

ARTICLES

EMBRACE THE SUCK: WHY STATES AND LOCALITIES SHOULD USE *PROPERTY RIGHTS* TO FIX BROKEN HOUSING VOUCHER PROGRAMS

by
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The largest federal affordable housing program is an income supplement program called Housing Choice Vouchers (formerly Section 8). When a low-income person has a housing voucher, they find and rent privately owned, market-rate housing. The tenant pays a portion of the rent, and the federal Department of Housing and Urban Development pays the rest of the rent directly to the landlord. Unfortunately, most voucher-holders end up renting in high-poverty neighborhoods and more than one in three tenants who receive a housing voucher are unable to use it before it expires. This is because most private landlords choose not to rent to tenants with housing vouchers.

For many housing advocates, these glaring failures in the Housing Choice Voucher Program are proof that Congress's decades-old decision to turn away from publicly owned affordable housing and towards market actors was a mistake. More than a dozen states and scores of localities have attempted to fix this broken federal program by granting tenants a human or civil right to pay rent with a housing voucher, known as source-of-income discrimination laws. Using both data and political economy theory, this Article first explains why

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this human rights approach to fixing federal housing voucher programs hasn't been successful.

The phrase "Embrace the Suck" was coined by members of the U.S. military as a mantra for persevering through hardship not of one's own making. This Article argues that states and localities can get the most out of broken federal housing voucher programs by "embracing the suck" of federal housing policy's reliance on private property owners' managerial discretion. Instead of attempting to limit this discretion by granting tenants oppositional human rights, states and localities should imbue vouchers with additional property rights and entitlements to increase voucher-holders' ability to compete in the private rental market. For example, states or localities can tie preferential property tax rates, expedited permitting status, and enhanced public services to housing vouchers to create demand for voucher-holding tenants among a broader range of landlords. Drawing from Progressive Property scholars and their forebearers, this Article argues that these additional property rights and incentives should be designed to promote the self-determination and economic agency of voucher-holders in choosing where to live.

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INTRODUCTION

Imagine you are a nurse's aide earning \$22,000 per year. You struggle to pay for food, clothing, transportation, healthcare, and your \$800-per-month rent. You live in fear of the unexpected illness, accident, or expense. Several years ago, you signed up for a housing voucher down at your city's housing authority—the agency that delivers rental assistance to low-income people—but so far, nothing has come of it.¹

Six weeks ago, out of the blue, the housing authority contacted you. Your name had risen to the top of the Section 8 housing voucher list! Your voucher would pay the difference between 30% of your income and the monthly rent for your apartment. In other words, for your current apartment, the amount of your monthly pay devoted to rent would shrink from \$800 per month to \$611 per month! That extra \$189 in your pocket each month would really help in paying off your debts, buying your prescriptions, and replacing the bald tires on your car. The letter explained that you had 60 days to find someplace to use your voucher, otherwise you would lose it. “No problem!” you thought.

When you told your apartment manager about your voucher, they informed you that they don't accept housing vouchers. If you want to use your voucher, you will have to move. You began looking for another apartment where you can use your voucher, but many landlords told you outright that they don't accept vouchers, or worse, they just didn't call you back once they learned you wanted to pay rent using a voucher. Finally, you found a willing landlord only to discover that the apartment unit did not pass the minimal quality inspection standards that are required by the voucher program. Time is running out to use your voucher. If you can't find a place to use your voucher soon, your opportunity will expire, and the housing authority will pass your voucher on to the next person on the Section 8 waiting list . . .

¹ As of 2016, approximately 75% of households receiving rental assistance in the U.S. were working or actively looking for work. The typical household receiving rental assistance is headed by a 38-year-old woman with two school-aged children who earns less than the federal poverty level working a low-wage job. Alicia Mazzara & Barbara Sard, *Chart Book: Employment and Earnings for Households Receiving Federal Rental Assistance*, CTR. ON BUDGET AND POL'Y PRIORITIES (Feb. 5, 2018), <https://www.cbpp.org/research/chart-book-employment-and-earnings-for-households-receiving-federal-rental-assistance>.

The vignette above is fictional, but it represents the experience of more than one in three federal housing voucher recipients.² It is repeated daily throughout our country as people attempt to use the federal, private-market-dependent, rental assistance program that supports 5.5 million of the lowest income Americans—tenant-based vouchers.³ Although it is the federal government that steers housing policy throughout the country toward private market actors based on the federal government's vast financial resources,⁴ this Article focuses on the significant power that state and local governments nevertheless possess to make federal housing programs successful. Specifically, this Article argues that state and local governments have the power to help actualize the laudatory goals of tenant-based voucher programs by embracing the suck of private market actors and their self-interested decision-making. State and local governments should use property rights to help voucher recipients compete meaningfully in the private rental market. This property strategy is not a cure for all that ails successful implementation of voucher programs. For example, it does not address the problem of neighbors hyper-policing Black voucher-recipients when they move into white neighborhoods.⁵ However, it does enlist private landlords in this fight.

Currently, federal law does not require private landlords to participate in the largest federal tenant-based voucher program.⁶ A private landlord does not run afoul of federal law if they decline to rent to an applicant simply because the applicant would pay rent with a housing voucher.⁷ In fact, private landlords make this decision so often that voucher-holders are frequently constrained to renting in high-

² Approximately 39% of housing voucher recipients were unable to find a place to use the voucher before the voucher expired according to a Housing and Urban Development-commissioned study in 2021. INGRID GOULD ELLEN, KATHERINE O'REGAN & SARAH STROCHAK, U.S. DEP'T OF HOUS. AND URB. DEV., USING HUD ADMINISTRATIVE DATA TO ESTIMATE SUCCESS RATES AND SEARCH DURATIONS FOR NEW VOUCHER RECIPIENTS 6 (2021), https://www.huduser.gov/portal//portal/sites/default/files/pdf/Voucher-Success_Rates.pdf.

³ See Ed Gramlich, *Housing Choice Vouchers*, in NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS & POLICIES 4-1, 4-1 (2023) (ebook) [hereinafter Gramlich, *Housing Choice Vouchers*] (citing *Housing Choice Voucher Program Dashboard*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard (Oct. 2024)); 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1 (2023).

⁴ For an excellent primer on federal housing programs, see MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 9–10 (Mar. 27, 2019).

⁵ Norrinda Brown Hayat, *Section 8 is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. UNIV. J. L. & POL'Y 61, 61–64 (2016).

⁶ 24 C.F.R. § 982.302(b) (2023) (“If the family finds a unit, *and the owner is willing to lease the unit under the program*, the family may request PHA approval of the tenancy.” (emphasis added)).

⁷ *Id.*

poverty, low-opportunity neighborhoods.⁸ Voucher recipients can drive up rents in those neighborhoods to the detriment of low-income renters without housing subsidies.⁹ All too often, this landlord reticence results in a voucher recipient being unable to find a place to use their voucher before it expires.¹⁰ For some housing policy experts, these results are evidence that relying on the self-interested decision-making of private landlords is a major design flaw in federal housing policy.¹¹ Attempting to correct this flaw, 22 states and more than 130 localities have used their police powers to prohibit discrimination against tenants with housing vouchers.¹² These laws typically create a human or civil right for voucher recipients to be free from discrimination based on their source of income, and then subordinate a landlord's property rights to the tenant's overriding right to be free from unlawful discrimination.¹³ However, as discussed below, the efficacy of these voucher discrimination laws is significantly limited by lack of awareness of the laws, landlord avoidance, and underestimations about the cost of enforcement.¹⁴ But states and localities have another power that they can apply to this problem—the power to allocate property rights.

Embracing the suck,¹⁵ as referenced in this Article's title, begins with state and local governments acknowledging that federal housing policy is structured around, *and values*, private, self-interested decision-making of landlords and tenants. When state and local governments attempt to improve voucher programs by limiting landlords' self-interested decisions, based on overriding police powers or an attempt to imbue private property with a moral imperative, state and local governments are fighting against the tide of federal policy to the detriment of their lowest-income

⁸ EVA ROSEN, *THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD* 12–16 (2020).

⁹ *Id.*

¹⁰ Gary Rhoades, *Freedom of Choice for Low-Income Renters Still Elusive as States and Cities Scramble to Confront Housing Voucher Discrimination*, 48 *HUM. RTS.* 16, 17 (2023) (documenting that in 2018, half of all voucher-holders in Los Angeles had their vouchers expire while looking for apartments that would accept them).

¹¹ *See, e.g.*, Armen H. Merjian, *Second-Generation Source of Income Housing Discrimination*, 2023 *UTAH L. REV.* 963, 972–73 (2023) (arguing that landlords cannot be relied upon to adhere to nondiscriminatory standards in screening voucher-holders).

¹² *See generally* POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B: STATE, LOCAL, AND FEDERAL LAWS BARRING SOURCE-OF-INCOME DISCRIMINATION (2024) [hereinafter *POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B*], <https://www.prrac.org/pdf/AppendixB.pdf> (listing the states cities, and localities that have established SOID ordinances).

¹³ *See infra* Section III.A.2.

¹⁴ *See infra* Section III.C.

¹⁵ This term is a rally cry coined by members of the armed forces to persevere in one's mission despite hardships not of one's own making. Sarah Sicard, *The Origin of the Military's Iconic Mantra: 'Embrace the Suck'*, *MIL. TIMES*, (Jul. 19, 2022), <https://www.militarytimes.com/off-duty/military-culture/2022/07/19/the-origin-of-the-militarys-iconic-mantra-embrace-the-suck/>.

residents. This Article argues that state and local governments can and should increase the success of housing voucher programs by granting *property* rights to voucher-holders. In fact, this “property rights strategy” is likely to be more effective and beneficial to tenants and landlords than voucher discrimination laws based in police powers or the recognition of a human right. In pursuing the property rights strategy, governments should view housing vouchers as personal property of voucher recipients, representing a bundle of rights like other forms of property. These property rights should be augmented in ways that increase voucher recipients’ liberty and dignity as participants in the local economy. In practice, this means enhancing vouchers with additional rights to ensure that voucher recipients have market power beyond high-poverty neighborhoods. For example, state and local governments can augment vouchers with income or property tax credits or preferential rates, access to low-cost capital improvement loans, access to loss or damage guarantee funds, preferential or expedited permitting or licensing requirements, or other rights that attach to a voucher and over which the voucher recipient exercises control.

Part I of this Article provides some essential background on federal tenant-based voucher programs with particular emphasis on the largest housing voucher program, Housing Choice Vouchers. This Part defines tenant-based vouchers, describes their prevalence, the theory behind them, and their likely future.

Part II examines how private landlords absorb tenant-based vouchers in the private rental market using both empirical research from social scientists and theory from legal scholars who describe private property as a method of resource management. This Part illustrates how landlords, making private management decisions in their own best interest, serve as gatekeepers that allow or even solicit voucher-holders in high-poverty neighborhoods, but eschew them in all other neighborhoods.

Part III delves into legal prohibitions on voucher discrimination, including a survey of data on these increasingly popular laws. The Part culminates in the observation that these laws are inefficient and ineffective protections for voucher-holders because landlords continue to broadly discriminate against voucher-holders. Additionally, these laws are typically poorly enforced, and landlords continue to attack these laws at the state and local level after they are passed.

Part IV explores affordable housing incentives for tenant-based vouchers. Beginning with a property theory grounded in liberal democracy, the Part moves on to an overview of the few incentive programs currently in existence. The Part ends with data about the efficacy, utilization, and cost of these programs.

This Article concludes with a slate of policy recommendations, ranging from the simple to the complex, that localities can use to increase the efficiency and efficacy of tenant-based voucher programs.

I. TENANT-BASED VOUCHERS

Subsidized affordable housing in the U.S. today can be divided into three general categories: public housing, project-based affordable housing, and tenant-based affordable housing. It is a common misconception that “subsidized housing” in the United States is synonymous with “public housing” and that “public housing” is all publicly owned. However, the vast majority of subsidized affordable housing in the United States today is privately owned,¹⁶ and one of the most popular affordable housing subsidies in the country is not housing at all, but a form of income supplement made available to low-income people so that they can rent privately owned, market-rate apartments.¹⁷ These income supplement programs are various forms of tenant-based vouchers wherein a tenant pays a percentage of their income toward rent and a housing agency pays the remainder of the rent directly to the landlord on the tenant’s behalf.¹⁸

Since the 1960s, federal low-income housing policy in the United States has been on a slow but steady march to private ownership, beginning with the introduction of programs to encourage private development, ownership, and operation of affordable housing properties in 1959.¹⁹ In 2000, Congress stopped building new publicly owned housing²⁰ and has been engaged in an excruciatingly slow plot to starve publicly owned housing of necessary operating and capital improvement

¹⁶ As of October 2022, approximately 734,000 households lived in public housing owned by the nation’s 2,738 public housing agencies. Ed Gramlich, *Public Housing*, in NAT’L LOW INCOME HOUS. COAL., ADVOCATES’ GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS & POLICIES 4-32, 4-32 (2023). By contrast, 3.44 million households live in privately owned Low-Income Housing Tax Credit units and approximately 1.5 million households live in other privately owned, publicly subsidized units. See Ed Gramlich, *Low-Income Housing Tax Credits*, in NAT’L LOW INCOME HOUS. COAL., ADVOCATES’ GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS & POLICIES 5-6, 5-6 (2023); *Assisted Housing: National and Local*, HUD USER: OFF. OF POL’Y DEV. & RSCH., <https://www.huduser.gov/portal/datasets/assthsng.html> (report generated July 14, 2023) (on-file with author).

¹⁷ Barbara Sard, *Housing Vouchers Should Be a Major Component of Future Housing Policy for the Lowest Income Families*, 5 CITYSCAPE: J. POL’Y DEV. & RSCH. 89, 89–90 (2001) (“A housing voucher is an income supplement earmarked to meet housing costs.”); C. Eugene Steuerle, *Common Issues for Voucher Programs*, in VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 3, 4 (Van Doorn Ooms, George E. Peterson, & Robert Reischauer, eds., 2000) (“[A] voucher is a subsidy that grants limited purchasing power to an individual to choose among a restricted set of goods and services.”).

¹⁸ Sard, *supra* note 17, at 89–90.

¹⁹ Nathaniel S. Cushman, *Affordable Housing: An Intimate History*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING 1, 8 (Tim Iglesias, Rochelle E. Lento & Rigel C. Oliveri eds., 3rd ed. 2022). Under Section 202, the housing for the elderly program provided low-cost loans to private developers and owners of housing for the elderly. *Id.*

²⁰ 42 U.S.C. § 1437g(g)(3)(A). The Faircloth Amendment caps the number of public housing units at the number of units “owned, assisted, or operated” by public housing agencies on October 1, 1999. *Id.*

funds.²¹ With apartments crumbling around tenants, public housing has earned a reputation for being the housing of last resort.²²

Instead of continuing with a housing management strategy that involved public construction, ownership, and operation of housing, the federal government has enacted a series of programs designed to encourage private property owners to assume the duty of providing housing to all renters, including extremely low-income renters.²³ These incentive programs address both increasing the supply of housing and also supporting the ongoing operations of buildings by helping low-income tenants pay rent.

There are two main types of affordable housing programs. In supply side (also known as “project-based”) affordable housing, private owners burden their land with servitudes meant to enforce a promise to use it for affordable housing for some amount of time.²⁴ In demand-side (also known as “voucher programs”), the government supplements a person’s income so that they can participate in the private rental market. A tenant with a voucher can attempt to rent privately owned, market-rate housing beyond what their income would otherwise support because the government will vouch for payment of a portion of their rent.²⁵

The private market has not yet solved our nation’s affordable housing crisis. In fact, by most accounts it is getting worse.²⁶ Some affordable housing scholars have

²¹ The National Association of Housing and Redevelopment Officials report that the approximately 1 million units of Public Housing Authority-owned public housing in the U.S. had a cumulative capital replacement and repair backlog of \$70 billion in 2020, and that this backlog is growing by approximately \$3.4 billion per year, not including inflation, based on aging buildings and chronic underfunding by Congress. *Capital Fund Backlog*, NAT’L ASS’N HOUS. & REDEVELOPMENT OFFS. (Apr. 2024), https://www.nahro.org/wp-content/uploads/2020/04/CAPITAL_FUND_BACKLOG_One-Pager.pdf.

²² For examples of and explanations for the decrepitude of public housing, see Ezra Rosser, *Shelter, Mobility, and the Voucher Program*, 10 BRIGHAM-KANNER PROP. RTS. J. 85, 87 (2021); ROSEN, *supra* note 8, at 12–16; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 227 (1985).

²³ See Cushman, *supra* note 19, at 8–22 (discussing the Section 236 Program and Tax Reform Act of 1969).

²⁴ Elizabeth Elia, *Perpetual Affordability Covenants: Can These Land Use Tools Solve the Affordable Housing Crisis?*, 124 PA. STATE. L. REV. 57, 60–61 (2019); Stephen Malpezzi, *Vouchers a Win for the Housing Market and the Economy*, RUTGERS CTR. FOR REAL EST. (Jan. 11, 2018), <https://realestate.business.rutgers.edu/news/vouchers-win-housing-market-and-economy>.

²⁵ Rosser, *supra* note 22, at 88; Malpezzi, *supra* note 24.

²⁶ Compare ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, IKRA RAFI & DIANE YENTEL, NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* 5 (2021), https://nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf (identifying a 6.8-million-unit gap in housing units affordable for and available to extremely low-income households), with ANDREW AURAND, DAN EMMANUEL, MATTHEW CLARKE, IKRA RAFI & DIANE YENTEL, NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* 9 (2022), <https://nlihc.org/sites/default/>

identified the federal government's managerial misstep in commodifying housing.²⁷ For these scholars, the government's duty to ensure that all residents are housed is too essential a resource allocation function to be delegated to private market actors.²⁸ The question of whether private property is the proper management system for our nation's affordable housing resources may be ripe for reexamination.²⁹ For example, in her sobering article about climate migration in the upcoming decades, Professor Alice Kaswan calls for a national strategy, including federal funding and federal checks on local land use laws, that can accommodate rapid housing of potentially millions of climate migrants.³⁰ Political economist Ricardo Tranjan has called into question whether there is a housing "crisis" at all or if, instead, housing shortages, skyrocketing rents, and rampant evictions are business-as-usual for the private real estate market.³¹ Additionally, Representative Ocasio-Cortez introduced a bill in 2021 that would repeal the ban on constructing new public housing that has been in place since 1999.³² Nonetheless, private "project-based" affordable housing programs continue to replace public housing and are by far the biggest engines driving the development of new and substantially rehabilitated affordable rental housing in the U.S. today.³³ This Article assumes that federal housing policy

files/gap/Gap-Report_2022.pdf (identifying a 7-million-unit gap in housing units affordable for and available to extremely low-income households, a 200,000 unit increase in housing scarcity in one year).

²⁷ E.g., Laura Wolf-Powers, *Property Commodification as a Municipal Strategy*, *Property Tax Reform as an Imperative*, L. & POL. ECON. PROJECT: BLOG (June 30, 2022), <https://lpeproject.org/blog/property-commodification-as-a-municipal-strategy-property-tax-reform-as-an-imperative/>; Elora Lee Raymond, *Collateral Cities*, L. & POL. ECON. PROJECT: BLOG (June 23, 2022), <https://lpeproject.org/blog/collateral-cities>.

²⁸ John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188, 192–93 (2003) (arguing that vouchers are insufficient substitutes for public housing and that voucher-holders are unable to compete with higher-income tenants in tight housing markets).

²⁹ Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L. J. 1, 9–12 (1991) (positing four possible government management strategies for resources; private property is but one of these management strategies).

³⁰ Alice Kaswan, *Creating Home: Multilevel Governance Structures for Emerging Climate Migration*, 93 TEMPLE L. REV. 735, 759–63 (2021).

³¹ RICARDO TRANJAN, *THE TENANT CLASS*, 1–10 (2023).

³² Repeal the Faircloth Amendment Act of 2021, H.R. 659, 117th Cong. (2021).

