

SECTION 8 EXISTING HOUSING EVICTIONS

I. INTRODUCTION

The federal government has created a complex matrix of housing assistance programs to respond to the problem of inadequate and insufficient housing for the poor.¹ Among the most active subsidy programs is the Section 8 Housing Assistance Payments (HAP) Program.² Under Section 8, the federal government assists low-income persons by directly subsidizing them for rent costs in existing housing.³ Section 8 has, until recently, mandated that local public housing authorities (PHAs) participate in unit management and tenant eviction.⁴

1. See generally D. MANDELKER, C. DAYNE, O. HETZEL, J. KUSHNER, H. MCGEE, JR. & R. WASHBURN, *HOUSING AND COMMUNITY DEVELOPMENT, CASES AND MATERIALS* 141-47 (1981) [hereinafter cited as *HOUSING AND COMMUNITY DEVELOPMENT*].

The housing assistance "matrix" includes the public housing and § 8 programs (42 U.S.C. §§ 1437a-1437j (1982)), the Rental Housing Subsidy or § 236 program (12 U.S.C. § 1715z-1 (1982)), and the Housing Insurance or § 221 program (12 U.S.C. § 1715e (1982)).

2. See 42 U.S.C. § 1437f(e) (1982), as amended by Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153 (1983).

3. See *id.* 42 U.S.C. § 1437f(f)(2) (1982) provides:

(2) The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwelling units shall provide that *all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner* (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities), except that the tenant selection criteria shall give preference to families which occupy substandard housing or are involuntarily displaced at the time they are seeking housing assistance under this section. In approving any public housing agency to assume all the management and maintenance responsibilities of any dwelling unit under the preceding sentence, the Secretary may do so without regard to whether such agency administers the housing assistance payment contract for that unit.

Id. (emphasis added). The 1983 amendments to Section 8 left intact private owners' responsibility for management decisions. See *infra* note 27 and accompanying text.

4. Before Congress amended Section 8 in the Omnibus Budget Reconciliation Act of 1981, the text of Section 8 pertaining to tenant eviction and unit management read as follows:

PHA participation in existing housing evictions raises the issue of whether tenancy terminations constitute "state action,"⁵ and thereby implicate constitutional and statutory protections against violations of fourteenth amendment rights.⁶ Recent statutory⁷ and regulatory⁸ amendments to Section 8, however, limit the role of PHAs in existing housing management. The new Section 8 procedures alter the relationship between existing housing landlords and local PHAs and pose the question of whether statutory and fourteenth amendment safeguards are available for evicted low-income tenants.

This Recent Development addresses the effects of these legislative and regulatory amendments on Section 8 tenants' rights in eviction proceedings. Part II discusses the development of Section 8 eviction procedures, including the recent amendments to the statute and regulations. Part III traces the progression of state action analysis and focuses on state action in the context of the Section 8 existing housing program. Part IV analyzes problems under the new Section 8 eviction procedures and examines potential remedies available to wrongfully evicted tenants.

II. TENANT EVICTION UNDER SECTION 8

A. *Statutory Mechanics and Previous Practices*

In enacting the Housing and Community Development Act of

(d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that

...
 (B) *the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy;*
 ...

(3) Notwithstanding any other provision of law, with the approval of the Secretary *the public housing agency administering a contract under this section with respect to existing housing units may exercise all management and maintenance responsibilities with respect to those units pursuant to a contract between such agency and the owner of such units.*

42 U.S.C. § 1437f(d) (1982) (emphasis added).

5. See *infra* notes 28-47 and accompanying text for a discussion of "state action."

6. U.S. CONST. amend. XIV, § 1 provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

7. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 326, 95 Stat. 357 (codified at 42 U.S.C. § 1437f(d)(B)(ii) (1982)). See *infra* note 26 and accompanying text for text and discussion of the recent changes.

8. See 24 C.F.R. § 882.215 (1984).

1974,⁹ Congress substantially revised and consolidated provisions of the Housing Act of 1937. The 1974 Act authorized, *inter alia*, a low-income leasing plan, commonly referred to as Section 8, for newly constructed, substantially rehabilitated, and existing privately owned housing.¹⁰

Under the Section 8 plan, private owners lease their rental property to low-income tenants. Tenants are required, in turn, to pay owners an amount not exceeding a prescribed percentage of the tenants' income.¹¹ The federal government subsidizes low-income tenants by paying the remaining portion of rent due the property owner. Funds appropriated for tenant subsidies are distributed by the Department of Housing and Urban Development (HUD) to local PHAs,¹² which then disburse the funds to property owners according to the terms of HAP contracts.¹³ HAP contracts also delineate statutory and regulatory procedures for eviction of Section 8 tenants.¹⁴

The 1974 Act gave owners of newly constructed and substantially rehabilitated housing more freedom to make management decisions than owners of Section 8 existing housing.¹⁵ HAP contracts governing new housing projects left virtually all management responsibilities to private owners.¹⁶ In contrast, the 1974 Act restricted an owner's management discretion in the existing housing program by giving PHAs the sole right to terminate existing housing tenancies.¹⁷ Thus, Congress relied heavily on both local PHAs and HUD to monitor rental unit quality, tenant qualifications, and owner compliance

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974).

