FIGHTING SECTION 8 DISCRIMINATION: THE FAIR HOUSING ACT'S NEW FRONTIER

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After showing a six-bedroom house in a middle-class, primarily white Somerville, Massachusetts neighborhood to a Section 8 subsidized family of eight, a landlord expresses concern that the house is not large enough. He proceeds to show them a house that he thinks will be more acceptable. This house, however, is in a primarily African American neighborhood and has only four bedrooms. The landlord cannot explain why this second, smaller house is more appropriate for the large family. He tells the Moving To Opportunity ("MTO")1 counselor assisting the Section 8 tenants that he hates the Section 8 program and that her clients "should go to where people accept Section 8."2

Introduction

Discrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the Fair Housing Act of 1968 ("FHA").3 Indeed, many housing advocates believe that the acceptability and legality of Section 8 discrimination enables landlords to use it as a proxy for other legally prohibited kinds of discrimination, such as that based on race, ethnicity, national origin, gender, family status, or disability.4

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1 Law Clerk to the Honorable Paul A. Magnuson, St. Paul, Minnesota; J.D., Harvard Law School, 1995; B.A., Swarthmore College, 1990. The author would like to thank Professor Duncan Kennedy for his insightful comments and invaluable advice.

2 Moving to Opportunity for Fair Housing, Pub. L. 103-120, § 3, 107 Stat. 1148 (1993) (codified at 12 U.S.C. §§ 1701z-11, 1721, 1735f-9; 42 U.S.C. §§ 1437f, 1490o, 9816, 11301, 12724). MTO, which is modeled after Chicago’s successful Gautreaux Program, see infra note 20, is intended to assist a small number of very low-income families move from public housing or project-based Section 8 housing located in high-poverty areas to private housing in low-poverty areas. A demonstration group of MTO participants will be provided with housing allowances and extensive support and counseling services and will be compared to a control group of traditional Section 8 recipients. Boston is an MTO city, along with Baltimore, Chicago, Los Angeles, and New York City. The future of the MTO program is uncertain, as Congress has proposed to cut its funding or even repeal the program. See S. Res. 2160, 104th Cong., 1st Sess., 141 Cong. Rec. S13,842-03, S13,855 (1995).

3 Interview with Sheri Williams, Manager, Moving to Opportunity Demonstration Program, Metropolitan Boston Housing Partnership, in Boston, Mass. (Apr. 18, 1995).


The Somerville landlord's deliberate concentration of Section 8 tenants into poorer, minority neighborhoods runs against every tenet of the Section 8 housing subsidy program. From the program's inception in 1974, Congress has touted Section 8 as a way to create economically integrated neighborhoods throughout the United States. Because poor African Americans are much more likely than poor whites to live in areas of high poverty concentration, policy debates surrounding the issue of poverty have necessarily implicated geographic desegregation strategies. 

5 See 42 U.S.C. § 1437f(a) (stating that Section 8's purpose is to "aid[] low-income families in obtaining a decent place to live and . . . promoting economically mixed housing"). Somerville is not the only city experiencing increasing concentrations of poor people within its boundaries. In Chicago's south suburbs, local officials and long-time residents complain that the Cook County Housing Authority has "dumped or steered the poor, predominantly black subsidy holders to their area," creating a so-called "Section 8 corridor." Bill Clements, Subsidized Housing, Destabilized Suburbs: Officials Confront the Shortcomings of Section 8, CENT. PA. BUS. J., Sept. 1992, at 18. Almost 90% of Cook County subsidy holders who received subsidies in the 1980s settled in or near this corridor. Id.

Similarly, residents in eastern Baltimore County fear that their communities are about to become home to a large Section 8 population. The MTO program is expected to move 285 poor families from inner city Baltimore to more economically mixed neighborhoods. Larry Carson & Pat Gilbert, Plan to Relocate Families from Inner City Fuels Fears, BALTIMORE SUN, July 31, 1994, at 1B. Although MTO was designed to disperse its Section 8 recipients throughout the metropolitan area, the white, working-class residents of some of these suburbs believe that the program is the first step in a plan to empty the contents of Baltimore's public housing projects into their communities en masse. Id. The residents' misguided outcry over MTO will only make the task of finding housing more difficult for the more than 3000 Baltimore County families currently benefiting from Section 8 funding.

6 See 42 U.S.C. § 1437f(a) (1988); cf. Mulroy, supra note 4, at 126 (arguing that the reason for increasing recipient's mobility through the program was to promote economic and racial integration).

7 See William J. Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy 58 (1987). According to William Julius Wilson and Alexander Polikoff, the dense concentration of very poor inner-city residents produces negative effects on their income levels, educational achievement, and employment rates. See, e.g., id. at 46–62 (arguing that social isolation, rather than cultural traits, causes negative effects in those areas); James E. Rosenbraun & Susan J. Popkin, Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs, in The Urban Underclass (Christopher Jencks & Paul E. Peterson eds., 1991); Alexander Polikoff, Housing Policy and Urban Poverty 2–8 (Apr. 1994) (paper prepared for the Center for Housing Policy, Washington, D.C.) (summarizing Wilson and others' arguments about the effects of socioeconomic and racial isolation).

Thus, Section 8's goals were subsequently expanded to include racial integration as well. Indeed, mobility programs, which usually employ Section 8 vouchers to provide inner city public housing residents with an opportunity to secure housing in the community of their choice, represent an important piece of the integrationist project. Presently, under the Clinton Administration, the Department of Housing and Urban Development ("HUD") is vigorously employing rental subsidies as part of its broader antipoverty strategy.

Created by the Housing and Community Development Act of 1974, the Section 8 Housing Assistance Payments Program enables low-income certificate holders to pay thirty percent of their income for a privately owned apartment that rents at or below a locally established Fair Market Rent ("FMR"). HUD, through local public housing authorities ("PHA") subsidizes participating landlords by paying them the difference between the tenants' contribution and the rental price. In return, landlords must keep units rented by Section 8 recipients in compliance with HUD's Housing Quality Standards ("HQS"). The newer Housing Voucher Program allows tenants more flexibility in finding apartments. The vouchers are valued at the difference between the FMR for the tenant's geographical area and thirty percent of the recipient's income. Tenants may rent an apartment for more than the FMR and pay more than thirty percent of their income; they may also find a unit for less than the FMR and pocket their savings. In order to receive payments from HUD, landlords must

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9 See Mulroy, supra note 4, at 126.
10 See Blair-Loy, supra note 8, at 1577.
11 See HUD Helps Move to the Suburbs, ST. LOUIS POST-DISPATCH, Sept. 9, 1994, at 6C (stating that the Clinton Administration considers the Section 8 "programs to have substantial potential in addressing the dangerous level of racial and class segregation in the United States"); see also U.S. DEP'T OF HOUSING & URB. DEV., THE REINVENTION BLUEPRINT 5 (Dec. 19, 1994) [hereinafter REINVENTION BLUEPRINT].
14 42 U.S.C. § 1437f(o) (1988 & Supp. V 1994). HUD has issued approximately the same number of vouchers as certificates. This Article treats Section 8 certificates and vouchers interchangeably unless otherwise indicated. The more generic term "subsidy" is used to refer to both. The differences may soon become moot, as the two programs are being consolidated. See 60 Fed. Reg. 34,660 (to be codified at 24 C.F.R. §§ 882.887, 982.983).
make their units conform to the HQS before they can rent to voucher recipients.\textsuperscript{17}

Despite its stated goals, the Section 8 program has not had its intended effect on segregation or concentration of poverty. A substantial minority of those applicants who are issued tenant-based subsidies are unable to find apartments in which to use them.\textsuperscript{18} Many recipients who do manage to participate in the program use their subsidies to pay for their current units or move within their own neighborhoods.\textsuperscript{19} The only programs that have produced any significant mobility are those that provide intensive counseling and assistance to subsidy recipients, such as Chicago's Gautreaux program.\textsuperscript{20} Those programs, which have been lauded

\textsuperscript{17} 24 C.F.R. §§ 887.207(b)(2), 887.251 (1995).

\textsuperscript{18} See U.S. DEP'T OF HOUSING & URB. DEV., HUD REINVENTION: FROM BLUEPRINT TO ACTION 28 (Mar. 1995) [hereinafter BLUEPRINT TO ACTION] (citing a 1994 study that found that 80% of Section 8 subsidy holders were successful in finding housing); John C. Weicher, The Voucher/Production Debate, in BUILDING FOUNDATIONS: HOUSING AND FEDERAL POLICY 265, 275 (1990) (reporting that in 1987, 60% of certificate holders and 65% of voucher holders were able to use their subsidies, with even lower percentages for minorities and large families). A 1970s demonstration project, the Experimental Housing Allowance Program ("EHAP"), produced even more disappointing results. The program, which involved giving housing allowances to 30,000 households in order to test rental housing supply and demand effects, generated little geographic mobility for residents and enabled fewer than half of all eligible households to use their subsidies. See Hartman, supra note 8, at 1565. For a description and analysis of EHAP, see EXPERIMENTING WITH HOUSING ALLOWANCES: THE FINAL REPORT OF THE HOUSING ASSISTANCE SUPPLY EXPERIMENT 2-7 (Ira S. Lowry ed., 1983) [hereinafter EXPERIMENTING WITH HOUSING ALLOWANCES]. See generally HOUSING VOUCHERS FOR THE POOR: LESSONS FROM A NATIONAL EXPERIMENT (Raymond J. Struyk & Marc Bendick, Jr. eds., 1981).


