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Michael H. Schill

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# PRIVATIZING FEDERAL LOW INCOME HOUSING ASSISTANCE: THE CASE OF PUBLIC HOUSING

Michael H. Schill †

In recent years, due to budgetary constraints and two conservative presidential administrations, the White House and Congress have increasingly debated whether the public sector has grown too large and unwieldy. Frequently, the context for these debates is the issue of "privatization." Presidents, legislators, and academics have advocated that various activities currently performed by the government be shifted to non-governmental actors. In 1988, the President's Commission on Privatization recommended that the federal government privatize a broad array of services presently provided by the public sector, including education, the administration of prisons and the construction of low income housing.<sup>1</sup>

As part of its report, the Commission on Privatization recommended that Congress direct the United States Department of Housing and Urban Development ("HUD") to sell public housing units to tenants at discounted prices.<sup>2</sup> Legislation providing for the privatization of public housing has been considered by Congress since 1984.<sup>3</sup> In 1986, the House of Representatives passed a bill sponsored by then Representative Jack Kemp which would have

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† Assistant Professor of Law, University of Pennsylvania Law School. A.B. 1980, Princeton University; J.D. 1984, Yale University.

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<sup>1</sup> PRESIDENT'S COMMISSION ON PRIVATIZATION, *PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT* (March 1988).

<sup>2</sup> See *id.* at 17-18; see also Peter J. Ferrara, *The Department of Housing and Urban Development*, in *MANDATE FOR LEADERSHIP III: POLICY STRATEGIES FOR THE 1990s* 285, 295-96 (Charles L. Heatherly & Burton Yale Pines eds. 1989) (Heritage Foundation recommendation that public housing authorities be required to sell public housing to resident management corporations).

<sup>3</sup> See, e.g., H.R. 4628, 99th Cong., 2d Sess., 132 CONG. REC. H1986 (1986) [hereinafter H.R. 4628]; S. 3030, 98th Cong., 2d Sess., 130 CONG. REC. S12,177 (1984) [hereinafter S. 3030]; H.R. 6317, 98th Cong., 2d Sess., 130 CONG. REC. 10,364 (1984) [hereinafter H.R. 6317].

given a tenant of public housing the right to purchase his or her dwelling at a price not to exceed twenty-five percent of the unit's fair market value.<sup>4</sup> Although the legislation did not pass in the Senate, Congress enacted statutes in 1988 to facilitate the sale of public housing units to tenants. As the Commission on Privatization recommendations indicate, privatization of public housing remains at the forefront of housing policy debates. In fact, since his appointment as Secretary of the Department of Housing and Urban Development, Secretary Kemp has repeatedly reaffirmed his commitment to the sale of public housing, "pledg[ing] the full resources" of HUD to achieving that objective.<sup>5</sup>

In this Article, I argue that a federal requirement that public housing be sold to tenants at discounted prices is unfair, unwise and unconstitutional. In Part I of this Article, I survey and assess the normative arguments in favor of privatization. Although many proponents of privatization tend to overstate the failings of government, their arguments favoring an increased reliance on the private sector in the provision of public goods and services are well supported by theoretical and empirical evidence. In Part II, I investigate the proper role of the federal government in increasing the housing opportunities of low income households.<sup>6</sup> Among the issues addressed are (1) whether public sector intervention in the

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<sup>4</sup> See H.R. 4628 (adopted by House of Representatives as an amendment to H.R. 1, 132 CONG. REC. H3530-H3542 (daily ed. June 11, 1986)).

<sup>5</sup> See Jack Kemp, A Seven Point Agenda to Strengthen Resident Management and Public Housing Homeownership (Address to National Convention on Resident Management and Urban Homesteading), reprinted in 135 CONG. REC. E1077 (daily ed. Apr. 5, 1989). For further expressions of Secretary Kemp's support for the sale of public housing, see *infra* notes 152-53. On March 20, 1990, a group of Republican Party senators introduced the Bush Administration's first set of housing proposals, aptly named the "Homeownership and Opportunity For People Everywhere Act of 1990 (HOPE)." See S. 2304, 101st Cong., 2d Sess., 136 CONG. REC. 2788 (1990) [hereinafter HOPE]. Title I of HOPE would implement a mandatory public housing sales program. For a summary of the proposed public housing sales program, see *infra* note 152.

<sup>6</sup> The federal government also indirectly intervenes in the housing market on behalf of middle and upper income households, primarily through its support of homeownership. Federal tax law does not require the taxation of imputed rental income and permits homeowners to deduct real property taxes and mortgage interest payments. See, e.g., I.R.C. § 163(h)(3) (1988) (interest deduction); I.R.C. § 164 (a)(1) (property tax deduction); U.S. DEP'T OF TREASURY, BLUEPRINT FOR BASIC TAX REFORM 85 (failure to tax imputed income); Cushing Dolbeare, *How The Income Tax System Subsidizes Housing For the Affluent*, in CRITICAL PERSPECTIVES ON HOUSING 264 (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds. 1986) (criticizing tax subsidies for homeownership on equity grounds). In addition, the federal government facilitates access to real estate credit by supporting the secondary mortgage market and by providing mortgage insurance. See generally ANTHONY DOWNS, THE REVOLUTION IN REAL ESTATE FINANCE 234-62 (1985); MICHAEL LEA, HOUSING AND THE CAPITAL MARKETS (M.I.T. Housing Policy Project HP #8, 1988); Michael H. Schill, Real Estate Finance Law in the 1990's: The Implications of Changing Financial Markets (1990) (unpublished manuscript).

housing market is justified and (2) how that intervention can be efficiently and effectively structured. I begin by examining the problems that housing policy is designed to alleviate and conclude that, over the past fifty years, the nature of the housing problem has changed from one of insufficient quality to one of affordability. Although providing low income households with sufficient resources to afford habitable housing might be achieved by pure income transfers rather than subsidies tied to housing, market imperfections and constraints, as well as political considerations, support assistance earmarked to housing consumption.

At present, low income housing assistance employs a mixed system of public and private ownership. The federal government has subsidized the construction of over 1.3 million public housing units owned and operated by the public sector. A larger number of households are assisted by federal rent subsidies and vouchers that supplement the amounts paid by tenants for housing owned and operated by non-governmental entities. I examine in Part II whether the theoretical predictions of privatization proponents are consistent with housing market realities. I find that existing data support the prediction that housing allowances and vouchers are usually more efficient and at least as effective as government provision of public housing. I also present evidence from the history and operation of the public housing program to explain why government construction programs tend to be less efficient than programs that rely on the private sector. Although I conclude, based on this analysis, that future federal programs should rely primarily on subsidizing the purchasing power of tenants with respect to privately owned housing, I also describe certain circumstances under which public housing can efficiently and effectively achieve social objectives.

Although I advocate privatizing *future* delivery of housing assistance in Part II, I do not subscribe to recent proposals that would sell *existing* public housing to tenants at sharply discounted prices. To the contrary, in Part III, I argue that the normative objective of transforming low income tenants into homeowners is grounded on a series of tenuous arguments and questionable empirical assumptions. Furthermore, data collected by researchers on similar British privatization programs and my own interviews and visits to British council housing estates suggest that American proposals to sell public housing would be inequitable with respect to tenants of public housing and households that desire public accommodation. In addition, granting tenants the right to purchase their dwellings would likely lead to financial difficulties for public housing authorities and disinvestment of their remaining housing stock.

Despite the recent debate about privatization among policy-

makers and social scientists, surprisingly little discussion has addressed the legal context of efforts to transfer public functions to private actors. Those who have considered these issues generally conclude that the Constitution is not a significant barrier to privatization efforts.<sup>7</sup> In Part IV, I examine the constitutionality of recent public housing sales proposals. I conclude that, in addition to being unwise, current proposals to require public housing authorities to sell their housing to tenants at discounted prices would violate the fifth amendment to the United States Constitution. Depending on how one characterizes the property interest of the public housing authority in its stock of housing, requiring a public housing authority to transfer title to its property at a fraction of its value would constitute a taking of property without just compensation or an impairment of the authority's contractual rights.

## I

### PRIVATIZATION: A SURVEY OF NORMATIVE ARGUMENTS AND EMPIRICAL EVIDENCE

In recent years, commentators and policymakers have proposed numerous plans to reduce the size and scope of activities presently carried out by government. Frequently these proposals have been advanced under the banner of "privatization." In this section, I summarize the various meanings of privatization. I also examine the rationales offered by advocates of privatization for reducing the size of the public sector, and in some cases, shifting public sector responsibilities to the private sector.

Privatization typically refers to the shift of functions from the state to the private sector.<sup>8</sup> Importantly, privatization need not result in a reduction in government expenditure for social services.<sup>9</sup>

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<sup>7</sup> See Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 497-522 (1988) (examining legal consequences of privatization and suggesting that courts will be hesitant to invalidate the shift of functions to the private sector on ground that they violate individual entitlements). *But cf.* Robert C. Ellickson, *The Legal Dimension Of The Privatization Movement*, 11 GEO. MASON U.L. REV. 157, 161-62 (1988) (although courts are unlikely to find major constitutional barriers to privatization, in some contexts there will be barriers to both the achievement of privatization and the terms of privatization).

<sup>8</sup> See Paul Starr, *The Meaning of Privatization*, in PRIVATIZATION AND THE WELFARE STATE 15 (Sheila B. Kamerman & Alfred J. Kahn eds. 1989). In the context of privatization proposals, the private sector typically refers to all entities other than the state including individuals and groups of individuals who band together to undertake activities, regardless of whether they are motivated by profit; *cf.* Marc Bendick, Jr., *Privatizing the Delivery of Social Welfare Services: An Idea to Be Taken Seriously*, in PRIVATIZATION AND THE WELFARE STATE, *supra*, at 97, 112-15 (comparing privatization to nonprofit and profit-motivated firms).

<sup>9</sup> Nevertheless, shrinking the size of the public sector, including its role in financing social services, is frequently one motive of advocates of privatization. *See generally*

Privatization proposals are sometimes categorized according to whether the state continues to fund production. "Government load-shedding" occurs when the state divorces itself from both the financing and the production of goods and services; "empowerment of mediating institutions" refers to situations in which the state continues to finance public goods and services, but leaves their delivery and production to the private sector.<sup>10</sup>

The most frequent justification for privatization is the utilitarian concern of efficiency.<sup>11</sup> According to this view, a primary, if not overriding, objective of public policy is the maximization of aggregate individual utility. To the extent that resources currently being utilized one way can instead be used differently so as to increase aggregate utility or output, the former use is inefficient.<sup>12</sup> A large number of empirical studies that compare public and private sector provision of goods and services conclude that the private sector is the more efficient provider.<sup>13</sup> Two reasons commonly offered to ex-

STUART M. BUTLER, MICHAEL SANERA & W. BRUCE WEINROD, *MANDATE FOR LEADERSHIP II: CONTINUING THE CONSERVATIVE REVOLUTION* (1984).

<sup>10</sup> See Bendick, *supra* note 8, at 98. Examples of load-shedding include budget reductions and user fees. Examples of empowerment of mediating institutions include contracting out, vouchers and subsidies. The transfer of government assets to private ownership combines aspects of both types of privatization. Privatization may be an unfortunate term for describing the shift of functions from the state to other entities, especially in circumstances where the state continues to fund production. In many senses, the distinction between private and public is chimerical. Government is intimately involved in most of the activities undertaken by so-called private actors. Private entities and interests have great influence in the composition of government and the shaping of policy. Indeed, distinguishing private from public functions and activities is difficult and, in some instances, lacks content. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1101-1105 (1980) ("public" and "private" corporations share many similarities; distinction designed to protect private property); Joan Williams, *The Development of the Public/Private Distinction in American Law* (Book Review), 64 TEX. L. REV. 225 (1985) (examining historical roots of public/private distinction). Compare Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1580 (1982) (imperfectly voluntary nature of city justifies some differential treatment of municipalities and homeowners associations) with Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1590 (1982) (Ellickson's voluntary/involuntary distinction mirrors private/public distinction and should be rejected).

<sup>11</sup> Privatization proposals also are supported by those who believe that individual choice should be subordinated to collective decisionmaking only in limited circumstances. See Cass, *supra* note 7, at 462-63 (1988) (describing normative principles building upon the Lockean tradition).

<sup>12</sup> The criterion of efficiency that I utilize in this Article is Kaldor-Hicks efficiency. A proposed allocation of resources is Kaldor-Hicks efficient if those who are made better off by a change in the allocation of resources could compensate those who are made worse off. To meet the requirements of Kaldor-Hicks efficiency, actual compensation need not be paid. See GEORGE W. DOWNS & PATRICK D. LARKEY, *THE SEARCH FOR GOVERNMENT EFFICIENCY* 7 (1986). For a discussion of alternative definitions of economic efficiency, see FRANK H. STEPHEN, *THE ECONOMICS OF THE LAW* 41-63 (1988).

<sup>13</sup> E.S. SAVAS, *PRIVATIZING THE PUBLIC SECTOR* 111 (1982) ("those who believe on a *priori* grounds that private services are best can find considerable support for their position."); James T. Bennett & Manuel H. Johnson, *Public versus Private Provision of Collective*

plain the apparent inefficiency of the public sector are the absence of transferable property rights in government enterprise and the belief that the structure of the political process tends to give special interest groups disproportionate influence and leads elected officials and bureaucrats to maximize their personal utility rather than the utility of the public.

A major difference between the private and public sectors is the existence in the private sector of transferable property rights in the residuum of enterprise. The existence of such profits, in theory, provides a strong incentive for private entrepreneurs to minimize costs and maximize productivity.<sup>14</sup> In addition, in instances where the ultimate owners of an enterprise delegate management to agents, as in a corporation, the existence of property rights creates an incentive for the owners to monitor carefully the activities of managers to ensure that they are profit-maximizing.<sup>15</sup> Even where

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*Goods and Services: Garbage Collection Revisited*, 34 PUB. CHOICE 55, 61-62 (1979) (private sector is more efficient than public sector); Anthony E. Boardman & Aidan R. Vining, *Ownership And Performance In Competitive Environments: A Comparison Of The Performance Of Private, Mixed And State-Owned Enterprises*, 32 J.L. & ECON. 1, 26 (1989) (mixed and state-owned enterprises perform substantially worse than similar privately owned corporations); David G. Davies, *The Efficiency Of Public Versus Private Firms, The Case of Australia's Two Airlines*, 14 J.L. & ECON. 149, 165 (1971) (private airline run more efficiently than public owned airline); Paul W. MacAvoy & George S. McIsaac, *The Performance and Management of United States Federal Government Corporations*, in PRIVATIZATION AND STATE-OWNED ENTERPRISES: LESSONS FROM THE UNITED STATES, GREAT BRITAIN AND CANADA 77, 128 (Paul W. MacAvoy, et al., eds. 1989) (four public corporations operate at lower level of effectiveness than private sector enterprise in cost containment and productivity); cf. JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 78 (1989) ("In sum, when a well-specified contract in a competitive context can enforce accountability, the presumption of superior private efficiency in delivering public services holds true."); Janet Rothenberg Pack, *Privatization and Cost Reduction*, 22 POL'Y SCI. 1, 22 (1989) (interviews with city and county officials show that cost savings from contracting with private sector exist when services are labor intense and there is competition); see also *infra* text accompanying notes 93-119 (comparing public housing to vouchers and housing allowances). But cf. G. DOWNS & P. LARKEY, *supra* note 12, at 49 (critiquing comparisons of private and public enterprise, but concluding that "[t]he research, overall, provides some evidence that private firms are somewhat more efficient in the delivery of certain services."); JOSEPH STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 197, 210 (2d ed. 1988) (evidence that public sector is less efficient than private sector is "limited").

<sup>14</sup> See Louis De Alessi, *Property Rights and Privatization*, in PROSPECTS FOR PRIVATIZATION 24, 31 (Steve H. Hanke ed. 1987) (public sector actors will not minimize costs in similar manner as private sector entrepreneurs).

<sup>15</sup> See CENTRO VELJANOVSKI, *SELLING THE STATE* 85 (1987) ("private ownership plus remuneration by variable residual claims creates powerful incentives and a self-enforcing system of monitoring of costs and performance"); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 782 (1972) (person who receives residual rewards of firm will monitor productivity and prevent shirking); Lawrence W. Lovik, *Bureaucracy, Privatization, and the Supply of Public Goods*, in ENTREPRENEURSHIP AND THE PRIVATIZING OF GOVERNMENT 23, 25 (Calvin A. Kent ed. 1987) (entrepreneur is motivated to make advantageous exchanges because he or she has property rights in a portion of the expected gain of the enterprise). But see

individual property owners fail to monitor, the existence of a market for corporate control provides a safeguard against inefficient management.<sup>16</sup> Similar incentives for cost reduction and careful monitoring do not exist or exist in only an attenuated fashion in the public sector.<sup>17</sup> Individual taxpayers do not have a direct claim to the surplus created by government. In addition, because a taxpayer's interest in the government is not freely transferable, no market for control exists to monitor efficiency.<sup>18</sup>

A second approach to explaining why government seems to act in an inefficient manner examines how individual choices are aggregated in majority rule, democratic political systems and the nature of the incentives that motivate elected officials and bureaucrats. Due to collective action problems, narrow self-interested groups, frequently referred to as special interest groups,<sup>19</sup> have an advan-

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ADOLF A. BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 8-9 (1932) (separation of management from ownership reduces incentives for efficiency).

<sup>16</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Starr, *supra* note 8, at 28.

<sup>17</sup> See J. DONAHUE, *supra* note 13, at 51 ("The attenuation of ownership inherent in public undertakings may slacken the entire chain of agency relationships binding citizens with those who ultimately do the work."); Cass, *supra* note 7, at 482 (public monitoring is less effective than private monitoring and will lead to higher agency costs). Additional reasons why the public sector might be less efficient than the private sector are that governments are usually not subject to the threat of bankruptcy and the pressures of competition. See J. STIGLITZ, *supra* note 13, at 199-201; JOHN VICKERS & GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS* 45-77 (1988); Cass, *supra* note 7, at 468. Nevertheless, several empirical studies have compared private and public production of goods and services in markets where competition existed and found that the public sector was still less efficient than the private sector. See *supra* note 13.

<sup>18</sup> Some have also argued that private, as opposed to public, property rights promote the efficient use of resources due to the so-called tragedy of the commons. In the tragedy of the commons metaphor, collectively owned property is inefficiently utilized since the full costs and benefits of an individual's use of the property are not internalized. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Nevertheless, unlike the collective property usually associated with the tragedy of the commons, access to, as well as over- and under-utilization of, publicly held property can be regulated by the state to result in an efficient level of use. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 187 (1988). Sub-optimal use of resources might still occur due to the absence of public sector incentives to pursue efficiency and difficulties in collecting sufficient information to determine efficient levels of utilization. In addition, political factors might result in an inefficient level of regulation or pricing for publicly held resources. See, e.g., R. COOTER & T. ULEN, *supra*, at 189-90 (examples of inefficient government regulation of publicly owned resources); MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 49-50 (1986) (examining abuses attributable to government regulation of the broadcast media).

<sup>19</sup> For a discussion of the meaning of special interest as opposed to public interest, see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective On Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1579-80 (1988).



tage over diffuse majorities in influencing government.<sup>20</sup> Individual voters who favor a government policy or program benefitting a large number of citizens often lack the incentive to organize and expend resources in collecting information and lobbying public officials. Typically, the costs associated with organizing large numbers of only moderately interested voters are enormous. Because benefits cannot be limited to those who organize, but instead must be shared among a large number of citizens, each individual voter has an incentive to leave the expensive and time consuming task of political organization to others and “free ride” on their efforts. Small groups of intensely interested citizens, however, have much lower organizational costs and are likely to have an impact on the legislative process that is disproportionate to their numbers. Special interest groups can use this organizational advantage to influence the political process and increase their wealth at the expense of the majority. This rent-seeking<sup>21</sup> behavior results in inefficiencies associated both with the resources the interest groups expend in their efforts to influence public officials as well as their successful diversion of public resources to private interests.

In addition to rent-seeking, political economists have argued that the public sector tends to be inefficient because elected representatives and administrative officials face strong incentives to act inefficiently. Based on their assumption that a legislator’s primary motivation is to win reelection, these theorists predict that public programs will be designed to confer concentrated benefits on legislative districts rather than to deal with public problems in an efficient manner.<sup>22</sup> In addition, administrative officials are thought to pursue their private goals rather than the public interest by maxi-

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<sup>20</sup> See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>21</sup> See JAMES M. BUCHANAN, ROBERT D. TOLLISON & GORDON TULLOCK, *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3 (1980).

<sup>22</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 119-262 (1962) (government allocations of goods and services are not guided solely by maximizing benefits and minimizing costs); JOHN A. FERREJOHN, *PORK BARREL POLITICS* 46 (1974) (government mishandles public works projects by overestimating benefits and underestimating costs); Barry R. Weingast, *A Rational Choice Perspective On Congressional Norms*, 23 AM. J. POL. SCI. 245, 249 (1979) (representative government will act inefficiently by enacting programs which provide for concentrated benefits to all legislative districts). Several scholars also have suggested that majority rule voting systems may be incapable of consistent or rational behavior. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (examining the logic of choice which requires that social choice be responsive to desires of individuals); DENNIS C. MUELLER, *PUBLIC CHOICE* 185-201 (1979) (presenting five postulates which operate when society allocates commodities among individuals to maximize their collective welfare); Robert Inman, *Markets, Governments, And The “New” Political Economy*, in 2 HANDBOOK OF PUBLIC ECONOMICS 647, 681-92 (Alan J. Auerbach & Martin Feldstein eds. 1987) (discussing Arrow’s Possibility Theorem).

mizing the size and scope of their bureaus.<sup>23</sup>

The indictments of the public sector offered by property rights and public choice theorists are themselves subject to criticism. Even though taxpayers do not possess freely transferable property rights in government enterprise, they nonetheless have an interest in efficient government operation. To the extent that government operates more efficiently, their tax burdens will be reduced. Property rights theorists also tend to have an idealized model of the private sector. Private sector enterprises, however, are observed to engage in inefficient behavior which is often unchecked by the market for corporate control.<sup>24</sup> Public choice theorists, in turn, may overstate the self-interest of voters and public officials. Little room is left for altruistic or public-regarding behavior on behalf of either group.<sup>25</sup>

Nevertheless, significant empirical evidence indicates that, on the whole, the public sector does tend to be a less efficient provider of goods and services than the private sector. The reasons offered by property rights and public choice theorists seem to explain at least part of the cause of this differential. However, most economists and political scientists would also agree that, at times, government action is necessary not only to achieve efficiency, but also to attain other objectives, such as the society's consensus of distributive fairness. The private sector may be unable to realize efficiency due to market failures. Among the most commonly mentioned causes of market failure are the existence of monopolies, public

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<sup>23</sup> See WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1973) (bureaucrats do not always maximize general welfare; instead they often allocate goods and services according to personal interest); William Orzechowski, *Economic Models of Bureaucracy: Survey, Extensions and Evidence*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 229, 230 (Thomas E. Borcherding ed. 1977) ("[B]ureaucrats maximize utility by producing outputs above minimum costs."). Among the reasons members of the bureaucracy may be free to maximize personal objectives is the absence of readily available measures of performance and the insulation from termination provided by civil service laws. See J. STIGLITZ, *supra* note 13, at 202-03. The insulation provided to public employees by the civil service laws may also promote efficient government practices by enabling employees to administer their programs free from threats of political retribution.

<sup>24</sup> See generally J. VICKERS & G. YARROW, *supra* note 17, at 15-24; John C. Coffee, Jr., *Regulating the Market for Corporate Control*, 84 COLUM. L. REV. 1145 (1984). In addition, private sector inefficiency may be attributable to the existence of monopolies or oligopolies. See J. STIGLITZ, *supra* note 13, at 71-75.

<sup>25</sup> See AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 51-66 (1988) (citing evidence that people act unselfishly); Richard A. Musgrave, *Leviathan Cometh—Or Does He?*, in TAX EXPENDITURE LIMITATIONS 77, 92 (Helen F. Ladd & T. Nicholas Tideman, eds. 1981) ("Human motivation is too many-sided and complex to be captured by the caricature of bureau-grabbing officials which permeates the Leviathan literature."); Gary R. Orren, *Beyond Self-Interest*, in THE POWER OF PUBLIC IDEAS 13, 24-29 (Robert Reich ed. 1988) (people pursue goals other than self-interest); Starr, *supra* note 8, at 31 (voters are capable of recognizing collective interest separate from their own; checks and balances among branches of government will limit inefficiency).

goods, externalities, incomplete markets and imperfect information.<sup>26</sup> Where a market failure exists, it may be necessary for the public sector to correct it, using its powers of taxation, spending and regulation.<sup>27</sup> Furthermore, even in instances where no market failure exists, the public sector has a role in achieving objectives that may have little to do with economic efficiency. For example, although the strength of the conviction ebbs and flows over time, most people would say that a legitimate role for government is the redistribution of wealth.<sup>28</sup> The coercive power of government is usually thought to be necessary to achieve this objective.<sup>29</sup>

Many people committed to objectives other than economic efficiency, such as income redistribution, tend to view the advocates of privatization with a mixture of skepticism and hostility. Clearly, the property rights and public choice theorists paint a somewhat bleak picture of the public sector and may call into question the ability of government to achieve worthwhile social objectives. In addition, advocates of redistribution may, at least in some cases, justifiably suspect that the proponents of privatization have a political agenda that goes beyond efficient delivery of social services to shrinking the level of government intervention in all facets of society.<sup>30</sup> Some may also suspect that there exists an ideological bias in privatization to benefit the wealthy at the expense of the poor.<sup>31</sup>

Nevertheless, it would be shortsighted for those who believe, as I do, in redistribution of income to reject out of hand the insights of those advocating privatization based on a suspicion of ulterior motives. To the contrary, proponents of privatization provide us with the tools to analyze how social services can best be delivered. Although efficiency may not always be the sole or overriding objective of public policy, once a particular social objective is chosen, it

<sup>26</sup> See HARVEY S. ROSEN, *PUBLIC FINANCE* 52-54 (2d ed. 1988); J. STIGLITZ, *supra* note 13, at 71-80; Inman, *supra* note 22, at 653-63.

<sup>27</sup> See J. STIGLITZ, *supra* note 13, at 76. Some economists, however, argue that there is little reason to expect public sector intervention in many market failures to bring about a more efficient utilization of resources. See EDWIN S. MILLS, *THE BURDEN OF GOVERNMENT* 31-43 (1986).

