THE FUTURE OF TENANTS' RIGHTS IN ASSISTED HOUSING UNDER A REAGAN VOUCHER PLAN: AN ANALYSIS OF SECTION 8 EXISTING HOUSING CASES

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I. INTRODUCTION

Around few issues are good intentions so polarized as around the issues of admissions and evictions in government-assisted housing.[1] In the last twenty-five years, a massive number of cases have extended procedural protections to applicants for,[2] and residents of,[3] assisted housing.[4] In those cases, plaintiffs' lawyers typically advo-

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1. This article uses the term "assisted housing" to refer to all types of government housing programs. These include public housing, privately owned subsidized housing projects, and programs that provide rent subsidies to tenants living in privately owned existing housing. Important structural distinctions between these programs will become apparent in the article's analysis of the relevant legal issues, requiring separate discussion of each scheme. For a synopsis of the major assisted housing programs, see notes 31-55 and accompanying text *infra*.

2. *See* notes 77-224 and accompanying text *infra*.

3. *See* notes 242-335 and accompanying text *infra*.

4. The first major decision concerning procedural rights for tenants in assisted housing was Thorpe v. Housing Auth. of Durham, 386 U.S. 670 (1967). Petitioner, a tenant in a public housing project, argued that the city housing authority violated the due process clause by terminating her lease without explaining the reasons for its action. *Id.* at 670-71. In a per curiam opinion, the majority declined to rule on the merits because of a contemporaneously issued federal administrative order requiring local officials to explain decisions to evict public housing tenants. *Id.* at 671-72. Jus-

cate procedural safeguards to ensure that tenants are not deprived of assisted housing for arbitrary or discriminatory reasons.[5] Program administrators disagree, arguing that so-called "safeguards" imposed by the courts make rational project management impossible and con-

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tice Douglas, however, in essence argued for a due process hearing requirement. *Id.* at 678-79 (Douglas, J., concurring).

The body of case law concerning procedural rights of assisted tenants, developed primarily in federal district courts, has reflected the periodic structural changes in the federal government's assisted housing programs. This article reviews these changes. *See* notes 77-224, 242-335, and accompanying text *infra*.

In addition to spurring considerable case law, the issue of tenants' rights in these assisted housing programs has sparked extensive legal commentary. *See, e.g.*, Blumenthal, *Housing the Poor Under the Section 8 New Construction Program*, 15 URBAN L. ANN. 281 (1978); Fuerst and Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor*, 9 URB. LAW. 496 (1977); Heen, *Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard*, 12 CLEARINGHOUSE REV. 1 (1978); Klein & Schrider, *Procedural Due Process and the Section 8 Leased Housing Program*, 66 KY. L.J. 303 (1977); Bishop, *Assisted Housing Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 672 (1975); Note, *The New Leased Housing Program: How Tenantable a Proposition*, 26 HASTINGS L.J. 1145 (1975); Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880 (1973); Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988 (1968); Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

5. *See, e.g.*, Fletcher v. Housing Auth. of Louisville, 491 F.2d 793, 798 (6th Cir.), *vacated*, 419 U.S. 812 (1974), *reinstated*, 525 F.2d 532 (6th Cir. 1975) (basis for change in admissions policies must be reasonable and grounded in purposes of the statute); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (privilege or right to occupy publicly subsidized low-rent housing is no less entitled to due process protection than entitlement to other recognized rights and privileges); Escalera v. New York City Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970) (government cannot deprive a private citizen of continued tenancy in public housing without affording adequate procedural safeguards); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (uncontrolled discretion in government agency vested with administration of vast program such as public housing would be intolerable invitation to abuse); Ressler v. Landrieu, 502 F. Supp. 324, 328 (D. Alaska 1980) (due process requires uniform application of specific criteria to ensure that project owners select tenants based on ascertainable standards); Neddo v. Housing Auth. of Milwaukee, 335 F. Supp. 1397, 1400 (E.D. Wis. 1971) (policy of summarily rejecting applicant for failure to pay rent in a previous tenancy, without affording a hearing, is arbitrary and unreasonable); McDougal v. Tamsberg, 308 F. Supp. 1212, 1214 (D.S.C. 1970) (the day has passed when a citizen's right to participate in publicly aided and supervised projects can be irrationally or arbitrarily withheld); Thomas v. Housing Auth. of Little Rock, 282 F. Supp. 575, 579 (E.D. Ark. W.D. 1967) (housing authority as public body cannot act arbitrarily or capriciously in selecting and evicting its tenants). *See also* Heen, *supra* note 4.

tribute to the dangerous and run-down conditions of many housing projects today.[6] Officials at the United States Department of Housing and Urban Development (HUD)[7] add that private landlords will refuse to participate in housing programs if courts limit their management discretion by imposing burdensome procedural requirements.[8]

By the mid-1970's, courts had decided a series of landmark cases setting the basic outlines of the law on admissions[9] and evictions[10] in projects built under the public housing program.[11] Concurrently, however, the public housing program ceased to be the major thrust of American housing policy.[12] Courts, therefore, began to hear admissions[13] and evictions[14] lawsuits involving projects built under the new generation of "subsidized" housing programs.[15]

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6. For a discussion of the arguments of program administrators, see Fuerst & Petty, *supra* note 4.

7. Congress has set a national housing policy

> to assist the several states and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income and, consistent with the objectives of this chapter, to rest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.

42 U.S.C. § 1437 (1976). To promote this policy, Congress established a series of assisted housing programs "(f)or the purpose of aiding lower income families in obtaining a decent place to live . . . ." *Id.* at § 1437f(a). Congress authorized the Secretary of HUD to prescribe regulations for the delivery of federal payments to assisted housing programs. *Id.* at § 1437f(c)6.

8. *See* notes 140-41, 194-96, 317-22, 336-41, and accompanying text *infra*.

9. *See* notes 91-99, 127-39, 167-93, and accompanying text *infra*.

10. *See* notes 250-52, 303-07, and accompanying text *infra*.

11. For the current text of the public housing program, see 42 U.S.C. §§ 1437b (1976). For a synopsis of the public housing program, see notes 31-36 and accompanying text *infra*.

12. *See* J. Williams, Subsidized Housing and Tax Expenditure Analysis (June 1, 1980) (unpublished thesis in Massachusetts Institute of Technology library). *See also* notes 37-55 and accompanying text *infra*.

13. See notes 100-14, 140-46, 167-69, 184-87, 194-96, and accompanying text *infra*.

14. *See* notes 285-93, 308-10, 314-16, and accompanying text *infra*.

15. For the text of the subsidized housing programs, see 12 U.S.C. § 1715*l*(d)(3) (1976 & Supp. IV 1980) (Section 221(d)(3) program); 12 U.S.C. § 1715z-1 (1976 & Supp. IV 1980) (Section 236 program); 42 U.S.C. § 1437f (1976 & Supp. III 1979), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. (Section 8 program). For a synopsis of these subsidized programs, see notes 37-40 and accompanying text *infra*.

All of these programs remain active in that the housing projects produced pursuant

In 1981, the Reagan administration announced plans to make dramatic changes in national housing programs. The administration has expressed its intention to replace Section 8 new construction/substantial rehabilitation,[16] the major extant federal housing program, with a new program involving housing vouchers.[17] The administration presently has no plans to combine the voucher plan with a production program.[18] If the administration implements its proposal to eliminate all production programs, it will have reversed over forty years of housing policy, which since the Depression has focused on producing new dwelling units.[19]

This shift will have a significant effect on the legal rights and responsibilities of federally assisted landlords and tenants,[20] and will present courts with a series of novel legal issues.[21] Perhaps fortunately, courts can draw on case law involving the previous assisted housing programs to define the rights of parties in a new housing voucher program. The most relevant cases are those that concern the Section 8 existing housing program,[22] which is essentially a housing

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to these acts still exist. Only the so-called "Section 8" program continues to produce new projects. The other two programs had ceased active production by 1973.

16. 42 U.S.C. § 1437f(b)(2) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. This "Section 8" program should be distinguished from the Section 8 existing housing program, *id.* at § 1437f(b)(1). Congress created both programs in the same statute. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 208(a)8, 88 Stat. 662 (amending the Housing Act of 1937, ch. 896, § 8, 50 Stat. 888). *See* notes 41-55 and accompanying text *infra*. This article focuses on the cases involving the Section 8 existing housing program. *See* notes 115-21, 147-59, 197-224, 311-13, 317-35, and accompanying text *infra*.

17. *See* notes 56-69 and accompanying text *infra*. The author takes no position on the desirability of the proposed voucher program.

18. *See* notes 64-69 and accompanying text *infra*.

19. *See* notes 31-38 and accompanying text *infra*.

20. *See* notes 343-74 and accompanying text *infra*.

21. *Id.* The Section 8 existing housing program involves both governmental and private actors in decisions involving applicants for and tenants of assisted housing. *See* notes 41-55 and accompanying text *infra*. An aggrieved party's procedural rights depend on whether a public official or private actor has made an admission or eviction decision. If the administration patterns its housing voucher program after Section 8 existing housing, the same issues as have arisen in the Section 8 exisiting housing context can be expected to arise in the proposed voucher program. *See* notes 343-74 and accompanying text *infra*.

22. 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. *See also* notes 41-55 and accompanying text *infra*.

voucher program.[23] The administration has stated its intention to include certain basic structural elements of Section 8 existing housing in its housing voucher scheme.[24] Thus, the existing housing case law provides a good indication of future tenants' rights litigation[25] under the Reagan administration's proposed voucher program.

After a brief synopsis of assisted housing programs,[26] including the proposed voucher scheme,[27] this article engages in a two-part analysis of the future of tenants' rights in assisted housing. First, it examines the cases involving admissions[28] and evictions[29] in the Section 8 existing housing program, and relates those cases to decisions involving the earlier housing production programs. The article then applies the legal principles developed in the Section 8 existing housing cases to the Reagan administration's proposed housing voucher plan.[30]

II. SYNOPSIS OF ASSISTED HOUSING PROGRAMS

A. *The Production Programs: Public and Subsidized Housing*

The public housing program[31] was the major assisted housing program in existence between 1937 and the mid-1960's.[32] About 1.1 million units of public housing are in use today, far more than any subsequent housing program has produced.[33] The public housing program is run through local housing authorities that develop, own, and operate the housing projects.[34] Thus, any admission or eviction

23. *See* notes 51-55 and accompanying text *infra*.

24. *See* notes 56-69 and accompanying text *infra*.

25. *See* notes 343-74 and accompanying text *infra*.

26. *See* notes 31-55 and accompanying text *infra*.

27. *See* notes 56-69 and accompanying text *infra*.

28. *See* notes 77-224 and accompanying text *infra*.

29. *See* notes 242-333 and accompanying text *infra*.

30. *See* notes 343-74 and accompanying text *infra*.

31. Housing Act of 1937, ch. 896, § 8, 50 Stat. 888 (1937) (current version at 42 U.S.C. § 1437b (1976)).

32. *See* H. AARON, SHELTER AND SUBSIDIES 108-44 (1972). This excludes urban renewal, which had a housing component, but was not primarily designed to produce housing for low- and moderate-income people.

33. *See* [1979] HUD STATISTICAL Y.B. 204, 213, tables 62, 71. While equivalent figures for the Section 221(d)(3) and 236 programs are unavailable, the programs were smaller in scope than the Section 8 program. *See* [1974] HUD STATISTICAL Y.B. 75, table 71; [1971] HUD STATISTICAL Y.B. 152-53, table 164.

34. 42 U.S.C. § 1437b(a) (1976).

decision concerning a public housing applicant or tenant clearly involves "state action"[35] for purposes of the fourteenth amendment.[36]

Three major programs, referred to herein as "subsidized housing programs,"[37] were introduced in the 1960's. Like public housing, these were "production" programs designed to promote construction of new housing projects.[38] The subsidized housing programs, however, differed from their predecessors in that private, subsidized persons replaced the government as developers, owners, and operators of newly constructed housing.[39] The shift from public to private control raised difficult state action questions when project owners made decisions concerning admissions and evictions.[40]

B. *Section 8 Existing Housing*

The Section 8 existing housing program[41] merits special attention in this analysis of the future of tenants' rights in a voucher scheme. The existing housing program differs from other assisted housing efforts in that it does not produce new dwelling units.[42] Instead, it makes existing units[43] available to lower-income tenants by supple-

35. *See* notes 78, 91-99, 127-39, 247-52, 304-07, and accompanying text *infra*.

36. U.S. CONST. amend XIV.

37. *See* note 15 and accompanying text *supra*.

38. *See* 12 U.S.C. §§ 1715*l*(d)(3), 1715z-1 (1976 & Supp. IV 1980); 42 U.S.C. § 1437*f* (1976 & Supp. III 1979).

39. *See* 12 U.S.C. §§ 1715*l*(a), 1715z-1(a) (1976 & Supp. IV 1980); 42 U.S.C. §§ 1437f(b)(1), (2) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357.

This article considers these programs together, although they differed in terms of the amount and structure of the federal subsidies. The important similarity is that they all involve federal payments to private landlords to build or substantially rehabilitate projects for eligible low-income tenants. *Id.*

40. *See* notes 78, 101-14, 142-46, 247-52, 284-92, 308-10, 314-16, and accompanying text *infra*. The case law shows that courts ultimately have found state action in virtually every subsidized housing program. The Sixth Circuit recently drew a bright line between subsidized housing programs and the "non-subsidized" Section 221(d)(4) mortgage insurance program in Hodges v. Meets, No. 81-5112 (Slip Op.) (6th Cir., Apr. 30, 1982). The *Hodges* court held that "governmental involvement in Section 221(d)(4) programs is (not) so extensive that the actions of the landlord can be imputed to the government."

41. 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357.

42. *See* notes 31-39 and accompanying text *supra*.

43. 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Reconcilia-

menting their rents with direct cash payments to private landlords.[44]

Public housing authorities (PHAs) play an important role in the operation of the program.[45] A PHA that wants to participate in the program[46] must submit an application to HUD highlighting three major factors: (1) the primary geographical areas from which assisted families will be drawn;[47] (2) the number and type of units that are needed;[48] and (3) housing quality standards.[49] If HUD approves an application for funding of a Section 8 existing housing program, the remaining issue is which families will receive Section 8 existing housing benefits.[50] Qualifying families will receive a housing voucher, called a Certificate of Family Participation,[51] entitling them

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tion Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. HUD regulations governing the existing housing program begin at 24 C.F.R. § 882.101 (1980).

44. 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. *See also* 24 C.F.R. § 882.105(a) (1980), and notes 51-55 and accompanying text *infra*.

Only one other major federal housing program utilized existing housing instead of producing new units. *See* Housing Act of 1961 § 302(b), Pub. L. No. 87-70, 75 Stat. 149, 166 (1961). For a full description of this program, see C. EDSON, A SECTION 23 PRIMER (1973).

45. 24 C.F.R. § 882.102 (1980) defines the PHA as any state or local government body authorized "to engage in or assist in the development or operation of housing for low-income Families."

46. *Id.*

47. *Id.* at § 882.204(a)(3).

48. *Id.* at § 882.204(a)(1), -(2).

49. *Id.* at § 882.204(a)(5).

50. The regulations define eligibility in terms of families qualifying as "Lower Income Families . . ." *Id.* at § 882.102. A Lower-Income Family has an income that "does not exceed 80 percent of the median Income for the area as determined by HUD. . . ." *Id.* The 1981 Omnibus Budget Reconciliation Act changed the eligibility standards to require that 95% of all Section 8 units must be rented to "Very Low Income Families," i.e., families with incomes that do not exceed 50% of an area's median income. *See* 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 405. For an explanation of the factors HUD uses to compute annual income, see *id.* at § 889.104.