\textsuperscript{20} The Gautreaux program grew out of a 1976 Supreme Court decision that determined that the Chicago Housing Authority had deliberately located its public housing in areas with high concentrations of poor African Americans. See Hills v. Gautreaux, 42 U.S. 284 (1976). As a remedy, the housing authority developed a program to assist public housing residents and those on waiting lists through the use of Section 8 subsidies in moving to private apartments in low-poverty neighborhoods within the city or to mostly white suburbs. See James E. Rosenbaum et al., Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?, 71 N.C. L. REV. 1517, 1522 (1993) [hereinafter Rosenbaum, Kerner Commission]. An administering nonprofit agency "finds landlords willing to participate in the program, notifies families as apartments become available, and counsels them about the . . . move; counselors accompany them to visit the units and communities." Id. Since 1976, over 4500 families have participated and over half of them have moved to predominantly white, middle-class suburbs. See id.; Janet Koven Levitt, Rewriting Beginnings: The Lessons of Gautreaux, 28 J. MARSHALL L. REV. 57, 93 (1994). Gautreaux mothers are able to find employment more easily than their counterparts who remained in Chicago, and their children do better in school and are more likely to go to college or be employed after high school graduation. See James E. Rosenbaum & Susan J. Popkin, supra note 7, at 342; Rosenbaum, Kerner Commission, supra; James E. Rosenbaum et al., Social Integration of Low-Income Black Adults in Middle-Class White Suburbs, 38 SOC. PROBS. 448 (1991); James E. Rosenbaum et al., White Suburban Schools: Responsibilities to Low-Income Black Children: Sources
for their small size, make the movement of poor and minority tenants into middle-class neighborhoods barely perceptible to current residents. However, moving only small numbers of families does little to effect large-scale desegregation and poverty deconcentration.

The Section 8 program’s minimal success in promoting integration is attributable to the wide-spread discrimination against prospective Section 8 tenants by private landlords, especially in largely white, middle-class communities. Such discrimination can create large concentrations of Section 8 recipients, often resulting in slum conditions and community resentment. Housing experts assert that the Section 8 program itself exacerbates the problem and that “[t]he landlords have too much control over how things work because the federal law does not require landlords to rent to subsidy holders.” The program’s goal of dispersing poor tenants throughout a metropolitan area cannot be achieved if recipients can only find housing in neighborhoods that already contain large numbers of low-income residents. Nevertheless, some landlords maintain that their discrimination against Section 8 recipients is justified, arguing that poor families with subsidies often overcrowd apartments, damage property, and make too much noise. Many landlords also refuse to accept Section 8 tenants because they do not want to deal with the attendant government requirements, which include signing a one-year lease, removing lead-based paint from apartments, and meeting specified housing quality standards. Some landlords reportedly allow their apartments to fail inspections to avoid accepting a Section 8 tenant. Blatant, and legal, discrimination by the very landlords who are central to the success of the Section 8 program’s mobility strategy ensures its ultimate failure.

The pressing need to examine Section 8 discrimination has become even more urgent. HUD, in an effort to stave off complete dismemberment by both the newly configured Congress or the Clinton administration, has

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of Success and Problems, URB. REV., Spring 1988, at 28. For an in-depth analysis of Gautreaux and subsequent remedies and policies, see Levit, supra.

21 See Abraham, supra note 19, at 33.
22 See Mulroy, supra note 4, at 134–39; Levit, supra note 20, at 95–96 (noting that demand for Gautreaux program certificates far outweighs supply); Abraham, supra note 19, at 33; Schill, supra note 19, at 531. Other explanations for the Section 8 program’s failure include subsidy recipients who wish to remain in their own neighborhoods, an administrative fee structure that discourages PHAs from promoting moves to other jurisdictions, bureaucratic difficulties, lack of support services for tenants, rents in affluent communities that exceed the FMR, and units that fail to meet the HQS. See Mulroy, supra note 4, at 145–54; Abraham, supra note 19; Schill, supra note 19, at 547–51.
23 See supra note 5.
24 See Clements, supra note 5.
26 Wilson, supra note 26.
proposed to "reinvent" itself as a smaller, more streamlined, efficient agency. As part of its proposals, collectively entitled the *Reinvention Blueprint*, HUD seeks to convert operating subsidies for public housing authorities into tenant-based subsidies for all residents of public and assisted housing, who could either continue to reside in their current apartments or move to units in the private rental market.\(^{28}\) PHAs would be forced to compete for both subsidized and unsubsidized low-income residents.\(^{29}\) HUD hopes to break up the worst of the large troubled PHAs by demolishing thousands of severely deteriorated public housing units and relocating their residents with Section 8 certificates.\(^{30}\)

HUD's proposal will create a massive influx of Section 8 subsidy holders into the private rental market. Even in localities with well-run PHAs, a certain number of tenants will choose to move to privately owned apartments. A sizable percentage of residents of the hundred or so severely troubled PHAs will certainly move, and in the ten to fifteen large cities whose PHAs cannot be restored and whose buildings will be demolished, most if not all tenants will be forced to turn to the private market for their housing.\(^{31}\)

The purpose of the foregoing discussion is not to criticize HUD's proposal. This Article leaves that task to others.\(^{32}\) Rather, it is to set the stage for the argument that protection from discrimination based on Section 8 status is crucial if even a small portion of this country's low-income housing needs are to be met in the face of massive privatization of federal housing. If landlords can arbitrarily turn away low-income tenants who leave public housing with Section 8 vouchers, effectuation of HUD's *Reinvention Blueprint* will create not hope and empowerment, but homelessness and despair.

This Article proposes an amendment to the Fair Housing Act that would prohibit private landlords from discriminating against prospective tenants because of their status as rental subsidy holders. There is precedent for including recipients of government assistance as a protected category in federal legislation. For instance, in 1949, Congress amended the Housing Act of 1937 to prohibit discrimination, based on the receipt of public assistance, against prospective public housing tenants.\(^{33}\) Al-

\(^{28}\) *Reinvention Blueprint*, *supra* note 11, at 10.
\(^{29}\) *Id.* at 8-11.
\(^{30}\) *Id.* at 13.
\(^{31}\) HUD estimates that at least 100,000 units of public housing will be lost; critics believe that number will be far higher. See *National Hous. Law Project, The Changes for Public Housing Recommended in HUD's Reinvention: From Blueprint to Action* 7-8 (1995).
\(^{33}\) *Housing Act of 1949*, ch. 338, § 301(8)(c), Pub. L. No. 81-171, § 301, 63 Stat. 413,
though the measure was later superseded, it indicates that in the past Congress has been willing to protect recipients of public assistance against willful discrimination. More recently, Congress passed the Equal Credit Opportunity Act of 1974, which prohibits discrimination against credit applicants on the basis of, among other things, receipt of public assistance.

Part I of this Article demonstrates the acute need for such an amendment and critiques reasons commonly given by landlords for refusing to rent to housing subsidy holders. Part II presents federal and state statutory and judge-made protections that currently exist and evaluates their effectiveness. Operating under the assumption that the HUD proposal is implemented, Part III analyzes the implications of the proposed amendment and considers its economic effects on the housing market, landlords, subsidized tenants, and unsubsidized tenants, in a variety of hypothetical scenarios. Part III also shows that the poor currently bear the costs of discrimination and concludes that cost-spreading is a fairer and more equitable way to provide low-income housing.

I. The Need for Protections

A. The Prevalence of Discrimination

Landlords blatantly discriminate against Section 8. They told me plain and simple they don’t take Section 8; that’s their policy.

Although a large number of Section 8 recipients are able to use their certificates and vouchers to find housing, landlords—particularly those in wealthier communities—continue to discriminate freely against subsidy holders. Regardless of their eventual success or failure in finding hous-

35 15 U.S.C. § 1691(a)(2) (1995) (“It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program . . . ”).
36 Mulroy, supra note 18, at 275; BluePrint to Action, supra note 18, at 28. Out of a total of 1.5 million subsidies issued, at least 300,000 Section 8 households were unable to use their subsidies in 1994. Telephone Interview with Gerald Benoit, Director of Rental Operations, Department of Public & Indian Housing, U.S. Department of Housing & Urban Development (Apr. 24, 1995) (providing the 1.5 million figure).
37 See Mulroy, supra note 4, at 139 (finding that suburbs are often closed to Section 8 tenants and that many Section 8 recipients have given up on the idea that Section 8 subsidies can be used to find housing in an area of one’s choice); Interview with Nadine Cohen, Staff Attorney, Lawyers’ Committee for Civil Rights Under Law, in Boston, Mass.
ing, most recipients experience discrimination from at least one landlord because of their Section 8 status.39

Possession of a Section 8 subsidy marks its holder as a low-income person, a status that carries with it a multitude of negative stereotypes.40 Landlords ascribe undesirable characteristics to Section 8 tenants: they are irresponsible; they are bad parents; they damage property; and they will host loud parties.41 Yet, discrimination against Section 8 recipients seems to go beyond simple aversion to poor tenants. MTO counselors who help Section 8 tenants locate housing in Boston find that landlords discriminate against Section 8 tenants more often than against other low-income tenants, perhaps because of the stigma attached to accepting public assistance.42

Although there are no data comparing Section 8 success rates in states that have protective statutes with those in states that do not, anecdotal accounts from the MTO program suggest that provisions prohibiting discrimination against Section 8 tenants have a positive effect on Section 8 recipients’ ability to locate housing outside of high-poverty neighborhoods. MTO participants in Boston, Massachusetts are protected by such a statute43 while participants in New York City enjoy no such protection. As of April 1995, thirty of 106 participants in Boston had successfully located housing, whereas in New York, only one in twenty participants had been successful.44 In addition to providing MTO clients with an avenue for legal redress, the Massachusetts antidiscrimination statute allows MTO counselors to leverage the possibility of legal sanctions to convince landlords to participate in the program.45

(Apr. 11, 1995); Interview with Philip Tegeler, supra note 4; Interview with Sheri Williams, supra note 2.