<sup>28</sup> See, e.g., E. MILLS, *supra* note 27, at 60-61 (modest redistributive program could command near unanimous support). *But see* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 149-231 (1974) (extensive state is not justified based on a theory of distributive justice).

<sup>29</sup> JOHN F. DUE & ANN F. FRIEDLAENDER, *GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR* 121 (1973) ("In the absence of governmental intervention, no redistribution will take place because of the public good nature of the income distribution.").

<sup>30</sup> See generally *MANDATE FOR LEADERSHIP III*, *supra* note 2.

<sup>31</sup> See Alan Walker, *The Political Economy of Privatisation*, in *PRIVATISATION AND THE WELFARE STATE* 19, 28 (Julien Le Grand & Ray Robinson eds. 1984) ("Privatization of the social services has an important part to play in the recapitalization of capitalism both in reducing the size of the public sector and in providing ready-made markets for the private sector.").

would seem difficult to argue against maximizing the benefits generated by government intervention. In some instances, the government will be the most efficient service provider; in other circumstances, however, a larger number of people could be assisted by greater reliance on the private sector. In the next section of this Article, I will turn to the appropriate manner in which federal housing subsidies should be delivered to low income households.

## II

### FEDERAL HOUSING ASSISTANCE IN THE 1990s: INCREASING RELIANCE ON PRIVATE SECTOR DELIVERY

The housing needs of low and moderate income households have changed during the twentieth century. Although fewer people live in substandard dwellings today than at any time in our history, many households pay a burdensome proportion of their incomes for rent. This section examines the role of the public sector in dealing with the housing problems of lower income households. At the outset, I set forth a rationale for public sector intervention in housing markets. I next move from the general to the specific and address how the federal government should deliver housing subsidies.<sup>32</sup> In particular, I examine the public housing program and compare it to housing allowance and voucher initiatives. I conclude that, on the whole, the federal government should focus its efforts on subsidizing low income demand for housing, rather than directly supporting the production of housing units. Nevertheless, direct provision of housing by the public sector may still be justified in certain circumstances, such as artificially constrained housing markets and markets that evidence housing discrimination against minorities.

#### A. A Rationale For Government Intervention In Housing Markets

Over the past fifty years, substantial progress has been made in improving the quality of American housing. According to census data, the proportion of households living in overcrowded or substandard dwellings has dramatically decreased.<sup>33</sup> Even though over-

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<sup>32</sup> In this Article, I focus on federal spending programs rather than police power regulations. Although the federal government occasionally intervenes to regulate housing markets, *see, e.g.*, Fair Housing Act, 42 U.S.C.A. §§ 3601-3631 (West 1977 & Supp. 1990); Real Estate Settlement and Procedures Act, 12 U.S.C.A. § 2601 (West 1989), typically it leaves such intervention to the states and localities. Nevertheless, the rationale I develop for government intervention in housing markets may also justify certain forms of police power regulation, either as a substitute for or as an adjunct to spending programs.

<sup>33</sup> From 1950 to 1983, the proportion of urban housing units which were occupied

all quality of housing, including low income housing,<sup>34</sup> has increased throughout the century, problems associated with the concentration of low income housing remain. Increasingly, low income households are relegated to inner city neighborhoods, far from opportunities for economic advancement, but in close proximity to crime, drugs and despair.<sup>35</sup> Those unable to afford rent also face severe housing problems. According to a 1988 study, contract and gross rents have respectively increased sixteen percent and fourteen percent faster than the rate of inflation between 1981 and 1987.<sup>36</sup> Earnings, especially those of low income households, have

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by more than one person per room declined from 13.3 to 3.5%. In addition, from 1950 to 1970, the proportion of urban housing units characterized by the United States Census as dilapidated or lacking complete plumbing facilities fell from 21.9 to 5.5%. See JAMES HEILBRUN, *URBAN ECONOMICS AND PUBLIC POLICY* 313 (3d ed. 1987); see also JAMES W. HUGHES & GEORGE STERNLIEB, *THE DYNAMICS OF AMERICAN HOUSING* 180 (1987) (there has been a substantial upgrading of housing quality); RANDALL JOHNSTON POZDENA, *THE MODERN ECONOMICS OF HOUSING* 138-39 (1988) (housing quality has improved and overcrowding has declined over last thirty to forty years). According to a recent report prepared by the Congressional Budget Office, only seven percent of all households live in dwellings in need of rehabilitation. See CONGRESSIONAL BUDGET OFFICE, *CURRENT HOUSING PROBLEMS AND POSSIBLE FEDERAL RESPONSES* 10 (1988). But see MARY K. NENNO & CECIL E. SEARS, *RENTAL HOUSING IN THE 1980's* 29 (there has been little shift in the actual number of physically inadequate or overcrowded units since 1975). Despite the improvement in overall quality, nonwhite households live in significantly lower quality dwellings than white households. See R. POZDENA, *supra*, at 141.

<sup>34</sup> Nevertheless, the proportion of very low income renter households living in dwellings in need of rehabilitation was 19% in 1985. See CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 18. A very low income household is one that earns less than or equal to 50% of an area's median income for households of similar size. *Id.* at 12.

<sup>35</sup> See DENNIS R. JUDD, *THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 162-63 (3d ed. 1988) (for the period 1950-1980, median income of central city families as a percentage of family median income outside central cities fell from 95% to 75% for six northern and midwestern metropolitan areas and from 99% to 85% for six southern and western metropolitan areas); see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (examining the decline of American cities and the changing class structure of American ghettos); Mark Alan Hughes, *Misspeaking Truth To Power: A Geographical Perspective On The "Underclass" Fallacy*, 65 *ECON. GEO.* 187, 194 (1989) (from 1970 to 1980 there was a net increase of 165 "impacted ghetto" census tracts in 46 metropolitan statistical areas containing the 50 largest American cities); Richard P. Nathan & Charles F. Adams, Jr., *Four Perspectives on Urban Hardship*, 104 *POL. SCI Q.* 483, 502-03 (1989) (proportion of urban poor families living in "poverty area neighborhoods" increased from 39.9% to 56.8% from 1980 to 1986); Gregory R. Weiher, *Rumors Of The Demise Of The Urban Crisis Are Greatly Exaggerated*, 11 *J. URB. AFF.* 225, 237 (1989) (from 1970 to 1980, population living in high poverty areas increased by 69%; in extreme poverty areas there was a 161% increase in population); *The Ghetto Underclass: Social Science Perspectives*, William Julius Wilson ed., in 501 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 8-192 (1989) (articles by various social scientists examining the problems of the "underclass").

<sup>36</sup> See WILLIAM C. APGAR, JR., *THE NATION'S HOUSING: A REVIEW OF PAST TRENDS AND FUTURE PROSPECTS FOR HOUSING IN AMERICA* 8 (M.I.T. Housing Policy Project HP#1, 1988). Contract rent is the monthly amount paid by tenants for housing services; gross rent includes contract rent plus fuel, water, sewerage and utility payments.

not kept pace with the increase in rents, requiring many households to pay excessive proportions of their incomes for rent.<sup>37</sup>

If, as most analysts agree, the major housing problem facing low income households today is one of affordability, why do public policymakers treat the difficulties faced by low income renters as housing problems rather than as problems of income distribution?<sup>38</sup> If the problems faced by these households could be solved by increased income, why not provide low income households with unrestricted income supplements rather than subsidies earmarked for housing expenditure? If the market for housing were free of market imperfections, and the only housing problem of low income households was affordability, elementary welfare economics would indi-

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Apgar's method of computing the change in real rents includes an adjustment for changes in housing quality, which explains the differences between his estimates and those of other studies based upon the Consumer Price Index. *See id.* at 7-8.

<sup>37</sup> *See id.* at 31-32. According to Apgar, the median ratio of gross rental expenditures to income (adjusted for inflation) increased from 21% in 1970 to 30% in 1987. Among young, single-parent families with children, the ratio increased from 34.9% in 1974 to 58.4% in 1987. A widely used rule of thumb suggests that housing expenditures are excessive if they exceed 30 percent of income. *See id.* at 32, 35. *But cf.* TERRY S. LANE, WHAT FAMILIES SPEND FOR HOUSING—THE ORIGINS AND USES OF THE "RULES OF THUMB" 53-55 (1977) (criticizing use of rent-to-income ratios). Although housing economists disagree about whether increasing rent-to-income burdens are attributable, in part, to the consumption of better quality housing, compare William C. Apgar, Jr. *Recent Trends In Housing Quality And Affordability: A Reassessment* in HOUSING ISSUES OF THE 1990s 37, 59-61 (S. Rosenberry & C. Hartman, eds. 1989) (constant-quality rents increased from 1970 to 1980) with John C. Weicher, *Housing Quality: Measurement and Progress* in HOUSING ISSUES OF THE 1990s 9, 29 (S. Rosenberry & C. Hartman, eds. 1989) (constant-quality rents have risen less than income in postwar period), they nevertheless agree that affordability problems have increased in recent years. *See* Apgar, *supra*, at 56-57; Weicher, *supra*, at 28-29; *see also* CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 10, 16 (80% of very low income renter households pay over 30% of their income for rent; 41% of very low income households pay 50% of their income for housing expenses); FORD FOUNDATION, AFFORDABLE HOUSING: THE YEARS AHEAD 12-13 (1989) (low income families have been squeezed by decline in real income and increase in housing costs); NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE: THE REPORT OF THE NATIONAL HOUSING TASK FORCE 6 (1988) (as of 1983 almost half of all low income households paid more than half their incomes for rent); NATIONAL LOW INCOME HOUSING COALITION, THE LOW INCOME HOUSING CRISIS AND HOMELESSNESS: THE IMPACT OF FEDERAL POLICIES 1981-89 I (1988) (between 1970 and 1983, median rents increased at twice the rate of median income); E.J. Dionne, Jr., *Poor Paying More For Their Shelter*, N.Y. Times, Apr. 18, 1989, at A18, col. 1 (63% of poor pay over half of their income for housing). *But see* Peter D. Salins, *Toward A Permanent Housing Problem*, in THE PUBLIC INTEREST 22, 25 (Fall 1986) (criticizing reliance on rent to income ratios as indicators of housing hardship). For some households, increased housing costs have led to homelessness. *See generally* PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 181-85 (1989); *Homelessness in America—The Need For Permanent Housing: Hearings Before the Subcomm. on Housing and Community Development of the Comm. on Banking, Finance and Urban Affairs, House of Representatives*, 101st Cong., 1st Sess. (1989).

<sup>38</sup> This Article proceeds on the underlying assumption that it is both proper and desirable for the government to engage in redistributive activities. I do not, except in passing, justify my normative and ethical bias in favor of redistribution.

cate that an unrestricted income supplement such as a negative income tax would be the most efficient policy. Earmarked subsidies and in-kind redistribution are generally considered to be inefficient, since many households would not, if left to their own choices, spend each additional dollar of income on a dollar's worth of housing consumption.<sup>39</sup> Instead, households would typically choose to spend only a portion of the increased income on housing and the remainder on other consumption items such as food and clothing. By providing low income households with in-kind assistance, the public sector's expenditure presumably results in less overall utility than would an unrestricted transfer payment.<sup>40</sup>

The housing market, however, is not free from market imperfections and artificial constraints on supply. Tying public subsidies to housing is justified in circumstances where they can be utilized efficiently to overcome these market failures and constraints. Although most economists believe that housing markets are generally competitive with a large number of actual and potential consumers and sellers,<sup>41</sup> absent government intervention, the housing market may fail to generate an optimal amount of housing. The supply of housing, although quite elastic in the long run, is relatively inelastic in the short run because of the length of time required for site selection, financing and construction.<sup>42</sup> In addition, government

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<sup>39</sup> Recent empirical evidence suggests that a household's income elasticity of demand with respect to housing expenditure is less than one. See J. HEILBURN, *supra* note 33, at 307 (describing estimates of income elasticity of demand as low as .14); EDWIN S. MILLS & BRUCE W. HAMILTON, *URBAN ECONOMICS* 193 (1989) (discussing income elasticity of demand for housing); David J. Ellwood & A. Mitchell Polinsky, *An Empirical Reconciliation of Micro and Grouped Estimates of the Demand for Housing*, 61 *REV. ECON. & STAT.* 199, 205 (1979) (income elasticity of demand for housing is "somewhat over 0.8"). Income elasticity of demand for housing is defined as the percentage change in housing expenditures that occurs as income increases by one percent.

<sup>40</sup> In addition, in-kind transfer programs typically have higher administrative costs than income transfers. See H. ROSEN, *supra* note 26, at 166.

<sup>41</sup> J. HEILBRUN, *supra* note 33, at 303 n.5 (view that housing markets are competitive is "widely accepted"); WILLIAM GRIGSBY, MORTON BARATZ & DUNCAN MACLENNAN, *SHELTER SUBSIDIES FOR LOW INCOME HOUSEHOLDS* 25 (U. of Pa., Dep't of City & Reg. Planning Res. Rpt. Series No. 3, 1985) (monopolistic market structures are not usually present in housing markets). *But see* JOHN I. GILDERBLOOM & RICHARD P. APPLEBAUM, *RETHINKING RENTAL HOUSING* 106 (1988) (rental markets are not competitive where ownership is professionalized and vacancy rates low).

<sup>42</sup> See E. MILLS & B. HAMILTON, *supra* note 39, at 194; R. POZDENA, *supra* note 33, at 36. To alleviate the short-run supply elasticity constraint, government would have to be able to build or stimulate the construction of housing in reaction to changed market conditions at a quicker pace than the private sector. Certain factors might favor government construction, especially when the type of housing to be constructed is uncontroversial. See *infra* note 132 (public construction may be more expeditious due to public sector control over land use and approvals process). Nevertheless, government plans to build low income housing are often met by community opposition that might make the time required for construction longer than for housing constructed by private sector developers. See *infra* note 132.

regulation impedes the supply of housing, especially for low income households. Zoning and land use regulations, health and safety ordinances, as well as rent control and security of tenure laws, may restrict the supply of housing.<sup>43</sup> Furthermore, discrimination against minorities in the housing market might limit their ability to purchase housing in certain neighborhoods.

Public intervention in the housing market may also be justified by the problem of substandard housing. Deteriorated housing sometimes poses an externality problem.<sup>44</sup> The existence of a dilapidated structure can reduce the value of neighboring homes and may lead to disinvestment in the neighborhood. Because the owner of the deteriorated structure does not have to bear all of the costs generated by his or her property, public intervention such as slum clearance or renovation assistance might be appropriate.<sup>45</sup> In much the same way that a deteriorated building might be considered a negative externality, a high quality building might be a positive externality or public good. The existence of such a structure might increase values and confidence in the community. Private entrepreneurs might avoid making the investment since they would receive only a portion of its benefit, with nearby owners free-riding on the remainder.

Another justification for government intervention in the housing market, as opposed to pure income assistance, is based on non-economic factors. As Tobin has noted, although Americans typically accept inequality in most aspects of life, there is a rough consensus that "certain specific scarce commodities should be distributed less unequally than the ability to pay for them."<sup>46</sup> Soci-

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<sup>43</sup> Subsidy programs that preempt local ordinances may promote efficient housing markets, but may be politically impractical. The federal government has been exceedingly reluctant to enact housing programs which interfere with the enforcement of state and local police powers. See Martin Tolchin, *Conferees Dropping Penalty for Rent Control*, N.Y. Times, July 22, 1981, at A1, col. 1 (House-Senate Conference drops Senate-passed provision to withhold housing funds from jurisdictions with rent control).

<sup>44</sup> An activity of one person that affects the welfare of another in a way that is outside the market is called an externality. See H. ROSEN, *supra* note 26, at 53.

<sup>45</sup> See R. POZDENA, *supra* note 33, at 145-46 (discussing neighborhood effects created by deteriorated housing); JEROME ROTHENBERG, *ECONOMIC EVALUATION OF URBAN RENEWAL* 40 (1967) (discussing externalities present in residential neighborhoods); Neil S. Mayer, *Rehabilitation Decisions in Rental Housing: An Empirical Analysis*, 10 J. URB. ECON. 76, 92 (1981) (empirical evidence indicates that neighborhood effects have an impact on landlord rehabilitation expenditures). But see E. MILLS & B. HAMILTON, *supra* note 39, at 230 (empirical studies have failed to find systematic negative effect on the price of single family homes caused by "undesirable" neighboring land uses, although absence of such a finding may be due to methodological limitations). The problems associated with substandard housing may also be addressed by strict code enforcement. See ANTHONY DOWNS, *NEIGHBORHOODS AND URBAN DEVELOPMENT* 164-68 (1981) (advocating selective code enforcement).

<sup>46</sup> James Tobin, *On Limiting The Domain of Inequality*, 13 J.L. & ECON. 263, 264



ety may be justified in preferring a minimum entitlement to housing, despite the desires of the recipient, for several reasons. People who prefer other goods and services to a minimum level of shelter may lack sufficient information or be unable to assess rationally the true worth of decent housing, thereby justifying societal paternalism. Furthermore, especially in light of the increasing number of children born to unmarried, teenage parents, efforts to provide a minimum level of housing consumption may be justified as necessary to protect those who do not themselves have the power to make expenditure decisions.<sup>47</sup> In addition, the knowledge that people are not living in desperately deteriorated and unhealthful accommodations may itself bring taxpayers positive utility and therefore serve as a consumption item for the donors<sup>48</sup> rather than the donees.<sup>49</sup>

### B. Public Housing and Housing Policy

The argument that government programs to provide housing assistance to lower income households are justified on grounds of market failure, supply constraints or societal consensus does not

(1970). Tobin calls this norm "specific egalitarianism." *See id.* The concept of specific egalitarianism is closely related to the concept of "merit goods" which is used to describe commodities that should be provided by the public sector even if market actors do not demand them. *See* RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13 (1959) (subsidized housing is a "merit want").

<sup>47</sup> The concern that children be well-housed has become particularly acute in recent years. Increasingly, lower income households are composed of a single parent with children. In many instances the parent is a woman who is still an adolescent. *See* W. WILSON, *supra* note 35, at 71-72 (46% of all poor families and 71% of all poor black families were headed by a single woman in 1982). The rent burden for these households is especially severe. *See* Eugenie L. Birch, *The Unsheltered Woman: Definition and Needs*, in *THE UNSHELTERED WOMAN: WOMEN AND HOUSING IN THE 80's* 21, 35 (Eugenie L. Birch ed. 1985) (female-headed households with children are twice as likely to have a problem with housing quality and three times more likely to have an affordability problem than other Americans). *But cf.* Regina Austin, *Sapphire Bound*, 1989 *WIS. L. REV.* 539, 572-73 (arguing against negative stereotype of unwed, black mothers).

<sup>48</sup> *See* W. GRIGSBY, M. BARATZ & D. MACLENNAN, *supra* note 41, at 53 (choice of housing subsidy is tied to donors' utility functions); Henry J. Aaron & George H. Von Furstenberg, *The Inefficiency of Transfers In Kind: The Case of Housing Assistance*, 9 *WEST. ECON. J.* 184 (1971) (tied subsidies for housing may be due to preferences of donors); Richard A. Musgrave, *Policies of Housing Support: Rationale and Instruments*, in 1 *HOUSING IN THE SEVENTIES: WORKING PAPERS* 215, 222 (U.S. Dep't of HUD, 1976) (high income households may derive special satisfaction from use of tax dollars for housing).

<sup>49</sup> I believe that there is nothing inappropriate with members of society determining that impoverished living conditions violate their ethical or aesthetic sensibilities and conditioning assistance to citizens upon their elimination. I recognize that at a certain point, such intervention into the lives of beneficiaries of public largesse may lead to important ethical and legal questions. *See generally* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. PA. L. REV.* 1293 (1984) (analyzing unconstitutional conditions doctrine); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) (government conditions on distribution of largesse may limit recipient's constitutional rights). Nevertheless, requiring a person who receives public largesse to use the funds to improve his or her housing does not, at least for me, cross this line.

lead to a simple answer to the question of how that assistance should be designed. Typically, housing policies are characterized as either supply- or demand-oriented. Programs in which the government supports the construction of new dwellings, either by building them itself or by subsidizing developers, are enacted to directly increase the supply of housing. Programs that provide the recipients of assistance with the funds to purchase housing services increase the demand for housing, and indirectly, its supply. In this section, I describe and compare public housing, a supply-oriented program, with housing certificates and allowances, a demand-oriented subsidy. I contend that in the future, the public sector should primarily subsidize demand, leaving the construction of additional housing to the private sector. Nevertheless, construction of public housing may be desirable under certain market conditions, including those markets subject to artificial entry barriers and discrimination.

### 1. *A Short History of Public Housing*

Since the mid-1930s, the federal government has funded the construction of housing for low income households. New Deal agencies such as the Public Works Administration bought land, cleared slums and built almost 22,000 housing units.<sup>50</sup> Direct federal provision of housing was initially dealt a blow in 1935 when a federal appeals court upheld a lower court ruling that the federal government could not use its power of eminent domain to condemn sites for housing projects because housing was not a "public purpose."<sup>51</sup> In 1937, however, Congress passed the Wagner-Steagall Housing Act of 1937, establishing the public housing program.<sup>52</sup> Under the Act, public housing would be built by local public housing authorities ("PHAs")<sup>53</sup> rather than by the federal government.

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<sup>50</sup> See GWENDOLYN WRIGHT, *BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA* 225 (1981).

<sup>51</sup> *United States v. Certain Lands in Louisville*, 78 F.2d 684 (6th Cir.), cert. granted, 296 U.S. 567 (1935), appeal dismissed, 297 U.S. 726 (1936).

<sup>52</sup> Pub. L. No. 75-412, 50 Stat. 888 (1937) (currently codified at 42 U.S.C. §§ 1437(a)-(j) (1982)).

<sup>53</sup> A public housing authority is a local municipal corporation created pursuant to state enabling legislation for the purpose of constructing, owning and operating housing for low income households. Typically, a PHA is governed by a board of commissioners appointed by the mayor and city council of the jurisdiction in which it is located. The administration of the PHA is usually vested in an executive or managing director and his or her staff. At present there are 3,415 PHAs operating in the United States. See generally CHARLES E. DAYE, DANIEL R. MANDELKER, ET AL., *HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS* 132-35 (2d ed. 1989); EUGENE J. MEEHAN, *PUBLIC HOUSING POLICY: CONVENTION VERSUS REALITY* 17-19 (1975); NATIONAL ASSOCIATION OF HOUSING & REDEVELOPMENT OFFICIALS, *THE MANY FACES OF PUBLIC HOUSING* 27-32 (1989); Hartman & Carr, *Housing Authorities Reconsidered*, 35 AMER. INST. PLANNERS J. 10 (1969). For further discussion of the legal nature of PHAs, see *infra* text accompanying notes 211-15.

In addition to concerns of comity, the program utilized PHAs because several state courts had held that cities and states had the power to condemn property for housing.<sup>54</sup> Under the program, a PHA and the federal government execute an Annual Contributions Contract ("ACC")<sup>55</sup> which sets forth the parties' rights and obligations. The PHA funds the purchase of land and the construction of housing by issuing long term bonds, typically with a forty-year maturity. The federal government undertakes an obligation to make all debt service payments on the bonds, effectively subsidizing all capital costs.<sup>56</sup> The PHA, in turn, obligates itself to operate the public housing in a manner consistent with federal statutes and regulations during the term of the ACC. The municipality in which the project is located is required to grant an exemption from real property taxes for the housing development. Unlike housing built by the Public Works Administration, public housing was, from the start, limited to low income households.<sup>57</sup> Due to the onset of World War II, only a modest number of units were built under the 1937 Housing Act.<sup>58</sup> In 1949, however, Congress passed the Housing Act of 1949<sup>59</sup> which provided federal subsidies for slum clearance and urban redevelopment.<sup>60</sup> As part of the Act, Congress authorized the construction of an additional 810,000 public housing units and established the national housing policy of "[a] decent home and a suitable living environment for every American family. . . ."<sup>61</sup> It was not until 1972, however, that all of the housing units authorized by the 1949 Act

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<sup>54</sup> See, e.g. *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); see also Myres S. McDougal & Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42 (1942); Jane Lang McGrew & Ana Fabregas, *The Housing Act of 1937: Legal Origins*, 44 J. HOUSING 156, 157 (1987).

<sup>55</sup> Consolidated Annual Contributions Agreement (November 1969).

<sup>56</sup> Since the mid-1980s, the federal government has also directly loaned funds and provided PHAs with grants to fund the construction of public housing, thereby eliminating the need for the issuance of bonds by PHAs. See 42 U.S.C.A. §§ 1437b(c)(1); 1437c(a)(2) (West Supp. 1989).

<sup>57</sup> To qualify for public housing, households had to earn an income at least 20% below the bracket that could afford the least expensive private housing. See G. WRIGHT, *supra* note 50, at 227-28.

<sup>58</sup> From 1937 to 1948, 117,000 public housing units had been constructed with 25,000 additional units deferred because of the war. See JAMES RUSSELL PRESCOTT, *ECONOMIC ASPECTS OF PUBLIC HOUSING* 24 (1974).

<sup>59</sup> Pub. L. No. 81-171, 63 Stat. 413 (1949) (currently codified at 42 U.S.C. § 1452(b) (Supp. V 1987)).

<sup>60</sup> For critical analyses of the urban renewal program, see generally, MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962* (1964); HERBERT J. GANS, *THE URBAN VILLAGERS* 305-35 (1962); J. ROTHENBERG, *supra* note 45; *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* (James Q. Wilson ed. 1966); see also *infra* text accompanying notes 108-17.

<sup>61</sup> Pub. L. No. 81-171, § 2, 63 Stat. 413 (1949).

were actually completed.<sup>62</sup> Today, approximately 1.3 million units of public housing exist in the United States.<sup>63</sup>

From its inception, public housing was controversial. In the 1930s, the private real estate lobby alleged that the program was socialistic and wasteful.<sup>64</sup> Projects were frequently segregated by race and built in less desirable neighborhoods where their presence would not be "offensive" to community residents.<sup>65</sup> Public housing was originally created for temporary occupancy by the "submerged middle class."<sup>66</sup> As soon as residents could get themselves on their feet, they were expected to move elsewhere. During the 1950s, however, the socioeconomic character of public housing changed. Federal government policies and programs such as mortgage insurance, tax preferences for homeownership and highway construction subsidized the movement of middle and moderate income households out of the city to the suburbs. At roughly the same time, black migration from the South to northern cities accelerated.<sup>67</sup> As manufacturing jobs followed the migration of households to suburban locations, central cities increasingly became home to low income and black households.<sup>68</sup> Public housing no longer served as a temporary haven for upwardly mobile households, but instead became a permanent home to a very poor and disproportionately nonwhite population.