51. *Id.* at § 882.209. Certificates of Family Participation are housing vouchers in that they entitle qualifying families to receive cash subsidies to offset a percentage of their monthly rent. In one sense, however, Section 8 existing housing is not a classic voucher program. In such a program, usually the holder of a voucher receives a direct subsidy. In the Section 8 scheme, the tenants do not receive the money directly. Instead, HUD channels the money through the PHA for payment directly to the private landlord. *See* 42 U.S.C. § 1437f(b)(1) (1976), *as amended by* Omnibus Budget Recon-

to pay no more than thirty percent of their income for rent.[52] The eligible family may then lease any apartment, provided the PHA finds that the unit meets HUD's housing quality standards,[53] the rent does not exceed HUD's fair market rental limits,[54] and the landlord is willing to rent.[55]

The importance of the Section 8 existing housing program becomes clear in view of the policy options that the Reagan administration is considering for assisted housing.

C. *The Proposed Housing Allowance*

The Reagan administration has clearly indicated its support for a housing allowance program, though it has not yet adopted a specific plan.[56] One reason for the delay may be the recognition of a need for a prolonged assessment of the federal government's future role in providing housing for the needy. When President Reagan took office, federal housing subsidies were the third largest and fastest growing welfare program.[57] The new administration moved quickly to reverse this trend: housing expenditures were severely cut for fiscal year 1982,[58] and Office of Management and Budget Director David Stockman recommended elimination of all funding for new subsidized housing units in the fiscal 1983 budget.[59] Stockman publicly indicated as early as March, 1981[60] his preference for a housing pro-

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ciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. *See also* 24 C.F.R. § 882.105(a) (1980).

52. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 403. The budget bill phases in a five percent increase in family contributions over the next five years. Previously, a family's maximum monthly contribution was 25% of its monthly income. The regulations vary the amount of the family's monthly contribution depending on the size of the family and its monthly income. *See* 24 C.F.R. § 889.105 (1980).

53. *Id.* at § 882.210(d).

54. *Id.* at § 882.210(b).

55. *Id.* at § 882.210(a)(2).

56. *See* notes 62-69 and accompanying text *infra*.

57. *See* Washington Post, Dec. 4, 1981, at A1, col. 3. Congress had authorized funding for approximately 200,000 new units. *See id.*, Dec. 2, 1981, at A1, col. 2. These projects cost approximately eight billion dollars annually. *See id.*, Dec. 4, 1981, at A3, col. 2.

58. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 398-400.

59. *See* Washington Post, Dec. 2, 1981, at A12, col. 3.

60. *Id.*, Feb. 9, 1982, at A9, col. 2. The current interest in replacing the traditional

gram utilizing existing housing (instead of a production program). One reason for this preference is that the subsidy cost per unit in the Section 8 existing housing program is approximately half that of a new unit subsidized under the Section 8 new construction program.[61]

To facilitate the shift from a production program to one utilizing existing housing, the President appointed a Commission on Housing. The Commission's first interim report, released October 30, 1981, adopted the reasoning developed by liberal economists in support of a housing allowance.[62] This reasoning is based on data that the housing problem of the poor is not a supply problem, remediable through production of new units; instead, it is an income problem that a targeted income transfer (housing voucher) approach could solve.[63]

The Presidential Commission did not specify the details for a new housing allowance program. Instead, the Commission stated that "details of program design can best be left to HUD and the state and

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production programs with schemes utilizing existing housing makes the case law on evictions and admissions in an existing housing program particularly relevant. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357 hints at this trend. The law recognizes that a unit of production housing is more costly than a comparable unit of existing housing. Thus, while allocating more funds for the production programs than for existing housing, Congress also placed a ceiling on the total Section 8 funds HUD may spend on producing new units. *Id.* at 399. Consequently, pursuant to this distribution, more than half of the Section 8 units funded will consist of existing housing. *See* S. REP. No. 97-139, 97th Cong., 1st Sess. 231 (1981), *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 396, 527.

Other activities within the administration indicate widespread support for the existing housing model. HUD has complemented the administration's support for utilizing existing housing by supporting a policy change. It has recently publicized a Rand Corporation study that concluded that rental housing units are not in short supply. *See* I. LOWRY, RENTAL HOUSING IN THE 1970'S: SEARCHING FOR THE CRISES (April, 1981) (prepared for conference, "The Rental Housing Crisis: Implications for Policy Development and Research," convened by HUD office of Policy Development and Research). The Lowry study does not focus on the distinction between market rate rental housing and rental housing for low-income tenants.

61. PRESIDENT'S COMM'N ON HOUSING, INTERIM REPORT 32-35 (Oct. 30, 1981). [hereinafter cited as Report]. *See also* S. REP. NO. 97-139, 97th Cong., 1st Sess. 231 (1981), *reprinted in* [1981] U.S. CODE CONG. & AD NEWS 396, 527. The Commission's final report, scheduled for release in late May, 1982, was unavailable at the time the *Urban Law Annual* went to press.

62. Report, *supra* note 61, at 35, n.5. *See also* FRIEDAN & WALTER, WHAT HAVE WE LEARNED FROM THE HOUSING ALLOWANCE EXPERIMENT 14 (1980); A. SOLOMON, HOUSING THE URBAN POOR 78-88 (1974).

63. Report, *supra* note 61, at 3-4, 6, 11-21.

local agencies charged with program administration."[64] Nevertheless, it still recommends that a "consumer-oriented housing assistance grant system should draw on the experience in Section 8 Existing Housing,"[65] and "should also take advantage of the administrative expertise that has already been acquired by state and local agencies in the course of Section 8."[66]

The Commission's general guidelines suggest that the new housing voucher scheme will parallel the Section 8 existing housing program in certain fundamental ways. The most basic similarity is that participants will receive vouchers and must find housing in the private market, presumably from landlords of small rental apartments.[67] In addition, the housing voucher program, like Section 8 existing housing, would not be an entitlement program.[68] Finally, the program will probably designate local housing authorities as the entities charged with allocating the relatively small number of housing vouchers among the relatively large number of eligible applicants.[69]

D. *The Importance of Prior Case Law in Analyzing Tenants' Rights in a Housing Voucher Program*

Federal housing programs have come and gone in a fitful and erratic fashion.[70] Nevertheless, when courts have faced litigation involving new and unfamiliar housing programs, they have consistently turned to case law developed under prior assisted housing programs. Unfortunately, most law review articles[71] have not undertaken any sustained comparison of public housing cases with cases involving subsidized projects. As federal housing policy moves into a third major era,[72] it is appropriate to undertake a detailed analysis of judicial treatment of basic admissions and evictions issues in each successive housing program. Analysis of cases involving prior housing programs should also provide some insight into the courts' probable future behavior when applying precedent which involves the existing

64. *Id.* at 40.
65. *Id.*
66. *Id.*
67. *Id.* at 6, 40-42. *See also* notes 51-55 and accompanying text *supra*.
68. Report, *supra* note 61, at 41.
69. *Id.* at 42.
70. *See* notes 31-55 and accompanying text *supra*.
71. *See* articles listed at note 4 and accompanying text *supra*.
72. *See* notes 56-69 and accompanying text *supra*.

housing program to a Reagan housing voucher program.[73] The following two sections of this article, therefore, review the case law on admissions to,[74] and evictions from,[75] Section 8 existing housing in the context of prior case law involving public and subsidized housing.[76]

III. Case Law on Admissions to Section 8 Existing Housing in the Context of Prior Assisted Housing Cases

A. *Overview*

The cases involving admissions of tenants to public and subsidized projects have raised three major issues. One line of cases, beginning with *Holmes v. New York City Housing Authority*,[77] required housing authorities to follow certain due process procedures when choosing among applicants eligible for public or subsidized housing.[78] In a second series of cases, courts held that applicants rejected from public

73. *See* notes 343-74 and accompanying text *infra*.

74. *See* notes 77-224 and accompanying text *infra*.

75. *See* notes 242-335 and accompanying text *infra*.

76. *See* note 60 *supra*.

77. 398 F.2d 262 (2d Cir. 1968).

78. *See* notes 91-114 and accompanying text *infra*. In public housing, applicants and tenants challenging decisions contest the actions of PHAs which clearly are creatures of state government. *See* 42 U.S.C. § 1437b(a) (1976). In subsidized housing, however, private landlords who make the same decisions have no relation with state government. Any semblance of a governmental character is based on the landlord's ties to the federal rather than the state government. *See* notes 39-40 and accompanying text *supra*.

Tenants' lawyers originally did not focus on this distinction. In an early case, McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), plaintiffs sued solely on state action grounds pursuant to 42 U.S.C. § 1983. 431 F.2d at 1190. The court dismissed the suit, distinguishing away the state action in public housing cases that tenants' lawyers cited. *Id.* at 1190-91. Similarly, in Weigand v. Afton View Apts., 473 F.2d 545 (8th Cir. 1973), the court said "the state action concept [cannot be extended] to a federally financed but privately owned and operated apartment house merely because a state assesses real estate taxes on this property at a lower rate than that assessed equivalent structures not similarly funded . . .", *id.* at 548, and because the landlord used state eviction procedures. *Id.*

Subsequently, the Fourth Circuit accepted plaintiffs' state action claims in a suit based on the fourteenth amendment. In Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), the court said state and federal involvement in subsidized projects was state action. *Id.* at 1239. The *Joy* court cited as evidence of state action both federal and state involvement with subsidized projects, and focused on a detailed examination of whether the subsidized landlord had "so far insinuated (itself) into a position of inter-

and subsidized projects must receive due process hearings.[79] In this second series of cases judges have applied a double standard of procedural protection. They have accorded greater weight to *tenants'* rights in *public* housing projects,[80] while generally deferring to the *landlords'* interest in broad management discretion in private, subsidized projects.[81] In a third series of cases, courts have barred the use of certain criteria for choosing among otherwise eligible applicants.[82]

In public and subsidized housing, tenants' rights issues invariably turn on the treatment given an application for a specific apartment.[83] Section 8 existing housing cases, by contrast, can involve either of

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dependence" as to be a state actor. *Id.* (citation omitted). Virtually all subsequent cases, including Second Circuit decisions, have followed *Joy.*

In Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974), Judge Friendly made a conscientious effort to reconcile himself to the notion that federal involvement could result in a finding of state action. "(T)here is a puzzlement how the receipt of *federal* aid creates *state* action to which 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) apply. The puzzlement is lessened—perhaps eliminated—when the federal assistance is conditioned upon state action or supervision is vested in a state or municipal agency." (citations omitted). *Id.* at 942, n.2.

The best solution to the "puzzlement" was simply to sue under the fifth amendment rather than either the fourteenth amendment or Section 1983 because fifth amendment suits require evidence of federal, not state action. Plaintiffs later abandoned the fourteenth amendment to bring causes of action under the fifth amendment requirement of federal action. *See* Short v. Fulton Redevelopment Co., Inc., 390 F. Supp. 517, 519 (S.D.N.Y. 1975) (tenants in subsidized housing projects claimed fifth and fourteenth amendments protect their property right in continuing to live in their apartments); Anderson v. Denny, 365 F. Supp. 1254, 1256 (W.D. Va. 1973) (tenants have right to procedural protection under fifth and fourteenth amendments prior to eviction from subsidized housing). *See also* Green v. Copperstone Ltd. Partnership, 28 Md. App. 498, 502, 346 A.2d 686, 689 (1975) (tenant in subsidized housing project claims property right entitling her to due process under fifth and fourteenth amendments).

79. *See* notes 127-39 and accompanying text *infra*.

80. *See, e.g.*, Neddo v. Housing Auth. of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971). Congress has also acted to afford rejected applicants to public housing procedural protection. The law requires PHAs to notify applicants of ineligibility decisions, and to provide rejected applicants with informal hearings. 42 U.S.C. § 1437d(c)(3) (1976). *See also* notes 127-39 and accompanying text *infra*.

81. *See* notes 140-46, and accompanying text *infra*. HUD recognizes in its regulations a distinction between publicly and privately owned housing in considering the procedural rights of rejected applicants. Landlords of subsidized projects need only inform such persons of the reasons for the rejection in informal interviews. 24 C.F.R. §§ 880.603(b)(3), 881.603(b)(3) (1980). If a PHA owns the project, it must provide the same type of informal hearing that HUD requires in the public housing context. *Id.*

82. *See* notes 160-96 and accompanying text *infra*.

83. *See* notes 31-39 and accompanying text *supra*.

two separate steps that are required before an existing housing tenant obtains a subsidized unit. First, candidates must apply for a Certificate of Family Participation entitling them to a rent subsidy.[84] If successful at this first stage, the recipient of a Certificate then must find a landlord willing to rent an apartment that meets HUD's specifications.[85] Thus, tenants' rights cases in the context of Section 8 existing housing involve two tiers of activity. The upper tier concerns the actions of the housing authority in issuing Certificates of Family Participation. The lower tier focuses on the individual landlord's decision to admit or reject the certified applicant.

This two-tier analysis is crucial to understanding the rights of applicants to Section 8 existing housing. The three major issues from the public and subsidized housing context re-emerge here, but receive very different treatment depending on the tier of activity involved. In upper-tier cases, involving governmental allocation of Certificates of Family Participation, courts tend to follow the precedent developed in the public housing cases. Key elements of this law include: (1) the application of *Holmes*-type due process standards to housing authorities' processing of Certificates;[86] (2) the granting of procedural due process protections similar to those granted to public housing applicants for (i) applicants for certificates and to (ii) tenants whose certificates have been terminated;[87] and (3) the prohibition on housing authorities from using certain criteria that courts also disapproved in the public housing context.[88]

In sharp contrast, the procedural rights of applicants to Section 8 existing housing largely disappear on the lower tier of activity. At this lower level, involving the approved applicant's search for a qualifying apartment, landlords and tenants[89] generally have agreed that the landlord's decision to accept or reject an application is purely a private matter.[90] This absence of state action leaves a disappointed applicant little legal recourse.

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84. *See* notes 50-52 and accompanying text *supra*.

85. *See* note 53 and accompanying text *supra*.

86. *See* notes 115-21 and accompanying text *infra*.

87. *See* notes 148-59 and accompanying text *infra*.

88. *See* notes 197-224 and accompanying text *infra*.

89. *See* note 121-2, 148, 238-40 and accompanying text *supra*.

90. Research uncovered no cases on point. At least one HUD attorney believes that tenants have not litigated this matter. Telephone interview with Herbert Levy, HUD Associate Regional Counsel, in New York City (Feb. 12, 1982).

The remainder of this section analyzes the Section 8 existing housing case law concerning admissions in the context of prior case law.

B. *Due Process Requirements in Processing Applications for Assisted Housing*

Courts have consistently required administrators to use fair and equitable procedures for processing applications for all types of assisted housing. In 1968, the Second Circuit's decision in *Holmes v. New York City Housing Authority*[91] established the basic due process requirements in the context of public housing.[92] Other courts subsequently have applied *Holmes'* principles to subsidized housing projects,[93] and probably will apply them to housing authorities' processing of applications for Certificates of Family Participation in Section 8 existing housing.[94]

The Second Circuit's statement of facts and holding in *Holmes* demonstrates that courts will not tolerate sloppy or unfair procedures for choosing among eligible applicants:

> The complaint cites numerous claimed deficiencies in the admissions policies and practices of the Authority. Regulations on admissions (other than those pertaining to income level and residence) are not made available to prospective tenants either by publication or by posting in a conspicuous public place. Applications received by the Authority are not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable and systematic manner. All applications, whether or not considered and acted upon by the Authority, expire automatically at the end of two years. A renewed application is given no credit for time passed, or precedence over a first application of the same date. There is no waiting list or other device by which an applicant can gauge the progress of his case and the Authority refuses to divulge a candidate's status on request. Many applications are never considered by the Authority. If and when a determination of ineligibility is made (on any ground other than excessive income level), however, the candidate is not informed of the Authority's decision, or of the reasons therefor.[95]

91. 398 F.2d 262 (2d Cir. 1968).

