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Rights at Risk in Privatized Public Housing

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RIGHTS AT RISK IN PRIVATIZED PUBLIC HOUSING

Jaime Alison Lee*

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I. INTRODUCTION

“When public goods are treated as a commodity, the needs of people are put in conflict with the companies’ desire to profit, and we always lose.” –Gary Straud, public housing resident, and Anthony Coates, President of AFSCME Local 647¹

Traditional public housing is dwindling. Federal policy has increasingly encouraged privatization, shifting stewardship of public housing out of the hands of government and into the hands of private, for-profit companies. Privatization in this context has both benefits and risks. A particularly compelling area of study is the attempt by lawmakers to conscript private contractors into serving public policy goals. Private landlords are obligated not merely to provide housing, but to conduct themselves in ways that promote the interests of vulnerable people. The case of public housing suggests that legislative mandates and contractual obligations are not enough to assure this outcome, and must be accompanied by a commitment to vigorous monitoring and enforcement.

Over the past two decades, public housing has joined the list of traditionally-public functions—including military combat, the administration of welfare benefits, and incarceration—that are carried out by private companies. The line between “public” and “private” is not easily drawn,² but “private” entities are commonly and properly understood to

1. Gary Straud & Anthony Coates, Op-Ed., *Selling Off and Selling Out*, BALT. SUN (Apr. 30, 2014, 1:47 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-public-housing-20140430-story.html>.

2. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000) [hereinafter Freeman, *The Private Role*]; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 2 (2014). This article uses the term “private” to refer to a for-profit entity that is not controlled, directly or indirectly, by elected officials, where “control” means “such dominion over finances, policies, or practices that the [organization] has, so to speak, no separate mind, will, or existence of its own but is a [] conduit for its principal.” 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPS. § 43 (2014). This article further uses the term “privatized public housing” to mean housing owned and managed by private entities through one of four recent privatization initi-

differ from “public” or governmental entities in two respects. First, private entities have a primary purpose of generating financial profit rather than serving public policy goals. Second, private entities usually escape a host of legal accountability measures imposed on public entities, such as electoral approval, due process requirements, and sunshine laws.³ Consequently, scholars have raised grave concerns about the exercise of power by private actors over people who are vulnerable due to income, race, ethnicity, or other factors,⁴ and are seeking ways to minimize privatization’s harms.

One potential approach is to incentivize private actors to act in ways that promote public goals⁵ by requiring them to meet standards traditionally imposed only on government.⁶ The enlisting of private actors to promote public values reflects Jody Freeman’s theory of “publicization,” by which:

private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state. So, rather than compromising democratic values of accountability, due process, equality, and rationality . . . privatization might extend these values to private actors through vehicles such as budgeting, regulation, and contract.⁷

Freeman’s theory of publicization is meant to suggest that “mechanisms exist for structuring public-private partnerships in democracy-enhancing ways.”⁸

atives, colloquially known as the HOPE VI program, the Choice Neighborhoods Initiative, and the Rental Assistance Demonstration Project-Based Voucher (RAD PBV) Program, and the Rental Assistance Demonstration Project-Based Voucher (RAD PBRA) Program. *See infra* notes 27, 42, and 53.

3. The literature discussing these concerns is vast and complex. *See, e.g.*, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009). For some discussions of accountability mechanisms to which private entities are not subject, *see* Freeman, *The Private Role*, *supra* note 2, at 574–91; Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L. REV. 1347, 1361 (2013). Prisons provide an example of how privatization can alter legal rights. *See, e.g.*, Allison L. Waks, *Federal Incarceration by Contract in a Post-Minneci World: Legislation to Equalize the Constitutional Rights of Prisoners*, 46 U. MICH. J.L. REFORM 1065 (2013).

4. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1262 (2003) (“With social services . . . accountability becomes especially important but also recalcitrant, because those most directly affected by the services or failures to provide services are politically and economically ineffectual”); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001); Matthew Diller, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization: Introduction*, 28 FORDHAM URB. L.J. 1307 (2001); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573 (2004); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239; Wendy A. Bach, *Welfare Reform, Privatization, and Power Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOK. L. REV. 275 (2009).

5. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) [hereinafter Freeman, *Extending Public Law*]; Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937 (2009); Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2217 (2013).

6. Freeman, *Extending Public Law*, *supra* note 5; Volokh, *Elusive Employee-Contractor Distinction*, *supra* note 2, at 149–50.

7. Freeman, *Extending Public Law*, *supra* note 5, at 1285.

8. *Id.* at 1290.

Can publicization fill the accountability gap caused by privatization? An excellent case study is presented by the federal public housing program. Congress has conditioned privatization on the preservation of certain rights and protections that are traditionally associated with governmental actors. For example, landlords must follow procedures very much like those mandated by Constitutional due process, must subject some contracts to notice-and-comment procedures, and must consult with residents before making certain business decisions about the housing. Such requirements derive from the Constitution and from democratic principles promoting an engaged citizenry, and lawmakers have tasked private landlords with their implementation. Whether this effort will succeed or fail has consequences for the public housing program as well as for other industries where publicization is desirable.

The primary mechanism for publicization in this context is contract. Scholars have begun to inquire into contract's adequacy to coerce private actors into public service,⁹ and this article furthers that inquiry. It concludes that in this particular context, the contractual scheme will fail to achieve the goals of publicization because it lacks both adequate rights monitoring and adequate remedies for rights violations. It argues for a new legislative mandate for federal enforcement, and proposes that public housing residents themselves play a greater role in the monitoring scheme.

Part II of this article begins with a brief history of public housing. For over seventy years, public housing has been nearly exclusively owned and operated by governmental entities. Since the mid-1990's, however, federal policy has strongly promoted privatization and today, perhaps as much as fifteen percent of public housing is privatized or designated to be privatized. Over the next few years, privatization will very likely become an option for the entire public housing inventory.

Part II also discusses why privatization is widely viewed as the only politically viable future for public housing, and briefly analyzes its impact on certain areas of policy concern, including economic efficiency, long-term affordability, and racial segregation and place-based deprivation.

The article then turns to an aspect of public housing privatization that has so far received little attention: the likely erosion of certain critical resident rights and benefits. Part II discusses the doctrinal origins of these benefits and their importance to the well-being of residents. Part III then examines the Congressional mandate to preserve these rights and the contractual scheme used to carry out that mandate. It suggests that publicization will ultimately fail because the federal monitoring scheme devalues these rights, contractual remedies are inadequate, and resident enforcement mechanisms may have less potency in the privatized context. The article further suggests a number of specific reforms that emphasize the importance of a federal enforcement scheme that incorporates resident perspectives.

9. See, e.g., Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 212 (2000); Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL'Y REV. 263 (2006); Epstein, *supra* note 5; Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559 (2001); Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339, 373 (2013).

II. PUBLIC HOUSING, PRIVATIZATION, AND PROTECTIONS

“We were told, when you go to sleep at night, it will be public housing. When you wake up in the morning, it will be public housing.” - Damaris Reyes, Executive Director, Good Old Lower East Side, testifying before The U.S. House Of Representatives Committee On Financial Services¹⁰

What is public housing, and how is privatization changing it? Below is a brief history of the public housing program and its shift toward privatization. An analysis follows of the implications of this transition for broader public housing policy, including a detailed discussion of certain rights that are at risk of being lost during the transition.

A. *Brief History of the Public Housing Program and The Rise of Privately-Owned Alternatives*

Public housing shelters over 2.3 million people nationwide.¹¹ Since the program was created in 1937, public housing policy has been set at the federal level, while local governmental agencies have implemented these mandates.¹² Today, over 3,100 local governmental entities across the country own and operate public housing, acting as “government landlords.”¹³ These entities are usually controlled by boards of directors appointed by a mayor or by another public official.¹⁴

Public housing’s original purposes included improving housing conditions for formerly middle-class workers left homeless by the Depression, as well as stimulating the

10. *The Administration’s Proposal to Preserve and Transform Public and Assisted Housing: The Transforming Rental Assistance Initiative: Hearing Before the Comm. on Fin. Serv.*, 111th Cong. 31 (2010), available at <http://financialservices.house.gov/media/file/hearings/111/printed%20hearings/111-140.pdf> [hereinafter *Proposal to Preserve and Transform Public and Assisted Housing*]. HUD officials promised that privatization would not change residents’ rights when promoting a legislative proposal very similar to the RAD programs presently in effect. See Nat’l Housing Law Project, *HUD Introduces Transformation of Rental Assistance Proposal*, HOUS. LAW BULL., Mar. 2010, at 74 n.7, available at <http://nhlp.org/files/01%20NHLP%20Bull%20Mar10.pdf> (“[S]enior HUD staff have stated that public housing tenants will go to sleep and wake up after the transformation and not notice the difference.”); see also *Preservation, Enhancement, and Transformation of Rental Assistance (PETRA): What is it, what issues have residents raised and how has HUD responded?* (October 2010), <http://www.nhlp.org/files/petra%20and%20res%20engagement.pdf>.

11. This number is derived from HUD administrative data from 2010, adjusted to 2013. The data is available at: <http://www.huduser.org/portal/datasets/picture/yearlydata.html#data-display-tab>.

12. For a discussion of the extent of federal control over public housing policy, see Otto J. Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality*, 3 WASH. U. J.L. & POL’Y 415 (2000).

13. The Council of Large Public Housing Authorities, *Facts About Public Housing*, § f, CLPFA.ORG http://www.clpha.org/facts_about_public_housing (last visited Dec. 18, 2014).

14. Robert Pozen, *The Financing of Local Housing Authorities: A Contract Approach for Public Corporations*, 82 YALE L.J. 1208, 1210 nn.16–17 (1973).

economy.¹⁵ The program boomed after the Second World War¹⁶ in order to accommodate returning veterans.¹⁷ It also began to house increasing numbers of poorer people, including racial and ethnic minorities.¹⁸ By the 1960s and 1970s, the public housing population had become predominantly black,¹⁹ with high-rise towers in urban cores deliberately segregating black residents into communities of concentrated poverty.²⁰

As costs increased, federal subsidies became the primary source of support for the program. In the early days, direct subsidies were unnecessary, since federally guaranteed municipal bonds generally paid for construction costs²¹ and rent paid by residents covered operational costs. As public housing opened its doors to the very poor, however, rent payments became insufficient to cover operating costs. Some local agencies began charging higher rents that were unaffordable to many residents, and in response to rent strikes staged by residents in the late 1960's,²² federal policymakers capped the amount of rent that residents were required to pay and the federal government began to directly subsidize operational costs as well as capital costs.²³

Against this backdrop—an increased reliance on taxpayer dollars, and a resident community that was the object of hostility and fear—public housing development came to a standstill. Emphasis shifted to other housing programs²⁴ and to finding alternatives to government-owned and operated housing.²⁵

15. See, e.g., 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, 688–89 (1994); Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 428 (2000).

16. Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 693 & n.28 (2012).

17. Green, *supra* note 15, at 691.

18. FitzPatrick, *supra* note 15, at 430.

19. Salsich, *supra* note 16, at 694; Green, *supra* note 15, at 691–92.

20. See, e.g., Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351, 1360 (1995); David Blair-Loy, *A Time to Pull Down, and A Time to Build Up: The Constitutionality of Rebuilding Illegally Segregated Public Housing*, 88 NW. U. L. REV. 1537 (1994); Green, *supra* note 15, at 691–92; Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35, 43–47 (2002); Danielle Pelfrey Duryea, Note & Comment, *Gendering the Gentrification of Public Housing: HOPE VI's Disparate Impact on Lowest-Income African American Women*, 13 GEO. J. ON POVERTY L. & POL'Y 567, 572–73 (2006); see also MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING, AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO* (1955) (placing fault with Chicago city officials, not local housing agency, for segregation). For discussions of the landmark litigation finding illegal racial discrimination in Chicago's public housing, see, e.g., Comment, *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing*, 118 U. PA. L. REV. 437, 439 (1970); Recent Case, *Housing—Public Housing—District Court Orders Housing Authority Not to Build in Black Ghetto and to Institute New Tenant Assignment Plan in Order to Remedy Past Discriminatory Practices.—Gautreaux v. Chicago Housing Auth.*, No. 66C 1459 (N.D. Ill., Nov. 24, 1969), modifying 304 F.Supp. 736, enforcing 296 F.Supp. 907, 83 Harv. L. Rev. 1441 (1970).

21. Salsich, *supra* note 16, at 692–93.

22. *Id.* at 695–96 (discussing rent strikes in the city of St. Louis).

23. Green, *supra* note 15, at 695; Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 877, 896–97 (1990); see also Salsich, *supra* note 16, at 698.