39 See Mulroy, supra note 4, at 134 (citing a 1985 Boston study finding that 79% of participants were turned away by landlords who refused to participate in the Section 8 programs, despite the existence of a Massachusetts statute that prohibits discrimination against housing subsidy holders).

40 See id. at 136–37.

41 See, e.g., id.; Clements, supra note 5, at 7.

42 Interview with Sheri Williams, supra note 2. According to Sheri Williams, manager of the Boston MTO program, the negative stereotypes are accurate only in a very small number of cases. Williams believes that Section 8 tenants who attempt to move out of their high-poverty neighborhoods into unfamiliar surroundings are usually the most motivated to succeed and are unlikely to become problem tenants. Id.


44 Interview with Sheri Williams, supra note 2.

45 Id.
B. Proffered Reasons for Discrimination Against Housing Subsidy Holders

A rational landlord’s primary concern in selecting a tenant is verifying the tenant’s ability to pay rent for the term of the lease. She may also look for tenants of good character, so as to preserve the value of her property; however, because the exchange of money is the essence of the landlord-tenant relationship, a refusal to accept a paying tenant should signal a discriminatory motivation. Landlords cite a variety of reasons for refusing to rent to Section 8 tenants. The landlord protections provided in the Section 8 statute can overcome some of these justifications; other considerations simply are not serious enough to outweigh Section 8 tenants’ dire need for affordable housing. Still others present legitimate economic concerns.

The Section 8 statute provides landlords with considerable protections. Landlords often express concern that if they sign the required year-long lease with a Section 8 tenant, they will not be able to evict the tenant, even if the tenant damages the apartment. However, the Section 8 regulations permit landlords to terminate tenancies for serious violations of the lease terms and conditions, for violations of federal, state or local law, or for other good cause. Landlords can also recover up to two months’ rent, net of the tenant’s security deposit, from the PHA to pay for any damages caused by the tenant.

Landlords may also base misguided leasing decisions on the fear that they will be unable to secure first and last months’ rent and a month’s security deposit from tenants under a Section 8 lease. While Section 8

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47 Id. at 584. In the context of the FHA, landlords may employ income, credit history, and other objective, nonracial criteria in tenant selection only if the connection to business necessity is strong. Id. Landlords’ decisions may also depend on personal preferences that are not related to race or any other protected category. For example, one landlord successfully cited a tenant’s attitude and aggressiveness as reasons to refuse to rent to him. Id. at 583 & n.158 (citing Hamilton v. Miller, 477 F.2d 908, 910 (10th Cir. 1973)). Regardless of their reasons, landlords must be prepared to demonstrate that the criteria employed are rationally related to the legitimate end of securing rental payment. Id. at 584.
48 See, e.g., Linda Whitford, 13 Mass. Discr. L. Rep. 1001, 1027–28 (1991); Valerie Mercer, 10 Mass. Discr. L. Rep. 1370, 1389 (1988). Most of the cases cited in this Section are cases heard before the Massachusetts Commission Against Discrimination. Because there are only a few cases dealing with this type of discrimination in the regional reporters, this Article relies heavily upon local agency actions for case law.
50 See Mulroy, supra note 4, at 162 n.11. After the PHA pays the landlord, it draws up a repayment agreement with the tenant for repayment directly to the agency.
regulations prohibit tenants from leaving security deposits equal to or higher than one month's rent, tenants can be required to put down thirty percent of their income or fifty dollars, whichever is greater. Tenants and the PHA must pay the first month's rent as soon as the unit passes inspection and the lease is signed, while the lease guarantees landlords the last month's rent. In addition, if a tenant vacates the unit in violation of the lease, the PHA will pay the landlord rent for the portion of the month the unit remains vacant after the tenant leaves plus eighty percent of the total rent payment for an additional month if the apartment remains vacant.

Another frequently voiced landlord concern is that the FMRs are not high enough to cover the costs of financing and maintaining units. Again, the Section 8 statute and regulations contain provisions that address this concern. FMRs are adjusted at least annually to take into consideration increased costs in a given locality. A PHA may also approve a contract rent up to twenty percent higher than the FMR if the tenant can afford it and if the landlord can show that an increase is essential to meet higher operating expenses. If a landlord still cannot afford to continue a Section 8 tenancy despite these measures, she may terminate the tenancy for "good cause." Courts have not forced landlords to lower their rents so as to make them accessible to Section 8 recipients.

Indeed, if a landlord is concerned about nonpaying tenants, she would be better served, not harmed, by participating in the Section 8 program. In lower-income neighborhoods, non-Section 8 tenants often cannot meet their monthly rental payments as they struggle with rent burdens up to fifty percent or more of their incomes. Some landlords in low-income neighborhoods, to the detriment of the program's goals, deliberately fill their buildings with Section 8 tenants to guarantee rent payments.

claimed that he lost money when he could not collect the last month's rent in advance because he could not earn interest on that money; Jocelyn French, 12 Mass. Disc. L. Rep. 1041 (1990); Valerie Mercer, 10 Mass. Disc. L. Rep. 1370, 1389 (1988). In many states this argument would be moot, since landlords are often required to pay the interest on security deposits back to their tenants.

53 See Mulroy, supra note 4, at 162 n.10.
55 Mulroy, supra note 4, at 134–36.
58 24 C.F.R. § 882.215 (1995). Under HUD regulations, "good cause" includes a desire to rent the unit for a higher price. Other examples include a tenant history of disturbing neighbors or destroying property, criminal activity by a tenant involving physical violence, and the landlord's desire to reclaim the unit for personal use. Id.
60 See Peter S. Canellios, Against Aim, Rent Subsidies Cluster Poor in New Places, BOSTON GLOBE, Mar. 15, 1992, at Metro 1. Admittedly, when landlords can lease their
Landlords also offer reasons for discriminating that are not directly addressed by the statute. Yet, these concerns do not supersede Section 8 recipients' urgent need for housing. For example, landlords object to government involvement in the running of their properties. They claim that the bureaucratic requirements of Section 8 are inconvenient, or that they do not want to commit themselves to a lease. However, under at least one state’s antidiscrimination statute, all of these reasons have been held to be insufficient justifications for discriminating against Section 8 recipients. As the Massachusetts Commission Against Discrimination (“MCAD”) held in Whitford v. Ford, “[a] general aversion to government involvement cannot constitute a legitimate non-discriminatory reason for refusing to rent to a Section 8 tenant.”

MCAD, following the Massachusetts Supreme Judicial Court’s decision in Attorney General v. Brown, has asserted that landlords are not “obligated to accept a Section 8 certificate if to do so would cause [them] substantial economic losses,” but landlords rarely offer any evidence that the Section 8 requirements have caused them more than de minimis harm. Instead, landlords defend themselves against charges of Section 8 discrimination by reiterating the same negative stereotypes often applied to Section 8 recipients. One landlord said that he did not want to enter into a Section 8 lease because rental subsidy recipients lie, are alcoholics, keep pets, and are gay. These unfounded assertions are simply negative stereotypes; they cannot justify discrimination.

Landlords, at times, do raise substantial economic concerns when rejecting Section 8 tenants. As noted above, units must meet HUD’s HQS before the PHA will approve a Section 8 lease. Landlords have committed to middle-income tenants who have no problem paying their rent. Section 8’s economic benefits to landlords are somewhat diminished.

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64 Linda Whitford, 13 Mass. Disc. L. Rep. 1001, 1026 (1991); see also Christy Parker, 15 Mass. Disc. L. Rep. 1337, 1354 (1993) (holding that landlord offered no evidence showing that the administrative burdens of renting to Section 8 tenants were any more time consuming than administering to tenants who had fallen behind in their rents); Jocelyn French, 12 Mass. Disc. L. Rep. 1041, 1060 (1990) (holding that the mere assertion of inconvenience caused by Section 8 requirements is not a sufficient justification).


67 See, e.g., Christy Parker, 15 Mass. Disc. L. Rep. 1337, 1353 (1993) (holding that the landlord provided no proof that the Section 8 program was burdensome).


69 See supra note 26 and accompanying text.
plained that, based on the rents the market will support, they cannot afford to make the repairs necessary to bring a unit into compliance with those standards. Yet, most states require that apartments comply with state sanitary codes, and failure to meet the code subjects the landlord to criminal sanctions. Landlords should not be allowed to refuse to rent to Section 8 recipients because they would rather rent illegally to non-Section 8 tenants.

