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Chairman Luetkemeyer, Ranking Member Cleaver, and other Members of the Subcommittee, thank you for inviting me here today. My name is Jaime Lee and I am an Assistant Professor at the University of Baltimore School of Law, where I teach the law of Business Organizations and also direct the Community Development Clinic.

I respectfully submit three key points for your consideration:

- Public housing rights are at risk under privatization due to extremely weak legal monitoring and enforcement.
- Stronger enforcement is needed to carry out Congressional intent to preserve these rights, and to ensure that contractors provide the benefits that they are being paid to provide.
- Privatization programs raise concerns about long-term affordability and about the potential exclusion of those in great need of public housing.

RELEVANT EXPERIENCE

I became familiar with public housing privatization as a lawyer in private practice. From 2002-2009, I represented public housing authorities across the country who partnered with private developers under HOPE VI and other programs and assisted them with transactional, financing, and regulatory issues.

After entering academia, I turned my focus to the tenant experience, publishing "Rights at Risk in Privatized Public Housing" in the Tulsa Law Review in 2015 and "Poverty, Dignity, and Public Housing," forthcoming in the Columbia Human Rights Law Review.

The matters presented arise from my research on public housing privatization in the United States, and appear to have analogs in the British programs being reviewed by the Subcommittee today.

EXECUTIVE SUMMARY

Public housing rights are at risk, even though Congress has mandated their preservation under privatization. These rights are derived from Constitutional norms and include:

- the right to remain in the housing unless there is legal good cause for eviction;
- the right to contest harmful acts by a landlord, without requiring the resources to mount a formal court action; and
- the right to participate (to be informed and to be heard) with respect to management decisions affecting one's housing.

These rights are at risk due to an extremely weak legal monitoring and enforcement infrastructure.

- Little to no data is collected on whether these rights are being respected, and existing legal remedies are ineffective or ill-suited to the privatized context.
- Low-income tenants also have no consumer power to "walk away," and thus there is no market-like system for "weeding out" poor performers.
- Stronger enforcement is needed to carry out Congress' intent to preserve these rights and to ensure that contractors provide the benefits that they are being paid to provide.
- Options for improved rights enforcement may include stronger transparency requirements; a legislative mandate for federal oversight and enforcement; and the dissemination of data that may be used to monitor rights compliance.

Privatization also raises concerns about affordability and about who can access public housing.

- Affordability may be jeopardized if insufficient public funding increases pressure to raise rents using legal waivers.
- Legal tools that make it harder to get into and stay in privatized public housing may be used to exclude or evict those who may most need public housing.

My brief review of the Large-Scale Volunteer Transfer Program in the United Kingdom appears to underscore these concerns in the following ways:

- Government oversight of tenants' rights under privatization has been greatly diminished in the UK,[1] although rights enforcement is necessary, since 47% of tenants reported that nonprofit housing providers failed to live up to their promises.[2]
- Insufficient funding for privatized programs is also a significant concern for UK providers.[3]
- Access to privatized public housing is viewed as much more restrictive in the US than in the UK.[4]

DETAILED TESTIMONY

Tenants' rights are discussed below. Potential effects on affordability and accessibility are discussed beginning on page 11.

THE UNENFORCED CONGRESSIONAL MANDATE

Since the mid-1990's, federal policy has promoted the privatization of public housing through the HOPE VI Program, the Choice Neighborhood Program, and the Rental Assistance Demonstration (RAD) Program.

Throughout these privatization experiments, Congress has largely demanded that private housing providers (whether for-profit or non-profit) preserve traditional rights and protections afforded to public housing tenants These rights include basic affordability restrictions and other key benefits that make public housing especially valuable to low-income tenants.

These rights also include legal benefits that only governmental actors would be traditionally required to provide. These rules derive from the Constitution and from democratic principles promoting an engaged citizenry. Congress has mandated, for example, that private landlords abide by Constitutional due process and consult with residents before making certain decisions about their housing.

Congressional intent has been quite clearly stated. All units under the HOPE VI and Choice Neighborhoods programs must be "developed, operated, and maintained in accordance with the requirements of the Act relating to public housing,"[5] and under both RAD programs, "tenants . . . shall, at a minimum, maintain the same rights . . . as those provided under section 6 and 9 of the Act,"[6] which address certain security-in-tenancy and participation protections. A host of statutory, regulatory, and administrative declarations further elaborate upon these protections,[7] which are in turn made applicable to private owners via contract.[8]

Despite Congressional intent, the legal infrastructure to monitor and enforce them is extremely weak. It is difficult to provide empirical data on the scope of the problem precisely because there is no systematic monitoring or enforcement system. These concerns are documented, however, by numerous case studies published in law journals and other fora, as well as by anecdotal research, including consultations with lawyers across the nation who represent tenants experiencing privatization under the RAD program.

This research supports concerns that some tenants today are experiencing great difficulty in obtaining information about privatization plans and implementation, echoing similar experiences under the HOPE VI program. It also reflects concerns that tenants are not benefiting from other rights promised under the law.

Rights In Detail: A Sample Story

Some of the most valuable benefits of public housing include security in tenancy rights, and rights to participate in governance and policy-making. A hypothetical narrative offers a backdrop for discussing the nature of these benefits, their origins, and their importance.

Imagine a faded complex of garden-style apartments, one or two stories in height and set around a spare courtyard. The building has continuously been owned and operated by the local housing agency as public housing since it was built many decades ago. Years of federal funding shortfalls have led to deferred maintenance, and the building is in dire need of major capital repairs.

Assume that this particular community reflects national averages for the public housing population at large. Seven out of eight residents are elderly, disabled, and/or responsible for small children.[9] The average household income is $13,724, even though wages are a major source of income for 28% of households.[10] Only twelve percent of households depend on welfare as a major source of income.[11]

The residents recently elected representatives to the building's resident council, which under federal law has the right to consult with the local agency as to how their housing is run. The residents elected Mrs. J to the council, along with other leaders who have been active in complaining to the landlord about the building's persistent mice, bedbug, and cockroach infestations. Mrs. J and the other council representatives plan to use their positions to advocate for better housing conditions.

The complex is selected to participate in a privatization program, which means that its federal funding stream can be supplemented with other kinds of financing. Agency staff has no expertise in complex real estate finance matters, so it hires a private real estate developer (who may be a for-profit or a non-profit) to assemble a financing package and oversee renovations.

The government's interest in the property makes it relatively attractive to private-sector banks and investors. The developer successfully arranges for a commercial bank loan to fund capital needs, which the bank secures through a mortgage. The company also raises equity through the tax credit program, through which investors contribute funds for renovations in exchange for significant tax savings.

To meet tax credit requirements, title to the building is transferred to a company controlled by the real estate developer. To safeguard their investment, the investors and the bank demand that the company be run by people with sophisticated knowledge of the tax credit program. Since agency staff cannot fill that role, the real estate developer assumes a controlling interest in the company that owns the building. It also hires an affiliated company to manage the building's day-to-day operations, such as addressing routine maintenance needs, collecting rents, and handling evictions.

