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# HELTER SHELTER: THE [DIS]ORGANIZATION OF PUBLIC HOUSING POLICY

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I. INTRODUCTION

Now is then a tumultuous time for national housing policy. In early 1995, then Housing Secretary Henry Cisneros<sup>1</sup> put forth the Department of Housing and Urban Development’s (“HUD”) budget proposal for the fiscal year 1996.<sup>2</sup> According to Cisneros, the proposal will “transform” public housing by consolidating “60 HUD programs into three flexible, performance-based funds.”<sup>3</sup> The entire Board of the Chicago Housing Authority resigned a few months later, transferring control of one of the nation’s largest public housing authorities to federal hands.<sup>4</sup> Furthermore, the Republican Senate majority wants to abolish HUD entirely.<sup>5</sup>

The Cisneros reorganization proposal, for instance, would give “residents market choice in the search for affordable housing [and] end[] the monopoly of housing authorities over Federal housing resources.”<sup>6</sup> It would also “accelerate[] the demolition of uninhabitable

1. On January 27, 1997, Andrew Cuomo, formerly a HUD Assistant Secretary, was confirmed as the new Housing Secretary. CONGRESS DAILY (Jan. 29, 1997), available in 1997 WL 7761220. To date, Secretary Cuomo has continued the Cisneros initiatives.

2. U.S. DEP’T OF HOUS. & URBAN DEV., EXECUTIVE SUMMARY, FISCAL YEAR 1996 BUDGET (1995) [hereinafter HUD EXECUTIVE SUMMARY].

3. *Id.* at 2.

4. *Graft and Mortar*, ECONOMIST, June 3-9, 1995, at 22; *HUD Takes Over Chicago Housing Agency*, FACTS ON FILE, June 1, 1995, at 389; Don Terry, *Chicago Housing Agency To Be Taken Over by U.S.*, N.Y. TIMES, May 28, 1995, at 1, 27.

5. See Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263 (1995); see also Dan Freeman, *Republicans Criticize HUD, Praise Cuomo*, ALBANY TIMES UNION (Jan. 23, 1997) (noting 1996 republican legislation to abolish HUD).

6. HUD EXECUTIVE SUMMARY, *supra* note 2, at 9. Part IV of this Article addresses the fact that this proposal also appears to transform low-income housing into federal housing stock from its

or non-viable public housing developments.”<sup>7</sup> To meet these goals, the Section 8 rental assistance programs<sup>8</sup> would be consolidated into a single performance-based fund.<sup>9</sup>

HUD’s intention, through this reorganization, is to ultimately cease all direct capital and operating subsidies to public housing authorities (PHAs), and to convert federal subsidy funds into rental assistance certificates.<sup>10</sup> Two interim funds, the Public Housing Operating Performance Fund<sup>11</sup> and the Public Housing Capital Performance Fund,<sup>12</sup> would terminate at the end of the transition period.<sup>13</sup> Housing authorities would then be required to compete with other providers of rental housing in the marketplace for low-income residents.

This Article argues that such efforts to streamline public housing funding, despite some admittedly good policy choices, will do little toward improving public housing management unless the management

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original character as local housing stock. *See infra* Part IV.

7. *Id.*

8. The Section 8 programs were created to “provide[] low income families with direct cash assistance for the acquisition of ‘decent,’ affordable housing.” Deborah Kenn, *Fighting the Housing Crisis with Underachieving Programs: The Problem with Section 8*, 44 WASH. U. J. URB. & CONTEMP. L. 77, 78 (1993) (citing Title II of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, which created Section 8). The rental assistance programs include “certificates, vouchers, contract renewals, certificates for persons with special needs, and Choice In Residency, and self-sufficiency programs.” HUD EXECUTIVE SUMMARY, *supra* note 2, at 8.

9. HUD EXECUTIVE SUMMARY, *supra* note 2, at 8.

10. *Id.* at 1-2.

11. *Id.* at 10. During the transition period, operating funds would be allocated according to the existing performance funding formula. *Id.*

12. *Id.* at 10-11.

13. *Id.*

[During the transition period, funds for public housing capital and management improvement would be allocated by a formula similar to that used in the current comprehensive grant program. Funds could be used for the entire range of purposes currently permitted under the programs being consolidated, including: development of new units; vacancy reduction; modernization, including management improvements; demolition and relocation; supportive services coordination and delivery; support of resident empowerment; economic development; community service; and replacement reserves.

*Id.*

activities of the public housing programs are also changed.<sup>14</sup> Such an argument is true whether the housing consists of publicly-managed units or whether control is solely maintained by conditioning the receipt of federal money on substantive requirements. It is this management aspect of housing which the current policy proposals are ignoring to their, and ultimately our, peril.

While the solution for improving public housing management is a policy matter, it is apparent that HUD has neither accurately diagnosed nor suitably addressed the problems with housing management. Many of the current problems have been created or worsened by previous policy solutions.<sup>15</sup> Currently, housing management suffers from three fundamental problems: (1) there are too many levels in the management structure; (2) there are too many policy goals; and (3) management methods are not responsive to market forces.<sup>16</sup>

With regard to the problems in public housing management, Congress is a primary culprit. Congress has amended the housing statutes and regulations numerous times in an effort to add accountability to PHA management, and to provide incentives for tenants to become better consumers of public housing.<sup>17</sup> Ironically, these additional oversight and accountability measures have only served to further encumber the ability of PHAs to effectively manage their housing stock.<sup>18</sup> Now, a public housing project is subject to layers of management requirements imposed by: the housing acts,<sup>19</sup> HUD regulations,<sup>20</sup> HUD directives and handbooks,<sup>21</sup> federal judicial

14. For purposes of this Article, "public housing policy" will be distinguished from "public housing management." HUD's proposed transformation includes changes in both policy and management. HUD's consolidation is also much broader than the Section 8 and Public and Indian Housing Programs, which are the focus of this Article.

15. See *infra* Part III.A.

16. HUD alleges, however, that its proposed funding changes represent a transition to a market-based operation. HUD EXECUTIVE SUMMARY, *supra* note 2, at 1.

17. See *infra* Part III.A.

18. *Id.*

19. See, e.g., United States Housing Act of 1937, ch. 896, tit. I, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (1994)).

20. See, e.g., Public and Indian Housing, 24 C.F.R. pts. 901-990 (1996); Section 8 Housing

review of PHA actions,<sup>22</sup> HUD regional office oversight,<sup>23</sup> HUD field office oversight,<sup>24</sup> local PHA management,<sup>25</sup> and tenant rights.<sup>26</sup> There is local discretion only when these requirements have been satisfied. Because of their bureaucratic management structure, PHA officials primarily focus on satisfying requirements set by HUD and Congress.<sup>27</sup> These one-size-fits-all requirements only imperfectly reflect tenant needs and local market supply conditions.

The fact remains that the federal government will continue to own more than 1.4 million units of housing stock.<sup>28</sup> The HUD proposal

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Assistance Programs and Section 202 Direct Loan Program, 24 C.F.R. pts. 811-891 (1996).

21. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 000.2, REV-1, HUD DIRECTIVES SYSTEM HANDBOOK (1993); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7420.7, PUBLIC HOUSING AGENCY ADMINISTRATIVE PRACTICES HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM (1993); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7460.8, REV-1, PROCUREMENT HANDBOOK FOR PUBLIC HOUSING AGENCIES (1993); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7485.2, REV-1, PUBLIC HOUSING MODERNIZATION STANDARDS HANDBOOK (1993); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 1378, TENANT ASSISTANCE, RELOCATION AND REAL PROPERTY ACQUISITION (1992); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7417.1, REV-1, PUBLIC HOUSING DEVELOPMENT HANDBOOK (1992); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7460.5, THE PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM (PHMAP) HANDBOOK (1992); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7475.13, PERFORMANCE FUNDING SYSTEM HANDBOOK (1992); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7485.3, COMPREHENSIVE GRANT PROGRAM (CGP) HANDBOOK (1992); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7465.1, THE PUBLIC HOUSING OCCUPANCY HANDBOOK: ADMISSION (1991); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7485.1, REV-1, THE PUBLIC AND INDIAN HOUSING COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM HANDBOOK (1989); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 1100.3, REV-5, ORGANIZATION OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HANDBOOK (1987); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 4910.1, MINIMUM PROPERTY STANDARDS FOR MULTIFAMILY HOUSING (1986); U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7486.1, PUBLIC HOUSING DEMOLITION, DISPOSITION AND CONVERSION HANDBOOK (1986).

22. See *infra* Part III.B (discussing federal cases regarding PHA actions).

23. See *infra* note 162 accompanying text (discussing HUD regional offices).

24. See *infra* note 161 and accompanying text (discussing HUD field offices).

25. See *infra* notes 147-59 and accompanying text (discussing the functioning of PHA management).

26. See *infra* Part III.B (discussing litigation based on tenant rights).

27. See WILLIAM A. NISKANEN, BUREAUCRACY: SERVANT OR MASTER? LESSONS FROM AMERICA 13-15 (1973); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 101-02 (1983) ("Rather than seeking to maximize social benefit, administrators will seek to maximize 'budgets,' 'votes,' or 'power.'") (footnotes omitted).

28. See Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60

assumes that by requiring the government-owned units to compete with privately-owned units, the publicly-owned units will either become more efficient or will be sold or otherwise converted for more suitable uses.<sup>29</sup> If this were a privatization scheme, the rationale would be sound. However, federal control over housing is too pervasive for those efficiency-oriented moves to occur within the current public housing scheme.

Part I of this Article introduces the concept of public housing management as a critical factor in housing issues. Part II discusses public housing policy, the choices of which drive all management issues. Part III is devoted to public housing management. The discussion in Part III is grouped into two broad areas: funding and litigation. The funding issues include public housing development, modernization and operating subsidies, and represent areas in which the primary relationship is between the PHA and HUD. The litigation issues include admissions, lease provisions, grievances (including eviction), and demolition. In the litigation category, there is a large PHA-tenant interface, in addition to the relationships PHAs have with HUD. Part IV proposes public housing reform, concluding that an effective reform of public housing would require less federal oversight and greater privatization in public housing.

## II. PUBLIC HOUSING POLICY

Assuming that the premise of a decent, safe, and sanitary home for every American continues to be a proper legislative goal, this Article proposes that we return to the fundamentals of the basic landlord-tenant relationship for management of public housing. In this regard, public housing policy should view public housing as a subset of the landlord-tenant relationship, in which the primary distinction is that the government, rather than a private owner, is the landlord. The Article also proposes that we reaffirm the policy of the Housing Act of 1937 to vest in local PHAs the responsibility for managing the public

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U. CHI. L. REV. 497, 500-01 (1993).

29. HUD EXECUTIVE SUMMARY, *supra* note 2, at 1-2.

housing stock or otherwise funding local recipients of aid, thus maintaining local control.<sup>30</sup> To the extent that public housing policy seeks to redistribute wealth through measures such as subsidizing the rent burden on eligible households, meeting the housing needs of the local community must be the primary goal.<sup>31</sup>

Under the current structure, however, public housing assistance is viewed as “primarily a social welfare program.”<sup>32</sup> The goals have become divorced from the relatively simple prospect of providing a decent, safe, and sanitary home for persons of low-income. Today, there are eight goals for federal housing policy: (1) “reduc[ing] . . . the amount of physically inadequate housing;” (2) “reduc[ing] crowding;” (3) “reduc[ing] the financial burden of housing;” (4) “promoting economic and racial integration;” (5) “encourag[ing] home ownership;” (6) “promot[ing] neighborhood revitalization, preservation and community development;” (7) “increas[ing] the supply of housing tailored to the needs of particular groups such as the aged and the needy;” and (8) “increas[ing] and stabiliz[ing] residential construction.”<sup>33</sup>

To reduce the financial burden of housing, for example, Congress provided that households should not spend more than 25% of their income on housing.<sup>34</sup> In 1992, about 4.7 million households received

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30. 42 U.S.C. § 1437f (creating local housing authorities to operate public housing projects).

31. Public housing policy should be aligned with public housing management in two respects. First, where the primary concern is the landlord-tenant relationship, the management issues should be due process and fairness when the government is the landlord. Second, when the concern is low-income housing subsidies, the management issues should be funding and accountability.

32. M.H. Hoeflich & John E. Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629 (1987) (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965)).

33. Henry J. Aaron, *Policy Implications: A Progress Report*, in DO HOUSING ALLOWANCES WORK? 67, 70-76 (Katharine L. Bradbury & Anthony Downs eds., 1981).

34. *Id.* at 72. This notion originated in the Housing Act of 1965 when Congress created the Rent Supplement Program. Schill, *supra* note 28, at 505. This was the first program geared toward individual family needs; it established that eligible tenants would pay no more than 25% of their income for rent and a flexible federal subsidy would cover the difference. *Id.* Such a concept was continued with the Section 8 Existing Housing Program. This percentage was increased to 30% with the Section 8 Existing Housing Certificate Program. *Id.* at 525 (citing 42 U.S.C. § 1437f(b) (1988)).

federal rental assistance.<sup>35</sup> HUD estimated that another 13 million qualified households did not receive rental assistance because of a funding shortfall.<sup>36</sup>

When the federal government becomes involved in allocating funds, there is an unavoidable problem of how to make the allocations among the states or communities.<sup>37</sup> In addition to the substantive housing goals mentioned above, housing policy is currently motivated by the same methodological goals that are generally applicable to most government programs, including efficiency, vertical equity, and horizontal equity.<sup>38</sup>

Defederalization of housing management could lead to different treatment of housing by each state.<sup>39</sup> This move away from universal standards and policies would require a change in thinking as well as a change in management practices—not a new way of thinking, but a return to the pre-*Lochner* federalism,<sup>40</sup> which encouraged states and cities to be laboratories for solving local problems, and which allowed changes in their programs to occur in response to local needs.<sup>41</sup> Community Development Block Grant (CDBG) funding operates under this idea on a superficial level;<sup>42</sup> however, there are still many

35. Stephen B. Kinnaird, Note, *Public Housing: Abandon HOPE, But Not Privatization*, 103 YALE L.J. 961, 973 (1994).

36. *Id.*

37. See Penny Loeb, *Waste, Fraud & Abuse*, U.S. NEWS & WORLD REP., Mar. 27, 1995, at 26. Under the block grant program, HUD allocates funds based on the poverty level and condition of housing in a community. *Id.*

38. Schill, *supra* note 28, at 539. Schill notes that the achievement of horizontal equity would require that all those eligible receive a subsidy, i.e. that housing assistance become an entitlement, and that “vertical equity provides that the neediest should derive the greatest benefits.” *Id.* at 539.

39. Hoeflich & Thies, *supra* note 32, at 633.

40. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*.”).

41. *Id.*

42. Hoeflich & Thies, *supra* note 32, at 630-31. In this article, the authors argue in favor of using Community Development Block Grant (CDBG) funding for all public housing needs rather than retaining housing policy almost exclusively at the federal level. *Id.* at 633, 635. Under the federal perspective, public housing authorities are generally little more than local offices for HUD that act solely in response to federal programs. The better perspective, according to the authors

strings attached to the funding.<sup>43</sup>

Federal funding should be divorced from any national housing goals. Allocation of funds should not occur on the basis of a national standard of eligibility, or on the basis of the needs of the housing stock or the operating costs of the PHAs. Supply-side or demand-side program rules should not determine allocation policies, nor should there be any national housing standards. Housing decisions should be left to the states.<sup>44</sup> There should be no HUD field or regional offices for providing technical assistance or oversight.<sup>45</sup> In exchange for a per capita allocation adjusted for local economic conditions, HUD's only role should be to maintain a set of accounting and auditing guidelines to measure the use of the funds.<sup>46</sup>

These recommendations can be understood only in the context of the histories of public housing policy and management, which are the subjects of the remainder of this Part and Part III. Part IV of this Article suggests the mechanics of housing reform.

#### A. *Relationship to State Landlord-Tenant Law*

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"views housing assistance as a part of economic development." *Id.* at 633. Such a perspective is better suited to local decisionmaking.

Hoeflich and Thies further argue that, under the CDBG Program, "[s]tates and municipalities must assume a primary role in all aspects of the subsidized housing market including initiating, financing, and operating housing projects and must not act solely in response to federal programs." *Id.* at 633-34. Local authorities would be responsible for allocation and disbursement decisions for CDBG-provided funds. *Id.* at 633 n.31 (citing Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974); Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (1977); 14 Hous. & Dev. Dev. Rep. (BNA) 914 (Apr. 6, 1987)). Because local authorities are better equipped to assess local housing needs, this scheme more ably implements the "goal of providing every American with adequate housing." *Id.* at 647.

43. See *infra* Part IV for a review of four block grant models.

44. For example, one municipality could use their allocation strictly for income maintenance and have no requirement for housing standards. Another PHA could develop, operate and maintain public housing units for low-income families. Yet another could operate public housing only for the elderly and handicapped, while providing housing vouchers to low-income families for use in obtaining housing in the private sector.

45. *But see* Jeffrey L. Katz, *Members Pushing to Retain Welfare System Control*, 53 CONG. Q. WKLY. REP. 280 (1995) (noting that although Republican governors want flexibility to operate their state welfare programs, many members of Congress, including some Republicans, want to retain power to establish goals and control use of funds).

46. See *infra* note 510-11 and accompanying text for a discussion of proposals to change HUD in this respect.

The United States Housing Act of 1937<sup>47</sup> did not interfere with the common law landlord-tenant relationship. The Act's goal was to improve housing conditions by providing federal funding to local housing authorities.<sup>48</sup> The Act gave PHAs the responsibility for development and management of public housing. This response followed court decisions which limited the federal government's ability to acquire land for subsidized housing on the ground that housing was not a public purpose under the Takings Clause.<sup>49</sup> However, in *City of Cleveland v. United States*,<sup>50</sup> the Supreme Court held that the Housing Act, which provided for the use of federal funds and credit to improve housing conditions, was a valid exercise of Congress' power to provide for the general welfare under the Commerce Clause.<sup>51</sup>

The federal government established six major housing-related organizations between 1932 and 1947: the Federal Home Loan Bank Board (FHLBB), the Federal Savings and Loan Insurance Corporation (FSLIC), the Federal Housing Administration (FHA), the Federal National Mortgage Association (FNMA), the home financing division of the Veteran's Administration, and the Housing Home Finance

47. See *supra* note 19.

48. In addition to improving housing conditions, the funds were also to be used for slum clearance, requiring that a unit of slum housing be eliminated for each new unit of public housing. See Harold A. McDougall, *Affordable Housing for the 1990s*, 20 U. MICH. J.L. REF. 727, 763 (1987). This was a political bargain struck with the housing construction industry, which opposed the government's entry into the market. *Id.* at 763 n.181.

49. Schill, *supra* note 28, at 499 n.12 (citing *United States v. Certain Lands in Louisville*, 78 F.2d 684 (6th Cir.), *cert. granted*, 296 U.S. 567 (1935), *appeal dismissed*, 297 U.S. 726 (1936)). However, "state courts had already decided that states and localities could constitutionally use their powers of eminent domain to provide low-cost housing." *Id.* (citing *New York City Hous. Auth. v. Muller*, 1 N.E.2d 153, 156 (N.Y. 1936) for the proposition that the creation of state housing authorities was within the police power of the states since they were intended to "protect and safeguard the entire public from the menace of the slums").

50. 323 U.S. 329 (1945).

51. The *City of Cleveland* decision followed the landmark case of *Helvering v. Davis*, 301 U.S. 619 (1935), in which the Supreme Court considered the scope of the Spending Clause in Article I, Section 8 of the United States Constitution. In considering the constitutionality of the Social Security Act, the *Helvering* Court adopted the Hamiltonian view of the Constitution, i.e. that the grant of power to Congress to spend for the general welfare was broad, and not narrowly limited to specific and enumerated powers as was argued by Jefferson and Madison. See John R. Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 249, 251-52 (1982).

Agency (HHFA).<sup>52</sup> In 1947 these housing programs were consolidated under HUD's predecessor, the HHFA.<sup>53</sup> The Department of Housing and Urban Development Act<sup>54</sup> raised the HHFA to the cabinet level as the Department of Housing and Urban Development in 1965.<sup>55</sup> Through these changes, federal participation in housing decreased.<sup>56</sup> Over the same period, the relative incomes of housing beneficiaries have fallen.<sup>57</sup>

As discussed in Part III.B, the landlord-tenant relationship in public housing projects changed as state courts began to recognize tenants' due process rights.<sup>58</sup> However, the landlord-tenant relationship also was changing outside of the context of state action. Statutory eviction laws provided landlords with a speedy remedy to

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52. McDougall, *supra* note 48, at 734.

53. *Id.* at 735.

54. Pub. L. No. 89-174, § 3, 79 Stat. 667 (1965) (codified at 42 U.S.C. § 3531 (1994)).

55. McDougall, *supra* note 48, at 735 n.34.

56. *Id.* at 757.

The gradual withdrawal of the government from subsidized housing for lower income groups has taken place over thirty years. From public housing to subsidized housing, from direct loans to mortgage amortization, from payments to landlords to payments to tenants, from long-term subsidy contracts (fifteen years) to short-term subsidy contracts (three to five years), the pattern has been clear. The government has withdrawn first from construction, then from lending, and finally from regulation.

*Id.* As the form of government subsidies have changed, so has housing management. The federal government's role has gone from banker to overseer.