³³ The Low-Income Housing Tax Credit program accounts for approximately 25% of all new multi-family housing construction in the U.S. See Yonah Freemark & Corianne Payton Scally, *LIHTC Provides Much-Needed Affordable Housing, But Not Enough to Address Today's Market Demand*, URB. INST.: URB. WIRE (Jul. 11, 2023), <https://www.urban.org/urban-wire/lihtc-provides-much-needed-affordable-housing-not-enough-address-todays-market-demands>. By design, properties developed using Low Income Housing Tax Credits are 99.9% owned by private investors. See *Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks*, OFF. COMPTROLLER CURRENCY 4 (Mar. 2014), <https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-insights/pub-insights-mar-2014.pdf>. Non-subsidized new construction of rental housing is

will continue to look to private-market for-profit and non-profit landlords for the foreseeable future.

A. *Their Prevalence*

There are many tenant-based voucher programs in the U.S. on the federal, state, and even local level.³⁴ The largest and most commonly known tenant-based voucher program is the Housing Choice Voucher Program (originally known as, and still commonly referred to as, Section 8) which funds more than 1.8 million vouchers, houses more than 5.5 million Americans, and costs approximately \$26 billion per year.³⁵ Many other federal and state voucher programs build off of or duplicate salient design features of the Housing Choice Voucher program.³⁶ As a result, the program requirements of the Housing Choice Voucher Program overwhelmingly represent the program requirements of all tenant-based voucher programs.

The Section 8 tenant-based voucher program generally operates as follows. First, a low-income person applies for a voucher with their local city or county

overwhelmingly built for households earning more than the area median income. See Alex Veiga, *Some Renters May Get Relief from Biggest Apartment Construction Boom in Decades, But Not All*, ASSOCIATED PRESS (July 30, 2023), <https://apnews.com/article/rent-apartment-construction-renting-affordability-b7d3612fcd14170e4fd802a3904317d3>.

³⁴ After the Housing Choice Voucher Program, the second largest tenant-based voucher program is the Veterans Affairs Subsidized Housing Vouchers, or VASH vouchers, jointly sponsored by the Housing and Urban Development (HUD) and the Department of Veterans Affairs and providing 120,000 vouchers per year. Enhanced tenant protection vouchers are given to tenants in some rental properties where other, project-based affordability restrictions are expiring. Emergency Solutions Grant vouchers and Shelter + Care vouchers are both targeted toward people who are homeless or who face the imminent risk of homelessness. Housing Opportunities for People With AIDS (HOPWA) is a federal voucher program for 49,000 low-income tenants living with AIDS or HIV. The National Low Income Housing Coalition maintains a database of state and locally funding tenant-based assistance programs. *Rental Housing Programs Database*, NAT'L LOW INCOME HOUS. ASS'N, <https://nlhlc.org/rental-programs> (last visited Dec. 28, 2024) (under "Program Type" select "Tenant-based rental assistance").

³⁵ 42 U.S.C. § 1437f(o); Gramlich, *Housing Choice Vouchers*, *supra* note 3, at 4-1.

³⁶ As of 2023, there are 77 state tenant-based housing programs and 18 local tenant-based housing programs separate from HUD's Housing Choice Voucher program but incorporating many of its features. SARAH ABDELHADI & ANDREW AURAND, NAT'L LOW INCOME HOUS. COAL., STATE AND LOCAL INVESTMENTS IN RENTAL HOUSING: A SUMMARY OF FINDINGS FROM THE 2023 RENTAL HOUSING PROGRAMS DATABASE 3 (2023), <https://nlhlc.org/sites/default/files/2023-10/state-and-local-investments-rental-housing-report.pdf>. HUD-VASH Vouchers combine specialized housing choice vouchers administered by HUD and local public housing authorities with behavioral health and other supportive services provided by the Department of Veterans Affairs for veterans of the armed services. *HUD-VASH Vouchers*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/vash (last visited Dec. 28, 2024).

housing authority.³⁷ In some cities, this is done by putting one's name on a waiting list maintained by the local housing authority.³⁸ Because demand for housing vouchers so overwhelmingly outstrips supply, voucher waiting lists can be "closed," meaning that no new names can be added to the list for years at a time.³⁹ When an applicant's name is called from the waiting list, the housing authority will confirm whether the applicant is eligible to receive a voucher based on their current household income, rental history, criminal record, and other factors that the housing authority might consider when allocating vouchers.⁴⁰ Next, based on the applicant's household income and the median rent price for the metropolitan area, they will be told how much the voucher is worth and how much rent the applicant will be responsible for paying from their own income.⁴¹ In general, applicants will be expected to pay 30% of their monthly income on housing costs, including rent, utilities, and insurance, if required.⁴² In general, Section 8's goal is to support voucher-holders in renting decent-quality market-rate housing, not luxury housing. For this reason, ordinary Section 8 vouchers cap the amount of a voucher to the 40th percentile of rents for the entire metro region.⁴³ This limit is intended to ensure that subsidized renters can afford modest, but decent, market-rate housing. Next, the applicant has a limited amount of time, typically 60 days, which might be extended by the housing authority upon request,⁴⁴ to find an apartment on the private market that they want to rent.⁴⁵ Nothing in the federal law requires landlords to accept housing vouchers, so in addition to size, cost, and location considerations, an apartment-hunting voucher-holder must also hunt for a landlord willing to accept the voucher.⁴⁶ Once the applicant has found an apartment they would like to rent and

³⁷ 24 C.F.R. §§ 982.1(a), .202(a) (2023).

³⁸ 24 C.F.R. § 982.204(a) (2023).

³⁹ 24 C.F.R. § 982.206(c) (2023). For example, the City of Miami's waiting list has been closed since October 2014. *Section 8 Questions and Answers*, CITY OF MIAMI, <https://www.miami.gov/Housing-Assistance-Recovery/Housing-Assistance/Section-8/Section-8-QandA> (last visited Dec. 28, 2024). Once an applicant is placed on the waiting list, wait times range between eight months and seven years with the average wait time being 28 months. Sonya Acosta & Erik Gartland, *Families Wait Years for Housing Vouchers Due to Inadequate Funding*, CTR. ON BUDGET & POL'Y PRIORITIES (July 22, 2021), <https://www.cbpp.org/research/housing/families-wait-years-for-housing-vouchers-due-to-inadequate-funding>.

⁴⁰ 24 C.F.R. §§ 982.306–.307, .553–54 (2023).

⁴¹ 24 C.F.R. §§ 982.503(a), .515(a), .516–17 (2023).

⁴² 24 C.F.R. §§ 982.1(a)(3), .503(d), .508 (2023).

⁴³ 24 C.F.R. §§ 982.1(a), 4(b), .104, .503(c)(2)(ii) (2023).

⁴⁴ 24 C.F.R. §§ 982.1(a), .303(a)–(b), .401, .503(c)(2)(ii) (2023) (setting initial term at no less than 60 days and allowing for extensions upon request and housing authority approval).

⁴⁵ George E. Peterson, *Housing Vouchers: The U.S. Experience*, in *VOUCHERS AND THE PROVISION OF PUBLIC SERVICES* 139, 144 (C. Eugene Steuerle, Van Doorn Ooms, George E. Peterson & Robert Reischauer eds., 2000).

⁴⁶ Gramlich, *Housing Choice Vouchers*, *supra* note 3, at 4–2.

a landlord willing to rent it to them, the public housing authority must send an inspector to the unit to make sure that it meets Housing and Urban Development's (HUD) Housing Quality Standards, in other words, a basic housing code promulgated by HUD.⁴⁷ If a unit fails HUD's Housing Quality Standards inspection, HUD will not agree to pay the voucher amount for the unit. Finally, if the unit passes housing quality standards, the landlord will be required to enter into a Housing Assistance Payment (HAP) contract with the local housing authority, acknowledging the provisions of the Section 8 program.⁴⁸ The HAP Contract is a non-negotiable form provided by HUD and includes provisions requiring a tenant addendum form be attached to the lease with the tenant. Once the tenant has moved into the unit, they must pay their portion of the rent based on their household income.⁴⁹ If their income or household size changes during the year, they must promptly notify the public housing authority so that their voucher and tenant-paid portion can be adjusted.⁵⁰ Every year, the unit must be reinspected by the housing authority and the tenant must recertify their household size and income.⁵¹ If a tenant is evicted for failure to pay their portion of the rent or for material noncompliance with the lease, they can lose their voucher.⁵²

B. Their Promise: Tenant-Based Vouchers and Progressive Property Ideals

When tenant-based vouchers were initially piloted by HUD in the mid-1970s they seemed like the solution to the problems associated with concentrated poverty and social isolation found in project-based affordable housing developments, including public housing.⁵³ In theory, tenant-based vouchers programs, which rely on the self-interested decision-making of both landlords and tenants to manage the nation's affordable housing supply, are a superior way to manage housing resources.⁵⁴ Not only do they promise to remedy housing inefficiency problems, but

⁴⁷ 24 C.F.R. § 982.405(a) (2023).

⁴⁸ 24 C.F.R. §§ 982.305(a)(5)(i), .305(b), .405, .451(a) (2023).

⁴⁹ 24 C.F.R. §§ 982.1, .305(c)(1), .308(f), .311(a), .451(b), .515(a) (2023).

⁵⁰ 24 C.F.R. § 982.516(c)(4)(ii), (d)–(e) (2023).

⁵¹ 24 C.F.R. § 982.516(a) (2023).

⁵² 24 C.F.R. § 982.552(b)(2), (c)(1) (2023).

⁵³ Peterson, *supra* note 45, at 150; Paul Boudreaux, *Vouchers, Buses, and Flats: The Persistence of Social Segregation*, 49 VILL. L. REV. 55, 71–72 (2004).

⁵⁴ Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2067–68 (2012) (defining an owner's residual managerial authority over property as the community's recognition of a property owner's right to set the agenda for the object owned after governmental regulation and third-party rights are considered).

also a host of other social problems created or exacerbated by the nation's policies related to housing, transportation, and land use planning.⁵⁵

Progressive property theory developed as a response to the purely economic view of property that has held sway since the mid-twentieth century.⁵⁶ Like Martin Luther nailing his 95 Theses to the doors of Castle Church,⁵⁷ the legal scholars who published the Statement of Progressive Property sought a radical departure from the doctrine of the day. They declared that the values of private property are more than just the “natural” laws of economic efficiency or preference satisfaction measured by exchange value.⁵⁸ Instead, property serves multiple and potentially conflicting values including social order, personhood, justice, democracy, and human flourishing.⁵⁹

Zachary Bray has identified several reasons why tenant-based housing vouchers are normatively superior to project-based affordable housing models according to a Progressive Property framework.⁶⁰ First, tenant-based vouchers have the potential to increase market efficiency by enlarging participation in the free, private rental housing market rather than removing subsidized tenants from this market altogether and placing them into project-based market consumer ghettos.⁶¹ To the extent that voucher-holders increase demand in the free market, private real estate developers can most efficiently build new free-market housing to meet this demand.

Additionally, tenant-based vouchers (fungible property owned by low-income people that are exchangeable for leasehold estates) promise to increase the autonomy and executive authority of low-income people to manage their own resources.⁶² Theoretically, tenant-based vouchers not only increase the political autonomy of low-income people, but de-objectify low-income people on a more fundamental

⁵⁵ The histories and on-going impacts of these policies have been described in a number of excellent publications. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 17–37 (2017); ROSEN, *supra* note 8, at 26–27; JACKSON, *supra* note 22, at 219–30; Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1974–86 (2015).

⁵⁶ See Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 256–57 (2019); Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

⁵⁷ John Jeffries Martin, *Martin Luther—Lessons and Legacy in the Age of Social Media*, THE HILL (Oct. 30, 2017, 1:00 PM), <https://thehill.com/opinion/technology/357815-martin-luther-lessons-and-legacy-in-the-age-of-social-media>.

⁵⁸ Alexander et al., *supra* note 56, at 743–44.

⁵⁹ *Id.*

⁶⁰ Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1134–35 (2012).

⁶¹ *Id.* at 1136–37.

⁶² *Id.*; Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L. J. 1287, 1297–98, 1326 (2014) (arguing that property is necessary for personal liberty and market efficiency in a liberal democracy).

level. In this way, housing vouchers can be a tool to enhance the agency and personhood of low-income tenants in stark contrast to the dehumanizing potential for public housing and project-based subsidies to treat low-income tenants as objects to be housed.⁶³

Finally, tenant-based vouchers hold the promise of unwinding the racial segregation and concentrated poverty that is our disgraceful and enduring legacy from twentieth century housing and land use policy.⁶⁴ As optimistically envisioned, a low-income tenant with a voucher can “move to opportunity” to access jobs, schools, health care, shopping, and the community of their choosing.⁶⁵

Bray’s claim that tenant-based vouchers are normatively superior to project-based affordable housing strategies according to the Progressive Property theorists’ metrics for human flourishing is based on these ideals, not on the realities of how tenant-based vouchers actually function in the housing market. This Article focuses on Source-of-Income Discrimination (SOID) as one of the most glaring ways that tenant-based vouchers fall short of their ideals. Progressive Property theory, and the Social Relations theory it is grounded in, offer insight into the role that private property rights can play in correcting these shortcomings.

Social Relations theorists look to the intersection of property rights and sovereign power to best understand political economy. For Social Relations theorists, “property rights are . . . delegations of sovereign power to individuals by the state; these rights should therefore be defined to accommodate the conflicting interests of social actors.”⁶⁶

Progressive Property theorists, a subset of Social Relations theorists, are committed to articulating norms and prescriptions for private property based in more accurate and nuanced political theory and moral philosophy than those provided by the preference satisfaction or utility aims of Law and Economics theorists.⁶⁷ While

⁶³ Singer, *supra* note 62, at 1297–98, 1326; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–73 (1982) (explaining Hegel’s conception of personhood as exertion of an individual’s will over an object in the external world).

⁶⁴ For an excellent review of this history, *see* ROTHSTEIN, *supra* note 55, at 17–37; *see also* JACKSON, *supra* note 22, at 219–30.

⁶⁵ HUD’s Moving to Opportunity for Fair Housing Demonstration Program studied more than 4,600 low-income families with children living in high poverty neighborhoods from 1994 to 1998. It compared outcomes for households in project-based public housing in these high-poverty neighborhoods to households from these properties that were given a tenant-based voucher and the opportunity to move to lower-poverty neighborhoods. *See* LISA SANBONMATSU, JENS LUDWIG, LAWRENCE F. KATZ, LISA GENNETIAN, GREG J. DUNCAN ET AL., U.S. DEP’T OF HOUS. & URB. DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION 1, 8 (2011), https://www.huduser.gov/publications/pdf/mtofhd_fullreport_v2.pdf.

⁶⁶ JOSEPH W. SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES*, at xliii (8th ed. 2022).

⁶⁷ Alexander et al., *supra* note 56, at 743.

the Progressive Property theorists' views differ, they tend to agree that private property's moral justification is as a means of promoting human flourishing. For example, Gregory Alexander and Eduardo Peñalver draw on moral philosophers and legal theorists including, Aristotle, Thomas Aquinas, Alistair MacIntyre, Martha Nussbaum, and Amartya Sen in identifying a property owner's obligation to use their property to promote human flourishing as a part of a broader moral obligation to others.⁶⁸ Joseph Singer builds on principles of classical liberalism in identifying the government's role in distribution of private property rights as essential for human dignity in a liberal democracy and as a bulwark against feudalism.⁶⁹ In expanding the moral justification for private property beyond the clear but overly simplified metric of economic efficiency used in Law and Economics to evaluate property-related social interactions, Progressive Property theorists have problematized the governmental duty to recognize, acknowledge, and enforce private property rights when the status quo fails to promote human flourishing despite economically efficient outcomes. While economic efficiency may be a tool for measuring success in attaining societal human flourishing, it is not an end-in-itself.

Relatedly, French social theorist Michel Foucault and legal scholars Larissa Katz and Carol Rose have examined the unique benefits private property ownership bestows on the public and the essential characteristics of private property ownership that must be preserved to realize this benefit.⁷⁰ For example, Carol Rose and Larissa Katz have both examined the policing function of private property owners as benefits of private property regimes.⁷¹ To the extent that a private owner maintains peace and order on their land, the public does not have to perform this task. Katz and Foucault have each examined the positive decisions of property owners to manage property and put it to beneficial use as an intrinsic benefit to the polity.⁷² Both describe governmental action undermining or eliminating a private owner's ability to set the agenda for their property as antithetical to the benefits of a liberal political

⁶⁸ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746, 760, 762–63, 770, 818 (2009).

⁶⁹ Joseph William Singer, *Property Law as the Infrastructure of Democracy*, Address at the Fourth Wolf Family Lecture on the American Law of Real Property at the University of Florida Fredric G. Levin College of Law (Apr. 4, 2011) (transcript available at <https://scholar.harvard.edu/files/jsinger/files/id.pdf>).

⁷⁰ Larissa Katz, *It's Not Personal: Social Obligations in the Office of Ownership*, 29 CORNELL J. L. & PUB. POL'Y 587, 598 (2020) [hereinafter Katz, *It's Not Personal*]; Rose, *supra* note 29, at 21–23; MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE* 349–53 (Michel Senellart ed., Graham Burchell trans., 2007).

⁷¹ CAROL M. ROSE, *"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety"*, in *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* 49, 58–62 (1994); Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 UNIV. PA. L. REV. 2029, 2031 (2012) [hereinafter Katz, *Governing Through Owners*].

⁷² Katz, *It's Not Personal*, *supra* note 70; FOUCAULT, *supra* note 70, at 352–53.

economy.⁷³ As Foucault explains, the “natural” laws of microeconomics inherent in liberal political economy effectively relegate the governmental role in resource management to measuring and monitoring population data and nudging (rather than dictating) private management decisions intended to keep markets in alignment with public goals.⁷⁴ The unifying thread through these theories is that human flourishing, or one’s ability to harness resources to steer the course of one’s life among numerous viable options, is both the moral justification for private property regimes as opposed to other forms of resource management strategies, and a normative ordering principle guiding when and how private property rights should be recognized or interfered with by the public.

Tenant-based vouchers illustrate this theory. Through the lens of liberal political economy described by Foucault, tenant-based vouchers are, themselves, a kind of market nudge or corrective.⁷⁵ By subsidizing low-income tenants’ incomes and then getting out of the way, the “natural” laws of supply and demand should produce the most efficient economic outcomes.⁷⁶ However, measurement and monitoring of these “natural” forces within the housing market reveal that the corrective is not working as intended. As explored in Part II, landlords’ perceived costs of renting to voucher-holding tenants exceed the perceived benefit of the voucher in all but low-income neighborhoods.⁷⁷ These failures may indicate the naïveté of lawmakers and regulators in understanding the extent of bias against recipients of public assistance.⁷⁸ Additionally, the design of the Housing Choice Voucher program has failed to meaningfully consider the workings of the private rental housing market that the program attempts to leverage—specifically, the program has failed to adequately or accurately quantify private landlords’ determinations of relative costs in renting to voucher-holders and instead assumed that a voucher-holding applicant could compete with a non-voucher-holding application of similar income throughout a jurisdiction.⁷⁹ Affordable housing policy experts have become increasingly aware of the role private landlords play in achieving the promise of tenant-based voucher programs. A wide range of statutory and programmatic changes have been proposed to alter landlords’ behavior.⁸⁰

⁷³ Larissa Katz, *Property’s Sovereignty*, 18 THEORETICAL INQUIRIES L. 299, 300 (2017) [hereinafter Katz, *Property’s Sovereignty*]; FOUCAULT, *supra* note 70, at 352–54.

⁷⁴ FOUCAULT, *supra* note 70, at 352.

⁷⁵ *See id.*

⁷⁶ *Id.*; *see also* Bray, *supra* note 60.

⁷⁷ *See* discussion *infra* Part III.

⁷⁸ Boudreaux, *supra* note 53, at 55, 58 (arguing that school vouchers, housing vouchers, and public transportation by bus fail because of a taboo against social integration of poor people into middle-class society).

⁷⁹ *See generally* ROSEN, *supra* note 8, at 130–64 (explaining how vouchers factor into landlord behavior and decision-making in the real estate market).

⁸⁰ *See* discussion *infra* Parts III–IV.