Landlords and residents are also concerned about the negative neighborhood effects associated with the arrival of Section 8 tenants. Some landlords fear that undesirable tenant behavior, such as damaging property or creating noise, will decrease the value of their property over time, sending the neighborhoods and property values into a downward spiral. In fact, the introduction of Section 8 tenants into a neighborhood may have the opposite effect. As part of the Experimental Housing Allowance Program ("EHAP"), modest repairs were made to a large number of units in some of the study’s worst neighborhoods. Although the actual revitalization effects of the repairs were largely invisible, many households perceived neighborhood improvement, especially in neighborhoods with high EHAP participation. These findings, although tentative and based on relatively small infusions of Section 8 subsidies into the studied communities, contradict the often-stated fear that an increase of Section 8 tenants into a neighborhood will produce a downward spiral and negative neighborhood effects. Clearly, more empirical investigation is necessary to determine the effects of an influx of subsidized tenants on more affluent neighborhoods.

In purely economic terms, discrimination against Section 8 tenants is not necessarily rational. The Section 8 statute assures landlords a steady stream of income and provides them with a multitude of financial protections. However, because of the pervasiveness of negative stereotyping and market failures such as informational asymmetry, emphasizing the protections and financial benefits of the Section 8 program will not necessarily change the mind of a landlord determined to discriminate.

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71 See Linda Whitford, 13 Mass. Discr. L. Rep. 1001, 1027–29 (1991); cf. Valerie Mercer, 10 Mass. Discr. L. Rep. 1370, 1389–90 (1988) (holding that a landlord could not refuse to rent to a Section 8 recipient because he wanted to rent to a non-Section 8 tenant whose lease would not provide for garbage pick-up when such garbage pick-up was required by state law). Whether housing codes are too strict to allow low-income landlords to remain solvent or whether the codes should be rigidly or selectively enforced is not addressed in this Article.
72 See Weicher, supra note 18, at 283.
73 See id. at 283–84.
In the face of such discrimination based on the source of a rental housing applicant’s income, protections provided by existing federal law are sorely inadequate. Only one recently enacted statute provides housing subsidy holders with any sort of protection against discriminatory treatment. Section 1437f(t) of the Housing and Community Development Act of 1987 prohibits private landlords who have previously accepted Section 8 tenants from discriminating against new tenant applicants because of their status as rental subsidy holders. Under that provision, landlords who have never leased to Section 8 tenants remain free to reject individuals on the basis of their subsidy status. Thus, Section 1437f(t) effectively creates a disincentive for landlords to rent to any Section 8 tenant because it burdens every subsequent rental with an antidiscrimination provision.

Although it suffers from this disincentive, judicial treatment of Section 1437f(t) in the few reported cases applying the new statute has been favorable to Section 8 holders. Despite defenses that the Section 8 contract terms were burdensome, and claims that the statute provided no private right of action, most courts have found that landlords who refused tenancy to Section 8 holders were in violation of Section 1437f(t). In one case, however, the Fourth Circuit accepted the landlord corporation’s assertion that it had refused to rent a unit to the plaintiff because of

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74 Cushing N. Dolbeare & Anne J. Stone, Women and Affordable Housing, in AMERICAN WOMAN 1990-91: A STATUS REPORT 94, 105 (Sara E. Rix ed., 1990); Clements, supra note 5, at 18 ("[F]ederal law does not require landlords to rent to subsidy holders.").


77 The statute provides that no landlord who has entered into a contract for housing assistance payments under this section on behalf of any tenant in a multifamily housing project shall refuse to lease any available dwelling unit . . . to a holder of a voucher . . . and to enter into a voucher contract respecting such unit, a proximate cause of which is the status of such prospective tenant as holder of such voucher.


78 See Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1277, 1283 (7th Cir. 1995) (stating that § 1437f(t) creates an implied cause of action for prospective tenants who are denied housing because of their status as Section 8 recipients and finding that defendant landlord violated the statute); Riddick v. Summit House, Inc., 835 F. Supp. 137, 143–45 (S.D.N.Y. 1993) (stating that plaintiff had an implied right of action and that landlord’s disagreement with HUD over contract terms should not deprive plaintiff of housing); Glover v. Crestwood Lake Section 1 Holding Corps., 746 F. Supp. 301, 308–09 (S.D.N.Y. 1990) (holding that § 1437f(t) creates a private right of action for Section 8 tenants against private landlords and that defendant landlord’s refusal to enter into a Section 8 contract with plaintiffs must be construed as a refusal to rent to a qualified Section 8 applicant, in violation of § 1437f(t)).
objectionable features of the Section 8 lease, and not because the plaintiff was a Section 8 recipient. That court rejected the argument that a landlord's refusal to enter into a Section 8 lease is necessarily discrimination based on subsidy-holder status.

Supplementing the minimal protection provided by Section 1437f(t), a number of states have enacted statutes that prevent private landlords from discriminating against housing subsidy holders. The provisions prohibit discrimination in the sale or rental of housing and protect prospective tenants from discrimination based on race, gender, religion, national origin, and marital status. Many of the statutes also include "source of income," "lawful source of income," or "status as a recipient of public assistance" as protected categories. Most statutes of this type specifically define "source of income" to include federal, state, or local housing subsidies. Those statutes that do not specifically define "source of income" have been targets for litigation over the phrase's meaning.

Other statutes specifically target discrimination based on housing subsidy status. Massachusetts provides the broadest protections for subsidized tenants, prohibiting discrimination based not only on status as a rental subsidy holder, but also on any requirements of the applicable

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79 See Peyton v. Reynolds Assoc., 955 F.2d 247, 252 (4th Cir. 1992) (finding that landlord's objection to one-year lease requirement imposed by local PHA was reasonable and not a pretext for discriminating against Section 8 recipients).

80 See id. at 253 (distinguishing Glover v. Crestwood Lake Section 1 Holding Corps., 746 F. Supp. 301 (S.D.N.Y. 1990)). However, the court pointed out that the shorter lease term requested by the landlord was allowed under the Section 8 provision, so the landlord's refusal to rent to the tenant was not justified. Id. at 250–51.


84 See, e.g., Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1282–83 (7th Cir. 1995) (finding that "lawful source of income" under the Wisconsin housing discrimination statute did not include housing subsidies because the subsidies have no monetary value independent of the voucher holder and the apartment sought).

85 See Me. Rev. Stat. Ann. tit. 5, § 4582 (West Supp. 1994) ("It is unlawful housing discrimination ... for any person furnishing rental premises ... to refuse to rent ... to any individual who is a recipient of federal, state or local public assistance, including ... housing subsidies primarily because of the individual's status as recipient ... ."); Mass. Gen. L. ch. 151B, § 4(10) (1984) ("It shall be an unlawful practice ... for any person furnishing ... rental accommodations to discriminate against any individual ... who is a tenant receiving federal, state, or local housing subsidies ... because the individual is such a recipient ... ."); N.J. Stat. Ann. § 2A:42-100 (West 1987) ("No person ... shall refuse to rent or lease any house or apartment to another person because of ... the source of any lawful rent payment to be paid for the house or apartment.").
public assistance, rental assistance, or housing subsidy program. California also provides extensive protections for subsidy holders through a very broad civil rights statute guaranteeing equal treatment for all people in almost all contexts. Although the statute does not specifically mention source of income as a protected category, the California Attorney General has determined that the statute would prohibit a refusal to rent housing based solely on the tenant’s receipt of public assistance.

Opponents of state antidiscrimination statutes argue that because the federal Section 8 program is voluntary, any state statute that prohibits discrimination against housing subsidy holders effectively mandates participation in the state subsidy program and is therefore preempted by the federal statute and is void under the Supremacy Clause of the United States Constitution. Courts that have considered this issue have held unanimously that the state statutes are not preempted by the Section 8 program. The federal scheme merely established the framework and funding for the Section 8 program; it did not preclude states from requiring participation.

It remains to be seen how well these statutes work to protect housing subsidy holders and how they will be applied by state and federal courts. Only three reported cases consider any of the statutes: Attorney General v. Brown in Massachusetts; M.T. v. Kentwood Construction Co. in New Jersey; and Knapp v. Eagle Property Management Corp. in Wisconsin. In Brown, the Supreme Judicial Court of Massachusetts decided that the defendant landlord should have the chance to prove that his reasons for refusing to rent to section 8 recipients were legitimate business reasons and that he was not discriminating solely based on the applicant’s status. In M.T. v. Kentwood, a landlord’s refusal to rent to a Section 8 recipient was held to violate both the federal statute, section 1437f(t), and the New Jersey antidiscrimination statute. The court in Knapp declined to apply Wisconsin’s protective statute to Section 8 recipients, despite the inclusion of “lawful source of income” as a protected category under the

91 See Brown, 511 N.E.2d at 1106; Soliman, 634 A.2d at 1060.
92 511 N.E.2d 1103 (Mass. 1987). Brown has lost some of its precedential value because it involved the interpretation of an earlier version of the current Massachusetts statute that required the landlord’s refusal to rent to be based solely on the applicant’s status as a recipient of a housing subsidy.
94 54 F.3d 1272 (7th Cir. 1995).
statute. This handful of cases has produced widely disparate results, suggesting that state legislation may not be the most effective tool for remediating housing subsidy discrimination.