92. *Id.* at 264.

93. *See* notes 100-14 and accompanying text *infra*.

94. *See* notes 120-21 and accompanying text *infra*.

95. 398 F.2d at 264.

The *Holmes* court first concluded that plaintiffs were entitled to due process.[96] Noting the potential for abuse when a program administrator operates with unbridled discretion, the court said "due process requires that selections among applicants be made in accordance with ascertainable standards."[97] Further, the court insisted that PHAs use objective and reasonable standards for selection.[98] After setting this procedural structure, the court dismissed the PHA's argument that applicants for public housing lack standing to raise the due process objection to bureaucratic administration of the program.[99]

In *Colon v. Tompkins Square Neighbors, Inc.*,[100] the Southern District federal court of New York applied *Holmes* to the context of subsidized housing. The *Colon* court insisted that private landlords of subsidized housing must afford rejected applicants *Holmes*-type procedural protection.[101] Characterizing the shift from public to subsidized housing as "a distinction without a difference,"[102] the court rejected the defendants' contention that public housing case law did not apply in a subsidized housing case.[103] Taking a broad view of government action, the court ordered the landlord to set a reasonable time limit on its processing of applications and to establish a chronological waiting list for eligible participants.[104]

The success of the *Colon* plaintiffs, however, is somewhat clouded because of language in the decision that distinguishes public housing

96. *Id.*

97. *Id.* at 265.

98. *Id.*

99. *Id.* (all applicants for public housing "are immediately affected by the alleged irregularities in the practices of the Authority"). *Id.*

100. 294 F. Supp. 134 (S.D.N.Y. 1968).

101. *Id.* at 139.

102. *Id.* at 137.

103. *Id.* at 137-38. Initially, the court established that governmental action existed. The apartments in question occupied an urban renewal site. The project also received federal financing, local tax exemptions, and a variety of governmental subsidies. *Id.* at 137. New York officials also played a supervisory role in administering the projects. *Id.*

After establishing governmental involvement with the private units, the court turned to the agency's violation. "By virtue of the state's election to put its property, power and prestige behind the housing project, in addition to its failure to affirmatively insure strict adherence to constitutional guarantees, it thereby becomes a party to the alleged discrimination." *Id.* at 138.

104. *Id.* at 139.

tenants' rights from the rights of tenants in subsidized projects.[105] The court demonstrated a sensitivity toward subsidized landlords' prerogatives that was absent from the public housing context.[106] The *Colon* court stressed that its conclusion:

> is not to say that tenants must be selected on the basis of a "point system" or on the theory of "first come, first served". It is unquestionably beneficial to the apartment project as a whole if the element of human judgment and discretion is allowed to remain with the Rental Committee in the administration of its tenant selection procedure so long as that discretion is not permitted to transcend the boundaries established by the Fourteenth Amendment to the Constitution.[107]

Colon was one of the earliest decisions to indicate that courts might approve different approaches in public and subsidized housing cases. Subsequently, legislation became increasingly solicitous of the discretion of private landlords to manage their subsidized housing projects without cumbersome due process requirements.[108] Simultaneously, courts have become increasingly adamant in requiring public housing authorities to offer public housing tenants more extensive procedural rights.[109]

A recent case demonstrates, however, that not all courts believe that tenants in subsidized housing projects should have less procedural protection than do public housing tenants. In *Ressler v. Landrieu*,[110] plaintiffs seeking admission to a subsidized housing project raised classic *Holmes* issues.[111] The Alaska federal district court, finding for the plaintiffs,[112] required the project owners to establish written tenant selection criteria,[113] and to set out detailed waiting list

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* notes 140-46, 194-96, 250-52 and accompanying text *infra*.

109. *See* notes 129-41, 160-61, 167-93, 251 and accompanying text *infra*.

110. 502 F. Supp. 324 (D. Alaska 1980).

111. *Id.* at 327-30.

112. *Id.* at 326.

113. *Id.* at 328. In a recent order, the court detailed the tenant selection criteria project owners must use. Such criteria "must relate to the eligibility of the applicant to fulfill lease obligations and should not automatically deny tenancy to a particular group or category of otherwise eligible applicants." Examples of acceptable criteria given are (a) "demonstrated ability to pay rent . . .; (b) good credit references; (c) positive endorsements from prior landlords; (d) absence of a record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior

procedures along *Holmes* lines.[114]

With the creation of the Section 8 existing housing program, challenges to housing authorities' procedures for allocating Certificates of Family Participation were inevitable, and relatively prompt. Only one court, however, has ruled on the procedural requirements for processing applications for this program. In *Baker v. Cincinnati Metropolitan Housing Authority*,[115] the plaintiffs claimed that the housing authority had violated due process by failing to publicize one of its acknowledged selection policies.[116] The court distinguished *Holmes*,[117] holding that the housing authority had not violated due process by failing to publicize its policy.[118] The court did say, however, that "publication and dissemination of the standards would be logical and salutory."[119]

In another case involving facts closer to *Holmes*, the plaintiffs in *Solomon v. New York City Housing Authority*[120] won *Holmes*-type procedures for the processing of their applications for Certificates of Family Participation. In a court approved settlement agreement, the Housing Authority agreed to protections that include: (1) assigning eligible applicants to positions on a waiting list; (2) requiring the housing authority to disclose to applicants their position on the list; and (3) offering applicants the opportunity to challenge the housing authority if they are dissatisfied with the progress of their applications.[121]

Research revealed no cases involving a *Holmes*-type suit challenging the procedures that private landlords use to reject a prospective tenant who has a Certificate of Family Participation. Apparently, potential plaintiffs have opted not to challenge potential landlords who use unfair procedures in rejecting their applications. Disap-

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residences which may adversely affect. . . other tenants; or (e) other good reasons relating to the applicants' ability to fulfill lease obligations." Order No. A77-228 Civil, filed July 28, 1981.

114. 502 F. Supp. at 329.

115. 490 F. Supp. 520 (S.D. Ohio 1980), *aff'd on other grounds*, No. 80-3441 (6th Cir. Apr. 20, 1982).

116. *Id.* at 522.

117. *Id.* at 530.

118. *Id.*

119. *Id.*

120. No. 79 Civ. 3591 (S.D.N.Y., June 24, 1981).

121. *Id.*

pointed applicants may consider such a lawsuit impractical because it would involve asking a court to impose due process requirements upon every private landlord who happened to be approached (unsuccessfully) by the holder of a Section 8 certificate.

C. *Due Process Hearings for Rejected Applicants*

Just as courts in most contexts have imposed *Holmes*-like due process standards on governmental entities that process applications for assisted housing, they also have consistently required that prospective tenants denied admission to assisted housing receive due process hearings. Courts have differed, however, on the level of due process required. After several decisions mandated due process hearings for applicants to public housing projects,[122] Congress changed the enabling statute to require PHAs to offer a hearing to any interested person.[123] In the subsidized housing context, HUD's current regulations require that owners of subsidized housing projects provide only informal "interviews" for rejected applicants.[124] In the Section 8 existing housing program, applicants have received both more and less protection than subsidized housing tenants receive. The courts have required housing authorities to provide notice and opportunity for a hearing to applicants disappointed on the upper tier of the existing housing program (the denial or termination of a Certificate of Family Participation).[125] Rejected tenants apparently do not fare so well on the lower tier.[126] A review of the cases in this area follows.

1. Public Housing Cases

The first public housing cases establishing the right to due process hearings for an applicant rejected from public housing were based upon the Supreme Court's decision in *Goldberg v. Kelly*.[127] The *Goldberg* Court held that the termination of one's right to receive a

122. Neddo v. Housing Auth. of Milwaukee, 335 F. Supp. 1397, 1400 (E.D. Wis. 1971) (housing authority's policy of rejecting applicant owing money in prior tenancy, without affording a hearing, is arbitrary and unreasonable); Davis v. Toledo Metropolitan Hous. Auth., 311 F. Supp. 795, 797 (N.D. Ohio 1970) (those seeking eligibility for public benefits entitled to opportunity for evidentiary hearing prior to declaration of ineligibility).

123. 42 U.S.C. § 1437d(c)(3) (1976).

124. 24 C.F.R. §§ 880.603(b)(3), 881.603(b)(3)(1980).

125. *Id.* at § 882.209(f).

126. *See* notes 89-90 and accompanying text *supra*.

127. 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that qualifying

governmental benefit deprives the former recipient of a property right. Consequently, due process requires a hearing to ensure adequate procedural protection.[128] In *Davis v. Toledo Metropolitan Housing Authority*,[129] an Ohio federal district court applied the *Goldberg* holding[130] to support its decision that applicants rejected from public housing also deserve a hearing.[131] The court did not address the factual difference between the two cases: *Goldberg* involved the *termination* of a governmental benefit, while *Davis* concerned the rejection of an *application* for a benefit.[132] Thus, it was not as clear in *Davis* as it had been in *Goldberg* that the plaintiffs had lost a property right requiring a due process hearing.[133]

In *Neddo v. Housing Authority of Milwaukee*,[134] a federal district court in Wisconsin also ignored the factual difference between *Goldberg* and the public housing situations.[135] Yet, the *Neddo* court went far beyond *Davis* in specifying the amount of due process a housing authority must afford to a rejected applicant.[136] The court did not require a record or witnesses under oath, but did insist that rejected applicants receive written notice, the right to counsel, and a statement of the reasons for the authority's decision.[137]

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persons are statutorily entitled to receipt of welfare benefits, and that recipients must receive procedural due process prior to termination. *Id.* at 266.

128. *Id.* at 267.

129. 311 F. Supp. 795 (N.D. Ohio 1970).

130. *Id.* at 796-97.

131. *Id.* at 797.

132. The fact that a governmental benefit already *granted* is a property right does not necessarily mean that the right to *apply* for a governmental benefit is a property right. The court conceded that the irreparable harm to plaintiffs in *Goldberg* was clearer than in *Davis*. The court concluded, however, that the risk of delay in processing an application required that tenants receive a hearing to determine their status. *Id.*

133. The factual distinction between *Goldberg* and *Davis* is clear. In *Goldberg*, the appellees faced the loss of welfare benefits that they were already receiving pursuant to state law. Thus, the Court addressed the narrow issue of the scope of due process required prior to termination of an existing property interest. 397 U.S. at 260. Conversely, in *Davis*, plaintiffs had no government benefit amounting to a property interest. They argued successfully, however, that they were entitled to due process to confront those who had denied their eligibility for the benefit. 311 F. Supp. at 796-97.

134. 335 F. Supp. 1397 (E.D. Wis. 1971).

135. *Id.* at 1400.

136. *Id.* at 1400-01.

137. *Id.* at 1400.

Subsequently, courts disagreed on the issue of what procedural protection a rejected applicant to public housing is entitled to receive.[138] In 1976, HUD settled the issue by promulgating a regulation that requires housing authorities to provide *Neddo*-type hearings to disappointed applicants.[139]

2. Subsidized Housing Cases

HUD has also promulgated guidelines for subsidized landlords to follow when rejecting prospective tenants.[140] The requirements do not require subsidized landlords to follow procedures as formal as those HUD requires of PHAs. In fact, the regulations seem designed to afford tenants a minimal amount of due process while imposing the lightest possible burden on subsidized project landlords. The regulations provide that if a landlord determines that:

> an applicant is ineligible on the basis of income or family composition, or that the owner is not selecting the applicant for other reasons, the owner will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has the right to meet the owner or managing agent in accordance with HUD requirements. Where the owner is a PHA (public housing authority), the applicant may request an informal hearing. If the PHA determines that the applicant is not eligible, the PHA will notify the applicant that he has the right to request a review by HUD of the PHA's determination.[141]

This regulation clearly reflects the double standard courts have ap-

138. *See* Sumpter v. White Plains Hous. Auth., 29 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649 (1972), *cert. denied*, 406 U.S. 928 (1972), where a New York court held that a rejected applicant has only the right to an informal interview. *Sumpter* is still the law governing rejection of applicants from city-financed public housing. *See* Gomez v. Christian, 104 Misc. 2d 354, 355-56, 428 N.Y.S. 2d 431, 432-33 (1980). *See also* Singleton v. Drew, 485 F. Supp. 1020 (E.D. Wis. 1980), the only case to address the central issue of whether a rejected public housing applicant has less of a constitutional property interest than does a tenant facing eviction. *Id.* at 1024. The *Singleton* court could safely face this issue because it held HUD regulations mooted the issue. *Id. See also* Billington v. Underwood, 613 F.2d 91 (5th Cir. 1980) for a detailed discussion of whether specific procedures satisfy due process requirements.

139. 24 C.F.R. § 860.207 (1980).

140. For rules currently applicable to new construction projects, see *id.* at § 880.603(b)(3) (1980). For rules currently involving substantial rehabilitation property, see *id.* at § 881.603(b)(3). For a discussion of HUD's initial rules on these programs, see the *New Leased Housing Program*, *supra* note 4, at 1206.

141. 24 C.F.R. §§ 880.603(b)(3) 881.603(b)(3) (1980).

plied to the actions of public housing authorities, as opposed to private, subsidized landlords.

The origin of this regulation is unclear from a review of reported case law. Nonetheless, only one court has required a subsidized landlord to offer a rejected applicant more than the minimal due process required by the regulation. In *Ressler v. Landrieu*,[142] the federal district court in Alaska required the defendant landlord to offer rejected applicants[143] more than an informal interview in which the landlord explains the reasons for rejecting the applicant.[144] The court cited public housing[145] cases and a Section 8 existing housing case in support of its holding that a rejected applicant must receive an informal hearing before an impartial HUD employee.[146] It remains unclear whether *Ressler* will stand alone, or if it signals a rethinking of what due process procedures applicants must receive when rejected from private, subsidized projects.

3. Section 8 Existing Housing

Three different sets of rules govern the due process procedures to which Section 8 existing housing applicants are entitled.

On the lower level of the existing housing program, applicants receive no due process protection. Private landlords are free to reject potential tenants holding Certificates of Family Participation without providing even an informal statement of their reasons for doing so.[147]

In sharp contrast, on the upper level of the existing housing program, PHAs are required to provide due process hearings to people affected by their allocation of Certificates.

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142. 502 F. Supp. 324 (D. Alaska 1980). The regulations cited in note 141 *supra* did not apply in *Ressler* because *Ressler* involved the so-called Section 8 "set-aside" program. *Id.* at 325. The cited regulations apply only to the Section 8 new construction and substantial rehabilitation programs.

143. *Id.* at 329.

144. *Id.* at 330.

145. *Id.*

146. *Id.* The Section 8 existing housing case cited was Ferguson v. Metropolitan Dev. and Hous. Auth., 485 F. Supp. 517 (M.D. Tenn. 1980). *See* notes 202-09, 224a and accompanying text *infra*.

147. *See* notes 89-90 and accompanying text *supra*. This finding is perhaps not surprising, since requiring potential landlords to give interviews (much less hearings) to every rejected existing housing applicant would force due process obligations on any landlord who happened to be approached by a potential tenant with a Certificate of Family Participation.