All residents have the opportunity under federal law to return to the building after renovations, and all do. They find that the roof leaks less and cosmetic repairs have been done, but also that the vermin have returned. Residents continue to lobby for better conditions, and just as the leases of Mrs. J and other resident council members are about to expire, each receives a notice that his or her lease will not be renewed.

According to the landlord, Mrs. J. has repeatedly failed to pay her rent on time. Other council members are accused of disturbing other residents and failing to keep guests from writing graffiti.[12] Mrs. J and the other resident leaders dispute these allegations and believe that the landlord is refusing to renew their leases in retaliation for their activism.

Since Mrs. J is disabled, suffers from a range of health problems, and has limited daily mobility, she

is panicked that she has only thirty days to find alternative housing that is affordable, close to medical, transportation, and social services, and close to her daughter, on whom she relies a great deal.

This brief narrative illustrates a number of concepts. It describes how a public housing complex might typically transition from governmental ownership and management to private control under either a for-profit or a non-profit. It also illustrates certain protections commonly afforded to public housing residents and that are intended to be preserved as the housing becomes privatized. These protections can be categorized into two broad groups, referred to as "security-in-tenancy" protections and "participation rights."

Rights to Security-In-Tenancy

Security-in-tenancy protections are legal assurances that a person may remain in her housing for the foreseeable future if she abides by the rules. In short, security in tenancy means that a person cannot be forced to vacate her housing unless good cause exists for terminating the tenancy, and these protections provide stability and reassurance that the resident will not lose shelter through no fault of her own.

Security in tenancy protections offer both functional and emotional benefits.[13] They guard against involuntary ejection from one's home and the disruption of one's social networks, daily functions, and emotional well-being.[14]

These protections are especially important for those who are disabled, elderly, or have children, who collectively make up eighty-seven percent of the public housing population,[15] and for individuals who are otherwise "hard to house," who face challenges in finding replacement housing that is affordable, accommodates their physical needs, and is convenient to essential medical, educational, and social services.[16] For many who live in public housing, security in their tenancy is not a mere convenience, but a critical safeguard against homelessness and against the harshness of private lease law.[17]

Security-in-tenancy rights come in various forms, including rights to continued occupancy, grievance procedures, and the right to return.

1. Continued Occupancy

Assume momentarily that Mrs. J lives in a private rental building that does not participate in any federal housing program. Mrs. J could go to court to disprove the landlord's allegation that she did not pay her rent, since all states require a court hearing prior to eviction.[18] Most states also offer a statutory protection against retaliatory eviction.[19] Even if she is successful in the courtroom, however, Mrs. J would not secure a right to renew her lease. A tenant in private housing simply has no right to continued occupancy; a private landlord may decline to re-let a unit when the lease term ends without cause and for any reason that is not illegally discriminatory.

Fortunately for Mrs. J, because she lives in public housing, she does have a legal right to continued occupancy. A public housing landlord must renew the lease to the current resident unless it has good cause not to do so. The right to continued occupancy derives from Constitutional due process requirements established during the "due process revolution" of the early 1970s.[20]

In *Goldberg v. Kelly*, the Supreme Court established that welfare benefits could not be terminated without due process under the Fourteenth Amendment.[21] *Goldberg* was explicitly applied to public

housing by the Second Circuit in *Escalera v. New York City Housing Authority*,[22] which held that under the Fourteenth Amendment, public housing benefits could not be terminated without adequate procedural safeguards, including good cause.[23] The Fourth Circuit in *Caulder v. Durham Housing Authority* further determined that *Goldberg's* protections expressly apply to public housing.[24]

Moreover, the Fourth Circuit found that a resident's property interest extends beyond the initial term of the lease in *Joy v. Daniels*, holding that a contractual end to the tenancy is overridden by due process requirements, which demand good cause for declining to renew a public housing lease upon expiration.[25] *Joy's* holding is now echoed in federal regulations.[26]

2. Grievance Procedures

Another security-in-tenancy benefit is the opportunity to grieve nearly any adverse act taken by one's landlord.[27] Grievance procedures provide a forum for dispute resolution that is more flexible and accessible than judicial proceedings and thus offer public housing residents greater security against eviction and other adverse events.

Grievance procedures offer both informal discussions as well as a more formal hearing.[28] Mrs. J, for example, has the legal right to first speak informally with her housing manager about her alleged nonpayment of rent.[29] If the landlord does not change course, Mrs. J can then appeal the outcome of the meeting through a more formal hearing,[30] administered by an "impartial" person selected in accordance with a process approved by the residents.[31]

Mrs. J has the right to have a lawyer or other representative at the hearing, at which she can examine the rules and regulations, examine records allegedly showing her nonpayment, cross-examine the staff person to whom she handed her check every month, and present her bank records to refute the landlord's grounds for eviction.[32]

She could also describe her activism efforts, as well as the landlord's refusal to renew the leases of other resident activists and call witnesses to support her theory of retaliation.[33] Both the informal and formal processes must be documented in writing,[34] and the decision of the hearing officer is binding on the landlord.[35] If Mrs. J remains unsatisfied, she can still pursue a court action.[36]

As the narrative illustrates, one benefit of grievance procedures is access to convenient, low-cost avenues for dispute resolution prior to eviction and other adverse housing actions. The procedures offer third-party adjudication in a setting that does not require legal expertise, since rules of evidence, standing requirements, and other technical courtroom requirements do not apply.[37] Grievance processes can be used to facilitate dispute resolution without the time, cost, legal expertise, and emotional toll of court proceedings, and participants are free to negotiate creative and flexible remedies that suit their particular circumstances.[38]

A further benefit is that a resident may confront a manager with a broader range of concerns than a court proceeding might entertain. Residents can grieve not only evictions but virtually any adverse action or inaction by the landlord.[39] Grievances thus provide a forum for working out a broad array of landlord/tenant conflicts, not just those presenting a legally cognizable cause of action.

Grievance rights derive from Constitutional due process rights articulated during the due process revolution. In *Thorpe v. Housing Authority,* a resident was evicted immediately after being elected as president of a resident organization.[40] Before the U.S. Supreme Court could confront the First

Amendment concern, HUD issued administrative guidance requiring procedural due process hearings much like those required in *Goldberg*, which were then refined through negotiations among HUD, legal advocates for residents, and a group of local housing agencies.[41]

The principle that grievance procedures can be invoked with respect to any adverse action, not just evictions, also derives from procedural due process.[42] *Escalera*, applying *Goldberg,* held that grievance procedures are triggered by the assessment of minor fines against residents,[43] establishing residents' right to invoke grievances to address a wide range of issues. The principles of *Thorpe* and *Escalera* set forth the basic infrastructure for today's grievance procedures and are now codified by statute.[44]

3. The Right to Return

In the hypothetical narrative, Mrs. J also benefited from a security-in-tenancy benefit known as "the right to return."[45] The right to return means that residents who are displaced due to renovations must be offered an opportunity to move back into the refurbished housing.[46] Unique to public housing, this right is one of its most sought-after benefits, and recent privatization programs offer a nearly universal right to return.[47]

The right to return resonates strongly among public housing and other low-income communities in part because of a long history of their displacement by governmental programs supporting activities such as urban renewal and the construction of highway and sports stadia.[48] Early public housing privatization initiatives are part of this history. HOPE VI's "mixed-income" policy displaced thousands of low-income black residents who could not return to the renovated sites because much of the new housing was reserved for higher-income, often white, residents.[49] Private landlords imposed stricter screening requirements for the renovated units, further excluding many former residents from returning.[50] Those displaced often lacked adequate support in finding replacement housing and adjusting to the loss of their homes, social networks, and services such as familiar schools, doctors, and transportation lines.[51] With no federally guaranteed right to return, residents at HOPE VI sites around the country protested strenuously to secure the right at the local level,[52] and advocates fought for decades for a change in federal policy.