Another line of attack on discrimination against Section 8 recipients finds its source in the Fair Housing Act. Several groups of Section 8 recipients have brought suits alleging that, because a majority of subsidy holders are people of color, landlords’ refusals to accept Section 8 subsidies have had a discriminatory effect on minorities. These claims have met with limited success. Nevertheless, at least one federal district court has found that a landlord’s refusal to accept Section 8 tenants had a disproportionate adverse impact on African American and Hispanic applicants as compared to white applicants. Relying on cases allowing recovery under a disparate impact theory and applying the burden-shifting paradigm of the Title VII employment discrimination line of cases, the court found that the plaintiffs made a prima facie showing of the discriminatory effect of the landlord’s policy of rejecting Section 8 applicants. The court further held that the defendant’s objections to renting to Section 8 tenants failed to meet the burden of proof under a disparate impact analysis and did not constitute a legitimate business defense.

Yet, six years later, in Knapp v. Eagle Property Management Corp., the Seventh Circuit refused to apply disparate impact analysis to a claim against a landlord for discrimination based on housing subsidy status. The plaintiff alleged that the Section 8 discrimination was a proxy for racial discrimination. The court determined that because landlord participation in the Section 8 program is voluntary, nonparticipation itself is a legitimate reason for refusing to accept Section 8 tenants. Moreover, the court reasoned that holding only those landlords participating in the Section 8 program liable for discrimination, and not punishing those who refused to participate, would only discourage participation in the Section 8 program. The court held neither participating nor nonparticipating landlords liable for racial discrimination under a disparate impact theory.

98 54 F.3d 1272 (7th Cir. 1995).
99 Id. at 1280–81.
100 Id. at 1280.
101 Id.
102 Id.
103 Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1280 (7th Cir. 1995).
As evidenced by these cases, a race-based disparate impact approach to Section 8 discrimination cases has fallen into disfavor with the courts. An amendment to the Fair Housing Act that included housing subsidy status as a protected category would eliminate the need to use a race or gender discrimination disparate impact analysis to remedy discrimination against housing subsidy holders.

III. Analysis of the Proposed Amendment

In the amendment to the FHA proposed by this Article, the phrase “status with regard to rental assistance” would be added in every instance where the categories protected by the FHA are enumerated. Thus, the amended FHA would thus prohibit discrimination in housing based on “race, color, religion, sex, familial status, national origin, or status with regard to rental assistance.” The new phrase would be defined as: “The condition of being a tenant receiving federal, state, or local rental subsidies.”

A. Who Bears the Costs of Antidiscrimination?: Effects on Individuals in a Static System

As set forth in Part II of this Article, because of the extensive landlord protections provided by the Section 8 program, Section 8 tenants cost landlords no more money than unsubsidized tenants. Therefore, landlords have no rational economic reason for refusing to rent to subsidy holders. If, however, it is assumed for the sake of argument that Section 8 recipients are higher-cost tenants—whether it be because of administrative fees, property damage, or elevated repair costs—then an antidiscrimination provision will shift the burden of who bears the costs of providing housing for subsidy recipients in the current private housing market. Specifically, rather than Section 8 subsidy holders bearing the entire burden of additional costs, any tangible expenses will be shared by both landlords and tenants. This section analyzes this cost-shifting through scenarios in which subsidy-based discrimination is permitted and those in which it is prohibited.

104 The amended phrase would be added to 42 U.S.C. § 3602(a), (b), (c), (d), and (e).
105 The definition would be added at 42 U.S.C. § 3602.
106 The following analysis considers only the immediate financial costs and benefits of adopting a nondiscrimination provision. The added monetary and nonmonetary benefits that can be gained from residing in an economically and racially integrated community are not included in the analysis.
107 See supra part I.B.
1. One-Neighborhood Model

Several initial assumptions must be made to construct a simple and stylized model that examines the impact of discrimination against Section 8 recipients. First, assume a single neighborhood with residents of two general income categories: middle-income and low-income. The two groups of residents are of about equal size. These residents are evenly distributed over a small geographic area, so that the decision to move between housing units is not affected by extraneous factors such as a change in commuting time or access to public education. A significant percentage of the low-income renters are recipients of Section 8 vouchers. Next, assume certain characteristics of the housing market. There are two categories of rental units within this neighborhood: those with lower rents have a lower level of amenities (“Level 1”) and those with higher rents have a commensurately higher level of amenities (“Level 2”). All units rent at or below the FMR and meet the HQS. With the help of their Section 8 vouchers, subsidized low-income tenants can afford to pay approximately the same rent as middle-income tenants. Finally, it must be assumed that there is no “black market” in which costs are passed off to consumers by covert and often illegal methods such as charging fifty dollars a month for keys.

In a scenario where there is a barely sufficient supply or even a shortage of Level 2 apartments to accommodate the demand of middle-income tenants, if Section 8 tenants do not present any additional costs to landlords and discrimination against them is permitted, then landlords can avoid renting to lower-income tenants without penalty. Yet, from an economic standpoint, if discrimination truly has no cost and rents are inelastic, the landlord should be indifferent to whom she rents the apartment as long as the rent is received. Mainstream economic analysis of the situation does not discount for discrimination unless it can be quantified. If the rents are flexible, then, assuming that Level 2 rents are already at the FMR, the addition of Section 8 subsidy holders will cause the equilibrium price for an apartment to rise above the FMR. In this case the Section 8 tenants will have to pay more than thirty percent of their incomes to rent Level 2 units.

The scenario is slightly different but equally detrimental to Section 8 tenants when they are posited as imposing higher costs on landlords—either in real terms, such as administrative costs of the Section 8 program,

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108 For the purpose of this analysis, assume that the housing subsidies are in the form of vouchers, not certificates. If the present analysis would result in alternate outcomes for certificate holders, that difference will be noted in the footnotes.

109 In this analysis, the HQS will be held constant. The effect of HQS and the implied warranty of habitability on the analysis will be discussed below. See infra part III.A.2.
or perceived terms, such as the stigma of poverty. Because of the posited higher cost of Section 8 tenancies and other landlord biases, landlords would prefer to rent to middle-income tenants rather than Section 8 tenants, given the same market rent. If discrimination against subsidy holders is permitted, most landlords will discriminate because renting to middle-income tenants creates a greater net benefit to landlords than renting to Section 8 tenants. Assuming that Section 8 tenants would prefer to rent the higher-amenity Level 2 apartments, in order to induce landlords to rent to them, they would have to pay more than the middle-income tenants in an amount greater than the cost differential between their tenancies and those of middle-income tenants. Unless Section 8 voucher holders are willing to pay more than thirty percent of their income for rent, landlords will fill their units with nonsubsidy holders.

If voucher holders choose not to pay more than thirty percent of their income for the Level 2 apartments, they must compete with unsubsidized low-income tenants for lower amenity Level 1 apartments. Assuming that there are transaction costs attached to renting to Section 8 tenants and that the current low-income tenants are typically paying their rent in full each month, the Section 8 tenants will again have to outbid the unsubsidized tenants to compensate landlords for the higher costs of renting to them. As before, when there are higher costs associated with subsidy holders in an economic model where rents are inflexible, landlords will always prefer nonsubsidized tenants. If prices are flexible and the new demand raises the equilibrium rent, the Section 8 tenants will be able to outbid the unsubsidized residents because their housing subsidies give them greater disposable incomes. In a static or inelastic market, the increased rents will not support new Level 1 construction because, despite the higher equilibrium price, the rents will not provide landlords with a large enough profit margin. Any increase in supply will be attributed to existing units that are currently empty and not on the market; the rise in equilibrium price will induce a small number of landlords to reintroduce units that were taken off the market in previous times because their marginal costs had exceeded the respective marginal benefits. However, the increased demand for Level 1 units will not be offset by an adequate increase in supply.

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110 Certificate holders, because their amount of contribution is fixed at 30% of their income, do not have the option of paying more for rent. They will thus not be able to rent Level 2 apartments at all if the rents are pushed over the FMR.

111 Subsidy recipients might decide not to pay more for the Level 2 apartments because the marginal utility of Level 2 amenities is less than the marginal utility of other personal expenditures.

Discrimination against subsidized renters in Level 2 housing negatively impacts unsubsidized low-income tenants as well. Faced with inflated rents resulting from competition with Section 8 recipients, unsubsidized low-income tenants will either be forced to pay a higher percentage of their income for rent and forgo other necessities, double up with family and friends to reduce rent costs, or become homeless. Middle-income tenants will not be affected because most Section 8 tenants will choose not to compete with them for Level 2 units. Landlords who avoid the higher costs by patently refusing Section 8 recipients or who rent to Section 8 tenants who will pay the higher costs will be unaffected as well. The increase in equilibrium rent of Level 1 units will in fact be beneficial to those landlords who perceive and impute a higher cost to subsidy holders when no such cost exists or is overestimated.

On the other hand, if discrimination against Section 8 recipients is prohibited and no black market develops to charge subsidy holders for their additional associated costs, landlords will not automatically be able to fill their units with middle-income tenants. The general increase in the number of individuals seeking Level 2 housing will lead to a rise in the equilibrium rent of Level 2 units. However, landlords will not be able to charge Section 8 tenants higher rents than they charge middle-income tenants to cover the increased costs. Theoretically, there should be little difference between middle-income tenants and Section 8 tenants in terms of access to housing, since both groups will be able to pay similar amounts in rent. Most Section 8 recipients will choose to live in Level 2 apartments to gain the higher amenity level, especially if HUD adjusts the FMR to reflect the overall change in equilibrium rents. The pressure on unsubsidized, low-income tenants will also be relieved because there will be less increase in demand for Level 1 units and more parity in the disposable incomes of those remaining individuals seeking Level 1 apartments.