The procedures a PHA must follow in rejecting an applicant are set forth in *Baker v. Cincinnati Metropolitan Housing Authority*.[148] The Ohio federal district court in *Baker* held that an applicant denied a Certificate is entitled to due process procedures *more* formal than the "informal interview" that HUD regulations require for applicants rejected from Section 8 new construction/substantial rehabilitation projects,[149] but *less* formal than the *Neddo*-type hearing[150] required by the *Ressler v. Landrieu* court.[151] The *Baker* court held that, while the rejected applicant is entitled to make an oral presentation at a post-denial hearing, the PHA could present its case through documents instead of witnesses.[152]

Courts have required considerably more elaborate due process hearings when a PHA decides to terminate a family's Certificate of Family Participation.[153] Three courts have required an oral pretermination hearing in this context, in *Watkins v. Mobile Housing Board*,[154] *Brezina v. Dowdall*,[155] and *Ferguson v. Metropolitan Development Housing Authority*.[156] *Watkins* and *Ferguson* are explicit in requiring full *Goldberg* procedures.[157] The *Brezina* decision[158] does not spell out specific procedures but notes only that an informal hearing is required.[159]

148. 490 F. Supp. 520 (S.D. Ohio 1980). The Sixth Circuit's affirmance of *Baker* did not discuss this issue. No. 80-3441 (6th Cir., April 20, 1982).

149. *See* notes 140-41 and accompanying text *supra*.

150. *See* note 134 and accompanying text *supra*.

151. 502 F. Supp. 324 (D. Alaska 1980).

152. 490 F. Supp. at 533.

153. Termination of a Certificate is, of course, much closer to the basic Goldberg v. Kelly fact pattern. *Goldberg* involved termination of welfare benefits.

154. No. 79-0067-P (S.D. Ala. May 14, 1979).

155. 472 F. Supp. 82 (N.D. Ill. 1979).

156. 485 F. Supp. 517 (M.D. Tenn. 1980).

157. *Goldberg* hearing procedures include written notice, a right to an impartial decisionmaker, a right to counsel, a right to confront and cross-examine witness, a right to present oral and written evidence, a right to a decision that explains the reasons that support it, and a right to appeal. (As enumerated in *Ferguson*, 485 F. Supp. at 524.)

158. *Brezina*'s failure to spell out specific hearing procedures may be due to the fact that the *Brezina* court's decision is based on part on a HUD regulation requiring a PHA to offer an "informal hearing" whenever a PHA refuses to renew a family's Certificate in a situation where the family wants a renewed Certificate so it can move into a new apartment. (This regulation does not spell out specific hearing procedures). *See* 24 C.F.R. § 882.209(e)(1) (1980), quoted at 492 F. Supp. at 84.

159. The due process procedures required in *Watkins* and *Ferguson* more closely

D. *Cases Challenging or Limiting Use of Certain Criteria for Tenant Selection*

The dichotomy between tenants' rights in public and subsidized housing projects becomes very clear in cases involving the use of various tenant selection criteria. Courts have barred the use of a number of these criteria in the public housing context on a variety of constitutional and statutory grounds,[160] generally sympathizing with prospective tenants who have challenged standards that public housing authorities used as guidelines for admission.[161] Courts have been far more reluctant to uphold similar challenges involving subsidized housing projects. In this context, they have shown greater sensitivity to subsidized landlords' fears that any limits placed on their ability to screen tenants will jeopardize the landlords' ability to manage their projects.[162]

The use of criteria for allocating Certificates of Family Participation is the most actively litigated admissions issue in the Section 8 existing housing context. One reason is that HUD has urged housing authorities to establish formal priorities whose existence is easy to prove.[163] Second, government action clearly is involved in the upper tier,[164] although it is absent from the lower tier of Section 8 existing housing activity.

This section begins with a review of the case law on selection criteria in the public and subsidized housing programs.[165] It then reviews the three reported cases involving the Section 8 existing housing program which have yielded inconsistent results.[166]

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resemble procedures required prior to *eviction* than procedures required in connection with admissions. *Ferguson* even quotes public housing eviction cases, stating that they involve "factual situations similar to the one before this Court." 485 F. Supp. at 523. These courts seem justified in requiring the (more elaborate) due process procedures required in eviction cases in the context of decisions involving terminations of Certificates of Family Participation, because termination of a Certificate presumably will lead very often to eviction of the family involved due to non-payment of rent. (If the family involved could afford to pay the portion of the rent subsidized under Section 8, it would not have been eligible for the Section 8 program in the first place).

160. *See* notes 167-76, 188-93, and accompanying text *infra*.

161. *Id.*

162. *See* notes 194-96 and accompanying text *infra*.

163. *See* notes 197-201 and accompanying text *infra*.

164. *See* notes 197-98 and accompanying text *infra*.

165. *See* notes 167-96 and accompanying text *infra*.

166. *See* notes 202-24 and accompanying text *infra*.

1. Public and Subsidized Housing Cases

Courts have summarily rejected the attempts of both PHAs and subsidized landlords to reject an applicant for reasons held to be illegal or unconstitutional. These decisions have forbidden criteria based on race,[167] or on an applicant's constitutionally protected rights such as free speech[168] and travel.[169]

Courts have found questions concerning other selection criteria considerably more difficult. The earliest decisions involved due process and equal protection challenges to housing authorities' practice of automatically rejecting unwed mothers.[170] This practice occurred primarily in the South in the late 1960's, and courts used different theories to forbid it. In *Thomas v. Housing Authority of Little Rock*,[171] a federal district court held that automatic rejection of women with illegitimate children violated due process.[172] The court said that "(s)uch a policy simply has no place in the low rent housing program and in that sense is arbitrary and capricious."[173] A South Carolina federal district court reached the same result in *McDougal v.*

167. Rejection of a housing applicant because of race may violate the Constitution. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977) (proof of discriminatory intent, not effect, is required to establish constitutional violations). It may also violate the Fair Housing Act of 1968, 42 U.S.C. § 3601 (1976). *See, e.g.*, United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980).

168. *See, e.g.*, Holt v. Richmond Redevelopment and Hous. Auth., 266 F. Supp. 397, 401 (E.D. Va. 1966) (injunction granted to block eviction of tenants who exercised first amendment rights).

169. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court held that residency requirements for eligibility for welfare assistance were unconstitutional restrictions on the right to travel. *Id.* at 629. Lower federal courts subsequently applied this holding to the public housing context. *See* King v. New Rochelle Mun. Hous. Auth., 314 F. Supp. 427, 430 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (five-year residency requirement for admission to state and locally subsidized public housing is unconstitutional restraint on right to travel); Cole v. Housing Auth. of Newport, 312 F. Supp. 692, 703 (D.R.I. 1970), *aff'd*, 435 F.2d 807 (1st Cir. 1970) (residency requirement interferes with basic human right to geographic mobility which is constitutionally protected). *But see* Lane v. McGarry, 320 F. Supp. 562, 564 (N.D.N.Y. 1970) (one-year state residency requirement prior to application does not necessarily penalize the constitutional right to travel).

170. *See* notes 171-76 and accompanying text *infra*.

171. 282 F. Supp. 575 (E.D. Ark. 1967).

172. *Id.* at 580.

173. *Id.* at 581. The court adopted this due process approach from Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955), where the court forbade arbitrary eviction from public housing on suspicion the tenant was a Communist. *Id.* at 53.

Tamsberg,[174] but it applied an equal protection theory.[175] The court required the housing authority to show that it had not arbitrarily excluded the plaintiff because she had an illegitimate child and to make a prima facie showing that her conduct amounted to a nuisance.[176] The equal protection theory seems more appropriate in this context than does a due process argument. Plaintiffs are contesting the lack of a "tight fit" between the classification (mothers with illegitimate children), and the purpose of the policy (to prevent the use of public housing for prostitution and other "conduct amounting to a nuisance or which seriously violates ordinary standards of decency").[177] HUD has appropriately taken notice of these decisions and has forbidden automatic rejection of unwed mothers for public housing tenancy.[178]

The other major series of cases challenging the constitutionality of selection criteria involves those guidelines for screening out the very poor. While it may seem ironic that assisted-housing landlords have fought to exclude the poorest potential tenants, they had a variety of motives. These reasons include the desire of public housing agencies to avoid bankruptcy,[179] the preference of some landlords of subsidized housing projects to attract the "right" kind of tenants[180] and to increase their cash flow, and the interest of all such landlords in screening out "problem" families.[181]

174. 308 F. Supp. 1212 (D.S.C. 1970).

175. *Id.* at 1215.

176. *Id.* at 1216.

177. *Id.*

178. 24 C.F.R. § 860.204(c) (1980). The regulation however specifically does not apply to the Section 8 programs where the owners of living units lease directly to tenants. *Id.* at § 860.202. However, automatic rejection of unwed mothers and welfare recipients from Section 8 projects is forbidden in the Housing Assistance Payments Contract that each Section 8 landlord must sign. HUD regulations also forbid the use of residency requirements in subsidized housing. *Id.* at §§ 880.603(b)(1), 881.603(b)(1) (1980). In Doe v. Charlotte Hous. Auth., No. C-C-78-0349 (D.N.C. 1978), the court extended *McDougal* to forbid PHA discrimination against mentally retarded persons.

179. A number of public housing authorities faced severe cash flow problems in the 1970's due to increased operating costs. *See* F. DeLeeuw, Operating Costs in Public Housing: A Financial Crisis 8-112-11 (Urb. Inst. 1977). *See also* notes 188-93 and accompanying text *infra*.

180. For a discussion of "problem families," see L. Peattie, Social Issues in Housing (1966) (unpublished mimeograph in Massachusetts Institute of Technology Library of Architecture and Planning).

181. HUD regulations empower PHAs to implement tenant selection policies and procedures that "preclude admission of applicants whose habits and practices reason-

During the early years of the public housing program, many PHAs automatically excluded all welfare recipients, thus effectively eliminating the poorest potential tenants.[182] While Congress eventually forbade automatic exclusion of welfare recipients from *public* housing,[183] the judiciary had to settle the issue in the context of *subsidized* housing. In 1968, a federal district court in New York in *Colon v. Tompkins Square Neighbors, Inc.* [184] struck down a rule that automatically excluded welfare recipients from a subsidized project.[185] Four years later, the Second Circuit reached the same result in *Male v. Crossroads Associates*[186] Both courts based their decisions on equal protection grounds.[187]

Subsequent decisions have all but eliminated an applicant's wealth as a criterion for selection to public housing. In *Fletcher v. Housing Authority of Louisville*,[188] the Sixth Circuit reviewed HUD's so-called "rent range formula"[189] which favored public housing applicants capable of paying higher rents over other applicants.[190] The "rent range formula" was HUD's response to threats of bankruptcy from a number of housing authorities.[191] HUD designed the formula to increase PHAs' income by giving preference to wealthier tenants who would pay more rent than would poorer potential tenants. The *Fletcher* court used very broad language in holding that "tenant admission policies which discriminate against applicants because of

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ably may be expected to have a detrimental effect on the tenants or the project environment." 24 C.F.R. § 860.204(b) (1980).

182. *See* L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 109 (1968).

183. 63 Stat. 422 (1949). Although the provision was repealed, 75 Stat. 164 (1961), in practice welfare recipients are freely accepted into big-city housing projects. *See also* L. FRIEDMAN, *supra* note 182, at 109.

184. 294 F. Supp. 134 (S.D.N.Y. 1968).

185. *Id.* at 138.

186. 469 F.2d 616 (2d Cir. 1972).

187. *Id.* at 622 (state or its alter egos may not relegate welfare recipients to second class citizenship solely because they receive welfare assistance); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. at 138 (where welfare recipient is reliable and has successfully applied, rejection due to his receiving welfare funds is unconstitutional arbitrary classification).

188. 491 F.2d 793 (6th Cir. 1974), *vacated*, 419 U.S. 812 (1974), *reinstated*, 525 F.2d 532 (6th Cir. 1975).

189. *Id.* at 795-97.

190. *Id.* at 795.

191. *Id.* at 796.

their poverty are no longer justified"[192] despite the acknowledged need of housing authorities to increase their rental income. Another court subsequently adopted the *Fletcher* holding in the public housing context.[193]

Courts have not applied these precedents in the context of subsidized housing. Tenants in subsidized housing programs rarely challenged landlords' use of specific criteria to determine eligibility for rental. One obvious reason for this dearth of cases is that Congress and HUD have given subsidized housing landlords broad discretion to choose their tenants. The statute states that "all . . . management . . . responsibilities, including the selection of tenants . . . shall be assumed by the owner."[194] Similarly, HUD's regulations clearly grant the owner extremely broad discretion to select tenants. The rules provide that the landlord must tell an applicant the reasons for the rejection "(i)f the owner determines that an applicant is ineligible on the basis of income or family composition, *or that the owner is not selecting the applicant for other reasons . . . .*"[195] (emphasis added). This language implies that a landlord may reject an applicant for any reason that is not unconstitutional, and at least two federal district courts have explicitly so held.[196]

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192. *Id.* at 804.

193. *See* Crawford v. Metropolitan Dev. & Hous. Auth., 415 F. Supp. 41, 47 (M.D. Tenn. 1976) (rent range system is inconsistent with National Housing Act and constitutes an abuse of discretion). *Cf.* Bradley v. Housing Auth. of Kansas City, Mo., 512 F.2d 626 (8th Cir. 1975) (affirming lower court dismissal of suit by public housing applicants challenging tenant selection preferences for higher-income applicants after housing authority gave plaintiffs apartments).

194. 42 U.S.C. § 1437f(e)(2) (1976 & Supp. III 1979).

195. 24 C.F.R. §§ 880.603(b)(3), 881.603(b)(3) (1980).

196. Ressler v. Landrieu, 502 F. Supp. 324 (D. Alaska 1980). The court rejected plaintiffs' claims that a Section 8 landlord's broad discretion to choose among eligible applicants violated due process. *Id.* at 328. *See also* Daubner v. Harris, 514 F. Supp. 856, 867 (S.D.N.Y. 1981) (rental policy constituted rational means to achieve legitimate government goals of rehabilitating neighborhood, and preserving and strengthening city's unique place in the nation's cultural life).

While tenants rarely challenge landlords' use of specific criteria in subsidized projects, two cases currently in litigation in Georgia deserve scrutiny. In Jenkins v. Chatham Properties, Inc., 496 F. Supp. 250 (S.D. Ga. 1980), plaintiffs challenged defendants' practice of automatically excluding applicants poor enough to be eligible for utility payment subsidies in excess of their rent. *Id.* (These so-called "negative rent" payments are authorized at 24 C.F.R. § 880.604 (1980)). The court abruptly dismissed plaintiffs' claims at a preliminary injunction hearing, noting that "assuming *arguendo* state action, defendants' conduct plausibly withstands a minimum scrutiny analysis. The fiscal conservation aspect of the regulatory scheme may be construed as

2. Section 8 Existing Housing

Substantial litigation has focused on the selection criteria housing authorities have used in allocating Certificates of Family Participation. HUD requires that PHAs wishing to use criteria aside from the applicants' income and family type must state these "additional" requirements for eligibility or preferences,[197] and must receive HUD's approval.[198] These procedures have made it easier for potential tenants of Section 8 existing housing to challenge specific eligibility criteria than it was to dispute such standards in subsidized projects.

Two such "local requirements" that HUD recommends to local PHAs have spurred most of the litigation. One criterion makes ineligible for Certificates of Family Participation those applicants who previously left the Section 8 existing housing program owing rent.[199]

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a legitimate state interest fostered by HUD to which the (owner subclassification) is rationally related." 496 F. Supp. at 252.