C. Their Future: Tenant-Based Vouchers Must be Improved Because They are Not Going Away

Despite the shortcomings of tenant-based vouchers, it seems likely that they will continue to be the federal government's affordable housing strategy of choice for the foreseeable future. Project-based affordable housing programs continue to provide new tenant-based voucher opportunities to tenants as private owners opt out of renewing affordability covenants or as tenants opt out of project-based properties in favor of vouchers.⁸¹

Most affordable housing advocates and scholars are calling for expansion of voucher programs. For example, some advocates are calling for Congress to create a universal housing voucher entitlement for all extremely low-income renters.⁸² Even those affordable housing experts who have researched the shortcomings and failures of voucher programs typically conclude that, imperfect as they are, tenant-based vouchers are superior to project-based affordable housing because some mobility for tenants is better than no mobility at all.⁸³ For example, HUD's first study of the "Moving to Opportunity" program found that while academic achievement, income, and employment rates did not improve for tenants moved from public housing projects in high-poverty neighborhoods to market-rate units in moderate-income neighborhoods, perceptions of safety and mental and physical health for women and girls significantly increased.⁸⁴ The same study found that voucher tenants, whether renting in moderate-income neighborhoods or high-poverty neighborhoods, lived in better quality housing than tenants living in public housing.⁸⁵

Private landlords are likely to influence the future of tenant-based voucher programs, but the nature of their influence is uncertain. In jurisdictions that protect

⁸¹ Tenant protection vouchers are provided to tenants in certain privately owned, project-based affordable housing developments when landlords decide not to renew project-based participation. Cushman, *supra* note 19, at 21. HUD's Rental Assistance Demonstration Program enables public housing authorities to recapitalize properties more easily using mixed-financing sources by converting public housing units to project-based Section 8, and allows residents of the properties to convert their subsidy to a tenant-based voucher. Jessie Alfaro-Cassella, *Preservation of Affordable Housing*, in *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT* 467, 473–76 (Tim Iglesias, Rochelle E. Lento & Rigel C. Oliveri eds., 3rd ed. 2022); US DEP'T OF HOUS. AND URB. DEV., *RAD Resident Fact Sheets*, <https://www.hud.gov/RAD/residents/ResidentFactSheets> (last visited Dec. 29, 2024).

⁸² MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 308–12 (2016) (arguing for a universal housing voucher for extremely low-income Americans); Brandon M. Weiss, *Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers*, 110 CALIF. L. REV. 179 (2022) (arguing that Opportunity Zone and 1031 Exchange tax expenditures should be eliminated and the revenue should be allocated to fund a universal housing voucher).

⁸³ DESMOND, *supra* note 82, at 308–12; *see also* ROSEN, *supra* note 8, at 25–26.

⁸⁴ SANBONMATSU ET AL., *supra* note 65, at 103, 133, 137, 253.

⁸⁵ *Id.* at 39.

voucher-holding tenants by limiting a landlord's power to discriminate against vouchers as a source of income, landlords often lobby against vouchers and voucher-holders. For example, as discussed in Part III, landlords in Iowa, Texas, and Indiana convinced state lawmakers to preempt local government authority to impose voucher discrimination ordinances.⁸⁶ There have been increasing calls for federal lawmakers to prohibit discrimination against voucher-holders.⁸⁷ If these efforts to include voucher-holders as protected classes under the Fair Housing Act succeed, it seems likely that private landlords will seek to limit the growth of voucher programs or will advocate for project-based alternatives. In contrast, for some private landlords on the lower end of the rental market, voucher-holding tenants are highly desirable.⁸⁸ These landlords support the growth of tenant-based programs.⁸⁹ Some jurisdictions have explored ways to increase demand for voucher-holding tenants in a broader range of neighborhoods, as discussed below.⁹⁰ To the extent that these efforts succeed and are adopted in other jurisdictions, a broader range of landlords may encourage lawmakers to expand the voucher program.

In turning to private markets to manage essential social relations, like the availability of housing for all members of the population, good governance requires monitoring population statistics to offer market nudges and redirections when needed.⁹¹ Given the likely continuation and expansion of tenant-based voucher programs, it is essential to collect and analyze data on state and local rental housing markets and the use of vouchers in these markets. Part III provides an overview of this data.

⁸⁶ See *infra* Section III.B.1.

⁸⁷ See *infra* Part III; *Bipartisan 'Fair Housing Improvement Act' Would Prohibit Discrimination Based on Source of Income and Veteran Status*, NAT'L LOW INCOME HOUS. COAL. (Nov. 19, 2018) [hereinafter *Bipartisan 'Fair Housing Improvement Act' Would Prohibit Discrimination*], <https://nlihc.org/resource/bipartisan-fair-housing-improvement-act-would-prohibit-discrimination-based-source-income>; *Senator Kaine and Representative Peters Introduce "Fair Housing Improvement Act"*, NAT'L LOW INCOME HOUS. COAL. (May 1, 2023), <https://nlihc.org/resource/senator-kaine-and-representative-peters-introduce-fair-housing-improvement-act>.

⁸⁸ See ROSEN, *supra* note 8, at 134–37 (discussing how voucher tenants are highly desirable because the program ensures reliable rent payments from housing authorities); Rebecca Gale, *Why D.C.'s Housing Vouchers Are Working Better Than Those in Other Cities*, PACIFIC STANDARD (Dec. 19, 2018), <https://psmag.com/economics/why-housing-vouchers-are-working-in-dc> (quoting Eva Rosen, “Voucher holders are moving to neighborhoods where the landlord is interested in renting to the voucher holders, which is where the financial incentive outweighs the bureaucratic hassle The reality of the economics is that it usually happens in poor neighborhoods.”).

⁸⁹ ROSEN, *supra* note 8, at 134–37, 140, 164–66.

⁹⁰ Gale, *supra* note 88 (explaining some of the D.C. Housing Authority's efforts to incentivize renting to voucher-holders throughout the D.C. rental housing market, including using small area fair market rents to calculate voucher payment limits so that tenants can afford to rent in higher-cost neighborhoods, reducing administrative burdens for landlords, and training tenants); see discussion *infra* Part II.

⁹¹ FOUCAULT, *supra* note 70, at 350–52.

II. VOUCHERS IN THE MARKET PLACE

“Part of the appeal of vouchers was their reliance on the advantages of the private housing market. . . ; yet, without adequately addressing the private market’s shortcomings, we are seeing them mirrored within the voucher program.”

—Eva Rosen⁹²

A. *The Data on Voucher Discrimination*

For all their promises, tenant-based vouchers have yet to live up to their hype. In recent years, HUD has funded numerous research projects to diagnose the cause of the Housing Choice Voucher program’s failures.⁹³ As with other affordable housing programs, voucher programs are insufficiently funded to address the overwhelming need of low-income people for affordable housing.⁹⁴ The problem of underfunding is so acute that in more than half the nation’s urban areas, housing authorities have closed their Housing Choice Voucher waiting lists, limiting the times when new applicants can add their names to the waiting list to just days or even hours every few years.⁹⁵ Housing Choice Voucher waiting lists in most major American cities are tens of thousands of names long and the average applicant in such a city may wait for more than two years before they are given the chance to use a voucher.⁹⁶

However, even when a tenant receives a voucher, in many jurisdictions, they face extreme difficulty in finding a rental unit where they can use their voucher. This kind of programmatic failure is categorically different from the problem of insufficient vouchers. While insufficient vouchers reveal a society unwilling to grant affirmative rights, unusable vouchers reveal a program that is poorly designed to align private ownership goals with civic policy goals.⁹⁷ Several social scientists have studied the role of landlords in controlling whether and how voucher tenants participate in the rental market.⁹⁸ In a study conducted in Washington, D.C., a municipality that prohibits refusing a tenant simply because they will use a voucher to

⁹² ROSEN, *supra* note 8, at 129.

⁹³ ELLEN, O’REGAN & STROCHAK, *supra* note 2, at iii.

⁹⁴ Acosta & Gartland, *supra* note 39.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ While landlords have rightly been identified as critical gatekeepers in determining where voucher recipients may live, they are not the only gatekeepers. Neighbors also play an essential gatekeeping function—hyper-policing Black voucher-holding families when they move into white neighborhoods. Hayat, *supra* note 5, at 65.

⁹⁸ See ROSEN, *supra* note 8, at 132–33; Dionissi Aliprantis, Hal Martin, & David Phillips, *Can Landlords Be Paid to Stop Avoiding Voucher Tenants?* (Fed. Rsrv. Bank of Cleveland, Working Paper No. 19-02, 2019), <https://doi.org/10.26509/frbc-wp-201902>.

pay rent or because of voucher program requirements, social scientists found that landlords nevertheless place a significant penalty, or devaluation, on tenant applicants who plan to pay rent with a voucher.⁹⁹ The rate of landlord discrimination against voucher-holders actually increases 0.75 percentage points for each \$100 of rent charged, meaning that higher rent properties discriminate more against, or devalue more, voucher-holders as compared to lower rent properties.¹⁰⁰ For example, if a voucher recipient receives 3 responses to every 10 apartment listing inquires for apartments at \$1,000 per month, they will receive only 2.3 responses for every 10 apartment listing enquiries for apartments at \$2,000 per month. To the extent that a voucher recipient is unable to find a place to use their voucher, or where a voucher recipient is constrained to using their voucher in a high-poverty neighborhood, the government has failed to distribute private property rights in a way that results in successful alignment of private parties' self-interested decisions with public goal of human flourishing for all.¹⁰¹

B. Digging Deeper: Landlord Decision-Making and the "Voucher Penalty"

Recognizing the critical role of landlords in making a tenant-based voucher program reach its fullest potential, several social scientists have begun to study landlord motivations for renting to or avoiding tenants with housing vouchers.¹⁰² In general, these social scientists have found that landlords penalize voucher-holders for several reasons. First, some landlords have negative perceptions of voucher-holders as bad tenants.¹⁰³ Based on correlations to race, gender, disability, and family status, this perception of voucher-holders as "bad tenants" can be a proxy for other unlawful discrimination.¹⁰⁴ Second, many landlords are reluctant to participate in voucher-program requirements which are more onerous than choosing not to participate.¹⁰⁵ Finally, many landlords have false beliefs or misunderstandings about voucher program requirements, including that they will be unable to evict a tenant

⁹⁹ D.C. CODE § 2-1402.21 (2022); Aliprantis, Martin & Phillips, *supra* note 98, at 3.

¹⁰⁰ Aliprantis, Martin & Phillips, *supra* note 98, at 9.

¹⁰¹ Singer, *supra* note 62, at 1297–98, 1326–27.

¹⁰² See, e.g., Aliprantis, Martin & Phillips, *supra* note 98; ROSEN, *supra* note 8, at 17, 132–33.

¹⁰³ Hayat, *supra* note 5, at 61–63, 65 ("Because the [Fair Housing] Act does not have 'source of income' protection, the FHA cannot address what I allege is actually old-fashioned race discrimination necessarily disguised as class-based attacks.").

¹⁰⁴ ROSEN, *supra* note 8, at 119; Fair Hous. Just. Ctr. v. Pelican Mgmt., No. 18-CV-1564, 2023 WL 6390159, at *12–14 (S.D.N.Y. Sep. 29, 2023), *appeal filed*, No. 23-7348 (2d Cir. Oct. 13, 2023) (landlord found liable for discrimination against people with disabilities in violation of FHA based on disparate impact of rejecting voucher-holders).

¹⁰⁵ U.S. DEP'T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHER PROGRAM LANDLORD LISTENING FORUMS AND FOCUS GROUPS 6 (2018), <https://www.hud.gov/sites/dfiles/PIH/documents/ListeningForumsPublicSummary012320.pdf>.

in default or the voucher program will subject their property to rent control.¹⁰⁶ Private landlords compare the net costs and benefits that they associate with renting to a voucher-holder to the costs and benefits of renting to a non-voucher-holding tenant.¹⁰⁷ Unsurprisingly, landlords are willing, even eager, to rent to voucher-holders where the opportunity cost of renting to voucher-holders is low, but as opportunity cost rises, landlords are increasingly likely to avoid renting to voucher-holders.¹⁰⁸ Where applicants without vouchers are deemed more desirable, landlords avoid renting to voucher-holders.¹⁰⁹

The harm does not stop with voucher-holders being constrained to renting in high-poverty neighborhoods. These voucher-holders skew demand in the high poverty neighborhoods where they use their vouchers.¹¹⁰ Eva Rosen found that landlords in high poverty neighborhoods are willing to go to great lengths, including having vacant units pre-approved by the housing authority, holding themselves out as Section 8 specialists, and soliciting tenants as they leave the housing authority office to offer them guided tours of rental units, to rent their units to voucher-holders.¹¹¹ This is because the rent limits on housing choice vouchers, typically set at the 40th percentile of the regional average market rent, may exceed market rents in high-poverty neighborhoods.¹¹² Voucher-holders have greater purchasing power than many other renters in high-poverty neighborhoods, and because a housing voucher cannot be used for anything other than housing, a voucher-holder has no incentive to avoid overpaying for rent. In this way, voucher-holders are skewing rents up (and shrinking supply for non-voucher-holders) in some high-poverty neighborhoods.¹¹³

Researchers have identified several changes that would better align private owners' goals with public goals to achieve a fuller range of benefits envisioned by the Housing Choice Voucher program. Some of these ideas require changes to federal housing policy and are outside of state and local government control. For example,

¹⁰⁶ See U.S. DEP'T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHER (HCV) MYTH-BUSTING AND BENEFITS FACT SHEET (n.d.), https://www.hud.gov/sites/dfiles/PIH/documents/HCV_Benefits-MythBusting_FactSheet10-5.pdf.

¹⁰⁷ PHILIP GARBODEN, EVA ROSEN, MEREDITH GREIF, STEFANIE DELUCA & KATHRYN EDIN, POVERTY AND INEQ. RSCH. LAB, JOHN HOPKINS UNIV., URB. LANDLORDS AND THE HOUSING CHOICE VOUCHER PROGRAM: A RESEARCH REPORT 22, 26 (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/Urban-Landlords-HCV-Program.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 32.

¹¹⁰ Matthew Desmond & Kristin L. Perkins, *Are Landlords Overcharging Housing Voucher Holders?*, 15 CITY & CMTY. 137, 147–49 (2016).

¹¹¹ ROSEN, *supra* note 8, at 24, 133–35.

¹¹² GARBODEN, ROSEN, GREIF, DELUCA & EDIN, *supra* note 107, at 26–27; ROSEN, *supra* note 8, at 137–40.

¹¹³ Desmond & Perkins, *supra* note 110, at 155–56.

HUD has recently conducted a pilot program in 24 localities where rent caps were set based on census tract data, which generally encompass a smaller geographic area, rather than regional data to ensure that voucher rents do not over-compensate landlords in low-rent neighborhoods and voucher rents are more competitive in higher rent neighborhoods.¹¹⁴ Preliminary research paradoxically found that while this change did not significantly alter landlord's bias against voucher-holders, it did increase voucher usage in higher cost neighborhoods.¹¹⁵ Based on these findings of increased mobility for voucher-holders, HUD has expanded the Small Area Fair Market Rents program.¹¹⁶

Other changes require state action. For example, a state might use its police powers to pass statewide laws prohibiting source-of-income discrimination, as more than twenty states have done.¹¹⁷ They might fund landlord education campaigns to dispel myths about federal program requirements. Or they might use state funds to create any number of financial tools to incentivize renting to voucher-holders such as damage insurance programs, compensation funds for time off-market awaiting Housing Quality Inspection, or even their own vouchers.¹¹⁸

Because all localities receive their police powers via delegation from their state constitution or via statute, and because real estate markets are inherently local, no two localities' tools to cope with their affordable housing crises will be the same.¹¹⁹ They can do this by creating incentives, such as property tax abatement for units

¹¹⁴ Small Area Fair Market Rents in Housing Choice Voucher Program Values for Selection Criteria and Metropolitan Areas Subject to Small Area Fair Market Rents, 81 Fed. Reg. 80678, 80678 (Nov. 16, 2016) (to be codified at 24 C.F.R. § 888.113); U.S. DEP'T OF HOUS. & URB. DEV., SUSPENSION OF SMALL AREA FAIR MARKET RENT (FMR) DESIGNATIONS (n.d.), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/SecretarysDetermination.pdf>; Kelly L. Patterson & Robert Mark Silverman, *Measuring Fidelity to HUD's Small Area Fair Market Rents (SAFMRs) Rule: Lessons from First Year Implementation*, 28 POVERTY & RACE 5, 5 (2019).

¹¹⁵ Aliprantis, Martin & Phillips, *supra* note 98, at 12–14. The outcome of this study deserves more research. The study measured landlord resistance based on Landlords failing to respond, or failing to follow through, with inquiries from prospective tenants who disclose their intent to use a voucher. *Id.* at 3. The fact that landlord resistance remained constant while actual leases for voucher-holders in higher income neighborhoods increased might mean that voucher-holding tenants or their caseworkers were able to persevere over landlord bias once a voucher-holder's purchasing power was increased.

¹¹⁶ Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Expands More Housing Choices to a Total of 800,000 Households with Rental Assistance (Oct. 10, 2023), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_23_242.

¹¹⁷ See POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 9–46 (identifying 23 state laws that prohibit source of income discrimination).

¹¹⁸ See discussion *infra* Section IV.B.

¹¹⁹ Nestor Davidson, Richard Briffault, Paul Diller, Sarah Fox et al., *Principles of Home Rule for the 21st Century*, 2020 NAT'L LEAGUE OF CITIES 13 [hereinafter Davidson et al.], <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf>.

occupied by voucher-holders and landlord education programs, or prohibitions, like SOID laws, or both. Currently, the prohibitions, in the form of voucher discrimination laws, far outnumber the incentives.¹²⁰ But use of local police powers to address voucher discrimination is not without controversy. Localities have faced challenges in courts' interpretations of their ordinances, in state preemption, and in enforcement.¹²¹

III. SOURCE-OF-INCOME DISCRIMINATION LAWS

Federal law does not mandate landlord participation in the Housing Choice Voucher Program,¹²² though the Fair Housing Improvement Act, introduced in the Senate in 2018 and re-introduced in 2023, would have changed that.¹²³ Professor Robert Schwemm has examined the numerous benefits to adding source-of-income discrimination to the Fair Housing Act and has even proposed legislation for doing so.¹²⁴ However, federal law explicitly does not preempt or prevent state and local governments from passing laws that would make landlord participation in the program mandatory.¹²⁵ Increasingly, state and local governments are passing laws to prohibit discrimination against voucher-holders in residential rental markets.¹²⁶ This Part III investigates voucher discrimination laws, also known as SOID laws. It examines how they fit into property law, how they are made, and the extent to which they serve their purpose.

At their most basic, SOID laws rely on police powers to reduce a landlord's discretion in making self-interested decisions about how to use residential rental property.¹²⁷ They do not usurp an owner's power to make private land use decisions by requiring a property owner to make a property available for residential tenancy, and they do not limit the rent a landlord can charge, but they do prohibit a landlord

¹²⁰ See POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12 (identifying 20 state laws and 117 local ordinances that prohibit voucher discrimination and just 4 state incentive programs to encourage landlords to rent to voucher-holders).

¹²¹ *E.g.*, *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52, 60 (Me. 2014); *City & Cnty. of S.F. v. Post*, 22 Cal. App. 5th 121, 137 (2018); *People v. Commons W., LLC*, 194 N.Y.S.3d 451, 452 (Sup. Ct., 2023).

¹²² 24 C.F.R. § 982.54(d), .302(b) (2023).

¹²³ *Bipartisan 'Fair Housing Improvement Act' Would Prohibit Discrimination*, *supra* note 87; *Senator Kaine and Representative Peters Introduce "Fair Housing Improvement Act"*, *supra* note 87.

¹²⁴ Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RESV. L. REV. 573, 637–39, 645, 648, 657 (2020).

¹²⁵ 24 C.F.R. § 982.53(d) (2023).

¹²⁶ See POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 243–52.