Since Section 8 tenants will not have to outbid middle-income tenants in order to live in Level 2 units, they will receive more marginal return for their money than under a discriminatory regime. Instead of bearing the entire burden of the additional costs associated with Section 8 tenants, either real or perceived, or being barred from the Level 2 market entirely, Section 8 tenants will share those costs with all tenants and all landlords. Landlords may raise rents to cover the costs only slightly if at all, for a significant increase to maintain a higher profit margin will cause tenants, Section 8 or otherwise, to seek Level 2 units in other neighborhoods with more elastic supplies. In a one-neighborhood scenario, introducing an

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113 Besides prohibiting discrimination by landlords in tenant selection, the FHA also prevents landlords from discriminating against members of protected categories “in the terms, conditions, or privileges of sale or rental of a dwelling.” 42 U.S.C. § 3604(b) (1995).
antidiscrimination provision will shift the higher cost of providing housing for Section 8 recipients from unsubsidized low-income tenants and Section 8 tenants to owners of Level 2 units and middle-income tenants.

2. Housing Quality Standards

Even assuming Section 8 tenants do not themselves impose higher costs on landlords, the requirement that the units they occupy comply with HUD's HQS may increase the real cost of their tenancies. In contrast to other costs which might not materialize at all or may be minimized by the tenants' actions, landlords whose units are not currently in compliance with the HQS will face tangible costs of upgrading those units. Although the HQS are less stringent than the sanitary codes in many localities, the Section 8 statute requires landlords to maintain the units under the threat of inspections and possible sanctions for violations. The administering PHA must inspect the unit to be leased before the Section 8 tenant can occupy the premises. Once a lease has been granted, the PHA must inspect the unit annually; if a violation is found, the unit will be evaluated as often as is necessary to ensure that the owner is complying with the HQS. The PHA cannot make any housing assistance payments for a unit that fails to meet the HQS unless the owner promptly makes the repairs and the PHA verifies the improvements. If the unit does not meet the HQS through repairs, the PHA may terminate the contract with the landlord or terminate the housing assistance payments to the landlord even if the tenant continues to occupy the unit, resulting in a loss of revenue for the landlord and imminent eviction for the tenant. Despite the potential for lax enforcement of the HQS, violations are more likely to be discovered by the PHA through the Section 8 program than through state-level sanitary code inspections, which are primarily initiated by tenants.

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115 See Robin Powers Kinning, Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study, 21 FORDHAM URB. L.J. 159, 195 (1993) (arguing that a local movement of code enforcement in these localities will necessarily increase the supply of apartments available for Section 8 tenants).
117 Id. at §§ 882.211(b), 887.257(a).
118 Id. at § 887.261(a).
119 Id. at §§ 882.209(b)(1), 882.211(c), 887.261(a). If the PHA terminates the housing assistance payments, in most circumstances it must issue a new Section 8 certificate or voucher to the tenant to use elsewhere. Id. at §§ 882.211(c), 887.261(b).
120 See Schill, supra note 19, at 528.
121 An argument can be made that the HQS themselves are overly strict. HUD's Section 8 standards are "higher than any other developed by HUD, the Congressional Budget Office, or the Office of Management and Budget." Michael R. Tein, Comment,
Assume that the FMR for a given apartment does not provide a profit margin large enough to fund the repairs necessary to bring the unit into compliance with the HQS. It must also be assumed that the marginal cost of repairs will exceed any return for the higher quality apartment, eliminating any incentive for the landlord to voluntarily upgrade the unit. If landlords are permitted to discriminate against Section 8 recipients, only those whose apartments can be brought into compliance with minor repairs will rent to subsidy holders willingly. In a market with an excess supply of renters, landlords with units that need substantial repair to meet the HQS either will lease to tenants who can pay the rent necessary to cover the cost of the repairs or to unsubsidized low-income tenants who are unlikely to report housing code violations. In this discriminatory regime, Section 8 tenants will be turned away without sanction because the landlords will have no economic or statutory catalyst for bringing their units into compliance with the HQS. Section 8 tenants will find fewer apartments that can pass the HQS and thus will have a more difficult time using their rental subsidies.

For landlords who rent apartments at or below the FMR, the effect of an antidiscrimination provision is complex. Presumably, because they will not be able to reject arbitrarily subsidy holders or charge them additional rent to cover the repairs, the landlords will be required to bring every housing unit into compliance with the HQS. The fact that the unit does not currently meet the HQS will not exempt the landlord from complying. The cost of the repairs will either be borne completely by landlords, if an increase of rent would cause enough tenants to leave, or be spread across all renters through pro-rata rent increases. In theory, resources will be redistributed to Section 8 tenants, who will then be able to find apartments in good repair.

In practice, however, it may take so long for a landlord to make the mandated repairs that the tenant loses her Section 8 subsidy because she can find no other place to live. Furthermore, numerous commentators have argued that because low-income housing has a very narrow profit margin, any additional costs borne by the landlord through aggressive...
code enforcement may drive many affordable units off the market, thereby reducing the total amount of housing stock available to low-income renters.\textsuperscript{126} A competing school of thought asserts that consistent and vigorous code enforcement may in fact keep declining low-income housing viable longer than without the enforcement, thereby increasing the number of available rental units.\textsuperscript{127} Unsubsidized renters will perhaps benefit indirectly from improved housing conditions as well. As in the first analysis, Section 8 tenants, with the protection of the antidiscrimination provision, will share the cost of improved housing with both the landlords and the other renters in the market.

B. Will Prohibiting Discrimination Really Increase the Housing Available to the Poor?: Effects on the Market After the Reinvention

The above analysis examined the effects of the proposed antidiscrimination provision in a single neighborhood in the current private housing market, with a separate public housing sector. The landscape will change significantly if HUD's Reinvention Blueprint is implemented because a significant number of public and assisted housing tenants will be shifted into the private market armed with certificates and vouchers. Rather than jumping to the immediate conclusion that permitting discrimination will leave former public housing residents homeless,\textsuperscript{128} this Section explores the redistributinal effects of the proposed antidiscrimination provision under the Reinvention Blueprint regime.\textsuperscript{129}

\textsuperscript{126}See, e.g., Neil K. Komesar, Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor, 82 Yale L.J. 1175, 1175–91 (1973); Charles J. Meyers, The Covenant of Habitability and the American Law Institute, 27 Stan. L. Rev. 879, 889–92 (1975). But see Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093 (1971) (positing that under circumstances in which landlords are unable to pass on the costs of housing code maintenance to tenants through rent increases, income could be redistributed from landlords to tenants without jeopardizing the housing supply); Richard S. Markowitz, The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications, 89 Harv. L. Rev. 1815, 1828–30 (1976) (asserting that the benefits of housing code enforcement to poor tenants outweigh harms to landlords, taxpayers, and the poorest tenants). See generally Kinning, supra note 115, at 160–70 (reviewing the academic literature on the long-standing code enforcement debate).


\textsuperscript{128}This is the conclusion reached by at least one critic of HUD's Reinvention Blueprint. See National Hous. Law Project, A Critique of HUD's Reinvention Blueprint, 25 Housing L. Bull. 29, 33 (1995) (asserting that in several big cities, many former public housing residents will become homeless after their buildings are demolished).

\textsuperscript{129}This analysis assumes that the federal government is merely transferring existing public housing funds to the Section 8 program, not infusing additional money into the system.
Assume a three-neighborhood market marked by perfect class segregation. The quality and cost of rental units in these neighborhoods rise as the incomes of the neighborhood's residents increase. The residents of Neighborhood 1 (N₁) are low-income; the residents of Neighborhood 2 (N₂) are middle-income; and the residents of Neighborhood 3 (N₃) are upper-income. In this market, housing is provided through the classic filtering model: as upper-income residents build new luxury housing in N₃, unit prices for the formerly upper-income housing in N₂ fall and thus become affordable to middle-income residents. Those residents move in, changing the physical boundaries of their neighborhood in the process. In turn, the newly vacated middle-income housing filters down and becomes available at lower cost in N₂, also changing the physical boundaries of this neighborhood. Despite the income differences of the neighborhoods, apartments renting for less than the FMR and meeting the HQS are available at least in N₁ and N₂. Again, assume that with their subsidies Section 8 recipients can afford to pay about the same amount of rent as middle-income renters.

As in the first analysis, given the same market rent, landlords would prefer to rent to middle-income tenants rather than to Section 8 tenants because of the alleged higher costs associated with Section 8 recipients. The Section 8 tenants, all other things being equal, would prefer to rent in N₂, which they can afford with their subsidies. If discrimination is permitted, pure economics dictates that most landlords will discriminate against subsidy holders if there is a scarcity of supply. Section 8 tenants will have to outbid the middle-class tenants for N₂ apartments to compensate the landlords for their higher costs if they want to live in that neighborhood. This competition will require the voucher holders to pay more than thirty percent of their income to rent those units.