24. Salsich, *supra* note 16, at 700.

25. *Id.* at 700–01; *Housing Choice Voucher Program Guidebook*, U.S. Dep't of Hous. & Urban Dev., at 1-1 to 1-2, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook (last visited Aug. 15,

Today, a variety of programs rely on private landlords to own and operate affordable housing.²⁶ Two programs now eclipse public housing in terms of the number of low-income people served. The first is the so-called “Section 8” program, a term that encompasses a wide variety of programs, most of which involve privately-owned rental buildings that house low-income tenants in exchange for federal subsidies paid to the building’s owner.²⁷ These owners charge a limited amount of rent and receive federal subsidies meant to fill the gap between the rent payment and the amount needed to ensure the housing’s financial viability. The owner generally receives up to 110% of fair market rent, offering a larger profit margin than the owner would earn without the subsidy.²⁸ Begun in 1974, such Section 8 housing today shelters nearly three times as many households as public housing does.²⁹

The other major federal program that enlists private landlords is the low-income housing tax credit program, which has created approximately 2.5 million units since its inception in 1986.³⁰ The program encourages deep-pocket investors to channel funds toward affordable housing purposes in exchange for credits that reduce their federal tax liability.³¹ The housing is developed, owned, and operated by entities created specifically for

2014); Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL’Y & L. 1, 18–29 (2014) (discussing the history of privatization initiatives).

26. For a wide-ranging analysis of affordable housing programs, see J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 529 (2007); see also THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, TENANTS’ RIGHTS 1–77 (4th ed. 2012) [hereinafter NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS].

27. Section 8 of the U.S. Housing Act of 1937 is the authorizing legislation for an array of programs. Each has different requirements, but most meet this general description. See National Housing Law Project, HUD Housing Programs, *supra* note 26, § 1.2.5. For convenience, this article uses the term “Section 8” to refer collectively to three different programs that together shelter 5 million low-income households today: the non-special purpose tenant-based rental voucher and project-based vouchers (PBV) programs, both of which are administered under the Housing Choice Voucher (HCV) Program, and the Project Based Rental Assistance (PBRA) program. See *National and State Housing Data Fact Sheets*, CENTER ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/cms/index.cfm?fa=view&id=3586> (last updated Nov. 20, 2014); NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, *supra* note 26, §§ 1.2.5.1, 1.2.5.4, & 1.2.5.5. The latest privatization initiative, known as the Rental Assistance Demonstration program or RAD, see *infra* note 49, makes changes to the existing PBV and PBRA programs in order to make the tenants’ experiences more like that of traditional public housing, see *infra* pp. 770–01 and *supra* note 2. For this reason, RAD PBV and RAD PBRA are both included in the category of “privatized public housing” as used in this article, see *supra* note 1, although they will eventually be funded under Section 8 of the Act rather than under Section 9, which traditionally funds public housing. See *infra* note 49.

28. 42 U.S.C. § 1437f(c)(1).

29. 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> (noting that 2.2 million households receive shelter under the Housing Choice Voucher Program, 1.2 million under the Project-Based Rental Assistance Program, and 1.1 million under the public housing program); see also MICHAEL STEGMAN, MORE HOUSING, MORE FAIRLY: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON AFFORDABLE HOUSING, BACKGROUND PAPER ON THE LIMITS OF PRIVATIZATION 27 tbl. 2 (1991) (comparing the number of housing starts under the Section 8 and public housing programs from 1979–1990).

30. *Data Sets*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.huduser.org/portal/datasets/lihtc.html> (last visited Dec. 17, 2014).

31. For fuller discussion of the tax credit program, see Desiree Carole Hensley, *Out in the Cold: The Failure of Tenant Enforcement of the Low-Income Housing Tax Credit*, 83 U. CIN. L. REV. 1079 (2014); Eric Mittereder, *Pushing the Limits: Nonprofit Guarantees in LIHTC Joint Ventures*, 22 J. AFFORDABLE HOUS. & CMTY. DEV. L. 79 (2013), available at <http://www.att-law.com/wp-content/uploads/2013/05/Pushing-the-Limit.pdf>.

that purpose, which may be controlled by either for-profits or non-profits.³² Although ten percent of the credits must be reserved for non-profits,³³ non-profits face special financing challenges in using tax credits effectively.³⁴

As support for privately-owned affordable housing has grown, funding for government-owned public housing has fallen to untenable levels.³⁵ Congressional appropriations were inadequate for so long that by 1998, deferred capital needs averaged \$30,000 per unit, for a total of \$36 billion.³⁶ Operational shortfalls are also extreme, with individual units underfunded, on average, by an estimated \$900 in 2012 alone.³⁷

Decades of insufficient funding and political support have caused the public housing inventory to shrink.³⁸ Over 260,000 units have been lost since the mid-1990s.³⁹ Throughout the late 1980's and 1990's, units were routinely declared uninhabitable due to a lack of maintenance and removed from the inventory in a process known as "demolition through neglect."⁴⁰ Between 1995 and 2010, an additional 150,000 units were lost,⁴¹ with 50,000 of those units intentionally destroyed without replacement under a privatization program known as HOPE VI.⁴² The vast majority of existing units is now over thirty years old,⁴³ and between 10,000 and 15,000 units are estimated to be lost each year due to inadequate appropriations.⁴⁴ Rough calculations suggest that as many as 400,000 fewer people live in public housing today than twenty years ago and, if this trend continues, that as many

32. See, e.g., Hensley, *supra* note 31, at 1082–83.

33. I.R.C. § 42(h)(5)(A) (2013) (10% set aside for nonprofits).

34. Hensley, *supra* note 31, at 1089–91; Mittereder, *supra* note 31, at 80.

35. Salsich, *supra* note 16, at 710.

36. U.S. DEP'T OF HOUS. & URBAN DEV., DEVELOPING CHOICE NEIGHBORHOODS: AN EARLY LOOK AT IMPLEMENTATION IN FIVE SITES 1–4 (Sept. 2013), available at http://www.huduser.org/portal/publications/choice_neighborhoods_interim_rpt.pdf [hereinafter EARLY LOOK AT IMPLEMENTATION]; see also *Proposal to Preserve and Transform Public and Assisted Housing*, *supra* note 10, at 2 (estimating unmet capital needs at \$20–30 billion).

37. Rice & Sard, *supra* note 29, at 5 (describing a 2012 operating shortfall of \$500 million for 1.1 million units). Shortfalls are generally calculated by comparing the amount HUD requests or receives from Congress in its annual budget against the amount calculated as needed for that year according to HUD's funding formula.

38. Hendrickson, *supra* note 20, at 55–56.

39. CENTER ON BUDGET AND POLICY PRIORITIES, *Policy Basics: Introduction to Public Housing*, at 2 (Jan. 25, 2013), available at <http://www.cbpp.org/cms/?fa=view&id=2528> [hereinafter *Policy Basics*].

40. See generally Julia Clayton Powell, Comment, *De Facto Demolition: The Hidden Deterioration of Public Housing*, 44 CATH. U. L. REV. 885, 897 (1995). In response, lawsuits, legislation, and administrative actions sought to prevent the loss of valuable units. See also Schill, *supra* note 23, at 897; Hendrickson, *supra* note 20, at 42–43; SUDHIR ALLADI VENKATESH, AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO 112 (2000) (noting that by 1982, "[m]aintenance in public housing had lapsed [and] millions of dollars were needed for modernization").

41. *Proposal to Preserve and Transform Public and Assisted Housing*, *supra* note 10, at 2.

42. *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> (statement of Rep. Maxine Waters, Chairman S. Comm. on Hous. and Cmty. Opportunity) [hereinafter *Academic Perspectives*].

43. *Policy Basics*, *supra* note 39, at 2.

44. PowerPoint: Rental Assistance Demonstration (RAD): What Residents and Advocates Need to Know Now, NAT'L LOW INCOME HOUSING COALITION (Sept. 18, 2012), available at http://nlihc.org/sites/default/files/RAD_Webinar_Presentation_9-18-12.pdf (see slide 3); see also *Public Housing Capital Fund*, COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES (2013), http://www.clpha.org/uploads/Issue_Briefs/2013IssueBrief-PublicHousingCapitalFund.pdf at 1.

as 30,000 people per year will permanently lose their public housing benefits due to attrition of the housing stock.⁴⁵ Although the federal government bears responsibility for housing for millions of low-income people, many of whom are elderly, disabled, have children, and/or suffer from chronic health concerns,⁴⁶ it has not committed the funding necessary to meet this responsibility.⁴⁷ Consequently, public housing has been suffering a slow death by financial starvation.

B. Privatized Public Housing

Privatization's primary benefit is that it offers a politically feasible alternative to this scenario, in part because since private landlords enjoy access to a broader range of financing sources. While most government landlords must rely solely on appropriations dollars to meet capital needs, private owners can supplement those dollars with other types of financing, such as commercial bank loans and equity raised from Wall Street investors through the low-income housing tax credit program.⁴⁸ Federal appropriations for operating needs are also expected to flow more generously to private owners than to government landlords because of privatization's relative popularity among lawmakers.⁴⁹ In short, privatization is widely viewed as the only politically viable option for raising desperately needed funds for both capital and operating purposes.⁵⁰

The relative willingness of Congress to subsidize private landlords as compared to government landlords is one reason that privatization has flourished in the past two decades. From 1993 to 2010, the HOPE VI program dedicated over \$6.1 billion to rebuild

45. Estimates vary somewhat. See *Facts About Public Housing*, *supra* note 13, at n.iii (citing 1,329,000 units in 1995); *Data Sets*, *supra* note 30 (calculating 1,150,000 units in 2013, with an average of 2.2 people per unit); see also *Proposal to Preserve and Transform Public and Assisted Housing*, *supra* note 10, at 2 (noting that HUD estimates a loss of 150,000 units over 15 years); Rice & Sard, *supra* note 29, at 9 (suggesting a loss of closer to 200,000 units over two decades).

46. See generally *Data Sets*, *supra* note 30. See also SUSAN J. POPKIN ET AL., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHANGES 34 (May 2004), available at http://www.urban.org/UploadedPDF/411002_HOPEVI.pdf [hereinafter *A Decade of Hope VI*] (discussing widespread health concerns).

47. See, e.g., Rice & Sard, *supra* note 29, at 10–11.

48. Governmental landlords are not necessarily precluded from accessing these additional types of financing. Some governmental landlords have developed sufficient expertise to be able to successfully access tax credit financing, for example, and others have statutory authority to access bank loans, but have not yet been authorized to do so by HUD. See Eileen M. Greenbaum, *Quality Housing and Work Responsibility Act of 1998: Its Major Impact on Development of Public Housing*, 8 J. AFFORDABLE HOUS. & CMTY. DEV. L. 310, 320–22 (1999) (discussing the need for HUD to issue implementing regulations to allow governmental landlords to mortgage their properties as permitted by the Quality Housing and Work Responsibility Act of 1998, Title V of Pub. L. No. 105–276, 112 Stat. 2461 (1998)).

49. Technically, current privatization initiatives are to be funded under the project-based provision of Section 8 of the United States Housing Act of 1937 (codified as amended at 42 U.S.C. § 1437f (2014)), whereas government-owned public housing is funded under Section 9 of the Act. See 42 U.S.C. § 1437g (2008). Federal operating subsidies for the RAD program are thus characterized as Section 8 funding instead of as public housing funding. This change is expected to produce a more reliable appropriations stream due solely to Section 8's comparative popularity among lawmakers.

50. See, e.g., Rod Solomon, *Notes from the Inside: Thoughts About the Future of Public Housing*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 34, 43 (2000) (arguing that without adequate capital needs funding from Congress, accessing private financing is the only alternative to selling, demolishing, or abandoning existing public housing).

approximately 57,000 units,⁵¹ the majority of which have been privatized. The successor program to HOPE VI, the Choice Neighborhoods Initiative,⁵² has continued this shift to private ownership and management on a smaller scale.

More recent initiatives have further expanded privatization and may well make it an option for the entire public housing inventory in the very near future. The first wave of the Rental Assistance Demonstration Program, or RAD, affected 3,400 units, of which about half were shifted to private⁵³ management.⁵⁴ Congress quickly expanded RAD to 60,000 units, and in 2015 expanded it again to 185,000 units.⁵⁵ HUD continues to urge lawmakers to make all 1.1 million units nationwide eligible to participate.⁵⁶

While RAD is not without controversy and critics, it appears likely to govern the future of public housing. It is the third iteration of a substantially similar program promoted by HUD since 2010, and HUD Secretary Julián Castro has characterized it as the “answer” for many communities.⁵⁷ Even if RAD expands, not all public housing will be privatized, but if the early numbers are any indication, a very significant portion will be.

Since RAD is presently in a demonstration phase, Congress has mandated a study to

51. U.S. DEP'T OF HOUS. & URBAN DEV., FY 2010 BUDGET: ROADMAP FOR TRANSFORMATION, at 20 (2010), available at <http://www.nhl.gov/budgetsummary2010/fy10budget.pdf>; see also Donna White, U.S. DEP'T OF HOUS. & URBAN DEV., *HUD Awards Six Housing Authorities \$113.6 Million to Revitalize Public Housing, Transform Surrounding Neighborhood*, HUD Doc. No. 10-112 (June 1, 2010), available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-112.