¹²⁷ Thomas Merrill calls an owner's self-interested discretion in how to use their property "residual managerial authority." Merrill, *supra* note 54, at 2068; Larissa Katz describes this same right to use private property as an owner's "agenda-setting authority." Katz, *Property's Sovereignty*, *supra* note 73, at 300.

from denying an applicant simply because the applicant plans to pay rent with a voucher.¹²⁸ Some laws extend further to say that a landlord may not decline an application because of a voucher program's requirements.¹²⁹

For several reasons, SOID laws can be attractive tools for pulling private property owner's land use decisions into alignment with public goals. For one, they are relatively low-cost to local governments. Also, depending on their location, they are often readily cognizable under a locality's established police powers.¹³⁰ When placed in Human Rights or Civil Rights ordinances, they are framed as protecting a class of residents (voucher-holders) from the harm of discrimination.¹³¹ When placed in a business regulation act, they are framed as one of the many requirements a person must satisfy to have the privilege of conducting a specific business in a jurisdiction.¹³² When placed in a property ordinance, they are framed as land use regulation akin to zoning.¹³³

HUD has endorsed these laws as a way for state and local governments to affirmatively further fair housing, as required by the Fair Housing Act.¹³⁴ In *County of Westchester v. Department of Housing and Urban Development*, HUD threatened to withhold funding when it was determined that the County had submitted false certificates related to its analysis of impediments to fair housing.¹³⁵ The settlement agreement negotiated between the County and HUD included the County promoting a legislative ban on voucher discrimination. HUD carried through on its threat and reallocated funding away from the County when it determined that the County had not fulfilled its settlement obligation to promote voucher SOID legislation.¹³⁶

¹²⁸ Katz, *Property's Sovereignty*, *supra* note 73, at 328 (arguing that a private landowner's power to set the agenda for private property based on private goals is constitutionally basic in a liberal democracy, though the state has the power to alter a private property owner's accession burdens or benefits with valid regulation).

¹²⁹ See, e.g., PORTLAND, ME., CODE OF ORDINANCES ch. 6, § 6-237(c)–(d) (2020); 34 R.I. GEN. LAWS § 34-37-4(a), (c) (2024); ANNE ARUNDEL, MD., CNTY. CODE tit. 9, § 1-9-103(A)(6) (2023).

¹³⁰ POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 40, 63, 93 (citing VA. CODE ANN. § 36-96.1(B) (2024); OAK PARK, ILL., CODE OF ORDINANCES ch. 13, § 1-1-1-2 (2016); S.F., CAL., POLICE CODE art. 33, § 3304 (1998)).

¹³¹ See, e.g., *id.* at 18–19 (noting Washington, D.C.'s SOID statute, and its intent to protect Section 8 recipients from discrimination).

¹³² See, e.g., *id.* at 183–84 (documenting a local SOID statute in Gahanna, Ohio that requires specific business entities to refrain from source of income discrimination).

¹³³ See, e.g., NOVATO, CAL., CODE OF ORDINANCES ch. IV, § 4-16 (2024).

¹³⁴ 42 U.S.C. § 3601, 3608(d), (e)(5).

¹³⁵ *Cnty. of Westchester v. U.S. Dept. of Hous. & Urb. Dev.*, 116 F. Supp. 3d 251, 255–56, 261 (S.D.N.Y. 2015).

¹³⁶ *Id.* at 255, 261–62, 266.

However, SOID laws are not a panacea. Their efficacy varies dramatically depending on how they are drafted, their enforcement mechanism, and the state's appetite to preempt localities.

State and local SOID laws usually include protections for a variety of kinds of income, like supplemental security income, child support, social security benefits, and pensions.¹³⁷ Some SOID laws exclude protections for tenant-based vouchers as sources of income but protect income like alimony, child support, social security, disability income.¹³⁸ However, the majority of local SOID laws explicitly include tenant-based vouchers.¹³⁹ Indeed, ensuring greater rental opportunities for tenant-based voucher-holders is the driving force behind many SOID ordinances.¹⁴⁰

A. *The Data*

Increasingly, localities are looking to their delegated police powers to prohibit landlords from rejecting applicants based on their use of housing vouchers or other sources of income a landlord may deem inferior. As of this writing, more than 130 localities have passed local SOID ordinances.¹⁴¹ Forty-six of those local ordinances are five years old or less. Some, like the local ordinances passed in California, Maryland, and Rhode Island, seem to have prompted their state governments to pass or extend SOID protections to voucher-holders, while the state governments in Iowa, Texas, and Kentucky have responded to localities' passage of SOID laws with explicit state law preemptions to prohibit any locality from passing such laws.¹⁴²

¹³⁷ See, e.g., BROWARD CNTY., FLA., CODE OF ORDINANCES §§ 16½-3(hh), 16½-35(a)-(e) (2024).

¹³⁸ See, e.g., DEL. CODE ANN. tit. 6, ch. 46, §§ 4602(27), 4603(b)(1), 4607(j) (2021) (providing landlords the right to not participate in any housing voucher program, but otherwise prohibiting them from discriminating based on source of income); MD. CODE ANN., STATE GOVT. §§ 20-701(j), 20-705 (2020) (including tenant-based vouchers as a protected source of income alongside alimony, child support, and disability income, and prohibiting discrimination based on any lawful income source).

¹³⁹ See e.g., BROWARD CNTY., FLA., CODE OF ORDINANCES §§ 16½-3(hh), 16½-35(a)-(e); L.A., CAL., MUN. CODE ch. IV, art. 5.6.1, § 45.67 (2020); REVISED MUN. CODE OF DENVER, COLO., ch. 28, art. IV, § 28-95 (2024); FREDERICK CITY, MD., CODE OF ORDINANCES ch. 32, app. F, § 4 (2024); N.Y.C., N.Y., ADMIN. CODE § 8-107 5(a)(1) (2024).

¹⁴⁰ ALISON BELL, BARBARA SARD & BECKY KOEPNICK, CTR. ON BUDGET & POL'Y PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS 2-3 (2018), <https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf>.

¹⁴¹ For a comprehensive and frequently updated list of state and local SOID laws, see POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

¹⁴² See CAL. GOV'T CODE tit. 2, div. 3, pt. 2.8, ch. 6, art. 2, § 12955(a), (i)(1), (k), (p)(1) (1980) (amended to add protection for vouchers in 2019); ALAMEDA, CAL., MUN. CODE art. XVIII, § 6-61.50 (2019); BERKELEY, CAL., MUN. CODE tit. 13, ch. 13, § 13-13-31 (2017); FAIRFAX, CAL., MUN. CODE OF ORDINANCES tit. 5, div. II, ch. 5.52, §§ 5.52.010-.020 (2024);

1. Authority

There are many different ways a locality might craft their SOID law, but all ordinances must be grounded in a delegation of the state's police powers to the locality.¹⁴³ The source of local power, together with the content and placement of a local SOID law are important factors in determining the outcome when state and local approaches to SOID regulation conflict.

Broadly speaking, a locality's municipal police powers may be categorized as either "home rule," meaning a broad delegation of state police power to a locality to govern local affairs, or "Dillon's Rule," meaning a narrow delegation of state police powers to a municipality to govern only specifically enumerated topics or necessarily implied to carry out an express grant of power.¹⁴⁴ Home rule powers are typically created by state constitution and can either be self-executing, or may require state legislation to be applied to a specific municipality.¹⁴⁵ Some states, like Vermont, make no specific mention of home rule powers in their constitutions, but have created the concept via state legislation.¹⁴⁶ Constitutionally created home rule jurisdictions can be further divided into so-called "*imperio*" and "legislative" home rule jurisdictions.¹⁴⁷ *Imperio* home rule jurisdictions serve the dual purpose of delegating expansive police powers to a municipality and also insulating the municipality from

L.A., CAL., MUN. CODE ch. IV, art. 5.6.1, §§ 45.66–67 (2020); L.A. CNTY., CAL., CODE OF ORDINANCES ch. 8.58, § 030 (2024); NOVATO, CAL., CODE OF ORDINANCES § 4-16.2 (2018); SAN ANSELMO, CAL., ORDINANCE No. 1131, tit. 10, ch. 13, § 10.13.010 (2018); SAN DIEGO, CAL., MUNICIPAL CODE ch. 9, art. 8, div. 8, §§ 98.0801–.0803 (2018); SAN RAFAEL, CAL., CODE OF ORDINANCES title 10, ch. 10.98, § 10.98.030(A)–(B) (2018); SANTA CLARA, CAL., CODE OF ORDINANCES title B, div. 37, § B37-2 (2017); WOODLAND, CAL., CODE OF ORDINANCES tit. 15, ch. 15.16, § 15.16.130(b), (c) (2018); MD. CODE ANN., STATE GOV'T. §§ 701(j)(2)(ii), 705(1) (2020); ANNE ARUNDEL, MD., CNTY. CODE tit. 9, subtit. 1, §§ 1-9-101(1)–(4), 1-9-102(1)–(7), 1-9-103(a)(1), 1-9-103(a)(7) (2023); BALT., MD., CITY CODE art. 4, subtit. 3, § 3-5(a) (2022); BALT. CNTY., MD., CODE OF ORDINANCES §§ 29-2-101 to 102 (2019); PRINCE GEORGE CNTY., MD., CODE OF ORDINANCES tit. 17, subdiv. 5, § 2-210(1) (2021); 34 R.I. GEN. LAWS §§ 3(5), 4(a) (2024); PROVIDENCE, R.I., CODE OF ORDINANCES ch. 16, art. II, §§ 16-54, -55(1)(B) (2021); TEX. LOC. GOV'T CODE ANN. § 250.007 (2015); AUSTIN, TEX., CODE OF ORDINANCES tit. 5, ch. 5-1, art. 2, div. 3, § 5-1-51 (2022); IOWA CODE § 331.304(13) (2021); DES MOINES, IOWA, CODE OF ORDINANCES ch. 62, art. I, § 101(2019); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-5 (2016); MARION, IOWA, CODE OF ORDINANCES ch. 181, § 181-3.1 (2022).

¹⁴³ While the 10th Amendment somewhat mysteriously reserves police powers not delegated to the United States "to the States respectively, or to the people," the Supreme Court has interpreted municipalities as "creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers." *Atkin v. Kansas*, 191 U.S. 207, 220 (1903); U.S. CONST. amend. X.

¹⁴⁴ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1112, 1115–17 (1980).

¹⁴⁵ Davidson et al., *supra* note 119, at 12–13.

¹⁴⁶ See VT. STAT. ANN. tit. 24, § 2291 (2024); VT. CONST. ch. II, § 1 (1973).

¹⁴⁷ Davidson et al., *supra* note 119, at 11–13.

state regulation over matters of local concern.¹⁴⁸ “Legislative” home rule jurisdictions are those that delegate expansive police powers to a municipality but reserve nearly plenary power to the state legislature to modify the home rule.¹⁴⁹

All delegation of police powers to municipalities are subject to questions of state preemption. Judge John Dillon was prescient in arguing that the judiciary plays a major role in determining the extent of local powers.¹⁵⁰ Regardless of whether a jurisdiction is classified as Dillon’s Rule, *imperio* home rule, or legislative home rule, the judiciary may be called upon to determine whether a municipality has authority to make a SOID law.¹⁵¹

Some clear trends have emerged. Of the localities that have passed SOID ordinances, the vast majority have done so pursuant to their constitutional home rule powers.¹⁵² Several localities in mid-Atlantic and New England states have passed SOID ordinances despite their state’s failure to recognize home rule.¹⁵³ However, less than half of states that do not have constitutional home rule have local SOID ordinances.¹⁵⁴ Further, several of the states that were early adopters of SOID statutes either do not have home rule or have weak forms of home rule that can be readily

¹⁴⁸ Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1346 (2009); Davidson et al., *supra* note 119, at 11.

¹⁴⁹ Davidson et al., *supra* note 119, at 12–13.

¹⁵⁰ JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 25–26 (1872).

¹⁵¹ See Baker & Rodriguez, *supra* note 148, at 1346 (examining trends in judicial decisions regarding state preemption of home rule ordinances).

¹⁵² See, e.g., ALBUQUERQUE, N.M., CODE OF ORDINANCES ch. 11, art. 3, § 11-3-2(A)–(D)(3) (2024) (declaring city’s Human Rights Policy as authorized by The City of Albuquerque Charter, which is authorized by the state constitution); N.M. CONST. art. 10, § 6. See generally POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

¹⁵³ See ANNAPOLIS, MD., CODE OF ORDINANCES tit. 11, ch. 11.32, § 11.32.030(A)(4) (2024); BALT. CNTY., MD., CODE OF ORDINANCES art. 29, tit. 2, subtit. 1, §§ 29-2-101 to -102 (2019); FREDERICK CITY, MD., CODE OF ORDINANCES, app. F, § 4 (2017); FREDERICK CNTY., MD., CODE OF ORDINANCES ch. 1-2, art. VII, § 1-2-93 (2024); HOWARD CNTY., MD., CODE OF ORDINANCES tit. 12, subtit. 2, § 12.207 (2024); MONTGOMERY CNTY., MD., Code pt. II ch. 27, art. I, div. 2, subdiv. A, § 27-12(a)(1) (2024); BOS., MASS., MUN. CODE ch. X, § 10-3.3(a), (a)(1) (2022); CAMBRIDGE, MASS., CODE OF ORDINANCES tit. 14, ch. 14.04, § 14.04.040 (2019); QUINCY, MASS., CODE ch. 12, § 12-30(A)(3) (2018); WILMINGTON, DEL., CITY CODE ch. 35, art. 3, § 35-76(1) (1998).

¹⁵⁴ States without constitutional home rule are: Kentucky, North Carolina, Georgia, Florida, Rhode Island, Maryland, New York, Delaware, Massachusetts, Idaho, Indiana, Mississippi, Alabama, Arkansas, New Hampshire, New Jersey, Vermont, and Virginia. TRAVIS MOORE, NEB. LEGIS. OFF. LRO SNAPSHOT, DILLON RULE AND HOME RULE: PRINCIPLES OF LOCAL GOVERNANCE (Feb. 2020), https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf. Of those states, the first nine contain localities that have passed some form of local SOID ordinance. POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 71–88, 101–16, 159–73, 207–09.

preempted by state law.¹⁵⁵ To this day, Vermont and Connecticut have no local SOID ordinances and Massachusetts has relatively few.¹⁵⁶ Additional trends may emerge related to home rule and state preemption of SOID ordinances, as discussed below.

2. Placement and Content

Some of the earliest SOID laws, passed in the 1980s, were as likely to be passed by states as by localities.¹⁵⁷ This trend quickly reversed itself so that by the 1990s, localities outnumbered states in passing SOID laws by more than 3 to 1.¹⁵⁸ By the 2020s, SOID prohibitions were five times more likely to be local ordinances than state laws.¹⁵⁹ Another clear trend is that momentum is building for SOID laws, with 12 state or local laws passed in the 1980s, 11 passed in the 1990s, 21 in the 2000s, 50 in the 2010s, and 46 so far in the first five years of the 2020s.¹⁶⁰

While some local SOID ordinances have served as catalysts for similar state laws, others have been weakened or even preempted by oppositional state laws.¹⁶¹ In light of the potential conflict between state and local laws, a locality's decision about where to place its SOID law in its local code of ordinances and the specific content of the ordinance is a strategic decision that can affect how the law may influence or succumb to state-level laws governing the same topic.

Local SOID ordinances are typically placed in a human or civil rights ordinance, under a municipality's general police powers, in a housing ordinance, or in a business regulation ordinance.¹⁶² A municipality's decision to place its SOID

¹⁵⁵ See POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 3–8 (listing states with SOID laws and identifying those that have been weakened by case law); see also *Marshal House, Inc. v. Rent Rev. & Grievance Bd. of Brookline*, 260 N.E.2d 200, 207 (1970) (“[The Massachusetts Constitution] prevents the adoption of local rent control by-laws in the absence of an explicit delegation to municipalities by the Legislature of power to engage in such regulation of the landlord-tenant relationship.”); *Black v. City of Milwaukee*, 882 N.W.2d 333, 354 (2016) (holding that state laws regulating purely local matters preempt all local ordinances when such laws apply “uniformly” to all “cit[ies] or villages”).

¹⁵⁶ POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 25, 105–08.

¹⁵⁷ See generally *id.* (of the 11 SOID laws passed in the 1980s, 5 were state laws (Wisconsin, Maine, Vermont, Connecticut, and Massachusetts) and 6 were local ordinances).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *infra* notes 189–97 and accompanying text.

¹⁶² For a list of ordinances placed under a locality's Civil Rights or Human Rights Act, see *infra* note 163. For a list of ordinances placed under a locality's general police powers, see *infra* note 165. The following eight localities place their SOID ordinances in their Housing Act: East Palo Alto, CA; LA Cnty., CA; Novato, CA; San Diego, CA; Santa Clara Cnty., CA; Woodland, CA; Chicago, IL; and Wickliffe, OH. The following ten localities place their SOID ordinances in their Business Licensing and Regulation Acts: Corte Madera, CA; Fairfax, CA; Marin Cnty., CA; Mill Valley, CA; San Rafael, CA; Kirkland, WA; Olympia, WA; Tumwater, WA; University

ordinance in one part of its municipal code rather than another can be difficult to understand. It is tempting to infer a relationship between the placement of these ordinances into municipal laws and the framing of these laws as protecting a tenant's negative right to be free from discrimination. For example, the majority of local SOID ordinances are placed in a locality's Civil Rights or Human Rights Act.¹⁶³ If this placement is indicative of an intent to protect a negative right, such placement has not insulated all local SOID ordinances from state preemption. Three municipalities in Iowa, Kentucky, and Texas, placed their SOID ordinances in their civil rights or human rights statutes but have since had their ordinances preempted by state law, as discussed below.¹⁶⁴

The second most common place to find SOID ordinances is under a locality's general police powers.¹⁶⁵ Since 2020, a disproportionate number of SOID ordinances have been placed under the general police powers sections of a municipal code, rather than under civil or human rights ordinances.¹⁶⁶ This may reflect an enhanced emphasis on state and local police powers to regulate landlords in response

Heights, OH; and Philadelphia, PA. *See generally* POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

¹⁶³ These include 40 SOID ordinances, out of 77 SOID ordinances total, in the following localities: San Francisco, CA; Denver, CO; Wilmington, DE; Cook Cnty., IL; Urbana, IL; Baltimore, MD; Baltimore Cnty., MD; Frederick Cnty., MD; Howard Cnty., MD; Montgomery Cnty., MD; Prince George's Cnty., MD; Minneapolis, MN; Nassau Cnty., N.Y.; N.Y.C., NY; Rochester, NY; Suffolk Cnty., NY; Syracuse, NY; Westchester Cnty., NY; Seattle, WA; Spokane, WA; Madison, WI; Alachua, FL; Broward Cnty., FL; Daytona Beach, FL; Gainesville, FL; Miami-Dade Cnty., FL; Tampa, FL; Des Moines, IO; Iowa City, IO; Marion, IO; East Lansing, MI; Holland, MI; Kalamazoo, MI; Lansing, MI; Wyoming, MI; Clayton, MO; St. Louis, MO; Albuquerque, NM; Bexley, OH; and Austin, TX. *See generally id.*

¹⁶⁴ DES MOINES, IOWA, CODE OF ORDINANCES ch. 62, § 62-101 (2019); IOWA CITY, IOWA, CODE tit. 2, ch. 3, § 2-3-5(A) (2016); MARION, IOWA, CODE OF ORDINANCES ch. 181, art. III, § 181-3.1 (2022); AUSTIN, TEX., CODE OF ORDINANCES tit. 5, ch. 5-1, art. 2, div. 3, § 5-1-51 (2022); TEX. LOC. GOV'T CODE tit. 7, ch. 250, § 250.007(a) (2017); LEXINGTON-FAYETTE URB. CNTY. GOV'T, KY., CODE OF ORDINANCES ch. 2, art. 2, § 2-31.2(1), (2)(A)–(B) (2024).