Section 8 recipients probably will not be willing to pay the elevated rents required to live in N₂ and will instead choose to reside in the lower quality housing of N₁. The quality of housing in N₁ will generally improve because Section 8 tenants will have more purchasing power than unsubsidized low-income tenants; landlords will be willing to upgrade the N₁ units in order to command a slightly higher profit. Section 8 recipients, however, are still not receiving the N₂ level amenity they would receive.

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130 See Kennedy, supra note 127, at 486–88.
131 Because HUD determines FMRs based on local housing markets, the FMRs for N₂ could be higher than for N₁, making it plausible that affordable apartments would be available in both neighborhoods. In the Chicago area, for example, the FMRs in the northern suburbs are higher than those in the southern and western suburbs. Clements, supra note 5.
132 Certificate holders, because their amount of contribution is fixed at 30% of their income, do not have the option of paying more for rent. They will not be able to rent N₂ apartments at all if the rents are pushed over the FMR.
for their money, absent discrimination. In addition, unsubsidized lower-income tenants are being priced out of the market. Residents of N2 and N3, on the other hand, remain essentially unaffected by this bidding war.

Against this background, assume that the Reinvention Blueprint is instituted and a large number of new Section 8 recipients move into the housing market, significantly increasing demand. If landlords are allowed to discriminate, the new subsidy holders will be forced to seek housing in N1. As long as N1 landlords do not perceive subsidy holders as creating additional costs, those landlords will willingly accept the new Section 8 recipients as tenants. The Section 8 tenants are in the same class as their usual tenants and bring with them a guaranteed income stream in the form of housing assistance payments. In fact, Section 8 tenants are preferable to many of these landlords’ usual tenants, who often have difficulty paying their rents in full every month. This sudden and substantial increase in demand for housing in N1 will drive up rents even further. At the same time, there will be no increase in housing supply because market rents will still be too low to support new private sector construction of N1 units, and new public construction will have been eliminated by the Reinvention. Many of the unsubsidized low-income tenants will be outbid by Section 8 tenants who can afford to pay the higher rents. Consequently, at least some unsubsidized low-income tenants will be forced to double up with friends or relatives, move to other low-income neighborhoods, or become homeless. Section 8 tenants will find adequate housing, but they will pay more for less amenity than they would receive absent discrimination, and they will not be able to choose freely where they will live.

133 A large number of Section 8 subsidies introduced into a housing market will cause rent inflation and, consequently, an increase in the FMR for that market. See Hartman, supra note 8, at 1568 n.31; Levi, supra note 20, at 91 n.174 (“When demand is stimulated, as it may be through the use of some type of market-oriented housing allowance, the nature of the housing market does not allow for quick supplier response. Therefore, a housing subsidy program that increased demand without effecting great increases in supply would merely lead to an increase in the cost of housing and, in reality, negate the effect of the housing allowance.”). But see EXPERIMENTING WITH HOUSING ALLOWANCES, supra note 18, at 26, 179–85 (observing that housing subsidies did not inflate marketwide housing costs in Green Bay, Wisconsin, or South Bend, Indiana); Larry J. Ozanne & James P. Zais, Communitywide Effects of Housing Allowances, in HOUSING VOUCHERS FOR THE POOR: LESSONS FROM A NATIONAL EXPERIMENT, supra note 18, at 207, 208–10 (finding that EHAP did not significantly increase housing demand, resulting in little, if any, rent inflation); Weicher, supra note 18, at 278 (“The findings are clear-cut. Existing housing subsidies have not resulted in rent inflation.”). Weicher did concede, however, that markets with a great deal of poor quality housing may experience a small amount of inflation due to the increased demand for housing meeting the HQS. Id. at 279. He also acknowledged that on a short-term basis, before the government or the private market had a chance to respond to the increased demand by increasing supply, rents would be driven up or down by the presence of Section 8 subsidy holders in a housing market. Id. at 280. Ozanne and Zais agreed that if housing subsidies are infused into a market in sufficient amounts to increase demand, rents are likely to increase. See Ozanne & Zais, supra, at 213–20.

134 See LEVEN ET AL., supra note 112, at 192–93.
Because N_2 and N_3 landlords will be allowed to discriminate against the new Section 8 recipients with impunity, N_1 will bear the entire burden of HUD’s public housing dispersal, to the advantage of N_1 landlords who will capture the full value of the public subsidy.

If discrimination against Section 8 tenants is prohibited when the Reinvention takes effect, N_1 and N_2 will essentially become one neighborhood. Section 8 recipients and middle-income renters will have similar amounts of money to spend on housing. Since landlords will not be able to discriminate against Section 8 tenants through pricing or by refusing to rent to them, N_2 will become open to subsidized tenants. Their increased costs, real and perceived, will be spread across both neighborhoods. Most Section 8 recipients will try to move into N_2 because of its higher amenity level, but some will choose to remain in N_1 because they do not want to pay higher rent or are satisfied with their current amenity level. Landlords will experience an increase in costs, which they will either absorb or spread across their holdings through rent increases.

If the Reinvention Blueprint is instituted, landlords will again benefit from the increase in demand and subsequent increase in rents. Unlike under a discriminatory regime, however, this increase in demand will be spread over two neighborhoods instead of one, resulting in smaller rent increases for individual units in N_1. Those subsidized tenants who decide to live in N_2 will also have to pay some rent increase, but not as much as they would have paid had they attempted to outbid middle-class renters to offset the costs of their tenancies in a discriminatory regime. Although unsubsidized lower-income tenants still face some risk of displacement because of rent increases, that risk is lower than if discrimination were allowed because the overall rent increases are less burdensome. Middle-income tenants, who were not affected when discrimination was allowed, now face rent increases as well because of additional demand for N_2 units.\(^{135}\) Because prohibiting discrimination effectively eliminates the distinction between N_1 and N_2, it will produce mobility and economic integration across those two neighborhoods, as the Section 8 program originally intended.

If the possibility of new construction is introduced, prohibiting discrimination benefits Section 8 recipients even more. In a market that allows discrimination, an increase in demand in N_1 alone will not affect new construction; the rents are not high enough to support private sector investment. When discrimination is prohibited, however, the increased

\(^{135}\) N_2 landlords, now required to accept higher cost tenants, will either absorb their added costs in the form of foregone profits or spread those costs across all apartments. As a consequence, residents of N_2 may pay more for their apartments than if a bidding war had not occurred. However, this slight increase will probably not significantly alter unsubsidized N_2 residents’ housing preferences.
return on renting for landlords produced by the influx of Section 8 tenants into the housing market will affect both Neighborhoods 1 and 2. The potential for profit may produce an economic incentive for new construction of private housing as well as the upgrading of current apartments. Some middle-income tenants will choose to move to new construction in N3 to avoid the changing character of N2; others will choose not to or will only be able to afford new construction in N3. Even if some “white flight” occurs, the result of the new construction is an increase in supply that eases the scarcity of housing in the market after the infusion of new residents. The increased supply counteracts some of the rent increases, making antidiscrimination less economically burdensome for all involved.

Clearly, this model is both highly stylized and unrealistic. People in the real world do not behave with such absolute conformity, and neighborhoods do not exist in isolation. But the model serves to illustrate which segment of the population bears the burden of discrimination. If discrimination on the basis of Section 8 status is permitted in the face of the impending public housing dispersal, most former public housing residents will be concentrated in low-income neighborhoods, displacing many of the unsubsidized, low-income tenants already residing there. Section 8 tenants will be denied the freedom of choice in housing that the Reinvention was intended to secure. This Article’s proposed antidiscrimination provision, by opening up middle-class neighborhoods, spreads the cost of housing the poor to those who can better afford it: middle-class renters and landlords.

C. Who Should Bear the Burden?

As the above analysis shows, on the assumption that Section 8 tenants are higher cost tenants, prohibiting discrimination against housing subsidy holders places a larger financial burden on landlords and wealthier renters than on the subsidy holders themselves. Even if it can be agreed that our society owes a duty of some kind to its poor, who should pay to fulfill that duty is and has always been hotly contested.

Some argue that forcing a redistribution of wealth from a small segment of the population, in this case landlords and middle-class tenants, is unfair because it requires these smaller groups to shoulder a burden

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136 This shift in the housing market in Neighborhood 2 is an example of the arbitrage process. See LEVEN ET AL., supra note 112, at 192. Arbitrage is a process by which housing supply in a given market shifts from one submarket to another. The shift occurs either by households moving from one neighborhood to another, as with the new Section 8 tenants, or by a change in a particular “housing bundle” so that the neighborhood serves a different group of tenants. See id. In the hypothetical, the character of the housing available to middle-income residents in N3 changed, prompting them to support new construction.
that should be borne by all taxpayers through welfare payments and housing subsidies. Arguing against a provision in a San Jose rent control ordinance that allowed hearing officers to consider the hardship of a tenant when evaluating rent increases, Justice Antonin Scalia explained that:

"[The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps) . . . [This method of redistribution has been used because] "public burdens . . . should be borne by the public as a whole.""