The intensity of these battles reflects the importance of the right to return, as does its reinstatement in later privatization programs, namely, the Choice Neighborhoods and RAD programs.

Participation Rights: Rights To Be Informed and To Be Heard

Benefits available to public housing residents also include participation rights, or rights to provide input to one's landlord on matters that affects one's living conditions.[53]

Participation rights have roots in principles of due process, although today's participation rights extend well beyond Constitutional minimums. For example, Mrs. J's resident council must be "recognized" by the public housing agency under federal requirements,[54] which qualifies it for funding for education, training, and other activities supporting resident involvement in the governance of their housing.[55] Public housing rules also encourage the establishment of formal channels of communication with agency officials.[56] Residents have formal notice-and-comment rights with respect to plans to sell, renovate, or privatize their housing[57] and with respect to proposed changes in lease terms, rent requirements, and house rules.[58] Residents are also entitled to fill one seat on the local agency's board

of directors.[59]

Mrs. J and her fellow residents might well benefit from these types of participation rights. They might use their funding to support community organizing trainings and protests against the evictions of the resident leaders.[60] The resident council could employ its federally-mandated channels of communication with agency officials to publicize the retaliatory evictions.[61]

Participation rights must be viewed with some skepticism, as they provide only for communication between residents and decision-makers, and do not guarantee residents any control or power over decisions.[62] Residents' bargaining power in such settings is often limited by race, their status as beneficiaries, and a lack of traditional markers of credibility such as education. Nevertheless, participation rights remain valuable, as they can increase residents' collective negotiating power in advocating for better housing conditions.[63] Rights to federal funding and to information disclosure are especially useful in facilitating resident mobilization and collective action to promote change.[64]

Rights At Risk: No Effective Monitoring Or Enforcement

Despite Congressional intent to preserve these rights, and the existence of legislative, regulatory, and contractual mandates to do so, there are critical weaknesses in the existing accountability framework.

1. Federal Monitoring Is Inadequate

Current monitoring schemes seem highly unlikely to uncover potential rights violations simply because they do not ask about them.

HUD possesses broad monitoring authority, yet it collects practically no information about security-in-tenancy and participation rights.[65] HUD is statutorily required to evaluate[66] whether local housing authorities have provided participation opportunities for residents,[67] but HUD's assessment tool simply does not evaluate this factor. Security-in-tenancy rights receive even less attention, and are simply absent from the statutory list of what HUD must monitor.[68]

In another example, HUD assesses performance under one program with respect to eight compliance categories.[69] Four categories address financial and administrative concerns, and three assess whether the landlord filled out required reports.[70] Of the hundreds of questions asked, not a single one inquires into security-in-tenancy or participation rights. At best, these rights might be covered under the generic category of "resident complaints" concerning "non-life-threatening conditions."[71]

HUD's systemic monitoring efforts are supplemented by the administrative complaint process,[72] which enables residents to initiate complaints, but lacks regulations or guidance explaining how they may do so,[73] and leaves it to HUD's discretion whether to respond or not.[74] Even in one program in which participation rights are singled out for monitoring and enforcement, HUD's responsiveness to complaints is reportedly inconsistent.[75]

2. Federal Enforcement Mechanism Are Inadequate

HUD can theoretically exercise a range of contractual remedies against private landlords, including termination,[76] and HUD may generally exercise any permissible remedy against a private owner.[77]

However, HUD cannot be compelled to act,[78] and even if it does, significant challenges exist to the effective exercise of remedies.

Three specific remedies are repeatedly emphasized in privatization contracts.[79] One is that HUD may petition a court for specific performance or an injunction. Court action is likely to be too costly to pursue, however, except where violations are repeated and egregious.

A second remedy is the reduction or termination of subsidies, which poses obvious risks. Since HUD is in a collaborative relationship with private actors and relies on them to provide services, it may shy away from enforcing in this manner. Moreover, a landlord penalized by a reduction in subsidy may simply further spend less on services rather than sacrifice profit. Severe fiscal sanctions may even threaten the project's financially viability, leading to a bankruptcy, workout, or foreclosure process that could displace residents and jeopardize long-term affordability.[80] Subsidy-reduction sanctions are so risky that residents have occasionally filed suit to prevent HUD from exercising this remedy.[81]

The third contractual remedy is to remove the housing asset from the contractor's control and to place it into the hands of either a court-appointed receiver or the enforcing agency itself.[82] This remedy poses logistical challenges of identifying a receiver capable of both administering a complex array of public housing requirements and implementing widespread organizational change that will endure once the receivership ends. Receivers have been appointed by HUD over local agencies in the past with success,[83] although instituting a receivership is exponentially more complicated in a privatized context.[84] Receivers must be identified who have expertise in both complex real estate financing matters and in public housing administration, and investors and lenders may well object to ceding control over their investment and seek to block the appointment.[85]

In sum, strong contractual remedies exist, but face such steep implementation challenges that they are likely to be exercised only when violations are especially egregious. In the vast majority of situations, these remedies may be too risky or costly.

Less severe remedies also exist, although they are not explicitly articulated in the contracts. HUD commonly employs intermediate-level sanctions against poor-performing local agencies, which it conceivably might also apply to private landlords.[86] For example, HUD might require a local agency to increase its reporting, meet certain performance standards within specified timelines, and require attendance at trainings.[87] Such soft incentives may spur change at local agencies, since HUD programs are often the agency's sole mission and HUD funds are often their sole source of income. Private landlords, on the other hand, may be less reliant on HUD and thus less susceptible to indirect HUD pressure.

Other intermediate-level sanctions are equally unlikely to be effective against private landlords. For example, when dealing with a poorly-performing local agency, [88] HUD might prohibit the agency from taking on new financial commitments, require it to submit any new business contracts with outside parties to HUD for approval, and impose third-party oversight of certain aspects of the agency's operations.[89] It is unlikely that HUD would inject itself so intrusively into private-sector business dealings, however, and equally unlikely that private landlords would readily submit to such intrusions.