52. The Choice Neighborhoods Initiative awarded \$350 million between 2010 and 2013, *FY2010-13 CHOICE NEIGHBORHOODS IMPLEMENTATION GRANT AWARDS*, DEPT. OF HOUS. & URBAN DEV., <http://portal.hud.gov/hudportal/documents/huddoc?id=implementgrantlist.pdf> (last visited Feb. 11, 2015); see also Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 747, 123 Stat. 3034, 3081 (2009). Choice Neighborhoods employs the same privatized ownership and financing mechanisms as HOPE VI. However, Choice Neighborhoods improves upon the HOPE VI program in many significant ways, including by reinstating the right to return and by seeking to address place-based deprivations as discussed *infra* at Part II.B.3. See also Salsich, *supra* note 16, at 719–20.

53. Although the present program, RAD, states that housing to be “owned or controlled” by a public entity or nonprofit organization, 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*], “ownership” is satisfied if the local agency merely retains ownership of the real property underlying the housing. U.S. DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, REVISION 1, at 29, § 1.6B.3 & n.22 (July 2, 2013), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-32rev1.pdf> [hereinafter *RAD Notice*]. RAD's definition of public ownership or control thus is much more attenuated than the definition used in this article. See *supra* note 3.

54. PowerPoint: *Overview of the Rental Assistance Demonstration Program*, at slide 15 (U.S. Dept. of Hous. & Urban Dev., June 2014), available at http://portal.hud.gov/hudportal/documents/huddoc?id=RADPROG_062414.PDF (noting that 53% of RAD units closed by May 2014 were managed by the local agency). Private ownership is less of a concern where the owner hires the local agency to manage the property. This article focuses on those situations where both owner and manager are private companies.

55. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 § 234, 128 Stat. 2130, 2757.

56. See, e.g., Remarks of Secretary Julián Castro Bipartisan Policy Center 2014 Housing Summit, U.S. DEP'T HOUS. & URBAN DEV. (Sept. 16, 2014), available at http://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2014/Speech_091614.

57. *Id.*

assess its effect on residents, among other things.⁵⁸ This study presents a crucial opportunity to evaluate and reform the program before it expands further.⁵⁹ An assessment should include an exploration of privatization's effect on certain persistent and challenging matters of public housing policy. The discussion below briefly assesses privatization's impact on certain key policy concerns, specifically, economic efficiency, long-term affordability, racial segregation, and place-based deprivations, although this analysis unfortunately cannot address these complex controversies in depth or address other important aspects of affordable housing policy.⁶⁰

1. Economic Efficiency

Perhaps the most common justification for privatization is that private actors provide better services at a lower cost to taxpayers than governmental entities.⁶¹ For-profit actors are often presumed to possess more expertise in service delivery and to be more motivated to act efficiently due to their need to win clients in a competitive marketplace. Such assumptions can be challenged on the grounds that competitive market conditions promoting economic efficiency do not necessarily exist in the subsidized housing industry, as discussed in more detail below.⁶² Nevertheless, some argue that private landlords can hardly do worse than government ones, given the shockingly poor conditions⁶³ of some government-run public housing, and egregious instances of mismanagement and corruption among some public housing officials.⁶⁴

The comparative efficiency of private landlords is a popular refrain in both scholarly and public discourse about public housing. In the 1990s, legal scholars argued for privatization based in part on studies showing that privately-owned Section 8 housing consumed

58. *RAD Appropriations*, *supra* note 53, at 675.

59. This article presumes that RAD is likely to expand, but does not presume that it constitutes effective or desirable housing policy. Some policymakers continue to advocate for alternative paths. *See generally* Peter Schroeder, *House Dem Questions WH Public Housing Relief Program*, THE HILL (Dec. 15, 2014), <http://thehill.com/policy/finance/227143-house-dem-questions-wh-public-housing-relief-program> (describing Rep. Maxine Waters' request that President Obama "rethink" RAD).

60. For a wider discussion of complexities of domestic affordable housing policy, see Byrne & Diamond, *supra* note 26, at 531 (delineating eight sometime conflicting goals of affordable housing policy, including: "1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds"); David J. Reiss, *First Principles for an Effective Federal Housing Policy*, 35 BROOK. J. INT'L L. 795, 795 (2010) (identifying "'first principles' of American housing policy," while acknowledging that the undertaking may be "quixotic" in light of "our muddied housing agenda").

61. *See, e.g.*, Schill, *supra* note 23, at 882 ("The most frequent justification for privatization is the utilitarian concern of efficiency. . . . A large number of empirical studies that compare public and private sector provision of goods and services conclude that the private sector is the more efficient provider."); John D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 (2010).

62. *See infra*, Part III.A.2.

63. Deplorable housing conditions and other problems, such as the miscalculation of rent payments, are widespread and crucially important. This article focuses on issues that are less tangible and less concretely measurable, and that receive less attention from regulators. However, many reforms proposed in this article could also be employed to improve housing quality and other areas of concern.

64. *See generally* Freeman, *Extending Public Law Norms*, *supra* note 5, at 1313–14 (describing this rationale for privatization as that of the "pragmatic privatizer").

significantly fewer appropriations dollars per unit than government-owned public housing.⁶⁵ The findings of these studies continue to influence today's debates. The contemporary housing finance market, however, has evolved with such complexity that appropriations figures do not tell the full story. A HUD study from 2000 indicated that half of all public housing units in fact cost less than a Section 8 voucher, with costs varying greatly depending on the agency's size and possibly its geographic location.⁶⁶ Moreover, most studies compare only direct appropriations for the Section 8 program and the public housing program, while neglecting to account for other costs that may be indirectly borne by taxpayers. Section 8 capital needs are often met through federally-guaranteed bank loans and/or federal low income housing tax credits,⁶⁷ for example, neither of which are cost-free to taxpayers and which in some cases may cost more than direct capital grants to local governmental agencies.⁶⁸ Other factors also make these studies unreliable measures of the programs' true value. The studies acknowledge a lack of comprehensive and consistent data⁶⁹ and also note that the Section 8 and public housing programs offer different substantive benefits, the comparative value of which are not reflected in analyses that focus on economic cost alone.⁷⁰

Moreover, recent studies offer some competing evidence that government-owned housing (also known as "conventional" public housing) simply does not always cost more than privately-owned housing, at least given how privatization has been implemented to date.⁷¹ The HOPE VI program was found to cost significantly more, for example, than

65. See Schill, *supra* note 23, at 900–02; Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497 (1993) (advocating for demand-oriented subsidies, such as Section 8 vouchers); Stephen B. Kinnaird, *Public Housing: Abandon Hope, but Not Privatization*, 103 YALE L.J. 961 (1994); Stephen B. Kinnaird, *Public Housing: Abandon Hope, but Not Privatization*, 103 YALE L.J. 961, 985 (1994); JOHN C. WEICHER, *PRIVATIZING SUBSIDIZED HOUSING* (1997).

66. OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., *ISSUE BRIEF NO. II: ECONOMIC COST ANALYSIS OF DIFFERENT FORMS OF ASSISTED HOUSING 3* (Dec. 2000).

67. STANLEY J. CZERWINSKI, ET AL., U.S. GEN. ACCOUNTING OFFICE, *GAO-02-76, COMPARING THE CHARACTERISTICS AND COSTS OF HOUSING PROGRAMS 80* (2002); Denise DiPasquale, et al., *Comparing the Costs of Federal Housing Assistance Programs*, FRBNY ECON. POL'Y REV., 147, 148 (2003) (noting that 40% of tax credit units also receive subsidies from a Section 8 program); WILL FISCHER, *Podcast: Transforming Rental Assistance*, CTR. ON BUDGET AND POL'Y PRIORITIES (Apr. 27, 2010), <http://www.cbpp.org/cms/?fa=view&id=3169> (stating that "public housing is often one of the most cost effective ways to help low-income people afford housing").

68. In its early days, the tax credit program was calculated to cost taxpayers twice as much per unit as a direct grant program. LEONARD E. BURMAN, *THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY* (2d ed. 2005). The program has been deemed "inefficient" by the Congressional Budget Office. Byrne & Diamond, *supra* note 26, at 603 (citing CONGRESSIONAL BUDGET OFFICE, *THE COST EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS: A CBO STAFF MEMORANDUM 283* (1992), *reprinted in* 56 TAX NOTES 493 (1992)); see also Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 387, 419 (2000) (describing the program as "riddled with inefficiencies"). Not only do taxpayers pay more, but tax credit tenants on average also pay more in rent in comparison to tenants of other major production programs. CZERWINSKI ET AL., *supra* note 67, at 4.

69. CZERWINSKI, ET AL., *supra* note 67, at 4.

70. *Id.* at 5; see also OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66, at 5.

71. An analysis of the economic efficiency of privatized public housing should also consider the fact that a significant for-profit industry has developed with respect to these programs, which means that of the total dollars invested in housing today, a greater portion is dedicated to profit or fees paid to developers, financial institutions,

both conventional public housing and other forms of privately owned, federally subsidized housing.⁷² A 2010 HUD study calculated that direct subsidies for a RAD-like program would cost taxpayers \$700-\$1000 more per unit per year than what HUD had just requested in appropriations dollars to run the housing conventionally.⁷³ In sum, in the context of public housing, the common presumption that privatized services are less costly for taxpayers is certainly contestable.

2. Long-Term Affordability for Residents

All housing programs must consider fundamental questions of who should be housed⁷⁴ and how affordable the housing should be. Public housing rent payments have long been capped at 30% of income,⁷⁵ 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.⁷⁶ Thus, federal policy reserves much of public housing for the extremely poor.⁷⁷ Some genuine concerns exist, however, about whether privatized housing will remain accessible to those least likely to be able to secure other forms of housing.

One concern is that residents may need to pay more of their limited income toward rent under the RAD program.⁷⁸ 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.⁷⁹ Even a small rent increase under RAD may be too great to bear for residents

consultants, financial brokers, and lawyers. Even local agencies earn “fees” from privatization projects, although unlike fees paid to for-profit entities, these funds must be rechanneled into other affordable housing purposes. *See, e.g.,* Melody Simmons, *Graziano Offers More Details on Sale of Public Housing to Developers*, BALTIMORE BREW (Mar. 13, 2014, 12:05 PM), <https://www.baltimorebrew.com/2014/03/13/graziano-offers-more-details-on-sale-of-public-housing-to-developers/> (stating that “about \$10 million of the expected \$27 million earned by HABC is “developer fees” under the sale and financing contracts would be returned to HABC to spend on other public housing sites, the commissioner disclosed at the hearing”).

72. OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 66, at 3 (noting that each HOPE VI unit cost federal taxpayers significantly more, on average, in direct taxpayer subsidies, than a conventional public housing unit); CZERWINSKI ET AL., *supra* note 67, at 148 (finding HOPE VI to be the most costly of the five federal housing production programs studied).

73. DEPT. OF HOUSING AND URBAN DEV., *Estimates of the Costs and Debt Leveraging Potential of Converting Public Housing to Long-Term Section 8 Project-Based Rental Assistance Contracts 5* (May 28, 2010) (on file with author). HUD’s appropriation requests are not reliable measures of the full costs of public housing, however, given that these requests often fall well short of the need as determined by HUD’s own funding formula. *See* Rice & Sard, *supra* note 29.

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

75. 42 U.S.C. § 1437a(a)(1) (2014).

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

77. 42 U.S.C. § 1437n(2) (2014); *see also* Green, *supra* note 15, 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).

78. 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 53, at 40–41.

79. *See* Teresa R. Simpson, *What People Make in the Memphis Area*, MEMPHIS.ABOUT.COM, <http://memphis.about.com/od/jobsandcareers/qt/memphisalaries.htm> (last visited Feb. 10, 2015); *U.S. Dep’t. of Housing*

in such circumstances.

A second concern is that private landlords may use their discretion to set admissions criteria that will bar many otherwise-eligible individuals from the housing. Private and public owners alike generally must admit all who qualify under federal and local standards, but 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,⁸⁰ among other things.⁸¹ 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.⁸² Another study found that Chicago residents reported a “stunning” frequency of health problems that turn simple daily living activities into challenges.⁸³

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, along with the aggressive eviction of residents viewed as more challenging or who might consume more resources, is popularly known as “creaming.”⁸⁴ Even governmental landlords engage in creaming,⁸⁵ and the problem is exacerbated when discretionary screening authority is coupled with the profit-motive and the absence of a public-sector motivation to “serve all.” Creaming by private landlords under the HOPE VI program drew national criticism.⁸⁶ RAD corrects some of the problems experienced under HOPE VI by

and Urban Dev., FYI 2015 Income Limits Documentation System, HUD.GOV, <http://www.huduser.org/portal/datasets/il/i12014/2014summary.odn> (last visited Feb. 10, 2015) (providing the information from which this example is derived). This example employs highly simplified calculations for illustrative purposes.

80. NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, *supra* note 26, §§ 2.5.3–2.5.6.

81. 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.

82. 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.

83. *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).

84. Creaming also occurs where private entities provide welfare services and prison services. *See* Bezdek, *supra* note 9, at 1601; Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151–52 (2010).

85. *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).