Justice Scalia went on to assert that what is really a welfare transfer should not be treated like mere economic regulation because doing so disproportionately burdens certain groups instead of properly spreading the burden across society at large. Redistribution of wealth financed by certain segments of society is, however, a common element of American public policy. Minimum wage laws and laws limiting the formation of monopolies are both mechanisms of redistribution that transfer wealth from one sector to another instead of spreading the burden of redistribution across all of society. Similarly, laws requiring safe products and safe workplaces protect consumers and employees from harm at the expense of manufacturers and employers. Finally, rent control ordinances artificially limit the rents that landlords can charge low-income tenants.

In recent years, many doctrines of American property law have increased the duties of land owners, resulting at least theoretically in a corresponding decrease in the rights more traditionally associated with property ownership. Doctrines governing property use increasingly re-

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138 Id. at 22.

139 See Gia L. Cincone, Note, Land Reform and Corporate Redistribution: The Republican Legacy, 39 Stan. L. Rev. 1229, 1229–30 (1987) (giving examples of redistribution and stating that despite this country’s concern with the security of private property, “some degree of redistribution is . . . widely accepted as a necessary adjunct to our market-based economy”).

140 See, e.g., Pennel, 485 U.S. at 12–13.

quire owners to consider the possible effects on others of certain uses of their property.\textsuperscript{143} For example, the implied warranty of habitability creates a duty on the part of landlords to provide tenants with decent, sanitary living conditions and a corresponding right in tenants to such living conditions. The warranty requires landlords to expend their own resources to repair conditions that violate the local housing code, despite the fact that poor tenants cannot afford rent increases sufficient to pay for these repairs.\textsuperscript{144} In this way, income is redistributed from landlords to poor tenants.\textsuperscript{145} Relying on the special, on-going relationship between landlords and tenants, Professor Bruce Ackerman posits that slum landlords have a moral obligation to provide their tenants with decent housing, in spite of the fact that such a duty requires landlords to bear a heavier financial burden than the rest of society.\textsuperscript{146} Even Justice Scalia, who was adamant that landlords not be required to shoulder a burden that should be carried by society at large, was willing to require landlords to remedy tenants' problems to the extent that they cause those problems.\textsuperscript{147}

\textbf{D. Will the Statute Work in Practice?}

This analysis has discussed the distributional consequences of a perfectly enforced antidiscrimination law. As experience with the FHA demonstrates, the reality of enforcement is often far from ideal. The source of the well-documented ineffectiveness of the FHA in alleviating housing discrimination lies in its enforcement provisions and the lack of vigilance with which those provisions have been employed, not in the classes it protects or the types of discrimination it prohibits.\textsuperscript{148} Until it was amended in 1988, the FHA relied solely on individual complaints filed either in federal court or with the Secretary of HUD.\textsuperscript{149} Very few of the complaints filed with the Secretary led to any sort of adjudication.\textsuperscript{150} In those rare cases where claims were actually adjudicated, HUD has made little effort

\textsuperscript{143} See id.
\textsuperscript{144} See, e.g., Ackerman, supra note 126, at 1169–74.
\textsuperscript{145} See Singer, supra note 142, at 681.
\textsuperscript{146} See Ackerman, supra note 126, at 1170–72.
\textsuperscript{147} Pennel v. City of San Jose, 485 U.S. 1, 22 (Scalia, J., concurring in part and dissenting in part) (arguing that landlords' responsibility for high rents may justify rent regulation).
\textsuperscript{149} MASSEY & DENTON, supra note 8, at 196, 198–99.
\textsuperscript{150} See id. at 196–97 (stating that 1970s investigations found that "only 20% to 30% of complaints filed with the Secretary ever reached formal mediation, and nearly half of the complaints that did so remained in noncompliance . . . . HUD made virtually no effort to follow up or monitor compliance in the conciliation agreements it reached").
to monitor landlord compliance. As the risk of prosecution was low and the damages to be paid were small, the FHA had little deterrent effect.

In 1988, Congress amended the FHA to make it easier and more affordable for plaintiffs to bring cases. The amendments also increased the costs of discrimination, empowered HUD Secretaries to initiate investigations on their own and to file complaints with the Attorney General, required HUD to try cases before an administrative law judge if it found reasonable cause, and expanded the role of the Justice Department in enforcing the FHA’s antidiscrimination provisions. Despite these improvements, the prohibitively high costs of filing a private lawsuit still dissuades most victims of discrimination from pursuing their claims. As a result, even though an estimated two million incidents of housing discrimination occur each year, only about 400 fair housing cases were decided between 1986 and 1993. It is too soon to know if the 1988 amendments will have a significant effect on fair housing enforcement.

An amendment to the FHA that protects housing subsidy holders will undoubtedly encounter enforcement difficulties similar to those already experienced under the current FHA. To date, the “take one, take all” provision in the Section 8 statute, which provides similar, though more limited protection, has had little impact. As in the racial discrimination context, full enforcement of a strong statute cannot overcome deeply entrenched discriminatory tendencies because “[e]ach time that one discriminatory process has been suppressed . . . . a new mechanism has arisen to take its place.” Just as the FHA, even with the aid of stronger enforcement mechanisms, cannot prevent the racial hostility that perpetuates segregation, the proposed FHA amendment cannot totally eliminate discrimination against recipients of government housing subsidies. A statute that affects only selected actors cannot accomplish the “shaping [of] collected behavior” essential to eliminating discrimination.

151 Id.
152 Id. at 199–200.
154 See Massey & Denton, supra note 8, at 200.
155 See id.
156 See id. at 211.
157 See 42 U.S.C. § 1437f(t) (1988 & Supp. V 1993) (prohibiting landlords who have accepted one Section 8 tenant from discriminating against subsequent tenants because of their status as rental subsidy holders).
158 See supra notes 76–80 and accompanying text.
159 Massey & Denton, supra note 8, at 211.
160 Cf. Sander, supra note 148, at 903 (stating that integration may actually increase racial hostility).
161 Id.
Problems of proof will also impede attempts to invoke the new law. Difficulties in proving Section 8 discrimination currently hinder legal services attorneys in Boston who are trying to use the Massachusetts provision. Landlords sometimes assert that they "don't take Section 8," but without such a straightforward indication, discriminatory intentions are difficult to detect. As with the FHA, if the proposed amendment passes, most discrimination will likely become much more subtle and difficult for their victims to pinpoint or even notice.

Without HUD oversight, a federal or state statute dictating landlord behavior cannot eliminate discrimination against Section 8 recipients. FMR levels must be reevaluated regularly by HUD to ensure that Section 8 recipients have realistic access to a broad range of neighborhoods. To increase the supply of apartments that qualify for Section 8 tenancies, HUD should consider lowering its HQS to the level required by other HUD programs. In addition, as Chicago's Gautreaux project has demonstrated, support services are crucial if Section 8 participants are to locate housing and cooperative landlords. Finally, Congress and state legislatures must increase funding for the Section 8 program and the services that support it.

All of this is not to say that an FHA amendment will have no effect. As the economic analysis above has shown, the amendment has the potential to ease the housing burden placed on the poor, especially in light of HUD's Reinvention Blueprint. Advocates must realize, however, that neither this amendment, nor any other single measure is a panacea. A broad combination of laws, policies, beliefs, and behaviors must be marshaled to achieve the goal of ensuring that subsidized tenants have the freedom to choose where they will live.

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162 Interview with Nadine Cohen, supra note 38.
163 See Massey & Denton, supra note 8, at 198.
164 Insufficient FMRs have been cited as one reason that Section 8 recipients have difficulty using their subsidies. In a 1985 Boston study, 77% of Section 8 respondents experienced landlords who refused to rent to them because of the low FMR levels set by the administering PHA. See Mulroy, supra note 4, at 134.
165 See Hartman, supra note 8, at 1565 (reporting that participation rates in EHPA soared when units rented to Section 8 tenants did not have to meet housing quality standards). This Article does not argue for elimination of the HQS but that HUD should explore the possibility of easing them somewhat.
166 See Mulroy, supra note 4, at 143, 144, 156; Rosenbaum, Kerner Commission, supra note 20, at 1522; Clements, supra note 5 ("[B]y not counseling its family clients on housing opportunities in other [less segregated] parts of the county and by not helping them find landlords in those areas willing to take the [Section 8] families, [the administering PHA] is helping maintain a racially segregated, dual housing market.")
Conclusion

Urban life is increasingly characterized by competition among different racial and socioeconomic groups, for community definition and for scarce resources, power, and opportunities.\textsuperscript{167} The allocation and provision of low-income housing is but one site of competition. Low-income tenants who are given rental subsidies to pay for housing should be able to use those subsidies in the neighborhoods of their choice; this was the goal of the Section 8 program’s creators. Frequently, the interests of Section 8 recipients in finding housing conflict with private landlords’ interests in freely choosing who will rent their property. In whose favor should the balance of rights tip? Who should bear the burden?

This Article has traced the economic effects of an amendment to the FHA that would prohibit discrimination against housing subsidy holders. When discrimination is permitted, Section 8 tenants bear the cost, usually in economic terms and always in a loss of choice in housing. When discrimination is prohibited, however, Section 8 tenants face lower rents and have more freedom of choice in where they live. The minimal costs of an antidiscrimination regime are borne primarily by landlords and middle-class renters. This type of redistribution may not be popular with politicians, but it does place the burden for meeting at least a portion of this country’s housing needs and integrationist goals on the shoulders of those who can better afford it.

\textsuperscript{167} See Calmore, \textit{supra} note 8, at 1489.