3. Resident Enforcement Through Participation Is Inadequate

While participation rights, if well-enforced, could provide another avenue through which residents could force private landlords to respect their rights, their potency is limited in the privatized setting.

A key benefit of participation rights is that they provide formal channels of communication between a local agency and resident representatives, such as through the resident council and the residents' seat on the agency's board of directors. If Mrs. J lived in conventional public housing, she could potentially use these channels to challenge the manager's systemic eviction of resident leaders, using her position on the resident council to make agency supervisors and the board of directors aware of the manager's actions. The agency, as the manager's employer, would be in a position to terminate or sanction the manager for her bad acts.

Where landlords and managers are employed by private companies, however, agency staff wields only attenuated control over their behavior. An agency cannot fire, sanction, or threaten to fire the individual, but can only seek to pressure the private company to take action against her. Thus, the lines of communication between residents and local agency officials may be significantly less likely, in a privatized setting, to improve how residents are treated.[90]

Private ownership also dilutes the power of participation rights in other ways. Participation rights include legal rights to information, which is frequently useful in catalyzing mobilization efforts, through which residents act collectively to exert pressure on the landlord to change its behavior.[91]

Privatization, however, means that control over individual housing projects is no longer centralized in the local agency, but dispersed among numerous private landlords. This diversity of ownership may make it more challenging to mobilize a sufficient number of residents against any one landlord. Unlike government landlords, private landlords are also generally not subject to sunshine laws[92] and may shield their principals, as private citizens, from becoming the objects of public protests.[93]

Moreover, while community organizing and other mobilization activities may be protected in conventional public housing under the First Amendment,[94] such speech rights have not explicitly been publicized and may not be protected in privatized public housing.

4. Market-Like Enforcement Is Inadequate

Finally, it might be argued that private landlords will voluntarily offer enhanced benefits in order to more effectively compete for tenants.[95] In this view, if tenants value the benefits, they will seek out landlords who offer them and reject those that do not, and thus the profit-motive will encourage landlords to provide public housing benefits.

The flaw in this argument is that competition for tenant dollars does not exist in the public housing sector, since low-income tenants have few or no alternative housing options and little or no ability to reject landlords who provide unsatisfactory service.[96]

As Wendy Netter Epstein explains, systemic market failures exist in the realm of public-private contracting, including a lack of competition, which lead to contracts that do not internalize the full costs of providing public services and causes beneficiaries to bear the excess cost in the form of poor service.[97]

Potential Avenues for Improved Rights Monitoring and Enforcement

Potential options for more effectively enforcing rights may include: adding an explicit legislative mandate that HUD must monitor and enforce rights; adding transparency requirements for open meetings, direct channels of communication with housing providers, and comprehensive disclosure of privatization plans and how tenants will be affected; collecting and publishing data that can be used to assess whether providers are performing, such as data collected through surveys, site visits, HUD and tenant reviews, and records of grievances and administrative complaints; and providing tenants broader legal rights to initiate investigations and enforcement actions.

PRIVATIZATION RAISES AFFORDABILITY CONCERNS

All housing programs must consider fundamental questions of who should be housed[98] and how affordable the housing should be. Public housing rent payments have long been capped at 30% of income,[99] with all new admissions reserved for people earning 80% or less of area median income and 40% of admissions further reserved for those earning 30% or less of area median income.[100] Thus, federal policy reserves much of public housing for the extremely poor.[101]

Genuine concerns exist, however, about whether privatized housing will remain accessible to those least likely to be able to secure other forms of housing.

First, under RAD, residents may need to pay more of their limited income toward rent.[102] A fast-food cook in Memphis with one child who earns $15,000 annually and pays no taxes might, after paying rent for a conventional public housing unit, have approximately $28 dollars per day remaining to cover all other living expenses.[103] Even a small rent increase may be too great to bear for residents in such circumstances.

Second, insufficient funding may cause pressure to raise rents, which may be done using legal waiver authority available under RAD[104] or the Moving to Work Program.

Third, the longevity of affordability is a concern. In RAD, the affordability period is already shorter than that of other public housing,[105] and owners may exit the public housing program once their contractual obligations end. They may even deliberately breach their contracts with the goal of escaping from their public housing obligations before the contract term expires,[106] which they may be tempted to do if converting the property to a market-rate use will be more profitable. Notably, RAD imposes significantly lighter affordability restrictions in case of a breach or foreclosure than do the HOPE VI or Choice Neighborhoods Programs.[107]

Fourth, other serious concerns exist about whether privatized public housing is as "permanently" affordable as conventional public housing. Some measures have been put in place towards this end: for example, federal approval is required to sell or close privatized housing and to lift affordability restrictions before the contract term expires,[108] and some local agencies also retain property rights enabling them to take back possession of the property once the contract with the private landlord expires,[109] which provides a potential path to long-term preservation. However, none of these measures are meaningful unless the necessary funding is available to sustain the program.

PRIVATIZATION RAISES ACCESS CONCERNS

In at least some cases, privatization has increased the use of tools that make it harder to get into, and stay in, public housing. Private landlords may use their discretion to set admissions criteria that will bar many otherwise-eligible individuals from the housing. Owners generally must admit all who qualify under federal and local standards, but they also retain the right to screen for such things as credit checks, alcohol abuse, "poor housekeeping" skills, prior landlord references, and eviction and rent payment history,[110] among other things.[111]

Such standards can bar access to public housing for those are least able to secure other shelter, and who therefore are more likely to rely on public housing to avoid homelessness. The Urban Institute classified at least 40% of residents at five Chicago sites as "hard to house," meaning that their ability to find suitable shelter outside of the public housing program was severely restricted due to low income and other factors, such as lack of a high school degree or involvement with the criminal justice system.[112] Another study found that Chicago residents reported a "stunning" frequency of health problems that turn simple daily living activities into challenges.[113]

The concern is that private landlords may exercise their screening discretion in ways that bar such individuals from accessing public housing. Selective admission of "easy" tenants who may consume fewer resources, along with the aggressive eviction of residents viewed as more challenging, is popularly known as "creaming."[114] Even governmental landlords engage in creaming,[115] and non-profit providers may be also be incentivized to cream, especially if funding is scarce.

Creaming by private landlords under the HOPE VI program drew national criticism.[116] RAD corrects some of the problems experienced under HOPE VI by guaranteeing that *current* residents will not undergo heightened screening standards in order to be re-admitted.[117] However, *future* applicants who are hard-to-house are likely to be screened out. Moreover, all suffer a higher risk of eviction.

A final concern is that these exclusionary tools frequently prioritize reforming personal behavior as a primary cure for poverty,[118] and underemphasize the need to address structural causes of poverty.

Thank you very much for the opportunity to discuss these matters.

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1. National Housing Federation, *Briefing: Regulatory Framework from 1 April 2012*, at 6-10.

2. Norman Ginsburg, *The Privatization of Council Housing*, Critical Social Policy Ltd 0261-0183 82 Vol. 25(1), at 126.

3. Housing Partnership Network, *Lessons of the International Housing Partnership*, Issue Brief, at 12 (February 2016); Diane K. Levy, Harris Beider, Susan Popkin, and David Price, The Urban Institute, *Atlantic Exchange: Case Studies of Housing and Community Redevelopment in the United States and the United Kingdom,* February 2010, at 21, 28.