As the income of public housing residents plummeted and the age of public housing projects increased, the rents charged by PHAs to cover operating expenses became increasingly burdensome. Some PHAs deferred maintenance due to shortages of funds.<sup>69</sup> In 1969, Congress's action to assist tenants by limiting maximum rents

<sup>62</sup> See J. Paul Mitchell, *Historical Overview of Direct Federal Housing Assistance*, in *FEDERAL HOUSING POLICIES AND PROGRAMS* 187, 195 (J. Paul Mitchell ed. 1985).

<sup>63</sup> *COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, PUBLIC HOUSING TODAY* 5 (rev. ed. 1988). Public housing exists in over 3,200 localities. See *id.*

<sup>64</sup> G. WRIGHT, *supra* note 50, at 220-21; Fenna Pit & Willem van Vliet, *Public Housing in the United States*, in *HANDBOOK OF HOUSING AND THE BUILT ENVIRONMENT IN THE UNITED STATES* 199, 206 (Elizabeth Huttman & Willem van Vliet eds. 1988).

<sup>65</sup> See *infra* note 134.

<sup>66</sup> See Lawrence M. Friedman, *Public Housing and the Poor*, 54 *CALIF. L. REV.* 642, 648 (1966) ("The projects were [built] for poor but honest workers—the members of the submerged middle class. . .").

<sup>67</sup> See DANIEL R. FUSFELD & TIMOTHY BATES, *THE POLITICAL ECONOMY OF THE URBAN GHETTO* 45-66 (1984) (discussing migration of blacks to northern cities from southern agricultural regions during and after World War II).

<sup>68</sup> For analyses of how suburbanization contributed to the crisis of the inner city and population changes within public housing, see generally, KENNETH T. JACKSON, *CRABGRASS FRONTIER* 190-245 (1985); Patrick J. Ashton, *Urbanization and the Dynamics of Suburban Development Under Capitalism*, in *MARXISM AND THE METROPOLIS* 54 (William K. Tabb & Larry Sawers 2d ed. 1984).

<sup>69</sup> See IRVING WELFELD, *WHERE WE LIVE: THE AMERICAN HOME AND THE SOCIAL, POLITICAL, AND ECONOMIC LANDSCAPE, FROM SLUMS TO SUBURBS* 191 (1988).

chargeable by PHAs further added to PHA burdens.<sup>70</sup> The federal government enacted subsidy programs to help PHAs pay for operating and modernization expenses. Neither of these subsidies, however, was fully funded, and many PHAs further cut back on maintenance which led to structural deterioration<sup>71</sup> and, in some extreme cases, the demolition of uninhabitable buildings.<sup>72</sup>

## 2. *Public Housing Today*

At present, there are over 1.3 million units of public housing in the United States, housing 3.5 million people.<sup>73</sup> Public housing constitutes 1.5% of the nation's housing stock.<sup>74</sup> The average annual income of households is \$6,539.<sup>75</sup> Approximately 60% of non-elderly resident households have no one employed and half receive Aid to Families with Dependent Children.<sup>76</sup> Thirty-eight percent of such households are composed of elderly persons.<sup>77</sup> Data from a 1986 survey of PHAs indicate that 60% of all families in public housing are headed by blacks and an additional 24% by hispanics.<sup>78</sup>

Over one-half of public housing developments are comprised

<sup>70</sup> The Brooke Amendment limited rents to 25% of income. See Pub. L. No. 91-152 § 213, 83 Stat. 3898 (1970). This ceiling has since been raised to 30%. See 42 U.S.C.A. § 1437a(a) (West Supp. 1989).

<sup>71</sup> See Eugene J. Meehan, *The Evolution of Public Housing Policy*, in *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT* 287, 297 (J. Paul Mitchell ed. 1985) ("The fiscal arrangements made by Congress were the most important single factor in the eventual breakdown of the conventional public housing program."); Pit & van Vliet, *supra* note 64, at 216 (federal government restricted funds for modernization and routine repairs).

<sup>72</sup> See EUGENE J. MEEHAN, *THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING* (1979) (discussing the experience of the St. Louis Housing Authority and the demolition of the Pruitt Igoe project); Lee Rainwater, *The Lessons of Pruitt-Igoe*, in *HOUSING URBAN AMERICA* 597 (Jon Pynoos, Robert Schafer & Chester W. Hartman eds. 2d ed. 1980) (discussing problems of relying upon public housing program to improve lives of low income black households); Alfonso A. Narvaez, *Newark Rips Down Its Projects*, N.Y. Times, Nov. 28, 1987, at 25, col. 2 (Newark plans to demolish one-third of its public housing). In addition to insufficient maintenance, many of the problems that have plagued some public housing developments are attributable to improper design and construction. See, e.g., E. MEEHAN, *supra* note 53, at 174-75 (cataloging design and construction flaws of public housing including shortage of large units, lack of amenities, low quality of materials used in construction and high density); Catherine Bauer, *Dreary Deadlock of Public Housing*, 106 *ARCHITECTURAL FORUM* 139 (1957) (advocate of public housing criticizes physical layout and conditions of housing); Pit and van Vliet, *supra* note 64, at 214 (lack of public space deprived citizens of opportunities for establishing neighborly relationships).

<sup>73</sup> See COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, *supra* note 63, at 5, 11.

<sup>74</sup> Rachel G. Bratt, *The Controversy and Contribution*, in *CRITICAL PERSPECTIVES ON HOUSING* 335, 342 (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds. 1986).

<sup>75</sup> NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, *supra* note 53, at 2. This figure is based on a 1989 survey of 202 PHAs.

<sup>76</sup> COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, *supra* note 63, at 13.

<sup>77</sup> *Id.*

<sup>78</sup> Mark L. Matulef, *This is Public Housing*, 44 *J. HOUSING* 175, 176 (1987).

of single family homes or garden apartments.<sup>79</sup> In addition, one quarter of all units are located in suburban locations.<sup>80</sup> Although several public housing developments have serious structural and social problems,<sup>81</sup> most studies indicate that public housing is in much better condition than its popular image would indicate.<sup>82</sup> A 1980 study of the physical condition of public housing commissioned by the federal government concluded that while the vast majority of the housing stock was in good condition, seven and two-fifths percent of all units had "chronic problems."<sup>83</sup> Another study that examined social, financial, managerial and physical problems concluded that only fifteen percent of all public housing units were troubled.<sup>84</sup> Furthermore, surveys indicate that residents of public housing are quite satisfied with their living conditions,<sup>85</sup> and that most public housing

<sup>79</sup> COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, *supra* note 63, at 5.

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Anthony DePalma, *In Newark's High-Rises, A Desperate Wait*, N.Y. Times, Apr. 17, 1989, at B1, col. 2; James C. McKinley, *Constant Reality in a Project: Fear of Violent Drug Gangs*, N.Y. Times, May 15, 1989, at A1, col. 1.

<sup>82</sup> See Mary Jo Huth, *An Examination Of Public Housing In The United States After Forty Years*, 8 J. SOC. & SOC. WELFARE 471, 482 (1988) ("It is amazing, for example, how much has been written about the infamous Pruitt-Igoe and other notorious high crime projects and how little publicity has been given to the many smaller projects, consisting of highly attractive clusters of one- and two-story townhouses and garden apartments surrounded by lawns, trees, and playgrounds, which uninformed passersby would not even recognize as public housing.").

<sup>83</sup> PERKINS & WILL, *AN EVALUATION OF THE PHYSICAL CONDITION OF PUBLIC HOUSING STOCK 14* (1980). Among the chronic problems were vandalism, age, poor management and deferred maintenance. See *id.* at 13.

<sup>84</sup> RONALD JONES, DAVID KAMINSKY & MICHAEL ROANHOUSE, *PROBLEMS AFFECTING LOW-RENT PUBLIC HOUSING PROJECTS 3* (1979). Troubled projects were disproportionately composed of buildings inhabited by families. Seventy-one percent of all public housing was designed for families, yet of those projects characterized as troubled, 92% were inhabited by families. Public housing projects inhabited primarily by elderly persons were under-represented in the troubled category—29% of all units were designed for elderly households, yet only 8% of the troubled projects were inhabited by the elderly. See *id.* at 42; see also Friedman, *supra* note 66, at 654 (suggesting that the success of elderly public housing is at least partially attributable to the fact that many residents are white, middle class people who are accepted by their neighbors).

In addition, a 1988 inventory of modernization needs prepared for the federal government estimated that the average cost of capital repairs and replacements for public housing units is \$7,392 and the estimated total cost is \$9,307,000,000. The report noted that "[r]elatively few public housing developments are in need of substantial structural changes to ensure their continued viability." See ABT ASSOCIATES, *STUDY OF THE MODERNIZATION NEEDS OF THE PUBLIC AND INDIAN HOUSING STOCK xi, xiv, xxi* (1988); see also John E. Farley, *Has Public Housing Gotten A Bum Rap?: The Incidence of Crime in St. Louis Public Housing Developments*, 14 ENV'T. & BEHAV. 443, 471 (1982) (empirical evidence suggests crime rates in public housing developments are not higher than in central cities as a whole).

<sup>85</sup> See GUIDO FRANCESCATO, SUE WEIDEMANN, JAMES R. ANDERSON & RICHARD CHENOWETH, *RESIDENT'S SATISFACTION IN HUD-ASSISTED HOUSING: DESIGN AND MANAGEMENT FACTORS* §§ 3.1 (1978) (66% of respondents to survey were satisfied with their homes in public housing and HUD-assisted housing); ALVIN RABUSHKA & WILLIAM G. WEISSERT, *CASEWORKERS OR POLICE? HOW TENANTS SEE PUBLIC HOUSING* 40-41 (1977)

authorities have extremely long waiting lists.<sup>86</sup>

### 3. *The Future Role of Public Housing in Federal Housing Assistance*

Public housing is only one of several housing programs enacted by the federal government to assist low income households. Since the mid-1970s, the government has increasingly relied on the private sector to deliver housing assistance. One supply-oriented approach initiated by the federal government in 1974 is called the Section 8 New Construction and Substantial Rehabilitation Program.<sup>87</sup> Under this program, the government subsidizes the rents of tenants who live in new or substantially renovated structures owned by non-profit or profit-motivated developers. The subsidy, which is tied to the units in these structures, is guaranteed for a period of twenty to forty years and covers the difference between the amount paid by the tenants (usually thirty percent of adjusted income) and a fair market rent based upon the developer's capital and operating costs.<sup>88</sup> In 1974, Congress also enacted one of a series of demand-oriented subsidy programs called the Section 8 Existing Housing Certificate Program.<sup>89</sup> Under this program, participating households are issued a certificate that enables them to rent dwellings owned by private landlords.<sup>90</sup> Provided that they lease homes that meet minimum quality standards and that do not cost more than the

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(survey of tenants in Wilmington, Delaware public housing showed elderly households had virtually no complaints and 60% of family households had no problems except for noise); George S. Rent & Clyda S. Rent, *Low Income Housing: Factors Related to Residential Satisfaction*, 10 ENV'T & BEHAV. 459, 469-73 (1978) (90% or more of residents surveyed in low income housing projects (including public housing) in South Carolina expressed satisfaction with neighborhoods and housing units). *But see* Raymond J. Burby & William A. Rohe, *Deconcentration of Public Housing: Effects on Residents' Satisfaction with Their Living Environments and Their Fear of Crime*, 25 URB. AFF. Q. 117, 127 (1989) (survey of residents of eight public housing projects showed relatively high levels of dissatisfaction with living environments).

<sup>86</sup> The average wait for a public housing unit is approximately 13 months. For nine percent of all PHAs the average waiting period exceeds three years. *See* MICHAEL A. STEGMAN, *THE ROLE OF PUBLIC HOUSING IN A REVITALIZED NATIONAL HOUSING POLICY 2* (M.I.T. Housing Policy Project HP #18, April 1988). Due to the large disparity between the rents charged for public housing and those charged for housing in the private market, long waiting lists may prove little.

<sup>87</sup> *See* Housing and Community Development Act of 1974 § 8(b)(2), Pub. L. No. 93-383, 88 Stat. 633, 662 (1976).

<sup>88</sup> As of September 30, 1987, approximately 794,000 households have been assisted under the Section 8 New Construction and Substantial Rehabilitation Program. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 32-33. No new commitments have been made since 1983, except for handicapped and elderly housing. *See id.* at 32.

<sup>89</sup> *See* Housing and Community Development Act of 1974 § 8(d)(1), Pub. L. No. 93-383, 88 Stat. 633, 664 (1976).

<sup>90</sup> Unlike supply-oriented programs, the subsidy provided by the Section 8 Existing Housing Certificate Program is not tied to a particular rental unit, but instead is tied to an individual recipient who can use it to pay for any housing that meets federal requirements.

federally prescribed maximum level,<sup>91</sup> households participating in the Section 8 Existing Housing Certificate Program must pay no more than thirty percent of their income for rent. The difference between thirty percent of income and the dwelling's rent is paid for by the federal government.<sup>92</sup>

In this section, I compare alternative methods for subsidizing low income housing. I conclude that the predictions of privatization proponents are consistent with existing empirical evidence: in most circumstances, demand-oriented subsidies are more efficient and effective than public housing in providing assistance to low income households. I also examine how the structure and operation of the public housing program contribute to its relative inefficiency and again present evidence to support some, but not all, of the predictions made by privatization theorists. Although the analysis in this section supports increased reliance on the private sector to deliver housing assistance to low income households, I describe certain circumstances in which public housing may better achieve public objectives.

a. *Comparing The Cost of Public Housing to Demand-Oriented Subsidies*

Most studies that compare the costs of alternative housing programs conclude that public housing is the most expensive method to assist low income households. For example, a 1982 study concluded that public housing and Section 8 New Construction housing respectively cost fifty-five percent and twenty-seven percent more than unsubsidized multifamily housing.<sup>93</sup> In 1988, the Congressional Budget Office estimated that housing an elderly household in public housing for twenty years costs the government thirty percent more than if it had given the household Section 8 Existing Housing

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<sup>91</sup> The fair market rent ceiling is the forty-fifth percentile of rents charged for existing residences in a given local market area. See JOHN C. WEICHER, *THE VOUCHER/PRODUCTION DEBATE 4* (M.I.T. Housing Policy Project, HP #13, April 1988).

<sup>92</sup> The Section 8 Freestanding Voucher Program is similar to the Existing Housing Certificate Program, except that participating households may rent homes that cost more than the federally prescribed maximum provided that they pay the excess rent out of their own funds. If the rent actually paid by a voucher recipient is less than the federally prescribed maximum, the subsidy is nonetheless based on the higher amount, permitting the tenant to pay less than 30% of his or her income for rent. For a comparison of Section 8 certificates and vouchers, see GENERAL ACCOUNTING OFFICE, *RENTAL HOUSING: HOUSING VOUCHERS COST MORE THAN CERTIFICATES BUT OFFER ADDED BENEFITS* (1989). Section 8 vouchers and certificates provide assistance for terms ranging from 5 to 15 years. As of September 30, 1987, 874,000 households were assisted by the Existing Housing Certificate Program and 82,000 by the Freestanding Voucher. See CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 32-35.

<sup>93</sup> See URBAN SYSTEMS RESEARCH & ENGINEERING, INC., *1 THE COSTS OF HUD MULTIFAMILY HOUSING PROGRAMS S-22* (1982).



Certificates and eight percent more than if it had provided the household with a home in a Section 8 New Construction dwelling.<sup>94</sup> Finally, a 1979 comparison of alternative housing subsidies found that the annual cost of subsidizing a household under the public housing program ranged from fifty percent to 112% more than the cost of providing assistance through housing allowances.<sup>95</sup>

Comparing the costs of alternative housing subsidies supports the prediction of advocates of privatization that public provision of services is more costly than private provision. Unfortunately, little systematic research has been done to examine why public housing tends to be more expensive to construct and operate than privately owned housing. It is therefore impossible to state with assurance whether the relatively high cost of public housing is attributable to public sector inefficiency or whether the expense is generated by other forces.<sup>96</sup>

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<sup>94</sup> See CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 50. The analysis assumes that the household will be housed for a period of twenty years and that the units have a useful life of twenty years without requiring rehabilitation. It is likely that the assumption that public housing has no residual value overestimates the relative cost of public housing. See *infra* note 95. The analysis also assumes a long-term discount rate of 2%.

<sup>95</sup> See STEPHEN K. MAYO, SHIRLEY MANSFIELD, DAVID WARNER & RICHARD ZWETCHKENBAUM, HOUSING ALLOWANCES AND OTHER RENTAL HOUSING ASSISTANCE PROGRAMS—A COMPARISON BASED ON THE HOUSING ALLOWANCE DEMAND EXPERIMENT, PART 2: COSTS AND EFFICIENCY 46-48 (1980). These estimates are based on the cost of subsidizing an average, two-bedroom unit in each program. No consideration of variations in quality are taken into account. In addition, the analysis assumes that the value of public housing fully depreciates over forty years. The authors defend this assumption on the ground that most public housing depreciates rather rapidly and requires further modernization expenditures. In addition, they estimate that even if their assumption of zero residual value were wrong, such a mistake would overestimate the cost of public housing by only 17%. See *id.* at 27-30. But see RACHEL G. BRATT, REBUILDING A LOW-INCOME HOUSING POLICY 72-75 (1989) (criticizing comparisons of supply- and demand-oriented housing programs). For a description of housing allowances, see *infra* note 122.

<sup>96</sup> The high cost of public housing may be attributable to factors other than inefficient program design or operation. It is likely that public housing tenants earn lower incomes than households who are assisted by housing allowances or the Section 8 Existing Housing Certificate Program. Therefore, since rent is based on income, the amount paid by public housing tenants would likely be lower than the amount paid by tenants assisted by demand-oriented subsidies, thereby increasing the size of the federal subsidy. In addition, due in part to their lower incomes, public housing tenants may have a disproportionate share of social or behavioral problems which might make operation of public housing more costly. See *infra* note 99; cf. CITIZENS HOUSING & PLANNING ASSOCIATION, TENANCY AND COSTS IN PUBLIC HOUSING—POLICIES, ATTITUDES AND CASE STUDIES 149 (1986) (multiple regression analysis shows the proportion of tenants who are single parents on welfare is significantly related to increased operating expenses). Furthermore, unlike private entrepreneurs, public housing managers may view their role not solely as housing providers, but as providers of social services. Direct provision of social services, such as job counseling and recreation, increase the cost of public housing as compared to privately owned housing. See *infra* text accompanying note 133. In addition, public housing managers, in their role as social service providers, may be less likely immediately to evict tenants for nonpayment of rent, instead preferring to try to work out a plan of affordable payments. But cf. RICHARD LEMPERT, DISCRETION IN A BEHAV-

Nevertheless, certain evidence suggests that the seeming inefficiency of public housing may, at least in part, be explained by the theories propounded by advocates of privatization. As summarized in Part I, supporters of privatization argue that government will inevitably provide services less efficiently than the private sector because the absence of transferable private property rights in government enterprise reduces the incentives of individuals to monitor government programs and insist on cost minimization. Privatization is also justified on the ground that the structure of the political process tends to promote rent-seeking behavior on the part of special interest groups and bureaucrats, leading to the maximization of private, rather than public benefit.

Several studies have noted that the absence of market discipline may contribute to the increased cost of public housing. According to one analysis, a major reason for the high cost of public housing is inflated construction expenditures. The study concludes that the market value of the housing services provided by public housing would not justify a similar investment by the private sector.<sup>97</sup> To the contrary, the government would save money, according to the study, by purchasing housing from the existing stock rather than building it itself.<sup>98</sup> The authors also note that operating costs of public housing tend to be approximately thirty percent higher than the cost of operating similar housing in the private sector.<sup>99</sup> Several

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IORAL PERSPECTIVE: THE CASE OF A PUBLIC HOUSING EVICTION BOARD 12 (Univ. of Mich., September 1989) (describing how discretion of public housing managers to "work with" tenants in financial difficulty has been limited due to more efficient record keeping). Although this type of behavior might not be profit-maximizing or cost-minimizing, it may be well within the mission of the public housing program and therefore not inefficient.

<sup>97</sup> See S. MAYO, S. MANSFIELD, D. WARNER & R. ZWETCHKENBAUM, *supra* note 95, at 151. The authors reach this conclusion by capitalizing the rents that public housing would earn in the private market. They find that the capitalized rental value of public housing is less than its development cost. Therefore, they conclude that the housing's hypothesized market value would not justify its construction. *See id.*

<sup>98</sup> *See id.* at 154. Part of the differential between the cost of constructing public and privately owned housing may be attributable to the nature of the subsidy rather than the absence of private property rights. Under the public housing program, the capital costs of construction are, within limits, fully paid for by the federal government, whereas operating expenses are only partially subsidized. This asymmetrical subsidy provides an incentive for PHAs to over-invest in capital (*i.e.*, construction expenditures) to avoid higher maintenance costs in the future, costs for which they will be at least partially responsible. *See* RICHARD F. MUTH, PUBLIC HOUSING: AN ECONOMIC EVALUATION 17-18 (1973).

<sup>99</sup> *See* S. MAYO, S. MANSFIELD, D. WARNER & R. ZWETCHKENBAUM, *supra* note 95, at 170; *see also* ARTHUR P. SOLOMON, HOUSING THE URBAN POOR 153-54 (1974) (inefficient operating procedures contribute to low public housing cost effectiveness). *But cf.* GRANVILLE CORP., PUBLIC HOUSING AUTHORITY EXPERIENCE WITH PRIVATE MANAGEMENT: A COMPARATIVE STUDY xi (1983) (PHA operational expenses for urban family projects were not significantly different from expenses at comparable projects managed by pri-

examinations of individual public housing authorities reinforce these findings by cataloging instances of lax accounting procedures and insufficient inventory controls.<sup>100</sup>

A large proportion of the differential between the cost of public housing and private sector housing may be attributable to the political process. The public housing program is the product of legislation that bears the mark of special interest groups. The preamble of the Housing Act of 1937 makes clear that the program was conceived as a public employment and slum clearance program as much

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vate contractors). Inefficient management may not explain the entire differential in operating expenses between public housing and housing available through the private market. Private landlords have extremely broad discretion with respect to their choice of tenants. In many circumstances, they may refuse to house tenants who they suspect are likely to constitute problems either due to household composition, criminal records or histories of nonpayment of rent. A public housing authority's tenant selection process is circumscribed by statutory and administrative regulations. *See, e.g.*, 42 U.S.C. § 1437a(b)(3) (1982) (establishing admission preferences for elderly, handicapped and displaced persons); 24 C.F.R. §§ 960.204-960.207 (1988) (tenant selection regulations). In addition, prospective tenants are entitled to a certain degree of due process with respect to selection and termination. *See Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir. 1970) (public housing tenants entitled to due process with respect to termination of tenancies); *Holmes v. New York City Housing Auth.*, 398 F.2d 262 (2d Cir. 1968) (due process requires selection of public housing tenants be made according to ascertainable standards). For an excellent in-depth examination of the eviction procedure of the Hawaii Housing Authority, see R. LEMPERT, *supra* note 96; RICHARD LEMPERT, *THE DYNAMICS OF INFORMAL PROCEDURE: THE CASE OF A PUBLIC HOUSING EVICTION BOARD* (Univ. of Mich., April 1989); RICHARD LEMPERT & KARL MONSMA, *LAWYERS AND INFORMAL JUSTICE: THE CASE OF A PUBLIC HOUSING EVICTION BOARD* (Univ. of Mich., March 1989). Because of this reduced discretion and, in some circumstances, a moral obligation to be the landlord of last resort, public housing may house a disproportionate portion of tenants who have a wide variety of financial and behavioral problems. The cost of operating housing for these households may therefore be expected to exceed the cost of providing housing in the private sector.

<sup>100</sup> *See UNITED STATES GENERAL ACCOUNTING OFFICE, PUBLIC HOUSING: CHICAGO HOUSING AUTHORITY TAKING STEPS TO ADDRESS LONG-STANDING PROBLEMS 24-36* (1989) (examining management problems of Chicago Housing Authority including its failure to establish and implement an adequate system of internal controls, budget overruns and frequent turnover of top management); *UNITED STATES GENERAL ACCOUNTING OFFICE, PUBLIC HOUSING: CONDITIONS AT THE LAUREL PARK PROJECT IN ST. PETERSBURG, FLORIDA 10* (1987) (discussing inadequate and ineffective maintenance program of PHA); *URBAN SYSTEMS RESEARCH & ENGINEERING, INC., supra* note 93, at S-23 (reason for higher cost of public housing partially attributable to large number of uncontrolled budget categories).

The problem of inefficient operating practices by PHAs should not be overemphasized. HUD periodically conducts management reviews of PHAs throughout the nation. An examination of the most recent management reviews for 37 PHAs under the jurisdiction of HUD's Philadelphia Area Office reveals that most PHAs were deemed to operate in compliance with HUD regulations and practices. The following are the problems most frequently cited by the HUD auditors, followed by the number of PHAs cited for having these problems: excessive tenant accounts receivable (8); excessive vacancies and slow turnover of apartments (7); insufficient inventory controls (7); insufficient procurement practices (6); lack of salary comparability data on file (5); insufficient maintenance (4); failure to submit reports to HUD in a timely fashion (3); cost overruns (3).

as a program to provide housing to low income households in a cost-effective manner.<sup>101</sup> In fact, the public employment and slum clearance objectives of the program conflict with efficient production of housing. As public employment legislation, supported by organized labor,<sup>102</sup> the Housing Act provides that employees and contractors of PHAs must be paid wages not less than those prevailing for similar work in the locality.<sup>103</sup> The prevailing wage floor, as well as other concessions to organized labor,<sup>104</sup> substantially increase the costs associated with the construction of public housing.<sup>105</sup>

The link between public housing and slum clearance also has had the effect of greatly increasing the costs of public housing. Slum clearance was included in the Housing Act of 1937 largely to placate adversaries of public housing who were concerned about competition from newly constructed publicly owned dwellings.<sup>106</sup>

<sup>101</sup> "An Act to provide financial assistance to the States and political subdivisions thereof for the elimination of unsafe and unsanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity." Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937).