57. See Schill, *supra* note 28, at 519. Initially, "public housing was designed for the 'submerged middle class' that had been dislocated during the Great Depression and would soon be on its feet again." *Id.* at 510 (citing Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642, 646 (1966)). The 1949 Housing Act gave preferences to two groups of applicants: the very poor that would be displaced by slum clearance programs and returning World War II veterans. *Id.* at 511. PHAs also were required to establish income ceilings to discourage moderate income households from remaining in public housing. *Id.* The Housing and Community Development Act of 1974 required PHAs to "establish tenant selection criteria 'to assure that, within a reasonable period of time, the project [would] include families with a broad range of incomes and [would] avoid concentrations of low-income and deprived families with serious social problems . . . .'" *Id.* at 512 (quoting the Housing and Community Development Act of 1974 § 201(a)). The Housing Act of 1981 represented an even stronger congressional declaration that "public housing should be almost exclusively devoted to those who earn the lowest incomes." *Id.* at 513. Since 1983, these targeting requirements have become less stringent. *Id.*

58. See *infra* notes 325-427 and accompanying text for a detailed discussion of litigation under landlord-tenant law.

recover possession without the use of force.<sup>59</sup> Early eviction laws were written in the context of a largely rural society and did not address concerns of apartment dwellers who had little interest in the land itself.<sup>60</sup> For example, at common law, there was no obligation of the landlord to repair.<sup>61</sup> The rules of constructive eviction evolved as a means to absolve the tenant of the duty to pay rent when the premises were unfit for habitation.<sup>62</sup>

The “revolution”<sup>63</sup> in landlord-tenant law is symbolized by two products. First, the 1970 opinion of Judge Skelly Wright in *Javins v. First National Realty Corp.*,<sup>64</sup> marked a change from viewing the residential lease as an interest in property to viewing it as a contract.<sup>65</sup> This change recognized a warranty of habitability and a dependency of covenants between the landlord and the tenant.<sup>66</sup> The implied warranty of habitability found in *Javins* incorporated into rental leases the requirements of local building codes and the policy choices on which they were based.<sup>67</sup> Thus, the *Javins* court read the housing codes into the lease contract and held that these duties could not be waived or shifted by agreement.<sup>68</sup> By adopting the view that a lease is a

59. See Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 772-80 (1994) (discussing the history and evolution of eviction law); see also *Lindsey v. Normet*, 405 U.S. 56, 71 (1971).

60. *Lindsey*, 405 U.S. at 86-87 (Douglas, J., dissenting).

61. *Id.* at 86, 87 n.12 (“While [a tenant] was not to commit ‘waste’—destruction of the property that would leave it in less productive condition than when he rented it—the owner owed him no obligation to assist in maintaining his buildings in a livable or decent condition.”).

62. *Id.* at 86.

63. For a discussion of whether there was in fact a revolution and the nature of these changes, see *Edited Transcript of Proceedings of the Liberty Fund, Inc. Seminar on the Common Law History of Landlord-Tenant Law*, 69 CORNELL L. REV. 623 (1984) [hereinafter *Liberty Fund Transcript*].

64. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

65. *Id.* at 1075.

66. *But see Lindsey*, 405 U.S. 56 (finding no due process violation when a state statute maintained independence of covenants).

67. *Javins*, 428 F.2d at 1081-82.

68. *Id.* Some commentators have viewed this finding of implied warranty of habitability as dicta, because the District of Columbia previously had enacted the warranty into its housing

contractual relationship, contract remedies, such as damages, reformation, and rescission, became available.<sup>69</sup>

The second product of the revolution in landlord-tenant law was the enactment of the Uniform Residential Landlord and Tenant Act ("Uniform Act").<sup>70</sup> Section 2.104 of the Uniform Act creates the landlord's duty to maintain the premises.<sup>71</sup> Specifically, the landlord must "comply with . . . applicable building and housing codes materially affecting health and safety";<sup>72</sup> "make all repairs . . . necessary to put and keep the premises in a fit and habitable condition";<sup>73</sup> and maintain utilities "in good and safe working order."<sup>74</sup> Although states have not been uniform in either their recognition of an implied warranty of habitability, or in adoption of the Uniform Act,<sup>75</sup> all have provided additional tenant's remedies in some form.<sup>76</sup>

The federal housing laws do not preempt state landlord-tenant laws. For example, whether the landlord or the tenant has breached the terms of the lease agreement is a matter of state law.<sup>77</sup> In addition, state law controls the issue of whether a landlord of a public housing project has waived a breach of the lease by accepting rent payments from the tenant.<sup>78</sup>

State law actions brought by tenants are most typically for breach

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regulations. *See, e.g., Liberty Fund Transcript, supra* note 63, at 647-48. Nonetheless, other courts have adopted Judge Wright's reasoning and found an implied warranty. *See, e.g., Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978) (holding that there is an implied warranty of habitability by a landlord in a rental lease for a specified time or at will).

69. *Javins*, 428 F.2d at 1075 ("Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.")

70. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 427 (1972).

71. *Id.* § 2.104.

72. *Id.* § 2.104(a)(1).

73. *Id.* § 2.104(a)(2).

74. *Id.* § 2.104(a)(4).

75. The following states have adopted the 1972 Act: Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia. *See* 7B U.L.A. 63 (1972 & Supp. 1996).

76. *See, e.g., TEX. PROP. CODE ANN.* § 92.052, §§ 92.056-.0561 (West 1996).

77. *See, e.g., Dunbar Hous. Auth. v. Nesmith*, 400 S.E.2d 296, 298-99 (W. Va. 1990).

78. *Id.*

of lease agreements and for unlawful detainer or ejection. Where there is a statutory duty to repair, in lieu of seeking judicial remedies the tenant may elect to repair an unremedied condition and deduct the cost of the repair from a subsequent rent payment, subject to certain limitations.<sup>79</sup> In addition, some local ordinances authorize tenants to deposit rental payments in an escrow account until the landlord has brought the premises into compliance with city building codes. Courts have found these ordinances consistent with landlord-tenant eviction procedures, and not violative of the due process rights of landlords.<sup>80</sup>

State eviction laws usually require a landlord to serve a notice to vacate, or notice to quit, before instituting an eviction proceeding in court.<sup>81</sup> Similarly, federal law requires PHAs to give “adequate written notice” when terminating a public housing tenant’s lease.<sup>82</sup> Provided the state law notice procedure does not interfere with the federally-required notice of lease termination, or abridge a tenant’s federal right to a grievance hearing, federal law does not affect the time when state law notice may be given.<sup>83</sup> When a tenant has requested a grievance hearing, a landlord may not institute state court eviction proceedings until the PHA panel decides the grievance.<sup>84</sup>

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79. See, e.g., TEX. PROP. CODE ANN. §§ 92.056-.0561 (West 1996). For example, a tenant may deduct the cost of repair or remedy from a subsequent rent payment so long as the amount deducted does not exceed one month’s rent. *Id.* § 92.0561(b). Before making any repairs, the tenant must also notify the landlord of his intention to do so. *Id.* § 92.0561(d)(2). The statute also limits the type of conditions that a tenant may repair and be entitled to deduct subsequent rent payments. *Id.* § 92.0561(d)-(e).

80. See, e.g., *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505 (Wis. 1977).

81. Gerchick, *supra* note 59, at 832.

82. 42 U.S.C. § 1437d(l)(3) (1994).

83. HUD regulations provide that “[a] notice to vacate which is required by State or local law may be combined with, or run concurrently with, a [federally-required] notice of lease termination.” 24 C.F.R. § 966.4(l)(3)(iii) (1996). Furthermore,

[w]hen the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination . . . , the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

*Id.* § 966.4(l)(3)(iv).

84. See 24 C.F.R. § 966.51(a)(2)(i); *Dunbar*, 400 S.E.2d at 298 (“[A] tenant in [a public housing] project is entitled to timely notice of termination of the lease and a right to a grievance

The judicial procedures of state forcible entry and detainer ("FED") or ejectment statutes are reviewable for due process violations by federal courts.<sup>85</sup> Three issues exist in an FED suit: physical possession, forcible withholding, and legal right to possession. In *Lindsey v. Normet*,<sup>86</sup> the Supreme Court found that Oregon's summary eviction procedures, which required trial no later than six days after service of the complaint unless a tenant provided security for accruing rent, were sufficient for due process purposes.<sup>87</sup> Furthermore, provisions in the Oregon FED statute, which barred the tenant from raising claims against the landlord for failure to maintain the premises, did not deny a tenant due process because the tenant was not foreclosed from instituting his own action against the landlord and litigating his right to damages.<sup>88</sup>

Treating the actions of the landlord and those of the tenant as independent rather than dependent covenants, the Court in *Lindsey* held that courts may segregate actions for possession of property from other actions arising from the same factual situation.<sup>89</sup> Other states have allowed tenants to raise affirmative defenses such as breach of an implied warranty of habitability in an FED action.<sup>90</sup> In addition, some courts have held that the eviction procedures of the Uniform Residential Landlord and Tenant Act provide public housing tenants with all the required elements of due process prior to termination of the tenancy.<sup>91</sup>

Generally, public housing tenants bring state law actions for individual complaints; however, where there are questions involving

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hearing by a panel selected by the parties. Until the panel decides the grievance, the landlord may not institute eviction proceedings.").

85. *Lindsey*, 405 U.S. 56.

86. *Id.*

87. *Id.* at 64.

88. *Id.* at 65.

89. *Id.* at 67.

90. *See id.* at 69.

91. *See, e.g.,* Housing Auth. of Lincoln v. Wolfe, 324 N.W.2d 891, 893 (Neb. 1982); Spence v. Reeder, 416 N.E.2d 914 (Mass. 1981).

common and general interests, these tenants have been able to maintain class actions in state courts against PHA landlords.<sup>92</sup> However, when there are systematic and classwide grievances by public housing tenants against a PHA, the tenants have generally sought a remedy in federal court. Part III.B of this Article discusses these procedures.

### B. Housing Assistance Programs

Aside from the question of whether the federal government or the state has ultimate sovereignty over the issue, the fundamental policy question of public housing is: what level and what means of government involvement or assistance are appropriate? The options include: the current standards approach to government-provided housing,<sup>93</sup> a market-based approach to government-provided housing,<sup>94</sup> construction subsidies from government to the private sector,<sup>95</sup> tax incentives to the private sector,<sup>96</sup> demand subsidies from the government to recipients,<sup>97</sup> or privatization of all housing services.<sup>98</sup> In resolving the issue of government involvement, one must make a tradeoff between housing quality and income maintenance.

92. See, e.g., *Scarborough v. Elmira Hous. Auth.*, 358 N.Y.S.2d 861 (N.Y. Sup. Ct. 1974).

93. Direct housing production by the government is a supply-side technique that attempts to regulate the quality of housing.

94. "Structural subsidies" such as mortgage title insurance and secondary mortgage programs were direct grant programs administered by federal agencies established for this purpose. Hoeflich & Thies, *supra* note 32, at 637.

95. Construction subsidies are forms of indirect funding aimed at increasing the housing supply. *Id.* at 634-35.

96. *Id.* See generally Stuart C. Johnson, Note, *Multi-Family Housing Bonds: Can the Tax Code Provide an Efficient and Effective Low-Income Housing Program?*, 5 VA. TAX REV. 497 (1986).

97. A voucher system allows public housing tenants to choose housing locations and qualities.

98. See Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990) [hereinafter Schill, *Privatizing*]; Kinnaird, *supra* note 35. Kinnaird states that "[t]hree privatization strategies should be pursued: (1) simulated privatization, in the form of conversion of federal subsidies to a payment system based on fair-market rents; (2) statutory reform permitting asset-maximizing disposition of current public housing properties; and (3) direct privatization of economically unviable projects to the highest bidder." *Id.* at 989.

Another related question is to what extent should we place conditions on the subsidy that respect the desires of the donors (i.e. the taxpayers)? Should we earmark or otherwise condition cash assistance so that it must be spent on housing? In addition, should we condition housing assistance on achieving a particular standard of housing quality?

Housing programs are generally viewed as supply-oriented<sup>99</sup> or demand-oriented.<sup>100</sup> Supply-oriented programs are designed to increase the supply of housing directly through government or government-induced (i.e. subsidized) building.<sup>101</sup> Demand-oriented programs indirectly increase the housing supply by providing funds to housing assistance recipients who stimulate demand through their purchasing power.<sup>102</sup>

Traditionally, American housing subsidies have been supply-oriented.<sup>103</sup> Builders constructed new units or rehabilitated existing units based on government incentives that assured them a fair rate of return.<sup>104</sup> This supply-oriented philosophy was embodied in the programs for low-rent public housing,<sup>105</sup> Section 236 rental assistance,<sup>106</sup> Section 235 homeownership assistance,<sup>107</sup> and Section 8

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99. Schill, *supra* note 28, at 524. Supply-side policies have included "direct government construction (public housing), direct governmental loans [12 U.S.C. § 1401q], assistance in debt service ([12 U.S.C. §§ 17152, 17152-1], and below market interest rates secured by federal insurance or guarantees [12 U.S.C. § 17151(d)(5)]." McDougall, *supra* note 48, at 742.

100. Schill, *supra* note 28, at 524. Demand-oriented techniques include tax deductions for mortgage interest, rental assistance payments in the form of direct cash transfer payments for lower income persons, and rent supplements to project managers of projects built pursuant to a supply-oriented project under § 236 of the 1968 Housing and Urban Development Act, 12 U.S.C. § 1715z-1 (1994).

101. Schill, *supra* note 28, at 524.

102. *Id.*

103. Aaron, *supra* note 33, at 87.

104. *Id.*

105. Low-rent public housing is "housing constructed and operated by local Public Housing Authorities." RAYMOND STRUYK, A NEW SYSTEM FOR PUBLIC HOUSING 3 (1980).

106. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476, 498 (codified as amended at 12 U.S.C. § 1715z-1 (1994)). The Section 236 rental assistance program had both a supply and a demand component. Under the supply component of the program, the private developer was provided an interest subsidy on the mortgage in return for an agreement to charge rents that were below-market. *Id.* See also Nolon, *supra* note 51, at 255. For discussion of the

new construction and substantial rehabilitation.<sup>108</sup>

Congress began shifting from supply-oriented housing programs to demand-oriented programs from 1974 to 1990.<sup>109</sup> These demand-oriented programs included the Section 8 existing housing rental assistance programs,<sup>110</sup> consisting of housing certificates<sup>111</sup> or housing vouchers,<sup>112</sup> and the Section 236 rental assistance program.<sup>113</sup> One

demand component, see *infra* note 113.

107. The Section 235 homeownership assistance program made subsidies available to lower income families to purchase homes. Congress created this program as part of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 235, 82 Stat. 476, 477 (codified as amended at 12 U.S.C. § 1715z (1994)). McDougall, *supra* note 48, at 742 n.76.

108. The Section 8 new construction and substantial rehabilitation program was a supply-oriented approach initiated with the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633, 662 (codified as amended in scattered sections of 12 and 42 U.S.C.). Communities applying for community development block grant funding were required to develop a Housing Assistance Plan (HAP), through which HUD reviewed developers' applications and allocated subsidies. Nolon, *supra* note 51, at 256.

109. Schill, *supra* note 28, at 525.

110. The Existing Section 8 Programs gave local public housing agencies set-asides of Section 8 funds to subsidize the rents of tenants in existing housing that met local housing standards. Under this program, the PHA became the vehicle through which applications were made to HUD for rent subsidies and moderate rehabilitation of existing housing. Nolon, *supra* note 51, at 256.

111. Schill, *supra* note 28, at 525.

[T]he Section 8 Existing Housing Certificate Program, provides participating households with certificates enabling them to rent homes from private landlords. If the homes meet minimum quality standards and do not cost more than the federally prescribed maximum "fair market rent" ("FMR"), households participating in the program pay no more than thirty percent of their income in rent; the federal government pays the balance.

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The fair market rent ceiling is the forty-fifth percentile of rents charged for existing residences in a given local market area.

*Id.* at 525 & n.171 (footnotes omitted).

112. The Section 8 Voucher Program enables participating tenants to obtain a subsidy to cover the difference between thirty percent of their income and their local prevailing FMR. *Id.* at 525. Under the voucher program, the government pays a fixed subsidy. Tenants whose rents are below the FMR may retain part of the subsidy, while tenants whose rents exceed the FMR must spend more than 30% of their income on rent. *Id.* at 526.

For the funding provisions of the Section 8 Voucher Program, see the Housing and Urban-Rural Recovery Act of 1983, 42 U.S.C. § 1437f(o) (1994).

113. The Section 236 program had both a supply and a demand component. See *supra* note 106. Under the demand component, the program benefited families whose incomes exceeded public housing eligibility limits. Nolon, *supra* note 51, at 255. For a discussion of the supply component, see *supra* note 106.

commentator has argued that demand-oriented programs have more beneficial market effects and are more cost-effective than supply-oriented programs.<sup>114</sup> Demand-oriented subsidies also provide more consumption choices,<sup>115</sup> and thus tend to discourage the concentrated poverty that has resulted from many supply-oriented programs.<sup>116</sup>

Public housing programs vary considerably in cost. Constructing public housing (a supply-oriented subsidy) costs far more than providing equivalent housing through housing allowances (a demand-oriented subsidy).<sup>117</sup> Neither of these programs, however, can provide housing as efficiently as the private market.<sup>118</sup> The private market is more efficient than construction subsidies primarily because the latter leads to excessive production costs. The private market also is more efficient than housing allowances because the latter is ineffectively earmarked for housing expenses. Failure to earmark such funds permits allowance recipients to use the funds for purposes other than housing.<sup>119</sup>

Cost efficiency and economic efficiency are not necessarily synonymous.<sup>120</sup> Economists generally view direct, unconstrained income transfers as the most economically efficient means of providing welfare benefits.<sup>121</sup> In contrast, economists generally view earmarked

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114. Kinnaird, *supra* note 35, at 984.

115. Schill, *supra* note 28, at 530-31 (“One of the major advantages of demand-oriented subsidies is that they permit households to choose their preferred neighborhoods rather than limiting their choices to communities already containing subsidized housing.”).

116. *Id.* at 531.

117. Aaron, *supra* note 33, at 89.

118. *Id.* at 105-06. *See also* Kinnaird, *supra* note 35, at 970-71 (stating that under the privatization theory, a private landlord’s “pursuit of self-interest is consonant with consumer needs and efficient investment in the housing stock”). There is empirical evidence that PHAs incur substantially higher costs than private housing suppliers. *Id.* at 972 & n.89 (noting a 1982 study which found that conventional public housing construction cost 40% more per unit, or 56% more per square foot, than unsubsidized housing).

119. Aaron, *supra* note 33, at 104.

120. Economic efficiency does not correspond to low cost or high value for the funder, but rather to a condition of equilibrium in the transaction for society as a whole.

121. Aaron, *supra* note 33, at 86 (“[I]f society were deciding whether to spend a given sum on housing allowances or on unrestricted cash assistance, it should choose unrestricted cash assistance.”).

housing subsidies and other in-kind transfer programs as relatively inefficient. Earmarked subsidies are less efficient than income transfers because such subsidies often exceed recipients' necessary housing costs.<sup>122</sup> In-kind transfer programs are also less efficient than income transfers because of the higher administrative costs associated with in-kind transfers.<sup>123</sup>

While housing allowance subsidies may contribute to economic inefficiency, they also provide a social benefit unavailable from direct income transfers.<sup>124</sup> Housing allowance subsidies can help ensure that aid recipients will receive the particular benefit that society intended to grant to them—adequate housing. Construction-linked housing programs similarly assure that allocated funds will serve their intended purpose.<sup>125</sup>

In addition to encouraging proper use of housing-allocated funds, construction-linked housing programs generate new residential building. Such building adds standard units to the housing stock and removes substandard units.<sup>126</sup>

Construction-linked subsidies are nevertheless constrained by the requirement that they meet federal housing standards.<sup>127</sup> The rationales for such requirements include maintaining property values and protecting occupants from hazardous conditions.<sup>128</sup> Government intervention in the housing market may, therefore, be justified by the problem of substandard housing. The housing policy question is whether the federal government should insist the poor spend more on improving their housing than they would if simply given more income.

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122. *See generally id.* at 78 (using examples to show that earmarked subsidies often exceed recipients' housing needs).

123. *Id.* at 83.

124. *Id.* at 79.

125. Aaron, *supra* note 33, at 88.

126. *Id.*

127. *Id.* at 89.

128. *See* Anthony Downs & Katharine L. Bradbury, *Conference Discussion, in* DO HOUSING ALLOWANCES WORK?, *supra* note 33, at 375, 383-84. Although Downs and Bradbury discuss the national standards of the Housing Allowances Experiment, the rationales apply to any housing standard, including local building codes.

Congress has tested the viability of housing allowances by establishing the Experimental Housing Allowance Program (“EHAP”).<sup>129</sup> Unlike income maintenance programs, housing allowance programs must satisfy housing quality standards.<sup>130</sup> While twenty percent of all U.S. households are eligible for a housing allowance program, not all eligible households are likely to enroll.<sup>131</sup> The EHAP study identified an apparent trade-off between the stringency of housing standards and the extent of participation in the housing allowance program—as housing standards increased, participation in the housing allowance program decreased.<sup>132</sup> The effect of providing allowances with no quality standards, however, is to raise the incomes of the participants without greatly improving their housing or removing substandard housing units.<sup>133</sup> In that case, the allowance program becomes purely income maintenance.<sup>134</sup> Further, the study found that “the poorest-quality housing units were not always occupied by the poorest households.”<sup>135</sup> In some cases, the differences between standard and substandard housing seemed trivial.<sup>136</sup> In fact, most commentators agree that the major housing problem for low income households today is affordability, not quality.<sup>137</sup>

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129. Congress authorized the Experimental Housing Allowance Program (“EHAP”) “to demonstrate the feasibility of providing families of low income with housing allowances to assist them in obtaining rental housing of their choice in existing standard housing units.” Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 504, 84 Stat. 1770, 1786 (codified as amended at 12 U.S.C. § 1701z-3 (1994)).