4. Harris Beider, Diane K. Levy, and Susan Popkin, The Urban Institute, *Community Revitalization in the United States and the United Kingdom*, at 12-13.

5. 42 U.S.C. § 1437z-7(c) (2014). The statute further clarifies that any statutory reference to "public housing" includes privately-owned units assisted by alternative financing, such as those developed under the low-income housing tax credit equity. *Id.*; 42 U.S.C. §§ 1437z-7(d)(1) & (d)(2)(C) (2014).

6. Consol. & Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, tit. II, 125 Stat. 552, 675 (2011), *available at http://portal.hud.gov/hudportal/documents/huddoc?id=HR-2112-RAD-Language.pdf* [hereinafter *RAD Appropriations*], at 123. Statutory requirements publicized under RAD include grievance procedures, 42 U.S.C. § 1437d(k) (2014), mandatory lease renewal unless there is good cause, 42 U.S.C. §§ 1437d(1) & (5) (2014), and financial support for resident councils. Generally, Section 6 contains many of the substantive public housing requirements, 42 U.S.C. § 1437d (2014), and Section 9 imposes these and other requirements on housing built with public housing funds. *See*, e.g., 42 U.S.C. § 1437g(d)(3) (2014).

7. For example, the requirement to renew a lease unless there for good cause is further explained in detail in a HUD notice concerning the RAD program, in certain standardized lease forms drafted by HUD and required to be used by private owners, in regulations, and in agency guidance materials. *See* U.S. DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, REVISION 1, at 47–48 (July 2, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-32rev1.pdf [hereinafter *RAD Notice*]; 24 C.F.R. §§ 966.4(a)(2) & (l) (2014); U.S. DEP'T OF HOUS. & URBAN DEV., PUB. HOUS. OCCUPANCY GUIDEBOOK 118 (June 2003), *available at*

http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10760.pdf [hereinafter OCCUPANCY GUIDEBOOK].

8. *See,* e.g., Dominique Custos & John Reitz, *Public Private Partnerships*, 58 AM. J. COMP. L. 555, 579 (2010).

9. *Policy Basics: Introduction to Public Housing*, CTR. ON BUDGET & POLICY PRIORITIES, http://www.cbpp.org/cms/?fa=view&id=2528 (last updated Jan. 25, 2013).

10. *Picture of Subsidized Households*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.huduser.org/portal/datasets/picture/yearlydata.html (presenting national averages calculated by HUD for 2013 based on 2010 administrative data) (last visited Oct. 7, 2014).

11. *Id.*

12. A lease may be terminated for "serious or repeated violation of material terms of the lease" or for "other good cause." *See* 42 U.S.C. § 1437d(1)(5) (1974); 24 C.F.R. §§ 966.4(f)(l)–(2) (2010). The reasons cited in the hypothetical are grounds for termination pursuant to the regulations.

13. Florence Wagman Roisman, *The Right to Remain: Common Law Protection for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

14. *Id.* (articulating the importance of security in tenancy and common-law bases for its extension); Dawn Jourdan & Ryan Feinberg, *Valuing Grief: A Proposal to Compensate Relocated Public Housing Residents for Intangibles*, 21 U. FLA. J.L. & PUB. POL'Y 181, 182 (2010) (discussing efforts to compensate forcibly displaced public housing residents for intangible losses, such as the intentional infliction of emotional distress); Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 284–97 (2006); *see also* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 Wis. L. Rev. at 862-871.

15. Douglas Rice & Barbara Sard, *President's Budget not Sufficient to Renew Rental Assistance Fully For Low-Income Households*, CTR. ON BUDGET AND POL'Y PRIORITIES, Tbl. 1 (Mar. 14, 2012), http://www.cbpp.org/cms/?fa=view&id=3701 (showing that elderly households comprise 31% of the public housing population, non-elderly households with disabilities comprise 21%, and non-elderly non-disabled households with children comprise 35%.).

16. *Id.* at 4–5.

17. Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 686 (1994).

18. *The Eviction Process*, EVICTION RES., http://www.evictionresources.com/eviction_process.html (last visited Dec. 18, 2014).

19. Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 110 (2010).

20. *See generally* Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9 (1997).

21. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

22. Escalera v. N.Y.C. Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970).

23. *Id*.

24. Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003 (4th Cir. 1970). Public housing is not an entitlement program, since not every individual who qualifies for it is guaranteed to receive housing. Once the benefit is received, however, the benefit cannot be taken away without due process.

25. Joy v. Daniels, 479 F.2d 1236, 1242 (4th Cir. 1973).

26. 24 C.F.R. § 966.4(a)(2)(i) (2014).

27. Exceptions include where the health, safety, or right to peaceful enjoyment of others is threatened and where there is violent or drug-related criminal activity. 42 U.S.C. § 1437d(k); 24 C.F.R. § 966.51(a)(2)(i) (2014).

28. 24 C.F.R. §§ 966.54–55 (2014).

29. 24 C.F.R. § 966.54; OCCUPANCY GUIDEBOOK, *supra* note 7, at 209–210.

30. OCCUPANCY GUIDEBOOK, *supra* note 7.

31. 42 U.S.C. § 1437c-1(d)(6), (e), & (f) (2014) (requiring the development of the grievance procedure in consultation with the resident advisory board and the holding of an open meeting for review and comment on the procedure); 42 U.S.C. § 1437d(k)(2) (2014); 24 C.F.R. § 966.55(b) (2014).

32. 42 U.S.C. §1437d(k)(4) (2014); 24 C.F.R. § 966.56(b) (2014).

33. 42 U.S.C. § 1437d(k)(5) (2014); 24 C.F.R. § 966.56(b) (2014).

34. 24 C.F.R. § 966.54 (2014); OCCUPANCY GUIDEBOOK, *supra* note 7, at 210; 24 C.F.R. 966.56(G) (2014); 42 U.S.C. § 1437d(k)(6) (2014).

35. 24 C.F.R. § 966.57(b) (2014).

36. 24 C.F.R. § 966.57(c) (2014).

37. 24 C.F.R. § 966.56(f) (2014). *See also* Michael Zmora, Note & Comment, *Between* Rucker *and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 NW. U. L. REV. 1961, 1986 (2009) (studies indicate the difficulties of success in housing court when unrepresented).

38. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22–23 (1997).

39. THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, TENANTS' RIGHTS § 10.2.2.3 (4th ed. 2012) [hereinafter NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS] ("[A] grievance must relate to PHA action or inaction concerning either the lease agreement or PHA regulations," which encompasses "almost every housing concern") (citing 24 C.F.R. §§ 966.50, 966.53(a) (2014)).

40. Thorpe v. Hous. Auth. of City of Durham, 393 U.S. 268, 271 (1969).

41. George Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463, 472–75 (1971).

42. *See* Escalera v. N.Y.C. Hous. Auth., 425 F.2d 853, 864 (2d Cir. 1970).