10. See 42 U.S.C. § 1437f (1982).

11. See *id.* § 1437f(c). Under subsection (c) of Section 8, the statute sets out the methods for calculating the required payments of low-income tenants. The amount of rent tenants are required to contribute ranges from fifteen to thirty percent of their income. The precise contribution required depends on whether the tenant is classified as having a low income, very low income, low income with large family, lower income with a very large family or if the tenant falls into the "other" category. *Id.* These categories were defined in §§ 1437f(f)(1)-1437f(f)(6), but were later repealed by the 1981 amendments to the Section 8 program. See *infra* notes 19-21 and accompanying text.

12. See 42 U.S.C. § 1437f(b)(1) (1982).

13. *Id.* §§ 1437f(c)-1437f(d).

14. See *id.* § 1437f(d).

15. See *supra* notes 3 & 4.

16. See *supra* note 3.

17. See *supra* note 4.

with HUD management regulations.¹⁸

B. *Recent Statutory and Regulatory Changes Affecting Section 8 Existing Housing Evictions*

The Housing and Community Development Amendments in the Omnibus Budget Reconciliation Act of 1981¹⁹ abrogated the 1974 Act's requirement that PHAs have the exclusive right to give notice to vacate existing housing tenancies.²⁰ Instead, the 1981 Act provided that the terms of the lease, coupled with applicable state law, would determine the procedural and substantive rights of tenants in eviction proceedings.²¹

Regulations adopted after enactment of the 1981 amendments substantially revised the regulations governing existing housing evictions under the 1974 Act.²² The new regulations, implemented in 1982 and revised in 1984, eliminated PHA review and approval of termination decisions for leases entered into after October 1, 1981.²³

18. See 24 C.F.R. § 882.116 (1984). Responsibilities detailed in the regulation include publication and dissemination of information regarding available low-income housing, receipt and review of applications for program participation, making housing assistance payments, calculation of rents payable by participating families, and authorization of evictions. *Id.*

19. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 326, 95 Stat. 357, 407 (codified at 42 U.S.C. § 1437f(d) (1982)).

20. *Id.* See *supra* note 4 and accompanying text.

21. 42 U.S.C. § 1437f(d) (1982).

22. See 24 C.F.R. § 882.215 (1984). HUD did not implement its new regulations until 1983. In the interim between 1981 and 1983, there was some confusion as to the nature of the PHA's involvement in existing housing evictions. This ambiguity led to several tenants litigating HUD's lack of compliance with the new Section 8. See *Jackson v. Village of Ossining*, No. 82-2012, slip op. (S.D.N.Y. Mar. 30, 1983).

23. HUD adopted regulations shortly after the passage of the original Section 8 in 1974. The regulations governing tenancy termination remained substantially unchanged until 1982 and stated as follows:

The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the family may, within the same period, present its objections to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease.

24 C.F.R. § 882.215 (1976).

HUD amended the regulations after Congress enacted the 1981 amendments to Section 8:

(b) *For leases entered into on or after October 1, 1981:* The Contract and Assisted Lease shall provide that with respect to the unit that the Owner shall

Congress hoped the changes in the Section 8 statute and regulations would stimulate owner participation in the existing housing program and reduce government involvement in the landlord-tenant relationship.²⁴ Moreover, HUD pursued Congress' aims by assuring

neither (i) terminate the tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Family, unless the Owner decides not to enter into a new Contract with respect to the unit, except for:

- (1) Serious or repeated violation of the terms and conditions of the Lease;
- (2) Violation of applicable Federal, State or local laws; or
- (3) Other good cause.

24 C.F.R. § 882.215 (1983).

The new regulations also provide that the leases entered into before October 1, 1981 be administered by PHAs, as under prior regulations. *Id.*

In 1984, HUD further amended the regulations. The amendment limited § 882.215(b)(ii)(2), quoted above, to laws "impos[ing] obligations on the tenant in connection with the occupancy or use of the dwelling unit and surrounding premises. . . ." *Id.* § 882.215(c)(1)(ii) (1984). The amendment also provided some examples of terminations for "other good cause," including:

Failure by the Family to accept the offer of a new Lease in accordance with paragraph (a)(4) of this section; a Family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to the unit or property; criminal activity by Family members involving crimes of physical violence to persons or property; the Owner's desire to utilize the unit for personal or family use or for a purpose other than use as a HUD assisted residential rental unit; or a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, desire to rent the unit at a higher rental).

Id. § 882.215(c)(2).

24. 42 U.S.C. § 1437f(d) (1982). The Senate Report on its version of the amended Section 8 noted the purpose behind the changes:

Section 322-5(e) is intended to minimize disturbance of the private relationship under State law between the unit owner and the tenant. The provision of housing opportunities for assisted families depends on the voluntary participation by private owners of existing housing. The proposal would assure owners that the procedural and substantive rights of the assisted tenant are the same as those applicable to non-subsidized tenants. The amendment is expected to encourage more owners to participate in the Section 8 existing housing program. Section 205 will not affect the rights of Section 8 tenants established under any Federal statute prohibiting discrimination on the bases of race, religion, sex, national origin or handicap, nor will it dilute any prohibitions against requiring illegal payments from a participant in Federal or State assistance programs.