130. Mahlon R. Straszheim, *Participation*, in *DO HOUSING ALLOWANCES WORK?*, *supra* note 33, at 113, 114.

131. Garland E. Allen et al., *The Experimental Housing Allowance Program*, in *DO HOUSING ALLOWANCES WORK?*, *supra* note 33, at 1, 21, 24.

132. Downs & Bradbury, *supra* note 128, at 376.

133. Allen, *supra* note 131, at 27-28.

134. Downs & Bradbury, *supra* note 128, at 382-83.

135. *Id.* at 379-80.

136. *Id.* at 382 (noting that a substandard classification could result from the absence or poor condition of a stairway handrail, or from having windows smaller than the required minimum size).

137. Schill, *Privatizing*, *supra* note 98. *But see* Straszheim, *supra* note 130, at 113-14 (“[T]he great majority of low-income households are paying a large fraction of their incomes for housing, and . . . many live in housing that is crowded or has deficiencies in quality.”).

In analyzing the success of the EHAP, one reviewer found that housing allowances are at least as effective as existing construction-related subsidies in promoting the national housing objectives.<sup>138</sup> The major exception may be in assuring an adequate supply of housing for target groups, such as the elderly and handicapped.<sup>139</sup>

Tax-exempt bond financing is another supply-side incentive program.<sup>140</sup> While bond programs benefit low-income housing consumers by increasing the supply, and thereby decreasing the price, of low-income housing, they are less efficient than a direct subsidy because the benefit of the tax-exemption accrues primarily to private developers.<sup>141</sup> Tax-exempt bond financing may nevertheless be preferable to a tax credit program.<sup>142</sup>

Full privatization is the zero-government management option.<sup>143</sup> However desirable that notion may be,<sup>144</sup> it is unlikely to happen in the

The EHAP findings further suggest that “demand-oriented subsidies are an effective and efficient mechanism for delivering housing services to low-income households . . . when the primary objective of the subsidy is to make housing more affordable” and that “housing allowances did not [inflate] the price of existing housing stock.” Schill, *Privatizing*, *supra* note 98, at 909.

138. Aaron, *supra* note 33, at 94.

139. *Id.*; but see *id.* at 103 (noting that allowance payments may help certain target group homeowners retain their current housing and avoid becoming renters).

140. See generally Johnson, *supra* note 96 (discussing tax-exempt bond financing under § 103(b)(4)(A) of the Internal Revenue Code). In the context of tax-exempt bond financing, a supply-side incentive means “seeking to improve the well-being of one society segment by providing production incentives through preferential tax treatment to another society segment.” *Id.* at 506 n.75.

141. *Id.* at 506. The issuance of tax-exempt bonds under § 103(b)(4)(A) would serve two public purposes. First, the bonds would indirectly provide housing for needy persons. *Id.* at 512. Because low-income housing is not uniformly available in the United States and because local approval of bond issuances is mandatory, states and local governments could have the flexibility of allocating offerings based on the housing needs in a particular community. *Id.* Second, these bonds would stimulate housing investment, increase employment, and expand the local tax base. *Id.*

142. *Id.* at 517-18 (noting that the benefits of a tax credit program would be lost on low income housing consumers who either failed to earn enough income to utilize the credit or failed to realize that the credit existed).

143. “Privatization typically refers to the shift of functions from the state to the private sector [but] need not result in a reduction in government expenditure for social services.” Schill, *Privatizing*, *supra* note 98, at 881 (footnotes omitted).

144. See generally Kinnaird, *supra* note 35, at 995 (advocating “opening low-income housing to market forces through efficiently-driven privatization”). With privatization, landlords could transfer their rights in the housing asset and fully recover its value. Therefore, landlords

near future given the abundant supply of public housing stock.<sup>145</sup> Further, the policy debate over income maintenance versus housing quality is ongoing. For the time being, housing policy will continue to have a significant element of government involvement. The proposal that HUD make public housing a market-based operation may be the right approach from a policy perspective,<sup>146</sup> but it must not fail to address the management component of housing if it is to have any real impact.

### III. PUBLIC HOUSING MANAGEMENT

Although public housing was conceived as a local housing program, in the past two decades HUD has issued a vast body of detailed regulations governing every aspect of PHA operations,<sup>147</sup> thus responding to both its expanded role and to congressional directives to increase federal oversight. As a result, public housing has evolved into a rigid and bureaucratic system.<sup>148</sup> Overcentralization and rigid HUD regulations prevent flexibility and change.<sup>149</sup>

A PHA is any state or local governmental entity “authorized to engage or assist in the development or operation of low-income housing.”<sup>150</sup> In a typical case, a board of commissioners appointed by

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would have incentives to maximize the asset’s profitability over the long term. In addition, competition would drive them to use the least-cost combination of inputs in producing a given level of output. *See generally id.* at 970-974 (discussing the application of privatization theory in the public housing context).

145. There are roughly 1.4 million units of public housing in over 10,000 developments. Schill, *supra* note 28, at 500-01. These properties could be sold to private landlords. Kinnaird, *supra* note 35, at 994. However, there is no market for the sale of individual units, and multi-family units are generally unsuitable for the private market, which favors single family homes. *Id.* at 962-63.

146. Kinnaird, *supra* note 35, at 995 (arguing that HUD should implement a market-based subsidy system for public housing, free PHA’s to maximize the value of public housing assets by sale to the highest bidder, and urge “troubled” housing authorities to privatize their most costly properties).

147. *Public Housing Demographics* (a working paper prepared for the CLPHA/NAHRO/PHADA public housing research project) (Oct. 1992) (on file with authors).

148. *Id.*

149. *Id.*

150. 24 C.F.R. § 5.100 (1996).

the mayor and city council of a given jurisdiction govern the PHA.<sup>151</sup>

To receive federal funding, a PHA must have both the legal authority and the local cooperation required for developing, owning and operating a public housing project under the Housing Act of 1937.<sup>152</sup> A PHA must demonstrate to the HUD field office that it has the required legal authority by providing documentation showing that it was created pursuant to a state housing authority law.<sup>153</sup> “Local cooperation” is a term that describes the requirement that a PHA have the local government’s cooperation, including property tax exemption and favorable treatment in providing public services and facilities.<sup>154</sup>

Although national housing policy claims “to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs,”<sup>155</sup> in practice, the detailed requirements of HUD regulations and the layers of governmental review and oversight prevent the exercise of much discretion by the PHA. The terms of an “Annual Contributions Contract” (ACC) govern the relationship between HUD and the PHA.<sup>156</sup> HUD has general statutory power to promulgate regulations necessary to implement the federal public housing programs.<sup>157</sup> HUD regulations generally are binding on the PHA by virtue of the agreements made in the ACC.<sup>158</sup> In addition, some provisions of the Housing Act are self-

151. Schill, *supra* note 28, at 499 n.11.

152. 24 C.F.R. § 941.201 (1996).

153. *Id.*

154. 24 C.F.R. § 941.201(c) (1996). HUD will not enter into a contract for loans with a PHA until the PHA negotiates and executes a cooperation agreement with the local governing body which ensures that the PHA will be exempted from real and personal property taxes, that they will accept payments in lieu of taxes, and that the project will be provided with the same public services at no cost or no greater cost than that normally furnished to others in the community. *Id.*

155. 42 U.S.C. § 1437.

156. An “Annual Contribution Contract” (ACC) is “[a] contract (in the form prescribed by HUD) for loans and contributions, which may be in the form of grants, whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of a public housing project.” 24 C.F.R. § 941.103 (1996). HUD has specified the ACC’s terms and conditions on a standard form. *See* U.S. DEP’T OF HOUS. & URBAN DEV., ANNUAL CONTRIBUTIONS CONTRACT, HUD-53011 (Nov. 1969) (on file with authors).

157. *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670, 673 n.4 (1967).

158. *See supra* note 156 (discussing the definition of ACC).

executing on PHAs, and become effective even without promulgation of HUD regulations.<sup>159</sup>

There are three levels of organization within HUD: (1) headquarters, (2) regional offices, and (3) field offices. Headquarters is responsible for broad policy decisions<sup>160</sup> which are implemented by field offices<sup>161</sup> subject to the supervision of regional offices.<sup>162</sup>

The housing management function in both the regional and field offices<sup>163</sup> is to “ensure that programs are operating in accordance with [HUD] standards, procedures, and quality controls; are meeting production goals, processing priorities, deadlines, and service

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159. *See* Gholston v. Housing Auth. of Montgomery, 818 F.2d 776, 784-86 & n.11 (11th Cir. 1987). *But see* Martinez v. Rhode Island Hous. & Mortgage Fin. Corp., 738 F.2d 21, 22-26 (1st Cir. 1984) (holding that a non-self-executing provision of the Housing Act of 1937 is still binding on a PHA in spite of lack of HUD implementing regulations).

160. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 1100.3 REV. 5, ORGANIZATION OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, at 1-2 (Jan. 1987) [hereinafter ORGANIZATION HANDBOOK].

Headquarters makes and interprets policy; establishes priorities and goals; promulgates standards, criteria, and procedures; and grants waivers. Headquarters delegates authority to Field Officials for decentralized programs; allocates funds and staffing to Regional Offices; provides technical guidance and assistance; and directs, monitors, and evaluates program administration and technical performance of Regional and Field Offices.

*Id.*

161. Field offices supervise and direct their assigned programs and activities in accordance with HUD policies and directives. *Id.* at 1-4 to 1-6. These programs include: (1) Housing/Public Housing Programs, which includes public housing and assisted housing development, management, and modernization, as well as the HUD mortgage credit programs; (2) Community Planning and Development Programs; and (3) Fair Housing and Equal Opportunity programs. *Id.*

162. HUD regional offices supervise, direct, and provide technical support to HUD field offices, and represent the Housing Secretary with governors, other state and local government officials, other federal agencies, clients, and the general public. *Id.* at 1-3.

163. There are ten regional offices and 71 field offices which may be classified as Category A, B, C or D, depending on the scope of the functions performed there. ORGANIZATION HANDBOOK, *supra* note 160, at App. I. Category A offices are responsible for public housing programs (including multifamily housing development, multifamily housing management, single-family housing development, and single-family housing management), community planning and development programs, and fair housing and equal opportunity programs. Category B offices are “normally responsible for all decentralized housing programs” while Category C offices are “normally responsible for all decentralized single-family insured housing programs” and Category D offices are “responsible only for limited single-family insured housing functions [and are a] component part” of other offices. *Id.* at 1-4 to 1-7.

requirements; and are free of fraud, waste, and mismanagement.”<sup>164</sup> HUD employees perform onsite reviews, audits, and surveys of PHA operations.<sup>165</sup> They monitor, evaluate, advise, assist, and coordinate PHA activity.<sup>166</sup>

HUD manages its operations through the Federal Register System and the Directives System. These are separate programs, but the Directives System is intended to supplement Federal Register regulations.<sup>167</sup> HUD directives tell staff and program participants how to carry out their responsibilities and participate in HUD programs.<sup>168</sup> HUD directives include handbooks, supplements, notices, and special directives, which clarify or elaborate on established policy. Directives must be consistent with HUD regulations.<sup>169</sup>

HUD regulations cover the following seven areas, which coincide more or less with the statutory provisions: development, admissions/occupancy, maintenance/operations, lease provisions, grievances and eviction, modernization, and destruction/demolition. The management areas can be grouped into two broader categories, funding and litigation. The funding issues include public housing development, modernization, and operating subsidies, and represent areas in which the primary relationship is between the PHA and HUD. On the other hand, the litigation issues include admissions, lease provisions, grievances (including eviction), and demolition. Although HUD regulations govern all of the issues in the litigation category,

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164. *Id.* at 15-36.

165. *See generally id.* at chs. 15 & 17 (describing general functions of HUD regional and field offices).

166. *Id.*

167. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 000.2, REV-1, HUD DIRECTIVES SYSTEM HANDBOOK (July 1989).

168. *Id.* at 1-1.

169. For a regulation to have the “force and effect of law,” it is necessary to establish a nexus between the regulation and some delegation of legislative authority by Congress. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979). An agency can issue substantive or legislative regulations pursuant to its statutory authority in order to implement its statutory mandate. *Id.* at 302-03 (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)). Agency regulations are subject to the rulemaking requirements of the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 5551-559 (1994). Under the APA, interpretive rules and general statements of policy are not subject to notice and comment procedures. 5 U.S.C. § 553(b)(A) (1994).

there is also a large PHA-tenant interface that raises concerns of due process and deprivation of federal rights.

### A. *Funding*

Under the current public housing system, funding means federal control. By accepting money, local PHAs are required to enter into an ACC with HUD which obligates them to comply with federal rules and regulations.<sup>170</sup> Federal funding of public housing is available through three separately-administered components of the regulations: development,<sup>171</sup> operating subsidies,<sup>172</sup> and modernization.<sup>173</sup> Federal resources for development, modernization, operating subsidies, and Section 8 funds are set by annual congressional appropriations. The Section 8 rental assistance programs are funded separately, even though PHAs may administer them.<sup>174</sup> The current HUD proposal to transform public housing, if implemented, will change the funding apparatus more than anything else.<sup>175</sup>

Originally, public housing received only development subsidies.<sup>176</sup> HUD advanced short-term construction loans, which were then consolidated with the amount permanently financed.<sup>177</sup> As construction neared completion, HUD and the PHA would sign an ACC and the federal government would then pay the interest and principal on PHA-

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170. See *supra* note 156 (discussing the ACC).

171. See 24 C.F.R. § 941 (1996) (providing development methods, PHA eligibility requirements, and application and proposal requirements).

172. See 24 C.F.R. § 990 (1996) (providing funding and management systems).

173. See 24 C.F.R. § 968 (1996) (providing the improvement assistance program, grant program, and vacancy reduction program).

174. See 24 C.F.R. § 882 (1996) (providing Section 8 certificate and moderate rehabilitation programs).

175. See generally HUD EXECUTIVE SUMMARY, *supra* note 2.

176. STRUYK, *supra* note 105, at 79. Because of the changes, largely in the 1960s, in tenant composition and the limitations on PHA discretion in determining the amount of rent, PHAs became dependent on further subsidies to meet increasing expenses. *Id.* (citing E. WHITE ET AL., THE HISTORY AND OVERVIEW OF THE PERFORMANCE FUNDING SYSTEM (1979)).

177. *Id.* at 78.

issued permanent financing bonds.<sup>178</sup>

The modernization program became necessary as existing public housing became dilapidated. This program provides financial assistance to PHAs to improve the physical condition and upgrade the management and operation of public housing projects to ensure they continue to serve lower income families.<sup>179</sup> HUD initially financed the modernization program by entering into ACCs with PHAs to pay for the interest and amortization of PHA-issued bonds.<sup>180</sup>

Over time, grant funding has replaced the system of bond financing for both development and modernization. For the most part, the federal government has forgiven the debt for the 1.4 million units of public housing stock,<sup>181</sup> and has funded most new units of housing as replacement stock when other units of public housing are demolished or disposed of.<sup>182</sup> Modernization funding is available to PHAs that apply to HUD pursuant to HUD's invitation and Notice of Funding Availability (NOFA), which is published in the Federal Register,<sup>183</sup> or

178. *Id.*

179. 24 C.F.R. § 968.101(a) (1996).

180. STRUYK, *supra* note 105, at 92.

181. The debt was actually a fiction. The federal government advanced funds in the amount necessary to service the debt. *See* Housing Auth. of Fort Collins v. United States, 980 F.2d 624, 626 (10th Cir. 1992). The fiction was abolished by section 3004 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 42 U.S.C. § 1437b(c)(1) (1994), which forgave housing authority debt.

42 U.S.C. § 1437b(c)(1) provides:

At such times as the Secretary may determine, and in accordance with such accounting and other procedures as the Secretary may prescribe, each loan made by the Secretary under subsection (a) of [42 U.S.C. § 1437b] that has any principal amount outstanding or any interest amount outstanding or accrued shall be forgiven; and the terms and conditions of any contract, or any amendment to a contract, for such loan with respect to any promise to repay such principal and interest shall be canceled. Such cancellation shall not affect any other terms and conditions of such contract, which shall remain in effect as if the cancellation had not occurred. This paragraph shall not apply to any loan the repayment of which was not to be made using annual contributions, or to any loan all or part of the proceeds of which are due a public housing agency from contractors or others.

*Id.*

182. 24 C.F.R. § 968.103 (1996).

183. *See, e.g.*, Notice of Funding Availability (NOFA) for Fiscal Year (FY) 1994 for public housing development; invitation for applications, 59 Fed. Reg. 26,902 (1994).

through non-competitive formula-funded grants.<sup>184</sup> As a condition of modernization funding, PHAs are required to execute and record a Declaration of Trust “to protect certain rights and interests of HUD” against the sale of the property.<sup>185</sup> Community Development Block Grant (CDBG) funding may also be obtained to supplement modernization funding.<sup>186</sup>

Operating subsidies also are funded through a grant program. With the imposition of so many federal mandates on the operation of public housing units, the rents charged to low-income tenants could not cover annual operating and maintenance expenses. For the past thirty years, federal operating subsidies have funded the PHAs’ financial shortfall. But because they are based on federal formulas, neither the operating subsidy funding system nor the modernization funding system are responsive to market forces; both have therefore “contribute[d] to [the] mismanagement of the public housing stock.”<sup>187</sup>

### 1. Operating Subsidies

During the 1960s and early 1970s, pursuant to its new statutory goals, HUD imposed rent ceilings and requirements for tenant composition.<sup>188</sup> These policies created financial hardship for PHAs which led, ultimately, to the development of the performance funding system (PFS) and federal subsidization of operating expenses.<sup>189</sup> In addition to determining each PHA’s share of the operating subsidy, the

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184. *Id.* at 26,903.

185. 24 C.F.R. § 968.210(l) (1996).

For each modernization project, HUD and the PHA shall enter into an ACC amendment, requiring low-income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

*Id.* § 968.105.

186. U.S. DEP’T OF HOUS. & URBAN DEV., DIAGNOSING MANAGEMENT PROBLEMS, 1 INSIDER’S GUIDE TO MANAGING PUBLIC HOUSING.

187. Kinnaird, *supra* note 35, at 989

188. STRUYK, *supra* note 105, at 79.

189. *Id.* at 80.

PFS calculation is used to estimate the annual aggregate subsidy which serves as the basis for requesting annual appropriations from Congress.<sup>190</sup>

Under the PFS, each PHA is assigned a separate per-unit-month operating subsidy payment level.<sup>191</sup> The subsidy for any given PHA is set at “the difference between the PHA’s total approved operating expenses and its expected total income for the year involved.”<sup>192</sup> The total allowable expenses under the PFS are comprised of an Allowable Expense Level (AEL) for non-utility costs, a separate Allowable Utilities Expense Level (AUEL), and several “[o]ther [c]osts” that are considered separately.<sup>193</sup>

Initial PHA subsidy levels were determined through a funding formula based on sample PHA expenses.<sup>194</sup> HUD established an AEL for each PHA in 1975.<sup>195</sup> Since that time, AELs and operating subsidies have been indexed based on a HUD-determined inflation factor.<sup>196</sup>

Seeing constantly escalating budgets and the need for cost justification, Congress enacted the Housing and Community Development Act of 1987<sup>197</sup> to require that HUD establish a formal review process to revise AELs as necessary to correct base year abnormalities, to reflect changed circumstances, and to ensure that

190. U.S. DEP’T OF HOUS. & URBAN DEV., HANDBOOK NO. 7475.13, REV., PERFORMANCE FUNDING SYSTEM (PFS) HANDBOOK (Feb. 1990) [hereinafter PFS HANDBOOK].

191. STRUYK, *supra* note 105, at 80.

192. *Id.* at 80-81.

193. PFS HANDBOOK, *supra* note 190. This handbook provides PHAs with the requirements and procedures for determining their eligibility for operating subsidy under the PFS as provided in 24 C.F.R. § 990 (1996).

194. STRUYK, *supra* note 105, at 80-81.

195. JOHN P. VITELLA & WAYNE H. SHERWOOD, COUNCIL OF LARGE PUBLIC HOUS. AUTH., REP. #92-2 TRENDS IN PUBLIC HOUSING BUDGETS AND FINANCES 1975-1990 2 (1992) (a working paper prepared for the CLPHA/NAHRO/PHADA public housing research project) (on file with authors).

196. *Id.*

197. Pub. L. No. 100-242, 101 Stat. 1815 (1988) (codified in scattered sections of 12 and 42 U.S.C.).

AELs reflect the economic conditions of the area.<sup>198</sup> A proposed rule was published on December 19, 1989.<sup>199</sup> It is what this analysis and justification reveals about federal oversight in general that is most interesting.

According to HUD,

[t]his formal review process could be interpreted to mean one of at least two things: a review of a PHA's actual expenses or actual types of expenses, as compared with the level of operating subsidy eligibility anticipated under the formula, on a one-time or annual basis [the standards analysis]; or a revision to the formula in response to the three listed factors, with one opportunity for each PHA to determine whether use of the revised formula indicates that the current Allowable Expense Level is inappropriately high or low [the comparative analysis].<sup>200</sup>

HUD chose the latter "comparative" process over the "standards" process, in part because it was "administratively feasible for both the Department and the PHAs."<sup>201</sup>

HUD explained that it did not originally adopt the standards approach for the PFS because

[the] standards approach would have involved reaching agreement on the type and level of maintenance, administration, and tenant services that should be eligible for reimbursement. Information on how much it costs to achieve these standards would then need to be obtained, preferably based on the experience of well-managed projects that are not part of the public housing system. . . . This approach was not adopted,

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198. Performance Funding System: Formal Review Process, Energy Conservation Savings, Audit Responsibilities, Definition of Responsible Insurance Company, 54 Fed. Reg. 52,000, 52,001 (1989).