<sup>102</sup> Among the most vocal supporters of the Housing Act of 1937 were the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO). See LEONARD FREEDMAN, PUBLIC HOUSING: THE POLITICS OF POVERTY 76 (1969); NATHANIEL S. KEITH, POLITICS AND THE HOUSING CRISIS SINCE 1930 36 (1973); TIMOTHY L. McDONNELL, THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS 307-08 (1957); Gertrude S. Fish, *Housing Policy During The Great Depression*, in THE STORY OF HOUSING 177, 216 (Gertrude Fish ed. 1979).

<sup>103</sup> Pub. L. No. 75-412, § 16(2), 50 Stat. 888, 896-97 (1937) (currently codified at 42 U.S.C. § 1440(g) (1982)). Prevailing wages are those determined by the Secretary of Labor in accordance with the Davis-Bacon Act. See 40 U.S.C.A. § 276a (West 1986).

<sup>104</sup> Statutes and regulations also required all federal projects to be governed by federal wage laws and all officers and employees of the federal housing agency to be covered by compensation insurance. See CHARLES ABRAMS, THE FUTURE OF HOUSING 273 (1946).

<sup>105</sup> Numerous studies document the effect of the Davis Bacon Act in raising the cost of federally sponsored construction projects. See, e.g., CONGRESSIONAL BUDGET OFFICE, MODIFYING THE DAVIS-BACON ACT: IMPLICATIONS FOR THE LABOR MARKET AND THE FEDERAL BUDGET 26 (1983) (Davis-Bacon Act is estimated to increase wages from 2% to 11%); ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON" ACTS, THE WALSH-HEALEY ACT, AND THE SERVICE CONTRACT ACT 129 (1986) (Davis-Bacon is "an expensive piece of legislation adding perhaps \$1 billion a year to the cost of federal building projects."); UNITED STATES GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED 10-11 (1979) (when compared to wages paid by the private sector, Davis-Bacon Act wages averaged 36.8% higher). Among the reasons for the increase in wages attributable to the Davis-Bacon Act are the fact that the floor is presumably set at the median wage, thereby prohibiting the government from taking advantage of the lower wages of one-half of the area's labor force and the tendency of the government to inflate the prevailing wage estimates. See CONGRESSIONAL BUDGET OFFICE, *supra*, at 24; UNITED STATES GENERAL ACCOUNTING OFFICE, *supra*, at 10; Steven G. Gallen, *Much Ado About Davis-Bacon: A Critical Review and New Evidence*, 26 J. L. & ECON. 707, 709, 734 (1983).

<sup>106</sup> See LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 111-12 (1968)

Under the Housing Act's "equivalent elimination" provisions,<sup>107</sup> for every unit of public housing built, an equivalent unit of low income housing must have been demolished, thereby leaving the overall supply of low income housing unchanged. Supported by real estate and local business interests,<sup>108</sup> slum clearance became the central element of the Housing Acts of 1949<sup>109</sup> and 1954.<sup>110</sup> Under the urban redevelopment and urban renewal programs, local government agencies purchased and cleared "blighted" land and then sold it to private entrepreneurs at prices that were approximately thirty percent of the cost to the local government. Between two-thirds and three-quarters of this seventy percent "write down" was paid for by the federal government.<sup>111</sup> Since the program envisioned the demolition of significant amounts of housing, Congress required that households displaced by redevelopment be given priority in the newly constructed public housing authorized by the 1949 Act.<sup>112</sup>

Linking slum clearance to housing had several deleterious ef-

(equivalent elimination requirement guaranteed that there would not be a substantial increase in housing stock); D. JUDD, *supra* note 35, at 262 (purpose of equivalent elimination was to keep public housing from competing with private sector housing); Peter Marcuse, *Housing Policy and the Myth of the Benevolent State*, 8 Soc. POL'Y 21, 24 (1978) (expansion of housing supply was not the goal of the Housing Act of 1937).

<sup>107</sup> Pub. L. No. 75-412 § 10(a), 50 Stat. 888, 891 (1937) (omitted from Housing Act in recodification, Pub. L. No. 93-383, 88 Stat. 633, 653 (1976)).

<sup>108</sup> ROGER FRIEDLAND, *POWER AND CRISIS IN THE CITY: CORPORATIONS, UNIONS AND URBAN POLICY 79* (1983) (urban redevelopment favored by "largest downtown corporations and financial intermediaries . . . who were interested in the economic reconstruction of the central city, and the prevention of another depression. . ."); D. JUDD, *supra* note 35, at 264-65 (discussing support of National Association of Real Estate Boards for urban redevelopment so long as it was implemented by private sector); Marcuse, *supra* note 106, at 25 (real estate interests supported urban redevelopment in principle); Marc Weiss, *The Origins and Legacy of Urban Renewal*, in *FEDERAL HOUSING POLICIES AND PROGRAMS 253, 254* (J. Paul Mitchell ed. 1985) ("Urban renewal owes its origins to the downtown merchants, banks, large corporations, newspaper publishers, realtors, and other institutions with substantial business and property interests in the central part of the city."). Despite supporting slum clearance, some of these same interests lobbied vociferously against the public housing provisions of the Housing Acts of 1937 and 1949. See N. KERR, *supra* note 102, at 103 (support by real estate lobby for slum clearance tempered opposition to Housing Act of 1949); Jewel Bellush & Murray Hausknecht, *Urban Renewal: An Historical Overview* in *URBAN RENEWAL: PEOPLE, POLITICS AND PLANNING 3, 11* (Jewel Bellush & Murray Hausknecht eds. 1967) ("The bill [Housing Act of 1949], sponsored by the unlikely trio of Senators Robert Taft, Allen Ellender, and Robert F. Wagner, Sr., also contained an urban redevelopment program supported by many of the same groups opposed to its public housing provisions. It seems likely that without the latter the bill would have passed with little or no difficulty, and that the redevelopment sections helped overcome opposition to the public housing titles."); Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 71, 81-92* (James Q. Witson ed. 1966) (real estate interests supported urban redevelopment, but did not support public housing).

<sup>109</sup> Housing Act of 1949, Pub. L. No. 81-171, §§ 101-10, 63 Stat. 413, 414 (1950).

<sup>110</sup> Housing Act of 1954, Pub. L. No. 83-560, §§ 301-16, 68 Stat. 590, 622 (1955).

<sup>111</sup> See M. ANDERSON, *supra* note 60, at 21-22.

<sup>112</sup> Housing Act of 1949, Pub. L. No. 81-171, § 302, 63 Stat. 413, 423 (1950).

fects on public housing which might account for at least a portion of its seemingly inflated cost. The requirement that a unit of slum housing be demolished for each unit of public housing built, at least for a time, effectively limited most public housing to central cities, since suburban jurisdictions did not have large quantities of blighted housing.<sup>113</sup> In addition to assuring that public housing tenants would have the lowest incomes and the fewest economic opportunities,<sup>114</sup> locating public housing in large central cities resulted in much higher land prices than would have been incurred had the housing been constructed in suburbs.<sup>115</sup> To economize on land costs, PHAs were forced to build higher structures than might otherwise have been desirable; this, in turn, increased construction and operating expenses,<sup>116</sup> not to mention social costs.<sup>117</sup>

<sup>113</sup> Suburbs that did not want public housing had numerous other methods to shield themselves from its construction. Because the program was voluntary and decentralized to local government units, communities that did not want public housing could merely decline to participate. Suburbs could also enact land use restrictions that made the development of public housing impossible. In combination with the equivalent elimination provisions of the Housing Act of 1937, the structure of the public housing program effectively limited most public housing to large central cities. See K. JACKSON, *supra* note 68, at 227 (1985). For an analysis of the reasons why certain communities elected to participate in the public housing program and built large numbers of units, see Michael Aiken & Robert R. Alford, *Community Structure And Innovation: The Case of Public Housing*, 64 AMER. POL. SCI. REV. 843 (1970).

<sup>114</sup> See sources cited *supra* note 35 (discussing urban underclass).

<sup>115</sup> Land located at the center of cities is much more expensive than land at the periphery. See MICHAEL GOLDBERG & PETER CHINLOY, *URBAN LAND ECONOMICS* 103-20 (1984) (discussing the bid rent model of land demand).

<sup>116</sup> Tall buildings require expensive mechanical systems such as elevators that are not needed for low density dwellings. Given the high usage of these systems and the consequent need for repair, both construction and operating expenses would tend to be higher for high rise as opposed to low-scale dwellings.

<sup>117</sup> Greater population densities may lead to a wide variety of social costs such as crime and vandalism, which inevitably increase operating expenses attributable to security and repair. See R. JONES, D. KAMINSKY & M. ROANHOUSE, *supra* note 84, at 47 ("[T]roubled projects have, on average, about twice as many units as relatively untroubled projects and nearly three times as many as untroubled projects. . ."). See generally OSCAR NEUMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1973) (critique of public housing architecture and population concentration). The requirement of the urban renewal program that displaced households be granted priority in admission also increased the level of social hardship among tenants. See Bratt, *supra* note 74, at 339 (discussing racial and economic transition of public housing tenants).

The poor physical quality and appearance of some public housing may also have been attributable to the influence of private real estate interests. The real estate industry was concerned that public housing might compete with housing available in the private market. Partly in response to these pressures, Congress enacted requirements that public housing not have "elaborate or expensive design or materials" and that it not cost more than the average construction cost of dwellings produced by the private sector. See L. FRIEDMAN, *supra* note 106, at 112-13. In making the housing legislation politically acceptable, Congress may have planted the seeds for future deterioration, social problems and rising operating and maintenance expenses. See RAYMOND J. STRUYK, *A NEW SYSTEM FOR PUBLIC HOUSING: SALVAGING A NATIONAL RESOURCE* 29-37 (1980) (cat-

Although the absence of private property rights and the influence of special interest groups may account for a portion of the relatively high cost of public housing, little evidence substantiates the privatization advocates' prediction that part of the increased cost of public housing is attributable to the tendency of bureaucrats to maximize their salaries or the size of their bureaus. Despite the occasional scandal involving the corruption of PHA officials or employees,<sup>118</sup> excessive salaries and staffs do not appear endemic. An examination of recent management reviews for thirty-seven PHAs under the jurisdiction of HUD's Philadelphia Area Office<sup>119</sup> indicates that only two were criticized for excessive salaries or fringe benefits and only one was admonished for over-staffing.

b. *Other Advantages and Limitations of Demand-Oriented Subsidies*

In addition to being more economical than public housing, demand-oriented subsidies provide tenants with greater choice as to the type of home and location.<sup>120</sup> Furthermore, to the extent that subsidized households occupy the existing stock of housing, demand-oriented subsidies may promote renovation of existing buildings or, at least, help prevent disinvestment.<sup>121</sup>

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alogue design flaws attributable, in part, to cost-cutting); Albert Mayer, *Public Housing Architecture Evaluated From PWA Days Up to 1962*, 19 J. HOUSING 446 (1962) (same); Albert Mayer, *Public Housing Design*, 20 J. HOUSING 133 (1963) (same).

<sup>118</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE, PUBLIC HOUSING: HUD OVERSIGHT OF THE ANNAPOLIS HOUSING AUTHORITY (1989) (examining HUD's oversight over PHA during period when executive director misappropriated comprehensive improvement funds); Jason DeParle, *The Worst City Government in America*, THE WASHINGTON MONTHLY, January 1989, at 33, 41-42 (discussing corruption involving District of Columbia Department of Human Services executives); Mark Mooney, *5 Percent of Housing Authority Supers on the Take*, United Press Int'l, Sept. 19, 1985; Martin Tolchin, *Kemp Tightens Control of 3,300 Housing Agencies*, N.Y. Times, Feb. 7, 1990, at A-23, col. 1 (Kemp acts to increase HUD oversight over PHAs after reports that director of Passaic, N.J. PHA was paid for two full-time and two part-time jobs).

<sup>119</sup> See *supra* note 100.

<sup>120</sup> Nevertheless, most demand subsidies enacted thus far require households to live in units that meet minimum quality standards. Some housing analysts have questioned whether tenants should be required to live in units which meet minimum quality standards as a condition of receiving federal assistance. See I. WELFELD, *supra* note 69, at 242-44 (criticizing minimum quality standards).

<sup>121</sup> Nevertheless, empirical evidence indicates that demand-oriented subsidies typically do not lead to significant upgrading of the existing housing stock. See *infra* text accompanying note 126. For a discussion of how housing deterioration may contribute to neighborhood disinvestment and renovation to reinvestment, see A. DOWNS, *supra* note 45, at 61-71 (discussing stages of neighborhood change); MICHAEL H. SCHILL & RICHARD P. NATHAN, *REVITALIZING AMERICA'S CITIES: NEIGHBORHOOD REINVESTMENT AND DISPLACEMENT* 9-45 (1983) (discussing causes and extent of neighborhood revitalization).

Even if demand-oriented subsidies do not necessarily lead to an upgrading of the housing stock, they may be preferable to public housing on the ground that they do not

Demand-oriented subsidies, however, are not the solution to all of the problems historically addressed by housing policy. In 1974, HUD funded the Experimental Housing Allowance Program ("EHAP"), an enormous demonstration project designed to examine the feasibility of a housing assistance payment entitlement program.<sup>122</sup> The study's results showed that only fifty-six percent of eligible households had an interest in participating in the program, and, of these households, only seventy-five percent successfully located housing.<sup>123</sup> Among the reasons for the rather low participation rates were the difficulties encountered by minority households in locating housing due to discrimination<sup>124</sup> and the desire of many people to remain in their existing homes although the housing's substandard quality would disqualify them for assistance.<sup>125</sup> In

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lead to disinvestment. Richard Muth has suggested that one negative aspect of public housing is its effect on the existing housing stock. According to Muth, the construction of public housing will increase the supply of housing and stimulate the filtering of units as tenants vacate their current homes. Their vacated units would filter down to an even lower income household and eventually be abandoned. Thus, public housing may not increase the total supply of low income housing in the long run and may lead to disinvestment. See RICHARD F. MUTH, *URBAN ECONOMIC PROBLEMS* 116 (1975); see also E. MILLS & B. HAMILTON, *supra* note 39, at 241 (possible that public housing increases rate of retirement of housing). *But cf.* Donald F. Vitaliano, *Public Housing and Slums: Cure or Cause?*, 20 *URB. STUD.* 173, 179, 182 (1983) (econometric analysis of census data indicates impact of public housing on housing disinvestment is minor and that rents in privately owned buildings decline an average of only 5 to 9% for each 1% increase in the proportion of public housing units in the total stock). Demand-oriented subsidies, however, may permit landlords to maintain the existing housing stock in addition to stimulating additional demand for new housing.

<sup>122</sup> EHAP was authorized by the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 504, 84 Stat. 1770, 1786 (1970), "[t]o demonstrate the feasibility of providing families of low income with housing allowances to assist them in obtaining rental housing of their choice in existing standard housing units." *Id.* EHAP had three components: (1) The Housing Allowance Demand Experiment, (2) the Housing Allowance Supply Experiment and (3) the Administrative Agency Experiment. The Demand Experiment entailed the issuance of three-year housing allowances to a sample of households in Pittsburgh, Pennsylvania and Phoenix, Arizona. The objective of the study was to examine the effects of alternative benefit formulas on the housing consumption of participating households. The Supply Experiment resulted in offers of housing allowances to all low income households in two housing markets, Green Bay, Wisconsin and South Bend, Indiana. The amount of the cash housing allowance in the Supply Experiment was based on income and the cost of housing in each market, but not on the actual expenditures of the participants. Only households living in dwellings that met minimum standards with respect to space, facilities, safety and sanitation were entitled to participate in the experiment. See *EXPERIMENTING WITH HOUSING ALLOWANCES: THE FINAL REPORT OF THE HOUSING ASSISTANCE SUPPLY EXPERIMENT 1-83* (Ira S. Lowry ed. 1983) (describing EHAP) [hereinafter *EXPERIMENTING WITH HOUSING ALLOWANCES*].

<sup>123</sup> See J. WEICHER, *supra* note 91, at 14.

<sup>124</sup> This is consistent with experience from the Section 8 Existing Housing Certificate Program. Under that program, about half of the white certificate holders successfully located housing, compared to only one quarter of minority households. See *id.* at 16.

<sup>125</sup> See *EXPERIMENTING WITH HOUSING ALLOWANCES*, *supra* note 122, at 85-86 (housing standards discouraged some eligible people from participating in Supply Experi-



addition, housing allowances, for the most part, did not succeed in improving the quality of housing or in increasing housing consumption. Under EHAP, tenants were entitled to spend more than the allowance for housing if they wished, or, alternatively, to spend less and keep the difference. Tenants, whose existing housing met minimum standards, tended to remain where they were, substituting the allowance for their personal funds.<sup>126</sup>

Despite these limitations, EHAP demonstrates that the private sector can successfully accommodate increased demand. In perhaps the most important result of the experiment, the researchers found that housing allowances did not cause inflation in the price of the existing housing stock.<sup>127</sup> Although the absence of increased rental prices might reflect the choice of locations for the experiment or the fact that less than half of all eligible households participated, it did suggest that, under varying market conditions, demand-oriented subsidies are an effective and efficient mechanism for delivering housing services to low income households. This is especially true when the primary objective of the subsidy is to make housing more affordable.

Nevertheless, although economic theory and empirical evidence support increased reliance on housing vouchers or rent certificates, they also support a continuing role for public housing. As EHAP

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ment). Lowry also cites small allowance entitlements, brief durations of eligibility, lack of information and reluctance to receive governmental assistance as reasons for the low level of participation. *See id.*

<sup>126</sup> *See id.* at 24 (half of all enrollees joined program while living in dwellings that met minimum standards and mainly used allowance to defray rent); C. PETER RYDELL, KEVIN NEELS, & C. LANCE BARNETT, PRICE EFFECTS OF HOUSING ALLOWANCE 22 (Rand Paper Series P-6794, 1982) (only small proportion of housing allowance goes into increased consumption). *But see* Bernard J. Frieden, *Housing Allowances: An Experiment That Worked*, in FEDERAL HOUSING POLICY AND PROGRAMS 373 (J. Paul Mitchell ed. 1985) (large numbers of households moved or upgraded their homes). Because many eligible households either remained in their existing dwellings or declined to participate, EHAP indicated that a housing allowance program would likely have little impact on improving the geographic mobility of low income households. *See* Kevin F. McCarthy, *Housing Search and Residential Mobility*, in THE GREAT HOUSING EXPERIMENT 191 (Joseph Friedman & Daniel H. Weinberg eds. 1983) (EHAP "had little effect on either the rate at which recipients moved or the geographic pattern of their mobility"); Peter H. Rossi, *Residential Mobility*, in DO HOUSING ALLOWANCES WORK? 147, 167 (Katherine Bradbury & Anthony Downs eds. 1981) (increase in probability of moving attributable to EHAP Supply Experiment is between 5.2% and 9.6%).

<sup>127</sup> EXPERIMENTING WITH HOUSING ALLOWANCES, *supra* note 122, at 26 (EHAP Supply Experiment "[h]ad no perceptible effect on rents or property values. . ."); C. RYDELL, K. NEELS & C. BARNETT, *supra* note 126, at 20 ("housing allowance program had virtually no effect on the price of housing . . ."); Frieden, *supra* note 126, at 376 (same). Evaluators of EHAP attribute the absence of price effects to the repair of some housing units, new construction and an increase in occupancy rates. *See* EXPERIMENTING WITH HOUSING ALLOWANCES, *supra* note 122, at 177; C. PETER RYDELL & C. LANCE BARNETT, PRICE EFFECTS OF HOUSING ALLOWANCES 20 (1982).

and the Section 8 Program demonstrate, demand-oriented subsidies are unlikely to improve markedly the quality of housing. Although the problem of deteriorated housing is less severe today than in the past,<sup>128</sup> among particular socioeconomic and racial groups substandard housing remains a major problem.<sup>129</sup> In addition to improving housing quality for its residents, the replacement of deteriorated private housing with new public housing may eliminate the externalities associated with substandard housing in certain neighborhoods.<sup>130</sup> Public housing may also be necessary in certain jurisdictions where the private sector cannot supply sufficient housing to satisfy demand due to market constraints such as stringent land use regulation, building codes or rent control.<sup>131</sup> In addition,

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<sup>128</sup> See *supra* text accompanying notes 33-34.

<sup>129</sup> See PAUL A. LEONARD, CUSHING N. DOLBEARE & EDWARD B. LAZERE, *A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR* 55 (1989) (black and Hispanic households are twice as likely as white households to live in substandard dwellings).

<sup>130</sup> See William A. Rabiaga, Ta-Win Lin & Linda M. Robinson, *The Property Value Impacts of Public Housing Projects in Low and Moderate Density Residential Neighborhoods*, 60 *LAND ECON.* 174, 178 (1984) (properties in Portland, Oregon gained value after location of public housing in close proximity). *But see* Hugh O. Nourse, *A Rationale for Government Intervention in Housing: The External Benefit of Good Housing, Particularly with Respect to Neighborhood Property Values*, in 1 *HOUSING IN THE SEVENTIES: WORKING PAPERS* 243, 250 (U.S. Department of Housing and Urban Development, 1976) ("There is no evidence supporting subsidization of the poor in standard quality housing in order to improve surrounding property values."). The objective of improving housing quality for low income households or neighborhoods does not necessarily lead to the conclusion that public housing is the appropriate form of government intervention. Some would say that public housing, itself, creates neighborhood effects by blighting neighborhoods. Although, as I have demonstrated, the stereotypical image of public housing is at war with reality, see *supra* text accompanying notes 79-86, an alternative policy approach would be to subsidize construction of low income housing by the private sector. Empirical studies, however, have reached conflicting conclusions as to whether supply-oriented subsidies paid to private sector developers are more cost-effective than public housing. Compare CONGRESSIONAL BUDGET OFFICE, *supra* note 33, at 92 (public housing is less expensive than Section 8 New Construction) with URBAN SYSTEMS RESEARCH AND ENGINEERING, INC., *supra* note 93, at S-4 to S-5 (public housing is more expensive than Section 8 New Construction). The construction of public housing may also facilitate community redevelopment by providing homes for displaced households. Whereas reliance on the private market would likely lead to hardship due to the time between clearance and construction of new housing, the government could coordinate the construction of public housing to precede clearance.

<sup>131</sup> Given the structure of the public housing program, however, it may be difficult for the program to correct these market barriers. Decisions on building and locating public housing are made by PHAs, which frequently are composed of people appointed by locally elected public officials. Their jurisdiction is usually co-terminous with the municipality in which they are located. Therefore, it is unlikely that a PHA would be inclined to obtain an exemption from restrictive zoning and building code requirements. Furthermore, PHAs in urban locations which would like to build housing in suburban locations will in most cases be unable to do so, since they do not have the power to build outside their municipal boundaries. *But see* *Hills v. Gautreaux*, 425 U.S. 284 (1976) (subsidized housing is ordered to be located outside city despite absence of interdistrict violation); CAROL B. MEEKS, *HOUSING* 253 (1980) (some PHAs serve several municipalities or counties).

to the extent that housing markets are extremely tight and the supply of housing, at least in the short-run, relatively inelastic, publicly provided housing may be helpful in preventing price inflation.<sup>132</sup> Public housing may also be used as a convenient vehicle for the public sector to provide social services such as health care, job training and education.<sup>133</sup>

Public housing can also be utilized efficiently and effectively to promote racial integration. Frequently, PHAs have been justifiably condemned for creating and maintaining housing segregation.<sup>134</sup> Nevertheless, many PHAs have constructed successful scattered-site housing in non-racially impacted communities.<sup>135</sup> Most housing analysts agree that minority households face discrimination in the

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<sup>132</sup> For a description of the problems faced by households seeking to utilize housing vouchers in extremely tight housing markets, see Michael Winerip, *In New York, H.U.D.'s Vouchers Pay for Already Cheap Housing*, N.Y. Times, Dec. 31, 1989, at 1, col. 6 (vouchers given to already subsidized tenants because vouchers were insufficient to enable low income households to rent apartments in unsubsidized private market). The ability of public housing to ameliorate problems of short-term supply inelasticity would depend on the public sector being able to purchase land, obtain government approvals and construct housing in a more expeditious manner than the private sector. Certain factors facilitate quick PHA action, such as its power of eminent domain and the likelihood that PHA officials would have a political relationship with municipal officials in charge of dispensing building permits and zoning variances. Cf. E. MEEHAN, *supra* note 53, at 25 (high probability of a significant amount of interaction between elected officials and PHA). Nevertheless, the fact that the decision to locate and build public housing is a public one may lead to procedural delays and time-consuming controversy. See, e.g., MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST* 91-120 (1955) (describing community opposition to public housing).

<sup>133</sup> See COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, *supra* note 63, at 25-27 (describing innovative services provided by PHAs); Matulef, *supra* note 78, at 176 (same).

<sup>134</sup> See, e.g., *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); WILLIAM C. JOHNSON, *THE POLITICS OF URBAN PLANNING* 138 (1989) (public housing located in minority neighborhoods or other areas undesirable to whites); John M. Goering & Modibo Coulibaly, *Investigating Public Housing Segregation: Conceptual and Methodological Issues*, 25 *URB. AFF. Q.* 265, 281 (1989) (in 1977, the percentage of units in which blacks constituted over 80% of the project's population was 46%); Elizabeth K. Julian & Michael M. Daniels, *Separate And Unequal—The Root and Branch of Public Housing Segregation*, 23 *CLEARINGHOUSE REV.* 666 (1989) (discussing litigation strategies to challenge public housing race segregation). *But cf.* Wilhemina A. Leigh & Mildred O. Mitchell, *Public Housing and the Black Community*, 17 *REV. BLACK POL. ECON.* 107, 118-19 (1988) (segregation in inner city public housing projects is inevitable because of racial composition of waiting lists).