S. REP. NO. 139, 97th Cong., 1st Sess. 256, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 519, 552. In 1978, the Senate committee preparing amendments to Section 8 reported that it had "rejected a proposal by the administration which would have permitted landlords of Section 8 existing housing projects to evict tenants without review by the local PHAs administering the program." *See* S. REP. NO. 95-871, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4773, 4788.

The committee noted its motivation for rejecting the administration's proposal:

owners that Section 8 tenancies would be subject to the same procedural and substantive requirements as other state-law tenancies.²⁵

Congress again revised the Section 8 subsidization programs in the Housing and Urban-Rural Recovery Act of 1983.²⁶ The 1983 Act eliminated the new construction portion of Section 8 but left intact the existing housing program and its owner-controlled procedures for tenant eviction.²⁷

Adoption of the proposal would leave Section 8 tenants to rely on State and municipal laws for protection, and the committee does not feel that HUD has provided ample information on the extent to which this protection would be sufficient. In the absence of such additional information, the committee omitted the proposed change in eviction procedures from the bill.

Id. The Senate's view prevailed in 1978 and the Housing and Community Development Amendments, as adopted, did *not* terminate PHA participation in Section 8 existing housing evictions. See H. REP. NO. 95-1792, 95th Cong., 2d Sess. 72, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4872, 4892 (1978 House Conference Report).

The 1981 amendments were a compromise between the strict termination of PHA involvement in evictions and a continuation of PHA involvement constituting state action. The requirement of "good cause" before eviction preserves due process protections while eliminating the requirement of an administrative hearing. See *infra* note 87.

25. See letter from HUD Secretary Samuel R. Pierce to Representative Thomas P. O'Neill, Speaker of the House of Representatives, reprinted in *Housing and Community Development Amendments of 1981: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 1st Sess. 439 (1981).

26. Pub. L. No. 98-181, 97 Stat. 1153 (1983).

27. The 1983 Act created a "housing payment certificate program." The new Section 8 program focused the federal housing assistance effort on increasing efficiency in program operations and on "maintaining the stock of subsidized housing already built." See S. REP. NO. 98-142, 98th Cong., 1st Sess. 31, reprinted in 1983 U.S. CODE CONG. & AD. NEWS 1770, 1802. Section 209(a) of the 1983 Act terminated new construction and rehabilitation authority. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209, 97 Stat. 1153, 1183. The impetus for the drastic change in Section 8's direction was the perception that the program was costly, poorly managed, and even unjust. Senator William L. Armstrong noted the historic problems with Section 8 in his comments to the Senate Report:

Abuses abound. Published reports documented that Section 8 was a program for the "greedy, not the needy." Elaborate housing was built that lined the pockets of the developers at the expense of the poor. Other scandalous practices were reported:

Section 8 contracts were given to developers who, coincidentally, contributed significant campaign sums to reigning politicians.

Illegal aliens were housed in subsidized units. Those with incomes exceeding Section 8's already broad eligibility standards lived in units built for the poor.

Newspaper and magazine headlines screamed "Billion Dollar Nightmare at HUD," "Very Poor Last in Line to Receive Federal Housing Assistance," "Taj

III. STATE ACTION

The fourteenth amendment prohibits states from denying equal protection or depriving persons of life, liberty, or property without due process of law.²⁸ Section 1983 of the Civil Rights Act creates civil liability for violations of constitutional rights and privileges under color of state law.²⁹ Fourteenth amendment and Section 1983 protections are triggered by *state action* rather than by private violations of constitutionally recognized rights.³⁰

Mahal in New York: Symptoms of Rent Subsidy Headaches," "Housing and Politics: The Way It Works."

S. REP. NO. 142, 98th Cong., 1st Sess. 109, reprinted in 1983 U.S. CODE CONG. & AD. NEWS 1770, 1879. Provisions relating to tenancy terminations in the Section 8 existing housing program were not affected by the 1983 amendments.

28. U.S. CONST. amend. XIV, § 1. See *supra* note 6.

29. 42 U.S.C. § 1983 (1982). Section 1983 provides:

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

Id. The tests employed in § 1983 and state action analysis are functional equivalents: "[t]he state action necessary to support a claimed violation of the fourteenth amendment, and the action 'under color of law' required by 42 U.S.C. § 1983, represent parallel avenues of inquiry in a case claiming a remedy under § 1983 for a violation of the fourteenth amendment's Due Process Clause." *Blum v. Yaretsky*, 457 U.S. 991, 1013 n.1 (1982) (Brennan, J., dissenting). See also *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); Note, *Section 1983—A Change in the Meaning of "Under Color of Law"*, 25 ARIZ. L. REV. 151 (1983).

30. See *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruickshank*, 92 U.S. 542 (1875). In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court set out the oft-quoted rule:

[T]he principle has become firmly embedded in our constitutional law that action inhibited by the first section of the fourteenth amendment is only such action as may fairly be said to be that of the States.

Id. at 513.

For varied discussion of state action analysis, see Henkin, *Shelley v. Kraemer: Notes for a Revision Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963); Note, *State Action*, 74 COLUM. L. REV. 656 (1974).

A. *Development of the Doctrine*

Since the *Civil Rights Cases*,³¹ courts have attempted to define the scope of fourteenth amendment protection by setting parameters on the actions attributable to the states. The United States Supreme Court has enunciated two tests to determine the nature of challenged acts: the "public function" test and the "nexus" test.