86. 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, supra* note 42. U.S. Representative and Committee Chairwoman Maxine Waters inquired as to “[w]hy would private developers be deciding

guaranteeing that *current* residents will not undergo heightened screening standards in order to be re-admitted.⁸⁷ However, *future* applicants who are hard-to-house are likely to be screened out, and all who are admitted may be at a higher risk of eviction. Furthermore, creaming raises concerns not only because it excludes individuals, but also because it can exclude certain housing projects. Properties in relatively good physical condition and in marketable locations are more likely to attract financing from private banks and investors, which may exclude properties from gaining assistance.⁸⁸

A third concern about privatized projects is the longevity of their affordability. Some attempts have been made to ensure that privatized public housing is as “permanently” affordable as conventional public housing. For example, federal approval is required to sell or close privatized housing and to lift affordability restrictions before the contract term expires.⁸⁹ Some local agencies also retain property rights enabling them to take back possession of the property once the contract with the private landlord expires,⁹⁰ which provides a potential path to long-term preservation, although it does not guarantee that the necessary funding will be available.

Despite these efforts, privatization poses specific and significant risks to long-term affordability. RAD’s affordability period is shorter than that of conventional public housing.⁹¹ Private owners may exit the public housing program once their contractual obligations end, and may even deliberately breach their contracts with the goal of escaping from their public housing obligations before the contract term expires,⁹² which it may be tempted to do if converting the property to a market-rate use will be profitable. Moreover, given that stewardship over public housing is no longer the obligation of governmental agencies, lawmakers may find it even easier to further reduce funding or even abandon the program outright.

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).

87. *RAD Appropriations*, *supra* note 53.

88. Note, *When Hope Falls Short: Hope VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477, 1483–84 (2003); Alexis Stephens, *Risks v. Rewards: Inside HUD’s Favorite New Program*, NEXTCITY.ORG (Oct. 9, 2014), <http://nextcity.org/daily/entry/public-housing-privatized-hud-rad-section-8> (stating that preliminary findings by the Institute for Urban Research at Southern Illinois University-Edwardsville suggest that projects less in need are more likely to be funded under RAD).

89. 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]; U.S. DEP’T OF HOUS. & URBAN DEV., HUD-52625, RENTAL ASSISTANCE DEMONSTRATION USE AGREEMENT § 9, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=UseAgreement.docx> [hereinafter RAD USE AGREEMENT].

90. See, e.g., *RAD Notice*, *supra* note 53, at 35 (describing ground lease option); Wayne Hykan & Eric Zinn, *Leases in Affordable Housing Transactions*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 185 (2004).

91. The RAD affordability period is only 15 or 20 years, *RAD Notice*, *supra* note 53, 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).

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

In sum, privatization raises unsettling concerns about whether the housing will remain accessible for people with few other options, and whether it eases the ability of landlords and lawmakers to exit from public housing obligations.

3. Segregation and Race- and Place-Based Inequality

Finally, privatization does little to address one of the most deeply troubling aspects of the public housing program: its role in creating and perpetuating racial segregation, both when discrimination was legal and after it was outlawed.⁹³ Housing segregation has contributed to the deep deprivations suffered by poor, minority communities, including the lack of fundamental services like public safety, education, economic opportunities, transportation, and consumer services.⁹⁴ These matters can be explored only briefly here, but must be mentioned as a critical part of the complex debate about the future of public housing.

Privatization initiatives have approached racial segregation and race- and place-based inequality in different ways. The HOPE VI program intentionally sought to “deconcentrate poverty” by replacing most of the public housing with housing for people with higher incomes. This “mixed-income” approach drew harsh criticism for many reasons,⁹⁵ including for linking its theory of neighborhood improvement with the removal of poor black residents.⁹⁶ HOPE VI’s successor program, the Choice Neighborhoods Program, responded with a more promising strategy that minimizes displacement of public housing residents⁹⁷ and invests in area schools and crime-prevention programs.⁹⁸

Privatization initiatives under the RAD programs take yet another approach and offer a “mobility” option.⁹⁹ RAD subsidies become portable after a period of time, meaning

93. See, e.g., Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913 (2005); Michelle Adams, *Separate and (Un)equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996).

94. See, e.g., DOUGLAS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

95. See, e.g., *When Hope Falls Short*, *supra* note 88; Nat’l Hous. Law Project, *False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, 32 HOUS. L. BULL. 119 (2002), available at <http://www.nhlp.org/files/FalseHOPE.pdf>; Duryea, *supra* note 20, at 570; Jim Fuerst & Jane Sims, *The Misguided Effort to “Reform” Public Housing in America*, J. AFFORDABLE HOUS. & CMTY. DEV. L. (2005); Henry Korman, *How the Proposed Hope VI Reauthorization Ignores the Severe Distress of Racial Segregation*, 17 J. AFFORD. HOUS. & CMTY. DEV. L. 353 (2008); Arthur M. Wolfson, *Lost in the Rubble: How the Destruction of Public Housing Fails to Account for the Loss of Community*, 9 CHAP. L. REV. 51 (2005).

96. See, e.g., Duryea, *supra* note 20, at 570; Fuerst & Sims, *supra* note 95; Korman, *supra* note 95; Nat’l Hous. Law Project, *supra* note 95; Wolfson, *supra* note 95; *When Hope Falls*, *supra* note 88. For an alternative vision of how HOPE VI could have been better designed to address segregation, see Ngai Pindell, *Is There Hope for Hope VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 434 (2003).

97. See, e.g., DEP’T OF HOUSING & URBAN DEV., OFFICE OF THE SECRETARY, HUD, NOTICE OF HUD’S FISCAL YEAR (FY) 2010 NOTICE OF FUNDING AVAILABILITY (NOFA) (2010). Congress has renewed the Choice Neighborhood program each year since 2010.

98. *Id.* U.S. Dep’t of Hous. & Urban Dev., Office of Pub. & Indian Hous., No. FR-5800-N-11, Choice Neighborhoods Implementation Grant Program at 1–2 (2014).

99. U.S. Dep’t of Hous. & Urban Dev., Office of Pub. & Indian Hous., Notice PIH-2012-32, Rental Assistance Demonstration at 128 (2013).

that residents may relocate and apply their subsidies to other housing units in other jurisdictions.¹⁰⁰ The mobility option theoretically enables residents to move from communities lacking adequate services into so-called “neighborhoods of opportunity.”¹⁰¹ However, areas that offer adequate services often lack private landlords who will accept the subsidies,¹⁰² and without an adequate supply of housing, the usefulness of the mobility option is limited.¹⁰³ Moreover, residents also simply may not wish to move from their homes and into new communities where they may fear harassment, stigma, and isolation on the basis of race and income.¹⁰⁴

Recent efforts to address race- and place-based deprivations through the Choice Neighborhoods and RAD programs are not insignificant. Without additional reforms, however, their impact on these complex and deeply entrenched problems are likely to be nominal.

C. Public Housing Protections

Privatization appears to provide little or no resolution to some of the most challenging and troubling issues raised by the public housing program. Yet privatization also appears, at present, to be the only politically viable future for the program. In part, this is because a compromise has been struck that accepts the limitations of privatization in exchange for the preservation of certain rights and benefits for residents. The following sections discuss these benefits, their doctrinal origins, and their legal and policy significance.

Some of the most valuable benefits of public housing include greater security in tenancy¹⁰⁵ and rights to participate in governance and policy-making.¹⁰⁶ These benefits do not exist in private unsubsidized rental housing and exist only to a limited extent in other federal rental housing programs. While these benefits are not always well respected even in the conventional public housing program, Congress has deemed them to be so important that it has demanded that private owners continue to provide them. A hypothetical narrative offers a backdrop for discussing the nature of these benefits, their origins, and their importance.¹⁰⁷

100. *Id.*

101. *Id.* at 74 (referring to 24 CFR 983.260 and § 1.7.C.5 p. 43–46, pertaining to RAD PBV and RAD PBRA, respectively); *see, e.g.*, LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 49–50 (2000).

102. *See, e.g.*, 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, 282–83 (2006).

103. Law forbidding discrimination on the basis of type of income may help to address this concern. *See, e.g.*, *States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, NAT'L HOUS. LAW PROJECT, <http://nhlp.org/files/04%20NHLP%20Bull%20Jan%2008%20states%20uphold%20source%20of%20income.pdf> (last visited February 9, 2015) (discussing case law in Maryland, Connecticut, and Massachusetts holding that state law forbids discrimination on the source of income).

104. *See Adams, supra* note 93, at 452–53.

105. *See infra* Part II.C.1.

106. *See infra* Part II.C.2.

107. Factual narratives with similar circumstances abound. *See, e.g.*, Alan Yu, *Senior Public Housing Residents Protest Terrible Living Conditions*, WBEZ 91.5 (Aug. 7, 2013), <http://www.wbez.org/news/senior-public-housing-residents-protest-terrible-living-conditions>.

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.¹⁰⁸ The average household income is \$13,724, even though wages are a major source of income for 28% of households.¹⁰⁹ Only twelve percent of households depend on welfare as a major source of income.¹¹⁰

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, bed-bug, 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 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 for-profit 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 for-profit company that owns the building. It also hires an affiliated for-profit 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

housing-residents-protest-terrible-living-conditions-108326.

108. *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).

109. *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).

110. *Id.*

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.¹¹¹ 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. 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.”

1. Security-In-Tenancy Protections

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 rights come in various forms, and among the most crucial are continued occupancy and grievance procedures.

a. 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.¹¹² Most states also offer a statutory protection against retaliatory eviction.¹¹³ 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

111. 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)(1)–(2) (2010). The reasons cited in the hypothetical are grounds for termination pursuant to the regulations.

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

113. 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).

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.¹¹⁴ In *Goldberg v. Kelly*, the Supreme Court established that welfare benefits could not be terminated without due process under the Fourteenth Amendment.¹¹⁵ *Goldberg* was explicitly applied to public housing by the Second Circuit in *Escalera v. New York City Housing Authority*,¹¹⁶ which held that under the Fourteenth Amendment, public housing benefits could not be terminated without adequate procedural safeguards, including good cause.¹¹⁷ The Fourth Circuit in *Caulder v. Durham Housing Authority* further determined that *Goldberg*’s protections expressly apply to public housing.¹¹⁸

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.¹¹⁹ *Joy*’s holding is now echoed in federal regulations.¹²⁰

While some legal scholars have argued that the right to continued occupancy should also apply to private landlords as a logical extension of the “revolution” in private landlord-tenant law, this has been done only in a handful of jurisdictions.¹²¹ Congress and HUD have also declined to apply this right to Section 8 housing. Thus, the right to continued occupancy upon lease expiration is a valuable benefit that is unique to public housing.

b. Grievance Procedures

Another security-in-tenancy benefit to be preserved in privatized public housing is the opportunity to grieve nearly any adverse act taken by one’s landlord.¹²² 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.¹²³ Mrs. J, for example, has the legal right to first speak informally with her housing

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

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

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

117. *Id.*

118. *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.

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

120. 24 C.F.R. § 966.4(a)(2)(i) (2014).

121. Green, *supra* note 15, at 702 (discussing the right to continued occupancy as a natural extension of the revolution in private landlord-tenant law).

122. 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).

123. 24 C.F.R. §§ 966.54–55 (2014).

manager about her alleged nonpayment of rent.¹²⁴ If the landlord does not change course, Mrs. J can then appeal the outcome of the meeting through a more formal hearing,¹²⁵ administered by an “impartial” person selected in accordance with a process approved by the residents.¹²⁶ 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.¹²⁷ 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.¹²⁸ Both the informal and formal processes must be documented in writing,¹²⁹ and the decision of the hearing officer is binding on the landlord.¹³⁰ If Mrs. J remains unsatisfied, she can still pursue a court action.¹³¹

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.¹³² 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.¹³³

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.¹³⁴ Grievances thus provide a

124. 24 C.F.R. § 966.54; U.S. DEP’T OF HOUS. & URBAN DEV., PUB. HOUS. OCCUPANCY GUIDEBOOK 209–210 (June 2003), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10760.pdf [hereinafter OCCUPANCY GUIDEBOOK].

125. OCCUPANCY GUIDEBOOK, *supra* note 124.

126. 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).

127. 42 U.S.C. § 1437d(k)(4) (2014); 24 C.F.R. § 966.56(b) (2014).

128. 42 U.S.C. § 1437d(k)(5) (2014); 24 C.F.R. § 966.56(b) (2014).

129. The complaint, discussion, and outcome of informal meetings must be documented and filed for future review. 24 C.F.R. § 966.54 (2014); OCCUPANCY GUIDEBOOK, *supra* note 124, at 210. Formal proceedings are documented in a transcript, 24 C.F.R. 966.56(G) (2014), and the hearing officer’s decision is put into writing. 42 U.S.C. § 1437d(k)(6) (2014).

130. 24 C.F.R. § 966.57(b) (2014).

131. 24 C.F.R. § 966.57(c) (2014).

132. 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).

133. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22–23 (1997) (“The collaborative claim that problem solving tends to produce higher-quality rules rests upon the belief that unanticipated or novel solutions are likely to emerge from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information or devise solutions together.”).

134. NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, *supra* note 26, § 10.2.2.3 (“[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)).

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.¹³⁵ 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.¹³⁶

The principle that grievance procedures can be invoked with respect to any adverse action, not just evictions, also derives from procedural due process.¹³⁷ *Escalera*, applying *Goldberg*, held that grievance procedures are triggered by the assessment of minor fines against residents,¹³⁸ 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.¹³⁹

Grievance rights are a key component of the due process protections afforded to public housing residents. Yet they are not always appropriate or effective in resolving rights concerns. Low-income and minority residents face many of the same structural barriers in grievance procedures as they do in more formal adjudicative settings,¹⁴⁰ but grievance procedures lack the more robust procedural safeguards of those fora. Moreover, the effectiveness of grievance procedures depends heavily on the personal willingness of the landlord or hearing officer to fairly consider the matter, and the inherent power imbalance between resident and landlord inevitably colors the proceedings.¹⁴¹ In addition, residents risk revealing information that can later be used against them in court.

Such concerns are not uncommon to alternative dispute resolution processes.¹⁴² Despite these limitations, however, some advocates still argue for greater use of grievance procedures in the subsidized housing context.¹⁴³ As suggested in Part III.E, with certain

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

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

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

138. *Id.*

139. 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).

140. For a discussion of the structural barriers to the effective self-representation of poor tenants in rent court, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); see also David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 407 (2011) (discussing barriers to low-income tenants successfully asserting an implied warranty of habitability claim).

141. Bezdek, *supra* note 140.

142. See, e.g., Mindy D. Rufenacht, *The Concern over Confidentiality in Mediation-an in-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 114; *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984).

143. Letter from Resident Engagement Group to Keith Ellison, U.S. Rep., 5th Dist. of Minn. (Jan. 25, 2011), available at <http://nhlp.org/files/Letter%20to%20Ellison%20from%20REG->

reforms, grievance procedures may become a more effective component of robust monitoring and enforcement system.

c. The Right to Return

In the hypothetical narrative, Mrs. J also benefited from a security-in-tenancy benefit known as “the right to return.”¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ Private landlords imposed stricter screening requirements for the renovated units, further excluding many former residents from returning.¹⁴⁹ 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.¹⁵⁰ With no federally guaranteed right to return, residents

Final%20rev%20w%20Sigs.doc.pdf). *But see* Robyn Minter Smyers, *High Noon in Public Housing: The Show-down Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW 573 (1998) (arguing that the costs of due process protections outweigh their supposed benefits).

144. *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.

145. *Id.* at 29.

146. *Id.*

147. *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).

148. 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).

149. *See* discussion of creaming *supra* Part II.B.2.

150. 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,

at HOPE VI sites around the country protested strenuously to secure the right at the local level,¹⁵¹ 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.

Security in tenancy protections offer both functional and emotional benefits.¹⁵² They guard against involuntary ejection from one's home and the disruption of one's social networks, daily functions, and emotional well-being.¹⁵³ 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,¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

2. Participation Rights

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.¹⁵⁷ Participation rights have roots in principles of due process, although today's participation rights

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_relocates.pdf; see also *infra* Part II.B.2 (discussing the special challenges to finding replacement housing faced by hard-to-house residents).

151. 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%20NHL%20BullFeb08%20_2%20\(Final\)_one%20for%20one.pdf](https://nhlp.org/files/07%20NHL%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)).

152. 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).

153. *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 McFarlane, *Properties of Instability*, *supra* note 147, at 862–871.

154. Rice & Sard, *supra* note 29, at Tbl. 1 (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%).

155. *Id.* at 4–5.

156. Green, *supra* note 15, at 686.

157. For discussions of the rights of public housing residents to participate in governance matters, see Salsich,

extend well beyond Constitutional minimums. For example, Mrs. J's resident council must be "recognized" by the public housing agency under federal requirements,¹⁵⁸ which qualifies it for funding for education, training, and other activities supporting resident involvement in the governance of their housing.¹⁵⁹ Public housing rules also encourage the establishment of formal channels of communication with agency officials.¹⁶⁰ Residents have formal notice-and-comment rights with respect to plans to sell, renovate, or privatize their housing¹⁶¹ and with respect to proposed changes in lease terms, rent requirements, and house rules.¹⁶² Residents are also entitled to fill one seat on the local agency's board of directors.¹⁶³

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.¹⁶⁴ The resident council could employ its federally-mandated channels of communication with agency officials to publicize the retaliatory evictions.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷ Rights to federal funding and to information disclosure are especially useful in facilitating resident mobilization and collective action to promote change.¹⁶⁸

supra note 16, at 715–16; 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. Poin-dexter, *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).

158. 24 C.F.R. § 964.18(a) (2014).

159. 42 U.S.C. §§ 1437g(e)(1)(E) & 1437g (h) (1) (2014); 24 C.F.R. § 990.108(e) (2014).

160. 24 C.F.R. § 964.105 (2014).

161. 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).

162. 42 U.S.C. § 1437c-1(e) (2014).

163. 24 C.F.R. § 964.515 (2014).

164. 24 C.F.R. § 964.11 (2014).

165. *Id.*

166. 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 156.

167. See Byrne & Diamond, *supra* note 26, at 587–90, 595–601. Participation rights, as currently structured, are less effective in the privatized setting, see *infra* Part II, but the reforms proposed in Part III will increase their effectiveness.

168. Mobilization is a fundamental component of the law and organizing movement, which suggests that law-

Security-in-tenancy rights and participation rights are largely unique to public housing, although other low-income tenants share many of the same needs and interests¹⁶⁹ and may deserve the same protections.¹⁷⁰ Private public housing landlords can, however, justifiably be asked do more for tenants than other landlords, given the special benefits that they receive through the program.¹⁷¹ Subsidies provide more than fair market rent, for example, and landlords often gain long-term control over housing assets at no cost or at a steeply reduced cost.¹⁷² They may enjoy greater access to financing, since lenders and investors find government-backed projects especially attractive, and can earn substantial fees for managing renovations. They are also relieved of the burden of finding new tenants when vacancies occur, since public housing waiting lists often far outnumber available units.

In short, landlords benefit from privatization programs and, as part of their bargained-for exchange with the government, are obligated to promote the Constitutional and democratic interests of low-income residents.

III. PUBLICIZATION, PROBLEMS, AND PROPOSALS

“The issue for us is enforcement [of public housing standards and regulations]. . . . The promise is that the properties are to be managed like public housing, but we don’t know what that means.” - David A. Prater, fair housing attorney, Maryland Disability Law Center¹⁷³

That political will exists to impose publicization and extend public housing protections is perhaps surprising,¹⁷⁴ given the program’s unpopularity among lawmakers and the programmatic complexity that publicization adds. The intent to publicize, however, has been quite clearly stated by Congress. 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,”¹⁷⁵ and under both RAD programs, “tenants . . . shall, at a minimum, maintain the same rights . . . as those provided under section

yers 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 157; see also Poindexter, *supra* note 157, at 671–72; Schmidt, *supra* note 157, at 334, 349–50.

169. For example, Section 8 tenants share many of the same characteristics as public housing residents. U.S. DEP’T OF HOUS. & URBAN DEV., HUD-52625, *RAD Use Agreement, Section 9*, *supra* note 89.

170. Roisman, *The Right to Remain*, *supra* note 152, at 817.

171. *Id.* at 834.

172. *Id.* at 831–34.

173. Melody Simmons, *City selling Baltimore’s high-rise public housing to private entities*, BALTIMOREBREW (Feb. 27, 2014), <https://www.baltimorebrew.com/2014/02/27/city-selling-baltimores-high-rise-public-housing-to-private-entities/>.

174. *See* Freeman, *supra* note 5, at 1329–35 (noting that governments may lack motivation to publicize).

175. 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 and 9 of the Act,¹⁷⁶ which address certain security-in-tenancy and participation protections. A host of statutory, regulatory, and administrative declarations further elaborate upon these protections,¹⁷⁷ which are in turn made applicable to private owners via contract, just as privatization scholars have envisioned.¹⁷⁸

In all four programs, contracts between HUD and private landlords require landlord compliance with all applicable statutory, regulatory, contractual, and subregulatory administrative guidance.¹⁷⁹ HUD contracts also place responsibility on local agencies to cause private landlords to comply with the rules.¹⁸⁰ HUD thus generally has privity of contract with both the private owner and the local agency, and may exercise contractual remedies against either in the event of breach or noncompliance.¹⁸¹ HUD's contracts also empower HUD to exercise an extensive array of monitoring and enforcement tactics, as discussed below.¹⁸²

Despite the sweeping language of these contracts, they do not assure that publicization will occur. Before analyzing the shortcomings of the contractual scheme itself, it is useful to examine the need for affirmative acts of publicization through legislative and contractual means. As discussed below, publicization is necessary because neither Constitutional doctrine nor market-based incentives serves to sufficiently motivate private actors to carry out public policy goals.

176. *RAD Appropriations*, *supra* note 53, 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).

177. 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 RAD Notice*, *supra* note 53, at 47–48; 24 C.F.R. §§ 966.4(a)(2) & (l) (2014); HUD, *Occupancy Guidebook*, *supra* note 124, at 118.

178. *See, e.g.*, Dominique Custos & John Reitz, *Public Private Partnerships*, 58 AM. J. COMP. L. 555, 579 (2010) (“[C]ontract law . . . could also be part of the solution in the sense that an easy way to extend the requirement of public law would be to make them applicable to the contractors in a [public-private partnership] by contract clause (or by statutes of regulations that in effect determine what the contract clauses are.)”).

179. The contract provisions differ somewhat for each program, but are sufficiently similar to enable consolidated discussion. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *Declaration of Restrictive Covenants* (Jan. 2003), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9763.doc [hereinafter *DECLARATION*]; RAD USE AGREEMENT, *supra* note 89 (incorporating the RAD Notice, which at Section 1.2 applies general PBV and PBRA statutory, regulatory, and guidance requirements, with exceptions as noted); 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*] (applicable to RAD PBRA, as modified by RAD requirements).

180. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., MIXED-FINANCE AMENDMENT TO CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT § 6(C)(1) (May 2004), available at <http://www.hud.gov/offices/pih/programs/ph/hope6/mfph/accamendment.doc> [hereinafter *MIXED-FINANCE AMENDMENT*]; *PBRA ACC*, *supra* note 179, § 3.2.(3).

181. *See, e.g.*, *DECLARATION*, *supra* note 179; *RAD USE AGREEMENT*, *supra* note 89.

182. *See supra* Part III.C.

A. *The Need for Publicization*

1. Doctrinal Ambiguity

Affirmative acts of publicization can serve to fill in gaps in Constitutional doctrine.¹⁸³ A gap exists in that private actors are not bound to respect Constitutional rights merely because they receive federal payment to carry out activities once conducted by the government;¹⁸⁴ some form of state action must exist in order for a private actor to be bound by Constitutional requirements. The state action doctrine has been roundly criticized as lacking a coherent basis in principle.¹⁸⁵ This point is illustrated by the fact that, according to case law and agency guidance, the state action doctrine requires Section 8 landlords to provide certain protections traditionally required of government actors, but not others, yet does not provide any clear basis for distinguishing between the two.¹⁸⁶ For instance, courts have held that in Section 8 housing, termination of a tenancy during the lease term implicates state action and requires due process, but termination of a tenancy upon expiration of the lease has not been treated as state action.¹⁸⁷ Similarly, any adverse action by a governmental landlord triggers due process protections, while only certain adverse actions by a private Section 8 landlord have been deemed to trigger those protections.¹⁸⁸

The state action doctrine does not adequately explain the basis for such distinctions. What is clear, however, is that the doctrine certainly does not require private landlords to provide all of the public housing benefits that governmental landlords must provide. Therefore, in order to bind private actors to Constitutional norms, some other form of legal obligation must be created. Statutory and contractual publicization mandates can serve this role.

2. Other Justifications

Some benefits are not of Constitutional significance,¹⁸⁹ but their preservation is still desirable for public policy reasons. In such cases, strong acts of publicization are necessary to coerce private actors into providing these benefits. It can be presumed that private actors will be reluctant to provide services that consume resources and reduce profit.¹⁹⁰ Public housing benefits fall into this category, as grievance procedures require time, secure ten-

183. Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 987-88 (2005).

184. See, e.g., Gilman, *supra* note 4, at 609-10; Custos & Reitz, *supra* note 178, at 578; Verkuil, *supra* note 183.

185. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 221; *State Action and the Public/private Distinction*, 123 HARV. L. REV. 1248 (2010); Freeman, *The Private Role*, *supra* note 2, at 575-79; Freeman, *The Contracting State*, *supra* note 9, at 178.

186. NATIONAL HOUSING LAW PROJECT, *HUD Housing Programs*, *supra* note 26, § 11.2.3.5.6.

187. *Id.*

188. *Id.* §§ 10.4.2-3.