43. *Id.*

44. 42 U.S.C. §1437d(k) (2014); *see also* 5 U.S.C.A 533(c) (1981)); Brown v. Hous. Auth. City of Milwaukee, 471 F.3d 63 (7th Cir. 1972); *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988, 1002 (1968).

45. *See, e.g.*, Choice Neighborhoods Docket No. FR-5700-N-25 HUD's Fiscal Year (FY) 2013 *NOFA for the Choice Neighborhoods Initiative-Implementation Grants,* at 28–29.

46. *Id.* at 29.

47. *Id.*

48. *See, e.g.*, Susan Bennett, *"The Possibility of a Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 263 (2000); Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 67–73 (2006) (discussing the loss of housing, community, and property through displacement); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 427–28; Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 IND. L. REV. 97, 129 (2009); Damon Y. Smith, *Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment*, 29 ST. LOUIS U. PUB. L. REV. 243, 248-249 (2009); *see also* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 Wis. L. Rev. 855, 888 (discussing broader property instability experienced by black Americans).

49. John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 452–53 (2003); Thomas C. Kost, *Hope After Hope VI? Reaffirming Racial Integration As A Primary Goal in Housing Policy Prescriptions*, 106 NW. U. L. REV. 1379, 1397 (2012). Fewer than 1 in 8 of the original residents in Chicago, for example, ultimately returned to the new developments. NAT'L HOUS. LAW PROJECT, *False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, HOUS. LAW BULL. at i-v (May–June 2002), *available at* http://www.nhlp.org/files/FalseHOPE.pdf (last visited February 26, 2015).

50. *See* discussion of creaming *infra*.

51. The lack of adequate support for residents in finding replacement housing has been closely studied in the city of Chicago. *See* Molly Thompson, *Relocating from the Distress of Chicago Public Housing to the Difficulties of the Private Market: How the Move Threatens to Push Families Away from Opportunity*, 1 NW. J. L. & SOC. POL'Y 267 (2006); SUSAN J. POPKIN & MARY K. CUNNINGHAM, THE URBAN INSTITUTE, UI NO. 07011-000-05, CHA RELOCATION COUNSELING ASSESSMENT – FINAL REPORT 12 (July 2002), *available at* http://www.urban.org/UploadedPDF/CHArelocation.pdf); ROBIN E. SMITH, THE URBAN INSTITUTE, UI NO. 07032-000-02, HOUSING CHOICE FOR HOPE VI RELOCATEES 45 (April 2002), *available at* http://www.urban.org/uploadedpdf/410592_hopevi_relocatees.pdf).

52. The right to return is not synonymous with a requirement to rebuild every demolished unit ("one-for-one replacement"), although the two concepts are closely aligned. *See infra* Part III.B. One-for-one replacement, and sometimes the right to return or a preference to return, were negotiated under HOPE VI on a site-by-site basis where the residents were able to demand it through legal action or through organized protests. *See, e.g.*, James Tracy, *Tenant Organizing Was One-for-One Replacement*, SHELTERFORCE ONLINE (2000), http://www.shelterforce.com/online/issues/109/organize.html (San Francisco); Katy Reekdahl*, Critics Question Whether New Orleans Housing Will Meet Needs*, NOLA, http://www.nola.com/news/index.ssf/2008/12/critics_question_whether_new_n.html (one of four New Orleans developments implemented one-for-one replacement at the insistence of residents); *Settlements Advance Integration for Public Housing Tenants*, HOUSING JUSTICE, https://nhlp.org/files/07%20NHLP%20BullFeb08%20_2%20(Final)_one%20for%20one.pdf (discussing litigation settled in Rockford, Illinois by an agreement guaranteeing one-for-one replacement (last visited February 26, 2015).

53. For discussions of the rights of public housing residents to participate in governance matters, *see* Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 715–16 (2012); Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117 (2009); Georgette C. Poindexter, *Who Gets the Final No? Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL'Y 659 (2000); Nicole Schmidt, *San Francisco Public Housing As an Avenue for Empowerment: The Case for Spirited Compliance with Tenant Participation Requirements*, 6 HASTINGS RACE & POV. L. J. 333, 336 (2009).

54. 24 C.F.R. § 964.18(a) (2014).

55. 42 U.S.C. §§ 1437g(e)(1)(E) & 1437g (h) (1) (2014); 24 C.F.R. § 990.108(e) (2014).

56. 24 C.F.R. § 964.105 (2014).

57. Section 18 of the U.S. Housing Act; 24 U.S.C. § 570 (2014); Marvin Krislov, *Ensuring Tenant Consultation Before Public Housing Is Demolished or Sold*, 97 YALE L.J. 1745, 1747 (1988).

58. 42 U.S.C. § 1437c-1(e) (2014).

59. 24 C.F.R. § 964.515 (2014).

60. 24 C.F.R. § 964.11 (2014).

61. *Id.*

62. Whether "participation" means decision-making power, or merely the right to offer input, is clearly a critical distinction. *See, e.g.,* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 234–37 (2014). Without decisional power, marginalized and disempowered communities must overcome a great many challenges in order to effectively make change using participatory governance structures. *See* Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 406 (2013). For case studies discussing challenging situations faced by public housing residents, see *supra* note 53.

63. *See* J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. at 587–90, 595–601 (2007*)*. Participation rights, as currently structured, are less effective in the privatized setting, *see infra*, but the reforms may increase their effectiveness.

64. Mobilization is a fundamental component of the law and organizing movement, which suggests that lawyers focus on supporting community mobilization in order to effectuate social reform. *See, e.g.*, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001). For a sample of discussions of participation and organizing in public housing, see Alexander, *supra* note 53; *see also* Poindexter, *supra* note 53, at 671–72; Schmidt, *supra* note 53, at 334, 349–50.

65. U.S. DEP'T OF HOUS. & URBAN DEV., *Performance-Based Annual Contributions Contract (ACC)* at Section 3.2 (June 22, 2011), *available at* https://portal.hud.gov/hudportal/documents/huddoc?id=accfinal.pdf [hereinafter *PBRA ACC*].

66. 42 U.S.C. § 1437d(j)(1) (2014).

67. 42 U.S.C. § 1437d (J)(1)(H)(ii) (2014).

68. While HUD may choose to include these items in its monitoring, it has not done so. *See* 42 U.S.C. § 1437d (J)(1)(K) (2014) (allowing the section to include any other evaluative factors that it deems appropriate); *see also generally Public Housing Evaluation & Oversight: Changes to the Public Housing Assessment System (PHAS) and Determining and Remedying Substantial Default*, 76 Fed. Reg. 36 (Feb. 23, 2011);*see also* 49 C.F.R. § 24.9 (reports on relocation and displacement activities can only be required every three years unless for good cause).

69. *Id.*

70. *Id.*; *Form HUD-9834, Management Review for Multifamily Housing Projects*, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=9834.doc (last visited February 26, 2015).