Under "public function" analysis, the Court will find state action where a private entity performs an activity that is an "exclusive prerogative of the state."³² Originally established as a broad test under *Marsh v. Alabama*,³³ the Court subsequently limited its findings of state action under the "public function" test in *Jackson v. Metropolitan Edison Co.*³⁴ and *Flagg Brothers, Inc. v. Brooks*.³⁵ In these deci-

31. 109 U.S. 3 (1883). See *supra* note 30.

32. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

33. 326 U.S. 501 (1946). In *Marsh*, the Court held that a "company town" prohibiting distribution of religious literature in violation of first amendment rights performed a "public function" which constituted state action. *Id.* at 509. "Public function" analysis under *Marsh* rested primarily on the notion that the "private" company town functioned as a "public" town by enforcing a state statute criminally punishing those who attempted to distribute religious literature. Justice Black, writing for the majority in *Marsh*, summarized the Court's findings:

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . . Since these facilities (such as bridges and roads in the "private" company town) are built and operated primarily to benefit the public and since their operation is essentially a *public function*, it is subject to state regulations.

Id. at 506 (emphasis added).

In dissent, Justice Reed noted that the majority opinion was the first to extend constitutional protections to religious exercises in private places and predicted that subsequent cases would restrict the "public function" analysis to the precise facts of *Marsh*. *Id.* at 512 (Reed, J., dissenting).

34. 419 U.S. 345 (1974). In *Jackson*, a customer brought suit against a privately-owned and operated utility for damages under Section 1983. The plaintiff alleged that the utility terminated his service without due process. The plaintiff argued, *inter alia*, that since Metropolitan provided an "essential public service" required by state statute, it performed a "public function" and thereby implicated state action and triggered fourteenth amendment due process protections. *Id.* at 352. The *Jackson* Court declined to find that Metropolitan performed a "public function," holding that the company did not "exercise . . . some power delegated to it by the State which is traditionally associated with sovereignty." *Id.* at 353. Supplying public utility service was not deemed the "exclusive prerogative of the state," a prerequisite to finding state action under *Jackson's* "public function" analysis. *Id.* Significantly, Justice Marshall's dissent found state action through the state's extensive regulation of public utility monopolies. *Id.* at 371 (Marshall, J., dissenting).

35. 436 U.S. 149 (1978). *Flagg Brothers* reaffirmed the *Jackson* Court's "public

sions, the Court held that only when a private entity exercises some power "delegated to it by the State" that is "traditionally associated with sovereignty"³⁶ will the private actor's conduct constitute a "public function."

The "nexus" test calculates the level of state involvement in a constitutionally prohibited activity.³⁷ The Court originally enunciated its "nexus" analysis in *Shelley v. Kraemer*,³⁸ and required only minimal state participation in the challenged private activity to comprise state action.³⁹ In *Burton v. Wilmington Parking Authority*,⁴⁰ the Court characterized the "nexus" test as a necessarily imprecise process of fact-sifting.⁴¹ The *Burton* Court concluded that when a state is inter-

function" analysis. The plaintiffs in *Flagg Brothers* challenged a warehouseman's proposed sale of the plaintiff's property under state law as violating the fourteenth amendment and Section 1983. The Court held that debtor-creditor dispute settlement is not traditionally an exclusive public function. *Id.* at 160. Through *Jackson and Flagg Brothers* the Court limited the *Marsh* "public function" test to private entities that perform "sovereign functions"—functions exclusively reserved to the states. *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1983); *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982).

36. 419 U.S. at 353. *See supra* note 35.

37. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 999-1020 (1980). *See also* Note, *supra* note 29, at 154-55.

38. 334 U.S. 1 (1948). In *Shelley*, the petitioners challenged private, racially restrictive covenants that had been upheld by state courts. Chief Justice Vinson concluded that the state court's "active intervention" in upholding the discriminatory covenants constituted state action. *Id.* at 19. The Chief Justice concluded:

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that the petitioners were willing purchasers of properties upon which they desired to establish homes It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

Id.

39. *See id.* at 20. The *Shelley* court broadly defined state action as follows: "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." *Id.*

40. 365 U.S. 715 (1961). In *Burton*, the Court again addressed the problem of determining when state involvement in prohibited activity becomes state action triggering constitutional protection. The *Burton* Court concluded that a private restaurant, leasing its facilities from an agency of the State of Delaware, violated the constitutional rights of a black person by refusing to serve him food or drink. *Id.* at 726.

41. *Id.* at 722. Justice Clark, writing for the majority, emphasized the inherent imprecision in applying state action "nexus" analysis: "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' . . . [o]nly by sifting facts and weighing circumstances can the

dependent with a private actor it becomes a "joint participant," and a sufficient "nexus" exists to support a finding of state action.⁴²

More recently, the Court has required more than mere official participation in private activity to find the requisite "nexus." In *Flagg Brothers*⁴³ and *Blum v. Yaretsky*,⁴⁴ Justice Rehnquist held that, at a minimum, states must actively "authorize and encourage" the challenged private actions.⁴⁵ Additionally, the Court in *Blum* held that state regulation of private activity, without more overt support, does not constitute state action.⁴⁶ Thus, *Flagg Brothers* and *Blum* departed from *Burton's* fact-oriented approach, which had mandated a focused weighing of state and federal regulation governing challenged activities.⁴⁷

nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* Recognizing potential problems in applying a fact-oriented "nexus" test, Justice Clark narrowly circumscribed the Court's holding to the context of public-private leasing relationships. *Id.* at 726.