199. *Id.*

200. *Id.*

201. *Id.*

largely because of difficulties in reaching a consensus as to what standards to use and what types of non-PHA projects to select for comparison.<sup>202</sup>

In contrast, a comparative approach merely required the application of a formula, based on comparative PHA operating costs and circumstances, that would predict a typical operating cost for any given type of PHA.<sup>203</sup> Although a comparative approach could not resolve the adequacy of the overall level of PHA expenditures, it could reveal whether a PHA was “over-funded or under-funded relative to other PHAs with similar characteristics.”<sup>204</sup> HUD’s response to the congressional requirement was to propose a one-time systematic adjustment to the current AEL.<sup>205</sup> HUD also stated that “using less than a 15 percent ‘range test’ in applying the new formula could not be justified.”<sup>206</sup>

Although the standards approach would have been superior as both a benchmark and a cost-control system when used at the local level, the need to agree on a nationwide basis (a consensus standard) made this approach unmanageable to HUD even in concept.

One commentator criticized the PFS approach because it “imposes no market-based cost constraints on PHAs. It grants PHA’s full subsidies for vacancy rates below 3% and partial subsidies for vacancy rates above that threshold.”<sup>207</sup> Likewise, the PFS offers few incentives to fill vacancies.<sup>208</sup> Most importantly, “[it] is based neither upon PHA performance, nor upon the magnitude of the jobs PHAs are currently required to do.”<sup>209</sup>

202. *Id.*

203. 54 Fed. Reg. 52,001.

204. *Id.*

205. *Id.*

206. *Id.* (“[HUD] concluded that PHAs with a current allowed expense level (AEL) no higher than 115 percent of the predicted formula expense level (FEL) under the new formula could not safely be said to be over-funded, just as those with expense levels above 85 percent of the FEL could not be said to be under-funded.”).

207. Kinnaird, *supra* note 35, at 990.

208. *Id.*

209. VITELLA & SHERWOOD, *supra* note 195, at 2.

## 2. Modernization

Current modernization funding is also insensitive to market pressures. HUD awards modernization funds based on a formula that accounts for the backlog and accrued needs of a PHA relative to the needs of other PHAs.<sup>210</sup> HUD determines funding primarily by the needs of the housing stock.<sup>211</sup> Therefore, the needs of the housing stock are based on a nationwide standard despite attempts to return discretion to local PHAs.

The current modernization program has two components: (1) the Comprehensive Grant Program (CGP) for PHAs that own or operate more than 250 public housing units<sup>212</sup> and (2) the Comprehensive Improvement Assistance Program (CIAP) for PHAs that own or operate fewer than 250 public housing units.<sup>213</sup> HUD established the CGP pursuant to the Housing and Community Development Act of 1987 in order to provide large housing authorities with greater discretion in planning and implementing modernization activities than they had under the existing CIAP program.<sup>214</sup> In addition to returning modernization to local control, another objective of the CGP was to establish a formula funding program for capital improvements under which PHAs receive a formula allocation as an annual accrual towards these needs.<sup>215</sup> For large PHAs, the formula allocation replaced the “competitive, discretionary CIAP in which HUD decide[d] which developments [were] to be funded by setting priorities, establishing a ranking system, and reviewing and approving individual applications.”<sup>216</sup> The CGP became effective for fiscal year 1993.<sup>217</sup>

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210. 24 C.F.R. § 968.103(d) (1996).

211. *Id.* § 968.103(e).

212. *Id.* §§ 305-435.

213. *Id.* §§ 968.205-240.

214. Public and Indian Housing Comprehensive Grant Program and Amendments to the Comprehensive Improvement Assistance Program, 57 Fed. Reg. 5514, 5575 (1992).

215. *Id.*

216. *Id.* at 5515.

217. *Id.*

Under the CGP, all PHAs with 250 or more units in management must submit a comprehensive plan for modernization (CPM).<sup>218</sup> A CPM is a master plan developed by the PHA which identifies, on a PHA-wide and individual-project basis, the current physical and management improvement needs of its entire public housing stock; sets forth strategies for addressing those needs; and discusses the results of the viability review conducted for every project.<sup>219</sup> The CPM also includes the five-year funding request plan, which all PHAs must submit and update annually.<sup>220</sup>

A PHA must conduct a physical-needs assessment survey to apply for funding under the CGP.<sup>221</sup> The survey evaluates the project against HUD's modernization standards contained within the Public Housing Modernization Standards Handbook.<sup>222</sup> It includes energy conservation measures determined by HUD to be cost-effective, and lead-based paint testing and abatement requirements.<sup>223</sup> Use of the modernization standards is required by the Housing Act.<sup>224</sup>

PHAs submit a completed survey and a cost estimate to modernize the project with their request for funding.<sup>225</sup> This cost estimate is used to determine whether housing projects are severely distressed.<sup>226</sup>

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218. 24 C.F.R. § 968.320(a) (1996). CPMs are the focal point of the PHAs modernization strategy. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7484.3, COMPREHENSIVE GRANT PROGRAM HANDBOOK 6-3 (Mar. 1992).

219. 24 C.F.R. § 968.315(e) (1996).

220. *Id.* § 968.315(e)(5)(i).

221. 24 C.F.R. § 968.315(e)(2)(i) requires that a "physical needs assessment identifi[y] all of the work that a PHA would need to undertake to bring each of its developments up to the modernization and energy conservation standards, as required by the Act, [and] to comply with lead-based paint testing and abatement requirements." *Id.* Additionally, the assessment must include: (1) "[t]he replacement needs of equipment systems and structural elements . . . during the period covered by the action plan" and (2) "[a]ny physical disparities between buildings occupied predominantly by one racial or ethnic group and . . . the physical improvements required to correct the conditions." 24 C.F.R. § 968.315(e)(2)(i)(B),(D) (1996).

222. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7485.02, REV-1, PUBLIC HOUSING MODERNIZATION STANDARDS HANDBOOK (Mar. 1993). The Modernization Standards Handbook provides design, construction and environmental criteria for modernization.

223. 24 C.F.R. § 968.315(e)(2)(i)(A) (1996).

224. *Id.*

225. *Id.* § 968.310(a)(1) (1996).

226. *Id.* § 968.310 (1996).

Further, PHAs designated as “mod troubled”<sup>227</sup> under the Public Housing Management Assessment Program (PHMAP) are subject to a reduced funding allocation under the CGP.<sup>228</sup>

The current backlog of modernization needs is not surprising.<sup>229</sup> HUD standards establish a uniform basis for evaluating the physical condition and energy efficiency in accordance with federal housing objectives.<sup>230</sup> The HUD Public Housing Modernization Standards Handbook includes both mandatory standards and project-specific standards.<sup>231</sup> The mandatory standards are intended to be used in conjunction with local building codes and may exceed those local codes.<sup>232</sup> This handbook contains nine technical chapters designed to

227. “Mod troubled” refers to PHAs that are troubled with respect to their modernization program.

228. 24 C.F.R. § 968.310(c)(2) (1996).

229. As of 1992, there were 1.4 million units of public housing in over 10,000 public housing developments. Schill, *supra* note 28, at 500-01. Although most PHAs’ stocks of public housing are relatively small, the largest 2% of PHAs control almost half of all stocks. *Id.* at 501. In addition, 6% of public housing stocks are “severely distressed,” and 700 projects containing 15% of the nation’s public housing stocks are “troubled.” *Id.* at 501 n.27.

Furthermore, a study prepared for the Commission on Severely Distressed Public Housing states that modernizing public housing would cost between \$14.5 and \$29.2 billion. *Id.* at 501-02, 501 n.29. The lower estimated cost is for “bringing all existing building systems into working order,” while the higher estimated cost “reflects the additional cost that PHAs would incur if they undertook lead paint abatement, reconfiguration to assure future viability and full project modernization.” *Id.* (citation omitted).

230. There are three types of standards: health and safety, systems integrity, and energy conservation. *See* 24 C.F.R. § 968.115 (1996). HUD regulations provide that all PHAs receiving HUD funding for modernization improvements must:

- [m]eet the modernization standards as prescribed by HUD;
- [i]ncorporate cost-effective energy conservation measures, identified in the PHA’s most recently updated energy audit, conducted pursuant to part 965, subpart C;
- [w]here changing or installing a new utility system, conduct a life-cycle cost analysis, reflecting installation and operation costs; and
- [p]rovide decent, safe, and sanitary living conditions in PHA-owned and PHA-operated public housing.

24 C.F.R. § 968.115.

231. *See generally* HUD PUBLIC HOUSING MODERNIZATION STANDARDS HANDBOOK, *supra* note 222.

232. An example of a mandatory standard is that for kitchen sinks:

- a. *Sinks.* Each dwelling unit shall be provided with a kitchen sink with water-proof backsplash. Sinks shall be in safe and sanitary condition, anchored and free of cracks, holes or material deterioration. Sinks shall be supplied with hot and cold water. Existing

bring a project up to “Minimum Property Standards” (MPS).<sup>233</sup> In comparison, the Section 8 standards only have a performance requirement and acceptability criteria which are published in HUD regulations.<sup>234</sup> There are no other mandatory housing quality standards in the Section 8 program.

Comprehensive modernization under the CIAP, as well as modernization under the CGP, includes programs to provide not only

sinks shall be retrofitted with energy conservation devices that are cost-effective, such as: water saving devices; or faucet flow restrictors.

When new sinks are provided, they should have the following features:

stainless steel basin; single faucet washerless controls; continuous and preformed backsplashes and edging; basket strainer; and hot water flow limited to .5 gpm; maximum 3 gpm total flow.

*Id.* at 5-2.

233. The nine chapters are:

- (1) Services, which includes fire protection, mail delivery, garbage collection, laundry facilities;
- (2) Site, which includes vehicular access, parking, health and safety, grading and drainage;
- (3) Building entrance and circulation, which includes public spaces halls, stairways;
- (4) Dwelling Units, which includes living and dining areas, kitchens, bathrooms, bedrooms and storage;
- (5) Mechanical systems, which includes mechanical equipment, heating, hot water, ventilation, and plumbing;
- (6) Electricity and lighting;
- (7) Structural systems;
- (8) Building envelope, including exterior walls, roofs, chimneys, windows; and
- (9) Products and material, including vegetation, paving, fencing, finishes, doors, and elevators.

*Id.* at i-iv.

234. For example, 24 C.F.R. § 882.109(b) “Food preparation and refuse disposal” provides:

(1) *Performance requirement.* The dwelling unit shall contain suitable space and equipment to store, prepare, and serve food in a sanitary manner. There shall be adequate facilities and services for the sanitary disposal of food wastes and refuse, including facilities for temporary storage where necessary (e.g., garbage cans).

(2) *Acceptability criteria.* The unit shall contain the following equipment in proper operating condition: cooking stove or range and a refrigerator of appropriate size for the unit, supplied by either the Owner or the Family, and a kitchen sink with hot and cold running water. The sink shall drain into an approved public or private system. Adequate space for the storage, preparation and serving of food shall be provided.

24 C.F.R. § 882.109(b) (1996).

physical but also management improvements.<sup>235</sup> Management improvement costs may include drug elimination activities, resident training activities, technical assistance to resident management corporations, economic development activities, and administration of equal opportunity requirements.<sup>236</sup> Large PHAs must conduct a management needs assessment, in addition to the physical needs assessment, for their comprehensive plan.<sup>237</sup>

For public housing modernization, PHAs and their contractors must pay prevailing wages.<sup>238</sup> If the work is other than “nonroutine maintenance,” HUD determines the wages of laborers and mechanics.<sup>239</sup> HUD regulations preempt state prevailing wage requirements.<sup>240</sup>

PHAs must use competitive proposal procedures for procurement of architectural and engineering services.<sup>241</sup> They must prepare and publicize a Request for Proposal (RFP) and solicit proposals from at least three qualified sources.<sup>242</sup> The PHA must perform a cost analysis associated with procurement of these professional services, which means that the PHA is required to make an independent estimate of the contract cost before receiving proposals.<sup>243</sup>

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA)<sup>244</sup> governs the acquisition of real

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235. 24 C.F.R. § 968.315(b) (1996) (regulating the CGP comprehensive plan); 24 C.F.R. § 968.215 (1996) (regulating the CIAP comprehensive plan).

236. *See* 24 C.F.R. § 968.112(g) (1996).

237. *Id.* § 968.315(e)(3) (1996).

238. 24 C.F.R. § 968.110(e) (1996).

239. *Id.* § 968.110(e)(2).

240. *Id.* § 968.110(e)(3).

241. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7485.1, REV-4, PUBLIC AND INDIAN HOUSING COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM 8-1 (Dec. 1989).

242. *Id.*

243. *Id.* at 8-3.

244. Pub. L. No. 91-646, 84 Stat. 1894 (1971) (codified at 42 U.S.C. §§ 4601-4655 (1994)). The URA sets forth the rights of a person, including an individual, partnership, corporation, or association who will be displaced as a direct result of acquisition, rehabilitation, or demolition for a federal or federally-assisted program or project, and the rights of a person whose real property will be acquired for such a program or project. 42 U.S.C. §§ 4601(5), (6)(A). HUD Community

property. URA provisions include requirements to appraise the real property and offer fair market value to the owner before negotiating to acquire the property, and to pay the cost of all incidental expenses.<sup>245</sup> Displaced persons may be entitled to moving expenses and a dislocation allowance, and in the case of a tenant, assistance in finding other housing.<sup>246</sup> PHA actions are further constrained by requirements to use federal government procurement procedures, financial management systems, and monitoring and reporting requirements.<sup>247</sup>

As will be discussed in the next section, previous attempts to streamline operations and to give greater discretion to local PHAs have failed. The failures are predictable. Unlike many federal regulatory programs, there is a general absence of market pressure from the regulated community through the HUD rulemaking process.

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Planning and Development staff have the authority to administer and provide technical assistance to program "grantees." U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 1374, TENANT ASSISTANCE, RELOCATION AND REAL PROPERTY ACQUISITION-HUD CPD STAFF RESPONSIBILITIES 1-2 (Feb. 1992). "[HUD] Field Offices must offer timely training and technical assistance sufficient to ensure that grantees understand these complex requirements." *Id.* at 3-1. According to HUD,

[r]elocation rules and some areas of real property acquisition are very complicated and very technical. Of particular difficulty is the definition of a "displaced person," and the steps that must be taken by grantees to avoid the unintentional "displacement" of a person with the resultant obligation to make payments to the person even though there was no intent or necessity to displace the person for the project.

*Id.*

245. 42 U.S.C. §§ 4651, 4653.

246. 24 C.F.R. § 968.108 (1996).

247. HUD regulations for development (24 C.F.R. § 941.208(d) (1996)), modernization (24 C.F.R. § 968.135 (1996)), and operating subsidies (24 C.F.R. § 990.103 (1996)) require housing grantees to use the Uniform Administrative Requirements for Grants, as provided in 24 C.F.R. § 85 (1996). The standards for financial management systems contained in 24 C.F.R. § 85.20 (1996), and for monitoring and reporting in 24 C.F.R. § 85.41 (1996), were at one time encompassed within the requirements of the ACC and further defined in U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. HH 7510.1, LOW-RENT ACCOUNTING HANDBOOK (Feb. 1978), and U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. HH 7476.1 CHG-5, AUDITS OF PUBLIC HOUSING AGENCIES AND INDIAN HOUSING AUTHORITIES BY INDEPENDENT PUBLIC ACCOUNTANTS (Oct. 1976). These requirements are currently applicable to the development, operation, and modernization phases of the public housing program. 24 C.F.R. § 85.6 (1996) now precludes federal agencies from imposing additional administrative requirements except in codified regulations published in the Federal Register. *See* 53 Fed. Reg. 8050 (1988) (presumably responding to legal challenges to the use of the HUD Handbooks as imposing binding requirements on the PHA without first subjecting these "rules" to public notice and comment).

This is because the regulated community itself is not subject to market forces. Nonetheless, there were many comments on the continued “over-regulation, federal control and burdensome paperwork requirements” of the proposed rule on the CGP and CIAP programs, and on the failure of HUD to recognize the mandate of the Housing Act of 1987.<sup>248</sup> HUD responded to these comments by making changes to its program approach in the final rule.<sup>249</sup> However, HUD acknowledged that, although it reduced the level of detail, the paperwork burden for the submission and reporting requirements in the final rule was greater than the estimates provided in the proposed rule.<sup>250</sup> HUD also recognized that its discretion was limited in some cases by statutory provisions.<sup>251</sup>

### 3. Accountability

As with the operating subsidy and modernization funding programs discussed above, the housing statutes and regulations have been amended numerous times in order to add accountability to PHA management. Because these reforms are dependent on federal oversight, they lead to additional standardization which, in turn, leads to greater focus on complying with federal requirements rather than meeting local needs. The end result is often less local accountability rather than more.

The Public Housing Management Assessment Program (PHMAP) is one such example. The PHMAP implements section 502(a) of the Cranston-Gonzalez National Affordable Housing Act of 1990

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248. For example, HUD received 48 comments on its 1991 proposed rule on the CGP and CIAP programs. The commentators included 39 public and Indian housing authorities, three municipalities, two resident organizations, the Council for Large PHAs, the National Association of Housing, Redevelopment Officials (NAHRO), the PHA directors Association (PHADA), and the National Housing Law Project. Public and Indian Housing Comprehensive Grant Program and Amendments to Comprehensive Improvement Assistance Program, 57 Fed. Reg. 5514, 5516 (1992).

249. *Id.*

250. *Id.*

251. For example, the requirement on a PHA to submit a “comprehensive assessment of [the] PHA’s physical and management needs on a development-by-development basis” is a statutory mandate and is not amendable by HUD. *Id.* at 5535.

(NAHA)<sup>252</sup> and evaluates the performance of public housing agencies in major areas of management operations.<sup>253</sup> NAHA specified seven indicators of management performance and allowed HUD to select up to five additional factors.<sup>254</sup> Under the PHMAP, if a PHA is designated a high performer, it would receive relief from certain administrative and reporting requirements.<sup>255</sup>

The PHMAP classifies PHAs as “high performers,” “standard,” and “troubled.”<sup>256</sup> PHAs that are troubled must correct the deficiencies found within 90 days or they may be required to file an improvement plan with the local HUD field office.<sup>257</sup> PHAs found to be troubled under the modernization program must execute a Memorandum of Agreement (MOA) with HUD, which is a binding contract to achieve agreed performance targets.<sup>258</sup> A failure to satisfy the terms of a MOA, or a violation of HUD regulations or the terms of the ACC, may constitute a substantial default, giving HUD the right to appoint a receiver to take over management of the PHA.<sup>259</sup>

Public housing directors and administrators often blame management for the failure of public housing projects.<sup>260</sup> Reform themes for reinventing government also conclude that hiring talented executives should be a priority. One study of conditions that contribute to effective implementation of government programs found that talented executives were a key element in almost every case

252. Pub. L. 101-625, 104 Stat. 4079 (codified as amended in scattered sections of 42 U.S.C.). For HUD regulations on the PHMAP, see 24 C.F.R. § 901 (1996).

253. U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 7460.5, THE PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM (PHMAP) HANDBOOK (Mar. 1992).

254. 42 U.S.C. 1437d(j).

255. 24 C.F.R. § 901.135(d) (1996).

256. *Id.* § 901.115.

257. *Id.* § 901.145.

258. *Id.* § 901.140(a).

259. *Id.* § 901.225.

260. *Techniques for Revitalizing Severely Distressed Public Housing: Hearings on What are the Factors that Make for a Successful Public Housing Program and How They Can Be Applied to the Severely Distressed Public Housing Program*, 103d Cong., 1-2 (1993) [hereinafter *Hearings*] (opening statement of Senator Paul S. Sarbanes).

evaluated.<sup>261</sup> However, there is no agreement on what type of talent is necessary.<sup>262</sup>

In 1990, Congress enacted legislation imposing the use of a project-based accounting (PBA) system on PHAs.<sup>263</sup> PHAs that receive operating subsidies under section 9 of the 1937 Act must use the PBA system<sup>264</sup>—i.e. they must “develop and maintain a system of accounting for operating income and operating costs for each project or operating cost center in a manner capable of generating information to meet HUD consolidated reporting requirements.”<sup>265</sup> Under the PBA system, “[o]perating income and cost information . . . must include at least rental income and the administrative costs, utilities costs, maintenance costs, repair costs, and other income and costs . . . [that are] project-specific for management purpose.”<sup>266</sup> PHAs are not required to allocate income or expenses that are not project-specific, including PHA central office overhead expense.<sup>267</sup>

HUD requires independent audits of PHAs under their regulations.<sup>268</sup> HUD’s authority is derived from the Single Audit Act

261. Levin, *Effective Implementation and Its Limits*, in 9 PUBLIC POLICY STUDIES: A MULTI-VOLUME TREATISE 218 (D. Calista ed., 1986).