¹⁶⁵ The following 23 localities place their SOID ordinance under their general police powers: Tempe, AZ; Berkeley, CA; Los Angeles, CA; Santa Monica, CA; St. Petersburg, FL; Boise, ID; Annapolis, MD; Albuquerque, NM; Bellevue, WA; King Cnty., WA; Renton, WA; Vancouver, WA; Ann Arbor, MI; Grand Rapids, MI; Linndale, OH; Reynoldsburg, OH; St. Upper Arlington, OH; Toledo, OH; Westerville, OH; Whitehall, OH; Worthington, OH; Yellow Springs, OH; and Memphis, TN. *See generally* POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

¹⁶⁶ *See supra* notes 162–69. Of the 23 SOID ordinances under a localities' general police powers, 13 of them have been enacted since 2020: Tempe, AZ; St. Petersburg, FL; Boise, ID; Albuquerque, NM; Bexley, OH; Reynoldsburg, OH; St. Upper Arlington, OH; Toledo, OH; Westerville, OH; Whitehall, OH; Worthington, OH; Yellow Springs, OH; and Providence, RI. *See generally* POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

to the COVID-19 pandemic. It is not clear whether ordinances under a municipality's general police powers will better withstand preemption efforts.

In many states, larger cities appear to have been early adopters of SOID ordinances, with the state legislature catching on and passing a state-wide law sometime later. For example, New York City passed its SOID ordinance in 2008 with numerous other localities passing their own SOID ordinances before New York state finally passed a statewide law in 2019.¹⁶⁷ These trends of larger, more cosmopolitan, more progressive municipalities granting broader protections to marginalized residents before their more conservative and rural state governments enact state-wide protection have been similarly documented in protections based on sexuality and gender identity.¹⁶⁸

There are instances of movement in the opposite direction as well, with state governments as early adopters of SOID laws, and localities later passing ordinances intended to expand state law protections or close loopholes in state laws. For example, Maine passed its SOID ordinance in 1985 pursuant to its Human Rights Act,¹⁶⁹ but the city of Portland, Maine passed a local SOID ordinance via voter referendum in 2020, nevertheless.¹⁷⁰ The state law prohibited discrimination in rental housing based on a prospective tenant's status as a voucher recipient.¹⁷¹ However, in 2014, the Maine Supreme Judicial Court found that a landlord's rejection of an applicant with a voucher based on the landlord's unwillingness to sign the Section 8 program's form lease amendment was not a violation of the state SOID law based on the applicant's status as a voucher-holder.¹⁷² In 2020, the voters of Portland, Maine approved an amendment to the Portland City Code that specifically, and in detail, closed this loophole in the state law by prohibiting landlords in the city from refusing to participate in or comply with state, federal, or local requirements of tenant-based rental assistance programs.¹⁷³ Similarly, in 1987 the high court in Massachusetts found that a landlord did not violate the state SOID ordinance for failing to rent to a Section 8 voucher-holder because the landlord did not want to participate

¹⁶⁷ N.Y.C., N.Y., ADMIN. CODE tit. 8, ch. 1 § 8-107-5(a)(1)(a) (2008); N.Y. EXEC. LAW § 296.2-a (McKinney 2019).

¹⁶⁸ Robert Salem, *The Strengths and Weaknesses of Local Human Rights Ordinances*, 48 CLEV. ST. L. REV. 61, 62 (2000).

¹⁶⁹ ME. STAT. tit. 5, § 4581-A(4) (2024).

¹⁷⁰ PORTLAND, ME., CODE OF ORDINANCES ch. 6, § 237(c)–(d) (2020); *Citizen Initiated Approved Referendum Questions, 2020 Question D - Rent Control*, CITY OF PORTLAND, <https://www.portlandmaine.gov/746/Citizen-Initiated-Approved-Referendum-Qu> (last visited Dec. 30, 2024).

¹⁷¹ ME. STAT. tit. 5, pt. 12, ch. 337, subch. 4, § 4582 (1983) (repealed 2011).

¹⁷² *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52, 59–60 (Me. 2014).

¹⁷³ PORTLAND, ME., CODE OF ORDINANCES ch. 6, § 6-237(c)–(d) (2020).

in HUD's requirements for the Section 8 voucher program.¹⁷⁴ The municipalities of Cambridge, Quincy, and Revere, Massachusetts adopted municipal ordinances in the years that followed, closing this loophole.¹⁷⁵

The distribution of regulatory power between state and local levels of government is often fraught with controversy. With SOID laws, local governments have attempted to strengthen federal voucher programs by leading their states in creating SOID protections and by strengthening pre-existing state SOID laws. However, localities can also be vulnerable to state preemption.¹⁷⁶ State and local decisions about placement of SOID laws in codes of law, and the associated framing of the government action as either articulating positive or negative rights of tenants or limiting landlord discretion via state police powers, can influence the resilience of these local laws. As the Supreme Court signals an erosion of civil liberties for women and minorities in its Constitutional jurisprudence,¹⁷⁷ time will tell whether states mirror this erosion in their state civil rights acts or strengthen protections for personal liberties in state laws. If the former, then those SOID laws created pursuant to human rights or civil rights laws may be more vulnerable than SOID laws that are created pursuant to general police powers or business licensing laws that overtly seek to regulate the powers of a private landowner.

B. *The Difficulties*

1. *Preemption*

As described above, there are patterns of states and localities passing SOID laws to further the goal of preventing discrimination against voucher-holders. However, when states and localities regulate the same issues, questions of preemption often arise. While federal regulations make participation in tenant-based voucher programs like Section 8 voluntary, they also expressly state their intention not to

¹⁷⁴ Attorney General v. Brown, 511 N.E.2d 1103, 1109–10 (Mass. 1987), *invalidated by*, 1989 Mass. Acts 1242.

¹⁷⁵ CAMBRIDGE, MASS., CODE OF ORDINANCES tit. 14, ch. 14.04 § 14.04.040(A) (2019); QUINCY, MASS., CODE pt. 1, ch. 12, art. IX, § 12-30(A)(3) (2018); REVERE, MA., CODE OF ORDINANCES tit. 9, ch. 9.24 § 9.24.040 (2023).

¹⁷⁶ See AUSTIN, TEX., CODE OF ORDINANCES tit. 5, ch. 5-1, art. 2, div. 3, § 5-1-51(A) (2022) (forbidding landlords from refusing to rent based on source of income); TEX. LOC. GOV'T CODE § 250.007(a) (2023) (barring municipalities or counties from adopting or enforcing source of income ordinances or regulations).

¹⁷⁷ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2301 (Thomas, J., concurring) (2022) (striking down the right to abortion as encompassed by a right to privacy); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175–76 (2023) (striking down affirmative action in academic admissions); *303 Creative, LLC v. Elenis*, 143 S.Ct. 2298, 2308–09, 2318 (2023) (striking down a Colorado human rights law that prohibits discrimination against homosexual people in provision of business services as violation of First Amendment).

preempt state or local laws that may make landlord participation mandatory.¹⁷⁸ Courts have also found that state SOID laws do not prevent localities from making their own, stronger, SOID ordinances.¹⁷⁹ However, the Texas, Indiana, Iowa, and Kentucky legislatures have done the reverse, passing state laws to expressly preempt local SOID ordinances.¹⁸⁰ In Texas, Austin passed a SOID ordinance in 2014 that was immediately challenged by the Austin Apartment Association.¹⁸¹ While the court denied the Apartment Association's request for an injunction,¹⁸² state lawmakers passed a law expressly preempting localities' authority to pass SOID ordinances that prohibit a landlord from rejecting a tenant based on their source of income.¹⁸³ Interestingly, the Texas law contains a carve-out for SOID ordinances that prohibit discriminating against veterans based on their source of income.¹⁸⁴ In other words, the state law prohibits a locality from mandating landlord participation in the Section 8 housing choice voucher program, but allows localities to mandate landlord participation in the Veterans Affairs Supportive Housing (VASH) voucher program, a subset of the Housing Choice Voucher program. Since the landlord requirements of the Section 8 and VASH programs are substantially similar,¹⁸⁵ this distinction seems to be the Texas legislature and governor dividing voucher-holders into the "deserving" and "undeserving" poor.¹⁸⁶ Dallas passed its SOID ordinance in 2016, despite the state's preemption statute from the year before.¹⁸⁷ The wording of the Dallas statute is broad enough to encompass all housing voucher programs

¹⁷⁸ 24 C.F.R. §§ 982.53(d), .302(b) (2023).

¹⁷⁹ *City & Cnty. of S.F. v. Post*, 22 Cal. App. 5th 121, 135–37 (2018) (holding that the California Fair Employment and Housing Act (FEHA) did not expressly preempt San Francisco's ordinance prohibiting landlords from opting out of the Section 8 program because the ordinance addressed a local land use issue with a distinct purpose from the FEHA).

¹⁸⁰ IOWA CODE tit. 4, subtit. 1, § 331.304(13) (2023); TEX. LOC. GOV'T CODE tit. 7, subtit. c, ch. 250, § 250.007(a) (2017); IND. CODE tit. 36, art. 1, ch. 3, § 36-1-3-8.5(1)–(2) (2024).

¹⁸¹ *Austin Apartment Assn. v. City of Austin*, 89 F. Supp. 3d 886, 889 (W.D. Tex. 2015).

¹⁸² *Id.* at 902.

¹⁸³ TEX. LOC. GOV'T CODE tit. 7, subtit. c, ch. 250, § 250.007(a) (2017); see Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170 (2018) ("In many cases, there appears to be a partnership between the private interests that seek to avoid local regulation and legislators at the state level . . .").

¹⁸⁴ TEX. LOC. GOV'T CODE tit. 7, subtit. c, ch. 250, § 250.007(b) (2017).

¹⁸⁵ Section 8 Housing Choice Vouchers, 86 Fed. Reg. 53207, 53208 (Sept. 27, 2021) ("Unless expressly noted below, all regulatory requirements and HUD directives regarding the HCV [Tenant Based Voucher] and [Project Based Voucher] programs are applicable to HUD-VASH vouchers, including the use of all HUD-required contracts and other forms.").

¹⁸⁶ Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1074–79 (2017). See generally Yael Cohen-Rimer & Netanel Dagan, *Deservingness on Trial: Neutralisation Techniques in Public Housing Jurisprudence*, 32 SOC. AND LEGAL STUD. 540 (2023) (discussing the concept of the "deserving" and "undeserving" poor).

¹⁸⁷ DALL., TEX., CODE OF ORDINANCES ch. 20A, art. 1, § 20A-4 (2016).

from governmental and non-governmental sources, as well as child support and spousal maintenance, except to the extent that the ordinance is prohibited by the state statute.¹⁸⁸

In Iowa, the cities of Iowa City, Des Moines, and Marion had each passed SOID ordinances in 2019, 2015, and 2000, respectively.¹⁸⁹ All three local ordinances specifically mentioned “housing choice voucher subsidies and similar rent subsidy programs” or “Section 8 vouchers,” among other enumerated sources of income.¹⁹⁰ There is no case law on any of these three ordinances, but in 2021 Governor Reynolds signed into law an amendment to the state home rule law to prevent counties and cities from passing or enforcing ordinances that prohibit a landlord from discriminating against holders of “federal housing choice voucher[s] issued by the United States department of housing and urban development.”¹⁹¹ In effect, the Iowa state law may, like the Texas law, ensure landlords’ right to discriminate against Section 8 Housing Choice Voucher holders while allowing localities to protect veterans with HUD-VASH vouchers from source of income discrimination, even though program requirements for landlords in the Housing Choice Voucher and VASH programs are substantially similar. As in the Texas example, this appears to be an instance of a state differentiating between the “deserving” and “undeserving” poor.¹⁹²

The Indiana preemption of home rule authority to pass SOID laws was passed in 2015 even though no local government in Indiana had yet passed a SOID law.¹⁹³

The Kentucky legislature passed a preemption law in 2024, specifically stripping localities of authority to require landlords to accept federal housing vouchers.¹⁹⁴ This Kentucky preemption statute declared an emergency related to the rights of property owners.¹⁹⁵

¹⁸⁸ DALL., TEX., CODE OF ORDINANCES ch. 20A, art. 1, § 20A-3(21) (2016).

¹⁸⁹ IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-5 (2016); DES MOINES, IOWA, MUN. CODE OF ORDINANCES ch. 62 § 101 (2019); MARION, IOWA, CODE OF ORDINANCES ch. 181 § 3.1 (2022); POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 96–98.

¹⁹⁰ Des Moines and Iowa City ordinances mention “housing choice voucher subsidies and similar rent subsidy programs.” POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12, at 97–98. The Marion ordinance referred to “Section 8 vouchers.” *Id.* at 98–99.

¹⁹¹ IOWA CODE §§ 331.304(13), 364.3(16) (2024); Katarina Sostaric, *Reynolds Signs Section 8 Discrimination Law*, IOWA PUB. RADIO (Apr. 30, 2021, 5:18 PM), <https://www.iowapublicradio.org/state-government-news/2021-04-30/reynolds-signs-section-8-discrimination-law>.

¹⁹² JACKSON, *supra* note 22, at 226–27 (identifying the “deserving poor” as the original intended recipients of public housing in the U.S.).

¹⁹³ IND. CODE tit. 36, art. 1, ch. 3, § 36-1-3-8.5 (2024); *see also* Press Release, Amy Nelson, Fair Housing Center of Central Indiana (Mar. 31, 2015).

¹⁹⁴ KY. REV. STAT. ANN. § 65.874 (2024).

¹⁹⁵ H.R. 18, 2024 Reg. Sess. (Ky. 2024).

Legal scholars who study localism have noted a marked increase in state preemption of local authority across a range of social issues. Alexandra Kass and Rebecca Wilton explain, “While state preemption of local policy choices is nothing new, the scope and intensity of preemption has increased in recent years in parallel with the rise of political polarization across the country between urban and rural areas, educated and less educated voters, and white and minority citizens.”¹⁹⁶ As stated above, 32% of local SOID laws have been enacted in the past five years or less.¹⁹⁷ National trends in state preemption suggest that some of these local laws may be vulnerable to state preemption. As noted above, localities are not making SOID ordinances in Dillon’s Rule jurisdictions; they are a creature of home rule jurisdictions only.¹⁹⁸ Of those jurisdictions, legislative home rule jurisdictions, like Texas and Indiana, that reserve plenary power to the state to define the scope of local home rule, are the most vulnerable to state preemption.¹⁹⁹ Further, those legislative home rule states, like Texas and Indiana, with islands of progressive cities surrounded by seas of property rights-oriented rural areas, may be especially vulnerable to state preemption. State preemption efforts in *imperio* home rule jurisdictions also seem most likely in states with significant urban/rural political divides.²⁰⁰ However, *imperio* home rule localities may benefit from the immunizing effect of constitutional home rule, where a home rule municipality is insulated from state preemption over matters of purely local concern.²⁰¹

In analyzing judicial decisions about this immunizing effect, Lynn Baker and Daniel Rodriguez found that although courts apply ad hoc analysis to questions of preemption in *imperio* home rule jurisdictions, there are similarities across jurisdictions in the form of this analysis and there are observable substantive trends.²⁰² Specifically, courts have found that local laws grounded in a municipality’s general police powers to protect the health, safety, and welfare, or land use and zoning powers govern issues of purely local concern and are more likely to be found immune from

¹⁹⁶ Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 98 (2022); see also Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957 (2019); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018); Schragger, *supra* note 183, at 1164 (2018).

¹⁹⁷ See POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12.

¹⁹⁸ POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12; see discussion *supra* Sections III.A–B.

¹⁹⁹ See *City of Austin v. Paxton*, 943 F.3d 993, 993–94, 996–97, 1004 (5th Cir. 2019). The City of Austin, Texas did attempt to argue that the state statute prohibiting SOID laws is, itself, preempted by federal law because the state statute obstructs Congressional intent, however the City’s case was dismissed by the Federal Court of Appeals for lack of subject matter jurisdiction.

²⁰⁰ See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER UNIV. L. REV. 1337, 1368–70 (2009).

²⁰¹ *Id.* at 1346.

²⁰² *Id.* at 1349.

preemption.²⁰³ In contrast, courts have found that laws grounded in civil rights or human rights are of mixed state and local concern and therefore vulnerable to state preemption in the event of operational conflict with state laws.²⁰⁴ It is interesting to note that the Texas and Iowa municipal SOID laws that were preempted by state law were human rights or civil rights laws.²⁰⁵ In the event that more states attempt to preempt local authority to impose SOID laws, the recent trend of placing SOID laws under a locality's general police powers, rather than under its civil or human rights law, may result in stronger arguments for immunity in *imperio* home rule jurisdictions.²⁰⁶

2. *Judicial Challenges and Enforceability*

Unfortunately, passing a SOID ordinance does not necessarily solve the problem of landlords in all but low-rent neighborhoods avoiding voucher-holders. Some landlords have challenged their locality's authority to impose voucher discrimination laws.²⁰⁷ Indeed, several courts have weakened local SOID laws based on these judicial challenges, as described herein. Conversely, some courts have upheld local SOID ordinances. Though, as discussed above, a landlord who loses in court may prevail in the state legislature.²⁰⁸ This Section provides an overview of the most influential or representative cases that either weaken or uphold state and local voucher discrimination laws. Interestingly, only a couple of these cases are grounded in fundamental property rights or questions about the legislative powers of the state to prohibit voucher discrimination. Instead, virtually all of them involve the court grappling with its relative comfort or discomfort in interfering with a landlord's business judgment and ultimately turn on the explicitness of the voucher

²⁰³ *Id.* at 1356–60.

²⁰⁴ *Id.* at 1362–63.

²⁰⁵ See AUSTIN, TEX., CODE OF ORDINANCES tit. 5, ch. 5-1, art. 2, div. 3, § 5-1-51 (2022); DALL., TEX., CITY CODE ch. 20A, art. 1, § 20A-4 (2016); DES MOINES, IOWA, CODE OF ORDINANCES ch. 62, art. IV, § 62-101 (2019); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-5 (2016); MARION, IOWA, CODE OF ORDINANCES ch. 181, art. III, § 181-3.1 (2022).

²⁰⁶ The following *imperio* home rule jurisdictions have placed their SOID laws under their general police powers statute or zoning statute: BERKELEY, CAL., MUN. CODE tit. 13, ch. 13, § 31 (2017); L.A., CAL., MUN. CODE ch. IV, art. 5.6.1, § 45.67 (2020); SANTA MONICA, CAL., CODE art. 4, § 4.28.030 (1985); NAPERVILLE, ILL., CODE OF ORDINANCES tit. 12, ch. 4, § 12-4-3 (2013); ANN ARBOR, MI., CITY CODE tit. 9, ch. 112 § 9:152(6) (2013); GRAND RAPIDS, MI., CODE vol. 1, tit. 9, ch. 160, § 9.364 (2014); LINNDALE, OHIO, CODIFIED ORDINANCES ch. 515, § 515.11 (2004); REYNOLDSBURG, OHIO, CODE OF ORDINANCES ch. 503, § 503.07(1) (2022); TOLEDO, OHIO, MUN. CODE ch. 554, § 554.03 (2020); WARRENSVILLE HEIGHTS, OHIO, CODIFIED ORDINANCES tit. 1, ch. 113, § 113.04 (2012); WESTERVILLE, OHIO, CODIFIED ORDINANCES ch. 511, § 511.03(a)(1) (2019); YELLOW SPRINGS, OHIO, CODIFIED ORDINANCES ch. 626, § 626.08 (1979).

²⁰⁷ *E.g.*, Austin Apartment Ass'n v. City of Austin, 89 F. Supp. 3d 886, 889 (W.D. Tex. 2015).

²⁰⁸ See discussion *supra* Section III.B.1.

discrimination laws themselves. Those decisions that weaken voucher discrimination laws tend to do so because courts are unwilling to recognize individual rights at the expense of business judgment without clear legislative intent.

a. Decisions that Weaken SOID Laws

Decisions that weaken SOID laws fall into four main categories. First, there are decisions that excuse discrimination based on reluctance to accept voucher program requirements. Second, there are decisions finding that only application rejections based solely on animus violate the statute. Third, there are decisions finding that any number of tenant screening procedures that may functionally preclude voucher-holders are not violations. Finally, there are decisions finding that vouchers aren't "income" for the purposes of SOID statutes. Each of these categories are discussed below.