Since the preliminary injunction hearing, the court has consolidated *Jenkins* with the second case, Lambert v. Wainsboro Properties, Ltd., No. CV-181-071 (N.D. Ga., filed Mar. 25, 1981, transferred to southern district). *Lambert* involves the same landlord as in *Jenkins*, in the guise of a different limited partnership. Plaintiffs have challenged the landlord's practice of systematically choosing richer over poorer applicants, regardless of their date of application. Plaintiffs' attorney says the landlord adopted its rule in an effort to comply with 24 C.F.R. § 880.40 (1980), requiring Section 8 landlords to maintain a tenant population in their projects whose average income was 40% of the area median income. Telephone interview with Ayres Gardner, Attorney for Plaintiffs (Sept., 1981). This requirement was abolished in the 1981 Budget Reconciliation Act. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 530. In a potentially far-reaching development, plaintiffs amended their complaint to ask the court to require HUD to implement the Section 8 statute's requirement that people living in substandard housing receive preference for Section 8 units. *See* 42 U.S.C. § 1437f(e)(2) (1976 & Supp. III 1979). Ms. Gardner says HUD told her it has not implemented the provision because of the difficulty in defining "substandard."

The author is grateful to Ms. Gardner for the information on *Lambert* she provided.

197. HUD PUBLIC HOUSING AGENCY ADMINISTRATIVE HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM (Nov., 1979) [hereinafter cited as HUD HANDBOOK].. Preferences and requirements are the two basic types of admission criteria. A preference gives an applicant with the preferred characteristic priority over an applicant lacking the characteristics. Due to the fact that many more applicants qualify for assisted housing compared to the number of available units, a preference might be as effective as a requirement to bar applicants for assisted housing who lack the preferred characteristic. 24 C.F.R. § 882.209 (1980).

198. HUD HANDBOOK, *supra* note 197, at 10.

199. *Id.* In the public housing context, rejected applicants have successfully challenged this criterion as a violation of due process. *See* Lancaster v. Scranton Hous. Auth., 479 F. Supp. 134 (M.D. Pa. 1979), *aff'd*, 620 F.2d 288 (3d Cir. 1980).

The second criterion requires an applicant to the Section 8 existing housing program to pay all rent owed from any previous tenure in public housing.[200] A number of PHAs have followed HUD's advice and have adopted these two criteria,[201] but disappointed applicants have forced three of the authorities into federal court to defend the practice. The courts have not reached a unanimous conclusion.

In *Ferguson v. Metropolitan Development and Housing Authority*,[202] a federal district court held that the prior indebtedness criterion constituted an unauthorized collection practice that "violates the stated purpose of the statutes, regulations, and legislative history creating the program.[203] The court read the enabling statute as "creat(ing) very specific eligibility criteria clearly intended to limit the discretion of the PHA in determining who may participate in the program."[204] The court quotes language in the annual contribution contract (ACC) between HUD and the PHA,[205] which provides that "(n)o person shall automatically be excluded . . . because of *membership in a class* such as unmarried mothers, recipients of public assistance, etc.,"[206] as well as language providing that PHA's shall use ACCs "*solely* for the purpose of providing decent, safe and sanitary dwellings" (emphasis added).[207] This language is used to support the court's holding, which seems to be that PHA's cannot use any criteria for choosing applicants other than the family size and income criteria provided by statute.

The *Ferguson* court's reasoning is open to question. The court fails to mention that the drafters of the ACC probably intended the cited language to incorporate the law developed in the cases forbidding automatic rejection of welfare recipients and unmarried mothers.[208]

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200. HUD HANDBOOK, *supra* note 197, at 10.

201. *See* notes 202-24 and accompanying text *infra*.

202. 485 F. Supp. 517 (M.D. Tenn. 1980). *Ferguson*'s precedential value was undercut by the Sixth Circuit's affirmance of Baker v. Cincinnati Hous. Auth., No. 80-3441 (6th Cir. Apr. 20, 1982). *See* note 224a *infra*.

203. *Id.* at 524.

204. *Id.*

205. *Id.* at 525. The ACC is the written agreement between HUD and PHAs that sets forth the federal assistance the PHA receives to make housing assistance payments and to cover other program expenses. 24 C.F.R. § 882.102 (1980). For further regulations involving the ACC, see *id.* at §§ 882.104, 882.107.

206. 485 F. Supp. at 525 (emphasis added).

207. *Id.*

208. *See* notes 170-87 and accompanying text *supra*.

The court instead reads the provision as proof that the discretion of housing authorities to select tenants is "narrow indeed."[209]

Not surprisingly, other courts reached conclusions contrary to *Ferguson* in reviewing the prior indebtedness criterion for selecting Section 8 existing housing applicants. In *Baker v. Cincinnati Metropolitan Housing Authority*,[210] a federal district court in Ohio relied heavily on the opinion of HUD's regional counsel to find that the statute justified automatic rejection of applicants who had left public housing owing rent and have not paid the amount owed.[211] It adopted the regional counsel's conclusion that the criterion was consistent with the program's goals of encouraging assisted families to pay their rent.[212] The court also dismissed somewhat abruptly the plaintiffs' series of constitutional arguments.[213] While finding state action present, the court held the selection criterion did not violate the equal protection clause because HUD had a rational basis for its policy of excluding public housing tenants with rent arrearages (to encourage payment of rent and to save money).[214] Moreover, in a striking jumble of constitutional scholarship, the court held that the criterion did not constitute an irrebuttable presumption because the guideline entitled rejected applicants to a due process hearing.[215] Finally, the court also rejected the plaintiffs' two due process claims: first, that the housing authority's failure to publish its rent arrearage

209. 485 F. Supp. at 525. The court also said the prior-indebtedness criterion "circumvents the procedures and protections" that state law provides to both landlords and tenants. *Id.* at 526. Finally, the court cites Fletcher v. Housing Auth. of Louisville, 491 F.2d 793 (6th Cir. 1974), *vacated*, 419 U.S. 812 (1974), *reinstated*, 525 F.2d 532 (6th cir. 1975), to support its contention that the PHA acted improperly. 485 F. Supp. at 526. *Fletcher* is analogous to *Ferguson* in that the court forbade housing authorities from using HUD-recommended criteria to cut costs. *See* notes 188-92 and accompanying text *supra*.

210. 490 F. Supp. 520 (S.D. Ohio 1980), *aff'd* No. 80-3441 (6th Cir. April 20, 1982). In a case decided after the *Urban Law Annual* had gone to press, another district court upheld the prior indebtedness criterion, citing *Baker* and *Vandermark* and distinguishing *Ferguson*. Kohl v. Housing Auth. of Bloomington, No. 80-3243 (C.D. Ill. May 3, 1982).

211. *Id.* at 527-28. The court rejected plaintiffs' reliance on the opinion of HUD's Boston counsel who determined that the PHA could not refuse to certify tenants who left public housing owing rent until they paid both rent arrearages and the landlord's attorney fees, and terminated all litigation on the matter. *Id.* at 528, n.58.

212. 490 F. Supp. at 528.

213. *Id.* at 528-33.

214. *Id.* at 529.

215. *Id.* at 530.

policy constituted a failure to provide adequate standards;[216] and second, that the post-denial hearing was inadequate.[217]

In *Vandermark v. Housing Authority of York*,[218] a federal district court in Pennsylvania also upheld the criterion of rejecting applicants who owe past rent.[219] In contrast to *Baker*, however, *Vandermark* reached the same conclusion with almost unseemly ease. It found power for the criterion in statutory language that gives housing authorities the right to formulate preferences.[220] The court said the statute vests the maximum amount of authority with the local public agencies,[221] and requires "sound and efficient management programs and practices to assure rental collection."[222] Next, the court dismissed the plaintiffs' rather creative argument that the housing authority's policy constituted rulemaking, and that HUD had promulgated the rule without complying with the Administrative Procedure Act.[223] Finally, the court summarily dismissed the plaintiffs' equal protection and substantive due process arguments.[224]

After these decisions, particularly *Ferguson* and *Baker*, the outcome of direct challenges to the prior indebtedness criterion in the Section 8 existing housing context seems uncertain.[224a] Whereas applicants to subsidized housing projects had no legal basis to directly attack the prior indebtedness criterion, courts that follow *Ferguson* now may make direct challenges more appealing by narrowly limiting the guidelines housing authorities may use to select tenants. Con-

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216. *Id.*

217. *Id.* at 531-33. The trial court's decision was affirmed by the Sixth Circuit, No. 80-3441, Apr. 20, 1982, in an opinion that cites the Third Circuit's decision in Vandermark v. Housing Auth. of York, 663 F.2d 436 (3d Cir. 1981).

218. 492 F. Supp. 359 (M.D. Pa. 1980), *aff'd*, 663 F.2d 436 (3d Cir. 1981). In affirming the district court, the Third Circuit distinguished *Ferguson*, but in so doing, misstated the *Ferguson* conclusion. *Id.* at 440, n.2.

219. 492 F. Supp. at 362.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 362-63.

224. *Id.* at 363-64.

224a. Events subsequent to the URBAN LAW ANNUAL'S press date indicate a strong trend towards upholding the prior indebtedness criterion. The Sixth Circuit's affirmance of *Baker* (although the *Baker* court did not explicitly mention *Ferguson*) presumably overrules *Ferguson*, since the *Ferguson* court is within the Sixth Circuit's jurisdiction. In addition, a third case upholding the prior indebtedness criterion was decided, Kohl v. Housing Auth. of Bloomington, No. 80-3243 (C.D. Ill. May 3, 1982).

versely, these plaintiffs would probably fail when presenting a direct challenge in a jurisdiction adopting *Baker*. Courts using the *Baker* approach will provide housing authorities broad power to establish criteria for selecting applicants.

D. *Do Section 8 Existing Housing Applicants Have More or Fewer Rights Than Other Assisted Housing Tenants?*

The preceding survey of case law demonstrates that applicants to public housing clearly have more procedural rights than do applicants to subsidized housing projects. The Second Circuit's decision in *Holmes v. New York City Housing Authority*[225] requires public housing authorities to employ due process procedures when processing the applications of would-be tenants.[226] HUD regulations adopted subsequent to *Davis* and *Neddo* require housing authorities to provide informal hearings to rejected applicants,[227] and *Fletcher* and its progeny forbid housing authorities from giving preference to richer over poorer applicants.[228]

Conversely, while subsidized housing landlords must follow certain basic *Holmes*-type procedures when processing applications,[229] they need only offer minimal due process "interviews" to rejected applicants.[230] Subsidized landlords may also have greater leeway to use an applicant's income to screen out poor people whom they consider undesirable.[231]

By comparison, the relative position of applicants to Section 8 existing housing is not entirely clear. The results of pending litigation[232] will help to resolve the issues, but one important factor can already be identified: the scope of procedural protection will most likely depend on which tier of the admission process is involved. On the upper level of activity, where housing authorities process applications for Certificates of Family Participation,[233] the rights of applicants will probably resemble more closely the expanded rights of

225. 398 F.2d 262 (2d Cir. 1968).
226. *See* notes 91-99 and accompanying text *supra*.
227. 24 C.F.R. § 860.207 (a) (1980).
228. *See* notes 188-93 and accompanying text *supra*.
229. *See* notes 100-14 and accompanying text *supra*.
230. *See* notes 141-42 and accompanying text *supra*.
231. 24 C.F.R. §§ 880.603(b)(3), 881.603(b)(3) (1980). *See* note 196 *supra*.
232. *See* note 224a *supra*.
233. *See* notes 51-55 and accompanying text *supra*.

public housing tenants. Several courts have held that Section 8 existing housing applicants are entitled to due process hearings if they are denied Certificates of if their Certificates are terminated.[234] In addition, the court in *Solomon v. New York City Housing Authority*[235] required the housing authority to provide *Holmes*-type procedures when processing applications for the Certificates. Finally, the *Ferguson* court held that housing authorities cannot use an applicant's prior indebtedness to deny Certificates,[236] although *Baker* and *Vandermark* make it unclear whether that holding will prevail as precedent.[237]

In sharp contrast, potential tenants under the Section 8 existing housing program have virtually no procedural protection when they apply for a specific apartment.[238] These tenants' dealings with private landlords do not involve state action,[239] so that landlords do not have to follow *Holmes'* processing procedures, and rejected applicants are not entitled to due process hearings. Moreover, HUD's efforts to limit landlord discretion to reject automatically certain groups of people seem very much *pro forma*.[240] Thus, once they actually look for housing, Section 8 existing housing prospective tenants have fewer rights than even prospective tenants of subsidized housing projects.

On balance, prospective tenants of Section 8 existing housing have

234. *See* notes 148-59 and accompanying text *supra*.

235. No. 79 Civ. 3591 (S.D.N.Y., June 24, 1981).

236. *See* notes 202-07 and accompanying text *supra*.

237. *See* notes 210-24 and accompanying text *supra*.

238. As discussed previously, certified applicants apparently have not sued to demand *Holmes*-type procedures from private landlords who reject their applications. *See also* note 147 and accompanying text *supra*.

239. *See* notes 78, 89-90, and accompanying text *supra*.

240. HUD says it has never exercised sanctions against an existing housing landlord for discrimination. Telephone interview with Stephen Balis, HUD General Counsel for the Section 8 existing housing program, in Washington, D.C. (Feb. 12, 1981). One reason for this, however, may be that the sanction against a discriminatory landlord would be to cut off the landlord's subsidy. This would produce the ironic result of blocking discrimination by eliminating the aggrieved tenant's landlord, and thus the tenant, from the program. In view of the lack of anti-discrimination enforcement procedures, some groups (notably single parents) not surprisingly have difficulty finding landlords who will rent to them. According to HUD statistics, over three-fourths of single-parent households and over 50% of all minority households with Certificates of Family Participation fail to find an apartment within 60 days, the maximum search time that the regulations allow. Housing Affairs, Feb. 5, 1982, at 6-7.

less effective protection than do applicants to either public or subsidized housing projects. The full range of protections these applicants enjoy on the upper tier of activity offers little concrete benefit if a potential tenant cannot convert a Certificate of Family Participation into a dwelling unit. Yet, on this second level of activity, the Section 8 existing housing program offers a prospective tenant virtually no protection when dealing with landlords who refuse to rent. Closely related policy and legal reasons help to explain this situation. If courts were to impose upon these landlords a mandate to afford rejected applicants procedural and substantive protections, and to require landlords to explain their actions, *all* private landlords would face the same rules because any landlord is a prospective Section 8 existing housing landlord. As a policy matter, courts are not prepared to make such demands of landlords. As a legal question, the absence of state action precludes due process claims against private parties.

The case law lessons involving admissions to Section 8 existing housing are relevant to any future housing voucher program. If the Reagan administration follows through on its early signals to fashion a voucher scheme after the Section 8 existing housing program,[241] tenants will enjoy fewer procedural and substantive protections than did applicants to the older production programs.

IV. Case Law on Evictions From Section 8 Existing Housing in the Context of Prior Assisted Housing Cases

A. *Overview*

The controversy over evictions from assisted housing has been more vehement and more focused than that over admissions procedures. Several reasons explain why assisted housing tenants threatened by eviction have filed far more lawsuits than have disappointed applicants. The first, and most obvious reason, is that a family facing eviction is more likely to retain an attorney than is a family disappointed because it was denied assisted housing. Second, tenants' attorneys have placed more emphasis on eviction cases.[242] In addition to their concern for the human consequences facing a family

241. *See* notes 64-69 and accompanying text *supra*.