262. *Hearings*, *supra* note 260, at 47 (“(P)ublic housing administration has become too complex to be left to amateurs or political hacks.”) (Written testimony of Stephen J. O’Rourke, Executive Director, Providence Housing Authority.) Successful public housing management reform requires “a strong, insightful, and unusually charismatic leader who sets the tone of [reform],” although “[i]t clearly helps if this person has worked in the complex field of public housing previously.” *Id.* at 60 (testimony of James G. Stockard, Jr., Commissioner, Cambridge (MA) Housing Authority). Describing the situation he found when he became executive director of the Austin (TX) Housing Authority (AHA), Richard Gentry cited “disorganization and a lack of technical expertise in every level from top management to maintenance” as a typical problem for most troubled agencies. *Id.* at 52 (testimony of Richard Gentry, Executive Director, Austin (TX) Housing Authority). “The loss of control over the level of expenses or over maximizing income (principally operating subsidy) will typically cause an agency to experience severe financial difficulty . . .” *Id.* at 53.

263. *See* 42 U.S.C. § 1437d(c)(4)(E) (1994).

264. 42 U.S.C. § 1437d(c)(4)(E); 24 C.F.R. § 990.301(a) (1996) (HUD’s final rule implementing the Act).

265. 24 C.F.R. § 990.310(a) (1996).

266. *Id.* § 990.310(b).

267. *Id.* § 990.310(c).

268. For example, PHAs that receive modernization funding must comply with the auditing requirements of Part 44. 24 C.F.R. § 968.145 (1996).

of 1984,<sup>269</sup> which established audit requirements for state and local governments, including PHAs that receive federal financial assistance.<sup>270</sup> PHAs are required to conduct a single audit in accordance with the requirements published at 24 C.F.R. § 44.<sup>271</sup> This is an annual requirement unless the state or local government has adopted a constitutional or statutory requirement for less frequent audits, in which case HUD will permit a biennial audit.<sup>272</sup>

Each change in a federal statute requires a corresponding change in regulation, usually accompanied by notice and comment rulemaking. The changes are then incorporated into one or more of the many HUD handbooks, which instruct PHAs on how to fill out the required forms and perform the required calculations. Housing managers may require training in the new procedures, and of course, there still is HUD field office review, regional office oversight, federal approvals and, as the next Part discusses, frequently there are court challenges.

### *B. Litigation*

According to HUD, housing statutes give PHAs “a great deal of discretion in operating [public housing programs] as long as they act consistently with Federal, state, and local laws, HUD regulations, [ACCs], and sound management practices.”<sup>273</sup> However, the definition of an eligible family,<sup>274</sup> the requirements for ceiling rents,<sup>275</sup> tenant selection policies and preferences,<sup>276</sup> and income eligibility<sup>277</sup> are

269. 31 U.S.C. §§ 7501-7507 (1994).

270. 42 U.S.C. § 7502(a); 24 C.F.R. § 44.1(C) (1996) (HUD regulation implementing auditing requirements of the Act).

271. 24 C.F.R. § 968.145 (1996). 24 C.F.R. § 44 sets forth the requirements that PHAs must observe in obtaining an audit. It provides that the audit should be performed in accordance with “generally accepted government auditing standards covering financial and compliance audits.” 24 C.F.R. § 44.3 (1996).

272. *Id.* § 44.4.

273. U.S. DEP’T OF HOUS. & URBAN DEV., HANDBOOK NO. 7465.1, REV-2, THE PUBLIC HOUSING OCCUPANCY HANDBOOK: ADMISSION, INTRODUCTION (Aug. 1987).

274. 42 U.S.C. § 1437a(a) (1994).

275. *Id.*

276. 42 U.S.C. §§ 1437d(c), 1437f (1994).

statutory. All of the admission policy requirements are substantive requirements of the HUD regulations.<sup>278</sup> Any failure of a PHA to comply with these requirements, as well as the nondiscrimination requirements, that results in denial of admission could constitute a possible violation of tenants' federal rights, triggering the right to bring suit under section 1983.<sup>279</sup>

Similarly, a PHA may not terminate or refuse to renew a lease other than for "serious or repeated violation" of material terms of the lease such as failure to make payments due, or failure to fulfill the tenant obligations under the lease.<sup>280</sup> The housing statutes and HUD regulations require each PHA to adopt a grievance procedure affording every tenant an opportunity for a hearing on any proposed adverse action, including eviction.<sup>281</sup> Further, the federal housing laws do not preempt state law actions such as breach of lease agreements and unlawful detainer or ejection.<sup>282</sup>

Most federal suits implicating PHA actions are brought as section 1983<sup>283</sup> causes of action under one or more of three allegations. First, and most common, is the allegation that the actions of the PHA or HUD deprived a public housing tenant of his right to due process under the Fifth or Fourteenth Amendments.<sup>284</sup> Second, tenants have

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277. 42 U.S.C. § 1437d(c).

278. 24 C.F.R. pt. 960 (1996).

279. *See, e.g.*, *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 429 (1987) (holding that although federal housing statutes provide remedial mechanisms to public housing tenants, Congress did not intend to preclude a § 1983 cause of action for the enforcement of tenants' rights secured by federal law).

280. 42 U.S.C. § 1437d(l)(4) (1994).

281. 42 U.S.C. § 1437d(k) (1994); 24 C.F.R. § 966.52 (1996).

282. *Housing Auth. of Everett v. Terry*, 789 P.2d 745, 749-50 (1990) (en banc).

283. 42 U.S.C. § 1983 (1994) provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

284. *See, e.g.*, *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670, 671 (1967) (per curiam);

sought to enforce federal rights that may be secured by the housing acts or HUD regulations.<sup>285</sup> Finally, tenants have argued that they are third-party beneficiaries to the ACC executed between HUD and the local PHA.<sup>286</sup>

Litigation generally arises due to one of the following circumstances: denial of benefits in the admissions process, reduction or termination of benefits (such as rent increases or non-renewal of a lease), eviction, or demolition of public housing. Tenant-plaintiffs often join HUD as a co-defendant with the local PHA. In the case of the Section 8 housing programs, the private landlord is also joined as a party. Tenant-plaintiffs most frequently seek declaratory judgments or injunctions as remedies,<sup>287</sup> although damages may be obtained in a section 1983 action.<sup>288</sup>

### 1. Section 1983 Causes of Action

Section 1983 provides a cause of action to persons whose rights under the United States Constitution or laws are infringed under color of state law.<sup>289</sup> The section 1983 “under color of state law” requirement and the state action requirement under section 1 of the Fourteenth Amendment are accepted to be coextensive.<sup>290</sup> The actions of state agencies, including PHAs, are accepted to be under color of

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Ressler v. Pierce, 692 F.2d 1212, 1214 (9th Cir. 1982).

285. See, e.g., Gomez v. Housing Auth. of El Paso, 805 F. Supp. 1363 (W.D. Tex. 1992) (establishing tenants’ rights to raise de facto demolition claims under 42 U.S.C. § 1437), *aff’d*, 20 F.3d 1169 (5th Cir. 1994).

286. Edwards v. District of Columbia, 821 F.2d 651, 653 (D.C. Cir. 1987); Concerned Tenants Ass’n of Father Panik Village v. Pierce, 685 F. Supp. 316, 322 (D. Conn. 1988).

287. Because the Eleventh Amendment does not bar suits for declaratory and injunctive relief aimed at state officials, section 1983 claims survive sovereign immunity challenges. Kentucky v. Graham, 473 U.S. 159, 169 n.18 (1985).

288. See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 105-06 (1989).

289. See *supra* note 283.

290. United States v. Price, 383 U.S. 787, 794 n.7 (1966).

state law.<sup>291</sup> In certain circumstances, even private landlords may be found to have been acting under color of state law.<sup>292</sup>

A tenant may have a private cause of action under section 1983 when there has been a violation of a federal right and when Congress has not specifically foreclosed a remedy under section 1983.<sup>293</sup> In *Maine v. Thiboutot*,<sup>294</sup> the Supreme Court held that individuals can sue under section 1983 for violations of statutory as well as constitutional rights.<sup>295</sup> However, section 1983 is available to enforce violations of federal statutes only if the statute at issue creates “enforceable rights, privileges, or immunities within the meaning of § 1983,” and if Congress has not “foreclosed such enforcement of the statute in the enactment itself.”<sup>296</sup> Some courts have also held that substantive federal regulations constitute “laws” under the meaning of section 1983 and an alleged violation of those regulations may state a valid section 1983 claim.<sup>297</sup> Section 1983 does not itself create substantive rights, but instead provides an express federal remedy against state officials for deprivation of rights established elsewhere in federal law.<sup>298</sup>

The leading private enforcement case in the public housing context is *Wright v. Roanoke Redevelopment & Housing Authority*.<sup>299</sup> In

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291. See, e.g., *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513, 522 (S.D.N.Y. 1974) (stating that a PHA’s action in “adjudging nondesirable tenants and in ordering their eviction are acts of the state and therefore satisfy the state action requirement of Section 1983”).

292. Evictions by private landlords may be under color of state law when, for example, an apartment complex was constructed on land purchased from the state, was partly funded by the state, and was operated under standards required by the state. *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971). See also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

293. *Wright*, 479 U.S. at 423.

294. 448 U.S. 1 (1980).

295. *Id.* at 4.

296. *Wright*, 479 U.S. at 423.

297. See, e.g., *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985) (“At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress’ mandate constitute ‘laws’ within the meaning of section 1983.”); *Billington v. Underwood*, 613 F.2d 91, 93-94 (5th Cir. 1980) (stating that a public housing tenant may bring a § 1983 action based on a housing authority’s violation of a HUD regulation).

298. *Samuels*, 770 F.2d at 193.

299. 479 U.S. 418 (1987).

reviewing the Brooke Amendment to the Housing Act of 1937, which imposed a ceiling on rents charged to low-income persons living in public housing projects, the *Wright* Court found no congressional intent to foreclose private enforcement of the Brooke Amendment. The Court thus reversed the Fourth Circuit opinion which held that HUD had the exclusive power to enforce the benefits due to tenants under the Brooke Amendment, and that the HUD administrative scheme foreclosed private enforcement.<sup>300</sup>

The *Wright* Court recognized that a statutory provision creates enforceable rights within the meaning of section 1983 only if it is sufficiently specific and definite to be within the competence of the judiciary to enforce.<sup>301</sup> The regulations at issue in *Wright*, which defined the statutory concept of “rent” to include a reasonable utilities allowance, were definite enough to be enforceable under section 1983.<sup>302</sup>

300. *Id.* at 424. The Court declared:

We disagree with the [Fourth Circuit’s] . . . conclusion that the administrative scheme of enforcement foreclosed private enforcement. . . . HUD undoubtedly has considerable authority to oversee the operation of the PHA’s. We are unconvinced, however, that [the defendant housing authority] has overcome its burden of showing that “the remedial devices provided in [the Housing Act] are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.” . . . Not only are the Brooke Amendment and its legislative history devoid of any express indication that exclusive enforcement authority was vested in HUD, but there have also been both congressional and agency actions indicating that enforcement authority is not centralized and that private actions were anticipated.

*Id.* at 424-25 (citations omitted).

301. *Id.* at 432. According to *Suter v. Artist M.*, 503 U.S. 347 (1992), if a statutory provision grants states significant discretion in meeting the statute’s objectives, it is less likely that the provision creates enforceable rights. *Suter*, 503 U.S. at 363. *But see* *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 519 (1990) (“That the amendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court.”); *Marshall v. Switzer*, 10 F.3d 925, 929-30 (2d Cir. 1993) (holding that if Congress limited States’ discretion in providing services, Congress did not intend to foreclose private enforcement under § 1983).

302. Nevertheless, four Justices disagreed. *Wright*, 479 U.S. at 432 (O’Connor, J., dissenting). Justice O’Connor, writing for the dissent, questioned whether Congress intended to create a federally enforceable right under the Brooke Amendment, and raised three questions: (1) whether there was an enforceable right to “reasonable utilities” under the Brooke Amendment; (2) whether an administrative regulation can create such a right where the statute has not; and (3) if an administratively-created right does exist, whether the regulations at issue established standards that

Following the decision in *Wright*, which found privately enforceable rights in rent ceilings under section 1437a, courts have found private rights under sections 1437d,<sup>303</sup> 1437f,<sup>304</sup> and 1437p<sup>305</sup> of the Housing Act. Section 1437d, for instance, requires PHAs to comply with HUD regulations regarding admissions, occupancy, and grievance procedures as a condition of their ACC.<sup>306</sup> Section 1437f provides rent subsidies to qualifying tenants under the subprograms commonly known as the Section 8 Existing Housing Certificate program and the Section 8 Voucher program,<sup>307</sup> and section 1437p establishes requirements for demolition of public housing.<sup>308</sup>

Section 1983 may be used to determine whether state officials have violated federal law in the same way that section 702 of the Administrative Procedures Act<sup>309</sup> is used to review the actions of federal officials.<sup>310</sup> In both cases, the courts distinguish between “intended” beneficiaries, who may sue, and “incidental” beneficiaries, who may not.<sup>311</sup>

To bring a section 1983 cause of action under any statute, plaintiffs must have a sufficient property interest in the defined statutory benefit,<sup>312</sup> and that interest must arise from an independent

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were subject to judicial enforcement. *Id.* at 434-38. The dissent expressed concern that, once a statute was found to create an enforceable right, “any regulation adopted within the purview of [such a] statute [would create] rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.” *Id.* at 438. Furthermore, the dissent believed that there was no section 1983 remedy—that petitioners were limited to breach of (lease) contract remedies. *Id.* at 440-41.

303. See, e.g., *Gomez*, 805 F. Supp. 1363; *Concerned Tenants*, 685 F. Supp. 316.

304. See, e.g., *Knapp v. Smiljanic*, 847 F. Supp. 1428 (W.D. Wis. 1994).

305. See, e.g., *Gomez*, 805 F. Supp. 1363; *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990).

306. 42 U.S.C. § 1437d.

307. *Id.* § 1437f.

308. *Id.* § 1437p.

309. 5 U.S.C. § 702.

310. See Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 235 (1991).

311. See *id.* at 235.

312. See *Holbrook v. Pitt*, 643 F.2d 1261, 1277 (7th Cir. 1981).

source, such as state law.<sup>313</sup> The analysis is the same as that used under due process to determine whether there is merely an expectancy in a benefit or whether there is a legitimate claim of entitlement.<sup>314</sup> When courts have not found a sufficient property interest under the housing statutes or regulations, Congress has sought to make their intent more clear.<sup>315</sup> For example, after the court in *Edwards v. District of Columbia*<sup>316</sup> found no tenant rights in constructive demolition of public housing under 42 U.S.C. § 1437p, Congress amended section 1437p, thus making clear that tenants have enforceable rights in that situation.<sup>317</sup>

There are limits on the availability of a section 1983 action that even Congress recognizes. In *Samuels v. District of Columbia*,<sup>318</sup> the court held that a PHA's systematic failure to provide public housing tenants an administrative forum for complaints of inadequate maintenance and repair was contrary to the intent of Congress in enacting section 1437d(k) and, therefore, was enforceable in a section 1983 action.<sup>319</sup> The *Samuels* court noted, however, their belief that section 1983 was not available to remedy a public landlord's "random and unauthorized failure to maintain a dwelling unit."<sup>320</sup>

The Supreme Court has noted that the availability of section 1983 presents a different inquiry from that involved in implied private right of action analysis.<sup>321</sup> To establish an implied private right of action under a federal statute, a plaintiff bears a relatively heavy burden of demonstrating that Congress affirmatively or specifically contemplated

313. *Id.*

314. *Id.* See also *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982).

315. *Tinsley*, 750 F. Supp. at 1008.

316. 821 F.2d 651 (D.C. Cir. 1987).

317. *Tinsley*, 750 F. Supp. at 1008 (citing H.R. CONF. REP. NO. 100-426 (1987), reprinted in 1987 U.S.C.C.A.N. 3317, 3458).

318. 770 F.2d 184 (D.C. Cir. 1985).

319. *Id.* at 198.

320. *Id.* at 201 n.14.

321. *Wilder*, 496 U.S. at 508 n.9.

private enforcement when it passed the relevant statute.<sup>322</sup> In contrast, the section 1983 inquiry begins with a presumption in favor of the private party's right to bring suit.<sup>323</sup> Congress is presumed to legislate against the background of section 1983 and to contemplate "private enforcement of the relevant statute against state and municipal actors absent fairly discernible congressional intent to the contrary."<sup>324</sup>

Thus, it is fair to say that what was intended as a communal grant to better housing in 1937 has been changed, by virtue of an independent statute, into a private right to specific government entitlement.

## 2. Procedural Due Process

The Due Process Clause of the Fifth Amendment applies to and restricts only governmental bodies and not private persons.<sup>325</sup> It is unremarkable, then, that notions of due process in the landlord-tenant relationship were virtually non-existent at common law.<sup>326</sup> In the early years of the public housing program, before constitutional questions of

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322. *Samuels*, 770 F.2d at 194. In implied right of action cases, the Court uses the four-criteria test developed in *Cort v. Ash*, 422 U.S. 66 (1975), "to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights." *Wilder*, 496 U.S. at 508 n.9. The separation-of-powers concerns in implied rights of action cases are not present in section 1983 cases because section 1983 provides "an alternative source of express Congressional authorization of private suits." *Id.* (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)). The *Cort* criteria are: (1) whether the plaintiff belongs to the class "for whose *especial* benefit the statute was enacted;" (2) whether there is any indication of explicit or implicit legislative intent to create or deny a private remedy; (3) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff;" (4) whether the cause of action is "traditionally relegated to state law, in an area basically the concern of the State, so that it would be inappropriate to infer a cause of action based solely on federal laws." *Cort*, 422 U.S. at 78. Some courts have reduced these four criteria to the question of legislative intent. Monaghan, *supra* note 310, at 246 n.19 (citing *Karahalios v. National Fed'n of Fed. Employers, Local 1263*, 109 S. Ct. 1282, 1286-87 (1989)).

323. *Samuels*, 770 F.2d at 194.

324. *Id.* (citing *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 739 F.2d 1467, 1470-71 (9th Cir. 1984)).

325. *Thorpe v. Housing Auth. of the City of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) ("[A] private landlord might terminate a lease at his pleasure. . . . [However,] '[t]he government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law. . . .'"").

326. See generally *Liberty Fund Transcript*, *supra* note 63.

due process had been raised in the courts, public housing managers had significant latitude in selecting applicants and evicting tenants. With this discretion, they could screen out potentially troublesome tenants and they could impose rent increases when needed to cover operating and maintenance expenses. Obviously, the property interest most deserving of due process protection is protection from eviction. There is, nonetheless, some process which a tenant is due in other phases of the PHA-tenant relationship.<sup>327</sup> Because PHAs act as arms of the state, there is concern that PHA discretion in evicting tenants not be exercised in an arbitrary and capricious manner.

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327. *See, e.g.*, 24 C.F.R. pt. 966.

a. Eviction

In the eviction context at common law, the landlord had the right to self-help and was permitted to “enter and expel the tenant by force, without being liable [in] tort for damages . . . provided he use[d] no more force than [was] necessary, and [inflicted] no wanton damage.”<sup>328</sup> The landlord could also bring an action for ejectment, but the procedure was considerably slower.<sup>329</sup> Some states sought to alter the common law bias favoring landlords by enacting forcible entry and detainer statutes. Such states require a “judicial determination that [the tenant] is not legally entitled to possession” prior to a forcible eviction.<sup>330</sup>

With private landowners, existing laws seek to balance the interests of the tenant who is in possession with those of the landlord threatened with economic loss.<sup>331</sup> In contrast, when the government is the landlord, the law guards against government actions that are arbitrary and capricious. In 1967, the Supreme Court decided *Thorpe v. Housing Authority of Durham*,<sup>332</sup> a case cited for the proposition that due process is required for public housing tenant eviction. However, the Court did not decide this constitutional question because after it agreed to hear the case, HUD issued a directive specifying eviction procedures PHAs were to follow.<sup>333</sup> Congress and the circuit courts were nevertheless influenced by Justice Douglas’ concurring opinion in the case.<sup>334</sup>

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328. *Lindsey v. Normet*, 405 U.S. 56, 71 (1972) (quoting *Smith v. Reeder*, 28 P. 890 (Or. 1892)).

329. *Id.*

330. *Id.* at 72.

331. *Id.* at 71-72.

332. 386 U.S. 670 (1967).

333. *See id.* at 671-72. Following the Supreme Court’s grant of certiorari, HUD issued a directive to local PHAs specifying eviction notice requirements and other eviction procedures. *See id.* at 672-73. The holding of *Thorpe* was simply that, because the case would assume a different posture if the procedures in the directive were followed, the judgment should be vacated and the case remanded for further proceedings as would be appropriate in light of the HUD directive. *Id.* at 673-74.

334. The concurring opinion of Justice Douglas did discuss the constitutional dimension.

At the time *Thorpe* was decided, there was no underlying statutory authority for the eviction procedures in the new HUD directive.<sup>335</sup> Later, Congress did address the issue in 42 U.S.C. § 1437d(k), but did not preempt state eviction procedures. Instead, section 1437d(k) provided for a grievance process that requires a hearing for any adverse action that may be taken against a tenant, including actions for eviction.<sup>336</sup> In certain instances of criminal activity, the PHA has the authority to use an expedited eviction procedure.<sup>337</sup> However, any eviction procedure must conform to the due process requirements determined by HUD.<sup>338</sup> Therefore, HUD has the authority to issue rules that establish the basic elements of due process, and to determine whether eviction procedures under the law of a jurisdiction meet HUD's due process definition.<sup>339</sup>

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Justice Douglas wrote:

[T]he essence of due process is "the protection of the individual against arbitrary action." . . . It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."

*Id.* at 678 (citations omitted).

335. *Thorpe*, 386 U.S. at 673 n.4.