189. Verkuil, *supra* note 183, at 964.

190. See Epstein, *supra* note 5.

ancies mean less landlord discretion to evict residents who demand more managerial attention, and robust participation rights can encourage residents to demand higher-quality services.¹⁹¹ These benefits may have little chance of preservation in a profit-driven system, justifying a robust publicization scheme.

A counterargument might be that publicization is unnecessary, as private landlords will voluntarily offer enhanced benefits in order to more effectively compete for tenants.¹⁹² 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 dissatisfactory service.¹⁹³ 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.¹⁹⁴ A competitive market could conceivably be created if landlords with stronger rights records received preferences in the award of public housing subsidy contracts, but this is not present practice.¹⁹⁵

Another counterargument against strong forms of publicization may be that even government actors routinely disregard public housing rights, and that private landlords should not be held to higher standards than public ones. Rights violations do occur throughout the conventional public housing system, since government landlords, while not primarily profit-seeking,¹⁹⁶ still have incentives to save money, evict challenging residents, and tamp down participation.¹⁹⁷ Governmental status alone certainly does not guarantee the sincere and dedicated service of public needs, and HUD and some local agencies are known for having weak records on rights.¹⁹⁸ On the other hand, that some public entities perform poorly does not excuse similarly poor performance by private actors. Rather,

191. *Public Landlords*, *supra* note 139, at 990–93.

192. Epstein, *supra* note 5, at 2244–46.

193. 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).

194. See Epstein, *supra* note 5, 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.”).

195. Some programs do bar landlords with poor rights records from receiving new government contracting opportunities. See *infra* Part III.E.1.

196. *Public Landlords*, *supra* note 139, at 996.

197. See generally Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 629–31 (2004) (noting that government entities also have reasons to reduce services, although incentives for for-profit actors are stronger).

198. *Public Landlords*, *supra* note 139, at 1003–06.

it only illustrates the need to attend with more care to rights enforcement in the privatized setting, since private actors have even stronger incentives to skimp on rights¹⁹⁹ and lack a historical commitment to serving public purposes.

In sum, affirmative acts of publicization are necessary to supplement Constitutional doctrine and to combat the threat to rights posed by the profit-motive. In the public housing context, such affirmative acts already exist in the form of Congressional mandates and contractual obligations imposed by HUD on private actors. Public housing rights are far from secure, however.

B. *The Publicization Mandate's Inherent Vulnerabilities*

Despite publicization, public housing rights remain vulnerable in a number of ways. One risk is that if political will to publicize weakens, crucial protections may be eliminated by Congress. To date, RAD has been implemented solely through appropriations bills,²⁰⁰ meaning that the publicization mandate can simply be removed from future bills. Even if RAD is eventually codified, the statutory protections presently guaranteed could be excised by Congress at a later date.

The history of public housing privatization provides a cautionary tale. During the early days of the HOPE VI program, federal law required that any unit demolished must be rebuilt.²⁰¹ This “one-for-one replacement” rule essentially guaranteed all residents a right to return and also ensured that privatization would not reduce the overall number of affordable units.²⁰² As the program expanded, however, Congress first suspended,²⁰³ then repealed the rule,²⁰⁴ paving the way for widespread displacement and the loss of approximately 50,000 units.²⁰⁵ The withdrawal of this critical protection fundamentally changed the nature of the program, and this experience underscores the fragility of the present promise to protect residents as privatization takes place.

Another vulnerability exists in that the current publicization scheme preserves only rights granted to residents by statute, but not those spelled out in regulatory or subregulatory mandates,²⁰⁶ where much of the substance of public housing law is found. Such benefits might thus be withdrawn with relatively ease by HUD in the future. Moreover, Congress has authorized the HUD Secretary to waive statutory requirements as “necessary” for RAD to be “effective.”²⁰⁷ Since HUD does not generally submit waiver requests to public notice or debate,²⁰⁸ such waivers could quietly eviscerate non-statutory protections

199. Michaels, *supra* note 197.

200. See, e.g., *RAD Appropriations*, *supra* note 53.

201. Powell, *supra* note 40, at 914.

202. Salsich, *supra* note 16, at 716.

203. Act of July 27, 1995, § 1002, 109 Stat. at 235.

204. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2573 (1998).

205. *Academic Perspective*, *supra* note 42.

206. *RAD Appropriations*, *supra* note 53.

207. *Id.*

208. HUD has published certain blanket waivers that have been granted to date. U.S. DEP'T OF HOUS. & URBAN DEV., *PIH-2012-32 (HA), Rental Assistance Demonstration – Final Implementation, Revision 1*, at 29,

with little scrutiny.²⁰⁹

The problem of administrative undermining is illustrated by recent HUD actions. Current administrative guidance suggests that private landlords in one program need not follow grievance procedures,²¹⁰ despite clear Congressional directive to the contrary. At best, this guidance is ambiguous and misleadingly encourages noncompliance, and at worst, it deliberately undermines Congressional intent. Clearly, even strongly-worded publicization mandates can be withdrawn or undermined, and experience suggests that the present mandate is indeed vulnerable.

C. *Weak Frameworks for Monitoring and for the Exercise of Remedies*

Even assuming that the publicization mandate remains in full force, it is still unlikely to effectively preserve public housing rights. This is due to critical weaknesses in the existing accountability framework. Richard Stewart defined three elements that are fundamental to effective accountability mechanisms: “(1) a specified accouter, who is subject to being called into account; (2) a specific account holder, who can require that the accouter render account for his performance; and (3) the ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance by the accouter.”²¹¹ To a casual observer, HUD’s contractual scheme appears to contain all three elements, as it provides HUD with broad monitoring and enforcement authority against private landlords. A closer look, however, reveals that the monitoring and enforcement system is deeply inadequate.

1. The Devaluation of Security-in-Tenancy and Participation Rights

The first of Stewart’s accountability elements, that the accouter be subject to being called into account, is nearly absent from the existing monitoring scheme. HUD reporting requirements are notoriously burdensome, and yet they fail to make any inquiry into security-in-tenancy and participation rights. Even though HUD is statutorily required to evaluate²¹² whether each local agency has provided participation opportunities for residents,²¹³ 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

§§ 1.5 & 1.6, pp. 23–46 (July 2, 2013), available at <http://portal.hud.gov/hudportal/documents/hud-doc?id=pih2012-32rev1.pdf>.

209. *Id.*

210. *RAD Notice*, *supra* note 53, at 42–43 (PBRA); U.S. DEP’T OF HOUS. & URBAN DEV., Attachment 1E - House Rules: Addendum A – Resident Procedural Rights 2, available at <http://www.radresource.net/output.cfm?id=leaseaddn> (last visited February 26, 2015). The RAD Notice requires grievance processes in the context of a “PHA (as owner).” *RAD Notice*, *supra* note 53, at 42–43. The term “PHA” is formally defined as either a governmental entity or a private company, *id.* at 11, although the term “PHA (as owner)” is not defined. The term “PHA (as owner)” could be construed as referring only to a governmental entity, since the phrase “(as owner)” appears to be an attempt to distinguish between a local agency acting as landlord, and a local agency acting as regulator or funder. The phrase “(as owner)” would presumably not be necessary if the term “PHA” in this context referred to private entities.

211. Stewart, *supra* note 166, at 245.

212. 42 U.S.C. § 1437d(j)(1) (2014).

213. 42 U.S.C. § 1437d (J)(1)(H)(ii) (2014).

monitor.²¹⁴

HUD does possess broad monitoring authority: it can require private landlords to furnish detailed data,²¹⁵ to file numerous monthly and annual reports,²¹⁶ to submit to independent audits,²¹⁷ and to submit to on-site reviews,²¹⁸ among other things. Yet HUD collects practically no information about security-in-tenancy and participation rights no.²¹⁹ In one program, for example, HUD assesses performance with respect to eight compliance categories.²²⁰ Four categories address financial and administrative concerns, and three assess whether the landlord filled out required reports.²²¹ 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.”²²²

Current monitoring schemes thus seem highly unlikely to uncover potential rights violations simply because they do not ask about them. Moreover, even if problems were discovered, it is not assured that HUD would take any enforcement action in response. A 2011 Inspector General audit found grave deficiencies in HUD’s enforcement of one Section 8 initiative, concluding that HUD failed to impose fines on noncompliant landlords and deemed reports satisfactory simply if timely submitted, without assessing whether the contents of the report met any substantive standard of quality.²²³

HUD’s systemic monitoring efforts are supplemented by the administrative complaint process,²²⁴ which enables residents to initiate complaints, but this system also suffers some crucial weaknesses. It places the burden of raising a complaint on residents, even though private landlords are not always required to share “know-your-rights” information

214. 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 Remediating 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).

215. *See, e.g.,* U.S. DEP’T OF HOUS. & URBAN DEV., *PIH-2012-32 (HA)*, *supra* note 53, at 34–35, 43; MODEL FORM REGULATORY AND OPERATING AGREEMENT, §§ 3.4(d), 3.5, & 5.3, *available at* https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_25920.doc (last visited February 26, 2015).

216. *See, e.g.,* *PBRA ACC*, *supra* note 179.

217. 24 C.F.R. § 985.101a (2014).

218. *See* *SEMAP Notice PIH 2001-6 (HUD)*, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2001-6.pdf> (last visited February 26, 2015); *Notice PIH 2005-33 (HA)*, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2005-33.pdf> (last visited February 26, 2015).

219. *PBRA ACC*, *supra* note 179.

220. *Id.*

221. *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).

222. *PBRA ACC*, *supra* note 216, §§ 3.1 & 3.5. Civil rights laws that cover similar grounds, but are doctrinally distinct, do receive slightly more attention under the required reports.

223. OFFICE OF THE INSPECTOR GENERAL, *2009-SE-0003*, *available at* <http://www.hud.gov/offices/oig/reports/files/ig0900003.pdf> (last visited February 26, 2015); *see also* HUD, *Draft Overview By HUD of Key Elements Of Invitation For Submission Of Applications For Contract Administrators And Annual Contributions Contract Revisions*, *available at* <https://www.ncsha.org/system/files/resources/Overview+Key+Elements+of+Invitation+for+Submission+Applications+and+ACC+Revisions+DRAFT.pdf> (last visited Dec. 14, 2010).

224. NATIONAL HOUSING LAW PROJECT, *HUD Housing Programs*, *supra* note 26, § 13.2.

with residents,²²⁵ and even though no regulations or guidance explain how residents can effectively file a complaint.²²⁶ Perhaps most significantly, any HUD response to administrative complaints is elective. HUD reportedly does sometimes remedy violations that are obvious and undisputed,²²⁷ but this leaves a great number of situations unaddressed.

Notably, participation rights have been singled out for monitoring and enforcement in the context of one particular HUD program, where subregulatory guidance not only requires that HUD respond to administrative complaints but also authorizes HUD to levy sanctions against noncompliant owners, including civil fines and debarment from participating in HUD programs.²²⁸ Even in this context, however, HUD's responsiveness to complaints is reportedly inconsistent.²²⁹

2. The Inadequacy of Remedies

The second element of Stewart's accountability framework is that an account holder must have the power to exercise remedies in the event of deficient performance.²³⁰ Kimberly Brown explains that where private contractors are delegated power and funding derived from the public, but lack accountability to the electorate, the federal executive branch must retain termination power over the contractor in order to meet its Constitutional obligations.²³¹ In the public housing context, the minimum requirements articulated by Stewart and Brown appear to be met, as HUD can theoretically exercise a range of contractual remedies against private landlords, including termination,²³² and HUD may generally exercise any permissible remedy against a private owner.²³³ Gaps occur, however, as HUD cannot be compelled to act.²³⁴ Moreover, even if HUD chose to enforce, significant challenges exist to the effective exercise of remedies.

225. See generally Freeman, *supra* note 2.

226. NATIONAL HOUSING LAW PROJECT, *HUD Housing Programs*, *supra* note 26, § 13.2.

227. *Id.*

228. HUD Notice H 2014-12, available at https://portal.hud.gov/hudportal/documents/huddoc?id=Tenant_partici_revision.pdf (applicable to certain HUD-assisted housing, including RAD PBRA housing, but not to other privatized public housing).

229. National Housing Law Project, *HUD Housing Programs*, *supra* note 26, at 447.

230. Stewart, *supra* note 166, at 245.

231. See Brown, *supra* note 3, at 1383–91 (stating that the exercise of certain powers by private parties demands “accountability to the President [in the form of] removability and a clear supervisory chain of command to the highest executive officeholder,” among other safeguards); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1036–37 (2013) (arguing that the “take Care” clause of the Constitution “obligates the president to ensure that agencies enforce the rights and duties created by Congress”).

232. 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. See also *infra* note 238.

233. 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”); *Model Form Regulatory and Operating Agreement*, *supra* note 215, art. 6.

234. Directors of The Columbia Law Review Association, Inc., *Remedies for Tenants in Substandard Public*

Three specific remedies are repeatedly emphasized in privatization contracts.²³⁵ 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 financial viability, leading to a bankruptcy, workout, or foreclosure process that could displace residents and jeopardize long-term affordability.²³⁶ Subsidy-reduction sanctions are so risky that residents have occasionally filed suit to prevent HUD from exercising this remedy.²³⁷

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.²³⁸ 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,²³⁹ although

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).