71. *PBRA ACC*, §§ 3.1 & 3.5. Civil rights laws that cover similar grounds, but are doctrinally distinct, do receive slightly more attention under

the required reports.

72. NATIONAL HOUSING LAW PROJECT, *HUD Housing Programs*, *supra* note 39, § 13.2.

73. *Id*.

74. *Id.*

75. National Housing Law Project, *HUD Housing Programs*, *supra* note 39, at 447.

76. As discussed, HUD generally has contractual rights directly against a private landlord, and also can indirectly enforce by demanding that the local agency enforce *its* contracts against the owner. For simplicity, the discussion in the text does not distinguish between direct and indirect enforcement, although as a practical matter indirect enforcement would present additional challenges since HUD would need to successfully coerce the local agency into action, and the local agency would also need to coerce the private contractor..

77. *See, e.g., Terms and Conditions Constituting Part A of a Consolidated Annual Contributions Contract Between Housing Authority and the United States of America*, Form HUD-53012A (7/95), ¶ 17(F), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=53012-a.pdf [hereinafter Consolidated ACC] (stating that HUD may exercise "any . . . right or remedy under existing law, or available at equity"); U.S. DEP'T OF HOUS. & URBAN DEV., *PIH-2012-32 (HA), supra* note 7, at 34–35, 43; MODEL FORM REGULATORY AND OPERATING AGREEMENT, art. 6, *available at* https://porta.hud.gov/hudportal/documents/huddoc?id=DOC_25920.doc (last visited February 26, 2015).

78. Directors of The Columbia Law Review Association, Inc., *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561, 565 (1968) (arguing that a resident has no means of compelling HUD to exercise its remedies against a nonperforming government landlord).

79. For HOPE VI and Choice Neighborhood projects, these provisions are contained in the regulatory and operating agreement, see, e.g., *Model Form Regulatory and Operating Agreement, supra* note 77, art. 6. For RAD PBV units, see *PBV HAP Contract Part 2*, U.S. DEP'T OF HOUS. & URBAN DEV. 13 (2014), *available at* http://www.radresource.net/output.cfm?id=pbvhap2. For RAD PBRA provisions, see *PBRA HAP Contract Part 2*, U.S. DEP'T OF HOUS. & URBAN DEV § 2.21, *available at* http://www.radresource.net/output.cfm?id=pbrahap2; 24 C.F.R. § 880.505; *id*. § 880.507.

80. *See* Sheryl A. Kass, *Bankruptcy and Low Income Housing: Where Is the Voice of the Tenants?*, 22 EMORY BANKR. DEV. J. 261 (2005) (exploring the difficulties in protecting tenants of privately-owned, federally-subsidized housing in the event of bankruptcy); Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 55 (2014).

81. National Housing Law Project, *HUD Housing Programs*, *supra* note 39, at 403–05, § 7.6.4.1; McNeill v. New York City Hous. Auth., 719 F. Supp. 233 (S.D.N.Y. 1989).

82. The local agency can act against the owner by demanding specific performance or seeking an injunction; seeking to recover federal funds from the owner; reducing future subsidy payments; or terminating the subsidy contract; and in mixed-finance HOPE VI and Choice Neighborhood projects, by taking possession of the project or appoint a receiver to take control of the project. *See Model Form Regulatory and Operating Agreement*, at 16; *Mixed-Finance Amendment,* at 15; *PBRA ACC*, at 12, 14–16; *PBRA HAP Contract Part 2*, § 2.21; *PBV HAP Contract Part 2*, § 15. HUD can demand that agency take any such actions, and if agency fails to enforce, HUD can exercise its own remedies against the local agency, including terminating the subsidy (which passes from HUD to the agency to the owner), appointing a receiver to manage the agency, or taking over the building itself and abrogating the contract between the local agency and the private owner. *See*, *e.g*., 42 U.S.C. 1437d (g) (2014) (requiring the local agency to convey title or possession of a project if the local agency is insubstantial default); ACC, ¶¶ 17(E) & (F); *PBRA ACC*, at 12; 24 C.F.R. § 880.507; U.S. DEP'T OF HOUS. & URBAN DEV., HUD-52625, RENTAL ASSISTANCE DEMONSTRATION USE AGREEMENT ¶ 3, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=UseAgreement.docx [hereinafter RAD USE AGREEMENT].

83. For positive assessments of court-appointed receiverships over local agencies, see Lynn E. Cunningham, *Washington D.C.'s Successful Public Housing Receivership*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 74, 74 (1999); Julie E. Levin & Murray S. Levin, Tinsley v. Kemp-*A Case History: How the Housing Authority of Kansas City, Missouri Evolved from a "Troubled" Housing Authority to a "High Performer,"* 36 STETSON L. REV. 77 (2006).

84. The contractual receivership remedy today is essentially the same as that stated over forty years ago in contracts between HUD and the local agencies. *See Remedies for Tenants in Substandard Public Housing*, *supra* note 234.

85. Receiverships instituted by a first-priority lender are not uncommon in commercial real estate practices, *see* Gregory D. May et. al., *Receiverships: An Additional Tool for Dealing with Commercial Real Estate Loan Defaults*, ACC Docket (November 2011), *available a*t http://demo.acc.com/legalresources/resource.cfm?show=1295309, but in this context, the first-priority lender must defer to a HUD-initiated receivership. There is precedent for government-instituted receivership over private housing. *See* Guardsman Elevator Co. v. United States, 50 Fed. Cl. 577U (2001); James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership As A Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORD. HOUS. & CMTY. DEV. L. 210, 217 (2004) (noting that the City of Baltimore may ask for a court-appointed receiver for a property with an outstanding vacant building violation notice); *see also id*. at 217 n.32 (noting that Ohio, Rhode Island, and Missouri have similar statutes).

86. Corrective action plans are often imposed before the more drastic remedies described *supra* are implemented. *See, e.g.*, 24 C.F.R. § 902.73 (2014) (stating that corrective action plans may be implemented if a local agency performs poorly in standardized HUD assessments); 24 C.F.R. § 968.335 (reserved by 78 FR 63793) (failure to conform to requirements related to certain public housing grant funds may subject a local agency to a corrective action plan); OMB Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*, OFFICE OF MGMT., & BUDGET, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a133/a133.pdfA-133 (noting that federal grantees may be subject to corrective action plans to correct deficiencies in financial audits).

87. *See, e.g.*, 24 C.F.R. § 902.75 (2014).

88. *See, e.g., Corrective Action Plan for Section 8 Housing Choice Voucher Program* (May 18, 2004), http://www.ci.berkeley.ca.us/citycouncil/housingauthority/2004housingauthority/packet/051804/2004-05-18%20HA%20Item%2004.pdf (illustrating a corrective action plan imposed on a local agency)(last visited April 29, 2015).

89. *See, e.g.*, 24 C.F.R. § 968.335 (reserved by 78 FR 63793).

90. *See generally* Kelsi Brown Corkran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J. L. ECON. & POL'Y 29 (2006).