The first type of decision that weakens voucher discrimination laws are those finding that a landlord does not violate an ordinance if their reason for rejecting a voucher-holder is unwillingness to participate in a voucher program's requirements applicable to landlords.²⁰⁹ In *Edwards v. Hopkins Plaza Ltd. Partnership* and *Dussault v. RRE Coach Lantern Holdings*, the Minnesota Court of Appeals and the Maine Supreme Judicial Court both begin by explaining that the Section 8 program is voluntary under federal law and that neither of their states had made participation mandatory.²¹⁰ The Minnesota court stressed that federal regulation explicitly states that the voluntary nature of the program under federal law is not intended to preempt state or local laws that make landlord participation in the Section 8 program compulsory.²¹¹ The *Edwards* Court held that despite the federal invitation for states and localities to regulate, Minnesota law and the administrative policy of the Minnesota Department of Human Rights, the agency charged with enforcing the SOID law, clearly support the conclusion that under state law, participation in the Section 8 program is voluntary.²¹² Therefore, the court in *Edwards* concluded that there was no violation of the state SOID law when a landlord bases their decision to opt out of the Section 8 program on business judgment related to program requirements of the Section 8 program.²¹³ In *Dussault*, the Maine Supreme Court held that rejecting a voucher-holder because of the requirements of the voucher program was not discrimination against the voucher-holder based on the person's status

²⁰⁹ *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 177–78 (Minn. Ct. App. 2010); *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52, 59–60 (Me. 2014).

²¹⁰ *Edwards*, 783 N.W.2d at 176; *Dussault*, 86 A.3d at 56 (“Federal law explicitly makes landlords’ participation in the voucher program voluntary.”).

²¹¹ *Edwards*, 783 N.W.2d at 176 (citing 24 C.F.R. § 982.53(d) (2009)).

²¹² *Id.*

²¹³ *Id.*

as a voucher-holder, and therefore did not qualify as discrimination in violation of the state statute.²¹⁴

The second category of judicial decisions weakening voucher discrimination laws are decisions that have held SOID laws only apply when a landlord's sole reason for denying a voucher-holder is animus toward voucher-holders.²¹⁵ Indeed, in justifying its decision that business judgment rationales do not violate the state SOID law, the *Edwards* court likened the Minnesota statute, which prohibits discrimination based on "status with regard to public assistance," to a prior version of a Massachusetts statute that prohibits discrimination "solely because the individual is [a recipient of housing subsidies]." ²¹⁶ In *Attorney General v. Brown*, the Massachusetts Supreme Court denied the Attorney General's motion for summary judgment after holding that virtually any business justification for denying a voucher-holder's tenancy could be a valid defense to discrimination since the state statute prohibited discrimination "solely" based on the tenant's status as a voucher-holder.²¹⁷

Third, there are decisions where courts have found that a landlord's screening procedures do not run afoul of a SOID law so long as those screening procedures are applied to both voucher-holding and non-voucher-holding applicants, regardless of whether the screening procedures may have a disparate impact on voucher-holders.²¹⁸ For example, in *Pasquince v. Brighton Arms Apartments*, the New Jersey appellate court found that a landlord did not violate the state SOID statute in rejecting the application of a voucher-holding applicant based on that applicant's poor credit score.²¹⁹ In reaching its conclusion, the court applied a burden-shifting, disparate treatment test wherein the applicant must make a prima facie case, then the burden shifts to the landlord to show a legitimate, nondiscriminatory reason for the screening criteria, and the applicant bears the burden of proving the landlord's reasoning is a pretext.²²⁰ The appellate court in *Pasquince* affirmed the trial court's decision that the plaintiff had failed to rebut the defendant's claim that the plaintiff was denied a tenancy based on his poor credit. In reaching its decision, the appellate court cited to New Jersey's SOID law, which expressly affirmed a landlord's right to deny a tenant based on poor credit.²²¹

Finally, some courts have interpreted vouchers as not being "income" for the purposes of the SOID statute. In *Sabi v. Sterling*, the California Supreme Court

²¹⁴ *Dussault*, 86 A.3d at 59–60, 63.

²¹⁵ *Attorney General v. Brown*, 511 N.E.2d 1103, 1109–10 (Mass. 1987).

²¹⁶ *Edwards*, 783 N.W.2d at 178.

²¹⁷ *Brown*, 511 N.E.2d at 1109–10.

²¹⁸ *Pasquince v. Brighton Arms Apartments*, 876 A.2d 834, 842 (N.J. Super. Ct. App. Div. 2005); Merjian, *supra* note 11, at 991.

²¹⁹ *Pasquince*, 876 A.2d at 842.

²²⁰ *Id.* at 841–42.

²²¹ *Id.* at 838–39.

narrowly construed the state source of income statute's definition of "income" in determining that rent payments by a housing authority based on a tenant's Section 8 voucher were not the tenant's "income." Since the statute only barred discrimination based on "income," a landlord was free to refuse to participate in the Section 8 program.²²²

The four kinds of decisions weakening SOID laws described above represent various negative treatments of SOID laws. In each of the four categories, courts are mediating between a legislatively declared individual right to be free from discrimination and a private property owner's right to set the agenda for their private property. These decisions indicate a judicial reluctance to infer individual rights at the expense of private property rights.²²³ Implicitly or explicitly, these courts challenge state or local legislatures to be more specific in drafting ordinances granting tenant rights at the expense of a landlord's business judgment. For example, in *Sabi v. Sterling*, the California Court stated,

We recognize that the Section 8 program serves, and has served, important public interests and that it reflects a broad consensus about a number of housing issues. . . . But questions of social policy are not for us to debate and they are certainly not for us to resolve. This is for the Legislature to do. We must confine ourselves to applying the law that the Legislature has enacted.²²⁴

In response to these adverse decisions, states do sometimes eventually amend their laws to make their voucher discrimination ordinance more explicitly inclusive of voucher-holders. For example, after the Massachusetts Supreme Court's 1987 decision in *Attorney General v. Brown*, finding that a landlord did not discriminate against a voucher-holder "solely" based on the tenant's status if the landlord's stated reason was unwillingness to participate in voucher program requirements, the Massachusetts legislature amended the law in 1989 to include discrimination "because the individual is [a housing subsidy] recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program."²²⁵ When states are slow to respond to judicial interpretations of statutes that weaken voucher protections, localities frequently step in to fill the gap. For example, the state of Maine included source of income discrimination in its human rights act in 2011,²²⁶ but in 2014 the State Supreme Court found that a landlord does not violate the Act

²²² *Sabi v. Sterling*, 107 Cal. Rptr. 3d 805, 819, 826 (Cal. 2010).

²²³ See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021) (arguing that when courts serve as arbiters of rights, rights become zero sum. In contrast, legislatures can recognize and balance multiple, seemingly oppositional rights).

²²⁴ *Sabi*, 107 Cal. Rptr. 3d at 826.

²²⁵ For a description of legislative history, see *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421, 427–29 (Mass. 2017); MASS. GEN. LAWS ch. 151B, § 4(10) (2014).

²²⁶ Housing Provisions of the Maine Human Rights Act, Me. Legis. Serv. ch. 613 (2012).

if they reject a voucher-holder because the landlord does not want to comply with voucher program requirements applicable to participating landlords.²²⁷ Despite the fact that the state of Maine has not clarified its state SOID law to explicitly include voucher program requirements applicable to landlords, the voters of Portland, Maine's largest city, passed an ordinance by referendum in 2020 prohibiting SOID discrimination and explicitly including as prohibited activity a landlord's refusal to participate in voucher program requirements.²²⁸

There are two negative treatments so far that are categorically different. They find local SOID ordinances ultra vires or unconstitutional. In *Apartment Ass'n of Greater Pittsburgh v. City of Pittsburgh*, the Pennsylvania Supreme Court struck down Pittsburgh's SOID ordinance for exceeding the City of Pittsburgh's home rule authority.²²⁹ The Pennsylvania Supreme Court analyzed the Business Exclusion in the state's home rule statute, which prohibits home rule municipalities from determining duties, responsibilities, or requirements placed on businesses.²³⁰ The court first found that the voucher discrimination ordinance imposed an affirmative burden on businesses by requiring them to participate in the Section 8 program against their will.²³¹ The court went on to find that the SOID ordinance did not fall under any explicit exemptions to the Business Exclusion provision of the home rule statute that would allow the City of Pittsburgh to impose this kind of affirmative burden on landlords. Therefore, the City of Pittsburgh exceeded its home rule authority in attempting to prohibit discrimination against housing voucher-holders based on voucher program requirements.²³² This decision is alarming because of how it may affect the validity of SOID ordinances in other Pennsylvania home rule municipalities.²³³ By grounding a private property owner's rights in business rights, the decision is even more alarming because it subsumes the justification for private property under capitalist values, essentially ignoring other justifications for valuing private property including the promotion of social order, democratic values, and human dignity.²³⁴

²²⁷ *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52, 59–60 (Me. 2014).

²²⁸ PORTLAND, ME., CODE OF ORDINANCES ch. 6, § 6-237 (2020).

²²⁹ *Apartment Ass'n of Metro. Pittsburgh v. City of Pittsburgh*, 261 A.3d 1036, 1038 (Pa. 2021).

²³⁰ 53 PA. CONS. STAT. § 2962(f) (2021).

²³¹ *Apartment Ass'n*, 261 A.3d at 1046.

²³² *Id.* at 1054.

²³³ Philadelphia and the Borough of State College are the other two municipalities in Pennsylvania with SOID ordinances currently in effect. PHILA., PA., CODE tit. 9 § 9-1108(1) (2024); BOROUGH OF STATE COLLEGE, PA., ORDINANCE ch. V, § 5-504 (2011).

²³⁴ See generally Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 MINN. L. REV. 605, 652 (2022) (arguing that property laws and property-adjacent laws like zoning must “set the minimum standards for all market relationships” consistent with the values of “liberty, equality, and democracy”).

In *People v. Commons West, LLC*, a New York trial court found that inclusion of SOID protections in the state's human rights act violated landlords' Fourth Amendment rights under the U.S. Constitution to be free from unreasonable searches.²³⁵ The court found that the Housing Choice Voucher Program's requirements related to housing quality inspections and access to books and records are both unreasonable searches to the extent the state SOID law makes them compulsory.²³⁶ At the time of this writing, this case has yet to be appealed.

With the Pittsburgh and New York trial court cases as significant exceptions, the decisions weakening SOID laws are notable for holdings that have not been made. Generally, courts are not invalidating these laws as unreasonable searches, or due process violations, or takings, or because they are *ultra vires*.²³⁷ While calling out state and local lawmakers for weak drafting, these decisions have generally not undermined state or local government's regulatory authority in this arena. In fact, numerous decisions have expressly affirmed this authority, as described below.

b. Decisions that Reinforce SOID Laws

Numerous courts have reinforced the validity of SOID ordinances. These have generally fallen into three categories: first, affirmations that SOID laws are valid exercises of the municipal or state police power and not preempted by federal law; second, endorsing exercises of judicial discretion in determining whether business judgment is a pretext for discrimination; and third, interpretations of the statutes or ordinances that support or enhance applicability.

The first category of judicial decisions supportive of local SOID laws are those that have affirmed local SOID ordinances as valid uses of the state police power and not preempted by federal law.²³⁸ HUD has confirmed that while federal law makes participation in the Housing Choice Voucher Program voluntary, there is no intent to preempt state or local laws that may mandate landlord participation.²³⁹

In upholding SOID ordinances, many courts have corrected defendants' claims that such laws require them to rent units to voucher-holders. In *Bourbeau v.*

²³⁵ *People v. Commons W., LLC*, 194 N.Y.S.3d 451, 452 (Sup. Ct., 2023).

²³⁶ *Id.* at 454.

²³⁷ See *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171 (Minn. Ct. App. 2010); *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52 (Me. 2014); *Attorney General v. Brown*, 511 N.E.2d 1103 (Mass. 1987); *Pasquince v. Brighton Arms Apartments*, 876 A.2d 834 (N.J. Super. Ct. App. Div. 2005); *Sabi v. Sterling*, 107 Cal. Rptr. 3d 805 (Cal. 2010).

²³⁸ *Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 245–46 (Conn. 1999) [hereinafter *Sullivan Assocs.*]; *Bourbeau v. The Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008).

²³⁹ 24 C.F.R. §§ 982.302(b), .53(d) (2023); see MARY CUNNINGHAM, MARTHA GALVEZ, CLAUDIA L. ARANDA, ROB SANTOS, DOUG WISSOKER ET AL., U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF POLICY DEVELOPMENT AND RESEARCH, A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHER 65–66 (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>.

Jonathan Woodner Co., the federal district court for the District of Columbia explained, “Landlords remain free not to rent to voucher holders provided they do so on other legitimate, nondiscriminatory grounds, such as an applicant’s rental history or criminal history.”²⁴⁰ However, courts have also been willing to look behind “business judgment” tenant screening policies to determine whether these result in source of income discrimination. For example, New Jersey has found that both minimum income requirements applied to all tenant applicants and individualized assessments of a specific applicant based on a credit report may be pretexts for impermissible voucher discrimination.²⁴¹

While the first two categories of cases have found that SOID laws are not vulnerable to due process and takings challenges, the third category of decisions affirmatively supports or enhances applicability of the laws.

The Supreme Court of Connecticut has interpreted a state SOID law as implicitly obligating landlords to conform to voucher program requirements including the requirement to enter into a prescribed lease addendum.²⁴²

The California Court of Appeals has held that despite statutory language referring only to landlords and tenants, the state’s SOID law may be applied to borrowers and lenders, as well.²⁴³ Similarly, the Connecticut Supreme Court denied an insurance company’s motion to strike a complaint from a landlord when an insurance broker refused to provide general liability coverage for a multi-family property because more than 20% of the landlord’s tenants paid rent with a Section 8 voucher.²⁴⁴

C. *Efficacy*

After the gantlet of passing a local SOID ordinance, it can be dispiriting to evaluate the efficacy of such hard-won protections. However, this evaluation is essential in determining the quality of local governance. Unfortunately, this Section, which evaluates the efficacy of local SOID laws reveals mixed results, at best.

To evaluate efficacy of voucher discrimination laws, this Section will examine three different sources of empirical information. The first source of empirical data are three matched-pair test studies²⁴⁵ conducted by social scientists over the last

²⁴⁰ *Bourbeau*, 549 F.2d at 87.

²⁴¹ *Bell v. Tower Mgmt. Servs., L.P.*, A-3165-08T3, 2010 WL 2346651, at *2–3 (N.J. Super. Ct. App. Div. June 11, 2010); *Pasquince* 876 A.2d at 842; *T.K. v. Landmark W.*, 802 A.2d at 528.

²⁴² *Sullivan Assocs.*, 739 A.2d at 251.

²⁴³ *Sisemore v. Master Financial, Inc.*, 60 Cal. Rptr. 3d 719, 724 (Cal. Ct. App. 2007).

²⁴⁴ *Francia v. Mount Vernon Fire Ins. Co.*, No. CV084032039S, 2012 WL 1088544, at *8–9 (Conn. Super. Ct. Mar. 6, 2012).

²⁴⁵ Matched-pair testing involves sending two separate candidates with similar qualities and qualifications but for the tested quality into the same situation to measure discrimination

decade.²⁴⁶ They show that, in many instances, SOID laws are easily skirted or ignored by landlords, management companies, and real estate agents, and that while SOID laws reduce voucher discrimination in some jurisdictions, discrimination is still rampant. The second source of empirical data are reports from state and local administrative enforcement agencies.²⁴⁷ They show that not only are voucher discrimination laws not well enforced, but some enforcement mechanisms written into ordinances themselves render these ordinances essentially unenforceable. Third, the Section will examine three voucher utilization data studies commissioned by HUD over the past 30 years, including jurisdictions with and without voucher discrimination laws. These studies show inconclusive increases in the success rate for individual households finding a place to use their vouchers before they expire and insignificant decreases in the concentration of poverty when a jurisdiction prohibits voucher discrimination.

Although researchers have found that SOID ordinances do not come close to eliminating voucher-based discrimination, nevertheless they can alleviate some of the burden on voucher-holders in finding properties to rent. This part will conclude by surveying best practices that increase the utilization rates and housing opportunities for voucher-holders.

1. Testing Studies

The primary sources of empirical data that currently exist regarding enforcement of SOID laws and ordinances come from three studies performed by social scientists, all of which involved matched testing pairs responding to advertisements for available rental units.²⁴⁸ The Urban Institute's 2018 study commissioned by HUD evaluated discrimination against voucher-holders in five locations across the country: Fort Worth, TX; Los Angeles, CA; Newark, NJ; Philadelphia, PA; and

associated with the tested quality. See *Matched-Pairs Design*, AM. PSYCH. ASS'N: DICTIONARY OF PSYCHOLOGY, <https://dictionary.apa.org/matched-pairs-design>, (Apr. 19, 2018).

²⁴⁶ See generally CUNNINGHAM ET AL., *supra* note 239, at 50–53.

²⁴⁷ See Delaware Housing Voucher Discrimination Enforcement Info Sheet, information from Rony Baltazar-Lopez, Dir. of Pol'y and Comm'ns, Del. Dep't of State, pursuant to a public information request (June 18, 2023) (on file with author); Albuquerque, NM Housing Voucher Discrimination Enforcement Info Sheet, information from Yvette Gurule, IPRA Specialist, Albuquerque, N.M., pursuant to a public information request (July 18, 2023) (on file with author); Boston Housing Voucher Discrimination Enforcement Info Sheet, information from Thaianha Bells, City of Boston, pursuant to public information request (July 18, 2023) (on file with author); Marissa J. Lang & Kyle Swenson, *D.C. Wins Historic \$10 million in Housing Voucher Discrimination Case*, WASH. POST., <https://www.washingtonpost.com/dc-md-va/2022/10/20/dc-voucher-penalty-settlement/> (Oct. 20, 2022).

²⁴⁸ See generally CUNNINGHAM ET AL., *supra* note 239; Aliprantis, Martin, & Phillips, *supra* note 98; Jamie Langowski, William Berman, Grace Brittan, Catherine LaRaia, Jee-Yeon Lehmann & Judson Woods, *Qualified Renters Need Not Apply: Race and Housing Voucher Discrimination in the Metropolitan Boston Rental Housing Market*, 28 GEO. J. POVERTY L. AND POL'Y 35, 36 (2020).

Washington, D.C.²⁴⁹ Two of these locations, Newark and Washington, D.C., had SOID ordinances in place for their entire testing area at the time of the test, the Philadelphia testing area was partially covered by a SOID ordinance, and the Fort Worth and Los Angeles testing areas were entirely unprotected from SOID at the time of the testing.²⁵⁰ The test sought to “measure the prevalence and extent of voucher-related discrimination, including differences in discrimination against racial and ethnic minorities and differences between low- and high-poverty neighborhoods,”²⁵¹ and to “identify the types and patterns of rental housing discrimination against voucher-holders,”²⁵² among other goals. The testing used a three-staged protocol to assess discrimination against applicants with housing vouchers.²⁵³ First, a testing pool was created by collecting rental housing listings in eligible zip codes and with rents below local housing authority payment limits. A tester contacted the landlords via phone or email to ask if the unit was still available and if the landlord accepted vouchers.²⁵⁴ When a landlord indicated that a unit was available and the landlord accepted vouchers, the unit entered the second phase of the test. A testing pair, matched in all characteristics except for voucher status, was assigned to call the landlord independently to gather information about the rental unit and to attempt to schedule an appointment to view the unit.²⁵⁵ When both parties in a testing pair were able to schedule appointments to view a unit independently, phase three of the test began. In phase three, each member of the testing pair would independently attempt to keep their appointment to view the unit and would report back about the appointment, including whether the applicant was invited to apply for the unit.²⁵⁶ The test revealed that in jurisdictions where landlords are allowed to reject vouchers, they overwhelmingly do. For example, the outright rejection rate in Fort Worth, Texas was 78% and in Los Angeles, California was 76%. These rates are surprisingly similar given Fort Worth’s 9.2% vacancy rate as compared to Los Angeles’s 3.7% vacancy rate. In jurisdictions that prohibit source of income discrimination, outright rejection of voucher-holders is still quite common. For example, rejection rates were 67% in Philadelphia, 31% in Newark, and 15% in Washington, D.C.²⁵⁷ Voucher denial rates were so high in locations without SOID laws that the Urban Institute study was not able to obtain its desired sample size for phases two

²⁴⁹ CUNNINGHAM ET AL., *supra* note 239, at 15.

²⁵⁰ *Id.* at 20.

²⁵¹ *Id.* at ix.

²⁵² *Id.*

²⁵³ *Id.* at 17.