336. 42 U.S.C. § 1437d(k).

337. See 24 C.F.R. § 966.4(l)(2)(ii) (1996).

338. HUD has the authority to make due process determinations under the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181, § 204, 97 Stat. 1155, 1178-79 (1983) (codified in scattered sections of 12 and 42 U.S.C.). The PHA eviction procedure must meet six requirements: (1) the evicted tenant must be advised of the specific grounds of eviction; (2) the tenant must have "an opportunity for a hearing before an impartial party"; (3) the tenant must have "an opportunity to examine any documents or records or regulations related to the proposed action"; (4) the tenant must be entitled to be represented at any hearing; (5) the tenant must be "entitled to ask questions of witness and have others make statements on his behalf"; (6) the tenant must be "entitled to receive a written decision by the [PHA] on the [eviction]." *Id.* § 204 (codified at 42 U.S.C. § 1437d(k)).

339. *Id.* In addition, Congress required that HUD establish the elements of due process using notice and comment rulemaking procedures under § 553 of the Administrative Procedure Act. HUD provided in 24 C.F.R. § 10.1 (1996) that it will use notice and comment rulemaking procedures before it promulgates any substantive rules. In *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994), the court held that HUD's own regulations (at 24 C.F.R. § 10.1) required that it provide public notice and comment when determining whether a particular state eviction procedure met the requirements of due process.

The case of *Lindsey v. Normet*, discussed in Part II.A, has become the touchstone used by HUD in reviewing state eviction statutes for constitutional due process. There is general agreement that constitutional due process does not require a written decision,<sup>340</sup> nor is this a required element of a HUD due process determination.<sup>341</sup> Under HUD regulations for a state due process determination<sup>342</sup> the elements include: (1) adequate notice to the tenant of the grounds for terminating the tenancy and for eviction; (2) the right of the tenant to be represented by counsel (this does not include the right to appointment of counsel); (3) the opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and (4) a decision on the merits.<sup>343</sup>

As a constitutional matter, what process is due depends on the facts of a given case and the issues to be decided.<sup>344</sup> The requirements for constitutional due process for evictions from public housing are derived from *Goldberg v. Kelly*.<sup>345</sup> In *Goldberg*, the Supreme Court held that procedural due process requires that welfare recipients be given a hearing before to any termination of benefits.<sup>346</sup> *Goldberg* established a two-step process for the analysis of cases involving

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340. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

341. 24 C.F.R. § 966.53 (1996).

342. The elements of due process “mean an eviction action or a termination of tenancy in a State or local court in which the [enumerated] procedural safeguards are required.” *Id.*

343. *Id.*

344. The determination of what process is due generally requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Holbrook v. Pitt*, 643 F.2d 1261, 1280 (7th Cir. 1981) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

345. 397 U.S. 254 (1970).

346. *Id.* at 261.

deprivation of a government benefit.<sup>347</sup> First, inquiry must be made as to whether an individual will suffer a loss of a “life, liberty, or property” interest if he is deprived of the particular private interest.<sup>348</sup> Second, if the first element exists, the court must balance the individual’s interest in avoiding the deprivation with the government’s interest in less formal procedures.<sup>349</sup>

Based on *Goldberg*, the Fourth Circuit decided that, before a PHA makes an eviction determination, constitutional due process requires five elements:

- (1) timely and adequate notice detailing the reasons for a proposed termination; (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses; (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests; (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth; and (5) an impartial decision maker.<sup>350</sup>

A hearing before a PHA is not constitutionally required prior to eviction.<sup>351</sup> Although a tenant has a right to request a grievance hearing, there is no due process violation if they do not request (and therefore do not receive) a PHA hearing as long as they receive the benefit of a full jury trial in state court.<sup>352</sup> The procedural due process protections that are afforded public housing tenants have generally been incorporated into HUD directives; however, the statutory elements required for an administrative grievance procedure generally

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347. *Id.* at 262-63.

348. *Id.*

349. *Goldberg*, 397 U.S. at 263 (stating the element of “whether the recipients’ interest in avoiding the loss outweighs the governmental interest in summary adjudication”).

350. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1004 (4th Cir. 1970).

351. *Swann v. Gastonia*, 675 F.2d 1342, 1348 (4th Cir. 1982).

352. *Roanoke Chowan Reg’l Hous. Auth. v. Vaughan*, 344 S.E.2d 578, 581-82 (N.C. App. Ct. 1986) (citing *Swann*, 675 F.2d 1342).

go beyond that required for constitutional due process.<sup>353</sup> Under the administrative guidelines, tenants must be given 30 days notice and an opportunity to present written comment on any proposed changes to the grievance procedures.<sup>354</sup> The PHA may establish an expedited grievance procedure for evictions related to criminal activity.<sup>355</sup> Unlike a section 1983 or third-party beneficiary action, the grievance procedure process does not address class-wide complaints.<sup>356</sup>

#### b. Rent or Service Charge Increases

Most courts have agreed that due process requires some notice to public housing tenants faced with a rent or service charge increase; however, courts also have agreed that due process protection does not require a full adversary hearing.<sup>357</sup> Where courts have not recognized a due process right associated with rate increases, they have reasoned that tenants lack a substantial interest in preserving the existing rental rates required to avail themselves of due process protections.<sup>358</sup> Courts generally no longer frame tenant rights with respect to rent increases in terms of due process because HUD has issued regulations which provide for notice, availability of supporting documents, opportunity for written objections, tenant participation, and posting of reasons for approval of rent increases.<sup>359</sup>

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353. See 42 U.S.C. § 1437d(k).

354. 24 C.F.R. § 966.52(c) (1996).

355. *Id.* § 966.55(g). A PHA may invoke the expedited grievance procedure for grievances involving: "(i) [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA; or (ii) [a]ny drug-related criminal activities on or near such premises." *Id.*

356. *Id.* § 966.51(b).

357. See, e.g., *Goldberg*, 397 U.S. at 266.

358. See, e.g., *Harlib v. Lynn*, 511 F.2d 51 (7th Cir. 1975).

359. See 24 C.F.R. § 966.56(b) (1996). 24 C.F.R. § 966.4(n) (1996) requires that lease agreements provide for the use of the grievance process for resolution of all disputes concerning PHAs and tenant's obligations. Although imposition of a repair or maintenance charge would be considered an adverse action, HUD did not clarify whether a proposed rent increase should be treated as an adverse action. 24 C.F.R. § 966.4(b)(4) (1996). 24 C.F.R. § 966.4(c) (1996) requires that the lease provide the frequency of rental redeterminations and the basis for interim redetermination. If a PHA makes such rent redetermination, it must notify the tenant of his right to ask for an explanation stating the specific grounds of the determination. 24 C.F.R. § 966.4(c)(A)

In *Geneva Towers Tenants Organization v. Federated Mortgage Investors*,<sup>360</sup> the Ninth Circuit held that, in the case of a federally assisted housing project, due process requires notice of the lessor's application for approval of rent increase, opportunity to make written objections to the increase, and a concise statement of the government's reasons for approving the increase.<sup>361</sup> However, the court also held that due process did not mandate a "full-dress" hearing.<sup>362</sup> On the other hand, the dissent in *Geneva Towers* maintained that the tenants had no legitimate claim of entitlement sufficient for due process protection because their only interest was a unilateral expectation of continued conferral of a benefit.<sup>363</sup> Some circuit courts have rejected the majority's approach in *Geneva Towers* and instead have adopted the reasoning of the dissent.<sup>364</sup>

### c. Tenant Selection Procedures

A PHA, as a landlord under 42 U.S.C. §§ 1437d and 1437f, is subject to the requirements of procedural due process in its tenant selection procedures.<sup>365</sup> Due process safeguards in processing an application for housing may be required for rejected applicants as well as for those who have met the eligibility criteria.<sup>366</sup> In *Holmes v. New York City Housing Authority*,<sup>367</sup> the Second Circuit held that procedural due process requires that PHAs adopt "ascertainable

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(1996). The PHA must also notify the tenant that if he disagrees with the determination, he has the right to request a grievance hearing. *Id.*

360. 504 F.2d 483 (9th Cir. 1974).

361. *Id.* at 492.

362. *Id.*

363. *Id.* at 493 (Hufstедler, J., dissenting).

364. See, e.g., *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (holding that applicants on public housing waiting list have no constitutionally protected property interest in public housing entitling them to due process rights under the Fifth Amendment); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) (holding that public housing tenants are not entitled to a trial-type hearing before a housing agency with regard to proposed rent increases).

365. *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968).

366. *Id.*

367. 398 F.2d 262 (2d Cir. 1968).

standards” in their tenant selection procedures.<sup>368</sup> Because there may not be enough housing for all of those who are eligible, due process may extend to the procedures for managing the waiting list.<sup>369</sup> Some courts have even required private landlords to use ascertainable standards in selecting among eligible applicants for Section 8 housing.<sup>370</sup>

Section 1437d(c) requires that every ACC provide that the PHA comply with statutory tenant selection criteria.<sup>371</sup> PHAs have the discretion to provide for a system of preferences that meets local needs;<sup>372</sup> however, there are statutory suggestions for these discretionary preferences.<sup>373</sup> All of the HUD-mandated PHA admission policy requirements are substantive.<sup>374</sup>

Under the Section 8 rental assistance programs, as provided in 42 U.S.C. § 1437f, admissions may be a two-step process: tenant screening and tenant selection. The local PHA makes an initial

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368. *Id.* at 265.

369. *Id.*

370. *Daubner v. Harris*, 514 F. Supp. 856 (S.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982). A Section 8 tenant is initially approved (i.e. determined to be eligible) by a PHA and provided a Certificate of Family Participation. *Vandermark v. Housing Auth. of York*, 663 F.2d 436, 439-40 (3d Cir. 1981). The private landlord then selects among applicants holding a certificate. *Id.*

371. Similarly, as part of its application to HUD under Section 8, the local agency must file an administrative plan which specifies the criteria by which it will determine family eligibility and assistance priority. *See* 24 C.F.R. § 960.204 (1996). HUD mandates family status and income limitations, 24 C.F.R. §§ 913.102, .106 (1996), but agencies are otherwise free to adopt additional criteria, subject only to the requirement that they be reasonably related to the program’s objectives and be approved by HUD as part of the administrative plan. 24 C.F.R. § 960.204 (1996).

372. *See* 24 C.F.R. § 960.204 (1996). A typical preference list from a HUD-approved policy handbook of a PHA gave admissions to the applicants in the following order of importance: “1. Families displaced by governmental action or natural disaster. 2. Families of servicemen and families of veterans. 3. Families who are transferred due to work in the area. 4. Families in unsuitable living conditions (without housing or living in substandard housing).” *Pelps v. Housing Auth. of Woodruff*, 742 F.2d 816, 818 (4th Cir. 1984) (quoting HUD handbook). This handbook also specified three criteria in determining priorities: “1. Families who live in a specified school district. 2. Families having an urgent need. 3. Date and time of application.” *Id.*

373. *See* 42 U.S.C. § 1437d(C) (1994).

374. *See, e.g.*, 24 C.F.R. § 960.203 (nondiscrimination requirements); 24 C.F.R. § 960.204 (tenant selection policies); 24 C.F.R. § 960.205 (standards for PHA tenant selection criteria).

eligibility determination and issues a certificate of eligibility.<sup>375</sup> Subsequently, the PHA presents the certificate to a private landlord who ultimately is responsible for tenant selection.<sup>376</sup>

The circuits are split on whether prospective tenants have a legitimate claim of entitlement when they have met the admissions eligibility requirements but before they are accepted as tenants to public or Section 8 housing. The Seventh Circuit in *Eidson v. Pierce*<sup>377</sup> found that neither the Housing Act nor any regulations promulgated under it create a property interest in, or a legitimate claim of entitlement to, Section 8 benefits for individuals holding certificates of eligibility.<sup>378</sup> The *Eidson* court based its holding on “the fact that there are not enough Section 8 housing units to accommodate all who are eligible and willing to take them.”<sup>379</sup>

However, some courts, including the Ninth Circuit in *Ressler v. Pierce*,<sup>380</sup> have found that applicants holding a certificate are entitled to due process in the subsequent consideration of their application by private landlords because they possess a sufficient property interest in Section 8 benefits as potential tenants.<sup>381</sup> Such courts have reasoned that the detailed and comprehensive regulations and guidelines promulgated pursuant to the Housing Act create a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements.<sup>382</sup> The *Ressler* court distinguished its holding from those of other courts that found no such entitlement on

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375. Under the Section 8 Certificate Program, HUD “enters into annual contributions contracts with PHAs to make housing assistance payments to owners of existing housing units on behalf of eligible low-income families. 42 U.S.C. 1437f(b)(1) (1994). PHAs [are responsible] for accepting applications, determining a family’s eligibility, maintaining a waiting list, selecting participants, and issuing certificates . . . to eligible families in accordance with HUD regulations.” *Drake v. Pierce*, 698 F. Supp. 1523, 1529 (W.D. Wash. 1988); 24 C.F.R. § 880.603 (1996).

376. *See Drake*, 698 F. Supp. at 1529.

377. 745 F.2d 453 (7th Cir. 1984).

378. *Id.*

379. *Id.* at 457.

380. 692 F.2d 1212 (9th Cir. 1982).

381. *Id.*

382. *Id.*

the relative levels of discretion afforded private owners in dispensing governmental benefits.<sup>383</sup>

When an entitlement exists, a private landlord's selection of tenants would likely satisfy due process if there are "ascertainable standards"<sup>384</sup> to guide the owner's discretion.<sup>385</sup> Courts do not consider due process claims where the standards are ascertainable and rejected applicants are provided sufficient notice of and basis for rejection.<sup>386</sup> When an entitlement does not exist, courts have rejected any requirement of the private landlord to employ ascertainable standards because "[t]he law does not tell the owner how to choose between two eligible individuals."<sup>387</sup> Reasonable and ascertainable criteria include: a demonstrated ability to pay rent, good credit references, positive endorsements from prior landlords, no record of disruptive behavior, and other good reasons related to the applicant's ability to fulfill lease obligations.<sup>388</sup> In *Vandermark v. Housing Authority of York*,<sup>389</sup> the court held that the York Housing Authority (YHA) policy denying participation in the Section 8 program to individuals who owe debts to the YHA arising out of their prior occupancy in YHA projects (the indebtedness policy), did not violate due process because eviction hearing procedures afforded prior tenants an opportunity to explain their reasons for not paying rent or to show changed conditions.<sup>390</sup>

### 3. Demolition and Constructive Demolition of Public Housing

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383. *Id.* at 1215. In upholding the requirement for ascertainable standards in the Section 8 tenant selection process, the court stated the criteria must "relate to the ability of the applicant to fulfill lease obligations and should not automatically deny tenancy to a particular group or category of otherwise eligible applicants." *Id.* at 1218. However, in *Price v. Pierce*, 615 F. Supp. 173 (N.D. Ill. 1985), the court held that because financially eligible applicants for Section 8 housing do not enjoy a property right to benefits deserving of due process protection, they have no cause of action under section 1983.

384. *See infra* text accompanying note 388.

385. *See, e.g., Daubner*, 514 F. Supp. 856.

386. *Id.*

387. *Eidson*, 745 F.2d at 460-61.

388. *See Ressler*, 692 F.2d at 1217.

389. 663 F.2d 436 (3d Cir. 1981).

390. *Id.* at 442.

The Housing and Urban-Rural Recovery Act of 1983<sup>391</sup> amended the Housing Act, requiring PHAs to obtain permission from HUD to demolish or to dispose of public housing property.<sup>392</sup> The 1983 amendments provided statutory criteria for approval of requests for demolition and disposal.<sup>393</sup> HUD will not approve a PHA request for demolition or disposition unless the request has been developed in consultation with tenants of the project involved, any tenant organization for the project, and any PHA-wide tenant organizations that will be affected.<sup>394</sup>

In addition to the requirements for tenant consultation<sup>395</sup> and relocation assistance for displaced tenants,<sup>396</sup> HUD regulations require a finding that the project “is obsolete as to physical condition, location or other factors, making it unusable for housing purposes *and* no reasonable program of modifications, [sic] is feasible to return the project . . . to useful life.”<sup>397</sup> PHAs seeking demolition must develop a replacement housing plan, including one-for-one replacement of any demolished public housing stock.<sup>398</sup>

In *Henry Horner Mothers Guild v. Chicago Housing Authority*,<sup>399</sup> the court held that section 1437p created enforceable rights against conduct that results in de facto demolition of public housing as well as actual demolition.<sup>400</sup>

391. Pub. L. No. 98-181, § 214, 97 Stat. 1153, 1184 (1983) (codified at 42 U.S.C. § 1437p).

392. 42 U.S.C. § 1437p(d).

393. *Id.*

394. 24 C.F.R. §§ 970.4(a), 970.5 (1996).

395. 24 C.F.R. § 970.4(a) (1996).

396. *Id.* § 970.5.

397. *Id.* § 970.6.

398. *Id.* § 970.11(a). One exception to the one-for-one replacement rule is that during any 5-year period a PHA may demolish “not more than the lesser of 5 dwelling units or 5 percent of the total dwelling units owned and operated by the [PHA], without providing an additional dwelling unit for each [demolished unit], but only if the space occupied by the demolished unit is used for meeting the service or other needs of public housing residents.” *Id.* § 970.11(j).

399. 780 F. Supp. 511 (N.D. Ill. 1991).

400. *Id.* at 515. *Accord Tinsley*, 750 F. Supp. at 1008-09; *Concerned Tenants*, 685 F. Supp. at 321 (holding that otherwise “public housing agencies [could] evade the law by simply allowing housing projects to fall into decay and disrepair”).

#### 4. Other Substantive Federal Rights

In addition to the right to complain of constructive demolition of public housing, substantive federal rights have been found in ceiling rents, admissions practices, tenant eviction, and termination of benefits.

In *Wright v. City of Roanoke Redevelopment and Housing Authority*,<sup>401</sup> the Supreme Court held that tenants who allege violations of their rights to mandatory rent limitations<sup>402</sup> could maintain a private cause of action under section 1983.<sup>403</sup> The Court found that: (1) the Brooke Amendment and its legislative history did not vest exclusive enforcement authority in HUD; (2) both congressional and agency actions indicated a decentralized authority which contemplated private actions; (3) the remedial mechanisms contained in the Housing Act were insufficient “to raise a clear inference that Congress intended to foreclose a [tenant’s] § 1983 cause of action;”<sup>404</sup> (4) the availability of state court enforcement mechanism did not “bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights”<sup>405</sup> and (5) the regulations defining “rent” include a reasonable utility allowance, which was definite enough to be enforceable under § 1983.<sup>406</sup>

Courts have generally agreed there is no property interest in an admissions preference. These preferences arise because there are more

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401. 479 U.S. 418 (1987).

402. The rent limitations appear at 42 U.S.C. § 1437a, which provides:

[A] family shall pay as rent for a dwelling unit assisted under this chapter . . . the highest of the following amounts, rounded to the nearest dollar:

(A) 30 per centum of the family’s monthly adjusted income;

(B) 10 per centum of the family’s monthly income; or

(C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family’s actual housing costs, is specifically designated by such agency to meet the family’s housing costs, the portion of such payments which is so designated.

403. *Wright*, 479 U.S. 418.

404. *Id.* at 424-25.

405. *Id.* at 429.

406. *Id.* at 431-32.

persons eligible for housing benefits than there are available housing units. The Fourth Circuit, in *Phelps v. Housing Authority of Woodruff*,<sup>407</sup> found that the “‘rights’ allegedly conferred by the preference and notice statutes lack[ed] the quality necessary to be of a ‘kind enforceable under § 1983.’”<sup>408</sup> The court therefore held that section 1437d(c)(4)(A) granted the tenant plaintiffs an entitlement only: “(1) to have included in the ACC a requirement (2) that the [defendant housing authority] adopt selection criteria that (3) accommodates their preference (4) while also accommodating the equally important goals of achieving a tenant mix representative of a broad range of incomes *and* of achieving financial solvency.”<sup>409</sup>

Other courts have used similar reasoning to deny preferences. In *Martinez v. Rhode Island Housing & Mortgage Finance Corp.*,<sup>410</sup> the First Circuit reasoned that because the 1981 amendments to 42 U.S.C. § 1437f and the accompanying legislative history evinced a congressional intent against preferences for Section 8 housing, a preference favoring low income housing applicants over very-low income applicants was contrary to this statutory policy.<sup>411</sup>

However, in a later opinion, *Paris v. Department of Housing & Urban Development*,<sup>412</sup> the First Circuit permitted a tenant selection scheme which provided for an economic mix of tenants by allowing higher income housing applicants to leapfrog lower income applicants that were senior to them on the housing waiting list.<sup>413</sup> The *Paris* court concluded that this scheme satisfied HUD regulations regarding tenant selection standards and that the HUD regulations were within the Secretary of HUD’s authority pursuant to 42 U.S.C.

407. 742 F.2d 816 (4th Cir. 1984).

408. *Id.* at 821.

409. *Id.*

410. 738 F.2d 21 (1st Cir. 1984).

411. *Id.* at 25. The *Martinez* court therefore upheld a temporary restraining order that required the state “to delete all reference to maximum quota on the number of persons or families in the ‘very low income’ . . . range” from its resident selection plan. *Id.* at 24-25. In addition, PHA’s were prohibited from giving a preference to applicant’s with higher incomes. *Id.*

412. 843 F.2d 561 (1st Cir. 1988).