235. 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 215, 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.

236. 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); Smetak, *supra* note 25, at 55.

237. National Housing Law Project, *HUD Housing Programs*, *supra* note 26, at 403–05, § 7.6.4.1; McNeill v. New York City Hous. Auth., 719 F. Supp. 233 (S.D.N.Y. 1989).

238. 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*, *supra* note 215, at 16; *Mixed-Finance Amendment*, *supra* note 180, at 15; *PBRA ACC*, *supra* note 179, at 12, 14–16; *PBRA HAP Contract Part 2*, *supra* note 235, § 2.21; *PBV HAP Contract Part 2*, *supra* note 235, § 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*, *supra* note 233, ¶¶ 17(E) & (F); *PBRA ACC*, *supra* note 179, at 12; 24 C.F.R. § 880.507; *RAD Use Agreement*, *supra* note 89, ¶ 3.

239. 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).

instituting a receivership is exponentially more complicated in a privatized context.²⁴⁰ 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.²⁴¹

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.²⁴² For example, HUD might require a local agency to increase its reporting, meet certain performance standards within specified timelines, and require attendance at trainings.²⁴³ 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,²⁴⁴ 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.²⁴⁵ It is unlikely that HUD would inject itself so intrusively into private-sector business dealings, however, and

240. 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.

241. 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 at <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).

242. 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.pdf>A-133 (noting that federal grantees may be subject to corrective action plans to correct deficiencies in financial audits).

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

244. *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).

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

equally unlikely that private landlords would readily submit to such intrusions.

D. *The Inadequacy of Alternatives to Federal Enforcement*

Current federal oversight and enforcement schemes have some readily apparent weaknesses. Is greater federal involvement a necessary response? To evaluate whether effective alternatives to federal enforcement exist, it is helpful to return to the hypothetical narrative of Mrs. J.

1. Private Rights of Action

Were Mrs. J to seek to enforce her rights against a government landlord, her rights of action would be quite limited. She must have the personal resources to bring suit.²⁴⁶ Moreover, she cannot necessarily enforce a right simply because her landlord is statutorily obligated to provide that right, since only Congress can create private rights of action to enforce federal law,²⁴⁷ whether expressly or impliedly.²⁴⁸ Only in limited circumstances have courts found implied private rights of action under the statute governing federal affordable housing programs²⁴⁹ and its regulatory or subregulatory requirements.²⁵⁰ Even assuming that Mrs. J could establish a private right of action against a government landlord, that same cause of action might not lie against a private landlord.²⁵¹

Mrs. J also has a lease with her landlord, the terms of which she could seek to enforce under contract law. However, she must have contractual privity with the landlord with respect to the rule that she wishes to enforce, and none of the HUD-drafted privatized lease forms comprehensively incorporate all public housing protections. Mrs. J's ability to bring

246. Effective use of the court system is simply inaccessible to many public housing residents, since low-income and minority people face significant barriers in accessing the legal system. *See, e.g.*, Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); Martha F. Davis, *Race and Civil Counsel in the United States: A Human Rights Progress Report*, 64 SYRACUSE L. REV. 447 (2014); Michael Zmora, *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).

247. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

248. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66, 80–85 (1975) (setting forth a four-part test for finding an implied cause of action).

249. Paul E. Harner, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L.J. 915, 921–22 (describing that “district and circuit courts have reached widely differing results when called upon to imply private rights of action under [the Act]”); *see also* National Housing Law Project, *HUD Housing Programs*, *supra* note 26, at 840–48, § 13.8.2.3 (reviewing various theories under which an implied right of action may be asserted); *id.* at 844–47, § 13.8.2.3.3 (describing a few implied private rights of action under the Act); John M. Lerner, *Private Rights Under the Housing Act: Preserving Rental Assistance for Section 8 Tenants*, 34 B.C.J.L. & SOC. JUST. 41, 44–45 (2014) (discussing limited private rights of action in the Section 8 program).

250. National Housing Law Project, *HUD Housing Programs*, *supra* note 26, at 804–05, § 13.8.1.2.2 *id.* at 805–08 § 13.8.1.3.

251. Even when private rights of action in the conventional public housing context exist, they may be refused by state courts because they are quasi-judicial acts that are not clearly governed either by landlord-tenant law or by state administrative procedures act requirements. *See* Nooree Lee, *Expanding the Role of North Carolina State Courts in Resolving Public Housing Disputes*, 33 N.C. CENT. L. REV. 40 (2010).

a contract action is far from certain.

If Mrs. J lacks a private right of action granted by Congress, and also lacks a basis for a suit against her landlord in her lease, she might seek to bring a cause of action based on the third-party beneficiary doctrine. Third-party beneficiary rights would enable Mrs. J to enforce contracts executed not by her, but by HUD, the local agency, and/or the private landlord.²⁵² For Mrs. J to enforce these contracts as a third-party beneficiary, the contracting parties must intend for that her to have that right.²⁵³ Few HUD contracts clearly state this intent, and where they do, other HUD contracts sometimes state a contradictory intent by explicitly denying third-party beneficiary rights.²⁵⁴ Moreover, the third-party beneficiary doctrine has been inconsistently applied in the public housing context.²⁵⁵ The third-party beneficiary doctrine is thus unreliable as a route to private enforcement.

Even assuming that a resident can state a viable cause of action, contract claims are not always well suited to resolving the problems faced by public housing residents. The right to return illustrates this point. While some residents did procure a right to return to the newly renovated housing developed under the HOPE VI program, thousands were unable to exercise their rights because the local agency failed to track them as they were relocated, and ultimately could not contact them when the housing was ready for reoccupancy.²⁵⁶ Individual, post-hoc enforcement actions likely would not have helped these residents access their rights, whereas forward-looking monitoring and oversight by federal officials might have made a difference.²⁵⁷

Individual enforcement actions are also unsatisfactory in this context because they may not effectively address systemic noncompliance. In adjudicating an individual resident's complaint for breach of contract, a court generally cannot assess a landlord's history of violations against other individuals or sanction a landlord for habitually flouting program requirements. In contrast, were HUD to equip itself with a robust monitoring and enforcement scheme, it could evaluate repeated or cumulative acts of noncompliance and respond accordingly.

While residents do have numerous avenues through which they may seek judicial

252. See Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J ON POVERTY L. & POL'Y 287 (2010).

253. See *id.* at 299-300.

254. Third-party beneficiary rights are explicitly granted in some contracts and denied in others. Compare, U.S. DEP'T OF HOUS. & URBAN DEV., *Rental Assistance Demonstration Use Agreement*, ¶ 9, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=UseAgreement.docx> [hereinafter *Use Agreement*]; *Consolidated ACC*, *supra* note 233, § 18 (explicitly denying third party beneficiary rights).

255. See Crowder, *supra* note 252, at 301 (arguing that a case denying public housing residents third-party beneficiary status was wrongly decided); Kenneth J. Foster, Note, *Public Housing Tenants as Third-Party Beneficiaries: Considering Ayala v. Boston Housing Authority*, 27 NEW ENG. L. REV. 85 (1992); see also *Remedies for Tenants in Substandard Public Housing*, *supra* note 234 (discussing difficulty in determining which law governs third party beneficiary claims).

256. *Where Did Relocated Public Housing Tenants Go?*, CHICAGO SUN TIMES (April 15, 2011), <http://mad-amenoire.com/109347/where-did-relocated-public-housing-tenants-go-cha-report-details/> (noting that over 2000 residents with a right to return were unable to exercise that right) (referencing Chicago Housing Authority, *The Plan for Transformation An Update on Relocation* (2011), available at http://www.thecha.org/assets/1/22/4_14_11_Report_FINAL_appendices_%281%29.pdf); *When Hope Falls Short*, *supra* note 88, at 1497 (stating that CHA started tracking residents only three years after the grant was awarded).

257. Federal oversight of relocation efforts were also lacking in the HOPE VI context. Ngai Pindell, *Is There Hope for Hope VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 433 (2003).

enforcement, these avenues are not always readily accessible or well suited to the context, and therefore should be viewed as supplements to, not as substitutes for, a comprehensive system of federal oversight.

2. Enforcement Through Resident Participation

It is conceivable that participation rights, if well-enforced, could provide another avenue through which residents could force private landlords to respect their rights. For a number of reasons, however, 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.²⁵⁸

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.²⁵⁹ 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 laws²⁶⁰ and may shield their principals, as private citizens, from becoming the objects of public protests.²⁶¹ Moreover, while community organizing and other mobilization activities may be protected in conventional public housing under the First Amendment,²⁶² such speech rights have not

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

259. See, e.g., Poindexter, *supra* note 157; Schmidt, *supra* note 157.

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

261. Zmora, *supra* note 246, at 1983–84.

262. 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).

explicitly been publicized and may not be protected in privatized public housing.

E. Recommendations

It seems clear that legal mandates alone are not enough to assure that publicization will take place. For rights to be preserved, Congress must demand that HUD actively protect rights through a robust monitoring and enforcement scheme. Such a mandate may be implemented by augmenting the existing RAD directive with the following italicized language: “*HUD shall ensure that tenants . . . shall, at a minimum, maintain the same rights . . . as those provided under sections 6 and 9 of the Act and under HUD implementing requirements.*” This language imposes an affirmative obligation on HUD to preserve and protect public housing rights. It also bars HUD from undermining the publicization mandate by exempting private landlords from regulatory or subregulatory requirements applicable to governmental landlords. Waivers of certain requirements should be permitted where necessary and appropriate, but waiver requests should be subject to public notice-and-comment procedures to ensure that public housing benefits are not diluted without adequate scrutiny and justification.

A rigorous rights preservation scheme would also include the elements discussed below: expanded remedies, the integration of residents into the monitoring and enforcement scheme, and an increased role for non-profit organizations.

1. Expanded Remedies

Legal remedies must be reformed and expanded. Options include adopting remedies already in use in other subsidized housing contexts, such as barring noncompliant landlords from doing business with federal agencies for up to three years,²⁶³ and specifically including rights violations as a justification for debarment.²⁶⁴ In addition, when HUD or local agencies invoke their authority by imposing fines or reducing subsidies, they must simultaneously be required to increase monitoring and oversight, and provided with the funds to do so, so as to deter noncompliant owners from merely reducing services in an effort to preserve profits as financial sanctions are applied.

HUD’s Office of Inspector General should also be deployed to deter and remedy rights violations. The Inspector General currently focuses its energy on the misapplication of funds by local agencies, procurement irregularities, and other activities related to protecting the federal fisc.²⁶⁵ Rights violations should be given equal priority to prevent the payment of tax dollars to non-performing landlords.

263. See 2 C.F.R. § 180.865 (Westlaw through Feb. 5, 2015) (providing that limited denials of participation, suspension, and debarment impose sanctions of varying levels of severity); 2 C.F.R. Parts 180 & 2424 (demonstrating that the prohibition may apply within only a certain program area, only within a certain geographic area, or government-wide, depending on the severity of the violation).

264. See U.S. Dep’t of Hous. & Urban Dev., Housing Choice Voucher Program Guidebook (7420.10G) Ch. 8.9 (2001), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35618.pdf (noting that debarment is warranted where an owner violates rights under the Fair Housing Act).

265. See generally U.S. Dep’t of Hous. & Urban Dev., Audit Reports & Memorandums, <http://www.hudoig.gov/reports-publications/audit-reports> (last visited Feb. 11, 2015).

Remedies exercisable directly by residents should also be enhanced.²⁶⁶ HUD should unambiguously grant third-party beneficiary rights enabling residents to enforce all relevant contracts and all benefits granted to them pursuant to statute, regulation, and subregulatory guidance. The resources necessary to pursue court action will limit the number of claims brought and prevent an overburdening of the courts, while still deterring poor performers and offering a valuable avenue of relief for residents. Finally, HUD should commit to studying best practices for remedying rights violations and set clear expectations for both landlords and local agencies.

2. Integration of Resident Expertise

The expansion of remedies must also be accompanied by more effective triggers for the exercise of remedies. Monitoring systems should focus much more strongly on rights. This may be implemented in part through landlord self-reporting, but valuable data should also come from the residents, whose personal experiences are the ultimate test of whether rights are respected or violated.

Legal scholars have argued in other contexts for the incorporation of beneficiaries of social welfare programs into monitoring and enforcement systems.²⁶⁷ Beneficiaries are stakeholders who can provide strong oversight and accountability, as well as an insiders' knowledge of what is working and what is not.²⁶⁸ In light of these considerations, the fact that residents currently play no role in the monitoring and enforcement scheme seems illogical.²⁶⁹

On the other hand, robust resident participation does face serious constraints. Participation is undoubtedly hindered by the dramatic power imbalance between landlords and residents, as well as by resident mistrust of participatory processes, a lack of time and other resources to commit to participatory schemes, and the discrediting of resident input on the basis of class, race, language, education level, and professional status.²⁷⁰ Participatory systems must carefully and comprehensively address these barriers by incorporating multiple power-leveling mechanisms.²⁷¹ If such a robust participatory system cannot be implemented, then residents' experiences and expertise should still be integrated into the monitoring process in order to improve accountability, but should do so in ways that place a minimal burden on residents. Some recommendations toward this goal are below.