91. *See, e.g.,* Poindexter, *supra* note 79; Schmidt, *supra* note 79.

92. *When Hope Falls Short, supra* note 88, at 1477–98.

93. Zmora, *supra* note 33, at 1983–84.

94. *See, e.g.*, Christopher D. Pelliccioni, *Political Speech in the Nonpublic Forum: Can Public Housing Facilities Limit Access to Political Canvassers?*, 53 CASE W. RES. L. REV. 569, 570–71 (2002) (arguing that the First Amendment provides the right of political canvassers, who are neither residents nor guests of residents, to enter public housing property); Martin J. Rooney, *The Public Forum Doctrine and Public Housing Authorities: Can You Say That Here?*, 21 BYU J. PUB. L. 323, 323–24 (2007) (advocating for a balanced consideration of the interests of a

governmental landlord, residents, and others in determining the scope of First Amendment protections in government-owned public housing).

95. Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2244–46 (2013).

96. In 2012, the United States had 11.5 million extremely low-income households, but only 3.3 million affordable, available rental units. HARVARD UNIVERSITY, *The STATE OF THE NATION'S HOUSING 2014*, at 30 http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14_txt_bw-full.pdf (last visited February 26, 2015).

97. *See* Epstein, *supra* note 91, at 2211; *see also* JOEL HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 11, 80 (1996) (reviewing both theoretical and empirical literature on privatization through contracting and concluding that "the consensus is that . . . contracting fulfills the stated goals of efficiency and accountability only when there's competition. . .[However, b]y and large, competition is hard to initiate or maintain"); Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465 (2003) ("The failure of a true market that promotes the efficient achievement of government goals requires an involved set of alternate accountability mechanisms that government must structure and administer.").

98. Hendrickson, *supra* note 20, at 39–43 (discussing frequent shifts in policy over who should live in public housing).

99. 42 U.S.C. § 1437a(a)(1) (2014).

100. Tenant Selection Policies, 24 C.F.R. 960.202(b)(1) (2014).

101. 42 U.S.C. § 1437n(2) (2014); *see also* Green, *supra* note 13, at 737–38 (noting that local agencies sought to admit higher-income people, in part to increase revenue; while courts found this to be legal, Congress responded in 1992 by statutorily restricting admissions to lower-income people).

102. Rent increases are clearly contemplated as a possibility under RAD, although any rent increases will be gradually phased in in an attempt to mitigate the burden on residents. *RAD Notice*, *supra* note 3, at 40–41.

103. *See* Teresa R. Simpson, *What People Make in the Memphis Area*, MEMPHIS.ABOUT.COM, http://memphis.about.com/od/jobsandcareers/qt/memphissalaries.htm (last visited Feb. 10, 2015); *U.S. Dep't. of Housing and Urban Dev.*, *FYI 2015 Income Limits Documentation System*, HUD.GOV, http://www.huduser.org/portal/datasets/il/il2014/2014summary.odn (last visited Feb. 10, 2015) (providing the information from which this example is derived). This example employs highly simplified calculations for illustrative purposes.

[104] Congress has authorized the HUD Secretary to waive statutory requirements as "necessary" for RAD to be "effective." *RAD Appropriations*, *supra* note XX.

105. The RAD affordability period is only 15 or 20 years, *RAD Notice*, *supra* note 3, at 14–15, although a mandatory one-time contract renewal extends the initial term to thirty or forty years. *Id*. In contrast, conventional, HOPE VI, and Choice units generally have 50-year terms. 42 U.S.C. § 1437g(d)(3)(A) & (e)(3) (2008).

106. *See* Smetak, *supra* note 25, at 55.

107. RAD *Use Agreement*, *supra* note 82, ¶ 3.

108. Covenants recorded against the properties may only be lifted with HUD approval. U.S. DEP'T OF HOUS. & URBAN DEV., DECLARATION OF RESTRICTIVE COVENANTS (2003), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9763.doc [hereinafter DECLARATION OF RESTRICTIVE COVENANTS]; RAD *Use Agreement*, *supra* note 82, ¶ 9.

109. *See, e.g.*, *RAD Notice*, *supra* note 82, at 35 (describing ground lease option); Wayne Hykan & Eric Zinn, *Leases in Affordable Housing Transactions*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 185 (2004).

110. NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, *supra* note 39, §§ 2.5.3–2.5.6.

111. Latitude to screen in some programs is quite broad, *see* 42 U.S.C. § 1437g(o)(6)(B), although screening is constrained by antidiscrimination laws and notice-and-comment procedures. Current residents, however, have little incentive to object through notice-and-comment procedures to heightened screening standards for others, and may in fact have reasons to support them.

112. Mary K. Cunningham, Susan J. Popkin, & Martha R. Burt, *Public Housing Transformation and the "Hard to House"*, Brief No. 9 at 3, URBAN INST. (June 2005); Susan J. Popkin, *Decade of Hope IV: Research Challenges and Policy* Changes, THE URBAN INSTITUTE, at 32–33.

113. *See* Susan J. Popkin & Liza Getsinger, *Tackling the Biggest Challenge*, URBAN INSTITUTE, http://www.urban.org/uploadedpdf/412257-Intensive-Case-Management.pdf (last visited Dec. 18, 2014).

114. Creaming also occurs where private entities provide welfare services and prison services. *See* Bezdek, at 1601; Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151–52 (2010).

115. *See* Jesse Kropf, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 75, 78 (2012) (discussing local agencies' screening out of people who have been arrested, but not convicted, for minor crimes); William C. Nussbaum, *Public Housing: Choosing Among Families in Need of Housing*, 77 NW. U. L. REV. 700, 702–03 (1982) (arguing against a deferential judicial standard of review for local screening standards and advocating for a more restrictive standard of review).

116. During a House hearing before the Subcommittee on Housing and Community Opportunity, Dr. Edward G. Goetz, Director, Center for Urban and Regional Affairs, and Professor, Urban and Regional Planning, confirmed that during the HOPE VI program, private actors used screening criteria that were "generally much stricter" than those used in conventional public housing. *Academic Perspectives on the Future of Public Housing: Hearing Before the Subcommittee on Housing & Community Opportunity of the Committee on Financial Services* 21, 111th Cong., 1st Sess. (July 29, 2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg53249/html/CHRG-111hhrg53249.htm [hereinafter *Academic Perspectives*]. U.S. Representative and Committee Chairwoman Maxine Waters inquired as to "[w]hy would private developers be deciding how we spend our government money to house?"). *Id.*; *see also* Terry A.C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998*, 11 STAN. L. & POL'Y REV. 173, 181 (1999) (describing how, at one HOPE VI project, residents had to pass rigorous background checks for re-admission, and restrictive "house rules" are used to monetarily penalize those who play on the grass, yell through windows, or wash, repair, or socialize around cars).

117. *RAD Appropriations*, *supra* note 6.

118. Harris Bieder, Diane K. Levy, and Susan Popkin, The Urban Institute, *Community Revitalization in the United States and the United Kingdom*, at 12-13.