<sup>135</sup> See James B. Hogan & Dorothy L. Lengyel, *Experiences With Scattered—Site Housing*, 2 *URB. RESOURCES* 9, 11-12 (1985) (survey of residents in Seattle's scattered—site public housing showed very high levels of satisfaction with neighborhoods and housing and an increased feeling of self-worth); J. Dennis Lord & George S. Rent, *Residential Satisfaction in Scattered-Site Public Housing Projects*, 24 *SOC. SCI. J.* 287, 300 (1987) (survey of predominantly black residents in scattered-site housing developments in white areas of Charlotte, North Carolina indicates that they were overwhelmingly satisfied with their residences); Ruth G. Price, *A Cheer for the Agencies*, *PLANNING*, Feb. 1985, at 19-20 (discussing scattered-site projects throughout the country); William K. Stevens, *Scattered*

housing market that frequently prevents them from locating housing in white neighborhoods or, alternatively, results in their paying a premium for housing in such areas.<sup>136</sup> The cost of building public housing in white neighborhoods may, in some instances, be less expensive than subsidizing the discrimination-inflated rents of minority tenants in the private sector.<sup>137</sup>

In summary, subsidizing consumer demand through housing allowances or vouchers seems to be the policy best suited to providing the greatest number of low income households with decent and affordable homes.<sup>138</sup> Nevertheless, it would be naive to expect a demand-oriented approach to be appropriate in all contexts. Housing markets are local, rather than national, thereby creating the need for a wide variety of approaches to deal with distinctive problems. In many markets, housing allowances alone will be sufficient. On the other hand, direct provision of housing by the public sector may

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*Low-Cost Housing Offers Renewed Hope To Poor and Minorities*, N.Y. Times, Sept. 15, 1988, at 6, col. 1 (same).

<sup>136</sup> See John Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s*, in *DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION* 43, 59 (Gary A. Tobin, ed. 1987) [hereinafter *DIVIDED NEIGHBORHOODS*] ("The best studies all find that the price of equivalent housing is higher in largely black than in largely white neighborhoods and that within a given neighborhood blacks pay more than whites for equivalent housing."); John Yinger, *Prejudice and Discrimination in the Urban Housing Market*, in *CURRENT ISSUES IN URBAN ECONOMICS* 430, 455-57 (Peter Mieszkowski & Mahlon Straszheim eds. 1979) (summarizing studies about price differentials based on race); cf. Douglas S. Massey, Gretchen A. Condran & Nancy A. Denton, *The Effect of Residential Segregation on Black and Economic Well-Being*, 66 *SOC. FORCES* 29, 52-54 (1987) (blacks are less able to achieve spatial objectives than whites of similar social status). *But see* James R. Follain, Jr. & Stephen Malpezzi, *Another Look at Racial Differences in Housing Prices*, 18 *URB. STUD.* 195, 201 (1981) (regression results "indicate decline and elimination of black premiums.").

<sup>137</sup> Cf. James W. Fossett & Gary Orfield, *Market Failure and Federal Policy: Low-Income Housing in Chicago 1970-1983*, in *DIVIDED NEIGHBORHOODS*, *supra* note 136, at 158, 178 (1987) (housing allowances and demand subsidies will have limited effect unless access to housing can be ensured). Public provision might also reduce high search costs incurred by minority households due to widespread racial steering practices. See Pearce, *A Sheltered Crisis: The State of Fair Housing Opportunity in the Eighties*, in *A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES* 143, 148 (U.S. Commission on Civil Rights, 1983) (discussing racial steering practices).

<sup>138</sup> Housing assistance would seem to be an appropriate candidate for privatization under the guidelines suggested in a recent book by John Donahue. See generally J. DONAHUE, *supra* note 13. Donahue suggests that privatization of services might achieve efficiency gains in circumstances where the government can specify what it wants from the private providers and monitor their performance effectively. See *id.* at 217. In addition, efficiency gains are much more likely to occur when the private provider of services operates in a competitive market. See *id.* at 218. To the extent that we as a society determine that an objective of housing policy is improved housing quality, the government can develop minimum standards and conduct periodic inspections, much as it does under the Section 8 Existing Housing Certificate Program. Compliance by private landlords with program requirements should be readily ascertainable. Furthermore, as noted at *supra* text accompanying note 41, housing markets typically meet the standards of competitive markets.

nonetheless be appropriate either as the primary housing delivery mechanism or in conjunction with demand-oriented subsidies to correct a wide variety of market failures and constraints or, alternatively, to achieve other public objectives such as minimum quality standards and effective delivery of social services.

### III

#### PRIVATIZING PUBLIC HOUSING: UNFAIR AND UNWISE

It does not automatically follow from the conclusion that federal housing assistance should increasingly rely on the private sector by subsidizing demand, rather than new construction, that the existing supply of public housing should be disposed of. To the contrary, in this section, after summarizing various proposals to privatize the existing stock of public housing, I argue that a federal requirement that PHAs sell their public housing to tenants at deeply discounted prices would be inequitable and unwise. First, I demonstrate that the underlying normative vision of proponents of proposals to sell public housing—that low income households should be homeowners rather than tenants—is based upon rather tenuous empirical assumptions and arguments. Second, even if transforming tenants into homeowners were a desirable objective, selling public housing to existing tenants is an inappropriate vehicle in which to implement the policy. Privatizing public housing would grant windfalls to some purchasers and likely harm many others. Prospective tenants, residents who do not purchase and PHAs would be adversely affected by lengthened waiting lists, reduced selection of units and locations, cutbacks in services and the further marginalization of public sector housing. In reaching these conclusions, I draw upon the experience of Great Britain since its enactment in 1980 of a law giving tenants of publicly owned housing the right to purchase their units. I analyze data collected by British researchers as well as my own interviews with British policymakers and tenants.<sup>139</sup>

#### A. Proposals To Privatize Public Housing

Proposals to sell public housing units to tenants are not entirely new in the United States. In 1965, the federal government enacted the Turnkey III Homeownership Opportunities Program which permitted tenants to purchase newly built public housing when their accumulated rent payments equalled the development cost of the

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<sup>139</sup> In addition to the books and articles cited in the text, evidence of the impact of Great Britain's council housing privatization program was obtained from interviews with over a dozen British government officials, neighborhood organizers, academics and tenants conducted in 1985. In addition to interviewing these individuals, I visited several council housing estates, including some that had been sold to tenants.

unit or when they received sufficient mortgage financing. The program, however, was not widely viewed as successful. Less than one-fifth of the total number of units of housing authorized by Congress were purchased, largely due to the long time period required for the tenants' equity to build and the inability of low income households to obtain private financing.<sup>140</sup>

More recent proposals to sell public housing to tenants are inspired by Great Britain's Housing Act of 1980.<sup>141</sup> Before 1980, local authorities in Great Britain could sell units of publicly owned housing, called "council housing," to occupants if they decided that the sale was in the best interests of their constituents. In 1980, as part of its legislative program to privatize the public sector,<sup>142</sup> the British government enacted legislation which gave tenants of council housing the right to buy their homes from local authorities. The Housing Act of 1980 prevents local authorities from exercising any discretion in refusing to sell units from their stock of housing. The legislation mandates that homes be sold at discounts that range from thirty-three to sixty percent of market value. In addition, purchasers are guaranteed mortgage loans to finance the sales.<sup>143</sup>

In 1984, the Heritage Foundation proposed that the United States adopt a program of public housing sales similar to the one in Great Britain.<sup>144</sup> In 1984, 1985 and again in 1986, members of Congress introduced bills to enable households living in public housing for a period of two years, who are deemed by the Department of Housing and Urban Development capable of assuming the responsibilities of homeownership, to purchase their units provided that the purchase would not interfere with the rights of other families residing in the public housing or harm the efficient operation of the pro-

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<sup>140</sup> See E. MEEHAN, *supra* note 72, at 157-64 (units in homeownership program were more abused than units in any other family development); Hilary Silver, Judith McDonald & Ronald J. Ortiz, *Selling Public Housing: The Methods And Motivations*, 42 J. HOUSING 213, 219 (1985); *Privatization of the Federal Government, Hearings Before the Subcomm. on Monetary and Fiscal Policy of the Joint Econ. Comm.*, 98th Cong., 2d Sess. 51 (1984) [hereinafter *Privatization Hearings*] (statement of June Koch, Assistant Secretary, U.S. Dept. of HUD).

<sup>141</sup> Housing Act, 1980, ch. 1, *as amended by* Housing Act, 1985, §§ 118-89.

<sup>142</sup> For other aspects of Britain's privatization program, see generally PRIVATIZATION AND THE WELFARE STATE (Julian Le Grand & Ray Robinson eds. 1984); C. VELJANOVSKY, *supra* note 15; J. VICKERS & G. YARROW, *supra* note 17.

<sup>143</sup> To reduce the likelihood that tenants would resell their homes for a profit shortly after purchase, the Housing Act provides that if such a resale were to occur within five years of the original purchase, the tenant-purchaser would have to repay a portion of the purchase price discount to the local authority. The proportion of the discount to be repaid upon resale decreases with time from the date of original purchase. See Housing Act § 155 (1985).

<sup>144</sup> The proposal suggests selling units at 30% of their assessed market value with no downpayment required. PHAs would be expected to provide thirty-year mortgage loans and purchasers would be penalized if they sold their units within seven years. See S. BUTLER, M. SANERA & W. WEINROD, *supra* note 9, at 116-17.

ject.<sup>145</sup> Under the terms of the proposed legislation, PHAs would be required to sell homes to qualifying tenants for a price not to exceed twenty-five percent of the dwelling's fair market value. In addition, the PHA would be required to provide mortgages to purchasers at an interest rate not to exceed seventy percent of the market interest rate. If a tenant were to resell his or her unit before five years had elapsed, he or she would have to pay to the PHA a proportion of the sales price ranging from seventy-five percent in the first year to fifteen percent in the fifth year.<sup>146</sup> Although this legislation did not pass both houses of Congress,<sup>147</sup> a bill did pass establishing a voluntary homeownership program,<sup>148</sup> and HUD instituted a public housing sales demonstration project.<sup>149</sup>

In 1988, the President's Commission on Privatization recommended the sale of public housing to tenants at discounted sales prices.<sup>150</sup> In addition, the current Secretary of HUD, Jack Kemp, a former congressional sponsor of legislation granting tenants the

<sup>145</sup> See *supra* note 3.

<sup>146</sup> The bills also provided for repair of the housing by the PHA before the sale, as well as technical assistance and training for purchasers. See H.R. 4628, *supra* note 3, at § 2; S. 3030, *supra* note 3, at § 2; H.R. 6317, *supra* note 3, at § 2.

<sup>147</sup> H.R. 4628, *supra* note 3, passed the House of Representatives in 1986. See *supra* note 4. It was never taken up by the Senate.

<sup>148</sup> Under the program, tenants of public housing may form a resident management corporation. If the corporation operates effectively and efficiently for a period of three years, the tenants may purchase one or more multifamily dwellings, provided that they are prepared to undertake ownership, management and maintenance of the building, and provided that the PHA certifies that the purchase will not interfere with the rights of other families residing in public housing, will not harm efficient management of other public housing and is in the community's interest. In addition, the PHA must, within thirty months of the sale, replace all of the units sold. The tenant's price is determined by negotiation between the purchaser and the PHA. Housing units may be resold only to resident management corporations, lower income families or PHAs, and the amount of profit that the seller can retain is strictly limited. No family residing in the public housing project may be evicted as a result of the sale. See 42 U.S.C. § 1437s (Supp. V. 1987).

<sup>149</sup> HUD announced the Public Housing Homeownership Demonstration on October 25, 1984. See 49 Fed. Reg. 43,028 (1984). Seventeen PHAs have been selected to participate in the program. The PHAs have agreed to sell 1,315 units of public housing to tenants. Under the program, the federal government will continue to make debt service payments on the housing units sold. Furthermore, properties sold to tenants must be in good condition prior to sale; tenants who do not wish to purchase their units may not be displaced, and safeguards against windfall profits from resale must exist for a minimum of five years after sale. The price for the units is to be negotiated between the purchasers and the PHA. *Id.* at 43,030-32. For a description of the demonstration project and the structure of each PHA's sales program, see Department of City and Regional Planning, University of North Carolina at Chapel Hill, Public Housing Homeownership Demonstration Assessment: Background Program Description Report (Jan. 1988).

<sup>150</sup> PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 17-18 ("For public housing in good condition and consisting of detached one-family houses, duplexes and row houses, Congress should pass legislation authorizing and directing HUD to sell these units aggressively to tenants at a discounted price, with no further government

right to buy public housing,<sup>151</sup> has repeatedly stressed his commitment to the sale of public housing units.<sup>152</sup>

### B. Evaluating Proposals To Sell Public Housing

Advocates of the sale of public housing to tenants suggest that the policy would generate significant benefits. While a member of Congress, Secretary Kemp asserted that poor people deserve to share in the "American dream of homeownership."<sup>153</sup> Among the advantages of homeownership usually mentioned are the ability of tenants to share in the financial rewards of real estate investment,<sup>154</sup> the better care that owners would presumably take in maintaining property they own,<sup>155</sup> the security of knowing that they will not be

expenditures for upkeep or debt service, while providing vouchers to tenants that freely elect to vacate.").

<sup>151</sup> See *supra* text accompanying notes 3-4.

<sup>152</sup> *Kemp Stresses Federal Aid To Poor Families, Not Developers, In Wide-Ranging Hearing*, 16 HOUSING & DEV. REP. 1038 (May 1, 1989) (Kemp outlines six top agenda items: homelessness, economic development, homeownership, public housing tenant management and homeownership, fair housing and anti-drug activities); Kemp, *supra* note 5 ("Last month at my swearing-in ceremony at HUD, I was thrilled to hear President [sic] George Bush say that all public housing residents should have . . . the right to purchase their housing. . . . I am honored to help carry out that mandate, and I pledge the full resources of this agency to make those rights and opportunities a reality for public housing residents of America.").

As part of its HOPE legislative program, see *supra* note 5, the Bush administration has proposed a mandatory public housing sales program. Under the proposed legislation, PHAs or resident management corporations are invited to submit proposals to HUD to convert public housing to private ownership. If the homeownership plan approved by HUD is initiated by tenants, the PHA would be required to transfer the units. HUD would provide financial assistance for the conversions in the form of planning and implementation grants. Although once public housing units are converted to private ownership they would no longer be eligible to receive public housing operating subsidies, the the legislation contemplates that HUD would provide continuing financial assistance either through grants or vouchers. The legislation places limits on how a PHA could spend any proceeds it would receive from a sale. One-half of the money could be used to defray costs incurred in operating the homeownership program; the other half would have to be paid to HUD. If the initial sales price for the housing is below market value, the plan submitted to HUD must include restrictions prohibiting "undue profits" for a period of ten years. The legislation also provides that a homeownership program may establish restrictions on resale. If the homeownership plan does not restrict resales to lower income purchasers for "the life of the homeownership program," replacement housing would have to be provided. Under the proposal, replacement housing might include additional public housing units, Section 8 certificates or vouchers, units provided through other HOPE programs, state or local housing or units built by private developers taking advantage of the Low Income Housing Tax Credit.

<sup>153</sup> "They [poor people] too yearn for homeownership—a home they can afford, a home in which to raise a family in security and independence, a home in which to take pride while building and improving for the future for their children." *Privatization Hearings*, *supra* note 140, at 27 (prepared statement of Rep. Jack Kemp).

<sup>154</sup> See PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 16.

<sup>155</sup> See Stuart Butler, *Privatization: A Strategy For Taming The Federal Budget*, HERITAGE FOUNDATION REP., Jan. 1, 1988, at 17. This justification for the sale of public housing is



evicted or forced to move due to rising rents<sup>156</sup> and the increased neighborhood stability fostered by better housing maintenance and longer periods of residency.<sup>157</sup> Advocates of privatizing public housing also point to the savings that will accrue to the federal government from no longer having to subsidize the public housing stock that is sold.<sup>158</sup> Furthermore, floating through discussions of privatization is the nebulous conviction that transforming poor people into homeowners will make them feel more a part of the American capitalist system and perhaps alter their political perspective.<sup>159</sup>

In this section, I examine the advantages and disadvantages of the proposed sale of public housing to low income tenants. On the whole, evidence suggests that the case for transforming low income tenants into homeowners is weaker than the adherents of privatization suggest. By applying the experience of Great Britain's sale of council housing to our own public housing program, I further conclude that the sale of public housing would be inequitable with respect to low income households and potentially disastrous with respect to the remaining public housing program.

### 1. *Transforming Tenants into Homeowners*

Homeownership is such an established feature of America's cultural landscape that it almost seems subversive to question its merits. Perhaps unsurprisingly, little systematic research exists that evaluates the advantages of homeownership for low income households.<sup>160</sup> Nevertheless, the benefits, although real in some instances, have been characterized by one leading housing analyst as "modest."<sup>161</sup> Based on an analysis of whether tenants receive as great a level of housing services as similarly situated owner-occu-

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a variant of the argument that freely alienable property rights will promote economic efficiency. See *supra* text accompanying notes 14-18.

<sup>156</sup> See *Privatization Hearings*, *supra* note 140 (statement by Kemp that homeownership will result in security).

<sup>157</sup> See 49 Fed. Reg. 43,028, 43,029 (1984) (notice of Public Housing Homeownership Demonstration).

<sup>158</sup> See PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 16; Butler, *supra* note 155.

<sup>159</sup> See *Privatization Hearings*, *supra* note 140, at 27 (statement by Kemp that the major goal is to "make the dream of homeownership a reality for thousands of public housing tenants . . . who don't have a strong voice in Washington, who feel left out of our economic system, and who have often become alienated from our political system").

<sup>160</sup> See PETER MARCUSE, HOMEOWNERSHIP FOR THE POOR: ECONOMIC IMPLICATIONS FOR THE OWNER/OCCUPANT (Urban Institute Working Paper 112-26, Mar. 10, 1971); RAYMOND J. STRUYK, SHOULD GOVERNMENT ENCOURAGE HOMEOWNERSHIP? (Urban Institute, 1977); Valerie Pierce, Federal Homeownership Programs For Low Income Families: Lessons From Past Experience (Oct. 22, 1987) (unpublished student paper, Yale Law School).

<sup>161</sup> R. STRUYK, *supra* note 160, at 27.

pants, Struyk concludes that basic housing services enjoyed by owners are not "overwhelmingly universally greater" than those supplied to renters by landlords.<sup>162</sup> The evidence does suggest, however, that "[i]f a difference does exist, it is among lower-income households."<sup>163</sup> Struyk also finds it difficult to substantiate the prediction that homeowners will contribute to neighborhood stability. Owners do tend to move less frequently than renters. Since owners are also investors, however, they may be more likely to flee neighborhoods which exhibit early signs of distress or change.<sup>164</sup>

With respect to the financial rewards of homeownership, the picture is even less clear. The benefits of homeownership are tied to several factors: the national economy, the location of the home, the nature of local housing markets and the ability of the purchaser to afford the costs of maintenance, taxes and debt service. Recent data on the sales prices of single family homes indicate that the dramatic appreciation of home values, which increased the wealth of many moderate income American households over the past two decades, has slowed or ceased.<sup>165</sup> Some economists have even suggested that projected demographic forces, such as the coming of age of the "baby bust" generation, may lead to a drop in demand for housing and significant depreciation of home values over the next several decades.<sup>166</sup>

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<sup>162</sup> *Id.* at 19; cf. Peter Linneman, *An Economic Analysis of the Homeownership Decision*, 17 J. URB. ECON. 230, 233 (1985) (landlord production costs may be lower than those of owner-occupants because of their ability to solve free-rider problems and internalize externalities. *But see* GEORGE C. GALSTER, HOMEOWNERS AND NEIGHBORHOOD REINVESTMENT 296 (1987) (survey of Wooster, Ohio households indicates that compared to owner-occupants, absentee landlords are less likely to maintain their properties).

<sup>163</sup> R. STRUYK, *supra* note 160, at 19; see also LARRY OZANNE & RAYMOND J. STRUYK, HOUSING FROM THE EXISTING STOCK: COMPARATIVE, ECONOMIC ANALYSES OF OWNER-OCCUPANTS AND LANDLORDS 24 (1976) ("[L]ow- to middle-income rental households that switch to owner-occupancy will have higher levels of basic and other structural services and will reside in better neighborhoods.").

<sup>164</sup> See R. STRUYK, *supra* note 160, at 23.

<sup>165</sup> See, e.g., Sean A. Burns, *Outlook for the Economy and Real Estate*, 2 REAL EST. OUTLOOK 2, 7 (1989) (median existing single-family home price declined 1.9% in August 1989, rising only 3.7% for the preceding year); Thomas J. Lueck, *New York Region's Housing: No Signs of Return to Boom*, N.Y. Times, Sept. 24, 1989 at 1, col. 1 (sellers of homes in New York metropolitan region must sometimes accept 20% less than they could have gotten one year earlier); Robert A. Rosenblatt, *Falling Home Prices May Hurt Banks, Gonzalez Warns*, Los Angeles Times, Dec. 15, 1989, at D-2, col 1 (House Banking Committee chairman states that "[t]he entire country, including California, is 'beginning to get the Texas taint' of falling real estate prices. . .").

<sup>166</sup> See N. Gregory Mankiw & David N. Weil, *The Baby Boom, The Baby Bust, And the Housing Market*, 19 REG. SCI. & URB. ECON. 19 (1989) (predicting that over the next two decades "housing prices will fall to levels lower than observed at any time in recent history."). If Mankiw and Weil's predictions are correct, excess supply and lower prices may reduce both the cost of rental and owner-occupied homes, thereby helping to alleviate the problem of housing affordability. Nevertheless, households who purchase homes will suffer financial hardship as prices decline.

Even in generally rising markets, housing affordable to low income households would likely be located in depressed or transitional neighborhoods where the risk of declining property values is significant. Even in instances where the risk of price depreciation is small, the illiquidity of real property investments might make homeownership inappropriate for households who must live at the margin.<sup>167</sup> Homeownership also decreases the mobility of households, making it more difficult for them to move to areas of greater employment opportunity.<sup>168</sup> Furthermore, one primary advantage of homeownership over renting—its favorable treatment under federal tax laws<sup>169</sup>—is probably irrelevant to most low income households since most of the benefits are available only to households that have a sufficiently large dollar amount of deductible expenses to justify itemization.<sup>170</sup>

The psychological and political benefits of homeownership are even more difficult to assess objectively. Plenty of survey and anecdotal information documents the high utility many people derive from owning their own homes.<sup>171</sup> Not having to worry about being

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<sup>167</sup> See P. MARCUSE, *supra* note 160, at 12.

<sup>168</sup> Cf. John D. Kasarda, *Jobs, Migration, and Emerging Urban Mismatches*, in *URBAN CHANGE AND POVERTY* 148, 193 (Michael G.H. McCreary & Laurence E. Lynn, Jr. eds. 1988) (arguing in favor of policies to improve the mobility of low income households that are increasingly living in "culturally and economically isolated inner-city areas of decline."). In addition to the illiquidity of real property investments, mobility might be hampered by the psychological attachment of an owner to his or her home. Cf. Mark Fried, *Grieving For A Lost Home*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 359-79 (James Q. Wilson ed. 1966) (discussing psychological problems created by involuntary displacement resulting from the urban renewal program). *But cf.* M. SCHILL & R. NATHAN, *supra* note 121, at 112-13 (majority of renter households surveyed who were displaced by private reinvestment prefer their current homes and neighborhoods to their previous ones).

<sup>169</sup> See *supra* note 6.

<sup>170</sup> Among the tax deductions available to households that itemize their deductions are mortgage interest payments, loan origination fees and real property taxes. Typically, the aggregate value of itemized deductions for low income households does not justify itemization. See Dolbeare, *supra* note 6, at 268 (fewer than one-half of all homeowners take mortgage interest and property tax deductions). Of course, landlords also receive lucrative tax benefits under the Internal Revenue Code. See I.R.C. §§ 167-68 (depreciation deductions). To the extent that housing markets are competitive, these benefits should be passed through to tenants. Owner-occupants of all income levels benefit from the failure by the federal government to tax imputed rental income. See *supra* note 6.

<sup>171</sup> See, e.g., EARL W. MORRIS & MARY WINTER, *HOUSING, FAMILY, AND SOCIETY* 286 (1978) (overwhelming proportion of empirical evidence supports proposition that homeownership norm pervades all classes and racial and ethnic groups); CHARLES VERT WILLIE, *A NEW LOOK AT BLACK FAMILIES* 52 (2d ed. 1981) (black working class views homeownership as an "indicator of respectability"); *Housing Act of 1984, Part 4: Hearings Before the Subcomm. on Housing and Community Development, Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 2861 (1985) ("Today, I feel so happy with my own house seeing my own children playing in their own backyard; my husband coming home from work parking his car in the driveway. I feel like a new person. Even if I win the

evicted or forced out by rising rents undoubtedly creates a greater sense of security and control over one's life. Nevertheless, homeowners are not entirely free from the threat of external forces. Rising real estate taxes and maintenance expenses may make the cost of owning a home as unaffordable as rising rents. In addition, the relative psychological benefits of homeownership should not be overstated; renters, including public housing tenants, typically respond that they are very satisfied with their homes.<sup>172</sup>

Homeownership does seem to be related to higher levels of voter participation in elections, thus supporting the argument that owning one's home may increase one's identification with and sense of belonging to the political community.<sup>173</sup> In addition, evidence from Great Britain indicates that the political orientation of tenants who purchased council housing became increasingly conservative<sup>174</sup>

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New York Lottery, I do not sell my house.") (testimony of Josephine Torres discussing Nehemiah homeownership program).

<sup>172</sup> See *supra* note 85.

<sup>173</sup> NATIONAL ASSOCIATION OF REALTORS, HOMEOWNERSHIP: KEY TO THE AMERICAN DREAM 22 (1988) (1986 survey shows that compared to renters, homeowners were more likely to be registered to vote and to vote in elections); PHILIP K. PIELE & JOHN STUART HALL, BUDGETS, BONDS, AND BALLOTS: VOTING BEHAVIOR IN SCHOOL FINANCIAL ELECTIONS 44 (1973) (homeowners more likely to vote in school financial elections than renters); Paul William Kingston, John L.P. Thompson & Douglas M. Eichar, *The Politics of Homeownership*, 12 AMER. POL. Q. 131, 146 (1984) (opinion surveys show homeownership is associated with increased voting rates, but no other form of political participation).

Empirical studies also show that when socioeconomic variables are controlled for, homeowners are more likely than renters to join voluntary organizations and take part in neighborhood activities. See Terry C. Blum & Paul William Kingston, *Homeownership And Social Attachment*, 27 SOC. PERSP. 159, 173 (1984) ("[H]omeowners are relatively more apt to espouse traditional social values, join voluntary organizations, and to be enmeshed in local neighborhood-based social networks."); Kevin R. Cox, *Housing Tenure And Neighborhood Activism*, 18 URB. AFF. Q. 107, 115 (1982) ("[T]he effect of homeownership upon neighborhood activism is remarkably robust."). Most explanations of the relatively high level of participation by homeowners suggest that homeowners seek to protect the economic investment they have made in their housing. See Blum & Kingston, *supra*, at 175 (homeowners have an incentive to enhance the general environment of their investment). But see Cox, *supra*, at 117-18 (the high cost of relocation, rather than investment protection, leads homeowners to participate in community affairs).

