND THE SHARING ECONOMY: REGULATING ONLINE MARKET PLATFORMS (D. McKee, et. al, eds., 2018); Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215 (2016).

engaged in theory, policy, and practice in the field. Today, a symposium issue of a law review about the local political economy, with or without political cartoons, would hardly stand out as unique.