²⁵⁴ *Id.* at 17–18.

²⁵⁵ *Id.* at 18.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 30.

and three of the test, limiting the reliability of the test's findings.²⁵⁸ That being said, the test found that voucher-holders were 8% more likely to be stood up for appointments to view an apartment than non-voucher-holders, even when landlords told testers that they accepted vouchers.²⁵⁹

The Boston Foundation, in collaboration with clinicians at Suffolk University Law School, led a test of voucher denial rates in the Boston metropolitan area that copied many aspects of the Urban Institute's five-city testing protocol.²⁶⁰ Despite a state-wide prohibition on SOID in Massachusetts and local SOID ordinances throughout much of the testing area, the study found an 86% discrimination rate based on voucher status.²⁶¹ The study identified two categories of discrimination that can only be identified by matched-pair testing.²⁶² The first is "ghosting," simply not responding to an inquiry or cutting off communication for no stated reason.²⁶³ The second is "discrimination with a smile" or unequal treatment.²⁶⁴ The study found that voucher-holders were ghosted 42% of the time while non-voucher-holders were ghosted 10% of the time.²⁶⁵ The study found similarly alarming discrimination in determining whether testers were able to actually visit the housing site with the largest discrepancy among white testers; 80% of white, non-voucher-holding testers were successful in actually visiting the housing site while only 12% of white voucher-holders were successful in visiting the housing site.²⁶⁶ Finally, the Boston study attempted to quantify many qualitative aspects of apartment-hunting that can have major results in rental rates, such as whether landlords or real estate agents greeted a tester upon meeting them, attempted to shake their hand, told them positive or negative things about the unit, the building, or the neighborhood, told the tester about other available units, offered them rental incentives, encouraged the tester to submit an application, or followed up with them after the site visit. These

²⁵⁸ *Id.* at 55.

²⁵⁹ *Id.*

²⁶⁰ Langowski et al., *supra* note 248, at 49, 61. The Boston test was based on just 50 rental units throughout the Boston metro area and used two sets of matched pairs—one pair designed to test for racial discrimination and the other pair designed to test for voucher-status discrimination. This study also tested, and found, significant race-based discrimination in housing searches.

²⁶¹ *Id.* at 42, 48.

²⁶² *Id.* at 52–54.

²⁶³ *Id.* at 62.

²⁶⁴ *Id.* at 63.

²⁶⁵ *Id.* at 54. The study breaks down this statistic by race, as well. Black voucher-holders were ghosted 39% of the time while Black non-voucher-holders were ghosted 18% of the time and white voucher-holders were ghosted 44% of the time while white non-voucher-applicants were ghosted just 4% of the time.

²⁶⁶ *Id.* at 56. Black non-voucher-testers were successful in obtaining a site visit 48% of the time while Black voucher-holder testers were successful in obtaining site visits only 18% of the time.

“discrimination with a smile” factors were found to consistently favor non-voucher-holding testers over voucher-holders.²⁶⁷

In *Can Landlords Be Paid to Stop Avoiding Voucher Tenants?*, researchers for the Federal Reserve Bank of Cleveland found that landlords heavily “penalize,” or devalue, tenants who indicate a desire to pay by voucher, regardless of the existence of SOID laws and ordinances.²⁶⁸ This study was conducted in Washington, D.C., which prohibits source of income discrimination, and measured landlord avoidance to tester inquiries about unit availability. Half of the testers included their intention to use a voucher in their inquiries while their matched-pair counterpart did not.²⁶⁹ The experiment was conducted in two waves. The first in 2015 was when HUD’s fair market rents, which limit the maximum value of a voucher, were determined by regional data and applied to the entire region. The second wave was conducted in 2017, when Washington, D.C. was part of a HUD pilot program that set fair market rents based on census tract data, allowing voucher limits to much more closely track neighborhood rents.²⁷⁰ The intention behind this policy change of using small area fair market rents rather than regional fair market rents was to increase the ability for voucher-holders to rent units in higher-rent neighborhoods while removing excess incentive to rent to voucher-holders in low-rent neighborhoods where regional fair market rent voucher limits might be above neighborhood rents.²⁷¹

The study found that in Washington, D.C., the degree to which landlords devalued voucher-holding applicants increased as rents increased, despite these applicants’ ability to pay rent. That is to say, in low-rent neighborhoods, landlords do not penalize and can even seek out voucher-holders. However, the higher rents rise in a neighborhood, the more landlords discriminate against voucher-holders, despite their ability to pay rent.²⁷² Using small area fair market rents to increase voucher limits in higher-cost neighborhoods did nothing to alleviate this landlord penalty; the second wave of the experiment found no improvement in landlord enthusiasm for vouchers.²⁷³ In fact, the authors were able to quantify the voucher penalty and determined that to totally eliminate the voucher penalty, the housing authority

²⁶⁷ *Id.* at 56–60.

²⁶⁸ Aliprantis, Martin & Phillips, *supra* note 98, at 9. In this study, “penalty” is a social science term meaning “a weight applied to a statistic or index that lowers its value because of some undesired characteristic.” See *Penalty Function*, AM. PSYCH. ASS’N DICTIONARY OF PSYCH., <https://dictionary.apa.org/penalty-function> (Apr. 19, 2018).

²⁶⁹ Aliprantis, Martin & Phillips, *supra* note 98, at 5–6.

²⁷⁰ *Id.* at 5.

²⁷¹ *Id.* at 2–3.

²⁷² *Id.* at 9.

²⁷³ *Id.* at 12.

would need to increase voucher limits by approximately \$3,000 per month, making voucher rents far more than fair market rents in high-cost neighborhoods.²⁷⁴

2. *Complaints and Administrative Enforcement*

Although there is some variability in the placement and content of SOID ordinances, most of them are enforced through a city's office of human or civil rights.²⁷⁵ The vast majority of ordinances call for administrative enforcement. Some jurisdictions pair administrative enforcement with a private cause of action.²⁷⁶ Many California cities and Rochester and Syracuse, New York have only private causes of action without administrative enforcement.²⁷⁷ A couple of jurisdictions make violations of SOID ordinances a criminal offense.²⁷⁸ More than a quarter of SOID jurisdictions include a complainant's right to attorney's fees. Despite this range of complaint methods, very few SOID complaints are filed anywhere and even fewer landlords appear to be penalized for violating SOID ordinances, as described below. One of the starkest examples of this is in Philadelphia, where the Urban Institute's matched pair testing found a 67% discrimination rate against voucher-holders.²⁷⁹ Philadelphia has had a SOID ordinance since 1980, enforceable through an administrative process that requires a complaint be filed with the Philadelphia

²⁷⁴ *Id.* at 15.

²⁷⁵ See generally POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12. Approximately 68 localities designate a human or civil rights or relations office as the administrative enforcement body including: Tucson, AZ; San Francisco, CA; Boulder, CO; Denver, CO; Wilmington, DE; Alachua Cnty., FL; Broward Cnty., FL; Gainesville, FL; Miami-Dade Cnty., FL; Tampa, FL; Atlanta, GA; Chicago, IL; Cook Cnty., IL; Naperville, IL; City of Urbana, IL; City of Wheeling, IL; Des Moines, IA; Iowa City, IA; Marion Cnty., IA; Lawrence, KS; Annapolis, MD; Baltimore, MD; Baltimore Cnty., MD; Frederick, MD; Frederick Cnty., MD; Howard Cnty., MD; Montgomery Cnty., MD; Prince George's Cnty., MD; Boston, MA; Cambridge, MA; Quincy, MA; Revere, MA; Ann Arbor, MI; East Lansing, MI; Holland, MI; Lansing, MI; Minneapolis, MN; Clayton, MO; Columbia, MO; St. Louis, MO; Albuquerque, NM; Buffalo, NY; Erie Cnty., NY; Nassau Cnty., NY; New York, NY; Suffolk Cnty., NY; Westchester Cnty., NY; Athens, OH; Akron, OH; Bexly, OH; Dayton, OH; Gahanna, OH; Linndale, OH; South Euclid, OH; University Heights, OH; Toledo, OH; Westville, OH; Philadelphia, PA; Providence, RI; Austin, TX; Dallas, TX; King Cnty., WA; Olympia, WA; Seattle, WA; Spokane, WA; Tumwater, WA; Vancouver, WA; and Madison, WI.

²⁷⁶ For example, in Ferdale, MI, Dayton, OH, and Buffalo, NY, the city codes allow for both administrative and court enforcement. *Id.* at 121, 160, 183.

²⁷⁷ See generally POVERTY & RACE RSCH. ACTION COUNCIL, APPENDIX B, *supra* note 12. California localities with only private causes of action include: East Palo Alto, Fairfax, Los Angeles, Los Angeles Cnty., Marin Cnty., Novato, San Anselmo, San Diego, San Rafael, Santa Clara, and Santa Monica.

²⁷⁸ See generally POVERTY & RACE RSCH. ACTION COUNCIL, *supra* note 12, at 58–59, 190–91, 217–18 (identifying jurisdictions in which a violation of a SOID ordinance is a criminal offense).

²⁷⁹ CUNNINGHAM ET AL., *supra* note 239, at 1, 30.

Commission on Human Relations and does award attorney's fees for valid complaints.²⁸⁰ The Commission received just two to three inquiries about SOID complaints per year on average until 2021 with even fewer complaints ultimately filed. In 2021, the Commission received a record ten inquiries and seven complaints ultimately filed. After a complaint is filed, the Commission investigates the complaint and either finds no cause and dismisses the complaint or finds probable cause and attempts a conciliation process or a hearing.²⁸¹ The conciliation process typically involves an agreement between the offending landlord and the Commission wherein the landlord agrees not to violate the SOID ordinance again, agrees to make a unit available to the complaining tenant, if needed, and agrees to remove any discriminatory advertisements.²⁸²

Unfortunately, this meager enforcement is the norm. For example, the state of Delaware, which has had a SOID law since 2016, saw only two complaints in 2019, five complaints in 2020, four complaints in 2021, 13 complaints in 2022, and four complaints as of July 2023. Fifteen out of these 28 complaints were dismissed.²⁸³ In the first year of Albuquerque, New Mexico's ordinance, the Human Rights Office filed just three formal complaints on behalf of voucher-holders and settled two of the three.²⁸⁴ Boston, Massachusetts, with one of the most actively enforced SOID laws, saw fewer than a dozen complaints filed in 2018 and 2019, but between one and two dozen filed each year between 2020 and 2023 with a handful of settlements each year, including an average of \$4,000 in damages.²⁸⁵ Given the negligible benefit to tenants in filing a complaint and the significant time pressure to find a qualifying rental unit before a voucher expires, it is perhaps unsurprising that so few tenants file complaints.

²⁸⁰ PHILA., PA., CODE tit. 9, §§ 9-1102, -1108, -1110, -1112 (2024).

²⁸¹ Pa. Hum. Rels. Comm'n, *Filing a Complaint*, COMMW. OF PA., <https://www.pa.gov/agencies/phrc/programs-and-services/file-a-complaint.html> (last visited Jan. 1, 2024) (from the list under "Investigative Process," select "The Results of the Investigation").

²⁸² *See id.* (from the list under "Investigative Process," select "The Conciliation").

²⁸³ Delaware Housing Voucher Discrimination Enforcement Info Sheet, information from Rony Baltazar-Lopez, Dir. of Pol'y and Commc'ns, Del. Dep't of State, pursuant to a public information request (June 18, 2023) (on file with author). Delaware's dismissal rate may be explained by the statute's explicitly allowing landlords to reject participation in government-sponsored voucher programs. DEL. CODE ANN. tit. 25, ch. 51, subch. I, § 5116(e) (2024).

²⁸⁴ Albuquerque, NM Housing Voucher Discrimination Enforcement Info Sheet, information from Yvette Gurule, IPRA Specialist, Albuquerque, N.M., pursuant to a public information request (July 18, 2023) (on file with author). Albuquerque's ordinance is criminal, offering no compensation to victims of discrimination. *See* ALBUQUERQUE, N.M., CODE OF ORDINANCES §§ 11-3-7, 11-3-99 (2024).

²⁸⁵ Boston Housing Voucher Discrimination Enforcement Info Sheet, information from Thaianha Bells, City of Boston, pursuant to a public information request (July 18, 2023) (on file with author).

Washington, D.C. employed a creative strategy to give teeth to its SOID law, despite few complaints being filed. It made an example out of a large and well-known landlord with an egregious paper trail of SOID discrimination, Daro Management.²⁸⁶ The settlement agreement included payment of \$10 million to Washington, D.C., banning several companies for life from ever owning or managing property in Washington, D.C. again, and revoking the real estate license of a prominent company executive.²⁸⁷ In coverage of the settlement agreement, D.C. Attorney General Karl Racine made very explicit his view that voucher discrimination is a substitute for discrimination based on protected classes such as race, gender, disability, and family composition.²⁸⁸

The D.C. Attorney General's vocal efforts to crack down on voucher discrimination are commendable. Hopefully, future data will show that by making an example out of Daro Management, voucher discrimination will decline in the District. However, the case against Daro was unusual because of the numerous "smoking guns" that the Attorney General's office was able to produce from executive emails and other forms of written communication.²⁸⁹ As the matched-pair testing studies have shown, most voucher discrimination is simply not returning phone calls, not showing up for appointments to show a unit without stating a reason, subtly dissuading a person from renting, or adding fees to make a unit unaffordable.²⁹⁰ These forms of discrimination are nearly impossible to identify, let alone prove, without matched pair testing.²⁹¹ Nevertheless, the extent of this type of discrimination can be glimpsed in matched pair testing and by analyzing voucher utilization data.

3. *Voucher Utilization Data*

HUD collects two important metrics about tenant-based vouchers: voucher fund expenditure rates and success rates. Expenditure rates measure the percentage of a public housing authority's annual allocation of voucher funds that the housing authority actually spends.²⁹² If a jurisdiction's expenditure rate is too low, the public

²⁸⁶ Lang & Swenson, *supra* note 247.

²⁸⁷ *Id.*

²⁸⁸ *Id.*; see also Press Release, Off. of the Att'y Gen. for D.C., AG Racine Announces Largest Civil Penalty in a Housing Discrimination Case in U.S. History (Oct. 20, 2022), <https://oag.dc.gov/release/ag-racine-announces-largest-civil-penalty-housing>.

²⁸⁹ Lang & Swenson, *supra* note 247; Press Release, Off. of the Att'y Gen. for D.C., *supra* note 288.

²⁹⁰ See Langowski et al., *supra* note 248, at 35; CUNNINGHAM ET AL., *supra* note 239; Aliprantis, Martin & Phillips, *supra* note 98, at 9–10.

²⁹¹ CUNNINGHAM ET AL., *supra* note 239, at 1–2.

²⁹² *Housing Voucher Success and Utilization Indicators, and Understanding Utilization Data*, CTR. ON BUDGET & POLY PRIORITIES (Mar. 4, 2019) [hereinafter *Housing Voucher Success*], <https://www.cbpp.org/research/housing/housing-voucher-success-and-utilization-indicators-and-understanding-utilization>.

housing authority is not efficiently administering its voucher programs.²⁹³ Measuring expenditure rates incentivizes housing authorities to keep apartment searching times as short as possible, since the delay between when a voucher is awarded and the time when the voucher-holder enters into a qualifying lease and begins to use the voucher to pay rent increases the risk that funds allocated for that voucher will not be fully spent in that year. HUD measures housing authority expenditure rates annually and uses this information to allocate funding between housing authorities.²⁹⁴

Success rates measure the number of households who are able to find a place to use their voucher in the allotted time before their voucher expires.²⁹⁵ Success rate data has not been collected in a systematic and regularized way.²⁹⁶ Therefore, HUD has collected and reported on success rates only sporadically over the past 30 years with large and expensive reports in 1985, 1993, and 2000.²⁹⁷ The expenditure rate is a measure of housing authority efficiency. The success rate is a measure of the efficacy of the federal program, itself—how effective is the voucher program in assisting any given voucher-holder in finding safe, decent, and affordable housing?

Generally, expenditure rates hover around 100% year-to-year, suggesting that public housing authorities are using federal voucher funds efficiently.²⁹⁸ On the other hand, success rates averaged just 68% in 1985, 81% in 1993, and 69% in 2000.²⁹⁹ In a 2019 study using HUD administrative data and encompassing an estimated two-thirds of all public housing authorities, not just the large metropolitan housing authorities measured in previous studies, the success rate had fallen to a new low of just 61%; meaning that after spending years on a voucher waiting list, more than one in three voucher recipients are unsuccessful in finding a place to use their voucher before it expires.³⁰⁰ The initial increase in the success rate followed by decades of decline suggests flaws in the voucher program itself. The program does

²⁹³ *Id.*

²⁹⁴ *Section Eight Management Assessment Program (SEMAP)*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/semap/semap_FAQs#4 (last visited Dec. 31, 2024).

²⁹⁵ *Housing Voucher Success*, *supra* note 292.

²⁹⁶ ELLEN, O'REGAN & STROCHAK, *supra* note 2, at iii.

²⁹⁷ *See generally* MERYL FINKEL & LARRY BURON, U.S. DEP'T OF HOUS. AND URB. DEV., OFF. OF POL'Y DEV. AND RSCH., *STUDY ON SECTION 8 VOUCHER SUCCESS RATES, FINAL REPORT*, Vol. I, at iie (Nov. 2001), https://www.huduser.gov/portal/publications/pdf/sec8success_1.pdf.

²⁹⁸ Expenditure rates are measured as budget utilization rates on HUD's Housing Choice Voucher Data Dashboard. HOUSING CHOICE VOUCHER (HCV) DATA DASHBOARD, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard (click the navigation arrow to access slide 2 of the dashboard) (last visited Dec. 31, 2024).

²⁹⁹ FINKEL & BURON, *supra* note 297, at ii. These rates in large metropolitan public housing agencies exclude Los Angeles because Los Angeles was not included in all 3 studies.

³⁰⁰ ELLEN, O'REGAN & STROCHAK, *supra* note 2, at iii, 1–2, 5, 9.

not sufficiently encourage private landlords to participate in the Housing Choice Voucher program or to accept tenants with vouchers.

The difference between expenditure rates and success rates demonstrates where public housing agencies need assistance in improving the efficacy of their tenant-based voucher programs. HUD has responded to this need by expanding the Moving to Work Demonstration Program, an ongoing laboratory where a small group of public housing authorities are freed from many of the standard rules and regulations of the Housing Choice Voucher program and encouraged to experiment and innovate to improve program outcomes.³⁰¹ In 2022, HUD announced the selection of 29 public housing authorities for a “Landlord Incentives” cohort in the Moving to Work Demonstration Project.³⁰² The housing authorities in this cohort will test out several programmatic changes within HUD’s control to make the voucher program more attractive to private landlords.³⁰³ These changes include things like using small-area fair market rents to better match rents to localized market prices, funding a damage claims fund to supplement tenant security deposits, creating pre-qualifying unit inspection processes to fast-track the lease-up process, and first-time program participation incentives of up to one month’s rent.³⁰⁴ Additionally, HUD’s most recent success rate report determined not only the success rate in 2019, but also that the regularly collected administrative data mined for the report is reliable and accurate enough to be used to track and monitor success rates on an ongoing basis rather than via infrequent and expensive studies.³⁰⁵

Some of HUD’s innovations in the Moving to Work Landlords Incentives cohort are frankly inspiring. They reflect an awareness of private landlords’ business considerations in leasing units and even the idea that tenant-based vouchers should ideally be competitive to landlords beyond those who have built a business model around contracting with HUD.³⁰⁶

³⁰¹ U.S. DEP’T OF HOUS. AND URB. DEV., MOVING TO WORK (MTW) DEMONSTRATION PROGRAM, <https://www.hud.gov/mtw> (last visited Dec. 31, 2024).

³⁰² Press Release, U.S. Dep’t of Hous. and Urb. Dev., HUD Announces Landlord Incentives Cohort of “Moving to Work” Demonstration: 29 Public Housing Authorities Selected to Join the Demonstration, 770 PHAs now part of MTW Expansion, (Jan. 27, 2022), <https://archives.hud.gov/news/2022/pr22-019.cfm>.