<sup>174</sup> See ELIM PAPADAKIS & PETER TAYLOR-GOOPY, THE PRIVATE PROVISION OF PUBLIC WELFARE 158 (1987) ("To some extent, the success of the Conservatives in capturing the working-class vote can be explained in terms of their positive attitude towards owner occupation."); cf. *Proceedings of Symposium on Privatization: The Assumptions and the Implications*, 71 MARQ. L. REV. 585, 625 (1988) [hereinafter *Proceedings on Privatization*] (comment by Ellickson that homeowners are more likely to adopt conservative views on issues such as local finance). But see Ted G. Jelen, *The Impact of Home Ownership on Whites' Racial Attitudes*, 18 AMER. POL. Q. 208, 210-11 (1990) (homeownership unrelated to partisanship or presidential vote, but is related to existence of racist views); Kingston, Thompson & Eichar, *supra* note 173, at 146-47 (opinion surveys show that homeownership "does not have a regular and general conservatizing impact."). The conservatizing tendency of homeownership is usually attributed to one of two related theories. The home constitutes the major financial investment of most households and may make the homeowner more likely to support protection of private property and

as a result of the purchase.<sup>175</sup>

## 2. *The Sale of Public Housing as a Matter of Housing Policy*

Although the magnitude of benefits of becoming a homeowner is hotly contested, homeownership would undoubtedly be advantageous for some low income tenants. Nevertheless, the sale of public housing to tenants is a particularly inappropriate way to achieve these objectives. Although the British housing market and publicly owned housing stock are strikingly different from our own,<sup>176</sup> Brit-

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maintenance of the status quo. See CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 73 (1977) ("homebuyer has a long-term vested interest in the neighborhood, the community, and the maintenance of the household's own property. . . ."); David Harvey, *Land, Capital, and Class Struggle Around The Built Environment in Advanced Capitalist Societies*, 6 POL. & SOC'Y 265, 272 (1976) (homeownership provides the allegiance of a segment of the working class to the principle of private property); Michael E. Stone, *Housing, Mortgage Lending, and the Contradictions of Capital in MARXISM AND THE METROPOLIS* 179, 186 (William K. Tabb & Larry Sawers eds. 1978) (homeowners' interests become tied to those of landlords and lenders). Marxists and neo-Marxists also suggest that homeownership promotes conservatism by fragmenting the working class. See MATTHEW EDEL, ELLIOT D. SCLAR & DANIEL LURIA, *SHAKEY PALACES: HOMEOWNERSHIP AND SOCIAL MOBILITY IN BOSTON'S SUBURBANIZATION* 193 (1984) (homeownership in suburbia divided the working class into different strata, isolated workers from their peers and furthered conservatism); Harvey, *supra*, at 272 (homeownership fragments working class). I will leave the question of whether the increasing conservatism of tenants as they become homeowners is a prospect that should be eagerly anticipated or ominously feared for others to resolve.

<sup>175</sup> One additional advantage of the change of tenure from renter to owner, with respect to publicly owned property, is allocative efficiency. Economic efficiency requires property rights to be freely transferable so that the underlying resource can be used by the person who values it most highly. Public housing is owned by PHAs under a contractual obligation to maintain it as such for lengthy periods of time. To the extent that transferring the property to the private sector releases it from this restraint on alienability, allocative efficiency will be promoted. *Bul see supra* text accompanying note 146 (under most privatization proposals property would not be freely alienable for limited period of time).

<sup>176</sup> British council housing comprises a much greater proportion of its nation's total housing stock than does American public housing. In 1981, just as the sale of council housing was beginning to accelerate, 31% of all British housing was owned and operated by the public sector compared to only 1.5% of all American housing. See E. Jay Howenstine, *Converting Public Housing to Individual and Cooperative Ownership: Lessons From Foreign Experience* 4 (U.S. Department of Housing and Urban Development, 1983) (mimeo); Pit & van Vliet, *supra* note 64, at 201. On the whole, residents of council housing are much higher up on the economic ladder than public housing tenants. The average income of council housing tenants is only one-third below the median income for owner-occupiers, and over one-half of all tenants are employed. See MICHAEL BALL, *HOUSING POLICY AND ECONOMIC POWER* 272 (1983). Council housing is generally in better condition than American public housing. Prior to commencement of the sales program, only 1 percent of all units were deemed "unfit." See Gray, *Consumption: Council House Management*, in *STATE HOUSING IN BRITAIN* 196, 199 (Stephen Merrit ed. 1979). The stock of council housing also has proportionately more of the types of units most people would prefer to purchase. Over 75% of all council housing units are single family homes, while less than 25% of American public housing is composed of single family accommodations. See Howenstine, *supra*, at 7; U.S. DEPARTMENT OF HOUSING AND URBAN

ain's experience with the sale of council housing is, nonetheless, instructive.

Since 1980, the British government has sold over one million units of council housing to tenants.<sup>177</sup> As might be expected, the tenants who purchase council housing tend to be middle-aged and earn higher incomes than those who choose not to buy.<sup>178</sup> Among the reasons for the concentration of sales among relatively affluent, middle-aged tenants is the substantial income required to maintain homes and meet monthly mortgage payments. In addition, there is a greater likelihood that older tenants have lived in council housing for a longer period of time and would therefore have had a greater opportunity to upgrade their homes.<sup>179</sup> Empirical studies of council housing sales have also consistently found similar patterns with regard to the types and locations of homes that are most often purchased. Tenants have purchased the more desirable single family homes much more frequently than any other type of council housing.<sup>180</sup> In addition, tenants have bought homes in outlying areas at much higher rates than homes in inner city locations.<sup>181</sup>

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DEVELOPMENT, ALTERNATIVE OPERATING SUBSIDY SYSTEMS FOR PUBLIC HOUSING 3 (1982).

<sup>177</sup> *Selling The Projects*, NATIONAL JOURNAL, Apr. 8, 1989, at 852.

<sup>178</sup> Households that purchase council housing are more likely to be composed of two wage earners, professionals, or skilled workers. They earn significantly higher incomes than do non-purchasers. See RAY FORREST & ALAN MURIE, *SELLING THE WELFARE STATE: THE PRIVATIZATION OF PUBLIC HOUSING* 125-26 (1988) (among employed households, 78% of sitting tenant purchasers are skilled manual, intermediate non-manual or professional employees, as compared to 62% of all council housing tenants; 76% of purchasers are employed, compared to 35% of all tenants); LENNART LUNDQVIST, *HOUSING POLICY & EQUALITY* 126 (1986) ("[t]he typical tenant purchaser is in his mid-forties, with adult children, and with an income higher than the average council tenant"); N.J. Williams, J. Sewel & F. Twine, *Council House Sales and Residualization*, 15 J. Soc. POL'Y 273, 276-79 (28% of purchasers as compared to only 6.4% of non-purchasers in Aberdeen, Scotland had incomes over £150 per week). Purchasing tenants are also over-represented in the 41-60 age cohort when compared to both all tenants and non-purchasing tenants. See R. FORREST & A. MURIE, *supra*, at 126; Williams, Sewel & Twine, *supra*, at 279.

<sup>179</sup> Cf. R. FORREST & A. MURIE, *supra* note 178, at 133-34 (discussing mobility within council housing).

<sup>180</sup> See *id.* at 120-21 (while flats comprise 30% of council housing stock, they constitute only 5% of sales from 1981 to 1985); GREATER LONDON COUNCIL, *COUNCIL HOUSE SALES: THE IMPLICATIONS FOR LOCAL AUTHORITY HOUSING IN LONDON* 7 (1984) (flats comprise between 60-75% of London's council housing, but only 10% of sales to tenants); Mike Barke, *The Sale of Council Homes in Newcastle Upon Tyne: Some Early Results*, N. ECON. REV. 2, 5 (1983/1984); (same in Newcastle); Williams, Sewel & Twine, *supra* note 178, at 285 (sales in Aberdeen have been predominantly of better dwellings in more popular areas).

<sup>181</sup> See R. FORREST & A. MURIE, *supra* note 178, at 139-60 (examining geographic patterns of sales in London, Liverpool and Birmingham); GREATER LONDON COUNCIL, *supra* note 180, at 6 (while only 45% of London's council housing is located in the outer boroughs, over 75% of sales have taken place there).

Despite its widespread popularity,<sup>182</sup> the council housing sales program has been intensely criticized on the ground that the sales have led to the "residualization" of the public sector housing stock.<sup>183</sup> Critics fear that as better quality dwellings are sold to tenants who earn the highest incomes, the council housing stock will increasingly be occupied by a low income, marginalized population.<sup>184</sup> Once this occurs, council housing could lose the widespread public support it has earned through the years.

Though American public housing has never enjoyed anything approaching the popular support of council housing in Great Britain, it is likely that current proposals to extend to tenants a right to buy their homes would result in similar, if less dramatic, changes. Due to the small overall size of the public housing stock, the very low incomes of public housing residents and the less desirable configuration of many units, it is highly unlikely that the proportion of tenants who would purchase their units would approach the level achieved in Great Britain. Nevertheless, it is likely that, as in Great Britain, the tenants who purchase their units would be those who earn the highest incomes and those who live in the most desirable units, typically single family homes or low density apartments outside the inner city.<sup>185</sup>

Even if promoting homeownership among low income house-

<sup>182</sup> After its initial opposition to council housing sales, the Labour Party joined the Conservative Party in supporting legislation to liberalize the program. See R. FORREST & A. MURIE, *supra* note 178, at 63-64; Rob Flynn, *Political Acquiescence, Privatization and Residualisation in British Housing Policy*, 17 J. SOC. POL'Y 289, 298-99 (1988).

<sup>183</sup> PAUL N. BALCHIN, *HOUSING POLICY: AN INTRODUCTION* 201-06 (1984); R. FORREST & A. MURIE, *supra* note 178, at 65-85; John English, *The Choice For Council Housing*, in *THE FUTURE OF COUNCIL HOUSING* 181, 190 (J. English, ed. 1982). But see David Clapham & Duncan MacLennan, *Residualisation of Public Housing: A Non-Issue*, 32 HOUSING REV. 9 (1983) (residualization has yet to be clearly established); Williams, Sewell & Twine, *supra* note 178, at 290 (residualization is likely to have only a marginal effect).

<sup>184</sup> Several critics of council housing sales argue that residualization will increasingly make Britain's publicly owned housing stock resemble that of the United States. See R. FORREST & A. MURIE, *supra* note 178, at 10-11 (citing earlier report of authors arguing that sales of council housing could result in a public sector housing stock like the United States); Valerie Karn, *Private Housing at All Costs: Some Lessons From America*, in *THE FUTURE OF COUNCIL HOUSING*, *supra* note 183, at 154-78 (British housing policy is creating similar problems for council housing as American housing policy created for public housing).

<sup>185</sup> Experience with HUD's Public Housing Homeownership Demonstration thus far supports the proposition that the most desirable units will be sold to relatively high income public housing tenants. Half of the units sold as of February, 1989 were scattered-site single family homes. See Maureen McCormick, *The Sale of Public Housing* 4 (Council of Large Public Housing Authorities, Feb. 27, 1989). Households participating in the sales program earned \$7,500 to \$30,000 per year, well above the median income for all residents of public housing. See *id.* at 5; see also *Results of Programs To Sell Units to Public Housing Residents Examined*, 16 HOUSING & DEV. REP. 896 (1989) (report by Stegman that purchasing households had an average annual income of \$18,568 and that 90% of households had at least one full-time wage earner).

holds is a desirable objective of public policy,<sup>186</sup> giving public housing tenants a right to purchase their units is not the appropriate approach to achieve this goal.<sup>187</sup> Public housing frequently has been criticized for violating principles of horizontal equity. At great expense, relatively few of the eligible pool of persons are housed, while most receive no assistance whatsoever.<sup>188</sup> Ironically, a sales program such as the one proposed would only magnify the inequity. Certain tenants, most of whom are likely to be the least needy, would receive a windfall paid for by the taxpayers, based solely on their good fortune in occupying a desirable public housing unit. Other public housing tenants, who earn lower incomes or occupy dilapidated units, would not benefit; many could be harmed.<sup>189</sup>

The sale of better public housing units to higher income tenants would harm existing and prospective tenants of public housing. Occupants of public housing would lose the opportunity to upgrade their current homes if the more spacious and desirable units were sold.<sup>190</sup> Assuming no major new rental housing programs are enacted,<sup>191</sup> prospective tenants would have to wait even longer for

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<sup>186</sup> For a discussion of the somewhat equivocal case for low income homeownership, see *supra* text accompanying notes 160-75.

<sup>187</sup> To the extent that a major objective of pro-homeownership policies is to give public housing tenants greater control over their living conditions, alternatives to selling public housing exist. Congress recently passed legislation designed to encourage tenants to assume the management of public housing themselves. See 42 U.S.C. § 1437r (1988). For a discussion of the experience thus far with tenant management, see *infra* text accompanying notes 291-94.

<sup>188</sup> See, e.g., R. MUTH, *supra* note 98, at 3 (comparing public housing program to an "all-or-nothing 'lottery'"); Edgar O. Olson & David M. Barton, *The Benefits and Costs of Public Housing In New York City*, 20 J. PUB. ECON. 299, 328 (1983) ("More than half of all households are eligible for the program, but only a small fraction of those who would like to participate are served . . . a significant proportion of public housing tenants receive such large benefits that their effective incomes are greater than those of the poorest ineligible families of the same size.").

<sup>189</sup> One sales program that would not create similar problems of horizontal inequity would be for the federal government to sell public housing to the highest bidder and give the existing tenants rent certificates or vouchers to live elsewhere. Cf. *Proceedings of Symposium on Privatization*, *supra* note 174, at 625 (1988) (comment by Ellickson that "[t]he simplest course would be to sell this housing in fee simple to the highest bidder"). Although such a program might be allocatively efficient, no proposal along these lines has been given serious consideration due to the problems of involuntary displacement that would inevitably result. In addition, as discussed *supra* text accompanying notes 128-37, such a policy might be undesirable, even on efficiency grounds, because public housing may be superior to demand-oriented subsidies in achieving certain policy objectives.

<sup>190</sup> Cf. Edward H. Kaplan, *Tenant Assignments: How PHAs Fill Their Units*, 42 J. HOUSING 13, 16-20 (1985) (tenants frequently accorded choice in selection of units).

<sup>191</sup> This assumption seems warranted in the current period of federal budgetary austerity. See DAVID C. SCHWARTZ, RICHARD C. FERLAUTO & DANIEL N. HOFFMAN, *A NEW HOUSING POLICY FOR AMERICA* 47 (1988) (total budget authority of HUD was cut 57% from 1980 to 1987).



public housing.<sup>192</sup> Current and prospective tenants and PHAs would also likely be harmed by the combination of an increase in average operating costs and a decrease in average rent payments. Currently, public housing tenants who earn above-average incomes and those who live in better quality units indirectly subsidize the poorest tenants and those who live in buildings requiring the greatest maintenance. This cross-subsidization results from two factors. First, since tenants pay only a fixed proportion of their income as rent, those with higher incomes pay more than those who earn less. Second, the cost of housing tenants in dwellings that require only minor maintenance is much less than the cost of maintaining units in dilapidated buildings. Therefore, a portion of the rent paid by a tenant living in better accommodations may be used by the housing authority to pay for the maintenance of apartments in poorer condition. A program to sell public housing would likely result in the loss of these cross-subsidies. Higher income tenants would be among those most likely to purchase their units, as would tenants who live in homes that are in the best condition. Even though total operating expenses would decrease as a result of the sale of housing, rent revenue would fall disproportionately. PHAs, faced with operating the most expensive segment of their housing stock as their rent revenue simultaneously declined, would have no alternative but to conserve funds by reducing services and deferring maintenance. Although PHAs would receive some revenue from the sale of their housing, it is unlikely to offset the shortfall created by the loss of cross-subsidies.<sup>193</sup>

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<sup>192</sup> The annual turnover rate for public housing is 14%. See M. STEGMAN, *supra* note 86, at 1. The replacement housing provisions of the Bush Administration's HOPE proposals might alleviate this problem. Nevertheless, the requirement that units sold to households who are not lower income be replaced may be illusory. Under the proposed legislation, comparatively short-term vouchers would constitute replacement housing. In addition, housing that would have been provided regardless of the existence of a sales program would be counted as replacement housing. See *supra* note 152. Furthermore, HOPE requires replacement only when transferred units have not been restricted to "lower" income buyers. The Housing Act defines a lower income family as a family whose income does not exceed 80% of the median income for the area. See 42 U.S.C.A. § 1437a (b) (1) (West Supp. 1989). Under federal rules, however, public housing is predominantly designed to house "very low-income" households. See 42 U.S.C.A. § 1437n (West Supp. 1989) (no more than 5 to 25 % of public housing may be rented to lower income families other than very low-income families). A very low-income family earns less than 50% of the area median family income. See 42 U.S.C.A. § 1437a (b) (1) (West Supp. 1989). Therefore, public housing units sold pursuant to HOPE would not have to be replaced even though their use would not be restricted to people whose incomes were comparable to those served under the public housing program.

<sup>193</sup> Revenue from the sale of public housing units to tenants would probably be insufficient to alleviate the increased financial distress of PHAs, since most units would be sold at only a fraction of their value. Furthermore, purchasers would most likely not be required to pay more than nominal amounts as downpayments, with the remainder of the funds advanced by the PHA in the form of purchase money mortgages at below-

A public housing sales program would also adversely affect the location of low income households. I have demonstrated in Part II that public housing can play a vital and cost-effective role in facilitating economic and, especially, racial integration.<sup>194</sup> Yet it is precisely the housing units that serve this purpose—single family and low density developments in areas outside inner city neighborhoods—that would be among the first to be sold.<sup>195</sup>

In addition to the negative effect of a public housing sales program on prospective and remaining tenants, tenants who purchase their dwellings may also be harmed as a result of privatization. Tenants who live in public housing, for the most part, earn very low incomes.<sup>196</sup> It is likely that most would be unable to afford the costs of homeownership, which would include maintenance, debt service and real property taxes.<sup>197</sup> Nevertheless, experience with other fed-

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market interest rates. See H.R. 4628 (requiring PHAs to loan funds to tenant-purchasers at interest rates no higher than 70% of the market interest rate); Dep't of City and Regional Planning, *supra* note 149, at 22-24 (downpayments required from purchasers participating in Public Housing Homeownership Demonstration range from 0 to 6% of sales price). Because whatever revenue the sales generate would be paid over a lengthy period of time, its present value is likely to be relatively small. Selling public housing to tenants would also generate revenues from real property taxes. Nevertheless, these revenues would generally be collected by the municipal government for the jurisdiction in which the housing is located, rather than by the PHA.

The Bush Administration's HOPE proposals would exacerbate the potential financial difficulties of PHAs since only one-half of the sales revenues could be retained by PHAs, and even that money would be restricted to subsidizing the costs of the homeownership program. See *supra* note 152.

<sup>194</sup> See *supra* text accompanying notes 134-37.

<sup>195</sup> These units would still serve the purpose of economic and racial integration as long as the current residents remained. Nevertheless, it is likely that once the period during which the government can recapture the sale price lapses, many of these households would sell their property to take advantage of their capital gains.

<sup>196</sup> See *supra* text accompanying note 75.

<sup>197</sup> See Letter from Robert McKay to Office of General Counsel (December 21, 1984), reprinted in *Homeownership Demonstration Program (Part 2): Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives, 99th Cong., 2d Sess., 193-95 (1986)* (illustrating increase of costs that homeownership would entail for purchasers of public housing in Boston).

The preliminary results of a HUD-sponsored evaluation of the Public Housing Homeownership Demonstration, see *supra* note 149, suggest that tenants who purchase public housing units would require substantial continuing subsidies. Tenants purchasing public housing under the Demonstration bore little resemblance to the average public housing resident. Over three quarters of the households were employed and their average incomes were two to four times the average for all public housing residents. Nevertheless, purchasers in five of the twelve sales programs have encountered financial problems. After the passage of one year, between 10 to 15 % of all buyers have defaulted or are delinquent with respect to their mortgage loans. Almost one-third of all buyers have expressed the view that mortgage payments are a strain on their budgets. See Michael Stegman, Presentation to Housing Conference, Wharton Real Estate Center, University of Pennsylvania (March 2, 1990). The likelihood that purchasers would require continuing financial assistance was recognized by the Bush Administration in its HOPE proposals. The proposed legislation contemplates continuing financial assist-

eral homeownership programs, and preliminary results from the Public Housing Homeownership Demonstration<sup>198</sup> indicate that many of these tenants would become caught up in the rhetoric of empowerment and, lacking sufficient information about the realities of homeownership, would attempt to purchase their units. One would therefore expect that significant numbers of purchasers would default on their mortgage loans. After foreclosure, not only would the purchasers probably lose whatever equity they had accumulated in their homes, but they would also have to find accommodations in the private housing market at rents that would probably exceed the amount they had previously paid for public housing.<sup>199</sup>

A recent study completed by the General Accounting Office emphasizes the risk that tenants who purchase public housing might encounter serious difficulty in affording the costs of homeownership.<sup>200</sup> The GAO report examined the feasibility of the planned conversion to tenant ownership of Washington, D.C.'s Kenilworth-Parkside development. The sale of Kenilworth-Parkside has often been referred to by privatization advocates as a model for an expanded public housing sales program.<sup>201</sup> Despite the expenditure of enormous amounts of federal modernization funds in advance of the sale<sup>202</sup> and the commitment of substantial federal funds to subsidize the operation of the housing after the conversion,<sup>203</sup> the GAO, using conservative assumptions, concluded that the project would not be able to support itself after thirteen years had elapsed.<sup>204</sup>

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ance to purchasers of public housing. *See supra* note 152. Although this assistance might make a sales program somewhat more feasible, it magnifies the already considerable problem of horizontal inequity inherent in current public housing homeownership proposals. *See supra* text accompanying notes 188-89.

<sup>198</sup> Many low income households purchased homes under the Section 235 Mortgage Interest Subsidy Program in the 1960s and 1970s. A large number of these households defaulted on their mortgages and lost their homes to foreclosure. *See infra* note 296.

<sup>199</sup> This type of scenario appears to be afflicting some purchasers of British council housing. *See, e.g.,* Penny Symon, *Home-owning Dreams That End in Nightmare*, Daily Telegraph, Oct. 31, 1988, at 23 (national survey by British government indicates that one in five purchasers of council housing units are in serious financial trouble).

<sup>200</sup> *See* GENERAL ACCOUNTING OFFICE, PUBLIC HOUSING: PLANNED KENILWORTH-PARKSIDE SALE RAISES ISSUES FOR FUTURE TRANSACTIONS (1989).

<sup>201</sup> *See* PRESIDENT'S COMMISSION ON PRIVITIZATION, *supra* note 1, at 18 (discussing success of Kenilworth-Parkside in the context of a recommendation to sell public housing); "Remarks By the President to National Association of Realtors," 5 (Dallas, Texas, Nov. 10, 1989) (Kenilworth-Parkside is an example of tenants seeking "to recapture the American dream of home ownership.").

<sup>202</sup> *See* GENERAL ACCOUNTING OFFICE, *supra* note 200, at 33-34 (HUD has spent an average of \$53,886 per unit to modernize Kenilworth-Parkside housing).

<sup>203</sup> *See id.* at 41-42 (tenants of Kenilworth-Parkside will require continuing federal housing subsidies for at least five years after sale).

<sup>204</sup> *See id.* at 50. The author of the report assumed that both income and expenses would increase at 5% per year.

A probable long-run result of a public housing sales program would be the further weakening of support for maintaining the remaining stock of public sector housing. As the best units were sold and the highest income tenants became homeowners, it is likely that public housing would become increasingly racially segregated and concentrated in inner city neighborhoods. Due to the increasing financial hardships likely to be faced by PHAs, as well as an image of public housing unlikely to command sympathy among the white middle class majority, the sale of some public housing might ultimately lead to the abandonment of the remaining stock. Not only would the abandonment of the public housing program squander a seventy billion dollar public investment,<sup>205</sup> but it would also preclude public housing from achieving those objectives for which it is suited.

#### IV

#### THE POWER OF THE FEDERAL GOVERNMENT TO REQUIRE PRIVATIZATION OF PUBLIC HOUSING

Not surprisingly, PHAs have, to a large extent, opposed programs which would enable tenants to purchase their units.<sup>206</sup> Recognizing that most PHAs would not willingly sell their housing to tenants, proponents of privatization have advanced proposals which would compel PHA participation. Though many alternative approaches exist to induce PHAs to participate in a public housing sales program,<sup>207</sup> proponents of privatization have uniformly advocated legislation that would require PHAs to sell their units to willing tenants.<sup>208</sup> In this section, I examine the likely constitutional challenges to such a mandatory public housing sales program. Un-

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<sup>205</sup> See COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, *supra* note 63, at 7 (value of public housing estimated at \$ 70 billion).

<sup>206</sup> See, e.g., *Homeownership Demonstration Program (Part 2): Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives, 99th Cong., 2d Sess., 193-95 (1986)* (letter by Council of Large Public Housing Authorities opposing several elements of homeownership demonstration); *Homeownership Demonstration Program: Hearing Before a Subcomm. of the Comm. on Government Operations, House of Representatives, 99th Cong. 1st Sess. 80-86 (1985)* (statement by National Association of Housing and Redevelopment Officials criticizing homeownership demonstration).

<sup>207</sup> Congress might, instead of mandating the sale of public housing, encourage PHAs to sell their housing to tenants. This legislation could follow either a carrot or a stick approach. Public housing authorities that agreed to sell their housing to tenants could be paid additional subsidies by the federal government. Alternatively, federal assistance already received by PHAs which is not contractually guaranteed, such as operating subsidies and modernization grants, might be conditioned upon a PHA agreeing to sell public housing to its tenants.

<sup>208</sup> See, e.g., H.R. 4628, *supra* note 3; S. 3030, *supra* note 3; H.R. 6317, *supra* note 3; PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 17-18; Ferrara, *supra* note 2, at 295-96. The proposed legislation bears many similarities to the "right to buy" provisions of Great Britain's Housing Act of 1980. See *supra* text accompanying notes 141-43.

like a voluntary sales program or a program which conditioned the receipt of discretionary federal subsidies on a PHA's agreement to sell its housing to tenants,<sup>209</sup> legislation granting tenants of public

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The Bush Administration's HOPE proposals also contemplate a mandatory public housing sales program. See *supra* note 152.