42. *Id.* at 725. The majority noted that the relationship between the restaurant and the public parking facility was an indispensable element in the financial success of the State Parking Authority. *Id.* at 724. The Court has subsequently referred to mutually beneficial relationships as "symbiotic" and indicative of significant state involvement. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1010 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974).

43. 436 U.S. 149 (1978).

44. 457 U.S. 991 (1982). In *Blum*, the Court held that state regulations authorizing changes in the level of care given residents of private nursing homes did not constitute state action. *Id.* at 1012.

45. 436 U.S. at 164-65. Writing for the majority in *Flagg Brothers*, Justice Rehnquist concluded that states are responsible for private conduct only "when the State, by its law, has compelled the act." *Id.* at 164 (emphasis added) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

46. 457 U.S. at 1011.

47. In *Blum*, the majority rejected the *Burton* approach and found no state action. See *id.* at 1012. Justices Brennan and Marshall challenged the majority's analysis because it departed from *Burton's* requirement of a focused examination of the factual context: the state and federal regulatory framework governing private nursing home decisions. See *id.* (Brennan and Marshall, JJ., dissenting). The dissenters began their opinion with a broad perspective of state action:

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, *the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent.* But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

B. *Application of State Action Analysis in the Assisted Housing Context*

Lower federal courts have decided a line of cases addressing the issue of when the conduct of private owners participating in public housing programs constitutes state action implicating fourteenth amendment protections.⁴⁸ In *McQueen v. Druker*,⁴⁹ decided before Congress had enacted Section 8, the court addressed whether a section 221(d)(3) landlord,⁵⁰ "financially assisted and partly controlled by the state," is a "joint participant" with the state when evicting a federally assisted tenant.⁵¹ By employing the *Burton* "nexus" test, the *McQueen* court concluded that the federal and state governments had placed themselves in an interdependent position with the landlords, thus implicating state action.⁵²

In *Joy v. Daniels*,⁵³ another section 221(d)(3) case, the landlord refused to renew a tenant's lease and offered no explanation. By applying the *Burton* fact-oriented approach, the *Joy* court found state action.⁵⁴ The *Joy* court determined that the state was sufficiently involved in unit management and tenancy terminations through state-authorized and administered rent subsidies, mortgage benefits, and by its use of state eviction procedures.⁵⁵

Id. (emphasis added). The dissenters concluded that the regulations furthered state fiscal goals, *id.* at 1014-19, and, to a great extent, controlled individual determinations to alter or terminate care. *Id.* at 1023. The dissenters also noted that the state's specific standards, not a private medical determination, directed each nursing home's decisions. *Id.* at 1022-27. Finally, the dissenters noted that the degree of interdependence between the State and nursing homes far exceeded the relationship that constituted state action in *Burton*. *Id.* at 1027-28.

48. See *infra* notes 49-71 and accompanying text.

49. 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

50. See 12 U.S.C. § 1715(d)(3) (1982). Section 221 of the National Housing Act authorized the Secretary of HUD to insure mortgages of owners who participate in subsidized housing programs. *Id.*

51. 317 F. Supp. at 1127.

52. *Id.* at 1127-28. The Court concluded that the federal and state governments "have elected to place their power, property, and privileges behind the landlords' authority over the tenants." *Id.* at 1128.

53. 479 F.2d 1236 (4th Cir. 1973).

54. *Id.* at 1239.

55. *Id.* at 1238-39. The *Joy* Court noted in pertinent part:

In the present case the defendant receives mortgage benefits from the FHA and is thus subject to the attendant FHA regulations. Additionally, the defendant has undertaken to utilize the eviction procedures authorized by South Carolina. While these factors, either separately or combined, have been held insufficient to

After enactment of Section 8 in 1974, courts were required to examine the relationship between private Section 8 owners and local or state PHAs to determine whether evictions constituted state action.⁵⁶ Two federal appellate cases, *Jeffries v. Georgia Residential Finance Authority*⁵⁷ and *Swann v. Gastonia Housing Authority*,⁵⁸ found state action in the Section 8 existing housing context.

In *Jeffries*, tenants brought a class action to challenge the constitutionality of the PHA's eviction procedures.⁵⁹ As in *McQueen* and *Joy*, the *Jeffries* court adopted the *Burton* fact-sifting approach for its analytical foundation.⁶⁰ First, the court examined the structure of Section 8 and its regulations as evidence that Congress intended to grant primary responsibility for all phases of the program's operation to the PHAs.⁶¹ The *Jeffries* court also pointed to the mutual benefits conferred on the landlord and the state, a determinative factor under *Burton* analysis.⁶² Finally, by finding that PHAs performed "specific government functions" pursuant to government regulations, the Eleventh Circuit concluded that they satisfied the "public function" test.⁶³

constitute "state action" they are relevant and material in the assessment of other evidence of state involvement.

Id.

56. See *infra* notes 57-71 and accompanying text.

57. 678 F.2d 919 (11th Cir. 1982), cert. denied, 459 U.S. 971 (1982).