³⁰³ *Id.*

³⁰⁴ U.S. DEP’T OF HOUS. AND URB. DEV., OFF. OF PUB. AND INDIAN HOUS., NOTICE PIH 2021-03: REQUEST FOR APPLICATIONS UNDER THE MOVING TO WORK DEMONSTRATION PROGRAM FOR FISCAL YEAR 2021, at 3–4 (Jan. 7, 2021) [hereinafter NOTICE PIH 2021-03], <https://www.hud.gov/sites/dfiles/PIH/documents/2021-03pihn.pdf>.

³⁰⁵ ELLEN, O’REGAN & STROCHAK, *supra* note 2, at iii.

³⁰⁶ *See* U.S. DEP’T OF HOUS. AND URB. DEV., PHAS RECOMMENDED TO RECEIVE DESIGNATION UNDER LANDLORD INCENTIVES COHORT OF THE MOVING TO WORK (MIW) EXPANSION (2022), <https://www.hud.gov/sites/dfiles/PIH/documents/LandlordIncentivesCohortSelecteesJanuary2022.pdf>.

Localities should add their resources to this effort in similar ways by appealing to private landlords' business judgment to incentivize renting to voucher-holders. The following section evaluates existing state and local enticements and incentives and recommends others.

IV. INCENTIVES

A. *The Theory: Free From, Free To, and Progressive Property*

The Progressive Property framework finds a justification for private property in the pursuit of plural and incommensurable values associated with human flourishing, rather than the unitary pursuit of economic efficiency and preference satisfaction.³⁰⁷ But for all its radical rhetoric, Progressive Property is ultimately a defense of private property as a form of resource management.³⁰⁸ Taking Progressive Property seriously means adopting the view that private property rights can and should be used to enhance personal and political agency, personhood, and dignity.³⁰⁹ It means that imbuing housing vouchers with additional property rights so that voucher recipients are full-fledged participants free to rent in the competitive private rental market outside of low-income neighborhoods is normatively superior to even a well-enforced right to be free from voucher discrimination.³¹⁰

It is now widely acknowledged that private landlords are key stakeholders in making any tenant-based voucher program work.³¹¹ In contending with these private gatekeepers' resistance to renting to voucher-holders, state and local lawmakers can limit private owners' discretion to opt out of renting to voucher-holders, as explored above. To the extent that these laws do not force a private property owner to use their property for residential rental purposes against their will, they arguably do not violate a private property owner's most basic right to "set the agenda" for the property according to the private owner's private ends.³¹² On the other hand, restricting a private owner's managerial authority to pursue their private ends with private property may be inefficient resource management, or even bad

³⁰⁷ Alexander et al., *supra* note 56, at 743–44.

³⁰⁸ *Id.* at 744 ("Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.").

³⁰⁹ *Id.*

³¹⁰ *Id.* ("Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.").

³¹¹ Gale, *supra* note 88.

³¹² Katz, *Property's Sovereignty*, *supra* note 73, at 300.

governance.³¹³ The preceding Section on efficacy of SOID laws bears out the ongoing resistance of private property owners to this restriction of their private authority via initial lobbying efforts, attempts to repeal or preempt such laws, and by ignoring them if and when possible.³¹⁴ Additionally, it shows the reluctance of some courts, in the absence of extremely clear legislative guidance, to find for an individual's right to be free from discrimination when that right is opposed to a landlord's private property rights.³¹⁵

Alternatively, state and local governments can allocate property rights in a way that promotes the dignity and autonomy of low-income renters, including voucher-holders, while at the same time acknowledging the validity of the private goals of private landlords. This approach requires state and local governments to concede that the federal government, which holds the purse strings to more than \$27 billion in tenant-based rental assistance,³¹⁶ has decided to rely on tenants and private property owners as the management strategy of choice for the nation's affordable housing supply. This private property strategy entails understanding trends in private, self-interested decision-making among voucher-holding tenants and private landlords, and then using soft power in the form of incentives to align these private parties' goals with public goals including not just full utilization of all tenant-based voucher funds, but also a 100% success rate, and meaningful choice for voucher-holders in deciding where to live.³¹⁷

Even when voucher-holders have meaningful choices about what neighborhood to live in, some voucher-holders will choose to live in high poverty neighborhoods.³¹⁸ Viewed through the lens of the private property strategy, a broad distribution of voucher-holders throughout a jurisdiction, including in high poverty neighborhoods, may be evidence of voucher-holders' autonomy and dignity in choosing housing that best fits their individual needs and goals. More troubling are the persistently discriminatory landlords in a private property strategy who might choose to avoid tenants with vouchers regardless of the incentives associated with

³¹³ Rose, *supra* note 29, at 9–12 (citing Steven N. S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 64 (1970)) (arguing that instituting regimes of private property is one of four ways to manage common resources and that efficiency determines which strategy is best for any given resource); FOUCAULT, *supra* note 70, at 350–52 (arguing that good governance in a liberal democracy requires broad distribution of private property and then limited governmental exercises of soft power to influence private decisions about management of that property).

³¹⁴ See discussion *supra* Section III.C.

³¹⁵ See discussion *supra* Section III.B.2.

³¹⁶ See generally *FY23 Budget Chart for Selected Federal Housing Programs* NAT'L LOW INCOME HOUS. COAL., (July 28, 2022), https://nlihc.org/sites/default/files/NLIHC_HUD-USDA_Budget-Chart_FY23_Senate.pdf.

³¹⁷ See discussion *infra* Section IV.B (exploring the landscape of existing state and local incentives).

³¹⁸ SANBONMATSU ET AL., *supra* note 65, at xiv.

the voucher. However, the private property strategy is able to absorb these landlords, provided that they are outliers. By relying on the “natural processes” of market logic, if state and local incentives are correctly calibrated, demand for vouchers will be high enough throughout a jurisdiction to give voucher-holders meaningful choices.³¹⁹

Of course, state and local governments can combine these approaches, prohibiting voucher discrimination while also encouraging landlord participation through incentive programs.³²⁰ This combined carrot-and-stick approach is incredibly common in another type of affordable housing policy: state and local inclusionary zoning laws.³²¹ Inclusionary zoning laws often require developers of market rate housing in a jurisdiction to set aside a certain percentage of that housing as affordable for low-income people.³²² However, this mandate is often paired with a raft of incentives such as density bonuses to increase the number of units a developer can build, height limit increases, minimum parking decreases, expedited permitting, and tax breaks.³²³ So far, the incentives identified for accepting tenants with vouchers have been slower to develop, as explored below.

B. *The Possibilities*

HUD has begun encouraging state and local governments to increase the value of tenant-based vouchers by decreasing the costs, increasing the benefits, and otherwise incentivizing landlord participation in voucher programs.³²⁴ Several states and local governments have developed and funded programs intended to mitigate perceived financial hardships associated with renting to voucher-holders. For example, Oregon has a damage mitigation fund that protects landlords for up to \$5,000 in damage to a unit rented by a voucher-holder.³²⁵ Washington State has a similar

³¹⁹ FOUCAULT, *supra* note 70, at 350–52.

³²⁰ Illinois, Oregon, Washington, and Virginia all combine prohibitions with incentives. 775 ILL. COMP. STAT. 5 / 3-102 (2024); 35 ILL. COMP. STAT. 200 / 18-173(a), 18-173(c) (2024); OR. REV. STAT. §§456.378, 659A.421(2)-(2)(a) (2023); WASH. REV. CODE § 59.18.255 (2018); H.B. 2578 § Sec. 2(1), Sec. 2(1)(a), 65th Leg. 2018 Reg. Sess. (Wash. 2018); VA. CODE ANN. §§ 58.1-439.12:04(B), 36-96.3(A) (2024). Albuquerque’s discrimination law was passed with funding to create an incentive program, which has not been formally adopted yet. ALBUQUERQUE, N.M., CODE OF ORDINANCES §§ 11-3-2(D), 11-3-3, 11-3-7(G)(1) (2024); Jessica Dyer, *Council Votes to Outlaw Rental Voucher Discrimination*, ALBUQUERQUE J. (June 6, 2022), https://www.abqjournal.com/news/local/article_050d0ee0-14c4-5916-a13a-5196545433d3.html.

³²¹ *Incentives*, INCLUSIONARY HOUS., <https://inclusionaryhousing.org/designing-a-policy/land-dedication-incentives/> (last visited Dec. 31, 2024).

³²² *Id.*

³²³ *Id.*

³²⁴ U.S. Dep’t of Hous. & Urb. Dev., *Landlords: Critical Participants in the Housing Choice Voucher Program, Evidence Matters*, Winter 2019, at 2, 4.

³²⁵ OR. REV. STAT. § 456.378 (2023).

damage mitigation fund that covers up to \$5,000 per unit, but can also be used to make up to \$1,000 of improvements to the property, cover lost rental income during the housing quality inspection period, and pay for unpaid rent and utilities.³²⁶ The New Mexico Child, Youth, and Family Department offers a similar mitigation fund program for landlords who rent to youth aged 18–25 who receive housing assistance. Like Washington State, the New Mexico program offers up to \$1,000 of assistance for unit renovations or repairs to pass housing quality inspection, compensation for time off-market between application acceptance and commencement of the lease term, and damage to the unit.³²⁷ Connecticut has a security deposit guarantee program³²⁸ that increases landlord comfort in renting to tenants with vouchers by serving as a damage mitigation fund. Additionally, in a favorable opinion the Connecticut Supreme Court has found that the deposit guarantee is a form of tenant income protected by the state SOID law.³²⁹ Therefore, landlords cannot turn away an applicant for failure to pay a security deposit in cash if the applicant supplies proof of the coverage by the state deposit guarantee.³³⁰

Illinois and Virginia have both passed laws to create beneficial tax rates for landlords who accept tenants with vouchers.³³¹ The Illinois program is a property tax abatement administered by housing authorities at the county level.³³² It is specifically intended to incentivize the use of vouchers in “opportunity neighborhoods” close to jobs and transportation and with lower concentrations of poverty.³³³ The Virginia tax incentive program is a state income tax credit that reduces state income taxes payable.³³⁴ The Virginia income tax credit program has an annual maximum expenditure cap of \$250,000 and it does not prioritize specific locations.

The differences between these state and local incentives illustrate the power that states and localities have to craft their incentives to achieve the particular goals of the jurisdiction. For example, Connecticut’s security deposit guarantee program and New Mexico’s Landlord Collaboration Program (for young adults) both aim to increase housing opportunities for populations that tend to be hard to house—chronically homeless populations and young adults who are homeless, aging out of

³²⁶ See generally H.B. 2578 § 2(1)(a)–(d), 65th Leg. 2018 Reg. Sess. (Wash. 2018).

³²⁷ *Landlord Collaboration Program (Youth)*, HOUS. N.M., <https://housingnm.org/programs/landlord-program/landlord-collaboration-program> (last visited Dec. 31, 2024).

³²⁸ *Security Deposit Guarantee Program*, CONN. STATE DEP’T OF HOUS., <https://portal.ct.gov/DOH/DOH/Programs/Security-Deposit-Program> (last visited Dec. 31, 2024).

³²⁹ Comm’n on Human Rights & Opportunities *ex rel.* Arnold v. Forvil, 25 A.3d 632, 641 (2011).

³³⁰ See *id.*

³³¹ VA. CODE ANN. § 58.1-439.12:04(B)(1), (2) (2024); 35 ILL. COMP. STAT. 200 / 18-173 (2024).

³³² 35 ILL. COMP. STAT. 200 / 18-173 (2024).

³³³ *Id.* at 200 /18-173(a), (b).

³³⁴ VA. CODE ANN. § 58.1-439.12:04(F) (2024).

foster care, or who have been released from juvenile justice custody, respectively.³³⁵ For both programs, tenants' housing vouchers are paired with other supportive services and the programs are designed to foster landlord interest in relationships with service provider organizations and agencies.³³⁶ The private landlords who participate in these programs have decided that participation in the program is the best use of their property in furtherance of their private goals. Reducing bureaucratic requirements may be less important than ensuring assistance with the requirements and profits in excess of what the market would otherwise provide. In contrast, Illinois's property tax abatement, prioritizing high-opportunity neighborhoods, attempts to deconcentrate areas of poverty and increase mixed-income residential housing throughout the jurisdiction.³³⁷ These landlords in higher opportunity areas have higher opportunity costs in deciding to rent to voucher-holding tenants and therefore may have less appetite for bureaucratic hurdles or may demand more benefits for taking on the cost of program compliance. Housing choice voucher tenants who must search for a qualifying apartment on their own and are not participants in a behavioral health or other program are more likely to benefit from tax abatement plans like Illinois's than risk mitigation plans like New Mexico's.

These innovations that account for the private, often market-based, decisions of landlords in renting to voucher-holders are commendable, but more can be done. For example, many local zoning codes include beneficial entitlements for project-based affordable housing projects, but few if any zoning or permitting incentive programs exist for landlords based on renting units to tenants with housing choice vouchers.³³⁸

Significantly, while federal, state, and local efforts are now underway to survey landlords and better understand the features of voucher programs that either attract or repel them, little to no corresponding effort has been made to survey voucher recipients to better craft voucher incentives that will help tenants achieve their goals. Instead, HUD has engaged in studies like the Moving to Opportunity Demonstration program that required voucher recipients to move into "higher opportunity" neighborhoods and "educated" voucher recipients about the benefits to children associated with growing up in higher income neighborhoods, or remain in high poverty neighborhoods so that HUD could measure long-term outcomes.³³⁹ This objectification of voucher recipients is antithetical to the goal of using property to promote human flourishing.

³³⁵ *Security Deposit Guarantee Program*, *supra* note 328.

³³⁶ *Landlord Collaboration Program (Youth)*, *supra* note 327.

³³⁷ 35 ILL. COMP. STAT. 200 / 18-173(a), (b) (2024).

³³⁸ *See Incentives*, *supra* note 321.

³³⁹ SANBONMATSU ET AL., *supra* note 65, at xiii–xv.

C. *The Data*

As of the time of this writing, there is scant data available to measure the success of programs designed to incentivize broader participation in voucher programs.

As discussed above, the researchers who studied landlord avoidance of voucher-holders in Washington, D.C. found that changing from a regional fair market rent formula to one based on smaller, census-tract average rents did not change landlords' perceptions about the desirability of voucher holding tenants.³⁴⁰ However, the study's final finding was that tenant mobility dramatically improved when voucher limits were tied to small area fair market value rather than regional fair market value.³⁴¹ The researchers speculate that this surprising outcome could be based on voucher-accepting landlords moving into higher-cost neighborhoods or landlords responding to voucher-holders later in the rental process than initial contact.³⁴² It might also be based on voucher-holders' increased ability to achieve their desired outcomes. Sociologist Eva Rosen has written about landlords who aggressively market to voucher-holders, including waiting outside of the housing authority office and offering to drive prospective voucher-holding tenants to look at available rental units in high-poverty neighborhoods.³⁴³ However, in a Seattle/King County experiment that gave some voucher recipients specialized search assistance and information about the benefits to children in living in "high opportunity" areas, the percentage of voucher-holders who rented in "high opportunity" areas increased from 15.1% to 53%.³⁴⁴

We will soon have more data about the efficacy of programs intended to increase the desirability of voucher-holding tenants. In 2022, HUD selected 29 public housing authorities to participate in the Landlord Incentives cohort of the Moving to Work Expansion Demonstration.³⁴⁵ These housing authorities will implement specific programmatic changes designed to make housing vouchers more attractive to a broader range of landlords.³⁴⁶ For four years, HUD will monitor outcomes including tenant success rates, the number of participating landlords, and the

³⁴⁰ Aliprantis, Martin & Phillips, *supra* note 98, at 2–3, 15.

³⁴¹ *Id.* at 14 ("New movers are now just as likely to move to high-rent and low-rent neighborhoods . . . Among the group of voucher tenants who are moving, higher rent limits affect lease-up locations and appear to induce moves into tracts where vouchers were totally absent.")

³⁴² *Id.* at 15.

³⁴³ ROSEN, *supra* note 8, at 130, 134.

³⁴⁴ Peter Bergmen, Raj Chetty, Stefanie DeLuca, Nathaniel Hendren, Lawrence F. Katz & Christopher Palmer, *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* 72 tbl.3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26164, 2023), https://www.nber.org/system/files/working_papers/w26164/w26164.pdf.

³⁴⁵ *Moving to Work (MTW) Expansion—Landlord Incentives Cohort*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/expansion/landlordincentivescohort (last visited Dec. 31, 2024).

³⁴⁶ NOTICE PIH 2021-03, *supra* note 304, at 3–4.

geographic distribution of voucher-holders for these 29 public housing authorities, as compared to a control group that does not implement landlord incentive changes.³⁴⁷ As results of these incentive programs are reported, best practices should begin to take shape regarding what a public housing authority can do to increase the market power of voucher recipients. However, public housing authorities are quasi-municipal instrumentalities of the state, distinct from state and local government and without a state or local government's broad powers. State and local governments can, and should, work with local public housing authorities to augment a voucher recipient's property rights in ways that public housing authorities cannot. More research is needed to discern the most effective state and local incentives to enhance the value of vouchers.

This research is beginning in states and localities that are surveying their landlords, similar to HUD's surveys. For example, in Albuquerque, New Mexico, the City commissioned a survey of landlords and management companies to determine which incentives, if any, would motivate landlords to accept voucher-holders.³⁴⁸ Responses were received from 74 landlords ranging from individuals with a single rental property to corporate owners with more than 50 units. The survey asked landlords to rank their interest in a variety of incentives, including a landlord liaison to help navigate program requirements and problems with tenants to a variety of financial guarantees and incentives such as financial assistance to bring units up to HUD's Housing Quality Standards, damage and rent guarantees, payment for time off market during inspections, and one-time rental incentives.³⁴⁹ The survey also included an opportunity for landlords to suggest other incentives or support.³⁵⁰ Perhaps unsurprisingly, the larger commercial landlords showed strong support for the purely financial incentives, such as the damage and rent guarantees and the time off market payments. Small mom-and-pop landlords ranged from moderately interested in to moderately opposed to all incentives.³⁵¹ Also, perhaps unsurprisingly, several of the smaller, mom-and-pop landlords used the comment section at the end of the survey to vehemently oppose all government programs or all voucher recipients, while larger landlords and management companies were more likely to use the comment section to explain specific problems they had encountered with voucher programs or voucher-holding tenants in the past, or to make suggestions about other meaningful incentives.³⁵² These survey responses lend credence to the general hypothesis that the gatekeepers for the majority of rental units in Albuquerque are

³⁴⁷ *Id.* at 7–8.

³⁴⁸ See generally City of Albuquerque, Landlord Partnership Survey, prepared by Carmichael Consultants (2023) (on file with author).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

making economic decisions in eschewing tenants with housing vouchers and with the right combination of incentives and hurdle reductions, this economic decision can be reversed.

CONCLUSION

Federal lawmakers' enthusiasm in looking to market actors to supply housing to subsidized low-income renters has been consistently gaining momentum since the 1970s with no signs of abatement. Yet tenant-based voucher programs have serious design flaws that tragically undercut their efficacy. While HUD is making commendable strides in identifying and correcting these design flaws, state and local governments also have significant power in determining whether tenant-based vouchers are successful.

This Article examined the development and proliferation of SOID laws as a human or civil rights-based approach to combating private landlords' decisions to opt out of participating in voucher programs. It revealed that SOID laws are only modestly effective, require robust enforcement, and are under constant attack in both the judicial and legislative branches.

Incorporating a Progressive Property theory of property rights, this Article has shown that state and local governments should use their powers to grant property rights and entitlements to make tenant-based vouchers more successful. Such an approach should be guided by a commitment to using property rights to promote individual agency, self-determination, and human flourishing for voucher recipients. In practice, this may mean imbuing vouchers with additional value to landlords, such as tax benefits, access to capital improvement funds and vacancy loss funds, or fast track status for state or local services. Current efforts to craft landlord incentives have necessarily been responsive to landlords' concerns and desires. Localities should not lose sight of property's power to enhance the agency of subsidized tenants, as well. To help tenant-based vouchers achieve their ideal as instruments of human flourishing, localities should leverage their ability to recognize property rights and entitlements to ensure that 100% of voucher recipients are able to use their vouchers in the neighborhoods of their choosing.