<sup>209</sup> Legislation which conditioned discretionary federal subsidies on PHAs' agreement to sell their housing to tenants might be subject to constitutional attack under the doctrine of unconstitutional conditions, which limits the ability of the government to grant benefits to its citizens on the condition that they relinquish constitutionally protected rights. See generally Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, And the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kreimer, *supra* note 49; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

As an instrumentality of the state, a PHA could argue that requiring it to sell its housing as a condition of continued receipt of operating or modernization subsidies would violate principles of federalism. See *United States v. Butler*, 297 U.S. 1, 72 (1936) (invalidating Agricultural Adjustment Act of 1933 which subsidized farmers who reduced their crops on the ground that the federal government may not "purchas[e] with federal funds submission to Federal regulation of a subject reserved to the states"). Nevertheless, no case since *Butler* has invalidated a condition tied to an exercise of the federal government's spending power on the ground of federalism. See Sullivan, *supra*, at 1431. Recent Supreme Court decisions indicate that federalism concerns do not constitute a major barrier to conditions attached to federal spending programs. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (upholding legislation that directed the withholding of federal highway funds from states which permit the purchase or possession of alcoholic beverages by persons under the age of twenty-one, while noting that certain coercive conditions which constitute compulsion would not be sustained); cf. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) (in the absence of a defect in the political process, federal courts will not protect states from exercises of federal regulation based upon principles of federalism).

A second line of federal cases implies that conditions impacting on constitutional rights which are tied to the receipt of government benefits must be related, to some degree, to the benefits provided. See *South Dakota*, 483 U.S. at 208 (requirement that states raise minimum drinking age to 21 is "directly related to one of the main purposes for which highway funds are expended—safe interstate travel.") In one recent case, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court held that conditioning the issuance of a building permit on the conveyance by a beachfront property owner of a lateral easement to the public constituted a taking of property without compensation. In *Nollan*, the Court observed that the state did not have the power to order the Nollans to convey the easement without paying them just compensation. In addition, the Court did not seriously question whether the Coastal Commission had the power to deny the building permit on the ground that the development blocked views of the ocean. Nevertheless, the Court held that the condition (the dedication of the lateral easement) was invalid because it was not substantially related to the purposes that would be served by denial of a permit. PHAs might argue by analogy that requiring them to sell their property to tenants would not be substantially related to the purposes that justify a cut-off of operating or modernization subsidies. Such an argument would likely face an uphill battle on two grounds. First, the federal government could plausibly assert that the condition was, in fact, substantially related to the purposes served by cutting off operating and modernization subsidies—the conservation of federal revenue. Second, *Nollan* might be distinguished on the ground that the condition in that case was attached to an exercise of the police power rather than the spending power. Much of the commentary following *Nollan* has suggested that the Court's decision reflects a view that police power restrictions on the exercise of property rights demand a higher level of judicial scrutiny than mere rationality review. See, e.g., Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 38 (*Nollan* may be read as imposing an intermediate level of

housing the right to purchase their units over the objections of PHAs would likely run afoul of constitutional provisions which protect owners of property from uncompensated takings and the denial of due process.

Doctrinal analysis of these constitutional claims varies depending on how the property interest of the PHA is defined. Formalistically, a PHA's interest in its stock of public housing may be described as an estate in fee simple.<sup>210</sup> PHAs hold record title to their public housing, and the duration of their estate in land is potentially infinite.

On the other hand, a PHA's interest in public housing is unlike most types of fee simple estates. The federal government pays for all of the capital costs of the housing as well as for continuing operating and modernization subsidies. Although the PHA manages the day-to-day operation of the property, it is subject to extensive federal regulation governing areas such as tenant selection,<sup>211</sup> computation of utility charges<sup>212</sup> and eviction procedures.<sup>213</sup> In the event that the PHA fails to adhere to its statutory and contractual obligations, the federal government has the right to take over ownership and management of the public housing.<sup>214</sup> In substance, a PHA may resemble a party to an executory contract more than an owner of a fee simple estate. The federal government agrees that it will undertake certain financial and regulatory obligations over a period of forty years. In turn, the PHA agrees to construct and operate public housing pursuant to federal regulation on the condition that at the

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judicial scrutiny on government regulation of property). On the other hand, courts treat governmental decisions to subsidize or not subsidize a particular activity with deference, even if that activity may be constitutionally protected from state interference. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3050-53 (1989) (upholding state law restricting abortions in public facilities and abortions conducted by public employees); *Harris v. McRae*, 448 U.S. 297, 316-19 (1980) (upholding federal law restricting use of Medicaid program to pay for abortions); *Maher v. Roe*, 432 U.S. 464, 475-76 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity. . . . Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."); *Buckley v. Valeo*, 424 U.S. 1, 99 (1976) (upholding expenditure limitations for candidates who receive public financing).

<sup>210</sup> "An estate in fee simple is an estate which . . . has a duration which is potentially infinite or [which is] terminable upon an event which is certain to occur but is not certain to occur within a fixed or computable period of time or within the duration of any specified life of lives; or [which is] terminable upon an event which is certain to occur, provided such estate is one left in the conveyer, subject to defeat upon the occurrence of the stated event in favor of a person other than the conveyer. . . ." *RESTATEMENT OF PROPERTY* § 14 (1936).

<sup>211</sup> 24 C.F.R. §§ 960.204-960.207 (1988).

<sup>212</sup> 24 C.F.R. § 965 (1988).

<sup>213</sup> 24 C.F.R. § 247 (1988).

<sup>214</sup> ACC § 501.

expiration of the forty year term, the PHA will own the property free and clear of federal requirements.<sup>215</sup>

Regardless of whether a PHA's property interest in public housing is characterized as a fee simple estate or a contractual right, a requirement that it sell its stock of public housing at deep discounts to tenants would violate the fifth amendment to the Constitution. Under the just compensation clause, property may not be taken by the federal government without just compensation. In addition, the fifth amendment protects against federal government impairments of its own contracts.

#### A. Taking of Fee Simple Interest

The just compensation clause of the fifth amendment provides that private property shall not be taken for public use without the payment of just compensation.<sup>216</sup> Although the just compensation clause refers only to "private" property, federal courts have required the United States to compensate states and state subdivisions, such as local governments and public authorities,<sup>217</sup> when it takes their property.<sup>218</sup> Similarly, the federal government may not take the property of a PHA without paying just compensation.

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<sup>215</sup> Litigants frequently have sought to characterize PHAs as mere instrumentalities or agents of the federal government. Courts, however, have usually maintained that PHAs do retain an independent existence, separate from the federal government, as a fee simple owner of property or as a party to a contractual relationship. *See, e.g.*, *Correlated Dev. Corp. v. United States*, 556 F.2d 515, 519-22 (Ct. Cl. 1977) (HUD not liable on contracts executed by PHA merely because of its supervisory role as specified in the Annual Contribution Contract); *Perez v. United States*, 444 F. Supp. 623, 626 (D.P.R. 1978), *aff'd*, 594 F.2d 280 (1st Cir. 1979) (PHA is independent contractor rather than an agent or employee of federal government, thereby insulating United States from vicarious tort liability); *Harris v. Lynn*, 411 F. Supp. 692, 693, 695 (E.D. Mo. 1976), *aff'd*, 555 F.2d 1357 (8th Cir. 1977), *cert. denied*, 434 U.S. 927 (1977) (PHA is fee owner of public housing and federal government is neither equitable nor real owner). *But see* *Commissioner of Labor & Indus. v. Lawrence Hous. Auth.*, 358 Mass. 202, 210, 261 N.E.2d 331, 336 (1970) (PHA is not subject to state competitive bidding requirements because under state law a PHA is acting as an agent of the federal government).

<sup>216</sup> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>217</sup> Public authorities are deemed to be subdivisions of the state in which they are located, deriving all of their power and authority from the state. *See* 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* 200 (3d ed. 1987); OSBORNE M. REYNOLDS, *LOCAL GOVERNMENT LAW* §§ 6, 13 (1982).

<sup>218</sup> *See* *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States."); *United States v. Carmack*, 329 U.S. 230 (1946) (condemnation of local property for federal post office and customhouse); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 841-88 (1989) (just compensation should be required for federal takings of state and local property).

There is little doubt that the federal government has the power to condemn public housing and sell it to tenants at a fraction of its fair market value. Since the late nineteenth century, courts have upheld the federal government's exercise of its implied power of eminent domain with respect to state and local property.<sup>219</sup> The major limitations on the federal government's eminent domain power are the requirements that the taking be for a "public use" and that just compensation be provided to the condemnee.<sup>220</sup>

A federal requirement that PHAs transfer title of public housing to tenants almost certainly would satisfy the public use requirement of the just compensation clause. Throughout much of the first half of the twentieth century, federal courts had difficulty deciding whether the government purpose necessitating a condemnation of property was public or private.<sup>221</sup> Since the New Deal, however, the Supreme Court has shown great deference to legislative determinations of public use. In *Berman v. Parker*<sup>222</sup> and *Hawaii Housing Authority v. Midkiff*,<sup>223</sup> the Supreme Court approved the exercise of eminent domain when the property condemned would ultimately be transferred to private individuals or entities. In *Berman*, the Court approved the condemnation of slum properties for eventual redevelopment or sale to private interests.<sup>224</sup> In *Midkiff*, the Court upheld a program enacted by Hawaii to condemn residential property owned by a handful of landlords for eventual sale to tenants.<sup>225</sup> In

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<sup>219</sup> See *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (1887), *appeal dismissed*, 140 U.S. 699 (1891). In *Stockton*, a federal appeals court upheld a federal law authorizing the condemnation of state property for the construction of a railroad bridge. The court observed that requiring the United States government to obtain the state's consent prior to appropriating its property would permit the state to stand in the way of the federal government's exercise of its constitutionally delegated powers. For a discussion of *Stockton* and the justification for federal eminent domain powers with respect to private and public property, see Schill, *supra* note 218, at 833-37.

<sup>220</sup> There may also be a requirement that the federal government provide the condemnee with procedural due process. See *United States v. Holmes*, 414 F. Supp. 831, 840 (D. Md. 1976) (federal government may condemn state property provided it adheres to due process and just compensation requirements of fifth amendment). For a discussion of whether states and localities are entitled to protection under the due process clause, see *infra* note 246.

<sup>221</sup> Compare *United States v. Certain Lands in Louisville*, 9 F. Supp. 137 (W.D. Ky.), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *cert. granted*, 296 U.S. 567 (1935), *appeal dismissed*, 297 U.S. 726 (1936) (federal condemnation for publicly owned housing is unconstitutional) with *Oklahoma City v. Sanders*, 94 F.2d 323, 327 (10th Cir. 1938) (taking of land for publicly owned housing satisfied public use test).

<sup>222</sup> 348 U.S. 26 (1954).

<sup>223</sup> 467 U.S. 229 (1984).

<sup>224</sup> *Berman*, 348 U.S. at 33.

<sup>225</sup> The purpose of the Hawaiian ordinance was to break up the concentrated landholding of residential property which was thought to contribute to inflated housing prices. Under the ordinance, upon petition by a minimum number of eligible tenants in a development tract, the Hawaii Housing Authority would hold hearings to decide



so doing, the Court set forth an extremely deferential standard against which public use challenges to condemnations would be judged: as long as the exercise of the eminent domain power "is rationally related to a conceivable public purpose,"<sup>226</sup> it will meet the requirements of the just compensation clause.

Requiring PHAs to transfer public housing units to tenants would almost certainly meet the standard set forth in *Midkiff*. Enabling tenants to become homeowners is rationally related to a number of conceivable public policies including transferring income to public housing tenants, fostering neighborhood stability and relieving the federal government of its obligation to pay operating and modernization subsidies.<sup>227</sup> Indeed, recent proposals to privatize public housing bear a resemblance to the land redistribution program at issue in *Midkiff*. In both instances, the public entity requires a landlord to transfer property which will eventually be owned by existing tenants. One important difference between the two programs, however, is that no proposal to privatize public housing provides for the payment of compensation to the current owners.

Under a recent Supreme Court ruling, *United States v. 50 Acres of Land*,<sup>228</sup> a public condemnee is "presumptively" entitled to the same amount of compensation as a similarly situated private property owner—the fair market value of the property taken.<sup>229</sup> Since under most privatization proposals the PHA would receive only a fraction of the property's fair market value from the tenant, the federal government must, under the just compensation clause, pay the difference. If a court were to base fair market value compensation upon the price that a willing buyer would pay to a willing seller for comparable housing, the amount of compensation could be substantial. However, public housing is unlike housing typically sold in the market. Statutes and contracts prohibit a PHA from selling its housing to the highest bidder during the forty year period in which it is obligated to operate the project as low income housing.<sup>230</sup> To

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whether to acquire the subject property. If the Authority determined that the acquisition would further the public purposes underlying the act, it would condemn the property and pay the condemnee compensation. The Authority would then sell the condemned properties to the tenants. In practice, the funds paid to the condemnees for their property were supplied entirely by the tenant-purchasers. See *Midkiff*, 467 U.S. at 233-34.

<sup>226</sup> *Id.* at 241; see also *id.* at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

<sup>227</sup> For a discussion of the ostensible public purposes served by privatizing the public housing stock, see *supra* text accompanying notes 153-59.

<sup>228</sup> 469 U.S. 24 (1984).

<sup>229</sup> *Id.* at 31.

<sup>230</sup> See 42 U.S.C. § 1437p (Supp. V 1987) (limitations on disposition of public housing); ACC Part II § 506 (if public housing is acquired by a third party a substantial default will occur under ACC); U.S. Dep't of HUD, Declaration of Trust (March 1967)

compensate the PHA for the property's fair market value based upon comparable sales of similar properties might lead to over-compensation.

An alternative method of computing fair market value compensation would be to value the property in a manner similar to property encumbered by a restrictive covenant. In condemnation proceedings, an owner of property subject to a restrictive covenant is usually paid the market value of his or her property subject to the encumbrance.<sup>231</sup> In effect, compensation for PHAs would be based not on the price a buyer would pay for housing that could be rented to anyone, but instead on the value of property that would have to be operated as low income housing for a period of years. Depending on the number of years remaining until the termination of the PHA's obligations under the ACC, the market<sup>3</sup> value of the property computed according to this method could be substantial or non-existent.<sup>232</sup>

Upon reflection, neither method of computing compensation for public housing based on fair market value seems appropriate. The Supreme Court has repeatedly stressed that the primary objective of the just compensation clause is to achieve indemnification, to put the condemnee "in as good a position pecuniarily as if his property had not been taken."<sup>233</sup> Providing the PHA with the value of the property as if unencumbered might lead to over-compensation, whereas providing it with the value of the housing as encumbered might leave it under-compensated. The apparent inadequacy of the fair market value concept as the sole criterion for computing compensation for public housing may be explained by the simple observation that PHAs own property not for its economic or fungible value,<sup>234</sup> but instead to serve the public interest of their communi-

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(document executed by PHA and HUD in which PHA agrees that HUD can require PHA to refrain from transferring public housing).

<sup>231</sup> See *Staninger v. Jacksonville Expressway Auth.*, 182 So. 2d 483 (Fla. Dist. Ct. App. 1966) (compensation for property encumbered by restrictive covenant is value of property as encumbered without consideration of the chance for removal of the encumbrance).

<sup>232</sup> PHAs operate some public housing at a loss. Therefore, to compute its fair market value according to the method described in the text would require that the present value of its market value as unrestricted property at the termination of the ACC be added to the present value of the losses likely to be incurred by the PHA during the remaining years of the ACC. If the term of the ACC has many years remaining, the sum of these values could be zero or a negative number.

<sup>233</sup> *Olson v. United States*, 292 U.S. 246, 255 (1934); see also *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-78 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970). But see *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-11 (1979) (Court acknowledges that it has failed to give principle of indemnification "its full and literal force").

<sup>234</sup> Cf. *Margaret Jane Radin, Property and Personhood*, 34 STAN. L. REV. 957, 991-1013 (1982) (distinguishing between fungible and personal property).

ties. Public housing may have little or no market value; yet, the unwillingness of many PHAs to part with it voluntarily<sup>235</sup> demonstrates that it has a "public" value which is not captured by a fair market value criterion.

I have argued elsewhere<sup>236</sup> that the distinctive functions served by publicly owned property justify a compensation method different from fair market value. Due to concerns of federalism<sup>237</sup> and allocative efficiency,<sup>238</sup> public property owners such as PHAs should be entitled to an amount in excess of fair market value when they can demonstrate that the property taken provided a benefit which would not be as fully provided after condemnation. In such a case, the PHA should be entitled to the amount it would cost to replace the condemned housing less accumulated depreciation.<sup>239</sup> Nevertheless, in certain circumstances, the PHA and the community it serves will not be harmed by the sale of the units to tenants either because of an excess supply of public housing or the fact that low income households continue to live in the housing after the transfer of ownership. Compensation in these cases is still necessary to assure that the government does not take resources for its own use that are more socially valuable in the hands of the PHA. To promote allocative efficiency and ensure that the federal government bears the full cost of its actions,<sup>240</sup> the PHA should, in these cases, be entitled to the market value of the housing as encumbered by the ACC.<sup>241</sup>

<sup>235</sup> Public housing authorities have been at the forefront of opposition to public housing sales programs. See *supra* text accompanying note 206.

<sup>236</sup> See Schill, *supra* note 218, at 892-900.

<sup>237</sup> Compensation for intergovernmental takings is justified as a prophylactic rule to protect states and regions from federal exploitation. See *id.* at 880-88.

<sup>238</sup> Compensation for intergovernmental condemnees is also justified as necessary to prevent fiscal illusion. If the government were able to take property without paying its market value to the owners, government might substitute condemned property for other inputs that might be less valuable to society. Compensation forces the government to bear the real costs of its actions. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.6 (3d ed. 1986) (compensation for private entities necessary to prevent fiscal illusion); Schill, *supra* note 218, at 859-61 (compensation for public entities necessary to prevent fiscal illusion).

<sup>239</sup> See Schill, *supra* note 218, at 897-900. The Bush Administration's HOPE proposals provide for replacement housing when units of public housing are sold without restrictions that future purchasers be lower income households. See *supra* note 152. Under some circumstances, this requirement may function as a form of in-kind compensation satisfying my suggested compensation rule. Nevertheless, the legislation's replacement housing requirements may be illusory. See *supra* note 192. It is also questionable whether in-kind compensation would satisfy the fair market value requirement of *50 Acres of Land*. See *supra* text accompanying notes 228-29.

<sup>240</sup> For a description of the concept of fiscal illusion, see *supra* note 238.

<sup>241</sup> Fair market value is a necessary minimum for just compensation to prevent the problem of fiscal illusion. See *supra* note 238. To prevent the federal government from using the property to further a less socially beneficial purpose than its current use, the minimum award should be equal to the property's current economic value to the PHA.

## B. Impairment of Contract

A PHA's property interest in its stock of public housing may, in substance, be characterized as an interest in an executory contract in which it agrees to build and operate public housing subject to federal regulation for a period of forty years in return for unrestricted ownership at the termination of the ACC.<sup>242</sup> When the interest of the PHA is conceptualized as an interest in an executory contract, a requirement by the federal government that the PHA sell its public housing to tenants at deep discounts may be seen as an impairment of the PHA's rights or as a repudiation by the federal government of its contractual obligations under the ACC.

The constitutional source of doctrines prohibiting the federal government from repudiating its own contracts is somewhat unclear. Article I, section 10 of the Constitution prohibits states from passing any law "impairing the Obligation of Contracts."<sup>243</sup> Neither the Constitution nor the Bill of Rights contains a parallel provision with respect to federal impairments of contracts,<sup>244</sup> and the Supreme Court has often observed that the contract clause does not apply to the federal government.<sup>245</sup> Nevertheless, apparently relying on the due process<sup>246</sup> and just compensation clauses of the fifth

<sup>242</sup> See *supra* text accompanying notes 211-15.

<sup>243</sup> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. CONST. Art. I, § 10.

<sup>244</sup> See generally Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267 (1988) (analyzing why the text of the contract clause applies only to states and the just compensation clause applies only to the federal government).

<sup>245</sup> *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.25 (1985); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732-33 (1984).

<sup>246</sup> There is some question as to whether the protections of the due process clause of the fifth amendment extend to state subdivisions such as PHAs. In *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), South Carolina asserted due process claims with respect to certain provisions of the Voting Rights Act. The Court dismissed the state's due process claims on the ground that the word "person" in the context of the due process clause did not include states. *Katzenbach*, 383 U.S. at 323-24. Nevertheless, the Supreme Court has implied, and lower federal courts have held, that even though states might not be persons under the due process clause, state subdivisions such as public authorities are entitled to its protections. See, e.g., *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 279-80 (1969) (holding that HUD circular does not violate due process clause); *Ohio Student Loan Comm'n v. Cavazos*, 709 F. Supp. 1411, 1420-22 (S.D. Ohio 1988) (in denying motion for relief from judgment, court holds that the Ohio Student Loan Commission is distinguishable from the state and protected by the due process clause), *rev'd on other grounds*, 900 F.2d 894 (6th Cir. 1990); *Housing Auth. of King v. Pierce*, 701 F. Supp. 844, 850 n.12 (D.D.C. 1988), *amended on other grounds*, 711 F. Supp. 19 (D.D.C. 1989) (rejecting HUD's argument that a PHA is not entitled to due process protections). *But cf. City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980) (on motion for reconsideration, court holds that municipality is not a person under due process clause).

Regardless of whether PHAs are entitled to the protections of the due process

amendment, the Court has repeatedly held that the federal government may not freely impair its own contractual obligations.<sup>247</sup>

An analysis of federal impairment of its own contractual obligations begins with the question of whether a contract exists in the first place. Frequently, the federal government enacts policies or programs which, unlike contracts, are subject to revision and repeal. In *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*,<sup>248</sup> the Supreme Court set forth guidelines for determining whether a statute creates contractual rights: "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'"<sup>249</sup> However, if the statute itself provides for the execution of a written contract on behalf of the government, the Court has noted that the obligation is clear and binding.<sup>250</sup>

Even in circumstances where a federal statute contemplates the execution of agreements between the federal government and third parties, the obligations of the government may not always be binding. In *Bowen v. Public Agencies Opposed to Social Security Entrapment*,<sup>251</sup> state and local governments challenged an amendment to the Social Security Act of 1935.<sup>252</sup> Under that statute, state and local governments could voluntarily participate in the social security system by executing an agreement with the Secretary of Health and Human Services. The Act also permitted the governments to terminate their agreements and withdraw from the system upon two years' ad-

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clause, they are nonetheless constitutionally protected against contract repudiations. The Supreme Court has held that the bar to federal government repudiation of its own contracts is an element of the protections created by the just compensation clause of the fifth amendment. See *Lynch v. United States*, 292 U.S. 571, 579 (1934) (property rights arising out of a contract with the federal government are protected by the just compensation and due process clauses); *Everett Plywood Corp. v. United States*, 651 F.2d 723, 727 (Ct. Cl. 1981) (same); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1341 (7th Cir. 1980) (same), *cert. denied*, 466 U.S. 958 (1984). The Court has repeatedly held that states and state subdivisions are protected under the just compensation clause. See *supra* text accompanying notes 217-18.

<sup>247</sup> See *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 278-79 (1969); *Perry v. United States*, 294 U.S. 330, 351 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934). For a discussion of these cases, see *infra* text accompanying notes 268-69.

<sup>248</sup> 470 U.S. 451 (1985). In *National R.R. Passenger Corp.*, the Court determined that an act of Congress establishing the National Railroad Passenger Corporation ("Amtrak") and providing for the transfer of passenger service obligations from private railroads to Amtrak did not establish contractual obligations between the federal government and private railroads.

<sup>249</sup> *Id.* at 466-67 (citing *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937)).

<sup>250</sup> *Id.* at 466.

<sup>251</sup> 477 U.S. 41 (1986).

<sup>252</sup> 42 U.S.C.A. § 301 *et seq.* (West 1983).

vance notice. The option to terminate was contained in each of the written agreements executed by the Secretary and the state and local governments. In 1983, however, Congress amended the Act by repealing the termination provision, thereby denying states and localities the ability to withdraw from the system.<sup>253</sup>

In *Bowen*, the Supreme Court reversed the trial court's decision that the 1983 amendment constituted a taking of property. Although its opinion is not a model of clarity,<sup>254</sup> the Court seems to have based its decision on two principles. First, the Court stated that the termination right bore little resemblance to a property right under the fifth amendment. The Court particularly emphasized the existence of a reservation clause in the Act permitting Congress "to alter, amend, or repeal any provision of the Act."<sup>255</sup> In finding that the agreements with the Secretary incorporated the provisions of the Act, the Court held that Congress had the power to amend or abolish the termination right without effecting a taking of property.<sup>256</sup>

The Court's second rationale for not finding a taking is more puzzling. The Court observed that the federal government has the power to enter into contracts that confer vested rights as well as the duty to honor those rights.<sup>257</sup> Nevertheless, the Court noted that it was reluctant to hold that the sovereign had waived its right to exercise its sovereign powers. According to the Court, "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign."<sup>258</sup> It is unlikely that the Court intended this language to be taken literally, because its application would result in the federal government never being bound contractually. Such a result would contravene several precedents<sup>259</sup> cited approvingly by the Court in *Bowen* as well as

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<sup>253</sup> See *Bowen*, 477 U.S. at 48.

<sup>254</sup> McConnell, *supra* note 244, at 273 ("The Court's reasoning is somewhat unclear. . . .").

<sup>255</sup> See *Bowen*, 477 U.S. at 52 (citing *Flemming v. Nestor*, 363 U.S. 603, 611 (1960)).

<sup>256</sup> *Id.* at 54-56; see also *American Hosp. Ass'n v. Schweiker*, 721 F.2d 170, 182-84 (7th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) (agreements between health care providers and federal government, entered into pursuant to Hill-Burton Act, were open-ended and incorporated statutory terms); *South Carolina State Educ. Assistance Auth. v. Cavazos*, 897 F.2d 1272, 1275-76 (4th Cir. 1990) (Congress reserved right to amend agreements with state agency).

<sup>257</sup> *Bowen*, 477 U.S. at 52.

<sup>258</sup> *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)).