58. 675 F.2d 1342 (4th Cir. 1982). See Note, *Administrative Law, Due Process in Section 8 Evictions*, 40 WASH. & LEE L. REV. 471 (1983) (case comment on *Swann*).

59. 678 F.2d at 921.

60. *Id.* at 922-23.

61. *Id.* at 923-24.

62. *Id.* at 924. The Court noted its agreement "with the district court that '[t]his privity of contract and conferring of mutual benefits results in a concert of action sufficient to be designated state action under *Burton*.'" *Id.*

63. *Id.* at 924-25. In finding state action through "public function" analysis the Court concluded that "GRFA's purpose is to build, rehabilitate, finance, and lease housing by administering the Section 8 program. In authorizing evictions, the authority thus acts pursuant to its public function. Moreover, the former Fifth Circuit has acknowledged that housing is a governmental function." *Id.* at 924. By applying the "public function" test the *Jeffries* court strengthened the already firm finding that a connection existed between the PHA and the federal government. The court's analysis, however, did nothing to define further the relationship between individual landlords and Section 8 tenants. *Jeffries'* influence on state action doctrine in Section 8 existing housing evictions is further reduced by limitations placed on "public function" analysis in *Jackson* and *Flagg Brothers*. See *supra* notes 34-35 and accompanying text.

In *Swann v. Gastonia Housing Authority*,⁶⁴ the Fourth Circuit considered claims closely paralleling those raised in *Jeffries*⁶⁵ to find state action. The *Swann* court emphasized that private landlords received subsidies directly from HUD that could equal eighty percent of the tenant's rent in the event that the property is abandoned during the term of the lease.⁶⁶ The court also noted that landlords were significantly regulated under then existing HUD standards⁶⁷ and by the PHA's exclusive authority to determine, on a case by case basis, whether "good cause" existed for the termination of tenancies.⁶⁸ Although the Fourth Circuit found government regulation in *Swann* "more indicative" of state action than in *Jackson*, the court offered no rationale for its conclusion that PHA involvement in tenancy regulation constituted state action.⁶⁹

Under the 1974 version of Section 8, as interpreted in *Jeffries* and *Swann*, a finding of state action, coupled with the conclusion that tenants have protected property interests,⁷⁰ provided tenants with valuable constitutional safeguards. Yet, prior to the 1983 amendments to the Section 8 existing housing program, HUD steadfastly refused to admit the existence of a "good cause" requirement for tenant evictions. The *Jeffries* court fortified tenants' rights in existing housing evictions by holding that Congress intended to incorporate a "good cause" requirement in the Section 8 program. This allowed the court to find that PHAs acting in close cooperation with private landlords

64. 675 F.2d 1342 (4th Cir. 1982).

65. *Id.* at 1344. In *Swann*, tenants filed a class action for declaratory and injunctive relief against their landlord and the local PHA to forestall eviction. The tenants alleged that their eviction violated § 1437f of the Section 8 Existing Housing Program and the due process clause of the fourteenth amendment. *Id.* See *supra* note 59 and accompanying text.

66. 675 F.2d at 1346. See also 24 C.F.R. § 882.105 (1984).

67. 675 F.2d at 1346. See also 24 C.F.R. § 882.109 (1984) (housing quality standards); *id.* § 882.111 (equal opportunity requirements).

68. 675 F.2d at 1346.

69. *Id.* The Fourth Circuit also found government involvement in *Swann* "significantly more indicative of state action than the mere grant to all landlords of access to state eviction proceedings, which . . . generally [have] been held insufficient to constitute state action." *Id.*

70. See generally *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (property interest in employment); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (person's "interest in a benefit is a 'property interest' " if secured by existing rules); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972) ("[S]ecurity of interests . . . already acquired in specific benefits" are protected property interests.). See also *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1002-04 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

in existing housing evictions constitutes state action.⁷¹

IV. WRONGS AND RIGHTS UNDER THE NEW SECTION 8

A. *Unresolved Issues*

Recent statutory and regulatory amendments to Section 8 profoundly affect the issue of state action in existing housing evictions.⁷² By eliminating PHA participation in the eviction process, the new provisions abrogate the obvious, yet crucial "nexus" between states and private actors.⁷³ Moreover, an analysis of the new statutory framework in the context of the state action doctrine reveals a complex set of unresolved issues.⁷⁴

First, pre-Section 8 cases found state action by evaluating "relevant and material" facts without a statutory framework compelling the PHAs to participate directly in the eviction process. In *Joy v. Daniels*, the court found state action by focusing on the aggregate of state activities: the owner's receipt of mortgage benefits, an indirect subsidy; the owner's receipt of rent supplements after a direct subsidy; PHA approval; and the owner's resort to state eviction procedures.⁷⁵ In the context of the new Section 8 program, PHA contact with private landlords may result in state action under two theories. First, the subsidy matrix and the PHA's relationship to owners in the existing housing program remain broad. Second, like *Joy*, the new statutory and regulatory framework requires that state law govern the landlord-tenant relationship. By strictly applying the state action

71. 678 F.2d at 926. See Payne, *State Action in the Section Eight Program*, 12 REAL ESTATE L.J. 172, 176 (1983). Payne noted the effect of *Jeffries*' "good cause" requirement and predicted the probable result had the court not found the requirement implicit in the legislative history:

If the state agency's role were construed to be a ministerial one, as suggested, the state action nexus would be reduced, and the *Jeffries* case could have been decided consistently with *Hartwood*, leaving all Section Eight tenants with only such protections against eviction as private tenants generally are afforded under state law. This result, which is not very enlightened, would nevertheless be consistent with the premise of the Section Eight program, which is to support the low-income tenant in the private market, rather than separate him in public housing. It would also reduce inconsistencies between the programs.