266. This approach has been recommended in other privatized contexts. Freeman, *Private Role*, *supra* note 2, at 636 (suggesting that prisoners' rights groups can be given standing to sue private prison administrators with the purpose of enforcing statutory and contractual requirements).

267. See, e.g., Bezdek, *supra* note 9, at 1608.

268. This concept is highlighted by participatory governance theorists, including in the context of privatized social services programs. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 89–90 (2011); Bach, *Governance, Accountability, and the New Poverty Agenda*, *supra* note 4; Bach, *Welfare Reform, Privatization, and Power Reconfiguring Administrative Law Structures from the Ground Up*, *supra* note 4. But see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. Pa. L. Rev. 541 (2008).

269. Legal advocates have urged for greater resident participation in HUD enforcement processes. See *Letter from Hous. Justice Network to Shaun Donovan*, Sec'y of U.S. Dept. of Hous. & Urb. Dev. 10-14 (May 3, 2010), available at http://nhlp.org/files/06%205_3_2010%20HJN%20Letter%20to%20Secretary%20Donovan%20re%20TRA.pdf.

270. Lee, *supra* note 166, at 413–16.

271. *Id.* at 423.

a. Right to Return

The right to return offers a simple example of how a monitoring system might be designed to better incorporate resident participation. Residents are well-positioned to report their experiences with respect to the right to return. HUD staff might incorporate resident perspectives by making site visits, conducting resident interviews, and serving as ombudsmen and liaisons.

b. Resident Survey

Resident experiences should also be integrated into long-term evaluations of landlord performance. For example, HUD should reinstate the resident survey that, from 1998 to 2013, was used as part of its periodic evaluation of local agencies.²⁷² The survey assessed the quality of services provided and resident satisfaction levels,²⁷³ but did not address security-in-tenancy or participation rights,²⁷⁴ accounted for only ten percent of the total performance rating points,²⁷⁵ and was never adapted for use in privatized public housing. HUD recently eliminated its use on the grounds that the response rate was too low.²⁷⁶ To promote more robust rights preservation, HUD should reinstate the survey, increase its weight in the performance ratings, and take measures to improve participation rates by involving resident groups, resident advocates, and social service providers in the survey administration and collection process.²⁷⁷

c. Grievance Procedures

Grievance data offers another innovative way to incorporate resident input into the enforcement scheme without overly burdening either monitors or residents. Grievance information is already required to be collected. When aggregated, it provides a collective history of resident concerns and a detailed record as to how a landlord has handled those concerns. Yet this data is not presently used for monitoring purposes. Federal monitors

272. 63 Fed. Reg. 46596, at 46622 (formerly 24 C.F.R. 902.50).

273. *Id.*

274. *See id.* at 46622 (requiring the survey to assess “resident evaluation of the overall living conditions,” including “maintenance and repair (i.e., work order response); communications (i.e., perceived effectiveness); safety (i.e., perception of personal security); services (i.e., recreation and personal programs); and neighborhood appearance”).

275. *Id.* at 46896 & 46622.

276. *Public Housing Evaluation and Oversight: Changes to the Public Housing Assessment (PHAS) and Determining and Remedying Substantial Default*, 73 Fed. Reg. 49544-01 (proposing the elimination of the resident services and satisfaction indicator and temporarily suspending its use because it “has not yielded the degree of feedback that HUD hoped to obtain”); 76 Fed. Reg. 10147 (eliminating the survey in the interim rule because it “does not have a sufficient completion rate overall to be useful”).

277. *Public Housing Evaluation and Oversight*, 76 Fed. Reg. 10136-01, at 10147.

should systematically analyze grievance data²⁷⁸ to uncover noncompliance and to trigger investigations or enforcement actions. Formal administrative complaints filed with HUD could be evaluated with the same purposes in mind.

A review of grievance and administrative complaint files might reveal not only individual instances of noncompliance, but also broader patterns of noncompliance by related owners at different sites. Violations at one site could warrant an investigation into that landlord's record at other sites, and systematic assessment over time could paint a valuable picture of which landlords repeatedly trigger complaints and flout federal requirements.

This data should also be made publicly available for the benefit of residents, their legal advocates, lawmakers, and the public at large. Information made available across sites and across jurisdictions would help residents allocate scarce resources to areas where litigation or mobilization might have broad impact.²⁷⁹

In addition, grievance procedures themselves must undergo a number of reforms. Administrative guidance for the RAD programs must be revised to remove any implication that grievance procedures are not required to the full extent intended by Congress.²⁸⁰ HUD should also conduct a comprehensive review of current grievance procedures,²⁸¹ in close consultation with residents and their legal advocates, with the goal of increasing the procedures' effectiveness in fairly and efficiently resolving disputes. At minimum, this review should consider formal training for third-party adjudicators; a requirement that the adjudicator cannot be chosen unilaterally by the landlord; a rule that information revealed during grievance procedures cannot be used in subsequent eviction or other court proceedings; and a requirement that private landlords disseminate clear, concise information to residents about how to effectively access grievance procedures.

d. Participation Rights

Participation rights can be better monitored in a number of ways. First, existing reporting requirements should be revised to include information on how frequently they reach out to resident groups or individuals, how frequently they meet, the general subjects of these meetings, and the outcomes. Self-reporting by landlords should be supplemented by questions posed directly to residents through mechanisms like the resident survey.

Second, participation rights can also be made more meaningful by subjecting private landlords to sunshine requirements mandating public disclosure of certain information. Evaluative assessments, such as grievance data, inspection data, landlord reports to HUD,

278. For an example of how records of similar public housing hearings have been analyzed over time for other purposes, see Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before A Public Housing Eviction Board*, 26 LAW & SOC'Y REV. 627, 633 (1992).

279. Freeman, *supra* note 2, at 635–36 (suggesting mandatory disclosure of statistics from private prison administrators).

280. *See supra* note 210.

281. One case study of an informal public housing eviction process that resembled the grievance process found that divergent outcomes often occurred. *See* Richard Lempert, *The Dynamics of Informal Procedure: The Case of A Public Housing Eviction Board*, 23 LAW & SOC'Y REV. 347 (1989).

and HUD reviews of landlord performance should be accessible to the general public. Landlords should also disclose the identity of principals and of related parties, and their role in other affordable housing projects, so that HUD, residents, and legal advocates can use this information to assess the performance of repeat players and identify the most effective advocacy approaches to meet residents' needs.²⁸² In addition, participation mechanisms should account for the newly triangulated relationship between the landlord, the agency, and residents.

3. Increased Nonprofit Participation

Finally, since private landlords' profit-motive may be in tension with the goals of publicization, it may be possible to lessen this tension by increasing participation of not-for-profit organizations.²⁸³ Federally tax-exempt nonprofit organizations are subject to legal controls that limit the profit-motive and emphasize service to residents,²⁸⁴ although they do not fully insulate the organizations from economic pressures or guarantee high-quality services.

Nonprofit participation can be efficiently encouraged through competitive procurement procedures that already are in place. Competitive selections offer points of intervention at which nonprofit participation might be preferred over for-profit participation.²⁸⁵ Simply changing the preference system can encourage more participation by nonprofits and by for-profits that collaborate with nonprofits.²⁸⁶

4. Notes on Feasibility

The call for increased federal monitoring may face resistance on the grounds that it will raise costs and chill private-sector participation.²⁸⁷ Before compromising rights for these

282. Freeman, *supra* note 2, at 635–36 (suggesting mandatory disclosure of statistics from private prison administrators for the same purpose).

283. See also Freeman, *Extending Public Norms*, *supra* note 5, at 1337–38; see generally JOHN EMMEUS DAVIS, *THE AFFORDABLE CITY: TOWARD A THIRD SECTOR HOUSING POLICY* 155–56 (1994) (discussing the benefits and problems of the development of affordable housing by community based nonprofits).

284. Legal constraints on nonprofits include restricted corporate purposes in charters, board of director oversight, Internal Revenue Service reporting, and contractual obligations to funders. Not all nonprofit involvement in certain privatization programs is viewed as beneficial, however. See, e.g., Bridgette Baldwin, *Shadow Works and Shadow Markets: How Privatization of Welfare Services Produces an Alternative Market*, 34 W. New Eng. L. Rev. 445, 446 (2012) (community service jobs mandated by welfare program subsidize nonprofit and for-profit companies).

285. Preferences for non-profit organization do exist, but are often quite weak. See, e.g., Md. Dep't of Hous. & Cmty. Dev., *Multifamily Rental Financing Program Guide*, 49 (2014), available at http://mdhousing.org/Website/programs/rhf/Documents/MD_Rental_Financing_Program_Guide_July_8_2014.pdf (stating that the "Program Guide") (showing that in competitive scoring for low income housing tax credits, nonprofit participation earned a maximum of 14 points of 200 total possible points).

286. See generally Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 268 (1995) (recommending that privatized affordable housing include management companies that emphasize social services); DAVIS, *supra* note 283, at 155–56.

287. See, e.g., Freeman, *supra* note 5.

reasons, however, policymakers should extend RAD's demonstration period for the purpose of experimenting vigorously with more robust monitoring and enforcement mechanisms, then assess whether this in fact deters private-sector participation. As many of the reforms proposed in this article indicate, rights enforcement systems need not be prohibitively resource-intensive, but can incorporate or adapt existing systems to be more effective.

Privatization also offers the opportunity to redeploy some existing resources. For example, local government landlords undergo significant monitoring to prevent fraud and waste.²⁸⁸ Concepts of fraud and waste do not apply to the private sector, however, as private companies are freely permitted to use government dollars inefficiently, and for whatever purpose they wish, as long as they perform under the contract.²⁸⁹ Consequently, at least some resources previously allocated to monitoring governmental landlords for waste and fraud can now be redirected to rights monitoring.²⁹⁰

Perhaps the most substantial barrier to reform is not a lack of resources, but the need to shift attention at the federal level to focus on rights enforcement. HUD's weak record on public housing rights enforcement has already been detailed. In some cases, HUD has even affirmatively disavowed any legal obligation to ensure local agency compliance with basic public housing requirements, such as housing quality.²⁹¹ A clear legislative mandate like that proposed above will likely help to spur change, but strong leadership is also necessary to reshape the institution into one with an energetic commitment to rights.²⁹² Such an investment is justified by the importance of the rights at stake, the Congressional call to preserve those rights, and the need to ensure that private actors perform the services for which they are paid.

288. U.S. DEP'T OF HOUSING & URBAN DEV., ANNUAL CONTRIBUTIONS CONTRACT: PROJECT-BASED SECTION 8 CONTRACT ADMINISTRATION 59 (2000), available at http://portal.hud.gov/hudportal/documents/hud-doc?id=samp_acc.pdf.

289. Public Housing Evaluation & Oversight: Changes to the Public Housing Assessment System (PHAS) and Determining and Remediating Substantial Default, 76 Fed. Reg. 36, at 10141 (Feb. 23, 2011) (exempting privately-owned units from management and financial obligations).

290. Another area where resources might be redeployed is in physical inspections, which currently take place for both public housing and tax credit purposes. See Hensley, *supra* note 31. While neither process is always effective, streamlining duplicative reviews into a single, more effective procedure would allow the reallocation of resources to rights preservation.

291. See *Boston Pub. Hous. Tenants' Policy Council, Inc. v. Lynn*, 388 F. Supp. 493, 495–96 (D. Mass. 1974); see also NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS, *supra* note 26 (noting that since the passage of a legislative requirement to routinely review the performance of local agencies, such a claim might no longer stand).

292. Dorit Rubinstein Reiss, *Account Me in: Agencies in Quest of Accountability*, 19 J.L. & POL'Y 611 (2011) (suggesting that one reason that agencies seek accountability is that it is understood to be part of the agency's mission); Freeman, *supra* note 5, at 212 ("Government agencies need to view contractual instruments as full-blown accountability mechanisms designed to monitor quality, provide access to decision-making, and ensure procedural fairness For contracts to be meaningful accountability mechanisms, [] agencies must develop and adapt their monitoring capacity, which requires both adequate funding and a shift in management priorities.").

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IV. CONCLUSION

In the coming decades, privatized public housing is likely to become the norm. Publicization offers opportunities to protect vulnerable residents, but the effort is so far incomplete. The attention of the federal executive branch must be shifted to rights preservation by way of a Congressional call to action. An effective rights-protection scheme must identify a stronger role for residents in monitoring efforts and acknowledge that their day-to-day experiences are central to this undertaking. It must be designed to not only deter and remedy discrete violations, but also to identify broader patterns and punish habitually poor performers.

Building an effective framework for rights enforcement in the age of privatization requires careful thought and attention. Public housing is in transition, providing a valuable chance for experimentation and assessment. The lessons learned will impact public housing for decades to come and may enhance reform in other privatized industries as well.