242. Telephone interview with David Bryson, attorney for the National Housing Law Project, in Berkeley, Cal. (Sept., 1981).

threatened with eviction, a number of tenants' attorneys have received reports of Section 8 existing housing landlords demanding payments from tenants "under the table."[243] These payoffs are in addition to the fair market rent that the tenant pays with the help of a federal subsidy.[244] Tenants' attorneys experienced in this type of litigation believe that without due process procedures that require a landlord to prove good cause to evict a Section 8 existing housing tenant, unscrupulous landlords would find it easier to evict tenants who refused to supply payoffs.[245]

All parties to assisted housing programs agree that procedures for eviction are vitally important. As is to be expected, however, they disagree on the necessary scope of that protection. Landlords argue that if they must become involved in lengthy, expensive due process hearings prior to evicting a "deadbeat", disruptive tenant, the success of an entire project can be jeopardized. In a vehement expression of landlords' concerns, authors J.S. Fuerst and Roy Petty wrote in 1977:

> No one would argue that the courts should deny due process rights to public housing tenants. In the rarefied and polite atmosphere of a federal courtroom, it seems the essence of justice that a tenant accused of antisocial behavior be given every opportunity to defend himself and avoid unfair sanctions; but, try explaining that to a group of worried tenants, anxious to evict one of their neighbors because he or his family threatens to harm their families, or makes their lives otherwise dangerous or unpleasant.
>
> One point all these cases overlook is the fact that public housing managers seek evictions only as an absolute last resort. Turnover is high enough in most projects without adding to it by unnecessary evictions; managers would prefer never having to evict anyone, and generally do so only when all other possible solutions have been exhausted. Housing managers know from experience that several disruptive tenants can empty out a whole floor of decent, responsible tenants—people who would rather take their chances on the private housing market than live amid squalid or dangerous conditions. A few delayed evictions can wreck an entire project, leaving the authority with none but problem families as willing tenants. Anyone who has seen these projects knows that they are little more than family prisons, and

243. *Id.*

244. *See* notes 51-54 and accompanying text *supra*.

245. Telephone interview with David Bryson, attorney for the National Housing Law Project, in Berkeley, Cal. (Sept., 1981).

it is hard to believe the European almshouses of the eighteenth century could have been any worse.[246]

Given the unanimity of opinion that assisted housing tenants have a right to procedural due process, the relevant cases concerning evictions have centered on the question of scope. As in the admissions context, the earliest cases concerned public housing tenants, focusing on whether their right to public housing was a property right for fourteenth amendment purposes.[247] Later cases involving the rights of subsidized housing tenants assume the existence of a property right, and explore the question of whether subsidized housing landlords' activities involved state action.[248] Most courts have ultimately found state action present, guaranteeing due process protections for tenants facing evictions from subsidized housing projects.[249] The courts, however, used a double standard (as they did in the admissions context)[250] to decide how much process subsidized tenants as opposed to public housing tenants should receive. They required housing authorities to offer public housing tenants fairly formal due process hearings,[251] but tended to ratify minimal due process procedures prior to evicting tenants from subsidized projects.[252]

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246. Fuerst & Petty, *supra* note 4, at 503.

247. *See, e.g.*, Caulder v. Durham Hous. Auth., 433 F. 2d 998, 1003 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (privilege or right to occupy publicly subsidized, low-rent housing is no less entitled to due process protection than other recognized rights and privileges); Escalera v. New York City Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970) (government cannot deprive private citizen of continued tenancy without affording him adequate procedural safeguards). Tenants' attorneys have sought a requirement of pre-eviction due process since Thorpe v. Hous. Auth. of Durham, 386 U.S. 670 (1967).

248. *See, e.g.*, Joy v. Daniels, 479 F.2d 1236, 1239 (4th Cir. 1973) (private landlord operating with county authorization and federal participation is sufficient state involvement to constitute state action for purposes of fourteenth amendment); McQueen v. Druker, 317 F. Supp. 1122, 1128 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971) (federal and state power, property, and prestige invested in landlord's authority over tenants places these actions within the scope of fifth and fourteenth amendments).

249. *Id. See* notes 285-92 and accompanying text *infra*.

250. *See* notes 91-109, 140-41, 167-96, and accompanying text *supra*.

251. *See* notes 303-07 and accompanying text *infra*.

252. *See* notes 308-10 and accompanying text *infra*. Housing authorities must offer fairly formal pre-eviction administrative hearings. *See* 24 C.F.R. § 866.58 (1980). In most jurisdictions, however, subsidized landlords need only prove good cause to evict in the course of state court eviction proceedings. *See id.* at §§ 880.607, 881.607.

These relatively straightforward standards for public housing and subsidized projects did not work efficiently when courts sought to apply them in the Section 8 existing housing program. Considerable controversy has surrounded the question of what procedures a landlord must afford to tenants threatened with eviction from a Section 8 existing housing unit. In the admissions context, the housing authorities' role in allocating Certificates of Family Participation (which clearly involves state action) and the landlords' decision to agree or refuse to rent to a particular tenant (which presumably does not) were easily distinguishable.[253] This simple division fails in the evictions context, where either the housing authority or the landlord, but not both, must take the lead in evicting a tenant from his apartment.[254]

Not surprisingly, pro-tenant forces wanted housing authorities, not private landlords, to be responsible for evictions of Section 8 existing housing tenants.[255] This would ensure the presence of state action, and so would guarantee tenants full due process rights.[256] Congress eventually accepted this position, writing into the Section 8 existing housing statute a requirement that housing authorities send all eviction notices.[257] Tenants' lawyers then turned to defining the scope of tenants' due process rights. Three separate questions developed: first, must the tenant receive a prior administrative hearing, or can due process requirements be satisfied during the state court eviction proceeding?[258] Second, does due process require that a landlord

253. *See* notes 147-59 and accompanying text *supra*.

254. *See, e.g.*, 24 C.F.R. § 882.215 (1980).

255. Telephone interview with Cushing Dolbeare, President and Executive Director, National Low-Income Housing Coalition, in Washington, D.C. (Feb. 12, 1982).

256. *See* notes 78, 91-99, 127-39, 247-52, 304-07 and accompanying text.

257. 42 U.S.C. § 1437f(d)(1)(B) (1976). HUD initially tried to evade due process requirements by giving housing authorities a minor, passive role, and shifting primary responsibility for eviction to the private landlords, 24 C.F.R. § 882.215 (1978). Tenants' lawyers successfully challenged this arrangement as a violation of the statute. *See* Jeffries v. Georgia Residential Finance Auth., 503 F. Supp. 610, 618 (N.D. Ga. 1980) (HUD regulation fatally conflicts with statute); Swann v. Gastonia Hous. Auth., 502 F. Supp. 362, 366 (W.D.N.C. 1980) (Congress gave public housing agency sole right to issue notice to vacate order to protect tenants' rights in eviction); Brown v. Harris, 491 F. Supp. 845, 847 (N.D. Cal. 1980) (regulation giving owner authority to issue order to vacate is contrary to clear and definite words of the statute). Both *Jeffries*, No. 81-7389 (11th Cir. June 14, 1982) and *Swann*, No. 81-1439 (4th Cir. Apr. 8, 1982) were subsequently affirmed.

258. *See* notes 303-13 and accompanying text *infra*.

prove "good cause" before eviction may proceed?[259] Third, does the "good cause" standard apply to lease nonrenewals as well as to mid-term evictions?[260]

Three federal cases have addressed these issues, and tenants have prevailed in two of the cases. In *Jeffries v. Georgia Residential Finance Authority*,[261] and *Swann v. Gastonia Housing Authority*,[262] different courts closely followed the case law developed in subsidized housing cases.[263] Together, *Jeffries* and *Swann* established: (1) that landlords must show good cause prior to a mid-term eviction;[264] (2) that a landlord may not refuse to renew a lease absent a showing of good cause;[265] and (3) that good cause in either situation may be proven in the state court eviction proceeding, making unnecessary a separate administrative hearing.[266] In a third, unpublished decision, a federal district court in Kentucky reached different conclusions. In *Cain v. Lexington-Fayette Urban County Housing Authority*,[267] the court distinguished prior case law and held that tenants facing evic-

259. *See* notes 314-35 and accompanying text *infra*.

260. *Id.* Two cases have discussed a fourth possible question. In *Gennaro v. Jonas Equities, Inc.*, No. C4-80-2258 (E.D.N.Y., Jan. 5, 1981), a private landlord allegedly punished a tenant for her participation in tenants' rights activities by refusing to accept Section 8 funding to further subsidize her apartment. The tenant argued that the landlord had to accept the subsidy. The court dismissed the suit for lack of subject matter jurisdiction, holding that HUD had no authority to force a landlord to continue to accept the subsidy. Background on *Gennaro* was obtained in an interview with Herbert Levy, HUD Associate Regional Counsel, in New York City (Feb. 12, 1982). *But see* Tann Realty Co. v. Thompson (N.Y. Civil Ct., Kings County, Sept. 30, 1981), *reported in* 9 HDR #20 (Oct. 12, 1981) (landlord must continue Section 8 benefits in its renewal lease if the expiring lease entitled the tenant to Section 8 subsidy). For a similar holding in the context of the Section 8 set aside program, see Ressler v. Landrieu, 502 F. Supp. 324 (D. Alaska 1980).

261. 503 F. Supp. 610 (N.D. Ga. 1980), *aff'd*, No. 81-7389 (11th Cir., June 14, 1982).

262. 502 F. Supp. 362 (N.D. N.C. 1980), *aff'd*, No. 81-1439 (4th Cir., Apr. 8, 1982).

263. *See* notes 285-92 and accompanying text *infra*.

264. 503 F. Supp. at 617.

265. 502 F. Supp. at 364, *aff'd*, No. 81-1439 (4th Cir., Apr. 8, 1982). Unlike the trial court in *Jeffries*, which based its good cause finding exclusively on constitutional grounds, the *Swann* trial court opinion cited statutory as well as constitutional grounds. The 4th Circuit's *Swann* opinion bases its good cause finding solely on statutory grounds..

266. 503 F. Supp. at 621. The Fourth Circuit's opinion in *Swann* reverses an unpublished trial court order that required a pre-eviction administrative hearing.

267. No. 70-178 (E.D. Ky. Dec. 19, 1980).

tion do not have due process protections because 1) they do not have a protected property interest, and 2) a private landlord's decision is not state action.[268]

The favorable decision in *Cain* did not end HUD's concerns that *Swann* and *Jeffries* ultimately would prevail as precedent, thus assuring that tenants would receive due process prior to eviction. After President Reagan's election, HUD proposed statutory language (that the Senate, but not the House adopted) designed to enact into law the agency's contention that Section 8 existing housing tenants have a property interest only in their Certificates of Family Participation, not in their apartments.[269] Thus, tenants would have absolutely no due process rights if their landlords sought to evict them. Congress eventually rejected this notion, adopting instead language that gives such tenants pre-eviction due process protections similar to those available to other assisted housing tenants.[270]

The remainder of this section elaborates the law on evictions from Section 8 existing housing in the context of prior assisted housing cases. It begins with a discussion of the case law on evictions of Section 8 existing housing tenants.[271] The section then evaluates new statutory provisions that affect tenant pre-eviction rights.[272]

B. *Case Law Issues*

1. Does Due Process Apply When Existing Housing Tenants Are Evicted?

The Section 8 existing housing program statute requires the public housing authority, not the private landlord, to send eviction notices to tenants.[273] Since its inception, HUD and many PHAs have dis-

268. *Id.*

269. *See* notes 336-38 and accompanying text *infra*.

270. *See* note 342 and accompanying text *infra*.

271. *See* notes 273-335 and accompanying text *infra*.

272. *See* notes 336-42 and accompanying text *infra*.

273. 42 U.S.C. § 1437f(d)(1)(B) (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357. This requirement originated in the federal government's older Section 23 leased housing program. *See* note 44 *supra*. When the Nixon administration introduced the Section 8 program in 1973, it encompassed only the new construction and substantial rehabilitation program. The Section 8 existing housing program emerged during the legislative process, and perhaps as an aside, Congress adopted the old Section 23 re-

liked this requirement.[274] Some PHAs do not want to send out eviction notices[275] because their counsel believe that once PHAs take such action, courts will require them to give tenants pre-eviction due process hearings similar to those that public housing tenants receive.[276] HUD and other housing authorities not only oppose any requirement that housing authorities send eviction notices; they also oppose giving Section 8 existing housing tenants *any* due process protection.[277] They argue that private landlords will not participate in the program if procedural requirements constrain their ability to evict.[278] Their legal argument for this position is that a tenant's property interest for due process purposes is in the Certificate of Family Participation, not the apartment.[279] Thus, they argue that a tenant having no property interest in the dwelling unit has no due process rights if evicted.[280]

HUD's reaction to Congress' distasteful requirement that PHAs send eviction notices was to draft a regulation that essentially evaded the requirement.[281] HUD's regulation allowed landlords to send eviction notices, provided that the local PHA had twenty days to veto the eviction.[282] Tenants suddenly facing the loss of procedural protection in eviction actions moved quickly to challenge HUD's rule.[283]

The analysis of the many cases[284] filed to challenge this regulation

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quirement that effectively gave Section 8 existing housing tenants more procedural protection than tenants had in the production-type projects.

274. Telephone interview with Cushing Dolbeare, President and Executive Director, National Low Income Housing Coalition, in Washington, D.C. (Feb. 12, 1982).

275. Telephone interview with Richard Y. Nelson, Jr., Deputy Executive Director National Association of Housing and Redevelopment Officials ("NAHRO") (July 1, 1981). Mr. Nelson said that PHAs believe they should not have to send eviction notices because it is the individual landlords—not PHAs—who are evicting the tenants involved.

276. *See* notes 303-07 and accompanying text *infra*.

277. HUD made this position clear in 1981. *See* note 337 and accompanying text *infra*.

278. Telephone interview with HUD attorney, in Washington, D.C. (July 1, 1981).

279. HUD made this argument in Cain v. Lexington-Fayette Urban County Hous. Auth., No. 78-179 (E.D. Ky., Dec. 19, 1980).

280. *Id.*

281. 24 C.F.R. § 882.215 (1980).

282. *Id.*

283. *See* note 284 and accompanying text *infra*.

284. *See, e.g.*, Jeffries v. Georgia Residential Finance Auth., 503 F. Supp. 610, 618

must begin with the extensive case law on evictions that developed after the federal district court holding in *McQueen v. Druker*.[285] *McQueen* held that a tenant in a subsidized housing project had the right to due process prior to eviction.[286] Other courts did not immediately accept this holding. The First Circuit eventually affirmed the lower court's decision,[287] but carefully avoided resting its decision on due process grounds.[288] Two other circuits subsequently held that tenants have no due process rights prior to eviction from subsidized housing projects because the program does not involve state action.[289] In 1973, the Fourth Circuit's opinion in *Joy v. Daniels*[290] reversed this trend and held that assisted housing tenants were entitled to due process.[291] Courts have subsequently cited *Joy* to support consistent holdings that state action is present in subsidized housing cases and HUD regulations provide tenants with due process

(N.D. Ga. 1980) (HUD regulation fatally conflicts with statute); Swann v. Gastonia Hous. Auth., 502 F. Supp. 362, 366 (W.D.N.C. 1980) (legislative history of Low Income Housing Act states that Congress gave the PHA sole right to issue notice to vacate order to protect tenant in eviction proceedings); Brown v. Harris, 491 F. Supp. 845, 847 (N.D. Cal. 1980) (conflict between statute and the implementing regulation is apparent, and rule is contrary to the statute's clear and definite words). In addition, many cases filed to challenge the HUD rule never resulted in final decisions. *See* Riebe v. Landrieu, No. 3-80-112 (D. Minn., filed May 16, 1980); Hutchinson v. Edgerton Highlands, No. 3-80-133 (D. Minn., filed Apr. 14, 1980); Simons v. Harris, No. 79-0691-LHB (N.D. Cal., filed Mar. 21, 1979); Melville v. Coos-Curry Hous. Auth., No. 78-979 (D. Ore., filed Oct., 1978); Haas v. Newport Hous. Auth., No. 79-CI-158 (Ky., filed Apr. 18, 1979). *Jeffries*, No. 81-7389 (11th Cir. June 14, 1982) and *Swann*, No. 81-1439 (4th Cir. Apr. 8, 1982) were subsequently affirmed.