Id.

72. See *supra* notes 7-8 and accompanying text.

73. For a discussion of *Jeffries* and *Swann*, see *supra* notes 59-69 and accompanying text.

74. See *supra* notes 26-27 and accompanying text.

75. See *supra* notes 53-55 and accompanying text.

analysis used in *Joy*, courts may find the requisite "nexus."⁷⁶

A second unresolved issue is the effect that state action decisions under Section 8's new housing program may have on the state action issue in the amended existing housing program. Prior to the repeal of Section 8's new construction authority in 1983, the new housing program restricted PHA participation in evictions, thereby reducing the "nexus" between the states and the owners of new Section 8 housing.⁷⁷ In *Miller v. Hartwood Apartments, Ltd.*,⁷⁸ the Fifth Circuit held that the eviction of a Section 8 new housing tenant for failing to comply with the material terms of the lease did not implicate state action.⁷⁹ The *Miller* court concluded that the tenant's connection with government action failed to meet the "nexus" test because private lessors under Section 8 are solely responsible for "all ownership, management, and maintenance" including tenant selection and termination.⁸⁰ The court disregarded the extensive federal and state regulation governing Section 8 new housing lessors and concluded that private owners operate the housing projects on a day-to-day basis without government involvement.⁸¹

By referring to Justice Rehnquist's holding in *Blum*, the *Miller* court reaffirmed that pervasive regulation alone will not establish the requisite "nexus" for state action.⁸² Thus, strict adherence to the *Blum-Miller* analysis in the context of the amended existing housing program could result in a finding of no state action. Alternatively, if *Burton's* fact-sifting analysis is adopted⁸³ and connected with higher levels of PHA involvement in the existing housing program, then courts may override *Blum* and *Miller's* view that state action is excluded from existing housing evictions.

A third unresolved issue is how the existing housing program amendments will affect the decisions in *Jeffries* and *Swann*.⁸⁴ The *Jeffries* court explicitly bases its state action finding on the broad

76. See *supra* notes 37-47 and accompanying text.

77. See *supra* note 27 and accompanying text.

78. 689 F.2d 1239 (5th Cir. 1982).

79. *Id.* at 1244.

80. *Id.* at 1243.

81. *Id.* at 1242.

82. *Id.* at 1243.

83. See *supra* notes 40-42.

84. See *supra* notes 60-71 and accompanying text.

range of contacts between PHAs and owners.⁸⁵ Because the Section 8 amendments have eliminated the PHAs' direct involvement in tenancy termination decisions and *Blum* rejected *Burton's* fact-oriented analysis, *Jeffries* and *Swann* are weak precedents in the amended Section 8 context.

B. The "Good Cause" Requirement

The amended statute and regulations require a showing of "good cause" before existing housing tenants can be evicted.⁸⁶ The state court adjudicating the eviction proceeding will ordinarily determine whether "good cause" exists.⁸⁷

In *Fitzpatrick v. Pierce*,⁸⁸ a district court held that federal courts should not interfere with state eviction proceedings because they anticipate that a state court may apply a "good cause" standard alleg-

85. See *supra* note 71 and accompanying text.

86. See *supra* notes 22-23 and accompanying text. See generally Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966) (suggesting reforms for landlord-tenant relations in public housing); Recent Development, 21 URBAN L. ANN. 317, 342-50 (1981) (discussing the constitutional development of rent control and the good cause eviction requirement). One problem with the new statute and an exception to the requirement of "good cause" is the so-called "individual unit loophole." The regulations implementing the new Section 8, 24 C.F.R. § 882.215 (1984), require owners to show "good cause" for evictions or non-renewals "unless the owner decides not to enter into a new contract with respect to that unit." *Id.* See *Mitchell v. HUD*, 569 F. Supp. 701 (N.D. Cal. 1983). In *Mitchell*, the court concluded that the "individual unit loophole" contradicted Congress' intent:

The regulation creates a situation where a landlord can arbitrarily fail to renew an assisted tenant's lease by transferring the obligation to provide assisted housing to another unit of the apartment complex. A landlord can "play musical chairs" with the apartments in the complex and thereby completely circumvent the explicit Congressional requirement that a tenancy not be terminated unless good cause is shown.

The "individual unit loophole" created by the Department's interpretation of section 1437f can also be viewed as contrary to the Congressional intent to help low-income families secure a decent place to live, and to promote economically mixed housing.

Id. at 708.

87. See *supra* notes 22 & 24. See also *Fitzpatrick v. Pierce*, 533 F. Supp. 167 (D. Mass. 1982) ("good cause" requirement in state eviction proceedings); *Wiggins v. HUD*, 523 F. Supp. 1170, 1178-79 (D. Md. 1981) (discussing constitutionality of state summary eviction procedures as a forum for determining "good cause"); Recent Decision, *Landlord-Tenant—Due Process—Tenant of Federally Subsidized Housing May Not Be Evicted Upon Expiration of Lease Absent a Showing of Good Cause—Green v. Copperstone Limited Partnership*, 36 MD. L. REV. 255 (1976).