413. *Id.*

§ 1437d(c)(4)(A).<sup>414</sup> Similarly, landlords are permitted to give Section 8 admissions preferences to current residents over nonresidents in selecting eligible tenants.<sup>415</sup>

Recently, however, courts have found there may be an enforceable federal right to admission preferences if the housing applicant can show that a PHA policy or custom violated federal selection and admissions preferences, or that policymakers were personally involved in such a violation.<sup>416</sup> Further, aggrieved applicants would have to show they were injured by the violations and that a favorable decision of the court would redress their injuries.<sup>417</sup> This finding of right in *Gomez* was based on a claim of third-party beneficiary status under the ACC as well as a section 1983 property interest in enforcement of the housing statute.<sup>418</sup> Assuming the correctness of the reasoning in *Gomez*, it is arguable that the circumstances under which suit may be brought as a third-party beneficiary may be nearly identical to those which are available under section 1983.<sup>419</sup>

In selecting tenants, a PHA may consider a variety of factors “reasonably related to individual attributes and behavior of an applicant.”<sup>420</sup> To avoid the concentration of families with “serious social problems” in public housing, for example, a PHA may consider “[r]elevant information respecting habits or practices” of the

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414. *Id.* at 566-67.

415. 24 C.F.R. § 5.410(h)(2) (1996). Residency preferences must be approved by HUD. *Id.* See *Ressler*, 692 F.2d 1212 (noting that local residence preference for current tenants would “encourage project owners to make full utilization of their Section 8 contract authority”).

416. *Gomez*, 805 F. Supp. at 1367-68.

417. *Id.* at 1369.

418. *Gomez*, 805 F. Supp. 1363.

419. Compare *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981) (differentiating between intended and incidental beneficiaries of HUD Section 8 benefits under ACCs) with *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (noting that parties benefited only as an incident to a federal scheme may not have a private remedy under § 1983), and *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498 (1990) (finding that a right was enforceable under the meaning of section 1983 when the parties were intended beneficiaries of the statute). At least one commentator has argued that the circumstances under which a § 1983 suit is available has come close to the standing rules when the issue is who may sue. See *Monaghan, supra* note 310, at 257.

420. 24 C.F.R. § 960.205(a) (1996). A PHA may grant a preference based on employment status. *Id.*

applicant.<sup>421</sup> On the other hand, PHAs may not terminate or refuse to renew leases “other than for serious or repeated violation[s] of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations” under the lease.<sup>422</sup> However, tenants who engage in drug-related criminal activity or criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants,<sup>423</sup> may be evicted without the need for a separate inquiry as to whether such criminal activity constitutes a serious or repeated lease violation<sup>424</sup> or other good cause for eviction.<sup>425</sup> A tenant may be evicted for criminal activity engaged

421. *Id.* § 960.205(b). These factors include, but are not limited to:

- (1) [a]n applicant’s past performance in meeting financial obligations, especially rent;
- (2) [a] record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of others tenants; and
- (3) [a] history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants.

*Id.*

422. *Id.* § 966.4(1)(2).

423. 42 U.S.C. § 1437d(1)(5); 24 C.F.R. § 966.4(1)(2)(ii) (1996).

424. 24 C.F.R. § 966.4(1)(2)(ii). *But see* Steven W. Barrick & Assocs. v. Witz, 498 N.E.2d 738 (Ill. App. Ct. 1986) (stating that landlord could not refuse to renew tenant’s lease, even though he had breached the lease by threatening his neighbors with violence, because landlord condoned the behavior by accepting rental payments for eight months after he became aware of the misconduct and by failing to warn tenant that the conduct was impermissible under the terms of the lease).

425. 24 C.F.R. § 966.4(1)(2)(ii). Both the Fourth Circuit, in *Swann v. Gastonia Housing Authority*, 675 F.2d 1342, 1345 (4th Cir. 1982), and the Eleventh Circuit, in *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 925 (11th Cir. 1982), acknowledged that Section 8 tenants have a protected property interest in their leases and could only have their tenancies terminated for good cause. In *R & D Realty v. Shields*, 482 A.2d 40, 44 (N.J. Super. Ct. Law Div. 1984), the court noted that good cause for failing to renew an assisted lease could not be established by a desire to substantially increase the amount of rent for a particular unit. In addition, in *Marine Terrace Associates v. Zeimbekis*, 472 N.Y.S.2d 287 (N.Y. Civ. Ct. 1983), the court denied a landlord’s holdover petition where the tenant violated a lease provision prohibiting nonfamily members from sharing the unit. The lease provision conflicted with a New York real property law amendment which provided that the lease of any residential premises should be construed to permit occupancy by the tenant, the tenant’s family and one additional occupant. *Id.* at 288. The *Marine Terrace* court held that a tenant in the Section 8 program could avail himself to the benefits of the New York statute and still enjoy all the rights and benefits of the Section 8 program. *Id.* at 288-89. Lastly, in *Jackson Terrace Ass’n v. Paterson*, 589 N.Y.S.2d 141 (N.Y. Civ. Ct. 1992), the court held that a landlord’s failure to serve notice of petition to terminate precluded termination of the tenancy despite the fact that the premises had been used as a “crack”

in by any member of the tenant's household, their guests, or other persons under the tenant's control.<sup>426</sup> PHAs may proceed with eviction for criminal activity regardless of whether a criminal prosecution has been commenced.<sup>427</sup>

### 5. Third-party Beneficiary to ACC

Because section 1983 has been available to enforce provisions of the housing statute and HUD regulations, courts have generally not decided the question of whether tenants are third-party beneficiaries of ACCs between HUD and the PHA.<sup>428</sup> Where the question has been

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house.

426. 42 U.S.C. § 1437d(1)(5) and 24 C.F.R. § 966.4(l)(2)(ii). *See Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245 (5th Cir. 1992) (tenant's constitutional rights were not violated when she was evicted for allowing her house guests to disturb or endanger others in the community with their criminal activity). *But see North Shore Plaza Assocs. v. Guida*, 459 N.Y.S.2d 685 (N.Y. Civ. Ct. 1983)(Landlord failed to prove substantial violations or repeated minor violations required to evict public housing tenant, where tenant's eight year old son committed sodomy on another tenant's son and a second incident where a security guard had to break up a fight between tenant's son and two other boys. The court held that these incidents were not substantial violations of the lease, noting that "substantial violations" include: (1) failure to pay rent; (2) not using the premises for the intended purpose; (3) permitting unauthorized individuals to reside on the premises; and (4) unauthorized or illegal alterations on the premises.) *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513 (S.D.N.Y. 1974) (holding that public housing tenants, subject to eviction because criminal acts of their nonresident adult sons violated housing regulations, stated a cause of action against the authority on several bases including violations of: (1) due process rights; (2) equal protection; (3) the First Amendment right of association; (4) vagueness and overbreadth of the regulation, violating the Fourteenth Amendment; and (5) conflict between the local regulation and HUD circular providing that tenant violations must be based on interference with other tenants' enjoyment of the premises relating to the actual or to threatened conduct of the tenant).

427. 24 C.F.R. § 966.4(l)(2)(ii).

428. *See Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985). Although it did not reach the question of whether aggrieved tenants could bring a third-party beneficiary claim, the *Samuels* court noted its preference for a section 1983 cause of action for redressing PHA violations of federal law and for determining which public housing claims belong in federal court:

We do not believe, for example, that an individual public housing tenant could bring a section 1983 action for a public landlord's random and unauthorized failure to maintain properly her dwelling unit on the theory that such action violates the provision of the [Housing] Act which calls for "decent, safe and sanitary dwellings." Such a limit on the availability of section 1983 to challenge PHA action is entirely reasonable given the congressional design of federally-funded public housing. Nothing in the language or history of the Act indicates that Congress intended the broad policy provisions of the Act to create a federal remedy for every aspect of public landlord-tenant relations, and we would be extremely reluctant to read those provisions to create a federal warrant of

decided, the circuit courts are divided.

In *Holbrook v. Pitt*,<sup>429</sup> the Seventh Circuit found that tenants were third-party beneficiaries of contracts between HUD and certain owners of HUD-insured rental properties.<sup>430</sup> In *Holbrook*, both the owner and HUD were found to have breached their obligations to the tenants. The court in *Holbrook* analyzed the case under principles of federal common law, but noted that its decision would have been the same if analyzed under the respective state law.<sup>431</sup> The court followed the approach of the Restatement (Second) of Contracts § 133<sup>432</sup> and divided beneficiaries into two classes—intended and incidental—and thereby focused on what the *Holbrook* court felt was the “central question”: “[D]id the contracting parties intend that the third party benefit from the contract?”<sup>433</sup> In finding that the tenants had enforceable rights under the contract, the court looked at the statutory

habitability enforceable under section 1983 in individual landlord-tenant disputes. To the extent that the plaintiffs’ third-party beneficiary theory could be extended to establish a federal cause of action for such discrete and random disputes, we think it would be plainly inconsistent with the structure of federal housing law.

*Id.* at 201 n.14 (citations omitted).

429. 643 F.2d 1261 (7th Cir. 1981).

430. *Id.* at 1271-73. The tenants in *Holbrook* received Section 8 assistance payments. Under the section 236 rental assistance program, HUD contracted to make periodic mortgage interest payments on the owner’s behalf in return for the owner’s agreement to reduce the rentals for lower income families. *Id.* at 1268-69. The contract also established certain rights and duties in the administration of the Section 8 assistance program. *Id.*

431. *Id.* at 1270 n.16.

432. *Id.* at 1270 n.17. Restatement (Second) of Contracts § 133 (Tent. Draft No. 4, 1968) provided:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the promisee manifests an intention to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

See *Holbrook*, 643 F.2d at 1270-71 n.17. The *Holbrook* court rejected the approach of the Restatement (First) which recognized three classes of third-party beneficiaries—donor, creditor, and incidental. *Id.*

433. *Holbrook*, 643 F.2d at 1270 n.17 (citation omitted).

language of section 1437f and noted that “Congress authorized Section 8 payments ‘[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing.’”<sup>434</sup> The funds were to be allocated according to the financial needs of the tenants. The court reasoned that if Congress had intended Section 8 to primarily assist troubled projects and not families, the statute would have provided that contracts be awarded and funded “in accordance with the financial condition of the project.”<sup>435</sup> The court also compared the statutory language with that in the Housing and Community Development Amendments of 1978, “which *was* designed to assist financially troubled multifamily projects” and under which “the level of assistance *is* based on the project’s financial circumstances, not the tenants’ incomes and rental assistance needs.”<sup>436</sup>

In addition to the statutory language, the *Holbrook* court looked to the regulations and the contract terms for intent to benefit the tenants. In particular, the court found that “the tenants had enforceable rights since the contracts were intended to provide them with rental assistance.”<sup>437</sup> Their status as third-party beneficiaries was not defeated by the presence of subsidiary purposes.<sup>438</sup> Nor was their status “defeated by the fact that they were not specifically named in the contracts, since they [were] identified at the time performance is due, i.e. when certification occurs.”<sup>439</sup>

In contrast, the Fourth Circuit rejected third-party beneficiary claims under the ACC in *Perry v. Housing Authority of Charleston*.<sup>440</sup> After reviewing the statutory scheme, the ACC between HUD and the PHA, and the lease agreement between the PHA and the tenants, the court in *Perry* concluded that the tenants were at best incidental

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434. *Id.* at 1271.

435. *Id.*

436. *Id.* at 1271 n.19.

437. *Id.* at 1273.

438. *Id.*

439. *Holbrook*, 643 F.2d 1273 n.23.

440. 664 F.2d 1210 (4th Cir. 1981).

beneficiaries to the ACC.<sup>441</sup>

In challenging a PHA's application of federal selection preferences, more recent court decisions have found these provisions privately enforceable by tenants by both section 1983 and third-party beneficiary claims.<sup>442</sup> Citing to section 201<sup>443</sup> of the ACC, the court in *Henry Horner* found that tenants are third-party beneficiaries of this agreement between HUD and the local PHA since "[t]he terms of the [ACC] . . . communicate that the purpose of the contract is to benefit public housing tenants, as well as low-income families generally."<sup>444</sup> Following the reasoning in *Henry Horner*, and looking also to section 206<sup>445</sup> of the ACC, another district court found that applicants and potential applicants were also third-party beneficiaries.<sup>446</sup> It is unclear whether these courts were made aware of, or considered, the language of section 510 of the ACC which provides in paragraph (B) that

441. *Id.* at 1218.

442. *See, e.g., Henry Horner Mothers Guild v. Chicago Hous. Auth.*, 780 F. Supp. 511 (N.D. Ill. 1991).

443. Section 201 of the Annual Contributions Contract provides:

The Local Authority shall at all times operate each Project (1) solely for the purpose of providing decent, safe, and sanitary dwellings (including necessary appurtenances thereto) within the financial reach of Families of Low Income, (2) in such manner as to promote serviceability, efficiency, economy, and stability, and (3) in such manner as to achieve the economic and social well-being of the tenants thereof.

ANNUAL CONTRIBUTIONS CONTRACT, *supra* note 156, at 17.

444. *Henry Horner*, 780 F. Supp. at 516.

445. Section 206 of the Annual Contributions Contract provides:

The Local Authority shall duly adopt and promulgate, by publication or posting in a conspicuous place for examination by prospective tenants regulations establishing its admission policies. Such relationship must be reasonable and give full consideration to its public responsibility for rehousing displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran and to the applicant's age or disability, housing conditions, urgency of housing need, and source of income, and shall accord to families consisting of two or more persons such priority over families consisting of single persons as the Local Authority determines to be necessary to avoid undue hardship.

ANNUAL CONTRIBUTIONS CONTRACT, *supra* note 156, at 19.

446. In *Gomez*, 805 F. Supp. at 1368, the court read the ACC and the HUD regulations to "benefit not just those persons who are tenants or . . . applicants on the waiting list, but also those persons who have attempted, but [who have] been unable, to get on the waiting list because of alleged violations of HUD regulations and the ACC."

nothing in the contract shall be construed as creating or justifying any claim against the Government by any third party other than the bondholders, who are protected under the provisions of paragraph (A).<sup>447</sup>

#### IV. REFORMING PUBLIC HOUSING MANAGEMENT

We submit that there are three primary reforms needed in public housing: (1) changing the beneficiaries of public housing assistance and the “rights” enforceable under section 1983 or as third-party beneficiaries to ACCs; (2) eliminating the use of ACCs to turn a local housing management program into a federal social program; and (3) changing federal funding by removing the current “standards” system. Because much of the constitutional analysis surrounding both section 1983 and impairment of contracts cases are centered around interpreting the intent of Congress—express or implied—it will take considerable political will in Congress to manifest an intent to do what we propose.

To reform public housing we must first reform its management. In order to do this, the management of PHAs must be defederalized legislatively, executively and judicially, not to mention internally. To defederalize public housing in the courts, the tenant’s rights to bring a section 1983 cause of action should be eliminated by congressional action.<sup>448</sup> Tenants have been allowed to bring their grievances into

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447. Section 510, Rights of Third Parties, provides:

(A) The Government covenants and agrees with and for the benefit of the holders from time to time of the Bonds and of interest claims thereunder, that it will pay the annual contributions pledged as security for such Bonds and interest pursuant to this Contract. To enforce the performance by the Government of this covenant such holders, as well as the Local Authority, shall have the right to proceed against the Government by action at law or suit in equity.

(B) Nothing in this Contract contained shall be construed as creating or justifying any claim against the Government by any third party other than as provided in subsection (A) of this Sec. 510.

ANNUAL CONTRIBUTIONS CONTRACT, *supra* note 156, at 63.

448. As discussed in Part III.B.1, the Supreme Court has held that section 1983 is available only if (1) the statute at issue creates “enforceable rights, privileges, or immunities within the meaning of § 1983 and (2) Congress has not “foreclosed such enforcement of the statute in the

federal court when most have an adequate state court remedy under landlord-tenant law.<sup>449</sup> Most individual grievances are currently resolved in state courts.<sup>450</sup> The availability of section 1983 actions, combined with a detailed federal regulatory scheme, has multiplied the number of rights and controversies, but has not necessarily improved housing.<sup>451</sup> When the actions of a local public housing authority demonstrate a pattern of wrongful behavior, the systematic nature of the complaint would allow a class-action to be brought into state court.<sup>452</sup> Likewise, a constitutional complaint can be heard by a state tribunal.<sup>453</sup> Of course, constitutional claims will continue to have a federal forum without the use of section 1983.<sup>454</sup>

In foreclosing the section 1983 remedy, Congress should unambiguously express its intent in housing reform legislation because the courts have struggled to infer such a negative intent.<sup>455</sup> *Pennhurst*

enactment itself.” *Wright*, 479 U.S. at 423. More recently, the Court has reconsidered the scope of federal power to abrogate a state’s sovereign immunity. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Thus, the judiciary also may eliminate the availability of the section 1983 remedy.

449. If the section 1983 cause of action were removed, tenants would be required to rely on their state law rights, or on constitutional protections which would remain. *See Wright*, 479 U.S. at 440-41 (O’Connor, J., dissenting).

450. The grievance procedures of HUD regulations are also designed for individual complaints. *See Wright*, 479 U.S. at 427. Only when there is a class-wide complaint will a federal court entertain a section 1983 or third-party beneficiary action. *Id.*

451. *See Schill*, *supra* note 28, at 497 (noting that “reports [of] appalling apartment conditions, corrupt administrators, and innocent [victims of] gang warfare” are commonplace) (footnotes omitted).

452. *See Scarborough v. Elmira Hous. Auth.*, 358 N.Y.S.2d 861 (N.Y. Sup. Ct. 1974).

453. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304 (1816) (interpreting Articles III and IV of the United States’ Constitution and finding both state and federal courts have authority to interpret federal law); *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505 (Wis. 1977) (reviewing local ordinance enforcing building codes against landlord for compliance with due process).

454. *See Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984) (“Even if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction.”).

455. Of course, Congress could also choose to amend section 1983 to limit its application to only constitutional torts. Since section 1983 is a statutory remedy, Congress has the authority to repeal it or amend it. *Smith*, 468 U.S. at 1012. For a discussion of the history of section 1983 actions and congressional intent to foreclose a section 1983 action, see David C. Frederick, Note, *Comprehensive Remedies and Statutory Section 1983 Actions: Context as a Guide to*

*State School & Hospital v. Halderman*<sup>456</sup> has been cited to support the first prong of the section 1983 analysis—that the relevant statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983. In *Pennhurst*, the Court’s analysis of the section 1983 action rested on its conclusion that Congress was acting pursuant to its spending power and its ability to condition the grant of federal funds on certain substantive requirements,<sup>457</sup> in contrast with a statute under which Congress exercised its authority to enforce the Fourteenth Amendment requiring the states to fund new, substantive rights.<sup>458</sup> The language of the provision in question was not mandatory, but hortatory, and was not enforceable as a condition to funding as were other sections of the same statute.<sup>459</sup> If the funds could not be terminated for failure to comply, the provision could not be considered enforceable as a condition. To be binding, the language must “express more than a preference for certain kinds of

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*Procedural Fairness*, 67 TEX. L. REV. 627 (1989).

456. 451 U.S. 1 (1980).

457. The Court explained that, “[u]nlike legislation enacted under § 5 [of the Fourteenth Amendment], legislation enacted pursuant to the spending power is . . . in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” *Pennhurst*, 451 U.S. at 17.

458. *Id.*

459. The relevant statutory provision, section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, contained a provision which stated:

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person’s personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutio[n] . . . that—(A) does not provide treatment, services, and habilitation which is appropriate to the needs for such person; or (B) does not meet the following minimum standards. . . .

*See id.* at 13. The court compared the language of section 6010 with that in sections 6005, 6009, 6011, and 6012 and concluded that section 6010 lacked the qualifying “conditional” language of the sections creating enforceable rights.

treatment.”<sup>460</sup>

Congressional intent to foreclose a section 1983 cause of action under the second prong of the analysis has been inferred only when the relevant statute itself provided for a comprehensive remedial scheme.<sup>461</sup> The availability of administrative mechanisms was sufficient to infer a congressional intent to foreclose a section 1983 action in *Smith v. Robinson*<sup>462</sup> when the administrative scheme was not simply a funding statute, but allowed for private actions;<sup>463</sup> however, the administrative enforcement scheme under the Housing Act, as reviewed in *Wright v. Roanoke*, was found not to preclude actions under section 1983.<sup>464</sup> The difference appears to be that a section 1983 remedy is available “only when the substantive statute fails to provide procedural remedies necessary to accomplish the underlying congressional purposes.”<sup>465</sup> The existence of enforceable federal rights to housing of a particular quality and price have intruded on state sovereignty, and Congress should unequivocally express that state law shall be the exclusive remedy for violation of tenant rights.<sup>466</sup>

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460. *Pennhurst*, 415 U.S. at 19. The Court has also noted the limitation of Congress’ spending power: “[I]f Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 415 U.S. at 17).

461. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981), the Court found that the Federal Water Pollution Control Act, which expressly provided particular private remedies, expressed Congress’ intent to foreclose section 1983 actions. *Id.* at 14-15.

462. *Smith*, 468 U.S. at 1010.

463. The *Smith* Court reviewed the language of the Education of the Handicapped Act (EHA) to determine “whether Congress intended that the EHA be the exclusive avenue” for plaintiffs. *Id.* at 1009. Finding that the minimal procedural safeguards of the original EHA had been replaced by “an elaborate procedural mechanism to protect the rights of handicapped children,” the *Smith* Court concluded that Congress intended to foreclose other avenues of relief including section 1983 claims. *Id.* at 1010-11.