<sup>259</sup> The Court cited the cases of *Perry v. United States*, 294 U.S. 330 (1935) and *Lynch v. United States*, 292 U.S. 571 (1934) for the proposition that the federal government has the duty to honor its contractual obligations. See *Bowen*, 477 U.S. at 52. For a discussion of these two cases, see *infra* text accompanying notes 268-69.

other portions of the Court's decision.<sup>260</sup> Instead, it is likely that the Court was merely setting forth its reason for a rule of strict construction with respect to the existence of binding federal contracts.<sup>261</sup>

There is little doubt that, under the principles set forth in *National Railroad Passenger Corp.* and *Bowen*, the relationship between PHAs and the federal government is contractual, and a requirement that PHAs transfer public housing to tenants would constitute a substantial repudiation of that contractual relationship. The Housing Act of 1937 expressly contemplates that the federal government and PHAs will enter into a contractual relationship.<sup>262</sup> In fact, the Act itself sets forth specific provisions that must be incorporated into the ACC.<sup>263</sup> The ACC, executed by the Secretary of HUD and the Chairman of the PHA, is a lengthy document which includes provisions governing the development and operation of public housing as well as clauses setting forth the rights and obligations of both parties. Unlike the statute and "contract" considered by the Court in *Bowen*, neither the Housing Act of 1937 nor the ACC contains a reservation by the United States permitting it unilaterally to alter, amend or repeal the PHAs' rights or the government's obligations. To the contrary, the Act and the ACC expressly contemplate that

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<sup>260</sup> See *Bowen*, 477 U.S. at 55 (Congress cannot take away the fruits of fully executed contracts, nor may it repudiate its own debts to save money).

<sup>261</sup> The discussion of sovereign power immediately followed the Court's statement that, in view of the purpose and structure of the Act and Congress's express reservation of a power to amend, the Court should be reluctant to construe the agreements in a manner that would foreclose future Congressional action. See *id.* at 52. Alternatively, the Court could have been referring to the doctrine which prohibits states from bargaining away their police powers. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 819, 821 (1879) (state grant of lottery franchise does not foreclose state from abolishing lotteries); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848) (state may condemn bridge held by company formed pursuant to a state charter). Nevertheless, this doctrine typically does not apply to contracts concerning financial matters. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977) ("[T]he power to enter into effective financial contracts cannot be questioned."); RONALD D. ROTUNDA, 2 CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 103 (1986) (economic obligations of states are enforceable). One recent district court case, however, has relied on the language in *Bowen* to hold that the federal government could alter the contractual right of a developer of subsidized housing to prepay its mortgage and be released from federal regulation. See *Orrego v. U.S. Dep't of Hous. and Urban Dev.*, 701 F. Supp. 1384, 1396-97 (N.D. Ill. 1988) ("[N]othing in the regulatory agreement, note or [National Housing Act], surrendered Congress' 'enduring' right to exercise its sovereign authority over the federal housing programs."). Interestingly, the court in *Orrego* seems to have inverted the reasoning of the Supreme Court in *Bowen*. Under *Bowen*, an express reservation to amend indicated that no contractual or property right existed that was immune to subsequent legislation. In *Orrego*, the court implies that for a contractual or property right to exist, there must be an express waiver of Congress's power to amend.

<sup>262</sup> 42 U.S.C. § 1437c(a) (1982) ("The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment.").

<sup>263</sup> 42 U.S.C. § 1437d (1982) (contract provisions and requirements).

contractual modifications require the mutual agreement of the United States and the PHA.<sup>264</sup> Under the terms of the Act and the ACC, the PHA holds title to the public housing,<sup>265</sup> and, upon payment in full of all indebtedness incurred in connection with the construction of the housing, all obligations of the PHA to the federal government come to an end.<sup>266</sup> An additional requirement that the PHA sell the housing to a third party would impair the contractual right of the PHA to own the housing free from obligation to or regulation by the federal government at the end of the forty year period.<sup>267</sup>

Current legal doctrine is unsettled with respect to the consequences of a finding that the federal government has impaired its own contractual obligation. One line of cases indicates that substantial impairment automatically results in the invalidation of the government action or the award of damages. For example, in *Lynch v. United States*,<sup>268</sup> the Supreme Court considered the constitutionality of a federal statute that abrogated annual renewable term insurance policies issued by the federal government. Upon finding that the insurance policies were contracts which the government had repudiated, the Court held that the legislation violated the just compensation and due process clauses of the fifth amendment.<sup>269</sup>

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<sup>264</sup> See 42 U.S.C. § 1437c(f) (1982) (“[A]ny contract heretofore or hereafter made for annual contributions, loans or both, may be amended or superseded by a contract entered into by mutual agreement between the public housing agency and the Secretary.”); ACC Part II § 512 (ACC may be amended by mutual agreement of United States and PHA). An important reason why the ACC is not subject to unilateral alteration is its function as security for debt obligations issued by the PHA. See 42 U.S.C. § 1437c(a)(I) (Supp. V 1987). Creditors would be very hesitant to lend money for construction of public housing if the federal government could substantially alter its obligations under the ACC.

<sup>265</sup> See, e.g., 42 U.S.C. § 1437a(b)(1) (1982) (“lower income housing project” defined as low income housing developed, acquired or assisted by a PHA); ACC Part II §§ 103(e), (f) (PHA shall acquire good and valid title to each project and properly record its deed).

<sup>266</sup> See, e.g., 42 U.S.C. § 1437c(a) (1982) (annual contributions to PHAs shall be paid over a period not to exceed forty years); ACC Part II § 518 (obligations under ACC terminate upon payment of all indebtedness of PHA in connection with particular project).

<sup>267</sup> *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969), supports the argument that the federal government may not repudiate its contractual relationship with a PHA. In *Thorpe*, the Supreme Court upheld a circular issued by HUD prescribing notification requirements for tenant evictions. The Court observed that although the circular imposed an additional obligation upon the PHA, it left the respective obligations of the parties to the ACC substantially unchanged. See *id.* at 279. Citing *Lynch*, the Court further implied that the federal government could not constitutionally enact a law which derogated or repudiated the PHA’s substantial contractual rights. See *id.* at 279 & nn. 31-33.

<sup>268</sup> 292 U.S. 571 (1934).

<sup>269</sup> See *id.* at 579; see also *Perry v. United States*, 294 U.S. 330, 351 (1935) (“The United States are as much bound by their contracts as are individuals. If they repudiate



However, recent Supreme Court cases suggest that, in determining whether a federal impairment of a federal government contract violates the fifth amendment, a court should adopt standards recently promulgated by the Court in its contract clause cases.<sup>270</sup> Upon finding that a state has impaired an obligation of contract, the Court applies a "dual standard" depending on whether the state itself was a party to the impaired contract.<sup>271</sup> In most cases, state laws impairing contracts between private actors are upheld under a standard which examines "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."<sup>272</sup> On the other hand, a state's repudiation of its own contractual obligation is subjected to much more exacting scrutiny. In *United States Trust Co. v. New Jersey*,<sup>273</sup> the Court invalidated state legislation which had sought to repeal a covenant limiting the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation by using revenues pledged as security for bonds issued by the authority. According to the Court, deference to legislative decision was not justified in the case of a government's repudiation of its own obligation.<sup>274</sup> A state's repudiation of its own contractual obligation would be sustained only if the "impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State."<sup>275</sup>

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their obligations, it is as much repudiation, with all the wrong and reproach the term implies, as it would be if the repudiator had been a State or a municipality or a citizen.'") (quoting the Sinking Fund Cases, 99 U.S. 700, 719 (1879)); *Everett Plywood Corp. v. United States*, 651 F.2d 723, 727 (Ct. Cl. 1981) (federal government cancellation of contract entitles other party to damages).

<sup>270</sup> See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1977) (analogizing contract clause doctrine to "dual standard of review" applied to federal repudiations of federal government contracts).

<sup>271</sup> See *id.* at 25-26 (dual standard of review exists for state impairments of contracts depending on whether government is a party to contract).

<sup>272</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934). In *Blaisdell*, the Court upheld the Minnesota Mortgage Moratorium Law which extended the period during which mortgagors could redeem their properties from a foreclosure sale. See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987) (state impairment of damage waiver contracts was substantial, but is "amply justified by the public purposes served by the Subsidence Act."); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983) (courts should defer to legislative judgment as to the necessity and reasonableness of particular measures). But see *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (statute providing that pension rights would vest after period of years regardless of contractual provisions violated contract clause).

<sup>273</sup> 431 U.S. 1 (1977).

<sup>274</sup> *Id.* at 26 ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake").

<sup>275</sup> *Id.* at 29. See Bernard Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contracts Clause*, 1979 SUP. CT. REV. 95, 108 ("The dual standard of review upon which [*United States Trust Co.*] turns permits the Court to subject the impairment of the State's own obligations to the strictest scrutiny.").

The Court found that the legislation violated the contract clause because it was "neither necessary to achievement of the plan [encouragement of public transportation] nor reasonable in light of the circumstances."<sup>276</sup>

In *United States Trust Co.*, the Court noted that a dual standard of review was also applicable to federal impairments of contracts.<sup>277</sup> Though a high level of judicial scrutiny of legislative measures inevitably presents difficult issues concerning the appropriate role of the judicial branch in a majoritarian political system,<sup>278</sup> the doctrine set forth by the Court, which does not permit the federal government to repudiate its own contracts merely upon showing a rational relationship to a legitimate government purpose, is justified on grounds of political theory and economic efficiency.<sup>279</sup> As the Court observed in *United States Trust Co.*, the presumption of legitimacy that usually attaches to governmental actions is absent when the government repudiates its own contract. In such instances, the government is acting in its own self-interest.<sup>280</sup> Therefore, it is appropriate for a

<sup>276</sup> *United States Trust Co.*, 431 U.S. at 29. For examples of cases applying *United States Trust Co.* to state impairments of state contracts, see, e.g., *Maryland State Teachers Ass'n Inc. v. Hughes*, 594 F. Supp. 1353, 1370 (D. Md. 1984) (changes to state pension system were necessary and reasonable); *Marvel v. Dannemann*, 490 F. Supp. 170, 176-77 (D. Del. 1980) (changes to state pension plan were not necessary).

<sup>277</sup> *United States Trust Co.*, 431 U.S. at 26 n.25 ("For similar reasons, a dual standard of review was applied under the Fifth Amendment to federal legislation abrogating contractual gold clauses" (citing *Perry* and comparing *Perry* to *Norman v. Baltimore & O.R.R. Co.*, 294 U.S. 240 (1935), which upheld a joint resolution of Congress declaring contracts providing for the payment of gold to be against public policy in the context of private corporate obligations)).

<sup>278</sup> See *United States Trust Co.*, 431 U.S. at 61 (Brennan, J., dissenting) (courts should grant wide latitude to legislators even if it results in damage to property); Note, *A Process-Oriented Approach to the Commerce Clause*, 89 YALE L.J. 1623, 1636-39 (1980) (arguing against judicial intrusion into policy judgments of legislatures absent proof of process failure).

<sup>279</sup> By arguing in favor of a non-deferential standard of review for federal government repudiations of its own contracts, I do not mean to suggest that a deferential rational basis test is the appropriate standard by which to judge state and federal impairments of private contracts. Although a discussion of the appropriate standard for reviewing such impairments is beyond the scope of this Article, several of the arguments offered in support of meaningful review of government repudiations of public contracts would also apply to impairments of private contracts. See Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 599 (1987) (Supreme Court should abandon dual standard and adopt unitary analysis of contract clause which affords no presumption in favor of either public or private obligations).

<sup>280</sup> *United States Trust Co.*, 431 U.S. at 26. The Court also observed that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* Several commentators, however, have suggested that the model of impartiality ascribed to a government's actions with respect to contractual relations among private individuals is inaccurate. See Richard A. Epstein,

court to examine relatively closely the rationale for the legislature's action to determine whether it is motivated by an impartial analysis of public policy or by a desire to save money or avoid obligations.<sup>281</sup>

A requirement that the federal government adhere to its contractual obligations may also be justified on grounds of economic efficiency.<sup>282</sup> If the federal government could renege on its contractual obligations, the risk of dealing with the government would greatly increase. Private parties would likely raise prices for goods and services they provide to the government to compensate for the expected cost of government repudiations.<sup>283</sup> Since most individuals are presumed to be risk averse, it is possible that they would raise costs by more than the expected loss due to repudiation, thereby leading to excessively high public sector expenses and allocative inefficiency. A rule of law limiting the ability of the federal government to repudiate its contracts creates a secure environment

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*Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 717 (1984) (purpose of contract clause is to deter rent-seeking); Merrill, *supra* note 279, at 615 (legislators represent private interests and therefore are subject to conflicts of interest when they take actions that impair private contracts). A belief that legislators are not impartial with respect to impairments of private contractual relationships might support the argument that such impairments should also be subjected to meaningful scrutiny. See Epstein, *supra*, at 750.

<sup>281</sup> Cf. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63-65 (1964) (when government in its capacity as an enterpriser causes economic loss, it should pay compensation under the just compensation clause because it cannot be expected to act with "restraint and a detached reflection"). There is little reason to fear that subjecting state and federal governments to a demanding standard when they impair their own contractual obligations would paralyze the government by requiring it to adhere to obligations or policies which they no longer desire to follow. Governments may, in such circumstances, use the power of eminent domain to condemn the property right which they seek to repudiate. Of course, such a condemnation requires the payment of just compensation. See *United States Trust Co.*, 431 U.S. at 29 n.27 (contractual obligations need not pose barrier to changes in policy since state has power to condemn contract rights); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 535 (1848) (state may condemn contractual right despite contract clause); Epstein, *supra* note 280, at 740-47 (discussing just compensation "exception" to prohibition on impairments).

<sup>282</sup> The argument that the risk of government repudiation might lead to increased cost of federal operations and allocative inefficiency mirrors the argument in favor of compensation for takings of all forms of property. For a more detailed discussion of the principles involved, see e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation For Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 590-92 (1984); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269 (1988); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 528 (1986); Schill, *supra* note 218, at 851-53.

<sup>283</sup> The Court implied that economic efficiency was one of the reasons for its holding in *Lynch v. United States*, 292 U.S. 571 (1934), that the federal government could not be permitted to repudiate its obligation to provide renewable term insurance to World War I veterans: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. . . . To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." *Id.* at 580.

for parties dealing with the government, thereby promoting both economical and efficient government operation.<sup>284</sup>

A federal government requirement that PHAs sell their stock of public housing to tenants is unlikely to meet the Supreme Court's standard with respect to whether a government's impairment of its own contract violates the Constitution. In *United States Trust Co.*, the Court provided some guidance on the application of the "reasonable and necessary" standard. The Court held that repeal of the bond covenant was unnecessary because a less drastic modification would have permitted the Port Authority to achieve its objectives of promoting public transportation.<sup>285</sup> The Court found that the state could have used alternative means to discourage automobile use and improve mass transit, such as increasing bridge and tunnel tolls and raising taxes on parking and gasoline.<sup>286</sup> The Court also found that repeal of the covenant would not be "reasonable in light of the surrounding circumstances" because at the time the covenant was granted, the need for additional public subsidy for mass transportation was foreseeable.<sup>287</sup>

In applying the "reasonable and necessary" standard to proposed legislation that would require PHAs to sell their housing to tenants at a fraction of fair market value, the first step is to determine whether the purposes served by privatization are important. The federal government could presumably argue that a number of objectives are served by privatization of public housing, including improved maintenance and increased stability of homeownership. Although the wisdom of these policy objectives is open to question, as I have demonstrated in Part III,<sup>288</sup> courts in the post-*Lochner*<sup>289</sup>

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<sup>284</sup> Justifying a high level of scrutiny for government repudiation of its own obligations on the ground of economic efficiency is subject to two qualifications. First, unlike most takings of private property, uncompensated repudiations of government contracts have a self-correcting character. The increased costs created by the government action would be borne largely by the government itself, thereby reducing the likelihood that it would repudiate the contract in the first place. Nevertheless, legislators could possibly have an incentive to repudiate contracts in the hope of reaping short-term political gain, even though the costs would be borne by taxpayers in the future. See Merrill, *supra* note 279, at 618. Second, to the extent that the possibility of government repudiation of contracts increases risk and allocative inefficiency, private parties contracting with the government could minimize the risk by purchasing insurance. Cf. Kaplow, *supra* note 282, at 527-42.

<sup>285</sup> *United States Trust Co.*, 431 U.S. at 29-30.

<sup>286</sup> See *id.* at 30 & n.29.

<sup>287</sup> See *id.* at 31.

<sup>288</sup> See *supra* text accompanying notes 160-75.

<sup>289</sup> In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court invalidated a New York law which prohibited the employment of bakery employees for over 10 hours a day or 60 hours per week. In its decision, the Court held that the state policy of regulating labor relations was an invalid intrusion of the state into the freedom of parties to contract. Subsequent Supreme Court cases repudiated the Court's second-guess-

era are likely to grant the government significant deference in determining which policy objectives it desires to follow.<sup>290</sup>

Nevertheless, although the two goals of transforming tenants into homeowners and reducing federal expenditures may well be deemed important, as was the case in *United States Trust Co.*, many alternative methods of achieving these objectives without impairing contractual obligations. If the objective of privatization is to improve the operation of public housing, existing management practices could be improved, management services could be contracted out or federal oversight could be increased. The objective of giving tenants greater control over their lives could be accomplished by greater tenant participation in management rather than the sale of public housing. For example, residents currently manage several public housing developments. Though few systematic studies of tenant management have been completed, the results thus far seem promising. An audit of one project shows that, from 1982 to 1985, rent receipts per unit increased by seventy-seven percent; rental income increased by seventy percent and administrative costs decreased by sixty percent.<sup>291</sup> Anecdotal evidence also indicates that, where successful,<sup>292</sup> tenant management can reduce vacancies, crime and welfare dependence.<sup>293</sup> According to the results of a tenant demonstration project conducted by Manpower Demonstration Research Corporation in the late 1970s, tenant management resulted in increased employment opportunities, personal development and an increased level of satisfaction with project management among tenants.<sup>294</sup>

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ing of legislative purposes. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage law); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price control legislation).

<sup>290</sup> *See, e.g., United States Trust Co.*, 431 U.S. at 29 (purposes of state are "admittedly important").

<sup>291</sup> *See* PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 20; Rosalind R. Inge, Address to President's Commission on Privatization 4 (Oct. 21, 1987) (available from United States Office of Management and Budget); Robert L. Woodson & Rosalind R. Inge, Cost Benefit Analysis of the Kenilworth-Parkside Public Housing Resident Management Corporation: Executive Summary 3 (May 1986) (based on Coopers & Lybrand analysis).

<sup>292</sup> In its report, the President's Commission on Privatization noted that some resident management organizations fail due to the absence of leadership, insufficient management skills and difficult relations with PHAs. *See* PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 1, at 21.

<sup>293</sup> *See* Woodson & Inge, *supra* note 291, at 4 (describing experience in Boston and Jersey City).

<sup>294</sup> *See* MANPOWER DEMONSTRATION RESEARCH CORP., TENANT MANAGEMENT: FINDINGS FROM A THREE-YEAR EXPERIMENT IN PUBLIC HOUSING 6 (1981). The report on the demonstration project also stated that management costs were greater under tenant management than they had been under PHA management. *See id.* at 6. The report indicated that, with respect to the operation of the public housing, "tenant management does not usually produce results markedly superior to those stemming from conven-

Homeownership itself may advance several federal policy objectives, such as permitting low income tenants to benefit from the financial rewards of property ownership and encouraging households to feel part of the capitalist system. The federal government, however, has a vast array of options at its disposal to achieve this goal without selling public housing. Under the Section 235 Mortgage Interest Subsidy Program,<sup>295</sup> the federal government promotes low and moderate-income homeownership by providing mortgage insurance and interest subsidies to private lenders. These subsidies permit participating lenders to charge below-market interest rates on home mortgage loans, thereby making homeownership more affordable to low income households.<sup>296</sup> In addition, although much more limited in scope, the Turnkey III Homeownership Opportunities Program<sup>297</sup> permitted public housing tenants to purchase newly constructed buildings through lease-purchase arrangements. More recently, Congress enacted the Nehemiah Housing Opportunity Grants Program,<sup>298</sup> under which federal money will support local programs that rely on the cooperative efforts of cities, states and local developers to build housing for low and moderate income

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tional housing authority management." *Id.* at 5; see also Padi Gulati, *Consumer Participation in Administrative Decision Making*, 56 SOC. SERV. REV. 72, 83 (1982) ("[I]t is quite clear from our data that there is no evidence to support the notion that management performance is improved materially by tenant participation."); Daniel J. Monti, *The Organizational Strengths and Weaknesses of Resident-Managed Public Housing Sites in the United States*, 11 J. URB. AFF 39, 49-51 (1989) (MDRC evaluations of resident management programs were too optimistic; resident management corporations are unlikely to succeed unless residents have ability to organize and deal effectively with troublemakers); William A. Peterman, *Resident Management: Putting It In Perspective*, 45 J. HOUSING 111, 112 (1988) (successful tenant management conversions cost a "considerable expenditure of federal dollars"). In 1988, Congress enacted legislation designed to promote tenant management. Under the statute, resident management corporations are allowed to retain revenues exceeding operating and project costs for certain purposes, and federal funds are made available to organize and train resident management groups. See 42 U.S.C. § 1437r(a) (Supp. V 1987).

<sup>295</sup> 12 U.S.C. § 1715z (1988).

<sup>296</sup> Approximately 500,000 homes were insured from 1968 to 1973 under the Section 235 program. See Silver, McDonald & Ortiz, *supra* note 140, at 223. The program was suspended in 1973 as part of the Nixon Administration's moratorium on housing assistance. After the moratorium, the program was continued on a much smaller scale. The Section 235 program has been plagued by corruption, mismanagement and a large default rate since its inception. See CONGRESSIONAL BUDGET OFFICE, HOUSING POLICY AND RECURRING ISSUES, reprinted in HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 308, 311 (Roger Montgomery & Daniel M. Mandelker 2d ed. 1979); R. BRATT, *supra* note 95, at 135-40; Mitchell, *supra* note 62, at 199; Robert Schafer & Charles G. Field, *Section 235 of the National Housing Act: Homeownership for Low Income Families*, in HOUSING URBAN AMERICA 485 (Jon Pynoos, Robert Schafer & Chester W. Hartman 2d ed. 1980) (editors' addendum chronicling abuses that occurred under program).

<sup>297</sup> See *supra* text accompanying note 140.

<sup>298</sup> Pub. L. No. 100-242, §§ 601-13, 101 Stat. 1951 (1988).

households.<sup>299</sup>

Federal impairment of PHAs' contractual rights is not only unnecessary to achieve policy objectives,<sup>300</sup> but is also not reasonable under the circumstances.<sup>301</sup> In *United States Trust Co.*, the impairment of the bond covenant was deemed unreasonable because the need for additional expenditure for mass transportation was foreseeable at the time the covenant restricting use of the bond security was granted. In much the same way, the supposed desirability of transforming tenants into homeowners was foreseeable when most ACCs between PHAs and the federal government were executed. The federal government has promoted homeownership among lower income households for several decades.<sup>302</sup> In addition, the problems that have plagued some public housing developments have been apparent at least since the 1950s.<sup>303</sup> Therefore, substantially impairing the contractual rights of PHAs cannot be justified as either neces-

<sup>299</sup> Under the Nehemiah program, homes are built by nonprofit developers on land donated by cities. Financing is obtained from federal grants and state tax exempt bonds. Purchasers are required to pay 10% of the cost of their homes at closing. The program originated in New York City where over 5,000 single family homes have already been constructed. See M. STEGMAN, *supra* note 86, at 35-37.

<sup>300</sup> An additional policy objective that might arguably be achieved by the sale of public housing to tenants is the conservation of public revenues. Nevertheless, saving money has frequently been held an insufficient objective to warrant the federal government impairing its own contracts. See *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 580 (1934); *Sinking Fund Cases*, 99 US. 700, 719 (1879). Even if reducing federal expenditures were an appropriate justification for impairment, it is highly questionable that privatization would result in significant savings. Experience with HUD's Public Housing Sales Demonstration thus far indicates that tenant-purchasers would continue to require a high level of continuing public subsidy. See, e.g., Department of City & Regional Planning, Univ. of N.C. at Chapel Hill, *supra* note 149, at 31-32 (PHAs participating in voluntary program to sell public housing to tenants provided funds for maintenance and repair after sale of units); McCormick, *supra* note 185, at 6; *Results of Programs to Sell Units to Public Housing Residents Examined*, *supra* note 185, at 896-97 (1989) (cost of renovating projects prior to sale to tenants is high). Indeed, the Bush Administration's HOPE proposals contemplate continuing subsidies to purchasing tenants. See *supra* note 152.

<sup>301</sup> There is some question as to whether the second aspect of the Court's test in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), that the impairment be reasonable in the circumstances, is redundant when considered in conjunction with the requirement that the impairment be necessary. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 87 (1977).

<sup>302</sup> The Section 235 Program was enacted as part of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448 § 101, 82 Stat. 476, 477 (1968). See also CHARLES ABRAMS, HOMEOWNERSHIP FOR THE POOR: A PROGRAM FOR PHILADELPHIA 115-42 (1970) (advocating a "used house program" for low income households).

<sup>303</sup> At the time most ACCs were executed, public housing financial and operational problems were evident. See, e.g., L. FRIEDMAN, *supra* note 106, at 119-46 (1968) (discussing public housing and its problems); G. WRIGHT, *supra* note 50, at 233 (public housing conditions deteriorated seriously in the 1950s); Bauer, *supra* note 72 (decrying physical and social problems of public housing).

sary to achieve an important government objective, nor as reasonable based on unforeseen circumstances.

#### CONCLUSION

In this Article, I have argued that although future federal housing assistance for low income households should rely to a greater extent on the private sector for *delivery* of services, that does not mean that the federal government should cut back its role in financing such assistance or abandon its already sizable investment in public housing. To the contrary, there remains a need for the public sector to assist low income households in obtaining adequate and affordable housing. By using the private sector to deliver these housing services, it is likely that the greatest number of households can be assisted for a given level of federal expenditure. There will remain for the foreseeable future, however, a role in American housing policy for publicly owned rental housing, especially in those circumstances where artificial constraints on supply or housing discrimination exist.

Although future housing assistance should not rely to a large extent on the construction of new public housing, current proposals to sell public housing to tenants at a fraction of fair market value contravene sound public policy and would violate the Constitution. Instead of disposing of its stock of public housing, the federal government should attempt to preserve its investment by preventing its further decay and by taking steps to ensure sound management.