88. 533 F. Supp. 167 (D. Mass. 1982).

edly contrary to both federal constitutional law and Section 8.⁸⁹ The *Fitzpatrick* court concluded that it would contravene principles of comity and federalism to deprive state courts of the opportunity to decide federal statutory issues regarding eviction proceedings.⁹⁰

"Good cause" eviction procedures do not provide tenants with as much protection as direct PHA supervision and the state action safety net. Recent cases, however, illustrate that the new Section 8 procedures will protect tenants from abusive evictions. In *Jones v. Orange Housing Authority*,⁹¹ the plaintiff complained that her eviction was retaliatory and without good cause, in violation of federal and state law.⁹² The plaintiff further argued that the termination of her lease violated due process and first amendment rights.⁹³ While the merits of these substantive claims were never litigated,⁹⁴ the *Jones* case nonetheless illustrates the aggressive actions that tenants can bring against retaliatory landlords.

Should a federal court conclude that a particular state court proceeding failed to provide a "full and fair opportunity" to litigate the "good cause issue," it may enjoin enforcement of the state eviction proceeding. In *Mitchell v. United States Department of Housing and Urban Development*,⁹⁵ the court reached this conclusion and re-

89. *Id.* at 170-71. The plaintiff contended in *Fitzpatrick* that her trial de novo would be "subject to a state ruling on good cause that is contrary to federal law." *Id.* at 170. The plaintiff cited a recent Massachusetts Appeals Court decision that would allegedly bind the trial court on the issue of "good cause." *Id.* The *Fitzpatrick* decision is supported by other authorities implicitly permitting the application of state courts' interpretations of "good cause." *See supra* note 87.

90. 553 F. Supp. at 171.

91. 559 F. Supp. 1379 (D. N.J. 1983).

92. *Id.* at 1381.

93. *Id.* In *Jones*, the plaintiff began leasing a Section 8 apartment in December, 1981. In October 1982, the plaintiff complained of a lack of heat. Eight days later, the owner informed Jones that her lease would not be renewed. *Id.* at 1380. In December 1982, Jones filed suit alleging eviction without good cause, retaliatory eviction under New Jersey law, violation of first amendment rights, and breach of contract. The court issued a temporary restraining order. *Id.* at 1381. The parties subsequently settled the case when the owner agreed to enter into a new lease. *Id.* Later the plaintiff filed an application for attorney's fees, that was denied. *Id.* at 1384.

94. *Id.* at 1381.

95. 569 F. Supp. at 704. In *Mitchell*, the plaintiff's lease began on February 1, 1982. A year later, the owner notified the plaintiff that it would not renew Mitchell's lease. Mitchell filed suit to enjoin the owner from terminating the Section 8 lease.

strained the state court from executing its judgment.⁹⁶ The *Mitchell* court also ordered the landlord to continue the tenancy and mandated HUD to continue making assistance payments pending the outcome of the "good cause" litigation.⁹⁷ Thus, *Mitchell* indicates that federal courts will continue their role in enforcing the new protections for tenants under the Section 8 existing housing program.

V. CONCLUSION

The 1981 amendments to Section 8 and HUD's recent regulatory changes have altered profoundly the relationship between PHAs and private landlords. These changes, in conjunction with recent Supreme Court decisions narrowing the scope of state action analysis, greatly reduce the likelihood that courts will find state action in Section 8 existing housing evictions.

The new requirement of "good cause" before eviction compels landlords to articulate supportable reasons for evictions. Moreover, recent decisions indicate that tenants continue to have remedies available to combat abusive evictions despite the PHAs' absence of direct supervision in tenancy terminations. Federal courts will continue to provide forums for Section 8 litigants in the event that state proceedings fail to address fully the "good cause" issue. Unfortunately, however, low-income tenants desiring to pursue these alternative remedies may not have access to legal counsel.

Congress' balancing of HUD's interest in stimulating private participation in the Section 8 existing housing program against due process protections for tenants has resulted in lowered involvement of PHAs in program management. While providing adequate housing

The owner concurrently filed an unlawful detainer action against Mitchell in order to obtain possession of the apartment. *Id.* at 703-04.

The court concluded that the owner's action may have been without "good cause" and that a preliminary injunction was required to prevent irreparable injury. *Id.* at 704-05. Importantly, the *Mitchell* court noted the scarcity of low-income housing and concluded that eviction of low-income tenants should be enjoined unless "good cause" is shown. *See also* *Tenants for Justice v. Hills*, 413 F. Supp. 389 (E.D. Pa. 1975) (absence of available housing necessitates eviction injunction); *Owens v. Housing Auth. of Stamford*, 394 F. Supp. 1267 (D. Conn. 1975) (scarcity of housing reinforces need for due process protections in eviction proceedings). The *Mitchell* case provides low-income tenants who face summary eviction under state procedures an important remedy.

96. 569 F. Supp. at 710.

97. *Id.*

to the poor remains an important federal legislative goal, Congress' Section 8 amendments may jeopardize the housing rights of the poor in order to reduce regulatory oversight and maintain private sector interest in the Section 8 existing housing program.

Ian Paul Cooper