464. See *supra* notes 299-302 and accompanying text. In *Wright*, the rights sought to be redressed by plaintiffs were rights to a maximum rent, including a reasonable utility allowance. 479 U.S. at 421-22. Since there were no other means in the Housing Act to enforce the provisions of the Brooke Amendment against PHAs, tenants were allowed to bring a section 1983 action in federal court. *Id.* at 427-29.

465. Frederick, *supra* note 455, at 636.

466. See *Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting). In addition to the remedies available under state landlord-tenant law, states would be free to adopt whatever regulatory

In this same vein, public housing should be defined as a community benefit rather than as an individual entitlement.<sup>467</sup> Again, the language of the amending legislation must be carefully drafted. Non-profit institutions receiving reimbursement under the Medicaid program have been found to have a section 1983 cause of action against a state.<sup>468</sup> Patients were not the intended beneficiaries, the service providers were.<sup>469</sup> The analysis for determining the intended beneficiary of a statute is similar to the third-party beneficiary analysis.<sup>470</sup> In *Wilder*,<sup>471</sup> the court found that the Boren Amendment to the Medicaid Act created a substantive federal right to reasonable and adequate reimbursement rates because health care providers were intended beneficiaries of the Act<sup>472</sup> and Congress did not foreclose a private judicial remedy.<sup>473</sup> Although the purpose of the Amendment was to

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structure and enforcement scheme they chose, or none at all.

467. One way of doing this is to provide federal funding only through community development block grants. Some GOP proposals have envisioned doing just that. *See, e.g., GOP Factions Aim to Abolish or Shrink Beleaguered HUD*, 53 CONG. Q. WKLY. REP. 1426 (1995). See also the rationale of cases such as *Holbrook*, 643 F.2d at 1271-72, comparing statutory language intended to assist troubled projects with language intended to benefit tenants.

468. *Wilder*, 496 U.S. 498. Medicaid is a cooperative federal-state program. *Id.* at 502. States that wish to qualify for federal assistance submit “plan[s] for medical assistance” to the Secretary of Health and Human Services. *Id.* The plan must include provisions for reimbursing medical service providers who serve needy individuals. *Id.* The state must also make “assurances . . . to the Secretary [that the State rates] are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.” *Id.* at 503 (quoting the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A) (1982 & Supp. V)).

469. The Boren Amendment “establish[ed] a system for reimbursement of providers and was phrased in terms benefiting health care providers”; therefore, health care providers were determined to be the intended beneficiaries. *Wilder*, 496 U.S. at 510.

470. As with third-party beneficiary analysis, the question is whether the plaintiff was an intended beneficiary of the provision, who is therefore entitled to sue, or an incidental beneficiary, who is not. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the Court commented that section 1983 may not be available when the plaintiffs are “benefited only as an incident of the federal scheme of regulation.” *Id.* at 109. The Court in *Wilder* applied this analysis to determine whether the plaintiff had a primary federal right. *Wilder*, 496 U.S. at 509-11. *See Monaghan, supra* note 310, at 257-60.

471. 496 U.S. 498.

472. Part one of the section 1983 analysis requires a finding that the provision creates rights, privileges and immunities under the Act. The finding of a right was held to “turn[] on whether ‘the provision . . . was intend[ed] to benefit the putative plaintiff.’” *Wilder*, 496 at 509.

473. *Wilder*, 496 U.S. at 509. Because the language of the statute was phrased in mandatory

reduce the federal government's role in calculating rates, a limitation on federal oversight was insufficient evidence of congressional intent to foreclose a section 1983 action.<sup>474</sup>

At the executive level, ACCs between HUD and PHAs are unnecessary and should be eliminated. This change will also require congressional action.<sup>475</sup> ACCs imposed conditions on PHAs in exchange for federal funding of construction and modernization projects.<sup>476</sup> When the debt was forgiven,<sup>477</sup> all that remained were the contract conditions.<sup>478</sup> In *Housing Authority of Fort Collins v. United States*,<sup>479</sup> the Fort Collins Housing Authority (FCHA) sought to remove the government's liens from its public housing properties, asserting that, under section 518 of the ACC,<sup>480</sup> the debt forgiveness provided by COBRA was the equivalent of "payment in full" and that, therefore, the ACC terminated by its own terms.<sup>481</sup> The Tenth Circuit upheld the authority of Congress to continue the contract conditions

rather than precatory terms, and because funds would only be provided as a condition of complying with the statutory terms, the statute gave rise to a binding and enforceable obligation. *Id.* at 510. This right was not merely procedural, but was a substantive right as well. *Id.*

474. *Wilder*, 496 U.S. at 521-22. Further, the Court found that the language of the statute which permitted states "to adopt any rates [they] find are reasonable and adequate" was not "'too vague and amorphous' to be judicially enforceable" because "the statute and regulation set out factors which [states] must consider in adopting rates." *Id.*

475. The requirement to enter into the ACC is statutory. 42 U.S.C. section 1437c(1).

476. *See STRUYK*, *supra* note 105, at 92.

477. As discussed *supra* note 181 and accompanying text, this "debt" was fiction that COBRA eliminated. *See also Fort Collins*, 980 F.2d at 626 ("COBRA abolished the fiction that Public Housing Authorities received loans which must be repaid . . .").

478. The debt forgiveness provisions of COBRA, 42 U.S.C. section 1347b(c)(1) (1994), provided that: "Such cancellation shall not affect any other terms and conditions of such contract, which shall remain in effect as if the cancellation had not occurred." *Id.* HUD's Statement of Policy, which followed the enactment of section 3004, explained that "'the ACC [will] run to the full term at which it otherwise would have terminated had there not been cancellation of the loan.'" *Fort Collins*, 980 F.2d at 628 (quoting 53 Fed. Reg. 31,274, 31,276 (1988)).

479. 980 F.2d 624 (10th Cir. 1992).

480. ACC section 518, Termination of Obligations, provides in relevant part that: "Upon payment in full of all indebtedness of the Local Authority in connection with any Project for which annual contributions are pledged, . . . all obligations of the Government and the Local Authority under this Contract with respect to such Project shall cease . . . and this Contract shall terminate as to such Project." ANNUAL CONTRIBUTIONS CONTRACT, *supra* note 156, at 65.

481. *Fort Collins*, 980 F.2d at 627.

for the full 40-year term of the ACC under both the Spending Clause of the Constitution<sup>482</sup> and under Congress' general reservation of power to alter or modify its contract terms by subsequent legislation.<sup>483</sup>

The court in *Fort Collins* first reasoned that because the Spending Clause allows Congress to attach conditions on the receipt of federal funds, COBRA's preservation of the existing conditions in the ACC (to maintain the low-income nature of the properties), was a valid exercise of Congress' authority to make all laws necessary and proper for carrying out their powers.<sup>484</sup> Second, relying on the Supreme Court's reasoning in *Bowen v. Public Agencies Opposed to Social Security Entrapment*,<sup>485</sup> the court found that the contractual arrangements in the ACC, even in this case where the sovereign itself was a party, remain subject to subsequent legislation by the sovereign.<sup>486</sup> Like the agreements in *Bowen*, the rights involved in *Fort Collins* did not resemble those which constitute property.<sup>487</sup>

The *Bowen* decision was based on a Fifth Amendment Takings analysis.<sup>488</sup> The contractual arrangements between the federal government and the municipalities reviewed by the *Bowen* court are very similar to those in the ACC (now that ACCs carry no associated housing debt). In *Bowen*, the State of California challenged an amendment to the Social Security Act which prevented termination of social security benefits.<sup>489</sup> Under the Act, states and their subdivisions

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482. *Id.* at 628-29.

483. *Id.* at 630.

484. *Id.* *But see* *New York v. United States*, 505 U.S. 144 (1992) (for federal law to withstand Tenth Amendment scrutiny states must be able to avoid the federal regulatory program).

485. 477 U.S. 41 (1986).

486. *Fort Collins*, 980 F.2d at 630 (citing *Bowen*, 477 U.S. at 55).

487. *Id.*

488. 477 U.S. at 43. The Contracts Clause of the United States Constitution prohibits the states from passing any law impairing the obligation of contracts: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. There is no similar constitutional provision restraining the federal government. The Supreme Court has held, however, that rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *See Lynch v. United States*, 292 U.S. 571, 579 (1934).

489. *Bowen*, 477 U.S. at 49.

executed agreements with the Secretary of Health and Human Services for coverage under the Social Security system.<sup>490</sup> When the agreements were entered into, the Act authorized voluntary participation by the states and voluntary termination.<sup>491</sup> Unlike the Housing Act, the Social Security statute included an express reservation clause<sup>492</sup> which gave Congress the right to alter or amend its provisions.<sup>493</sup> The agreements were executed with knowledge of the reservation clause and expressly incorporated it.<sup>494</sup>

The *Bowen* Court found that the contractual right at issue did not constitute property within the meaning of the Fifth Amendment because the provision was simply a part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare; therefore, the Court held that there was no vested right, and no taking.<sup>495</sup> Although there are limits on the Sovereign's exercise of its reserved powers to alter contracts, the contract right in *Bowen* was not a "debt of the United States nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium."<sup>496</sup>

The *Fort Collins* court, on the other hand, noted the absence of an express reservation clause in the Housing Act, but relied on the general reservation of sovereign authority recognized in *Bowen* to find that Congress retained the power to modify the terms of the ACC.<sup>497</sup> This was so even though the Housing Act and the provisions of the ACC require the mutual agreement of HUD and the PHA to amend its terms.<sup>498</sup>

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490. *Id.* at 45-46.

491. *Id.*

492. *Id.* at 44. The Court noted, however, that without regard to its source, and even when the power is unexercised, sovereign power governs all contracts unless surrendered in unmistakable terms. *Id.* at 52.

493. *Id.*

494. *Id.* at 54.

495. *Bowen*, 477 U.S. at 55-56.

496. *Id.* at 55 (citations omitted).

497. *Fort Collins*, 980 F.2d at 630.

498. *See* 42 U.S.C. § 1437c(f) ("[A]ny contract heretofore or hereafter made for annual

The Supreme Court has held that obligations of the federal government “can be impaired [in a constitutional sense] only ‘by a law which renders them invalid, or releases or extinguishes them . . . [or by a law] which, without destroying [the] contracts, derogate[s] from substantial contractual rights.’”<sup>499</sup> Once an impairment to a private contract has been found, the Fifth Amendment dual standard of review applicable to state legislation under the Contract Clause is applied to the impairing federal legislation.<sup>500</sup> An impairment of the government’s own contracts “may be constitutional if it is reasonable and necessary to serve an important public purpose.”<sup>501</sup>

The nature of ACCs has changed over time. What was once a financial security contract is now purely a general welfare

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contributions, loans, or both, may be amended or superseded by a contract entered into by mutual agreement between the public housing agency and the Secretary.”); ANNUAL CONTRIBUTIONS CONTRACT § 512, *supra* note 156, at 63 (“[B]y mutual agreement [of United States and PHA the ACC] may be amended in writing . . . .”) In actuality, the ACC is amended and superseded with frequency as it incorporates the terms of later congressional enactments. *See, e.g.*, HUD Form 52520A (Oct. 1979) (copy on file with authors) (superseding certain prior ACCs). These are standard form amendments which, although signed by both parties, do not contemplate negotiation. In fact, a superseding agreement is executed for each modernization of an existing project.

499. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 279 (1969) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 431 (1934)).

500. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1977) (referring to the Supreme Court decisions of *Perry v. United States*, 294 U.S. 330, 350-351 (1935); *Lynch v. United States*, 292 U.S. 571, 580 (1934)). Under the dual standard, the test for impairment of private contracts is whether the “[l]egislation adjusting the rights and responsibilities of contracting parties [is based on] reasonable conditions and of a character appropriate to the public purpose justifying its adoption.” *United States Trust*, 431 U.S. at 22. In reviewing economic and social regulation under this standard, courts will “defer to legislative judgment as to the necessity and reasonableness of a particular measure.” *Id.* at 22-23. For impairment of the government’s own contracts, the test is whether the impairment is reasonable and necessary to serve an important governmental purpose. *Id.* The *United States Trust* Court noted that in both cases, the government’s powers derive from the reserved-powers doctrine, but that the basis is different for each. *Id.* In the latter case, the reserved-powers doctrine “requires a determination of the State’s power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.” *Id.* at 23.

501. *United States Trust*, 431 U.S. at 25. In general, a government may not contract away its police powers, but there are instances in which it can “bind itself in the future exercise of its taxing and spending powers.” *Id.* at 24.

agreement.<sup>502</sup> Similarly, HUD has required PHAs to execute Declarations of Trust as a condition of modernization funding to prohibit the transfer of PHA property without HUD consent.<sup>503</sup> Because modernization funding is no longer required to be secured by a loan agreement, HUD binds PHAs by virtue of extensions of ACC terms and liens created by Declarations of Trust.<sup>504</sup> The remaining agreements of ACCs and Declarations of Trust do not constitute property rights within the meaning of the Fifth Amendment because they remain subject to later amendment by Congress.<sup>505</sup> Even obligations that did constitute valid contractual rights could constitutionally be impaired by the reasonable and necessary exercise of congressional authority.<sup>506</sup>

Additionally, Congress should remove all authority from HUD to develop and enforce national housing standards. Local communities currently have enforceable building codes which provide for the safety of tenants. There is no reason to have uniformity of design standards except to make it easier for an oversight staff of the federal government to approve construction and modernization plans. Such requirements interfere with the ability of the local community to provide basic housing or shelter to those who need it and force local communities to expend resources on activities that do not advance housing goals.

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502. To the extent an ACC is security for outstanding municipal bonds, it continues to function as a financial security contract. Laws which authorize impairment of municipal bond contracts are unconstitutional. *Id.* at 24 n.22.

503. 24 C.F.R. § 968.210(l).

504. *Id.*

505. *Fort Collins*, 980 F.2d at 630.

506. The standard for impairment of contracts of third parties is less stringent. *See United States Trust*, 431 U.S. at 22 (noting that the standard for impairment of private contracts is whether the law serves a legitimate government purpose). Because lease agreements between PHAs and their tenants and service contracts between PHAs and third parties are of limited duration, they are unlikely to be impaired. Contracts for construction or modification would, likewise, continue to be binding on the local agency. Substantive rights in tenants as third-party beneficiaries have not been clearly established, despite a couple of court decisions finding such rights. *See supra* notes 428-39 and accompanying text. Those decision found the language of the Housing Act persuasive evidence of congressional intent to benefit tenants as a class. Any amendment to the Housing Act would therefore need to leave no doubt that Congress no longer (if in fact it ever did) intends that tenants receive substantive rights as third-party beneficiaries of contracts between HUD and PHAs.

Organizationally, HUD regional and field offices should be closed. Their work is redundant of that of PHAs and imposes two additional layers of approval and supervision that add little to the ultimate result.<sup>507</sup> Decisionmaking does not reside in the HUD offices now and, for this reason, HUD continues to claim that there is local control of public housing.<sup>508</sup> The sole function of the HUD regional and field offices is to advise and consult, primarily in relation to how to meet federal guidelines that are also largely superfluous.<sup>509</sup>

Congress should also remove HUD's oversight authority over PHA accounting and budgets. To the extent that there needs to be accountability for the proper use of federal money, there should continue to be a requirement for project-based accounting only.<sup>510</sup> Because PHA operating budgets now are not zero-based<sup>511</sup> and reflect no market-based (and therefore objective) standard of cost control, there must be a general system of accounts against which the operation can be audited. Such a system would resemble the accounting procedures utilized by many nonprofit organizations at the request of their funders. The auditing itself should be performed by independent accounting firms, however, and not by HUD staff. The performance funding system, with its comparative approach, should be abandoned.

HUD has already proposed to eliminate the requirement for prior approval of demolition of public housing.<sup>512</sup> In addition, Congress should remove the requirement that replacement units be constructed when a unit is demolished.<sup>513</sup> Public housing stock should be a local commodity for which the community determines its most valuable use. The need for and nature of relocation assistance is better determined at the local level as well.

The funding issue is more problematic than it initially appears. The

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507. See *supra* notes 44-45 and 160-65 and accompanying text.

508. HUD EXECUTIVE SUMMARY, *supra* note 2, at 1.

509. See *supra* Part III.A.

510. See *supra* notes 266-67 and accompanying text.

511. See *supra* Part III.A.

512. HUD EXECUTIVE SUMMARY, *supra* note 2, at 9.

513. See *supra* notes 391-98 and accompanying text.

HUD proposal to rely on rental assistance certificates for funding for both capital expenditures and operating subsidies<sup>514</sup> is superior in some respects to a system of block grants.<sup>515</sup> One reason for avoiding block grant funding is that funding through grants subjects the grantee to the federal government procurement and recordkeeping procedures of OMB Circular A-102, whereas loan funding does not.<sup>516</sup> The Community Development Block Grant Funding (CDBG) Program already is burdened with massive recordkeeping requirements itself,<sup>517</sup> although there are other models for block grant funding.<sup>518</sup>

The alternative HUD proposal resembles, in some respects, a privatization scheme.<sup>519</sup> PHAs, to the extent public housing resources

514. HUD EXECUTIVE SUMMARY, *supra* note 2, at 9.

515. See Loeb, *supra* note 37, at 26 (noting current waste problems in the CDBG program for financing housing).

516. See *supra* notes 170 & 185 and accompanying text. Nor do payments made to private landlords through the Section 8 program subject them to the requirements of OMB Circular A-102. *Id.*

517. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., HANDBOOK NO. 6510.2, REV-2, COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM: ENTITLEMENT GRANTEE PERFORMANCE REPORT INSTRUCTIONS (July 1993). This handbook contains 112 pages of instructions and examples of how to fill out the year-end performance reports, including a 17-page checklist to see that the forms were correctly filled out. There are seven forms in all: A GPR Cover Sheet, an Activity Summary, an Activity Summary for Direct Benefit Activities, a Financial Summary, a One-for-One Replacement form, a Rehabilitation Summary, and a Displacement form. *Id.*

518. There are four basic models of fund allocation for a block grant program: (1) Short-Term All Purpose Grants; (2) Long-Term All Purpose Grants; (3) Allocation of Budget Authority Under Current Programs; (4) Limited Purpose Block Grants. Nolon, *supra* note 51, at 260-62. Under the Short-Term All Purpose Model, block grant recipients would receive short-term authority to spend immediately, thus encouraging program commitments for one-time land acquisition, capital grants or rental assistance contracts. *Id.* at 261. The Long-Term All Purpose Model allocates long-term authority to grant recipients. It generally provides for an annual limit on federal treasury obligations, which could be manipulated to encourage favored housing activities. *Id.* Under the third model, Allocation of Budget Authority Under Current Programs, current housing projects are left in place, control over program selection and mix are transferred to the state or local level, and Congress continues to maintain program standards. Budget authority allocation would be determined by formula, enabling each jurisdiction to select its choices from a range of federal programs. *Id.* Finally, the Limited Purpose Block Grant program keeps most federal subsidy programs intact by allowing recipients to use the limited purpose grant to design some replacement programs. *Id.*

519. See Kinnaird, *supra* note 35, at 989. In his article, Kinnaird suggests that "three privatization strategies should be pursued: (1) 'simulated privatization' in the form of conversion of federal subsidies to a voucher payment system based on fair-market rents; (2) statutory reform permitting asset-maximizing disposition of existing public housing properties; and (3) direct

are not privately-owned, would have to compete with the private sector for tenants. This is an excellent idea and would facilitate radical reform of PHA management if other federal standards and regulations were eliminated. With the exclusive use of vouchers and certificates for funding, more subsidy dollars would go directly to housing consumption.

On the other hand, the proposal for Section 8 certificate and voucher programs continues to be based on the idea of funding eligible families.<sup>520</sup> A national standard of eligibility violates the principle of federalism and community control. Even worse, the HUD proposal appears to vest sovereignty in the federal government and remove the local housing authorities as the focus of the housing aid program.<sup>521</sup> In fact, the proposal would move the country toward the idea of a national entitlement to housing—the notion that if you meet the eligibility criteria, you receive a subsidy. Local communities, not the federal government, should control entitlement and allocation decisions. Likewise, the community, not the family, should be the designated recipient/beneficiary of federal funds.

Because block grants generally have been made to assist “projects,” there is a seminal problem of how to direct the allocations to the state or local governments.<sup>522</sup> Congress now requires HUD to include the cost of assisted projects over the full life of the federal government’s commitment with its budget submissions.<sup>523</sup>

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privatization of economically unviable projects to the highest bidder.” *Id.* He recommends broad implementation of the first two strategies and reservation of the third technique for the “largest, urban ‘troubled’ housing authorities” only. *Id.*

520. HUD EXECUTIVE SUMMARY, *supra* note 2, at 8.

521. HUD claims it will “end[] the monopoly of housing authorities over federal housing resources.” HUD EXECUTIVE SUMMARY, *supra* note 2, at 9. This implies that the housing stock will become federal housing stock and cease to be local housing stock.

522. See Nolon, *supra* note 51, at 258-59.

523. *Id.* at 259.

## V. CONCLUSION

There are no easy solutions to the problems of public housing. Current housing plans, while well intentioned, miss a critical part of the story—public housing management. We have attempted to show that, ultimately, there is only one solution to the national housing crisis—defederalizing public housing and returning it to the province of state landlord-tenant law. To do so requires hard choices, including eliminating any notions of individual entitlement, including “rights” that have been enforceable under section 1983. Although Congress may have the power to condition the receipt of federal funds on meeting broad policy goals, it is this idea of national uniformity that has created the bureaucracy and the mismanagement of public housing. By returning control of housing management to PHAs, and redefining their basic mission to be a purely local goal of providing shelter, we hopefully will begin a transformation to a truly suitable housing policy.