285. 317 F. Supp. 1122 (D. Mass. 1979), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

286. *Id.* at 1129.

287. 438 F.2d 781 (1st Cir. 1971).

288. *Id.* at 784-85.

289. *See* Weigand v. Afton View Apts., 473 F.2d 545, 547-48 (8th Cir. 1973) (state action does not extend to a federally financed but privately owned apartment house merely because state assesses real estate taxes at a lower rate); McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (granting tenant in subsidized housing pre-eviction hearing would be altogether far too-reaching); *Contra* McLellan v. University Heights, Inc., 338 F. Supp. 374, 382 (D.R.I. 1972) (sufficient government involvement with landlord justifies application of fourteenth amendment principles).

290. 479 F.2d 1236 (4th Cir. 1973).

291. In *Joy*, the Court held that the participation of the federal government through its funding mechanism, and the use of state eviction proceedings, combined to create state action affording the tenants the right to procedural due process. *Id.* at 1239.

protections.[292]

HUD acceded to the judicial trend in 1976, changing its regulations to require due process for tenants prior to eviction from subsidized projects.[293] HUD, however, continued to resist changing its regulation requiring the landlord, rather than the PHA, to send eviction notices to Section 8 existing housing tenants.[294] In 1980, however, three federal district courts struck down this regulation as a violation of the statute.[295] In late 1980, HUD proposed a new regulation designed to conform to the statute as the courts interpreted it.[296] The proposed rule, requiring housing authorities to send all eviction

292. *See* Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974) (sufficient government involvement in subsidized housing program subjects landlords to fifth amendment); Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937, 942 (2d Cir. 1974) (private redevelopment company subject to same due process requirements as municipal authority); Short v. Fulton Redevelopment Co., 390 F. Supp. 517, 519 (S.D.N.Y. 1975) (involvement of three levels of government in two housing projects is sufficient to constitute state action under the fourteenth amendment); Anderson v. Denny, 365 F. Supp. 1254, 1258 (W.D. Va. 1973) (state approval of rent subsidies, and defendants' use of state eviction procedures are state action); Appel v. Beyer, 39 Cal. App.3d 7, 16-17, 114 Cal. Rptr. 336, 342 (1974) (federally assisted but privately owned housing project is not immune from procedural due process requirements in eviction). *Contra* Flamm v. Real-Blt, Inc., 168 Mont. 351, 355, 543 F.2d 190, 192 (1975), *cert. denied*, 425 U.S. 941 (1976) (receipt of federal benefits in the form of mortgage insurance and rent supplements under subsidized housing program statute does not make private corporation a state or federal agency for due process purposes).

293. 24 C.F.R. § 450 (1976). Although HUD specifically excluded Section 8 projects from the new regulation, in 1979 the agency eventually gave tenants in these production projects the same protection. *Id.* at §§ 880.607, 881.607 (1980).

294. 24 C.F.R. § 882.215 (1980).

295. *See* Jeffries v. Georgia Residential Finance Auth., 503 F. Supp. 610, 618 (N.D. Ga. 1980) (HUD resolution fatally conflicts with statute); Swann v. Gastonia Hous. Auth., 502 F. Supp. 362, 366 (W.D.N.C. 1980), *aff'd*, No. 81-1439, (legislative history of Low Income Housing Act states that Congress gave the PHA sole right to issue notice to vacate order to protect tenant in eviction proceedings); Brown v. Harris, 491 F. Supp. 845, 847 (N.D. Cal. 1980) (conflict between statute and the implementing regulation is apparent, and rule is contrary to the statute's clear and definite words). *Jeffries*, No. 81-7389 (11th Cir. June 14, 1982) and *Swann*, No. 81-1439 (4th Cir. Apr. 8, 1982) were subsequently affirmed.

296. HUD originally proposed a new rule designed to incorporate the court's interpretations of the statute. *See* 45 Fed. Reg. 72697 (1980). Later, the agency abandoned the rule, opting instead to attempt to change the Section 8 enabling statute to preclude the need for PHAs to send eviction notices by limiting tenants' entitlement to their certificates and excluding their apartments. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357.

notices,[297] pleased neither housing authorities (who opposed performing this duty) not tenants' lawyers (who wanted full due process procedures).[298] HUD never finalized the rule, evidently deciding to avoid the need for it by changing the Section 8 enabling statute.

2. What Process is Due? Good Cause Requirement and the Forum for Proving It.

The earliest eviction cases, involving public housing, focused on the specific procedures courts required when PHAs held pre-eviction due process hearings.[299] Later, however, in the subsidized housing context, the private landlord replaced the governmental actor (the PHA) formerly available to provide due process hearings.[300] The courts solved the problem that this situation presented by redefining due process requirements. Instead of defining due process as a specific set of procedures in a pre-eviction administrative hearing, as courts had done in the public housing context, they defined due process as a standard of proof.[301] A subsidized landlord satisfied due process requirements upon proving good cause to evict.[302] This solution still left unanswered the question of which forum the landlord could use to prove good cause. Both issues are discussed below.

a. *Can good cause be proved in a state eviction proceeding, or is a prior administrative hearing required?*

Tenants' lawyers ordinarily ask courts to require landlords to prove good cause in an administrative hearing prior to the time the eviction notice is sent.[303] In public housing cases, courts have granted this request. In *Escalera v. New York City Housing Authority*,[304] and *Caulder v. Durham Housing Authority*,[305] courts required PHAs to hold fairly formal due process hearings.[306] The public

297. 45 Fed. Reg. at 72697.

298. Telephone interview with HUD attorney, in Washington, D.C. (Feb. 4, 1982).

299. *See* notes 247, 251, 303-07 and accompanying text *supra*.

300. *See* notes 248, 252, 308-10 and accompanying text *supra*.

301. *See* notes 303-10, 314-16 and accompanying text *infra*.

302. *See* notes 308-10 and accompanying text *infra*.

303. *See* notes 304-07 and accompanying text *infra*.

304. 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970).

305. 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

306. *Id.* at 1004, 425 F.2d at 863.

housing cases tend to focus on whether the specific procedures utilized in an individual hearing were close enough to those required in a full-blown evidentiary hearing to fulfill due process requirements.[307]

Courts have once again applied a double standard to PHAs and subsidized housing landlords,[308] holding PHAs to a much higher level of due process than "private" landlords of subsidized projects. Most courts in subsidized housing cases have not required landlords to hold separate administrative due process hearings.[309] Instead, courts generally have held that such landlords may satisfy due process (as a matter of federal constitutional law) by providing good cause in state court eviction proceedings.[310]

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307. 433 F.2d at 1002; 425 F.2d at 862-63.

308. *See* notes 108-09 (processing applications for assisted housing), 140-45 (procedures for rejecting applications), and 194-196 (use of selection criteria) and accompanying text *supra*.

309. Numerous courts have held that subsidized landlords need not hold administrative hearings prior to eviction if a landlord can subsequently prove good cause at an eviction proceeding. *See* Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937, 946 (2d Cir. 1974) (private landlord entitled to serve eviction notice need not provide a further hearing because of improved conduct during the period consumed by the hearing and federal court proceeding); Joy v. Daniels, 479 F.2d 1236, 1243 (4th Cir. 1973) (prior administrative hearing is unnecessary, provided the tenant at some point receives a plenary judicial hearing); Anderson v. Denny, 365 F. Supp. 1254, 1261 (W.D. Va. 1973) (state court proceedings are sufficient to provide a constitutionally adequate means of affording due process of law); McQueen v. Druker, 317 F. Supp. 1122, 1131 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971) (state court provision for eviction hearing negates requiring any other opportunity); Appel v. Beyer, 39 Cal. App. 3d 7, 19, 114 Cal. Rptr. 336, 344 (1974) (administrative type procedures that avoid judicial hearings are not always accepted); Green v. Copperstone Ltd. Partnership, 28 Md. App. 498, 517, 346 A.2d 686, 697 (1975) (due process permits use of state's summary statutory eviction procedures of private project is determining factor requiring fundamental fairness to intended beneficiaries); Tompkins Square Neighbors, Inc. v. Zaragoza, 68 Misc. 2d 103, 104, 326 N.Y.S. 2d 665, 666 (1971) (administrative hearing required prior to eviction of tenant from state-financed redevelopment project); *modified in part*, 68 Misc. 2d 955, 328 N.Y.S.2d 262 (1972); *supplemented*, 69 Misc. 2d 301, 329 N.Y.S.2d 402 (1972); *modified*, 73 Misc. 2d 126, 341 N.Y.S.2d 627 (1973); *rev'd*, 43 A.D.2d 551, 349 N.Y.S.2d 395 (1973); *appeal dismissed*, 34 N.Y.2d 737, 313 N.E.2d 790, 357 N.Y.S.2d 497 (1974). *See also* Henry Knox Sherrill Corp. v. Randall, 33 Conn. Supp. 15, 17-18, 358 A.2d 154, 156 (1975) (panoply of governmental assistance and regulation is sufficient to find landlord's activities are state action).

310. In a few cases, courts have rejected the double standard and required landlords of subsidized projects to hold separate administrative hearings. Most of these decisions are in the New York State courts. New York courts seem less intimidated by imposing the burden of an administrative hearing on subsidized landlords because many *private* landlords in New York City are required to prove good cause to evict

This double standard has also applied to Section 8 existing housing eviction cases. PHAs had feared that if they sent out eviction notices to tenants, courts would follow the case law that required them to offer pre-eviction, administrative hearings.[311] The one opinion that addressed the issue prior to the time it was resolved by statute in 1981 should have eased this concern. In *Jeffries v. Georgia Residential Finance Authority*,[312] a federal district court in Georgia held that while PHAs must send eviction notices, they need not provide pre-eviction administrative hearings.[313]

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any tenant from a rent-controlled apartment. N.Y. UNCONSOL. LAWS § 8585-2 (1974). *See* Fuller v. Urstadt, 28 N.Y.2d 315, 318, 270 N.E.2d 321, 323, 321 N.Y.S.2d 601, 603 (1971) (state agency must give Mitchell-Lama tenants a "limited hearing" prior to eviction); Bonner v. Park Lake Hous. Dev. Fund Corp., 70 Misc. 2d 325, 329, 333 N.Y.S.2d 277, 281 (1972) (landlord of Section 236 project required to offer pre-eviction hearing); Tompkins Square Neighbors, Inc. v. Zaragoza, 68 Misc. 2d 103, 106, 326 N.Y.S.2d 665, 668 (1971), *modified in part*, 68 Misc. 2d 955, 328 N.Y.S.2d 362 (1972); *supplemented*, 69 Misc. 2d 301, 329 N.Y.S.2d 402 (1972); *modified*, 73 Misc. 2d 126, 341 N.Y.S.2d 627 (1973); *rev'd*, 43 A.D.2d 551, 349 N.Y.S.2d 395 (1973); *appeal dismissed*, 34 N.Y.2d 737, 313 N.E.2d 790, 357 N.Y.S.2d 497 (1974) (hearing requirement imposed on subsidized landlords no more burdensome than hearing requirement imposed by Rent Control Act on private landlords).

311. Most decisions have required housing authorities to provide pre-eviction, administrative hearings. *See, e.g.*, Glover v. Housing Auth. of Bessemer, 444 F.2d 158, 161 (5th Cir. 1971) (pre-eviction, evidentiary hearing required for public housing tenant); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (public housing tenants must receive hearing prior to decision to evict them); Escalera v. New York City Hous. Auth., 425 F.2d 853, 863 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970) (public housing tenants facing eviction must have the opportunity to present their case to impartial official in advance); Owens v. Hous. Auth. of Stamford, 394 F. Supp. 1267, 1272-73 (D. Conn. 1975) (public housing tenants facing eviction properly stated cause of action based on denial of due process); Brown v. Housing Auth. of Milwaukee, 340 F. Supp. 114, 115 (E.D. Wis. 1972), *aff'd*, 471 F.2d 63 (7th Cir. 1972) (that tenants in Wisconsin public housing receive a hearing in state court eviction action does not negate the need for procedural due process at time PHA sends notice of termination); Housing Auth. of Milwaukee v. Mosby, 53 Wis.2d 275, 286-87, 192 N.W.2d 913, 918 (1972) (HUD circular providing for pre-eviction administrative hearing applies retroactively to public housing tenants facing eviction). Current public housing cases are governed by 24 C.F.R. § 866.50 (1979), which requires a pre-eviction hearing quite independent of whether or not such a hearing is required by due process.

312. 503 F. Supp. 610 (N.D. Ga. 1980).

313. *Id.* at 621. The *Swann* trial court, in an unpublished decision and without any discussion, held in an order issued April 8, 1981, that a pre-eviction administrative hearing was required. *See* Swann v. Gastonia Hous. Auth., No. 81-1439, (4th Cir. Apr. 8, 1982). The Fourth Circuit reversed, holding that due process required only proof of good cause during state eviction proceedings.

b. *Good cause*

After choosing the forum, the second aspect of "how much process is due" to a Section 8 existing housing tenant focuses on what a landlord must prove in the due process hearing. The law since the decision in *McQueen v. Druker*[314] has required a subsidized landlord to prove good cause both before a mid-term eviction and when refusing to renew a tenant's lease.[315] HUD accepted the good cause standard in both of these contexts in subsidized housing, and incorporated the standard into its eviction regulations for subsidized housing.[316]

By contrast, courts and HUD have disagreed over the application of the good cause standard in proceedings to evict tenants from Section 8 existing housing. Three cases have addressed the issue. In *Jeffries v. Georgia Residential Finance Authority*,[317] the court held that a landlord must show good cause to evict a tenant in the middle of a lease term.[318] In *Swann v. Gastonia Housing Authority*,[319] the Fourth Circuit affirmed a North Carolina federal district court decision that a landlord could not refuse to renew a tenant's lease in the absence of good cause to evict.[320] *Swann* contradicts the holding in a third case, *Cain v. Lexington-Fayette Urban County Housing Authority*.[321] In *Cain*, a federal district court in Kentucky held that good cause is not required when a Section 8 existing housing landlord refused to renew a tenants' lease.[322] The *Cain* court accepted the defendant's[323] arguments that a Section 8 existing housing tenant's

314. 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

315. *Id.* at 1131. The good cause requirement originated in the classic, early due process cases. *See* Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

316. 24 C.F.R. §§ 880.607(b)(1)(iii), 881.607(b)(1)(iii) (1980). The agency has defined good cause as "material noncompliance with the lease," material failure to carry out an obligation under a state landlord-tenant act, or "other good cause." *Id.* at §§ 880.607(b)(1)(i-iii), 881.607(b)(1)(i-iii).

317. 503 F. Supp. 610 (N.D. Ga. 1980) *aff'd*, No. 81-7389 (11th Cir. June 14, 1982).

318. *Id.* at 617.

319. 502 F. Supp. 362, *aff'd*, No. 81-1439 (4th Cir., April 8, 1982).

320. *Id.* Slip op. at 7.

321. No. 78-179 (E.D. Ky., Dec. 19, 1980).

322. *Id.*

323. Although HUD has championed this argument before Congress, see notes 336-38 and accompanying text *infra*, the agency was not a defendant in this litigation.

property interest is limited to a Certificate of Family Participation;[324] it does not include the tenant's apartment.[325] The court added that if the tenant did have a protected property interest in the apartment, the absence of state action would negate any requirement of due process prior to nonrenewal of the lease.[326]

Swann and *Jeffries* clearly follow precedent while *Cain* does not. Courts have consistently held that good cause is required both prior to mid-term eviction and for lease non-renewals in the subsidized housing context.[327] Previous decisions have defined a tenant's prop-

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324. No. 78-179 (E.D. Ky., Dec. 19, 1980).

325. *Id.*

326. *Id.*

327. *See* Joy v. Daniels, 479 F.2d 1236, 1241 (4th Cir. 1973) (congressional policy of providing every American with decent home, and prohibiting arbitrary and discriminatory action against tenants justifies finding of property right in continued occupancy); McQueen v. Druker, 317 F. Supp. 1122, 1130 (D. Mass. 1970) (public housing tenant has status regarded as entitlement in living unit). No courts apparently have held that a tenant's property right ended with the lease. Numerous cases in nine jurisdictions, however, involving seven different state and federal housing authorities, have required due process for lease nonrenewals. *See* Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937, 943 (2d Cir. 1970) (tenant has right to continued occupancy of apartment despite having lease without renewal provision); Wilson v. Lincoln Redevelopment Corp., 488 F.2d 339, 340 (8th Cir. 1973) (private developer must provide tenants due process when terminating their tenancies); Joy v. Daniels, 479 F.2d 1236, 1241 (national housing policy creates in tenant a property right or entitlement to continue occupancy beyond expiration of lease); McLellan v. University Heights, Inc., 338 F. Supp. 374, 379 (D.R.I. 1972) (tenant has right to decent affordable housing, right not to be uprooted, right to stability as a resident, and right to be left alone); McQueen v. Druker, 317 F. Supp. 1122, 1129 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971) (statute expressly or impliedly gives assisted tenant a right to retain occupancy until cause exists for eviction); Green v. Copperstone Ltd. Partnership, 28 Md. App. 498, 516, 346 A.2d 686, 697 (1975) (tenant has property right of entitlement to continued occupancy absent cause to evict other than mere expiration of lease); Fuller v. Urstadt, 28 N.Y.2d 315, 317, 270 N.E.2d 321, 323, 321 N.Y.S.2d 601, 602 (1971) (subtenants do not have right to renewal of subleases, but cannot be denied renewal without rational cause); Hudsonview Terrace, Inc. v. Maury, 100 Misc. 2d 331, 332, 419 N.Y.S.2d 409, 410 (1979) (eviction requires cause other than mere expiration of lease); Tompkins Square Neighbors, Inc. v. Zaragoza, 68 Misc. 2d 103, 105, 326 N.Y.S.2d 665, 667 (1971) (PHA may not terminate monthly lease of tenant it finds undesirable absent providing notice of good cause and full hearing); Ivywood Apts. v. Bennett, 51 Ohio App. 2d 209, 214, 367 N.E.2d 1205, 1208 (1976) (eviction is permissible only after giving timely and adequate notice detailing reasons for termination, and an adequate hearing that reveals proper reason for eviction). The three cases in which courts have held that tenants were not entitled to pre-eviction due process based their holdings on findings that no state action was involved when subsidized landlords evict their tenants. *See* Weigand v. Afton View Apts., 473 F.2d 545, 548 (8th Cir. 1973) (summary eviction actions permissible where only state

erty right as the interest in living in a specific apartment.[328] Since both eviction and lease nonrenewals deprive the tenant of that right, he or she is entitled to due process in both contexts.

Two major reasons have emerged for this definition of the tenant's property right. First, courts have focused on the legislative history of the housing programs,[329] and on Congress' intent to give a decent house to every American.[330] Courts have regularly cited both of these factors as evidence that Congress intended to create an atmosphere of "stability (and) security" where families could live without fear of arbitrary eviction.[331] A second argument for this position on tenants' rights is that tenants have a reasonable expectation that under normal circumstances they will be permitted to remain in the housing indefinitely.[332]

HUD's official position is that it opposes a good cause standard, both in the context of lease nonrenewals and in mid-term evictions.[333] In fact, however, HUD is more willing to enter into settlements in which good cause is required prior to mid-term evictions than it is to settle when plaintiffs seek good cause prior to nonrenewal of a lease.[334]

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involvement in private housing consist of tax exemption); McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2nd Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (receipt of federal benefits in form of mortgage insurance does not transform private builder into a state agency for purposes of procedural due process); Flamm v. Real-Blt., Inc., 168 Mont. 351, 355, 543 P.2d 190, 192 (1975), *cert. denied*, 425 U.S. 941 (1976) (receipt of federal benefits in the form of mortgage insurance and rent supplements under the subsidized housing program statute does not make private corporation a state of federal agency for due process purposes).

328. *Id.*

329. *See, e.g.*, Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Swann v. Gastonia Hous. Auth., 502 F. Supp. 362 (W.D. N.C. 1980), *aff'd*, No. 81-1439 (4th Cir., Apr. 8, 1982).

330. 479 F.2d at 1240, *citing*, 12 U.S.C. § 1701(t) (1976).

331. McQueen v. Druker, 317 F. Supp. at 1130.

332. Swann v. Gastonia Hous. Auth., 502 F. Supp. at 366, *aff'd*, No. 81-1439 (4th Cir., Apr. 8, 1982). The court noted that *Joy* and other decisions determined that tenants had a reasonable expectation of retaining their assisted housing because landlords customarily renew leases absent some specific reason. *Id.*

Usually the subsidized housing cases such as *Joy* and *McQueen* draw first from the language of the statute and its legislative history. Courts then "bolster" their contentions with evidence that landlords customarily renew leases. *Swann* switches this order, suggesting that the legislative history bolsters the custom of renewal. *Id.* at 366.

333. Interview with HUD attorney, in Washington, D.C. (Feb. 4, 1982).

334. *Id.*

Although the decision in *Cain* vindicated the position of HUD and the PHAs, they remained sufficiently concerned about the contrary trial court holdings in *Swann* and *Jeffries* to ask Congress for corrective legislation.[335]

B. *Statutory Change*

HUD failed in two previous attempts to convince Congress to repeal the statutory provision that required PHAs to send Section 8 existing housing eviction notices.[336] In 1981, Congress acted but gave HUD less than it wanted. The agency had hoped that Congress would abolish due process requirements for tenants by writing into the statute a provision limiting a participant's property interest to the Certificate of Family Participation.[337] HUD's proposed language passed the Senate but not the House.[338] In the conference committee, conferees rejected HUD's proposed limitations on tenants' property interests in their Section 8 existing housing.[339] One possible reason for the rejection is that most PHAs did not share all of HUD's concerns about the issue.[340] Their goal was to eliminate the requirement that they send the eviction notices; they did not oppose the good cause requirement for evictions.[341]

The greatest division of opinion in the committee occurred over the

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335. *See* notes 336-41 and accompanying text *infra*. As a postscript to the *Jeffries-Swann-Cain* discussion, while these cases alone have resulted in decisions on "good cause", tenants' lawyers have filed numerous lawsuits to gain due process rights for Section 8 existing housing tenants by using a "good cause" argument. *See, e.g.*, Alexander v. Landrieu, No. 80-1321 (D. Col., filed Oct. 1, 1980); Fleming v. Landrieu, No. C80-1393A (N.D. Ohio, filed Aug. 5, 1980); Piretti v. Hyman, No. 79-622-K (D. Mass., filed June 23, 1979); Doscocz v. Alameda Co. Hous. Auth., No. 65975-8 (N.D. Cal., filed Apr. 23, 1979).

336. Telephone interview with David Bryson, attorney for the National Housing Law Project, in Berkeley, Cal. (Sept. 1, 1981).

337. HUD's proposed language read as follows: "The procedural and substantive rights of a tenant of Section 8 Existing Housing to occupancy of a particular unit are determined by the terms of the lease, in accordance with State and local law." S. REP. No. 97-139, 97th Cong., 1st Sess. 256, *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 527, 552.

338. H. CONF. REP. No. 97-208, 97th Cong., 1st Sess. 694, *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 1018, 1053.

339. *Id.*

340. Telephone interview with Richard Y. Nelson, Jr., Deputy Executive Director, NAHRO (July 1, 1981).

341. *Id.*

issue of applying the good cause standard to lease nonrenewals as well as to mid-term evictions. A markedly intelligent compromise produced the following language:

> i the lease between the tenant and the owner shall be for at least one year or the term of (the contract between HUD and the PHA), whichever is shorter, and shall contain other terms and conditions specified by the Secretary; and
>
> ii the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.[342]

Essentially, the landlord has two choices when deciding not to renew a lease. The landlord may continue in the Section 8 existing housing program only by proving good cause for refusing to renew a lease at a due process hearing. Alternatively, the landlord may dispense with the good cause showing and refuse to renew the lease for any reason allowable under state law if his preference is to drop out of the program.

This resolution, of course, is subject to abuse. In order to be rid of a tenant who continually complains about disrepair, or who refuses to make the illegal payoffs, a landlord may refuse to renew the lease, drop out of the program for one or two years, and subsequently attempt to reenter. It can only be hoped that most landlords will find such gimmicks not worth their trouble.

V. TENANTS' RIGHTS IN A HOUSING VOUCHER PROGRAM

The Reagan administration has made few details of its housing voucher program available.[343] It appears, however, that tenants' rights under such a program will resemble in certain basic respects tenants' rights in the Section 8 existing housing program.[344] One similarity between participants in the two programs will be their relationship to potential landlords. As with the holders of Section 8 existing housing Certificates of Family Participation, courts will probably find that a private landlord's refusal to rent to a voucher

342. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) *amending* 42 U.S.C. § 1437f(d)(1)(B) (1976).

343. *See* notes 56-69 and accompanying text *supra*.

344. *See* notes 147-59, 197-224, 232-40, 273-98, 311-13, 317-32, and accompanying text *supra*.

holder does not constitute state action.[345] Thus, courts will not require landlords to follow due process procedures when rejecting applicants,[346] nor will they limit landlords' discretion to reject tenants because of their poverty[347] or for any other lawful reason.[348] As a result, voucher holders will lack the due process and substantive protections that cases such as *Holmes*, *Neddo*, and *Fletcher* have given to public housing applicants.[349]

In contrast, applicants for housing vouchers probably will have many of the due process and substantive protections available to public housing applicants on the "upper level" of the voucher program (that is, in their relationship with the PHA in charge of allocating vouchers).[350] As in Section 8 existing housing, courts most likely will require PHAs to follow due process procedures both in allocating vouchers[351] and in providing a hearing to any applicant who is denied a voucher or whose voucher is rescinded.[352] It remains unclear whether PHAs will receive broad discretion to use criteria for allocating vouchers in addition to the basic eligibility standards. Whether courts hearing voucher cases follow *Baker* and *Vandermark* (which allow PHAs very broad discretion),[353] or *Ferguson* (which does not)[354] depends in part on how the housing voucher statute is written, and perhaps on whether future Section 8 cases follow *Baker* and *Vandermark*, or *Ferguson*.[354a] Ultimately, however, the holder of a voucher (like the recipient of a Section 8 certificate) has no place to live until a private landlord agrees to rent an apartment.[355] Thus, on balance, voucher holders seemingly will have less effective legal protection than do applicants to either public or subsidized housing.[356]

345. *See* note 239 and accompanying text *supra*.

346. *Id.*

347. *See* note 240 and accompanying text *supra*.

348. *Id.*

349. *See* notes 225-28 and accompanying text *supra*.

350. *See* notes 51-55 and accompanying text *supra*.

351. *See* notes 115-19 and accompanying text *supra*.

352. *See* notes 147-59 and accompanying text *supra*.

353. *See* notes 210-24 and accompanying text *supra*.

354. *See* notes 202-09 and accompanying text *supra*.

354a. *See* note 224a *supra*.

355. *See* note 55 and accompanying text *supra*.

356. For a discussion of the legal protections afforded to public housing applicants, see notes 91-99, 127-39, 182-93, and accompanying text *supra*. For a similar

The future of tenants' rights prior to eviction in a housing voucher program is difficult to foresee. Congress' decision in the Section 8 context to abandon its attempt to deny tenants all pre-eviction due process[357] has meant that the courts have not had to decide whether such an attempt, if successful, would be constitutional.

Courts may well have to confront this issue in the housing voucher context. The Reagan administration is currently considering abandonment of the rules establishing pre-eviction due process procedures in public housing.[358] Thus, the administration's voucher program possibly may also attempt to avoid pre-eviction due process requirements. Presumably, the administration would accomplish this end by limiting the definition of a recipient's property interest to the voucher, and excluding the apartment. Thus, the administration would attempt to win in the voucher context the battle recently lost in the context of Section 8.[359]

The strategy of defining recipients' property interest so as to preclude due process requirements is based on language in recent Supreme Court due process cases.[360] These decisions suggest that legislatures may define the nature of property interests in the governmental benefits they confer.[361] Justice Rehnquist first established this position in his plurality opinion in *Arnett v. Kennedy*.[362] In *Arnett*, the Court upheld the constitutionality of the Civil Service law that provides a post-dismissal "paper hearing" to a discharged government employee.[363] Justice Rehnquist's opinion rests on the theory that "where the grant of a substantive right is inextricably intertwined with the limitation on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[364]

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discussion in the subsidized housing context, see notes 101-14, 140-46, 194-95, and accompanying text *supra*.

357. *See* notes 336-42 and accompanying text *supra*.

358. *See* Washington Post, Aug. 13, 1981, at A27, col. 4.

359. *See* notes 336-42 and accompanying text *supra*.

360. *See* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

361. *See* notes 362-71 and accompanying text *infra*.

362. 416 U.S. 134 (1974). Chief Justice Burger and Justice Stewart joined the plurality, while the remainder of the Court divided into two concurring and two dissenting opinions.

363. *Id.* at 163.

364. *Id.* at 153-54.

A majority of the Court[365] disagreed with Justice Rehnquist's rationale. Justice Powell concurred in part with the result, but stated that the plurality "misconstrues the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee."[366] Later, however, in *Bishop v. Wood*,[367] a minority of the Court[368] accused the majority of "effectively adopting the analysis rejected by the majority of the Court in *Arnett*."[369] *Bishop* upheld the firing of a state policeman without a hearing on the grounds that the state never intended to give the policeman a property interest in his job.[370] Absent such a property interest, the court said due process was not required.[371]

The Senate's language stating that a Section 8 existing housing tenant has a property interest only in the Certificate, not the apartment,[372] was a bold attempt to call the Supreme Court's bluff. The Senate designed the language to persuade courts that Section 8 existing housing tenants must take the "bitter" lack of due process procedures with the "sweet" rent subsidy package.[373] If the Reagan administration were successful in summoning the votes to pass similar language in a housing voucher program, the Supreme Court would have to face the difficult question of how far Justice Rehnquist's "bitter with the sweet" principle can be taken. As Professor Lawrence Tribe has stated, once the Court has held that Congress may define the nature of the entitlement, it becomes difficult to define a consistent role for the courts and the constitution.[374] Could Congress overrule *Goldberg v. Kelly* simply by passing a law defining a welfare recipient's entitlement as a right (a privilege?) that is not a property right?

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365. Justice Blackmun joined in Justice Powell's concurring opinion. Justice White concurred in part and dissented in part. Justice Douglas, and Justice Marshall joined by Justices Douglas and Brennan, filed dissenting opinions.

366. 416 U.S. at 167 (Powell, J., concurring).

367. 426 U.S. 341 (1976).

368. Justices White, Brennan, Marshall, and Blackmun dissented in three separate opinions.

369. 426 U.S. at 353, n.4 (Brennan, J., dissenting).

370. *Id.* at 347.

371. *Id.* at 350.

372. *See* notes 336-37 and accompanying text *supra*.

373. S. REP. NO. 139, 97TH CONG., 1ST SESS. 231 (1981), *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 527.

374. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 532-63 (1978).

If the enabling statute states that voucher holders—unlike tenants in every other federally assisted housing program—have no right to a pre-eviction due process hearing, the Supreme Court may well have the opportunity to answer this question.